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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MELODY SNYDER,

Plaintiff and Respondent,

v.

JOHNNY SALDANA,

Defendant and Appellant.

A145756

(Sonoma County
Super. Ct. No. SFL-57794)

Johnny Saldana (Father) appeals the trial court's order regarding custody of Father's minor son (Minor). We affirm.

BACKGROUND

Father and Minor's mother, respondent Melody Snyder (Mother), never married. The instant action was filed in January 2012. In November 2012, following a trial, Judge James G. Bertoli awarded the parties joint legal and physical custody and set a visitation schedule. The court also ordered Father to complete a 52-week domestic violence/anger management program "of the type offered by Nova nonviolent alternatives."

In August 2013, Father filed a motion to modify custody and visitation. In February 2014, a hearing on this motion was held before Judge Robert S. Boyd. At the beginning of the hearing, the parties informed the court they had agreed to attend co-parent counseling. The parties then argued three issues: Father's request for sole legal and physical custody of Minor, whether Father had previously refused to participate in mediation, and the parties' disagreement about whether Minor should be enrolled in

preschool. At the conclusion of Mother's arguments, Mother's counsel noted: "I would want to make the Court aware that we have discovery pending specifically asking for proof that father has attended and completed the 52-week batter[er]'s program that he was ordered to attend." Father's counsel responded, "when the order was entered, [Father] registered at Nova, but they would not let him participate there" because a Nova employee had testified for Mother against Father. Father's counsel continued: "So [Nova] gave him an alternative. They gave him an anger management online program [a]s one of the alternatives they gave him, and he's registered for that program and has been attending it online, anger management program. [¶] [Father] advises me that he tried to register at Nova, but they would not --" The court responded, "Okay." At the conclusion of the hearing, the court issued oral orders regarding preschool, mediation, and custody.¹

In September 2014, Father filed a request to modify visitation, seeking more time with Minor. At the time, Father had Minor on Monday from 7 a.m. to 3:30 p.m.; Wednesday at 7 a.m. to Thursday at 7 a.m.; Friday from 7 a.m. to 3:30 p.m.; and, every other weekend, Friday at 3:30 p.m. to Sunday at 10 a.m. At a January 2015 hearing before Judge Raima Ballinger, both parties agreed to participate in co-parent counseling, and further agreed to set a May 2015 date for mediation with Family Court Services in the event the co-parent counseling was unsuccessful. The next court hearing was set for June.

In May 2015, Mother filed a declaration stating the parties attended three sessions of co-parent counseling and had been "close to reaching an agreement to modify the parenting plan." However, Mother noted Father "claim[ed] he took an online anger management class in lieu of the court ordered NOVA type program," but "was unable to describe to [the co-parent counselor] any tools he learned from the anger management

¹ According to the register of actions, the court also issued a written order; however, this order is not part of the record on appeal.

program.” Father subsequently terminated the co-parent counseling. Mother requested Father be “ag[a]in” ordered to take an in-person anger management program.

Father submitted a declaration stating: “I believe that Mother constantly raises obstacles to my having more time with [Minor], such as insisting that I have an anger-management problem and that the online course I have been taking is insufficient.” Father’s counsel also filed a declaration stating she reviewed the recommendation from the Family Court Services mediator. She stated the mediator recommended Father “have NO increase in his custodial time until he attends NOVA or a NOVA-type program in person,” and stated this recommendation “depends heavily on the conclusion that [Father] had violated a court order by not attending a NOVA-type anger management program in person instead of online.” Father’s counsel submitted an excerpt from the reporter’s transcript of the February 2014 hearing before Judge Boyd, and stated in her declaration that Judge Boyd “did NOT indicate in any way that enrollment in the online program was insufficient.”²

A hearing before Judge Ballinger was held on June 1, 2015. Father’s counsel argued that Judge Boyd “did, indeed, okay the online program.” Judge Ballinger disagreed: “there is an ongoing conversation, and you got a Judge going ‘okay,’ the way a lot of people do when they nod their head, which is like ‘Yeah, tell me more.’ . . . I did not view that at all as saying that was appropriate.” Judge Ballinger continued, “[the purpose] of 52-week programs . . . is not just getting some book learning. The whole point of those programs is the interaction that the people experience with their peers. [¶] . . . And an online course is just not going to be appropriate.” Father’s counsel then argued that Judge Bertoli’s order “does not specify that the program must be in-person. It doesn’t preclude online.” Judge Ballinger disagreed: “It would preclude online, because the order specifically says ‘as a NOVA program.’ [¶] There are . . . three programs, 52-week programs in this County. . . . [E]very one of those 52-week programs is a group session. When you get an order that says you’re going to do a NOVA-like program, that

² The declaration erroneously identifies the bench officer as Judge Bertoli.

is the group program.” Judge Ballinger rejected Father’s assertion that NOVA directed him to an online program as “not . . . believable at all.” Father’s counsel argued attendance at an in-person program would be “an extreme hardship” because Father was unable to drive, but Judge Ballinger, after determining Father was only working two to three days per week, found he could take the bus. Judge Ballinger adopted the mediator’s recommendation that Father take an in-person, 52-week anger management program.

DISCUSSION

Father argues (1) Judge Ballinger violated Father’s right to due process by ordering him to take an in-person anger management program, and (2) Judge Ballinger erred in relying on the recommendation of a biased mediator. Mother did not file a brief on appeal. We reject Father’s contentions.

I. Appealability

Our review of the record raises two issues regarding appealability. First, Father filed a notice of appeal on June 30, 2015, identifying June 1, 2015 as the date of the appealed-from order. The minute order from June 1, 2015 provides: “Defendant[’]s counsel is to submit order for Court[’]s signature.” The written order was not filed until September 4, 2015.³ The notice of appeal was therefore premature. (Rule 8.104(c)(2) [“if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed”].) We will treat the notice of appeal as filed immediately after entry of the September 4, 2015 order. (Rule 8.104(d)(1) [“A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.”].)

The second issue is whether the September 4, 2015 order is appealable. The statement of appealability in Father’s brief states: “Appeals may be taken from orders or decrees made appealable by the Family Code, including: 1) a judgment in an action or

³ Father did not include the September 4, 2015 written order in his record on appeal. On our own motion, we augment the record on appeal to include this order. (Cal. Rules of Court, rule 8.155(a)(1)(A).) All subsequent rules references are to the California Rules of Court.

proceeding, or 2) other enumerated orders. (Code Civ. Proc., § 904.1.)” This statement fails entirely to “explain why the order appealed from is appealable.” (Rule 8.204(a)(2)(B).) We exercise our discretion to excuse this failure, however, because our independent review demonstrates the order is appealable. (Rule 8.204(e)(2)(C).)

In *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, the Court of Appeal concluded a custody order “entered after a hearing and determining the issues raised in [the father’s] complaint [seeking to establish a parental relationship and requesting custody and visitation], constituted an appealable ‘final judgment[] as to custody.’ ” (*Id.* at p. 1378.) The court further found a subsequent order issued following one party’s request to modify the parenting schedule constituted “an appealable order after judgment.” (*Id.* at pp. 1376, 1378.) No judgment appears on the register of actions in this case. However, Judge Bertoli’s November 2012 order issued following a contested trial and resolved the outstanding issues raised in the parties’ pleadings.⁴ Accordingly, it constituted “an appealable ‘final judgment[] as to custody,’ ” and the appealed-from order, issued following Father’s motion to modify visitation, constitutes “an appealable order after judgment.” (*Enrique M.*, at p. 1378.)

II. *Due Process*

Father argues the trial court violated his right to due process by ordering further counseling. Father argues “Judge Ballinger reinterpreted a 2012 order in 2015 which had previously been reinterpreted differently by Judge Boyd,” and therefore Judge Ballinger “essentially ordered a second round of Nova-type counseling.”

We see no basis in the record to find that Judge Boyd approved Father’s decision to take an online rather than in-person anger management program. Neither party asked Judge Boyd to rule or opine on the issue. The reporter’s transcript makes clear that the

⁴ According to the register of actions, Mother’s initial complaint alleged domestic violence and sought a restraining order as well as orders regarding custody and visitation. Father then filed a petition to establish a parental relationship. Before the contested custody trial, the trial court issued a mutual stay-away order and the parties stipulated to Father’s paternity.

parties were simply informing the court about a potential concern. There is no basis to construe Judge Boyd’s neutral comment of “okay” as indicating his approval—explicit or implicit—of the online program. As there was no ruling by Judge Boyd on this issue, the general principle that “ ‘one trial court judge may not reconsider and overrule a ruling of another judge’ ” (*Anne H. v. Michael B.* (2016) 1 Cal.App.5th 488, 498) is not implicated. Father raises no other argument that Judge Ballinger’s interpretation of Judge Bertoli’s original order is error and we see no basis in the record to so find. Accordingly, Father’s argument that the challenged order requires him to attend a second year of counseling in violation of due process and Family Code section 3190 is unavailing.⁵

Father also argues Judge Ballinger required him to attend co-parent counseling. He points to the court’s oral statement at the hearing that “[t]he likelihood of [Father] getting any more time with his child, if he does not go to co-parent counseling, is not good.” This comment is not a binding ruling and was not reflected in the written order issued after the hearing. It is not a requirement to attend counseling within the meaning of Family Code section 3190 and therefore does not implicate that section.

Father argues, “ ‘[u]nless it is shown that parental visitation would be detrimental to the best interests of the child, reasonable visitation rights must be awarded,’ ” citing *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1028. He fails to explain why the schedule allotting him three days per week and every other weekend constitutes a denial of reasonable visitation rights.

III. *Mediator Bias*

Father next argues the trial court erred in relying on a biased mediator. Father claims “the assigned mediator had previously been the target of a formal complaint by Father of engaging in ethnic bias,” yet failed to disclose the conflict of

⁵ Family Code section 3190, subdivision (a), provides in relevant part: “The court may require parents or any other party involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, including, but not limited to, mental health or substance abuse services, for not more than one year”

interest. There is no record evidence that Father filed a formal complaint against the mediator. Father cites only the reporter's transcript for the February 2014 hearing before Judge Boyd, at which Father's counsel stated, "my client believes that there is some ethnic bias against him by [the mediator]." There is also no record evidence that the mediator failed to disclose any conflict of interest: Father did not include the mediator's report in the record on appeal and no declaration or other evidence to this effect appears in the record. Absent any record support, this argument must fail. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187 [“ ‘In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court.’ ”].)

Father also argues the mediator "appeared to show bias again by recommending that the court overturn Judge Boyd's implicit approval of the online class." As we have rejected Father's argument that Judge Boyd approved the online class, there is no basis to conclude this recommendation evidences bias.

DISPOSITION

The order is affirmed. Respondent shall recover her costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A145756)