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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ROBERT BROGLIA, Plaintiff and Appellant, v. AMY BRENNER, Defendant and Respondent.	2d Civil No. B227927 (Super. Ct. No. SD040405) (Ventura County)

Robert Broglia appeals from orders (1) denying his request for appointment of counsel, (2) denying his request to be transported from prison to personally appear for a court ordered mediation and for a hearing on his request for child visitation, and (3) an order granting child custody to Amy Brenner and denying his requests for visitation and contact. We conclude that Broglia was denied meaningful access to the court for a hearing in which his fundamental right to have contact with his child was threatened. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Broglia and Brenner conceived a child just before Broglia was arrested, convicted of burglary, and sentenced to prison for 34 years to life as a third strike offender. Brenner acknowledges that Broglia is the father of the child. From 1998 until 2005, Brenner and the child visited Broglia in prison. They stopped visiting Broglia in 2005.

In April 2010, Broglia filed a petition for an order establishing a parental relationship. He requested visitation and unrestricted contact with the child by telephone and mail. He asked the court to grant sole physical and legal custody to Brenner.

Brenner opposed Broglia's request for visitation and contact. She declared that prison visits upset the child and that the child is afraid of Broglia. Brenner declared the child never bonded with Broglia and cried when they visited him. She declared Broglia is a member of the "Nazi Low Riders" prison gang and threatened her at their last visit.

In response, Broglia declared that the child never cried during a visit. He declared the child is not afraid of him or the prison environment, that the child visited him there every weekend for seven years and knows and loves him as a father. He asserted that prison visitation records verify more than 400 visits. He did not submit copies of those records to the court. He declared he never threatened Brenner or the child, that he has no record of prison discipline or anger management problems, and that he is not a member of a prison gang. He declared that Brenner stopped visiting because she found a new romantic partner.

Broglia asked the court for an order that he be transported from Kern Valley State Prison to attend a court ordered mediation and a custody and visitation hearing, each of which was set for August 26, 2010. The court denied the request on the ground that the "Court has no legal authority." The court vacated the August 26, 2010 mediation and continued the custody and visitation hearing to September 2, 2010.

The register of actions shows that in August Broglia filed a request for appointment of counsel and a declaration of indigency. The record does not include a copy of the request, but the court acknowledged the request on the record at the custody hearing.

At the September 2010 custody and visitation hearing, the court denied Broglia's request for visitation and contact. It granted judgment of paternity to Broglia and sole legal and physical custody to Brenner. The court found that "it is not in the best interest of the minor child to be required to visit a parent in prison." The court granted "[n]o visitation to [Broglia] until further order of the court."

The court denied Broglia's request to be transported from prison to court. It reasoned, "Under Penal Code Section 2625 [subdivisions] (b) and (d), the Court is only required to order a prisoner to be transported when he desires to be present in a proceeding to terminate parental rights under Family Code Section 7800 or Welfare [and] Institutions Code [section] 366.26. In any other action in which the prisoner's parental or marital rights are subject to adjudication it is within the Court's discretion to order any prisoner's production under [subdivision] (d) of Penal Code Section 2625. [¶] . . . The Court does not intend to exercise its discretion and order that Mr. Broglia appear or be transported to court for these proceedings. They are not proceedings under Family Code Section 7800 or Welfare [and] Institutions Code 366.26. Therefore, Mr. Broglia's motion is denied. And his motion to be transported here is denied. His motion for custody and visitation is denied."

DISCUSSION

The court must grant reasonable visitation to a parent unless it is shown that visitation would be detrimental to the child. (Fam. Code, § 3100, subd. (a).) Inmates retain the right to reasonable visitation with their children. (*Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 640.)

A prisoner does not generally have the right to be transported to personally appear in civil court. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 926-927.) A statutory exception to that rule exists, but it does not apply here because this was neither a proceeding to terminate Broglia's rights or to adjudicate the child a dependent. (Pen. Code, § 2625, subd. (b).) The trial court correctly concluded that its decision whether to order Broglia to be transported to court was discretionary. (§ 2625, subd. (e).)

But 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.) Here, Broglia's personal interest in parental visitation was threatened. A parent has a fundamental right to a relationship with their child, interference with which may only be justified by compelling necessity, such as abuse.

(*In re Smith* (1980) 112 Cal.App.3d 956, 968-969.) Any child visitation order must comport with due process. (*McLaughlin v. Superior Court* (1983) 140 Cal.App.3d 473, 483.)

Incarcerated parents must be granted reasonable means to be heard before a court renders a decision on child visitation. (*Hoversten v. Superior Court, supra,* 74 Cal.App.4th at pp. 641-642.) "[I]ndigent prisoners face obstacles that prevent their appearances in civil court proceedings. Such obstacles, however, should not deny access to prisoners who have informed the court of their desire for a hearing to determine visitation rights." (*Id.* at p. 642.)

Once the trial court became aware of Broglia's claim that he was an indigent prisoner, "it became incumbent upon it to take measures to assure he had some kind of access." (*Hoversten v. Superior Court, supra,* 74 Cal.App.4th at p. 642.) The court denied Broglia's request to be transported to court and his request for appointed counsel, but took no alternative measures to secure Broglia's access to the court-ordered mediation or to the visitation hearing at which it severed his right to any visitation or contact with his child.

Meaningful access to the courts by an indigent prisoner does not necessarily mandate a particular remedy. (*Payne v. Superior Court, supra,* 17 Cal.3d at p. 923.) Courts are encouraged to devise alternative means to allow meaningful access. (*Wantuch v. Davis, supra,* 32 Cal.App.4th at p. 792.) Remedies to secure access may include: (1) deferral of the action until the prisoner is released; (2) appointment of counsel for the prisoner; (3) transfer of the prisoner to court; (4) utilization of depositions in lieu of personal appearances; (5) holding of trial in prison; (6) conduct of pretrial proceedings by telephone; (7) propounding of written discovery; (8) use of closed circuit television or other modern electronic media; and (9) implementation of other innovative, imaginative procedures. (*Id.* at pp. 793-794.) An opportunity to participate in mediation may also provide access. (*Hoversten v. Superior Court, supra,* 74 Cal.App.4th at p. 643.) The prisoner does not have a right to a particular remedy. The right to appointed counsel arises when there is a bona fide threat to personal or property interests and no other

feasible alternative exists. (*Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 200-201; *Payne v. Superior Court, supra*, 17 Cal.3d at p. 924.)

"In determining the appropriate remedy to secure access, the trial court should consider the nature of the action, the potential effect on the prisoner's property, the necessity for the prisoner's presence, the prisoner's role in the action, the prisoner's literacy, intelligence and competence to represent himself or herself, the stage of the proceedings, the access of the prisoner to a law library and legal materials, the length of the sentence, the feasibility of transferring the prisoner to court and the cost and inconvenience to the prison and judicial systems." (*Wantuch v. Davis, supra*, 32 Cal.App.4th at p. 793.)

We take no position as to whether visitation or contact with Broglia is in the child's best interest. Our concern is that Broglia have the benefit of the court's determination whether other options would be feasible for him to have access to the court.

The dissent's prognostications could prove to be correct if the court determines that Broglia be accorded some type of access to a court hearing. It is at such a hearing that the court can resolve the parties' conflicting allegations.

DISPOSITION

The orders appealed from are reversed. The cause is remanded for further proceedings to determine whether or not some form of access to the court proceeding may be accorded Broglia. Each party is to bear their own costs.

NOT TO BE PUBLISHED.

GILBERT, P.J.

I concur:

PERREN, J.

Yegan, J. Dissenting

I respectfully dissent. I signed the opinion in *Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636) and I agree that it is good law. It serves the salutary purpose of providing avenues for the trial courts to ensure that all persons have "access" to the courts. Here the record does not adequately show that the trial court considered and rejected the various means to insure this access. Perhaps the trial court did so and just did not articulate its thought process. Error is never presumed and, on appeal, we should presume that the trial court did consider and then rejected other avenues for access. But, perhaps it did not. In any event, it is not appropriate to reverse in this case. No case has expressly held that failure to consider alternate forms of access to the trial court is "structural" error requiring per se reversal. The present appeal is subject to a harmless error analysis and here, any error is harmless.

Before an appellate court orders the trial court to take a trip, it should consider the possibility of arriving at a final destination. This does not "undercut" the holding of *Hoversten, supra*. It just requires some evidentiary showing of a possibility of success. Here, even if appellant is given some access to the trial court, I do not believe that he can arrive at his destination. Absent contempt proceedings (which, on this record, seems pretty far-fetched), there is no way that the trial court can, in reality, force mother to transport the minor to prison. Mother is the sole legal custodial parent and is given the right to parent her child as she sees fit. (E.g. *Troxel v. Granville* (2000) 530 U.S. 57, 65-66; [l47 L.Ed. 2d 49, 56-57; 120 S. Ct. 2054].) She has opined that it is dangerous to take her daughter to prison for such visits. The trial court has expressed agreement with this opinion.

It is unlikely that the trial court would allow a stranger or one of appellant’s "out of custody" associates in the "Nazi low rider’s" to provide transportation. If mother refuses to comply with a visitation order, the trial court would not change custody to appellant who is serving 34 years to life. In these circumstances, in my opinion, it is a waste of scarce resources to have the trial court revisit appellant’s request for access to

the trial court and for court-ordered visitation. Only in the most compelling of cases should there be forced visitation in the prison setting.

In *Hoversten* we said that a prisoner was "not required to demonstrate with certainty that a different result would occur on retrial. He need only show facts indicating a sufficiently meritorious claim to entitle him to a fair adversary hearing. (Citation)" (*Hoversten v. Superior Court supra*, 74 Cal..App.4th at p. 640). Appellant has made no such showing that prison visitation is in his daughter's best interests. Appellant has been incarcerated for the natural life of the minor and it seems obvious that there cannot be much of a bond based on previous prison visitations. There is no reason to believe that mother will contradict her declaration that appellant threatened her and that the minor does not want to visit appellant in prison. It is unlikely that a mediator would opine that such visits would be a good idea. What more can appellant say in addition to his written presentation even if given further access to the trial court? Even live-witness testimony where the trial court could judge the credibility of witness would not seem to help his case. Having been convicted of so many felonies, the trial court would, in all probability, view his testimony with distrust. (Evid. Code, § 788.)

Here it is apparent that the trial court has not credited appellant's factual claims and did credit those of the mother. Had it credited appellant's factual claims, the trial court would have exercised its discretion and ordered some type of access or some other method of proceeding. I understand that appellant loves his daughter and would like to visit with her. Perhaps, in the future, he can make a sufficient factual showing that prison visitation is in her best interests. The Court of Appeal will reverse a judgment upon an affirmative showing that there has been a miscarriage of justice. I cannot say that appellant has made this showing.

The judgment should be affirmed.

NOT FOR PUBLICATION

YEGAN, J.

Roger Lund, Judge

Superior Court County of Ventura

Robert Broglia, in pro. per., for Plaintiff and Appellant.

No appearance for Respondent.