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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re H.D., a Minor.

C.D.,

Petitioner and Respondent,

v.

W.S.,

Objector and Appellant.

F064013

(Super. Ct. No. S-1501-AT-2966)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John L. Fielder,
Judge.

Gino deSolenni, under appointment by the Court of Appeal, for Objector and
Appellant.

Janice M. Banducci and Gerald M. Leverett for Petitioner and Respondent.

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*Before Wiseman, Acting P.J., Cornell, J. and Kane, J.

W.S. (father) is the biological father of H.D. From October 2008 until December 2010, father had no contact with H.D. and admitted he made no attempt to make contact during that period. Between January 2009 and January 2010, father made no payments for H.D.'s support. C.D., H.D.'s mother (mother), obtained an order freeing H.D. from father's parental custody and control under Family Code section 7822,¹ on the ground that father left H.D. in mother's care for at least one year without communication or provision for support and with the intent to abandon. Father now argues that there was insufficient evidence to prove he "left" H.D. or intended to abandon him within the meaning of section 7822. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORIES

H.D. was conceived during a one-night encounter between mother and father in 2001. Mother awoke after the encounter with no memory of having had intercourse with father. H.D. was born in February 2002. Paternity testing showed that mother's boyfriend at the time was not the father, and mother concluded that father must be the father. Mother initiated a child-support action against father in Solano County. The action was later dismissed because father could not be found.

In January 2006, mother spotted father tending bar in Bakersfield. She told him they had a child together. Father said, "You know how many times I've heard that before?" and walked away.

In July 2007, Mother contacted father after finding his MySpace page on the Internet. Mother was now married and told father she wanted him to agree to the termination of his parental rights so her husband could adopt H.D. Father refused and said he wanted to be part of H.D.'s life.

Mother initiated a new child-support action. Court-ordered paternity testing confirmed that father was H.D.'s father. The court granted visitation rights to father and

¹Subsequent statutory references are to the Family Code.

ordered him to make support payments, with the visits and payments both to begin in January 2008.

For support, father was ordered to pay \$451 per month plus half the cost of daycare and medical insurance, plus arrearages. He was granted the right to visit for three hours each Tuesday and Thursday and 12 hours every other Saturday and Sunday.

Father made only a few support payments. He made two payments in January 2008 and one payment covering half of February 2008. In July 2008, father made a payment for daycare expenses. Two payments also were made in January 2009. Mother received one check in January 2010 from the county, representing wages that had been garnished from father. For a full year, from January 2009 to January 2010, mother received no payments.

Father's visits did not last long. He made his last midweek visit in September 2008 and his last weekend visit in October 2008. Father had no contact with H.D. or mother from October 2008 until after the present action was filed in December 2010.

Mother filed this action in Kern County Superior Court on December 1, 2010. Her petition cited section 7822, subdivision (a), which provides for an action to terminate parental custody and control 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).) An order terminating parental custody and control “terminates all parental rights and responsibilities with regard to the child.” (§ 7803.)

The petition also cited section 7825, which provides for an action to terminate a father’s parental custody and control where “the child was conceived as a result of an act in violation of Section 261 of the Penal Code [i.e., rape], and where the father was convicted of that violation.” (§ 7825, subd. (b).) This ground for termination of father’s

rights was not pursued in the subsequent proceedings, and there is no indication in the record that father was convicted of raping mother.

In December 2010, father went to the Department of Child Support Services to try to reestablish visitation and to arrange for support payments to be transferred from his bank account to mother. Mother received two payments in January 2011.

A Family Court Service Officer filed two reports before the hearing on the petition. The first report, dated January 18, 2011, stated that father's current whereabouts were unknown and that mother had not heard from him since he stopped visiting H.D. in 2008. Mother's husband had begun raising H.D. when H.D. was 15 months old and wanted to adopt H.D. Mother told the officer that H.D. felt hurt when father stopped visiting in 2008, but he had since learned to accept father's absence. The officer interviewed H.D., who told her he had a difficult time when father stopped visiting and wondered why father did not want to see him. He understood that "his mom is going to court so he and his mom have control over whether he has to see [father] or not."

The report included the results of a background check on father. Father had a 2004 conviction for driving under the influence. His driver's license was suspended and he had several convictions for driving with a suspended license. He had convictions in 2009 for manufacturing or possessing a dangerous weapon and for obstructing a public officer.

The report concluded that father had been out of contact and failed to pay support for at least one year and that it was in H.D.'s best interest to make him available for adoption by his stepfather. The report recommended that mother's petition be granted pursuant to section 7822.

The Family Court Service Officer's second report was filed on March 2, 2011. The officer had interviewed father. Father told the officer, erroneously, that he did not learn of H.D.'s existence until H.D. was six or seven years old. H.D. was not yet four when mother confronted father in the bar in Bakersfield in 2006, and H.D. was five when

mother contacted father in 2007. Father said, also erroneously, that his last visit with H.D. was about 18 months ago. (The last visit was in October 2008 and the interview was in January 2011, so about 27 months had elapsed.)

Father said he did not want to give up his parental rights. He stopped visiting H.D. out of concern for H.D.'s feelings, having heard from his brother that H.D. said he wondered if his mother did not love him anymore since she was making him visit with father. Father said he stopped making support payments because he was unable to pay; he had lost his job, his house, and his driver's license. In November 2010, he had obtained work again and wanted to make support payments and have a relationship with H.D. He believed H.D.'s reluctance to visit with him arose from mother's feelings toward him, and thought he and H.D. could reestablish a relationship with the help of a counselor.

After interviewing father, the officer continued to be of the opinion that the court should grant mother's petition. She stated that, although father said he stopped visiting out of concern for H.D.'s well-being, it would have been better to work with a therapist to resolve the issue than to absent himself for such a long time.

The hearing was held on April 1, 2011. Mother testified that she allowed father to begin visiting H.D. before the court began holding hearings in the 2007 proceedings. Father had mother's telephone number at that time. Mother got a new telephone number in March 2008, and father had that number also. Her number did not change at any time after that.

Mother and her husband moved from Bakersfield to Northern California in August 2009. Mother called father's number, intending to inform him of the move. Someone else answered and said it was father's telephone. Mother left a message with this person. The family moved back to Bakersfield in June 2010.

In addition to having mother's telephone number, which did not change when she moved, father also knew where mother's parents lived. Mother testified that father could have reached her through her parents at any time.

Mother testified that H.D. has always called her husband "dad." She supported H.D. in doing so, but told H.D. that father was his biological father and he could call father "dad" if he wished. H.D. stopped asking about father after father stopped visiting.

Mother's husband, J.D., testified at the hearing. He said father had and used his cell phone number during the period when father was exercising his visitation rights in 2008. J.D. had the same cell phone number from then until at least June 2010. Father did not call at any time after he stopped visiting in October 2008.

Father also testified at the hearing. He said he stopped visiting H.D. in 2008 because of what he had heard from his brother and because of H.D.'s demeanor. Father lost his job and his house in 2008 and became homeless. He was in jail on a misdemeanor conviction in November and December of 2009. During the period when he was homeless, he lost his telephone and did not remember mother's or J.D.'s telephone numbers. At some point, he asked his sister to call mother, but he did not call himself because he "had nowhere to go" and "had nowhere to live," and "felt hopeless, you know?" He said he knew his sister went to see H.D. one Christmas, but otherwise he believed his sister did not make contact with the family.

Father did not call mother in October 2008 to talk about his reasons for stopping the visits. When asked why not, he said, "Well, I had a lot of feelings going on. I really didn't know how to express them. I mean, I don't—I don't have an answer to that question really."

Father testified that he still wanted to see H.D. during the period when he did not visit and knew it was important to keep in contact with him. He did not call mother to tell her this, he said, because "I couldn't even fix my own life, at the time," and "I couldn't express my feelings." Although father had no car, he thought he probably could

have found a ride to go see H.D., “but I didn’t. [¶] I’m sorry. That’s the only thing I can say about it.”

Father’s family never told him they would not give him transportation to visit H.D. He was out of contact with his family for a time, and said, “It was pretty much my doing.”

Mother’s counsel asked, “So you—did you choose not to call for your son ...?” Father answered, “Yes.”

Counsel appointed for H.D. asked father, “And did you consider at all the effect of you stopping your visitation with [H.D.], how it would [a]ffect [H.D.]?” Father answered, “Every day.” Counsel continued, “But you didn’t take any steps to reinstate it until December of 2010, correct?” Father said, “Yes, ma’am.”

After this, the court asked father whether he had any Native American heritage. He did, and the court suspended the proceedings so that inquiries could be made pursuant to the Indian Child Welfare Act.

The hearing resumed on November 18, 2011. Father did not attend. His attorney said, “For the record, my office yesterday around three o’clock left a very detailed message with [father], explaining to him the importance of being here today. He did not respond to our message. And we’ve had no contact with my client.”

Counsel for the parents made brief arguments. Counsel for H.D. characterized father’s testimony as “self-serving” and said his reasons for remaining out of communication with H.D. “seem very shallow.” She opined that it would be in H.D.’s best interest if the petition were granted.

The court found that father stopped visiting H.D. in October 2008 and never resumed and that he was out of contact from that time until the time of the hearing. It stated:

“I do not think that [father] is doing anything other than what [he] feels is in his best interest, and I’m sorry it has to sound so harsh ... but that is the situation here. He views this child as something that perhaps if he

has time, then he'll engage with the child in. If he doesn't, if he's busy, if he's got things in his life, then the child is of no consequence.”

The court stated that it was authorized to infer, from a lack of contact or support for one year or longer, that a parent had an intent to abandon a child. On that basis, the court found that father intended to abandon H.D. The court granted the petition based on section 7822.

DISCUSSION

Father argues that insufficient evidence was presented to support the court's order. “When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof.” (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.)

To prevail, mother was required to show four elements: Father (1) left H.D. in her care and custody (2) for at least one year (3) without provision for H.D.'s support or without communication and (4) with the intent to abandon H.D. (§ 7822, subd. (a)(3).) The court's finding in mother's favor must be supported by clear and convincing evidence. (§ 7821.) The governing statutes must be “liberally construed to serve and protect the interests and welfare of the child.” (§ 7801.) Failure to communicate or provide support “is presumptive evidence of the intent to abandon.” (§ 7822, subd. (b).) The court can find abandonment if the parent has made “only token efforts to support or communicate with the child” (*Ibid.*) The parent need not intend to abandon the child permanently; it is enough if the parent intends to abandon the child during the one-year statutory period. (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 885 [construing predecessor statute, former Civ. Code, § 232].)

I. Sufficiency of the evidence that father left H.D. in mother's care and custody

Father first contends that the evidence was insufficient because it did not show that he ever “left” H.D. in mother’s care and custody within the meaning of section 7822. He relies on *In re Jacklyn F.* (2003) 114 Cal.App.4th 747, 755, in which it was held that “parental nonaction” alone cannot establish that a child has been “left” within the meaning of section 7822. “We do not agree that evidence of a failure to communicate or support for the statutory period of time can, in itself, satisfy the separate statutory requirement that the child be ‘left’ for a prescribed period of time.” (*Ibid.*) Instead, the requirement of leaving the child must be satisfied by a “physical act” or “voluntary action.” (*Id.* at p. 754.)

We disagree with *In re Jacklyn F.* for several reasons. First, the court’s holding is inconsistent with the plain meaning of the statute. Section 7822, subdivision (a)(3), provides for a petition to terminate parental rights where “[o]ne parent has left the child in the care and custody of the other parent” The word “to leave” in this type of context normally connotes inaction. To leave anything in the possession or custody of another person means simply to let that other person continue to possess it. The primary dictionary definition of “leave” is “to cause or allow to remain; not take away.” (Webster’s New World Dict. (2nd college ed. 1982) p. 804, col. 2.)² The most natural interpretation of the statute’s words is that an action to terminate parental rights lies when one parent allows the child to remain in the custody of the other without communication or support for the statutory period with the requisite intent.

Second, it is difficult to see what “physical act,” beyond allowing the child to remain in the other parent’s custody, could reasonably be required to establish that the child was “left.” Must the parent deposit the child in a basket on the other parent’s

² “[T]o give up; abandon; forsake” is the 10th definition. (Webster’s New World Dict. (2nd college ed. 1982) p. 804, col. 2.)

doorstep? The court's opinion in *In re Jacklyn F.* provides no clue about what conduct might satisfy the requirement it delineates.

Third, it would make little sense to say (as § 7822, subd. (b), says) that an *intent to abandon* can be inferred from inaction (noncommunication and nonsupport) if *leaving* cannot be inferred from inaction. If physical conduct amounting to abandonment were a requirement, it would never be necessary to infer an intent to abandon from inaction. The physical act would always support the necessary inference. Subdivision (b)'s presumption would then be surplusage.

Fourth, the court's conclusion in *In re Jacklyn F.* seems to have been influenced by the fact that, in that case, there was a court order granting temporary guardianship to the appellant mother's parents. (*In re Jacklyn F.*, *supra*, 114 Cal.App.4th at p. 749.) The Court of Appeal appeared to find this fact significant in holding that the mother could not be held responsible for leaving the child in her parents' custody, the implication being that the mother had merely acceded to the court's order. (*Id.* at p. 756.) The Court of Appeal relied on cases in which it was held, for instance, that "where the care and custody of the child is taken away from the parent by order of the court without the consent of the parent, there is no abandonment." (*Id.* at p. 754.) Yet the proposition that a finding of abandonment cannot be based on a parent's mere obedience to a court order is fully consistent with the common-sense notion that a parent who goes incommunicado for a year has left his child in the care of others. In any event, father's silence and nonsupport in this case had nothing to do with his compliance with any court order placing H.D. with another caretaker. To the contrary, father stopped communicating after the court granted him visitation rights, and he stopped providing support after the court ordered him to provide it.

We find *In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491 more persuasive than *In re Jacklyn F.* There, the Court of Appeal held:

“In determining the threshold issue of whether a parent has ‘left’ his or her child, the focus of the law is ‘on the voluntary nature of a parent’s abandonment of the parental role rather than on *physical* desertion by the parent.’ [Citations.] [¶] Thus, this court has held that a parent will not be found to have voluntarily left a child in the care and custody of another where the child is effectively ‘taken’ from the parent by court order [citation]; however, the parent’s later voluntary inaction may constitute a leaving with intent to abandon the child [citation]. [¶] Numerous appellate decisions have long agreed that the leaving-with-intent-to-abandon-the-child requirement of section 7822 can be established by evidence of a parent’s voluntary inaction after an order granting primary care and custody to the other parent. [Citations.]” (*In Marriage of Jill & Victor D.*, *supra*, 185 Cal.App.4th at p. 504.)

The court went on to attempt to harmonize *In re Jacklyn F.*, which had been decided by another panel of the Third District Court of Appeal. It stated:

“[W]e do not read *Jacklyn F.* as holding that evidence that a parent has failed to communicate with his or her child for a year or has failed to provide any support for the child during that time can never be circumstantial evidence that the parent left the child and did so with the intent to abandon the child. Otherwise, it would be nearly impossible to prove that a parent who does not communicate with or support his or her child for a year has done what *Jacklyn F.* characterized as the ‘physical act’ of leaving the child for the statutory period.” (*In re Marriage of Jill & Victor D.*, *supra*, 185 Cal.App.4th at p. 505.)

It is not clear to us that *In re Jacklyn F.* and *In re Marriage of Jill & Victor D.* really can be reconciled. After all, *Jacklyn F.* says there must be a “voluntary action” of leaving (*In re Jacklyn F.*, *supra*, 114 Cal.App.4th at p. 754), while *In re Marriage of Jill & Victor D.* says “voluntary inaction” can suffice (*In re Marriage of Jill & Victor D.*, *supra*, 185 Cal.App.4th at p. 504). It is clear to us, however, that *In re Marriage of Jill & Victor D.* contains the superior analysis and that its analysis supports the trial court’s decision in the present case. The evidence amply supported the finding that, through voluntary inaction, father left H.D. in mother’s care and custody.

Father says his case is distinguishable from *In re Marriage of Jill & Victor D.* because father, unlike Victor, did not ignore any court proceedings and did not move

away, and failed to pay support only because of inability to pay. In our view, although these distinctions might be relevant to the intent to abandon, they do not show that father did not leave H.D. in mother's care and custody. As we have said, to "leave" in this context means only to "allow to remain."

In his reply brief, father argues that the requirement of "leaving" H.D. "could not have been established" because father "did not have custody of the minor during the relevant statutory time period" There is no authority, however, for the proposition that an action to terminate parental rights under section 7822 lies only if the parent against whom it is brought had custody. Even *In re Jacklyn F.* did not so hold.³

We perceive no room for doubt that father left H.D. in mother's care and custody during the period when he did not communicate with H.D. and did not support him. The court's finding on this point was supported by substantial evidence.

II. Sufficiency of the evidence that father intended to abandon H.D.

Allowing a child to remain in another's custody obviously does not, by itself, amount to abandonment; many children live with one parent while the other shares in their support and remains in continuous communication, and these children have not been abandoned. That is why it must also, under section 7822, be shown that the parent failed to communicate or provide support and had an intent to abandon. The proof of the failure to communicate and provide support is not challenged in this appeal. The proof of the intent to abandon is the only remaining issue; we turn to it now.

Father contends that there was insufficient evidence to show that he intended to abandon H.D. As we have mentioned, there is a statutory presumption that a parent who fails to communicate or provide support for one year has an intent to abandon. Father

³A heading in the table of contents of father's reply brief says there was a denial of due process because the trial court failed to enforce a visitation order. This argument is not developed in the brief and does not appear to refer to anything in the record of this case. We assume the heading was included in error.

argues that he rebutted this presumption with his testimony that his failure to communicate or provide support arose from personal problems, including unemployment and homelessness.

There was ample evidence on the basis of which the trial court could base a finding that these problems did not prevent father from communicating. Mother testified that her telephone number never changed during the period of father's noncommunication and that father knew and had used that telephone number before. Mother also testified that father knew where her parents lived and always could have contacted her through them. In his own testimony, the reasons father gave for his failure to communicate had to do with his feelings of hopelessness, not with any practical obstacles. He said he forgot mother's telephone number, but he did not deny that he could have contacted mother through her parents. He also admitted that if he had tried to find a ride to visit H.D., he could have found one. In fact, he admitted that it was by his own choice that he did nothing to contact H.D. for over two years. Section 7822, subdivision (b), provides that failure to communicate *or* provide support for the statutory period is presumptive evidence of an intent to abandon, so father's unexcused failure to communicate is sufficient to support the ruling even if father showed he would have paid support if he had had money.

Father also argues that he should not have been found to have abandoned H.D. because mother "relocated [without] notifying anyone" when the family lived in Northern California between August 2009 and June 2010. The court could reasonably find, however, that mother took reasonable steps to notify father by calling his telephone, steps that failed only because father gave his telephone to someone else without providing mother any alternative means of contacting him. Further, the court could reasonably find that, despite the relocation, father had the ability to call mother at her unchanged telephone number at all times and had the ability to contact her through her parents at all times, and never did so.

As for father's assertion that he stopped visiting because H.D. appeared uncomfortable with the visits, the trial court reasonably could have agreed with the Family Court Service Officer's view that measures other than breaking off communication for two years could have been taken. Even assuming H.D. did express unhappiness, the court could find that father's reaction was consistent with an intent to abandon.

In sum, the evidence was sufficient to allow the trial court to find that father had the intent to abandon H.D. even though father was homeless and unemployed and H.D. might once have expressed dissatisfaction with the visits. Based on the statutory presumption and parents' testimony, the court reasonably could find that father always had the ability to communicate, but chose not to do so.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.