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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of EVE and JAMES K.  
MORGAN.

EVE MORGAN,

Respondent,

v.

JAMES K. MORGAN,

Appellant.

D058449

(Super. Ct. No. EFL09786)

APPEAL from a judgment of the Superior Court of Imperial County, Poli Flores, Judge. Reversed and remanded.

The appellant in this case was at all material times incarcerated at a state prison. Relying on facts which do not appear in the record on appeal, he argues prison officials unlawfully deprived of him of the ability to appear for trial in the marital separation proceeding which gives rise to his appeal. Accordingly, he contends the judgment of

separation, including the trial court's determination of the date of separation, should be reversed.

Because appellant relies on matters outside the record, on appeal we treat his appeal as a petition for a writ of error *coram vobis* and reverse the trial court's judgment with directions it conduct a new trial at which appellant has an opportunity to appear by telephone.

### FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

Respondent Eve Morgan (Eve) and appellant James K. Morgan (James) were married on May 23, 1992. In her petition for a legal separation from James, Eve alleged the parties separated on January 27, 1993. James responded to Eve's petition and in his response alleged the parties separated in October 2009.

At all material times below, James was incarcerated at the Centinela State Prison and acting in propria persona. Prior to trial on the issue of the date of separation, James applied for and was granted permission to appear by telephone.

Trial was held on August 19, 2010. However, James did not appear by telephone or otherwise. The trial court proceeded without any appearance by him, determined the parties separated on January 27, 1993, and granted Eve legal separation from James.

On August 31, 2010, James sent the trial court a letter in which he stated that very shortly before trial, prison officials told him that, notwithstanding the trial court's order

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<sup>1</sup> We have augmented the record with the superior court file. (Rule 8.155(a), Cal. Rules of Court.)

permitting him to appear by telephone, he could not place a telephone call to the court because he did not have the required \$65 in his prison trust account. Thereafter, a notice of judgment was served and filed and James filed a timely notice of appeal.

On appeal James argues the trial court's determination of the date of separation and judgment of separation must be reversed because he was not given an adequate opportunity to appear and participate at trial. Because James relies on circumstances which do not appear in the record on appeal, we elected to treat his appeal as a petition for a writ of *coram vobis* and gave Eve an opportunity to brief us on the availability of *coram vobis* relief in the circumstances presented here.

## DISCUSSION

### I

Although rare, the writs of *coram vobis* and *coram nobis*<sup>2</sup> are available where error does not appear in the record, no other remedy is available and the issue raised is not one which was previously decided on the merits by the trial court. (*Betz v. Pankow, supra*, 16 Cal.App.4th at p. 941; *Los Angeles Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 9; see also *People v. Shipman* (1965) 62 Cal.2d 226, 230.) The writs issue in those unusual instances where a litigant has been deprived of " 'a fair adversary

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<sup>2</sup> The writ of *coram vobis* lies in an appellate court and permits it to direct relief from a trial court order or judgment; the writ of *coram nobis* lies in a trial court and permits it to vacate its own judgments and orders. (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 941, fn. 5.)

proceeding in which fully to present their case.' " (*Mullen v. Department of Real Estate* (1988) 204 Cal.App.3d 295, 301.)

Although the writs have been issued most commonly where a litigant's ability to fully participate in proceedings has been hampered by extrinsic fraud, we believe where, as here, a prisoner litigant's ability to participate is entirely out of his control, the writ should also be available as a means of remedying obstacles to participation in proceedings in which the prisoner is a party. This conclusion grows out of the principle that "[a]n indigent prisoner who is a defendant in a bona fide civil action threatening his or her personal or property interests has a federal and state constitutional right, as a matter of due process and equal protection, of meaningful access to the courts in order to present a defense. [Citations.] . . . . A prisoner may not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a bona fide civil action threatening his or her personal or property interests." (*Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792, fn. omitted.)

## II

The record here fully supports James's request for relief from the judgment. His inability to appear at trial of the date of separation issue does not appear in the record on appeal, at this stage of the proceedings there is no other remedy available to him, and the trial court did not make any determination with respect to the reasons he was not able to appear. It is noteworthy that, although given an opportunity, Eve has not contested James's contention that prison officials would not permit him to telephone the court on

the day set for trial. The prison official's decision effectively denied James of his right to meaningfully participate in the trial.

Because through no apparent fault of his own James was denied an opportunity to participate at trial, the trial court's judgment must be reversed. In a very similar situation where we were required to reverse a civil judgment entered against an indigent prisoner, we directed that on remand the trial court *ensure* the prisoner was provided meaningful access and stated: "While the trial court may exercise its discretion in determining the appropriate manner by which such access is provided, the trial court must make sure that whatever method is utilized actually provides meaningful access. For example, to the extent that the trial court elects to rely on telephonic hearings to provide such access, the court may wish to communicate itself, telephonically and/or by letter, with prison personnel to determine what logistical arrangements are necessary to enable [the prisoner] to appear telephonically, and ensure that both court staff and prison personnel make those arrangements." (*Jameson v. Desta* (2009) 179 Cal.App.4th 672, 684, fn. omitted.) We reiterate the directions we provided in *Jameson v. Desta* here: on remand the trial court bears the responsibility of ensuring that James has a meaningful opportunity to participate in the trial court's proceedings and in discharging that responsibility the trial court may wish to communicate with prison officials so that it can ensure that any arrangements which are necessary to facilitate his participation take place.

DISPOSITION

The judgment is reversed and remanded for proceedings consistent with our directions.

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BENKE, Acting P. J.

WE CONCUR:

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HUFFMAN, J.

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AARON, J.