

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

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CAF 24-01290

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF THE ADOPTION OF A CHILD
WHOSE FIRST NAME IS MAKAYLA

JASON L., PETITIONER-RESPONDENT;

MICHAEL B., RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR
RESPONDENT-APPELLANT.

CARL J. SCHWARTZ, JR., PENN YAN, FOR PETITIONER-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Yates County (Patrick F. McAllister, A.J.), entered July 31, 2024, in a proceeding pursuant to Domestic Relations Law § 111. The order, inter alia, determined that the consent of respondent to the adoption of the subject child 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 child, appeals from an order determining, following an evidentiary hearing, that he abandoned the child and that his consent to the adoption of the child by petitioner, who is married to the child's mother and has acted as the child's stepfather since she was approximately 18 months old, is not required pursuant to Domestic Relations Law § 111. We affirm.

Where, as here, a child is conceived or born in wedlock, a parent's consent to adoption is required unless the parent "evinces an intent to forego [their] parental or custodial rights and obligations as manifested by [their] failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so" (Domestic Relations Law § 111 [2] [a]; see § 111 [1] [b]). When a parent's "inability to visit with the child[] results from [their] own deliberate acts, [such as criminal conduct,] the underlying circumstances need not preclude a finding of a lack of contact with the child[] evincing an intent to abandon the[child]" (*Matter of Joshua II.*, 296 AD2d 646, 648 [3d Dept 2002], *lv denied* 98 NY2d 613 [2002]; see *Matter of Julia P.*, 306 AD2d 937, 938 [4th Dept 2003]; see also *Matter of Nathon O.*,

55 AD3d 995, 996 [3d Dept 2008], *lv denied* 11 NY3d 714 [2008])). Indeed, "[t]he fact that a parent is incarcerated does not in itself excuse [their] failure to support, maintain contact with, or plan for the future of [the] child" (*Matter of Amanda*, 197 AD2d 923, 924 [4th Dept 1993], *lv denied* 82 NY2d 662 [1993]; see *Matter of Clair*, 231 AD2d 842, 842 [4th Dept 1996], *lv denied* 89 NY2d 806 [1997]; see generally *Matter of Gregory B.*, 74 NY2d 77, 88-89 [1989], *rearg denied* 74 NY2d 880 [1989])). Nevertheless, "'[w]here the person having custody of the child thwarts or interferes with the noncustodial parent's efforts to visit or communicate with the child, a finding of abandonment is inappropriate'" (*Matter of Brianna B. [Swazette S.-Shacoya L.]*, 175 AD3d 1791, 1792 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020])). "'The party seeking a finding of abandonment has the burden of establishing abandonment by clear and convincing evidence'" (*id.*).

Here, we conclude that Family Court properly dispensed with respondent's consent to the adoption of the child inasmuch as petitioner established by clear and convincing evidence that respondent abandoned the child (see Domestic Relations Law § 111 [2] [a]; *Brianna B.*, 175 AD3d at 1791-1792; *Amanda*, 197 AD2d at 923-924). The court properly considered respondent's "'contact with the child[] during the period of time, whether six months or longer, immediately preceding the filing of the [operative] petition'" (*Matter of Sophia [Tammy M.W.-Irhad R.]*, 195 AD3d 1549, 1551 [4th Dept 2021], *lv denied* 37 NY3d 913, 914 [2021])). Contrary to respondent's contention, "[a]lthough [he] was incarcerated for a part of that period, that 'does not in itself excuse his failure to . . . maintain contact with . . . [the] child'" (*Matter of Joseph*, 227 AD2d 974, 974-975 [4th Dept 1996]; see *Amanda*, 197 AD2d at 924). The evidence presented at the hearing established that respondent sent the child a single letter during his period of incarceration of approximately 2½ years, which constitutes "insubstantial and infrequent contact [that] is insufficient to preclude a finding of abandonment" (*Amanda*, 197 AD2d at 924; see § 111 [6] [b]; *Matter of Brittany S.*, 24 AD3d 1298, 1299 [4th Dept 2005], *lv denied* 6 NY3d 708 [2006]; *Matter of Taylor O.P.*, 303 AD2d 1024, 1024 [4th Dept 2003])). The court was entitled to reject respondent's testimony that he was logistically and financially unable to contact the child more during his incarceration, particularly considering the evidence that he had the means to contact other people from prison such as his sister (see *Matter of Hayden II. [Renee II.-Devan JJ.]*, 135 AD3d 997, 999-1000 [3d Dept 2016], *lv denied* 27 NY3d 904 [2016]; see also *Brianna B.*, 175 AD3d at 1792), and we see no basis to disturb the court's determination here. Moreover, contrary to his related contention, respondent's testimony that he could not contact the child following his release from prison due to the conditions of his parole "fall[s] short of adequately explaining [his] failure to meet [his] parental obligations" inasmuch as there is no indication that he was precluded from contacting the mother, which he failed to do (*Hayden II.*, 135 AD3d at 999; see § 111 [2] [a]; *Matter of Bambi C. v Michial F.*, 265 AD2d 816, 816 [4th Dept 1999])). Finally, to the extent that respondent contends otherwise, we conclude that the court properly determined that the record does not support

the conclusion that petitioner or the mother thwarted or interfered with respondent's efforts to communicate with the child (see *Brianna B.*, 175 AD3d at 1792; *Brittany S.*, 24 AD3d at 1299; *Amanda*, 197 AD2d at 924).