Filed 10/23/12 Marriage of Jackson CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| In re the Marriage of JASPER and MARLENE JACKSON.<br><br>JASPER JACKSON,<br><br>Appellant,<br><br>v.<br><br>MARLENE JACKSON,<br><br>Respondent. | B236203<br><br>(Los Angeles County Super. Ct. No. BD426374) |

APPEAL from an order of the Superior Court of Los Angeles County, Mark A. Borenstein, Judge. Affirmed.

Jasper Jackson, in pro. per., for Appellant.

Law Offices of David L. Ingram and David L. Ingram for Respondent.

Appellant Jasper Jackson appeals from the trial court's failure to enforce terms of a marital settlement agreement and its order imposing sanctions. We affirm.

## BACKGROUND

Marlene and Jasper Jackson executed a stipulated marital settlement agreement in July 2009, which was entered as a judgment of dissolution on July 30, 2009.[1] The parties agreed that the date of separation to be used for the purpose of calculations in the agreement was January 22, 2006. In July 2011, Jasper filed an order to show cause, contending Marlene had not satisfied certain obligations to which she had agreed regarding the division of community property. He also filed a declaration in support of his request for an order to show cause, apparently attaching a chart detailing the money he contends he had received and the amounts he was still owed. However, that chart is not in the record on appeal.

In addition, Jasper served a subpoena and document request on Marlene requiring her attendance at the hearing and production of documents responsive to his request.[2] Marlene's counsel appeared at the hearing but produced no documents; Marlene did not attend the hearing. Jasper did not provide notice of the subpoena and document request in his moving papers, but the court said the subpoena appeared to be in proper form and stated that Marlene was therefore required to be present in court. Nonetheless, the court

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[1] Because the parties have the same last name for ease of reference we refer to them in this opinion by their first names, with no disrespect intended.

In the marital settlement agreement, Jasper is referred to as the petitioner and Marlene as the respondent.

[2] Specifically, he requested she produce copies of: (1) "UBS financial statements for January 2006 in both accounts"; (2) Limited Brands statements for January 2006; (3) Disney Saving and Investment Plan for January 2006; (4) Vista Credit Union statement for January 2006; and (5) "all bank stat[e]ment[s] for January 2006. (Bank of America and Chase)." Jasper does not discuss items 3 through 5 in this appeal, so we will not. We note that none of these three items is specifically referenced or divided in the marital settlement agreement.

did not enforce the subpoena, refused to grant a continuance, and rejected Jasper's request to issue a bench warrant and require Marlene to appear at a later date and produce documents.[3] The court advised Jasper that he needed to take her deposition instead, saying, "Get the discovery before you come here. This isn't a time for you to conduct a deposition of the witness on the witness stand."

The court carefully scrutinized the evidence Jasper presented regarding the money Jasper said he was owed. As to each item, the court concluded (1) that he had not presented sufficient evidence to demonstrate that community property was present in the particular account, (2) that he had not presented sufficient evidence that he had not received the full amount he was owed, and/or (3) that he had previously raised the same argument and had again failed to present sufficient evidence that Marlene owed him the money he claimed. The court denied Jasper the relief he requested but as to two items, the UBS accounts, the court did so without prejudice, indicating that if Jasper could return to court and present evidence that the accounts contained community property, the court would consider an order to show cause addressing the division of the UBS accounts. The court repeatedly advised Jasper that it was not sufficient to show that there was a balance in an account as of January 2006, the date of separation; he was required to present evidence showing the source of any funds deposited into the account, i.e., that community property was used to fund the account in whole or in part.

As we will explain, we conclude that the trial court correctly determined that Jasper had not produced sufficient evidence to support any of his claims. However, we conclude the court erred in finding Jasper's subpoena to be valid but in nonetheless rejecting Jasper's request to issue a bench warrant to require Marlene to appear and produce documents. Under the particular circumstances of this case, we find that error to be harmless because the specific documents Jasper requested in his subpoena would have

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[3] The court discussed with Jasper and Marlene's counsel whether Jasper was required to provide notice of seeking consumer records pursuant to Code of Civil Procedure section 1985.3, but the court did not rule on that issue. As we discuss below, such notice was not required in conjunction with Jasper requiring Marlene to produce records.

been insufficient to prove his points as they merely would have shown the balances in various accounts in January 2006. Accordingly, we affirm in full the court's order denying Jasper's order to show cause.

## DISCUSSION

### I. The Applicable Law

#### *A. General Principles of Appellate Review*

We review the trial court's decision regarding enforcement of the subpoena for an abuse of discretion. "Under that standard, we are obligated to assume that the judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) All intendments and presumptions are indulged in favor of the judgment. (*Ibid.*) Further, any conflicts in competing facts are resolved in favor of the judgment. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) Finally, it is the appellant's burden to prove that, under consideration of the entire circumstances of the case, the trial court's decision exceeded the bounds of reason. (*Ibid.*; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)" (*In re Marriage of Fogarty and Rasbeary* (2000) 78 Cal.App.4th 1353, 1364-1365.)

"[W]here a trial court's factual finding is challenged on the ground there is no substantial evidence to sustain it, the power of the reviewing court begins and ends with the determination as to whether, on the whole record, there is substantial evidence, contradicted or uncontradicted, that will support the trial court's determination. [Citation.] [¶] The appellate court views the evidence in the light most favorable to the respondents [citation], resolves all evidentiary conflicts in favor of the prevailing party and indulges all reasonable inferences possible to uphold the trial court's findings [citation]." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.)

In addition, "'error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.) Further, we will not

presume prejudice from an error. It is an appellant's burden to persuade us that the court erred in ways that result in a miscarriage of justice. (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601; *In re Marriage of Dellaria & Blickman-Dellaria* (2009) 172 Cal.App.4th 196, 204-205; Cal. Const., art. VI, § 13.)

"[W]e make clear that mere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

*B. Property Division in Marital Dissolutions*

"[A marital settlement agreement] is governed by the legal principles applicable to contracts generally. (*In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174, 1180.) 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs [its] interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.]' (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822.)" (*Tanner v. Tanner* (1997) 57 Cal.App.4th 419, 424-425.)

"Except as otherwise provided by statute, all property, real or personal, wherever situated, *acquired by a married person during the marriage* while domiciled in this state is community property." (Fam. Code, § 760, italics added.) "Property owned *before marriage* or *acquired during marriage by gift, will, or inheritance* is separate property." (Cal. Const., art. I, § 21, italics added.) "'The status of property as community or separate is normally determined at the time of its acquisition.'" (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 757.) Thus, all property acquired by a married person during marriage is presumptively community property. (Fam. Code, § 760.) *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 290, explained the nature of the presumption contained in Family Code section 760 and how it may be overcome: "This is a rebuttable presumption affecting the burden of proof; hence it can be overcome by the party contesting community property status. [Citation.] Since this general community

property presumption is not a title presumption, virtually any credible evidence may be used to overcome it, including tracing the asset to a separate property source, showing an agreement or clear understanding between parties regarding ownership status and presenting evidence the item was acquired as a gift. [Citation.]" (See also *In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1491 [the party seeking to rebut the community property presumption must establish by a preponderance of the evidence that the property is separate]. But see *Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 843, disapproved on another point in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [suggesting clear and convincing evidence standard should be applied to overcome the community property presumption of Fam. Code, § 760].)

## II. Jasper's Claims Regarding Money Owed to Him

Bearing in mind the applicable law, we now discuss each of Jasper's claims on appeal.

### *A. The Equalizing Payment*

The marital settlement agreement provided as follows: "To equalize the division of community property assets and obligations as set forth in this Agreement, [Marlene] shall pay [Jasper] the sum of Seven Thousand Five Hundred Dollars ($7,500) through the Qualified Domestic Relations Order. This payment shall be accomplished by a transfer of the equalizing payment from [Marlene's] retirement plan pursuant to a Qualified Domestic Relations Order . . . ."

Jasper contends Marlene gave him a check in the amount of $5,200, and he received $2,199.99 from the Los Angeles County Sheriffs from a bank levy, leaving a balance owed to him of $100.01. He did not, however, present documentary evidence of those facts to the trial court, such as copies of the canceled checks or of his bank statement showing deposits made from those sources. It was within his ability to produce such evidence, without reliance on Marlene's appearance or production of documents, but he failed to do so. We therefore conclude that the court properly found that Jasper

did not produce sufficient evidence to establish that he did not receive the full $7,500 he was owed.

*B. The Limited Brand Retirement Plan*

Jasper contends Marlene agreed to pay him $15,872.57 from her Limited Brand Retirement Plan. He admits he received $11,597.58 through a qualified domestic relations order (QDRO), leaving a balance of $4,275.01.

The settlement agreement did not specify the amount to be paid to Jasper but instead specified that Jasper was entitled to half of the account balance as of the date of separation, as augmented by subsequent earnings, dividends, interest accumulation, and plan performance attributable to his share from the date of separation to the date of distribution to Jasper. It further stated that "The benefits not allocated to [Jasper], including but not limited to all contributions to the plan made by [Marlene] or forfeitures allocated and contributions made on behalf of [Marlene] with respect to the period after the date of separation, shall belong to [Marlene] and are subject to [Marlene's] disposition pursuant to plan provisions." The settlement agreement stated that the parties anticipated entering into a stipulation for a QDRO to divide the retirement benefits provided for in the Limited Brand Savings Plan. The QDRO was to be prepared by a third party, and the reasonable cost of the order was to be shared equally by the parties.

At the hearing, Jasper stated that Marlene failed to sign the paperwork on time and as a result the money he received was reduced. The court asked him to indicate which evidence showed that he lost money because she failed to sign the paperwork. Jasper referred the court to an exhibit, but the court found that the statement provided by Jasper showed that all of the money was taken out during the marriage, and nothing remained in the account to divide. Jasper said the money was transferred to another account, but acknowledged that he had not stated that in his declaration. He said that was why he wanted Marlene to be present in court. However, he only requested in his subpoena that she produce a copy of the Limited Brand statement for January 2006, which would not have demonstrated what payment he received and whether a penalty was incurred.

It is clear that Jasper did not provide sufficient evidence to establish that he had not received all of the money to which he was entitled from his share of the Limited Brand Retirement Plan. The Limited Brand account was divided by Jasper's own QDRO and the trustee distributed the money directly to him. Because he received at least a partial disbursement by way of a QDRO, he should have had in his possession documentary evidence detailing what he received and perhaps indicating the cost of preparation of the QDRO and whether a penalty was exacted for failure to complete the paperwork in a timely manner, but he failed to produce any documentary evidence in support of his claim. The trial court properly rejected this portion of Jasper's claim for lack of sufficient evidence.

*C. The UBS Financial Services Accounts*

Jasper contends Marlene agreed to pay him 50 percent of $522.90 ($261.45) from her "Investment Account" bearing the number TP88506. The settlement agreement does not specify the amount owed, rather it states "UBS Financial Services account TP 88506 shall be equally divided between the parties." At the hearing on the order to show cause, Jasper stated: "The account was opened . . . during my marriage, this account, this investment account." The court asked, "Where is the evidence of that?" to which Jasper replied: "That is why I want Ms. Jackson to be here." Marlene's counsel represented that the account was closed but stated he did not know what happened to the $522.

Jasper also contends Marlene agreed to equally divide $25,954.62 from UBS Investment account number TP44738, which was the balance on the date of separation (Jan. 22, 2006). The agreement provided that "As part of the Parties' marital settlement, [Jasper] is awarded 50% of the community property interest from that certain Individual Retirement Rollover Account (ending in 3834)[4] in [Marlene's] name, for which UBS

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**4** Jasper states the account number to be TP44738, while the settlement agreement identifies the account as ending in 3834. Exhibit C to the motion to augment the record on appeal clarifies that the account number is "TP 44738 34," and thus the account referred to by Jasper in his opening brief is the same one mentioned in section 3.1 of the

Financial Services, Inc. is trustee. [Marlene] shall direct the trustee to distribute the above amount from this account to such other IRA account as [Jasper] shall specify. The remaining 50% of the community property interest and the separate property interest is confirmed to [Marlene]."

At the hearing, Marlene's counsel said the IRA account was separate property and was rolled over, and that Jasper was awarded one-half of the community interest in the account, if any. However, the plain language of the settlement agreement contemplated that both UBS accounts contained community property. The larger retirement account also apparently contained separate property funds, but the settlement agreement contemplated that it was comprised at least in part of community property funds. The agreement does not state, as was represented by Marlene's counsel, that the community property, *if any*, was to be divided. Rather, the agreement clearly contemplates that the account contained both separate and community property.

Jasper told the trial court that Marlene rolled over the account, about $10,000, and then "[w]e got into stocks, and we used this account, and the money that we made, we put into this account, this retirement account." The court replied, "So you apparently have bank statements." He responded that he did, and the court asked why he had not included the bank statements showing money being contributed or taken out. He said Marlene had told UBS not to give him any information. The court said that was hearsay, and asked if he had subpoenaed records from UBS. Jasper said he had done so, but acknowledged he had not made an effort to enforce the subpoena against UBS.

The court found that Jasper had produced no evidence that during the marriage Marlene contributed community funds to the IRA rollover account. As the court explained, "Just because there was a balance at the time that you separated in an IRA account doesn't make it community property. You still have to prove — you have to

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settlement agreement. We note that we denied Jasper's motion to augment the record to include exhibit C, which is not authenticated in any manner. We examined exhibit C for the limited purpose of identifying the account to which Jasper was referring on appeal.

show that during the marriage, you or she contributed community assets to this account, and you haven't done that."

At a minimum, Jasper had to first demonstrate that the accounts were opened during the marriage or that community property funds were deposited into the accounts. Jasper produced no such evidence, other than his rather vague statements to the trial court. His sworn declaration in support of his order to show cause did not include specific statements regarding the time of acquisition of the various accounts or any detailed factual assertions. However, Jasper did attempt to compel Marlene's attendance at the hearing so she could produce documentary evidence and testify regarding the source or sources of the funds in the accounts. "A witness, served with a subpoena, must attend at the time appointed, with any papers under his control lawfully required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed." (Code Civ. Proc., § 2064.) In addition, the "confidential relationship [of spouses] imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." (Fam. Code, § 721, subd. (b).) "The spouse who controls community property assets occupies a position of trust which is not terminated as to assets remaining in his or her hands after separation. 'It is part of his [or her] fiduciary duties to account to the [spouse] for the community property when the spouses are negotiating a property settlement agreement.' [Citation.]" (*In re Marriage of Koppelman* (1984) 159 Cal.App.3d 627, 634, overruled on another ground in *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 451, fn. 13.) That fiduciary duty continues until the division of community property is accomplished. Marlene was the account holder on both UBS accounts, and she therefore had control of any community property assets held in those accounts. It was incumbent on her to appear at the hearing and respond to Jasper's claims that she had failed to divide community property assets.

We note that in serving the subpoena and request for production of documents on Marlene prior to the hearing, Jasper did not comply with Code of Civil Procedure section 1985.3, regarding provision of notice of seeking consumer records. The court discussed

with Marlene's counsel and Jasper whether such notice was required where the person being subpoenaed is the consumer, but did not decide the issue or cite it as the reason it was not enforcing the subpoena.

Jasper was not required to comply with Code of Civil Procedure section 1985.3 in seeking Marlene's appearance at the hearing and production of documents. By its clear terms, section 1985.3 applies to "'[p]ersonal records . . . which are maintained by any 'witness'" which is, for example, a health care provider, bank, attorney, school, or the like. It does not apply to personal records maintained by an individual consumer. The provision is designed to ensure that individual consumers have notice and opportunity to object to another entity producing records pertaining to the individual consumer. If the individual consumer is asked to produce documents, he or she obviously has notice and can move to quash the subpoena.

We conclude that the trial court abused its discretion by refusing to enforce the subpoena and compel Marlene to appear and produce documents responsive to Jasper's request. Jasper was not required, as the court indicated, to take Marlene's deposition in order to gather the evidence he needed to prove that Marlene had failed to give him his portion of community property funds. Jasper was entitled to proceed as he did, by serving a subpoena on Marlene and requiring her to appear and produce documents.

However, in reviewing the list of documents Jasper specified he wanted Marlene to produce, it is plain that the documents he requested would not have established the source of funds because he asked only for "UBS financial statements for January 2006 in both accounts." As the court explained to Jasper, demonstrating the balances in the accounts on the date of separation was insufficient; Jasper was required to prove that the accounts contained community property, i.e., property acquired during the marriage other than by gift, will, or inheritance. We therefore conclude that the trial court's error in failing to enforce the subpoena was harmless. No miscarriage of justice resulted from the court's error because the documents Marlene would have been required to produce would have constituted insufficient proof to establish the source of the funds in the UBS accounts. As the trial court noted at the beginning of the hearing, "I'm having a little

trouble understanding how even with testimony from [Marlene] you would be able to obtain an order that these amounts are due you."

In summary, we find that although the court erred in failing to enforce the subpoena served upon Marlene, such error was harmless as the result would have been no different had she appeared and produced the requested documents. Those documents would not be sufficient to prove that the UBS accounts contained community property, let alone exactly how much was community versus separate property in order to enable the court to order a division of a specific amount. Accordingly, we also affirm the portion of the trial court's order denying Jasper the requested relief regarding the UBS accounts, which order was without prejudice to Jasper attempting to bring another order to show cause seeking division of these accounts.

*D. Matter Decided Previously*

Finally, Jasper contends that on February 27, 2006, the trial court signed an order instructing Marlene to pay Jasper $4,000. The order, dated February 27, 2006 (years prior to execution of the settlement agreement), states that "[p]ending hearing, petitioner is given temporary use and control of $4,000.00 of the funds in account [ending in 3652] at Washington Mutual Bank." The court here denied Jasper's request to order payment of $4,000 pursuant to the order of February 27, 2006.

The record makes clear that the order of February 27, 2006, was one entered while the dissolution action was pending in order to give Jasper *access* to funds available through what seems to have been an equity line of credit. It was not an order requiring Marlene to pay Jasper that amount of money. We conclude the trial court properly refused to order Marlene to pay Jasper $4,000. Indeed, Jasper had previously asked the court to enter the exact same order, and the trial court had properly refused to do so. Jasper was not entitled to repeatedly request the same order where he had no new evidence to offer and the request had been definitively rejected.

## III. Sanctions

Marlene's counsel requested sanctions of $5,000 be imposed on Jasper pursuant to Family Code section 271 because of his repeatedly seeking orders regarding matters that had already been resolved. The trial court stated: "[Y]ou've been told before that you have to actually show that the assets in there was [*sic*] community property." The trial court noted that Jasper had previously raised at least four of the six items discussed at the hearing. The court decided that imposition of sanctions of $1,000 was sufficient to deter further unreasonable conduct and unnecessary motions in the future.

Jasper questions "why [he] would be ordered to pay attorney fees when the Respondent is not obeying court orders." We clarify that it was not attorney fees he was ordered to pay but rather *sanctions*, as a penalty for bringing the same requests to the court more than once and without sufficient evidence to support them. We find no error in the court's order imposing sanctions.

For the sake of clarity, we reiterate that the trial court denied Jasper all of the relief he requested. As to the UBS accounts only, while the trial court denied Jasper his requested relief, it indicated that if Jasper could present evidence sufficient to demonstrate that those accounts contained community property, the court would entertain an order to show cause regarding division of those accounts at a later date.

## DISPOSITION

The order is affirmed. The parties are to bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.