Filed 7/26/16 In re N.A. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 N.A., a Person Coming Under the Juvenile Court Law.	B267332
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.A., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK09146)

APPEAL from an order of the Superior Court of Los Angeles County. Terry Truong, Juvenile Court Referee. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance by Plaintiff and Respondent.

Marissa Coffey, under appointment by the Court of Appeal, for Minor.

* * * * * * * *

Appellant J.A. appeals from the disposition order of June 8, 2015 in which the court made findings regarding paternity. The juvenile court found appellant, who is the biological father of N.A., to be a father under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*), but not a presumed father. The court found N.A.'s stepfather, Jaime M. (stepfather), with whom N.A. has lived for over nine years, to be the minor's presumed father.

Appellant contends the court's finding that he qualified as a *Kelsey S.* father automatically conferred upon him presumed father status, and all of the corresponding rights of a presumed father, and that the juvenile court therefore made an error of law that must be reversed.

N.A. filed a responsive brief arguing that we have authority under Code of Civil Procedure section 906 to review the juvenile court's *Kelsey S.* finding and that the record fails to show substantial evidence in support of that determination. N.A. argues appellant therefore cannot show any prejudice from the juvenile court's alleged error and that its disposition order should be affirmed. In reply, appellant contends we cannot review the *Kelsey S.* finding because N.A. did not file a cross-appeal.

We conclude we have jurisdiction to review the juvenile court's *Kelsey S.* finding and agree the record lacks substantial evidence demonstrating that appellant qualifies as a *Kelsey S.* father. As the record discloses no other basis upon which appellant can be granted presumed father status, appellant has not affirmatively shown any prejudice from the court's disposition order. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and appellant met in California in 2003. Mother became pregnant in 2004 and she moved with appellant to Texas where they lived with his family. Mother and appellant never married, but appellant was "supportive" of mother during her pregnancy. N.A. was born in Texas in April 2005. Appellant was present at N.A.'s birth and signed the birth certificate. Mother, appellant and N.A. continued to live together in Texas until N.A. was about five months old. At that time, mother believed appellant was being unfaithful to her, so she returned to California with N.A. and moved in with her mother.

After mother and N.A. moved back to California, appellant had no further contact with N.A.

Shortly after returning to California, mother met stepfather. They began dating and then mother and N.A. moved in with stepfather. Stepfather treated N.A. like his own son. Mother and stepfather married in 2008. They had four children together. The birth of the fourth child, L.M., in November 2014 precipitated the current dependency case.

N.A. and his four half siblings came to the attention of the Los Angeles County Department of Children and Family Services (Department) based on a hospital referral that mother, after giving birth to L.M., tested positive for methamphetamines. The Department's investigation indicated mother had a long history of substance abuse, including the use of methamphetamines. Mother admitted using drugs during her pregnancy with L.M. because she was stressed out, but said she regretted it.

On January 20, 2015, the Department filed a petition pursuant to Welfare and Institutions Code section 300, subdivision (b), alleging that mother's unresolved history of substance abuse compromised her ability to care for all five children and placed them at substantial risk of harm, and that stepfather's knowledge of mother's substance abuse problems and failure to protect the children also placed the children at risk.

All five children were detained, and ordered removed from mother's custody. The children were released to stepfather on the condition that mother not reside in the family home. The court ordered that appellant would be afforded visitation once he was located and had contacted the Department. The detention and addendum reports indicate that, at that time, appellant's whereabouts were still unknown and efforts to contact him had been unsuccessful. Mother was reported as saying she only knew appellant still resided in Texas, and denied knowing any other contact information for him. She reported father paid her $50 per month in child support.

The court ordered an evaluation by a Multidisciplinary Assessment Team (MAT) as to all the children, and a report prepared in time for the adjudication hearing.

The February 26, 2015 jurisdiction and disposition report indicates the Department located appellant in Texas in early February. During a telephone interview, appellant

reported he had not seen N.A. since he was a baby when mother left with him for California. He said he has sent mother $265 per month in child support since she left. Appellant admitted he had no relationship with N.A. but said that was because mother always changed her telephone number and would not keep in contact with him or update him, so he never knew how to get in contact with her to see N.A.

Appellant told the social worker that since he has never had any relationship with N.A., he did not want to take him away from stepfather, who was the only person N.A. had known as a father figure. Appellant said if N.A. was being abused or if mother was unable to reunify with him, then he would be willing to care for N.A. and have custody of him. Appellant reiterated that he did not think it would be good to take N.A. from the only family he has ever known. Appellant gave permission for his wife to speak with the social worker and she requested that the Department explore "other relatives in placing [N.A.] before looking" to appellant.

N.A. told the social worker he did not know appellant, and only knew that he was called "Junior." He said he did not want to have any contact with appellant and was scared the Department would force him to live in Texas. N.A. agreed he would be willing to talk to appellant on the telephone.

In discussions with the social worker, mother denied she was an addict, but admitted she had used methamphetamines since the age of 15. Mother said she wanted help and would participate in programs. N.A. acknowledged he knew his mother used drugs, that she would sometimes go to the bathroom, and would come out later "acting weird." He said his mother and stepfather did not drink alcohol, except maybe on holidays. The social worker noted a concern that stepfather did not grasp or was in denial as to the seriousness of mother's substance abuse.

The Department recommended that N.A. not be placed with appellant despite the fact he was nonoffending because of the lack of any father-child relationship and appellant's expressed desire not to remove N.A. from the only family he has known. The Department recommended N.A. remain released to stepfather, with family maintenance services, and that mother receive reunification services and monitored visitation. It was

also recommended that appellant receive reunification services and regular telephonic communication with N.A.

The jurisdiction and disposition report was mailed to appellant. In an addendum dated March 18, 2015, the Department reported that appellant had changed his mind and now wanted to have custody of N.A. Appellant told the social worker that after receiving the jurisdiction and disposition report and after speaking with the MAT assessor, he became concerned about the number of reported school absences for N.A., and the fact that he appeared to be having trouble in school with bullying. Appellant said that mother may have too many children to take care of properly, and that he could provide more support for N.A. in Texas. Appellant said he felt N.A. was "closed off" during their telephone conversations, which were usually brief because N.A. did not seem to want to talk, so appellant was having difficulty building a relationship with him over the phone. Appellant said he could not afford to come to California, but that he, his wife and daughter live in a four-bedroom home in Texas with plenty of room for N.A. He said his wife was now supportive of N.A. coming to live with them.

The addendum report also documented that the social worker asked N.A. how the phone calls with appellant were going and that N.A. had said "kinda good." But N.A. said appellant just asks him the same questions. The calls were brief. N.A. repeated his concern about not being forced to go to Texas. He also said he was not interested in having appellant come to California to visit. N.A. said he was scared and did not want to meet with appellant because he did not know him. N.A. said he would not feel comfortable, because stepfather is his "papi" and has been taking care of him since he was small.

The MAT report indicated that stepfather is invested in N.A.'s well-being, has been in his life since he was a baby, and is able to meet N.A.'s needs. The report also indicated that mother had recalled one other contact between appellant and N.A. when N.A. was two years old. No other details about that contact were provided.

In a May 4, 2015 supplemental report, the Department recommended that N.A. "remain in placement and not be released to [appellant] in Texas and for the court [to]

order [N.A.] to receive Family Reunification services with mother. . . . [N.A.] has been raised by his mother all of his life and knows his mother and step father [J.M.] as his family. Mother has been compliant with [the] Department and she has been compliant with all of her court ordered programs. Mother has been randomly drug testing clean and she continues to participate in her substance abuse program. [N.A.] has expressed he wants to reunify with mother and he is willing to gradually start visits with [appellant] during his summer vacations."

On May 4, 2015, the court set a hearing to resolve "parentage" for June 8, 2015 and continued the disposition hearing to be heard the same day. Both stepfather and appellant filed motions regarding paternity and requested presumed father status. Stepfather requested presumed father status under Family Code section 7611, subdivision (d). Stepfather argued that his long-term relationship and bond with N.A. was stronger and deserving of greater consideration under section 7612 than appellant's relationship which was only biological. Appellant's motion asserted presumed father status under *Kelsey S.*, noting that he signed the birth certificate, lived with N.A. for the first few months of his life, paid monthly child support, and did not have a relationship with N.A. because of the difficulty of keeping in touch with mother because she changed her telephone number frequently.

At the June 8, 2015 disposition hearing, appellant was not present, and could not be reached by his counsel on the telephone. The court noted that appellant's declaration attached to his paternity motion was not executed, but acknowledged that most of the same information was already documented in the Department's reports. The court heard argument from counsel regarding both paternity motions. Counsel for N.A. argued that stepfather should be granted presumed father status, that he is the only person N.A. identifies with as his father, and that appellant failed to make the requisite efforts to establish his parental rights and therefore should not be granted presumed father status.

The court found that appellant did appear to be a *Kelsey S.* father, but did not "rise to the level of" a presumed father. Instead, the court found stepfather to be N.A.'s presumed father. The court also concluded mother had complied with her case plan and

could return to the family home. Family maintenance services were continued for mother and stepfather, with all five children released to both parents. Appellant was granted unmonitored visitation with N.A. in Los Angeles County.

This appeal followed.

DISCUSSION

1. *Kelsey S.* and Presumed Fathers

The Uniform Parentage Act (UPA; Fam. Code, § 7600 et seq.) " 'provides a comprehensive scheme for judicial determination of paternity.' [Citation.]" (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1050.) " 'The UPA distinguishes between "alleged," "biological," and "presumed" fathers.' [Citation.] 'Presumed father status ranks highest.' [Citation.] '[O]nly a presumed . . . father is a "parent" entitled to receive reunification services under [Welfare and Institutions Code] section 361.5.' [Citation.]" (*In re D.A.* (2012) 204 Cal.App.4th 811, 824.)

Section 7611 of the Family Code enumerates several rebuttable presumptions by which a man may qualify as a presumed father, including by receiving "the child into his . . . home and openly hold[ing] out the child as his . . . natural child." (§ 7611, subd. (d).)

In *Kelsey S.*, an adoption case, the Supreme Court identified a "nonstatutory alternative whereby a biological father could qualify for the same parental rights as those afforded by statute to presumptive fathers." (*Adoption of Michael H.*, *supra*, 10 Cal.4th at p. 1063 (conc. & dis. opn. of Kennard, J.).) The court concluded 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." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) *Kelsey S.* has been extended to apply in dependency proceedings. (See, e.g., *In re Jerry P.* (2002) 95 Cal.App.4th 793, 797.)

Here, stepfather qualified as a statutory presumed father pursuant to Family Code section 7611, subdivision (d). Appellant has not claimed any basis for obtaining presumed father status other than the nonstatutory alternative afforded by *Kelsey S.*

2. Code of Civil Procedure Section 906

N.A. urges us to review the juvenile court's finding at the disposition hearing that appellant was a *Kelsey S.* father. N.A. contends the finding is not supported by substantial evidence, so appellant has suffered no prejudice as a result of the juvenile court's denial of presumed father status.

Appellant argues the *Kelsey S.* finding is final and may not be reviewed because N.A. did not file a cross-appeal and therefore may not urge error.

Section 906 of the Code of Civil Procedure sets forth an exception to the general rule that a respondent may not urge error on appeal. "The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken. The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken." (§ 906.)

" 'The purpose of the statutory exception is to allow a respondent to assert a legal theory which may result in affirmance of the judgment.' [Citation.]" (*Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 728; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 333.) Without filing a separate cross-appeal, a respondent may properly raise an argument that shows the trial court reached the right result, "even if on the wrong theory." (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57.)

In his reply brief, appellant concedes that the *Kelsey S.* finding is a ruling that affected the juvenile court's ultimate determination of presumed father status and therefore the exception in Code of Civil Procedure section 906 "appears to apply." However, appellant maintains that the ruling was adverse to N.A. so he could have

appealed that ruling but chose not to, so section 906 does not apply. Appellant thus declined to address the lack of prejudice argument on the grounds that review of the *Kelsey S.* finding is not properly before this court.

In *Adoption of H.R.*, a prospective adoptive mother raised, as a nonappealing respondent, Code of Civil Procedure section 906 to challenge the validity of a *Kelsey S.* finding by the juvenile court in favor of the biological father. (*Adoption of H.R.* (2012) 205 Cal.App.4th 455, 466-467.) Despite having found the father to be a *Kelsey S.* father, the juvenile court terminated the father's parental rights, concluding that to allow him to block the adoption would not be in the best interests of the child. (*Adoption of H.R.*, at pp. 462-464.) The father appealed the termination of his parental rights, arguing the court applied the incorrect legal standard given his status as a *Kelsey S.* father, which required a showing of unfitness as a parent. (*Adoption of H.R.*, at pp. 458, 467.) The Court of Appeal reviewed the *Kelsey S.* finding pursuant to section 906, reasoning that "[b]ecause [the prospective adoptive mother's] claim that the trial court erred in finding father to be a *Kelsey S.* father, if found to be valid, would result in affirmance notwithstanding father's contention that the trial court erred in determining his unfitness, we now address the issue of whether father was properly found to be a *Kelsey S.* father." (*Adoption of H.R.*, at p. 467.)

Similarly here, N.A. obtained a favorable ruling at the disposition hearing, despite the *Kelsey S.* finding in favor of appellant. The court ordered that N.A.'s stepfather was his presumed father and allowed mother to return to the family home with family maintenance services. N.A. was therefore not aggrieved by the *Kelsey S.* finding.

Moreover, resolution of N.A.'s claim that the *Kelsey S.* finding was in error would be dispositive of appellant's appeal. If, as N.A. contends, the *Kelsey S.* finding fails for lack of substantial evidence, then appellant has no basis to assert presumed father status, he cannot show he has suffered any prejudice, and the court's disposition order is properly affirmed. We therefore conclude we may review, pursuant to Code of Civil Procedure section 906, the merits of the juvenile court's *Kelsey S.* finding.

However, we cannot reverse the *Kelsey S.* finding, as N.A. asks us to do. Code of Civil Procedure section 906 does not allow a respondent to seek affirmative relief, only to argue a legal theory that supports affirmance. (See, e.g., *California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7 [explaining that the statutory exception does not allow a nonappealing respondent to seek affirmative relief in the form of a reversal or modification, only to urge error to show lack of prejudice as a basis for sustaining the judgment].)

3. The *Kelsey S.* Finding

Appellant contends the record supports the juvenile court's determination of his status as a *Kelsey S.* father. We disagree.

" 'When deciding whether a parent meets the requirements under *Kelsey S.*, appellate courts have reviewed the ruling for substantial evidence. [Citations.] The burden is on the biological parent "to establish the factual predicate" for *Kelsey S.* rights. [Citation.] To the extent that the issue is a mixed question of law and fact, we exercise our independent judgment in measuring the facts against the applicable legal standard. [Citation.]' [Citation.]" (*Adoption of H.R., supra,* 205 Cal.App.4th at p. 468; accord, *In re D.S.* (2014) 230 Cal.App.4th 1238, 1244-1245.)

Determining whether an alleged father qualifies as a *Kelsey S.* father is a fact-intensive inquiry and "[a] court should consider all factors relevant to that determination. 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 the child--not merely to block adoption by others.' . . . 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, citation omitted.)

Here, it is undisputed appellant is the biological father of N.A., that he lived with mother during her pregnancy and for the first five months of N.A.'s life, was present at N.A.'s birth in Texas and signed the birth certificate. Appellant has also contributed financially to N.A.'s care. Mother contends the amount is only $50 per month, while appellant claims it is $265 per month. No documentation is included in the record to clarify the actual amount paid.

However, it is also undisputed that after mother returned to California with N.A., appellant had no further contact with N.A. for the next *nine years* of his life. The MAT report indicates there may have been one additional contact when N.A. was two years old, but no details are provided as to the nature of the visit. Appellant had some contact with mother by providing her child support payments, and may have known the address of the maternal grandmother where mother lived prior to their move to Texas. Appellant says mother would change her telephone number frequently. The record does not contain any evidence of efforts by appellant to maintain contact with mother in order to maintain a relationship with N.A.

When first contacted by the Department, appellant declined to assert his parental rights and did not seek custody of N.A. Instead, appellant stated his desire to allow N.A. to stay with stepfather as the only father figure he had known. Appellant did express a willingness to be considered for custody if mother failed to reunify with N.A., or there was evidence that N.A. was being abused. Appellant's wife told the Department she wanted other relatives to be considered for placement first. Appellant only expressed an interest in asserting his rights as a father when he learned that N.A. was apparently experiencing some difficulty in school.

We respect appellant's desire to not disrupt N.A.'s life and relationship with his stepfather, and his payment of child support. But, the record establishes that appellant chose to stand on the sidelines, even after the Department had stepped in to safeguard N.A.'s interests while mother resolved her substance abuse issues, and not assert his parental rights unless there would be no other choice for N.A. His later request for custody of N.A. is not enough to meet the *Kelsey S.* requirement that he "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.) The disposition order finding stepfather to be N.A.'s presumed father is affirmed.

DISPOSITION

The juvenile court's June 8, 2015 disposition order, including that part of the order granting presumed father status to Jaime M., the minor's stepfather, and denying presumed father status to appellant, is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.