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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

In re KEVIN L., a Person Coming Under
the Juvenile Court Law..

H. T.,

Plaintiff and Respondent,

v.

MICHAEL L.,

Defendant and Appellant.

A138300

(City & County of San Francisco
Super. Ct. No. 022574)

Michael L. appeals from a judgment terminating his parental rights and freeing his son (now 13 years old) from his custody and control due to abandonment under Family Code section 7822.¹ He contends the court erred in denying a request for joinder by the child’s paternal grandmother and that substantial evidence does not support the court’s finding that he abandoned his son. We shall affirm.

Factual and Procedural Background

In January 2001, Michael and Lucy N. had a son. The parents’ relationship ended sometime before the child’s second birthday. When the child was about three, Michael moved to Texas. In 2004, Michael was arrested, convicted and sentenced to prison for a term of 24 years and four months. At Michael’s request he was transferred to a federal prison in California, where he remains incarcerated at this time.

¹ All statutory references are to the Family Code.

In 2006, Lucy was granted sole legal and physical custody of the child. At the same time, the paternal grandmother was awarded weekly visitation with the child. Pursuant to the terms of the visitation order, the grandmother was prohibited from allowing communication between Michael and the child without Lucy's consent. It is undisputed that since 2006, there has been no direct communication between Michael and Lucy or his son.

In 2011, Lucy married petitioner H.T. The couple had been dating since 2003 and H.T. has been a father figure to the child throughout the couple's relationship. On October 10, 2012, H.T. filed a petition to declare the child free from Michael's custody and control so that he could adopt the child. On January 22, 2013, the paternal grandmother filed a petition for joinder in the proceedings. Grandmother's petition was denied at the start of trial on February 1, 2013.

On March 4, 2013, the court terminated Michael's parental rights after finding by clear and convincing evidence that Michael left his son with Lucy without provision for support and without communication for well over a year with the intent to abandon the child. Michael filed a timely notice of appeal.

Discussion

1. *The court did not err in denying grandmother's request for joinder.*²

Under California Rules of Court, rule 5.24 "A person who claims . . . an interest in any matter subject to disposition in the proceeding may be joined as a party to the family law case only as provided in this chapter." Subdivision (c)(2) authorizes "[a] person who has or claims custody or physical control of any of the minor children subject to the action, or visitation rights with respect to such children, [to] apply to the court for an order joining himself or herself as a party to the proceeding."

In this case, grandmother argued that joinder was necessary to protect her visitation rights. The court denied grandmother's request for joinder, explaining that the

² We question Michael's standing to appeal from an order denying grandmother's motion and affecting only her rights. However, since neither party has raised or addressed the issue, we shall consider the merits of Michael's contention.

issue before the court “is very narrow. It is whether the biological father’s parental rights will be terminated. And this court is not going to make any orders regarding visitation. . . . The fact that the biological grandmother does have her own case open in which there is a visitation order, I think that that is the place to address the issues that grandmother seeks to have protected.”

On appeal, Michael contends the court erred in denying joinder because the decision on H.T.’s petition sets in motion a series of events that will directly and necessarily lead to termination of grandmother’s visitation rights. He suggests that if his parental rights are terminated and H.T. adopts the child, H.T. and Lucy, as a married couple, may move to terminate grandmother’s visitation order and the court will be required to grant their motion under section 3104, subdivision (b). We disagree.

A grandparent’s right to visitation is statutory. (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 219.) As applicable here, section 3104, subdivision (a) authorizes the court to grant reasonable visitation rights to a grandparent if the court “(1) Finds that there is a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child [and] (2) Balances the interest of the child in having visitation with the grandparent against the right of the parents to exercise their parental authority.” Subdivision (b) provides, however, “A petition for visitation under this section may not be filed while the natural or adoptive parents are married, unless one or more of the following circumstances exist: [¶] (1) The parents are currently living separately and apart on a permanent or indefinite basis. [¶] (2) One of the parents has been absent for more than one month without the other spouse knowing the whereabouts of the absent spouse. [¶] (3) One of the parents joins in the petition with the grandparents. [¶] (4) The child is not residing with either parent. [¶] (5) The child has been adopted by a stepparent. [¶] At any time that a change of circumstances occurs such that none of these circumstances exist, the parent or parents may move the court to terminate grandparental visitation and the court shall grant the termination.” Because Michael’s son will be a “child [who] has been adopted by a

stepparent,” grandmother is protected from the automatic termination of visitation rights based on changed circumstances. (*Finberg v. Manset* (2014) 223 Cal.App.4th 529.)

Michael’s reliance on *Lopez v. Martinez* (2000) 85 Cal.App.4th 279 is misplaced. In *Finberg* the court explained, “Subdivision (b)(5) was added in response to *Lopez v. Martinez* (2000) 85 Cal.App.4th 279. In *Lopez*, the natural father was absent and his whereabouts were unknown. [Citation.] The maternal grandparents were involved in the child's care for years while the mother lived with them. The mother remarried and moved from her parents' home to her new husband's home, and discontinued contact with her parents. The grandparents successfully petitioned for visitation pursuant to section 3104, subdivision (b)(2) [one parent's whereabouts unknown]. But when the stepfather adopted the child, the court was forced to terminate that visitation pursuant to section 3104, subdivision (b) [change of circumstances]. The appellate court wrote, ‘We recognize this may be one of those relatively rare cases where adherence to a statutory rule may work an injustice in the particular case. Indeed it may prove to be inconsistent with the best interest of this particular child [T]he grandparents essentially functioned as the child's parents during his early formative years. Nonetheless, we find the statutory language clear and unambiguous and, of course, binding on this court.’ [Citation.] [¶] The Legislature used ‘common sense’ in drafting its response to *Lopez* by adding subdivision (b)(5) to ‘remove the possibility of a stepparent preventing visitation with the child by adopting that child.’ ” (*Finberg v. Manset, supra*, 223 Cal.App.4th at pp. 112-113.)

Michael’s reliance on the rebuttable presumption found in section 3104, subdivision (e) is similarly misplaced.³ Michael may be correct that if H.T. successfully adopts the child and he and Lucy agree that grandmother’s visitation rights should be terminated, a rebuttable presumption will arise that grandparent visitation is not in the child’s best interest. A rebuttable presumption, however, is not the same as automatic termination. Grandmother will have the opportunity to rebut the presumption based on

³ Section 3104, subdivision (e) provides: “There is a rebuttable presumption that the visitation of a grandparent is not in the best interest of a minor child if the natural or adoptive parents agree that the grandparent should not be granted visitation rights.”

her preexisting relationship with the child. Indeed, in 2006, the court determined that the relationship between the grandmother and the grandchild “has engendered a bond such that visitation is in the best interest of the child.” (§ 3104, subd. (a)(1).) Under these circumstances, the trial court reasonably concluded that resolution of the visitation issues should be addressed in the visitation proceedings and not in the proceedings now before us.

2. *Substantial evidence supports the court’s findings under section 7822.*

Section 7822 authorizes the court to declare a child free from the custody and control of a parent who “has left the child in the care and custody of the other parent for a period of one year without any provision for the child’s support, or without communication from the parent, with the intent on the part of the parent to abandon the child.” (§ 7822, subd. (a)(3).) “[F]ailure to provide support[] or failure to communicate is presumptive evidence of the intent to abandon.” (§ 7822, subd. (b).) If a parent has “made only token efforts to support or communicate with the child, the court may declare the child abandoned” (*Ibid.*)

We review the trial court’s findings under section 7822 for substantial evidence. (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010.) “Under the substantial evidence standard of review, ‘[a]ll conflicts in the evidence must be resolved in favor of the respondents and all legitimate and reasonable inferences must be indulged in to uphold the judgment.’ ” (*Id.* at pp. 1010–1011.)

The evidence is largely undisputed that Michael left his son in Lucy’s care and custody when he moved to Texas and that he had no contact with either his son or Lucy after 2006. Although Michael offered into evidence some letters, cards and gift tags from Christmas presents that he apparently sent to his mother to give to his son, the cards were never passed along to the child and the gifts were given without attribution. The trial court reasonably concluded that these token attempts at communication were not sufficient to demonstrate an intent to maintain a parental relationship with the child.

Michael's lack of communication is presumptive evidence of the intent to abandon. (§ 7822, subd. (b); see *Adoption of Allison C.*, *supra*, 164 Cal.App.4th at p. 1013.)

Michael argues that his failure to communicate cannot establish an intent to abandon because Lucy prohibited all communication between him and his son. The trial court acknowledged that the 2006 custody order required Lucy's consent before any such communication was permitted and that "[i]n observance of the court order, the paternal family did not talk to [the child] about [Michael] nor allow [Michael] contact with [the child] when he visited." The court found, however, that "[a]lthough [Michael] was aware of the custody visitation court order, he never brought a court challenge nor sought modification." The court reiterated that Michael "voluntarily did nothing to modify the order or to establish any communication with [his son or Lucy]. The uncontradicted evidence is that [Michael] intentionally abandoned [his son], preferring that [Lucy] continue to provide sole support for and legal authority over [the child], while [Michael] learned about [his son] from his family who continued to visit regularly with [the child]."

Michael disputes the finding that he did nothing to attempt to change the custody order, claiming that he wrote to Lucy on three occasions and also wrote to the family court seeking assistance. The court acknowledged Michael's claim that he wrote three letters to Lucy seeking her permission to contact the child, but found, based on Lucy's testimony, that "no such letters were received by [Lucy] and that [Michael's] allegations in this regard are not credible." With respect to his attempt to contact the family court, the record contains a copy of a letter written in January 2007 by Michael to a family court commissioner, in which he explains that Lucy is preventing him from having contact with his son and asks the commissioner to grant him the right to communicate with him. The record also contains the reply written in March 2007 by the family law facilitator for the superior court which reads, "As judicial officers are prohibited from receiving mail directly from litigants who have pending cases in the court, your letter was routed to our office so that your questions and concerns could be addressed. [¶] If you wish to have your request heard by Commissioner Slabach, you will need to enlist the aid of family members to assist you obtaining and preparing the necessary paperwork. If I recall, your

brother visited our Family Law Self-Help Center . . . a number of times in helping your mother beg[i] n the process of establishing her visitation orders. We would be happy to assist any of your relatives or friends who could visit our Center.” Despite this advice and offer of assistance, Michael made no further attempt to secure the right to communicate with his child after 2007.

Finally, Michael argues that his lack of communication was not the product of an intent to abandon but rather was caused by his fear that Lucy would retaliate by restricting his mother’s visitation if he sought assistance from the court. The court rejected this argument, stating, “The court does not find credible any testimony regarding fear of retaliation by [Lucy] against the paternal family if a request were made to modify the custody/visitation orders.” The record establishes that Michael’s family had successfully used the courts in 2006 to protect grandmother’s visitation rights when Lucy initially stopped visitation following Michael’s incarceration and that, while there is ongoing animosity between Lucy and the paternal family, there is no evidence that Lucy previously engaged in retaliatory behavior. Lucy testified, and the family did not dispute, that she always complied with the visitation orders, even when she was not living in San Francisco. She also testified that it was never her intent “to bar visitation or any contact that Michael would have in good faith attempted” with his son. She just “wanted to be able to make certain decisions for [her son] . . . particularly with what . . . and when he was told about where his biological father was.” The record supports the court’s finding that Michael’s alleged fear of Lucy lacked credibility and did not excuse his failure to act.

Michael’s reliance on *In re Jack H.* (1980) 106 Cal.App.3d 257, 264-265 is misplaced. In that case, the child had been removed from mother’s custody and placed in a foster home. The trial court terminated mother’s parental rights in part based on a finding that mother’s failure to communicate with the child demonstrated an intent to abandon. The appellate court reversed the abandonment finding because the trial court had applied an improper quantitative analysis of the mother’s communication with her child and failed to examine the genuineness of the mother's efforts to communicate under all the circumstances. (*Id.* at p. 265.) The appellate court noted that the foster mother and

social worker had placed restrictions on mother's communications with the child and that the record was unclear whether the trial court had considered the mother's good faith belief that the restrictions were greater than they actually were. (*Id.* at pp. 264-265.) The Court of Appeal emphasized that the factual uncertainty as to mother's good faith belief was "critical since the mother's subjective intent to abandon is the controlling issue." (*Ibid.*, italics omitted.) In the present case, however, the court clearly considered Michael's claim that he did not discuss visitation with Lucy or seek modification from the court because he was afraid she would retaliate against his family and found that the assertion lacked credibility. Thus, the court rejected the notion that Michael's failure to act was the product of a good faith belief that doing so would be detrimental to his mother's relationship with the child. Moreover, unlike in *In re Jack*, *supra*, at page 265, in which the trial court found that the mother "maintained an 'honest desire to have the children,' " the court in this case found that Michael had no desire to directly parent his son, preferring instead to allow Lucy to shoulder the responsibilities of parenting and to learn about his son through his parents.

The record thus supports the court's finding under section 7822 and the order must be affirmed.

Disposition

The order terminating parental rights is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Jenkins, J.