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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of SHAWN and
KIMBERLY S.

SHAWN S.,

Appellant,

v.

KIMBERLY S.,

Respondent.

E051207

(Super.Ct.No. VFLVS032358)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. David R. Proulx,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Shawn S., in pro. per., for Appellant.

No appearance for Respondent.

I. INTRODUCTION

Appellant Shawn S. appeals from a May 12, 2010, postjudgment family court order awarding his former wife, respondent Kimberly S., sole physical and legal custody of the parties' then six-year-old son J., restricting Shawn to supervised visits with J., and declaring Shawn a vexatious litigant. Shawn claims he did not have a fair hearing on these claims because the family court was biased against him, and insufficient evidence supports the court's determination that he was a vexatious litigant.

Kimberly has not filed a respondent's brief. Instead, she filed and served a notice of her intention not to file a respondent's brief, in which she states she was unable to file a respondent's brief but does not believe Shawn's claims have any merit.

We affirm the May 12, 2010, order. We find no merit to Shawn's claims of judicial bias, and conclude that the family court did not abuse its discretion in awarding Kimberly sole legal and physical custody of J. or in restricting Shawn to supervised visits with J. We also conclude that substantial evidence supports the court's discretionary determination that Shawn was a vexatious litigant.

II. BACKGROUND

A. *The Parties*

Shawn and Kimberly were married around 2004, and their son J. was born in July 2004. Shawn and Kimberly separated and divorced in 2005. Shawn has an older son and an older daughter from a previous relationship, and Kimberly has an older daughter.

Shawn is a “full time stay at-home father” and disabled veteran, rated 100 percent disabled by the Department of Veterans Affairs. Shawn suffers from migraine headaches due to a spinal injury he sustained while serving in the United States Army. Kimberly works full time.

Shawn and Kimberly had an acrimonious relationship even before J. was born in July 2004. For example, only several days before J. was born, Shawn called the police after Kimberly locked him out of their home and slammed a bathroom window on his thumb. In April 2005, the police responded to a report of another verbal altercation at the parties’ home.

B. The December 2006 Custody Order

On December 5, 2006, when J. was 18 months old, the juvenile court issued a final custody order awarding Shawn and Kimberly joint legal and physical custody of J. and adopting an agreed-upon visitation schedule. Shawn was to have J. on weekdays and on Monday and Tuesday nights, while Kimberly was to have J. on weekends and on Wednesday through Sunday nights. After issuing the order, the juvenile court terminated its jurisdiction over J. and ordered any requests to modify its order to be brought in the family court.

J. was the subject of juvenile court dependency proceedings in 2005, 2006, and again in 2009. The 2005 and 2006 dependency proceedings also involved the parties’ older children.

In May 2006, Children and Family Services reported to the juvenile court that Shawn appeared to suffer from Munchausen's by Proxy Syndrome, "a pattern of behavior in which caretakers deliberately exaggerate, fabricate or induce physical or psychological-behavioral-mental health problems in others." The social worker opined that Shawn "appear[ed] to act in an unethical manner" and misrepresented facts to support his claims of abuse against Kimberly.

C. The Family Court Proceedings (August 2008 to February 2010)

Between August 2008 and December 2009, Shawn filed multiple applications in the family court seeking to reduce and restrict Kimberly's visits with J. based on his claims that Kimberly was sexually and physically abusing J. At some point, the case was assigned to Commissioner David Proulx for all purposes. Commissioner Proulx presided over all hearings in the family court except one ex parte hearing on October 1, 2008, at which no ex parte relief was granted.

On August 14, 2008, when J. was four years old, Shawn petitioned the family court for an order modifying the December 2006 custody order by restricting Kimberly to supervised visits with J. Shawn claimed Kimberly had been sexually abusing J. by touching his private parts, and that J. was withdrawn and reluctant to see his mother.

At the August 14 ex parte hearing on Shawn's petition, Kimberly was present in court. The court denied ex parte relief and ordered the parties to report to Family Court Services on September 18, where J. was to be interviewed.

On August 22, 2008, Shawn filed another declaration for a same day ex parte hearing and an ex parte order preventing Kimberly from visiting J. Shawn complained that the family court and “every public agency charged with keeping children safe” had callously disregarded his claim that Kimberly was sexually abusing J. Shawn said he filed a police report, the police were investigating the matter, and Shawn had an appointment with a “sexual assault counselor next week to begin determining the extent of the abuse.”

At the August 22 ex parte hearing, Kimberly was not present in court. The court placed J. in Shawn’s temporary custody, ordered no visitation for Kimberly, advanced its Family Court Services referral to August 28 from September 18, and ordered the parties to return to court on August 29.

On August 29, the court awarded Shawn temporary full physical custody of J. and restricted Kimberly to supervised visits from noon to 3:00 p.m. on Saturdays, pending the Children’s Assessment Center’s (CAC) evaluation of J. Family Court Services recommended the evaluation to determine whether any sexual abuse had occurred. Shawn was ordered to have the CAC evaluate J. as soon as possible, and the parties were ordered to return to court on September 22.

On September 22, 2008, the court vacated its August 22 and 29 orders modifying the parties visitation schedule, and reinstated the 50/50 “share plan” established in the December 5, 2006, custody order. The court ordered J. enrolled with a therapist, Dr. Vicki Davio. At the hearing, Shawn complained that he was “a little appalled” by the

court's decision, given that J. had "shown more than enough signs that [he was] being abused by [Kimberly]"

Two days later, on September 24, 2008, Shawn filed another application for an order to show cause for a "stay away order," preventing Kimberly from seeing J. at all pending the CAC's evaluation of J. In his declaration, Shawn claimed that J. had disclosed "new information" regarding Kimberly's sexual abuse. J. said that Kimberly was hitting him "in the private parts" and "play[ing] with" his private parts, and J.'s disclosure was recorded on an audiotape and videotape.

On October 1, 2008, an ex parte hearing was held before Judge Nancy Duffy on Shawn's application for the stay away order. Judge Duffy denied Shawn's request for the stay away order, but Kimberly agreed to have her soon-to-be 18-year-old daughter present during her overnight visits with J. Shawn admitted he had cancelled J.'s first appointment with Dr. Davio because he was "here in court," but the appointment was rescheduled to October 2.

At the October 1 hearing, Judge Duffy pointed out that Commissioner Proulx would return to court on October 16. The parties were ordered to mediation on October 30, and a noticed hearing on Shawn's application for the stay away order was scheduled for November 26.

On October 1, 2008, the same day that Judge Duffy denied his ex parte request for a stay away order, Shawn filed yet another application, this time requesting reinstatement of the court's August 29 ex parte order restricting Kimberly to supervised visits with J.,

from noon to 3:00 p.m. on Saturdays. At an October 16 hearing on Shawn's request, Commissioner Proulx said he had just received a handwritten fax from Dr. Davio stating she saw no signs that J. was being sexually abused. The court told Shawn it was concerned that Shawn was having a third person "interrogate" J., even though there was no indication from Family Court Services, from the CAC, or from Dr. Davio that J. was being harmed. The court took the October 30 mediation and the November 26 hearing off calendar, finding there were no new allegations of sexual abuse and no need to review the matter further.

Six months later, on April 3, 2009, Shawn filed another application to modify the parties' December 2006 custody order by awarding Shawn primary physical custody of J., restricting Kimberly's visitation, and ordering that J. be seen by a therapist other than Dr. Davio. This time, Shawn claimed that Kimberly had "developed a habit of allowing [J.] to sleep naked in bed with her," and claimed he had personally seen Kimberly touch J.'s genital area on "at least one occasion." Shawn also claimed that J. was telling him he did not want to see his mother "because she hurts me," and J. had also made it clear that he no longer wanted to see Dr. Davio. Shawn further complained he had been "virtually foreclosed from contacting" J. when J. was with Kimberly. On April 3, the parties were again ordered to mediation at Family Court Services.

J. was in foster care from May 6, 2009, to July 29, 2009. Thereafter, the dependency proceedings were dismissed, and J. was returned to the parties' joint physical and legal custody pursuant to the December 2006 custody order.

On May 8, 2009, Children and Family Services filed a dependency petition for J., alleging that from around August 2008 to the present, Kimberly had “thrown the child to the ground on several occasions,” “struck the child in his genitals with her hand as a punitive measure,” and “struck the child with her hand or fist on arms and legs, causing bruising” The petition also alleged that Shawn failed to protect J., despite knowing that Kimberly had been physically and sexually abusing J. for around one year.

On May 26, 2009, J. was interviewed at the CAC. During the CAC interview, J. denied being physically or sexually abused by Kimberly.

On May 27, 2009, Dr. Davio wrote a two-page letter to David Kelly, the social worker assigned to J.’s case. Dr. Davio suggested that J. have monitored visits with Shawn pending further investigation by Children and Family Services or an Evidence Code section 730 evaluation.

By May 27, 2009, Dr. Davio had seen J. in 13 sessions, and J. consistently denied that Kimberly had ever sexually or physically abused him. In a February 5, 2009, session, J. “blurted out” to Dr. Davio that ““dad said I’m going to see a nice man and I’m going to live with dad and visit mom,”” and went on to say that ““*my dad said to tell the nice man mom is touching my privates.*”” When asked whether Kimberly was touching his privates, J. said ““No,”” and J. also said ““No”” when asked whether anyone else was touching his ““privates, bumm, or penis.”” J.’s foster parent had also seen no signs that J. had been sexually abused.

On August 7, 2009, Shawn filed another application to modify the December 2006 custody order, essentially by restricting Kimberly to weekend visits with Shawn. Shawn claimed he would be losing “95%” of his custody time with J. because J. was about to begin kindergarten, and his attempts to discuss the matter with Kimberly had been unsuccessful. On August 7, the court denied ex parte relief and referred the parties to Family Court Services.

On August 28, 2009, *Kimberly* filed an application seeking sole custody of J. and the court’s assistance in locating J. In violation of the court’s orders, Shawn did not bring J. to Kimberly at 3:30 p.m. on August 27 as scheduled, and Kimberly did not know J.’s whereabouts as of August 28. Shawn took J. out of school around noon on August 27, texted Kimberly saying he was not going to bring J. to her that day, and did not bring J. to school on August 28. At a September 4 ex parte hearing, Kimberly was awarded temporary physical custody of J., but as of that date J. was still in Shawn’s custody.

On September 4, 2009, Shawn filed another application, this one through an attorney, renewing his claims that Kimberly was sexually and physically abusing J. Again, Shawn sought full custody of J. and supervised visitation for Kimberly.

At the September 4, 2009, hearing, Shawn’s attorney presented several photographs to the court, which Shawn claimed corroborated J.’s “spontaneous statements of abuse” by Kimberly. Kimberly explained that after J. returned home from foster care, he bruised both of his legs while playing on a swimming pool slide. The court expressed serious concern that Shawn failed to comply with the court’s orders,

refused to share J. with Kimberly, and repeatedly made “what may be specious claims of abuse against Kimberly.” Accordingly, the court awarded Kimberly temporary sole legal and physical custody of J. and no visitation for Shawn. The parties were further ordered to keep their Family Court Services appointments, and return to court on October 23. J. was still in counseling with Dr. Davio.

On October 23, 2009, the court granted Shawn temporary supervised visitation for 90 days, through Dr. Davio. On December 4, 2009, the court increased the supervised visits to two hours each week. Meanwhile, on September 28, 2009, and December 4, 2009, Shawn filed two more applications, with numerous exhibits attached, generally complaining that he was unable to see J. and there was “no one to advocate for [J.’s] safety and welfare.”

On January 11, 2010, Kimberly petitioned to have Shawn declared a vexatious litigant.

At a February 5, 2010, hearing the court determined that Shawn was a vexatious litigant and issued a prefiling order requiring Shawn to obtain permission from the presiding judge of the court before filing any new litigation. (Code Civ. Proc., §§ 391, 391.7.) At the same hearing, the court awarded Kimberly full legal and physical custody of J., and supervised visitation for Shawn. The court said it did not believe that Shawn’s physical or sexual abuse allegations against Kimberly had any merit—even though Shawn had previously convinced the court that ex parte orders limiting Kimberly’s visitation should issue.

Following the February 5, 2010, hearing, Kimberly prepared a formal order, and the order was signed and entered on May 12, 2010. The order states that Shawn may visit J. for four to six hours on two Saturdays each month, and the visits are to be supervised by MPI Investigations. Kimberly has discretion to choose the dates, times, and locations of the visits.

Shawn appeals from the May 12, 2010, order.

III. DISCUSSION

A. *Shawn Was Not Denied a Fair Hearing Based on Judicial Bias*

Shawn claims he was prevented from having a fair hearing on his and Kimberly's applications because Commissioner Proulx demonstrated "ongoing and pervasive judicial bias" and "a hostile attitude" toward him throughout the family court proceedings. (Code Civ. Proc., § 657, cl. 1. [decision may be vacated and new trial granted based on irregularity in the proceedings preventing party from having a fair trial]; see, e.g., *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841-843 [trial court's impartiality toward attorneys prevented fair trial and required reversal of judgment], disapproved on other grounds in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349, and disapproved as explained in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4.) Based on our review of the entire record, we find no merit to Shawn's judicial bias claim.

Shawn points out, for example, that at the August 29, 2008, hearing, Commissioner Proulx remarked that it was "unusual to have an allegation that a female has molested a child," and he did not recall such an allegation in his 16 years on the

bench. Based on this comment, and the court's purportedly "hostile" tone toward Shawn and "coddling" attitude toward Kimberly, Shawn argues that Commissioner Proulx "diminished [the] validity" of his claim that Kimberly was sexually abusing Shawn simply because Kimberly was a woman.

The record shows, however, that no orders adverse to Shawn were issued based on the court's comment that it was unusual for a party to allege that a woman was molesting a child. To the contrary, at the August 29, 2008, hearing, the court awarded Shawn temporary full physical custody of J. and restricted Kimberly to supervised visits pending the CAC's evaluation of J.

As Commissioner Proulx pointed out at the August 29, 2008, hearing, Family Court Services recommended the CAC evaluation to determine whether any sexual abuse had occurred. The court explained to the parties that the CAC was an agency that "deals specifically with sexual abuse allegations," and the court had found the CAC "extremely helpful in establishing whether or not an alleged sexual abuse has occurred." Accordingly, the court deferred ruling on Shawn's request to modify the December 2006 custody order pending the CAC evaluation.

Thereafter, on September 22, 2008, the court ordered J. to therapy with Dr. Davio in lieu of the CAC interview. Shawn was supportive of this order, and even asked the court to order J. to therapy with Dr. Davio. Shawn explained to the court that J., who was only four years old at the time, was reluctant to talk to strangers, including the police detective who was investigating Shawn's allegations.

One year later, at the September 4, 2009, hearing, the court awarded Kimberly temporary sole legal and physical custody of Shawn, and made the temporary order permanent at the February 5, 2010, hearing. The court made both orders only after Dr. Davio had had numerous therapy sessions with J., and had consistently reported that J. showed no signs of having been sexually or physically abused. The CAC, Family Court Services, the social worker, and the police detective who investigated Shawn's allegations all reached the same conclusion. In addition, by his actions in filing numerous petitions to restrict Kimberly's visitation, Shawn showed that he was obsessed with making claims of sexual and physical abuse against Kimberly.

In sum, the record in no way indicates that Commissioner Proulx harbored any bias against Shawn. Rather, the record amply demonstrates that the court modified the December 2006 custody order only after J. had been in therapy for many months, and the evidence plainly showed that Shawn's claims of sexual and physical abuse against Kimberly were not to be credited.

B. The Family Court Did Not Abuse Its Discretion in Awarding Kimberly Sole Legal and Physical Custody of J., or in Restricting Shawn's Visitation

Shawn next claims that the family court abused its discretion in modifying the juvenile court's December 2006 custody order, and awarding Kimberly sole legal and physical custody of J. We find no abuse of discretion.

Generally, custody and visitation orders are reviewed on appeal for an abuse of discretion. (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 14-15.) A joint custody order may be

modified or terminated upon a showing that the modification or termination is required to serve the best interest of the child. (Fam. Code, § 3087; see also *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256 [final custody order may be modified or terminated upon a showing of a significant change in circumstances such that the modification or termination is in the best interest of the child].)

Shawn argues that the family court abused its discretion and ““exceeded the bounds of reason”” in awarding Kimberly sole legal and physical custody of J., given that he was legally obligated to protect J. from abuse. We disagree.

Given the evidence that Shawn was obsessed with making claims that Kimberly was sexually and physically abusing J., and the lack of any evidence to support Shawn’s claims, the court did not abuse its discretion in awarding Kimberly sole legal and physical custody of J., or in restricting Shawn to supervised visitation. The record shows that J. was at serious risk of suffering severe emotional harm if Shawn continued to have frequent and unsupervised access to him.

As Shawn points out, Family Code section 3027.5, subdivision (a), states that: “No parent shall be placed on supervised visitation, or be denied custody of or visitation with his or her child, and no custody or visitation rights shall be limited, solely because the parent (1) lawfully reported suspected sexual abuse of the child, (2) otherwise acted lawfully, based on a reasonable belief, to determine if his or her child was the victim of sexual abuse”

Contrary to Shawn’s argument, however, the family court did not violate Family Code section 3027.5 or any other statute in awarding Kimberly sole legal and physical custody of J., or in restricting Shawn’s visitation. As discussed, Shawn was denied legal custody of J. and his visitation rights were limited only after J. had been in therapy with Dr. Davio for many months and it had become abundantly clear that Shawn’s claims of physical and sexual abuse against Kimberly were unfounded.

C. The Court Properly Determined That Shawn Was a Vexatious Litigant

At the February 5, 2010, hearing, the court determined that Shawn was a vexatious litigant within the meaning of Code of Civil Procedure section 391, subdivision (b)(1), and issued a prefiling order requiring Shawn to obtain the prior approval or leave of the presiding judge before filing any new litigation. (Code Civ. Proc., § 391.7, subd. (a).)

Shawn challenges the court’s vexatious litigant determination, essentially arguing that insufficient evidence supports it. We disagree, and conclude that substantial evidence supports the vexatious litigant determination.

“““A court exercises its discretion in determining whether a person is a vexatious litigant. [Citation.] We uphold the court’s ruling if it is supported by substantial evidence. [Citations.] On appeal, we presume the order declaring a litigant vexatious is correct and [infer] findings necessary to support the judgment.” [Citation.]” (*Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1169.)

As pertinent, Code of Civil Procedure section 391, subdivision (b)(1), defines a vexatious litigant as a person who, “[i]n the immediately preceding seven-year period has

commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been . . . finally determined adversely to the person” (Code Civ. Proc., § 391, subd. (b)(1); *Golin v. Allenby* (2010) 190 Cal.App.4th 616, 633, fn. 20.) The term “litigation” is broadly defined as meaning “any civil action or proceeding, commenced, maintained or pending in any state or federal court.” (Code Civ. Proc., § 391, subd. (a); *Fink v. Shemtov, supra*, 180 Cal.App.4th at p. 1170.)

Here, substantial evidence supports the court’s discretionary determination that Shawn was a vexatious litigant. (Code Civ. Proc., § 391, subd. (b)(1).) Within the seven-year period ending on December 4, 2009, when Shawn’s last application was filed, Shawn filed well over five family court applications in propria persona, and all were finally determined adversely to Shawn. Indeed, Shawn filed no fewer than five unsuccessful applications to restrict Kimberly’s custody and visitation based on allegations—later determined to be unfounded—that Kimberly was physically or sexually abusing J.

IV. DISPOSITION

The May 12, 2010, order is affirmed. Kimberly shall recover her costs on appeal.

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KING
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.