Filed 12/21/15 In re Kyle L. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

Adoption of KYLE L., a Minor.	2d Juv. No. B264073 (Super. Ct. No. A017163) (Ventura County)
JENNIFER R. and KURTIS L., Appellants, v. W.R., Respondent.	

Jennifer R. (mother) and Kurtis L. (father) appeal from an order terminating their parental rights and freeing seven-year-old Kyle L. for adoption based on the finding that they abandoned the child. (Fam. Code, § 7822, subd. (a)(2).)[1] The trial court found that the parents' *inability* to pay support or visit on a regular basis established intent to abandon the child. This misstates section 7822, subdivision (b) which provides that the "failure to provide support, or failure to communication is presumptive evidence of the intent to abandon." A parent's *inability* to support or communicate with the child due to the parent's incarceration or lack of financial resources does not establish abandonment as

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

a matter of law. Abandonment, including intent to abandon, must be proved by clear and convincing evidence. (§ 7821; *In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1211.) We reverse and remand for further proceedings.

Factual and Procedural History

Kyle, age seven, has lived with his maternal grandfather, W.R., the last four years. During that time, mother and father were in and out of jail. When Kyle was born in June 2007, mother had just been released from jail and father was still in jail. Mother gave birth to Kyle and returned to jail when Kyle was seven months old.

Mother remained in jail until February 2009 and reunited with 18-month-old Kyle. Shortly after mother's release, a dependency petition was filed in Los Angeles County for general neglect and caretaker absence. The dependency proceeding was dismissed in September 2009. Mother and Kyle moved to the San Fernando Valley to live with the maternal grandmother and friends in various hotels and motels.

In January 2011, mother was stopped on the freeway for expired license tags. Kyle was in the car. Mother was arrested on a parole warrant and called her father, W. to pick Kyle up. Mother was in custody one day and, upon her release, picked Kyle up at W.'s house. Mother went back to jail in July 2012 and asked W. to "take him for a week or two. . . ." Mother asked to see Kyle but W. did not think jail was a place for children. W. obtained guardianship of Kyle on October 20, 2011, and has cared for him ever since.

Mother was convicted of identity theft and incarcerated from July 2012 until August 2014. W. did not allow visitation but mother did send letters and cards and talk to Kyle on the phone. In August 2014, mother was released from prison, remained sober, and enrolled in a drug treatment center in North Hollywood. Although mother lacked the financial resources to support Kyle, she did visit Kyle.

Father's contact with Kyle was sporadic. Father first saw Kyle in October 2008 after he was released from jail. Kyle was 18 months old. Father visited off and on until February 2010, at which time he turned himself in and was incarcerated until February 2012.

The paternal grandparents paid child support ($300 to $600 a month) on father's behalf from May 2011 until September 2014. Commencing in April 2014, father paid $149 a month to Ventura County Child Support. Father also kept in contact with Kyle while incarcerated. After father was released from prison in February 2012, he made repeated requests to visit and communicate with Kyle. W. denied these requests.

The Section 7822 Petition

On October 31, 2014, W. filed a section 7822 petition to terminate parental rights. The petition alleged that mother and father left Kyle in W.'s custody with no support and "with infrequent communication . . . , with the intent . . . to abandon said minor child continuously since January 2011 up to and including the time of this petition."

Before the hearing on the petition, W. told a social worker that he loved Kyle and wanted to adopt and treat him as his own. The social worker interviewed Kyle twice. Kyle referred to his parents as "mom" and "dad" and was told that adoption meant that W. would be his parent forever. In a second interview, Kyle was asked how he felt about being adopted. Kyle said "kinda good and kinda sad." Kyle said that W. is "nice to me and takes me on a lot of trips." When asked why he felt sad, Kyle said it was "hard to explain." The social worker believed that Kyle had conflicted feelings about adoption but that W. and Kyle had a strong parent-child relationship.

At the contested hearing on the petition, the trial court found "there have been attempts to communicate, but they've been minimal. I do not understand how, after all this time, two people who have been in the court system, who have orders [for] child support, have never filed anything to establish any better kind of connection with the child until March 25th of this year. It makes very little sense to me. [¶] I do believe that . . . the inability to pay support or to visit on a regular basis can be presumptive evidence of an intent to abandon, and I believe that that is the case here." The court found that Kyle is a person described in section 7822 and terminated parental rights.

Abandonment

Section 7822, subdivision (a)(2) provides that parental rights may be terminated where the child has been "left" in the care of and custody of another person for a period of six months without provision for support or without communication from the parent or parents, with the intent to abandon the child.[2] (*In re Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010.) "The elements of abandonment for purposes of section 7822 are delineated as follows: (1) the child must be 'left' by a parent in the care and custody of another person for a period of six months; (2) the child must be left without any provision for support or without communication from the parent; and (3) the parent must have acted with the intent to abandon the child. [Citation.]" (*In re Jacklyn F.* (2003) 114 Cal.App.4th 747, 754.)

The trial court found that the parents' *inability* to pay support or to visit on a regular basis is presumptive evidence of intent to abandon. This misstates section 7822, subdivision (b) and does not resolve the issue of whether Kyle was "left" with W. for the statutory period. Intent to abandon is but one of the statutory elements that must be proved to establish abandonment. (*In re Jacklyn F., supra,* 114 Cal.App.4th at p. 755.) Section 7822, subdivision (a)(2) requires that the child be "left" for a specified period. (*Ibid.)* A parent "leaves" a child by voluntarily surrendering the child to another person's care and custody. "Case law consistently focuses on the voluntary nature of a parent's abandonment of the parental role rather than on the *physical* desertion by the parent." (*In re Amy A.* (2005) 132 Cal.App.4th 63, 69.)

The trial court made no finding that father "left" Kyle with W. Evidence of a failure to communicate or support for the statutory period of time does not, in itself,

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[2] Family Code 7822, subdivision (a) states in pertinent part: "A proceeding under this part may be brought if any of the following occur: [¶] (1) . . . [¶] (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."

satisfy the statutory requirement that the child be "left" for a prescribed period of time. (*In re Jacklyn F., supra,* 114 Cal.App.4th at p. 755.)

Father argues that his incarceration was involuntary and there was no abandonment because he did not voluntarily surrender Kyle to W.'s custody and care. We reject the argument because "[b]eing incarcerated does not, in, and or itself, provide a legal defense to abandonment of children." (*In re Rose G.* (1976) 57 Cal.App.3d 406, 424.) Father abdicated his parental role by committing the crimes that led to his incarceration. (*Adoption of Allison C., supra,* 164 Cal.App.4th at p. 1012.) If the rule were otherwise, the child of a criminal recidivist would never be adopted. (*Id.*, at p. 1016.) Father's argument that the 2011 guardianship order precludes a finding that father "left" Kyle in W.'s care is equally without merit. (See *In re Jacklyn F., supra,* 114 Cal.App.4th at p. 756; *In re Amy A., supra,* 132 Cal.App.4th at p. 70.) "In the event that a guardian has been appointed for the child, the court may still declare the child abandoned if the parent or parents have failed to communicate with or support the Child . . . ." (§ 7822, subd. (b).)

With respect to the second and third elements of section 7822, subdivision (a)(2), a parent's failure to provide support or communicate is presumptive evidence of the intent to abandon. If the parent made token efforts to support or communicate with the child, the trial court may declare the child abandoned. (§ 7822, subd. (b); *In re E.M.* (2014) 228 Cal.App.4th 828, 838.)

The trial court found that the *inability* to support or communicate with Kyle is prima facie evidence of abandonment. That is not what section 7822, subdivision (b) says.[3] A parent's inability to pay support rebuts the presumption of abandonment. (*In re*

[3] Section 7822, subdivision (b) states: "The failure to provide identification, failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. 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. In the event that a guardian has been appointed for the child, the court may still declare the child abandoned if the parent or parents have failed to communicate with or support the child within the meaning of this section."

George G. (1977) 68 Cal.App.3d 149, 159 & fn. 11; *Adoption of Allison C., supra,* 164 Cal.App.4th at p. 1013.) There is no evidence that W. demanded that father or mother pay for Kyle's support. "[N]onsupport, absent demand or ability to pay, cannot, *standing alone*, prove intent to abandon or trigger the presumption of intent to abandon. [Citations.]" (*Id.*, at p. 1014.)

Mother lacked the financial means to support Kyle, but did visit and send letters and cards. Father, on the other hand, paid some support and did talk to Kyle on occasion. Whether mother or father made only token efforts to support or communicate is for the trial court to decide based upon all the facts and circumstances of the case. (*In re Brittany H.* (1998) 198 Cal.App.3d 533, 550.) The inability of a parent to support or communicate with the child due to incarceration or lack of financial resources is not conclusive evidence of intent to abandon or abandonment.

Appointment of Counsel for Kyle

Mother and father contend that the trial court erred in not considering appointment of counsel for Kyle. Section 7861 provides: "The court shall consider whether the interests of the child require the appointment of counsel . . . ." Counsel should be appointed where the child's interests are not satisfactorily being represented in a proceeding to free the child from parental custody and control. (*In re Richard E.* (1978) 21 Cal.3d 349, 354; *Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 170-171.) "[S]ection 7861 makes clear that the [trial] court has a *non*discreitonary duty to at least *consider* the appointment. [Citation.]" (*Id.*, at p. 171.) The Human Services Agency (HSA) report states that Kyle was conflicted about being adopted. When asked about adoption, Kyle said he felt "kinda good and kinda sad."

"[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. (*In re Richard E.*(1978) 21 Cal.3d 349, 354 [].) 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, supra*, 121 Cal.App.4th at pp. 170-171.)[4]

Section 8603

The report also states that W.'s wife is not a party to the case and there is no evidence that she consents to Kyle's adoption. That is an impediment to adoption. Section 8603 (a) provides: "A married person, not lawfully separated from the person's spouse, shall not adopt a child without the consent of the spouse . . . ." Upon remand, the trial court must consider this issue and if consent is not forthcoming, the adoption must be summarily denied.

Conclusion

We reverse and remand for further proceedings for the reasons stated above. Upon remand, the trial court shall first determine whether respondent's wife consents to the adoption. Second, it should consider whether it should appoint independent counsel for Kyle. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

[4] Three months before the contested hearing, father's counsel asked the trial court to consider appointing counsel for Kyle. The trial court said it would "have to have good cause" to do so and "at this point in time, that request is denied." The HSA report was filed two months later and indicated that Kyle was conflicted about being adopted. It failed to state whether W.'s wife consented to the adoption. We believe the report triggered a sua sponte duty to consider the appointment of counsel for Kyle. (*Neumann v. Melgar, supra*, 121 Cal.App.4th at pp. 170-171.)

Ellen Gay Conroy, Judge

Superior Court County of Ventura

Janette Freeman Cochran, under appointment by the Court of Appeal, for J.R., Appellant.

Leslie A. Barry, under appointment by the Court of Appeal, for K.L., Appellant.

No appearance for Respondent.