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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re Marriage of PATRICK and TRESSA LOWE

PATRICK LOWE,

Respondent,

v.

TRESSA LOWE,

Respondent;

BRYAN LEE STETSON,

Appellant.

F067926

(Super. Ct. No. FL-613376)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. James Compton,
Judge.

Bryan Lee Stetson, in pro. per., for Appellant.

No appearance by Respondents.

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* Before Levy, Acting P.J., Kane, J., and Franson, J.

Appellant Bryan Lee Stetson (Bryan) is the natural father of a girl born in October 2006 (Daughter). He filed a motion for joinder in a marriage dissolution proceeding between Daughter's mother and her stepfather, claiming he had the requisite interest in that proceeding because it involved the custody of Daughter.

The trial court denied the motion for joinder and Bryan appealed. Neither Daughter's mother nor her stepfather have contested the appeal or otherwise appeared before this court.

We conclude Bryan has demonstrated he claims an interest relating to a subject of the dissolution proceeding and is so situated that, in his absence, a disposition regarding the custody of his natural child might impair his ability to protect his interest as a father. Consequently, Bryan has established that his joinder in the proceeding was mandatory pursuant to Code of Civil Procedure section 389.¹

We therefore reverse the order denying his motion for joinder.

FACTS AND PROCEEDINGS

Parties

Bryan is an inmate confined in the State of Washington's prison system. The record contains a document showing his "earned release date" is August 17, 2019. Bryan and Tressa Geiger² were never married, but are the natural parents of Daughter, whose surname is Stetson.

In August 2008, Patrick Lowe and Tressa married. Their only child, a son, was born in April 2009.

¹ All further statutory references are to the Code of Civil Procedures unless indicated otherwise.

² Tressa has also been known as Tressa Hawkins and, during her marriage to Patrick Lowe, as Tressa Lowe. In January 2013, the superior court in the marriage dissolution proceeding restored her former name, Geiger.

In April 2010, Patrick Lowe and Tressa separated and he filed a petition for dissolution of marriage. The day after the petition was filed, the trial court ordered both sides to submit to a urine drug test.

This opinion will not recount all the allegations of misbehavior on the part of Tressa and Patrick Lowe, but provides the following two paragraphs as examples.

In September 2010, Tressa filed a request for an order directing Patrick Lowe to enroll in an anger management course, to stay away from her, and to avoid direct or indirect contact with her. The request stated that Patrick Lowe had struck her twice with an open hand and punched her once in the face. Tressa attached photographs to show her bruises and black eye. The trial court granted a temporary restraining order against Patrick Lowe.

In a July 2012 declaration, Patrick Lowe asserted that Tressa had a history of violence against him and, more recently, had been coming to his residence highly intoxicated and arguing with him. The declaration described an incident in which Tressa came to his residence intoxicated, physically attacked a woman inside the house, threatened to attack the wife of Patrick Lowe's boss when the wife appeared outside the house, and tried to take custody of Daughter. A sheriff's deputy arrived at the scene and arrested Tressa.

On July 26, 2012, the trial court entered a temporary order stating Patrick would have temporary custody of Daughter pending further court order.

Bryan learned of the temporary custody order after attempting to file papers in *Hawkins v. Stetson*, Kern County Superior Court case No. S-1501-FL-597644, a case in which he was a party and involved the custody of Daughter.

On August 31, 2012, the trial court modified its temporary custody order by entering an order granting Patrick Lowe and Tressa joint custody of Daughter and directing them not to consume alcohol during their custodial period or during the 12

hours preceding a custodial period. Bryan attempted to file an objection to this order, but the clerk refused to file it.

In November 2012, a family law facilitator with the superior court sent Bryan a memorandum (1) telling him that intervention in the dissolution case was probably the best way to go and (2) enclosing an ex parte application to intervene as parent and a fee waiver packet with special instructions for incarcerated persons. Bryan completed and submitted the documents.

The clerk of the superior court returned Bryan's ex parte application to intervene with a December 20, 2012, cover letter stating the application was not eligible for filing. The reason given stated: "PER JUDGE A JOINDER NEEDS TO BE FILED."

A family law facilitator (1) sent Bryan a December 26, 2012, memorandum stating a joinder needed to be filed and (2) providing him with a notice of motion and declaration for joinder and a notice of nonappearance. Bryan was advised to sign and date the documents and return them for further processing. The memorandum also stated, "Your fee waiver application is retained in our office for 90 days, a new fee waiver is needed thereafter."

Bryan signed the notice of motion and declaration for joinder,³ dated them January 3, 2013, and returned the documents to the family law facilitator. A January 29, 2013, memorandum from the family law facilitator acknowledged receipt of the joinder and stated the family law clerk returned the documents for filing fees. The memorandum also stated:

³ The notice of motion and declaration of joinder were on Judicial Council form FL-371 (rev. Jan. 1, 2003). California Rules of Court, rule 5.24(d) states that form FL-371 must be used for all applications for joinder in a family law case, except those of an employee pension benefit plan.

“Your fee waiver was returned to you when your documents were rejected on December 20, 2012. Please forward the fee waiver and required supporting documents to our office for processing with the Joinder. I have enclosed additional fee waiver plus instructions for your convenience.”

Bryan’s documents were resubmitted and filed. His ex parte application for telephonic appearance at the April 22, 2013, hearing on his joinder motion was denied on March 13, 2013. When that hearing was held, only Tressa’s counsel appeared. After the hearing, the trial court filed a minute order denying Bryan’s motion for joinder.

Bryan filed a notice of appeal dated June 21, 2013.

DISCUSSION

I. STANDARD OF REVIEW

Generally, a ruling on whether joinder of a person or entity is compulsory under section 389 is reviewed for an abuse of discretion. (*TG Oceanside, L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1366.) The abuse of discretion standard calls for varying levels of deference depending on the aspect of the trial court’s ruling under review. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.) Specifically, the trial court’s findings of fact will be upheld if supported by substantial evidence and its resolution of questions of law are subject to independent review. (*Id.* at pp. 711-712.)

III. COMPULSORY JOINDER UNDER SECTION 389

A. Statutory Text

Compulsory joinder is addressed in section 389, subdivision (a), which states a “person ... shall be joined as a party in the action if ... he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring ... inconsistent obligations”

This general statutory provision applies to family law proceedings. California Rules of Court, rule 5.24(a)(1) acknowledges that “[a]ll provisions of law relating to joinder of parties in civil actions generally apply to the joinder of a person as a party in a family law case”

B. Contentions

1. *Bryan’s Contentions*

Bryan contends, in effect, that “he claims an interest relating to the subject of the action” (§ 389, subd. (a)) because Daughter is his biological child and his parental rights have not been terminated. He asserts Daughter is subject to other child custody/child visitation orders that were not mentioned in the papers filed by Tressa and Patrick Lowe in the dissolution proceeding.

Bryan also claims that he is “so situated that the disposition of the action in his absence may ... as a practical matter impair or impede his ability to protect” his “interest” as Daughter’s natural father. (§ 389, subd. (a).) Bryan’s appellate brief implicitly recognizes that his status as an inmate in the Washington prison system renders him unable to take custody or physical control of Daughter and asserts his “interest” in having contact with his daughter.⁴

⁴ California Rules of Court, rule 5.24(c)(2) states a person who has or claims custody or physical control of any minor children subject to the action, or visitation rights with respect to such children, may apply to the court for an order joining himself as a party to the proceeding. Here, Bryan is claiming (at a minimum) visitation rights in the form of some type of contact with Daughter. It appears that visitation rights include contact that is not face to face, such as telephone calls. (See *Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1526 [visitation orders stated length of weekly supervised visits and number of telephone calls per week that the father and the mother could have with child in custody of grandparents].)

2. *Lack of Opposition*

Neither Patrick nor Tressa filed a respondent's brief to oppose Bryan's position that he should have been joined in the dissolution proceeding because that proceeding concerned the custody and control of Daughter. Thus, neither Patrick Lowe nor Tressa have argued joinder is inappropriate because (1) Bryan lacks the requisite interest in the proceeding or (2) the orders regarding the custody of Daughter would not impair his ability to protect his paternal interest in contact with Daughter. (See § 389, subd. (a).)

C. Analysis

The documents in the appellate record show that Daughter's surname is the same as Bryan's and that he is her natural father. The declaration Bryan provided with his motion for joinder states that his parental rights regarding Daughter have not been terminated.

Therefore, Bryan has established that "he *claims* an interest relating to the subject of the action" (§ 389, subd. (a), italics added) based on his paternal interest in contact with Daughter. Consequently, we conclude Bryan has established the first statutory element for compulsory joinder—that is, he has *claimed* an interest relating to a subject of the dissolution proceeding.

With respect to the second statutory element, the documents in the appellate record show that the custody orders in the dissolution proceeding between Patrick and Tressa would, as a practical matter, hinder his ability to protect his interest in contact with his Daughter because those orders do not address, one way or the other, whether Bryan may have contact with Daughter. Therefore, Bryan has established the second statutory element for compulsory joinder.

Because Bryan has established the two requisite statutory elements for compulsory joinder, it follows that he has demonstrated that joinder was mandatory. Accordingly, his motion for joinder should have been granted. (See *Denham v. Superior Court* (1970) 2

Cal.3d 557, 564 [appellant challenging an order must affirmatively demonstrate prejudicial error].)

IV. OTHER ISSUES

A. Claims of Error

Bryan has raised other issues in this appeal that involve alleged denials or violations of his right to due process of law. These issues primarily concern his right to access to the court proceeding that addressed the control and custody of Daughter.

The first issue Bryan set forth in his opening appellate brief is whether the failure of Patrick Lowe, Tressa and the trial court to comply with the notice requirements in Family Code sections 3408 (notice to person outside California) and 3425 (notice before child custody determination) denied his right to due process of law.

The second issue Bryan raised is whether the trial court's denial of his application to appear telephonically at the April hearing on his motion for joinder constituted an abuse of discretion or a denial of his rights to free speech and due process.

The third issue Bryan raised is whether the trial court violated the requirements in Family Code section 3048 that states every custody order shall contain the basis for the court's exercise of jurisdiction and the manner in which notice and opportunity to be heard were given. (Fam. Code, § 3048, subd. (a)(1), (2).)

The fourth issue Bryan raised in this appeal is whether the trial court violated his due process right to access to the courts when it failed to file his application to intervene as a parent.

We do not address the foregoing issues in detail because they have been rendered moot by our conclusion that Bryan's motion for joinder should have been granted.

B. Relief Sought

Bryan's opening appellate brief requested the case be remanded to the trial court and he be provided with an opportunity to be heard. We will direct the trial court to grant

Bryan's motion for joinder, which will make him a party to the proceedings, and allow him (if he chooses) to pursue a request to modify the order regarding the custody and visitation of Daughter that is in effect at the time of his request.

Bryan also requested that our remand order state that he can have contact with Daughter. The determination whether to allow Bryan contact with Daughter and what that contact would entail should be made by the trial court in the first instance after (1) Bryan has presented the specifics of any proposed modification and (2) Patrick Lowe and Tressa have had an opportunity to respond to that proposed modification. Therefore, we deny (without prejudice) Bryan's request that the trial court be directed to enter an order granting him contact with Daughter.

DISPOSITION

The April 22, 2013, order denying appellant's motion for joinder is reversed and the superior court is directed to (1) vacate that order and enter a new order granting appellant's joinder in this proceeding and (2) allow appellant standing to pursue a modification of the order specifying the terms of custody and visitation applicable to his daughter.

Because the appeal was unopposed, appellant shall bear his own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3) & (5).)