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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MELISSA M. BIALLA,

Plaintiff and Appellant,

v.

BRENT B. THOMSON,

Defendant and Respondent.

A131409

(Marin County  
Super. Ct. No. FL-1000898)

After a bifurcated court trial in her domestic partner dissolution action, Melissa M. Bialla appeals from orders establishing a date of separation and denying her temporary support and attorney fees, as well as from posttrial rulings upholding these orders. We find Bialla's appeal premature with respect to the date of separation issues because there is no final judgment in the dissolution proceeding and Bialla failed to obtain certification under Family Code section 2025 to proceed with an appeal on the bifurcated date of separation issue. We dismiss Bialla's appeal from the order denying her support and attorney fees as untimely. We affirm the order denying her relief from that order based on mistake and excusable neglect.

**I. BACKGROUND**

On February 22, 2010, Bialla filed a petition in pro. per. to dissolve her domestic partnership with Thomson, alleging the parties registered their domestic partnership in Vermont on or about August 17, 2001, and separated on August 17, 2009. Thomson's response to the petition alleged the parties registered their partnership on March 18, 2002, and separated in January 2006, a span of less than four years. Thomson immediately

moved to bifurcate the issue of the parties' date of separation and have it set for an early trial.<sup>1</sup> Bialla stipulated to a separate trial on the date of separation issue, and agreed to a trial date of July 13, 2010 for that issue.

In June 2010, the parties stipulated to continue the trial date to September 22, 2010 to accommodate settlement efforts in which they were then engaged. Those efforts failed and on August 10, 2010, Thomson served Bialla with a deposition and document production notice for August 20. Bialla requested and Thomson agreed to a three-week continuance to September 9 to permit Bialla to attend the Burning Man Festival in Nevada and to prepare for the deposition. On August 29, Bialla gave notice she would be applying ex parte to continue the trial and deposition dates, or in the alternative for an order shortening time to have her order to show cause (OSC) for partner financial support and attorney fees heard in advance of the September 22 trial date. By order entered on August 31, the trial court denied these requests, and ordered Bialla to appear at her September 9 deposition. Bialla's request for temporary support and attorney fees was scheduled for hearing on November 1, after the bifurcated trial.

All of Thomson's subsequent attempts to take Bialla's deposition before the September 22 trial date were rebuffed by Bialla, with varying explanations. On September 8, she told Thomson's counsel, Stefan Spielman, she could not attend the September 9 deposition because she had a cold.<sup>2</sup> On the next rescheduled date for the deposition, she claimed she had no transportation. When Spielman offered to pay for a cab, Bialla told him she was not ready for the deposition and would not appear on the rescheduled date. On the night before the third scheduled date, Bialla e-mailed Spielman

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<sup>1</sup> Thomson asserted in her supporting declaration Bialla had "taken extreme financial risks" in regard to three real estate properties after the parties separated in 2006, and had over \$6 million in debt and negative equity in all three properties. According to Thomson, by claiming a 2009 separation date, Bialla was seeking to link Thomson to the debts she had incurred after separation, and to obtain partner financial support from Thomson despite the parties' financial independence since 2006.

<sup>2</sup> According to Spielman, Bialla later admitted to him she went out to dinner with friends at a restaurant/bar on Friday night, September 10. Spielman asserted Bialla drank alcohol and socialized that night, but Bialla denied this.

to tell him she could not attend, causing Thomson to incur reporter's fees. Bialla suggested a date of Monday, September 20. Spielman requested confirmation of that date in writing by September 16, but Bialla did not respond on September 16 or Friday, September 17. By the time Bialla did respond, on Saturday, September 18, Spielman maintained it was too late to arrange for a court reporter for Monday, September 20.

On September 21, 2010, Bialla retained an attorney solely to represent her at the September 22 trial. On that date, Thomson filed a motion in limine requesting Bialla be precluded from introducing documentary evidence and from giving oral testimony at the bifurcated trial. The motion was based on Bialla's asserted willful violations of the court's August 31 order that she appear for her deposition and produce documents required for Thomson to prepare for trial. At the outset of the bifurcated trial, the court granted Thomson's motion.

The court heard testimony only from Thomson, including cross-examination by Bialla's trial counsel, followed by argument. Bialla's counsel argued as an initial matter Bialla was not competent to stand trial or cope with the litigation due to her asserted bipolar disorder, which was exacerbated by stress resulting from her dire financial circumstances. He requested the appointment of a guardian ad litem. The court denied the request based on its lateness, the lack of evidence Bialla suffered from a psychological malady affecting her ability to prepare her case, and the fact she had initiated the case with her petition. At the conclusion of argument, the court found the parties' date of separation was January 26, 2006, and requested Spielman to prepare a written order after hearing.

On November 1, the trial court denied Bialla's request for temporary support and attorney fees, finding (1) the parties had been financially independent since their separation in 2006, and (2) there were no significant property issues remaining to be litigated and therefore no need for a fee award. A signed order to that effect was not entered until November 22. Notice of entry of the order was served on December 1. The court also entered its written order after trial on the date of separation issue on

November 22, and notice of entry of that order was also served on December 1. The notices of entry of both orders were filed with the court on December 3.

On November 12, 2010—before entry of the written order after trial—Bialla filed a notice of intent to move for a new trial under Code of Civil Procedure sections 657 to 659. She was again representing herself in pro. per. On December 2, 2010, Bialla filed an OSC for reconsideration of both of the orders filed on November 22, and for relief from mistake based on excusable neglect pursuant to Code of Civil Procedure section 473 with respect to both orders. Bialla’s papers in support of her motions and OSC disputed Spielman’s account of her conduct in response to his attempts to take her deposition, offered correspondence and affidavits contradicting Thomson’s testimony regarding the parties’ relationship after Thomson moved out in 2006, and provided evidence of Bialla’s difficult financial and emotional problems as well as her unsuccessful efforts to secure legal representation in the months preceding the September 22 trial.

Bialla’s motion for a new trial and for relief based on excusable neglect, as well as her OSC for reconsideration were heard and denied on February 10, 2011. A written order was entered on the same day, and notice of its entry was served on February 11, 2011. The order stated in relevant part: “The Court sympathizes with the circumstances [Bialla] has recently brought to light, but does not find that they are sufficient to support any of the relief sought by her current motions. [¶] No showing has been made that new evidence or new law has recently been discovered which materially would have affected the outcome of the proceedings previously heard and decided which could not have been produced timely. [¶] [Bialla’s] refusals to . . . comply with [Thomson’s] reasonable discovery requests . . . were the exclusive cause of the Court’s granting of [Thomson’s] motion for issues sanctions. . . . [Bialla’s] failure to act to protect her own interests cannot be excused on grounds of surprise, mistake, or excusable neglect.”

On March 10, 2011, Bialla filed a notice of appeal from “[t]he orders of the court that were made Feb 10, 2011.”

## II. DISCUSSION

The threshold question in this case is whether this court has jurisdiction over any aspect of this appeal. For the reasons discussed below, we conclude we have jurisdiction over one narrow issue—whether the trial court erred in denying Bialla’s OSC seeking relief from the order denying her temporary support and attorney fees based on mistake or excusable neglect—and are without jurisdiction to consider any other issue raised.

The right to appeal in California is governed by statute and appellate courts have no jurisdiction to entertain appeals except as provided by the Legislature. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696; *In re Marriage of Loya* (1987) 189 Cal.App.3d 1636, 1638 (*Loya*.) When we determine an appeal has been taken from a nonappealable judgment or order, it is our duty to dismiss the appeal. (*Cole v. Rush* (1953) 40 Cal.2d 178; *Loya*, at p. 1638.) In addition to whether an appeal is authorized by statute, our jurisdiction to hear the appeal also depends on strict compliance with the time period for filing notices of appeal established by California Rules of Court, rules 8.104 and 8.108. Timely filing is an indispensable prerequisite to the appellate court’s power to entertain the appeal. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56; *Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 828–829.) Except for certain public emergencies, we have no authority to excuse a tardy notice of appeal. (Cal. Rules of Court, rule 8.104(b).)

Code of Civil Procedure section 904.1 enumerates the primary types of court orders and judgments that are appealable. (*Loya, supra*, 189 Cal.App.3d at p. 1638.) Insofar as is relevant here, section 904.1, subdivision (a)(1) provides most interlocutory judgments and orders, with certain limited exceptions, are not appealable. However, subdivision (a)(10) authorizes appeals from orders made appealable by the Family Code, which does authorize interlocutory appeals in circumstances described below. Code of Civil Procedure section 904.1, subdivision (a)(2) allows appeals from certain orders made after an appealable judgment or order. Code of Civil Procedure section 906 provides that orders *not separately appealable* may nonetheless be reviewed in the course of hearing

an appeal brought under section 904.1, either as intermediate rulings leading up to the appealable judgment or order, or because they otherwise substantially affect the rights of a party, such as the denial of a new trial motion.

Bialla's notice of appeal states she is appealing from the orders made on February 10, 2011. On that date, the court entered an order denying Bialla's motions for (1) a new trial; (2) reconsideration of the order entered after trial of the date of separation issue; and (3) relief from that order after trial based on surprise, mistake, or excusable neglect under Code of Civil Procedure section 473, subdivision (b). Orders denying a new trial motion or a motion for reconsideration are not separately appealable, but are reviewable on appeal from the underlying order or judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19–20 [new trial]; Code Civ. Proc., § 1008, subd. (g) [reconsideration].) Orders denying relief under section 473 are appealable only when they seek relief from an appealable judgment or order. (Code Civ. Proc., § 904.1, subd. (a)(2); see *Litvinuk v. Litvinuk* (1945) 27 Cal.2d 38, 43–44; *County of Ventura v. Tillett* (1982) 133 Cal.App.3d 105, 111, disapproved on another ground in *County of Los Angeles v. Soto* (1984) 35 Cal.3d 483, 492, fn. 4.)

In addressing the issue of appealability we are not necessarily bound by a strict or literal interpretation of the notice of appeal. Notices of appeal are to be liberally construed in favor of their sufficiency so as to permit, *if possible*, a hearing on the merits. (Cal. Rules of Court, rule 8.100(a)(2); *In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 252.) As long as the orders from which appellant intends to appeal are reasonably clear, and there is no prejudice or surprise to the respondent, we may construe her notice of appeal to encompass the orders challenged in her opening brief. (See *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19–22 [notice of appeal from a nonappealable order can be interpreted to apply to an existing appealable order or judgment, if no prejudice would accrue to the respondent]; *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361.)

Bialla states in the first paragraph of her opening brief that she is appealing from two orders: (1) the order precluding her from presenting evidence or testimony in

support of her case, and (2) the order denying her relief in the form of domestic partner support and attorney fees.<sup>3</sup> The substantive arguments Bialla makes in her brief are addressed to whether (1) the trial court erred in allowing the trial on the date of separation and other proceedings to go forward despite Bialla's claimed psychological disability, (2) the trial court abused its discretion in denying her attorney fees request, and (3) the parties had agreed to arbitrate disputes of this nature. In effect, Bialla is therefore challenging the orders entered on November 22 determining the separation date issue and denying her request for attorney fees pendente lite. The court's ruling on the evidence preclusion motion is not directly appealable, but it would be reviewable on this appeal if the order after trial of the separation date issue was appealable. (Code Civ. Proc., § 906.) But as discussed *post*, Bialla's appeals from these November 22 orders are untimely even assuming for the sake of analysis the orders are in fact otherwise appealable.<sup>4</sup>

Under California Rules of Court, rule 8.104, a notice of appeal must be served on or before 60 days after service of notice of entry of the order from which the appeal is taken. Notices of entry of the November 22 orders were served on December 1, 2010. Bialla's notice of appeal was filed 99 days later, on March 10, 2011. Unless Bialla's time for appealing the orders entered on November 22 was extended 39 days by the operation of rule 8.108, her appeal is untimely. In our view, the application of rule 8.108 would not make Bialla's appeal timely.

Rule 8.108 of the California Rules of Court extends the time to appeal from an appealable judgment or order when the aggrieved party has filed a valid notice of intention to move for a new trial or a valid motion for reconsideration. (Cal. Rules of Court, rule 8.108(a) & (e).) With respect to a motion for reconsideration, the time for

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<sup>3</sup> She states erroneously these orders were entered on December 3, 2010.

<sup>4</sup> Orders granting or denying temporary support and attorney fees in the domestic partnership context are definitely appealable. (See *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 564.) As discussed *post*, the order after trial of the bifurcated separation date issue is not appealable absent trial court certification of the issue for immediate appeal, which Bialla failed to seek or obtain. (See Cal. Rules of Court, rule 5.180(b)(2).)

appealing is extended to the *earliest* of the following dates: (1) 30 days after service of notice of an order denying the reconsideration motion (March 13, 2011, in this case); (2) 90 days after the motion to reconsider is filed (March 2, 2011); or (3) 180 days after entry of the appealable order (May 21, 2011). (Cal. Rules of Court, rule 8.108(e).) Thus, the filing of Bialla’s motion for reconsideration only extended her time to appeal the underlying orders until the earliest of these dates—March 2, 2011. Her notice of appeal filed March 10, 2011 was therefore not timely under either rule 8.104 or rule 8.108(e).

Although a *valid* notice of intention to move for a new trial can extend the time for appeal,<sup>5</sup> Bialla’s notice in this case was not valid because it was filed on November 12, 2010, 10 days before any signed, written order was entered for either of the rulings challenged. Such a premature notice is ineffectual for any purpose, including extending the time to appeal under California Rules of Court, rule 8.108(b). (*Bryant v. Los Angeles Transit Lines* (1953) 116 Cal.App.2d 473, 474; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 588, p. 667.) In any event, rule 8.108(b) would only have extended Bialla’s time to appeal until the earliest of the three dates specified in the rule. In this case, that would be 30 days after expiration of the jurisdictional period for ruling on a motion for new trial. (Cal. Rules of Court, rule 8.108(b)(1)(B).) The trial court’s jurisdiction over the motion expired “60 days from and after service on the moving party . . . of written notice of the entry of the judgment . . . .” (Code Civ. Proc., § 660; *Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1486–1487.) The 60-day period expired on January 30, 2011, before the court heard the motion. Thus, even assuming for the sake of analysis that rule 8.108(b) of the California Rules of Court applied despite Bialla’s premature notice of intention to move for a new trial, her time to appeal from the underlying orders was only extended by rule 8.108(b) until 30 days after January 30, which was March 1, 2011. Her notice of appeal filed on March 10 was therefore

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<sup>5</sup> Under rule 8.108(b) of the California Rules of Court, a valid notice extends the time to appeal until the *earliest* of 30 days after service of the order denying the new trial motion, 30 days after denial of the motion by operation of law, or 180 days after entry of judgment.

untimely as to both underlying orders entered on November 22, 2010, even if the new trial motion was effective to extend the time to appeal from those orders.

California Rules of Court, rule 8.108(c) pertaining to motions to vacate also did not extend Bialla's time to appeal from the November 22 orders sufficiently to make her March 10, 2011 appeal timely as to those orders. Under rule 8.108(c), Bialla's time to appeal could only have been extended until March 2, which was 90 days after December 2, 2010, the date she filed her OSC for relief based on mistake from the November 22 orders.

To sum up the analysis to this point, if Bialla's appeal is construed to be from the denial of her motions for a new trial or for reconsideration, neither ruling is separately appealable. The denial of her OSC based on mistake or excusable neglect can be appealed to the extent it sought relief from an appealable final order. If Bialla's appeal is construed to be from either of the orders entered on November 22—the order determining the date of separation and the order denying temporary support and attorney fees—the appeal was untimely. The only appealability question remaining is whether either of the orders entered on November 22 was an appealable, final order, which would give this court jurisdiction over Bialla's appeal from the ensuing order denying her OSC seeking relief from the order under Code of Civil Procedure section 473, subdivision (b).

As mentioned earlier, the bifurcated issue of the date of separation was not appealable absent certification of the issue by the trial court. Family Code section 2025 provides in relevant part as follows: “[I]f the court has ordered an issue or issues bifurcated for separate trial or hearing in advance of the disposition of the entire case, a court of appeal *may* order an issue or issues transferred to it for hearing and decision *when the court that heard the issue or issues certifies that the appeal is appropriate*. Certification by the court shall be in accordance with rules promulgated by the Judicial Council.” (Italics added.) California Rules of Court, rule 5.180 provides a procedure for a party on timely noticed motion to obtain a certificate of probable cause that a final appellate ruling on a bifurcated issue is desirable and, if the motion is granted, a procedure for a motion to the Court of Appeal to proceed with an appeal of the bifurcated

issue. None of those procedures were followed in this case and, therefore, the November 22 order after trial on the date of separation issue was not appealable and the OSC seeking relief from it was also not appealable.<sup>6</sup>

As noted earlier, orders granting or denying temporary support and attorney fees are appealable. They come within the collateral order doctrine which allows for appeals of final orders on collateral matters that involve the payment of money. (See, e.g., *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368–369; *Askew v. Askew* (1994) 22 Cal.App.4th 942, 964, fn. 37.) Although Bialla’s purported appeal from the November 22 order denying support and attorney fees was untimely, as discussed *ante*, her appeal from the ensuing order denying her motion for relief from that order based on mistake or excusable neglect was not untimely. Family Code section 2025, pertaining to bifurcated issues, also has no bearing on the appealability of either the original November 22 order denying support and fees, or the ensuing order denying relief from it under Code of Civil Procedure section 473, subdivision (b). We therefore turn to the merits of Bialla’s appeal from the February 10 order denying her relief under section 473, subdivision (b) from the earlier order on support and fees.

Reviewing Bialla’s brief on appeal, the only contention that arguably addresses the trial court’s denial of her request for relief under Code of Civil Procedure section 473 from the order denying support and fees is her claim that before making any substantive decisions the court should have continued all proceedings to ascertain her competency to

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<sup>6</sup> All of the trial court’s rulings pertaining to the date of separation will be reviewable under Code of Civil Procedure sections 904.1 and 906 in an appeal from the entry of a final judgment in the dissolution action. Thus, in a proper appeal from a final judgment, the trial court’s rulings precluding Bialla from offering certain evidence, determining the date of separation was in January 2006, and denying her posttrial motion for a new trial, reconsideration, or relief based on mistake as to the date of separation order will all be reviewable. The court’s denial of Bialla’s motion for support and fees will not be reviewable in such an appeal because it was an appealable order from which no timely appeal was taken. Code of Civil Procedure section 906, which authorizes review of most intermediate rulings and rulings denying a new trial, does not “authorize the reviewing court to review any decision or order from which an appeal might have been taken.”

proceed in pro. per., citing *In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261 (*Christine C.*). In *Christine C.*, wife appealed from a judgment entered in a marital dissolution case after the court denied wife’s request for a continuance of the trial based on the Americans with Disabilities Act (ADA). (*Christine C.*, at p. 1264.) The request was accompanied by a declaration from wife’s treating psychiatrist that she was “ ‘in a totally depleted state emotionally’ ” and required hospitalization and relief from further legal stress for an indeterminate period not to exceed three months. (*Id.* at p. 1269.) After the court denied the request, wife—who was representing herself in pro. per.—checked herself into a psychiatric hospital and did not participate in the rest of the trial. (*Id.* at p. 1269.) The Court of Appeal reversed the ensuing judgment, finding the trial court erred in denying wife accommodation under the ADA because she had followed procedures required by the ADA and by applicable court rules, and it was undisputed she suffered from a disability, bipolar disorder, for which ADA accommodations were mandatory. (*Christine C.*, at pp. 1273–1277.)

In this case, there was no undisputed diagnosis of a mental or physical disability, and no proper request for accommodation. Bialla did not cite *Christine C.* or the ADA in her request for relief from the order denying support and fees. Moreover, in this case, Bialla herself filed the petition initiating the proceedings, as well as the OSC seeking support and attorney fees. It is difficult to see how she could successfully complain that mistake or excusable neglect caused by mental disability prevented her from obtaining the results she sought. Further, the record shows Bialla was capable of filing multiple ex parte applications and motions before and after the trial in this case, casting doubt on her claim of incapacitation. (See *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1128–1129 [fact attorney could get to the courthouse, prepare papers, and argue motions suggests he was not so incapacitated he could not file timely oppositions].) Bialla does not explain with particularity how the order denying her request for support and fees—based on her financial independence from Thomson since 2006 and the absence of significant property issues remaining to be adjudicated—came about *as a result of* mistake or excusable neglect on her part caused by her claimed disability. Bialla thus

fails to establish the trial court abused its discretion in denying her request for relief from the order denying support and fees. (See *Luri*, at p. 1128 [standard of review under Code Civ. Proc., § 473, subd. (b) is whether trial court abused its discretion].)

In sum, none of the trial court's rulings pertaining to the critical issue of the parties' date of separation is reviewable on this appeal. All of those issues—including the court's orders excluding Bialla's evidence, denying Bialla's request for the appointment of a guardian ad litem, determining the date of separation, and denying Bialla's posttrial motions for a new trial, reconsideration, and relief from mistake regarding the issue of date of separation— will be reviewable upon a timely appeal from the final judgment in the parties' dissolution action. With one exception, issues pertaining to the trial court's order denying Bialla's request for temporary support and attorney fees are no longer open for review because (1) Bialla failed to timely appeal from that order, (2) the subsequent orders denying her motions for a new trial and for reconsideration with respect to that order were nonappealable. As to the sole ruling encompassed by her notice of appeal over which we do have jurisdiction—the court's refusal to grant relief from its order on temporary support and attorney fees due to mistake or excusable neglect—we have reviewed and affirm that ruling here.

### **III. DISPOSITION**

The appeal is dismissed with respect to all orders other than the February 10, 2011 order denying relief under Code of Civil Procedure section 473, subdivision (b)

from the November 22, 2010 order on temporary support and attorney fees. The February 10, 2011 order is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.