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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of ERIK D. and JOY L.
JOHNSON.

ERIK D. JOHNSON,

Appellant,

v.

JOY L. JOHNSON,

Respondent.

A133279

(Alameda County
Super. Ct. No. RF09463371)

In this dissolution action, the trial court gave respondent Joy L. Johnson sole authority on a temporary basis to make all medical and educational decisions for the minor children of her and her former spouse, appellant Erik D. Johnson. On appeal, Erik contends that Joy's request to modify the joint custody order was not properly before the trial court, such that the court had no jurisdiction to enter the medical and educational order that it did. We affirm the order.

I. FACTS¹

Appellant Erik D. Johnson married respondent Joy L. Johnson in 1998. They had two children—a son born in 2002 and a daughter born in 2004. The family lived in Alameda County. In 2006, the couple separated and the following year, Erik petitioned

¹ The facts come from the record on appeal, including augmented transcripts of the September and November 2010 hearings.

for dissolution of the marriage in Contra Costa County. It appears that the marriage was dissolved in 2008. At all relevant times, the children attended school in Castro Valley, in Alameda County. In February 2009, Erik's life shifted to San Jose, where he moved to live with his girlfriend and her daughter.

A series of disputes arose between the parents about how best to provide for their children's legal, educational and therapeutic needs. In February 2009, Erik sought to transfer the family court proceedings to Santa Clara County, without success. Instead, in June 2009, those proceedings were transferred to Alameda County, where Joy lived. In an October 2009 custody order, the Alameda County court ordered that the parents share joint custody of the minors, set up a visitation schedule and ordered that the minors remain in their Castro Valley school for the 2009-2010 school year.

Erik and Joy's minor son had been seeing a therapist. Without Joy's consent, Erik brought the minor to a new therapist. A hearing was conducted on June 10, 2010,² about this dispute.

Erik repeatedly attempted to reenroll the minors in schools near his various homes, forcing Joy to obtain court orders precluding him from removing them from their Castro Valley school. Meanwhile, on June 24, Erik petitioned the court to allow the minor children to be transferred to a San Jose school near where he and his current wife live with their children. He also requested a modification of visitation arrangements, to extend his weekend visitation from Sunday night to Monday morning.

On July 9, Joy opposed both requests. Her response to Erik's motion was made on a form adopted for mandatory use by the Judicial Council. In it, she asked that the minors be allowed to remain in their Castro Valley school. Joy opposed Erik's request for a change of visitation but indicated that she would consent to an order giving her custody of the minors on school days. Joy also asked that she be given exclusive decisionmaking authority on health and education matters for both minors. This response was mailed to Erik's San Jose address on the same day it was filed.

² All subsequent dates refer to the 2010 calendar year unless otherwise indicated.

While those requests were pending, the trial court issued an order after its hearing on the therapeutic dispute. On June 29, the court ordered that the minor be returned to treatment with his former therapist and that visits to the new therapist be terminated. Erik was ordered to pay \$2,500 of Joy's attorney fees and \$2,500 as a sanction for violating prior court orders.³ (Fam. Code, § 271.) On July 15, he sought reconsideration of this order, which Joy opposed. (Code Civ. Proc.,⁴ § 1008, subd. (a).)

In late July, the trial court set a September date for the hearing on Erik's motion for reconsideration and ordered that a November 15 trial be conducted on custody, school enrollment, and other pending issues. In the interim, the trial court ordered that the minors be enrolled in the Castro Valley school for the fall 2010 semester and that the current child custody arrangement be maintained.

On September 9, after a hearing, Erik's motion for reconsideration was denied. Dates for an October status conference and the November 15 trial were ordered to be maintained. At the September hearing, Erik asserted that Joy had not moved for a change in custody. Joy's counsel countered that the mother had made a motion for a change of both physical and legal custody. The trial court understood that requests to change schools and for a change of custody were then pending. It expressed its expectation that the issue of custody would be tried on November 15.

A status conference was set for October 22 on the outstanding issues. Erik sought a continuance of the status conference, again opposed by Joy. On November 5, after a hearing on the motion for continuance, the motion was denied. The November 15 trial date was again ordered to be maintained. At that hearing, Erik again stated that the only motion before the trial court was the motion to change schools. He argued that he had never received any pleading indicating that a change of custody was at issue. The trial court opined that the school change request involved intertwined visitation and custody

³ In November, Erik filed a late notice of appeal from this order. We dismissed his purported appeal in August 2011. (*In re Marriage of Johnson* (Aug. 17, 2011, A130279) [nonpub. opn].)

⁴ All statutory references are to the Code of Civil Procedure unless otherwise indicated.

issues. It concluded that the custody issue was before it, and Joy's counsel explained that her July response to Erik's motion included this request. Both the mother's counsel and the trial court recalled that this issue had been discussed at an earlier hearing. The trial court agreed that the motion had been made. Rejecting Erik's claim of confusion, it noted that its July order had included custody among the issues to be resolved at the November trial.

At the close of the November 5 hearing, Erik—who had represented himself throughout most of the proceedings—expressed his intention to speak with counsel to address those custody issues. On November 10, Erik had obtained counsel, who sought a continuance of the November 15 trial date, on grounds that he was unprepared to go to trial. Joy opposed this request continuance, which was denied on November 12.

On November 15, Erik's counsel was present in court. Joy was ready for trial, but Erik failed to appear. The trial court explained to new counsel that Erik had a troubling pattern of repeatedly seeking continuances. It also expressed some concerns about Erik's credibility. It was not persuaded that Erik had good cause to be absent from the trial. Although the trial court believed it had discretion to proceed without Erik's presence, it continued the trial until November 29, because of the importance of the trial issue—custody and visitation. (§ 594, subd. (a).) The trial court ordered that the matter would be tried on that date, with or without Erik's presence. Erik was ordered to pay Joy's counsel \$4,270 in attorney fees for expenses resulting from the postponement. (§ 1024.)

At the November 15 hearing, Erik's counsel stated that he understood that the issue before the court was custody and visitation, although his client had an objection about that issue. Prompted by Erik's continued insistence that the custody issue was not properly before the trial court, on November 15, Joy filed an ex parte motion seeking to obtain sole legal and physical custody of the minor children. She requested an order shortening time and sought to consolidate this issue with those set for trial on November 29. The trial court did not believe this was necessary, but agreed to allow the filing and signed the order shortening time in order to resolve the issue. Erik's counsel waived objection to the order shortening time. On November 17, the trial court approved

the request to shorten time. Joy also sought to exclude some of Erik's trial exhibits on various grounds—hearsay, lack of foundation and lack of authenticity.

Trial was conducted on Erik's motion to change schools and Joy's request for sole legal and physical custody of the minors on November 29 and December 13. On April 11, 2011, the trial court filed its statement of decision on these issues. Expressing doubt about Erik's credibility, it denied his request to enroll the minors in a San Jose school. It also denied Joy's request for sole custody of the minors. Finding that Erik had made overt and intentional efforts to alienate the minors and to be uncooperative with her in his coparenting of them, the trial court gave Joy temporary authority to make final decisions on all educational and medical issues pertaining to the minors until further court order. It also ruled that if Erik failed to comply with the educational aspect of this order, it would award sole legal custody to Joy. Ten days later, Erik filed various objections to the statement of decision, including a renewed objection to the trial court's jurisdiction to hear a motion for modification of custody. For her part, Joy asked the trial court to enter an order consistent with its statement of decision. On July 20, 2011, the trial court overruled Erik's objections to its statement of decision.

II. PROCEDURE

On appeal, Erik contends that the trial court had no jurisdiction to enter its order and asks us to vacate any aspects of the order that do not pertain to his own request for a change of schools or visitation. He specifically objects to those aspects of the trial court order giving Joy final authority to make all educational and medical decisions, to enroll the minors in all school and extracurricular activities, and to select the minors' primary care physician, dentist and therapist. He argues—without supporting his claim of error with any legal authority—that the trial that was conducted deprived him of due process.

Erik was entitled to written notice of Joy's request for change of custody and visitation. (§ 1010.) He received this written notice twice. First, on the Judicial Council mandatory response form, Joy checked a box indicating "I do not consent to the [visitation] order requested but I consent to the following order" giving her custody of the minors on school days. A responding party may seek affirmative relief as an alternative

to that requested by a moving party by means of a responsive declaration. (Fam. Code, § 213, subd. (a); see *Brody v. Kroll* (1996) 45 Cal.App.4th 1732, 1735-1737 [allowing responsive motion that touches on broad scope of original motion].)

Erik had actual notice that this issue was in dispute by July 2010. After Erik's repeated objections that this motion was insufficient—objections that the trial court repeatedly rejected—Joy was permitted to file a second motion in November 2010, this one expressly stating that she sought sole legal and physical custody of the minors.⁵ By this time, Erik's counsel also had actual notice that this issue was in dispute. We are satisfied that the trial court had jurisdiction to consider the custody and visitation issues that Joy raised when it made its order giving her temporary authority to make all medical and educational decisions for the minors.

The order is affirmed.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.

⁵ Erik also objects that the request for modification of custody and visitation was not sent to mediation. (Fam. Code, § 3170, subd. (a).) The parties have participated in mediation earlier in this matter. The trial court has broad discretion to determine whether a case warrants further mediation services. (*In re Marriage of Green* (1989) 213 Cal.App.3d 14, 25.) We are satisfied that the trial court did not abuse its discretion by not referring this matter to mediation again.