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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.M.

B.B. et al.,

Petitioners and Respondents,

v.

M.M.,

Objector and Appellant.

E054898

(Super.Ct.No. RIA019240)

OPINION

APPEAL from the Superior Court of Riverside County. James A. Cox, Judge.

Reversed.

Konrad S. Lee, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance for Petitioners and Respondents.

No appearance for Minor.

This court has previously addressed a similar dispute between the parties.

(*Adoption of A.M.* (June 29, 2009, E043937) [nonpub. opn.].) The prior opinion

addressed the trial court granting the biological father's motion for judgment on the mother's and stepfather's petition to terminate the biological father's parental rights to his child, A.M. This court affirmed the trial court's ruling, concluding substantial evidence reflected the biological father never intended to abandon A.M.

In August 2010, A.M.'s mother, petitioner and respondent L.M. (Mother), again petitioned the trial court to terminate the parental rights of A.M.'s biological father, objector and appellant M.M. (Father). (Fam. Code, § 7822.)¹ The trial court concluded Father abandoned A.M. and terminated Father's parental rights. Father appeals the termination of his parental rights. First, Father asserts the trial court erred by relitigating the termination issue due to the doctrine of collateral estoppel. Second, Father asserts the record does not support a finding that he intended to abandon his son, A.M. Third, Father contends the trial court abused its discretion by not following the recommendation made in the social study report. We reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PRIOR TRIAL COURT RULING

The facts in this subsection are taken from this court's prior opinion involving Mother and Father: "Mother and Father married in 1995 and A.M. was born in July 1995. Father is named on A.M.'s birth certificate. During the marriage, Father abused alcohol. Mother obtained a one-year restraining order against Father in 1996, which granted her custody of A.M. Mother and Father divorced in 1998. In December 1998,

¹ All further statutory references will be to the Family Code unless indicated.

Father entered the Delancey Street two-year, residential substance abuse program.

Father graduated from Delancey Street in December 2000. Father regularly paid child support for A.M. beginning in 2001. Mother married B.B. in 2001.

“Father filed a request for visitation with A.M. in February 2006. Father had last seen A.M. in July 1997—A.M. believed B.B. was his biological father until January 2007. In October 2006, Father and Mother attended mediation to discuss visitation. Mother agreed that Father should be allowed to establish gradual visitation with A.M. On November 6, 2006, B.B. filed a stepparent adoption request. In the request, B.B. indicated that he would ask the court to terminate Father’s parental rights to A.M. On November 22, 2006, B.B. filed the [first] petition to terminate Father’s parental rights. On January 5, 2007, Mother moved to be joined as a party so that she could assist in the termination of Father’s parental rights. The court granted Mother’s motion for joinder. On July 17, 2007, the trial court held a hearing on the petition to terminate Father’s parental rights. After B.B. rested his case, Father made a motion for judgment on the basis that B.B. and Mother failed to prove Father abandoned A.M. The court granted Father’s motion.”

B. PRIOR APPEAL

In the prior appeal, Mother asserted, “the trial court erred by (1) applying the incorrect legal standard when determining whether the evidence supported a finding that Father intended to abandon A.M., and (2) violating Mother’s due process rights by denying her the opportunity to present her case.” This court concluded the trial court applied the correct legal standards when rendering its ruling. Further, this court

assumed the trial court violated Mother's due process rights; the assumption was made due to the lack of clarity in the record as to whether Mother and B.B. shared counsel or whether Mother was self-represented. We held the assumed error was harmless because (1) substantial evidence reflected Father did not intend to abandon A.M., and (2) Mother failed to explain the issues she would have presented differently than B.B.'s attorney.

In concluding substantial evidence supported a finding Father did not intend to abandon A.M., this court cited the following evidence: "In 1999 or 2000, while Father was in the Delancey Street program, Father gave his mother Christmas gifts to give to A.M. Father wrote four letters to Mother regarding A.M., dated September 2001, October 2001, December 2001 and August 2002. Father spoke to Mother on the telephone "a lot" regarding A.M.; however, we note Mother denied speaking to Father on the telephone. Father paid child support for A.M. from 2001 through December 2006. In January 2007, Mother terminated the child support enforcement action against Father, but Father opposed the termination, so that he could continue to pay child support. Father filed for visitation with A.M. in February 2006. Father explained that he did not request visitation with A.M. until 2006 because Mother told Father that he "would never see [his] son," which made Father very emotional." This court filed its prior opinion on June 29, 2009.

C. CURRENT TRIAL COURT CASE

1. *PETITION*

On August 31, 2010, Mother filed a petition to terminate Father's parental rights. In Mother's petition she alleged the following: The Orange County District Attorney's

Office (OCDA) closed its child support enforcement action against Father on February 1, 2007, at Mother's request. Despite a court order for child support, Father made his last support payment on January 1, 2007. Father was \$16,555 in arrears in August 2010.

Father did not see A.M. from November 22, 1995, to August 21, 2006. Father filed for visitation with A.M. on August 21, 2006. Father and A.M. visited three times during August 2008. After the third meeting, Father wrote a letter to the trial court requesting the court's visitation order "be put on hold." Father did not visit A.M. again, or otherwise communicate with A.M.

2. *PROBATION OFFICER'S REPORT*

a) Mother

The Riverside County Probation Department filed a report in this case on August 4, 2011. The report reflects the following facts from Mother's point of view: In July 2007, Father twice visited A.M. "Shortly thereafter," Father filed for custody of A.M. in Orange County Superior Court (OCSC). The custody trial took place in February 2008. The OCSC granted Father visitation with A.M. Father visited A.M. once between February and July 2008. In August 2008, three visits took place. Father did not visit A.M. again. In October 2008, Father sent a letter requesting the visits "be put on hold."

b) Father

The report reflects the following facts from Father's point of view: The OCSC granted Father full custody of A.M.; however, Father did not want to remove A.M. from

Mother's care, so he permitted A.M. to stay with Mother. During the August 14 visit, A.M. appeared "angry and agitated." A.M. told Father and the visit supervisor that he had been forced to attend the visit and did not want to be there. Father and the visit supervisor tried to calm A.M., but after a few minutes he left. Father was frustrated to see A.M. so angry, when he was trying to introduce himself to A.M. Father did not contact A.M. after the August 14 visit because "he saw how angry [A.M.] was and he wanted to give [A.M.] time to calm down. [Father] hoped with time [A.M.] would come to realize on his own his desire to get to know his father." "On a few occasions" after the August 14 visit, Father contacted A.M. on his cellular telephone, but the calls were not returned.

Father stopped paying child support for A.M. because (1) Mother closed the enforcement case, and (2) Mother said she did not want any money from Father. Father did not continue to pursue visitation with A.M. because he felt "continuing the Court battles was not in [A.M.'s] best interests." Father has always had a bedroom set up in his home for A.M., and will continue to do so because he believes he will be given an opportunity to bond with A.M. in the future.

c) A.M.

A.M. was interviewed in July 2011, when he was 16 years old. The report provides the following facts from A.M.'s point of view: A.M. has no feelings for Father. During the August 14 visit, A.M. mocked a hand gesture Father made. Father became angry, called A.M. a "freak boy," and said, "Don't come to me looking for money when you turn 18." A.M. became upset and left the visit. A.M. has not had any

contact with Father since August 14, 2008; he has not received any cards, gifts, or letters from Father. A.M. would like Father's parental rights terminated so A.M. could be adopted by B.B.

d) Probation Officer's Evaluation

The probation officer who interviewed Mother, Father, and A.M. concluded Father did not have contact with A.M. for over one year, but that it appeared Father never intended to financially abandon A.M. The probation officer reasoned that Mother did not want financial support from Father, and therefore Father should not be faulted for not sending money to Mother. The probation officer concluded Father did not intend to abandon A.M., and it would not be in A.M.'s best interests to terminate Father's parental rights. The probation officer recommended Mother's petition be denied, and the court refer the matter to mediation to set a visitation schedule.

e) Trial

(1) *Father's Testimony*

On December 10, 2001, Father was ordered by a court to pay \$385 per month for A.M.'s child support. Father never sought to modify the child support order. Father explained that after the district attorney agreed to Mother's request to cancel its enforcement case, Father received a document, with "the filing number of the actual court case" reflecting the case had been closed. Father contacted "Orange County child support and they said there was no more case, there's no one to pay" Father tried to "file a case to force them to take money from [him]," but the request was denied. Father was informed "there was no physical means or no vehicle for [him] to pay them

any further money, that [Mother] closed the entire case. There's no case." Thus, Father explained he never modified the child support order because "[t]here's no order to modify." Father was unaware Mother only closed the child support enforcement case, and not the case that created the child support order.

Father did not send money directly to Mother because he was frightened of her, and he wanted a third party, such as the court, to retain records of his payments. Father was frightened of Mother because she threatened to sue Orange County if it continued collecting child support from Father, and she threatened the judges, attorneys, and counselors involved in the case with "some kind of lawsuit or sanctions." Father stated every interaction with Mother "has turned into a nightmare, manipulated and twisted." Father feared any direct contact with Mother would lead to accusations that he was threatening her and further days in court. Due to Father's criminal history (prior to his sobriety), Father assumed law enforcement would believe Mother. Father's criminal history consisted of six kidnappings and multiple robberies; Mother had a restraining order against Father prior to his sobriety. During Mother's and Father's marriage, they both engaged in violent behavior toward one another.

Father had made all of his child support payments for six or seven years, until Mother ended the child support enforcement case. Over the years, Father had driven from Nevada to California over 30 times to appear at court hearings concerning A.M.; Father had spent \$300,000 in legal fees. Father explained that around the same time he filed for visitation in Orange County, Mother was petitioning for the termination of his parental rights in Riverside County, thus there were multiple court hearings. Father also

hired a private investigator to check on A.M. and “look into” B.B. Father carried a photograph of A.M. in his wallet and thought about A.M. every day.

During the first August 2008 visit, B.B. accompanied A.M. and Father. B.B. secretly recorded a conversation between Father and A.M. Afterwards, the trial court ordered B.B. to stay away from Father and A.M.’s visits, and for Mother to transport A.M. to the visits. At the third August 2008 visit, B.B. drove A.M. to the bowling alley, and then remained in the parking lot during the visit. Mother and B.B. violated the court’s order because Mother needed to attend school during the visitation. Father had driven five hours to visit with A.M. for one hour at the bowling alley.

Between August 15, 2008, and August 30, 2010, Father twice tried to contact A.M. by telephone. On one occasion Father left a voice message; on the second occasion Mother hung up on Father. Father did not try to reinitiate visitation because he feared it would lead to Mother and B.B. requesting “another day in court that costs [Father] \$5,000.” Father testified, “I would have [to] go back to the judge in an ex part[e] that costs me \$5,000, months of work just to explain that [Mother and B.B.] have once again done something else to violate [a] court order or to violate some law, and then I would be reissued another visitation? To what? To what end? When were you [(Mother)] going to stop?”

Father asked for the visitation order to be placed on hold after the August 2008 visits so Mother and B.B. could “cool off.” Father did not try to contact Mother or B.B. about visitation because he was waiting for them to contact him, apologize for B.B. being at the bowling alley visit, and say “our antics are done.” Father has lived in his

home in Nevada for approximately eight years. During that time, Father has maintained a furnished bedroom for A.M. Every year for A.M.'s birthday, Father bought a collector's edition Disney watch for A.M. Father was collecting the watches and planned to present them to A.M. during the reunification process. Father did not send the watches to A.M. through the years because gifts he sent in earlier years were not given to A.M.; Father speculated Mother disposed of the gifts. Additionally, there was a court order requiring Mother and Father discuss any gifts Father intended to give to A.M.

During trial, Father's attorney asserted the "no support, no communication with the intent to abandon" issue had already been litigated. The trial court asserted the current case covered the years after the previous case, so the issue was not res judicata.

(2) *A.M.'s Testimony*

A.M. was 16 years old at the time of trial. A.M. first learned about Father when A.M. was 12 years old; A.M. was excited to meet Father. During the first reunification counseling meeting A.M. asked why Father was not present during A.M.'s childhood. Father explained Mother threatened to take A.M. to Panama, and that B.B. took A.M. from Oregon to California. After the visit, Mother showed A.M. his passport, which reflected a visit to Panama. A.M. did not believe Father's story, because he felt he and Mother would have stayed in Panama if she were going to kidnap him. Thus, at the second counseling appointment, A.M. was upset at Father, because he felt Father lied to him about his reasons for missing A.M.'s childhood. A.M. left in the midst of the second visit because the counselor did not permit A.M. to question Father.

At the August 2008 visit, which took place at the bowling alley, A.M. mocked Father's hand gesture, and Father called A.M. "freak boy." A.M. was upset by the name calling and left the bowling alley. Father went out to the parking lot, saw B.B., and began yelling at B.B. A.M. did not hate Father, but felt nothing for him. A.M. was no longer interested in getting to know Father because he felt Father lied to him about his reasons for missing A.M.'s childhood and Father called him "freak boy." A.M. plans to change his last name to B.B.'s last name when he turns 18.

(3) *B.B.'s Testimony*

Mother requested the OCDA close the child support enforcement case to "prove the point" that Father would not pay child support unless forced to do so. B.B. explained that he and Mother lost the prior case to terminate Father's parental rights solely because Father had been making forced child support payments. B.B. filed his 2006 Riverside County petition to terminate Father's parental rights after Father filed his 2006 Orange County petition for custody of A.M. B.B. filed the termination petition because Father was seeking full custody of A.M.

B.B. recalled a time when A.M. was two years old and Father arrived at B.B.'s home. B.B. also remembered Father trying to contact Mother about A.M. when A.M. was seven or eight years old.

(4) *Mother's Testimony*

In 1997, Mother filed to divorce Father. In 1998 or 1999, when A.M. was two years old, Father stopped by Mother's house. In 2001, Father began paying child support for A.M. Father had a "perfect record" of paying child support. In 2006, Father

filed for visitation with A.M. A few months later, Mother made her first request for the OCDA to close A.M.'s child support enforcement case. Mother wanted to close the enforcement case to see if Father would continue to pay child support when not forced to do so by the OCDA. The OCDA wanted to continue collecting child support for A.M. Mother then made a second request for the OCDA to close its enforcement case.

On January 11, 2007, Mother announced at a hearing (but not under oath) that she requested to stop the child support enforcement case. On April 19, 2007, Mother again said during a hearing that she planned to close the enforcement case. Judge Webster recommended a trust fund be opened in A.M.'s name, and the child support money be placed in the trust. On July 17, 2007, during the first termination trial, Mother testified that she was closing the enforcement case, but not terminating the child support order. Mother never made a written or oral request that Father continue paying child support directly to her.

In 2007, the OCSC ordered the parties to participate in reunification counseling. The counselor's report reflected A.M. "was being trained and poisoned by [Mother] to hate [Father]." The counselor concluded Mother was an alienating parent who was "obsessed with hatred and filled with venom." The counselor believed Mother "was going to run away to Panama with [A.M.], and that [A.M.] was . . . a ticking time bomb waiting to explode."

The OCSC scheduled three visits in August 2008 because Father planned to be working in Irvine for three weeks during that August. In October 2008, Father sent a letter requesting his visitation with A.M. be placed on hold. In June 2009, this court

affirmed the ruling denying the first petition to terminate Father's parental rights. Mother did not hear from Father for two years, until she filed the petition in the instant case to terminate his parental rights. Mother did not file contempt proceedings in response to Father's failure to pay child support.

(5) *Transcripts*

The trial court in the instant case reviewed a reporter's transcript from the prior termination case. The transcript reflected an April 19, 2007 hearing before Judge Webster. The relevant portion of the 2007 transcript provides:

“[Mother]: I'd like to clarify, go on the record that I have not closed the child support case. That has to be done by a court order. I closed the child support enforcement case through the [OCDA].

“[Father's Attorney]: Which is, essentially, he's not paying child support which is the bottom line.

“[Mother]: By choice.

“[Father's Attorney]: Not by choice. He wants to pay child support.

“The Court: Why don't you just have him put it into an account in trust for the child[?]”

“[Father's Attorney]: Which he will do. That's not a problem. [¶] But we wanted to keep the case open but they would not let us because mom requested the case be closed.” It appears Father was not present during this conversation.

The trial court in the instant case also reviewed a portion of the reporter's transcript from the July 17, 2007, trial concerning terminating Father's parental rights.

The July 17 transcript reflects Father was present in court when the following exchange occurred during the cross-examination of Mother:

“[Father’s Attorney]: [I]s it true that you formally requested the Orange County Department of Child Support Services to terminate and close your file with respect to collection of support?”

“[Mother]: The enforcement action, yes. I requested that the enforcement action be stopped but not that the court-ordered child support be stopped.”

(f) Judgment

The trial court issued a written judgment. The trial court found it was undisputed that Father had not paid child support “since before the lower court’s ruling in 2007, and has failed to communicate with the minor for a period in excess of one year, since August 2008.” Thus, the trial court concluded the evidence satisfied the requirements for the court to presume Father abandoned A.M. The trial court then addressed whether Father had rebutted the abandonment presumption by proving he did not have the intent to abandon A.M.

The trial court noted Father’s defense was that he had a good-faith belief he did not need to pay child support after Mother closed the enforcement case. The trial court found Father’s defense to be “compelling,” until the court read the 2007 reporter’s transcripts. The trial court concluded the 2007 transcripts revealed Mother’s intent to end the child support enforcement action for the purpose of seeing whether Father would continue paying child support when not forced to do so by the OCDA. The trial

court further noted a parent has a duty to provide child support even if a court order is not in place.

The trial court found Father blamed Mother and B.B. for the lack of communication between Father and A.M. However, the trial court did “not believe the excuse to be compelling.” The trial court noted Father had previously succeeded in gaining visitation with A.M., and visits were just beginning when Father “abandoned the effort.” The trial court also observed that A.M. was 16 years old and wanted to be adopted by B.B. Based upon the foregoing, the trial court terminated Father’s parental rights to A.M. for the purpose of permitting B.B. to adopt A.M.

DISCUSSION

A. COLLATERAL ESTOPPEL

Father asserts the trial court erred by permitting relitigation of the abandonment issue, which was settled by this court in June 2009. We disagree.

“Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, [courts] have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

[Citations.]’ [Citation.]” (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511 (*Hernandez*).

Of the foregoing elements, the one in dispute in this case is the first: whether the abandonment issue is identical to the issues decided in the 2009 case. “For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding.

[Citation.] In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts. [Citations.] ‘The “identical issue” requirement addresses whether “identical factual allegations” are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.

[Citation.]’ [Citation.]” (*Hernandez, supra*, 46 Cal.4th at pp. 511-512.)

Section 7822, subdivision (a)(3), provides a petition for terminating a person’s parental rights may be brought if “[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.”

In the prior case, the petition to terminate Father’s rights was filed in November 2006. In the prior petition it was alleged Father abandoned A.M. by not contacting A.M. for the 10-year period between 1996 and 2006. The trial court found that Father’s regular payment of child support showed he did not intend to abandon A.M. Based

upon that finding the court granted Father's motion for judgment. (Code Civ. Proc., § 631.8.)

In the current case, the petition to terminate Father's rights was filed in August 2010, and asserted Father failed to communicate with A.M. from August 15, 2008, to August 31, 2010. The current petition further alleged Father had not paid child support since January 1, 2007. The court terminated Father's parental rights due to Father's failure to communicate beginning in 2008, and failure to support beginning in 2007.

Based upon our review of the petitions and the judgments, the two cases did not involve identical factual allegations. The first case concerned factual allegations covering 1996 to 2006, and the current case concerns factual allegations related to 2007 to 2010. Since the cases involve different factual allegations, we conclude the abandonment issue sought to be precluded from relitigation is not identical to the abandonment issue decided in the former proceeding. Accordingly, collateral estoppel does not apply in this case.

Father asserts collateral estoppel is applicable in this case because it is "virtually the same" as the prior case—involving "identical parties and the identical issues." Father's argument is not persuasive, because whether the ultimate issues or dispositions are the same is not the relevant inquiry; the question is whether the factual allegations are identical, and in this case they are not. (*Hernandez, supra*, 46 Cal.4th at pp. 511-512.)

B. SUBSTANTIAL EVIDENCE

Father asserts substantial evidence does not support the finding he intended to abandon A.M. We agree.

As set forth *ante*, a person’s parental rights may be terminated if he has abandoned his child. “Abandonment occurs when a ‘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.’ [Citations.]” (*In re Marriage of Jill and Victor D.* (2010) 185 Cal.App.4th 491, 500.)

“Thus, a section 7822 proceeding is appropriate where ‘three main elements’ are met: ‘(1) the child must have been left with another; (2) without provision for support or without communication from . . . his parent . . . for a period of one year; and (3) all of such acts are subject to the qualification that they must have been done “with the intent on the part of such parent . . . to abandon [the child].”’ [Citation.] ‘The . . . failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent . . . ha[s] made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent . . .’ [Citation.]” (*In re Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010.)

“An appellate court applies a substantial evidence standard of review to a trial court’s findings under section 7822. [Citation.] Although a trial court must make such findings based on clear and convincing evidence (§ 7821), this standard of proof “is for the guidance of the trial court only; on review, our function is limited to a determination

whether substantial evidence exists to support the conclusions reached by the trial court in utilizing the appropriate standard.” [Citation.] 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.” [Citation.] Abandonment and intent “are questions of fact for the trial judge. . . . His decision, when supported by substantial evidence, is binding upon the reviewing court.”” (*In re Adoption of Allison C., supra*, 164 Cal.App.4th at pp. 1010-1011, fns. omitted.)

Father stopped paying child support in February 2007 after Mother terminated the enforcement case. In July 2007 Father was present in court when Mother testified she “requested that the enforcement action be stopped but not that the court-ordered child support be stopped.” Father contacted “Orange County child support and they said there was no more case, there’s no one to pay” Father tried to “file a case to force them to take the money from [him],” but the request was denied. Father was informed “there was no physical means or no vehicle for [him] to pay them any further money, that [Mother] closed the entire case. There’s no case.” Thus, Father explained he never modified the child support order because “[t]here’s no order to modify.”

The record reflects Father did not understand he could continue paying Mother. Father tried to send child support via the OCDA, but was rejected. Father did not send money directly to Mother because he feared having any direct contact with her. Father was not present when the trial court suggested the idea of creating a trust account for A.M. Further, it appears from the record the attorney representing Father, who was

present when the trust suggestion was made, was no longer representing Father approximately two months after the suggestion was presented. Thus, it is unclear if the trust idea was relayed to Father.

While the record reflects Father was present when Mother testified about only ending the enforcement action, it would be reasonable for Father to believe the statement from the OCDA that the case was over, specifically that there was “no vehicle for [him] to pay them any further money, that [Mother] closed the entire case. There’s no case.” In other words, the evidence that Father was present when Mother said she only ended the enforcement action is not clear and convincing evidence of missing payments with an intent to abandon. Rather, it appears Father missed child support payments due to confusion about how to give the money to Mother. Father mistakenly believed the child support case ended, and he feared having direct contact with Mother. Thus, Father’s intent in not sending payments was avoiding Mother, as opposed to abandoning A.M.

Mother has not submitted a respondent’s brief in this matter, so we cannot address her arguments. The trial court reasoned Father failed to pay child support while intending to abandon A.M. because Father was notified by Mother’s testimony in 2007 that she only closed the enforcement portion of the child support case. We find the trial court’s reasoning to be problematic because Father contacted the OCDA to request the ability to pay child support, but was denied.

Father stated he did not pay Mother directly because he feared her. The trial court itself described Mother as “a very assertive woman to the point of almost

obnoxiousness.” Father described a mutually violent relationship between himself and Mother. A reunification counselor found Mother was “obsessed with hatred and filled with venom.” Mother threatened to sue Orange County if it continued collecting child support from Father, and she threatened the judges, attorneys, and counselors involved in the case with “some kind of lawsuit or sanctions.” Thus, it appears there is a basis for Father fearing Mother because she is hate-filled, has a history of violent behavior, and was threatening legal action against people who collected child support on behalf of A.M. In sum, the evidence in the record does not reflect an intent to abandon A.M., instead, it reflects either confusion about the status of the court order or a desire to avoid Mother.

Next, we address Father’s failure to communicate with A.M. At the last visit at the bowling alley, A.M. became upset and walked out of the bowling alley. Father then yelled at B.B. in the bowling alley parking lot, because B.B. violated the trial court’s order by transporting A.M. to the visit and being at the visit location. Father did not try to contact Mother or B.B. about scheduling another visitation appointment because he was waiting for them to contact him, apologize for the bowling alley incident, and say “our antics are done.”

Father did not go to court to request a court ordered visitation schedule because he believed it would lead to Mother and B.B. requesting “another day in court that costs [Father] \$5,000.” Father spent \$300,000 in legal expenses trying to gain visitation with A.M. and/or custody of A.M. Father lived in Nevada, but repeatedly drove to Orange and Riverside Counties to appear at hearings concerning A.M. Father was a carpenter

and during the trial in this case he was having trouble making his house payment. Father explained that he was having difficulty appearing for trial in the instant case due to financial issues. When the court asked if the parties could finish the trial by the end of the week, Father told the court, “I don’t have the financial wherewithal to do that. This is costing [me and my romantic partner] our wages per day, hotels and meals right now and to rent a vehicle it’s not—it’s costing us [\$]500 plus all these days.”

Thus, it appears Father did not seek a visitation schedule through the trial court because (1) he had already spent \$300,000 in attempts to see A.M.; (2) he was suffering financial hardship; and (3) he believed resorting to the courts would cost an additional \$5,000. In other words, Father’s intent in not seeking a court ordered visitation schedule was not to abandon A.M., but to preserve financial resources. This intent is confirmed by the evidence that Father maintained a furnished bedroom in his home for A.M., should A.M. ever want to stay with Father. It is unlikely Father would have maintained a bedroom for a child he intended to abandon.

Father purchased gifts for A.M., but did not send them because he believed Mother disposed of the gifts Father sent A.M. in earlier years. Additionally, there was a court order requiring Mother and Father to discuss any gifts Father intended to give to A.M. Accordingly, Father’s failure to contact A.M. via gifts or cards does not reflect an intent to abandon; rather, it reflects a desire to avoid Mother and avoid the gifts being discarded.

The trial court found Father intended to abandon A.M. because Father’s reasons for not communicating with A.M. involved blaming Mother’s and B.B.’s bad behavior.

We agree that Father cited Mother's and B.B.'s behavior as a reason for not contacting A.M.; however, we disagree that this shows an intent to abandon. Rather, it reflects an intent to not attract attention from Mother by enforcing visitation. Father wanted a relationship with A.M., as evinced by the money spent on legal fees, driving back and forth from Nevada to California, maintaining a room for the child, and purchasing gifts. However, Father believed Mother to be a burdensome obstacle in his path to building a relationship with A.M., and after fighting with her from 2006 to 2008, finally decided to take a break after the bowling alley incident.

Next, the trial court found Father's act of surrendering visitation shortly after visits had begun indicates an intent to abandon A.M. While we agree Father's decision to abandon visitation efforts may not have been the preferred choice, we disagree that it reflects an intent to abandon. As set forth *ante*, Father believed obtaining a visitation schedule from Mother or B.B. would lead to further confrontation, and obtaining a schedule from the court would be too expensive. We note Father could have tried scheduling visits through the person who supervised the visits; however, it seems Father feared that would also lead to an expensive court action by Mother.

In sum, all the evidence reflects Father wanted a relationship with A.M., but wanted to avoid further legal expenses and confrontations with Mother and/or B.B. Accordingly, it does not appear Father intended to abandon A.M. As a result, we conclude the trial court erred by granting Mother's petition to terminate Father's parental rights. We will reverse the trial court's decision, because the petition should be denied.

C. PROBATION REPORT

Father asserts the trial court erred by not following the recommendation in the probation officer's report. We do not address this contention because it has been rendered moot by our reversal of the trial court's order. (See *Ramirez v. Nelson* (2008) 44 Cal.4th 908, 920 [not addressing an issue that has been rendered moot by the court's holding].)

DISPOSITION

The judgment is reversed. The trial court is directed to enter an order denying Mother's petition. Father is awarded his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER

J.

We concur:

HOLLENHORST

Acting P. J.

KING

J.