

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CAF 24-00939

PRESENT: WHALEN, P.J., CURRAN, SMITH, OGDEN, AND HANNAH, JJ.

IN THE MATTER OF THE ADOPTION OF CASON C.

ERRON W., PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

V

JAMES E.C., JR., RESPONDENT-APPELLANT.

IN THE MATTER OF THE ADOPTION OF SAYLOR C.

ERRON W., PETITIONER-RESPONDENT,

V

JAMES E.C., JR., RESPONDENT-APPELLANT.

BROWNLOW LAW, P.C., ROCHESTER (WINSTON R. BROWNLOW OF COUNSEL), FOR
RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County
(Eugene J. Langone, Jr., J.), entered February 16, 2024. The order
determined that the consent of respondent to the adoption of the
subject children by petitioner is not required.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: Respondent, the biological father of the subject
children, appeals from an order determining, following an evidentiary
hearing, that his consent to the adoption of the children by
petitioner is not required pursuant to Domestic Relations Law § 111
(2) (a). We affirm.

The father contends that Family Court lacked subject matter
jurisdiction over the adoption proceedings inasmuch as the adoption
proceedings amount to a collateral attack on the custody provisions of
a valid foreign divorce decree, specifically, the Texas divorce decree
that, inter alia, provided the father with supervised visitation
rights. We reject that contention. "New York does not recognize an
adoption proceeding as a custody proceeding" (*Mazur v Mazur* [appeal
No. 1], 207 AD2d 61, 67 [4th Dept 1994]; see Domestic Relations Law
§ 75-b; see generally *Matter of Anonymous*, 13 AD2d 885, 886 [3d Dept

1961]), and the adoption proceeding therefore is not a collateral attack on the custody determination in the divorce decree. Further, the court has subject matter jurisdiction over proceedings to adopt children born in other states and to adjudicate disputes between residents and nonresidents (see *Matter of Jarrett*, 230 AD2d 513, 521 [4th Dept 1997], appeal dismissed 90 NY2d 935 [1997], lv denied 91 NY2d 804 [1997], cert denied 524 US 918 [1998]).

Contrary to the father's contention, we conclude that the court properly dispensed with his consent inasmuch as petitioner established by clear and convincing evidence that the father abandoned the children by his "failure for a period of six months to visit the child[ren] and communicate with the child[ren] or person having legal custody of the child[ren], although able to do so" (Domestic Relations Law § 111 [2] [a]; see *Matter of S.M.E. [B.J.D.-H.K.E.]*, 217 AD3d 1427, 1428 [4th Dept 2023]; *Matter of Brianna B. [Swazette S.-Shacoya L.]*, 175 AD3d 1791, 1791-1792 [4th Dept 2019], lv denied 35 NY3d 907 [2020]). Petitioner established that the father made no attempt to contact the children or the mother for over six months preceding the filing of the petitions and that the father failed to pay child support while he was incarcerated. We thus conclude that the father's efforts "were so insubstantial or infrequent that they did not preclude a finding of abandonment" (*S.M.E.*, 217 AD3d at 1428 [internal quotation marks omitted]; see *Matter of J. [Sarajoy V.-Ryan G.]*, 218 AD3d 583, 584 [2d Dept 2023]; *Matter of Sophia [Tammy M.W.-Irhad R.]*, 195 AD3d 1549, 1550 [4th Dept 2021], lv denied 37 NY3d 914 [2021]). The father's incarceration does not excuse his failure to contact or communicate with the children (see *J.*, 218 AD3d at 584; *Matter of Ashton*, 254 AD2d 773, 773 [4th Dept 1998], lv denied 92 NY2d 817 [1998]; *Matter of Clair*, 231 AD2d 842, 842 [4th Dept 1996], lv denied 89 NY2d 806 [1997]). To the extent that the court was presented with conflicting testimony regarding the substance and frequency of contact and communication by the father during the six-month period, the court resolved that credibility issue in favor of petitioner. "[T]he court's credibility determinations are . . . entitled to great deference" (*Brianna B.*, 175 AD3d at 1792 [internal quotation marks omitted]), and we see no basis to disturb the court's determination here. Additionally, the court was entitled to discredit testimony that the mother and petitioner thwarted the father's efforts to contact the children (see *id.*), and we conclude that the record does not support the father's assertion that the mother and petitioner interfered with any such efforts (see *Matter of Brittany S.*, 24 AD3d 1298, 1299 [4th Dept 2005], lv denied 6 NY3d 708 [2006]; *Matter of Amanda*, 197 AD2d 923, 924 [4th Dept 1993], lv denied 82 NY2d 662 [1993]; cf. *Matter of Lydia A.C. v Gregory E.S.*, 155 AD3d 1680, 1681 [4th Dept 2017]).

We also reject the father's contention that the court erred by not considering whether the proposed adoption was in the children's best interests. An evaluation of the best interests of the children is not part of the threshold determination of abandonment and, "[w]hile promotion of the best interests of the child[ren] is essential to the ultimate approval of the adoption application, such

interests cannot act as a substitute for a finding of abandonment" (*Matter of Mitchell* [Onondaga Dept. of Social Servs.], 70 AD2d 367, 371 [4th Dept 1979]; see *Matter of Corey L v Martin L*, 45 NY2d 383, 391 [1978]; *Matter of Medina Amor S.*, 50 AD3d 8, 15 [1st Dept 2008], *lv denied* 10 NY3d 709 [2008]).

Finally, we note that, in resolving this appeal, we have not considered any documents or purported changes in factual circumstances brought to this Court's attention for the first time postargument (see generally *Matter of Fichera v New York State Dept. of Env'tl. Conservation*, 159 AD3d 1493, 1495-1496 [4th Dept 2018]).