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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Adoption of ALEAH M., a Minor.

JESSICA M.,

Plaintiff and Respondent,

v.

MELISSA O.,

Defendant and Appellant.

G046071

(Super. Ct. No. AD77617)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald P. Kreber, Judge. Affirmed.

Matthew I. Thue, under appointment by the Court of Appeal, for Defendant and Appellant.

Donna P. Chirco, under appointment of the Court of Appeal, for Plaintiff and Respondent.

* * *

This is an appeal by Melissa O., the biological mother of now almost eight-year-old Aleah M., from a judgment terminating her parental rights to Aleah and freeing Aleah for adoption by Aleah's stepmother, Jessica M. The basic theory of the judgment is that Melissa abandoned Aleah for a period in excess of one year, leaving Aleah with Jessica for that time period without support. (Fam. Code, § 7822.)

Melissa's sole argument on appeal is remarkable. She does not argue that the evidence of abandonment was insufficient. Rather, she argues the "record demonstrates conclusively" Aleah's father George and his wife Jessica "were not credible." That is a very high bar to set for oneself on appeal. In *Adoption of Allison C.* (2008) 164 Cal.App.4th 1004 (*Allison C.*), for example, this court dismissed a challenge to a finding of abandonment based on credibility in a single sentence in a footnote, merely noting credibility is for the trial court to determine. (*Id.* at p. 1015, fn. 9.)

Unfortunately for Melissa's appeal, she cannot clear the height. A challenge to credibility on appeal requires resort to the relatively exotic doctrine of physical impossibility, or at least extreme inherent implausibility. As was noted in *People v. Watts* (1999) 76 Cal.App.4th 1250, 1258, "The rule was stated in *People v. Ozone* (1972) 27 Cal.App.3d 905, 910: 'It is blackletter law that any conflict or contradiction in the evidence, or any inconsistency in the testimony of witnesses must be resolved by the trier of fact who is the sole judge of the credibility of the witnesses. It is well settled in California that one witness, if believed by the jury, is sufficient to sustain a verdict. To warrant the rejection by a reviewing court of statements given by a witness who has been believed by the trial court or the jury, there must exist either a physical impossibility that they are true, or it must be such as to shock the moral sense of the court; it must be inherently improbable and such inherent improbability must plainly appear.' [Citations.]"

Here, at most, Melissa merely shows that, contrary to the testimony of George and Jessica, she might have indeed succeeded in reaching George and Jessica by

telephone on various dates after March 1, 2009 when, *unquestionably*, Melissa didn't pick up Aleah for a weekend visit at an exchange point in San Clemente. The phone calls, however, were tangential to the main point of the adoption proceeding, which was whether Melissa had failed to visit Aleah for over a year after March 1, 2009. Melissa herself admitted on the stand that her "last actual visitation with Aleah was at the end of February 2009" or "in March." Accordingly, we affirm the judgment.

FACTS

The *relevant* facts are undisputed. Aleah was born in August 2004. George is Aleah's biological father, Melissa her biological mother. George and Melissa never married. Rather, Jessica married George in November 2005. There is no dispute that, at least since 2008, Jessica and George have been Aleah's primary caregivers. Aleah calls Jessica, "Mom."

In 2006, George brought a paternity action to establish his right to custody or visitation. As of April 23, 2008, an order in the paternity case provided George would have primary physical custody of Aleah while Melissa would be entitled to visitation every second, fourth and fifth weekend of every month. The paternity action visitation order remained in effect until August 2009, when an order in a family law action (filed by George to compel some support from Melissa) awarded George sole legal and physical custody of Aleah.

George and Jessica live in Santa Ana. In 2009 Melissa lived, in her words, "almost south San Diego." To facilitate weekend visitation, there would be an exchange of Aleah by the parties at a Carl's Jr. in San Clemente. The trial judge in the paternity action had the excellent idea that the parties should buy something at the restaurant to obtain a receipt marked with the time and date to prove they had gone to the rendezvous point. George and Jessica customarily obtained such receipts. The trial judge also told the parties that they should give the other party 30 to 45 minutes leeway before giving up.

Beginning the second weekend in March, 2009, Melissa began to be a no-show at the exchange. So, for example, George and Melissa had a receipt (subsequently received in evidence) showing that they bought something at the Carl's Jr. in San Clemente at 7:12 p.m. on Friday, March 13, 2009. They were in possession of eight other receipts from the subsequent missed visitations. The evidence was uncontroverted – confirmed by Melissa herself in a statement to a court investigator as well as her own testimony on the stand – that Melissa never visited Aleah again after March 1, 2009.

As for child support, the only support paid by Melissa for Aleah was in April 2010, and that was through the Department of Child Support Services after George obtained a support order in the family law action in August 2009.

Melissa did send Aleah a Christmas card and present in December 2010, which was after Jessica had filed the petition that initiated this adoption case in late July 2010.

On July 28, 2010, Jessica filed a petition to free Aleah from Melissa's parental custody and control and adopt Aleah herself. The case went to trial about 10 months later, beginning June 3, 2010, and finished in mid-August.

Melissa's main theory in the proceeding (expressed by her attorney both in opening and closing statements) was that George and Jessica had "actively" tried to keep Melissa from her child. The trial judge, however, rejected what he called the "set up" theory right off. As if reading from the *Allison C.* opinion, the judge expressly found both George and Jessica credible. He particularly noted the Carl's Jr. receipts constituted circumstantial evidence that George and Jessica had traveled down to San Clemente to provide Aleah with visitation. Finding adoption to be in Aleah's best interest, the judge alluded to Justice Henry Moore's famous phrase from *In re Rikki D.* (1991) 227 Cal.App.3d 1624, 1632, "Children should not be required to wait until their parents grow

up.”¹ The judge noted that Melissa had sat “on the side lines” instead of doing anything to assert her right to visitation. He thus granted Jessica’s petition.

DISCUSSION

A

George and Jessica’s lack of credibility was Melissa’s main defense at trial. She presented evidence alleging George and Jessica generally behaved badly in the time period around Aleah’s birth in 2005. Melissa’s trial attorney thus asserted in closing argument: “Here is a man who cheated on his girlfriend and somebody else got pregnant and has been trying to dance on the top of the head of a pin and keep that from being a problem.” According to this line of defense, Jessica had brought the adoption action because “she wanted vindication for her long-term partner for having cheated on her and produced a child.”²

At trial she also presented evidence of phone records connected to Melissa’s missed weekend visits. Indeed, those phone records are the centerpiece of the opening brief. On appeal now Melissa argues the records showed she made “significant effort to remain in contact” with Aleah but George and Jessica “lied” about her *lack* of efforts at trial.

B

Family Code section 7822 sets forth three elements. The child must have been “left with another.” The child must have been left “without provision for support or without communication” for a “period of one year.” And the first two elements must have been done “with the intent . . . to abandon.”³ As explained in *Allison C.*, the intent

¹ *In re Rikki D.* was disapproved by *In re Jesusa V.* (2004) 32 Cal.4th 588 on the issue of whether a biological father’s presence was necessary for a dependency adjudication. The dicta about children not having the time to wait for parents to grow up, however, was untouched.

² This line of defense included various e-mails from Jessica sent around 2005, some of which were none too complimentary of George, and the revelation during trial – to which Jessica freely admitted – that during that time period Jessica set up a “false profile” on a social networking site to get information from Melissa.

³ Subdivision (a) of Family Code section 7822 provides:

element can be satisfied if the intent exists for the period of no support or communication – even if the allegedly abandoning parent hopes one day to resume a relationship.

(*Allison C.*, *supra*, 164 Cal.App.4th at pp. 1015-1016.)

Here, the statutory period was from March 2009 through April 2010. *Whatever* might be said of George or Jessica’s actions in, as Jessica’s trial brief put it, the “emotionally chaotic and draining” period around May 2005, the issue was of only marginal importance to the issue of Melissa’s own actions in 2009 and early 2010. There was certainly nothing in 2005 to shock the moral sense of the court in an adoption proceeding based on an alleged abandonment years afterwards.

Likewise the phone records. Even assuming, for sake of argument, the absolute worst that might be inferred from the phone records – that George and Jessica lied on the stand about not receiving phone calls from Melissa on days connected to missed visits – no basis for reversal would be shown.⁴ Melissa herself acknowledged her lack of contact with Aleah since March 1, 2009. Melissa also acknowledged she never spoke with Aleah by telephone in the period February 2009 through July 2010. George and Jessica have had the same address in Santa Ana since May 10, 2003, and have had

“(a) A proceeding under this part may be brought if any of the following occur:

“(1) The child has been left without provision for the child’s identification by the child’s parent or parents.

“(2) The child has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child’s support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.

“(3) One 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.”

⁴ In addressing Melissa’s argument we are bending over backwards to examine the merits. Melissa’s argument about credibility is wholly dependent on the phone records received into evidence as an exhibit. But while Melissa’s appellate counsel has formally requested transmittal of the trial court exhibits to this court, we have learned that the exhibits were returned to the parties after trial. It was thus Melissa’s responsibility to round up all the exhibits and transmit them to this court for this appeal, not simply request the trial court send us what it no longer has. The burden is on the appellant to show error by an adequate record. (E.g., *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125.) Here, an adequate record has not been provided to show the error she now claims. However, Melissa’s failure on appeal to carry her burden of providing an adequate record on appeal makes no difference in this case given the marginal relevance of the phone records to the real issue in the case, namely Melissa’s absence of support and visitation in the critical period March 2009 to April 2010.

the same landline since 2007. Melissa had called using that landline. If visitation were being denied she could have done so again. Melissa never wrote any letters protesting any denial of visitation, and in fact her attorney at trial recognized she had given up trying to assert any rights to visitation. Melissa's only explanation for her inactivity was her fear that Aleah would be "taken away from me permanently as far as the state or something like that."

Moreover, nothing about the phone records would compel the trial judge to believe the worst about George and Jessica's credibility. Quite the opposite. Melissa herself admitted she turned around half way to the initial missed visit on March 13, 2009. And, George and Jessica were in possession of receipts from the San Clemente Carl's Jr. which demonstrated they had actually shown up at the exchange point so that Melissa could be with Aleah during the weekend. The receipts showed actual presence and action. The phone records show no content, and were also incomplete. Melissa acknowledged that she didn't have any phone records showing she called George on March 13, 2009, the initial missed visit.

Melissa argues the receipts do not necessarily show George, Jessica and Aleah were present during those dates and times. But it is *that* suggestion which is inherently implausible. The trial court would be required, against all common sense, to assume that George and Jessica had somehow contrived to obtain receipts from other customers of that Carl's Jr. on the precise dates and times in question. This is, obviously, way too big a stretch for an appellant whose burden is to show the inherent improbability of the other side's position.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.