

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RANDALL LANE SETTLEMIRE,

Petitioner,

v.

THE SUPERIOR COURT OF SAN LUIS  
OBISPO COUNTY,

Respondent;

PATRICIA SETTLEMIRE,

Real Party in Interest.

2d Civil No. B158416  
(Super. Ct. No. FL02-0081)  
(San Luis Obispo County)

OPINION AND ORDER FOR  
PEREMPTORY WRIT OF MANDATE

If it acts like a judge, rules like a judge, and decides like a judge, is it a judge? Not if it is a commissioner in judge's clothing deciding a case without a stipulation from all parties.

The trial court assigned an order to show cause involving a domestic restraining order and a myriad of other issues to a commissioner "for a hearing, and findings on any matter of fact upon which information is required by the Court." As we shall explain, the assignment was invalid because a party did not stipulate to it.

*FACTS*

Patricia Settlemire applied for a domestic violence restraining order against her husband, Randall Lane Settlemire (hereafter Settlemire), in the San Luis Obispo Superior Court. Commissioner Lane Stewart issued a temporary restraining

order and set the matter for an order to show cause to determine not just the restraining order, but temporary child custody, visitation, disposition of a community asset, the relinquishment of firearms, and the exclusion of Settlemire from his residence.

In his response, Settlemire stated that he intended to present witness testimony and would contest all the temporary orders obtained by his wife. He also filed a declaration under Code of Civil Procedure section 170.6 seeking the peremptory disqualification of Commissioner Stewart.<sup>1</sup> The trial court reassigned the case to Commissioner Ginger Garrett.

Settlemire objected to a commissioner deciding the case and moved to vacate the assignment. The trial court denied his motion and modified its earlier order to read: "This matter is referred . . . pursuant to Code of Civil Procedure section 259(b) for a hearing, and findings on any matter of fact upon which information is required by the Court."<sup>2</sup>

Settlemire petitioned this court for writ of mandate. He contended that, absent a stipulation from both parties, the commissioner lacked the authority to preside over the proceeding.

On May 8, 2002, we issued a temporary stay of proceedings. In our order we invited respondent court to reconsider its ruling in light of *In re Horton* (1991) 54 Cal.3d 82 [commissioner may preside over a contested matter only if both sides approve]. Respondent court rejected our invitation and "decline[d] to assign the May

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<sup>1</sup> Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

<sup>2</sup> Section 259 states in part: "Subject to the supervision of the court, every court commissioner shall have power to . . . [¶] . . . [¶] (b) Take proof and make and report findings thereon as to any matter of fact upon which information is required by the court. Any party to any contested proceeding may except to the report and the subsequent order of the court made thereon within five days after written notice of the court's action. A copy of the exceptions shall be filed and served upon opposing party or counsel within the five days. The party may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order."

10, 2002 hearing to a judge." We have issued an order to show cause and respondent court has filed its opposition to the petition.

Although rare, respondent court may oppose the writ petition when: "(1) the real party in interest did not appear; and (2) '[t]he issue involved directly impacted the operations and procedures of the court or potentially imposed financial obligations which would directly affect the court's operations.'" (*James G. v. Superior Court* (2000) 80 Cal.App.4th 275, 280, citing *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1018-1019; cf. *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1059.)

## *DISCUSSION*

### *1. The Role of the Commissioner*

Court commissioners make a "significant contribution to the reduction of the judicial workload in the superior courts" (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 363) and "provide needed relief to the overburdened judicial system." (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1211.) Indeed, commissioners are the backbone of most family law departments. (See Jud. Council of Cal., Admin. Off. of Cts., Rep. on Role of Subordinate Judicial Officers (adopt Cal. Rules of Court, rule 6.609) (2002) com., pp. 6-9.)

The San Luis Obispo Superior Court presently consists of 11 judges and 3 commissioners. In the fiscal year 2000-2001, there were 1,089 family law filings in that county. (Jud. Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2002) Fiscal Year 2000-2001 Statewide Caseload Trends, Superior Courts Tables 4a.fl & 14a, pp. 46.2, 58.1.) There is no doubt that without the aid of its three commissioners, the San Luis Obispo Superior Court would be overwhelmed by its growing domestic relations caseload.

Article VI, section 22 of the California Constitution authorizes the Legislature to provide for the appointment of commissioners to perform subordinate judicial duties. Courts have the inherent authority to appoint commissioners. (*People v.*

*Superior Court (Laff)* (2001) 25 Cal.4th 703, 734 ["article VI, section 22, was not intended to circumscribe the inherent power of the courts to appoint subordinate judicial officers, but rather was intended to confirm the Legislature's authority to provide for such appointments"].)

The tasks of a commissioner are demanding and varied. Commissioners may: hear and decide small claims cases (Gov. Code, § 72190); conduct arraignments (Gov. Code, § 72190.1); issue bench warrants upon a defendant's failure to appear or obey a court order (Gov. Code, § 72190.2); sit as juvenile court hearing officers (Welf. & Inst. Code, §§ 247-253); decide ex parte motions for orders and writs (§ 259, subd. (a)); approve bonds and undertakings (§ 259, subd. (c)); decide preliminary matters in prescribed domestic relations matters, including custody of children, support, costs and attorney fees (§ 259, subd. (f)); and hear actions to establish paternity and enforce child and spousal support orders (§ 259, subd. (g)). These duties require no stipulation.

## 2. *The Commissioner as Judge*

To the question, "Are superior court commissioners real judges?" we answer unequivocally, "Sometimes." On occasion a commissioner may preside as a judge.

"The judicial power of this State is vested in the Supreme Court, courts of appeal [and] superior courts . . . ." (Cal. Const., art. VI, § 1; *In re Horton, supra*, 54 Cal.3d at p. 89.) A commissioner may act with the full authority of a judge when there has been (1) an order of the presiding judge of the court appointing the commissioner to act as a temporary judge, and (2) the actual or implied stipulation of the parties. (Cal. Const., art. VI, § 22; Cal. Rules of Court, rule 6.609(b); *Horton*, at pp. 90-91; *Kim v. Superior Court* (1998) 64 Cal.App.4th 256.)

By order of the presiding judge of the San Luis Obispo Superior Court on April 19, 2002, Commissioner Ginger Garrett was appointed to act as a temporary judge. But Settlemire did not so stipulate. Therefore, Commissioner Garrett could not

hear the case. (*In re Horton, supra*, 54 Cal.3d at p. 90.) Our inquiry, however, does not end here.

### 3. *The Commissioner as a Referee*

There are two kinds of reference hearings: general and special. In a general reference hearing, the referee, with the consent of the parties, hears and decides the entire controversy. (§ 638.) "A trial court's nonconsensual general reference constitutes an unconstitutional abdication of judicial authority." (*Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 714.)

A special reference, in contrast, is limited to specific fact determinations. (*Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1522-1523.) A court may appoint a referee without the consent of the parties "[w]hen a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action." (§ 639, subd. (a)(3).) Although the findings and recommendations made by a commissioner at a special reference hearing are advisory and not binding, great weight is given to the commissioner's opinion. (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 176.)

Subdivision (b) of section 259 allows a judge to appoint a commissioner to preside as a fact-finding referee to "[t]ake proof . . . and report findings thereon as to [a specific] matter of fact upon which information is required by the court." (See also *People v. Superior Court (Laff), supra*, 25 Cal.4th at p. 721.) In family law matters, a commissioner is authorized to "[h]ear and report findings and conclusions to the court for approval, rejection, or change, [in] all preliminary matters . . . ." (§ 259, subd. (f); see also Fam. Code §§ 2032, subd. (d), 5251.)

Unless both parties consent, the court may not, under the guise of a reference, cause the lion's share of a case to be heard by a referee. (6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 61, pp. 460-461.) Neither section 259 nor section 639 authorizes a commissioner to preside over a case in its entirety and decide all legal and factual issues. (*Ruisi v. Thieriot, supra*, 53 Cal.App.4th

at p. 1209.) "Deciding a major issue in a case, which probably will determine liability, is not a subordinate judicial duty." (*Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 436.)

Orders for special reference in domestic cases commonly are used in pendente lite motions for child and spousal support, temporary restraining orders, valuation of business assets, property, liens and pensions. (Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 2002) ¶ 5:475, pp. 5-160-5-161.) Special reference hearings are also used to resolve accounting, discovery and credibility issues. (See, e.g., *In re Marriage of Petropoulos, supra*, 91 Cal.App.4th 161.)

Here, the trial court's order of May 1, 2002, amounted to a general reference. All issues were referred to Commissioner Garrett "for a hearing, and findings on any matter of fact upon which information is required by the Court." The order did not specify particular facts or issues to be decided by the Commissioner. Instead, the order gave the commissioner authority to decide all facts and issues: permanent injunction, custody, and disposition of a community asset.

This case is not, as respondent court argues, part of a dissolution case. Instead, it is a case unto itself most likely requiring an assessment of credibility of the parties and witnesses and the determination of several issues.

It is true that a referee as a fact finder must necessarily make credibility findings. (*In re Marriage of Petropoulos, supra*, 91 Cal.App.4th 161.) In *Petropoulos*, the trial court in response to motions for modification of spousal support appointed a special master to determine the parties' income and assets. The court also ordered the special master to determine the parties' credibility. But, unlike respondent court here, the trial court in *Petropoulos* presided over a good portion of the trial. It had ample opportunity to independently weigh the credibility of the parties in evidentiary hearings that it conducted for over three days in which it heard testimony from the parties and the special master. (*Ibid.*) Here respondent court heard no evidence, but instead turned the trial over to the commissioner to resolve all facts. This was an abdication of the court's

judicial obligation. (*Ruisi v. Thieriot, supra*, 53 Cal.App.4th at p. 1211 [order appointing a special master to determine "any and all issues regarding custody" of the parties' minor child is defective].)

#### 4. *The Use and Misuse of Superior Court Commissioners*

It is a fact of judicial life that commissioners are often given assignments that judges do not want to perform. Some stalwart judges embrace the demands of a family law assignment. But to others, family law tops the list of assignments to eschew. It is one of the most difficult and challenging of all judicial assignments. Family law cases may involve issues that cut across numerous specialties in the legal landscape, including contracts, corporations, trusts, partnerships and taxation, among others. Hearings can be battlegrounds where withering love gives way to rancorous hostility. This environment takes an emotional toll on the parties, their counsel, and the trial judge.

Years ago, Justice Robert Gardner of the Fourth Appellate District wrote: "Domestic relations litigation, one of the most important and sensitive tasks a judge faces, too often is given the low-man-on-the-totem-pole treatment, quite often being fobbed off on a commissioner. . . . [W]e begrudge the judicial resources necessary for careful and reasoned judgments in this most delicate field - the breakup of a marriage with its resulting trauma and troublesome fiscal aftermath. The courts should not begrudge the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice to all parties involved." (*In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 422.)

Perhaps that is why some judges view the assignment to sit in the family law department as a form of banishment to the lower circles of judicial inferno. Worse, "[t]he family law judge is often the newest judge on the court and usually has little or no experience in family law." (Judicial Council of Cal., Advisory Com. Rep., Achieving

Equal Justice for Women and Men in the California Courts (1996) p. 160.)<sup>3</sup> "[T]he assignment of a judge to family law cases is one of the most difficult and stressful of all the responsibilities of a circuit judge." (*In re Report of Com'n of Family Courts* (Fla. 1991) 588 So.2d 586, 591.)

Courts have drawn the same conclusion. (*In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, 38, fn. 4 ["We do not fault the trial court, but we do lament that the courts are unable to give adequate time to sensitive family law matters"]; see also *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1218, fn. 2; *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1059, fn. 3.) In many cases, attorneys and their clients prefer an experienced commissioner to hear their domestic matter. But for whatever reason, a party may choose not to stipulate to a commissioner. (*In re Marriage of Galis* (1983) 149 Cal.App.3d 147, 154 [while "the use of court commissioners and referees is an important tool in the economical and expeditious administration of justice[,] . . . to force an unwilling litigant to try his or her case before someone other than a judge violates clearly announced legislative policy"].)

The comments to rule 6.609 of the California Rules of Court, concerning the role of subordinate judicial officers, acknowledge the vast family law experience commissioners have, but warned that "the use of commissioners [may] create the misperception that [family law cases receive] 'second-tier' justice and that the courts do not consider them important enough to merit the attention of judges." (Jud. Council of Cal., Admin. Off. of Cts., Rep. on Role of Subordinate Judicial Officers (adopt Cal. Rules of Court, rule 6.609), *supra*, com., p. 4.)

In December of 2000 the Judicial Council created the Subordinate Judicial Officer Working Group. Its purpose was to make recommendations on the role of subordinate judicial officers. Chaired by the Honorable William R. McGuiness,

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<sup>3</sup> It has been proposed that, if the courts are unwilling to commit sufficient resources and time to family cases, the judiciary runs the risk of having these matters heard by another forum. (Gorenfeld, *Family Law in the 1980s—Looking Backwards* (1980) 55 State Bar J., No. 3, pp. 132-134.)



Administrative Presiding Justice of the First Appellate District, the working group was composed of trial judges, attorneys, commissioners and court executive officers.

Its report recommended that, aside from some limited family support matters, "all judicial duties in family law cases be reserved to judges." (Jud. Council of Cal., Admin. Off. of Cts., Rep. of the Subordinate Judicial Officer Working Group on Subordinate Judicial Officers: Duties and Titles (2002) pp. 7, 22 (hereafter SJO Working Group Report).) This is because "[j]udicial decisions in family cases have lasting effects on the parties' homes, familial relationships, and finances." (*Id.* at p. 22.)

The SJO Working Group Report stressed that even preliminary matters in family cases should be heard by judges. "The consequences of [protective orders] are often high—arguably higher than incarceration. People can be removed from their homes and have their children removed from their custody. Although these decisions are 'temporary,' they often have long-term consequences." (*Id.* at p. 23.)

Finally, the SJO Working Group Report noted the practice of some family law trial judges who, upon the refusal of a party to stipulate to the use of a commissioner, invoke section 259, subdivision (f) and order that the same commissioner sit as a referee. (SJO Working Group Report, at p. 24; see also Hogoboom and King, Cal. Practice Guide: Family Law, *supra*, ¶ 5:475, at p. 5-160.) The working group found this procedure to be an inefficient use of judicial resources and called for the repeal of subdivision (f).

#### CONCLUSION

"[A] number of decisions have stated that the power of a trial court to compel the parties to submit an aspect of a judicial proceeding to a subordinate judicial officer is derived from statute, and only those issues particularly described in the statute may be referred without the consent of the parties." (*People v. Superior Court (Laff)*, *supra*, 25 Cal.4th at p. 734.) The trial court's order for reference of a case with multiple issues was an improper delegation of judicial duties. (*In re Marriage of Olson* (1993)

14 Cal.App.4th 1, 8.) The trial court's broad order for a reference hearing denied Settlemyre's constitutional right to have his case heard by a superior court judge.

Let a writ of mandate issue directing respondent superior court to vacate its order sending the matter for a reference hearing and to enter a new order that entitles Settlemyre to a hearing before a superior court judge.

The order to show cause and the stay, having served their purposes, are dissolved. The parties are to bear their own costs.

CERTIFIED FOR PUBLICATION.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Teresa Estrada-Mullaney, Judge  
Superior Court County of San Luis Obispo

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Law Offices of Tony Marlow and Anthony J. Marlow for Petitioner.

Benton, Orr, Duval & Buckingham, Brenda L. McCormick and Mark S.

Borrell for Respondent.

No appearance for Real Party in Interest.