Filed 10/3/12 Marriage of De Monbrun CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of MARY M. and DANIEL R. DE MONBRUN	B236130
MARY M. DE MONBRUN, Respondent, v. DANIEL R. DE MONBRUN, Appellant.	(Los Angeles County Super. Ct. No. PD032003)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Terrell, Judge. Affirmed in part; reversed in part.

Willsey Law Offices and Burke W. Willsey for Appellant.

Law Offices of Donald A. Hayes and Donald A. Hayes for Respondent.

INTRODUCTION

Daniel R. De Monbrun (husband) appeals a postjudgment order concerning the division of property between husband and Mary M. De Monbrun (wife) in this marital dissolution action. Husband's main argument is that the trial court erroneously valued the parties' pensions as of the date of trial instead of as of the date the parties separated. He also contends the trial court failed to take into account his alleged separate property contribution to the parties' purchase of a house in Valencia (the house). Finally, husband challenges a $10,000 sanction the trial court awarded wife pursuant to Family Code section 271. We shall reject husband's first two arguments. But we shall also find that the sanction award was an abuse of discretion and thus must be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Husband and Wife's Marriage*

Husband and wife were married on June 23, 1984. The couple had three children—Amy, James and Sara—who were born in 1986, 1987 and 1989, respectively. On November 14, 1999, husband and wife separated. Wife filed a petition for dissolution of marriage on March 12, 2002.

2. *The Dissolution Judgment*

Husband and wife, both in propria persona, reached a marital settlement agreement (MSA) prepared by a paralegal retained by wife.[1] Pursuant to the MSA, a dissolution judgment was entered on August 9, 2002.

The judgment provided that the house was initially awarded to wife but after the three minor children were enrolled and attending college, the house would be sold and the parties would divide the net proceeds equally. It also provided that husband was required to pay wife spousal support and child support.

With respect to husband's pension plan, the judgment stated wife "is awarded one-half of the community property interest in [husband's] plan(s) through his employment with Crescenta Valley High School (Glendale USD) from the date of marriage, 6-23-

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[1] We do not have a copy of the MSA in the record.

1984, to the date of separation, 11-14-1999, including any accrued interest to the date of distribution. The parties shall stipulate to a Qualified Domestic Relations Order (QDRO)."[2] The judgment provided husband with identical rights to wife's pension plan with her employer.

3. *Husband's Retirement*

In 2006, husband was diagnosed with leukemia. He has had serious health problems since then. In 2008, husband was placed on disability leave for the entire year by his employer. At the urging of his physicians, husband retired in June of 2008.[3]

Upon retirement, husband began receiving $5,002.16 per month, less taxes, from his pension plan. Husband did not, however, tell wife about his retirement. Further, husband retired without an "option beneficiary." This means that in lieu of a payment of a lump sum to a survivor upon his death, husband will receive a slightly greater monthly payment from his pension plan.

4. *Husband's Motion to Enforce the Judgment*

a. *The Initial Moving and Responsive Papers*

On April 21, 2009, husband filed a motion to enforce the judgment. Husband sought an order requiring the house to be sold. In support of the motion, husband attached declarations from his three children stating that they no longer lived in the

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[2] Under the Employee Retirement Income Security Act of 1974, codified at title 29 United States Code section 1001 set seq., spouses in dissolution actions may not transfer rights in retirement benefits unless the court so orders in a QDRO. (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 511, fn. 7 (*Gray*).) A QDRO was never prepared in this case.

[3] After husband's bone-marrow transplant in September 2007, his son lived with him for nearly two years to take care of his daily needs. Husband stated in a May 14, 2010, declaration that since his retirement, "it has been necessary for me to continue to undertake various treatments at least once a week and sometimes as frequently as twice a week. After those treatments, my physical and mental condition is limited and my ability to make decisions is adversely affected. As a consequence, although I have met regularly with my attorney, I frequently am unable to make any kind of considered decisions."

house, and that either they were enrolled in college or had taken all of the college classes they intended to take.

Husband further claimed that he was entitled to a credit of $52,000 because he allegedly made a payment in that amount out of his separate property as the down payment for the purchase of the house. He sought to recover this $52,000 from the proceeds of the house, plus one-half of the remaining net proceeds.

In response, on May 11, 2009, wife filed a declaration and a brief requesting an order permitting her to purchase husband's interest in the house in lieu of selling it to a third party. Wife denied husband was entitled to a credit of $52,000. She further claimed that husband owed her child support and spousal support payments.

b. *August 21, 2009, Stipulation*

On August 21, 2009, the parties entered into a stipulation regarding husband's motion to enforce the judgment. The stipulation provided, inter alia, that (1) husband owed wife $5,649.85 in back child support, including interest, as of August 4, 2009; (2) both parties' retirement plans should be evaluated by experts; (3) wife shall buy husband's interest in the house; and (4) wife can apply to the purchase price of the husband's interest in the house credits for child support owed by husband, the difference between wife's interest in husband's pension plan and his interest in wife's pension plan, and spousal support arrearages, if any.[4]

c. *Delays Due to Health Problems*

The matter was continued several times pursuant to stipulations between the parties. There were also delays in the proceedings due to serious health problems suffered by husband's counsel.

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[4] At first husband disputed wife's claim for spousal support arrearages. Since at least June 2008, wife was earning in excess of $3,000 per month more than husband. On April 29, 2011, husband filed a motion to terminate spousal support. This motion was granted on May 27, 2011. Spousal support was terminated as of June 1, 2011. Thus for a period of at least three years, from June of 2008 to May of 2011, husband was required to pay wife spousal support even though she earned a substantially greater monthly income than he did.

d. *July 27, 2010, Hearing*

The trial court held a hearing on July 27, 2010. Judge Christine Bird presided. A major topic of discussion at the hearing was the accuracy of a declaration filed by Kathleen Badman, an expert pension evaluator retained by wife. One issue was whether husband's pension should be valued as of the date of separation or as of the date of trial. Judge Bird stated she was concerned that Badman valued husband's pension as of 2010, "whereas the terms of the judgment provide that you're supposed to take a value back in 1999, and then [there] should be some interest and that should be brought to present value." As we shall explain *post*, however, Judge Bird misinterpreted the judgment.

e. *September 27, 2010, Hearing*

On September 27, 2010, the parties had another hearing on the matter, again before Judge Bird. Judge Bird reviewed additional information submitted by wife's expert and expressed concerns about whether the evaluation was "fair" because it assumed husband would live until he was 110 years old. The parties stipulated at the hearing that they would each retain experts and, after conferring with both experts, would attempt to settle disputes regarding their respective interests in each other's pension plans. The parties, however, did not enter into a settlement agreement.

f. *April 26, 2011, Hearing*

On April 26, 2011, the trial court held its final hearing on husband's motion to enforce the judgment. Judge Michael Terrell presided.

Wife's pension expert, Mark Tubbiola, testified that husband had 30.431 credited employment years, and that the credited community years were 15.237. He further testified that the community property interest in husband's pension was 50.07 percent. Additionally, Tubbiola stated that as of April 25, 2011, the total value of husband's pension plan was $813,979, and that the community property interest in the plan was $407,560. Tubbiola made similar calculations regarding wife's pension plan, and concluded that the community property interest in her plan was $182,724.

Finally, Tubbiola stated that husband had received a total of $171,874 in pension payments from June 2008 to April 2011. After adding 10 percent simple interest, Tubbiola determined the community interest in these payments was $97,930.

Husband did not retain an expert due to lack of funds. At the time, he did not have a bank account or any assets of significant value.

5. *June 22, 2011, Order and Statement of Decision*

On June 22, 2011, Judge Terrell issued an order and statement of decision adjudicating husband's motion to enforce the judgment. The trial court found that the judgment did not provide for a date of valuation for husband's and wife's respective pension plans and thus, pursuant to case law, valued the plans as of the date of retirement and the date of trial. The court calculated the amount husband owed wife in connection with the two pension plans as follows: $407,560 (the community value of husband's plan as of the date of trial), plus $97,930 (the community value of the payments husband received from June 2008 to April 2011, plus 10 percent interest), minus $182,724 (the community value of wife's plan on the date of trial) equals $322,766. One-half of $322,766 is $161,383.

Pursuant to a stipulation of the parties, the court found that the equity in the house was $288,387.41. The court ruled that wife could buy husband's interest in house for $144,193.70, which was one-half of the equity. The court rejected husband's claim that he was entitled to a $52,000 credit on the ground that the claim was barred under the doctrines of res judicata and collateral estoppel. Additionally, the court found that husband owed wife $6,624 for child support and $16,066 for spousal support.

The court calculated the amount husband owed wife as follows:

Difference in Value of Community Value of Pensions		$161,383
Child Support		$6,624
Spousal Support		$16,066
	Total	$184,073
The amount wife owes husband for buy-out of house		$144,193
	Total	$39,880

With respect to the $39,880 husband owed wife, the court stated: "Given the age[5] and health of Husband and given Husband's poor record of making monthly payments, a payment plan involving monthly installments is not appropriate. Wife may seek to enforce this order by any legal means available to her, including via a QDRO."

The court also issued monetary sanctions against husband in the amount of $10,000 pursuant to Family Code section 271. In reaching this decision, the court found there was no legitimate reason for husband not to inform wife he was receiving retirement benefits. The court also found husband's position that the pension plans should be valued as of the date of separation "was not reasonable given the well-established case law" and that husband's position "frustrated settlement and increased litigation."

Nonetheless, the court declined to award wife the full $30,000 in attorney fee sanctions she requested on the ground "that some of the delays and continuances were the unavoidable product of health problems suffered by both Husband and his counsel, and it would create an undue financial burden on Husband." The court ordered husband to pay sanctions directly to wife's attorney in monthly installments "pursuant to a QDRO in the total amount of $10,000."

DISCUSSION

1. *The Pension Plans*

a. *The Trial Court Correctly Valued the Pension Plans*

We review the meaning of a trial court dissolution judgment de novo. (*In re Marriage of Davis* (2004) 120 Cal.App.4th 1007, 1017-1018 [independently review a marital settlement agreement and ensuing judgment].) As stated, the judgment provided wife "is awarded one-half of the community property interest in [husband's] plan(s) through his employment with Crescenta Valley High School (Glendale USD) from the date of marriage, 6-23-1984, to the date of separation, 11-14-1999, including any accrued

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5 As of May 20, 2010, husband was 63 years old.

interest to the date of distribution." Husband argues this provision plainly states that the pension plan will be valued as of the date of separation. We disagree.

The judgment merely identified the period during which there was a community interest in the plan—the date of marriage through the date of separation. This period must be delineated so that the community portion of the plan can be determined.[6] The pension plan, however, can be valued as of the date of retirement even though the community portion (i.e. percentage) is ascertained as of the date of separation. (*In re Marriage of Jacobson* (1984) 161 Cal.App.3d 465, 475.)

Although there is no community interest in contributions to husband's pension plan after the date of separation, the value of the community interest in the plan presumably will continue to grow until the date of distribution. The phrase "including any accrued interest to the date of distribution" in the judgment indicates wife is entitled to recover not only one-half of the community value in the plan, she is also entitled to recover the interest that accrues thereon until distribution.

Contrary to husband's contention, the judgment does not state *when* the plan must be valued. Wife's expert conceded that if there were sufficient information, as a matter of mathematics, the plan could be valued as of the date of separation. But there was nothing in the judgment that required the valuation of the plan as of the date of separation. The judgment was simply silent on this point.

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[6] Where, as here, the credited time of service is a substantial factor in determining the benefit payable under a defined benefit plan, the court may utilize the "time rule" in dividing the community property and separate property interests in the plan. (*Gray, supra*, 155 Cal.App.4th at p. 508, fn. 3). "According to the time rule, the community interest is that fraction of the retirement benefits, the numerator of which represents the length of service during marriage and the denominator of which represents the total length of service by the employee spouse. [Citation.] The rule thus divides the separate property and community property interests in a pension by giving equal weight to each year of service, regardless of whether the divorce occurred early in the employed spouse's career (when salary-based pension contribution deductions might be smaller but would have longer to grow) or closer to retirement (when salary-based pension contribution deductions might be greater but would have less time to grow)." (*Ibid.*)

We thus turn to the case law to determine when the pension plan should be valued. Under the case law, "the appropriate date of valuation of retirement or pension benefits is the date of trial or the date of payment of benefits." (*In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 448; accord *In re Marriage of Adams* (1976) 64 Cal.App.3d 181, 185-186.) The trial court correctly and appropriately applied this rule in this case.

b. *Husband Did Not Show There was a Miscarriage of Justice*

Even assuming the trial court erroneously failed to value the pension plan as of the date of separation, husband has not met his burden of showing this error was prejudicial. Wife's expert conceded that the value of the plan at separation would be lower than its value at husband's retirement because "the date of separation is before the date of retirement." If the pension plan were valued on the date of separation, however, wife would also be entitled to recover interest on her share of the community value through the date of distribution pursuant to the terms of the judgment. Because the record does not include any information on, inter alia, (1) the value of the pension plan as of the date of separation and (2) the accrued interest on that value, we cannot determine if the judgment would have been more favorable to husband had the trial court valued his pension plan as of the date of separation. Husband thus has not shown that any error resulted in a miscarriage of justice, and without such a showing, we cannot reverse the order. (Cal. Const., art. VI, § 13; *Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 83.)

2. *Husband's Claim That He is Entitled to a $52,000 Credit is Barred by the Doctrine of Res Judicata and the Limitations Period to File a Motion to Set Aside a Judgment*

Like other judgments, "judgments of dissolution are entitled to res judicata as to all questions determined by them." (*Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1515.) Under Family Code sections 2122, however, a party may file a motion to set aside a dissolution judgment, irrespective of res judicata concerns, on one or more of six grounds: fraud, perjury, duress, mental incapacity, mistake, and failure to comply with the disclosure requirements of Family Code section 2100 et seq. (Fam. Code, § 2122;

Rubenstein v. Rubenstein (2000) 81 Cal.App.4th 1131, 1152.) This motion must be filed within one year after the date on which the complaining party discovered or should have discovered, the fraud, perjury, mistake, or failure to disclose, or if the motion is based on duress or mental incapacity, within two years of the date of the judgment. (Fam. Code, § 2122.)

Here, husband claims that he is entitled to a $52,000 credit toward the value of the house because he allegedly made a down payment in that amount with his separate property in the 1980s or 1990s. The judgment, however, does not provide husband with such a credit. Because the division of the house between husband and wife was a matter determined by the judgment dated August 9, 2002, husband is barred under the doctrine of res judicata from relitigating the matter. (Cf. *In re Mariage of Foster* (1986) 180 Cal.App.3d 1068, 1072.)

Moreover, husband knew or should have known about the basis for his $52,000 claim before the judgment was entered. Yet husband did not file a motion to set aside the judgment, which was entered more than 10 years ago. Indeed, husband does not assert any of the six grounds for a motion to set aside the judgment. In any case, the time limit for husband to file such a motion has expired. (Fam. Code, § 2122.)

3. *The Trial Court Abused Its Discretion By Awarding Wife Sanctions*

Husbands challenges the trial court's $10,000 sanctions award. We review the court's ruling under an abuse of discretion standard. (*In re Marriage of Abrams* (2003) 105 Cal.App.4th 979, 991 (*Abrams*), disapproved on other grounds in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1097.)

Family Code section 271 provides in part: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the

parties' incomes, assets, and liabilities. *The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed.*" (Italics added.)

Here, the trial court issued sanctions on two grounds. First, it found that husband's position on the date of valuation was not "reasonable given the well-established case law." The trial court, however, acknowledged in its statement of decision that the parties can agree to a specific valuation date pursuant to a MSA, which can be incorporated into a judgment. Although we agree with the trial court's view that the judgment in this case did not provide a specific valuation date, husband's position to the contrary was not unreasonable or frivolous. Indeed, before the judgment was entered, Judge Bird took the same position.

Family Code section 271 is not meant to incorporate the "English" rule[7] into all dissolution actions, whereby the prevailing party is awarded attorney fees. The statute only provides for sanctions in cases of where a party's conduct frustrates the policy of the law in favor of settlement, and increases the cost of litigation. (*Abrams*, *supra*, 105 Cal.App.4th at pp. 990-991.) Where, as here, a party takes a reasonable but ultimately unmeritorious position, Family Code section 271 sanctions are not justified.

The second ground the trial court stated for issuing sanctions was that "there was no legitimate reason for Husband to not inform Wife that he was receiving retirement benefits and to not make efforts to cooperate with her to ensure that she received her community share of the benefits." We agree with the trial court that husband was required to inform wife of his retirement in June 2008, though his culpability for failing to do so is somewhat mitigated by the fact that he was very ill at the time. Moreover, after husband filed his motion to enforce the judgment, he disclosed his retirement to wife and did not dispute her right to recover her share of the pension payments he

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[7] Under the "English" rule the losing party pays the winner's attorney fees. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1144.) This is in contrast to the "American" rule, which provides each party pays his or her own fees. (*Ibid.*)

received. The trial court not only awarded wife her share of all pension payments husband received from June 2008 to April 2011, it also awarded her 10 percent interest on those sums.[8] Thus the two grounds the trial court gave for the sanctions are not supported by the record.

Additionally, the trial court did not take into account the unreasonable financial burden sanctions placed on husband. Husband had virtually no assets and considerable debt, and according to husband's latest income and expense declaration, his monthly after-tax income exceeded his monthly expenses by $548. Assuming husband does not incur additional debt, it will take husband approximately six years to pay off the $39,880 he owes wife under the order dated June 22, 2011, excluding post-order interest and sanctions. It will take husband another year and a half to pay off the $10,000 sanctions. Under these circumstances, the trial court abused its discretion in awarding wife monetary sanctions pursuant to Family Code section 271.

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[8] It is also worth noting that the trial court awarded wife three years of spousal support arrearages for a period of time during which wife earned substantially more monthly income than husband. (See Fn. 4, *ante*.)

DISPOSITION

We reverse the portion of the June 22, 2011, order awarding wife $10,000 in sanctions. The order is otherwise affirmed. In the interests of justice, the parties shall bear their own costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.