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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

Adoption of L. J., a Minor.	
G. S.,	C070964
Plaintiff and Respondent,	(Super. Ct. No. 11FCO04440)
v.	
J. J.,	
Defendant and Appellant.	

J. J. (appellant) is the biological father of L. J. He appeals from a court order freeing L. J. from appellant's parental custody and control under Family Code[1] section 7822. On appeal, appellant argues there was insufficient evidence to prove he intended to abandon L. J. within the meaning of section 7822. We disagree and affirm.

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[1] Subsequent statutory references are to the Family Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

A

Family History

Mother and appellant were married in April 2005. One year later, L. J. was born. In July 2007, mother and appellant separated; mother moved in with her parents in Yorba Linda, California, taking L. J. with her. Shortly thereafter, mother obtained a temporary restraining order against appellant. Appellant was properly served with the temporary restraining order, which included notice of an upcoming hearing on a permanent restraining order. Despite receiving notice, appellant did not attend that hearing.

The Superior Court of California in Riverside County subsequently issued a three-year domestic violence restraining order prohibiting appellant from contacting, either directly or through third parties, mother, L. J., and L. J.'s half brother. Attached to the restraining order was a custody order, granting sole legal and physical custody of L. J. to mother and denying appellant visitation. At or about the same time mother obtained the permanent restraining order, a criminal complaint was filed in Riverside County charging appellant with domestic violence. That charge was later reduced to a misdemeanor for disturbing the peace.

In the fall of 2008, the Superior Court of California in Orange County ordered appellant to pay $900 a month in child support for L. J.[2] From the outset, appellant's child support payments were "sporadic." Appellant made partial support payments through a wage garnishment order in January and February 2009, but paid no child support between March 2009 and January 2010. Thereafter, appellant made partial child support payments through a wage garnishment order.

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[2] Child support was being litigated in a separate action by the Orange County Department of Child Support Services.

In July 2009, following a contested hearing where mother, appellant and L. J. each were represented by separate counsel, mother and appellant obtained a judgment in Orange County Superior Court dissolving their marriage. Included in that judgment was an order granting mother sole legal and physical custody of L. J. and awarding appellant supervised visitation with L. J. for three hours every Saturday. The order allowed appellant to use either a "non-professional" to supervise his visits with L. J., provided that person was approved by mother, or choose from the list of professional supervisors included in the order.

In October 2010, after living with her parents for three years, mother married G. S. and moved to Amador County. In January 2011, in Amador County, G. S. filed a petition to declare L. J. free from appellant's custody and control so that G. S. could adopt her. In support of his petition, G. S. argued appellant abandoned L. J. by failing to communicate with her or provide her with support in the 12 months preceding the petition. Appellant, who had not had any contact with L. J. since July 2007, opposed the petition and the matter went to trial.

B

Trial On The Petition To Free L. J. From Appellant's Custody

The first trial on the petition to free L. J. from appellant's custody and control, which began on August 23, 2011, ended in a mistrial. The second trial began on January 18, 2012.

1. *Mother's Testimony*

Mother explained she obtained the domestic violence restraining order against appellant because he was physically and verbally abusive to her during their marriage. While she was pregnant with L. J., appellant kicked her in the stomach, punched her in the face, held knives to her throat, and threatened her. Because of appellant's violent conduct, mother previously filed a petition in Orange County to terminate his parental rights to L. J., but she could not locate appellant to serve him with the petition.

Appellant had no contact with L. J. after mother left him in July 2007. Before she moved to Amador County in 2010, however, mother lived with her parents; appellant knew mother's parents and he knew where they lived. Mother believed appellant was permitted to contact L. J. through her parents if his contact was peaceful, but his contact with her parents had not been peaceful and after making threatening and harassing phone calls to mother's parents, they obtained a criminal protective order against him. Mother also believed appellant was permitted to contact L. J. through mother's attorney, but he never did. In any event, mother maintained a current address with the Orange County Department of Child Support Services.

In July 2009, appellant was granted supervised visitation with L. J., but he never exercised that right. According to mother, it was not until six months after the petition to free L. J. from appellant's custody was filed that appellant made any effort to contact L. J. Then, in the spring of 2010, appellant filed a motion seeking visitation, and in November 2011, appellant sent L. J. a gift for the first time -- a sweatshirt. L. J., six years old at the time of trial, recognized G. S. as her father, though she knew he was not her biological father. L. J. only knew appellant's name, she had no memory of him.

At the time of trial, appellant owed mother approximately $25,000 in child support arrears. The last support payment she received from appellant was for $22, and his payments were always made through a wage garnishment order.

2. *Appellant's Testimony*

At the time of trial, appellant lived in Riverside County with his girlfriend, who supported him financially. He admitted to losing his nursing license as a result of violating the restraining order obtained by mother. He explained that, after he violated the order, his nursing license was suspended and he was put on probation. When appellant completed the paperwork to have his license reinstated, he omitted the number

of times he violated the restraining order.[3] Appellant claimed the omissions were inadvertent, he thought he had provided the correct information. He nevertheless lost his nursing license.

After losing his nursing license, appellant's only source of income was his unemployment benefits. He became a certified parenting and anger management instructor but worked only as a volunteer. He was, however, trying to turn his volunteer work into a business that would provide parenting, coparenting, anger management, and batterer's intervention classes. He anticipated that business would generate income from which he could pay child support.

Appellant said he never intended to abandon L. J., but admitted he had not seen her in nearly four years. He said he did not attend the hearing on the permanent restraining order because, at the time, he and mother were "communicating" and had agreed to go to counseling. Then, the morning of the hearing on the permanent restraining order, mother told him not to attend, to go to work instead because they needed the money. He indicated mother told him she would not be attending the hearing. Following the time scheduled for that hearing, according to appellant, mother continued to text him and talk to him on the phone. Appellant said he did not know about the permanent restraining order until later, when his family law attorney advised him the court had issued the order. Criminal charges were then filed against him for domestic violence.

Appellant acknowledged that in 2009 he was awarded supervised visitation with L. J., but said he could not afford to pay for the supervision. He also said he was "advised" to settle the pending criminal charge of domestic violence before he "made

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[3] The trial court noted appellant was "reluctant" to testify about the restraining order violations. Appellant would do nothing more than estimate he violated the order approximately five times.

any attempts to see [L. J.]." He was advised not to see L. J. while the criminal case was pending.

Once the criminal charges were resolved, appellant said he contacted "the supervising agency" to arrange visitation with L. J., but he no longer knew where mother and L. J. were living. He did not contact mother's parents to find L. J. because their relationship with him was "not good," and he was "worried" about violating the restraining order again. He said he did try to contact mother through her attorney of record but received no response. At some point, appellant received a substitution of attorney, pursuant to which mother's attorney of record "subbed . . . out." Mother's attorney returned to the case approximately 14 months later when the petition to free L. J. from appellant's custody was filed. Appellant had no contact with mother's attorney in the interim.

When asked about child support, appellant said he paid support whenever he had income. It was also his understanding that, absent an agreement to the contrary, all child support in Orange County was paid through wage garnishment orders. He and mother had no such agreement. Appellant admitted he made no provisions for L. J.'s support while he was unemployed, but noted he had made no provisions to support himself either. At the time of trial, he believed the order for child support required him to pay $160 per month.

Appellant also admitted his parental rights to another of his children had been terminated because he failed to pay child support or contact the child for a year. The mother of that child also obtained a domestic violence restraining order against appellant. Appellant has a third minor child, 16 years old at the time of trial, whom he had not seen since 2007. That child's mother also obtained a restraining order against appellant, but the order had terminated and he said he was making efforts to see that child. Appellant also has two adult children, twins, with whom he claimed to have a good relationship.

3. *Trial Court's Ruling*

The trial court took the matter under submission and issued a written decision on February 14, 2012. The court granted the petition to free L. J. from appellant's custody. In reaching its decision, the court found L. J. did not know appellant; she considered G. S. to be her father. The court also found there were numerous means by which appellant could have located L. J. and mother after he was granted supervised visitation but failed to make any "significant" effort to do so. The trial court expressly found incredible appellant's testimony that he did not maintain contact with L. J. because mother "hid" the minor from him.

The trial court further found that even if he could not locate L. J., appellant could still have supported her financially but he did not. As noted in the trial court's decision, at the time of trial, appellant had paid a total of only $1,300 in child support. In sum, the court ruled there was clear and convincing evidence appellant intended to abandon L. J. Moreover, G. S. was the only father L. J. had ever known. It was, therefore, in L. J.'s best interests to free her from appellant's custody so G. S. could adopt her.

DISCUSSION

Appellant argues there was insufficient evidence to support the court's order terminating his parental rights. He concedes he had no contact with the minor for the four years preceding the petition, but argues that was not his fault. He further argues that during the same period, he paid as much support for the minor "as . . . he was able" given his "circumstances." We are not persuaded.

A

Legal Principles

A proceeding to have a child declared free from the custody and control of a parent may be brought under section 7822 where "[o]ne parent 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), italics added.) A parent's "failure to communicate" with the child for a period of one year or more "is presumptive evidence of the intent to abandon. If the parent [has] made only token efforts to . . . communicate with the child, the court may declare the child abandoned by the parent . . . ." (§ 7822, subd. (b).)

Whether a parent has intentionally abandoned a child within the meaning of section 7822 is a question of fact for the trial court. (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1011.) We review the court's findings for substantial evidence -- evidence that is reasonable, credible and of solid value. (*Ibid*.) Our review does not permit us to consider the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the trial court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding or order. (*In re L. Y. L.*, at p. 947, *Adoption of Allison C.*, at p. 1011.)

B

Appellant Failed To Maintain Contact With L. J. For The Statutory Period

Appellant contends there is insufficient evidence he intended to abandon L. J. He concedes he failed to maintain contact with L. J. for more than the statutory period. He also concedes such a failure gave rise to the presumption he intended to abandon L. J. He nevertheless argues he rebutted the statutory presumption. We disagree.

1. *The July 2009 Order Granting Appellant Supervised Visitation Superseded The Prior No-Contact Order*

Appellant first contends the restraining order prevented him from contacting L. J. until it expired in July 2010, six months before the petition to free L. J. from his custody was filed. The record does not support appellant's contention.

In July 2009, nearly 18 months before the petition to free L. J. from appellant's custody was filed, the trial court granted appellant supervised visitation with L. J. every Saturday for three hours. Appellant never exercised that right. He now argues he did not contact L. J. after he was granted supervised visitation because the order granting him supervised visitation conflicted with the restraining order and "the restraining order takes priority over the judgment." Appellant is wrong.

The restraining order issued was not a "protective order issued in a criminal case on Form CR-160," which "takes precedence in enforcement over any conflicting civil court order. (Pen. Code, § 136.2(e)(2)." Nor was it "[a]n emergency protective order (Form EPO-001) that is in effect between the same parties," which "is more restrictive than other restraining orders [that] takes precedence over all other restraining orders. (Pen. Code, § 136.2.)" Rather, it was a domestic violence restraining order issued pursuant to section 6200 et seq. It is not, therefore, in the class of restraining orders that take precedence over subsequent, conflicting civil orders. (See Pen. Code, § 136.2, subd. (e) [addressing restraining orders issued by a criminal court after criminal charges are filed for domestic violence].)[4]

Indeed, section 3031 expressly provides that under certain circumstances, a custody order is enforceable, even if it conflicts with a previously issued restraining order: "(a) Where the court considers the issue of custody or visitation the court is encouraged to make a reasonable effort to ascertain whether or not any emergency protective order, protective order, or other restraining order is in effect that concerns the parties or the minor. The court is encouraged not to make a custody or visitation order

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[4] Appellant testified criminal charges of domestic violence were filed against him, however, there is no evidence in the record he was ever subject to a criminal restraining order.

that is inconsistent with the emergency protective order, protective order, or other restraining order, unless the court makes both of the following findings:

"(1) The custody or visitation order cannot be made consistent with the emergency protective order, protective order, or restraining order.

"(2) The custody or visitation order is in the best interest of the minor.

"(b) Whenever custody or visitation is granted to a parent in a case in which a domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the custody or visitation order shall specify the time, day, place, and manner of transfer of the child for custody or visitation to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members. . . .

"(c) When making an order for custody or visitation in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the court shall consider whether the best interest of the child, based upon the circumstances of the case, requires that any custody or visitation arrangement shall be limited to situations in which a third person, specified by the court, is present, or whether custody or visitation shall be suspended or denied."

Here, the record does not include a reporter's transcript of the hearing related to the July 2009 order for supervised visitation. We must, therefore, presume the trial court properly executed its duty in using reasonable efforts to ascertain whether there was a restraining order in effect before determining the order for supervised visitation was in L. J.'s best interest. (See Evid. Code, § 664 [it is presumed that official duty has been regularly performed]; see also *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583 [we must adopt all inferences in favor of the judgment].) Such a presumption is further supported by the fact that appellant, mother, and L. J. each were represented by counsel at that hearing and the order for visitation was detailed and specific, as contemplated by

section 3031. Thus, the restraining order did not supersede the later issued order for supervised visitation.

Similarly, and contrary to appellant's claim, the custody order attached to the restraining order did not supersede the subsequently issued order for supervised visitation. Thus, appellant's claim that the restraining order prevented him from maintaining contact with L. J. after July 2009, fails.

2. *There Is No Evidence Appellant Made Any Effort To Find A Nonprofessional Person To Supervise Visitation With L. J.*

Appellant further contends he did not contact L. J. after the order for visitation was issued because he could not afford to pay for professionally supervised visits. Appellant was not, however, limited to professional supervision. The order for visitation allowed either a "*non-professional person* who is selected by [mother], *or* a professional person from any of the following named groups" to supervise appellant's visits with L. J. (Italics added.) There is no evidence in the record that appellant made even a token effort to find a nonprofessional person to supervise his visits with L. J. Accordingly, this argument also fails.

3. *Appellant Made No Real Effort To Locate L. J. After He Was Granted Supervised Visitation*

Appellant's claim that he could not locate L. J. after he was granted supervised visitation is not supported by the record. Appellant makes numerous excuses for his claimed inability to find L. J.: he was afraid of mother's parents, mother's attorney would not return his calls, mother no longer had an attorney, or he was afraid of violating the restraining order again. Appellant made these same arguments in the trial court. The trial court was not persuaded and neither are we.

Appellant had no trouble violating the restraining order to have inappropriate contact with mother's parents, yet could not bring himself to contact them in order to make contact with L. J. Appellant and mother were both represented by counsel when

the order for visitation issued, yet appellant made no effort to utilize counsel as a conduit for making contact with L. J. or scheduling visitation. Moreover, as noted by the trial court, mother always had a current address on file with the Orange County Department of Child Support Services; she never made her whereabouts a secret.

C

Substantial Evidence Supports The Trial Court's Decision

In sum, there is substantial evidence to support the trial court's decision that appellant's excuses are just that -- excuses. He made no real effort to contact L. J. during the nearly year and one-half he was permitted supervised visitation with the child before G. S. filed his petition. Appellant has, therefore, failed to rebut the presumption that his failure to maintain contact with L. J. for the statutory period established his intent to abandon the child. We thus affirm the trial court's order.[5]

DISPOSITION

The order of the court is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

DUARTE, J.

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[5] Because we resolve the issue of abandonment by finding appellant failed to maintain contact with L. J. for one year, we need not address whether he also demonstrated his intent to abandon L. J. by failing to support L. J. for 12 months prior to G. S. filing the petition to free L. J. from appellant's custody.