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

In re B.H., a Person Coming Under the Juvenile
Court Law.

SARAH P.,

Petitioner and Respondent,

v.

JON A.,

Objector and Appellant.

F069735

(Super. Ct. No. AT3362)

OPINION

THE COURT*

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

Catherine C. Czar, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance for Petitioner and Respondent.

-ooOoo-

Jon A. (father) appeals from an order granting a petition, pursuant to Family Code section 7822¹, declaring his daughter, B.H., free from his parental custody and control.

* Before Kane, Acting P.J., Poochigian, J., and Franson, J.

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

He contends there is insufficient evidence to support the juvenile court's findings. We affirm.

STATEMENT OF THE CASE AND FACTS

B.H. was born in October of 2011, the child of father and Sarah P. (mother).² In March of 2012, the juvenile court ordered joint legal custody of B.H., with sole physical custody to mother and supervised visitation to father. In July of 2013, mother filed a petition to declare B.H. free from the parental control and custody of father, pursuant to section 7822.

In August of 2013, the juvenile court appointed counsel for father and B.H. A Family Court Services Investigator's Report filed in October of 2013 recommended the petition be granted. The report stated that B.H. lived in Bakersfield with mother, stepfather Brian P., an older half sister and a younger half sister. Father lived in Ventura with his two sisters. Father was in the military from November of 2005 until being honorably discharged in June of 2010.

According to the report, mother and father never lived together and mother ended the relationship with father during her pregnancy when she learned he was using drugs. He was present for her ultrasound appointment, but she did not hear from him again and had no way of contacting him when B.H. was born. Father did serve mother with custody and visitation papers when B.H. was one month old; mother thought he learned of B.H.'s birth through Facebook. Father was granted specific visitation times, but exercised his visitation rights "only briefly" and had not seen B.H. since March of 2012. Mother reported that she had the same address and phone number she had when father did visit B.H. and he could always contact her via e-mail if he planned to visit. Mother had

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

continued contact with the paternal grandmother, but father had not had any contact, nor provided any support.

The report stated that, according to father, he contacted mother one or two times during her pregnancy and that they discussed how they would co-parent B.H., but that contact was limited because mother did not want him around. He was not present at the birth because mother did not tell him when she went into labor. He tried to contact mother after B.H.'s birth, but was unable to reach her. Father was eventually able to meet B.H. with the help of his mother. He visited B.H. two or three more times, and then hired an attorney to file for custody and visitation. Father was granted supervised visits in January of 2012, and he had regular visits until March of 2012, but had not seen her since.

The report stated that father reported a drug addiction that lead to homelessness and for which he eventually sought and received treatment. When he successfully completed the program in late March of 2013, he attempted to reestablish contact with B.H., but because he learned maternal grandmother had died and mother was pregnant with her younger child, he did not think it was the right time to do so, so he spent the next few months trying to get his life back on track. Father acknowledged that he had no contact and provided no support for B.H. for over a year, but denied he intended to abandon B.H. Father stated he was not in a position to be a part of her life during that time because of his drug problem, temporary homelessness, time in rehab and the time it took to get his life back together.

A contested hearing was held in May of 2014. Father, mother, and mother's husband Brian P., testified. Mother testified that her dating relationship with father ended when she was three months pregnant. Mother then dated Brian P., who was present at B.H.'s birth and had been in a father/daughter relationship with B.H. since her birth, and now wished to adopt her. According to mother, father had visitation with B.H. from

January to March of 2012, but had had no contact of any kind with either her or B.H. since then. Mother never received any sort of support from father. Mother has had the same phone number and has a relationship with father's mother, who knows where mother currently resides. Mother thought that, between March and October of 2012, father lived with his girlfriend within a mile of mother's home. She had served papers on him at that address. Bryan P. and mother married in May of 2012 and he considers B.H. to be his daughter.

Father testified that he was currently residing in Ventura, but was in the process of "moving back" and was "kind of back and forth." Father was discharged from the military in 2010 and then became addicted to opiates, as a result of which he was homeless. According to father, he lived with his girlfriend for "a very brief time," but was "pretty much kicked out of there, too." Although he acknowledged that the girlfriend's home was about a mile from where B.H. lived, he did not visit her during that time frame. Nor had he visited her or contacted mother since he became sober in October of 2012. Father agreed that he last saw B.H. in March of 2012.

When questioned by his own counsel, father testified that he abused OxyContin, Xanax and Vicodin from the summer of 2010 until October of 2012, when he "kind of broke down" and decided to get help. Father testified that between B.H.'s birth in October of 2011 and her first birthday in October of 2012, when he became sober, he retained counsel and appeared in court in connection with custody of B.H. Father acknowledged that after March of 2012, he did not attempt to communicate with B.H. at all because he was "messed up, drugged out" and was living on the streets. When he decided to become sober in October of 2012, father entered a rehabilitation center in January of 2013, when there was room for him, and was a resident there for 90 days. Father claimed he began abusing drugs after he was discharged from the military because

he “was trying to mask a pain” which resulted from “flashbacks” associated with his work in the military as a mine detector.

When questioned by mother’s counsel, father acknowledged that he voluntarily chose to “get clean and sober” in October of 2012, and had been employed in two jobs since then, but he had not send any support for B.H.

In closing, father’s counsel stated that father never intended to abandon B.H., but that “it is very difficult for anybody who has not served in combat for 16 months to understand truly what was going through [father’s] mind while he was driving that mine sweeper every day.” Mother’s counsel argued that father had not seen B.H. for over two years and that B.H. did not know him. Instead, she knew Bryan P. as her father. Counsel for B.H. argued that father had the opportunity to have a relationship with B.H., but chose not to.

The juvenile court subsequently granted the petition, rejecting father’s argument that his failure to visit or communicate with B.H. was the result of post-combat stress or diminished capacity. The juvenile court found that father’s claim of diminished capacity was not supported by the evidence, as he had been able to hire an attorney, filed a paternity action, seek and obtain orders for visitation, all while, by his own admission, addicted to prescription drugs. Specifically, the juvenile court stated:

“[Father] also testified that his quitting use of prescription drugs was a decision he made when he realized his drug use had affected his ability to see his daughter. He testified that he stopped using drugs in October 2012 based essentially on his willpower. It is difficult to reconcile a decision to quit using drugs so that he could see his daughter with a claim of diminished capacity. Rather, it appears to reflect a clarity of thought and decision-making power seldom attributed to drug users. While the Court appreciates that there are reasons that [father] may have initially chose to use drugs, there is nothing in the record that would indicate a diminished capacity that would excuse his action in not visiting with or communicating with B[.H.] Therefore, the Court does not find that [father] had a

diminished capacity that would have effected the voluntary nature of his actions in this matter.”

The juvenile court found mother had established the elements of section 7822 by clear and convincing evidence that father intended to abandon B.H. when he left her in mother’s care for more than one year, without provision for support and without communication, and that father provided no explanation in response to this prima facie evidence.

DISCUSSION

Father contends that there is insufficient evidence to support the trial court’s finding that he intended to abandon B.H. within the meaning of section 7822. According to father his “trauma-induced addiction issues and [m]other’s reluctance to allow [f]ather contact with B[H.] placed serious roadblocks in [f]ather’s attempts to visit with his child or provide support, but did not diminish his intent or desire to have a relationship with her.” We disagree.

Applicable 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 ... [her] 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 relationship 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]; *In re Connie M.* (1986) 176 Cal.App.3d 1225, 1237, fn. 2 [same, citing *Burton*].)

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.)

Analysis

The first element of section 7822 required evidence that father left B.H. in mother's care and custody for a period of one year. Here, there is no question that B.H. had been in mother's care alone since March of 2012, when mother had sole physical custody of B.H. and father stopped visiting. Thus, while B.H.'s custody status at that point was a matter of a "judicial order taking custody ... [which] cannot support a finding of abandonment," (*In re Jacklyn F.*, *supra*, 114 Cal.App.4th at p. 754) father's inaction

following March of 2012 easily converted the “taking” into a “leaving” for purposes of the abandonment statute (*id.* at pp. 755-756).

There is also no question that there is substantial evidence to support the finding of the second element, that father failed to communicate with B.H. or failed to provide for her support for a period of one year. The statute does not require that the parent fail to do both. But here, father himself acknowledges that he had no contact with B.H. since March of 2012 and made no effort to communicate with B.H. or to provide for her support.

Finally, we consider whether the evidence supported the trial court’s finding that father had “an intent to abandon.” Father, by his own admission, did not provide any support for B.H. after March of 2012. This failure to support is presumptive evidence of father’s intent to abandon B.H. (§ 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, father, again by his own admission, last communicated with B.H. in March of 2012. We believe these facts constituted substantial evidence that during these 16 months (from March of 2012 until July of 2013, when mother filed her petition to declare B.H. free from father’s custody and control), father failed to support and/or communicate with B.H. with the intent to abandon her.

The claim that father was unable to communicate with or support B.H. due to post-combat stress or diminished capacity due to drug abuse, even if believed, does not in and of itself constitute a legal excuse for his failure to keep in touch or support B.H. (*Adoption of Oukes* (1971) 14 Cal.App.3d 459, 467; *In re Maxwell* (1953) 117 Cal.App.2d 156, 166.) Father is unable to explain why he was able, during the time when he claimed to be incapacitated, to hire a lawyer to help him file a paternity action and

obtain visitation; to decide to stop using drugs on his own and to seek treatment; and to obtain and hold onto several jobs. As stated by the juvenile court, “there is nothing in the record that would indicate a diminished capacity that would excuse his action in not visiting with or communicating with B.H.” The issue of credibility is for the trier of fact to determine. Considering the totality of the circumstances and the conflicts in evidence reflected by the record, we are unable to state that the juvenile court was not justified in finding as it did. (*In re Conrich* (1963) 221 Cal.App.2d 662, 668.)

While father’s enrollment in drug treatment is commendable, B.H.’s need for parental support and contact could not wait for father to finally get clean and sober.

“[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 failed 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.

DISPOSITION

The order is affirmed.