10/25/19 Marriage of Berkley CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of MICHAEL JAY and GABRIELLE JORDAN BERKLEY.	B290405 (Los Angeles County Super. Ct. No. BD344874)
MICHAEL JAY BERKLEY, Appellant, v. GABRIELLE JORDAN BERKLEY, Respondent.	

APPEAL from an order of the Superior Court of Los Angeles County, Bruce G. Iwasaki, Judge. Affirmed.

Kendall Gkikas & Mitchell, Kristina Kendall-Gkikas, for Appellant.

No appearance for Respondent.

Gabrielle Jordan Berkley (Gabrielle) petitioned in 2001 to dissolve her marriage to Michael Jay Berkley (Michael), the court entered Michael's default, and the court then entered a judgment of dissolution. Over a decade later, Michael asked the court to treat real property he conveyed to Gabrielle by grant deed—which was not litigated in the dissolution proceedings—as a community asset and divide the property's value equally between him and Gabrielle. The family court acknowledged it had jurisdiction to consider the omitted asset issue but found there was good cause, in the interests of justice, to decline to award Michael any portion of the value of the property. We consider whether the family court's ruling, which relied heavily but not exclusively on Michael's delay in seeking relief, constitutes an abuse of the court's discretion.

I. BACKGROUND

Gabrielle and Michael married in 1993 and had two children. In 1998, they acquired real estate in Altadena, California (the Property) that they leased to others to generate income. The deed stated title to the Property was taken by Michael and Gabrielle, "husband and wife as Joint Tenants."

Two years later, in July 2000, Michael and Gabrielle separated. She instituted marriage dissolution proceedings not long thereafter, but before she did so, Michael executed a grant deed conveying the Property to Gabrielle. According to Michael, he agreed to convey the Property to her because she told him she would not ask for any child or spousal support if he did so. In some contrast, the grant deed from Michael to Gabrielle bears the following attestation: "Conveyances Given For No Value [¶]

This is a bonafide gift and the grantor received nothing in return . . . ."

Gabrielle filed a form petition to dissolve the marriage in April 2001 based on irreconcilable differences. In the section of the petition requiring her to declare whether there were then-known community or quasi-community assets and debts, Gabrielle checked a box indicating "[t]here are no such assets or debts subject to disposition by the court in this proceeding."

Six months later, Gabrielle asked the family court to enter default in the case because her dissolution proceeding did not request money or property and there were no issues involving division of community property. Gabrielle and the court itself served on Michael her request for entry of default, and the court later entered the requested default.

Then, in May 2002, the family court entered a judgment of dissolution. The court ordered Gabrielle and Michael to share joint legal custody over their two children, with physical custody solely to Gabrielle. The court further ordered—pursuant to a stipulation between the parties—that Michael was to pay Gabrielle $1,000 per month in child support ($500 per month for each child). Nothing in the judgment made reference to the Property.

Three years later, in 2005, Gabrielle sold the Property to a third party for $385,000. Michael estimates Gabrielle used approximately $51,000 of the sale proceeds to pay off the existing mortgage on the Property.

In the years that followed, Michael fell behind on making the court-ordered child support payments. By his own admission, he was over $250,000 in arrears by 2017.

In August of that year, Michael filed a "Request for Order" in family court seeking a hearing on two related issues. First, Michael asked the court to determine his child support arrearages, explaining he had made some payments but had a large outstanding obligation and wanted the court to set a repayment plan that he could afford. Second, Michael asked the court to find the Property was an omitted community asset in the dissolution proceeding and to divide the 2005 sale price of the Property equally between him and Gabrielle by ordering her to make an equalization payment of $167,000 (half the sale price minus the existing mortgage payoff) "which can be credited against [his] child support obligation."[1]

The Los Angeles County Child Support Services Department (the Department) filed a responsive declaration to Michael's Request for Order.[2] The Department opposed Michael's request to offset his child support obligation with any equalization payment the court might order, citing case law that explains any debt Gabrielle might owe him could not be offset against child support arrears because child support is owed to the child, not the parent. The Department further maintained any issue regarding the determination of child support arrearages

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[1] This figure exceeds the principal portion of Michael's child support arrearages in 2017, as calculated by Michael.

[2] At the hearing later held by the court on Michael's Request for Order, the family court stated it had "reviewed the papers submitted by the parties." From this we infer Gabrielle also filed a responsive declaration, which Michael opted not to include in the record on appeal. As we shall explain, that was unwise.

should be referred to a child support commissioner and not heard in family court.

The family court held a hearing on Michael's Request for Order in early 2018. The court questioned why it should find the Property was an omitted asset and divide the sale proceeds equally between the former spouses in light of Michael's nearly two-decade delay in seeking relief. Michael's attorney acknowledged she "underst[oo]d the court's concern in terms of the delay here" but contended Family Code section 2556 "expressly allows the court at any time—and laches is not a bar—for [Michael] to come in and ask" the court to adjudicate an omitted asset.[3] In response to questions from the court, Michael's attorney confirmed it was her position that her client had transferred the Property to Gabrielle over a decade earlier—with all the liabilities that come with being the record owner of property—but still considered the Property a community asset for all that time and waited to litigate until 2017.

Gabrielle's attorney conceded the court had jurisdiction under Family Code section 2556 to adjudicate the allegedly

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[3] Family Code section 2556 provides: "In a proceeding for dissolution of marriage . . . the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability."

omitted asset (i.e., the Property). But her attorney emphasized the statute permitted the court to consider the interests of justice in deciding there should be an unequal division of the asset or liability. Gabrielle's attorney pointed to Michael's child support arrearages and the absence of a source from which Gabrielle could pay Michael any money as factors that counseled against ordering Gabrielle to pay Michael a portion of the Property sale proceeds.[4]

The family court ultimately agreed it could adjudicate the Property as an omitted asset but declined, for good cause and in the interests of justice, to divide the asset equally among the former spouses—or, indeed, to award Michael any portion of the value of the Property. The court specifically found an unequal division of the asset was warranted because Michael "waited really 17 years after he now contends he knew all along it was his community property to take any steps to enforce that, [and] it is not in the interests of justice for him to receive any funds from the sale of that property."[5]

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[4] In response to these points made by Gabrielle's attorney, the court stated, "I think that can be considered in the interests of justice."

[5] The court also found Michael's claim that there was a deal to convey the Property to Gabrielle in exchange for a commitment he would not have to pay child support to be "unsupported by evidence." And as to the request for a determination of child support arrears, the court denied that without prejudice and deferred the request to a child support commissioner.

II. DISCUSSION

The family court correctly determined the Property is an omitted community asset and did not abuse its discretion in concluding it should decline, in the interests of justice, to award Michael any portion of the value of the Property. Michael's contention to the contrary—most charitably understood, that the court cannot consider delay in seeking relief as part of the considerations relevant to the interests of justice—suffers from procedural and substantive defects.

Procedurally, Michael has not provided a complete record of the evidence that was before the trial court in making its interests of justice determination. Most notably absent, it seems, were the "papers" the record suggests Gabrielle filed in response to his Request for Order. By failing to present all the evidence that might support the family court's ruling, Michael cannot prevail in this appeal. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 ["Accordingly, if, as defendants here contend, 'some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error assigned is deemed to be waived'"].)

Substantively, and on the record presented, we are convinced Michael's arguments fail for two reasons. First, we do not read the record to indicate the family court relied on Michael's long delay in seeking relief as the sole reason for declining to make an equal division of the Property's value. The court was also convinced it could take into account Gabrielle's apparent lack of funds, over a decade later, to make a so-called equalization payment and her assumption for at least a short period of all the burdens of property ownership. Second,

although "there is no *statute of limitations* imposed by Family Code section 2556 on a former spouse who seeks adjudication of omitted or unadjudicated community property" (*In re Marriage of Huntley* (2017) 10 Cal.App.5th 1053, 1060, italics added), nothing in the text of the statute prevents a family court from considering a party's long delay in seeking relief as a factor relevant to whether an unequal division is warranted for good cause and in the interests of justice. If the Legislature had intended "the interests of justice" to bar any consideration of prejudice to one party that results from another party's inexcusable delay in seeking relief, it could have said so.[6] Thus, even putting aside Michael's procedural default on appeal, the record reveals no abuse of discretion. (*In re Marriage of De Prieto* (2002) 104 Cal.App.4th 748, 759; see also *Laraway v. Sutro & Co., Inc.* (2002) 96 Cal.App.4th 266, 274 ["Although the courts have defined 'good cause' in a variety of contexts, the concept is relative and depends on all the circumstances. . . . As a general

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[6] Indeed, consideration of delay in postjudgment division of omitted community assets was not an entirely foreign concept when the Legislature enacted the predecessor to Family Code section 2556, Civil Code section 4353. In *Huddleson v. Huddleson* (1986) 187 Cal.App.3d 1564, the Court of Appeal considered a husband's laches defense to his ex-wife's postdissolution action for distribution of his pension as an undistributed community asset. (*Id.* at p. 1573.) The wife's 12-year delay in asserting her claim gave the Court of Appeal "some concern," but it put this concern aside because "the very nature of pensions and the substantial changes in California law as to their division have fostered such delays." (*Id.* at p. 1574.) Nothing similar can be said here to excuse Michael's delay in seeking the division of proceeds from the sale of the Property.

rule, however, 'good cause' includes reasons that are fair, honest, in good faith, not trivial, arbitrary, capricious, or pretextual, and reasonably related to legitimate needs, goals, and purposes"].)

DISPOSITION

The family court's order is affirmed. Costs on appeal, if any, are awarded to Gabrielle Berkley.

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BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.