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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Adoption of A.O., a Minor.

K.U.,

Plaintiff and Respondent,

v.

K.N.,

Defendant and Appellant.

G051767

(Super. Ct. No. 14AD000289)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James L. Waltz, Judge. Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and Appellant.

Robert L. Williams for Plaintiff and Respondent.

\* \* \*

K.N. (father), the biological father of now four-year-old A.O. (child) appeals from a judgment declaring the child free from his custody and control so the child can be adopted by his stepfather, plaintiff K.U. (Fam. Code, §§ 7820, 7822; all further undesignated statutory references are to this code.) The trial court terminated father's parental rights based on its determination that he left the child with the child's mother, M.O., for over a year with the intent to abandon the child for the statutory period of one year. Father contends insufficient evidence supports the court's determination that he left the child with the intent to abandon him, his due process right was violated, and counsel should have been appointed for the child. We disagree and affirm the judgment.

#### FACTS AND PROCEDURAL BACKGROUND

Father and mother had an on and off relationship until 2011 when mother became pregnant with the child. In April 2011, mother moved a few hours away and father had minimal contact with her because he was a registered sex offender and could not leave the county or the state. Nevertheless, he and the paternal grandmother were present for the child's birth in September 2011.

In July 2012, mother moved closer to where father resided, after which father maintained regular contact with the child until February 2013, when mother and the child moved to California. Thereafter, father had "minimal" contact with them, although he remains current on his court-ordered child support payments.

Father informed mother he was taking a road trip in March 2013 and wanted to visit the child. Father visited the child twice that month. In June, the paternal grandparents took the child to Washington to visit with them and father. Although father wanted to extend the visit for another week, mother refused and asked if father would be willing to terminate his parental rights. Father indicated "he would think about it." The child has not seen father since the visit.

Although father started the “the process to request visitation through the [c]ourts in Washington” before the June visit, he has not “actively pursued it since.” He had trouble focusing on finishing the paperwork because it took a long time to complete and he did not have an attorney.

Father did not contact the child again until the end of September 2013 when he called to wish him a happy birthday. A few days before, father had served on mother a “temporary parenting plan” filed in Washington to establish visitation. They agreed to “mutually develop a visitation arrangement” without court involvement. Mother flew to Washington in early October to discuss parenting arrangements but they were unable to reach an agreement. When mother asked father again about relinquishing his parental rights, father said he was opposed to it. In mid-October, mother left a message for father about visits but he did not return her call.

Mother sent father a text message in mid-November. Father responded on November 29, 2013 and asked to speak to the child but the child was not home. He did not answer the telephone when mother called back two hours later. Since that date, father has not contacted mother or sent the child “cards, letters, and/or presents,” despite his possession of mother’s current address, friendship with her on Facebook, and knowledge that mother had been in Washington several times from November 2013 to January 2014. Although mother did not deny father visits, she stopped initiating them.

Father said he stopped attempting to contact mother because, “It didn’t seem like it was going to happen anyways which is why I actively started to pursue” “Court ordered visits.” He felt “uncomfortable talking to the mother” because they often disagreed and he did not believe their conversations were civil. He “hates confrontations.”

In November 2014, the child’s stepfather petitioned the court to have the child declared free from father’s custody and control in an effort to adopt the child. After being served, father sent mother “a motion for ‘temporary orders’ for visits on December

23, 2014 and January 6, 2015” but failed to file the necessary paperwork and thus no hearings were held.

In mid-January 2015, a California court investigator interviewed father. Father stated that although he would like to attend the hearing, he could not leave the state of Washington. He indicated he would request an attorney be appointed to represent him.

At the hearing on the petition, the court found father had over 30 days of actual notice of the proceedings but nevertheless failed to file any opposition, appear in court, or request representation and thus had defaulted. According to the court, father had “made only token efforts to establish and maintain contact with the child over the past year and/or even longer,” which raised a presumption of an intent to abandon. Because no evidence was presented to rebut that presumption, the court determined the requirements of section 7822 were satisfied. The court granted the petition and ordered father’s parental rights terminated immediately.

## DISCUSSION

### *1. Sufficiency of the Evidence*

Father contends substantial evidence does not support the three elements required to show abandonment. We disagree.

“Section 7800 et seq. governs proceedings to have a child declared free from a parent’s custody and control. The purpose of such proceedings is to promote the child’s best interest ‘by providing the stability and security of an adoptive home.’ [Citation.] The statute is to ‘be liberally construed to serve and protect the interests and welfare of the child.’” (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1009-1010.)

Under section 7822, a proceeding to declare a child abandoned may be brought where “[o]ne 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).) Failure to communicate or provide support “is presumptive evidence of the intent to abandon.” (§ 7822, subd. (b).) The court may also declare a child abandoned where a parent has “made only token efforts to support or communicate with the child.” (*Ibid.*)

“A finding of abandonment is appropriate where three main elements are met: (1) the child must have been left with another; (2) without provision for support or without communication from the parent for the statutory period; and (3) with the intent on the part of the parent to abandon the child. [Citations.] ““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.”” [Citation.] The parent need not intend to abandon the child permanently; it is sufficient the parent had the intent to abandon the child during the statutory period. [Citation.] “[The] question whether such intent to abandon exists and whether it has existed for the statutory period is a question of fact for the trial court, to be determined upon all the facts and circumstances of the case.”” (*In re E.M.* (2014) 228 Cal.App.4th 828, 838-839.)

We review a trial court’s finding of abandonment for substantial evidence. (*In re Amy A.* (2005) 132 Cal.App.4th 63, 67.) The appellant has the burden of showing the evidence is insufficient to support the findings. (*In re E.M., supra*, 228 Cal.App.4th at p. 839.)

### *1.1 Father “Left” the Child in Mother’s Care*

Father asserts he did not “leave” the child with mother because although a court order did not give mother sole legal and primary custody, his legal inability to leave Washington due to his criminal background effectively placed the child “in [m]other’s sole care through judicial action when [m]other chose to leave Washington.” The contention lacks merit.

“The threshold issue that must be addressed in this matter is whether the minor was ‘left’ within the meaning of the statute. The fact that a parent has not communicated with a child for [the statutory period] or that the parent intended to abandon the child does not become material under section 7822 unless the parent has ‘left’ the child.” (*In re Jacklyn F.* (2003) 114 Cal.App.4th 747, 754.) In determining whether a parent has “left” his or her child with another person, the focus is “on the voluntary nature of a parent’s abandonment of the parental role rather than on *physical* desertion by the parent.” (*In re Amy A., supra*, 132 Cal.App.4th at p. 69.) “[A] parent will not be found to have voluntarily left a child in the care and custody of another where the child is effectively ‘taken’ from the parent by court order [citation]; however, the parent’s later voluntary inaction may constitute a leaving with intent to abandon the child.” (*In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491, 504.) Therefore, nonaction in the face of a judicial custody order may result in a finding the parent “voluntarily surrendered” his or her parental role. (*In re Amy A.*, at p. 69.)

Here, the child was not taken from father by a court order. The record contains no evidence he ever sought custody of, or cared for, the child. It shows father maintained contact with the child up until mother moved to California, after which father visited the child twice in California during the month of March 2013 and had the child visit in Washington for a week in June. That was the last time father saw the child. After the visit in Washington, father did not contact the child until three months later to wish him a happy birthday. This was father’s last contact with the child. Although mother

attempted twice to initiate contact between father and the child, father did not respond until November 29, 2013, then made no subsequent efforts when the child was not home on that date.

Father admitted he voluntarily ceased contact with mother because he was uncomfortable. But that also meant he was voluntarily cutting off most of his contact with the child. And any discomfort in dealing with mother did not prevent father from sending the child letters, cards or gifts. Yet father has not done so since November 29.

Father did file in Washington a “temporary parenting plan” to establish visitation and served it on mother. But he never followed up on it. He thereafter did not attend the hearing on the petition to have his parental rights terminated under section 7822, file any opposition, or seek to have an attorney appointed like he said he was going to do. Under these facts, we conclude father voluntarily surrendered his parental role and “left” the child in mother’s sole care and custody for a period of one year within the meaning of section 7822.

Father claims that in response to the petition, he filed a motion in the Washington family court twice “for ‘temporary orders’ for visits, and made contact with [m]other.” But no hearings were ever held on the motions because father failed to file the necessary paperwork.

Father maintains his lack of communication is not sufficient to satisfy the requirement for abandonment that the child be “left” in the care of the other parent. (§ 7822, subd. (a)(3).) He quotes *In re Jacklyn F.*, *supra*, 114 Cal.App.4th at page 756, for the proposition “‘parental nonaction’ must involve more than merely failing to communicate in order to give meaning to the statutory language requiring that the minor be ‘left.’” There, the paternal grandparents petitioned for guardianship of the child. The mother contested the petition, appeared at the hearing, and filed written opposition seeking the child’s return. She also told an investigator the child was only staying with the grandparents until she got her life together and desired the child be returned to her

care. The trial court granted guardianship to the grandparents in December 1998. Four months later, the grandparents obtained a restraining order against the mother but granted her visitation rights. Although mother visited the child only once, she sent ““stack[s]”” of letters to her, which were required to be sent to the child’s therapist and screened. These letters were given to the grandparents, who did not show them to the child and did not tell the child the mother had attempted to contact her. (*Id.* at pp. 749-752, 756.)

In May 2002, the mother filed a petition to terminate guardianship and requested “supervised visitation, telephone contact and counseling with the minor.” (*In re Jacklyn F., supra*, 114 Cal.App.4th at p. 750.) The grandparents opposed the petition and filed a petition to terminate parental rights based on abandonment. (*Id.* at p. 756.) The mother appeared and testified at the hearing that she was “told she was not allowed to have any contact with the [child] except by mail,” was instructed to send letters to the child’s therapist, and did not know she was authorized to visit the child or she would have done so. (*Id.* at p. 752.) Unconvinced, the trial court granted the petition and terminated the mother’s parental rights based on abandonment. (*Id.* at p. 753.)

The appellate court reversed. In its view, “Once the guardianship was granted, appellant was no longer legally entitled to custody of the minor without further court order. At such point, the minor’s custody status became a matter of judicial decree, not abandonment. We conclude that appellant’s conduct following the granting of the guardianship—which included sending ‘stacks’ of letters to the minor but failing to visit her—did not constitute ‘parental nonaction’ amounting to a leaving.” (*In re Jacklyn F., supra*, 114 Cal.App.4th at p. 756.)

Here, while the facts are not entirely parallel, the record contains no evidence of a judicial decree, any correspondence or gifts much less stacks of letters to the child, or any attempt by father to contest the petition to declare the child free from his custody and control. He may have been a registered sexual offender legally unable to leave the county or the state, but he was present at the child’s birth although mother had

moved several hours away and went on a road trip during which he visited the child, presumably in California. By doing so we assume he either violated the terms of his probation or obtained a court order allowing him to do so. And even if he could not personally attend the hearing, father was provided with notice that he had the right to have counsel appointed if he could not afford one, yet took no action in that regard and otherwise made no attempt to contest the petition including filing an opposition. Such inaction constitutes more than a mere failure to communicate with the child.

### *1.2 Father Failed Communicate with the Child*

Father contends his “lack of communication was not indicative of an intent to abandon” because he had a genuine desire to maintain contact with the child. He relies on *In re Jack H.* (1980) 106 Cal.App.3d 257, an appeal from an order declaring two children free from the mother’s custody and control. There the juvenile court removed the children from the mother’s custody and placed them in foster care. Before 1977, mother was afraid frequent visits would upset the children and thus exercised her visitation rights sparingly. After 1977, she visited every two weeks until all visitation rights were suspended when it was determined her visits disrupted the foster home. “At trial, the mother testified she wanted the boys returned.” (*Id.* at p. 262.) The trial court found the mother’s “efforts to communicate with the children were token,” among other things, and declared the children free from mother’s custody but stayed it for six months. (*Ibid.*)

The court of appeal reversed. (*In re Jack H.*, *supra*, 106 Cal.App.3d at p. 271.) In addressing the trial court’s finding of abandonment, it noted the disputed nature of “the extent of restriction placed upon the visitation privileges of the mother” and the uncertainty of whether the trial court ignored “the mother’s good faith belief that her visitation rights were more limited. Such factual uncertainty is critical since the mother’s subjective *intent to abandon* is the controlling issue.” (*Id.* at pp. 264, 265.) The court

held that rather than using a purely quantitative test to find communications have been token, a “court must examine into the genuineness of the [parent’s] efforts at communications under all the circumstances.” (*Id.* at p. 265.) Upon examining the facts, the court determined the trial court erroneously applied a quantitative test by finding the mother’s “communications were token even though she maintained an ‘honest desire to have the children.’ The mother’s ‘honest desire to have the children’ is inconsistent as a matter of logic with an intent to abandon.” (*Ibid.*) The court also noted it was “unclear whether the [trial] court’s finding was based solely upon a determination of the nature of the actual restrictions and ignoring the mother’s good faith belief that her visitation rights were more limited.” (*Ibid.*)

Father claims this case is analogous because he desired “to maintain a relationship with his son, but communications with [m]other had become unproductive” and a finding of token communication was inconsistent with his intentions. The analogy is inapt. Father’s failure to maintain communication with the child did not arise out of any uncertainty about his belief that his right to do so was limited. Rather, he voluntarily chose to cut off all contact because he felt “uncomfortable talking to the mother” and “hates confrontations.” He did not appear or request counsel to represent him at the hearing on the petition, much less testify that he desired to maintain contact with the child. Although he filed requests in Washington for visitation, he never completed the required paperwork because it was too hard and took too long.

Father maintains he frequently visited the child before mother moved to California. That may be but “it is sufficient the parent had the intent to abandon the child during the statutory period,” which is a factual question for the court. (*In re E.M., supra*, 228 Cal.App.4th at p. 839.)

Because substantial evidence supports the trial court’s finding that father had not communicated with the child for a period of over one year, we need not address whether he failed to provide support for that period. Section 7822 requires a showing

that the parent either failed to support *or* failed to communicate for one year. “[U]se of the word “or” in a statute indicates an intention to use it disjunctively so as to designate alternative or separate categories.” (*People ex rel. Green v. Grewal* (2015) 61 Cal.4th 544, 561.) We note, however, that contrary to father’s claim he “voluntarily provided financial support,” the child support he paid was ordered by the court.

### *1.3 Father Presumably Intended to Abandon the Child*

Under section 7822, subdivision (b), a failure to communicate “is presumptive evidence of the intent to abandon.” (§ 7822, subd. (b).) Father contends he rebutted the presumption because he “showed no express or implied intent to abandon” the child. According to father, he made efforts to communicate with mother and the child following their move to California, paid support, resumed his efforts in the Washington courts to set up formal visitation once he knew the stepfather was seeking to terminate his parental rights, and showed his desire to be present or represented at the hearing on the petition. But this is nothing more than a request that we reweigh the evidence, which we may not do on a substantial evidence review. As to his filing of a notice of appeal, we may not consider such evidence as it was not before the trial court when it made the order we are reviewing on appeal. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

## *2. Due Process Violation*

Father asserts he was deprived of due process because the court proceeded without his presence or that of an appointed attorney despite knowing from the court report that father desired both. Under section 7862, “If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless that representation is knowingly and intelligently waived.” But father did not appear at the hearing, much less show he was unable to afford counsel. The court thus had no mandatory obligation to appoint counsel for him.

Further, “due process requires appointment of counsel for indigent noncustodial parents accused of neglect in stepparent adoption proceedings, *if* indigency is demonstrated *and* appointment of counsel is requested.” (*In re Jay R.* (1983) 150 Cal.App.3d 251, 260, italics added.) We perceive no reason why the same rule should not apply in cases of abandonment. Here, father did not show he was indigent or that he formally requested counsel, only that “he will be requesting” one. No due process violation occurred.

### 3. *Appointment of Counsel for the Child*

Father argues section 7861 required the court to appoint counsel for the child. As relevant, the statute states, “The court shall consider whether the interests of the child require the appointment of counsel. If the court finds that the interests of the child require representation by counsel, the court shall appoint counsel to represent the child, whether or not the child is able to afford counsel.”

“[I]n proceedings to free a child from parental custody and control, typically each side asserts it is protecting the best interests of the child and, in the process, the court becomes fully advised of matters affecting the child’s best interests. [Citation.] Accordingly, our Supreme Court has ruled that counsel need be appointed for the children only if the trial court, in its discretion, determines that their interests are not satisfactorily represented during the adjudication of the other issues. [Citation.] Where there has been no showing one way or the other, however, the court’s failure to appoint counsel is deemed *erroneous*.” (*Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 170-171.)

Nevertheless, “failure to appoint counsel for a minor in a freedom from parental custody and control proceeding does not require reversal of the judgment in the absence of miscarriage of justice.” (*In re Richard E.* (1978) 21 Cal.3d 349, 355.) Under this rule, a trial court’s failure to consider appointment of independent counsel for the

minor child is subject to harmless error analysis. (*In re Sarah H.* (1980) 106 Cal.App.3d 326, 330.)

Father argues only that the child's "interests were not protected" due to the failure to appoint counsel for him. He claims the record revealed the child had a relationship with him and his family, which "was worthy of protection." But that does not show the child's interests were prejudiced given that this information was already in the record and considered by the court. Nothing in the record suggests the child's interests were overlooked in this case. We conclude the child's rights were not prejudiced by the court's failure to appoint counsel to represent him.

#### DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.