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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re C.M., a Minor.

D.Q.,

Petitioner and Respondent,

v.

E.M.,

Objector and Appellant.

E055834

(Super.Ct.No. RIA020527)

OPINION

APPEAL from the Superior Court of Riverside County. Kenneth J. Fernandez, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

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

Haslam & Perri, Donald G. Haslam and Shannon R. Thomas for Petitioner and Respondent.

E.M., father, and M.Q., mother, had a three-year relationship, resulting in the birth of C.M., the minor, in 2002. The relationship ended in 2003, after father stole a safe from mother's parents' home and moved in with his male partner. Family law orders awarded the parents joint legal custody and ordered father to pay child support, but father never voluntarily paid support for his child. Visitation became problematic after mother married D.Q., the stepfather, and father was convicted of first degree burglary in connection with the earlier theft of the safe from mother's parents, resulting in his incarceration. Upon his release in 2007, mother opposed visitation without a monitor, obtained new family law orders awarding her sole custody and requiring father to participate in certain programs. For over a year, monitored visits took place, but father never completed the court-ordered programs, and visits stopped in 2009 due to father's lack of funds to pay for the monitor. After a year, and after father sustained additional convictions, D.Q. filed a petition for a stepparent adoption and to terminate father's parental rights. The court found abandonment and terminated the parental rights of father. Father appealed.

On appeal, father claims there is insufficient evidence to support the finding that father left C.M. with intent to abandon, or that he failed to provide support for the statutory period. We affirm.

## **BACKGROUND**

Mother and father met in 1994 when they were students, and began dating in 2000. They lived together in 2001, and mother became pregnant with the minor. Father was

supportive and the couple planned to marry, but due to financial difficulties, they moved in with mother's parents. The minor was born in May 2002. Father was present for the birth and executed a paternity declaration. In 2003, while the family was still living with mother's parents, father stole a safe from mother's parents' home. Thus, father was forced to leave and the relationship between mother and father failed. Mother and the minor remained with mother's parents. Father lived with his male partner. In November 2003, an action to establish a parental relationship (hereafter referred to as the paternity case or the Family Law case) was filed.

In 2004, mother's parents moved to Temecula and mother and minor continued to reside with them after the move. In April 2004, the maternal grandmother sought and obtained a restraining order prohibiting any contact by father. Initially, between 2004 and 2005, visitation went well and father had significant contact with the minor. However, in 2005, the amount of visitation diminished. In 2005, orders were made in the paternity case awarding joint legal custody to both mother and father, with primary physical custody to mother, and reasonable visitation for father. The family law court also ordered father to pay child support in the amount of \$647 per month. That order was never modified.

In 2006, mother married D.Q., the stepfather of the minor, after mother gave birth to another son, the minor's half-sibling. At some point, mother became concerned that father was "not a . . . positive influence" for the minor because he was inconsistent with visits and she became aware that father had exposed the minor to sexual activities

between himself and his male partner. Additionally, mother was aware that there was an arrest warrant outstanding for father, of which he was unaware, and she did not want to risk father being arrested on the warrant while on a visit with the minor. Therefore, mother withheld visits. Mother also did not provide her address to father. Father was arrested in September, which also interfered with visits.

Father filed an order to show cause (OSC) re modification of custody in March 2006, as a result of the difficulty in exercising visitation with the minor for a seven-week period. Also in March 2006, father contacted Child Protective Services (CPS) claiming that the minor's stepfather had a drug problem. In conducting the investigation, the CPS worker found nothing wrong with stepfather, but the minor disclosed that he had witnessed father and father's boyfriend licking each other's genitals.

When father appeared in family court, he was arrested on a warrant for the burglary of mother's parent's home. Mother, the only witness to the burglary of her parents' home, had reported the crime to authorities in response to father's order to show cause (OSC). Father was incarcerated between September 2006 and January 2007, and attempted to arrange visitation with the minor upon his release. However, mother was afraid to let father visit the minor because in the past father had threatened to kidnap the minor.

Three months later, father filed an OSC regarding the lack of visitation, resulting in a referral for a court-ordered evaluation pursuant to Evidence Code section 730 (730 evaluation). On June 13, 2007, while still awaiting the 730 evaluation, the court awarded

mother physical custody and ordered supervised visits for father. The court also ordered the parents to participate in a psychological evaluation. On September 12, 2007, further hearing took place in father's absence relating to the 730 evaluation. The court ordered that the minor telephone his father every Monday, Wednesday, and Friday at 7:30 p.m. Father gave the minor cellular telephones, one in 2007, and a second number sometime after the first telephone was lost, with which to call father.

Visits were supervised by three successive supervisors. The first supervisor monitored approximately 12 visits over a six-month period. A second monitor supervised between 10 and 12 visits between January 2008 and May or June of 2008. Visits went well and the minor was comfortable with father, becoming emotional when it was time to return to mother's home on more than one occasion. On May 21, 2008, this visitation supervisor attempted to contact mother to set up a visit for Father's Day, but mother never returned telephone calls, so father never received a visit on Father's Day that year.

On May 5, 2008, the 730 evaluation was completed and the hearing on father's order to show case was conducted, resulting in a subsequent modification of custody and visitation in which mother was granted sole legal and physical custody of the minor and father was granted supervised visitation. Father did not appear at the hearing. The order, which adopted most of the recommendations contained in the 730 evaluation, further required father to participate in a 16-week parenting training, with no overnight visits until he completed the training. The order also adopted a recommendation that father

participate in psychotherapy, and that both parents complete sections A, B, and C of the coparenting program at Solutions for Families. The coparenting program was never completed because father never completed his parenting classes.

On December 22, 2008, father filed another OSC relating to modification of custody and visitation, but it was continued for lack of service, and eventually taken off calendar on July 22, 2009, when father did not appear on two separate hearing dates, although he called in on May 12, 2009, to explain he was ill. Father was hospitalized in December 2009, and again in February 2010, for health issues related to his diagnosis of anemia.

Mother opened a case with Child Support Services to collect child support, but she only received two payments, obtained by intercepting father's tax refunds, once in 2008, and the second one in 2009. After the second tax intercept, mother closed the child support collection file in anticipation of and to facilitate the stepparent adoption. When father received notice of the closing of the child support case, he contacted the agency to determine if he still had an obligation to pay, and was told he was not obligated unless mother took action.

Father's last in-person visit with the minor occurred on the minor's birthday, in May 2009. His last telephone contact with the minor was on the minor's birthday in 2010. Father paid no child support after the second tax intercept in 2009. When the petition to free the minor from father's custody and control was filed, father was incarcerated on new criminal charges. He has four felony convictions: first degree

burglary committed in 2006 (Pen. Code, §§ 459, 460), possession of controlled substance, cocaine (Health & Saf. Code, § 11350, subd. (a)), second degree burglary (Pen. Code, § 459), and grand theft. (Pen. Code, § 487, subd. (a).) His earliest possible release date was in April 2012.

On October 28, 2010, stepfather, D.Q., filed a petition to free the minor from the custody and control of his father to facilitate a stepparent adoption on the ground of abandonment. (Fam. Code, § 7822.) The petition was amended to include an allegation that father had been convicted of a felony, the facts of which proved unfitness. (Fam. Code, § 7825.) The probation report included input from the minor who expressed a desire to be adopted.

Following a bench trial, the court dismissed the ground relating to father's felony conviction. However, the court found by clear and convincing evidence that (1) the minor had been left by father with the mother, (2) without communication or support from father for the period between September 22, 2009, and June 23, 2011,<sup>1</sup> (3) with the intent to abandon. The court determined that any communication that occurred between father and the minor between September 22, 2009, and June 23, 2011 was token communication. Therefore, the court granted the stepfather's petition for freedom from parental custody and control. Father appealed.

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<sup>1</sup> The first petition was filed in October 2010, but was amended twice; the second amended petition was filed on June 23, 2011.

## DISCUSSION

Father argues there is insufficient evidence to support the judgment terminating his parental rights. Specifically, he argues there is insufficient evidence that he “left” the minor with his mother with the intent to abandon. He also asserts his failure to support the minor did not manifest an intent to abandon because he was indigent and because mother terminated the child support enforcement proceeding, did not demand support. Finally, father argues that termination of parental rights was not in the minor’s best interests. We disagree.

### a. **Standard of Review**

We apply the substantial evidence standard of review. (*In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491, 503.) Applying this standard, we do not pass on the credibility of witnesses, resolve conflicts in the evidence, or reweigh the evidence. (*Ibid.*) All conflicts in the evidence must be resolved in favor of the respondent and all legitimate and reasonable inferences must be indulged in to uphold the judgment.<sup>2</sup> (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010-1011.)

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<sup>2</sup> Respondent urges us to deem father’s arguments as forfeited because he failed to include all the material evidence favorable to the judgment. Father’s brief is on the cusp of ignoring unfavorable evidence on which the trial court based its decision. However, because of the importance of the issues and interests at stake for both the father and the minor, we exercise our discretion to reach the issue on the merits. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317 [court addressed evidence supporting the judgment although summary disposition was proper].)

Abandonment and intent are questions of fact for the trial judge and his decision, when supported by substantial evidence, is binding upon the reviewing court. (*Adoption of Allison C.*, *supra*, 164 Cal.App.4th at p. 1011, citing *In re Brittany H.* (1988) 198 Cal.App.3d 533, 549.) We simply determine whether there is substantial evidence, believed by the trial court, to support the court’s findings. (*In re Marriage of Jill & Victor D.*, *supra*, 185 Cal.App.4th at p. 503.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court’s finding or order. (*Adoption of Allison C.*, *supra*, 164 Cal.App.4th at p. 1011.)

**b. Sufficiency of Evidence that Father “Left” the Minor without Communication or Support.**

In relevant part, Family Code section 7822 provides that a proceeding to terminate parental rights may be brought if one 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 to abandon the child. (Fam. Code, § 7822, subd. (a)(3).) The failure to provide identification, failure to support, or failure to communicate is presumptive evidence of the intent to abandon. (Fam. Code, § 7822, subd. (b).) 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).)

In determining whether a parent has “left” his or her child, the focus of the law is on the voluntary nature of the parent’s abandonment of the parental role rather than on

physical desertion. (*In re Marriage of Jill & Victor D.*, *supra*, 185 Cal.App.4th at p. 504, citing *In re Amy A.* (2005) 132 Cal.App.4th 63, 68.) Although a parent may not be found to have voluntarily left a child in the care and custody of another where the child has been “taken” from the parent by a court order, the parent’s later voluntary inaction may constitute a leaving with intent to abandon. (*In re Cattalini* (1946) 72 Cal.App.2d 662, 665.)

Thus, there are numerous decisions holding that the “leaving” element may be established by evidence of a parent’s voluntary inaction after an order granting primary care and custody of the child to the other parent. (*In re Marriage of Jill & Victor D.*, *supra*, 185 Cal.App.4th at p. 505; *In re Amy A.*, *supra*, 132 Cal.App.4th at p. 70; *In re Jacqueline H.* (1979) 94 Cal.App.3d 808, 815-816; *In re Cornrich* (1963) 221 Cal.App.2d 662, 666-667.)

Evidence of a parent’s failure to communicate with or support the child for the statutory period can satisfy the statutory requirement that the child be “left” for the prescribed period. (*In re Marriage of Jill & Victor D.*, *supra*, 185 Cal.App.4th at p. 505.) 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 intent to abandon and 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. (*In re Amy A.*, *supra*, 132 Cal.App.4th at p. 68.) A parent’s incarceration does not, in and of itself, provide a legal defense to abandonment.

(*Adoption of Allison C.*, *supra*, 164 Cal.App.4th at p. 1012; see also *In re Rose G.* (1976) 57 Cal.App.3d 406, 424.)

Regarding the presumption of intent to abandon accruing from a parent's failure to support, father's ability to support was limited due to his incarceration during a portion of the statutory period (from September 2010 to October 2010, when the petition was filed), but incarceration is not an acceptable excuse for nonsupport because the incarceration is the result of the parent's own volitional and wrongful actions. (See *Adoption of Allison C.*, *supra*, 164 Cal.App.4th at p. 1012.)

It is true that failure to support in the absence of a demand does not necessarily prove the intent to abandon. (*In re George G.* (1977) 68 Cal.App.3d 146, 159.) It is also true that evidence of a parent's inability to pay support rebuts the presumption of abandonment. (*Adoption of Allison C.*, *supra*, 164 Cal.App.4th at p. 1013.) However, where the failure to support is coupled with a failure to communicate, the court may apply the presumption of intent to abandon. (*Adoption of Allison C.*, at p. 1013, citing *In re Randi D.* (1989) 209 Cal.App.3d 624, 630.)

Here, father had the opportunity to seek enforcement of visitation orders in proceedings that he initiated in 2009, and all through 2010, prior to his most recent incarceration. However, he took no action after his failures to appear in court on his own OSC in 2009 to enforce visitation. Although father testified that he did not know the residence address of mother and stepfather, and complained that mother did not answer or return his telephone calls, mother had been represented by the same attorney throughout

the child custody proceedings and he made no attempt to locate or serve mother through counsel.<sup>3</sup> Additionally, the family court orders required that mother keep him apprised of her address (and vice versa), so he could have sought enforcement of that order, as well.

Further, he did not follow through with the court orders of May 5, 2008, to complete psychotherapy and parenting education, as a predicate to the co-parenting program, which, as the trial court noted, would have allowed for more liberalized visitation. Thus, the court correctly found that during the statutory one-year period he did not visit and did nothing to enforce his visitation rights, although he was knowledgeable of the means to do so.

The court found father's communication efforts to be token. We agree. After the petition for termination of parental rights was filed, father sent letters to the minor at mother's current address. After father's most recent incarceration, he claimed to have sent letters to his son, but mother denied receipt of any correspondence until the petition was filed. Father's incarceration commenced the month before the petition was filed, since he was arrested in September 2010. This was too little, too late. Given the

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<sup>3</sup> Testimony that father could have contacted mother's parents to obtain her address ignored the fact that father's probation conditions in the burglary case prohibited any contact with the victims of that crime. Additionally, the child custody orders required the parties to notify each other of current residence addresses. Nevertheless, there were other ways in which father could have located the minor during the statutory period in question, which he demonstrated by conducting a people search on the computer on one occasion, or seeking to enforce that portion of the family law order.

conflicting “he said, she said” nature of the evidence, we are bound by the trial court’s determination.

Regarding father’s failure to support, we disagree with the notion that mother made no request for support: she requested it in the course of the child custody proceedings and obtained a child support order in the amount of \$647 per month. She later instituted a child support collection action with Child Support Services. The testimony is unrefuted that during the statutory period preceding the petition to terminate his parental rights, father paid no support. It is true mother could have enforced the child support order in family law proceedings and made verbal demands, but the father’s duty to support pursuant to a valid support order did not evaporate just because mother did not seek formal redress for failure to pay. (*County of Orange v. Smith* (2002) 96 Cal.App.4th 955, 962 [child’s right to support cannot be abridged by his or her parents; waiver of child support is void].)

Further, father’s incarceration does not excuse his failure to support. He was incarcerated on his current commitment beginning in September 2010, but the statutory period for the termination of parental rights began to run in October 2009, eleven months earlier. Father was out of custody for most of that time. Father asserted he was unable to pay prior to his arrest because he was ill and not gainfully employed during that period. However, he had financial assistance from his parents who would have paid child support on his behalf if father had requested, but he did not. He also could have sought a modification of the child support order based on his inability to pay.

Additionally, even when father was gainfully employed, he contributed, involuntarily, only two payments of \$647 each, over a period of five years from the date of the support order. We have no reason to believe that father would have voluntarily paid child support even if he were healthy and employed. Finally, even if we were to agree with father's argument that he did not have the ability to pay support during the statutory period, Family Code section 7822 does not require proof of *both* lack of communication and failure to support. Because the disjunctive "or" is used in the statute, evidence of *either* a parent's failure to support his child *or* his failure to communicate with the child is sufficient to support a finding of abandonment.

There is substantial evidence to support the trial court's findings that father left the minor with his mother and stepfather with the intent to abandon. The fact that there was conflicting testimony does not compel a reversal of the judgment.

**c. Sufficiency of Evidence that Termination of Parental Rights Was in the Minor's Best Interests.**

Father argues that termination of his parental rights was not in the minor's best interests. We disagree.

We agree that in any proceeding where there is at issue the custody of a minor child, the court must consider the minor's best interests. Indeed, Family Code section 7800 expressly provides that the statutory intent is to serve the child's best interest by providing the stability and security of an adoptive home where those conditions are otherwise lacking. (See *Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 162-163.)

Here, the termination of father’s parental rights was in the best interest of the minor because father had abandoned the minor, as determined by the trial court, by failing to communicate or support the minor for the statutory period, and because the proposed stepparent adoption presented stability and security for the minor. The fact that the minor had a loving relationship with his father in the past does not amount to detriment which might preclude a judgment terminating parental rights.

Father’s lack of support and inconsistent contact, coupled with his criminal convictions, which caused him to be absent from his child’s life, demonstrate that adoption would promote the security and stability the Legislature envisioned for children. Childhood is brief and a child’s need for a permanent and stable home cannot wait for a parent to rehabilitate himself or herself. (*Adoption of Allison C., supra*, 164 Cal.App.4th at p. 1016.) Adoption is in the child’s best interests.

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.