

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re AVA B., a Minor.

H.L. et al.,

Petitioners and Appellants,

v.

JOSHUA B.,

Objector and Respondent.

D060601

(Super. Ct. No. A57559)

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Affirmed.

Joshua B. appeals a judgment terminating his parental rights to his minor daughter, Ava B., on the basis of abandonment under Family Code section 7822.¹ Joshua contends: (1) the evidence showed he rebutted the presumption of intent to abandon Ava; (2) the court violated his rights to due process and a fair hearing by denying him the

¹ Statutory references are to the Family Code.

opportunity to call a key witness in support of his theory Ava's mother, Jessica L., used undue influence and coercion to prevent him from contacting Ava; and (3) Jessica should be estopped from benefiting from section 7822. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Ava was born in Maryland in May 2007. Joshua was present at Ava's birth and was named as her father on her birth certificate. In March 2008 Jessica and Joshua ended their relationship. The next month, Jessica moved with Ava to San Diego. Joshua knew where Jessica and Ava lived and had sporadic contact with them.

In April 2009 the court in Maryland granted physical custody of Ava to Jessica, and joint legal custody of her to Joshua and Jessica. A visitation order provided for visits between Joshua and Ava to occur every other month, alternating between California and Maryland. Joshua was to provide 30 days notice to Jessica before visiting Ava in California. Joshua was also ordered to pay child support.

On October 9, 2009, Jessica married H.L. The next day, Joshua arrived in San Diego for a visit with Ava. Jessica would not allow the visit to occur because she, H.L. and Ava were leaving on a family vacation and Joshua had not given Jessica sufficient notice of the visit.

In April 2010 jurisdiction was transferred to San Diego. Jessica was awarded sole legal and physical custody of Ava, and Joshua was ordered to have a three-hour supervised visit in San Diego. Joshua did not visit Ava after June 2009 and did not make any child support payments after December 2009.

In March 2011 H.L. filed a petition under section 7822, seeking to free Ava from Joshua's custody and control on the ground Joshua had not communicated with or supported Ava for a period of one year.² The petition was filed as a companion matter to H.L.'s stepparent adoption petition.

At the hearing on the petition, Joshua testified he knew Ava and Jessica's address and telephone number in San Diego. He said he last saw Ava in June 2009 when she was two years old, and continued to talk to her on the telephone until Jessica prevented him from doing so. Jessica would not allow Joshua to see Ava when he came to San Diego in October 2009 for a visit. Joshua claimed he made two child support payments. The last payment was at the end of 2009 or beginning of 2010.

Jessica testified she never prevented Joshua from talking to Ava by telephone. She said Joshua never sent cards or gifts to Ava.

Joshua's counsel told the court he wanted to call a witness, John R., who was not currently available. Counsel explained John had accompanied Joshua to San Diego in October 2009 and could attest to the fact that Jessica acted in bad faith with respect to Joshua's attempt to exercise his visitation rights. The court gave Joshua's counsel the opportunity to contact John by telephone. When counsel was unsuccessful, he presented no further evidence.

After considering the evidence and arguments of counsel, the court granted H.L.'s and Jessica's petitions and declared Ava free from Joshua's custody and control. The

² Jessica filed a consent and joinder to the petition.

court found Joshua intended to abandon Ava by not contacting her or paying child support for more than a year. The court further found Ava's best interests would be served by allowing H.L. to adopt her.

DISCUSSION

I

"Section 7800 et seq. governs proceedings to have a child declared free from a parent's custody and control. The purpose of such proceedings is to promote the child's best interest[s] 'by providing the stability and security of an adoptive home.' (§ 7800.) The statute is to 'be liberally construed to serve and protect the interests and welfare of the child.' (§ 7801.)" (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1009-1010.)

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).)³ A parent's "failure to provide support, or 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 support or communicate with the child, the court may declare the child abandoned by the parent" (§ 7822, subd. (b).)

³ Although the statute requires lack of support *or* communication (§ 7822, subd. (a)(3)), the court's findings here were based on Joshua's failure both to support and communicate with Ava.

Whether a parent has intentionally abandoned a child within the meaning of section 7822 is a question of fact for the trial court, which it resolves by objectively measuring the parent's conduct rather than the parent's subjective claims. (*Adoption of Allison C.*, *supra*, 164 Cal.App.4th at p. 1011; *In re Amy A.* (2005) 132 Cal.App.4th 63, 69; *In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1212.) The trial court considers the frequency of the times the parent tried to communicate with the child, the genuineness of the effort under all the circumstances and the quality of the communications that occurred. (*In re B.J.B.*, *supra*, at p. 1212.; *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.)

We review the court's findings for substantial evidence—evidence that is reasonable, credible and of solid value. (*Adoption of Allison C.*, *supra*, 164 Cal.App.4th at p. 1011.) 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 Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) 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.* (2002) 101 Cal.App.4th 942, 947; *Adoption of Allison C.*, *supra*, at p. 1011.)

Here, the undisputed evidence shows that at the time the petition was filed, Joshua had not communicated with Ava or supported her for more than a year. His claim he did not intend to abandon Ava is insufficient to overcome the presumption of intent to

abandon and is contradicted by other evidence in the record. Further, Joshua presented no evidence that his disabilities or financial situation prevented him from calling, writing or simply inquiring about Ava's well-being. From this evidence, the court could reasonably find Joshua intended to abandon Ava during the one-year statutory period before the petition was filed. (See *In re Daniel M.* (1993) 16 Cal.App.4th 878, 885.)

Joshua claims Jessica interfered with his efforts to communicate with Ava. The court, however, disbelieved him. Instead, the court found Jessica credible when she testified she would never prevent Joshua from speaking with Ava or maintaining a relationship with her. Although Jessica did not make Ava available for a visit with Joshua in October 2009 because of a planned family vacation, this does not explain or excuse Joshua's failure to ever again visit or communicate with Ava, or send any child support.

Moreover, if Joshua believed Jessica was somehow preventing him from having contact with Ava, he should have availed himself of the opportunity to enforce the court's visitation order or seek a different order. He had previously used the court system and knew how to do so. "[T]he reality is that parents sincerely interested in maintaining contact, whether by telephone, card or personal visit, with their children, or with the persons responsible for their care, will do so under ordinary circumstances in any [one-year] period." (*In re Rose G.* (1976) 57 Cal.App.3d 406, 420.) The court could reasonably infer from Joshua's lack of interest in Ava that his failure to support or communicate with her for more than a year was motivated by an intent to abandon. Substantial evidence supports the court's findings under section 7822.

II

Joshua contends Jessica's bad faith conduct in this case should estop her from benefiting from section 7822. In support of this theory, Joshua asserts the court violated his due process right to a fair hearing when it denied him the opportunity to call his friend John as a witness in order to show Jessica's coercion and undue influence thwarted Joshua's reasonable efforts to maintain a relationship with Ava.

Preliminarily, we note John did not testify because he was unavailable, not because the court denied Joshua the opportunity to call him as a witness. The record shows the court gave Joshua's counsel the opportunity to contact John by telephone, but counsel was unsuccessful in this regard. Thus, the court did not deny Joshua his right to due process.

In any event, Joshua proffered John's testimony to corroborate his own testimony that Jessica prevented him from visiting Ava in October 2009. As the court noted, the October 2009 visit was a "red herring" because Joshua then stopped visiting or supporting Ava altogether. Thus, John's testimony would not have aided Joshua with respect to rebutting the presumption of intent to abandon during the relevant one-year statutory period.

Further, Joshua presented no evidence at trial that Jessica "influenced" him to stop visiting Ava or caused him such duress that he felt compelled to stop visiting her. Joshua's argument as to coercion and estoppel, raised for the first time on appeal, is unsupported in the record, purely speculative and borders on the absurd. The court properly terminated Joshua's parental rights under section 7822.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.