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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

APARNA KHANOLKAR,

Respondent,

v.

JEFFREY ORR,

Appellant.

2d Civil No. B235425
(Super. Ct. No. 1301915)
(Santa Barbara County)

Jeffrey Orr appeals orders of the family law court denying his motion to modify child custody and visitation, and declaring him to be a vexatious litigant. (Fam. Code, §§ 3022, 3088; Code Civ. Proc., § 391 et seq.)

FACTUAL AND PROCEDURAL HISTORY

Orr and Aparna Khanolkar separated in March 2004 after a nearly seven-year marriage. The couple has two minor children and initially shared custody. In February 2007, following an incident of domestic violence, Khanolkar requested the San Diego County family law court to permit Orr only supervised visitation. In June 2007, the court granted the request; Khanolkar and the children thereafter moved to Santa Barbara.

On May 13, 2009, the Santa Barbara County family law court denied Orr's motion to modify custody and visitation. The court signed and filed its written order on August 4, 2009.

On November 25, 2009, Orr again filed a motion to modify child custody requesting joint custody of the children. He asserted that he did not present a risk of harm to the children and offered to participate in mediation, counseling, and custody and psychological evaluations.

At a January 13, 2010 hearing, the family law court "strongly suggested" that Orr undergo psychological testing due in part to his "strange" behavior and "conduct [that] bordered on stalking." The court determined that there was insufficient evidence of changed circumstances to modify custody and visitation orders, but continued the matter for later reconsideration.

Following the hearing, Orr participated in a psychological evaluation with Doctor Ronald Iverson. On May 27, 2010, the family law court ordered that Iverson's written evaluation be filed with the court and sealed as a confidential document. The court stated that the report "constitutes sufficient evidence of changed circumstances to begin the process of modification of custody and visitation orders to a more normal relationship."

On August 23, 2010, the family law court held a nine-hour evidentiary hearing. The court later filed a tentative decision denying Orr's motion. The family law judge stated that he "lack[ed] confidence" in Orr's ability to be an effective parent. The judge referred to Orr's unusual behavior of "waxing" his son's back and shaving his daughter's legs. The court concluded that it is in the best interests of the children that Khanolkar have sole legal custody and Orr have unsupervised visitation. It later adopted the tentative decision as a statement of decision and filed its written order on February 2, 2011.

Approximately two weeks later, Orr, through his attorney, filed a motion for reconsideration and requested a binding custody evaluation. On April 6, 2011, the

family law court denied the motion. Two days later, Orr filed a motion, in propria persona, seeking legal custody and shared physical custody of the children. On April 19, 2011, Orr filed yet another motion in propria persona seeking reconsideration of the February 2, 2011 order and binding custody evaluation. Khanolkar responded and requested that the court determine Orr to be a vexatious litigant pursuant to Code of Civil Procedure section 391, subdivision (b)(3). The court denied each of Orr's motions and on June 15, 2011, found him to be a vexatious litigant. The court also granted Khanolkar's request that Orr obtain permission of the court prior to filing further litigation in propria persona. (Code Civ. Proc., § 391.7, subd. (a) [court may enter "a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed"].)

Orr appeals and challenges the orders denying his motion to modify custody and declaring him to be a vexatious litigant subject to a prefiling order.

DISCUSSION

I.

Child custody and visitation orders are modifiable throughout the child's minority whenever the court finds a modification is "necessary or proper" in the child's best interests. (Fam. Code, § 3022.) The family law court has continuing jurisdiction and the matter remains pending even after entry of judgment of the underlying dissolution. (*Ibid.*) A party seeking to modify a permanent custody order may do so only upon a showing of a significant change of circumstances so affecting the child that modification is essential to the child's welfare. (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1088.)

Here Orr failed to meet his burden of establishing change of circumstances so affecting the children that modification was essential to their welfare. His motions were repetitive of earlier motions and failed to set forth new or changed information warranting a change of custody.

II.

The family law court found that Orr was a vexatious litigant pursuant to Code of Civil Procedure section 391. That section provides: "(b) 'Vexatious litigant' means a person who does any of the following: [¶] . . . [¶] (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."¹ Pursuant to section 391.7, subdivision (a), the court issued a prefiling order requiring Orr to obtain the permission of the presiding judge of any court in which he proposes to file any new litigation. For purposes of section 391.7, "litigation" includes "any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code." (§ 391.7, subd. (d).)

We review a determination that a party is a vexatious litigant under the abuse of discretion standard. (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 971.) Here Orr filed repeated motions for modification of child custody and visitation, without evidence of changed circumstances, within days of the court's denial of previous motions. The family law court properly found that Orr was seeking to relitigate the same issues and facts. This was a sufficient basis to declare him a vexatious litigant pursuant to section 391, subdivision (b)(3).

Moreover, section 391.7 does not deny Orr due process of law. (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 221-222.) "Section 391.7 does not deny the vexatious litigant access to the courts, but operates solely to preclude the initiation of meritless lawsuits and their attendant expenditures of time and costs. [Citation.] Vexatious litigant statutes are constitutional and do not deprive a litigant of due process of law." (*Ibid.*) Pursuant to section 391.7, the vexatious litigant has the right to seek the permission of the presiding judge or justice to file future litigation. (*In re R.H.* (2009) 170 Cal.App.4th 678, 704.)

¹ Further statutory references in II, *ante*, are to the Code of Civil Procedure.

III.

To the extent that Orr claims error in pre-June 15, 2011 rulings and orders, we do not consider his contentions. Those rulings and orders have long been final and may not now be contested.

The orders are affirmed. Khanolkar shall recover costs.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

James W. Brown, Judge

Superior Court County of Santa Barbara

Jeffrey Orr, in pro. per., for Appellant.

Aparna Khanolkar, in pro. per., for Respondent.