

APPELLATE DEFENDERS, INC.



RECENT TRENDS IN DEPENDENCY CASE LAW

June 2010 through November 2010

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JURISDICTION

Petition & Findings

In re Precious D. (2010) 189 Cal.App.4th 1251 (2nd Dist., Div. 1) [Los Angeles County] **Where a teenaged child's actions were the reason she was detained, the Court of Appeal found jurisdiction was not proper because dependency jurisdiction must be based on the parent's inability to adequately supervise or protect the child and requires parental unfitness or neglect.** Seventeen-year-old Precious was incorrigible and ran away from home, misbehaved, and missed classes. After the agency found her in another city, she refused to return home. Precious refused to visit her mother or participate in services, but she spoke daily to her mother by phone. The court found the petition filed per Welfare and Institutions Code¹ section 300, subdivision (b), true and removed Precious. Mother argued jurisdiction must be based on the parent's unfitness or neglect. Finding due process required substantial evidence of mother's unfitness for jurisdiction to be proper, the court reasoned to find otherwise would allow parental rights to be terminated without any finding of unfitness and reversed the dispositional and subsequent orders.

In re Ethan C. (2010) 188 Cal.App.4th 992 (2nd Dist., Div. 1) [Los Angeles County] **Where a father's inaction lead to the death of a sibling, the reviewing court found his actions did not need to be criminally negligent in order to find dependency jurisdiction.** The appellate court found ample support for jurisdiction under section 300, subdivision (f), after father failed to secure a sibling in a child seat and she died after a car accident. Father argued on appeal that subdivision (f) did not apply unless his negligence rose to the degree of criminal culpability. The reviewing court did not agree and found the standard for jurisdiction under subdivision (f) in a dependency case is less than criminal negligence. Further, the trial court was not required to find father posed a current risk of harm in order to take jurisdiction over the child.

¹All statutory reference are the Welfare & Institutions Code unless otherwise indicated.

In re A.M. (2010) 187 Cal.App.4th 1380 (4th Dist., Div. 1) [San Diego County]

Where a parent is found to have caused the death of another child through abuse or neglect, the court need not find a current risk of harm to remove the child's siblings from the parent. The parents were previously involved with the agency after the death of their infant son, James. The children were afraid of father because of severe corporal punishment. Father is in the military. After allegations that father placed a pillow over one of the child's face to keep her quiet, the Navy Criminal Investigative Service reopened its investigation into James' death and father admitted he caused James' death. In finding jurisdiction, the juvenile court relied on father's statement that he pushed James towards mother to wake her, he heard James struggling to breathe, listening for two minutes, and then he went to sleep. The Court of Appeal found this to be sufficient evidence to support jurisdiction under subdivision (f) because father heard James struggling to breath, could assess the risk and did not intervene which caused the death of James through neglect. Further, subdivision (f) does not require a finding of current risk to remove the remaining children.

In re R.R. (2010) 187 Cal.App.4th 1264 (2nd Dist., Div. 8) [Los Angeles County]

Father's motion to quash a subpoena for his medical records was properly denied when father placed his lack of drug use at issue. Father appealed the order declaring his daughter a person described by section 300, subdivision (b), and admitting his medical records. Eight-year-old child detained because of mother's drug use and abandonment. Father appeared later and requested custody of his daughter. Father claimed to be sober for 6 years, but mother said he used methamphetamine with her. The agency filed a subpoena for father's medical record to show he admitted to hospital personal that he used methamphetamine, other illegal substances, and drank beer every day. Father filed a motion to quash the subpoena, but the juvenile court denied the hearing and the motion to quash as untimely. The appellate court found the trial court correctly determined the motion was untimely, any error in not hearing the motion was harmless because as a matter of substantive law the motion would have been denied, and father's medical records came within the patient-litigant exception to the physician-patient privilege because he claimed to be drug free. Further, failed to object to the hearsay from the medical records cited in the agency's reports and this hearsay was admissible.

In re Maria R. (2010) 185 Cal.App.4th 48 (4th Dist., Div. 1) [San Diego County]

The Court of Appeal determined that where three sisters were found to be described by section 300, subdivision (d), based on sexual abuse by their father, the trial court lacked substantial evidence to find the son was described by subdivision (j), as likely to be sexually assaulted by this father under subdivision (d), based only on father's conduct with the female siblings without more. The appellate court rejected the reasoning that because father has sexually abused his daughters, without more, he is likely

to sexually abuse his son. However, the reviewing court also found the trial court could find the son was described by subdivision (j) if the court determined the son was described by any of the subdivisions identified in subdivision (j) including subdivisions (a), (b), (d), (e), or (i). In other words, the son might be harmed by the parents' conduct which was separate from the sexual assaults.

DISPOSITION

Placement with Non-Custodial Parent

In re Karla C. (2010) 186 Cal.App.4th 1236 (1st Dist., Div. 5) [San Mateo County]

Where juvenile court placed five-year-old daughter with her father in Peru but desired to maintain juvenile court jurisdiction, the appellate court reversed and remanded the case to allow the trial court to gather evidence about the recognition and enforcement of the court's jurisdiction and imposition of measures necessary to ensure enforceability of the juvenile court's orders while Karla was outside the U.S.

Child removed from mother after disclosure of sexual abuse by step-father. Biological father deported to Peru when child was less than a year old, but child had visited him in Peru and he had ongoing phone contact. Child did not want to return to father. Unclear whether mother would continue her relationship with the step-father since she initially did not believe her daughter. Court of Appeal not convinced the trial court could enforce an order to return Karla to the U.S. even though Peru is a signatory to the Hague Convention.

Reunification Services

In re Pedro Z., Jr. (2010) 190 Cal.App.4th 12 (2nd Dist., Div. 1) [Los Angeles County]

When a child is placed with a previously custodial parent at the disposition hearing, the remaining parent is not entitled to reunification services as a matter of law.

Mother and father lived together before father was arrested and the children were detained. Father remained in custody for the duration of the case. At the disposition hearing, the trial court placed the child with mother and denied father's request for reunification services. The appellate court rejected father's claim that the juvenile court was required to provide reunification services finding that because the child was neither in out-of-home care nor in the custody of a former non-custodial parent, father was not entitled to reunification services.

In re T.G. (2010) 188 Cal.App.4th 687 (4th Dist., Div. 2) [Riverside County]

Father can appeal an order for reunification services at a six-month review hearing where the trial court determined father's progress was inadequate and there was no substantial probability of return. At the six-month review hearing, the juvenile found father's progress towards alleviating or mitigating the causes necessitating placement inadequate, but continued services for another six months. Father appealed and the

appellate court found the court's orders and finding were not generally favorable to father. In addition, because father could not challenge the reasonable services finding after the 12-month review hearing and because of the heightened showing necessary for additional services at the 12-month review hearing, father was aggrieved. The reasonable services finding contained in the order made at the six-month review hearing was adverse to father's parental interest in reunification and, consequently, the order is appealable under section 395. The Court of Appeal found father's failure to notify the social worker of his imprisonment delayed his reunification and not because the social worker failed her duties as argued by father.

L.Z. v. Super. Ct. (2010) 188 Cal.App.4th 1285 (1st Dist., Div. 3) [Contra Costa County] **Where there was insufficient evidence that mother knew or reasonably should have known her baby was abused, the court erred in denying reunification services for mother.** Mother was a teenaged parent when her two-month-old child suffered unexplained, nonaccidental injuries while in her parents' care including a spiral fracture to her left humerus and nine broken ribs. Mother suspected father after he was alone with the baby during one of their fights and when he returned with the child she was screaming and afterwards she did not use her left arm as much as her right arm. The appellate court found the trial court incorrectly focused on determining who injured the child and the agency did not demonstrate that mother should have known the injury to the baby's arm was caused by abuse. The court also determined mother's reunification services should not be predicated on father's willingness to admit guilt. The Court of Appeal reversed the court's order denying mother reunification services and setting a section 366.26 hearing. The trial court was ordered to provide mother with reunification services.

In re A.L. (2010) 188 Cal.App.4th 138 (4th Dist., Div. 3) [Orange County] **Where child was not removed from her mother's custody, father was properly given family "enhancement" services rather than reunification services.** Father was temporarily caring for three-month-old child when she received a transverse fracture of the femur which required emergency surgery. Father's explanation that the unattended child fell from the bed was not consistent with her injury. The child was placed with her mother, which was her primary residence since father was only providing day care. Father was given "family enhancement services" but argued the bypass provisions did not apply because the case was governed exclusively by section 362. The Court of Appeal found that "family enhancement services" falls within "child welfare services" as defined in section 16501 and reunification services were not necessary because the family was not united prior to the dependency case. In addition, father made no claim that the "family enhancement plan" was not reasonable or not designed to eliminate the conditions that lead to the dependency.

In re G.G. (2010) 186 Cal.App.4th 150 (2nd Dist., Div. 5) [Los Angeles County]
Substantial evidence supported the trial court's order mandating counseling services for father to address his use of sexist and racist language as part of the reunification plan. Father argued on appeal that the case plan must be modified to delete the requirement he undergo counseling because no sustained findings were made that father made racist and sexist remarks in the presence of his twin daughters. Twin five-year-old daughters were removed after a bruise and scratches were found near the eye of one of the girls. Further, father refused to obtain timely, necessary therapeutic intervention for the children after it was recommended numerous times. During and before the case, father had angry interactions with school personnel, social workers, police officers and even the psychologist who did his psychological evaluation. These interactions included racists and sexist remarks about anyone who angered father. The Court of Appeal reasoned the trial court did not abuse its discretion by ordering father to counseling to address his angry racist and sexist attitudes in order to allow father to work with others, such as social workers and service providers, to ensure reunification with his children.

In re Kyle E. (2010) 185 Cal.App.4th 1130 (3rd Dist.) [Sacramento County]
Visitation order which did not indicate a minimum number of visits or that visitation was to occur regularly was remanded for the trial court to provide further detail and clarity. In addition, the oral pronouncement and written order could not be harmonized, requiring a remand. Sixteen-year-old minor became dependent after mother was unable to provide adequate care or protection because of child's conduct included running away, suicidal ideation, and threatening to kill his sister. The appellate court found the order improperly delegated to the agency the responsibility to determine whether visitation would occur at all. Given the lack of necessary detail in the oral pronouncement, and the improper delegation of authority in the written order, the Court of Appeal remanded for the juvenile court to clarify the applicable terms and conditions including a minimum number of visits or an order that visitation was to occur regularly.

Relative Placement

In re N.V. (2010) 189 Cal.App.4th 25 (4th Dist., Div. 1) [San Diego County]
The trial court erred in refusing to consider the reasons the agency denied approval of a relative's home for placement at the disposition hearing. Maternal grandmother's home was denied approval and, at the disposition hearing, the trial court sustained the agency's objection to questioning the social worker about the reasons the grandmother's home was not approved. The reviewing court held the children's interest in prompt placement with a suitable relative precludes any unnecessary delay in the juvenile court's review of the agency's determination that the grandmother's home was unsuitable and the court abused its discretion by excluding evidence concerning the agency's reasons for refusing approval.

PRELIMINARY/CONTINUING CONSIDERATIONS
Indian Child Welfare Act (ICWA)

See also *In re C.B.* (2010) 190 Cal.App.4th 102, post p. 10.

In re Jonah D. (2010) 189 Cal.App.4th 118 (2nd Dist., Div. 1) [Los Angeles County]
Appellate court found paternal grandmother's belief she had Native American history, without more, was not sufficient to warrant notice under the ICWA. Since the grandmother could not identify a specific tribe, was told she had Indian heritage when she was a young child, and had no living relatives to provide additional information, the reviewing court found the information too vague, attenuated and speculative to give the dependency court any reason to believe the children might be Indian children.

In re Skyler H. (2010) 186 Cal.App.4th 1411
Rehg. den. Aug. 19, 2010; review den. & ordered not to be officially pub. Nov. 10, 2010.

Marsden Hearing

In re V.V., et al. (2010) 188 Cal.App.4th 392 (3d Dist.) [Sacramento County]
Partially published opinion addressed whether the court erred in denying father's request to discharge his retained counsel. **Where the court held a *Marsden* hearing and denied father's *Marsden* motion, the Court of Appeal found the *Marsden* procedure does not apply for retained counsel.** However, the appellate court found any error by the juvenile court to be harmless beyond a reasonable doubt because the court separately addressed father's request to discharge retained counsel and substitute another retained counsel of father's choosing. The juvenile court was not unwilling to allow father to discharge his retained counsel, but the court was unwilling to grant a continuance to allow the new counsel time to prepare. Part of the court's opinion was based on the length of the continuance requested by the new retained counsel because he had no experience in dependency law and "such expertise cannot be acquired in three weeks."

REVIEW HEARING

V.C. v. Superior Court (2010) 188 Cal.App.4th 521 (6th Dist.) [Santa Clara County]
Where father failed to make substantive progress in court-ordered treatment and no substantial probability existed that the child could be returned to him within 6 months, the juvenile court properly terminated reunification services at the 18-month review hearing and scheduled the section 366.26 hearing despite any additional barriers because father was incarcerated. Father contended the court erred by not granting six more months of services as he was making significant and substantial progress. Newborn child was removed from her mother after testing positive for

methamphetamine. Father was jailed four months after the dependency began and, while in custody, he attended some reunification but not everything offered. While released, father completed additional reunification services. Father argued he should receive more reunification services because section 361.5, subdivision (e), requires the court to consider the particular barriers to incarcerated parent's access to court-mandated services. The Court of Appeal found father had waived his opportunity to complain the services were unreasonable by failing to object after the disposition hearing. As for terminating reunification, the juvenile court had little choice after father failed to avail himself of services offered to him before and during his incarceration. Although he was incarcerated for 14 of 18 months, his incarceration was due to his felony conduct, which was not an external factor over which he had no control.

SECTION 388

In re H.S. (2010) 188 Cal.App.4th 103 (3rd Dist.) [Sacramento County]

Where father's expert reached a new opinion based on the same evidence available to the experts who testified at trial, the new conclusion does not amount to new evidence necessary for a hearing under section 388. Two-month-old child had serious injuries including broken bones, a subdural hematoma, and bruises. The parents had conflicting, inadequate explanations for the injuries. At the disposition hearing, the court heard testimony from the treating physician and appellant's own expert. Based on the evidence the court denied reunification services finding the parents could not show it was in the child's best interest. Relying on Code of Civil Procedure sections 657 and 1008 to define the term "new evidence" in section 388, the court determined the phrase must be construed to include three requirements: new evidence, reasonable diligence, and materiality. A belated opinion of an expert based on evidence previously known at the time of trial is not "new evidence."

Post-termination

In re A.C. (2010) 186 Cal.App.4th 976 (6th Dist.) [Santa Clara County]

A section 388 petition is the appropriate procedural means to move a minor freed for adoption to a more restrictive placement. The agency filed a section 387 petition to move A.C. from a foster home placement to a group home. The child appealed the court's grant of the 387 petition arguing the factual findings necessary to grant a 387 petition "are harmful to her." A.C. did not object to the court's order that she be removed from foster care and placed in a group home. The reviewing court reversed the court's order finding the broader application of section 388 made it the appropriate legal means to move a freed dependent.

SECTION 387

In re A.O. (2010) 185 Cal.App.4th 103 (2nd Dist., Div. 1) [Los Angeles County]

The appellate court found substantial evidence to support the trial court's finding that the previous order placing the child with her father was no longer effective to protect her even though father had arranged for the stepmother to continue to care for his daughter. Child placed with father after two sisters divulge sexual abuse by the maternal step-grandfather and mother's failure to reunify. After children placed with father, he was arrested and incarceration and the agency filed a supplemental petition per section 387. Father argued the court could not assert jurisdiction over a child because he was an incarcerated parent who made appropriate arrangements for the care of his child similar to section 300, subdivision (g). The Court of Appeal found subdivision (g) was inapplicable to a supplemental petition under section 387 because subdivision (g) deals only with the initial imposition of dependency court jurisdiction. The reviewing court found father's ability to arrange for child care upon his arrest was irrelevant to the proceedings on a supplemental petition.

SECTION 366.26 ISSUES

Termination of Parental Rights

In re A.L. (2010) 190 Cal.App.4th 75 (4th Dist., Div. 1) [San Diego County]

Where mother's appeal was successful and the appellate court reversed the trial court's order denying mother's 388 petition and termination of parental rights, father was entitled to have his parental rights reinstated as well. This was so even though father told the court at the section 366.26 hearing that he no longer wished to participate in the dependency proceeding and asked to be excused, which the trial court granted. The Court of Appeal determined, at least in part, that adoption was no longer the plan for the children after the reversal. As a result, no legitimate purpose was served by leaving the minors without a father and whatever benefits may come from father and the paternal side of the family.

Beneficial-Relationship Exception

In re C.B. (2010) 190 Cal.App.4th 102 (6th Dist.) [Santa Clara County]

The Court of Appeal reversed the trial court's order terminating parental rights and remanded for the limited purpose of allowing the court to reconsider, under the proper legal standard, whether the parent-child relationship exception to the termination of parental rights applied. **Trial court's order termination parental rights was based improperly in part upon an unenforceable expectation that the prospective adoptive parents will voluntarily permit future contact between the children and the biological parent.** Siblings aged nine and 10 years old testified they wanted to continue

to see and talk to their mother even though they wanted to be adopted by their foster-parent aunt and uncle. Court also considered and rejected the sibling exception. Appellate court also considered two ICWA arguments and reversed to allow proper notice to the Seneca tribes.

In re Bailey J. (2010) 189 Cal.App.4th 1308 (6th Dist.) [Santa Clara County]

Appellate court rejected mother's claim that the beneficial-relationship exception should apply since the child was detained at birth and never lived with mother and the only relationship was based on supervised visits. Further, the court rejected the sibling exception finding the older sibling was attached to Bailey but Baily would not suffer detriment if that relationship was not preserved. Per the appellate court, even though mother visited regularly each week, these supervised visits amounted to little more than play dates for Bailey.

In re Scott B. (2010) 188 Cal.App.4th 452 (2nd Dist., Div. 3) [Los Angeles County]

The appellate court reversed the order terminating mother's parental rights and found the beneficial-relationship exception applied where an autistic, 11-year-old had a strong emotional attachment to his mother, his precarious emotional state continued, and his history of regressing and running away showed a good chance the child would have a meltdown if his usual, frequent visitation with his mother did not continue. In such a situation, the only way to insure Scott's visitation continued was by court order and such an order could only be accomplished if Scott's permanent plan was legal guardianship. In 2006, mother was unable to protect Scott from his aggressive maternal grandmother and uncles and was unable to properly supervise or control the then seven-year-old child due to his special needs of attention deficit hyperactivity disorder and autism. Mother visited without fail for the duration of the case and Scott consistently said he wanted to return to his mother. In addition, Scott was consistently opposed to being adopted except for a brief time prior to the section 366.26 hearing.

In re Jose C. (2010) 188 Cal.App.4th 147 (2nd Dist., Div. 8) [Los Angeles County]

After mother's parental rights were terminated, the child and maternal grandfather appealed arguing the court erred in finding Jose adoptable and the court should have found Jose's grandfather to be his presumed father to allow him to assert the beneficial-relationship exception. **The Court of Appeal found Jose adoptable despite his special needs and found grandfather could not become Jose's presumed father.** Mother and Jose are both developmentally delayed and receive services from a Regional Center. Mother was accused of using inappropriate physical discipline and was determined to have a cognitive ability of a five-year-old who could not control her inappropriate statements or her temper. Despite this, mother and Jose maintained a close bond. The Court of Appeal found the adoptability argument was based solely on the speculation that

when Jose understands “adoption will mean the loss of his relationship with grandfather and with his mother, he may well reject both the placement and the foster mother.” Refusing to speculate, the reviewing court found Jose generally and specifically adoptable. If only specifically adoptable, the court found ample evidence of the foster mother’s ability to meet Jose’s needs. As for grandfather’s claims that he should have been named Jose’s presumed father, despite the absence of such a request at the trial court, the appellate court found the grandfather could never be Jose’s presumed father because he never held himself out as Jose’s father, a necessary element to become a presumed father.

PROCEDURAL ISSUES

Interstate Compact on the Placement of Children (ICPC)

In re C.B. (2010) 188 Cal.App.4th 1024 (4th Dist., Div. 2) [Riverside County] Parents are married with three children when mother's methamphetamine use affected her ability to care for the children. Father is working as an underwater welder in the Gulf of Mexico while mother remained in California. The trial court placed the children with father with family maintenance services but when he planned to return to work in the Gulf of Mexico, the agency argued the juvenile court could not place the children out of state unless it complies with the Interstate Compact on the Placement of Children (ICPC). Father argued the ICPC did not apply to a placement with a parent. The agency appealed when the court authorized father to leave California with the children. **After an exhaustive review of the ICPC, the court concluded the ICPC simply did not apply, regardless of whether the father was an offending or a non-offending parent and the trial court's order was affirmed.** The published opinion hopes to point out that the resulting lack of uniformity among states is dysfunctional and that a solution may call for a multistate legislative response.

Service to Parents in Mexico

Kern County Dept. of Human Services v. Super. C.T. (2010) 187 Cal.App.4th 302 (5th Dist.) [Kern County]

Where a case involves supplemental or subsequent juvenile dependency proceedings, the Court of Appeal determined the Hague Service Convention does not apply. Two-year-old child became a dependent in September 2008 because of the parents’ substance abuse and domestic violence. Father made a general appearance. After reunification services, the child was returned to his parents but dependency court jurisdiction continued. The child was redetained based on injuries to his half-sibling allegedly caused by father’s drug relapse. A 387 petition was subsequently filed and father voluntarily agreed to be deported to Mexico. Father was located in Mexico and notice was mailed to him regarding the jurisdiction/disposition hearing in Spanish by international registered

mail. Father confirmed he received notice of the hearing. The appellate court reasoned that since the parents received proper notice of the proceedings in September 2008, the juvenile court already had dependency jurisdiction over the child and personal jurisdiction over the father. Consequently, the court concluded the Hague Service Convention did not apply when the department filed the subsequent and supplemental petition. Notice provided pursuant to California dependency law was proper.

In re Vanessa Q. (2010) 187 Cal.App.4th 128 (2nd Dist., Div. 7) [Los Angeles County]

Where a father jailed in Mexico made a general appearance in family court through his attorney, the failure to service father properly pursuant to the Hague Service Convention was not fatal to personal jurisdiction over him. Father's parental rights terminated pursuant to Family Code section 7822, subdivision (a)(3), after the trial court found father abandoned his children. Mother ended their relationship in May 1996, but soon afterwards, father broke in mother's home, tied up everyone at gunpoint including his children, raped mother and took the family to Mexico by force and held them captive for two months. Father raped mother multiple times and she became pregnant with their 3d child. In January 2008, mother's husband filed petition to free all three children from father's custody and control. Father argued the judgement is void for lack of personal jurisdiction because he was not properly served per the Hague Convention. The court found father made a general appearance through his attorney when he requested an "indefinite continuance" to allow him to appear in person. Such a request is participation by father in the action and "in some manner recognizes the authority of the court to proceed." Father's general appearance was father's consent to the court's exercise of personal jurisdiction and cured any defect of service.

MISCELLANEOUS

De Facto Parents

In re D.R. (2010) 185 Cal.App.4th 852 (1st Dist., Div. 4) [Alameda County]

One incident of serious physical abuse as corporal punishment was not sufficient to automatically terminate de facto parent status when foster-uncle and 12-year-old child continued to share a psychological bond. Child's uncle had raised child since he was an infant after he became a dependent following removal from his mother. After child was removed because of the uncle's misconduct, he displayed anxious, impulsive and aggressive behavior and was diagnosed with attention deficit hyperactivity disorder, posttraumatic stress disorder, and physical abuse. The agency moved to terminate uncle's de facto status, but the trial court refused finding maintaining the de factor parent was in the child's best interest. The reviewing court found terminating de factor status is not the same as granting de facto status and the trial court was within its discretion to find that

the single incident of misconduct did not rise to the level warranting termination of uncle's de facto parent status.

Family Code Termination

In re the Marriage of Jill & Victor D. (2010) 185 Cal.App.4th 491 (3rd Dist.) [Yolo County]

When a biological father fails to communicate with or send support to his children for almost two years, the trial court properly found he intended to abandon his offspring and the court was within its discretion to terminate his parental rights.

Father's parental rights terminated per Family Code section 7820 based on the trial court's finding he intended to abandon his children. Father argued the trial court erred by not considering events prior to his absence such as how the children improperly came to be in mother's custody, by improperly relying on father's failure to communicate and support the children, and insufficient evidence existed to show he intended to abandon the minors. Father's last visit was in February 2001 and he made only one voluntary child support payment prior to the mother's petition to terminate parental rights. The trial court properly relied only on events after father stopped visiting and communicating with his children. Further, father's inaction in pursuing any kind of contact was sufficient to show he intended to abandon them within the meaning of the statute.