Filed 2/25/15 Marriage of Hernandez and Santana CA3

**NOT TO BE PUBLISHED**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Sacramento)**

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| In re the Marriage of EMILIANO R. HERNANDEZ and ALMA R. SANTANA. | C071648 |
| EMILIANO R. HERNANDEZ,<br><br>Appellant,<br><br>v.<br><br>ALMA R. SANTANA,<br><br>Respondent;<br><br>F.H.,<br><br>Respondent. | (Super. Ct. No. 05FL05284) |

Emiliano R. Hernandez (father), who appears in propria persona, appeals the family court's orders of July 18, 2012, and August 8, 2012, denying reconsideration of its prior order awarding sole legal and physical custody of the minor F.H. to her mother,

Alma R. Santana.[1] We agree with respondent F.H. that father's claim that his due process rights were violated because he was not appointed counsel or awarded an evidentiary hearing is not cognizable in the instant appeal because we lack jurisdiction to review the orders denying father's motion for reconsideration. Accordingly, we shall dismiss the appeal.

## FACTUAL AND PROCEDURAL BACKGROUND

F.H. was born to father and mother prior to their marriage in December 2004. They separated in July of 2005 after a domestic violence incident. At that time, F.H. lived with father in Sacramento. Father encouraged F.H. to call him "Mommy"; expressed a belief that F.H. did not need mother in her life; and attempted to have F.H.'s middle name changed from one selected by mother and used by her to refer to F.H.

In 2009, mother was awarded supervised visitation with F.H.; visitation was to be supervised because mother had not had much contact with F.H. since her separation from father. However, father frustrated mother's efforts to have a relationship with F.H., and the parties continuously sought judicial intervention in their custody dispute. Thus, minor's counsel was appointed in May 2010 to represent F.H.'s interests. Counsel filed a report that was critical of father, and father sought to have minor's counsel removed and to be awarded sole legal and physical custody of F.H.

Then, in early January 2011, following the family court's denial of father's ex parte request—for an order shortening time to add removal of minor's counsel and custody and visitation issues to an already scheduled hearing—because no emergency existed, father "repeatedly argue[d] with the court" and "refused to comply with the court's order to both desist or depart counsel table for receipt of the court's Minute Order." The court found father in contempt and remanded him for five days for

[1] Mother did not file a respondent's brief but appeared at oral argument before this court.

"contumacious conduct involving failure to obey an order in open court." The court ordered temporary custody to mother pending a status review hearing.

F.H. remained with mother thereafter in Los Angeles, and father was awarded supervised visitation. Minor's counsel filed an updated report that indicated F.H. had adjusted well to life with her mother and enjoyed getting to know her half sister. F.H. was enrolled in school near mother's home (despite father's efforts to frustrate the process). Mother reported that in conversations with F.H., father was making F.H. feel guilty about being away from him. Minor's counsel suggested that father's continued efforts to frustrate the mother-child relationship and his continuous litigation indicated an unwillingness to change, and minor's counsel opined it was in F.H.'s best interests to remain with mother and to award father scheduled visitation and contact. The court agreed and awarded sole physical custody to mother and joint legal custody to both parents in January 2011. However, father and mother continued to litigate the custody of F.H. And, because father continued his obstreperous behavior and violated the court's order regarding visitation, in May 2011, the family court awarded mother sole legal and physical custody of F.H.

Thereafter, in October 2011, father, mother, and minor's counsel entered into a custody agreement relative to F.H. That agreement provided joint legal custody, sole physical custody to mother, scheduled visitation to father, child support to be paid to mother, co-parenting and individual counseling, and guidelines for communication.

Nonetheless, in March 2012, mother filed an application with the court to be heard May 16, 2012, to modify the child custody and child support agreement. Mother sought sole legal custody and primary physical custody. Apparently, F.H. had emotionally regressed with father's increased contact and visitation, she was suffering from the burden of traveling to Sacramento for visits with father, and the scheduled telephone conversations between F.H. and father were causing conflict. Prior to the scheduled

hearing, mother requested an ex parte hearing in April 2012 because the stipulated agreement could not be enforced to resolve a dispute about the end time for one of father's visits because the agreement contained no specific start or end time for visits. The family court ordered a specific start and end time for visits and directed specific drop-off locations and procedures. Then, at the May 16, 2012 hearing, the court ordered father to complete counseling, prohibited father from having any physical contact with F.H. other than in a supervised agency setting, limited father's telephone contact to once per week, ordered a specific sum of child support to be paid by father, and awarded mother sole legal and physical custody of F.H.

On July 18, 2012, the court conducted a hearing on father's motion to modify visitation.[2] Father represented to the court that the motion was really "a continuance on the response of [father's] custody time being taken away" at the May 16, 2012 hearing. Thus, the family court treated it as a motion for reconsideration of the family court's May 16, 2012 order and denied it. However, because proper notice was not given, the court continued the hearing to August 8, 2012. Father immediately appealed.

Mother filed a response to father's motion on July 27, 2012. At the continued hearing on father's motion, held on August 8, 2012, father clarified that he sought a return to the custody agreement signed by the parties in October 2011. The family court found there had been no change in circumstances meriting the requested modification and, aside from ordering where supervised visitations were to take place, left in place "all other orders not in conflict." Father also appeals this order. Father objected to the court's August 8, 2012 order, which the court construed as a request for statement of decision and motion for reconsideration and then denied.

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[2] Though this motion was apparently filed/endorsed on June 8, 2012, it is not included in the record on appeal.

## DISCUSSION

Father appeals from the trial court's July 18, 2012 and August 8, 2012 orders declining father's request to revert to the stipulated custody arrangement that preceded the trial court's May 16, 2012 order granting sole legal custody and primary physical custody to mother. F.H. contends father's claims are not cognizable on appeal and the appeal must be dismissed because the orders denying father's motion for reconsideration are nonappealable. We agree and dismiss the appeal.

Father's motion—filed on June 8, 2012, and heard on July 18, 2012, and August 8, 2012—is not included in the record on appeal. The party challenging the judgment or order "bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the [appellant]." (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549; accord, *People v. $17,522.08 United States Currency* (2006) 142 Cal.App.4th 1076, 1084.) Here, the family court construed father's motion as one for reconsideration and denied it. Without inclusion of the motion in the record, we have no cause to question the family court's conclusion that the motion sought reconsideration of its May 16, 2012 order. And, "[a]n order denying a motion for reconsideration . . . is not separately appealable." (Code Civ. Proc., § 1008, subd. (g).) Therefore, we must dismiss the instant appeal.

Moreover, we have thoroughly reviewed the record and the briefs filed by all parties, and, even if we were not compelled to dismiss the appeal as stated above, we would reject father's contention that he has a due process right to appointed counsel in his custody dispute with mother (see *In re Marriage of Laursen & Fogarty* (1988) 197 Cal.App.3d 1082, 1087 ["a party to a custody proceeding is not eligible to receive appointed counsel"]) or that he was denied an evidentiary hearing.

## DISPOSITION

The appeal is dismissed. Respondent F.H. is awarded her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, J.

We concur:

RAYE, P. J.

BLEASE, J.