Filed 8/14/12 In re K.S.C2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re K.S. et al., Persons Coming Under the Juvenile Court Law.	B236646
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANTHONY S., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK77112)

APPEAL from an order of the Los Angeles County Superior Court. Elizabeth Kim, Referee. Affirmed.

Maryann M. Milcetic, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

Anthony S. (Father) seeks to set aside all paternity, jurisdictional and dispositional findings made by the juvenile court in connection with his children, K.S. and Antoinette S., on the grounds he was not provided notice of the dependency proceedings. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Father and Latisha D. (Mother) met in 1996 when they were both 15 years old. In 1998, Mother gave birth to a son named Keyon C. Riley C. was Keyon's father. Mother then had two children with Father, K. in 1999 and Antoinette in 2000. Mother and Father lived together with the three children in his mother's home in San Bernardino until 2003, when they ended their relationship and Mother took the children to Los Angeles.

Referrals were made to the Los Angeles County Department of Children and Family Services (Department) in 2000, 2006 and 2007 for general neglect of the children but each case was closed because the caseworker was unable to locate the family. The Department received another referral about the children on April 9, 2009, indicating the children were consistently asking the neighbors for food and that Mother may be using drugs. A caseworker from the Department contacted Mother the next day and surveyed her home. The caseworker noted that there was food in the home, including cereal, milk, juice and canned goods, and that it appeared to be well-maintained. The children reported that they ate everyday and were looked after by a babysitter when their Mother was working and they were home from school. The children also appeared to be developmentally on target and emotionally stable. However, Mother took a drug test on April 13, 2009, and tested positive for amphetamines and methamphetamine. Mother admitted to the caseworker she used ecstasy two weeks prior to testing when she was out with a friend.

A Welfare and Institutions Code section 300[1] petition was filed on May 4, 2009, alleging that Mother's illicit drug use endangered the children. (§ 300, subd. (b).)

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[1] All further section references are to the Welfare and Institutions Code unless otherwise specified.

The petition further alleged that Father and Riley failed to provide the necessities of life for Keyon, K., and Antoinette. (§ 300, subds. (b) & (g).) The petition listed Father's address as 243 N. Meridian Sp#84, San Bernardino, CA 92410. Notice of the detention hearing was provided to Mother and Riley by phone. No notice was provided to Father because no phone number was listed on the Department's report.

Mother and Riley both appeared at the May 4, 2009 hearing date. The juvenile court found Riley to be the presumed father of Keyon and Father to be the alleged father of K. and Antoinette. When asked about Father's whereabouts in a paternity questionnaire, Mother wrote, "No clue, maybe San Bernardino." The juvenile court found a prima facie case for detaining the children was established and ordered the children to be released to Mother on the condition she continue to participate in a drug program and submit to random testing.

Notice of the May 26, 2009 disposition hearing was served by first class mail to Father at the San Bernardino address. At the hearing on May 26, 2009, the juvenile court found notice of the proceedings had been given as required by law. It sustained allegations relating to Mother's substance abuse and Father's failure to provide for K. and Antoinette. It rejected the allegations regarding Riley. It further declared the children dependents of the court and allowed Mother to retain custody of the children so long as she continued her drug rehabilitation program. The juvenile court denied family reunification services to Father based on his status as an alleged father. The minute order from the disposition hearing was mailed to Father in San Bernardino.

A supplemental petition was subsequently filed after Mother tested positive for amphetamine and methamphetamine. Father was provided notice of the hearing on the supplemental petition by certified mail to the San Bernardino address. At a hearing on September 9, 2009, Mother and Riley appeared. The juvenile court ordered the children removed from Mother's custody. Keyon was released to Riley's home and K. and Antoinette were placed in a foster home. The court further ordered Mother to attend a drug rehabilitation program, counseling and parenting classes.

At the 12-month review hearing on September 22, 2010, the juvenile court terminated family reunification services and issued an order permanently placing Keyon with Riley. The court further scheduled a section 366.26 hearing to select a permanent plan for K. and Antoinette. The children's foster mother was interested in adopting them and they wanted her to adopt them. Mother agreed that was the best thing for the girls. Father was sent notice by first class mail of the six-month review hearing and a copy of the 12-month review order to the San Bernardino address.

On January 19, 2011, the Department submitted a declaration of due diligence, which documented its search for Father on various databases, including those from LexisNexis, the federal prison, the county jail, the military, child support, DMV, voter registration and postal service. The search indicated he may have been incarcerated at some point but was released from prison on September 8, 2010. Mail sent to the San Bernardino address and another address in Pawhuska, Oklahoma, which appeared on the LexisNexis database, was returned. The juvenile court continued the section 366.26 hearing on January 19, 2011, to allow the Department time to publish notice of the proceedings to Father.

Father contacted the Department on January 31, 2011, to ask how Antoinette and K. were. He told the caseworker that he found out they were in foster care three weeks ago. He provided them with his correct address in Perris, California. When asked whether he had inquired after the girls in the two years they had been in foster care, Father said Mother told him the girls were fine. However, he never asked to speak to them. Father requested to visit the girls but disagreed with having his visits supervised. On February 1, 2011, Father called the caseworker. He was upset and told her he would hire a lawyer to get his children back.

Notice of the March 23, 2011 review hearing was mailed to Father's address in Perris, but Father did not appear. Notice of the section 366.26 hearing was mailed to Father via certified mail to his Perris address; delivery was confirmed on April 1, 2011. Father appeared for the June 20, 2011 hearing and was appointed counsel, who made a special appearance on his behalf. Father's attorney told the court that the Department had

not made efforts to try and properly notice him. The court continued the hearing and ordered Father to file any motions challenging his notice within three weeks. Monitored visitation was ordered between Father and the children.

On July 11, 2011, Father filed a section 388 petition claiming he was not provided notice of the dependency proceedings. He requested that all findings relating to the May 4, 2009 petition be set aside and new proceedings be held to allow him to participate. He also requested the juvenile court consider whether it would be in the girls' best interest to be in his custody rather than in foster care. Father's declaration stated that neither he nor his family had lived at the San Bernardino address since 2003. He moved to Pawhuska, Oklahoma in 2008 and lived there until 2010. During that time, he was only able to talk to the girls on a "couple of occasions" but Mother would occasionally call and inform him about them. However, she did not tell him that they were in foster care. Because Father did not have updated contact information for Mother or the children, he asked his relatives in Los Angeles to help locate them. His mother was eventually able to locate Mother and informed him the children had been removed from her care. At the July 12, 2011 hearing on Father's section 388 petition, Father's attorney again made a special appearance on his behalf. The Department was ordered to respond to the petition and the matter was continued to August 17, 2011.

In its interim review report, the Department reported that the girls still wanted to be adopted by their foster mother but did want visits with Father. The girls also reported that they never heard from Father and never spoke to or saw Father. Mother reported that Father never called to ask how the girls were and she often did not have his latest contact information. Father admitted he never asked to speak to the girls when he contacted Mother. Although a visit was set up for August 6, 2011, Father had not visited with the girls. The Department recommended that Father's petition be denied.

At an August 17, 2011 hearing on Father's section 388 petition, Father's attorney clarified that his "appearance has to be [a] general appearance if there is an issue with notice." The hearing was continued to allow the regularly assigned hearing officer to be present. At a September 6, 2011 status hearing, the Department reported that Father, his

aunt and his mother visited with the girls on August 6, 2011. Neither the girls nor Father and his family recognized each other; they had to be introduced by the foster mother. The visit lasted two and one-half hours. The foster mother stated that Father was aggressive towards her and she was not comfortable monitoring the visits by herself. Father then requested weekly supervised visits with the girls at the Department's offices because he had conflict with the foster mother.

Shortly after the visit, the children told their social worker they did not want to live with Father. They felt the foster mother's home was their home and they wanted her to adopt them. The children also requested they visit with Father once per month rather than once per week, as ordered by the juvenile court. Mother continued to want the foster mother to adopt the girls. In the Department's response to Father's section 388 petition, it noted that Father had been incarcerated. He was convicted for purchasing cocaine base for sale and was sentenced to one year in jail. He violated his probation shortly after he was released and was sentenced to three years in state prison. The Department further argued that it was not in the girls' best interest to grant Father's petition. Meanwhile, the foster mother's home study was expected to be approved by October 31, 2011.

On September 21, 2011, Father's attorney made a special appearance on behalf of Father. K.'s and Antoinette's attorney asked the juvenile court to restrict Father's visits to once a month because "they are finding it to be too much. They don't know him. . . [¶] . . . [¶] . . . The kids have other activities. They don't mind seeing this gentleman; but, they don't consider him a father, and they don't want to have weekly visits with him." Father's counsel requested the visits remain as previously ordered. The juvenile court ordered one visit with Father happen before the next hearing on October 3, 2011, at which time it would again address the frequency of his visits.

At the October 3, 2011 contested hearing on Father's section 388 petition, testimony was elicited from Father, his aunt, Mother and the caseworker. Father testified that he lived with Mother and the children from 1999 until 2003, when Mother moved to Los Angeles. Father then lived with his mother in a mobile home at 243 N. Meridian, Space 84 in San Bernardino until 2004. He was incarcerated in 2006. After he was

released from custody in September 2007, he lived with his brother at 243 N. Meridian, an apartment next door to the mobile home "with the same address." His mother had moved to Los Angeles by then and was no longer living in the mobile home. In July 2008, Father moved to 216 Anita Street in Tushka, Oklahoma, where he lived when the children were detained in 2009. Father moved back to California in August 2010. Father then asked his family to help him find K. and Antoinette. His sister was able to contact Keyon on Facebook, which led to Father's contact with the caseworker. Prior to Father's contact with the Department, all notice was provided to Father at 243 N. Meridian Sp#84, San Bernardino, CA 92410.

The juvenile court denied Father's petition, finding that he was a biological but not presumed father. The juvenile court found that Mother did not thwart the children's contact with Father. Instead, the court believed Father had moved out-of-state, become incarcerated and lost contact. The court found that it was not in the children's best interests to grant custody to Father. The section 366.26 hearing was continued to November 2011 and Father filed a notice of appeal on the denial of his section 388 petition.

DISCUSSION

I. Notice

Father argues the Department failed to exercise reasonable due diligence in locating and notifying him of the dependency proceedings, thereby prejudicing his efforts to secure custody of his children. As a result, Father contends all orders issued after the detention hearing should be vacated with instructions to hold a new jurisdictional and dispositional hearing with respect to Father. We review the matter de novo and conclude that notice was deficient in this case. (*In re J.H.* (2007) 158 Cal.App.4th 174, 183.) However, any resulting error was harmless.

A. The Lack of Notice Violated Father's Due Process Rights

The "interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic of civil rights [citations][.] [T]he state, before depriving a parent of this interest, must afford him adequate notice and

an opportunity to be heard." (*In re B. G.* (1974) 11 Cal.3d 679, 688-689.) "Notice is both a constitutional and statutory imperative." (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114.) "The means employed to give notice 'must be such as one, desirous of actually informing the absentee, might reasonably adopt to accomplish it.' " (*In re Antonio F.* (1978) 78 Cal.App.3d 440, 450.) A judgment is void for lack of jurisdiction of the person where there is no proper service of process on or appearance by a party to the proceedings. (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1016.) Thus, if a parent proves the absence of due process notice to him in juvenile dependency proceedings, a "fatal defect" exists in the jurisdiction of the juvenile court to have entered the dependency judgment. (*In re B. G., supra,* at pp. 688-689.) A section 388 motion is a proper vehicle to raise a due process challenge based on lack of notice. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 481, 487-488.)

In *In re B. G., supra,* 11 Cal.3d 679, the father brought the children from Czechoslovakia without the mother's approval to live with their grandparents. The father died shortly after they arrived in California. Prior to his death, the father dictated a "will" in which he stated he wished for his children to continue to live in the United States with their grandmother. If she was unable to care for them, he wanted his neighbors to care for the children. (*Id.* at p. 684, fn. 3.) When the neighbors applied for a foster home license, the probation department scheduled a dependency hearing because the children had no legal guardian. The children were placed in the neighbors' custody. The mother was not notified of the proceedings even though the probation department knew her address or knew the grandparents had her address. (*Id.* at pp. 684-685.) The court held that "total absence of notice in any form cannot comport with the requirements of due process." (*Id.* at p. 689.)

In *In re Arlyne A.* (2000) 85 Cal.App.4th 591, Division One of this court reversed dispositional and adjudication orders for lack of personal jurisdiction. The Department continued to send notice of the proceedings to appellant father's old address despite having received information from two sources that both his current residential and business address were in a police report. (*Id.* at p. 597.)

Here, the Department failed to conduct any search for Father until almost two years after the initial dependency petition was filed. Its declaration of due diligence was filed on January 19, 2011, and the initial petition was filed on May 4, 2009. As in *In re Arlyne A.*, notices continued to be sent to Father's old address in San Bernardino despite the fact that they were returned with the notation that the addressee was unknown there. When the Department did conduct a search for Father, the LexisNexis database revealed two addresses, one for 216 Anita Ave. in Pawhuska, Oklahoma and one for 243 Meridian Ave., Sp#84 in San Bernardino. If the Department had conducted its LexisNexis search in 2009, it would have discovered Father's whereabouts since he lived at 216 Anita Street[2] when the initial detention petition was filed. By the time the Department attempted to locate Father in Oklahoma in 2011, however, Father had already moved back to California. The Department's failure to conduct a search for Father at the commencement of the dependency proceedings and for two years afterwards does not comport with the requirements of due process.

We are not convinced by the Department's argument that Father waived the defect in notice because his counsel made a general appearance by requesting the court revise its visitation order. None of the parties in the cases relied upon by the Department contested the defect in notice when he or she first appeared. (*In re Etherington* (1950) 35 Cal.2d 863, 867; *In re Gilberto M.* (1992) 6 Cal.App.4th 1194, 1198-1200; see also *In re B. G., supra,* 11 Cal.3d at p. 689.) Indeed, the mother in *In re B. G.* expressly stipulated there was no defect in notice. (*In re B. G., supra,* at p. 689.) Here, Father expressly made a special appearance to contest the defect in notice at his first appearance at the June 20, 2011 hearing and has continued to do so throughout the proceedings below and during this appeal.

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[2] The reporter's transcript shows Father testified he lived at 216 Anita Street in "Tushka," Oklahoma and that he did not know how to spell Tushka. Given the similarity of Tushka to Pawhuska and the identical street address, it is reasonably certain Father was actually living in Pawhuska and not Tushka.

B. Any Error Resulting From the Lack of Notice Was Harmless

Nevertheless, we find any error resulting from the lack of notice to be harmless, that is, there is no evidence that actual notice to Father would have changed the outcome of the jurisdiction and dispositional hearing. (*In re J.H., supra*, 158 Cal.App.4th at p. 185; *In re Angela C.* (2002) 99 Cal.App.4th 389, 391.) The California Supreme Court has concluded that "[i]f the outcome of a proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless and reversal is not required." (*In re James F.* (2008) 42 Cal.4th 901, 918.) An alleged due process violation is reviewed under the "harmless beyond a reasonable doubt standard of prejudice." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 193; *In re Angela C., supra,* at p. 391.)

Under section 388, a parent may petition the court to change, modify, or set aside a previous court order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petition must allege why the requested change is "in the best interest of the dependent child." (§ 388, subd. (b).) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (See *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.) The party filing a section 388 petition has the burden to show by a preponderance of the evidence that the proposed modification is in the best interests of the child. (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1796.)

The record establishes that even if Father had successfully contested the allegations against him in the section 300 petition, there was ample reason for the juvenile court to take jurisdiction over K. and Antoinette as a result of the allegations against Mother. Further, it was unlikely the juvenile court would have granted custody to Father as he lived in Oklahoma at the time of the initial petition. It was Father's burden to show that the juvenile court would have granted him custody. Despite this burden, Father has not shown that he would have moved back to California in 2009 or even had the resources to visit. Father asserts that he "could have traveled to California or the court could have appointed an attorney to represent his interests at trial." Even if we accept that Father would have come to California for trial, Father makes no

representations as to how frequently he could have visited the girls from Oklahoma during the proceedings. The record shows he had no relationship with his children in 2009, having visited with them only three times since 2003. Father failed to even request visits with the children for four to five months after he initially contacted DCFS and did not recognize the children at their first meeting. These facts belie Father's contention that he "wanted custody of the girls and was able to provide for them." Father's conduct instead evidenced a lack of commitment to the girls. Therefore, it is not reasonably probable the juvenile court's jurisdiction or custody orders would have been different had Father received sufficient notice.

We do not accept Father's contention that he is similarly situated with Keyon's father, Riley, who was found a nonoffending parent and ultimately granted custody of Keyon. Father claims that had he been provided early notice, he would also have been able to successfully challenge the allegations against him and regain custody of the girls like Riley did. Father notes he and Riley are similar in that Riley had not visited with Keyon since 2005 because Mother "kept moving and hiding from him." Moreover, both he and Riley could readily rely on their families for support. What Father ignores is the fact that Riley "employed various search mechanisms trying to track [Mother] down." Unlike Father, there is no evidence in the record that Riley had access to Mother's contact information yet failed to make substantial efforts to locate her. Father's family, on the other hand, maintained frequent contact with Mother and yet, Father only saw his children three times in six years. As discussed above, Father's conduct, unlike Riley's, fails to show a commitment to his parental responsibilities. Any error in failing to give Father proper notice was harmless beyond a reasonable doubt.

C. Best Interests of the Children

In any event, Father failed to establish that the best interests of the children would be supported by vacating the jurisdictional and dispositional orders. (*In re Justice P., supra,* 123 Cal.App.4th at p. 191.) It is clearly established that " '[u]p until the time the section 366.26 hearing is set, the parent's interest in reunification is given precedence over a child's need for stability and permanency.' [Citation.] 'Once reunification

services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.]" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447.) The burden thereafter is on the petitioner to prove changed circumstances and the best interests of the children pursuant to section 388 to revive the reunification issue. (*Ibid.*; *In re Justice P., supra,* at p. 191.)

Here, a section 366.26 hearing was set and reunification services had terminated. Yet, Father urges us to direct that the dependency proceedings begin anew so he can "fully participate, and the juvenile court could then decide whether it was truly necessary to remove the girls from his custody or whether father should be given services in order to help him reunify the family." Father contends that it would be in the best interests of the children to get reacquainted with paternal family members. Father also claims that foster mother's home study had not been completed and therefore it was in the best interests of the children to have father and the paternal family readily available for placement consideration. We do not find either of these trumps the girls' right to a permanent plan. In any event, we hope that Father's newfound interest in the girls would extend to providing them with a suitable home if the foster mother's home study is not approved.

In re Justice P. tells us that "[i]f a missing parent later surfaces, it does not automatically follow that the best interests of the child will be promoted by going back to square one and relitigating the case. Children need stability and permanence in their lives, not protracted legal proceedings that prolong uncertainty for them. Further, the very nature of determining a child's best interests calls for a case-by-case analysis, not a mechanical rule." (*In re Justice P., supra,* 123 Cal.App.4th at p. 191.) In this case, K. and Antoinette wish to be adopted by their foster mother with whom they have been living for two years. Foster mother and Mother agree that it would be in the best interest for them to be adopted. Father does not have a relationship with K. and Antoinette and has heretofore shown little interest in a relationship with them. In short, Father's rights do not trump those of his children, particularly at this stage in the proceedings.

II. Presumed Father Status

Father further contends the juvenile court erred when it denied him presumed father status as part of his Welfare and Institutions Code section 388 petition. According to Father, he met both prongs of the test under Family Code section 7611 as he received them into his home and publicly acknowledged the girls as his own.

Under the law, "only a presumed, not a mere biological, father is a 'parent' entitled to receive reunification services under section 361.5." (*In re Zacharia D., supra,* 6 Cal.4th at p. 451.) " '[P]arental rights are generally conferred on a man not merely based on biology but on the father's connection to the mother [and/or] child through marriage (or attempted marriage) or his commitment to the child.' " (*Id.* at p. 449.) A natural father may become a presumed father if he receives the child into his home and openly holds out the child as his natural child. (Fam. Code, § 7611, subd. (d); *In re Zacharia D., supra,* at p. 449; *In re Phoenix B.* (1990) 218 Cal.App.3d 787, 790, fn. 3.) It is for the trier of fact to determine whether a father has established by a preponderance of the evidence that he received the child into his home and openly held her out to be his child. We review the juvenile court's ruling for substantial evidence. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1651-1653.)

The facts of this case are similar to those in *In re Spencer W., supra,* 48 Cal.App.4th 1647. There, the mother and father lived together with their child from 1989 to 1992. Because the father was unemployed during that time, the mother paid the rent and other expenses from her welfare check. (*Id.* at p. 1651.) The juvenile court rejected the father's attempt to seek presumed father status. Holding that presumed father status is earned based on a commitment toward developing a substantial familial relationship with the child, the Court of Appeal affirmed. (*Id.* at p. 1655.)

The court found the evidence permitted the conclusion that he did not receive the child into his home, but instead, that the mother permitted the father to reside in her home. Moreover, the father's residence with the child did not demonstrate of his commitment to the child, but reflected that he acted out of personal convenience and self-interest. Moreover, the evidence permitted the conclusion that the father's conduct was

not sufficient to satisfy the requirement that he openly and publicly admit paternity. While the father claimed paternity to family and friends, he denied paternity when there might have been some cost to him. The father also failed to take formal steps to place his name on the birth certificate, to establish paternity by legal action, or to assume child support obligations. Except for a few phone calls made to a social worker, he was indifferent toward establishing or maintaining a parental relationship with the child. (*In re Spencer W., supra,* 48 Cal.App.4th at p. 1654.)

Similarly, in *In re Sarah C.* (1992) 8 Cal.App.4th 964, the appellate court affirmed the trial court's denial of presumed father status to the biological father. There the claimant had told some people he was the father; however, he took no steps to have his name put on the child's birth certificate; he never took formal steps to identify her to governmental agencies as his daughter; he lived with her and her mother only because he needed a place to stay; he provided her little economic support; and he made negligible efforts while imprisoned to contact her or establish a relationship with her. (*Id.* at pp. 972-973, 977.) The court reasoned that presumed father status is earned based on a commitment toward developing a "substantial familial relationship to the child," and that the trial court had ample basis for denying presumed father status even to the biological father on the facts of the case. (*Id*. at pp. 974-975.)

Here, substantial evidence supports a finding that Father did not receive the girls into his home. The evidence showed that Father lived with Mother and the children at his mother's home from 1999 until Mother moved out in 2003. It is undisputed that Mother paid rent to the paternal grandmother every month. As in *In re Spencer W.*, there is no indication Father made any contributions to the paternal grandmother, financial or otherwise. It is unlikely he made much of a financial contribution as he was unemployed from 2001 to 2008. Contrary to Father's claim that it was "more father's home than mother's," Father fails to cite to any authority which holds that the paternal grandmother's home qualifies as his home for purposes of presumed father status.

The record also shows that Father lost touch with the girls after Mother moved out in 2003 and was indifferent as to establishing a relationship with them, just as in *In re Spencer W.* and *In re Sarah C.* He visited with the girls only twice between 2003 and 2005. He was then incarcerated in 2006 and was unable to locate the children when he was released although his sister and mother continued to see the children frequently during that time. Father saw them for a three-week period in 2008 when they came to live with him and his brother in San Bernardino. Thus, the sum total of Father's contact with his children from 2003 to 2011 was three weeks and two days. Though Father testified that his wages were garnished pursuant to a child support order by the Department of Child Support Services, there is no indication he voluntarily accepted financial responsibility for the girls. Substantial evidence supports the juvenile court's ruling that Father failed to show a commitment to his children to warrant presumed father status.

We find Father's reliance on *In re J.O.* (2009) 178 Cal.App.4th 139 and *S.Y. v. S.B.* (2011) 201 Cal.App.4th 1023 to be misplaced. In *In re J.O.*, the trial court found that appellant had established his status as presumed father under Family Code section 7611, subdivision (d), but that the presumption had been rebutted by clear and convincing evidence. The sole issue addressed in *In re J.O.* was whether appellant's failure to care for or to provide financial support to his children warranted rebuttal of the presumption of paternity that arises under section 7611, subdivision (d). As discussed above, Father has not established the presumption and thus, we need not consider whether it has been rebutted.

The facts in *S.Y. v. S.B.* are also distinguishable. There, S.Y. and S.B. were two women who were in a committed relationship for over 13 years during which time S.B. adopted two children. (*S.Y. v. S.B., supra*, 201 Cal.App.4th at pp. 1032-1033.) During the majority of their relationship, they maintained separate residences; however, S.Y. spent the majority of time in S.B.'s home, helping S.B. raise the children. (*Id.* at p. 1033.) After breakup, S.B. cut off contact between S.Y. and the children and S.Y. filed a petition with the court to establish herself as the children's second legal parent.

S.B. maintained that S.Y. was not a presumed parent because she had never received the children into her own home, instead spending her time with them in S.B.'s home. The appellate court held that substantial evidence supported the contention that S.Y. fulfilled the requirement of receiving the children into her home. The record showed that S.Y. was devoted to the children even after her relationship with S.B. ended. She acted as a parent in a myriad of ways including cleaning up after them, setting up college accounts, paying for their therapy, volunteering at the school, and naming the children as beneficiaries. (*Ibid.*) S.Y.'s actions could not be more different from Father's. Though Father may have lived in the same household as the children during their infancy, there is no evidence he performed the role of devoted parent during their residency. His lack of interest in the children after his breakup with Mother is also telling. Unlike S.Y., he failed to show any interest in, much less devotion to, K. and Antoinette.

In any case, Father's presumed father argument was made in a section 388 petition, which requires consideration of the best interests of the children. Even if there is merit to Father's argument that the juvenile court erred in denying him presumed father status, Father has failed to show that the best interests of the girls are served by disrupting any stability and permanency they have achieved with the foster mother. As we pointed out, the girls' right to a permanent plan is paramount at this stage of the proceedings.

Finally, we are not persuaded by Father's argument that he qualifies for presumed father status simply because he is identified as the father on K.'s and Antoinette's birth certificates. Under the Family Code, a father who signs a voluntary declaration of paternity automatically qualifies as a presumed father. (Fam. Code, §§ 7611, 7570.) However, the record does not contain a copy of the declaration of paternity. Indeed, Father does not state that he signed one for K. or Antoinette. Instead, he argues that under Health and Safety Code section 102425, the hospital staff was required to submit one "[i]f the parents are not married to each other" in order to add the Father's name to the birth certificate. Father reasons that signed voluntary declarations of paternity must exist since his name is on the birth certificates. We reject this assumption. There is no evidence that the hospital staff was aware that Mother and Father were not married at the

time of their children's births so as to require they sign voluntary declarations of paternity. Under these facts, we may not presume that a voluntary declaration of paternity exists as to either child.[3] (*In re D.A.* (2012) 204 Cal.App.4th 811, 826-827.)

DISPOSITION

The juvenile court's order denying Father's section 388 petition is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.

[3] On July 18, 2012, well after all the briefs in this case had been filed, Father requested that we take judicial notice pursuant to Evidence Code section 452 of certified copies of declarations of paternity for K. and Antoinette that were purportedly signed and witnessed at the time of each girls' birth. The request is one which would require that we take additional evidence and would effectively put us in the role of fact finder, which properly belongs to the juvenile court. (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1416-1417.) As a result, it is denied. In any event, this new information does not change our analysis that Father has failed to demonstrate it is in the girls' best interest to delay their permanent plan and attempt reunification with a father who has been absent since 2003.