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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of RONALD H. and
LILLIAN S. DULAC.

RONALD H. DULAC,

Appellant,

v.

LILLIAN S. DULAC,

Respondent.

G047574

(Super. Ct. No. 10D000638)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Ronald P. Kreber, Judge. Affirmed.

Merritt McKeon for Appellant.

Law Offices of Shields & Kowalski and Susan L. Kowalski for Respondent.

* * *

Ronald Dulac appeals from a restraining order obtained by Lillian Dulac, with whom he is going through divorce proceedings. He presents no argument that the order is not supported by substantial evidence.¹ Rather, Ronald's appeal centers on the fact the trial judge who made the order had also, about four months earlier, heard a restraining order request made by his adult son Rokyt, but heard it without notice to Ronald. Even though Rokyt's request was denied, Ronald argues failure to notify him constituted a denial of due process that permeated the subsequent hearing.

At root, Ronald's appeal is predicated on the assumption the trial judge should have sua sponte recused himself from hearing *Lillian's* request for a restraining order, having already been exposed to Rokyt's evidence without notice to Ronald. We disagree. None of the statutory grounds to disqualify a judge are present (see Code Civ. Proc., § 170.1)² and the facts of this case don't come anywhere near showing the probability of actual bias that is the constitutional standard for due process disqualification of a judge as enunciated by our Supreme Court in *People v. Freeman* (2010) 47 Cal.4th 993.

I. FACTS

Ronald filed a petition for dissolution of his marriage to Lillian in January 2010. The couple had four children, one of whom, Rokyt, was already 18. Apparently Ronald took no action to press the case forward, so Lillian did not file her response to Ronald's petition until late November 2011, about 22 months later.

As the dissolution case got going in 2012, both Lillian and Rokyt filed two separate requests for domestic violence restraining orders, using the standard "DV-100 Request for Order" form. Lillian filed her request on April 12, 2012, based on an event

¹ As is often the case in domestic cases, we refer to the parties by their first names. No disrespect is intended; it is just the only way to avoid confusion when the parties share a last name. We refer to Lillian as Lillian "Dulac" as distinct from Lillian "Sikanovski" because Dulac is the name she used in her initial filing in this case, her formal response to Ronald's dissolution petition.

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

two days previously, on April 10. Lillian claimed Ronald “came at me in a threatening manner calling me names” in the process of removing (and allegedly in some cases causing damage to) various items of what Lillian asserted were community property. Lillian’s request also cited a similar event on February 4, 2012, in which Ronald was alleged to have acted in a threatening manner during another effort to remove property.³ Lillian’s DV-100 request, however, was continued a number of times and was not actually heard until August 28, 2012.

Meanwhile, on April 11, 2012, Rokyt filed his own DV-100 request for a domestic violence restraining order. Like Lillian’s request, Rokyt’s request grew out of events on April 10, 2012. Rokyt also used the same case number as the general dissolution case, Orange County Superior Court number 10D000638. According to Rokyt, Ronald attempted to have a certain Mazda automobile, which Rokyt claimed Ronald had given him without restriction, towed away.

A restraining order, form DV-110, was issued in conjunction with Rokyt’s request, which on its face ordered Ronald to stay at least 100 yards away from Rokyt, including Rokyt’s residence in Fountain Valley (where also Lillian and the other three children lived). Most importantly for Rokyt, the DV-110 order gave him temporary exclusive possession of the Mazda pending a hearing on his request, scheduled for May 4, 2012.

Rokyt, however, was never able to serve Ronald with the restraining order. A declaration of diligence was prepared on April 20, showing that a particular sheriff’s deputy had tried to serve the orders on Ronald at an address in Huntington Beach on April 16, 17 and 19, but had been unsuccessful.⁴

³ We deliberately avoid characterizing the property, as that is a matter for the trial court in the determination of the division of marital property, a task that apparently still lies ahead.

⁴ The declaration of diligence bears no file stamp, but, since our record is a clerk’s transcript, we may presume it found its way into the trial court file sometime before the scheduled hearing on May 4, 2012.

Rokyt's matter came up on May 4, 2012, as scheduled. Ronald, the appellant in the matter before us now, has not supplied a reporter's transcript of the hearing. The minute order, however, reflects that the trial court began the morning under the misapprehension that Ronald had been served, since around 9 a.m. the court trailed the matter "waiting for the Responding Party to make an appearance." Then, an hour later, Rokyt informed the court "he was unable to properly effectuate service on the Responding Party." The minute order states that on "further examination" of Rokyt, the court "determined that the Moving Party did not in fact serve the Responding Party for today's hearing." Nevertheless, Rokyt was sworn and testified. After the testimony the court found there was "insufficient evidence to substantiate by a preponderance of the evidence that domestic violence has occurred." The judge further noted "this appears to be a civil dispute." Accordingly, Rokyt's requested domestic violence restraining order was denied.

Lillian's request for a domestic violence restraining order, however, remained pending, and was finally heard in a two-day hearing, held on August 28 and 30. At the beginning of the hearing Ronald gave his trial counsel a copy of the May 4, 2012 minute order we have just quoted. The judge soon noted Rokyt's matter was "no longer before the court." The hearing then commenced and the court heard testimony from Lillian, Ronald, and a real estate agent. The trial judge found Lillian to be credible and found Ronald had, at the very least, approached her on April 10 in a non-friendly manner using abusive language. The trial judge granted Lillian's request, and directed that Ronald attend an anger management program, then a parenting class. From that order Ronald timely filed this appeal.⁵

⁵ As explained in *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, a request under the Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.) is essentially its own cause of action. (*Id.* at p. 335.) This appeal thus presents a separate collateral matter apart from the main dissolution action, and so does not run into any procedural bar posed by the one final judgment rule.

II. DISCUSSION

Preliminarily, we note that California sets out, in section 170.1, a fairly lengthy list of reasons requiring the disqualification of a judge. Interestingly enough, none of those reasons include previously hearing a matter involving one of the litigants in which that litigant did not receive notice. However, even if the statute did include such a hearing as a reason for disqualification, it is well established that a litigant can waive section 170.1 and still allow a judge to hear a matter. (See *In re Christian J.* (1984) 155 Cal.App.3d 276, 280 [“the right to urge the disqualification of a judge for most causes” under section 170.1 “may be waived by the parties”].) Failing to promptly raise a ground for disqualification under section 170.1 will constitute such a waiver. (*In re Steven O.* (1991) 229 Cal.App.3d 46, 54 [“It is also clear that one manner in which a party may waive a judge’s disqualification is by failing to raise the issue promptly.”]; see § 170.3, subd. (c)(1) [requirement statement of reason for disqualification must be “presented at the earliest practical opportunity after discovery of facts constituting the disqualification”].) Ronald did not raise any issue involving Rokyt’s May 4 hearing when Lillian’s case began on August 28, and it is clear he was aware of the May 4 hearing at the time, so we may safely conclude Ronald waived all *statutory* grounds for disqualification of the trial judge.

That leaves, as Ronald’s appeal is indeed framed before us, an appeal to unadorned due process. The topic of when due process requires recusal of a judge was well covered by our Supreme Court about four years ago in *Freeman*. The *Freeman* decision arose out of a situation in which an attorney was being prosecuted for soliciting one of her clients to kidnap her daughter from the daughter’s foster parents. It was also alleged, among other things, that she had burglarized the foster parent’s home and chased the foster parents on the freeway. (*Freeman, supra*, 47 Cal.4th at pp. 996-997.) The case

came before a judge in a *Marsden* hearing⁶ where the next order of business was the setting of bail, and the attorney told that judge there were rumors she'd been stalking the dependency court judge who had removed her daughter in the first place. (*Id.* at p. 997.) The judge at the *Marsden* hearing then disclosed on the record that he was a friend of the dependency court judge, and decided to recuse himself from hearing the bail issue. (*Ibid.*) The case was then assigned to a series of several judges, and finally came back to the first judge by the day of trial, when the defendant's attorney flat out told the first judge she thought he was biased, and shouldn't hear the case at all. (*Id.* at p. 999.) The defendant attorney was subsequently convicted, but the Court of Appeal reversed the conviction on the ground her due process rights were violated by the first judge's failure to disqualify himself when the case returned to him. (*Ibid.*) The Supreme Court, however, reversed the Court of Appeal's judgment, concluding the appropriate test for due process disqualification was whether the circumstances, objectively considered, were sufficiently extreme (and the word appears numerous times in the opinion⁷) to constitute a risk of actual bias or prejudgment. Perhaps the best summary of the high court's rationale can be found in this sentence: "The Court of Appeal held that the circumstances of this case required the trial judge to recuse himself and his failure to do so violated defendant Marilyn Kaye Freeman's due process rights. We conclude, however, in light of *Caperton* [*supra*, 556 U.S. 868], that this case does not present the 'extreme facts' that require judicial disqualification on due process grounds." (*Freeman, supra*, 47 Cal.4th at p. 996.)

The facts in the case before us now are much less extreme than even those in *Freeman*. There is absolutely nothing to indicate this trial judge had any sort of stake

⁶ After *People v. Marsden* (1970) 2 Cal.3d 118, involving the right of a defendant in a criminal matter to replace court-appointed counsel.

⁷ The number includes numerous quotations from *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, the case from which the *Freeman* court largely drew its analysis. (See *Freeman, supra*, 47 Cal.4th at pp. 1001-1006.)

– even a small emotional investment – in the outcome of Lillian’s request. Objectively, the trial judge was sufficiently unimpressed with the strength of Rokyt’s May 4 evidence that he denied Rokyt’s request, a fact that suggests Ronald simply made a tactical decision to wait and see how the trial judge ruled in Lillian’s case before making an issue of the earlier hearing. After all, this judge had once ruled in his favor concerning at least part of the events of April 10; that might have led Ronald to conclude he would do so again.

There is also nothing in the record to indicate any kind of *bias or prejudice* on the trial judge’s part. He simply heard evidence concerning a young man’s request that he have exclusive possession of an automobile that might have been his, or his father’s – that’s still to be decided – and ruled in favor of the appellant.

In short there is no suggestion of bias *against* appellant and no suggestion appellant made a timely objection.

III. DISPOSITION

The order is affirmed. Respondent Lillian shall recover her costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.