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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Amador)

In re the Marriage of SHANE and SUSAN CROWE.

C073201

SHANE CROWE,

Appellant,

v.

SUSAN HULSEBUS,

Appellant;

S.C.,

Respondent.

(Super. Ct. No. 04FC2389)

In this contentious child custody case, the trial court ordered joint legal custody and shared physical custody, with the mother as the primary caregiver, a change from a prior order giving father temporary sole physical custody. Father appeals.¹

The trial court observed that this case “has gone on for over 8 years without a final custody order. It has been heard by perhaps a dozen different judges, resulting in inconsistent rulings, and has made at least two trips to the appellate court. It has been characterized by extreme acrimony between the parents. . . . The Court urges both parties to set aside their differences and do their best” for their daughter, S.C. (the child). This is now the third trip to the appellate court--and a fourth is still pending--and we, too, urge the parties to settle their differences in the best interests of the child.²

Father has filed a brief that is at times difficult to understand, at times relies on facts not in the record or not supported by record citations, and at times makes arguments without coherent analysis or legal authority. His decision to proceed without counsel does not entitle him to violate ordinary procedural rules. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) The child appears with counsel and defends the trial court’s orders. Father’s principal contention is that a December 2009 custody order was a final order, and therefore the mother should have had to show changed circumstances at the hearing on the order now under review. Based on our review of the record, we reject this contention, as well as the father’s other contentions. Accordingly, we shall affirm.

¹ Mother cross-appealed but did not file a brief; accordingly we deem her cross appeal to be abandoned. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 711, pp. 780-781.) We deny as moot father’s “Motion to Decide Appeal per Rule 8.220 and to Dismiss Cross-Appeal.”

² There is a separate appeal yet pending from subsequent orders (case No. C078728). No party suggests those subsequent orders have mooted any issues raised in this appeal. Father has recently filed a request for judicial notice of a reporter’s transcript of a subsequent hearing that apparently resulted in further modification of custody orders. However, because that hearing occurred well after the instant notice of appeal, and father does not contend it moots any issues in this case, we deny the request.

BACKGROUND

We briefly outline the procedural history here and provide further information as required later to address the issues father raises. We emphasize that we are reviewing an appeal from orders made in February 2013, illuminated by a subsequent written final order made in March 2013. While some prior orders may be relevant to some issues on appeal, we do not directly review those prior orders.

The child was born in November 2003.

Marital status was terminated in 2007.

In March 2009, Judge Smith issued a “Ruling on Order to Show Cause re Child Custody and Visitation.” He rejected the mother’s claims that the father was molesting the child, and found she was attempting to alienate the child from the father. He ordered joint legal custody, with temporary sole physical custody to the father, ordered the mother into counseling, ordered both parties into “co-parenting counseling,” and provided a supervised visitation schedule.

In December 2009, after a November 2009 long cause hearing, Judge Smith issued another ruling, in part rejecting the mother’s claims that the father had been trying to alienate the child from her, and confirming the March 2009 order with minor modifications. He ordered mother to prepare formal findings and an order after hearing, but no such documents are in the record. This December 2009 ruling does not state that it is a final or permanent custody order.³

In September 2011, mother filed an order to show cause (OSC) to modify custody and visitation, father moved to have her declared a vexatious litigant, and father filed his own OSC to modify the extant order. These matters were set for a combined hearing, and

³ However, at the November 2009 hearing preceding his December 2009 written ruling, Judge Smith mentioned in passing that changed circumstances were needed for him to modify his March 2009 order. This may have contributed to father’s view that the December 2009 ruling was a final or permanent order, as detailed *post*.

at a preliminary hearing in October 2011, Judge Kolpacoff explained that custody orders could always be modified, and observed that a trial would be held “for a permanent order of custody and visitation, so that both parties have the final order from which they can seek whatever remedy is available to them.” This was a reference to the fact that we had already dismissed mother’s appeal from the March 2009 order, as from a non-final order. (*In re Marriage of Crowe* (June 3, 2011; C061502) [nonpub. opn.] (*Crowe I.*)) We will discuss our prior decision in more detail in Part I of the Discussion, *post*.

Judge Kolpacoff made a temporary order for joint physical and legal custody, ordered unsupervised visits by mother, and ordered an evaluation pursuant to Family Code section 3118.⁴

Before the scheduled trial, Judge Kolpacoff recused himself.⁵

In July 2012, Judge Shockley clarified the visitation schedule, and ordered the child to be taken to her counselor, given access to her lawyer, and be returned to the father. Mother vowed to disobey this order. The next week, Judge Shockley granted father’s request for an emergency order, after mother refused to follow the original order.

Later, at the child’s counsel’s suggestion, and without objection, the trial court (Shaver, J.) agreed to accept evidence from prior hearings; the parties were permitted to introduce further evidence or recall witnesses. At the beginning of the trial, without objection, the trial court provided a “Preliminary Summary of Factual Findings” that summarized prior evidence.

⁴ Undesignated statutory references are to the Family Code.

⁵ The recusal followed our stay and suggestive *Palma* letter in lieu of an alternative writ (see *Palma v. U. S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171), in response to father’s mandamus petition. (*Crowe v. Superior Court* (3 Civ. No. C070390).)

In February 2013, the trial court issued “permanent” custody orders, ordering joint legal and physical custody, with mother as the primary caregiver, and ordered the father to attend a batterer’s program. Father timely appealed.

In March 2013, the trial court filed a written final judgment that had been omitted from the permanent custody order. This was in effect a nunc pro tunc order, and therefore was unaffected by the pendency of the appeal.

DISCUSSION

I

Changed Circumstances

In two overlapping portions of his brief, father contends the trial court should not have altered the December 2009 order absent a showing of changed circumstances by mother, because that order was a permanent or final order, and that Judge Shaver should not have reconsidered issues already decided by Judge Smith.

The general legal background for father’s claims is as follows. Although a child custody order can be modified at any time, “Under the changed circumstances rule, after the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, custody modification is appropriate only if the parent seeking modification demonstrates ‘ “a significant change of circumstances” indicating that a different custody arrangement would be in the child’s best interest.’ ” (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1072.) Our Supreme Court has explained that rule “fosters the dual goals of judicial economy and protecting stable custody arrangements” and is “ ‘based on principles of res judicata.’ ” (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535.)

In contrast, at “an initial custody determination, the trial court has ‘the widest discretion to choose a parenting plan that is in the best interest of the child.’ [Citation.] It must look to *all the circumstances* bearing on the best interest of the minor child.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31-32; see *In re Marriage of Brown &*

Yana (2006) 37 Cal.4th 947, 955-956.) Therefore, a party seeking to change whatever interim or temporary custody orders have been made has an easier burden than a party seeking to change a final or permanent custody order. (See, e.g., *Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 738 [improper modification of final order where trial court did not require movant to show changed circumstances]; *In re Marriage of McLoren* (1988) 202 Cal.App.3d 108, 116 [similar holding]; cf. *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1053-1054 [improper for trial court to require movant to show changed circumstances, when no prior final judicial custody determination had been made].)

The predicate for father's arguments is his claim that the December 2009 custody order was a final or permanent order. However, the record negates this predicate point.

Denying father's motion in limine-- couched as a pretrial objection and bolstered by the child's counsel's similar objection--Judge Kolpacoff had declined to treat the December 2009 order as a permanent order, adding the fact the child had been provided only supervised visits with the mother for over two years was "repugnant" and open for reconsideration. Judge Shaver, too, did not view the December 2009 order as a final order. Neither do we.

In determining whether a custody order is a temporary or final order, "The sole trigger is whether the order sought to be modified was intended to be a 'final' judicial custody determination—without regard to whether it was entered after a contested hearing *or* by default judgment *or* by stipulation." (3 Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2015) Modifications of Orders and Judgments, ¶ 17:298, p. 17-98; see *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 257-259 (*Montenegro*); *In re Marriage of Richardson* (2002) 102 Cal.App.4th 941, 951-952.)

The December 2009 order followed a hearing on mother's OSC to modify the March 2009 order, from which mother had already taken an appeal. It is captioned as a "Ruling on Order to Show Cause for Modification of Child Custody and Visitation." It is

in form and effect a modification of the March 2009 order, which had been captioned similarly as a “Ruling on Order to Show Cause re Child Custody and Visitation.” As we shall explain, the December 2009 order was not a final or permanent order.

First, the December 2009 order was based on a hearing following mother’s OSC, not a proceeding characterized as a trial. (See *In re Marriage of Lewin* (1986) 186 Cal.App.3d 1482, 1487 [“The change of circumstance rule . . . has no applicability to a pendente lite stipulation or pretrial order *or order to show cause*”], italics added (*Lewin*).) The March 2009 order, too, had followed an evidentiary hearing. (*Crowe I, supra*, at p. 1.)⁶

Perhaps even more importantly, the March 2009 order granted joint legal custody with “*temporary sole physical custody*” (italics added) to father. The December 2009 order increased mother’s visitation, and made other orders not here relevant, but provided that “all prior orders of the court shall remain in full force and effect.” Thus, the December order left in place the March *temporary* physical custody order. A temporary order is not a final or permanent order. Because the December order left all non-modified parts of the March order intact, we reject father’s point that the December order made no “reference to temporary orders.” Nor are we persuaded by father’s point that it did not set a review hearing, as had the March order. It still left untouched the “temporary” part of the March custody order.

Further, neither of the 2009 orders is captioned as a judgment or permanent order, but instead both are captioned as rulings on orders to show cause. (See *Montenegro, supra*, 26 Cal.4th at p. 259 [orders “did not clearly state that they were final

⁶ In a different case, our Supreme Court noted: “The court’s December 23, 1996 ‘Order After Hearing,’ granting joint legal custody to the parties and primary physical custody to the mother, constituted a final judicial custody determination that the court need not reconsider in the absence of changed circumstances.” (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1088, fn. 2.) But the court did not hold every custody order after an evidentiary hearing qualifies as a final custody order.

judgments”].)⁷ And although both OSC rulings directed that mother follow up with formal orders, the record on appeal does not show that a formal order was presented for the latter of the rulings. Nor did father submit a formal order, when the mother failed to do so.

Finally, we find it significant that in the mother’s prior appeal we characterized the March 2009 order as a non-final order, and dismissed her appeal for that reason.⁸ (See *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 556-565.) In *Crowe I* we discussed the December 2009 order in detail. (*Crowe I, supra*, at pp. 11-12, 16-17.) We implicitly treated it, too, as a nonfinal custody order, in the following passage: “Nor is [the March 2009 order] appealable as an order *after* final judgment, since, so far as we know, no final judgment has ever been entered in this dissolution proceeding, let alone entered before the March 2009 ruling was made.” (*Id.* at p. 18, underscoring added, italics in original.) Thus, knowing the details of the December 2009 order, we did not construe it as a final order. We adhere to that view.⁹

Based on all the circumstances outlined above, we find the December 2009 order was not a final or permanent custody order.

Thus the mother did not have to satisfy the changed circumstances standard, and Judge Shaver had the duty to review the relevant custody factors *de novo*, without deference to Judge Smith’s findings. (Cf. *In re Alberto* (2002) 102 Cal.App.4th 421,

⁷ Of course, the caption of a document is not dispositive, because sometimes documents are mislabeled. (See *Stiger v. Flippin* (2011) 201 Cal.App.4th 646, 654.) But a caption is certainly relevant in determining the nature of a document.

⁸ *Crowe I* consisted of two separate appeals, one from the March order (case No. C061502) and another from a June 2009 vacation order (case No. C062141). The latter is irrelevant here.

⁹ We need not address whether *Crowe I* constitutes law of the case on this point, an issue not explicitly briefed by the parties. (See *People v. Stanley* (1995) 10 Cal.4th 764, 786.)

426-428 [ordinarily one superior court judge may not reconsider the orders of another].) Therefore, father's contrary claims are not well taken.

II

The Minor's Missing Testimony

Father contends the trial court erred by not having the child testify. This point is treble forfeited, as we shall explain.

At trial, mother objected to the lack of the child's testimony, but *father* did not, and the child's counsel did not want the child to testify. Before a final ruling, the child's counsel asked that the court hear the child's testimony in chambers, and father agreed to this idea, albeit reluctantly. But later, the trial court ruled the child's testimony would not be helpful.

So far as the record shows, father did not timely object to the trial court's ruling excluding the child's testimony. The point is first mentioned in father's posttrial motion for reconsideration, and then again in father's written objections to the trial court's written final judgment.

We first conclude the contention is forfeited for lack of timely objection. "Procedural irregularities or erroneous rulings in connection with the relief sought or defenses asserted will not be considered on appeal where a timely objection could have been made but was not made in the court below." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 784 (*Grimshaw*)). Moreover, father does not explain the "substance, purpose, and relevance of the excluded evidence" as required. (Evid. Code, § 354, subd. (a); cf. *People v. Fontana* (2010) 49 Cal.4th 351, 365-366.) A reasonably specific offer of proof is required to preserve a claim that evidence was wrongly excluded. (See 3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, §§ 413-414, pp. 567-570 (Witkin).) Finally, father has not even attempted to demonstrate how the error "resulted in a miscarriage of justice" as is his burden, as the appellant. (Evid. Code, § 354; see *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106 (*Paterno*)).

Accordingly, the claim that the trial court should not have proceeded without taking and considering the child's testimony is treble forfeited.

III

Best Interests of the Child

In two overlapping portions of his brief, Father contends the trial court abused its discretion in determining the best interests of the child. In reviewing a child custody order, we apply the following deferential standard of review:

“ ‘The trial judge, having heard the evidence, observed the witnesses, their demeanor, attitude, candor or lack of candor, is best qualified to pass upon and determine the factual issues presented by their testimony. This is especially true where the custody of minor children is involved. An appellate tribunal is not authorized to retry the issue of custody, nor to substitute its judgment for that of the trier of facts. Only upon a clear and convincing showing of abuse of discretion will the order of the trial court in such matters be disturbed on appeal. Where minds may reasonably differ, it is the trial judge's discretion and not that of the appellate court which must control.’ ” (*Lewin, supra*, 186 Cal.App.3d at p. 1492.)

Because father makes *no* effort to describe the evidence contrary to his position, let alone describe and analyze it in light of the applicable standard of review, he has forfeited his claim. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Although father provides an intricately detailed statement of the case, he fails to faithfully describe the facts before the trial court supporting the order from which the appeal was taken; instead he provides an abbreviated, disjointed, and nearly unintelligible, outline of the hearing. “Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner.” (*Estate of Palmer* (1956) 145 Cal.App.2d 428, 431.)

Nonetheless, we will briefly address father's specific contentions.

A. *The Section 3118 Evaluation*

In stray passages of his briefing, father contends the trial court should not have proceeded without obtaining the anticipated section 3118 evaluation (for child abuse). This claim is forfeited for several reasons.

The child’s counsel and mother objected to the lack of the evaluation, but *father* did not.¹⁰ Father said “a full-blown 3118 evaluation is not called for, because there’s . . . been no findings of sexual abuse.” When it became clear no evaluation would be completed in time for trial, father said, “I understand I was not agreeable to one, but I said I would be willing to do it again”--meaning to pay for an evaluation again--and father clarified that he was seeking a continuance. After colloquy, where the child’s counsel supported a continuance for an evaluation and mother opposed any delay, the trial court ruled it had done what it could to “get [an evaluation] done” but the court could not pay for one, and an evaluation would be helpful but not *necessary*; thus, no continuance was warranted.

Father did not object when it became clear the evaluation was not going to be completed, but instead asked only for a continuance. (See *Grimshaw, supra*, 119 Cal.App.3d at p. 784.) He provides no argument or authority in his briefing to establish that he has preserved the contention of error now pressed on appeal. Nor does he provide coherent argument and authority to support his contention. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Further, as the child’s counsel aptly points out: “The trial court [after the trial] deemed the evidence insufficient to support a finding that [the child] was sexually abused—a finding in Father’s favor. [Citation.] The only benefit to Father of reversal and remand for a section 3118 evaluation would be the satisfaction of having an evaluator confirm that the allegations of sexual abuse against him are false.”

¹⁰ Before trial, father had pointed out he had already paid for prior evaluations, but did not insist that this one be conducted.

Father does not demonstrate what the missing evaluation would have revealed, nor does he explain what offer of proof he made, if any, in the trial court. (Cf. Evid. Code, § 354; 3 Witkin, *supra*, §§ 413-414, pp. 567-570.) Nor does he explain how he was prejudiced, inasmuch as the trial court explicitly *discounted* the claims he sexually abused the child. (See *Paterno, supra*, 74 Cal.App.4th at pp. 105-106.) We do not see how a section 3118 evaluation of the child would have resulted in a *more favorable* finding for father.

B. *Other Points*

Father's remaining briefing regarding the trial court's purported abuse of discretion largely relies on purported facts that are not supported by citations to the record. We disregard these unsupported facts. (See *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 (*Duarte*)). Father does point to portions of the record indicating mother had posted or endorsed material on the Internet about the allegations of sexual abuse of the minor. The record citations he supplies are to the November 2009 hearing preceding the December 2009 order, at which Judge Smith chastised the mother regarding the materials she had caused to be placed on the Internet. Father also claims that while he was the custodial parent, the child thrived at school, but after the February 2013 order was made, mother delayed in enrolling the child in school.

Father's points fail to establish an abuse of discretion. The trial court was presumably aware of these points and did not find them to be compelling. The weight to be accorded to any particular piece of evidence is a matter falling within the trial court's broad discretion. (See *Lewin, supra*, 186 Cal.App.3d at p. 1492.) We must consider *all* of the evidence before the trial court, viewed in the light most *favorable* to the trial court's ruling.

Father adds that the trial court failed to consider various reports, but again fails to support these contentions with record citations, therefore we disregard them. (See *Duarte, supra*, 72 Cal.App.4th at p. 856.) He also repeats his contention that a de novo

determination of the best interests of the child was precluded by the December 2009 order, a point we have already addressed and rejected in Part I, *ante*.

IV

Disentitlement Doctrine

Father suggests that because mother was in contempt of trial court orders, the trial court should have applied the disentitlement doctrine and barred her from seeking relief in the form of a modification of prior orders, but he then also cites cases involving the *appellate* disentitlement doctrine.

To the extent the father would have us apply the appellate disentitlement doctrine, we decline. If we applied the doctrine, we would dismiss mother's cross-appeal. (See *Stone v. Bach* (1978) 80 Cal.App.3d 442, 444.) However, because mother has abandoned her cross-appeal by failing to brief it, we dismiss it anyway.

To the extent father contends the trial court should have barred mother from seeking a change in the prior custody order, we disagree. The authority father cites for extending the appellate disentitlement doctrine to trial court matters is a case involving reunification services under the dependency statutes. The case held that where a party's violation of court orders frustrates the ability of another party to litigate or the trial court to fairly adjudicate an issue, the at-fault party may be barred from seeking relief. (*In re C.C.* (2003) 111 Cal.App.4th 76, 85-86.)¹¹ In *this* case, father does not explain how the mother's purported breaches impaired father's ability to present his case at trial, or prevented the trial court from assessing the best interests of the child. Although father claims mother "has paralyzed the ability of the Superior Court to secure the information required to resolve the issues of this case," his briefing does not explain why this is so.

¹¹ We express no view about the propriety of extending the appellate disentitlement doctrine to trial court matters, as it is not necessary for us to decide that question.

