

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

In re VALERIE P., a Minor.

BRENDA P.,
Petitioner and Respondent,
v.
BENJAMIN M.,
Objector and Appellant.

F065160
(Super. Ct. No. AT-3099)

OPINION

THE COURT*

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

Leslie A. Barry, under appointment by the Court of Appeal, for Objector and
Appellant.

Nieves Rubio, attorney for Petitioner and Respondent.

-ooOoo-

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

INTRODUCTION

When she was 15 years old, Brenda P. (mother) became pregnant with Valerie P. and gave birth to her in 2003. The father, Benjamin M. (father), was then 18 years old. Father was convicted of unlawful misdemeanor sexual intercourse with mother and last visited Valerie in 2004. Mother filed a petition on November 9, 2011, pursuant to Family Code section 7822¹ to have Valerie declared free from father's parental custody.

After a contested hearing on June 6, 2012, the trial court granted mother's petition to declare Valerie free from father's parental custody. Father contends there is no substantial evidence to support the trial court's judgment. We disagree and affirm the judgment.

FACTS AND PROCEEDINGS

Mother testified that she and father had Valerie together and Valerie is now eight years old. Father and his family members have not requested any visitation time. Mother has had the same phone number for the past 10 years. The last time father visited Valerie was in 2004. The last time mother spoke to father was also in 2004. Mother stated that father had not called her since 2004. Although mother moved in 2004, she explained that father knew about the move because father went to mother's new home to fight her new boyfriend. Mother lived at this second address between 2004 and 2010. In 2010, mother moved to her current address.

Mother remembered father visiting her at her second address to fight with her new boyfriend in August of 2005. Father was not there to visit Valerie. Mother was aware that father was in and out of prison and had a problem with the law. Mother conceded that she would like father to have no contact with Valerie. Had father contacted her, however, mother would not have prevented him from visiting with Valerie.

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

Father testified that he had a relationship with mother for three or four years. In 2003 or 2004, father was in custody. When he was released, he was homeless for three months. Most of father's family did not stay in touch with him. Father did tell mother where he was living. Father visited with Valerie, but last saw her in 2005. Between 2005 and 2011, father did not see Valerie because mother would threaten to call the police when he tried to see Valerie in 2004 and 2005. Father said that between 2005 and 2011, he tried to call mother four or five times but her telephone was disconnected.

Although father obtained papers to request a court order for visitation with Valerie between 2005 and 2011, he never filed them. Every time father was released from prison, he tried to see Valerie, but mother and her family would threaten to call the police. The most recent time that father tried to see Valerie was 2009. Father corrected himself and stated that because he did not know where mother lived, he did not go to her house. He would, however, encounter Valerie around and tried unsuccessfully to visit with her.

Father explained that he brought Valerie things but mother and her family just threw them away. Father conceded that he actually had mother's physical address where he could have tried to see Valerie. Father said he sent Valerie five Christmas cards between 2005 and 2011 but he sent no birthday cards. Father could not remember which years he sent Christmas cards to Valerie.

Father was not allowed to visit mother until "she was of age." When asked when mother reached the age of majority, father replied: "Out of sight out of mind. I don't know." Father asserted that he just wanted to see Valerie "and all they want to do is fight me for it."

The trial court took the matter under submission and issued a written decision on June 14, 2012. The court found that father last saw Valerie in 2004 and failed to send her any letters or request any visitation with her. Father last saw mother in 2005 during a

confrontation with mother's new boyfriend. The confrontation occurred at mother's residence, where mother resided between 2004 and 2010. When questioned about when a restraining order against visiting mother would end, father replied "out of sight, out of mind" and failed to attempt visitation with Valerie after mother turned 18 years old. The court found that father made no attempts to contact mother or the child after the mother turned 18 years old. No support was ordered to be paid by father. Father did not file any request with the court for custody or visitation.

Although father claimed mother's family members threatened him when he tried to contact Valerie, the court found that father failed to provide specific information concerning the nature, time, and dates of the alleged threats. The court found father's testimony inconsistent about the times he tried to see Valerie and the alleged threats from mother's family.

The court found that father sent about five Christmas cards to Valerie and no birthday cards. The court ruled that these few attempts at communication over the previous eight years qualified as only a token effort at communication. The court held that mother established by clear and convincing evidence the necessary facts to establish that father abandoned Valerie and granted mother's petition to terminate father's parental rights.

DISCUSSION

Father contends there is insufficient evidence to support the trial court's finding that he abandoned Valerie. He asserts there was substantial evidence that he was prevented by mother's family from communicating with Valerie and the trial court erred in terminating his parental rights pursuant to section 7822. 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 is no dispute that Valerie was left in her mother's care since 2004 and had no actual contact with father. Father, at most, had sent five Christmas cards between 2004 and 2011. Father sought no court order concerning support, custody, or visitation. Although father was in and out of prison, he was aware of mother's residence from 2004 to 2010 and made no attempt to communicate with Valerie by letter, telephone, or in person. The court rejected father's testimony that he had been threatened by members of mother's family when he tried to communicate because father could not be specific as to the nature, time, or date of these alleged threats.

There is substantial evidence in the record that father failed to communicate with Valerie since 2004, and that sending five Christmas cards was, at best, a token effort at

communication. (§ 7822, subd. (b).) 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 factual findings and rulings.

Finally, we consider whether the evidence supported the trial court's finding that father had the intent to abandon Valerie. Father, by his own admission, never provided any support for Valerie. This failure to support is presumptive evidence of father's intent to abandon Valerie. (§ 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.)

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.