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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LORENA ARGUELLES,

Plaintiff and Appellant,

v.

TARIK A. GHAZY,

Defendant and Respondent.

B268728

(Los Angeles County
Super. Ct. No. BD485870)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tamara E. Hall, Judge. Affirmed as modified.

Darren S. Young for Plaintiff and Appellant.

Kearney Baker, Gary W. Kearney for Defendant and Respondent.

* * * * *

Following their separation, the juvenile court awarded custody of a couple's four children to husband. The family court ordered wife to pay husband child support based on her imputed income, declined to award any spousal support, and determined that the family residence was community property to be divided between the spouses; because wife had engaged in a series of unauthorized transactions to get title to the family home in her own name and also never collected rent while she had exclusive possession of the house, the court also awarded attorney's fees and damages for waste. Wife appeals each of these rulings. Because her arguments lack merit, we affirm with a minor modification to the judgment.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Lorena Arguelles (wife) and Tarik Ghazy (husband) married in 1999. They had four children before separating in April 2008.

II. Procedural Background

Wife filed for dissolution in May 2008.

The matter did not go to trial until May 2015. By that time, a juvenile court had awarded husband sole legal and physical custody of the couple's four children, subject to wife having 10 hours of supervised visitation each month.

Following an eight-day trial, the family court issued a 16-page ruling. In its ruling, the court awarded husband child support of \$2,845 per month and calculated that amount based on a salary the court imputed to wife. The court declined to award any spousal support because both husband and wife had asked the court to "terminate its jurisdiction" to do so. The court also

divided the couple's property. As pertinent to this appeal,¹ the court ruled that the marital residence was community property, the value of which had to be split between the spouses; that wife owed husband \$36,100 for waste during the period of time she exclusively possessed the property; and that she should pay \$51,962 in attorney's fees for breaching her fiduciary duties to him.

Following entry of judgment and denial of wife's motion for reconsideration, wife filed this timely appeal.

DISCUSSION

I. Child Support

Following dissolution, a minor child's parents have "equal responsibility to support [that] child in the manner suitable to the child's circumstances." (Fam. Code, § 3900.)² The Family Code contains a "mathematical formula" for calculating child support that is based in part on the "relative [actual] incomes of the parents." (*In re Marriage of De Guigne* (2002) 97 Cal.App.4th 1353, 1359; §§ 4055, 4057, 4058, subd. (a).) A family court nevertheless has the discretion to look to a parent's "earning capacity . . . in lieu of the parent's [actual] income" if doing so is in "the best interests of the children." (§ 4058, subd. (b).) We engage in a limited review of a family court's child support order, which includes its decision to impute a parent's income from earning capacity, asking only "whether the court's factual determinations are supported by substantial evidence and

¹ The family court divided other property as well, but that division is not challenged on appeal.

² All further statutory references are to the Family Code unless otherwise indicated.

whether the court acted reasonably in exercising its discretion.”
(*In re Marriage of Berger* (2009) 170 Cal.App.4th 1070, 1079.)

Under these standards, we conclude the family court’s child support order was not erroneous. The court found that calculating child support based on wife’s earning capacity was in the best interest of the children because wife repeatedly refused to file financial disclosure documents notwithstanding orders to do so, such that the failure to impute income to her “would result in [husband] having insufficient income to provide for each child’s reasonable needs.” In evaluating a spouse’s earning capacity, courts examine “both [her] ability and opportunity to earn an income” (*In re Marriage of Barth* (2012) 210 Cal.App.4th 363, 375; *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1301-1302); proof that the spouse “would actually have been hired for an available job” is not required (*In re Marriage of Barth*, at p. 376, fn. 8).

Here, there was evidence that wife had worked as a financial analyst for a financial services company for 10 years; had operated a clothing and retail business for many years that generated revenue of at least \$7,000 per month; was licensed as a casualty insurance agent as well as a real estate agent; was a licensed minister who operated a nonprofit ministry and relief organization; and was collecting monthly Social Security and in-home care benefits of \$2,600 for her disabled mother and disabled adopted daughter. This constitutes substantial evidence that wife had the ability and opportunity to become gainfully employed in a number of different industries. In light of the court’s further finding that husband’s monthly income was \$5,948 and that he was responsible for the expenses for all four

children, the court's order requiring wife to pay \$2,845 per month is also supported by substantial evidence.

Wife challenges the family court's ruling on two grounds. She argues that the court erred in not giving controlling weight to her testimony that she no longer operates her retail business, that she never used her insurance or real estate licenses, and that she is now unable to work due to a disability. Because it is up to the trial court to weigh conflicting evidence and make credibility calls (*Schneer v. Llaurado* (2015) 242 Cal.App.4th 1276, 1285-1286 (*Schneer*)), we may not on appeal gainsay its resolution of such issues, particularly where, as here, the court's findings are reasonable in light of the self-serving nature of wife's testimony and the absence of any documentation corroborating her disability. Wife also contends that the family court should have ordered a vocational evaluation report before imputing any income to her. The court had ample evidence before it on which to base wife's earning capacity; the absence of additional information does not undermine the court's finding.

II. Spousal Support

Upon dissolution, a family court may order one former spouse to provide financial support to the other after examining a number of statutorily enumerated factors. (§§ 4300 & 4320; *In re Marriage of Schleich*, 8 Cal.App.5th 267, 288.) We review spousal support orders for an abuse of discretion (*In re Marriage of Schleich*, at p. 276), but decline to do so in this case. The family court found that wife had "in [her] petition, requested that the court terminate its jurisdiction to award spousal support," and on that basis terminated its jurisdiction. The family court's finding is supported by substantial evidence: Wife did not request spousal support in her dissolution petition, never sought

spousal support during the seven years her petition was pending prior to trial, did not at trial present evidence specific to spousal support, and did not ask the family court to reconsider its finding that she had asked the court to terminate jurisdiction over spousal support. The family court's brief discussion of the merits of the issue, as an alternative basis for its ruling, does not negate its initial finding that plaintiff had waived the issue of spousal support. Because spouses can waive their rights to spousal support (e.g., *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1350; *In re Marriage of Wilson & Bodine* (2012) 207 Cal.App.4th 768, 771), wife's election to do so in this case bars her from changing her mind on appeal.

III. Division of Martial Residence

Following dissolution, the family court must characterize the spouses' property as either "community property" or the separate property of either spouse, and then divide any community property. (*In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1399-1400 (*Valli*); §§ 760, 770, 771.) Community property is any property acquired during the marriage that is not (1) traceable to a separate property source, (2) acquired by gift or bequest, or (3) earned or accumulated while the spouses were living separate and apart. (*Valli*, at p. 1400.) Community property is to be divided equally between the spouses. (§ 2550.) We review a family court's characterization and disposition of property for an abuse of discretion and uphold any predicate findings of fact if they are supported by substantial evidence. (*In re Marriage of Dellaria & Blickman-Dellaria* (2009) 172 Cal.App.4th 196, 201.)

The family court did not abuse its discretion in determining that the family residence was community property, and in

splitting its \$590,000 value between husband and wife. The house was acquired in 2006, while the spouses were married and living together. What is more, the down payment for the house came from a joint bank account, and both spouses contributed to the payments on the two mortgages used to finance the balance of the purchase price. Indeed, wife admitted in her filings in the dissolution proceeding that the residence was community property. The court noted that the spouses had placed title to the house and the two mortgages in husband's name alone, but went on to apply the well-settled rule that the form of title in which property is held yields to the presumption, noted above, that property acquired during the marriage is community property. (*Valli, supra*, 58 Cal.4th at pp. 1410, 1412-1414; *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 301; see also Evid. Code, § 662 [form of title presumption].)

Wife levels two attacks at the family court's reasoning. First, she asserts that she testified that she made most of the mortgage payments during their marriage. However, the court found wife was not credible on this point, and we have no reason to second-guess that credibility finding. (*Schneer, supra*, 242 Cal.App.4th at pp. 1285-1286.)

Second, wife argues that the family court erred in not giving dispositive weight to the fact that she acquired title to the residence solely in her own name after the spouses separated. As an initial matter, this argument has little legal force because, as noted above, the form of title yields to the presumption that property acquired during marriage belongs to the community. (*Valli, supra*, 58 Cal.4th at pp. 1410, 1412-1414.) Further, the family court found that wife acquired this title through "trickery[] and deceit." More specifically, the court detailed how the

residence had gone into foreclosure when the spouses stopped paying the mortgages when they separated, how the court and husband acceded to wife's suggestion that she try to avert foreclosure by granting wife permission to make mortgage payments and to exclusively possess the residence, and how wife took no action to avert foreclosure and bought the \$590,000 home for \$234,000 at the foreclosure auction, how she bought the house at the auction as joint tenants with her uncle, had her uncle quitclaim his interest to her, and then transferred title to her disabled mother and adopted daughter two weeks before the original March 2015 trial date—all without informing husband or the court. Given this manipulation of title, the family court did not err in characterizing the residence as community property to avoid the injustice of leaving husband saddled with the still-outstanding \$227,000 second mortgage in his name alone.

IV. Additional Awards

A. Attorney's fees

While married, spouses owe each other a fiduciary duty “of the highest good faith and fair dealing” that applies when they manage and control community property and precludes them from unilaterally selling, conveying or encumbering that property. (§§ 721, subd. (b), 1102, subd. (a).) If a spouse breaches this duty and thereby impairs the other spouse's interest in the community property, the family court must award attorney's fees and costs to the other spouse. (§ 1101, subd. (g); *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 347.) We review such an award for an abuse of discretion. (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 975-976.) Contrary to what wife asserts on appeal, the family court's finding that wife breached her fiduciary duty to husband by orchestrating a

foreclosure on the marital residence in order to buy it back at a fraction of its value is amply supported by the record. The court's award of fees flows from this breach.

B. Watts charges

When one spouse has exclusive use of a community property asset, the family court can require her to reimburse the community for the value of that exclusive use. (*In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 374.) Such assessments are called “Watts charges” after the seminal case. We review a family court's assessment of such charges for an abuse of discretion. (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 818-819.)

The family court did not abuse its discretion in requiring wife to pay husband \$36,100 in *Watts* charges. As alluded to above, the court had granted wife exclusive use of the marital residence in October 2008 (for the purpose of averting foreclosure), and wife retained possession until the foreclosure sale in May 2010. Relying on expert testimony that the fair rental value of the residence at that time was \$3,800 per month, the court found that wife owed the community \$72,200 (\$3,800 times 19 months) and thus owed husband half that amount—that is, \$36,100.³

Wife raises three objections to this award. First, she asserts that she never had “exclusive possession” of the marital residence because she let other people live with her. But what

³ The family court's oral ruling calculated the mathematically correct amount of waste—namely, \$36,100. However, the court's subsequent judgment incorporating its written tentative ruling stated the amount of waste as \$36,000. We adhere to the oral ruling, and order that the judgment be modified accordingly.

matters is that her possession was exclusive *of husband's*, and that she never charged any of these people rent for their use of the residence; this provides an adequate foundation for *Watts* charges. Second, wife contends that she paid the mortgage after taking possession in 2008, and “save[d]” the residence from foreclosure. But the family court found to the contrary, and there was ample evidence to support its finding. Lastly, wife expresses disagreement with the expert’s opinion on the residence’s rental value, but she has waived this argument by offering no citations to the record, no authority, and no further argument.

DISPOSITION

The amount of the *Watts* charges is modified to \$36,100. Except as modified, the judgment is affirmed. Husband is entitled to his costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ