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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of L.B. and R.U.

L.B.,
Respondent,
v.
R.U.,
Appellant.

A134080

(Contra Costa County
Super. Ct. No. MSD0005823)

INTRODUCTION

R.U. (Father) and L.B. (Mother), whose marriage was terminated in May 2001, are the parents of two minor children, both of whom were conceived using egg donors. One of the conditions of the judgment of dissolution to which both parties stipulated was Father could not inform the children of this fact during their minority. Father appeals from an order denying his motion for modification of this and other conditions relating to custody, asserting his due process rights were violated by the court's denial of his request for an evidentiary hearing. Father maintains the court erred in denying his motion to inform the children of their "biological mothers" and to enjoin Mother from "interfering"

with his attempt to obtain an Italian passport. We conclude the trial court did not err, and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Father and Mother were married in October 1992. Their “marital status was terminated” in May 2001. During their marriage, they had two children, R.U. (Daughter) and J.U. (Son).¹ Each child was conceived through the use of eggs donated by different women.

In September 2008, a stipulated judgment on reserved issues was entered following a trial. That judgment provided, inter alia and as relevant to this appeal, that Mother have sole legal custody and primary physical custody of both children. Mother was granted “sole authority to make health care and educational decisions concerning the minor children.” The mutual restraining orders entered in 2001 were to remain in “full force and effect.” The stipulated judgment provided for a detailed visitation, holiday and vacation schedule. It also specified each child’s extracurricular activities, and provided “[n]either parent shall sign up either child for any future extracurricular activities without the written consent of the other party,” and that Daughter “may remain” in cello. The judgment also provided “[Father] shall not inform the children during their minority of their donor egg status.”

On April 29, 2011, Father filed a motion for modification of child custody and visitation, in addition to other orders. He specifically sought “[m]yself and the children be allowed Italian passports,” the mutual restraining order be lifted, Daughter “be allowed to choose the instrument she plays and math club or other club participation, or at least not be forced into participation,” and that the “[c]hildren be told of their biological mothers.”

Father filed a declaration in support of his motion, in which he asserted Daughter “was forced to study cello from the age of six to present,” but has now “resumed violin” and is “much happier.” Father states “[s]till, [Mother] continues making her take cello

¹ We ordered this appeal be designated confidential, granting Mother’s request “to seal file and redesignate [the] appeal using [the] parties’ initials.”

lessons. This needs to stop. I'd like to ask that [Daughter] be allowed to cease cello lessons and that both parents need to agree in order to stop violin." Father also declared he "agreed to her joining the Math Club" but wants her to drop the math team.

Father also sought that "[b]oth children . . . be told of their biological mothers and be allowed to meet them and their families should they so desire." He declared "[Mother] has been living and perpetuating a lie about the children's origins. The children are both from egg donors. Originally, while we were still married, [Mother] and I agreed to wait until the kids were seven before telling them about their biological mothers, in order to avoid possible confusion on the parts of the children. [Mother's] own therapist indicated that the children could be told when they [were] seven. Later, when we separated, [Mother] asked the court-appointed mediator . . . to include in her report the recommendation that the children not be told that they came from donor eggs, but she did not indicate when they should be told. [¶] When we contracted with the biological mothers, both asked to be sent Christmas[] and birthday cards, which I did from the beginning; one of them [E.S.], also wanted somewhat more of a connection, asking to meet [Son] sometime in the future and perhaps introduce him to her family. [Mother] and I agreed at the time; however, once [Mother] had gotten what she wanted from [E.S.], she reneged on her contractual agreement. [¶] Since then, I have been in contact with both women directly and, in particular, to apologize to [E.S.] for [Mother's] behavior."

Father further declared he was granted Italian citizenship in December 2009. He thereafter sought an Italian passport for himself, but "[Mother], true to form, refused to agree to my obtaining a passport, arguing to the authorities that I may skip the country in order to avoid paying court-ordered child support. The Italian consulate bought off on that argument, so I was denied a passport." Accordingly, he seeks "[m]yself and the children be allowed Italian passports" because it would allow them to "get through customs as EU citizens much more quickly than we can now as foreigners" and "could be helpful to the kids when they become adults."

Mother filed a responsive declaration in which she disagreed with the changes to the stipulated judgment sought by Father with the exception that Daughter “shall be allowed to choose which instrument she plays and for which instrument she takes lessons.” She indicated Daughter was no longer participating on the math team, so Father’s request in that regard was moot. Attached to Mother’s declaration were letters from the children’s health care providers and therapists, who were unanimous in their opinions that the children not be told of their donor egg status at this time.²

Father then filed a supplemental declaration in which he stated, inter alia, the “donor families have resurfaced,” and declared he did not go on vacation with them, but admitted he “let them use my Tahoe house.” He stated Son’s egg donor “donated with the understanding that she would be given pictures and updates. [Mother] has not honored this agreement, nor allowed me to do so.”

The court scheduled a mediation for July 27, 2011, after which the mediator made written recommendations. The recommendations for a “parenting plan” included: “1. Neither parent should be permitted to obtain passports for the children allowing them to leave the United States except by mutual written parental agreement. [¶] 2. Holidays falling on a Monday shall extend that parent’s weekend by a 24 hour period. . . . [¶] Neither parent shall schedule activities for the children during the other parent’s scheduled parenting time without the other parent’s prior agreement [¶] 4. [Daughter] has expressed a desire for playing soccer and or volleyball as an extracurricul[ar] activity and this should be given a priority over but not necessarily in lieu of her participation on the math team. [¶] 5. Transfers/exchange of the children shall continue as currently arranged per court order.”

The mediator made a separate recommendation “for future procedures” as follows: “Parents shall select a court approved therapist and within 60 days work with this therapist to come up with a plan regarding informing the children of their egg donor status. This plan shall include the ‘timing and implementation’ (the when and how) to

² Father objected to the letters as hearsay.

inform the children regarding their egg donor status as well as how to best address related issues such as half-sibling, medical history, and to assist the parents on appropriately responding to questions the children may have as a result of being informed about their egg donor status.” In relation to the egg donor and passport issues, the mediator concluded: “Mother has good cause to be concern[ed] about Father obtaining Italian passports for the children as well as disclosure of the children’s egg donor status given the nature and history of conflict between the parents. This mediator is therefore not in favor of either at this time.”³

At the hearing on September 13, 2011, the court indicated it was “inclined at this moment to adopt the mediator’s recommendations for the parenting plan,” but not “the mediator’s recommendation for future procedures which recommended that . . . within 60 days the parents start coming up with a therapist to talk to the kids about their origins. I don’t think we even need to introduce that at this time. [¶] . . . [¶] . . . Because it does seem like it’s going to create more anxiety in this family, which doesn’t need any more stress and anxiety.” Following argument by counsel, the court adopted the mediator’s parenting plan recommendations, with some minor modifications. The court ordered the mutual restraining order be continued, and that exchanges of the children take place “curbside without contact by the parents.” The court ordered the parents could renew the children’s Unites States passports but not obtain “non-U.S. passports.” The court also denied Father’s request for an order that Mother “not interfere with [the] process” of Father obtaining an Italian passport, stating Father should “take that up with the Italian consulate” because it did not have “jurisdiction over the Italian passport for adults.”

At the conclusion of the hearing, after the court made its orders, Father indicated “he’d want a long cause on the mediator’s recommendations for future proceedings” regarding meeting with a therapist to plan for informing the children of their egg donor status. The court denied that request.

³ We note Father omitted this page of the mediator’s report from his appendix, and does not mention the mediator’s conclusion in his briefs.

DISCUSSION

Family Code Section 217⁴

Father asserts the trial court's denial of his request for a "long-cause hearing" regarding informing the children of their egg donor status violated section 217 and denied him his due process rights.

Section 217 provides in pertinent part: "At a hearing on any order to show cause or notice of motion pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties. [¶] (b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing. . . . [¶] (c) A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony. If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing." (§ 217.)

Father admits he did not comply with the requirements of section 217.⁵ He did not "file and serve a witness list with a brief description of the anticipated testimony." (§ 217, subd. (c).) He never identified what witnesses he sought to have testify.⁶ Nor did he request a continuance at the hearing. (§ 217, subd. (c).) Indeed, Father never sought a "long cause" hearing until after the trial court had made its ruling. Thus, Father forfeited

⁴ All further statutory references are to the Family Code unless otherwise indicated.

⁵ Father concedes the rules of court effective at the time of the hearing, "[former] Rule 5.119(b)(5) could have provided the basis for a denial of a right to a Section 217 hearing, as neither party filed witness lists in accordance with Rule 5.119(e)."

⁶ Father maintains "the record demonstrates a proffer of opinion evidence from third parties: [Mother] supplied hearsay letters from alleged 'medical professionals' in support of her position, and the mediator recommended that . . . the parties . . . develop a therapeutic plan." Father, however, did not "proffer" this evidence or seek live testimony, nor did he comply with the requirements of section 217.

his right to present live testimony.⁷ (See Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 8:264.) The court did not err in denying his belated request at the end of the hearing, after it had already made its ruling. And, because Father did not submit a witness list or comply with section 217, the court was not required, as Father claims, to state its reasons for denial of “live testimony.” (See former Cal. Rules of Court, rule 5.114(c), effective at the time of the hearing.) The trial court neither erred nor denied Father his due process rights.

Alleged Change in Circumstances Regarding Children’s Knowledge of Donor Egg Status

Father claims he “alleged a change in circumstances sufficient to justify modification of the [j]udgment.”⁸ He asserts two changes: the children are three years older than they were when the judgment was entered, and “the egg donors have surfaced and . . . there is a very real risk that [son’s] donor will reach out to him as she can when he turns 18. In fact, [Son] will be 18 on March 29, 2013.”

“ ‘The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test.’ [Citation.] Under this test, we must uphold the trial court ‘ruling if it is correct on any basis, regardless of whether such basis was actually invoked.’ ” (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255 (*Montenegro*)). A “ ‘showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting

⁷ Father asserts he “expressly requested an evidentiary hearing during the law and motion hearing,” citing the reporter’s transcript of the hearing at page 11, lines 5–7. Those lines read: “The Respondent: I can’t without the court’s help—without this Court’s help. [¶] The Court: I disagree.”

⁸ In his reply brief, Father asserts he demonstrated a change in circumstances but was not required to do so.

from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice’ [Citation.]” (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1449.)

In reviewing any order or judgment we also start with the presumption that the judgment or order is correct, and if the record is silent we indulge all reasonable inferences in support of the judgment or order. It is the appellant’s burden to demonstrate error, and provide adequate citation to the record, and to present reasoned argument with citation to supporting legal authorities. The failure to meet this burden may result in this court deeming the claimed error to have been waived, or the court may affirm because the presumption in favor of the judgment has not been rebutted. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556–557.)

There are two tests the family courts may apply to custody determinations: the best interests test and the changed circumstances test. (*Montenegro, supra*, 26 Cal.4th at p. 256.) The best interests test applies in initial and temporary custody determinations. (*Ibid.*) The changed circumstances test applies when a parent seeks “to modify a permanent custody order.” (*Ibid.*) It “does not apply to a modification request seeking a change in the parenting or visitation schedule.” (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1077.) The significant distinction is whether custody is at issue. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2012) ¶ 17:302.2, p. 17-73.) A modification request to “alter parenting time (or other incident of the joint custody order, such as the child’s schooling, that will not vary the allocation of ‘custody’ per se” is not subject to the changed circumstances test. (*Ibid.*) Instead, the family court considers the best interests of the child. (*In re Marriage of Lucio, supra*, 161 Cal.App.4th at p. 1080.)

Father fails to note that the judgment he seeks to modify does not prevent the children from being told they were conceived using donor eggs—it only prevents *Father* from so informing them while they are minors. The judgment gave Mother sole legal custody and primary physical custody of the children, and sole authority to make educational and medical decisions on their behalf. The judgment specifically forbade Father to “attend any meetings with medical professionals regarding the treatment of the

parties' children" and "any medical appointments except in the event of a medical emergency when the children are in his custody," as well as forbidding him to tell the children of their donor egg status. Thus, the changed circumstances Father alleges—the children are older, Son is almost 18 years old, and the egg donors have "resurfaced"—do not support Father's claim the judgment prohibiting him from informing the minors of their donor egg status should be modified. Nothing prevents Mother, who has sole authority to make educational and medical decisions on behalf of the minors, from informing the children they were conceived using egg donors.

Father made no showing why it was in the best interests of the children to eliminate the provision in the judgment prohibiting him from informing the minors about the egg donors. The court did not abuse its discretion err in denying Father's motion in this regard.

Father's Attempt to Obtain Italian Passport

Father sought an order that "[m]yself and the children be allowed Italian passports."⁹ The court indicated as to Father's passport request: "I think he has to take that up with the Italian consulate. I don't have jurisdiction over him getting a passport. [¶] . . . [¶] . . . I don't have jurisdiction over the Italian passport for adults. I can address kids, but that's it. So if you're having trouble with an Italian passport, I'm sorry, but it's not in my jurisdiction." Father maintains the court "did not properly exercise its discretion when it misconstrued [his] request for relief."

Father stated in his declaration "According to Italian law, if a divorced family has minor age children, then both parties need to agree before the citizen is issued a passport." Father filed a declaration to which was attached an e-mail from the Italian Consulate stating "This Consulate General in response to our official letter sent to [Mother] has received a detailed communication by [which] your ex wife denied her consent to issue your Italian passport. She explains that this decision is based on different reasons, supported on proceedings judicial; between them: a restraining order to

⁹ The court denied his motion as to the children's Italian passports, and Father does not raise this issue on appeal.

take the children out of the State of California and United States; [¶] the order to pay an annual sum for six years to partially reimburse [Mother]; [¶] the obligation to pay Child support and Educational support in U.S.A. [¶] In addition, she has concerned that you can try to go to Europe, or Italy with the children, and remain there, to avoid your financial responsibilities. [Mother] in that letter, also inform that you have filed a Court Motion against her. [¶] On light to above, this Consulate General can not presently issue your Italian passport, without an agreement between the parties and/or a final court decision.”

At the hearing, his counsel indicated “[Mother] keeps giving [the Italian Consulate] misstatements that keep [Father] from getting his passport. We ask that she not interfere with that process.”

Father does not now claim the court had jurisdiction to order that he “be allowed [an] Italian passport[,]” as he sought in his moving papers. Instead, he asserts he was “asking the trial court to enjoin [Mother] from interfering, which it had jurisdiction to do because of the mutual restraining orders in the Judgment that the court declined to vacate.”

At the outset, we note Father sought to vacate the mutual restraining order, not use it as a basis to prevent Mother from lawfully communicating with the Italian Consulate. Moreover, Father cites to no language in the mutual restraining order that has any application to what he now seeks. Indeed, he does not include it as part of the record on appeal.

Father acknowledged in his declaration Italian law requires Mother to agree to his obtaining an Italian passport while the children are still minors. The e-mail from the Italian Consulate attached to his declaration indicates Mother only contacted the Consulate in response to its letter to her. The Italian Consulate has already made its decision to deny the passport application. Father’s recourse, if any, is with the Italian Consulate.

DISPOSITION

The order is affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.