IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

In re Adoption of H.R., a child K.R., et al., plaintiffs and respondents v. A.L., defendant and appellant.	No. C068485 Placer County No. SAD0002534

APPELLANT'S OPENING BRIEF

Appeal from Orders Terminating Parental Rights
State of California, County of Placer
Hon. Angus Saint-Evans, Judge

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INTRODUCTION

Appellant father is an unmarried man who is committed to his daughter. He attempted to marry his child's mother, provided for her support, sought a judgment of paternity and custody beginning three months before the child's birth and never wavered from his commitment to parent his child. His efforts were frustrated by the mother's secreting herself and the baby from father, the mother's placement of the child with respondents for adoption at birth despite father's pending custody proceedings, and respondents withholding the child from him.

The trial court found that appellant had promptly come forward and made a full commitment to his parental responsibilities such that he had the rights of a presumed father under the analysis of *Adoption of Kelsey*

S. (1992) 1 Cal.4th 816 (hereinafter "*Kelsey S.*") and that his consent to the adoption was therefore required.

Nonetheless, the trial court terminated appellant's parental rights over his objection, finding that placement of the child with him would be detrimental. The court did not state the legal basis for its decision, but it provided factual findings of detriment because father lived in a home shared with other adults, because father had a history of substance abuse from which he had rehabilitated, because father was in arrears in his child support obligation for two other children, and because father was "controlling" toward women.

None of the facts found by the court, individually or together, is sufficient for termination of parental rights under Family Code sections 7820 et seq., which contain the sole bases for terminating parental rights of a presumed father outside of the dependency context.[1]

Accordingly, because the trial court failed to apply the correct law, reversal is required.

In addition, to the extent that the trial court's findings can be construed to include a finding that placement of the child with father would be detrimental even if parental rights are not terminated, it must also be reversed. Because a guardianship can result in termination of parental rights solely on a showing of the child's best interests, a finding of parental unfitness within the meaning of the dependency scheme must be made prior to creating the guardianship. That is the only way to ensure

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1 All subsequent statutory references are to the Family Code unless otherwise specified.

that father's parental rights are protected.

Accordingly, appellant asks this court to reverse the trial court's findings and orders, and remand this case to the trial court with instructions to place appellant father's child with him.

INTEGRATED STATEMENT OF THE CASE AND STATEMENT OF FACTS

1. The parents' relationship results in pregnancy.

A. Mother and father agree to marry after learning of the pregnancy.

Father and Kari ("mother") met in late February 2009 at work, and they soon became intimate. At that time, father was living in a one bedroom apartment, and Kari was living in her father's home, along with her 15-year-old daughter Jenna. (1 Reporter's Transcript ("RT") 138:10-16. Kari told father she was pregnant in April or May, the same day that she found out. (1RT 6:26-7:14; 137:13-25; 218:11-19.)

At the end of May 2009, father and Kari together rented a two-bedroom apartment in the same complex in which father had been living, in order to have more room for Jenna and the baby. (Exh. 10, 1Aug.Clerk's Transcript ("CT") 35-56.) Kari said she did so because she wanted to "do the right thing." She did not want to raise this child alone. (1RT 139:4-20.

Father said that Kari continued to drink wine and smoke cigarettes during her pregnancy. They had many arguments about it, as father tried to get her to stop because of the risk to the baby's health. (1Aug.RT 9:24-10:8; 43:19-25.) In late June or early July, father told the doctor about Kari's drinking and smoking. (1RT 45:18-47:28.) Kari admitted smoking during her pregnancy but denied drinking. (1RT 173:16-26. 174:16-18.)

Father transported Kari to monthly prenatal appointments and

attended them with her until September 2009. (1RT 27:24-25;(1RT 86:12-27.) He attended two sonograms of the baby. (Exh. 17, 1Aug.CT 77-78.) Kari withdrew her consent for him to communicate with the doctor in September, and thereafter father could not attend appointments or get any information about the baby's prenatal health. (1RT 47:3-12.)

Together they applied for WIC benefits, which Kari used to purchase food. (1Aug.RT 11:3-6; 180:18-21.) In addition, while father was not employed full time, he did side jobs to pay the rent and he received unemployment and food stamps. (1Aug.RT 13:18-14:4; 22:15-23:12; 90:1-6.) Kari's medical care was covered by Medi-Cal. (1RT 27:19-23.) Father paid the rent on the new apartment, food, and utilities, and paid for gas to transport mother to her doctor's appointments and work. (1RT 29:3-13; 89:15-16.) Kari testified that he did not give her any money, but did bring detergent and other supplies home. (1RT 218:20-219:5.)

Father supported Kari in efforts to be trained as a phlebotomist, bringing her dinner at school, and purchasing some supplies for her. (1RT 30:10-31:7.) Kari agreed that he did to this, but said the cost of the supplies was minimal. (1RT 182:2-5.) He also helped her at work, bringing her food and carrying things that were too heavy. (1RT 31:8-17.) He provided emotional support to Kari when she was nauseous, rubbing her stomach and bringing her cold clothes. He also would interact with the fetus, whistling to it and playing with it. (1RT 33:7-24; 186:28-187:10.) When Kari was four months pregnant, they selected the name Journey Joy for the baby. (1RT 34:16-22.)

Despite their disagreements, Kari and father agreed to get married, and both of them contributed to a deposit on some rings at Kay Jewelers.

(Exh. 12, 1Aug.CT 57-62.)

Together they purchased or were given items for the baby, including a crib, a basinet, clothing and diapers. (1RT 53:1-19,54:6-55:8; 180:5-16; 2RT 295:23-27.)

Kari and her daughter went to visit father's father on his deathbed, in late August 2009, during which visit father and Kari told the grandfather that they were expecting a child together. Kari and her daughter are listed, along with father, in the grandfather's obituary as his survivors. In addition, Kari helped father prepare a memorial CD for the grandfather's funeral which they signed as "Jenna, Kari and Anthony [L]." (1RT 37:21-39:24, 193:23-194:26, 195:1-12; exh. 27 [memorial dvd] 1Aug.CT 132.) On August 27, 2009, they were photographed together. (Exh. 22, 1Aug.CT 109.) Kari admitted that they were very happy "on the days we were getting along." (1RT 208:21-25.)

B. The relationship is stormy, and Kari terminates it, alleging that father is abusive.

Although the parents had rented an apartment together, they lived together there for only three days, in June 2009. Thereafter, according to father, Kari and Jenna were at the apartment about 50-60% of the time, and he stayed with at her dad's house the rest of the time. (1RT 10-9:5.) He stated that they lived together "off and on" from the third month to the seventh month of the pregnancy, staying at both the apartment and at Kari's father's house. (1RT 20:7-12.) Kari denied this. Instead, she testified that she moved out after three days because he was yelling at her and was physically abusive. (1RT 142:9-142:21.) However, after a few weeks she did begin talking with father again, and spending the night with him.

(1RT 145:10-25.) She estimated that they spent about 40% of the nights that summer together. (1RT 152:4-13.)

Both them testified that their relationship was stormy and marked by frequent argument. She testified that he was controlling and violent, and that that was the reason she decided to break off their relationships. (1RT 152:4-27.)

Two days before the paternal grandfather's funeral at the end of August, Kari went to the jeweler and took all of the ring deposit money. Kari did not tell father about this at that time, but later told him that she had needed the money to fix her car. (1RT 11:11-12:9, 147:13-148:28; 1Aug.CT 62.)

Kari told father she wanted to end their relationship in September 2009, during the seventh month of the pregnancy, while they were at a prenatal appointment. (1Aug.RT 12:9-19.) She testified that she decided to end the relationship because she was tired of the way he was treating her. (1RT 196:22-197:4.) Kari testified that she "did not feel" that father provided emotional support for her. (1RT 220:26-221:2.)

She testified that the difficulty she had with father was her "apprehension about him being a good dad" and "his domination of me and his verbal abuse when we would argue." (1RT 210:20-23.) She did not believe that he could support a child and felt that he lacked responsibility and maturity. (1RT 223:8-15.)

Jenna testified that throughout the relationship, father would call Kari "mean names" that were derogatory. (1RT 254:26-255:13.) She also said that at school she was learning signs of domestic aggression and abuse. She noticed these signs between Kari and father. (1RT 251:8-27.)

Kari testified to three incidents which she claimed involved physical violence between father and herself. (1RT 25:7-17; 1RT 262:22-267:9-20; 1RT 197:28-198:17.)

Kari never filed a police report about any of these incidents, and she did not seek a court restraining court order until two days after he filed his petition to establish his paternity of the unborn child.

C. Father's background.

Father has two older children, who live with their mother in Vancouver, Washington. They were now 12 and 13 years old. (1RT 56:1-28.) He has an arrearage on child support, due to periods of time in which he was in his addiction and in recovery. (1RT 82:7-83:10.) However, he has worked out a payment arrangement with child support collection agency to pay off the arrearage at the rate of $60 per month. (1RT 83: 1-5; 84:19-85:2.) The amount due at the time of trial about $18, 800. (2RT 313:11-16.)

Father speaks to his children almost weekly by telephone and more frequently over the internet. (1RT 56:19-24; 81:24-82:3.) The children and their mother all wrote letters to the court expressing the strength of the children's relationship with their father, and his appropriate parenting style. (1CT 187-188.)

Father had a criminal conviction history, of which the court took judicial notice pursuant to a request by respondent and father's counsel. (Exhibits 31-36, inclusive, 1&2 Aug.CT 140-312..)

Father's history included convictions in 1994 for receiving stolen property, and in 2000 and 2005 for violations of restraining orders and for substance abuse-related offenses. Father testified that during the period

1994-2005 he was addicted to methamphetamine and committed crimes to support his habit. (1RT 16:5-23; 18:28-19:3.) Father successfully completed all of the conditions of these convictions except for payment of restitution and fines. (*Ibid.*) At the time of trial, father owed about $15,000 in fines and restitution for prior offenses, which was being paid by garnishment of his paycheck. (2RT 313:1-18.) His last offense was in 2005. He successfully completed a one year substance abuse program at the Salvation Army between August 2005 and March 2006. (*Ibid.;* 1RT 210-26:27; exh. 79, 1Aug.CT 79.) He thereafter completed emergency medical technician training. (*Ibid.*)

Father's godmother, Patti B., who has known father since he was 12 years old, testified that father had worked very hard at his recovery and that she believed his recovery was "very successful" and that his addiction had ended six years ago. (2RT 291:16-23, 303:27-28, 306:19-28.) She denied that he drinks, and said she would know because she speaks with him or sees him every day. (2RT 301:1-4; 307:3-12.) Father had a sponsor, and his recovery was evident in his day to day living. (2RT 296:1-14.) As one example, she explained that he had orchestrated a meal giveaway for Christmas 2009 that benefitted over 300 people at Loaves and Fishes. (2RT 8-297:13.) Photographs of homeless people receiving and enjoying the meals, and of Ms. B.'s family helping to prepare them, were received in evidence. (Exhs. 41-43, 2Aug.CT 347-349.)

When asked her opinion of father's ability to be a stable parent given his substance abuse and criminal history, she stated, "I think he can do it very well. He has made amends for the things that he has done, and he is trying to -still in the process of trying to fix the people that he has

hurt. And he is a changed person. I mean, that's why the term "second chance" is there. I mean, he meets life on life's terms." (2RT 300:22-28.)

Father testified that he remains active in N.A. and does not drink. (1RT 81:7-14.) Kari denied this. (1RT 156:19-157:2.) Kari testified that father and she both drank wine and both quit when they learned of the pregnancy. (1RT 156:8-16; 213:24-27.) His apartment manager testified that, in 2009, when father was with his prior girlfriend, the manager had smelled alcohol on father; however, he never saw him drinking and he knew the police had been called once because of the girlfriend's drinking (1RT 106:9-26.)

2. Father files a petition to establish his paternal relationship three months before his child is born.

On October 26, 2008, father filed a petition to establish a parental relationship in Sacramento County Superior Court. (1CT 3-5.) In support of his petition, father alleged that mother and he were "having issues relative to her pregnancy." He stated that "I have attempted to be as supporting as I can be, yet she has made it clear that she is not ready for my support." (1CT 5.) Father stated that he wanted to be an active paren and create a strong bond with his daughter and wanted to develop a "viable parenting plan" for her. (1CT 5.)

On the same date, father filed an application for an order to show cause requesting paternity testing to assure paternity. While he had no doubt that he was the unborn child, he asked for the testing to assure tha "our daughter's rights are not violated."(1CT 8-10.)

Both of father's petitions were served on mother the same day, October 26. (1CT 27-28.)

Two days later, on October 28, 2009, mother obtained temporary ex parte restraining orders, requiring father not to harass her. The court denied her requests for stay away and noncommunication orders. (1CT 13-17.) In her request for the orders, mother alleged that she and father had a fight, as a result of which she "broke up" with him and he filed a petition regarding paternity. (1CT 21-22.) Father denied any abuse or harassment. (1CT 29-31.)

Mother's response to father's paternity petition admitted that father was the unborn child's father but stated that she was "astonished" that he had filed his petition. She said "I have been making plans to have my child adopted at birth, and I have been completely forthcoming with [father] about" these plans, because of her concern that neither of them could provide proper care for a child. (1CT 45-46.)

The first hearing on these combined petitions was held on November 16, 2009. The court continued the temporary orders and added prohibitions on father contacting mother or being within 100 yards of her home or work. The matters was continued for trial. (1CT 58-59.)[2]

On December 1, 2009, the court ordered paternity tests and again continued the matter. (1CT 60.)[3]

On December 10, 2009, the court heard sworn testimony from mother and father on mother's request for restraining orders. The court

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[2] This court on September 1 granted appellant's request to augment the record on appeal with the reporter's transcript of this hearing. It appears, however, that no reporter was present and no transcript is available.

[3] See footnote 1.

denied mother's requests, stating that the court "is not convinced that respondent's testimony is truthful." The court dismissed the temporary orders issued October 28 and November 16. (1CT 106.)[4]

The child H.R. was born on January 1, 2010. (1CT 83.)

The paternity test was conducted in mid-January 2010 and confirmed that father was the child's biological father. (1CT 108-110.)

3. Baby H.R. is born with "uterine growth retardation." Mother places her for adoption at birth despite the pending paternity proceeding.

Kari testified that she began seriously considering adoption in October. She felt that she could not raise another child alone, and believed that she and father could not raise a child together because they could not even have a civil relationship. (1RT 153:7-10, 11-27.)

She did not tell father when the baby was born, although Kari's attorney had promised that he would be informed. Father learned of the baby's birth by calling every hospital in the area. (1RT 62:12-63:6.)

The baby had "a hard time breathing" and was at the hospital for five days after birth. Kari did not know the reason for the child's problems, and denied that she had any medical problems. (1RT 158:19-159:11; 219:18-220:1.)

Laurel R. later testified that the child was in intensive care following birth due to "uterine growth retardation." The baby weighed five pounds five ounces, was jaundiced and had trouble breathing. (1RT 279:12-14,

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[4] See footnote 1.

281:16-285:7.)[5] Laurel R. also stated that the baby "does have special needs. She is one of those babies where she needs a lot of attention." (1RT 283:4-5.)

Intrauterine growth retardation is defined as a birth weight of less than 10 percentile of predicted fetal weight for gestational age, or less than five pounds eight ounces. (1Aug.CT 97.)

Respondents were at the hospital when the baby was born, and held her immediately after birth. (1RT 279:5-9.)

4. Respondents file an adoption petition and a petition to terminate father's rights.

Six days after the child's birth, on January 6, 2010, mother signed an independent adoption placement agreement with respondents Kenneth and Laurel R. (1CT 64.)

Kenneth R. was employed full time as a security guard, and also was employed as a substitute teacher. (1RT 271:26-272:11.) Laurel R. was a cosmetologist. (1RT 276:1.) Both Kenneth and Laurel testified that they decided to adopt due to infertility problems, and that they "loved [the baby] to death." (1RT 273:14-23, 274:16, 278:17.)

The adoption agency which investigated the independent adoption was California Department of Social Services in Sacramento County (CDSS). A social worker from CDSS stated that the advisements to the relinquishing parent required by Family Code section 8801.5 had been provided to mother on December 23, 2009, prior to the child's birth. (1CT

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[5] Photographs of the child in the intensive care unit are included in Exhibit 38 which was admitted into evidence. (1RT 280:1-16.) However, there is no copy of this exhibit in the record.

64-65.) The adoption placement agreement makes no mention of father o of his pending paternity proceeding.

On December 21, 2009, mother signed a "Declaration" on a CDSS form. This declaration was not attached to the adoption placement agreement. It was prepared and witnessed by respondent's attorney, Nanci Worcester. (1RT178:11-20.) In this declaration, mother states that she believes appellant to be the child's father, acknowledges the existenc of father's paternity proceedings, and states that father objects to any adoption. (1CT 125-128.) This document was not presented to any court until CDSS filed it in Placer County in March 2010 as attachment to its report on its investigation of the independent adoption. (1CT 122-124.)

The child was placed with respondents on January 7. (1CT 61.)

On January 8, 2010, respondents, who reside in Placer County, file a petition with the Placer County Superior Court seeking to adopt the child, whom they named Hailey R. The petition states that father is an alleged father, and that respondents will ask that the court terminate his parental rights. (1CT 61-63.) The adoption placement agreement was attached as an exhibit to this request. (1CT 61-67.)

On the same date, respondents filed a petition to terminate father's parental rights under Family Code sections 7662-7664. The petition alleged that father was the child's biological father but that his consent was not necessary for the adoption of the child. The petition did not mention father's pending action to establish paternity, but generically asked that any other proceedings be stayed. (1Exh. 1-2.).

In November 2009, mother had retained an attorney. (1CT 47.) On January 12, 2010, a new attorney was substituted in to represent her,

Nanci Worcester. (1CT 68.) This is the same attorney who represented respondents on their adoption petition and on their petition to terminate father's rights. (1CT 61; Exh.1, 1Aug.CT 1; 1CT 61.)

On January 12, 2010, mother filed an amended response to father's paternity petition. In this response, she alleged that "parentage of alleged father has not been established." She also asked that father's proceeding be stayed pending a final determination of the adoption petition, and that father's proceedings be transferred to Placer County to be consolidated with the respondent's adoption petition. (1CT 70-72.)

At trial on July 28, 2010, mother testified she never had any doubt that father was the baby's father. She could not explain why this response, which had been prepared by Nanci Worcester, the respondent's attorney, stated that parentage was not established. (1RT 161:21-162:14, 163:3-6.)

The CDSS adoption specialist who was assigned to investigate the adoption and see the child was Linda Salazar. (1RT 64:22-66:5.) She testified on July 28 that she had observed the respondents with the baby after the child was placed with them, and that she had no reservations about their adoption of the child. (1RT 67:19-27.)[6] She had only one conversation with father, in March, two months after the baby was born. That was when she learned he would not consent to an adoption. (1RT

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[6] After Mr. and Mrs. R. separated and Ms. R. determined to adopt as a single parent, Ms. Salazar told the court that she was requesting a psychological evaluation of Ms. R. as part of her investigation. (2CT 394.) The results of that evaluation are not contained in the record., although respondent's counsel referred to them at the last hearing. (2RT 374:26-28; 380:20-22.)

70:5-12; 79:7-10.) She never spoke with him again. At the time of trial in July 2010, Ms. Salazar had not received the baby's medical records and did not know the reason the child stayed in intensive care for five days after birth. (1RT 71:4-7.)

5. Father asks to be found to be the child's *Kelsey S.* father and to place the child with him.

On January 12, 2010, the Sacramento County Superior Court granted mother's request to transfer the paternity proceeding to Placer County. (1CT 73.)[7] The formal minute order was not filed until more than one month later, on February 23. (1CT 74-75.)[8] Placer County acknowledged acceptance of the case on March 1. (1CT 76-80.) Father retained counsel on February 8, 2010. (1CT 176.)

As soon as the Placer County Superior Court notified father that the transfer of the paternity proceeding had been accepted, father filed an amended petition to establish paternal relationship. In this amended petition, he set forth the baby's date of birth and name, asked that he be found to be the child's father, asked for physical and legal custody of the child, and asked that the child's name be changed to Jurney L. (1CT 83-84.

Father also filed an application for an order to show cause (OSC) seeking custody of the child. (1CT 87-95.)

Father asked the adoption petition be denied, and that he be

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7 See footnote 1.

8 Father later advised the court by declaration that the delay was due to mother's attorney not promptly preparing a written order. Father's counsel ultimately prepared and submitted to order. (1CT 92-93.)

determined to be the child's father because he "came forward on day one of the pregnancy, provided housing to [mother], provided for her daily needs, took her to doctor appointments, attempted to marry her, and expressed my joy and anticipation of being a father to Baby J. to anyone who would listen." (1CT 93.) Accordingly, he had constitutionally protected rights to his child under the authority of *Adoption of Kelsey S.* (1992) 1 Cal.4th 816. (1CT 90-95.)

Mother filed a response. She agreed that they had lived together, but only for three days. She agreed they had planned to be married and that she had broken it off. She agreed that father was the child's biological father. She disputed the other assertions made by father, asked that any parental rights he had be terminated and that respondent's adoption petition be approved. Mother also disputed that father had any constitutionally protected paternity rights, noted that the disputed factual assertions required a trial, and asked that the child remain with the respondents pending resolution of all of the issues. (1CT 130-154.)

Father filed a "reply" to mother's declaration, disputing her statement of the facts. He also attached statements of people who knew them as a couple, and statements from his other children and their mother about his positive attributes as a father. (1CT 178-188.) Mother responded with another declaration denying that she had lived with father or planned to raise the child with him, and attaching declarations of other witnesses. (1CT 190-197.)

Mother's attorney withdrew at the same time as mother's responsive documents were filed. (1CT 120.)

CDSS filed a report with the court on its investigation of the

adoption. It stated that the social worker has spoken with father, who refused to consent to the adoption, and to mother, who had consented. CDSS noted the legal obstacle to finalizing the adoption was termination of father's parental rights and stated that it would provide its report on the suitability of the prospective adoptive parents once that issue had been resolved. (1CT 122-124.)[9]

6. Placer County consolidates the adoption proceeding and the paternity proceeding, sets trial dates and grants father visits.

The transfer-in hearing was conducted on May 3, 2010. (1CT 198-202, 234-235.)[10] The Placer County Superior Court accepted the transferred paternity proceeding, and joined it with the adoption proceeding. All parties stipulated that father was the child's biological father. The court ordered father and respondents to participate in mediation to address temporary custody and parenting time for father pending trial. (1CT 198-202, 234-235.)

On May 25, the court received a report that mediation was not successful. Father was insisting on custody and respondents were insisting on adopting the child. (Exh.22, 1Aug.CT 106-107.) The court set a trial in July to address termination of father's parental rights. (1CT 207.)

The court also found that father "is biological and alleged father bu

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CDSS filed periodic reports indicating that it could not complete its investigation until the issues of paternity were resolved on July 2, 2010 (1CT 226), October 1, 2010 (1CT 243), December 10, 2011 (2CT 314), March 9, 2011 (2CT 394), May 10, 2011 (2CT 431), and June 8, 2011 (2CT 434).

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See footnote 1. The written order after hearing was approved by the court on July 28, 2010. (1RT 2:9-20.)

not the presumed father." However, it noted father's assertion that he is a *Kelsey S.* father. The court ordered that father receive visitation with the child, supervised by father's godmother, twice per week for two hours each visit, pending trial. (1CT 207.)[11]

Father said that the first time he saw his daughter, it was "like seeing her at birth." He believed that she recognized him, and he her. (1RT 49:13-23.)

Once visits began, father never missed one. During visits, he feeds and changes the baby, they talk and make vocal sounds together, and interact with the dogs. He sits on the floor with her and helps encourage her to crawl. He takes her outside and pushes her on a swing, and takes her on walks. (1RT 50:14-51:4.)

Father's godmother, Patricia B., was the court-designated supervisor of the visits. She testified that father would get in the back seat of the car with the baby, to help calm her because she did not like the car seat. During the visit, father would play with her and she would laugh and giggle. Father would feed and change her. He would read to her, push her in a swing, and help her walk. (2RT 294:19-295:21; 302:20-28.) The child also would look for father when he was out of sight and cry until he returned. (2RT 294:19-295:21.)

At the time of trial, father was living with his godmother Patty B. He occupied one bedroom in that home, and intended to share it with the baby. Photos of the home and of father's room depicted the space and the provisions father had made for the baby, including a bed, toys and

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[11] See footnote 1.

clothing. (Exh. 28, 1Aug.CT 133-139; 1RT 53:15-54:9.)

Father was employed full time. (1RT 35:6-14.)

Patty B. testified that she owned the four bedroom, three bath home in Citrus Heights. In addition to herself and father, two other adults shared the home. (1RT 290:6-15.) She worked as a hospital unit coordinator at Mercy San Juan Medical Center. (1RT 290:15-19.) She had known father since he was 12 or 13 years old. She allowed him to live in her home, rent free, so that he could pay an attorney in the paternity litigation. In exchange, he did chores and repairs to the home. (2RT 291:1-293:15.)

He was employed full time, and had completed emergency medical tech-1 training. (Exh. 22, 1Aug.CT 107; exh. 24, 1Aug.CT 115-121.)

7. A contested trial is conducted.

The contested trial on father's paternity petition and respondent's adoption petition was conducted over two days, July 28 and 30, 2010. (1CT 236-242.) The bench officer was the Honorable Angus Saint-Evans. This same bench officer presided over all of the subsequent hearings in this case.

Both parents, mother's daughter Jenna, and Linda Salazar testified, as set forth previously. In addition, there was testimony from two expert witnesses and from respondents.

A. Expert opinions regarding child's mental health.

Dr. Siggins was accepted by the court as respondent's expert on the phenomenon of infant-parent attachment and the significance of disruption of infant-parent attachment. Dr. Siggins never observed father with his daughter. (1RT 125:13-16.) However, he testified that the father's

short term visits "cannot compensate or weight against" the hours of interaction the child had had with respondents. (1RT 115:3-7.)

He testified that the baby was securely bonded to the respondents, based on observing them together once on a three-hour visit. (1RT 111:1-22; 117:115:27-116:4.) He further testified that disrupting that attachment would be detrimental to her because the child would suffer a "serious" attachment disorder because of the child's young age. (1RT 112:5-113:9; 115:8-13; 120:16-23.) He stated that the child's bonding "would be inhibited" as a result of changing custody of a seven month old child from the primary psychological parent. (1RT 135:26-136:1.)

Dr. Daniel Edwards was accepted by the court as father's psychological expert. (1RT 229:16-19.) Although not qualified as an expert on early childhood attachment, he was knowledgeable about issues relating to disruptions of attachments. He stated that he didn't think a child would be damaged by being moved from one nurturing family to another nurturing family so long as the child's needs were met. (1RT 244:23-28.)

3. Expert opinions regarding "antisocial fathers."

Dr. Siggins also was qualified as an expert on the phenomenon "known in the trade as antisocial fathers." (1RT 109:22-110:17.) He testified that "antisocial" fathers were persons who exhibit antisocial personality disorder or personality traits and features. They tended to raise their children "in what is called an authoritarian parenting style which sets the child up or at risk for developing antisocial personality disorder themselves." (1RT 114:2-15.) According to Dr. Siggins, antisocial fathers could be identified by a history of substance abuse or criminal activity.

(1RT 114:12-22.)

Dr. Daniel Edwards was accepted by the court as father's psychological expert on antisocial personality disorders. (1RT 229:16-19.)

He testified that he had examined father to determine father's current mental status and whether he met the requirements for a diagnosis of antisocial personality disorder. Dr. Edwards conducted a three hour interview of father, and also administered to him a standardized personality inventory. (1RT 229:20-28; 230:20-231:18.)

Dr. Edwards concluded that father did not meet the criteria for a personality disorder set forth in the DSM-IV because father's antisocial behavior was connected with his drug use, which had ended in 2005. (1RT 234:8-17.) The witness distinguished antisocial behavior, such as committing a crime, and an antisocial personality disorder. The latter is a long-standing problem with adjustment and behavior which begins before age 15 and continues through the adult years. (1RT 235:6-20.) Father did not have this history. The fact that he had committed antisocial acts while using drugs could mean that the behavior was driven by drugs and, when drug use stopped, the antisocial behavior disappeared. (1RT 236:9-21; 243:18-27.)

C. Counsel argue and submit the case.

Respondent's counsel argued that father had not established himself as a *Kelsey S.* father with the rights of a presumed father, and therefore the test for the court was the best interest of the child, under Family code section 7664. (2RT 319:10-321:5.)

If the court found father to be a *Kelsey S.* father, counsel contended that respondent Kenneth R. would also be a presumed father, and the

court would have to balance the child's interests based on two competing presumed fathers, and to compare the two homes - father's and respondent's - and decide what would be better for this child. Finally, respondent's counsel argued that, under section 3041, detriment to remove the child from a stable home would provide "ample grounds for choosing Kenneth as the better presumed father" in the event that the court found that *Kelsey S.* applied. (2RT 321:6-322:17, 331:10-23; 2Supp.CT 12-34.)[12]

The court then asked father's counsel whether, if the court found father to be a *Kelsey S.* father, parental rights could be terminated based on the child's best interest as respondents contended. (1RT 323:2-8.) Father's counsel said no.

He pointed out that if the court finds father to be a *Kelsey S.* father, the test is not the child's best interest, but rather whether there is clear and convincing evidence of a detriment to the child to be placed with the father under section 3041 or that the father is unfit. Absent unfitness, father cannot be deprived of his constitutional right to raise his own child. (2RT 323:2-324:7; 2SuppCT 1-8.) Father's counsel also pointed out that respondent Kenneth R. is not a presumed father because he never held the child out as his own child, but rather as his adopted child. (2RT 332:13-333:3.)

The evidence was closed and the case submitted to the court on July 30, 2010. The court indicated it would file a written decision. Pending that

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2SuppCT is the supplemental clerk's transcript filed on or about September 15, 2011 which contains the parties' trial briefs.

decision, father's visitation would continue unchanged. (1CT 242.; 2RT 333:4-6, 334:13-16.)

At the conclusion of the hearing, respondents' counsel told the cou that, if the court were to decide that father could block the adoption, respondents would ask leave to file a guardianship petition. The court responded that respondents would have to see the ruling and "then mak whatever actions or applications you want to after that." (2RT 334:19-335:14.) No petition for guardianship was ever filed.

8. After the trial is completed and before the court files its decision, respondent father Kenneth R. leaves his wife and seeks a divorce. Father moves to reopen the trial to present this new evidence and to address the impact of respondents' divorce on the child.

In late September, and before the court's decision was filed, respondent father Kenneth R. contacted father's attorney and told him that he and his wife were separating. (1CT 244-245.) In response, father's counsel filed a motion asking to reopen the evidence in the case. The cour set a hearing on the motion for November 9, 2010. (1CT 244-255.)

9. Before father's motion to reopen the case is heard by the court, th court files its intended statement of decision finding that father i a *Kelsey S.* father, but that placement of the child with him woul be detrimental.

The court filed a written intended statement of decision on Octobe 20, 2010. (1CT 256.) It did not mention the pending request to reopen the evidence.

The court's decision first concluded that father "meets the requisite and is determined to be a *Kelsey S.* father." (1CT 258.) The court noted tha father had participated, as far as the mother would allow, during prenata care; had attempted to marry the mother, an effort which was terminate

by the mother; had sought protection of the courts by filing the paternity proceeding and had participated in genetic paternity testing. (1CT 257-258.)

The court then turned to the issue of whether the father was unfit, which it also phrased in terms of whether parental custody would be detrimental to the child. (1CT 257-258.)

This issue the court resolved against father. Relying on Family Code section 3041, the court found that the child would suffer from "psychosocial traumas" if she were removed from the care of respondents, with whom she had lived since she was seven days old. (1CT 258-260.)

The court also found that father could not meet the child's needs. The court found that he was a "controlling and domineering man", who viewed "women as possessions." The court disbelieved his testimony about his relationship with mother. Also, father had not provided proof of financial support to mother, he had a history of substance abuse, was in arrears on his child support obligation for his other two children, and lived in a home which is not "sufficient nor appropriate to raise a child." (1CT 259-263.) Finally, the court stated that father had not provided "any real plan" of how he would care for the child. (1CT 263.)

The court did not address respondent's argument that Kenneth R. was also a presumed father, and that the rights of the two fathers should be balanced under section 7812 based on the child's best interest.

The court concluded that placing the child with father would be detrimental to her, and ordered that his parental rights be terminated to permit adoption by the respondents. (1CT 264.)

10. The court stays and reconsiders its tentative decision.

Respondent Laurel R. filed a response to father's motion to reopen. She had retained new counsel, as her prior counsel had a conflict because he had represented both Laurel R. and her husband and could not represent her individually. Laurel R. declared that she intended to adopt the child as a single mother, and stated that the birth mother had consented to her doing so. (1CT 279-285, 289.)

The November 9 hearing on father's motion to reopen evidence was continued one day and held on November 10, 2010. (1CT 292.)

The court granted father's motion and set a hearing date for introduction of new evidence. It also ordered discovery reopened on the issue of the respondents' divorce and its impact on the child's best interests. Father's twice-weekly visits remained as previously ordered. (1CT 297.)

For the December 14 hearing, respondent Laurel R. filed an opposition to the motion to reopen the trial to take evidence on the breakdown of her the marriage and objections to father's attempt to take depositions of herself and her husband, Kenneth R., asserting the marital privilege. (2CT 300-309.) Laurel R. also filed an amended petition for adoption listing herself as the sole adopting parent and attached a consent to the single parent adoption signed by mother. (2CT 354-358.) Kenneth R. filed a declaration removing himself from the petition for adoption and consenting to the adoption of the child by Laurel R. as a single parent. (2CT 310-311.)

In response, father filed a motion to dismiss the adoption proceeding and place the child with him. He pointed out the harm the child had already suffered from the disruption of her relationship with

Kenneth R. The possible loss of that attachment was a harm which the court relied on in deciding that moving the child to father would be detrimental. Father also asked the court to appoint an attorney to represent him as he had borrowed all the money he could to pay his attorney and had no ability to pay any further attorneys fees. (2CT 315-329.)

Father's attorney filed a declaration supporting the request for dismissal. Counsel recounted Kenneth R.'s deposition testimony, which stated he decided to divorce laurel R. because she had had extramarital affairs with six individuals, and because she utilized medical marijuana. Counsel also confirmed that he was withdrawing from father's representation due to father's inability to pay. (2CT 349-353, 361.)

On December 14, 2010, the court scheduled a trial for January 7, 2011 to address the motion to dismiss, the applicability of the marital privilege, and whether the law would permit the filing of an amended petition for adoption. Kenneth R. was permitted to withdraw from the proceedings. The father's visitation schedule remained the same. (2CT 365.) The next week, the court ordered that any documents which contained any statements which might involve the marital privilege between Kenneth and Laurel be filed under seal. (2CT 370.) Father's counsel's declaration was not sealed or stricken from the record.

The court on January 3, 2011 appointed an attorney to represent father. (2CT 372.) It then continued the January 7 trial date to February 18, 2011. (2CT 377.) However, that appointed attorney resigned January 27, indicating that the case would require more time than he could devote to it. (2CT 382.) A week later, the court relieved the appointed attorney and

appointed the public defender's office to represent father. (2CT 387.) The court then continued the matter again. (2CT 389.)

The continued hearing was finally conducted on February 25, 2011. On that date, the court confirmed its finding that father was a *Kelsey S.* father. (Aug.RT 5:24-28; 2CT 393.)[13] The court also denied father's motion to dismiss the proceedings under Family Code section 8804 because of Kenneth R.'s withdrawal from the adoption petition, denied father's request that an attorney be appointed for the child, and denied father's motion to increase his visits. (Aug.RT 2:3 -3:21; 2CT 393.)

The court then set a trial date for April 1, 2011 to address whether its tentative decision should become final, and for updated reports. (Aug.RT 4-6.)

11. Multiple motions are filed and considered.

Father's public defender filed a brief for the April 12 trial, as requested by the court. In the brief, counsel noted that the court had heavily relied, in its tentative decision, on the stability of the adoptive placement and the harm which would result to the child if her attachment to the adoptive parents was broken. The court had also relied on Family Code section 3041, which provides that harm from disruption of a stable placement may be considered in concerning detriment, and on the expert trial testimony of the risk of detachment disorder if the child was removed. (2CT 396-403.)

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13 The Augmented Reporter's transcript was filed with this court on or about September 2, 2011 and contains only the transcript of the hearing on February 25, 2011.

Counsel pointed out that all of the circumstances on which the court had relied to find detriment to remove the child from respondent's home had changed. There was no longer a marriage nor a stable placement and the child's attachment to Kenneth R. was broken because he no longer wished to be part of the child's life. (2CT 396-399.)

Counsel also pointed out that the court's reliance on Family Code section 3041 was improper because Family Code section 7807 disallowed it, and thus the detriment to the child from removal from the prospective adoptive home could not properly be considered by the court in determining the father's unfitness. (2CT 399-400; 2RT 368:12-369:1.) Respondents' attorney agreed that reliance on section 3041 was improper. (2RT 379:9-17.)

Laurel R.'s attorney filed a brief disagreeing with father, and opposing the reopening of evidence. (2CT 406-421.)

The parties appeared and argued the matter on April 12, 2011. The court took the matter under submission. Father's visits were to remain as previously ordered. (2CT 425.)

12. The court amends its tentative decision to delete any reference to or reliance on the stability of the adoptive home, but affirms the balance of its decision.

On May 2, 2011, the court filed a "post judgment order" in which it concluded that the biological father's parental rights should be terminated and the adoption allowed to proceed. (2CT 427-428.)

The court agreed that its prior reliance on the stability of the prospective adoptive home was in error, and struck that portion of its tentative decision. (2CT 428.)

The court confirmed its prior finding that "clearly [father] meets the *Kelsey S.* standard." However, the court continued, "for the reasons set forth in the court's initial decision he is incapable of the role of parent and his parental right must be terminated." (2CT 427.)

The court also denied the motions to dismiss and for a new trial. It ordered Laurel R.'s attorney to prepare a judgment in conformity with the October 20 tentative decision and with this order. (2CT 428.)

Father filed his notice of appeal from the May 2, 2011 post-judgment order on June 13, 2011. (2CT 436.)

The written judgment for termination of father's parental rights was signed by the court and filed on July 29, 2011. (2CT 438-444.)

This judgment repeats much of the tentative decision language, but strikes "consideration of the prospective adoptive home stability" and any consideration of the factors under Family Code section 3041. (2CT 442-43.)

In its judgment, the court states the test for unfitness as whether there will be "actual harm to the child if the child were to live with the father." (2CT 440.) In making its decision that the father was unfit by this standard, the court relied on the following factual findings:

(1) father is controlling and domineering, views women as possessions and has demonstrated "signs and warnings" of domestically violent behavior (2CT 440);

(2) father failed to financially support mother during pregnancy, and applying for and sharing the benefits of food stamps and the WIC program does not amount to support (2CT 440);

(3) father failed to show sufficient "intangible support for the mother"

during her pregnancy, including emotional support and support for mother's educational efforts (2CT 440-441);

(4) father is a recovering drug addict and alcoholic whose period of sobriety "cannot be much longer than 2 years" (2Ct 441);

(5) father is "substantially in arrears" in his child support obligation for his other two children, which "is a harbinger or indicator of his ability to appropriately and successfully raise" a child by himself (2CT 441);

(6) father is not now in a relationship with someone who can help him raise the child; further, he lives with his godmother and other adults "in a residence that does not seem to be sufficient nor appropriate to raise a child." His plan is to share his bedroom in that home, which is owned by his godmother, with the child (2CT 441);

(7) father is not antisocial, as his expert testified; but, although being antisocial by itself isn't a factor affecting fitness, the "court does have reservations because of and based upon the character of his testimony and his demeanor while testifying" (2CT 441-442);

(8) father did not provide cards, gifts, or clothing for his daughter during the pendency of the proceedings, even though such "would seem appropriate" "if he was truly interested in the well being of his child" (2CT 442);

(9) father "does not set forth any real plan of what he will do should he prevail in this action to care for" the child, and although he says he is ready, willing and able, father provides no specifics (2CT 442.);

(10) father's "past conduct reflects the potential to harm." (2CT 442.);

Father filed a supplemental notice of appeal designating this

judgment on August 22, 2011. (1 Supp.CT 1-2.)[14]

STATEMENT OF APPEALABILITY

A judgment terminating parental rights to facilitate the adoption of a child is an appealable order. (*In re Isaac J.* (1992) 4 Cal.App.4th 525, 528-535.)

ARGUMENT

1. The court's order terminating parental rights must be reversed because the court applied the wrong legal standard.

In finding that parental custody would be detrimental and terminating parental rights, the court did not refer to Family Code section 7820 et seq, or to any statutory standard for terminating parental rights.

This is error requiring reversal.

A. The fundamental nature of parental rights and the standard of review.

The termination of parental rights is "a drastic remedy to be resorted to only in extreme cases." (*In re Terry E.* (1986) 180 Cal. App. 3d 932, 949.) "Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood'." (*In re Angelia P.* (1981) 28 Cal.3d 908, 916 see also *Kelsey S.* (1992) 1 Cal.4th 816, 848 [" The child has a genetic bond with its natural parents that is unique among all relationships the child will have throughout its life"].) (*In re Baby Girl M.*(2006) 135 Cal.App.4th 1528, 1535-1526.)

The "fundamental" nature of parental rights requires that there be

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[14] Volume 1 of the supplemental clerk's transcript was filed in this court on August 22, 2011. It contains only this notice of appeal.

clear and convincing evidence of the facts necessary to terminate such rights. (*Terry E., supra,* 180 Cal. App. 3d at 949; *Santosky v. Kramer* (1982) 455 U.S. 745, 759 [71 L. Ed. 2d 599, 102 S. Ct. 1388] [in light of the "fundamental liberty interest" at stake, the facts underlying termination of parental rights must be proven by at least clear and convincing evidence]; *Angelia P., supra,* 28 Cal.3d at pp. 915-916 ["the very essence of the proceeding is the complete and final legal termination of a relationship which is biological in nature and most personal in form"]; *In re Marriage of O'Connell* (1978) 80 Cal. App. 3d 849, 855 [an order to terminate parental rights constitutes a "termination of a most fundamental and basic civil right" and "results in a total severance of the natural ties between the parent and the child"].) This standard mandates that the evidence be so clear as to leave no substantial doubt;`sufficiently strong to command the unhesitating assent of every reasonable mind. (*Terry E, supra.*, 180 Cal.App.3d at 949.)

The decision to terminate parental rights lies in the first instance within the discretion of the juvenile court, and will not be disturbed on appeal absent an abuse of that discretion. (*In re Arthur C.* (1985) 176 Cal. App. 3d 442, 446.) While the abuse of discretion standard gives the court substantial latitude, "[t]he scope of discretion always resides in the particular law being applied, i.e., in the `legal principles governing the subject of [the] action . .' " (*City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1297 [255 Cal. Rptr. 704].) "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an `abuse' of discretion." (*Id.* at 1297-1298.)

The failure of the trial court to apply the correct legal standard

constitutes an act in excess of its jurisdiction and therefore is an abuse of its discretion. (*Paterno v State of California* (1999) 74 Cal.App.4th 68, 85.)

B. Parental rights of a Kelsey S. father cannot be terminated unless the court finds him "statutorily unfit" within the meaning of Family Code section 7820 et seq.

The trial court found that father was a *Kelsey S.* father and that he therefore had a right to withhold his consent to the proposed adoption. (2CT 439-440.)

Relying on *Kelsey S.*, the trial court identified the test for termination of parental rights as whether "there will be actual harm or detriment to the child" if placed with father. (2CT 440.) It then went on to itemize particular facts which in its view demonstrated created such a risk of harm or detriment. (2 CT 440-441.)

However, the trial court's statement of the applicable test was wrong. *Kelsey S.* requires that the father be found "statutorily unfit under section 232 [now, 7820]" before he can be "deprived of his right under section 221.20 to withhold consent." *(Kelsey S., supra,* 1 Cal.4th at 850-851.)[15]

This language makes clear that the statutory requirements applicable to termination of parental rights of a presumed father apply to termination of parental rights of a *Kelsey S.* father.

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The only statutory bases for termination of parental rights of a presumed parent are section 7800 et seq. and Welfare and Institutions Code section 366.26, applicable to dependency proceedings. (§ 8606, subd. (a).)

C. None of the Family Code bases for termination of parental rights is applicable in this case.

"A proceeding to terminate parental rights may be brought if the child comes within any of the descriptions in this chapter." (§ 7820.) Family Code section 7820 is part of Chapter 2, part 4, Division 12 of the Family Code. A finding that one of these subdivisions applies must be made by clear and convincing evidence. (§ 7821.)

The court did not find that any of these provisions applied. Further such a finding cannot be implied. Where the trial court has failed to make express findings the appellate court may imply such findings only where the evidence is clear. (See, e.g., *In re Andrea G.* (1990) 221 Cal.App.3d 547, 554-555 ["ample" evidence supported implied finding and result "obvious" from the record]; *In re Corienna G.* (1989) 213 Cal.App.3d 73, 83-84 [substantial evidence "amply" supported implied finding].)

Here, the record contains no evidence that any of the statutory bases for termination applies.

(1) Abandonment, child abuse and juvenile dependency proceedings.

Three sections authorize termination of parental rights in instances of abandonment (§ 7822), neglect and abuse (§ 7823), and when a child is made a dependent and reunification services have been denied to the parent under Welfare and Institutions Code section 361.5, subdivisions (b) (3) [abuse of child resulting in a prior dependency], (4) [caused the death of another child] or (5) [severed physical abuse of a child under five]. (§ 7829.)

In addition, section 7800 et seq. is expressly made inapplicable to a

child who is made a dependent of the juvenile court after January 1, 1989; for those children, the dependency scheme is the exclusive means for termination of parental rights. (§ 7808.)

None of these sections applies. The child was never abandoned or abused, and she was never a dependent of the juvenile court.

(2) Disability due to substance abuse.

A fourth basis is set forth in section 7824. This provides that parental rights may be terminated when a parent has a "disability", defined as "any physical or mental incapacity which renders the parent or parents unable to care for and control the child adequately." Included within this definition is incapacity caused by habitual use of alcohol or drugs, but only if the child has been a dependent of the juvenile court for one year. This basis for termination does not apply. Father has no disability, he has no current substance abuse problem and the child was never a dependent.

Father admitted to a history of substance abuse. However, he had successfully completed a year of substance abuse treatment at the Salvation Army (Exh. 79, 1Aug.CT 79), and he had not relapsed into drug use since 2005. While he may occasionally have used alcohol, there was no evidence that such use was "habitual" or that it caused father to be unable to care for his child.

Indeed, the court explicitly found that father did not suffer from any current addiction. Instead, it found that father was "a recovering drug addict and alcoholic" and that his period of sobriety "cannot be much longer than 2 years." (2CT 441.)

(3) Conviction of a felony proving unfitness.

A fifth basis, provided by section 7825, is that the parent has been convicted of a felony, the facts of which "are of such a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child." Given the fundamental rights which are at stake, termination of parental rights under this provision is only proper when the specific facts underlying the conviction are so egregious as to have a direct bearing on parental unfitness. (*In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1536-1538.) That is not the case here. Father's convictions were related to substance abuse and property crimes, did not involve physical harm to any person and did not involve any children.

(4) Parental mental disability or delay.

Two bases for terminating of parental rights are provided when the parent suffers from mental delays or disabilities. Section 7826 authorizes termination when a parent is both declared by a court to be developmentally delayed or mentally ill, and the state director of mental health declares that the parent is incapable of supporting or controlling a child.

Section 7827 authorizes termination when two licensed mental health experts provide evidence that the parent suffers a mental disability or disorder that renders the parent unable to care for the child.

Neither of these provisions applies. There was no expert evidence that father had any mental disability or delay which rendered him incapable of parenting his child, and no court ever so found.

(5) A voluntary or court-ordered placement of the child for one yea by a parent who fails to benefit from reunification services.

Section 7828 authorizes termination of parental rights if two conditions are met: (1) the child has, for one year, been in out of home placement supervised by the juvenile court, the county welfare department or a licensed "child-placing agency" and (2) the court finds that return of the child to the parent would be detrimental to the child because the parents "have failed during the one-year period, and are likely to fail in the future, to maintain an adequate parental relationship with the child." (§ 7828, subd. (1).)

The conditions of this section do not apply here. It contemplates placements of children pursuant to disposition orders made by the juvenile court involuntarily removing the child from parental custody (§ 7828, subd. (b)), and voluntary placements made by a parent pursuant to a plan for voluntary reunification services under Welfare and Institutions Code section 16507.4. (§ 7828, subd. (c).)

Termination of parental rights cannot occur under this section unless the court finds that reasonable services were offered to the parent to overcome the problems which led to the continued loss of custody and that, in spite of these services, return of the child would be detrimental. (§ 7828, subd. (e).)

This section does not apply. The child was not removed from father's custody by the juvenile court, nor did he voluntarily place the child with the agency with a plan for voluntary reunification services. Father never voluntarily relinquished custody, and has consistently requested custody since the child was born.

Further, the placement with respondents was an independent placement made by the mother, and was not supervised by any child-placing agency. CDSS's role was to investigate the suitability of the adoptive parents, not to supervise the placement. (§ 8806.) Further, that agency did not identify any problems or offer father any reunification services to address any perceived problems. Indeed, the social worker for that agency testified that she only spoke with father once, and that her primary job was to evaluate the adoptive parents. (1RT 70:5-12; 79:7-10.) In addition, the court made no finding that services had been offered, that father had failed to benefit from them, or that placement of the child with father would be detrimental to her in spite of the availability of the services.

Finally, the proceeding to terminate father's rights was untimely under this section. The petition can only be filed after the child has been in out of home placement for one year. (§ 7828, subd. (a)(1).)

2. Appellant, as a fit *Kelsey S.* father who refuses to consent to an adoption, is legally entitled to custody of his daughter.

A. The child must be restored to her father's custody.

If a presumed father withholds consent to an adoption requested by the birth mother, the adoption cannot proceed unless the father's parental rights are terminated in accordance with section 7800 et seq. (§ 8606.)

This protection applies to *Kelsey S.* fathers. "We recognize that, as a matter of substantive due process, the parental rights of a *Kelsey S.* father cannot be terminated without a finding that he is unfit." (*Adoption of Danielle G.* (2001) 87 Cal. App. 4th 1392, 1406.)

If the father's rights are not terminated because the requirements of

section 7820 et seq are not met, as appellant's cannot be, the question then becomes one of custody.

The *Kelsey S.* court expressly refused to hold that the child must immediately be returned to the father. Instead, it stated that if a father "has a right to withhold his consent (and chooses to prevent the adoption), there will remain the question of the child's custody." (*Kelsey S., supra,* 1 Cal. 4th 816, 851.) The *Kelsey S.* court did not discuss the rules applicable to such a custody determination because that issue was not before it. (*Id.*)

However, the Legislature has addressed this. The Family Code provides that, in the event a parent refuses to give a required consent to an adoption, the child must be restored to that parent "subject to the provisions of section 3041." (§ 8804, subd. (c).)

B. Respondent has forfeited any claim that parental custody would be detrimental and that guardianship is required because she never raised the issue in the trial court.

Respondent sole request below was for termination of parental rights. Although respondent's counsel suggested that she might request a guardianship in the even the court refused to terminate father's parental rights (2RT 334:19-335:14), no guardianship petition was ever filed.

Thus, the question of detriment to placement of this child with her father without termination of parental rights was never addressed by the parties or the court.

A party may not raise theories on appeal which were not raised in the trial court. (*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 686.) Because the issue is forfeited, this court should remand the matter with

instructions to place this child with her father.

C. If the issue of custody in a guardianship has not been forfeited, it should be resolved by this court because of the important interests at stake and because the question is one of law applied to undisputed facts.

The trial court did not specifically address custody under section 3041 in the absence of termination of parental rights as required by section 8804, subdivision (c). It did not rely on section 3041 to terminate parental rights. (2CT 443.) Nonetheless, the court found that placement would be detrimental, using the language of section 3041, and that parental rights should be terminated.

Ordinarily, this court will remand to the trial court when it fails to make findings under the correct statute. This is because it is the province of the trial court, and not the appellate court, to make factual findings. (*In re V.F.* (2007) 157 Cal. App. 4th 962, 973.)

However, this court can and should exercise its discretion to address this issue, for the following reasons:

First, father's request for custody of his daughter was raised by father from the beginning of the case, in his petitions to establish parental relationship (1CT 3-5; 83-84), in his application for an order to show cause for placement (1CT 87-95), in his trial brief (2SuppCT 7-8), and in his counsel's closing arguments at trial. (2RT 323-2-324:7; 329:10-12.)

Although respondents never asked for a guardianship if parental rights could not be terminated, respondents and mother repeatedly argued that such custody would be detrimental to the child within the meaning of section 3041.

Thus, all parties proceeded over the course of this protracted

litigation as though the applicability of section 3041 to father's custody request was before the court.

Second, the court's decision specifically finds that placement of the child with her father "would be detrimental" to her and that termination of parental rights is in her "best interest". This echoes the language of section 3041 [parental custody would be "detrimental" and placement with nonparent required to serve child's "best interest"].). Because the court found that placement with father would be so detrimental as to justify termination of parental rights, the lesser finding that placement would be detrimental even without termination of parental right, based on the same factual findings, can logically be implied.

Third, the question whether a finding of detriment to parental custody under section 3041 can constitutionally be based on the facts found true by the court is a legal one, as to which this court exercises its independent judgment. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

Fourth, this case presents an important question of first impression regarding the constitutionality of section 3041 as applied to a *Kelsey S.* father given the enactment of Probate Code section 1516.5, which now allows a guardianship to lead to termination of parental rights based solely on a showing of the child's best interest.

Finally, it is in the public policy of this state that issues of a child's permanent placement be resolved as expeditiously as possible. Remand for a new trial to address custody without termination of parental rights will unnecessarily extend this litigation without any corresponding benefit to the parties or to the child. The facts are not in dispute, and this court is in as good, or better, position to apply the law to those facts as is

the trial court. (Compare *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1060, fn.4 ["There is no need for yet further evidentiary proceedings on whether [father] is entitled to constitutional protection under Kelsey S. because the trial court's existing findings are responsive to and dispositive of this issue. To remand the cause for such further proceedings, moreover, would be to delay resolution of an already lengthy lawsuit and protract the uncertainty it has brought into the lives of all concerned, particularly the minor child, beyond the four-plus years already elapsed."].)

D. Section 3041 is unconstitutional as applied to deny appellant custody of his child without a finding of parental unfitness.

Section 8804 requires that the child be restored to a parent who refuses to consent to an adoption "subject to" section 3041.

Section 3041 provides that a court may not place a child with a nonparent over parental objection without making a finding that "granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child." Although section 3041 states that detriment is the test for placing a child with a nonparent over parental objection, it does not contain any definition of the term. Instead, it expressly provides that no finding of parental unfitness is required to support a detriment finding.

This section is unconstitutional as applied to deny placement of a his child to a fit *Kelsey S.* father.

(1) Father has a constitutionally protected right to raise his own child.

"Parents have a fundamental interest in the care, companionship, and custody of their children." (*In re Gladys L.* (2006) 141 Cal.App.4th 845, 348, relying on *Santosky v. Kramer, supra,* 455 U.S. 745, 758.)

"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. A parent's interest in maintaining a parent-child relationship is an extremely important interest, and termination of that right by the state must be viewed as a drastic remedy to be applied only i extreme cases." (*In re Guardianship of Christian G.* (2011) 195 Cal.App.4th 581, 597-598.)

Thus, when a biological father has promptly come forward and made a full commitment to his parental responsibilities, as has father here his parental rights cannot be terminated absent a finding of unfitness as statutorily defined. (See argument *supra,* pp. **.)

This principle was recognized by the Second District Court of Appeal in the dependency context. A father immediately came forward when he learned of his paternity. At that point, his eight month old daughter had been a dependent from birth, had lived with a preadoptive family her entire life, and a hearing to terminate parental rights was pending. In reversing the trial court's orders terminating the father's rights, the court held that, by "offering to provide emotional and financial support and a home for a child he believes is his" father was entitled to the opportunity to establish himself as a *Kelsey S.* parent. If he was successful, he was entitled to visitation and reunification services leading to placement of his child with him. (*In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1118.) Even though the child had established a relationship with the adoptive parents, the court held that the father's "interests must be also considered, not just the child's interests." (*Ibid.*)

(2) Previous appellate decisions holding that a finding of parental unfitness is not required to establish a guardianship under section 3041 are not controlling because they assumed that denial of custody could not result in termination of parental rights, an assumption now reversed by Probate Code section 1516.5.

If parental rights can not be terminated, the only legal basis on which custody can be provided to respondent and denied to father is through appointing respondents as the child's legal guardian. (§ 7505 [parental rights cease on appointment of guardian].)

Appellant contends that, to deny him custody of his daughter under section 3041 and appoint respondents as guardians of his child, respondents must prove and the court must find, by clear and convincing evidence, that he is unfit, not merely that placement would be detrimental and not in the child's best interests.

Appellant acknowledges that several courts have rejected this contention, and have held that no finding of parental unfitness is required.

Guardianship of Zachery H. (1999) 73 Cal.App.4th 51 is factually very similar to this case. Mother there placed the baby for adoption at birth. The father successfully resisted petitions to terminate his parental rights and to adopt the child based on *Kelsey S.* The trial court then granted a guardianship petition to the couple who had cared for the then-four year old child from birth. On appeal, the father argued, as father has in this appeal, that the federal constitution embodied a parental preference that requires a showing of parental unfitness before a nonparent could be appointed as a guardian over parental objection. He also argued that section 8804, subdivision (c) required that the child be restored to the custody of a parent who did not consent to an adoption. In rejecting these

contentions, the Sixth District Court of Appeal stated that the statute "must be construed as being subject to constitutional rights" of the child to a stable placement she had had from birth. (*Id.*, at 65-79.)

The Fourth District Court of Appeal, Division One has also upheld the use of a detriment standard instead of a unfitness standard against a constitutional challenge because it allows the child to remain in a long-term placement while not threatening parental rights. (*H.S. v. N.S.* (2009) 173 Cal. App. 4th 1131, 1141-1142.) Relying on *Zachery H.*, the court found that the Legislature's use of the detriment to the child requirement instead of the parental unfitness requirement focuses on the child's interest. "This is an appropriate balancing of the competing interests in cases involving custody because a custody ruling under section 3041 does not permanently sever the parental relationship, but it does have the potential to severely impact a child's well-being. Because the parental relationship can still be maintained notwithstanding an award of custody to a nonparent, and because of the state's compelling interest in protecting the child's well-being, the Legislature could properly conclude that the determinative factor should be harm to the child rather than parental fitness." (*H.S. v. N.S.* (2009) 173 Cal. App. 4th 1131, 1141-1142.)

The *H.S.* court did not mention Probate Code section 1516.5.

Similar conclusions granting a guardianship of a child placed at birth over the objection of a *Kelsey S.* father and based on the detriment from removing the child from a stable home, have been reached by the Fourth District Court of Appeal, Division Two. (*Adoption of Danielle G.* (2001) 87 Cal.App.4th 1392.)

However, these decisions have all been undermined by subsequent statutory changes. All of them distinguished guardianship because it did not lead to termination of parental rights. Accordingly, each court concluded that a lower standard for removal from parental custody was appropriate, and that the child's interest in remaining in a long-term placement could outweigh the parent's constitutional right to raise his child.

None of these decisions discussed the impact of Probate Code section 1516.5. That section, enacted effective January 1, 2004, provides that, once a child has been in a guardianship for two years, parental rights may be terminated to enable the guardians to adopt the child based only a showing of the child's best interest and without any finding of parental unfitness.

(3) Because Probate Code section 1516.5 authorizes termination of parental rights following a two year guardianship solely on a showing of the child's best interests, a finding of parental unfitness prior to establishment of the guardianship is constitutionally required.

Our Supreme Court has addressed the constitutionality of Probate Code section 1516.5 in two cases, *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, and *In re Charlotte D.* (2009) 45 Cal.4th 1140.

In each of those cases, a child had been voluntarily placed by a parent in a guardianship. Subsequently, the guardians in each case petitioned to terminate parental rights so that they could adopt the child.

The parents challenged the termination orders, arguing that Probate Code section 1516.5 was unconstitutional because it allowed for termination of parental rights based only a showing of the child's best

interests. The high court rejected this challenge. It found the statute facially constitutional because the parents in each case had voluntarily surrendered custody and had not exercised any parental rights for at least two years. Because of that parental consent and inaction, termination of parental rights did not violate constitutional protections. (*Guardianship of Ann S., supra*, 45 Cal.4th at 1131-1132.).

However, the high court noted that the section could be unconstitutional as applied to particular parents. Due process requires, before parental rights may be terminated, that there be a finding of parental unfitness at some point in the proceedings. Thus, due process considerations affecting termination of parental rights have been introduced into the guardianship scheme by section 1615.5. (*Guardianship of Ann S., supra*, 45 Cal.4th 1110, 1145, fn. 17.)

Unlike the parents in *Ann S.* and *Charlotte D.*, father here never consented to the placement of his daughter with respondents, and has sought a judicial order for placement since prior to the child's birth.

Different considerations apply when the request for the guardianship is based on allegations of parental unfitness than on parental consent. In that circumstance, no guardianship may be granted until the matter is referred to the local agency in charge of investigations of child neglect and abuse. (Prob. Code § 1513.) That agency is required to investigate whether services should be offered to protect the child and strengthen the family, or whether a juvenile dependency petition must be filed.

The referral procedure thus provides constitutionally required protection for parental rights.

The Probate Code is intended to work hand-in-hand with the dependency laws as a cohesive statutory structure that aims to subject all cases alleging parental unfitness to the rigors of a dependency investigation. Accordingly, probate courts are expected to send those cases involving abuse or neglect to the county's dependency agency for investigation and provision of services. The statutory scheme appears calculated to ensure that all claims of parental child abuse and neglect are investigated by the same agency and subjected to the same standards. If the investigation suggests the child cannot safely reside in the parental home, then the interplay of the statutes strongly suggests that reunification services are to be offered to the family. (*In re Guardianship of Christian G., supra,* 195 Cal.App.4th 581, 596.) Whether allegations of parental unfitness arise in a dependency context or the guardianship context, there is no "second path." All allegations of parental unfitness must "cross the brief into juvenile court." (*Ibid.*).

Only through the standards and procedures provided in the dependency context can parental rights be constitutionally protected. (*In re Gladys L.* (2006) 141 Cal.App.4th 845, 848.)

(4) None of the facts found true by the court, singly or in combination, establish sufficient risk to the child to justify dependency jurisdiction.

The interplay of the guardianship and the dependency legislative schemes reflect a Legislative creation of a "cohesive statutory structure that aims to subject all cases alleging parental unfitness to the rigors of a dependency investigation." The statutory scheme appears calculated to ensure that all claims of parental child abuse and neglect are investigated

by the same agency and are subjected to the same standards. (*Guardianship of Christian G., supra,* 195 Cal.App.4th at 605-606.)

Any determination of detriment under section 3041 must therefore also be subjected to the dependency scheme because it is a prerequisite to a guardianship order.

Dependency jurisdiction requires proof of a substantial risk of serious harm or injury to a child based on one of ten specified statutory bases. (Welf. & Inst. Code § 300.) A child may only be removed from parental custody if the risk is established by clear and convincing evidence and there are no reasonable means available to protect the child absent removal. (Welf. & Inst. Code § 361, subd. (c).) If the risk is established and the child removed, the parent is entitled to receive reunification services designed to address the problem, reduce the risk and return the child to parental custody. (Welf. & Inst. Code § 361.5.)

A review of the trial court's detriment findings, grouped by subject, demonstrates that none of them meets these requirements.

(a) *Custody cannot be denied because father is poor or because he shares housing with others.*

The first group of factors relied on by the court is based on the father's low income and his living arrangements. The court found that father had not financially supported the mother during the pregnancy, and that applying for and sharing the benefits of food stamps and the WIC program did not count as support. (2CT 440.) It found that father was in arrears in his child support obligations for his other children. Although father explained that the arrearages had arisen when he was using drugs and that he was now making monthly payments which

included a contribution toward the arrearage, the court concluded that the existence of the arrearages "is a harbinger or indicator of his ability to appropriately and successfully raise" a child by himself. (2CT 441.)

Finally, the court disapproved of father's living arrangements. Father lived with his godmother and two other adults in a four bedroom home. He planned to have the baby share his bedroom with him, and had furnished it with a bed, toys, and clothing for her. Father provided photographs of the home and of his bedroom to demonstrate their cleanliness and appropriateness. The court found that the residence "does not seem to be sufficient nor appropriate to raise a child" although it did not indicate what was wrong with it. (2CT 441.) The court did not mention that father had given up his apartment and was living rent-free in this home in order to pay the litigation expenses which he incurred in this case fighting for his daughter. The court also did not mention that father was an EMT, or that he was employed full time.

These financial factors are an impermissible basis on which to deny custody absent any proof that father's limited resources would result in neglect or abuse. "We cannot separate parents and their children merely because they are poor." (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 792.) Homelessness and poverty are not grounds for dependency jurisdiction. (Welf. & Inst. Code § 300, subd. (b).)

Despite his financial problems, father has demonstrated that he can provide for his child's needs. He is willing and able to work and is employed full time (exh. 78, 1Aug.CT 79; 1RT 35:6-14), he has a clean and safe environment for his daughter in a home in which there is extended family support (exh. 28, 1Aug.CT 133-139), and he acknowledges and is

paying his obligations for his other two children.(1RT 83:1-5; 84:19-85:2.)

(b) *Custody cannot be denied because of father's "controlling" personality.*

The court found that father is controlling and domineering, views women as possessions and has demonstrated "signs and warnings" of domestically violent behavior (2CT 440). The court also found that, while father is not antisocial, the "court does have reservations because of and based upon the character of his testimony and his demeanor while testifying." (2CT 441-442.)

The court did not state the facts on which it relied in making these findings. Presumably, it was concerned about mother's testimony that father had been violent and demeaning in his relationship with her.

Father disputed mother's description of the incidents between them. The Sacramento County Superior Court found her testimony was not truthful and denied her petitions for restraining orders. (1CT 106.)

However, even if father has a controlling and domineering personality in his relationships with women, that is insufficient for dependency jurisdiction. Dependency jurisdiction requires that the child perceive or be affected by domestic violence or that the child be placed at substantial risk of serious harm because of it. (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 398.) There was no such evidence here.

(c) *Custody cannot be denied because father is in recovery.*

The court found that father is a recovering drug addict and alcoholic whose period of sobriety "cannot be much longer than 2 years" (2CT 441.) Father admitted to a history of drug abuse. But, as the court acknowledged in this finding, there was no evidence that he had any current problem with illegal drug use, or that his history of drug use

created a current risk of harm to this child. Without that showing, there is no dependency jurisdiction. (Welf. & Inst. Code § 300, subd. (b).)

(d) *Custody cannot be denied because father does not have a parenting plan.*

The court found that father "does not set forth any real plan of what he will do should he prevail in this action to care for" the child, and "although he says he is ready, willing and able, father provides no specifics." (2CT 442.) What the court believed was missing is unclear. Father had housing, baby furniture and clothing, a job, and extended family support with his godmother. (Exh. 28, 1Aug.CT 133-139.) He had arranged for relatives to provide child care while he worked (1CT 255.) There was no evidence that father was incapable of providing appropriate care for his daughter. In the absence of any evidence that the missing "specifics" of father's child care plans created a substantial risk of physical harm to the baby, dependency jurisdiction would be improper.

(e) *Custody cannot be denied based on the court's other, subjective, concerns.*

The court made several other findings, none of which establishes any substantial risk of serious physical harm to this child. The court found that father failed to show sufficient "intangible support for the mother" during her pregnancy, including emotional support and support for mother's educational efforts; that he is not now in a relationship with someone who can help him raise the child, and that he did not provide cards, gifts, or clothing for his daughter during the pendency of the proceedings, even though such "would seem appropriate" "if he was truly interested in the well being of his child. " (2CT 440- 442);

These findings are little more than the court's subjective concerns that father has not behaved as the court would have preferred. None of

these reflect on father's commitment to his child or establish that she would be at risk in his care.

D. Section 3041 is unconstitutional as applied to the extent that it denies custody of his child to a fit Kelsey S. father based on detriment from removing the child from a placement to which the father never consented.

Section 3041 provides that detriment to the child includes the harm of removal from a stable placement of a child with a person who has assumed the day to day role of a parent for a substantial period of time,. (§ 3041, subd. (c).)

This provision has been interpreted to meant that the child's constitutional interest in stability of a placement in which she has been in from birth outweighs the *Kelsey S.* parent's constitutional rights. This is true even if the parent did not consent to the placement and the placement lasted a long time only because of the length of the litigation over the child's custody. (*Guardianship of Zachary H.* (1999) 73 Cal App 4th 51, 65.)

However, *Zachery H.* reached this conclusion in reliance on the assumption that placement of the child with a nonparent in a guardianship would not result in termination of parental rights, an assumption which has been changed the enactment of Probate Code section 1516.5.

Further, when a *Kelsey S.* father comes forward to care for his child, his parental rights must be considered, and they are superior to any rights of the child in a continued placement. (*In re Baby Boy V.* (2006) 140 Cal. App. 4th 1108, 1118.)

This result is required to protect the father's parental relationship.

Otherwise, an unmarried father's parental rights could be defeated by the mother placing the child at birth, just as mother did here, and then dragging out the litigation over placement long enough that the child grows attached to the prospective adoptive parents. Such a result makes a mockery of the protections which the constitution provides and renders meaningless the Supreme Court's decision in *Kelsey S.*

This, however, is the exact argument which respondents made below. They argued that the child's emotional attachment to the adoptive parents required that she remain with them. They contended that the child would suffer emotional harm if removed from respondents' home, in which she had lived since birth. . (2RT 321:6-322:17, 331:10-23; 2Supp.CT 12-34.) They even offered a psychologist who opined that removal would cause the child significant attachment problems in the future. 1RT 112-115.) Father's psychologist disagreed. (1RT 224.)

CONCLUSION

Appellant father Anthony L. has done everything he can to demonstrate his commitment to his daughter. He attempted to marry the child's mother, he provided financial support for mother and child during pregnancy, and he commenced and pursued legal proceedings seeking placement of his child beginning before the child's birth, exhausting all of his financial resources and incurring significant debt in the process.

The trial court found that he had promptly come forward and made a full commitment to his child, such that his consent was required for the adoption of his child by respondents.

Despite all of these findings, the trial court terminated father's parental rights. It found that placement of the child with her father would

be detrimental to this child on grounds that amount to no more than value judgments about father's character and lifestyle, and which have no relation to the exclusive grounds for termination of parental rights set forth in the Family Code and required by constitutional due process guarantees.

Appellant acknowledged to the trial court, and he acknowledges here, that he is not perfect, and that he has made mistakes in his life. However, he has worked hard to turn his life around, to make amends for his wrongs, and to be a stable and contributing member of society. He has been free from substance abuse and illegal activities since 2005. Although he was convicted of several crimes, he has complied with all of the terms of his probation, and the records of the convictions would have been dismissed except for the payment of fines and restitution. He has had problems with anger control toward mother and other women, but he has never been arrested or convicted any crime establishing that he would be an unfit parent. Father has a good relationship with his other children who live out of state and with their mother, and he regularly pays child support for them. He is employed full time and has appropriate housing with his godmother, who also provides him with emotional and extended family support.

His godmother, who has known him since he was 12 years old, testified that father is a "changed person" who has "made amends" for the wrongs he committed while using drugs. "[T]hat's why the term "second chance" is there. I mean, he meets life on life's terms." (2RT 300:22-28.)

The law does not require that parents be perfect, only good enough

to provide for their children and to protect them from neglect and abuse. As the Fourth District Court of Appeal has noted, "We do not get ideal parents anywhere. Even Ozzie and Harriet weren't really Ozzie and Harriet. Ideal parents are a rare—if not imaginary—breed. .... But the State of California is not in the business of evaluating parents and redistributing their offspring based upon perceived merit." (*David B. v. Superior Court* (2004) 123 Cal. App. 4th 768, 789.)

Appellant therefore asks that this court reverse the trial court's findings and orders terminating his parental rights because they are not based on sufficient statutory or constitutional grounds. He further asks that this court find that, on the basis of the factual findings made by the court, placement of his daughter with him would not be detrimental to her as a matter of law. Accordingly, this court should instruct the trial court on remand to order the child restored to her father's custody immediately.

Dated: November 7, 2011

Respectfully submitted,

Darlene Azevedo Kelly
Attorney for Appellant

Certificate of Length

I, Darlene Azevedo Kelly, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 14,918 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204. This document was prepared in WordPerfect and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this certificate was executed at Oakhurst, California on November 7, 2011.

Darlene Azevedo Kelly
Attorney for Appellant