Filed 11/28/18 Marriage of Zacky CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of NANCY and SCOTT ZACKY.	2d Civil No. B284750 (Super. Ct. No. 1439526) (Santa Barbara County)
NANCY ZACKY, Petitioner and Respondent, v. SCOTT ZACKY, Appellant.	

Scott Zacky appeals a family law order denying his motion to withdraw his stipulation that Elizabeth E. Vogt (Vogt) serve as a postjudgment special master/referee on child custody matters. (Cal. Rules of Court, rule 3.906.)[1] The trial court found

[1]Further unspecified rule references are to the California Rules of Court. In California, the terms "referee" and "special

that appellant was estopped from challenging how Vogt decided three custody disputes and there was no basis for Vogt's disqualification. We affirm.

Facts and Procedural History

On August 18, 2015 appellant and respondent Nancy Zacky (Nancy) filed a stipulated judgment of marital dissolution providing for joint legal and physical custody of their three daughters. Disputes soon arose about how to raise the children. On September 22, 2015, the parties stipulated that Vogt would serve as referee on all issues concerning legal or physical custody of the children. (Code Civ. Proc., § 638, subd. (a).) The written stipulation provided that Vogt's decisions would be final and not appealable.[2]

On three custody matters, the parties submitted unfiled pleadings and documents to Vogt. Vogt took evidence and issued statement of decisions that were entered as orders on April 22, 2016, May 27, 2016, and August 19, 2016. (Code Civ. Proc., §§ 638, subd. (a); 643, subd. (a); 644, subd. (a).) The orders are briefly summarized as follows:

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master" are used interchangeably. (*Marriage of Olson* (1993) 14 Cal.App.4th 1, 6, fn. 4.)

[2] Appellant and Nancy stipulated that Vogt shall have "authority and jurisdiction to hear and determine [custody] issues, just as a court of competent jurisdiction would have, including but not limited to an order modifying any provision in the Judgment relating to the custody of said children." It was further stipulated that Vogt "has no authority to hear or determine modification of . . . child support . . . or to award attorney's fees."

The April 22, 2016 order changed the 2016 summer parenting schedule to one week on and one week off so the children could attend camp. The order provided that Nancy could determine whether the children should attend summer camp even if camp fell on appellant's custody day.

In a May 27, 2016 order, Vogt found that appellant's phone calls and voice messages "demonstrate[d] significantly poor parenting judgment." Appellant was ordered not to appear naked in front of the girls, discuss his genitals with them, or sleep with them. The order authorized Nancy to take the girls to a psychotherapist of her own choosing.

The third order entered on August 19, 2016, granted Nancy's request for a school student accommodation plan for the treatment of the youngest daughter's diabetes. Before the order was entered, appellant refused to consent to the pediatrician's recommended plan or let Nancy take the child to the doctor on appellant's custody days. Vogt found there was a change of circumstances affecting the parties' right to make joint decisions about the children's health and education. Appellant was directed to raise with the superior court any question about Vogt's jurisdiction to make such an order. Appellant, however, decided not to file an objection or motion with the superior court and said he would go forward with the issues that had been presented to Vogt. Nancy later submitted Vogt's decision to the superior court by way of an ex parte application so the child could get the medical treatment plan approved with the Montecito Union School.[3]

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[3] Appellant claimed that the order permitting Nancy to take the daughter to a scheduled doctor's appointment was an improper ex parte order and violated Family Code section 3064.

Appellant's RFO to Withdraw

After the third order was entered, Nancy served a Request for Order for sole legal custody (Custody RFO) pursuant to Family Code section 3006 which provides that "'[s]ole legal custody' means that one parent shall have the right and the responsibility to make the decision relating to the health, education, and welfare of a child." The Custody RFO was served on February 13, 2017 but not filed with the superior court. Appellant served lengthy opposition papers and, three months later, filed a Request for Order to Withdraw (RFO to Withdraw) the stipulation for Vogt's appointment. The RFO to Withdraw requested that the trial court vacate Vogt's prior orders on the ground that Nancy submitted pleadings and documents to Vogt without first filing the documents with the superior court pursuant to rule 2.400. The RFO to Withdraw alleged that Vogt was biased and failed "to follow court rules, statutes, law and procedure" which resulted in "disorderly proceedings and a lack of any consistent procedure." Appellant requested, in the alternative, that the trial court order Nancy to file future RFOs with the superior court before submitting the RFO to Vogt.

Denying the RFO to Withdraw, the trial court found that appellant, like Nancy, submitted unfiled documents to Vogt without complying with rule 2.400. The trial court concluded that appellant was estopped from withdrawing his stipulation for Vogt's appointment or challenging the prior orders, and that appellant was not harmed by the rule 2.400 violation. The court further found there was no evidence that Vogt was biased or should be disqualified.

Appellant, however, stipulated that Nancy could take the child to the doctor.

Abuse of Discretion

On review, the trial court's order is presumed correct and appellant has the burden of showing an abuse of discretion. (See, e.g., *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 790.) The test for abuse of discretion is whether the trial court "exceeded the bounds of reason" considering all of the circumstances. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) A motion to withdraw a stipulation for the appointment of a referee requires a showing of good cause (rule 3.906(a)) and requires that the trial court weigh the evidence to determine whether good cause has been shown. Such a stipulation may not be revoked by a party's change of mind after the referee has made an adverse ruling. This is so because a referee's erroneous ruling on a factual or legal issue does not constitute good cause to withdraw the stipulation. (Rule 3.906(a)(1).)

Estoppel

Appellant contends that the trial court erred in finding that he was estopped from withdrawing his stipulation or challenging the custody orders. Rule 2.400(b)(1) provides that when a matter is to be heard by a referee, all original documents are to be filed with the superior court clerk to ensure that the clerk "'has the complete case file and can make all nonconfidential portions of the file available to the public . . . .' [Citation.]" (*Conservatorship of Townsend* (2014) 231 Cal.App.4th 691, 705.) Although Nancy did submit unfiled documents to Vogt, appellant was timely served with copies and provided notice and the opportunity to be heard on each matter. Appellant was represented by counsel, did not object to the procedure, and like Nancy, submitted unfiled documents to Vogt which was tantamount to an equitable forfeiture of rule 2.400

procedures. (See, e.g., *Lynch v. California Coastal Com.* (2017) 3 Cal.5th 470, 476.)

Equitable estoppel is founded on concepts of equity and fair dealing (*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279) and may arise even though there was no fraud on the part of the person to be estopped. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384.) "'The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citation.]' [Citations.]" (*City of Goleta v. Superior Court*, *supra*, at p. 279.)

Whether an estoppel exists and whether appellant, by his representations or conduct, lulled Nancy into a false sense of security is a question of fact. (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925-926.) Because estoppel is a factual question, we review the trial court's ruling in the light most favorable to the judgment and determine whether it is supported by substantial evidence. (*In re Marriage of Kelkar* (2014) 229 Cal.App.4th 833, 847.) Under that standard, we accept as true all evidence tending to establish the correctness of the trial court's findings and resolve every conflict in favor of the judgment. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

Appellant did not object to Nancy's practice of submitting unfiled documents to Vogt and followed the same procedure. On some matters, appellant requested affirmative relief. The trial court found that appellant did not object to the RFOs and that "[n]either party filed their moving or opposing

papers with the Court" before Vogt ruled on the custody matters. The trial court reasonably concluded that appellant "is estopped to now object on the basis of the papers not being filed with the Court. There is no evidence that [appellant], at all times represented by competent counsel, was deprived of any opportunity for a fair hearing with respect to any matter." The record clearly supports the finding that appellant is estopped from tactically invoking rule 2.400 to nullify the prior orders or withdraw his stipulation for Vogt to serve as a referee. Rule 2.400 is designed to ensure open access to court records so that nonconfidential portions of the file are available to the public. (*Conservatorship of Townsend*, *supra*, 231 Cal.App.4th at p. 705.) The rule does not protect appellant nor was appellant prejudiced by Nancy's failure to follow rule 2.400.

Unilateral Right to Withdraw Stipulation

Appellant argues that he has the unilateral right to withdraw his stipulation. Rule 3.906(a) provides that a motion to withdraw a stipulation for the appointment of a referee must be supported by a declaration establishing good cause. Appellant cites no authority, and we have found none, that rule 3.906 gives appellant the right to unilaterally withdraw his stipulation and terminate Vogt. Where, as here, the parties stipulate to the use of a consensual general reference, the decision of the referee stands as the decision of the trial court. (Code Civ. Proc., § 644, subd. (a); *Lindsey v. Conteh* (2017) 9 Cal.App.5th 1296, 1304.) Appellant stipulated that Vogt "shall have the exclusive jurisdiction to hear, determine and make orders resolving conflicts between the parties concerning any or all of the issues that either party presents to the Special Master relating to legal custody or physical custody of the parties' minor children . . . .

The parties agree that the Special Master and not any other person, judge, or court, shall hear or determine such issues. The Special Master shall have the same authority and jurisdiction to hear and determine [custody] issues, just as a court of competent jurisdiction would have, including but not limited to an order modifying any provision in the Judgment relat[ing] to the custody of said children." (Italics added.)

Appellant is precluded from "testing the waters" with Vogt, and when confronted with an unfavorable decision, retroactively withdrawing his stipulation based on the theory that Vogt's rulings are null and void because documents were not first filed with the superior court. Appellant's reliance upon *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, a move-away case, is misplaced. There, husband was awarded shared physical and legal custody of the minor children. In a postjudgment order, the trial court changed custody to give wife sole physical and legal custody and permitted wife to move the children to Virginia. (*Id.* at p. 1119.) The Court of Appeal reversed because husband was denied the "opportunity to be meaningfully heard" before the move-away request was granted. (*Ibid.*) *Seagondollar* did not involve a consensual general reference or a rule 2.400 matter in which a referee considered unfiled pleadings and documents before modifying custody.

Appellant argues that Nancy failed to file the Custody RFO with the superior court and that it barred Vogt from ruling on the matter. (Rules 2.400(b), 5.92(b)(5), 5.96(a); Fam. Code, § 3064, subd. (a).) The issue is moot because Nancy withdrew the Custody RFO after appellant failed to appear at a scheduled hearing and filed his own RFO to Withdraw the

stipulation to use Vogt as a referee.[4] Nancy, *at appellant's repeated insistence*, refiled the Custody RFO with the superior court on June 28, 2017.

Waiver and estoppel principles apply to the rules governing use of a referee in child custody matters. (See *In re Richard S.* (1991) 54 Cal.3d 857, 864.) In *In re Richard S.*, the parties stipulated that a referee could sit as a temporary judge. After father was awarded custody, mother claimed the referee lacked jurisdiction to enter a final order because the stipulation was not in writing or signed and filed with the court as required by rule 244. (*Id.* at p. 862.) Our Supreme Court held that "rule 244 is directory rather than mandatory . . . and . . . no purpose would be served by interpreting it as intended to void any action taken when the requirements of the rule were not precisely fulfilled." (*Id.* at p. 865.) The same analysis applies here. "He who consents to an act is not wronged by it." (Civ. Code, § 3515.) Because rule 2.400 is directory and serves an administrative purpose, Nancy's failure to comply with the rule does not invalidate the prior custody orders. (*In re Richard S.*, *supra*, at pp. 865-866; see, e.g., *People v. Gray* (2014) 58 Cal.4th 901, 909

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[4]Appellant was served with the Custody RFO on February 13, 2017, submitted opposition, objections and a witness list, requested affirmative relief, and agreed to continue the hearing from March 23, 2017, to May 3, 2017, to June 8, 2017, and then July 27, 2017. Although appellant did not show for the May 3, 2017 hearing, his attorney did appear and argued that Vogt had no jurisdiction to decide the Custody RFO because Nancy failed to file the moving papers with the superior court. Appellant, in essence, waited three months to raise the rule 2.400 issue. After Vogt overruled the objection, appellant filed the RFO to Withdraw his stipulation based on the same rule 2.400 argument.

[failure of city to post 30-day warning notice did not preclude prosecution of defendant for violating red light traffic law].)

We reject the argument that rule 2.400 is jurisdictional or renders a custody order null and void simply because pleadings and documents were not filed with the superior court before the referee ruled on the custody matter. "[T]here may be circumstances [where] the failure to [first] file documents with the superior court . . . as required under rule 2.400(b) may be waived . . . ." (*Conservatorship of Townsend*, *supra*, 231 Cal.App.4th at p. 705.) This is such a case but waiver and estoppel may not apply in every case. In *Townsend*, the Court of Appeal concluded that the deadline to file a motion for new trial and notice of appeal was jurisdictional and could not be extended on waiver principles. (*Id.* at p. 706.) Unlike *Townsend*, this is not a case where a rule of court was waived to extend the jurisdictional time for an appeal.

Future RFOs and Compliance

Appellant argues that he has been denied due process because there is no assurance that Nancy will not, at some future hearing, ask Vogt to consider pleadings and documents that were not filed with superior court. The trial court directed Nancy and her attorney "to comply with all rules and procedures as if the matter were proceeding formally without appointment of a referee." Nancy has done so. Nancy withdrew the Custody RFO and filed and served a new Custody RFO pursuant to rule 2.400. Appellant requested that the trial court "take control of the proceedings" and clarify the "rules of engagement." That has been done. This court will not consider speculative claims that Nancy may, at some time in the future, fail to comply with the trial court's order. As a reviewing court, we do not issue advisory

opinions based on hypothetical facts or speculative future events. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 998; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.)

Bias

Appellant claims that Vogt is biased and failed to disclose potential conflicts as a referee. (See Cal. Code of Judicial Ethics, Canon 6.D.(5)(a).) At a May 3, 2017 hearing, Nancy's trial attorney greeted Vogt with a hug and a kiss and referred to her as "Libbie." Vogt said that she and Nancy's attorney were "'friendly'" but "'we are not friends'" and were opposing counsel in prior cases. Vogt had also served as special master on a couple of cases involving Nancy's attorney. We reject the contention that a warm greeting by attorneys who have practiced in the same locale demonstrates bias or partiality. The record reflects that Vogt prefers to be called "Libbie" and that appellant's prior attorney, Nicholas Salick, addressed Vogt as "Libbie" at a prior hearing.[*] When appellant retained new counsel and raised the issue of bias and conflict of interest, Vogt advised the parties that she has no particular relationship with Nancy's trial attorney other than bar meetings and a few cases in which they were opposing counsel. Vogt did not socialize with counsel, did not own property with counsel or receive financial remuneration from counsel, and first met the parties after her appointment as a referee.

The trial court correctly found that a referee or judge is not disqualified simply because the referee or judge, while

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[*] There may be instances where a hug and a kiss to say hello are appropriate. But is should not occur between an attorney and a referee who is presiding over the hearing.

acting as an attorney, opposed a party's lawyer in a prior case. (Rothman, Cal. Judicial Conduct Handbook (4th ed. 2017) § 7.38, pp. 451-452.) Appellant complains that Vogt said it would be "'difficult to unring the bell'" but has taken the statement out of context. During a March 17, 2017 phone conference, Vogt said that she had not read either side's papers and that it would be difficult to "'unring the bell,'" meaning that she had been involved in the case for a long time. Vogt assured counsel that she would not consider the past conduct of the parties giving rise to the earlier orders unless asked to do so and that she would limit herself to the evidence presented. No reasonable person could construe the "unring the bell" comment to mean that Vogt was biased or predisposed to rule in Nancy's favor.

Appellant argues that Vogt did not follow the law but a referee's erroneous ruling on a factual or legal issue is not good cause for withdrawing a stipulation. (Rule 3.906(a)(1).) The RFO to Withdraw is, in substance, a motion to disqualify Vogt and any order denying such a disqualification request must be reviewed by writ of mandate. (Code Civ. Proc., § 170.3, subd. (d); *People v. Panah* (2005) 35 Cal.4th 395, 444; *Sears*, *Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1348-1349 [the term "judge" as used in Code Civ. Proc., § 170.3 includes commissioners and referees].) Appellant did not file such a writ petition.[5]

[5]Appellant did file a petition for writ of supersedeas to stay the proceedings which we denied on September 20, 2017. (B284750.)

Disposition

The judgment (order denying Request for Order to withdraw stipulation and vacate referee's orders) is affirmed. Nancy is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Pauline Maxwell, Judge

Superior Court County of Santa Barbara

Howe Engelbert and Sarah M. Engelbert, Michelle R. Fay for Appellant.

Hollister & Brace and Paul A. Roberts, Marcus S. Bird, Kevin R. Nimmons for Petitioner and Respondent.