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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Adoption of A.A. et al., Minors.

S.D. et al.,

Petitioners and Respondents,

v.

J.A.,

Objector and Appellant.

E055969

(Super.Ct.No. ADORS800093)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael Torchia, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance by Petitioners and Respondents.

J.A. (Mother) appeals the trial court's termination of her parental rights pursuant to Family Code section 7822,¹ freeing A.A. and M.A. for adoption by maternal grandmother, B.D., and maternal stepgrandfather, S.D. (collectively, the grandparents).

Mother claims that the trial court erred when it granted the grandparents' petition to free A. and M. from her control based on a lack of evidence of abandonment supporting termination under section 7822. The grandparents have not filed a response.

I

PROCEDURAL AND FACTUAL BACKGROUND

A. *Guardianship and Petition to Terminate Parental Rights*

On May 17, 2004, B. filed letters of guardianship for A. and M. Updated letters of guardianship were filed in February 2008, adding S. and Mother's sister, R.D., as coguardians. On July 18, 2008, the grandparents filed an adoption request for both M. and A.² The father of A. and M. was listed as M.M.

On September 19, 2008, the grandparents filed their petition for freedom from parental custody and control pursuant to section 7800 et. seq. (the petition). S. and B. alleged that Mother and M.M. had not provided any support for the children. M.M. had not contacted the children since October 2003. Mother had not visited the children since

¹ All further statutory references are to the Family Code unless otherwise indicated.

² The records for the adoption request have not been provided to this court. However, in its ruling, the trial court noted that on August 4, 2008, the adoption and guardianship were ordered to be heard together.

August 2004. Mother had infrequent telephone calls with the children. It was also alleged that Mother and M.M. both had extensive criminal records.

The California Department of Social Services (the Department) filed numerous requests for extensions to file a report on the adoption petition filed on July 18, 2008. On March 7, 2011, the Department filed a preliminary report. Mother did not agree with the adoption despite the voluntary guardianship by the grandparents. Mother's place of residence could not be confirmed. The Department could not locate M.M., who was alleged to be the biological father. The Department could not make a recommendation on the adoption because of its inability to contact Mother and M.M.

B. Trial and Closing Arguments

Mother was appointed counsel, and the matter was set contested. A trial on the petition was conducted on December 1, 2011. At the time of trial, A. was nine years old and M. was eight years old.

The grandparents called Mother as a witness. At the time of the trial, Mother lived in a drug and alcohol treatment program. She had voluntarily entered the program eight days earlier due to methamphetamine addiction.

Mother was on probation. She had been convicted of burglary of a residence about six months prior to the hearing and would be on probation for three years. She refused to address how recently she had used methamphetamine, choosing to invoke her Fifth Amendment right not to incriminate herself. Mother admitted that prior to her

burglary conviction, she had been using methamphetamine “[a]ll the time.” She had used drugs consistently from 2007 until her conviction.

Mother had been living in Ontario for one year prior to entering drug treatment. She lived with a third daughter (who is not a subject of the petition), who would be three years old in January, and with the father of that daughter. She was not working. Prior to that time, she had lived in Rancho Cucamonga for two years. When she lived in Rancho Cucamonga, she worked at a towing company for one year. Prior to moving to Rancho Cucamonga, she had lived in Ontario for one year.

In 2006, Mother lived in Las Vegas and had lived there since 2004. She moved to Las Vegas to get away from M.M. When she moved to Las Vegas, M. was about to turn one, and A. was two. When Mother left, she and B. agreed that B. would be the “temporary” guardian of the girls for one year.

While in Las Vegas, M.M.’s six-year-old daughter lived with Mother, and Mother took care of her. Mother worked at a grocery store and attended a beauty college. Even though Mother was working, she provided no support to A. and M. Mother claimed that while she was in Las Vegas, the grandparents would not let her see A. and M. She had plans to see them every other weekend, but she never came to California during the two-year period because she claimed that the grandparents would not let her visit.

In 2006, when she returned to California, she was convicted of a drug-related charge with M.M. She regularly used drugs between 2006 and 2007. Mother claimed

she called B. and requested to talk to A. and M. between 2006 and 2007, but her request was denied. In 2008, she sought visitation with A. and M.

In April 2009, Mother had the new baby and went to the grandparent's house to give A. and M. Easter gifts. She visited with M. for a few hours. Mother did not visit A. and M. between 2004 and April 2009.

S. testified that other than M.'s first birthday, which occurred right after Mother moved to Las Vegas, he did not know that Mother ever planned to visit the girls. S. admitted they recommended to Mother that she not come visit after just leaving for Las Vegas because the girls were having a hard time adjusting and were not sleeping. He and B. felt it was better if the girls had more time to adjust prior to her visiting.

Mother had not sent any letters or cards to the girls and only physically visited in April 2009. She had not sent any support. S. admitted that Mother called the house 10 to 15 times while in Las Vegas. She spoke with the children on a couple of occasions.

When Mother returned to California and moved in with M.M., S. and B. felt that the children would not benefit from seeing Mother because when she was with M.M., she was using drugs.

When Mother first left, M. and A. could not sleep and were crying, waking up every hour. A. required counseling, but M. was fine after a few months. Within six to nine months of Mother leaving, the children were adjusted to the situation and were happy. A. and M. were excelling in school. After the children were adjusted, Mother was allowed to speak with them over the telephone. In 2006, when Mother returned to

live with M.M., S. and B. decided it was in the children's best interest to limit contact with her.

S. indicated they originally agreed to take A. and M. until Mother could get a stable job and get her life on track. It was not the intention from the beginning to adopt the children. When Mother graduated from cosmetology school, S. discussed with her taking back the girls. The grandparents had Mother's car repaired for her for graduation. When Mother came to retrieve the car, she did not ask to see the children. Instead of taking the children back, Mother resumed her relationship with M.M.

It was not until 2008 that Mother brought gifts to A. and M. S. felt it was not in the best interests of A. and M. to have contact with Mother. S. admitted that if Mother had asked for visitation in 2007, he would have denied it.

B. testified that Mother signed a voluntary guardianship agreement for B. to take A. and M. Mother did this so M.M. would not take the children. B. claimed that Mother agreed that not visiting A. and M. one month after she moved to Las Vegas was the best thing for the children. B. indicated that within six to nine months after Mother moved to Las Vegas, B. would have approved of visitation.

In the beginning, B. never intended to adopt A. and M.; the plan was to return them to Mother's care once she finished school and had a job. B. did not recall Mother asking in 2005 or 2006 to visit the children. Mother would call on occasion and speak with A. Mother oftentimes called to talk to B. but did not ask to speak with A. and M.

In August 2006, the plan was to return A. and M. to Mother, but she was back using drugs. Mother requested a visit. This was the only request that year, and it was denied by B. due to Mother's drug use. B. could tell by speaking with Mother on the telephone that she was using drugs. Mother called between 2006 and 2008, but B. could not recall her asking to see the children. On occasion, she would ask about the girls.

B. was receiving public assistance for A. and M. in the amount \$550 per month. It was not enough to take care of the children. B. never asked Mother for support.

Mother testified on her own behalf that she never intended to abandon A. and M. In 2007, she received a notice about child support from the Department of Child Support Services but was not required to pay because she had no money. She had recently been contacted again and had a court date scheduled. Mother tried to contact B. about the guardianship in 2008 but claimed B. would not take her calls. Mother claimed she always asked to talk to or visit A. and M. when she would call. She was consistently denied visitation in 2006 and 2007.

Mother finally sought assistance from the court in 2008 by requesting visitation. Mother testified that she would not be opposed to the grandparents continuing the guardianship because it was the "best place for [the children]." However, she needed to see her children. Mother claimed that she never came to the grandparents' house to visit M. and A. because she thought it would cause a scene. Mother moved back with M.M. in 2006 because she had nowhere else to live.

Both parties submitted closing argument in writing. The grandparents argued that Mother had abandoned A. and M. Mother had not supported the children since 2004. Despite the fact that the grandparents were receiving public assistance, Mother had been sued for support in 2007. She had had steady employment but refused to support her children. She had made no effort to provide care to the children. She had been to the grandparents' home once between 2004 and 2006 and did not ask to see the children.

In 2006, the grandparents attempted to transition the children back to Mother, but Mother did not take them. She chose instead to live with M.M., who was considered a threat to the children. While living with M.M., Mother was twice convicted of drug-related charges. Between 2006 and 2008, the grandparents suspected that Mother was using drugs, and they did not want her to contact the children. Mother never attempted to visit. In 2009, Mother made one visit and was not denied access to the children.

At the time of trial, Mother was living in a drug rehabilitation facility and had a recent conviction for burglary. The grandparents submitted a declaration that M.M. had had no contact with the children since 2004 and had provided no support.

In Mother's written closing argument, she argued that there was no showing she abandoned A. and M. or that she failed to provide support. Mother moved to Las Vegas to attend school, and she claimed that B. agreed it was a good decision. B. agreed to be the guardian of A. and M. until Mother finished school. Once Mother settled in Las Vegas, she tried to set up visitation, but the grandparents refused, claiming they were trying to transition the children to adapt to their rules. The grandparents also did not like

some of the decisions that Mother had made, including where she was living and with whom.

As to visitation, the children were not home when she tried to retrieve her vehicle, and she had made one visit around Easter 2009. In 2006, the grandparents would not allow her custody because she moved in with M.M. Mother claimed she was denied visitation between 2004 and 2008.

In 2006 through November 2007, Mother admitted she was using illegal drugs. As a result, she did not want to seek custody of A. and M. in court.

Mother also claimed she had not failed to support A. and M. The grandparents had been receiving public assistance between 2004 and 2008 in the amount of \$550 per month. Mother was never asked to send money.

Mother argued she should not be penalized that she had not visited the children, because the grandparents would not allow it. Mother contended it was in the best interests of A. and M. to know that she loved them and was requesting to see them.

C. *Statement of Decision and Ruling*

The trial court issued a written ruling. It had read all of the pleadings, papers, and other documents in the case. It set forth its statement of facts. Relevant here, the trial court found that Mother agreed to leave A. and M. with B. She was allowed to visit the children six to nine months after she moved to Las Vegas. Over the next few years, Mother had “sporadic” and “minimal” contact with the children. Mother had “virtually” no contact with the children whether or not caused by B. not communicating with her or

because she chose not to visit. The trial court also referred to the request for visitation filed by Mother in May 2008, where she stated that she wanted the children to get to know her. Mother continued to use drugs. M.M. had never contacted the children.

In reaching its decision, the trial court addressed Mother's failure to support A. and M. under section 7822. It noted that Mother claimed that she did not fail to pay support because there never was a child support order in place, the grandparents never sought support, and she did not have an ability to pay. The trial court noted that her addiction caused her to have unstable income, but she was employed for a period of time. It noted, "While her financial circumstances may have been problematic, she still had an affirmative duty to support her children."

The trial court noted that it understood Mother's wish to re-establish a relationship with her children and applauded her for entering drug rehabilitation. However, it stated, "[I]t is dubious that she has now reached a stage in her life where she could resume a parental role in her children's life." The trial court referred to the fact that she was living in a rehabilitation facility and that she had pending criminal charges.

The trial court found by clear and convincing evidence that Mother "abandoned these children under Family Code § 7822." Mother's drug addiction had impacted the entire family. She had done nothing but make a request for visitation five years after she left her children and moved to Las Vegas. The trial court found, "Despite her testimony, which the Court does not find credible, it does not appear she engaged in any meaningful

physical or phone contact with her children for many years.” M. had been abandoned when she was only six months old and did not even know Mother.

Moreover, even when Mother returned to live in California, she did not try to reunite with her children but rather continued with her drug use. Mother’s drug use did not render her abandonment involuntary or unintentional. It noted that “the focus should be on the children’s best interests, and not the travails of their parents.”

As for the failure to support, the trial court found there was no evidence of Mother providing tangible support to A. and M. after 2003. The trial court found she did have a source of income when she lived in Las Vegas but provided nothing to the children or grandparents. The trial court concluded, “Accordingly, it is the Court’s position that the requisites of Family Code § 7822 have been met and that clear and convincing evidence establishes that the children have been left in the care and custody of [the grandparents] for several years prior to the filing of the Petition without communication and support from [Mother] and the birth father [M.M.] with the intent by both to abandon the children.”

The trial court also concluded that it was in the best interests of A. and M. to remain in the care of the grandparents. The grandparents were providing a secure and stable home and loved and cared for the children as if they were their own. A. and M. did not even appear to know Mother or M.M.

The petition was granted, and the order was filed on March 22, 2012. Mother filed a notice of appeal from the order on March 27, 2012.³

II

TERMINATION OF PARENTAL RIGHTS

“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 (*Allison C.*))

As relevant here, section 7822 provides that a proceeding to declare a minor free from the custody and control of a parent may be brought where “[t]he child has been left by both parents . . . in the care and custody of another for a period of six months without any provision for the child’s support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.” (§ 7822, subd. (a)(2).) Section 7822 further provides: “The failure to . . . provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the

³ Mother claims she appeals the order granting adoption of A. and M., but the only order made by the trial court that is included in the record is the termination of parental rights.

child, the court may declare the child abandoned by the parent or parents.” (§ 7822, subd. (b).)

In view of the drastic nature of a termination of parental rights, “proof of abandonment must be established by clear and convincing evidence. [Citation.]” (*Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 163.) “““[T]he question whether such intent to abandon exists and whether it has existed for the statutory period is a question of fact for the trial court, to be determined upon all the facts and circumstances of the case.”” [Citation.]” (*Allison C., supra*, 164 Cal.App.4th at p. 1016.)

“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 [citation], 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.] . . . ““: . . . An appellate court is not empowered to disturb a decree adjudging that a minor is an abandoned child if the evidence is legally sufficient to support the finding of fact as to the abandonment [citations].”” [Citation.]” (*Allison C., supra*, 164 Cal.App.4th at pp. 1010-1011, fns. omitted.)

The trial court here determined that the failure to communicate on the part of Mother was evidence of abandonment. It concluded that she had not engaged in any “meaningful physical or phone contact with her children for many years.”

In determining the intent to abandon by a parent, “the trial court may consider not only the number and frequency of his or her efforts to communicate with the child, but the genuineness of the effort under all the circumstances [citation], as well as the quality of the communication that occurs. . . .’ [Citation.]” (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.) “When the evidence permits the conclusion of only token efforts to communicate with the child, ‘[u]nless the presumption of abandonment raised by [that] fact has been overcome as a matter of law, the findings and order of the trial court . . . must be sustained.’ [Citation.]” (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1212.) Additionally, section 7822 does not “require an intent to abandon permanently. Rather, an intent to abandon for the statutory period is sufficient.” (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 885 [analyzing former Civ. Code, § 232, subd. (a)(1), which contained substantially same language as section 7822].)

Mother’s efforts to contact A. and M. after she left for Las Vegas were minimal. Mother stated that she only once sought to visit M. and A., right after she left the home. The trial court disbelieved that she intended to visit every other weekend. Although she claimed she called and tried to visit several other times, the trial court did not believe her testimony, and it was within its province to disbelieve her. (*In re B.J.B., supra*, 185 Cal.App.3d at p. 1212 [a trial court is not required to believe testimony as to intent, and

such testimony does not “of itself overcome the presumption of abandonment as a matter of law”].) B. and S. both disputed that Mother tried to visit while living in Las Vegas after the first few months. Moreover, once she returned to California, between 2006 and 2008, she had minimal to no contact with A. and M. The trial court found that there was minimal contact during this time and clearly rejected that Mother was foreclosed by B. and S. from visiting or contacting the children. “[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 six-month period.” (*In re Rose G.* (1976) 57 Cal.App.3d 406, 420, rejected on other grounds in *In re Cynthia K.* (1977) 75 Cal.App.3d 81, 85.)

Mother chose to live with M.M. despite the knowledge that B. and S. disapproved of her living with him and her admission that she used drugs when she was with him. Mother stated that she never intended to permanently abandon A. and M. and wanted to get them back when she had her life together, but she did nothing to facilitate the regaining of custody. The trial court’s conclusion that Mother had minimal or no contact with A. and M. between 2004 and the time of trial was supported by substantial evidence.

Additionally, Mother failed to provide any support for A. and M. since 2004. A parent’s failure to contribute to his or her child’s support absent a demand, coupled with a failure to communicate, may support an intent to abandon. (*Allison C.*, *supra*, 164 Cal.App.4th at p. 1013.) Only token efforts to support or communicate with the child do

not disturb the presumption of an intent to abandon. (See *In re B.J.B.*, *supra*, 185 Cal.App.3d at p. 1212.)

Mother admitted that over the years, she held two jobs. She testified that she was told that she did not have to pay child support in 2007 because of her income. Moreover, it is true that the grandparents never requested support from Mother. However, Mother admitted that she had been contacted again by child support services and had a pending proceeding regarding her payment of child support. Mother contends that the grandparents acquiesced in her failing to pay support. The record does not support that the grandparents refused support. The trial court properly found that Mother failed to provide any support, and, coupled with her lack of communication, this was substantial evidence of abandonment.

Mother relies upon *In re Jacklyn F.* (2003) 114 Cal.App.4th 747 and *In re Cattalini* (1946) 72 Cal.App.2d 662 to support her claim that she did not abandon A. and M. *Cattalini*, however, involved a judicial decree that took the child away from the parent appealing the abandonment of the child, not voluntary abandonment. (*Cattalini*, at pp. 665-666.)

In *Jacklyn F.*, the mother had left her child with the grandparents for three days. When the grandparents could not contact the mother, they filed for guardianship. The mother contested the guardianship proceeding. The trial court granted guardianship. Eventually, the trial court found that mother had abandoned the child and terminated the mother's parental rights. (*In re Jacklyn F.*, *supra*, 114 Cal.App.4th at pp. 749-750, 753.)

On appeal, the court reversed the order, finding that once the guardianship was granted, the mother was no longer legally entitled to custody without further court order. This did not constitute abandonment. (*Id.* at pp. 756-757.)

Here, Mother voluntarily left A. and M. with the grandparents. Further, when she returned to California, she made no effort to obtain custody of the children or terminate the guardianship. B. and S. both testified that they spoke with Mother regarding taking back custody of A. and M., but she chose instead to move in with M.M. As such, these cases cited by Mother are not applicable in this case.

Finally, the trial court properly found that it was in the best interests of A. and M. to terminate parental rights. As noted, section 7800 et seq. refers to the court's duty to promote the children's best interests and to liberally construe these statutes "to serve and protect the interests and welfare of the child[ren]." (§ 7801.) Here, A. was only two years old and M. was less than one year old when Mother left. Mother had one visit throughout a seven-year period. She had spoken with A. intermittently. She had no knowledge of where they attended school or any of their favorite things. On the other hand, the grandparents had taken care of these girls for very nearly their whole lives, and they were excelling in school.

Mother continued her drug use and was living in a rehabilitation facility. She expressed she needed to see her children but had no expression of love or caring for the two children. As noted by the trial court, it was "dubious" that she was ready to resume parental control of A. and M., two girls who barely knew Mother.

Here, the evidence was sufficient to support the trial court's finding of abandonment under the clear-and-convincing-evidence standard.

III

DISPOSITION

The order terminating parental rights as to A. and M. is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.