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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

Adoption of D.M., a Minor.	
K.M. et al., Plaintiffs and Respondents, v. B.N., Defendant and Appellant.	A137341 (San Mateo County Super. Ct. No. A15987)
B.N., Petitioner, v. SUPERIOR COURT FOR THE COUNTY OF SAN MATEO, Respondent; K.M. et al., Real Parties in Interest.	A139153 (San Mateo County Super. Ct. No. A15987)

I.

INTRODUCTION

An unwed, natural father who does not statutorily qualify as a presumed father under Family Code section 7611¹ does not have a right to withhold consent to an at-birth, third-party adoption unless the father shows that promptly upon learning the mother was pregnant with his child, he came forward and demonstrated a full commitment to his parental responsibilities. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849 (*Kelsey S.*)) If the father makes this showing, parental rights may not be terminated absent a finding of the father's unfitness as a parent. This is so even if the court finds it otherwise to be in the child's best interest to terminate parental rights, and to let the adoption proceed. (*Ibid.*; *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051-1052 (*Michael H.*))

B.N. (father) is the biological father of the minor, D.M. (the minor), born in May 2012. In this section 7662 proceeding to free the minor for adoption, father appeals after the trial court found he failed to meet the burden of proving he is a presumed father under *Kelsey S.* Father contends "[t]he ruling reflects an incorrect understanding of the *Kelsey S.* rule, and a failure to correctly apply it." We disagree, and conclude substantial evidence supports the trial court's finding. Accordingly, we affirm the judgment terminating father's parental rights pursuant to section 7662 and freeing the minor for adoption by K.M. and J.M., the prospective adoptive parents (adoptive parents).

¹ All statutory references are to the Family Code. A man can qualify for presumed father status pursuant to one of the provisions of section 7611, under which "[a] man is presumed to be the natural father of a child if," he and the mother execute a voluntary declaration of paternity (§§ 7611, 7573); he marries the child's mother (§ 7611, subd. (a)); attempts to marry the child's mother (§ 7611, subds. (b), (c)); or "receives the child into his home and openly holds out the child as his natural child." (§ 7611, subd. (d).) We note there are cases that analyze the provisions applying to presumed fathers in a gender-neutral manner and to women who seek presumed parent status. (See *E.C. v. J.V.* (2012) 202 Cal.App.4th 1076, 1084-1085, fn. 3 (*E.C.*); *In re Karen C.* (2002) 101 Cal.App.4th 932, 938 ["foregoing principles [applying to presumed fathers] should apply equally to women".])

Father also petitions for a writ of habeas corpus or, in the alternative, writ of mandate, which we have consolidated with his appeal.² In his petition, he contends he received ineffective assistance of counsel because his counsel did not seek to have court-ordered, in-home visits with the minor in order to have him declared a presumed father under section 7611, subdivision (d).³ He also claims his counsel was ineffective in failing to present additional evidence indicating his commitment to his parental responsibilities under *Kelsey S.* Father claims it is reasonably probable, but for these omissions, the outcome of the trial would have been more favorable to him. Again we disagree, and deny the petition.

II.

FACTS AND PROCEDURAL HISTORY

We recite the evidence in the light most favorable to the court's order, noting that the version of facts in father's briefs portrays many of the facts as he would like the court to see them rather than as the court actually found them. (See *Adoption of A.S.* (2012) 212 Cal.App.4th 188, 214-215.)

J.S. (mother) and father met in early June 2011, and began living with each other a few months later. When he testified, father acknowledged that during the course of their relationship, they had sexual relations without using any birth control. Mother testified that "[f]rom the very beginning, . . . he wanted me to have his baby." In late September or early October 2011, mother moved out.

Mother testified she moved out because of father's continuing domestic violence against her, sometimes in the presence of her young son. She said father was very controlling, and if she did not comply with his demands he would strike her "out of the blue. I never knew when to expect it from him, and that's what was the scariest thing."

² We have received letters from counsel for the minor and counsel for the mother joining in the opposition to father's writ filed by real parties in interest, the adoptive parents.

³ A man is a presumed father under section 7611, subdivision (d) if "[h]e receives the child into his home and openly holds out the child as his natural child." [Citation.] (*Amy G. v. M.W.* (2006) 142 Cal.App.4th 1, 12.)

Lisa T., J.S.'s mother, testified she noticed bruising around her daughter's neck, back and arms while she was in a relationship with father. Mother eventually confided father was responsible. Mother's friend testified similarly.

Father denied hitting mother. However, he acknowledged his history of domestic violence against other women, including a conviction for domestic violence in 2009 against an ex-girlfriend. He further admitted he had been accused of domestic violence by numerous other women he had been involved with in the past.⁴ He also admitted spending three years in prison for possession of crack cocaine.

Soon after moving out of father's home in September 2011, mother said she took a pregnancy test which showed positive results. She shared this information with father within "like two days" after moving out. Father requested "ob/gyn" confirmation, and she provided that confirmation soon thereafter.

Father testified he has seven other children. He acknowledged his lack of consistent participation in parenting these children, but claimed to have "moved forward" and is "stepping up to be a responsible father even though my children are grown." In testifying about the possibility of becoming a father again, he said, "I didn't let my mind really entertain that. Because I didn't want to have—being in the mindset and then turn out that it not to be my child. But I prayed. I asked myself, you know, what will I prepare myself for if it is mine? That's all I can do."

Mother said throughout the months of October, November, and December, she contacted father "[a]lmost every day." She continuously told father she believed the child was his, even though she was not entirely sure, as there was one other possible father, Mr. L. Father, on the other hand, testified mother would get upset at him and sometimes tell him the child was his and sometimes say he was not the father. At times, he believed he was the father, at other times he did not. He testified, "I didn't

⁴ The trial court noted at the conclusion of the hearing that father "appeared to have significant memory issues with regard to criminal cases involving domestic violence and restraining orders that had been issued against him"

want—I wasn't going to play that game. So, I said, once my son was born and he is proven to be my biological child, I'd do everything I can to fight for my child."

Mother had a difficult pregnancy, was often in pain, and at the same time was trying to care for her son, who was a toddler. Mother testified she requested support from father as she was moving from motel to motel, living on public assistance, and struggling to survive. Although father was gainfully employed, he refused to help her.⁵

Father admitted he did not provide mother with any financial assistance during her pregnancy. Father testified he "wasn't going to contribute financially. . . . And I wasn't going to contribute any cash money to paying for room, paying for an apartment or any of that until I knew concrete that this was my biological child." Father also claimed mother had a "scamming history" and "different hustles going on." He explained, "I'm not going to contribute cash physically when I'm playing—this head game being played with me and knowing that there possibly could be somebody else the father."

Mother testified she thought about adoption "from the beginning." In October, she told father she wanted to place the baby for adoption. Mother said that his reaction "was irate. He said I wanted to give his blood up. That I can't be giving his blood away. That his family was too black and too strong to be giving his child up." A friend put mother in touch with the adoptive parents and they connected around the fourth or fifth month in her pregnancy. Mother testified she did not tell father about her meeting with the adoptive parents. During this time mother kept in contact with father, and he always had her phone number after she told him she was pregnant. She often communicated her unhappiness about how he was responding to the pregnancy. She testified, "I would call him on occasions. And I would be crying, and I'm telling him I don't have no support. My family is not supporting me. They don't want me having this baby. [¶] You promised me you're going to be here. You're not

⁵ Father disputed mother's testimony, and indicated he took her out to eat "four or five times," purchased food for her, and purchased some clothing and shoes for her. He testified he purchased "a couple little onesie outfits" for the minor.

here. You don't come to doctor's appointments. You don't do nothing. And that's just—and I have—I would always tell him the same thing.”

Mother said she made adoption plans during the pregnancy but “you know, there was still that option there you know. And I just wanted him to come through like he said he was going to and show me that he really did want this baby.” Mother said she continued to have conversations with father about him helping her with the pregnancy until the beginning of March when “I finally gave up on him supporting me.”

After mother told him she wanted to place the baby for adoption, father told her to make her prenatal appointments for Thursdays, and he would get off of work and take her to the appointments. She said she “made every appointment for Thursdays,” and called to remind him about the appointments, but he “never once came to any appointment.”⁶

On March 31, 2012, right after she had her ultrasound, mother said she went to go see father because she “wanted him to see her stomach.” She thought “maybe he would maybe support me a little bit more, be there for me if he saw that I was showing.” Mother testified, “he just kept telling me how I messed everything up.” She said he called her “a bitch. And he started telling me that I gave his pussy away.” He then “kept slapping me [in the face] until I was in tears.” He wouldn't let her go. He demanded she come over to him. She testified, “And then, the next thing, you know, [father] grabbed me by my hair and pulled me on the bed and made me pull my pants down. And he wouldn't let me get up.” Father then raped her. Mother testified he also threw her down the staircase.⁷

Lisa T. testified that “within the hour or so” after this incident, mother called her and told her father had beaten and raped her. Mother's friend testified that after this incident, mother told her father had “raped her and he put his hands on her

⁶ Father testified that the reason he never accompanied mother to her prenatal doctor appointments is that she was always cancelling and changing the dates.

⁷ Father denied ever physically abusing mother and denied raping her.

again.” She saw bruises on mother’s upper arms and face. She said it looked like mother had a black eye.

Mother did not tell the adoptive parents about father, “[b]ecause I was scared they wouldn’t want to adopt the baby.” Towards the end of the pregnancy, mother said she was talking to father “to see where his head was once more.” He told her he wanted custody of the baby, but she told him “[d]o you really honestly think that I want you to be in this child’s life let alone just hand over my child that I’ve been carrying all this time?”

The minor was born in Santa Rosa in May 2012. Immediately after his birth, mother placed the minor in the physical care of the adoptive parents. From the hospital, they took the minor to their San Mateo home. Mother arranged for Mr. L., who was a possible father, to sign documents, waiving his rights. Mother testified, “I was attempting to hide my son from an abusive man.”

She sent father a text message with a photo of the minor on June 4, 2012. The text message stated the baby looked just like “his dad.”⁸ She phoned him, misinforming him that she had given birth in Oregon, and falsely claiming she was still in Oregon. She also gave him an inaccurate date of birth. Later, after mother returned to Santa Rosa, she kept making excuses why he could not see the minor.

On June 12, 2012, father filed a petition in Sonoma County to establish a parental relationship. In doing so, father testified he “was stepping up to take responsibility for my child, to see my child, to contribute, to be a father to my child.” Around this time, he learned that mother had given the minor up for adoption and that an attorney would be contacting him.

On June 29, 2012, pursuant to section 7662, the adoptive parents filed a petition in San Mateo County to adopt the minor, identifying father as an alleged natural father, and requesting that father’s parental rights be terminated so that the adoption could proceed without his consent. Father filed opposition. On August 2, 2012, the

⁸ Paternity testing eventually established with a 99.99 percent certainty that he was the minor’s biological father.

Sonoma County Superior Court stayed father's action pending determination of the section 7662 proceeding in San Mateo.

Trial was held on the section 7662 petition. After trial, on December 7, 2012, father was found to be an alleged father with no rights to block the adoption, and his rights were terminated. Specifically, the court made a credibility determination in mother's favor and found father "did not meet his burden under *Kelsey S.* and that it was only after, apparently, he saw the picture of the child some time in June that he took any sort of meaningful action with regard to this child." Additionally, the court made a finding under section 7664, subdivision (b) that the minor's best interests were served by allowing adoption to proceed without father's consent.⁹ This appeal and writ petition followed.

III.

FATHER'S APPEAL

The principle issue raised by father on appeal is whether the trial court erred by finding he was not entitled to the right under *Kelsey S.* to withhold consent to the minor's adoption. In *Adoption of O.M.* (2008) 169 Cal.App.4th 672 (*O.M.*), this court set out the standard of review. "The burden is on a biological father who asserts *Kelsey S.* rights to establish the factual predicate for those rights. [Citation.] In reviewing the trial court's implied factual findings . . . with respect to whether [a biological father] met this burden, we apply the substantial evidence test. [Citation.] To the extent that the issue is a mixed question of law and fact, we exercise our independent judgment in measuring the facts against the applicable legal standard. [Citation.]" (*Id.* at pp. 678-680, fn. omitted.) In applying the substantial evidence test, we view the evidence in the light most favorable to

⁹ "Where a natural father does not have presumed father status under section 7611 or a constitutional right to block adoption under *Kelsey S.*, ' "the child can be adopted without his consent, and his parental rights can be terminated, unless the court determines it is in the child's best interest for him to retain parental rights. . . ." ' [Citation.]" (*Adoption of A.S., supra*, 212 Cal.App.4th at p. 215.) Father does not challenge the trial court's best interests finding, the effect of which was to terminate his parental rights to the minor. (§ 7664, subdivision (c).)

the trial court's findings. (*In re A.A.* (2003) 114 Cal.App.4th 771, 782.) We resolve all conflicts in the evidence and draw all reasonable inferences in favor of the judgment and do not reweigh the evidence. (*Ibid.*)¹⁰

In *Kelsey S.*, *supra*, 1 Cal.4th at page 849, the California Supreme Court held the equal protection and due process clauses of the United States Constitution guarantee an unwed, natural father the right to veto an adoption by withholding consent if the father meets certain conditions. "If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent." (*Ibid.*)

A court should consider a number of factors in determining whether an unwed, natural father's parental rights are entitled to constitutional protection. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) "The father's conduct both *before and after* the child's birth must be considered. Once the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate 'a willingness himself to assume full custody of the child—not merely to block adoption by others.'

¹⁰ We note that in deciding *In re I.W.* (2009) 180 Cal.App.4th 1517, the Sixth District Court of Appeal has held the classic substantial evidence standard is inappropriate where the challenged ruling is based upon the parents' failure to carry their burden of proof. The court held that where the issue on appeal turns on a failure of proof at trial, the question for the reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law, requiring that appellant's evidence be (1) " 'uncontradicted and unimpeached' " and (2) " 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*Id.* at p. 1528.) We need not, and do not, determine if the modified standard of review in *In re I.W.* is applicable and correct. Regardless of the standard of review that we apply to the court's ruling on the *Kelsey S.* determination, we conclude the court correctly determined that father had failed to satisfy his burden of proof. The evidence father relies on to contend that the court should have found he is a *Kelsey S.* father is by no means undisputed, nor is it of such weight and character as to " 'leave no room for a judicial determination that it was insufficient to support [the] finding.' [Citation.]" (*Ibid.*)

[Citation.] A court should also consider the father’s public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child.” (*Ibid.*, original italics, fn. omitted.) In a subsequent decision, *Michael H.*, *supra*, 10 Cal.4th 1043, the court clarified that time is of the essence, cautioning that a father “cannot compensate for his failure to [promptly come forward to offer support] by attempting to assume his parental responsibilities many months *after* learning of the pregnancy.” (*Id.* at p. 1054.)

Father contends the court erred in finding he did not fall within the class of fathers having constitutionally protected parental rights as enunciated by our Supreme Court in *Kelsey S.* and *Michael H.* Specifically, he claims “the court did not take into account . . . the mother’s fraudulent concealment of the adoption or his valid doubts whether the child was his.” He emphasizes that he filed his petition for custody immediately upon learning of the minor’s birth and assuring himself that he was indeed the father. He also contacted the mother asking to see the newborn minor but she thwarted his efforts. Furthermore, he emphasizes the mother hid father’s identity as the minor’s father from everyone involved in the adoption process, she lied to father about the date and location of the minor’s birth, and she allowed the minor to be taken from the hospital by the adoptive parents despite knowledge of father’s opposition to the adoption. Stating the mother “deliberately concealed [the adoption] from him and lied to everyone so that she could keep him from taking steps to assert and protect his rights,” father maintains the court erred in concluding he did not meet the *Kelsey S.* requirements.

Essentially, father asks that we disregard the evidence of his complete lack of interest in assuming the responsibilities of parenthood during the mother’s pregnancy, as well as the evidence of his callous disregard for the pregnant mother’s physical and emotional well-being, and instead only focus on the mother’s misrepresentations and the father’s interest in forming a parent-child relationship after the minor’s birth. However, this assertion fundamentally misconstrues the relevant timetable to be examined under *Kelsey S.* In a newborn adoption, the father’s opportunity to make a commitment to parenting must be grasped in a prompt and timely manner during the mother’s pregnancy,

not after the child's birth. In other words, the father must have " 'promptly' demonstrated a 'full commitment' to parenthood *during pregnancy* and within a short time after he discovered or reasonably should have discovered that the biological mother was pregnant with his child" (*Michael H.*, *supra*, 10 Cal.4th at p. 1054.)

In *Michael H.*, *supra*, 10 Cal.4th 1043, our Supreme Court emphasized that pre-birth action is essential to achieving the status of a *Kelsey S.* father. In *Michael H.*, the natural father agreed that the child should be placed for adoption. After the child was born, however, the father's commitment to parenting the child was " 'nothing short of impressive.' " (*Id.* at p. 1053, fn. omitted.) He promptly sought custody, sent out birth announcements, and bought baby supplies. (*Id.* at p. 1049.) The trial court found that the father's post-birth efforts were sufficient to render him a presumed father under *Kelsey S.*, and the Court of Appeal affirmed. (*Id.* at pp. 1049-1050.)

In reversing, the Supreme Court reasoned, "[T]he mother may well need emotional, financial, medical, or other assistance during pregnancy It can scarcely be disputed that prenatal care is critically important to both the mother and the child. [Citations.] To the extent the mother needs such critical assistance and the unwed father is able to provide it, the father, as one of the two individuals responsible for the pregnancy, should be encouraged to do so early on and should not be granted constitutional protection after birth if he has failed to timely fulfill this responsibility. Indeed, if unwed fathers are not encouraged to provide prenatal assistance when they are able to do so, the burden will often shift to the state and therefore to society generally. [Citation.] ¶] Furthermore, if an unwed father is permitted to ignore his parental role during pregnancy but claim it after birth, it will often be very difficult to know with certainty whether he will be able to successfully contest an adoption until after the child is born. This uncertainty could well dissuade prospective adoptive parents from attempting to adopt the children of unwed mothers who, like [the mother in *Michael H.*], have chosen for whatever reason not to keep their child and raise it themselves. And that result would frustrate the state's clear interest in encouraging such adoptions and providing stable homes for children. [Citations.]" (*Id.* at pp. 1055-1056; see also *O.M.*,

supra, 169 Cal.App.4th at p. 681 [“[T]he rationale underlying the *Kelsey S.* requirements, and particularly the need for timely provision to unwed mothers of ‘emotional, financial, medical, or other assistance during pregnancy’ [citation], militates against affording *Kelsey S.* rights to a biological father who has precluded himself from even attempting to provide such support”].)

Properly focused, we have no hesitation in concluding substantial evidence supports the trial court’s finding father is not entitled to presumed father status under *Kelsey S.* The record is replete with evidence father failed to take any affirmative steps manifesting a commitment to parenting responsibilities within a short time after he discovered or reasonably should have discovered that the mother was pregnant with his child. (*Michael H.*, *supra*, 10 Cal.4th at p. 1054.) Shortly after their relationship ended, during which mother and father both testified they were having unprotected sex, mother informed father of her pregnancy. However, father was indifferent to the possibility that his sexual relationship with mother had resulted in him fathering a child. The evidence established that throughout her pregnancy, the mother was in constant contact with father and repeatedly asked for his assistance. He showed no interest in helping her or learning more about the pregnancy. Even though mother set up medical appointments to accommodate father’s schedule and he assured her he would accompany her, he never showed up. Moreover, father did not provide mother any financial assistance for housing, clothing, or other pregnancy expenses despite the fact that he maintained steady employment. Instead, father was content to leave mother to manage a difficult, painful pregnancy alone, without funds or suitable housing and living on public assistance. In attempting to coax him into accepting some parental responsibility, the visibly pregnant mother brought him an ultrasound photo. He reacted by beating her, raping her, and then throwing her down the stairs. This brutal abuse reflects father’s total disregard for the well-being of the mother and his unborn child, which is the antithesis of promptly coming forward and demonstrating a full commitment to his parental responsibilities.

While making no explanation for his dangerous and violent behavior, father attempts to explain his complete inaction and indifference during the time the mother was

pregnant by indicating he made a decision to wait until he was absolutely certain mother was carrying his biological child before taking any parental responsibility. However, father knew he had unprotected sexual relations with mother over an extended period of time, which encompassed the dates of the minor's conception. Furthermore, father's writ petition, consolidated with this appeal, contains father's declaration that he knew that he "was probably the father" and told his relatives so.

Whatever interests might be served in allowing a presumed father to sit back and do nothing until a genetic link to the child is established, those interests remain subsidiary to the interests of the expectant mother in financial and emotional support during her pregnancy and to the interests of the child and prospective adoptive parents in a legal process free from eleventh-hour assertions of paternity. To hold otherwise, and find that doubts about paternity relieves a possible father from supporting the mother during her pregnancy, would ignore the holding in *Michael H.* That decision stresses that if a possible father wishes to assert his parental rights, he must act during the pregnancy to protect his rights. (*Michael H.*, *supra*, 10 Cal.4th at p. 1060; see, e.g., *In re D.A.* (2012) 204 Cal.App.4th 811, 824 [biological father with doubts about paternity established *Kelsey S.* father status when "[d]uring mother's pregnancy he expressed his desire for a genetic test to determine whether he was the baby's father, he took mother to prenatal medical appointments, and he offered to help with any associated expenses".]) Under

such circumstances, the law does not recognize a lack of absolute certainty about paternity as a justifiable reason for delaying making a commitment to the unborn child.¹¹

In conclusion, we find substantial evidence in this record amply demonstrates father's unwillingness to timely accept parental responsibility after he learned of mother's pregnancy. Therefore, it supports the trial court's conclusion that father was not entitled to presumed father status under *Kelsey S.*, which would have required his consent as a prerequisite to the minor's adoption. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 825.) Consequently, the order terminating father's parental rights must be affirmed on appeal.

IV.

PETITION FOR WRIT OF HABEAS CORPUS OR IN THE ALTERNATIVE WRIT OF MANDATE

Father contends, both in his appeal and the related writ petition, "he was prejudicially deprived of his constitutional due process right to effective assistance of counsel in the section 7662 proceeding" because his "attorney failed to ask the court to order that [the father] could have in-home visitation in order to achieve statutory presumed father status by receiving the child into his home and holding him out as his natural child."¹²

¹¹ We find *In re Julia U.* (1998) 64 Cal.App.4th 532, factually distinguishable. In *Julia U.*, the father had a mere casual relationship with the mother, resulting in only two acts of intercourse. (*Id.* at p. 541.) Further, the mother was sexually promiscuous with varying partners, and named three other men as the possible father. (*Ibid.*) On these facts, the court found weak evidence that the father had reason to suspect his paternity. (*Ibid.*) The instant case differs factually. Here, father and mother lived together during the time of the minor's conception. They engaged in repeated acts of intercourse without any birth control. Mother testified there was only one other possible father, Mr. L. She immediately informed father of the pregnancy, consistently sought his involvement and commitment to the unborn child, and told him on numerous occasions she believed he was the father. Thus, as compared to the father in *Julia U.*, father had much stronger reason to suspect his fatherhood.

¹² At least one Court of Appeal has concluded a petition for writ of habeas corpus may be used to collaterally attack an order terminating parental rights on the ground the parent was not afforded effective assistance of counsel. (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 462-463.) For purposes of our decision, we will assume likewise.

In making this argument, father bears the burden of proving his counsel's representation was deficient and the deficiency resulted in prejudice. (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.) "First, there must be a showing that 'counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms.' [Citations.] Second, there must be a showing of prejudice, that is, [a] 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*In re Emily A.* (1992) 9 Cal.App.4th 1695, 1711, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) "It is not necessary to examine whether counsel's performance was deficient before examining the issue of prejudice. [Citation.] A court may reject a claim of ineffective counsel if the party fails to show the result would have been more favorable but for trial counsel's failings. [Citation.]" (*In re N.M.* (2008) 161 Cal.App.4th 253, 270.)

By way of background, for purposes of adoption, presumed fathers "usually have a statutory right to veto adoption by withholding consent regardless of what the court believes to be the child's best interest. [Citation.]" (*Michael H., supra*, 10 Cal.4th at p. 1051.) In contrast, "[a] natural father's consent to an adoption of his child by third parties is not required unless the father makes the required showing that retention of his parental rights is in the child's best interest." (*Kelsey S., supra*, 1 Cal.4th at p. 825; see § 7664, subd. (b).)

Further, father's status as biological father based on genetic testing does not entitle him to the rights or status of a presumed father. "Because presumed fatherhood is based not on a biological connection but rather a man's *relationship* with the child (or the child's mother) . . . , genetic testing has no applicability in determining presumed father status. [Citation.]" (*In re Joshua R.* (2002) 104 Cal.App.4th 1020, 1026.) "This is because biological paternity is not a relevant factor in determining presumed father status under section 7611. [Citation.] Thus, 'it is irrelevant that the biological father can prove

his paternity or even that all parties to the proceedings may concede that [he] is the biological father.’ [Citation.]” (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 586.)

“In order to become a ‘presumed father,’ a man must fall within one of several categories enumerated in Family Code section 7611. Under Family Code section 7611, a man who has neither legally married nor attempted to legally marry the child’s natural mother cannot become a presumed father unless (1) he receives the child into his home and openly holds out the child as his natural child, or (2) both he and the natural mother execute a voluntary declaration of paternity. [Citations.]” (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595; *In re Liam L.* (2000) 84 Cal.App.4th 739, 746-747.)

When the matter was tried below, father did not argue for presumed father status based on any of these specifically enumerated statutory requirements; and there was no reason to do so, as the record shows he did not meet any of the statutory requirements for presumed fatherhood. Father was never married to mother, they never attempted to marry, and they did not jointly execute a voluntary declaration of paternity. (§ 7611, subds. (a)-(c).) Although father held the minor out to be his child after paternity was established, he did not “*physically* bring the child into his home,” which is required to satisfy section 7611, subdivision (d). (*Michael H., supra*, 10 Cal.4th at p. 1051; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585; *In re A.A.* (2003) 114 Cal.App.4th 771, 786-787 [father did not receive child into his own home even though he had visits in other people’s homes].) The record on the writ petition establishes that the one visit father had with the minor took place in his attorney’s office. Instead, father argued unsuccessfully that he was entitled to presume father status under *Kelsey S.*, a determination we have upheld on appeal.

Father argues that if he had had effective counsel, counsel would have sought and obtained in-home, father-child visits so that he could be deemed a statutorily presumed father under section 7611, subdivision (d). Assuming there were no procedural obstacles

to granting father's motion for visitation¹³ and the court was, in fact, receptive to ordering in-home visits for a child less than a year old, father still would not be able to meet his burden of showing that he would have been entitled to presumed father status under section 7611, subdivision (d).

“ ‘The statutory purpose [of section 7611] is to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.’ [Citation.]” (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.) “[A] presumed parent is not just a casual friend of the other parent, or even a long-term boyfriend or girlfriend, but someone who has entered into a familial relationship with the child: someone who has demonstrated an abiding commitment to the child and the child's well-being, regardless of his or her relationship with the child's other parent. [Citations.]” (*E.C.*, *supra*, 202 Cal.App.4th at p. 1085; *Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 239-240.)

Therefore, courts elaborating on the statutory requirement under section 7611, subdivision (d), that a presumed parent “receives the child into his home and openly holds out the child as his natural child,” have not analyzed this statutory language in a vacuum. Instead, they have required something more than a few court-ordered visits with the minor. (See *In re Cheyenne B.* (2012) 203 Cal.App.4th 1361, 1380 [evidence of occasional visits did not warrant finding man to be presumed father under § 7611, subd. (d)]; *In re D.M.* (2012) 210 Cal.App.4th 541, 550 [supervised, two-hour court-ordered visits with child were insufficient to show father received the child in his home under § 7611, subd. (d)].) Consequently, *even if* father's counsel had successfully persuaded the court to grant father a few in-home visits pending the section 7662 proceeding, that fact, standing alone, would not have qualified him as a section 7611, subdivision (d) presumed father.

¹³ We decline to judicially notice the legislative materials submitted by the adoptive parents on the stay provision located in subdivision (c) of section 7662 as this provision is irrelevant to our resolution of this issue.

Moreover, in “determining whether a man has ‘receiv[ed a] child into his home and openly h[eld] out the child’ as his own [citation], courts have looked to such factors as whether the man actively helped the mother in prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had acknowledged the child; whether he provided for the child after it no longer resided with him; whether, if the child needed public benefits, he had pursued completion of the requisite paperwork; and whether his care was merely incidental. [Citations.]” (*In re T.R.*, *supra*, 132 Cal.App.4th at p. 1211; *In re J.H.* (2011) 198 Cal.App.4th 635, 646; *E.C.*, *supra*, 202 Cal.App.4th at p. 1087.) While a parent need not satisfy each of these factors in order to attain presumed parent status, these factors assist the court in determining whether the parent has “entered into a familial relationship” with the child. (*Ibid.*)

As we have explained in great detail in the consolidated appeal, these factors overwhelmingly stack up against father in his attempt to achieve presumed father status. He showed absolutely no commitment to the mother or the minor’s well-being during the mother’s pregnancy. Although mother consistently asked for his help, he failed to provide her with any financial support, nor did he assist with necessary food, clothing, housing and medical care. He was emotionally and physically abusive toward mother and treated her with utter contempt. His conduct was a blatant violation of his parental responsibilities. A few court-ordered visits in father’s home would not have trumped all of these other factors.

Therefore, father does not belong to the preferred class of fathers that the Legislature intended to benefit because these fathers have established a positive familial bond. “If an individual can qualify for presumed father status based on his good deeds consistent with parental responsibilities, it follows that under certain circumstances he can be disqualified by repugnant conduct that is detrimental to the child. [Citations.]”

(*In re T.R.*, *supra*, 132 Cal.App.4th at p. 1212.) Father has no statutory claim to presumed parenthood. Thus, there is no reasonable probability “but for” counsel’s allegedly deficient performance, the result of the section 7662 proceeding would have been different. (*People v. Sapp* (2003) 31 Cal.4th 240, 263; *Strickland*, *supra*, 466 U.S. at p. 694.)

Father next claims his counsel was ineffective in failing to put on available evidence showing his commitment during mother’s pregnancy to parenting his child. In support of this argument, father submits declarations from his mother and sister, indicating that during mother’s pregnancy, father told his family that if the child was his, he was going to raise the child. They saw numerous items he bought in preparation for caring for the child, including a car seat, stroller, toys, blankets and clothing. They describe father as happy and excited at the prospect of raising his child and indicate that the entire family was looking forward to welcoming the child into their family. They conclude their declarations by stating they were willing to testify about father’s preparations to take custody and care for the minor, but father’s counsel never called them to testify. Father has submitted his own declaration stating he was willing to testify in greater detail, if he had been asked, about his preparations and intentions during mother’s pregnancy to assume custody and raise the child “if he was mine.”

But as we have explained, such evidence indicating an intention to assume parental responsibilities after the minor is born and proven to be father’s biological child is insufficient to overcome father’s failure to “promptly come[] forward and demonstrate[] a full commitment to his parental responsibilities—emotional, financial, and otherwise” during the mother’s pregnancy. (See *Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) Even if the declarants had testified at trial consistently with their declarations, the overwhelming evidence of father’s failure to assume his parental responsibilities under *Kelsey S.* would not have been rebutted. Therefore, father has failed to show that he suffered prejudice from the claimed ineffective assistance of counsel because it is not reasonably probable the outcome at trial would have been different. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1668.)

V.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus or in the alternative writ of mandate is denied.

RUVOLO, P. J.

We concur:

REARDON, J.

HUMES, J.