

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FIFTH APPELLATE DISTRICT

CHERI WILLIAMS,

Plaintiff and Appellant,

v.

STEPHEN WILLIAMS,

Defendant and Respondent.

F061623

(Super. Ct. No. 0618565)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Timothy A. Kams, Judge.

Tritt & Tritt and James F. Tritt for Plaintiff and Appellant.

Nuttall Coleman & Wilson and Roger D. Wilson for Defendant and Respondent.

-ooOoo-

Appellant Cheri Williams (Mother) filed an order to show cause seeking modification of the existing child custody and visitation order. The parties met in mediation and the family court mediator prepared a proposed order. However, following a contested hearing, the court left the existing order in place.

Mother challenges the trial court's refusal to adopt the proposed order. According to Mother, the trial court denied her a fair trial by: failing to enforce a local rule requiring

that any objections to the mediator's proposed order be filed in writing; failing to consider the mediator's report and notes in support of the proposed order; and making erroneous evidentiary rulings.

We conclude that the trial court did not err in refusing to adopt the proposed order. Accordingly, the judgment is affirmed.

BACKGROUND

Mother and respondent, Stephen Williams (Father), were divorced in 1999. The parties have two minor children, Ashley and Brandon.

Between 2003 and 2009, the parties had joint legal and physical custody of the children. In September 2009, Mother requested modification of the custody order. This request was based on Father having been arrested for driving under the influence of alcohol in July 2009. Ashley was in the vehicle at the time of the arrest.

The matter went to mediation. The mediator, Kimberly Day, recommended that Mother have sole legal and physical custody of the children and that Father have supervised visits. Father was also to undergo drug and alcohol testing if requested by Mother and receive mental health and substance abuse treatment. In September 2009, the court adopted Day's recommendations with slight modifications as the temporary order of the court pending a hearing.

On January 4, 2010, the parties filed a stipulation and order regarding child custody and visitation. The order provided that Mother would have primary custody and that the children would reside with Father on alternate weekends. Father was to abstain from the use of alcohol 24 hours prior to any physical contact with the children and was to voluntarily submit to a urinalysis test by 5:00 p.m. on the Monday following his visitation with the children. Father was to pay for these tests until March 31, 2010, after which any testing was to be arranged and paid for by Mother. Either the failure to test or a positive result would cause all of Father's unsupervised visits to be suspended. Father

was to continue to participate in counseling, but was no longer required to attend Alcoholics Anonymous meetings.

In April 2010, Mother filed an order to show cause requesting modification of the January 4, 2010, order. Mother alleged that Father was continuing to drink and had failed to test for alcohol as required by the order. Father filed a response asserting that he had not breached the January 4, 2010, stipulation and order.

The parties and their children were ordered to mediation with Joan St. Louis. Thereafter, St. Louis prepared a proposed order. St. Louis's recommendations included that Father: be limited to supervised visits with the children; complete an inpatient substance abuse program; immediately join a Twelve Steps Alcoholics Anonymous program; and participate in counseling.

At an August 10, 2010, hearing on Mother's order to show cause before Judge Allen-Hill, Father requested a contested hearing on St. Louis's proposed order. When asked if there was a specific paragraph in the proposed order that he disagreed with, Father responded that he disagreed with paragraphs 2.01 (sole legal custody to Mother), 3.01 (sole physical custody to Mother), 3.02 (supervised visits for Father), 4.01 (supervised holiday visits for Father), 5.05 (alcohol testing of father as directed by Mother), 7.01 (inpatient substance abuse program for Father), 7.02 (Father to participate in 12-step program) and 7.03 (mental health counseling for the children).

The court stated the matter would be assigned by master calendar and ordered the parties to appear on October 6 for assignment as a long cause hearing. The court further ordered the parties to serve their witness lists and "objections for trial" by September 24. Father was not represented by counsel at this time.

Father retained counsel and filed a substitution of attorney on October 5. When the parties appeared as ordered on October 6, Father's counsel requested a continuance. Mother's counsel objected stating that they were prepared for trial. Father's request was denied. Mother had timely filed a witness list and objections for trial but Father had not.

The matter was assigned for a long cause hearing and transferred to Judge Kams on October 7. Father's counsel sought to submit in limine motions and a trial brief to which Mother objected based on Father's failure to comply with Judge Allen-Hill's order to exchange witness lists and written objections for trial. Mother argued that Father was not entitled to a trial on the issues raised in Father's responsive declaration because he had failed to file written objections to the proposed order as required by Judge Allen-Hill and Superior Court of Fresno County Local Rules, rule¹ 5.5.7. Rather, Mother asserted, the proposed order should be adopted. Mother further argued that Father should be precluded from presenting any witnesses.

The court ruled that, because Father had not filed a witness list, Father could only call himself and Mother as witnesses during his case-in-chief. However, the court refused to deny Father a trial on the issues despite his failure to file written objections for trial. The court reasoned that Mother was made aware of Father's objections to the mediator's proposed order through Father's responsive declaration and his oral objections to specific paragraphs at the earlier August 2010 hearing.

Pursuant to the court's order, Father presented his case through his and Mother's testimony. Father described the January 4, 2010, stipulation and order and detailed his compliance with all of its terms. He disputed Mother's allegations that he had failed or refused to test. Father acknowledged that he had been late testing on one Monday following the visitation with the children. He explained that his normal testing facility was closed that afternoon and that by the time he got to an alternate site he was 15 minutes late.

To present her case, Mother called herself, Father, Father's ex-wife Wendy Williams, Wendy's boyfriend Joshua Hatton, and the children's counselor Donna Van Pelt. Mother did not call the mediators to testify. When the mediators were contacted by

¹ All further rule references are to Superior Court of Fresno County, Local Rules.

the court clerk, it was discovered that they were not under subpoena and that St. Louis was not available.

Mother testified that she entered the January 4, 2010, stipulation based on Father's assurances that he was no longer drinking. When Mother found out that this was not true, she felt that she had entered the agreement based on false pretenses. Mother testified that she does not believe that the post visitation testing is sufficient to keep the children safe.

Mother called Joshua Hatton to testify regarding his surveillance of Father. One afternoon Hatton followed Father. He saw Father leave a liquor store carrying a 12-pack of beer, drive to his home, and then drive to an apartment complex. Hatton later saw Father and an unidentified woman standing on a balcony holding bottles of beer. However, Hatton acknowledged that the day he followed Father was not one of the days that Father had visitation with the children.

Wendy Williams, Father's most recent spouse, testified that she believed Father had a drinking problem and that he was very depressed after his July 2009 arrest. Wendy left Father in August 2009 and filed for divorce.

Van Pelt, a marriage and family therapist, had been treating the children for approximately four months. She expressed the opinion that Father should only have supervised visitation.

At the conclusion of the testimony, Mother's counsel renewed her objection to the trial and moved for a nonsuit based on Father's failure to file the objections for trial as required by rule 5.5.7. The court noted that Mother was asking the court to essentially disregard the trial, which the court refused to do. The court also observed that the local rules allow the court latitude. Accordingly, the court denied Mother's motion.

The court next considered whether it should consider the mediator's report and recommendation in making its ruling. The court decided to consider the report but give it little weight because the mediator had not been present for cross-examination.

Following closing arguments, the court pronounced its ruling. The court concluded that the current order was a good one and left it in place with minor modifications. The court noted that the January 2010 order addressed Father's drinking around the children and that there was no evidence demonstrating that Father had not complied with that order.

DISCUSSION

I. THE TRIAL COURT WAS NOT REQUIRED TO ADOPT THE PROPOSED ORDER UNDER RULE 5.5.7.

As noted above, when setting the contested hearing on the proposed order, Judge Allen-Hill ordered the parties to file witness lists and "objections for trial." Mother contends that Father's failure to file written "objections for trial" violated rule 5.5.7 and thus the court was required to adopt the proposed order. According to Mother, the absence of written notice of Father's objections to specific paragraphs in the proposed order denied her due process and resulted in "trial by ambush."

Rule 5.5.7 covers the situation where a party objects to a Family Court Services proposed order for child custody and visitation. For post-court mediation proposed orders, the objecting party must file a written objection no later than 20 days after the date the proposed order is mailed. If the 20-day period expires without objection, "the proposed order *may* be signed and filed as an order of the court." (Rule 5.5.7 B, italics added.) The objections must propose alternate language to each paragraph objected to and give reasons for the suggested change. Further, "[a]bsent extraordinary circumstances, only those specific sections of the proposed order to which an objection is made may be considered by the court." (Rule 5.5.7 B.4.b.)

Rule 5.1.1 sets forth various actions the court may take when a party fails to comply with the Fresno County family law rules. These actions include making an order based solely on the pleadings before the court, making or vacating orders as appropriate under the circumstances, continuing the matter, awarding attorney fees, and removing the

matter from calendar. Nevertheless, the family law rules “shall not prevent the exercise of judicial discretion whenever appropriate.” (Rule 5.1.1 F.)

Contrary to Mother’s position, rule 5.5.7 does not require the court to adopt the proposed order if written objections are not filed. Rather, the court *may* adopt the order. Thus, whether to adopt the order lies in the court’s discretion. Further, under rule 5.1.1, the court has discretion regarding the action it takes in response to a party’s failure to comply with the rules. Therefore, the issue is whether the court abused its discretion when it proceeded with the contested hearing. (Cf. *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 498.)

Judicial discretion implies the absence of arbitrary determination, capricious disposition or whimsical thinking. (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246.) Accordingly, a court will not be found to have abused its discretion unless it exceeded the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Here, although Father did not file written objections to the proposed order in the form required by rule 5.5.7, he orally specified the paragraphs that he objected to in the proposed order, by number, approximately two months before the contested hearing. Thus, the court and the parties were made aware of the issues to be resolved at the hearing. Under these circumstances, the court did not exceed the bounds of reason by proceeding with the hearing. Trial courts are authorized to impose sanctions for violation of local rules. Nevertheless, courts should ordinarily avoid crippling a litigant’s ability to present his or her case based on a local rule violation. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1364.) Such rigid rule following is not consistent with the strong policy favoring the disposition of cases on their merits and a court’s function to see that justice is done. (*Ibid.*)

Mother further contends that she was denied due process because she did not receive “precise” notice of the issues to be tried that she would have received had Father filed written objections. According to Mother, she was entitled to know in advance of

trial what specific paragraphs were to be targeted by Father and the basis for each challenge.

Due process requires notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314.) The purpose of such notice is to inform the affected individual of, and permit adequate preparation for, an impending hearing. (*K.G. v. Meredith* (2012) 204 Cal.App.4th 164, 181.) Thus, the notice must be of such nature as to reasonably convey the required information and afford a reasonable time for those interested to make their appearance. (*Mullane, supra*, at p. 314.) If these conditions are reasonably met, the constitutional requirements are satisfied. (*Id.* at pp. 314-315.)

Here, Mother was apprised of the specific paragraphs that Father objected to in the proposed order. Moreover, in his declaration in response to Mother's order to show cause, Father answered Mother's accusations and requested 50 percent custody of the children. Under these circumstances, Mother had reasonable notice of the issues to be tried. This was not a "trial by ambush." Accordingly, Mother was not denied due process.

II. THE TRIAL COURT DID NOT ERR WHEN IT FAILED TO CONSIDER THE MEDIATOR'S NOTES.

In making its ruling, the trial court considered the report and recommendation prepared by the mediator, St. Louis. In a child custody case, such a report "is 'evidence to be weighed with all other evidence'" (*In re Marriage of Slayton & Biggums-Slayton* (2001) 86 Cal.App.4th 653, 659.) Mother argues that the trial court should have also considered St. Louis's supporting notes and its failure to do so was error. According to Mother, it was necessary for the court to consider St. Louis's reasons and the factual basis for her recommendation in order for that recommendation to be given sufficient weight.

However, Mother did not call St. Louis to testify at the hearing. Therefore, Father was denied the opportunity to cross-examine St. Louis, an adverse witness, to explore any possible deficiencies in St. Louis's understanding of the facts or her conclusions. (Cf. *In re Marriage of Slayton & Biggums-Slayton*, *supra*, 86 Cal.App.4th at p. 659.)

Accordingly, the court properly excluded St. Louis's notes. Admission of those notes would have denied Father due process. (*Wheeler v. Wheeler* (1973) 34 Cal.App.3d 239, 242.)

III. EVIDENTIARY RULINGS DID NOT DENY MOTHER A FAIR TRIAL.

Mother argues that certain of the trial court's evidentiary rulings contributed to a distorted fact pattern and an unfair trial. Mother contends the trial court made the following erroneous rulings:

1. When Father was asked whether the children told him they did not feel comfortable discussing their concerns with a previous counselor, Ms. Capalare, an objection was sustained for hearsay.

2. When Father was asked if he was present when Mother told her attorney she had concerns about signing the 2010 stipulation and order, an objection was sustained for hearsay.

3. When Mother was asked whether she had received reports of Father drinking, from anyone, an objection was sustained for hearsay.

4. An objection was sustained on the ground that the answer--that Mother wanted Father to test before taking Brandon to an event because Father admitted he had been drinking and driving with Brandon in the car in the past--was beyond the scope of the question of why she called him and requested that he test.

5. When the children's therapist, Van Pelt, was asked whether the children had expressed dissatisfaction with their prior therapist, Capalare, an objection on the ground of relevance was sustained.

6. When Van Pelt was asked about alcoholism, objections were sustained on the ground of the subject being beyond her expertise.

7. Objections on the grounds of relevance were sustained when Mother was asked whether Father had served alcohol at Ashley's 13th birthday in 2008 and when Wendy Williams was asked if Stephen had admitted to her in the fall of 2009 that he could not stop drinking.

Other than reciting these alleged evidentiary errors, Mother's arguments are cursory. With the exception of one reference to Evidence Code section 210 (relevance), Mother cites no authority. Generally, an appellate court does not consider contentions that are unsupported by authority. (*People v. Crittenden* (1994) 9 Cal.4th 83, 153.)

Moreover, the objected to hearsay was in fact hearsay. Contrary to Mother's position, the hearsay was not relevant to the various actors' states of mind or for impeachment. Regarding relevance, the court was only interested in whether Father had complied with the January 2010 stipulation and order. Accordingly, testimony pertaining to events that pre-dated that 2010 stipulation and order was properly excluded as irrelevant.

In sum, Mother has not met her burden of demonstrating prejudicial evidentiary error.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent.

Franson, J.

WE CONCUR:

Gomes, Acting P.J.

Detjen, J.