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

In re LILY H., a Minor.

ANDREA H.,
Petitioner and Respondent,
v.
JOSEPH L.,
Objector and Appellant.

F065059
(Super. Ct. No. AT-3049)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. Stephen D. Schuett,
Judge.

Roger J. Grass, for Objector and Appellant.

Andrea H., in propria persona, for Petitioner and Respondent.

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* Before Levy, Acting P.J., Cornell J., and Gomes, J.

INTRODUCTION

Andrea H. (mother) became pregnant with Lily H. by Joseph L. (father) and gave birth to Lily at the end of May 2009. Mother filed a petition on August 5, 2011, pursuant to Family Code section 7822¹ to have Lily declared free from father's parental custody.

After a contested hearing on March 16, 2012, the trial court granted mother's petition to declare Lily free from father's parental custody. Father contends there is no substantial evidence to support the trial court's judgment and that the time for measuring abandonment should have begun when he was notified of the results of a paternity test. We disagree and affirm the judgment.

FACTS AND PROCEEDINGS

An investigator's report filed by Family Court Services stated that mother and father had a nonmarital relationship that produced Lily. Mother and father had dated only a short time when mother learned she was pregnant. The two lived together briefly in another community prior to Lily's birth.

Father did not come to Bakersfield for Lily's birth. Father visited Lily three days later. Although father was invited to Lily's first and second birthday parties, he did not attend. Father sent Lily a gift for her second birthday. Mother obtained sole custody of Lily, by court order, in February 2011. Father's paternity was established in March 2011. Father began paying child support for Lily in March 2011, through a wage garnishment.

After Lily's birth, father initially had concerns over whether he was Lily's biological father and wanted a paternity test. Father told the court investigator that his son, who was 16 years old when Lily was born, required several brain surgeries. Had he not been his son's sole caregiver, father would have focused on Lily earlier.

¹ Unless otherwise designated, all statutory references are to the Family Code.

At the hearing, father testified that he was not present at Lily's birth because he was at his daughter's high school graduation and his son's junior high school graduation. Father confirmed his statements to the court investigator that his son had a serious medical condition, which required surgeries and this made it difficult for him to focus on Lily's parentage.

Father explained that he had been in a dating relationship with mother and they lived with each other at the end of 2008, after mother learned she was pregnant. Sometime in late 2008 or early 2009, father and mother broke up. One morning after father went to work, mother moved away while she was still pregnant. Father heard nothing from mother for a week. Although mother never told father that he made her pregnant, father assumed he was the father "because we were messing around at the time." Father was married to another woman when he was dating mother and he is still married. Father said he had a paternity test in March 2011 because he was not sure if he was Lily's biological father.

Father did not live with mother, or Lily, after Lily's birth and had no relationship with mother. Father only saw Lily at mother's home once right after she was born. When asked if father held Lily out as his daughter, father replied that he had his "suspicions" and he could say yes and no because he still wanted a DNA test. Father visited Lily for five or six hours and never saw her again. After the DNA test established father's paternity, a deduction for child support was made from his unemployment check. Father provided no support for Lily prior to the garnishment on his unemployment check.

Father sent Lily a birthday gift once, in 2011. Father denied mother's assertion that he was invited to Lily's first and second birthday parties. Father conceded that he never filed an action in court to establish his paternity and the first legal action was initiated by mother when she filed a reverse paternity action. When father had a blood

test in 2011, he did not ask to visit Lily because he could not afford to drive to Kern County and stay in a hotel room.

Mother testified that the only time father saw Lily was a few days after she was born. Mother lived with father for a time while she was pregnant. Mother told father that he was Lily's father. Although mother wanted to have a relationship with father, father tried to reconcile with his wife. Mother communicated with father prior to Lily's birth because she wanted him involved in Lily's life. Before, during, and after Lily's birth, mother called father and invited him to visit.

Mother heard father tell mother's sister-in-law that Lily was his child. Because father failed to provide support for Lily, mother had to go on public assistance. Father did not assist in any of mother's expenses, including her pregnancy costs. Between 2009 and early 2011, father contacted mother by Facebook and telephone, but never talked about Lily. Mother has been the sole care provider for Lily since her birth.

The trial court took the matter under submission and issued a written decision on March 23, 2012. The trial court found that although mother encouraged father to be part of Lily's life, father only visited Lily once right after her birth and had no further communication with Lily. The court found no evidence that mother tried to prevent father from visiting or communicating with Lily. The court found uncontroverted evidence that father deserted Lily for the statutory period and that father knew Lily existed and he was the likely father. The court noted that father could only say he did not [initially] have a paternity test conclusively establishing his fatherhood.

The court rejected an argument by father's counsel that the statutory period should not be measured until after the father can establish paternity. The court also rejected father's argument that imputing knowledge of paternity to him prior to a paternity test establishing his paternity violated his due process rights. The court found father's point would make the application of section 7822 untenable and father had every reason to

know Lily was his child. The court noted that this was not a case where the mother waited beyond the statutory period to inform father of her pregnancy. The court granted mother's petition and terminated father's parental rights.

DISCUSSION

Father contends there is insufficient evidence to support the trial court's finding that he abandoned Lily and his due process rights were violated because the statutory period should have begun in March 2011, after he confirmed he was likely Lily's father through a paternity test. We disagree and affirm the trial court's judgment.

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); *Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010 (*Allison C.*))

To constitute abandonment there must be an actual desertion, accompanied with an intention to entirely sever the parental relationship and throw off all obligations growing from that relationship. 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 the child. An intent to abandon 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 or parents”].) Intent to abandon may be found on the basis of the parent’s objective conduct, as opposed to stated desire. (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 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.*)

The parent need not intend to abandon the child permanently. 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 (*Amy A.*)) 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]; *In re Connie M.* (1986) 176 Cal.App.3d 1225, 1237, fn. 2.)

We apply a substantial evidence standard of review to a trial court’s finding under section 7822. The trial court’s findings must be made on clear and convincing evidence (§ 7821; *Amy A.*, *supra*, 132 Cal.App.4th at p. 67.) 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. All 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. (*Allison C.*, *supra*, 164 Cal.App.4th at pp. 1010-1011.)

Abandonment and intent are questions of fact for the trial court and its decision is binding on an appellate court when supported by substantial evidence. We are 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. The appellant has the burden of showing the finding or order of the trial court is not supported by substantial evidence. (*Allison C.*, *supra*, 164 Cal.App.4th at p. 1011.)

There was substantial evidence before the trial court that father was well aware he was Lily's father. Rather than supporting Lily and establishing a relationship with her, despite mother's entreaties to do so, father failed to visit or communicate with Lily after his one trip to see her a few days after her birth. When mother filed the instant petition, over two years had passed since Lily's birth. Father's single birthday gift to Lily constituted a mere token effort at communication. (§ 7822, subd. (b).) Substantial evidence, in the form of both mother's and father's testimony, supports the trial court's factual findings and rulings.

Finally, we consider father's argument that his due process rights were violated because the statutory period of section 7822 should have started when paternity was established in March 2011, rather than after Lily's birth in late May 2009. As the trial court noted in its ruling, a similar argument was made and rejected in *Adoption of Michael D.* (1989) 209 Cal.App.3d 122, 129-132 [superseded on another ground by statute in *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1127; *In re Mario C.* (1990) 226 Cal.App.3d 599, 606].)

From a due process standpoint, father was not denied notice of these proceedings, representation of counsel, or an opportunity to present evidence on his own behalf. Factually, father was aware of, and had been told by mother, that she was pregnant and he was the father. Father waited until nearly two years after Lily was born to have a paternity test. Father was not deceived concerning mother's pregnancy and did nothing legally to protect his parental rights for nearly two years. Father's formulation for measuring the time for abandonment would undermine the purpose and legislative intent of section 7822, to prevent the abandonment of children by their parents.

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

DISPOSITION

The judgment is affirmed.