Filed 1/17/13 Marriage of Abbate and Camarata CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of JOSEPH C. ABBATE AND SHELLIE A. CAMARATA.	
JOSEPH C. ABBATE, Respondent, v. SHELLIE A. CAMARATA, Appellant.	E052329 (Super.Ct.No. FAMRS701521) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Martin A. Hildreth, Judge, and Michael J. Gassner, Temporary Judge (pursuant to Cal. Const., art. VI, § 21). Affirmed.

Shellie A. Camarata, in pro. per., for Appellant.

Haslam & Perri, Donald G. Haslam and Shannon R. Thomas for Respondent.

Shellie A. Camarata appeals from an unfavorable order and a separate unfavorable judgment in a family law action. The order arises from a decision by Judge Hildreth on

June 24, 2010, which denied Ms. Camarata's request for a restraining order against her former husband, Joseph C. Abbate.

The judgment arises from a decision by Commissioner Gassner on July 30, 2010, denying Ms. Camarata's request for an order establishing parentage by estoppel. The judgment was filed on September 29, 2010.

By order dated January 21, 2011, this court found that the order and judgment were appealable final judgments. The order denying a restraining order is separately appealable under Code of Civil Procedure section 904.1, subdivision (b)(6). The judgment denying the request to establish parentage by estoppel is the result of a separate procedure for the determination of parentage. (Fam. Code, §§ 7630-7650.)[1] It is a final determination on the issue and is directly appealable.

I

UNDISPUTED FACTS

Ms. Camarata has a son, born in March 2002. The parental rights of the boy's natural father were terminated in 2006.

Ms. Camarata and Mr. Abbate met in the summer of 2004 and were married on August 6, 2005. The boy was three and a half years old at the time. In addition to their marital relationship, Ms. Camarata wanted a father for her son, and Mr. Abbate agreed to

[1] Unless otherwise stated, all further statutory references are to the Family Code.

assume that parental role. Accordingly, an adoption petition was filed on December 22, 2005. The petition was eventually dismissed on December 15, 2009.

On June 15, 2007, Ms. Camarata took the boy to a hospital as a result of his physical symptoms and complaints that he had been molested. He entered therapy with Dr. Ann Bingham-Newman, and treatment continued at least through June 2, 2010.

Believing that Mr. Abbate had molested the child, Ms. Camarata immediately left the marriage. She filed a dissolution petition on September 27, 2007. In that petition, she listed Mr. Abbate as a de facto parent and asked the court to order the payment of child support. The marriage was ordered dissolved on May 6, 2010, effective June 25, 2010. The de facto parent motion was heard separately and denied on July 30, 2010.

Ms. Camarata also filed a civil action against Mr. Abbate for sexual battery as a result of his alleged molestation of the boy. After a trial, a jury found in favor of Mr. Abbate. The decision was affirmed by this court. (*C.C., a minor, etc., et al. v. Abbate* (Aug. 31, 2010, E048398) [nonpub. opn.].)[2]

The alleged molestation was reported to the sheriff's department by an emergency room physician. The sheriff's department investigated by having Ms. Camarata make two recorded pretextual telephone calls to Mr. Abbate. Apparently, no criminal charges were ever filed as a result of the investigation.

---

[2] Although the opinion was not published, we consider it under California Rules of Court, Rule 8.1115(b).

II

THE REQUEST FOR A RESTRAINING ORDER

On August 1, 2007, Ms. Camarata filed a request that the court grant a restraining order against Mr. Abbate. A temporary restraining order was issued on August 2, 2007. The order was confirmed at a hearing on August 20, 2007, and was subsequently reissued a number of times. As a result of the order, Mr. Abbate did not see the child after August 2, 2007.

On June 24, 2010, a motion for a new restraining order against Mr. Abbate was heard by Judge Hildreth. The court denied the motion, as well as a request for a restraining order against Mr. Abbate's father.

In this appeal, Ms. Camarata argues that the trial court violated her constitutional due process rights by not allowing her to call witnesses on the day of the hearing on the motion. She also details the evidence the witnesses would have submitted if they had been allowed to testify.

At the beginning of the hearing, Judge Hildreth asked Ms. Camarata a number of questions. He stated that he would treat the answers as offers of proof. He then read the declaration of Dr. Ann Bingham-Newman, focusing on the question of whether there was a risk of future harm if the restraining order was not issued. The court found no such references in the declaration. Upon inquiry, the court was also told that the original restraining order against Mr. Abbate's father was based on events other than issues relating to access or threats of harm to the child.

Based on Ms. Camarata's answers to the court's questions, the court found: (1) the child had no current relationship with Mr. Abbate, as required by section 6211; (2) there was no evidence of present danger to the child, as required by section 6250; and (3) Mr. Abbate had no current access to the child, as required by section 6251, subdivision (b). Accordingly, it denied the request for restraining orders against Mr. Abbate and his father.

Ms. Camarata complained that the court had not given her the opportunity to put on her case. The court responded, "Well, I gave you an opportunity to make an offer of proof. It's very important that you persuade the Court that you have the ammunition to support your allegations. You did not do that."[3]

On appeal, Ms. Camarata argues that the court misapplied the law because sections 6250 and 6251, subdivision (b) deal only with requests for an ex parte emergency order. She also states in detail the testimony the witnesses would have provided if allowed to testify. The most relevant portion of the proffered testimony is the psychologist's opinion that "[the child's] greatest fear remains, as it did three years ago, that Joe will return to hurt him again."

---

[3] Ms. Camarata had filed several declarations detailing the expected testimony of her witnesses. It is not clear whether the trial court actually read those extensive declarations and attachments or whether it simply relied on the answers to the questions it posed to Ms. Camarata. Nevertheless, it did not advise her at the beginning of the hearing that she had to make a full offer of proof to avoid a decision which would be made without hearing witness testimony.

The Domestic Violence Prevention Act is found in sections 6200 et. seq. Section 6211 defines the term "[d]omestic violence" as "abuse" (§ 6203) against defined persons. In this case, Ms. Camarata was clearly a protected person under section 6211, subdivisions (a), (c), and (f), and her child was a cohabitant or former cohabitant under section 6209 and thus was a person defined in section 6211, subdivision (b). Section 6211, subdivision (f) also applies to the child. Thus, although the request for an order was on behalf of the child, the definition of "domestic violence" in section 6211 applies to both the mother and the son in this case.

Section 6220 provides, "The purposes of this division are to prevent the recurrence of acts of violence and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence."

Contrary to the statement of the trial court, section 6211 does apply to former cohabitants and does not contain a requirement that there be a current relationship with the person to be restrained.

Ms. Camarata is also correct in stating that the other sections relied on by the trial court, sections 6250 and 6251 subdivision (b), apply to ex parte emergency protective orders and not to orders issued after hearing. (But see section 6203, which incorporates in its definition of "abuse" behavior that constitutes grounds for an emergency protective order under section 6320.)

Mr. Abbate replies by arguing that Ms. Camarata had an adequate opportunity to be heard. In effect, he argues that, if the trial court erred in its reasoning, the error was not prejudicial.

Mr. Abbate further argues that the decision in the civil action acts as collateral estoppel in this action. In other words, he contends that the judgment in the sexual battery civil case operates as a conclusive adjudication as to the issues actually litigated and determined in the prior proceeding. He finds that the lack of a finding of molestation in the civil action means that Ms. Camarata cannot contend that Mr. Abbate molested the boy as a reason for seeking a restraining order in this action.

We review a summary denial of a temporary restraining order under the Domestic Violence Prevention Act for abuse of discretion. (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 333.) Mr. Abbate's argument is a specific application of the settled precedent holding that the trial court does not err if it is right for the wrong reason. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

The undisputed facts of this case establish that, because of the temporary restraining order, Mr. Abbate had not seen the child in three years and had made no attempt to do so. No current abuse or current threat of domestic violence was shown. (§§ 6203, subd. (b), 6320.)

Past violence can be the basis for a restraining order. (§§ 6300, 6345, subd. (a).) However, under the circumstances here, past violence cannot be shown because the civil jury determined that Mr. Abbate did not commit sexual battery upon the boy. We agree

with Mr. Abbate that that decision, which was upheld by this court, collaterally estops Ms. Camarata from claiming that there was sexual battery in the past.[4] (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936-937.) Since there was no other basis for a claim based on past conduct toward the child, that avenue was also closed to Ms. Camarata.

Thus, we cannot find that the trial court's denial of the request for a restraining order was a prejudicial abuse of discretion.

III

THE REQUEST FOR A FINDING THAT MR. ABBATE

IS A FATHER BY ESTOPPEL

In her response to Mr. Abbate's petition to dissolve the marriage, Ms. Camarata requested that the court find that Mr. Abbate was a de facto parent. She also requested child support "by Petitioner as estoppel father."

Following dissolution of the marriage, Ms. Camarata filed a motion for a determination that Mr. Abbate was a parent by estoppel. The motion was heard commencing on July 30, 2010. After hearing testimony and receiving evidence, Commissioner Gassner denied the motion. A judgment was entered on September 29, 2010.

---

[4] At the time of the hearing on the request for restraining orders, only a tentative opinion had been issued in case No. E048398. Since there was no final decision by this court, the opinion itself was unusable for any purpose. However, that opinion is now final and can be given preclusive effect.

On appeal, Ms. Camarata argues that the trial court erred in failing to find that Mr. Abbate was a father by estoppel. She cites *In re Marriage of Johnson* (1979) 88 Cal.App.3d 848, *In re Marriage of Valle* (1975) 53 Cal.App.3d 837, and *Clevenger v. Clevenger* (1961) 189 Cal.App.2d 658. She also argues that the trial court's oral statement of decision was factually and legally defective.

Mr. Abbate argues that the trial court did not abuse its discretion in finding that he was not a parent by estoppel. Mr. Abbate also argues that Ms. Camarata waived her right to object to the statement of decision on appeal because she failed to make a proper objection at the hearing.

This court addressed a similar situation in *In re Marriage of Pedregon* (2003) 107 Cal.App.4th 1284. The husband there began living with his future wife when the child was 18 months old. They married in 1991 and separated in 2000. The husband treated the child as his son, and the child was not aware of the fact that the husband was not his natural father. (*Id*. at pp. 1286.) The trial court initially ordered the husband to pay child support but subsequently granted the husband's motion to stop paying child support on grounds that he was not the child's natural father. (*Id*. at pp. 1286-1287.)

We quoted *In re Marriage of Freeman* (1996) 45 Cal.App.4th 1437, 1447: " . . . 'Significantly, a husband's obligation to support his wife's children may arise quite apart from the presumption set forth in sections 7540 and 7541 and apart from whether he is the biological father of the children. A line of cases holds that the conduct of a husband with no biological ties to a child may nonetheless estop the husband from

avoiding parental responsibilities even after the husband's marriage to the child's mother is dissolved.'" (*In re Marriage of Pedregon, supra,* 107 Cal.App.4th at p. 1288, fn. omitted.) We then discussed the cases cited by Ms. Camarata: *Clevenger*, *Johnson*, and *Valle.*

The seminal case is *Clevenger v. Clevenger, supra,* 189 Cal.App.2d 658. It involved "the difficult and unique problem of defining the duty of support which a husband owes to his wife's illegitimate child when the husband, from the date of the birth of the child, accepts the child into his family, publicly acknowledges the child as his own and treats the child as if he were legitimate. We shall point out that while under some circumstances the husband would be estopped to assert the illegitimacy of the child and thereby avoid liability for its support, we cannot ascertain in this record a sufficient basis for such an estoppel. Likewise, although the husband's express agreement to provide for the child may be enforceable, the record does not substantiate that agreement here." (*Id.* at p. 662.)

Although Mr. Clevenger was not the biological father of the minor, he married the minor's mother and accepted the parental role. Accordingly, he acted as a father to the child. "If the facts should show, however, that the husband represented to the boy that he was his father, that the husband intended that his representation be accepted and acted upon by the child, that the child relied upon the representation and treated the husband as his father and gave his love and affection to him, that the child was ignorant of the true

facts, we would have the foundation of the elements of estoppel. [Citations.]" (*Clevenger v. Clevenger, supra,* 189 Cal.App.2d at p. 671.)

Relevant here is *Clevenger's* further conclusion: "We emphasize a second limitation on the husband's liability: the representation must be of such long continuance that it frustrates the realistic opportunity of discovering the natural father and truly establishes the paternal relationship of the putative father and the child. We do not discuss here a relationship of some passing days; this relationship continued over the span of a decade." (*Clevenger v. Clevenger, supra,* 189 Cal.App.2d at p. 675.)

Of course, there was ample evidence in our case that Mr. Abbate held himself out to be the child's father and that he acted as his father from the fall of 2004 until the parties separated on June 15, 2007, a period of two and a half years. Mr. Abbate also filed an adoption petition in 2005, and the natural father's parental rights were terminated in 2006. The adoption petition was eventually dismissed on December 15, 2009.

The trial court found that the child was eight years old at the time of the hearing and that Mr. Abbate had had a relationship with the boy for two and a half years. It apparently concluded that this was an insufficient length of time to firmly establish a parental relationship under *Clevenger.* It also noted a lack of evidence regarding the child's belief of parentage at the time of the hearing and Ms. Camarata's efforts to keep Mr. Abbate away from her son, including the obtaining of a restraining order and the filing of other actions against Mr. Abbate.

In *Pedregon*, we discussed *Johnson* as follows: "Relying on *Clevenger*, the court in *In re Marriage of Johnson* reversed the trial court's ruling denying child support, concluding the putative father was responsible for child support based upon parentage by estoppel even though the child was not the husband's biological child. The husband had treated the child as his own since the child's birth and held himself out as the child's natural father, although he claimed he never told anyone he was the child's natural father. [¶] The *Johnson* court concluded the six-year-long parent-child relationship was long enough to require child support liability based on parentage by estoppel. The *Johnson* court further concluded that, even though the putative father never told the child he was his father, it was implied through the putative father's conduct." (*In re Marriage of Pedregon, supra,* 107 Cal.App.4th at pp. 1289-1290, fns. omitted.)

Regarding *Valle*, we said: "Likewise, in *In re Marriage of Valle*, the court concluded a six-year-long father-son relationship, beginning when the child was five years old, was of sufficient duration to establish parentage by estoppel when the child was unaware the putative father was not his natural father." (*In re Marriage of Pedregon, supra,* 107 Cal.App.4th at p. 1290, fn. omitted.)

Thus, the ultimate test is not mechanically determined by the duration of the relationship alone; it is whether the relationship between Mr. Abbate and the boy continued for a long enough period of time to "truly establish[] the paternal relationship of the putative father and the child." (*Clevenger v. Clevenger, supra,* 189 Cal.App.2d at p. 675.) The cases discussed above are based on relationships more than five years long.

Ms. Camarata has not cited any case in which a relationship for a lesser period of time was found to be sufficient to firmly establish a parental relationship, nor have we been directed to any case in which a parental relationship of any duration was severed as a result of allegations of sexual molestation by the parent.

Accordingly, we cannot conclude that the trial court abused its discretion in refusing to find that Mr. Abbate was the child's father by estoppel.

IV

STATEMENT OF DECISION

As noted above, Ms. Camarata also argues that the trial court failed to provide a statement of decision which met the requirements of Code of Civil Procedure section 632.

Mr. Abbate argues that Ms. Camarata waived her right to object to the statement of decision on appeal because she failed to make a proper objection at trial.

The record shows that, at the beginning of the July 23, 2010, hearing, Ms. Camarata asked that the court provide a "written statement of decisions [*sic*]." The court responded by asking if it would be satisfactory if it stated its reasons on the record. Ms. Camarata responded affirmatively. At the end of the hearing, the court stated its reasons for decision on the record.

Code of Civil Procedure section 632 provides, in relevant part: "The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing

at trial." Ms. Camarata finds the court's statement to be inadequate. She cites *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1130: "The Legislature, by its enactment of section 632, and the Judicial Council, by its adoption of California Rules of Court, rule 232 . . . , have created a comprehensive method for informing the parties and ultimately the appellate courts of the factual and legal basis for the trial court's decision." (Fn. omitted.)

Ms. Camarata specifically requested the court to make findings on what she characterized as "certain prongs that have to be met in order for you to make the finding" of parenthood by estoppel. As noted above, the basis for such a finding is a determination that (1) the husband represented to the child that he was his father; (2) the husband intended that his representation be accepted and acted upon by the child; (3) the child relied upon the representation and treated the husband as his father and gave his love and affection to him; and (4) the child was ignorant of the true facts. (*Clevenger v. Clevenger, supra,* 189 Cal.App.2d at p. 671.)

As discussed above, the trial court, in its decision, found a lack of evidence as to the boy's current belief of parentage but apparently rested its decision on the relatively short time that Mr. Abbate acted in a parental capacity. It did not make the other requested findings.

Although Ms. Camarata contends that the trial court deprived her of her right to file an objection to the statement of decision, she cites Code of Civil Procedure section

634.[5] She did not bring the alleged omissions to the attention of the trial court after the trial court orally announced its findings.

We agree with Mr. Abbate that, "under section 634, the party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. The section declares that if omissions or ambiguities in the statement are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party. The clear implication of this provision, of course, is that if a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment. Furthermore, section 634 clearly refers to a party's need to point out deficiencies in the trial court's statement of decision as a condition of avoiding such implied findings, rather than merely to request such a statement initially as provided in section 632." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134, fn. omitted.) Otherwise, "it would be unfair to allow counsel to lull the trial court and opposing counsel into believing the statement of decision was acceptable, and thereafter to take advantage of an error on appeal although it could have been corrected at trial. [Citations.]" (*Id*. at p. 1138.)

---

[5] Code of Civil Procedure section 634 provides: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."

We therefore agree with Mr. Abbate that because Ms. Camarata failed to object at trial or at any other time before judgment, she waived her right to complain of such errors on appeal and allowed this court to make implied findings in favor of the prevailing party. (*In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1132.) However, the waiver is not significant here because we do not need to make any implied findings in Mr. Abbate's favor. There was ample evidence, largely undisputed, that Mr. Abbate did assume a parental role during the two and a half years he knew the boy. Thus, even though the evidence clearly supports a finding of a parental relationship, the trial court found that the relationship did not last long enough to support a finding of parenthood by estoppel. As discussed above, on this record we cannot find a prejudicial abuse of the trial court's discretion in its rejection of the request for such a finding.

V

DISPOSITION

The order and judgment appealed from are affirmed. In the interests of justice, the parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.