Filed 8/1/18 In re Z.H. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Z.H., A Person Coming Under the Juvenile Court Law.	B284159 (Los Angeles County Super. Ct. No. CK99338)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Z.H. et al., Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Conditionally affirmed and remanded with directions.

Aida Aslanian, under appointment by the Court of Appeal, for Appellant Z.H.

Leslie A. Barry, under appointment by the Court of Appeal, for Appellant Stanley P.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Minor Z.H. and his biological father, Stanley P., appeal from the juvenile court's orders denying Stanley's petition for modification under Welfare and Institutions Code[1] section 388, and terminating his parental rights under section 366.26. On appeal, Z.H. and Stanley join in arguing that the juvenile court erred in finding that Stanley was not entitled to presumed father status under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*). They also assert that the juvenile court failed to comply with the requirements of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) prior to terminating parental rights. We remand the matter to allow the juvenile court to comply with ICWA and otherwise conditionally affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Dependency Jurisdiction Over Z.H.

Stanley and Tiffany H. (Mother) are the biological parents of Z.H., a boy born in December 2015. Mother also has two older children with Kenneth J., and as of 2015, these children had been removed from parental custody and were receiving permanent placement services. At the time of Z.H.'s birth, both Mother and the baby tested positive for methamphetamine. While in the hospital, Mother told hospital staff and a case social worker that

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[1] Unless otherwise stated, all further statutory references are to the Welfare and Institutions Code.

Kenneth was Z.H.'s father, but indicated she had not had any contact with him in many months. Mother did not identify a father on Z.H.'s birth certificate.

On December 9, 2015, the Department of Children and Family Services (DCFS) filed a dependency petition on Z.H.'s behalf. At the detention hearing, the juvenile court found that Kenneth, who was then incarcerated, was the alleged father of Z.H, and ordered that the child be detained. Z.H. was placed in foster care with Mr. and Mrs. Y. when he was a few days old.

At the jurisdiction hearing held on January 21, 2016, the juvenile court sustained the petition filed on behalf of Z.H. pursuant to section 300, subdivisions (b) and (j). The court made true findings on the allegations that Z.H. had tested positive for methamphetamine at his birth, that Mother had a history of mental and emotional problems, and that Mother and Kenneth had a history of illicit drug use and domestic violence. At the disposition hearing on February 25, 2016, the court declared Z.H. a dependent of the court and ordered that the child be removed from parental custody. The court denied reunification services to both Mother and Kenneth, and set the matter for a section 366.26 hearing to select and implement a permanent plan for Z.H.

II. Section 366.26 Permanency Planning Hearings

On June 23, 2016, the juvenile court held the permanency planning hearing for Z.H. The DCFS informed the court that Z.H. was doing well in the home of his foster parents, Mr. and Mrs. Y., and had developed a strong bond with them. Mr. and Mrs. Y. considered Z.H. to be a part of their family and were committed to adopting him. Neither Mother nor Kenneth had made any effort to visit the child.

At the June 23, 2016 hearing, Mother's attorney advised the court that Mother now was claiming that Z.H.'s biological father was Stanley. According to her attorney, Mother did not initially identify Stanley as Z.H.'s father because she was hoping to regain custody of the child. However, once Mother realized that she would not be able to reunify with Z.H., she decided to tell the truth about the child's parentage because she wanted Stanley to have an opportunity to know his son. Based on Mother's disclosure, the court decided to continue the matter to July 11, 2016, and ordered the DCFS to provide Stanley with notice of the next hearing.

On July 11, 2016, Stanley made his first appearance in the case. An attorney was appointed to specially appear on his behalf. At Stanley's request, the juvenile court ordered DNA testing to determine his paternity. A DNA test was completed on July 28, 2016, and confirmed that Stanley was Z.H.'s biological father. At the next hearing held on August 9, 2016, the court made a finding that Stanley was Z.H.'s biological father based on the DNA test, and appointed counsel to represent him. Neither Stanley nor his counsel made any request at that time. The permanency planning hearing was continued to October 13, 2016.

At the October 13, 2016 hearing, Stanley appeared with his counsel and requested visitation with Z.H. The court ordered monitored visits between Stanley and Z.H. for one hour every two weeks. At the hearing, Stanley completed a Parental Notification of Indian Status form in which he indicated that he may be a member of the Chickasaw tribe and may have Indian ancestry. The court ordered the DCFS to conduct an appropriate ICWA inquiry and notify any relevant tribes. The court continued the permanency planning hearing to January 12, 2017, and

thereafter ordered additional continuances while the DCFS conducted its ICWA investigation.[2]

In a status report filed on February 23, 2017, the DCFS noted that Stanley's visitation with Z.H. began on November 4, 2016. Stanley was cooperative with the DCFS and visited Z.H. on a regular basis. The visits were going well, and Z.H. seemed excited to see Stanley at the start of each visit. The DCFS also reported that Z.H. continued to do well in the home of his foster parents and appeared to be happy in their care. Mr. and Mrs. Y. were attentive to the child's needs and committed to providing him with a safe and stable home. The DCFS recommended adoption as the permanent plan for Z.H.

III. Stanley's Section 388 Petition

On March 10, 2017, Stanley filed a section 388 petition for modification. In his petition, Stanley asked the juvenile court to make a finding that he was the presumed father of Z.H. He also asked that his visitation with Z.H. be liberalized to unmonitored and overnight visits. Along with the section 388 petition, Stanley filed a Statement Regarding Parentage form in which he asserted that he took Mother to two doctor's appointments during her pregnancy, had held himself out as Z.H.'s father, and had provided the child with such necessities as clothing, toys, and food. Stanley also stated that he loved Z.H. and was willing to "do whatever it takes to get him out [of] the situation he [is] in."

On March 23, 2017, the juvenile court granted Stanley a hearing on his section 388 petition. The court also gave the

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[2] A more detailed discussion of the ICWA investigation is set forth in our legal analysis of the issues raised on appeal.

DCFS discretion to allow unmonitored visits between Stanley and Z.H. At a permanency review hearing held on April 6, 2017, the court granted de facto parent status to Mr. and Mrs. Y. based on a finding that they had been Z.H.'s caretakers since the child was two days old and that the reunification period had passed.

On May 8, 2017, the DCFS filed its response to Stanley's section 388 petition and recommended the petition be denied. With respect to Stanley's request for presumed father status, the DCFS noted that Stanley had never made any attempt to visit Z.H. or to contact the agency prior to Mother naming him as the biological father. Stanley also had not provided Z.H. with any financial support. With respect to Stanley's request for unmonitored and overnight visitation, the DCFS noted that, while Stanley would bring toys and snacks to his monitored visits with Z.H., he never brought such basic necessities as diapers and milk, nor had he ever volunteered to change the child's diaper. Z.H.'s foster parents also had reported noticeable changes in the child's behavior after the monitored visits, such as difficulty with his routine naps. Additionally, the DCFS stated that it had concerns about Stanley's marijuana and alcohol use. Stanley had a medical marijuana card that expired in January 2017. Prior to that date, he missed one on-demand drug test and tested positive for marijuana with a blood alcohol level of 0.07% at a second test. After the expiration of his card, Stanley again tested positive for marijuana at a third test.

The DCFS's response also attached a letter from Brenna Vigneau, the social worker who served as the monitor for Stanley's visits with Z.H. According to Vigneau, Stanley had been visiting with Z.H. since November 2016. The visits initially occurred every two weeks, but were changed to weekly in March

2017. As of April 2017, Stanley had visited Z.H. 13 times. He consistently arrived on time to the visits and often brought toys, clothes, and snacks for the child. The foster parents, however, provided a diaper bag for Z.H. with diapers, wipes, and other necessities. Stanley was appropriate during the visits and typically would feed and play with the child. Z.H. appeared comfortable with Stanley and interacted with him. The child exhibited no signs of distress at the end of the visits. In contrast, Z.H. was hesitant to separate from Mr. and Mrs. Y. and would become upset when Vigneau took him from his foster home for a visit. Z.H. also showed a level of comfort and security with his foster parents that he did not demonstrate with Stanley. While Vigneau believed it would be beneficial for Z.H. to keep visiting Stanley, she did not think that severing Stanley's parental ties would be detrimental to the child. In contrast, Vigneau believed that severing the relationship with Mr. and Mrs. Y. would be detrimental to Z.H. given that they had served as his primary caretakers since he was a newborn baby.

IV. Hearing on the Section 388 Petition

On May 15, 2017, the juvenile court held the hearing on Stanley's section 388 petition. The court received into evidence the petition and the DCFS's reports, and took judicial notice of certain prior orders in the case. The court then heard testimony from Stanley and Vigneau.

Stanley testified that he first became aware he might be Z.H.'s biological father when Mother was one to two months pregnant. At that time, Mother told Stanley that she was pregnant and that he was the father. About one month later, however, Mother told Stanley that he was not the father. At that point, Stanley and Mother "went [their] separate ways," although

he continued to see her around the neighborhood. On the day Z.H. was born, Stanley happened to be at the same hospital visiting his sister. While at the hospital, Stanley learned that Mother had given birth, but he did not see the baby. During his testimony, Stanley stated that he believed Mother when she told him that he was not the father. However, he also stated that, at the time of Z.H.'s birth, he still felt he was the father. Stanley testified the reason he did not try to confirm his paternity was that Mother had a restraining order against him, which prohibited him from having any contact with her.

In or about July 2016, Stanley received a notice from the juvenile court requesting that he submit to a paternity test. Once his paternity was confirmed, Stanley began holding himself out as Z.H. father. He also made a request for visitation with Z.H. through his attorney. The case social worker arranged the visits, which typically were one hour every week at the DCFS's office. As described by Stanley, Z.H. would smile and reach for him at the start of the visits. Stanley would play with Z.H. and recite the alphabet to him. On one occasion, Z.H. said "Dada." Stanley often brought snacks and clothes for Z.H., but the foster parents provided a stocked diaper bag. Stanley had not changed Z.H.'s diaper during any of the visits because there had never been a need. When asked what relief he was seeking from the juvenile court, Stanley responded, "Well, I just want my son in my custody."

Vigneau testified that she had known Z.H. since he was placed in his foster home. She saw Z.H. on a regular basis while serving as the monitor for the child's visits with Stanley. At the time of the hearing, Z.H. was 18 months old and had attended 17 visits. According to Vigneau, Z.H. would respond positively to

Stanley at the start of the visits by smiling and reaching for him. During the visits, they would play together and Z.H. appeared to have a good time. However, Z.H. had a similar disposition around other adults because he was a happy baby who interacted easily with people. Vigneau had observed Z.H. at the church nursery he visited each Sunday, and noticed that his interaction with the staff at the nursery was similar to his interaction with Stanley.

Vigneau was responsible for transporting Z.H. to and from the visits. Initially, her practice was to pick up the child from his foster home and place him in her car. However, because Z.H. would cry whenever Vigneau took him from the home, the foster mother began placing the child in the car, which helped alleviate his stress. Z.H. did not exhibit any similar signs of separation anxiety at the end of his visits with Stanley. Vigneau also had observed that Z.H. appeared more relaxed on the days she visited the foster home to check in on the family than on the days she took the child for a visit with Stanley.

Vigneau never saw Stanley change Z.H.'s diaper during the visits, and only saw him check if the child needed to be changed on one occasion. There were a few times when Z.H. needed a diaper change at the end of the visit, which Vigneau did herself. Vigneau also never heard Z.H. call Stanley "Dada." The child was non-verbal and primarily communicated through sign language. Although Z.H. had not used the sign for "daddy" during the visits with Stanley, he had used the sign when communicating with his foster father. Based on Vigneau's observations, Z.H. was very attached to his foster parents and had a stronger relationship with them than he had with Stanley.

At the close of the evidence, the juvenile court heard the argument of counsel. Stanley's counsel argued that the section 388 petition should be granted because Stanley had been led to believe he was not Z.H.'s father, had stepped forward as soon as the paternity test revealed he was the father, and had shown a commitment to developing a relationship with the child through his consistent visitation. Counsel for Z.H. and counsel for Mother joined in requesting that Stanley's petition be granted. Counsel for the DCFS and counsel for the foster parents, Mr. and Mrs. Y., asked the court to deny the petition on the grounds Stanley had reason to believe he was Z.H.'s father prior to the child's birth but took no steps to determine his paternity, and delayed in seeking both visitation with the child and presumed father status even after his paternity was established.

The juvenile court denied the section 388 petition. The court noted that Stanley had been represented by counsel since he first appeared in the case on July 11, 2016, at which time he agreed to submit to a paternity test. Although the test results establishing his paternity came back by the end of July 2016, Stanley did not request visitation with Z.H. until October 2016 and did not file his section 388 petition until March 2017. The court further noted that Stanley had been told at the beginning of Mother's pregnancy that he was the biological father. When the relationship strained, Mother claimed that someone else was the father, but Stanley knew Mother well and reasonably should have known she might be trying to deny him access to the child. Stanley could have initiated a paternity action in family court shortly after Z.H.'s birth to determine if he was the biological father, but he instead waited until he was contacted by the juvenile court to seek a paternity test. The court also found that,

while Stanley had an attachment to Z.H., he did not have a parental relationship with the child. On that basis, the court concluded that Z.H.'s best interest would not be promoted by the proposed change in order.

V. Hearing on the Termination of Parental Rights

On May 24, 2017, the juvenile court resumed the section 366.26 permanency planning hearing for Z.H. The court agreed to incorporate and consider the evidence and testimony from the hearing on the section 388 petition at the section 366.26 hearing. After Mother testified about the nature and scope of her visits with Z.H., the court heard argument as to whether parental rights over Z.H. should be terminated.

Both counsel for Stanley and counsel for Mother argued that parental rights should not be terminated based on the beneficial parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)). Counsel for Z.H. joined with the parents in opposing the termination of parental rights, reasoning that both parents had been visiting Z.H. on a regular basis, Stanley appeared to have a close relationship with the child, and Mother recently had another baby who was doing well in her care. Counsel for Z.H. argued that either parent might be able to obtain custody of the child in the future, and that he deserved an opportunity to be raised by one of his biological parents. Counsel for the DCFS and counsel for the foster parents, Mr. and Mrs. Y., asked the court to terminate parental rights and free Z.H. for adoption by the foster parents. They argued that Mother's visits with Z.H. had been inconsistent and at times problematic, and that Stanley's visits, while pleasant, failed to show that he occupied a parental role in the child's life.

The juvenile court found that Z.H. was adoptable and the beneficial parent-child relationship exception did not apply. The court noted that Z.H. had been in his current placement since he was a few days old and had developed a strong bond with his foster parents. Mother had not visited Z.H. on a consistent basis and had missed numerous court appearances in the case. While Father's visits with Z.H. had been consistent and appropriate, he had not established a parental relationship with the child. The court ordered that parental rights over Z.H. were terminated and designated Mr. and Mrs. Y. as the prospective adoptive parents. Following the termination of parental rights, both Stanley and Z.H. filed notices of appeal.

DISCUSSION

I. Presumed Father Status Under *Kelsey S.*

On appeal, Stanley and Z.H. join in challenging the juvenile court's orders denying Stanley's section 388 petition and terminating his parental rights. They specifically argue that the juvenile court erred in denying Stanley's request for presumed father status under *Kelsey S.* because the evidence established that Stanley came forward as soon as he discovered he might be Z.H.'s father and acted promptly and diligently to assert his parental rights. They further assert that, because Stanley qualified for presumed father status under *Kelsey S.*, the juvenile court could not terminate his parental rights over Z.H. absent a showing of unfitness, which was not made in this case.

A. Governing Law

The Uniform Parentage Act (UPA) (Fam. Code, § 7600 et seq.) provides the statutory framework for judicial

determinations of parentage. (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 116.) The UPA distinguishes between three categories of parents: an alleged parent, a biological parent, and a presumed parent. (*In re D.A.* (2012) 204 Cal.App.4th 811, 824.) A person who may be the biological parent of a child but has not established maternity or paternity, or achieved presumed parent status, is an alleged parent. (*In re H.R.* (2016) 245 Cal.App.4th 1277, 1283; *In re D.P.* (2015) 240 Cal.App.4th 689, 695.) An alleged parent has limited rights in dependency proceedings, generally consisting of notice of the proceedings and an opportunity to appear to challenge his or her parentage status. (*In re D.P.*, *supra*, at p. 695.) An alleged parent is not entitled to appointed counsel or reunification services. (*Ibid.*) A biological parent is a parent who has established maternity or paternity, but has not achieved presumed parent status. (*In re H.R.*, *supra*, at p. 1283; *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.) A biological parent may be offered reunification services only if the juvenile court determines that such services will benefit the child. (§ 361.5, subd. (a); *In re Kobe A.*, *supra*, at p. 1120.) A presumed parent ranks highest of all three categories and enjoys a full panoply of rights, including entitlement to appointed counsel, reunification services, and custody absent a finding of detriment. (*In re H.R.*, *supra*, at p. 1283; *In re D.P.*, *supra*, at p. 695.) Presumed parent status is based on the familial relationship between the parent and child, rather than any biological connection. (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1018.)

The UPA sets forth several rebuttable presumptions under which a person may qualify as a presumed parent. (Fam. Code, § 7611.) In *Kelsey S.*, the California Supreme Court concluded that, under narrow circumstances, a biological father may be

entitled to assert constitutional paternity rights even though he does not qualify for any of the statutory presumptions for parentage. (*Kelsey S., supra* 1 Cal.4th at pp. 849-850.) *Kelsey S.* specifically held that "[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." (*Id.* at p. 849.) While *Kelsey S.* was decided in the context of adoption, its application has been extended to dependency proceedings. (*In re D.S.* (2014) 230 Cal.App.4th 1238, 1244; *In re Jerry P.* (2002) 95 Cal.App.4th 793, 797.) "In the dependency context, this means that a biological father is entitled to presumed father status if he satisfies the requirements of *Kelsey S.*" (*In re D.S.*, *supra*, at p. 1244.)

In determining whether a biological father has met the requirements of *Kelsey S.*, the court must consider all relevant factors, including "[t]he father's conduct both before and after the child's birth" and whether he "promptly attempt[ed] to assume his parental responsibilities as fully as the mother [would] allow and his circumstances permit[ted]." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) "[T]he father must demonstrate 'a willingness himself to assume full custody of the child—not merely to block adoption by others.'" (*Ibid.*) "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." (*Ibid.*) The court "must consider whether [the father] has done all that he could reasonably do under the circumstances." (*Id.* at p. 850.)

"'The burden is on a biological father who asserts *Kelsey S.* rights to establish the factual predicate for those rights.' [Citation.]" (*In re D.S.*, *supra*, 230 Cal.App.4th at p. 1244.) "[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. [Citation.] 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; accord, *In re Luis H.* (2017) 14 Cal.App.5th 1223, 1227.)[3]

In a dependency case, "up until the time the section 366.26 hearing is set, the parent's interest in reunification is given precedence over the child's need for stability and permanency." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) However, "[o]nce reunification services are ordered terminated,

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[3] Because the juvenile court's factual determinations are generally reviewed for substantial evidence, it has been posited that a challenge to a finding that a biological parent did not qualify for presumed parent status is similarly reviewed for substantial evidence. (See, e.g., *In re D.A.*, *supra*, 204 Cal.App.4th at p. 824; *In re J.H.* (2011) 198 Cal.App.4th 635, 646.) The parent's failure to carry his or her burden of proof on this point, however, is properly reviewed, as in all failure-of-proof cases, for whether the evidence compels a finding in favor of the appellant as a matter of law. (See *In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1163 ["[a]s the issue on appeal turns on [appellants'] failure of proof at trial, 'the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant[s] as a matter of law'"]; *In re I.W.*, *supra*, 180 Cal.App.4th at pp. 1527-1528 [same].)

the focus shifts to the needs of the child for permanency and stability." (*Id.* at p. 309.) Accordingly, if a biological father fails to achieve presumed father status prior to the termination of any reunification period, he is not entitled to reunification services or to custody of the child. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 454.) In such a case, the father's sole remedy is to "move under section 388 for a hearing to reconsider the juvenile court's earlier rulings based on new evidence or changed circumstances." (*Ibid.*, fn. omitted.)

Section 388 is a general provision permitting the juvenile court, "upon grounds of change of circumstance or new evidence . . . to change, modify, or set aside any order of court previously made. . . ." (§ 388, subd. (a).) The statute allows the modification of a prior order only when the moving party establishes that (1) changed circumstances or new evidence exists; and (2) the proposed modification would promote the best interests of the child. (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1193; *In re Y.M.* (2012) 207 Cal.App.4th 892, 919-920.) We generally review the ruling on a section 388 petition for an abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

B. The Juvenile Court Did Not Err in Denying Stanley's Section 388 Petition for Presumed Father Status Under *Kelsey S.*

In his section 388 petition, Stanley asked the juvenile court to find that he was entitled to presumed father status under *Kelsey S.* The juvenile court denied the petition on the ground that Stanley had failed to prove that he acted promptly to assert his parental rights upon learning Mother was pregnant with Z.H. Because the issue on appeal turns on Stanley's failure of proof, the question before us is whether the evidence compels a finding

in Stanley's favor as a matter of law. We conclude the evidence does not compel such a finding, and therefore, the trial court did not abuse its discretion in denying the section 388 petition.

The record reflects that, prior to Mother's pregnancy with Z.H., Stanley and Mother had been in an on-again-off-again sexual relationship for several years. As of early 2015, Stanley had a close relationship with Mother, was spending a lot of time with her, and had no reason to believe that she was engaging in sexual relations with anyone else. Accordingly, when Mother told Stanley that she was pregnant in 2015, he believed her. He also accompanied Mother to a health clinic where the pregnancy was confirmed. About a month or so later, without any explanation, Mother told Stanley he was not the father, and they ended their relationship. Mother did not identify anyone else as the father at that time, but the maternal grandmother told Stanley the father was Kenneth. While Stanley continued to see Mother around the neighborhood on a regular basis, they did not speak again about the pregnancy or his paternity. Stanley never took Mother to any prenatal medical appointments or provided her with any support.

The record further reflects that Stanley was at the hospital on the day Z.H. was born and was told by Mother's family that she had given birth. At the time of Z.H.'s birth in December 2015, Stanley still felt he was the baby's father despite Mother's denial, but he did not make any effort to see Z.H., nor did he take any steps to try to establish his paternity. The first time Stanley came forward to inquire about his paternity was on July 11, 2016, when he appeared at the continued section 366.26 hearing in response a request from the court to submit to a DNA test. Once Stanley's paternity was confirmed on August 9, 2016, he waited another two months before he requested visitation with Z.H. and

another five months before he sought to qualify for presumed father status. At the time Stanley filed his section 388 petition for presumed father status on March 10, 2017, Z.H. was 15 months old and had been in the home of his prospective adoptive parents, Mr. and Mrs. Y., since he was a newborn baby.

In arguing that Stanley was entitled to presumed father status under *Kelsey S.*, appellants assert that his efforts to assume his parental responsibilities earlier were thwarted by Mother, who repeatedly lied about Z.H's parentage until late in the dependency proceedings. There may be circumstances where a mother's conduct in concealing her pregnancy or the paternity of the child excuses the biological father's delay in asserting his parental rights, provided that he comes forward and shows a full commitment to fatherhood as soon as he knows or has reason to know that the mother is pregnant with his child. In this case, however, the evidence did not compel a finding that Stanley acted promptly and diligently to assume his parental responsibilities upon learning of Mother's pregnancy. Stanley admitted that, for the first few months of the pregnancy, Mother told him the truth about his paternity. Nevertheless, during that time, Stanley did not provide her with any financial or other support. Stanley further admitted that, even after Mother claimed he was not the father, he still "felt [he] was." When asked about the basis for this belief, Stanley testified, "[B]ecause as far as I see, I was the only one having relations with her." Stanley also explained that, around the time of Z.H.'s conception, he and Mother "saw each other all the time," and he never saw her spending time with other men. Yet despite having a logical basis for his belief that he was the father, Stanley made no effort to support Mother

during the pregnancy or to establish a parental relationship with Z.H. upon learning of the child's birth.

As the California Supreme Court reiterated in *Adoption of Michael H.* (1995) 10 Cal.4th 1043, a biological father ordinarily cannot meet the requirements of *Kelsey S.* "unless he 'promptly' demonstrated a 'full commitment' to parenthood . . . within a short time after he discovered or reasonably should have discovered that the biological mother was pregnant with his child," and "he cannot compensate for his failure to do so by attempting to assume his parental responsibilities many months after learning of the pregnancy." (*Id.* at p. 1054.) Here, Stanley either knew or had reason to know that Mother was pregnant with his child early in the pregnancy, and he continued to suspect he was the father even after Mother and her family falsely told him that he was not. Despite holding this belief, Stanley failed to take any action to confirm his paternity until more than seven months after Z.H.'s birth, when he appeared at the section 366.26 hearing, and for the first time, sought a paternity test. Given this evidence, Stanley has not shown that, as a matter of law, he was entitled to presumed father status under *Kelsey S.*[4]

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[4] While Appellants cite to a number of cases where the biological father was found to qualify for presumed father status under *Kelsey S.*, none of them compel such a finding in this case. In each of the cited cases, the biological father came forward to assume his parental responsibilities as soon as he knew or had reason to know he was the child's father. (See *In re D.A.*, *supra*, 204 Cal.App.4th at pp. 814-815 [when mother told biological father he might be the father, he expressed his desire to have a paternity test done as soon as the baby was born, he took mother to prenatal medical appointments, and he offered to help her with any associated expenses]; *In re J.L. supra*, 159 Cal.App.4th at pp. 1016-1017 [as soon as mother informed biological father of his

Appellants nevertheless contend the juvenile court erred in denying Stanley's request for presumed father status because the court made certain misstatements of fact in issuing its ruling on the section 388 petition. In particular, they point to the court's statement that Mother first named Kenneth as Z.H.'s biological father, and that "when those results proved negative[,] then she named somebody by the name of Allen." As appellants note, this statement was factually incorrect because Kenneth never took a paternity test, and Mother never identified an individual by the name of "Allen" as Z.H.'s father. Instead, Allen was named as an alleged father of one of Mother's two older children during their concurrent dependency case. However, when considered as a whole, the court's ruling reflects that it was not based on Mother's conduct in making false allegations about her other children's parentage. Rather, the ruling was based on Stanley's conduct in failing to come forward in a timely manner once he had reason to know Mother was pregnant with his child.

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paternity, he returned to California, began visiting the child, and sought full custody of the child in juvenile court]; *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1111-1112 [upon learning of the child's existence, biological father immediately contacted the DCFS, requested reunification services, and asked the court to order a paternity test]; *In re Julia U.* (1998) 64 Cal.App.4th 532, 541-542 [based on mother's representations and involvement with multiple men, biological father reasonably believed he was not the child's father, but he promptly agreed to submit to a paternity test upon being identified by mother as one of three alleged fathers].) Here, Stanley had reason to know he was Z.H.'s biological father during Mother's pregnancy, but he did not come forward to establish his paternity or seek a relationship with Z.H. until many months after the child's birth.

Appellants also challenge the juvenile court's statement that Stanley could have filed a paternity action in family court shortly after Z.H.'s birth to determine if he was the child's father. They note that, upon the filing of a dependency petition, the juvenile court has exclusive jurisdiction to decide issues of parentage, and thus, Stanley could not have obtained relief in family court. It is true that, once the section 300 petition was filed on Z.H.'s behalf in December 2015, the juvenile court had sole jurisdiction over any issues involving the child's parentage. (§ 316.2, subd. (e); *In re Alexander P.* (2015) 4 Cal.App.5th 475, 487.) Hence, even if Stanley had filed a paternity action in early 2016, he could not have been granted presumed father status by the family court. However, if Stanley had diligently pursued his legal rights upon learning of Z.H.'s birth, he would have been alerted to the pending dependency case, and he would have been able to establish that he was the child's biological father much earlier in these proceedings. Stanley did not do so, and only came forward to assert his parental rights when he was given notice of the permanency planning hearing and was asked to submit to a paternity test. The juvenile court properly considered Stanley's delayed efforts to establish his paternity in finding that he did not satisfy his burden under *Kelsey S.*

In asserting that Stanley met the requirements of *Kelsey S.* despite his initial lack of any involvement in the child's life, appellants focus on Stanley's conduct after he requested and was granted visitation by the juvenile court. They reason that, once Stanley began visiting Z.H., he did everything he could to establish a relationship with the child within the confines of monitored visitation. The undisputed evidence does show that, starting in early November 2016, Stanley visited Z.H. on a

regular basis, the child reacted positively to him, and they seemed to enjoy each other's company during the visits. It is also true that the monitored visitation schedule was a limiting factor in Stanley's ability to occupy a parental role in the child's life. While Stanley's efforts to bond with Z.H. during their visits are commendable, they do not establish that, both before and after the child's birth, Stanley was committed to assuming his parental responsibilities as promptly and as fully as his circumstances permitted. As our Supreme Court has observed, "[w]hile under normal circumstances a father may wait months or years before inquiring into the existence of any children that may have resulted from his sexual encounters with a woman, a child in the dependency system requires a more time-critical response. Once a child is placed in that system, the father's failure to ascertain the child's existence and develop a parental relationship with that child must necessarily occur at the risk of ultimately losing any 'opportunity to develop that biological connection into a full and enduring relationship.' [Citation.]" (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 452.) Because the evidence does not compel a finding that, as a matter of law, Stanley satisfied the *Kelsey S.* requirements for presumed father status, the juvenile court did not err in denying his section 388 petition.

C. The Juvenile Court Did Not Err in Terminating Stanley's Parental Rights

Z.H. also contends the juvenile court erred by terminating parental rights without first finding that Stanley was an unfit parent. This claim lacks merit. Because Stanley did not qualify for presumed father status under *Kelsey S.*, his paternity status was that of a biological father. "'[A] biological father's 'desire to establish a personal relationship with a child, without more, is not a fundamental liberty interest protected by the due process

clause." [Citation.]' [Citation.]" (*In re Jason J.* (2009) 175 Cal.App.4th 922, 933.) Accordingly, a biological father's parental rights may be terminated based solely upon the best interest of the child and without a finding of parental unfitness or detriment. (*Id.* at pp. 933-934 [where father's "only status was that of a biological father," the court "did not err by terminating [his] parental rights without making an express finding of unfitness"]; *In re A.S.* (2009) 180 Cal.App.4th 351, 362 [where biological father did not establish presumed father status, the court "was not required to make a particularized finding of unfitness or detriment before terminating his parental rights and instead was entitled to focus on [the child's] best interests"].) Because Stanley never elevated his paternity status above that of a biological father, the juvenile court was not required to make a finding of unfitness before terminating his parental rights, and instead properly based its decision on the best interest of Z.H.

II. Compliance with ICWA

Z.H. and Stanley also join in arguing that the juvenile court's order terminating parental rights must be reversed because both the court and the DCFS failed to comply with the requirements of ICWA. In particular, they assert that the court failed to make a finding as to whether ICWA applied, and that the ICWA notices sent by the DCFS were inadequate.

A. Relevant Background

When Stanley made his first appearance in the case on July 11, 2017, his counsel indicated that Stanley was not aware of any Indian ancestry, but would present more information at the next hearing. On October 13, 2016, Stanley's counsel informed the court that Stanley believed he might have Indian

ancestry based on information provided by his family. According to Stanley's family, his grandfather was Thomas Alexander, a member of the Chickasaw tribe. During the hearing, Stanley completed a Parental Notification of Indian Status form in which he stated that he may have Indian ancestry and may be a member of the Chickasaw tribe. The court ordered the DCFS to conduct an ICWA inquiry and notify any relevant tribes.

In a Last Minute Information for the Court filed on January 12, 2017, the DCFS stated that, during its investigation, the Chickasaw Freedmen was the only tribe identified with respect to Z.H.'s possible Indian ancestry. The DCSF also stated that it had completed ICWA notices for that tribe and had sent them by certified mail. The DCFS attached a copy of the notice, which included the following information: (1) the name, date of birth, and place of birth of Z.H.; (2) the name, address, date of birth, and place of birth of Mother, Stanley, Stanley's mother, and Stanley's father; (3) the name, date of birth, and date and place of death of Stanley's grandmother; (4) the name of Stanley's grandfather; and (5) the names of Stanley's great-great grandfather and Stanley's great-great-great grandparents, each of whom was identified as deceased and as a member of the Chickasaw Freedmen tribe. The notice indicated that it was mailed to Stanley, Mother, the Bureau of Indian Affairs, the Secretary of the Interior, and the Chickasaw Nation of Oklahoma, but it did not include a signed declaration or proof of service. The DCFS's report did attach a copy of one certified mail receipt, which reflected a delivery was received by the Chickasaw Nation of Oklahoma on December 9, 2016.

At the January 12, 2017 permanency planning hearing, counsel for the DCFS informed the court that ICWA notices for the "only viable tribe" that had been identified were mailed on December 2, 2017, and requested that the matter be continued while the agency awaited a response from the tribe. The court continued the matter to February 6, 2017. In a Last Minute Information for the Court filed on that date, the DCFS reported it still had not received any response to the ICWA notice. Additional continuances were granted on February 6 and 23, 2017, to allow the DCFS more time to address the status of ICWA.

On March 15, 2017, the DCFS sent a second set of ICWA notices regarding Z.H.'s possible Indian ancestry in the Chickasaw tribe. The second notice contained less information than the first. It listed: (1) the name, date of birth, and place of birth of Z.H.; (2) the name, address, date of birth, and place of birth of Mother and Stanley; and (3) the name and date of birth of Stanley's mother. It did not include any information about Stanley's grandparents, great grandparents, or other older generations. The second notice did include a signed declaration and proof of service, which indicated that the notice was mailed to Stanley, Mother, the Bureau of Indian Affairs, and the Secretary of the Interior on March 15, 2017.

On April 6, 2017, the DCFS filed with the juvenile court a copy of a third set of ICWA notices. The third notice contained the same identification information about Z.H.'s maternal and paternal relatives as the first notice, including the names of Stanley's great-great grandfather and his great-great-great grandparents, and their possible membership in the Chickasaw Freedmen tribe. It also included a signed declaration. The third

notice indicated that it was sent to Stanley, Mother, the Bureau of Indian Affairs, the Secretary of the Interior, and the Chickasaw Nation of Oklahoma, but like the first notice, it did not include a signed proof of service.

In an interim review report filed on May 10, 2017, the DCFS stated that it had not received any response to its ICWA notices. The agency attached copies of two certified mail receipts, which reflected that a delivery was received by the Bureau of Indian Affairs on April 14, 2017, and by the Chickasaw Nation of Oklahoma on April 17, 2017. No other relevant information about the DCFS's ICWA investigation was included in the record. Prior to terminating parental rights over Z.H. on May 24, 2017, the juvenile court never made any finding as to whether ICWA applied to the child's case.

B. Governing Law

ICWA provides that "[i]n any involuntary proceeding in a [s]tate court, where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe" of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a).) Similarly, California law requires notice to the Indian custodian and the Indian child's tribe in accordance with section 224.2, subdivision (a)(5), if the DCFS or the court knows or has reason to know that an Indian child is involved in the proceedings. (§ 224.3, subd. (d).) The circumstances that may provide reason to know the child is an Indian child include, without limitation, when a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's

parents, grandparents or great-grandparents are or were a member of a tribe. (§ 224.3, subd. (b)(1); see *In re Isaiah W.*, (2016) 1 Cal.5th 1, 15 ["section 224.3, subdivision (b) sets forth a nonexhaustive list of 'circumstances that may provide reason to know the child is an Indian child'"]; *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1386-1387 [because only the tribe may make the determination whether the child is a member or eligible for membership, there is no general blood quantum requirement or "remoteness" exception to ICWA notice requirements].)

As the California Supreme Court has explained, "a juvenile court has an affirmative and continuing duty in all dependency proceedings to inquire into a child's Indian status. (§ 224.3(a).) If a court determines it has reason to know a child is an Indian child, the court must notify the [Bureau of Indian Affairs (BIA)] and any relevant tribe so that the tribe may determine the child's status and decide whether to intervene. (§ 224.2.) If adequate and proper notice has been given, and if neither the BIA nor any tribe provides a determinative response within 60 days, then the court may determine that ICWA does not apply to the proceedings. (§ 224.3(e)(3).) At that point, the court is relieved of its duties of inquiry and notice (§ 224.2, subd. (b)), unless the BIA or a tribe subsequently confirms that the child is an Indian child (§ 224.3(e)(3))." (*In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 14-15.) "Only after proper and adequate notice has been given and neither a tribe nor the BIA has provided a determinative response within 60 days does section 224.3(e)(3) authorize the court to determine that ICWA does not apply." (*Id.* at p. 11.)

C. The Juvenile Court Failed to Comply with the Requirements of ICWA

Appellants argue the juvenile court erred in terminating parental rights over Z.H. without ever making a finding as to whether ICWA applied to the child's case. We agree. The record reflects that, after Stanley reported that he might have Indian ancestry in the Chickasaw tribe, the DCFS sent three sets of ICWA notices to the tribe and the BIA. The last ICWA notice was received by the BIA on April 14, 2017, and by the tribe on April 17, 2017. The juvenile court terminated parental rights over Z.H. on May 24, 2017. Prior to terminating parental rights, the court never made a finding as to the adequacy of the notices that were sent or the applicability of ICWA to the child's case.

To comply with the requirements of ICWA, "[t]he juvenile court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings." (*In re E.W.* (2009) 170 Cal.App.4th 396, 403; see *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705 ["it is up to the juvenile court to review the information concerning the notice given, the timing of the notice, and the response of the tribe, so that it may make a determination as to the applicability of the ICWA"].) While the finding "may be either express or implied," the record "must reflect that the court considered the issue and decided whether ICWA applies." (*In re Asia L.* (2003) 107 Cal.App.4th 498, 506; *In re E.W.*, *supra*, at p. 405 ["an implicit ruling" on the applicability of ICWA "suffices, at least as long as the reviewing court can be confident that the juvenile court considered the issue"].) The failure to make any determination as to the applicability of ICWA constitutes error. (*In re Jennifer A.*, *supra*, at p. 705 ["the court must decide, one way or the other, whether

the ICWA applies, so it can proceed in compliance therewith when appropriate"].)

In this case, there is no indication in the record that the juvenile court ever made either an express or implied finding as to the applicability of ICWA. On several occasions, the court continued the section 366.26 hearing so that the DCFS could conduct an appropriate inquiry, send notice to the relevant tribe, and report on the status of its compliance with ICWA. The last update provided by the DCFS was in its May 8, 2017 interim review report, in which the agency attached copies of certified mail receipts from the BIA and the Chickasaw tribe regarding the third ICWA notice, and indicated that it had not received any response to that notice to date. Less than 60 days after the BIA and the tribe received the third ICWA notice, the juvenile court terminated parental rights over Z.H. Neither the court nor the parties ever addressed compliance with ICWA at the May 24, 2017 hearing terminating parental rights, and the minute order from the hearing does not make any mention of the issue.

Because the record does not demonstrate that the juvenile court considered whether proper and adequate notice was given under ICWA and whether ICWA applied to the proceedings for Z.H., the matter must be remanded for the court to make the requisite determination.[5] On remand, the court shall review the

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[5] Z.H. contends the ICWA notice was inadequate because it failed to identify Stanley's membership in the Chickasaw tribe, and instead listed his tribal membership as "Unknown." It is unclear from the record whether Stanley was claiming that he might be a member of the Chickasaw tribe, or was asserting that he might have Indian ancestry based on the membership of his older generation relatives, who were identified in the notice as Chickasaw Freedmen members. This factual issue should be

form and content of the ICWA notice, any proof of service and receipt of notice by the BIA and the tribe, and any response from the BIA or the tribe. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether Z.H. is an Indian child. If the court finds that Z.H. is an Indian child, it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related California law. If not, the court's original section 366.26 order remains in effect. (*In re Elizabeth* (2018) 19 Cal.App.5th 768, 788; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 655.)

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addressed by the trial court on remand in deciding whether adequate notice was given.

DISPOSITION

The juvenile court's order denying Stanley's section 388 petition is affirmed. The order terminating parental rights under section 366.26 is conditionally affirmed, and the matter is remanded to the juvenile court for full compliance with the inquiry and notice provisions of ICWA and related California law and for further proceedings not inconsistent with this opinion.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.