Filed 6/6/18 L.B. v. C.B. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

L.B., Plaintiff and Appellant, v. C.B., Defendant and Respondent.	2d Civil No. B278489 (Super. Ct. No. 16FL0216) (San Luis Obispo County)
J.S., Plaintiff and Respondent, v. C.B., Defendant and Respondent, L.B., Objector and Appellant.	(Super. Ct. No. 16FL0348)

Appellant L.B. qualified as a statutorily presumed father of A.B., a minor child (child). Respondent J.S. is child's biological father. L.B. appeals from the trial court's judgment (1) setting

aside a Voluntary Declaration of Paternity (VDP) signed by him and respondent C.B., child's mother (mother); (2) finding that J.S. is child's presumed father pursuant to *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*); (3) finding that, between the two conflicting fatherhood presumptions (appellant's statutory and J.S.'s *Kelsey S.* presumptions), J.S.'s presumption prevails; and (4) finding that this is not an appropriate case in which to recognize more than two parents, i.e., mother and J.S., pursuant to Family Code section 7612, subdivision (c).[1] We affirm.

Facts

Because we apply the substantial evidence standard of review to the trial court's factual findings, "[w]e state the facts . . . in the light most favorable to . . . respondent[s]. [Citations.]" (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 870; see also *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 642, fn. 3 ["in summarizing the facts on appeal we 'must consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment'"].)

Child (a girl) was born in August 2014. J.S. is her biological father. Throughout mother's pregnancy, she was unmarried. She had previously been married to appellant, but they had divorced in 2010. During the previous marriage, appellant learned that he was unable to father a child because of a low sperm count.

Mother and J.S. dated for less than one month. Mother was 36 and J.S. was 22 or 23 years old. Mother notified J.S. when she found out she was pregnant. J.S. suggested that she

[1] All statutory references are to the Family Code.

have an abortion. A week later, mother falsely told him that she had undergone an abortion. "[H]er exact words were, 'You made me go against my religion, and I'll never forgive you for that. Please do not contact me ever again.'" J.S. "truly believed that she had an abortion."

Appellant was present at the hospital when child was born. Mother agreed to have him named as the father on child's birth certificate. In September 2014 appellant and mother signed a VDP declaring under penalty of perjury that appellant is child's biological father. In December 2014 a friend informed appellant that J.S. is child's biological father.

Appellant and mother remarried in December 2014. Appellant moved in with mother and child. He told people, including J.S., that he was child's father. Before the marriage, appellant had minimal contact with child and provided no care for her. During the marriage, mother was primarily responsible for child's care.

In December 2015 appellant moved out of mother's residence. After they separated, mother did not allow appellant to have any contact with child. But appellant visited child three times pursuant to court-ordered visitation. After the visits, child did not sleep well and had bad dreams.

In December 2015 a friend informed J.S. that mother had recently given birth to a child who looked like him and that mother was in a relationship with appellant. J.S. believed that he might be child's father. He unsuccessfully tried to find mother on social media. She had blocked him on her Facebook page. He telephoned her, but she had blocked his phone number.

In May 2016 mother informed J.S. that he was child's father. J.S. thereafter visited child at mother's residence five days per week.

J.S. spoke to appellant on three occasions. The first was in December 2015 after J.S.'s friend had informed him of child's birth. J.S. asked appellant if J.S. was child's father. Appellant "charged at" J.S. and said, "'No, she is not yours. She's my daughter, and you stay away.'" Appellant threatened that "something would happen" to J.S. if he "didn't leave [appellant's] family alone."

A few weeks later, J.S. went to the residence of mother's parents. Appellant was there. J.S. said, "'I need to know if [child] is mine.'" Appellant "[j]ust kinda charged at [J.S.] and kinda puffed up, . . . put his chest out." Appellant said: "'[Child] is mine. She's not your baby,' and . . . 'Get the F out.'" J.S. felt threatened. The trial court stated, "[T]he record can reflect [appellant] is probably twice as big as [J.S.]."

The third encounter between J.S. and appellant occurred at a courthouse in April or May 2016. Appellant "got in [J.S.'s] face and said, "'You better watch yourself, little boy.'"

J.S. described his relationship with child as follows: "[S]he's my world. . . . [S]he calls me 'dad,' and she knows I'm her dad. . . . [O]ur relationship is getting strong, and I feel bad that I missed out on the [first] two years of her life." Child is excited when J.S. visits her and is sad when he leaves.

As to his relationship with mother, J.S. testified: "Our relationship is good now. We both decided that we're going to step up as parents and raise the baby together, and we're going to be there for [her]. And whatever is in her best interest, that's

what we're going to do." J.S. has told his family that he is child's father.

For the past three years, J.S. has worked 40 hours per week as a manager for a company that cleans medical buildings. The job is "well-paid." He realizes that, if the court designates him as child's parent, he will have a child support obligation. He would "be more than willing to pay anything for [his] daughter." When visiting her, he has brought her clothes, shoes, snacks, toys, and movies. He has not paid mother's pregnancy or child's birth expenses. Nor has he paid money for child's support. J.S. explained, "I haven't had any money because I paid -- I'm fighting for my daughter." J.S. has discussed with mother "setting up a child support schedule" after the conclusion of the court proceedings.

Procedural History

In April 2016 appellant filed a "Petition for Custody and Support of Minor Children." The petition alleged that appellant is child's father. The VDP was attached to the petition. Appellant requested that he and mother be granted joint legal and physical custody. Mother responded to the petition by filing a request for genetic testing and for an order setting aside the VDP.

On May 31, 2016, J.S. filed in propria persona a "Petition to Establish Parental Relationship." The petition alleged that J.S. is child's father. J.S. requested that he and mother be granted joint legal and physical custody. He also requested that mother pay pregnancy and birth expenses. On June 28, 2016, J.S.'s counsel filed an amended petition that left blank the part concerning payment of pregnancy and birth expenses.

In her response to J.S.'s petition, mother admitted that J.S. is child's father. She requested that they be granted joint legal custody, that she be granted sole physical custody, and that J.S. be granted reasonable visitation.

The trial court ordered that appellant's and J.S.'s petitions be "consolidated and . . . heard as one action" under case number 16FL0216. In August 2016 the court conducted a two-day trial on the consolidated petitions.

Trial Court's Ruling

The trial court filed a five-page ruling. The court found: (1) When mother and appellant signed the VDP, they knew that appellant was not child's biological father. (2) Appellant qualifies as a presumed father under section 7611, subdivision (d), which provides that a person is presumed to be a child's natural parent if the person "receives the child into his or her home and openly holds out the child as his or her natural child."[2] (3) In April or May 2016, J.S. learned that he was child's natural father. (4) "The parties have stipulated that [J.S.] is the biological father of [child] . . . . Thus, no genetic testing is necessary." (5) "[T]he testimony of [mother] as to the rather minimal involvement of [appellant in child's life] is credible." (6) "Once [J.S.] learned that he was the father he has been actively involved in the child's life." (7) J.S. qualifies as a presumed father pursuant to *Kelsey S.*,

[2] Appellant also qualified as a presumed father under section 7611, subdivision (c)(1), which provides that a person is presumed to be a natural parent if, "[a]fter the child's birth, the presumed parent and the child's natural mother have married" and "[w]ith his or her consent, the presumed parent is named as the child's parent on the child's birth certificate." The court's ruling does not mention this subdivision.

supra, 1 Cal.4th 816. (8) It is in child's best interest to set aside the VDP. (9) This is not an appropriate case to recognize more than two parents, i.e., mother and J.S., pursuant to section 7612, subdivision (c).

A judgment was subsequently filed setting aside the VDP, decreeing that J.S. is child's natural father, vacating prior visitation orders in favor of appellant, and finding "no detriment will occur to [child] in only recognizing two parents," i.e., mother and J.S.

Appellant Has Not Carried His Burden of Showing that the Trial Court Abused Its Discretion in Setting Aside the VDP

"The purpose of a voluntary declaration of paternity is to permit unwed parents to acknowledge the man's biological paternity of [the] child." (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1019.) "[A] completed voluntary declaration of paternity . . . that has been filed with the Department of Child Support Services shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction." (§ 7573.) But a court "may" set aside a VDP if the man who signed it is not the biological father "unless the court determines that denial of the action to set aside the voluntary declaration of paternity is in the best interest of the child, after consideration of all" eight specified factors. (§ 7575, subd. (b)(1), factors (A)-(G).)

We review for abuse of discretion an order setting aside a VDP. (See *In re William K.* (2008) 161 Cal.App.4th 1, 9.) "A trial court's exercise of discretion will be upheld if it is based on a reasoned judgment and complies with the legal principles and policies appropriate to the particular matter at issue. [Citation.]" (*In re Marriage of Economou* (1990) 224 Cal.App.3d 1466, 1476.)

Appellant has the burden of showing an abuse of discretion. (*Ibid.*)

Appellant argues that the trial court abused its discretion because it did not consider all of the statutory factors. Appellant asserts: "The court . . . appeared to 'flip a coin' by finding in favor of [mother] on the basis of her 'credibility.'" "[T]he trial court . . . categorically disregarded *all* the enumerated factors under . . . Section 7575(b)(1)." "By setting aside the voluntary declaration of paternity without assessing all factors under Section 7575, the trial court ignored crucial and compelling factors supporting a denial of the motion to set aside the Voluntary Declaration of Paternity."

In its ruling the court noted that section 7575 identifies "[a] number of factors" to be considered in determining whether the denial of a request to set aside a VDP is in the child's best interest. As mother sets forth at pages 20-22 of her brief, the trial court expressly considered the following factors: (1) "[t]he age of the child" (§ 7575, subd. (b)(1)(A)); (2) "[t]he nature, duration, and quality of any relationship between" appellant and child (*id.*, subd. (b)(1)(C)); (3) appellant's request "that the parent-child relationship continue" (*id.*, subd. (b)(1)(D)); (4) "[t]he benefit or detriment to the child in establishing [her] biologic parentage" (*id.*, subd. (b)(1)(F)); (5) "[w]hether the conduct of the man who signed the voluntary declaration has impaired the ability to ascertain the identity of, or get support from, the biological father" (*id.*, subd. (b)(1)(G)); and (6) "[a]dditional factors deemed by the court to be relevant to its determination of the best interests of the child" (*id.*, subd. (b)(1)(H)). As to the fifth factor, the court stated: "The conduct of [appellant] in telling [J.S.] that he was [child's] father made it more difficult for

[J.S.] to determine his own parentage. In fact, [J.S.] was mislead [*sic*] both by [appellant] and [mother] to the point where he had no reason to pursue a parentage finding."

The only relevant statutory factor that the court did not expressly consider in its ruling was "[t]he length of time since the execution of the voluntary declaration of paternity by [appellant]." (§ 7575, subd. (b)(1)(B).)[3] But we presume that the court considered this factor. "Our starting point is the presumption that duty was regularly performed. (Evid. Code, § 664.) [Therefore,] the presumption is that the [Court] knew and properly applied the law. It is an appellant's burden to overcome the regularity presumption by an affirmative showing." (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1152; see also *In re Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 653-654 ["'[w]e must presume that the court knew and applied the correct statutory and case law' and applied them to the facts in this case"].)

Appellant has failed to carry his burden of overcoming the presumption that the Court followed the law and considered all of the relevant statutory factors. Section 7575 does not say that each relevant factor must be expressly considered on the record. "We decline to add such a requirement to the statute. [Citation.]" (*Quail Lakes Owners Assn. v. Kozina* (2012) 204 Cal.App.4th 1132, 1140.) The statute requires the court to state the basis for its decision only if it denies an action to set aside the VDP: "If the court denies the action, the court shall state on the record the

[3] The court did not mention an irrelevant factor: "Notice by the biological father of the child that he does not oppose preservation of the relationship between the man who signed the voluntary declaration and the child." (§ 7575, subd. (b)(1)(E).) J.S. never gave such notice.

basis for the denial of the action and any supporting facts." (§ 7575, subd. (b)(2).) Here, the court granted mother's request to set aside the VDP.

The Finding that J.S. Qualifies as a Kelsey S. Father Is Supported by Substantial Evidence

Appellant argues that the evidence is insufficient to support the trial court's finding that J.S. qualifies as a presumed father under *Kelsey S.*[4] ""Presumed" fathers are accorded far greater parental rights than . . . biological fathers. [Citation.] Presumed father status is governed by . . . section 7611, which sets out several rebuttable presumptions under which a man may qualify for this status . . . . [Citations.] . . .' [Citation.]" (*In re T.G.* (2013) 215 Cal.App.4th 1, 4-5.)

J.S. does not qualify as a presumed father pursuant to section 7611. But he may acquire presumed father status pursuant to *Kelsey S.* There, our Supreme Court stated: "If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. . . . [¶] . . . The father's conduct both *before and after* the child's birth must be considered. Once the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental

[4] Appellant also argues that J.S. did not have "standing to assert presumed father status under *Kelsey S.* when he did not assert *Kelsey S.* status to begin with." The argument is forfeited because it is not supported by meaningful analysis with citations to the record and authority. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate 'a willingness himself to assume full custody of the child - not merely to block adoption by others.' [Citation.] A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849, fns. omitted.)

An unwed father who promptly demonstrates the required commitment to his parental responsibilities is referred to as a "*Kelsey S.* father." (See *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1462.) "Although section 7611 makes no provision for a *Kelsey S.* father in its list of presumptions, a father asserting valid *Kelsey S.* rights may effectively qualify for presumed father status as the result of his constitutional right to parent, which overrides any contrary statutory direction." (*In re J.L.*, *supra*, 159 Cal.App.4th at p. 1023.)

The trial court found: "While *Kelsey S*[.] . . . generally requires that the biologic parent step forward at the earliest moment, here, since [J.S.] had been deceived about the birth of the child, he had no opportunity to step forward. Once he learned that [mother] had given birth to his child, he promptly stepped forward to establish a parent child relationship."

"The Supreme Court has not articulated a standard of review for decisions awarding *Kelsey S.* father status." (*In re J.L.*, *supra*, 159 Cal.App.4th at p. 1023, fn. 5.) The Court of Appeal is divided on the issue. Some courts have applied the substantial evidence standard of review. (See *Adoption of A.S.* (2012) 212 Cal.App.4th 188, 209.) Pursuant to this standard,

"'[w]e . . . determine if there is any substantial evidence, contradicted or not, which will support the conclusion of the trier of fact. [Citation.] Substantial evidence is "reasonable, credible evidence of solid value such that a reasonable trier of fact could make the findings challenged . . . ." [Citation.] . . . ' [Citation.]" (*Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133, 1145.) "'We view the evidence in the light most favorable to the ruling, giving it the benefit of every reasonable inference and resolving all conflicts in support of the judgment. [Citation.] We defer to the trial court's credibility resolutions and do not reweigh the evidence. [Citation.] If there is substantial evidence to support the ruling, it will not be disturbed on appeal even if the record can also support a different ruling.' [Citation.]" (*In re M.Z.* (2016) 5 Cal.App.5th 53, 64.)

Other appellate courts have applied the substantial evidence standard to the trial court's factual findings, but have independently reviewed whether the facts satisfy the *Kelsey S.* standard: "In reviewing the juvenile court's factual findings with respect to whether [an unwed biological father] met [his] burden [under *Kelsey S.*], we apply the substantial evidence test. [Citations.] [¶] . . . [¶] The question whether an unwed biological father's actions reflect the level of commitment required to ripen his inchoate constitutional interest into a constitutional right under *Kelsey S.* implicates constitutional and public policy considerations, and thus is a predominantly legal inquiry. [Citation.]" (*In re D.S.* (2014) 230 Cal.App.4th 1238, 1244-1245.) Therefore, "whether the facts satisfy the *Kelsey S.* standard is a mixed question [of law and fact] to be reviewed de novo . . . ." (*Id.* at p. 1245.)

We need not decide which standard of review applies here. Respondents prevail under either standard. We apply the substantial evidence standard of review with the understanding that the result would be the same under independent review.

For the following reasons, appellant contends that substantial evidence does not support the trial court's finding that J.S. qualifies as a *Kelsey S.* father: (1) He "waited a year-and-a-half before seeking to establish any sort of parental responsibility for [child]." (2) "In his Petition to Establish a Paternal Relationship, [he] . . . marked that [mother] should shoulder all financial expenses that she may have incurred during her pregnancy and did not offer even token amounts of monetary assistance for [child] or to [mother] at any time."[5] (3) He . . . does not have an established parental relationship with [child]." (4) He "has not shown any inclination to assume full custody of the child. In his petition, he asked for joint custody." (5) He has not "publicly acknowledged paternity of [child]."

The Court of Appeal considered a similar factual situation in *In re J.L.*, *supra*, 159 Cal.App.4th 1010. It upheld the trial court's finding that the biological father (Christopher) qualified as a presumed father under *Kelsey S.* "Prior to [child's] birth, Christopher suspected he might be the baby's father, but Mother repeatedly told him he was not." (*Id.* at p. 1015, fn. omitted.) When child was born in May 2005, "Mother was unwed but involved with Adrian. Mother and Adrian executed a voluntary declaration of paternity, and Adrian was identified as [child's]

---

[5] Appellant is referring to the original petition that J.S. filed in propria persona. The amended petition subsequently filed by J.S.'s counsel left blank the part concerning payment of pregnancy and birth expenses.

father on the birth certificate. For the next year, Adrian acted as [child's] father, living with and financially supporting Mother and [child]." (*Ibid.*) Mother and Adrian repeatedly told Christopher that he was not the father. Adrian warned Christopher to stay away from both Mother and child and threatened him. "When [Mother] . . . acknowledged to Christopher that he was the father in June 2006, Christopher rushed to assert his paternity and seek full custody." (*Id.* at p. 1023.)

The Court of Appeal noted that Christopher "did not pay for [child's] birth or bring an action to establish paternity." (*In re J.L.*, *supra*, 159 Cal.App.4th at p. 1023.) But the court concluded that, based on his wrongful conduct, "Adrian is estopped from arguing that Christopher should be barred from asserting *Kelsey S.* rights because Christopher did not immediately attempt to assert his status as father."[6] (*Id.* at p. 1024.) "[E]ven without the application of estoppel," the trial court could reasonably have concluded that Christopher qualified as a *Kelsey S.* father because he "was discouraged from earlier assertion of his rights by Mother's consistent denials and . . . he asserted his rights and

---

[6] "[E]stoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts. [Citations.] [¶] 'Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury.' [Citation.]" (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 59.)

sought full custody of [child] as soon as Mother acknowledged he was [child's] true father. [Citation.]" (*Ibid.*)

Pursuant to *In re J.L.*, appellant arguably is estopped from claiming that J.S. "should be barred from asserting *Kelsey S.* rights because [he] did not immediately attempt to assert his status as father." (*In re J.L.*, *supra*, 159 Cal.App.4th at p. 1023.) Appellant signed the VDP even though he knew he was not child's biological father. He threatened J.S. and insisted that he was child's father. The trial court found that J.S. "was at all times unaware of [appellant's] inability to father a child."

We need not rely on an estoppel theory to resolve the *Kelsey S.* issue. (The parties have not raised this theory.) As in *In re J.L.*, substantial evidence supports the trial court's finding that J.S. qualifies as a *Kelsey S.* father. J.S. "promptly came forward and demonstrated as full a commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted within a short time after he learned" that he was child's father. (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1060.) In his Petition to Establish Parental Relationship, J.S. sought joint physical and legal custody with mother. Appellant has not cited any authority requiring a *Kelsey S.* father to seek to remove child from mother's custody by petitioning for sole physical and legal custody. J.S. acknowledged his paternity to his family.

J.S. cannot be faulted for not paying mother's pregnancy or child's birth expenses. He did not learn that he was the father until about 21 months after child's birth. We recognize that J.S. has not provided financial support for child, although he has given her gifts of shoes, clothing, and toys. He explained, "I haven't had any money because I paid -- I'm fighting for my

daughter." J.S. should not be penalized for using his available funds to retain counsel to establish a paternal relationship.

We reject appellant's claim that J.S. "does not have an established parental relationship with [child]." J.S. testified that, after mother had informed him that he was child's father, he visited child five days per week. Child calls him "Dad." She is excited when he visits her and is sad when he leaves.

Alleged Failure to Weigh Conflicting Presumed Fatherhood Claims

Both appellant and J.S. qualified as presumed fathers. Appellant maintains that "the trial court abused its discretion by failing to weigh the competing presumptions in accordance with Family Code § 7612(b)." (Bold omitted.) Section 7612, subdivision (b) provides: "If two or more presumptions arise under Section . . . 7611 that conflict with each other, . . . the presumption which on the facts is founded on the weightier considerations of policy and logic controls." "'[F]or purposes of resolving conflicting presumptions under section 7612, subdivision (b), a *Kelsey S.* father is the equivalent of a statutorily presumed father. . . .'" (*J.R. v. D.P.* (2012) 212 Cal.App.4th 374, 389.) We review for abuse of discretion the trial court's resolution of conflicting presumptions. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 607.)

Appellant asserts, "[T]he trial court seems to have improperly found for [J.S.] based on his biological ties and nothing else." "Biological paternity does not necessarily determine which presumption will prevail. [Citation.]" (*In re P.A.* (2011) 198 Cal.App.4th 974, 981.) "The . . . court thus was obliged to weigh all relevant factors—including biology—in determining which presumption was founded on weightier

considerations of policy and logic." (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 608.)

"The mere fact that the court did not explicitly refer to [section 7612, subdivision (b)] when the statute contains no such requirement does not support the conclusion that it was ignored." (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563.) "[I]t is presumed that the court followed the law." (*Ibid.*) In addition to the biological factor, in its ruling the trial court considered the following factors: (1) appellant had "minimal involvement" in child's life when he was living with her; (2) J.S. "testified that he sees the child 4 or 5 times a week and he and [mother] seem to have an amicable relationship in terms of access to the child and co-parenting"; (3) mother and appellant "have a difficult relationship" and mother "clearly does not support having [appellant] involved in [child's] life"; (4) appellant has a "lengthy criminal history including a Battery conviction in which [mother] appears to have been the victim"; (5) during mother and appellant's second marriage, appellant verbally and emotionally abused her; and (6) appellant deliberately misled J.S. by claiming that appellant was child's father. Appellant's deception delayed J.S.'s development of a parent-child relationship: "[Appellant] was mislead [*sic*] . . . to the point where he had no reason to pursue a parentage finding."

Appellant has therefore not carried his burden of showing that the trial court abused its discretion by failing to engage in the weighing process required by section 7612, subdivision (b).

The Trial Court Did Not Err in Recognizing Only Two Parents

As a general rule, there can be only one presumed father. (*In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1086.) But

section 7612, subdivision (c) creates an exception to this rule. It provides: "In an appropriate action, a court may find that more than two persons with a claim to parentage . . . 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 . . . ."

The trial court declared: "This is not an appropriate action to recognize more than two parents . . . . The court finds no detriment will occur to [child] in only recognizing two parents ([mother] and [J.S.])." Appellant argues that the court erred "because it would be detrimental to [child] if [he were] removed as a parent."

The burden was on appellant to show that he qualified as a third parent under section 7612, subdivision (c). (*In re M.Z.*, *supra*, 5 Cal.App.5th at p. 66.) The trial court concluded that he had failed to carry his burden. "In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . [¶] . . . [W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Appellant has failed to show that the evidence of detriment to child satisfies this stringent standard.

In any event, substantial evidence supports the court's finding that the recognition of only two parents would cause no detriment to child. During the one-year period that appellant was living with child, mother was primarily responsible for her care. In December 2015 appellant moved out of mother's residence. From the date of separation until the trial in August 2016, appellant visited child only three times. Mother described child's reluctance to be with appellant during the first visit: "The first time [child] went inside [mother's residence] several times, said 'no,' and slammed the door while I was awkwardly standing outside with [appellant]. I tried to get her to come outside again time after time, and she continued to slam the door." Child eventually agreed to go with appellant only because her older sister accompanied her. Mother described child's "demeanor" after the visits as follows: "[S]he's not really been herself. She has bad dreams. She doesn't sleep well. She has a different demeanor about her personality."

Appellant Does Not Qualify as a Kelsey S. Father

Appellant asserts that, "[a]s a practical matter, the trial court has stripped [him] of his parental rights." Appellant claims that he qualifies as a *Kelsey S.* father. Therefore, "his federal constitutional right to due process and equal protections of the law prohibit termination of his parental relationship absent a showing of unfitness as a parent. [Citation.]" (See *In re Jerry P.* (2002) 95 Cal.App.4th 793, 797 ["we hold the constitutional protection afforded biological fathers under *Kelsey S.* extends to men who are not biological fathers but who meet the other criteria for presumed father status under the *Kelsey S.* decision"].)

Appellant's *Kelsey S.* claim is forfeited because he did not raise it in the trial court. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 582 ["Because Armando did not ask the court to find he was a father within the meaning of *Kelsey S.*, he has waived his right to raise the issue here"].)

Disposition

The judgment is affirmed. Mother shall recover her costs on appeal. "Because [J.S.] did not file a brief in this court, there are no costs on appeal to award [to him]." (*In re Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 704.)

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Patrick J. Perry, Commissioner

Superior Court County of San Luis Obispo

Tardiff Law Offices and Neil S. Tardiff, for Plaintiff and Appellant, L.B.

Stephen D. Hamilton for Defendant and Respondent, C.B.

No appearance for Plaintiff and Respondent, J.S.