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

In re CAIDEN W., a Minor.

JEREMY W.,

Petitioner and Respondent,

v.

MANDI S.,

Objector and Appellant.

F064399

(Super. Ct. No. AT-3029)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. James Compton, Commissioner.

Beth A. Melvin, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance for Respondent.

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* Before Wiseman, Acting P.J., Levy, J., and Franson, J.

Mandi S. (mother) appeals from a judgment granting a petition, pursuant to Family Code section 7822¹, declaring her son, Caiden, free from her parental custody and control. She contends that there is insufficient evidence to support the trial court's finding. She also contends that the trial court failed to comply with the Indian Child Welfare Act (ICWA; 25 U.S.C., § 1901 et seq.). We agree with her latter contention and reverse and remand for the sole purpose of ensuring compliance with the ICWA. In all other respects, the order terminating mother's parental rights is affirmed.

STATEMENT OF THE CASE AND FACTS

Caiden was born in May of 2001, the child of mother and Jeremy W. (father).² When mother and father separated soon after Caiden's birth, Caiden remained in mother's care. In October 2002, father sought and was granted physical custody of Caiden. Mother initially received day visits, but a month later the court ordered her visits to be supervised. In February of 2003, the court suspended mother's visits and conditioned reinstatement on mother's completion of parenting classes, substance abuse treatment, and clean drug tests.

Despite the order suspending her visits, mother claims that she had weekly visits with Caiden from 2002 to 2009, visiting him under the supervision of Caiden's paternal grandmother at the grandmother's house. Father denied that mother visited Caiden during this time period.

Mother was in custody for part of 2009 on a narcotics charge. Upon her release in December of 2009, she entered a residential treatment program, which she successfully completed in February of 2011. She completed a parenting program in April of 2010. Mother claims that when she was released from jail and contacted father about visiting

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

² Father is the respondent in this appeal, but failed to file a brief.

Caiden, he would not discuss the issue with her. In April of 2011, mother petitioned for reinstatement of her visitation, as she had completed the requisite programs.

The hearing on mother's petition for visitation was stayed when, on June 10, 2011, father petitioned pursuant to Family Code sections 7822 and 7825 to have Caiden freed from mother's parental custody and control. In his petition, father alleged that mother had failed to visit Caiden since he was two years old and that she had provided no provisions for his support. According to the petition, father was unaware of mother's whereabouts until he discovered, in January of 2010, that she was living across the street from him. While across the street, mother never inquired about or attempted to communicate with Caiden. Father also alleged that he had begun a relationship with Faith in 2005, whom he later married, and who was now a mother-figure to Caiden. Father believed that Caiden would "suffer detriment" as a result of mother's efforts to obtain visitation, and alleged that Caiden did not want any contact with mother as he had developed a bond with Faith. Father alleged that it was in Caiden's best interest to be freed from mother's custody so that Caiden could be adopted by Faith.

At the August 5, 2011, hearing on the petition, mother was present and requested counsel. Counsel was appointed for both mother and Caiden, and the matter continued.

At the October 14, 2011, hearing, the parties were not ready to proceed, but the court received the Family Court Services investigator's report, which documented the parents' conflicting versions regarding mother's contact with Caiden. The investigator reported that Caiden did not remember when he last visited with his mother. He did remember one occasion when he got off the school bus and his mother called out to greet him. Caiden ran inside because "he was afraid [his mother] was going to take him," although Caiden could not explain to the investigator why he thought that. The investigator interviewed Caiden's paternal grandmother, who stated that she was unaware of mother visiting Caiden at her home. The investigator concluded that father and his family had made it difficult for mother to visit Caiden, but criticized mother for taking

nine years to complete the programs that would have allowed her to ask for reinstatement of visitation. The investigator recommended that the court grant father's petition.

At the hearing, the court asked mother whether she had Native American ancestry. Under oath, mother stated that she thought she had Cherokee heritage on her father's side of the family. The court instructed mother's counsel to obtain information from mother about her heritage, and scheduled a further hearing for January 13, 2012.

At the January 13, 2012, contested hearing, father, his wife Faith, and his father Roy testified in support of the petition. Father testified that it had been at least nine years since Caiden visited with mother. According to father, he realized sometime in 2009 that mother was living across the street from him. He denied speaking with her since this discovery, since he had "no reason to." Father testified that Caiden only went outside when he was with him, and that mother had not tried to approach Caiden. According to father, he spoke to Caiden about visiting mother when he first learned she was across the street, but that he left the decision whether to visit her entirely up to Caiden. Father spoke to Caiden about mother's visitation request, but only to tell him that they would be going to court. Father opposed mother's request for visitation because "she'[d] been out of [Caiden's] life so long that ... there's no reason for her to come and wreck my life again – or my son's."

Faith testified that she had never heard from mother in the seven years that she had been with father. According to Faith, she and father never discussed mother living across the street from them, or that she was ever even a topic of conversation. When questioned further by the court, Faith acknowledged that she and father had "[b]riefly" discussed mother living in their neighborhood and that she had talked to Caiden about it when he initiated the conversation. Caiden seemed "angry" during that conversation. Faith testified that she had discussed Caiden's anger with a school counselor and that he had seen a school psychologist for a period of time; father testified that Caiden had not been

in counseling to address issues about his mother but that he had recently been enrolled to do so.

Roy testified that mother had not been to his home to visit Caiden from 2003 to the present and that, had mother visited when he was not there, his wife, Caiden's paternal grandmother, would have told him so. When shown a picture of mother and Caiden together, Roy acknowledged that it appeared to have been taken in 2005 in front of his home, but he maintained that he was unaware mother had been to his home to visit Caiden.

Mother acknowledged that the court had suspended her visits with Caiden until such time as she completed a parenting class and substance abuse treatment, programs which she did not complete until 2011. She explained her delay as follows: "I knew it was the conditions on paper, but I was visiting with my child at his grandparents' house. [Father] knew about it." According to mother, she visited Caiden once a week until her incarceration in August of 2009. When she visited, she occasionally gave Caiden gifts, such as cash and a Yamaha 50 motorcycle, for which she produced a registration in court. The last time she gave Caiden a gift, this time of money, was in July of 2009. Mother testified that, when she was released from jail in December of 2009, she immediately called father but was told by Faith that she could not visit. When she asked Caiden's paternal grandmother about visiting, she was told Caiden no longer spent much time at their house. Mother then entered a residential treatment program for a year. She was not to have contact with anyone for the first 30 days of the program. After several months, mother earned weekend passes. Mother testified that she had last contacted father on Easter of 2011. At that time, father told her he did not want her in Caiden's life. According to mother, she did not file her request to modify the Family Law Court's visitation order from more than a year after her release from jail because it took that long for her to get the documentation she needed to support her request. That petition was suspended when father filed the current petition.

Mother said that she discovered she lived on the same street as Caiden when she was released from custody. Mother claimed she never approached Caiden because father was always with him. Mother offered several photos into evidence, including a photo of Caiden taken in 2009, which was taken by Caiden's paternal grandmother and given to mother, and one of Caiden and mother taken in 2005 outside of the paternal grandmother's house.

In summation, father's counsel argued that mother's intent to abandon Caiden was evident from the fact that she last provided a gift for Caiden in July of 2009 and then had no contact with him before filing her visitation request in May of 2011. Mother's counsel urged the court to find that father and his family had made a "concerted effort" to keep Caiden out of mother's life. Caiden's counsel questioned the credibility of father and his family members, but was also critical of mother for taking over seven years to accomplish the treatment programs ordered in 2003 as a condition of visitation. Caiden's counsel did not express an opinion as to whether Caiden would suffer detriment if he did not have a relationship with mother, as she had been absent much of the time due to substance abuse.

The court agreed that there were "credibility problems" with father and family, but determined that mother had failed to maintain contact with Caiden, focusing on the time between mother's release from jail in December of 2009 and the filing of the petition for visitation modification in April of 2011. The court granted the petition, stating:

"I understand she was in in-treatment, an in-treatment facility, for portions of that, but after about four months of being in that, which I would have put somewhere around March or April, she had earned weekend passes. [¶] Based upon the testimony I have heard, I do find that there has been a period in excess of a year where mother has failed to maintain contact with the minor child. And without explanation, the Court, based upon that, is going to find in fact there was an intent to abandon."

No mention was made of the ICWA compliance issue at this hearing.

DISCUSSION

I. IS THERE SUFFICIENT EVIDENCE TO SUPPORT THE FINDING PURSUANT TO SECTION 7822?

Mother contends that there is insufficient evidence to support the trial court's finding that she "left" Caiden or that she did so with the intent to abandon him within the meaning of section 7822. We disagree.

A. Law

A proceeding to have a child declared free from the custody and control of a parent may be brought under section 7822 if the parent has abandoned the 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." (§ 7822, subd. (a)(3).) Thus, three elements must be met: "(1) the child must have been left with another; (2) without provision for support or 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.]" (*In re Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010 (*Allison C.*).

""In order to constitute abandonment there must be *an actual desertion*, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same." [Citations.]' [Citation.] Accordingly, the statute contemplates that abandonment is established only when there is a physical act – leaving the child for the prescribed period of time – combined with an intent to abandon, which may be presumed from a lack of communication or support." (*In re Jacklyn F.* (2003) 114 Cal.App.4th 747, 754; § 7822, subd. (b) ["failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon"].) To overcome the statutory presumption, the parent must

make more than token efforts to support or communicate with the child. (§ 7822, subd. (b) [“If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent”]; *In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1212.) Intent to abandon may be found on the basis of an objective measurement of conduct, as opposed to stated desire. (*In re B.J.B.*, *supra*, at p. 1212.) The court may consider the frequency with which the parent tried to communicate with the child, the genuineness of the effort under all the circumstances, and the quality of the communication that occurred. (*Ibid.*; *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.) “The parent need not intend to abandon the child permanently; rather, it is sufficient that the parent had the intent to abandon the child during the statutory period.” (*In re Amy A.* (2005) 132 Cal.App.4th 63, 68.) Furthermore, the one-year statutory period need not be the year immediately preceding the filing of the petition. (See *Adoption of Burton* (1956) 147 Cal.App.2d 125, 136 [interpreting predecessor statute Civ. Code, § 224] (*Burton*); *In re Connie M.* (1986) 176 Cal.App.3d 1225, 1237, fn. 2 [same, citing *Burton*].)

B. Standard of Review

We apply a substantial evidence standard of review to a trial court’s finding under section 7822. (*In re Amy A.*, *supra*, 132 Cal.App.4th at p. 67.) “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.]” (*Allison C.*, *supra*, 164 Cal.App.4th at pp. 1010-1011, fn. omitted.) All evidence most favorable to the respondent must be accepted as true and that which is unfavorable discarded as not having sufficient verity to be accepted

by the trier of fact. (*In re Gano* (1958) 160 Cal.App.2d 700, 705.) “Abandonment and intent “are questions of fact for the trial [court] [Its] decision, when supported by substantial evidence, is binding upon the reviewing court. 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.] ‘The appellant has the burden of showing the finding or order is not supported by substantial evidence.’ [Citation.]” (*Allison C.*, *supra*, at p. 1011.)

C. Analysis

The first element of section 7822 required evidence that mother left Caiden in father’s care and custody for a period of one year. Here, there is no question that Caiden had been in father’s care since October of 2002, when father was granted physical custody of the child. A subsequent court order issued in 2003 suspended mother’s right to visit with Caiden. Thus, while Caiden’s custody status at that point was a matter of “judicial order taking custody ... [which] cannot support a finding of abandonment,” (*In re Jacklyn F.*, *supra*, 114 Cal.App.4th at p. 754) mother’s inaction in the following seven plus years easily converted the “taking” into a “leaving” for purposes of the abandonment statute (*id.* at pp. 755-756).

Having concluded that the evidence was sufficient to support a finding that mother left Caiden in father’s care, we consider whether the evidence supported the second element of section 7822, namely, that mother failed to communicate with Caiden or failed to provide for his support for a period of one year. The statute does not require that the parent failed to do both. The trial court found that “there has been a period in excess of a year where mother has failed to maintain contact with [Caiden].” Father testified that it had been at least nine years since Caiden visited with mother. Caiden told the investigator that he did not remember when he last saw his mother, but that, on one occasion when he got off the school bus in his neighborhood, his mother called out to greet him. According to mother, she visited Caiden weekly until her incarceration in

August of 2009, but that, once she was released in December of 2009, father told her he did not want her in Caiden's life. Mother testified that, even though she was living on the same street as Caiden, she never approached him because father was always with him. Either the court did not believe mother's claim that father prevented her from visiting Caiden, or it believed her efforts, even if rebuffed, were "only token efforts to support or communicate with the child." (§ 7822, subd. (b).) In either case, after considering all the evidence and observing the demeanor of the witnesses, the court was in the best position to ascertain the truth from the conflicting evidence. Substantial evidence, in the form of both mother's and father's testimony, supports the trial court's finding.

Finally, we consider whether the evidence supported the trial court's finding that mother had "an intent to abandon." Mother, by her own admission, did not provide any support for Caiden after July of 2009, when she claims she gave him a gift of money. This failure to support is presumptive evidence of mother's intent to abandon Caiden. (§ 7822, subd. (b).) And although failure to pay child support when the parent does not have the ability to do so or when no demand has been made does not, by itself, prove intent to abandon, such failure coupled with failure to communicate may do so. (*Allison, C., supra*, 164 Cal.App.4th at p. 1013; *In re Randi D.* (1989) 209 Cal.App.3d 624, 630.) Here, mother, again by her own admission, last visited with Caiden in August of 2009. We believe these facts constituted substantial evidence that during these 20 months (from August of 2009 until April of 2011, when mother filed her petition for reinstatement of visitation), mother failed to support and/or communicate with Caiden with the intent to abandon him. Mother's renewed interest in visiting Caiden in April of 2011, when she filed the petition, did not negate the sufficiency of the evidence of mother's intent to abandon Caiden during the previous period.

While mother's completion of a substance abuse treatment and parenting program is commendable, Caiden's need for parental support and contact could not wait for mother to finally complete these programs, first ordered in 2003.

“[A] child’s need for a permanent and stable home cannot be postponed for an indefinite period merely because the absent parent may envision renewing contact with the child sometime in the distant future. (Cf. *In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080; *In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038 [‘The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it.’]; see also *In re Rikki D.* (1991) 227 Cal.App.3d 1624, 1632 [‘Children should not be required to wait until their parents grow up’][, disapproved on other grounds in *In re Jesusa V.* (2004) 32 Cal.4th 588, 624, fn. 12].)” (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 884; see also *Allison C.*, *supra*, 164 Cal.App.4th at p. 1016.)

“Simply stated, a child cannot be abandoned and then put ‘on hold’ for a parent’s whim to reunite. Children continue to develop, and the Legislature has appropriately determined a child needs a secure and stable home for that development. Consistent with the statutory purpose to serve the welfare and best interests of children by expeditiously providing a child with an opportunity for the stability and security of an adoptive home when those conditions otherwise are missing from the child’s life [citations], we conclude that [the statute’s] phrase ‘intent ... to abandon the child’ does not require an intent to abandon permanently. Rather, an intent to abandon for the statutory period is sufficient.” (*In re Daniel M.*, *supra*, 16 Cal.App.4th at p. 885.) “[T]he Legislature has determined that the state’s interest in the welfare of children justifies the termination of parental rights when a parent fails to communicate with his or her child for at least one year with the intent to abandon the child during that period, even though the parent desires to eventually reestablish the parent-child relationship.” (*Id.* at p. 884.) “[A] child’s interest in obtaining the stability and security of an adoptive home would be defeated if the intent to abandon requirement ... were interpreted to ‘allow an absent parent to totally forsake and desert his [or her] child for [more than a year] at a time without fear of [losing] parental rights simply because he [or she] had the intent to reestablish the parent-child relationship at some indefinite time in the future.’” (*Ibid.*)

Viewing the evidence in the light most favorable to the court's judgment, as we must, we conclude substantial evidence supports the judgment.

II. IS NOTICE UNDER THE ICWA INADEQUATE?

At the October 14, 2011, hearing on the section 7822 petition, father's counsel mentioned that the investigator's report did not "address ICWA issues."³ The court responded, stating, "Yet again, they did not address ICWA issues. I got a note to that effect that it was not addressed at all even though I asked Ms. Matheney⁴ to make certain they do that. They still are just ignoring that. They apparently don't think it matters." The trial court then asked mother whether she had any Native American ancestry. Under oath, mother stated that she thought she had Cherokee heritage on her father's side of the family. The trial court instructed mother's counsel to obtain "as much information as possible on that," and that the issue would be addressed "if that is the case." Father's counsel noted that he had "an ICWA notification to make," but that he had not heard mother state which "tribe or band." The trial court stated that it had instructed mother provide that information to father's counsel through her own counsel and that that should be done within the next 10 days. A further hearing was scheduled for January 13, 2012, but the ICWA issue was not addressed again. Mother now contends that failure to address the issue requires reversal of the intent to abandon order.

The ICWA provides that when a child subject to a dependency proceeding is or may be of Native American heritage (referred to in the ICWA as an "Indian child") each tribe of which the child may be a member or eligible for membership must be notified of the dependency proceeding and of the tribe's right to intervene in the proceeding. (25

³ Father's section 7822 petition included form ICWA-010 declaring that Caiden had no known Indian ancestry and form ICWA-020 declaring that father had no known Indian ancestry.

⁴ Matheney appears to be the Manager of Family Court Services.

U.S.C., § 1912(a).) Section 180 incorporates the notice provisions set forth in the ICWA, calling for notice of an Indian child custody proceeding to be served on the Indian child's tribe. (§ 180, subs. (a) & (b).) An "Indian child custody proceeding" for purposes of the Family Code includes a proceeding initiated by the parent of an Indian child for purposes of declaring the Indian child free from the custody and control of the other parent. (§ 170, subd. (c).)

An "Indian child," for purposes of the ICWA, is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C., § 1903(4).) "A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe ... shall be conclusive." (Welf. & Inst. Code, § 224.3, subd. (e)(1).)

California law places an "affirmative and continuing duty" on "[t]he court, court-connected investigator, and party seeking a ... declaration freeing a child from the custody and control of one or both parents" to inquire whether the child involved in the custody proceeding is or may be an Indian child. (Cal. Rules of Court, rule 5.481(a); see also Fam. Code, § 177, subd. (a); Welf. & Inst. Code, § 224.3, subd. (a).) Upon receipt of information giving the court "reason to know" that a child in the matter before it is an Indian child, the "petitioner ... must send *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) to the parent ..., and the Indian child's tribe, in the manner specified in ... Family Law Code section 180" (Cal. Rules of Court, rule 5.481(b)(1).) "The responsibility for compliance with the ICWA falls squarely and affirmatively on the court" and, in the case of matters under the Family Code, the petitioning party. (*Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406, 1410; Welf. & Inst. Code, § 224.3, subd. (a); Fam. Code, § 177, subs. (a) & (b).) Failure to comply with ICWA notice requirements may constitute prejudicial error. (*In re H.A.* (2002) 103 Cal.App.4th 1206, 1213.)

Various appellate courts have held that the notice provisions of the ICWA are not triggered by “vague references” to Indian heritage. (See, e.g., *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520-1521 [father’s claim of Indian heritage, without naming the tribe and which he later retracted, was insufficient to require notice under the ICWA].) But here, mother’s reference to Indian heritage, that she had Cherokee ancestry on her father’s side, was not vague, triggering the notice requirement. (See, e.g., *In re Damian C.* (2009) 178 Cal.App.4th 192, 195-196 [mother’s reference in her ICWA-020 form to Pasqu-Yaqui heritage was sufficient to trigger the ICWA notice requirement]; *In re J.T.* (2007) 154 Cal.App.4th 986, 988, 993 [ICWA notice requirement, triggered by references to Cherokee and Sioux heritage, was not satisfied until every band of these tribes was notified].)

In response to mother’s statement of Cherokee heritage, the trial court instructed mother’s counsel to get “as much information as possible on that” from her client, and that the court would need to further address the issue “if that is the case.” Father counsel also acknowledged his need to make an “ICWA notification.” The minute order for that date states only that the hearing was continued “for the parties to address Indian Child Welfare Act issues.” (Some capitalization omitted.) But the record is silent as to any response from both the trial court’s instruction to mother’s counsel to gather the information and to father’s counsel’s need to make the proper notification. Nothing in the record discusses the ICWA issue further.

The trial court has a sua sponte duty to assure the petitioner’s compliance with the notice requirements of the ICWA and this duty continues until proper notice is given. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 261.) We cannot say with certainty from this silent record that the notice requirements of the ICWA were satisfied. Mother is correct that a parent does not waive an ICWA notice issue by failing to raise it below. (*In re J.T.*, *supra*, 154 Cal.App.4th at p. 991; *In re Nikki R.* (2003) 106

Cal.App.4th 844, 849.) We will reverse and remand for the sole purpose of ensuring ICWA compliance.

DISPOSITION

The order declaring Caiden free from mother's custody and control is reversed and the matter remanded to the trial court for the sole purpose of ensuring compliance with the ICWA. The trial court shall make a proper inquiry, and comply with the notice provisions of the ICWA. If, after proper inquiry and notice, the juvenile court determines Caiden is an Indian child, the juvenile court shall proceed pursuant to the terms of the ICWA. If the juvenile court determines the ICWA does not apply, the order declaring Caiden free of mother's custody and control shall be reinstated.