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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of H. DOUGLAS and ADITH DANIEL.	B241676 (Los Angeles County Super. Ct. No. BD468274)
H. DOUGLAS DANIEL, Appellant, v. ADITH DANIEL, Respondent.	

APPEAL from an order and the judgment of the Superior Court for the County of Los Angeles, Rafael A. Ongkeko and Robert E. Willett, Judges. Affirmed.

Van Antwerp Law Firm and L. Walker Van Antwerp III for Appellant.

No appearance for Respondent.

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Appellant H. Douglas Daniel (husband) appeals from the judgment of dissolution entered April 5, 2012, contending the trial court erred in ordering spousal support payments to respondent Adith Daniel (wife) for a time period when she was still living with husband in the marital residence and he was already incurring all of the living expenses, and further that the court misapplied Family Code section 2641[1] in calculating an equalization payment to wife regarding the community's repayment of husband's law student loans. Husband also objects to an attorney fees order issued in July 2011. We have severed that issue for later disposition. As to the balance of husband's contentions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Husband and wife separated on February 19, 2008, after 13 years of marriage. They have one child, born in 1994, who was a minor at the time of separation.

Husband has been an attorney since 1987 and operates his own law practice. In 2005, husband and wife obtained a refinancing of the mortgage on their home, and received funds (approximately $90,000) to pay debts and do some remodeling to their home. About $28,000 from the refinance was used to pay off husband's law school student loans. The student loans were incurred between 1982 and 1985 when husband attended law school at the University of California, Los Angeles.

The primary community asset was the family residence in Burbank purchased in 1995. After the date of separation, husband continued to make all of the payments on the mortgage and to pay for all of the family's living expenses. Despite the legal separation, husband and wife continued to live in the family home together with their daughter. (The record is somewhat unclear, but it appears wife stayed in a separate guest home on the property.) Husband also provided money directly to wife to pay for various items like food.

Husband initiated the dissolution proceedings in June 2007. Trial commenced in April 2010. Wife represented herself and husband was represented by counsel.

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[1] All further undesignated statutory references are to the Family Code.

Both testified at trial, in addition to several witnesses. Husband requested to stay in the family residence and have custody of their daughter so that she could complete high school without transferring to another school. Husband was willing to have the court award wife an equalization payment for the value of her community interest in the equity in the home. During testimony, sealed by the trial court, the daughter expressed her desire to stay living in the family home with her father.

Following trial, the court issued a tentative statement of decision on September 24, 2010. Joint legal custody of the daughter was awarded to both parents, with physical custody being granted to husband. Husband was ordered to pay spousal support to wife beginning October 1, 2010, in the amount of $800 per month for two years, then stepping down to a monthly payment of $600 for one year, and down to $400 for two years. The court found it was reasonably likely wife would be self-supporting by October 1, 2015.

The court retained jurisdiction over the disposition of the marital residence, awarding the home to husband, subject to an equalization payment to wife based on the fair market value at the time of trial, minus the outstanding loan obligation. The court determined wife was owed an equalization payment of $45,000. The court further granted husband a period of time within which to seek a refinancing of the loan and to have wife's name removed from the mortgage documents. If refinancing and a buyout of wife's interest were not possible by March 1, 2011, the home was to be listed for sale and the proceeds distributed accordingly.

By early 2011, wife had obtained representation and contended that husband had failed to make support payments and had not obtained a refinance or paid her the equalization payment for her interest in the home. Subsequently, wife filed an order to show cause requesting an award of attorney fees pursuant to sections 2030 and/or 271, and requesting orders compelling husband to comply with the terms of the tentative statement of decision, including preparation of a formal judgment, listing the house for sale, and payment of support. Husband opposed wife's motion, arguing that wife had never moved from the family residence and he was therefore already paying all of her

expenses as well as their daughter's expenses, so he had paid wife only $500 per month in support and no child support payments. He also contended wife was the party refusing to meet and confer about listing the home for sale.

After oral argument on July 19, 2011, the court ordered, in relevant part, as follows: "the tentative decision issued September 24, 2010 shall be the judgment of the court. The parties shall submit a Judgment. [¶] [Wife] shall forthwith list the family residence for sale [and husband] shall sign all necessary papers to do so. [¶] . . . . [¶] [Husband] shall pay to counsel for [wife] attorney's fees and costs/sanctions pursuant to Family Code sections 271 and 2030 the sum of $5,000.00, without prejudice, within ten days." A formal order after hearing was thereafter filed and served.

Judgment of dissolution was entered on April 5, 2012. Husband filed his notice of appeal on June 1, 2012, appealing the final judgment of dissolution and from an order "after judgment." Husband filed an opening brief. Wife did not file any brief or make an appearance before this court.

DISCUSSION

Husband raises two challenges to the judgment: (1) the court abused its discretion in ordering spousal support payments without conditioning the commencement of such payments on wife moving out of the family residence; and (2) the court misapplied section 2641 and erred in calculating the reimbursement owed by husband to the community for payments made by the community to pay down his law school student loans.

With respect to the date of commencement of spousal support payments, husband has failed to affirmatively show error or an abuse of discretion. It is a general principle of appellate practice that the "order of the lower court is ' "presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." ' [Citation.]" (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610; see also *In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 197.) It is the appellant's burden to overcome that presumption of correctness.

Husband merely states, without citation to authority, that the order to commence spousal support should have been made contingent on wife moving out of the family residence. The court's tentative statement of decision issued in September 2010 acknowledged that husband had been voluntarily paying for wife's support and that she was still living in the family home, with husband paying the parties' living expenses. The court ordered spousal support to commence October 1, 2010. Husband does not argue that any objections to the tentative statement of decision were raised at any time. During the hearing on July 19, 2011, when the court ordered the parties to prepare a judgment formalizing the September 2010 tentative statement of decision, the court asked husband if there were disputes as to the numbers to be included in the final judgment which counsel for wife was going to prepare. Counsel for husband did not raise any substantive objections. Husband has failed to affirmatively show error or an abuse of discretion by the court.

As for husband's contention the trial court abused its discretion in applying section 2641 to determine the amount of the equalization payment owed to wife for the community funds used to pay down his law school student loans, husband has also failed to establish an abuse of discretion.

The record reflects that community funds were used in 2005 (obtained from the refinance of the family residence) to pay down $28,864 of husband's student loan debt that he incurred some 10 years before the marriage. Wife requested reimbursement of one-half of the community payment on the loan. Husband argued no reimbursement was appropriate because the community had benefitted from his law school education; more specifically, he argued the family had survived financially almost exclusively on the income he derived from his profession.

Section 2641, subdivision (b)(1) provides, in relevant part, that upon dissolution "[t]he community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made." The statute defines "community

contributions to education or training" to include the repayment of a student loan. (*Id.*, subd. (a).) The statute has been interpreted as plainly applying to payments made to pay down a student loan, even where the loan was incurred, as here, before the marriage. (*In re Marriage of Weiner* (2003) 105 Cal.App.4th 235, 239-240.)

Section 2641 subdivision (c) provides that "reimbursement and assignment required by this section shall be reduced or modified to the extent circumstances render such a disposition unjust." The trial court acknowledged subdivision (c) and found the community had benefitted "substantially" from husband's law school education, thus justifying a reduction in the amount owed in reimbursement to the community. The trial court therefore reduced the one-half payment requested by wife by 40 percent.

Husband acknowledges the court made a "thoughtful analysis" to give credit to the fact that husband's education as a lawyer had benefitted the community. It appears that husband primarily finds fault with the fact the court applied the statutory interest rate, which brought the amount of the reimbursement back up significantly to $12,772.32. However, the statute *mandates* that interest be included in the calculation. (§ 2641, subd. (b)(1) ["amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made"].) Husband provides no analysis or citation to authority for why the court's decision to include interest, in accordance with the statute, amounts to an abuse of discretion. (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598 ["it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered"].)

DISPOSITION

The judgment is affirmed.

GRIMES, J.

We concur:

RUBIN, Acting P. J. FLIER, J.