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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

A. M.,

Plaintiff and Respondent,

v.

ALBERTO F., SR.,

Defendant and Appellant.

A132102

(San Mateo County
Super. Ct. No. F083708)

The trial court commissioner allowed mother and respondent A. M. to have overnight visitation with her minor child over the objection of father and appellant Alberto F., Sr. On appeal, Alberto Sr. contends that the commissioner had no jurisdiction to preside over the court trial because he filed a written objection to having any commissioner act as a temporary judge. We affirm the custody and visitation order.

I. FACTS

In July 2001, Alberto F., Jr. was born to A. M. and Alberto F., Sr. The three parties lived together until mid-2005. In July 2005, A. and Alberto Sr. parted, prompting A. to seek an order granting joint legal and physical custody of the minor to both parents and a visitation schedule. For the next few years, the parents' relationship with Alberto Jr. was relatively stable. A. was the primary caretaker. There were occasions on which A. struck Alberto Sr. and Alberto Jr.

In January 2008, Alberto Sr. experienced some alcohol-related problems. At that time, the trial court awarded temporary custody to A. and allowed Alberto Sr. visitation with the minor. In May 2009, an allegation that A. had physically abused the minor

prompted the trial court to award sole legal and physical custody of Alberto Jr. to his father. A. was permitted supervised visitation.

At a July 1, 2009 hearing, the trial court indicated that if—as Alberto Sr. intended—he filed a peremptory challenge against the trial judge to whom the case was reassigned, then the matter would likely be assigned to a commissioner for trial.¹ On July 13, 2009, the superior court received two documents from counsel for Alberto Sr., both executed on July 12, 2009. The first was his peremptory challenge of the trial judge assigned to the case. The second was an objection of assignment of the case to a commissioner. Both of these documents were not filed until July 22, 2009.

In the meantime, the peremptory challenge was granted on July 21, 2009. The grant order was filed on July 22, 2009, and that same day, the matter was reassigned to Commissioner Richard H. DuBois in department 16. Alberto Sr. did not file a specific objection to Commissioner DuBois’s assignment in the days immediately following it.

On September 4, 2009, Commissioner DuBois conducted his first hearing in this matter—a status conference. The status conference statement filed by Alberto Sr. the same day did not object to the commissioner hearing the matter. The commissioner presided over two October 2009 hearings, without objection.

By the end of October 2009, the commissioner ordered that Alberto Sr. be given temporary sole physical custody of Alberto Jr. Joint legal custody of the minor was awarded and A. was permitted to have weekly unsupervised visitation with Alberto Jr. By December 2009, the commissioner allowed A. to have overnight visitation with her son every other weekend. These visits did not occur because Alberto Jr. refused to spend the night with his mother.

The commissioner presided over six more hearings in 2010, but did not change the basic custody and visitation arrangement. He indicated ongoing concerns about Alberto

¹ The record was augmented to include various transcripts and trial court documents. We granted the request for augmentation without making a determination of relevance. We conclude that these items are relevant.

Sr.'s possible interference with A.'s visitation. Alberto Sr. raised no objection to the commissioner's jurisdiction to preside over any of these hearings.

By August 2010, a trial date of January 2011 had been set. In November 2010, a dispute arose between Alberto Sr.'s counsel—who was also his sister and the aunt of Alberto Jr.—and the commissioner about whether she could represent her brother at the upcoming trial. Alberto Sr.'s attempt to resolve this issue was addressed to department 16, where Commissioner DuBois sat.

In late December 2010, Alberto Sr.'s counsel asserted that his July 2009 objection required that the matter be reassigned from the commissioner to a judge. A.'s counsel responded that the blanket objection was ineffective against Commissioner DuBois and that if it was effective, it had been waived by Alberto Sr.'s failure to object to the ongoing proceedings before the commissioner. In early January 2011, the commissioner acknowledged that the July 2009 objection to any commissioner hearing Alberto Sr.'s case had not been ruled on. He determined that because he had presided over several aspects of the case without objection to him doing so, that objection had been waived. He noted that if Alberto Sr. disagreed with the ruling, he could challenge it with the supervising judge of the family law court.

Before trial was scheduled to begin in January 2011, Alberto Sr. sought a writ of mandate and requested a stay in our court, contending that the commissioner lacked jurisdiction to conduct the upcoming trial. We summarily denied the petition and stay request.²

² A summary denial of a writ of mandate is not res judicata because it does not constitute a decision on the merits. Alberto Sr. is entitled to raise this issue anew on appeal. (*Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 640.) He asked us to take judicial notice of his filings in this related appellate matter. We granted that request while reserving a determination of the relevance of these materials. We now conclude that these items are relevant to the matter before us on appeal. We have also taken judicial notice of the entire file in this related matter, on our own motion.

In late January 2011, the commissioner conducted a two-day trial in this matter. Alberto Sr.'s sister represented him at trial. Alberto Sr. did not raise any question about the commissioner's authority to proceed as the trial began.

At Alberto Sr.'s request, the commissioner issued a statement of decision at the end of February 2011. In it, he concluded that both Alberto Sr. and A. could safely and adequately care for the minor. Still, he was critical of Alberto Sr.'s hypersensitivity to minor injuries suffered by Alberto Jr. while in A.'s care. The commissioner found that repeated allegations of child abuse from Alberto Sr. and his family had affected the child's feelings toward A. The commissioner also found that Alberto Sr. and his family had made A.'s successful visitation with Alberto Jr. difficult, impacting the child's attitude toward his mother.

In March 2011, the commissioner's order on custody and visitation issues was filed. Both parents were given joint legal custody of Alberto Jr., while Alberto Sr. was given temporary physical custody of the minor. A. was to have regular visitation, including overnight visitation. The commissioner's plan was to move to joint physical custody by increasing the time that A. would spend with the child. Alberto Jr.'s counselor would work with him to facilitate overnight visitation with A. Notice of entry of the order was given in April 2011, and the notice of appeal was filed in May 2011.³

II. COMMISSIONER'S AUTHORITY TO PRESIDE

Alberto Sr.'s sole contention on appeal is that the commissioner had no jurisdiction to preside over the court trial. He argues that he never stipulated that the commissioner could do so and that he had filed a written objection to having any commissioner act as a temporary judge at an earlier stage of the proceedings.

On the stipulation of the parties, a temporary judge may be appointed to try a case and make a final determination of it. (Cal. Const., art. VI, § 21; Code Civ. Proc. § 259, subd. (d).) A court commissioner may hear all preliminary matters relating to child

³ In January 2012, Alberto Sr. petitioned this court for a writ of supersedeas and requested a stay of the visitation order, reasoning that the court commissioner lacked jurisdiction to preside over the trial. We denied the writ and the stay request.

custody. (Code Civ. Proc., § 259, subd. (e).) San Mateo County local rules provide that a party is deemed to stipulate that a family law matter may be heard by a commissioner if the party fails to file a written objection within 30 days *after* a notice of assignment is served on the party. (Super. Ct. San Mateo County, Local Rules, rule 5.4(E)(2) (rule 5.4(E)(2).))

Alberto Sr. did not file a timely objection to Commissioner DuBois's authority to hear the case. His blanket objection was executed and received by the court *before* Commissioner DuBois was assigned to case. Until the assignment was made on July 22, 2009, notice of assignment could not have been given. Any objection to having the matter decided by a commissioner that was filed *before* that time would have been ineffective. Alberto Sr. had 30 days after the assignment to Commissioner DuBois to raise an objection to him, but he failed to do so. (See rule 5.4(E)(2).)

Assuming arguendo that we found the written objection to be valid, we would find that Alberto Sr. stipulated to the commissioner's authority by his and his counsel's conduct after its filing. He and his counsel allowed Commissioner DuBois to preside over hearings for a year and a half before raising an objection to having him determine these matters. The right to have an elected or appointed superior court judge preside over a trial is not so fundamental that it requires an express oral or written stipulation permitting a commissioner to sit as a temporary judge. A stipulation may also be inferred from counsel's conduct. (*In re Horton* (1991) 54 Cal.3d 82, 86, 91-92.) A right may be deemed to be intentionally relinquished when a party's acts are inconsistent with an intent to enforce that right and would induce a reasonable belief that the right has been relinquished. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 33-34.) Thus, even if Alberto Sr.'s written objection were deemed to apply to Commissioner DuBois after his appointment, Alberto Sr.'s failure to raise the issue until December 2010—despite participating in many hearings before the commissioner on the matter—constituted a waiver by conduct of any objection to the commissioner's authority to preside.

The custody and visitation order is affirmed.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.

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