Filed 7/2/18 Adoption of D.W. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ADOPTION OF D.W., a Minor.	2d Civil No. B283847 (Super. Ct. No. A017614) (Ventura County)
R.W. et al., Plaintiffs and Appellants, v. D.P., Defendant and Respondent.	

Appellants R.W. and S.W., child's prospective adoptive parents, appeal from a judgment decreeing that respondent qualifies as a presumed father pursuant to *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*) and that child therefore cannot be adopted without his consent. (Fam. Code,[1]

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

§ 7669.)[2] Based on the entire record, we conclude that the trial court's decision is supported by substantial evidence. We therefore affirm.

Kelsey S. Standard

Respondent D.P. is the unwed, biological father of D.W. (child). He does not qualify as a "presumed father" under statutory law. (§ 7611.) Where, as here, a biological father does not qualify as a presumed father under section 7611, he "generally does not have statutory standing to block the adoption of his child unless he proves that it is in the child's best interests that the adoption not proceed." (*Adoption of Baby Boy W.* (2014) 232 Cal.App.4th 438, 442.) But "[i]f 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. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.)

"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 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

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[2] Section 7669, subdivision (a) provides: "An order requiring or dispensing with an alleged father's consent for the adoption of a child may be appealed from in the same manner as an order of the juvenile court declaring a person to be a ward of the juvenile court . . . ."

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, fn. omitted.)

"The burden is on the biological parent to establish the factual predicate for *Kelsey S.* rights." (*Adoption of H.R.* (2012) 205 Cal.App.4th 455, 466.) An unwed father who carries his burden is referred to as a "*Kelsey S.* father." (See *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1462.)

Facts[3]

Child was born two days before his mother's 19th birthday. Mother immediately relinquished him for adoption to a licensed California adoption agency. Mother's signed relinquishment form named appellants as the prospective adoptive parents. Appellants "left the hospital with the baby."

Respondent met mother in April 2015 when he was 21 years old and she was a high school senior. In June 2015 mother informed him that she was pregnant. On "multiple occasions" respondent told her that she and child were his "responsibility." When respondent said "responsibility," he meant both "emotional" and "financial responsibility." Respondent also told mother that he "'would take care of her if she needed anything.'"

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[3] Because we apply the substantial evidence standard of review, "[w]e state the facts . . . in the light most favorable to . . . respondent." (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 870.)

After learning that mother was pregnant, respondent initially spoke to her "[e]very day." He "constantly ask[ed her] how the pregnancy [was] going." But "one day [in the second week of July 2015] she just didn't want to talk to [respondent]. She said she wanted space." On July 14, 2015, respondent texted mother, "I do know that you asked me to give you some space, and honestly it will kill me but I will take it just for you babe."

The next day, mother texted respondent that she was considering adoption for child. He replied: "[P]lease don't give up on our child please, I'm already so happy with it. If you and your parents don't want it, I will take it. . . . I fell in love with it the minute we found out you were pregnant." "I can't give away my own child."

Mother "blocked" respondent on all of her social media sites. She did not block his phone number on her cell phone. She asked respondent not to "contact" or "bother" her.

Respondent did not go to mother's medical appointments "[b]ecause she didn't allow me to" go. He was not present at the hospital when child was born because "[n]o one told me about it. No one let me know." He wanted to be present for child's birth.

Two to three days after child was born, mother informed respondent of the birth and her relinquishment of child to the adoption agency. The next day, respondent filed a petition to establish a parental relationship. He did not file the petition before child's birth because the superior court's family law self-help center informed him that he "couldn't do anything until the baby was born."

Throughout the pregnancy, mother lived with her parents. Respondent knew that she was not working. Mother

never told respondent that she was in need of financial support and never asked him for money. Respondent believed that she did not need financial assistance.

Mother testified that she "need[ed] money." Until she was 38 weeks pregnant, she worked at Home Depot. Mother was covered under her parent's medical insurance, but she personally paid all of the required copayments. She also paid for "her own maternity clothes." Mother's parents paid "for the remainder of her living expenses."

During and after mother's pregnancy, respondent worked full-time as a service manager for a restaurant. His monthly take-home pay after payroll deductions was about $2,000. His monthly expenses were about $600. He lived at his parents' residence. Two days a week, he attended class at Ventura College.

When mother was pregnant, respondent met with her father and said "[t]hat I will take full responsibility . . . and that I will provide anything that [mother] would need, and the baby, of course." But respondent admitted that he had "never made an offer to either [mother] or the [adoption] agency to provide any financial support." Respondent explained: "I chose to give her space when she wanted it. And if I would get close to her, she [would] tell me not to do it. So I didn't know how [I was] supposed to actually give her stuff." "I always wanted to be there in person but I wasn't able to go near her." Respondent testified that, if mother had asked for money, he would "have been willing to provide for her financially."

Respondent was present at mother's deposition and heard her testify that her hospital bills remained unpaid. This did not concern respondent "[b]ecause I'm thinking first of getting

my son back and then dealing with the other bills after." Respondent testified that, if child were "with" him, child's hospital bills would be his responsibility; but "if I'm not able to see him, no." At the time of trial, child's hospital bills were "still unpaid."

Shortly after child's birth in March of 2016, Anna Cowan, a pregnancy counselor employed by the adoption agency, offered to arrange a visit with child. Respondent testified: "I called her and told her no, I was filing the petition. She told me if I wanted to see my son, and I told her no at that time."

Respondent's initial visit with child occurred in June. At the first court hearing in May, Cowan offered to arrange the visit. Respondent did not request an earlier visit. Respondent acknowledged that, before and after child was born, he "had the ability to contact Ms. Cowan."

As of the trial date, respondent had five visitations with child. Each time he visited, he brought clothes and toys. His request for a visit was never denied. Respondent had "no doubt" that appellants "are doing a good job raising" child.

Procedural History

On March 4, 2016, respondent filed a "Petition to Establish Parental Relationship." He requested sole legal and physical custody of child.

On March 15, 2016, the adoption agency filed a "Petition to Determine Parental Rights of Alleged Natural Father and to Determine Necessity of Consent." The petition requested that the "Court find and declare that . . . [respondent] is the natural father of said child; and that the consent of said father is not necessary for the adoption of said child." Pursuant to section

7664, subdivision (c), the granting of the adoption agency's petition would terminate respondent's parental rights.

Appellants joined in the adoption agency's petition. The petitions were consolidated. The court conducted a three-day trial on the consolidated petitions.

Trial Court's Statement of Decision

The trial court determined that respondent met his burden of establishing that he qualifies as a *Kelsey S.* father. The court found that respondent "steadfastly held himself out as the child's father and voiced his opposition to the adoption." "At [mother's] request, [he] stayed away" from her during the pregnancy. "When asked during the trial why he hadn't filed a lawsuit before the child's birth to prevent the adoption, [respondent] credibly testified that he sought advice from the Self-Help Center at the Ventura County Superior Court and was advised to wait until after the child was born before filing a lawsuit." "As soon as he learned of [child's] birth he went to the courthouse and filed his petition to establish his parentage."

The trial court continued: "[T]he Court finds that [respondent] never paid any money to [mother] or her parents during her pregnancy. It is also true that he did not pay any money to [appellants] after [child's] birth. However, it is also true that neither [mother], her father, nor [appellants] ever asked [him] for any money. [¶] The Court believes that if a request had been made [respondent] would have provided reasonable financial assistance for both [mother] and [child] both before and after [child's] birth."

The court observed: "[T]he Court has not reached this decision lightly and is fully aware of the consequences of this decision. [Appellants] will be heartbroken, and the parties and

[child] will be faced with further litigation. However, those emotional considerations are outweighed by [respondent's] constitutional right to establish a parental relationship with [child]."

Judgment

In its judgment, the trial court found respondent to be child's "'presumed father'" pursuant to *Kelsey S.* and also found him to be a "fit" father. The court granted respondent's "petition to establish that he is the father of the minor child." It ordered that respondent's "consent is necessary for any adoption of the child."

Standard of Review

"The Supreme Court has not articulated a standard of review for decisions awarding *Kelsey S.* father status." (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1023, fn. 5, superseded by statute as stated in *In re Alexander P.* (2016) 1 Cal.App.5th 1262, 1274.) 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.) Other courts have applied the substantial evidence standard to factual findings, but have independently reviewed whether the facts satisfy the *Kelsey S.* standard. (See *In re D.S.* (2014) 230 Cal.App.4th 1238, 1245 ["whether the facts satisfy the *Kelsey S.* standard is a mixed question [of law and fact] to be reviewed de novo"].)

"Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to

the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 (*Crocker National*); accord, *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 384.)

In *Kelsey S.* our Supreme Court required that the unwed father "promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) This is the key issue. (See *id.* at p. 850 ["the trial court must consider whether [the unwed father] has done all that he could reasonably do *under the circumstances*"].) This issue is predominantly factual because "the pertinent inquiry requires application of experience with human affairs." (*Crocker National*, *supra*, 49 Cal.3d at p. 888.)

Moreover, the determination of this issue "is an 'individual-specific decision' that is 'unlikely to have precedential value.' [Citation.]" (*In re R.V.* (2015) 61 Cal.4th 181, 198.) Deferential substantial evidence review of a mixed question of law and fact "is appropriate . . . when the lower court's determination is 'highly individualized' [citation] and would not likely result in an appellate opinion elucidating rules of general applicability." (*Id.* at p. 199.)

We therefore apply the substantial evidence standard of review, which imposes a "'daunting burden'" upon appellants. (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.) "'When determining whether substantial evidence is present, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or determine where the preponderance of the evidence lies. [Citation.] We merely 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.] The appellant must show the evidence is insufficient to support the trial court's findings.' [Citation.]" (*Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133, 1145.) "'[W]e draw all reasonable inferences in support of the findings, view the record favorably to the . . . court's order and affirm the order even if there is other evidence supporting a contrary finding.' [Citation.]" (*Adoption of Baby Boy W.*, *supra*, 232 Cal.App.4th at pp. 452-453.)

Substantial Evidence Supports the Trial Court's Finding that Respondent Qualifies as a Kelsey S. Father

An unwed father who seeks *Kelsey S.* status must, among other things, demonstrate: "(1) . . . a willingness to financially support [mother during pregnancy and] child and (2) a willingness—at least to the extent she makes possible—to emotionally support . . . mother during her pregnancy." (*Adoption of T.K.* (2015) 240 Cal.App.4th 1392, 1394; see also *Adoption of Emilio G.*, *supra*, 235 Cal.App.4th at p. 1145; *Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 722.)

"Viewing [the] evidence in the light most favorable to [respondent], giving [him] the benefit of every reasonable

inference, and resolving all conflicts in [his] favor, as we must under the rules of appellate review" (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614), we conclude that a reasonable trier of fact could find that respondent "promptly attempt[ed] to assume his parental [financial and emotional support] responsibilities as fully as the mother [would] allow and his circumstances [would] permit" (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849).

As to emotional support, respondent spoke to mother every day, "constantly ask[ing] how the pregnancy [was] going," until she requested that he not contact her. Respondent cannot be faulted for respecting mother's wishes.

As to financial support, respondent concedes that he did not contribute toward mother's and child's support. But neither mother, her father, the adoption agency, nor appellants asked him for money, and respondent made clear to mother and her father that, if he were asked for financial support, he would provide it. On "multiple occasions" he told mother that she and child were his "responsibility." When respondent said "responsibility," he meant both "emotional" and "financial responsibility." Respondent also told mother that he "'would take care of her if she needed anything.'" He told mother's father, "I will take full responsibility . . . and . . . will provide anything that [mother] . . . need[s], and the baby, of course." Respondent testified that, if mother had asked for money, he would "have been willing to provide for her financially." The trial court found that "if a request had been made [respondent] would have provided reasonable financial assistance for both [mother] and [child] both before and after [child's] birth."

When questioned at trial whether he "chose not to provide . . . financial support," respondent answered: "I chose to

give her space when she wanted it. And if I would get close to her, she [would] tell me not to do it. So I didn't know how [I was] supposed to actually give her stuff."

Appellants criticize respondent for not attending mother's medical appointments during her pregnancy, not participating in parenting classes with her, and not being present at the hospital when child was born. But a reasonable trier of fact could conclude that his absences were justified. Respondent testified that he did not go to the medical appointments "[b]ecause [mother] didn't allow me to" go. He explained, "[S]he would tell me that she didn't want to see me and she said it will make her uncomfortable if I will be inside [the doctor's office] with her." Respondent did not attend parenting classes with mother because he "had to work." He was not present at the hospital when child was born because "[n]o one told me about it. No one let me know."

Appellants also criticize respondent for not filing an action to establish his paternity before child's birth. (See § 7633 ["An action under this chapter may be brought, an order or judgment may be entered before the birth of the child"].) But the trial court found that respondent had "credibly testified that he sought advice from the Self-Help Center at the Ventura County Superior Court and was advised to wait until after the child was born before filing a lawsuit." When mother informed him of child's birth, he promptly filed a petition to establish a parental relationship.

We presume that the trial court believed respondent. In its statement of decision, the court "found [respondent] to be forthright." In applying the substantial evidence standard of

review, "[w]e do not . . . reassess the credibility of witnesses." (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1246.)

There are two troubling aspects of the evidence. First, respondent turned down an opportunity to visit child shortly after birth. His deliberate three-month delay in making contact with his newborn son is inconsistent with the conduct of a father who has "*promptly* attempt[ed] to assume his parental responsibilities as fully as the mother will allow and his circumstances permit." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849, italics added.)

The second troubling aspect of the evidence is respondent's attitude about his responsibility for paying birth expenses. At trial he was asked, "[H]as it caused you any concern that [mother's] hospital bills have remained unpaid?" Respondent replied: "No. . . . Because I'm thinking first of getting my son back and then dealing with the other bills after." An unwed father seeking *Kelsey S.* status should not condition his payment of birth expenses upon obtaining custody. In determining whether an unwed father qualifies as a *Kelsey S.* father, the trial court "should . . . consider the father's . . . payment of . . . birth expenses commensurate with his ability to do so." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.)

However, these two troubling aspects of the evidence do not disqualify respondent from becoming a *Kelsey S.* father. "In determining [the] existence [of substantial evidence], we look at the entire record on appeal rather than simply considering the evidence cited by a party. [Citation.] 'The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citation.]'" (*Estate of Young* (2008) 160 Cal.App.4th 62, 76.) "So long as

there is 'substantial evidence' to support [the trial court's decision], the appellate court must affirm, even if the reviewing court would have ruled differently had it presided over the proceedings below, and even if other substantial evidence would have supported a different result." (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1208.)

Based on the whole record, a reasonable trier of fact could find that respondent qualifies as a *Kelsey S.* father. As the trial court noted in its statement of decision, he "steadfastly held himself out as the child's father and voiced his opposition to the adoption." He "demonstrate[d] 'a willingness himself to assume full custody of the child—not merely to block adoption by others.' [Citation.]" (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) When mother said she was considering adoption, respondent protested: "If you and your parents don't want it I will take it." Upon learning that mother had given birth, he took "prompt legal action to seek custody of the child." (*Ibid.*) In his petition to establish a parental relationship, he requested sole legal and physical custody. Respondent emotionally supported mother until she told him not to contact her. He made clear to mother and her father that he would provide financial support if she or child needed it. Accordingly, substantial evidence supports the trial court's finding that respondent "is a 'presumed father,' as defined by the case of *Kelsey S.*"

We reject appellants' claim that the trial court "applied incorrect legal criteria to its determination to excuse [respondent] from demonstrating a full commitment to parental responsibility under *Kelsey S.*" The trial court did not excuse respondent from his *Kelsey S.* burden. It concluded that he had

carried his burden. Substantial evidence supports that conclusion.

Disposition

The judgment is affirmed. Respondent shall recover his costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J

Rocky J. Baio, Judge

Superior Court County of Ventura

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