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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ELIZABETH C. WEINERT, Plaintiff and Respondent, v. DENNIS V. MCGUIRE, Defendant and Appellant.	A127821, A128909 (San Francisco County Super. Ct. No. FLD-08-395667)

Before us are two appeals that we have, at appellant's request, consolidated for purposes of oral argument and decision. The first, case No. A127821, is from superior court findings and an order dated January 22, 2010, modifying appellant father's visitation of Jack, the parties' child. The second appeal, case No. A128909, is from a June 11, 2010 order granting mother sole legal custody of Jack. In both cases, the parties appeared at trial and in this court in propria persona.

We shall affirm the judgments and orders in both cases.

THE FIRST APPEAL

In his first appeal, case No. A127821, father makes two claims: (1) that the trial court abused its discretion by failing "to determine if the proof of service [filed by respondent mother with her petition to modify visitation] was legitimate or perjury" and denying appellant "the opportunity to obtain documentation, witnesses, and counsel" in connection with the hearing on the issue of visitation; and (2) that no evidence showed a need for the supervised visits ordered by the court. The order is appealable. (Code Civ. Proc., § 904.1, subd. (a)(2).)

Facts and Proceedings Below

The sparse record appellant has submitted and the uncommonly short briefs the parties have filed,[1] which cite no legal authority, shed little light on the history of this dependency case. This appeal arises from a ruling on mother's petition to modify visitation. The register of actions included in the clerk's transcript indicates mother was awarded physical custody of the parties' son in 2008, and the issue was subsequently reviewed at several hearings in 2009. Mother filed several claims of domestic violence against father in 2009 and 2010, but the record does not indicate the rulings, if any, on such claims. Father repeatedly filed peremptory challenges (Code Civ. Proc., § 170.6) against judges assigned those and other claims made by mother. In a memorandum filed on August 16, 2010 in support of his motion to consolidate the appeals, father states that the matter commenced as a juvenile dependency case in which he "failed at the 3 chances given by the court for reunification with the child." In a declaration also filed in support of the motion, father states that the "gist" of his first appeal is that "he was never served, respondent [mother] committed perjury, the court was made aware of this, and help[ed] [mother] to facilitate this act."

Mother's petition to modify visitation was originally scheduled to be heard by Commissioner Marjorie A. Slabach on January 6, 2010 in Department 404. Commissioner Slabach declined to address the issue, however, apparently because father belatedly responded to the petition by filing his own motion for an order to show cause regarding visitation and wanted time to marshal evidence in support of his motion. It is unclear from the record, but Commissioner Slabach evidently continued the hearing on visitation to January 21 to provide father additional time in which to do this.

At the commencement of the January 21, 2010 hearing on the petition to modify visitation, which was before Superior Court Judge Ellen Chaitin, mother explained that "since the original court order [awarding the parties shared legal custody, mother physical custody, and father visitation] was put in place, there's been continuous no

[1] Appellant's opening brief consists of four pages of argument, respondent's brief consists of three pages, and appellant's reply brief consists of two pages of argument.

shows, failure to appears, cancellations, last minute cancellations." Mother claimed father had not visited Jack for nearly five months. Father said that at some point in 2009 mother "said there would be no more visiting" so he filed a motion to modify visitation but admitted that he failed to appear for the hearing and also failed to attend a related mediation also scheduled by the court.

As the court stated, mother's papers alleged that "there have been visits set up, and that you haven't taken advantage of them. It's a negative impact on the child. He gets disappointed." At the commencement of the hearing, the court inquired why father had not responded to the mother's petition, and did not appear prepared to present any witnesses or other evidence. Father's answer was, "I was never served."

The only facts pertinent to the issue of service in the record are the following. On December 23, mother filed with the court a form dated December 22 in which Sheriff's Lieutenant John Garcia certified that he attempted to personally serve father with notice of a hearing at 8:30 a.m. on January 6, 2010, in Department 404, regarding various domestic violence claims by mother and her request for a temporary restraining order. Lt. Garcia states on the form that his attempt to serve father "was unsuccessful because defendant was not found." Lt. Garcia attached to the form a "Declaration of Diligence" in which he explained that 242 Turk Street, the address father used on his pleadings, was a "residential treatment facility" managed by persons who would not disclose whether father resided there. Garcia stated that he left notice at the facility for father to contact the Sheriff's Office.

Also on December 23, father filed with the court a proof of personal service executed on December 20 by a process server, Michele DiFrisco, who stated that on that day he served mother with copies of father's request for an order to show cause relating to visitation. A week later, father filed a declaration stating that he was informed by the court clerk of the January hearing[2] to be held in Department 404, and that "[i]n order to

[2] Father indicated that the hearing was to be held on January 4, 2010, not January 6, as was the case, but as we shall explain, father appeared at the January 6 hearing.

effectively prepare a defense, I will need to subpoena witnesses and documentation, and respondent is respectfully requesting three (3) subpoena's [*sic*] endorsed by your office."

The foregoing documents show father was made aware of and appeared at the January 6, 2010 hearing noticed by mother in connection with her claims of domestic violence and request for a restraining order. Since father failed to include the reporter's transcript of the January 6th hearing, we cannot be sure what happened there; although Judge Chaitin's comments at the January 21st hearing indicate father never filed any pleading seeking modification of his right to visit Jack or any response to mother's petition to modify visitation. It appears, however, that at the January 6th hearing father reiterated his past expressions of an intent to request modification of visitation and the presiding officer, Commissioner Slabach, continued the matter to January 21, 2010 to provide him additional time to do so.

Despite his repeated statements of an intention to obtain greater visitation, father again failed to file such a motion or even formally contest mother's motion. The matter before the court on January 21st was only mother's request for modification of custody and visitation. At the commencement of the hearing, father told Judge Chaitin he was unable to address mother's application for a change in his visitation because mother never served him with notice of the hearing on her request to modify custody and visitation. Judge Chaitin, evidently aware that the visitation issue was raised by father at the January 6th hearing, reminded father of that fact and pointed out that the January 21st hearing was not requested by mother but set by Commissioner Slabach to provide father additional time to file his own motion to modify visitation.

Treating father's indication that he lacked time to marshal evidence in opposition to the modification of visitation requested by mother as a request for a further continuance, Judge Chaitin stated: "I am not going to give you a continuance at this point. I find there's been insufficient effort on your part to get subpoenas or to call witnesses. You've had enough time. [¶] I also read you wanted an opportunity to get counsel. There's been enough time to get counsel; so I'm prepared to proceed today; so

if that's a request for a continuance, it's denied. [¶] So tell me what you dispute in these papers that mother has filed that support her request to modify visitation?"

Father responded as follows: "Your honor, a lot of what she had submitted to the court wasn't worthy of a response. I was going to get in touch with child protective services because it was my position that either she's putting false information before the court or she's delusional. [¶] There was also an allegation in her papers that I made threats over the Internet. I was going to ask this court to contact the district attorney's office to have this allegation investigated." Asked by the court, "[i]s that all you have to say," father responded, "yes."

When mother was asked by the court whether she had anything further to say, she responded only that she was "taken aback" and "speechless" at father's charges against her and his request for a criminal investigation. The court asked mother whether she had discussed with the paternal grandmother whether she was willing to supervise her son's visitation with Jack at her house, mother said she had not and that "[i]t was just a suggestion that that would be a safe place to conduct these visits." The court then asked, "[o]kay. Is the matter submitted at this point?" After mother acceded, father stated: "before I submit, I'm objecting because I never received a proof of service, and I believe I should be given a fair chance before this court. And I guess—I'll stand submitted right now."

The court then ruled as follows from the bench: "I do not want to order supervised visitation with a relative or anyone else who hasn't agreed to it, although the paternal grandmother might be an appropriate person to supervise, because I would assume, that you know there's no real bias here. And the child would be in a home environment in case there was a delay or Dad didn't show. But without her agreement, the court really can't do that. [¶] So what I'm going to do is order supervised visits [¶] . . . by an outside agency." The court ordered that father have "two-hour visits, bi-weekly,"

"and ordered the parties to share the fee of the agency designated to supervise father's visits.[3]

The court admonished father that "if you have a habit of cancelling the visits, [the agency will] ultimately cut you off because they have a waiting list. These are very sought after visits; so it's very important to comply with all of their requirements." The court ordered progress reports to be provided by the agency "to see how the visits are going." After granting mother's request to modify visitation, the court declined her request to terminate father's shared legal custody, noting that that and other issues "can be revisited at a later point, if appropriate."

Discussion of First Appeal

Father's first claim is that, by failing to determine whether the proof of personal service filed by mother on December 23, 2009 with her petition to modify "was legitimate or perjury," the trial court abused its discretion. However, as indicated, the trial court refused to make that determination because mother claimed (and the clerk's transcript before us shows) that the proof of service by mail she filed on December 17, 2009 related to the January 6, 2010 hearing, which father attended. By participating in the hearing, father waived any challenge to service. Indeed, father *expressly* waived the issue at the January 21st hearing, at which he stated: "I did write to the clerk's office letting them know that there is proof of service, in fact, in the file but I was never served. The only way I found out was when I was filing my papers that the Clerk told me we had a hearing coming up."

Blind to the consequences of his own conduct and his failure to produce evidence supporting his claims, appellant plangently insists that:

"1) It's a fact appellant was never served.

"2) It's a fact respondent lied in open court.

"3) It's a fact appellant informed the Clerk of the Court about lack of service.

"4) It's a fact the S.F. Sheriff[] stated appellant was never served.

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[3] Father had earlier informed the court that he was "indigent" and "barely surviving on my unemployment checks."

"5) Sadly, it's a fact this court [i.e., the trial court] was told 3 different times appellant was not served.

"6) It's an ugly fact, this court chose to ignore the blatant falsehoods by respondent. . . ." (Bolding and italics omitted.)

The only one of the above "facts" warranting further comment by us is the assertion that "the S.F. Sheriff[] stated appellant was never served." The sheriff's statement father apparently refers to is that made by Lieutenant John Garcia in the proof of service form mother filed on December 23, 2009. Garcia declares under penalty of perjury that "[a]fter due search, careful inquiry and diligent attempts at the dwelling house or usual abode and/or business, I have been unable to make *personal delivery* of said process on [father]" because father was "not found" at 242 Turk Street, #705, San Francisco, CA 94102, the address father uses in all communications with mother and that address is a residential treatment facility that "[w]ill not divulge if [father] resides there." (Italics added.) The failure of such personal service is, however, irrelevant.

Personal service is required in a family law proceeding such as this only with respect to temporary restraining orders, and the "proof of service" father seemingly relies upon refers only to service of documents pertinent to restraining orders and domestic violence prevention. This appeal is not from a restraining order. The relief mother obtained was sought by means of an order to show cause (OSC) and OSC papers may be served in the informal manner authorized by Code of Civil Procedure section 1010 et seq., which includes service by mail. (Code Civ. Proc., § 1012.) The clerk's transcript contains a form "proof of service by mail" in which process server Jack Goeckel states that he served mother's application for an OSC on father by mailing the pertinent documents to him on December 17, 2009, at the address he gave the court.[4]

[4] Father's fixation with the service of process and indifference to the law governing that issue is also exemplified by the "notice to the court" he filed in our court on August 9, 2010, which states as follows: "Appellant apologizes to the court, and especially to the Clerk of the Court, for complaining about lack of service of Respondent's Brief. As shown by the attached exhibit [a photocopy of the envelope in which mother mailed him her pro per brief] appellant received his copy via U.S. Postal

For the foregoing reasons, and especially because father has failed to show that he was not placed on notice of the purpose of the January 21st hearing, which he attended, at the January 6th hearing, which he also attended, the trial court properly rejected the defect in service father claims.

So, too, is father's second claim—that the evidence demonstrated no need for the supervised visits ordered by the court—wholly unsupported.

So far as the record shows, the *only* relevant evidence the parties presented on this issue at the January 21st hearing were their statements to the court. As we have said, mother stated that father continually failed to show up for or cancelled visitation with Jack at scheduled times and places, and had not visited Jack for nearly five months, which father acknowledged. Indeed, father stated that he had not visited his son for "eight, nine months at least" and had not requested a visit with his son since June 2009. Father said he had filed a motion for modification of visitation because at some unidentified point in 2009 mother "said there will be no more visiting," but he admitted his failures to appear at a hearing scheduled for that purpose and a related mediation scheduled by the court.

Reminded that the hearing was on mother's petition to modify visitation, not his, father responded that "a lot of what she had submitted to the court wasn't worthy of a response. I was going to get in touch with child protective services because it was my position that either she's putting false information before the court or she's delusional.

Service, and informs the Clerk of Court, that the declaration under penalty of perjury at the back of Respondent's Brief is less than credible regarding service on appellant. And the primary purpose of this notice is to highlight what can only be described as a pattern employed by Respondent."

A document is deemed filed in this court on the date our clerk receives it, and a brief is timely if the clerk receives it before the time to file it has expired. (Cal. Rules of Court., rule 8.25(b).) The proof of service on the last page of mother's respondent's brief establishes that the brief was personally delivered to our clerk on July 1, 2010, and is therefore timely and father does not claim otherwise. The form also contains father's name and address and he acknowledges his timely receipt of the brief by first class mail. Briefs are commonly sent adverse parties by mail and the practice conforms to the Rules of Court. (*Id.*, rule 8.25(a).)

[¶] There was also an allegation in her papers that I made threats over the Internet. I was going to ask this court to contact the District Attorney's Office to have this allegation investigated." When asked by the court, "[i]s that all you have to say?" father said, "yes."

The order directing supervision of father's visitation with Jack is amply supported by the statements of the parties at the January 21st hearing.

But there is an additional reason we must reject father's claims. Error is never presumed on appeal. To the contrary, appealed judgments and orders are presumed correct; and appellant has the burden of overcoming this presumption by affirmatively showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *Estate of Davis* (1990) 219 Cal.App.3d 663, 670.) " 'A necessary corollary to this rule is that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.' . . . [citations] . . ." (Eisenberg et al, Cal. Practice Guide, Civil Appeals and Writs, ¶ 4.2, at p. 4-1.) The record father has presented does not include many such portions of the proceedings below. For example, father did not include in the record the transcript of the January 6th hearing, at which he may well have explicitly waived any objection to service of process and reiterated his continuing desire to seek modification of visitation, thereby inducing Commissioner Slabach to continue the proceedings to January 21st, which would also constitute waiver of objection to service of process. Also omitted from the record are any of the pleadings filed by mother in the trial court. We know there are such documents only because at the January 21st hearing Judge Chaitin referred to allegations in mother's "papers" relating to father's failure to show up for scheduled visits, and the negative impact of this on his son. An appellant cannot obtain reversal of a trial court order on the basis of an abuse of discretion when there is no record explaining what occurred at a significant hearing or fully elucidating the trial court's reasoning. (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.) As the party challenging a discretionary ruling, father had an affirmative

obligation to provide a record adequate to permit us to assess whether the court abused its discretion. His failure to do so forfeits the argument. (*Ibid*.)

For the foregoing reasons, we shall affirm the judgment and order in case No. A127821.

THE SECOND APPEAL

The issues appellant raises in the second appeal, case No. A128909, are that the trial court denied him a fair hearing "because it denied him his witnesses, one of which [*sic*] was present right outside the courtroom," and "[t]here was no factual basis or evidence before the court justifying the termination of his parental rights."

Facts and Proceedings Below

The hearing at issue, which was on respondent mother's request to terminate joint legal custody, took place before Judge Chaitin on May 25, 2010. When the hearing commenced, and the court noted that though it was 9:30 a.m., as noticed, appellant was not present, the clerk stated that appellant had phoned and said "he's running late." Displeased at appellant's failure to appear, as he had in the past, because the matter had been put over to accord him a hearing on termination of joint legal custody, and also because respondent and a deputy city attorney were present and ready, the court commenced the proceedings.

Deputy City Attorney Kimiko Burton said she was present because father had subpoenaed a number of child welfare workers to appear. The court made clear its familiarity with past efforts to systematize visitation, and appellant's repeated refusal to participate. Indicating that it saw no reason for testimony from welfare workers subpoenaed by a party who had not bothered to himself appear, the court stated: "[b]ased on my review of the file and my review of all the facts in this case that are contained within the various filings and the previous findings by the court, and what I understand to be that he hasn't participated in visitation at all for a substantial period of time here, the court is going to grant the mother sole legal custody."

After signing the order, the court indicated to the city attorney that appellant's subpoenas of child welfare workers was no longer relevant. The mother then sought

leave to make another request: that the court "deem Mr. McGuire as a vexatious litigant." After responding, "I can't do that," the court saw that father had belatedly entered the courtroom and told him: "I just terminated your legal custody. You're 30 minutes late."

At that point, the court asked Deputy City Attorney Burton to restate the reason for her presence. Ms. Burton said that because father had subpoenaed several child welfare workers, she had told the court clerk she would be appearing to contest the subpoenas on the ground "that the last child welfare worker who had anything to do with this case was well over a year ago, and it goes back a number of years. And I frankly don't believe that anybody has any current thoughts or any probative testimony to offer on this matter." Asked to respond, appellant said: "Wade Ishimura, the last social worker[,] was right outside." When the court asked him to explain the relevance of Ishimura's testimony and that of the other child welfare workers he had subpoenaed, appellant answered that they "would be able to provide testimony as to the mother's credibility. Making false reports, the reasons why she had to have supervised visiting, the documentation of elder abuse, domestic abuse, felony child endangerment. And everything that I found going through the files and the detention reports and addendums that would be in support."

In response, the city attorney noted that "Mr. Ishimura last touched this case nearly two years ago [and] has not been involved with this family since then. So anything [he had to say], I would believe is stale and is not relevant to the court's decision."

Judge Chaitin then explained to appellant that "we are at a different juncture in this case. I was the judge who heard the dependency matter. I dismissed the dependency matter because I was satisfied that the child was safe with mother, that the child did not need the intervention of the court anymore to assist mother in providing safe and nurturing care for the child. And so, none of that is relevant as to what might have happened two years ago, three years ago, four years ago." She also reminded father that

she had ordered that he have visitation with his son, who was then 11 years of age, but appellant refused to participate.

When Judge Chaitin asked appellant whether he had anything else to add, he explained that he didn't always appear for scheduled visitation at the Rally program because a former attorney told him that Rally is "for people who have histories of domestic abuse or have a history of harming their child," and "if I was to participate in that, I would be conceding that I'm a person who has harmed his child." Appellant also said child welfare worker Ishimura had stated in a past report that he "was always consistent with Mrs. Corn," his son's therapist, and a child welfare worker named Rodell had at one time opined that he was fit to have unsupervised visits with his son.

After the matter was submitted, the court explained that its main concerns were father's inability over a long period of time to establish any relationship with the child, and that his joint custodial rights interfered with the mother's ability "to be a competent and complete parent." The court informed appellant that "there is nothing that you presented today, sir, or anything in your past behavior or your relationship with the child which would negate mother's request to terminate your legal custody of the child." [¶] And the fact of the matter is you don't have a relationship with the child. [¶] I know in your heart you love the child, but you have no relationship with the child. And at this point having you present as a legal parent is really harmful for the child, because mother has to be in a position where she can make the sole decisions because she is the only parent who has a relationship with the child. [¶] So I am going to terminate your legal custody."

Discussion of Second Appeal

Appellant's first claim—that he did not receive a fair hearing because the trial court "denied him his witnesses, one of which was present right outside the courtroom"—is wholly without merit. To begin with, as the trial court observed, appellant failed to provide the court notice of any witnesses he planned to call, as it had previously ordered. Furthermore, as the city attorney explained, the specific witness appellant referred to, Wade Ishimura, participated in the case prior to Judge Chaitin's previous ruling and had

no contact with the parties or their child during the last two years. The court refused to hear from Ishimura only because appellant was unable to show that his testimony, or that of any other child welfare worker he had subpoenaed, was relevant to the issue before the court.

Appellant's second claim—that "[t]here was no factual basis or evidence before the court justifying the termination of his parental rights"—is frivolous. The closest appellant came at the termination hearing to explaining his admitted failure to establish a relationship with his son was to blame his wife for the problem. Admitting his relationship with Jack was "limited," appellant stated that "I can't help that. If the mother doesn't let me see the child, I can't see the child." The trial court refused to accept the excuse. The court acknowledged that "at one time during the history of this case mother was not helpful in having you see the child," but that was not the case after the court ordered that appellant have visitation with Jack at the Rally program. However, as earlier indicated, the court pointed out to appellant that he had "refused to participate, claiming your rights were violated and you refused to participate. . . . [¶] . . . [¶] When I ordered the Rally visits, I was hopeful that you would normalize a pattern of visitation with the child, and that we would move off that to some type of unsupervised visitation. But that has not occurred."

The order terminating appellant's custodial rights is amply supported by record evidence.

DISPOSITION

For the reasons set forth above, the superior court findings and an order dated January 22, 2010 modifying appellant's visitation of Jack in case No A127821, and the June 11, 2010 order granting mother sole legal custody of Jack in case No. A128909, are both affirmed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Lambden, J.