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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Estate of SAMIR ZAWAHRI,
Deceased.

B268103

(Los Angeles County
Super. Ct. No. BC565877)

CALIFORNIA FAIR PLAN
ASSOCIATION,

Petitioner and Respondent,

v.

MARYBELLE FAYAD, as Co-
administrator, etc., et al.,

Objectors and Appellants.

RANDA ABDOU,

Petitioner and Respondent,

v.

MARYBELLE FAYAD, as Co-
administrator, etc., et al.,

Objectors and Appellants.

B268247

(Los Angeles County
Super. Ct. No. BP143248)

APPEAL from a judgment of the Superior Court of Los Angeles County, Brenda Penny, Commissioner. Affirmed.

Overton, Lyman & Prince and Stephen L. Jones for
Objectors and Appellants.

Bases & Bases, Jeffrey M. Bases and Arielle N. Bases
for Petition and Respondent Randa Abdou.

BACKGROUND

The underpinnings of this case are both tragic and well-known to Los Angeles residents.

On June 7, 2013, 23-year-old John Zawahri (John) shot and killed his brother, Christopher and his father, Samir (Zawahri) at their family home at 2036 Yorkshire Avenue in Santa Monica, California. John then set fire to the home. Officers ultimately cornered and killed John later that day in the library of Santa Monica College. Before he was killed, John shot and killed three more people and wounded several

others.¹ John had prepared a three-page handwritten note before his death; the note was found on his body. Therein, John expressed remorse for killing his father and brother, but gave no motive for his spree. He said goodbye to friends and expressed hope that his mother would be taken care of financially via his father's estate. Investigators believed that John's mental illness played a role in the killings.²

Zawahri died without a will. After Zawahri's death, his widow Randa Abdou (Abdou) filed a petition for letters of administration as did his sister, Nouhad Fayad, and niece, Marybelle Fayad.³ Ultimately, Nouhad and Marybelle

¹ City of Santa Monica Office of Emergency Management, *July 7th, 2013 Shooting Incident* (March 2014) <https://www.smgov.net/uploadedFiles/Departments/OEM/Video_Archive/Santa%20Monica%20Shooting%20Experience%20verFeb%202014.pdf> (as of April 27, 2017).

² Eady, *Zawahri Had Remorse Letter, Police Say*, The Corsair, The News Site for Santa Monica College (June 15, 2013) <<http://www.thecorsaironline.com/news/2013/06/15/zawahri-had-remorse-letter-police-say>> (as of April 27, 2017).

³ When a person dies intestate, someone must be appointed to administer the estate. (Prob. Code, § 8460, subd. (a).) "Appointment . . . becomes effective when the person appointed is issued letters." (Prob. Code, § 8400, subd. (a).) Probate Code section 8461 lists the priority of persons entitled to appointment as administrator, providing in relevant part: "Subject to the provisions of this article, a person in the following relation to the decedent is entitled to appointment as administrator in the following order of

Fayad were appointed as co-administrators of Zawahri's estate. Abdou then filed a Probate Code section 850 petition requesting that the court determine ownership of the estate property. Abdou further requested cancellation of deed as well as transfer of estate property to her, including all accounts in Zawahri's name and an estate account funded with one of those accounts. Abdou also filed a Probate Code section 11700 petition seeking a determination as to who was entitled to the estate.

The insuring agency, the California FAIR Plan Association (hereafter Plan), declared the family home and its contents a total loss. The Plan interpleaded the policy proceeds of \$230,471 for loss of the home and \$52,856 for the value of the contents into the court to allow for distribution of the proceeds once the court determined to whom they belonged. The co-administrators filed objections to Abdou's two petitions. After discovery, the matters were set for trial. A nine-day bench trial took place in March and April 2015.

THE TRIAL COURT'S RULING

On September 10, 2015, the trial court issued a statement of decision outlining the trial testimony as well as the court's resulting decisions. The court found that Zawahri and Abdou had married in 1980 in Lebanon. Zawahri subsequently came to the United States and Abdou joined him in 1985. A deputy commissioner confirmed their

priority: (a) Surviving spouse. [¶] . . . [¶] (f) Brothers and sisters. [¶] (g) Issue of brothers and sisters."

marriage on December 31, 1985 in Los Angeles. The marriage produced two children—Christopher, who was born in 1987, and John, who was born in 1989.

The marriage was rocky and marred by Zawahri's physical abuse of Abdou. In 1993, Zawahri filed an application for dissolution (SP005642) but never pursued it. Thus, no orders of dissolution ever issued.⁴ Zawahri and Abdou remained married and, in January 1996, the couple bought their home at 2036 Yorkshire Avenue. Title to the property was taken by the couple as husband and wife as joint tenants.

The marriage remained volatile and Zawahri's anger frightened Abdou and the children. As a result, Abdou frequently took the children away until Zawahri calmed down. Zawahri also threatened to kill himself. Nevertheless, Zawahri and Abdou continued to work on their problems and continued to reside together as a married couple. Around January 1996, Zawahri was in college pursuing his studies to become an accountant. Abdou worked at a restaurant and paid the mortgage until Zawahri

⁴ The case should have been dismissed after five years. (See Code Civ. Proc., § 583.310 ["An action shall be brought to trial within five years after the action is commenced"]; § 583.360, subd. (a), (b) ["An action shall be dismissed . . . if the action is not brought to trial within the time prescribed in this article"].) However, the Los Angeles County Superior Court website still lists the case as "pending." <<https://www.lacourt.org/casesummary/ui/OSCasesummary.aspx#EV>> (as of March 8, 2017).

took over the payments after finishing college and finding a higher-paying job. During this period, Zawahri and Abdou continued to live together with the children.⁵

The marriage remained tumultuous and, in 1998, Abdou moved out of the house and into an apartment with the children. On May 1, 1998, Abdou applied for a restraining order after Zawahri followed her in his car, broke her car window and struck her.⁶ He also took her passport. The couple quickly reunited, however. On May 18, 1998, Abdou and the children moved back into the family home and the restraining order was dismissed. Abdou kept the apartment in case Zawahri became volatile again and, over the next few years, Abdou moved in and out of the family home. Zawahri and Abdou still considered themselves to be a married couple, however.

At some point after September 2011, Abdou moved out of the family home, taking John with her. Once John entered adolescence, he began suffering from a mental

⁵ The court found Abdou's testimony (and that of her witnesses) regarding the marriage and the history of the family to be credible. The court further found that their testimony was not impeached in any way during the proceedings. Conversely, the court found Marybelle Fayad (and Fayad's witnesses) not to be credible. Fayad's demeanor and the impeachment of her testimony further impacted her credibility.

⁶ On the restraining order application, Abdou checked the box indicating that no divorce or legal separation was pending.

illness that included harboring violent fantasies. Zawahri and Abdou determined that because of John's mental problems and, for the benefit of their children, they had to keep John and Christopher apart. After about a year, John moved back into the family home while Christopher moved in with Abdou.

John's mental condition continued to deteriorate. He threatened to kill people, including his brother, whom he stabbed in 2006. John was placed in a juvenile detention facility and treated at UCLA's psychiatric facilities. He was also institutionalized at a facility in Texas for over a year. When John returned to California, he required 24-hour supervision. Christopher was not allowed to go to the family home for fear he would be harmed by John. Zawahri and Abdou found that the way to cope with the violence in their marriage, as well as a mentally ill child, was to maintain separate residences, which they did until Zawahri's death in 2013. According to Abdou, the couple wanted to remain married and this arrangement allowed them to do so given the problems with John.

After hearing and crediting the trial testimony, the court addressed these issues: (1) whether Zawahri and Abdou were legally separated under Family Code⁷ section 771, subdivision (a);⁸ (2) whether section 721 mandated that

⁷ All further statutory references are to the Family Code unless otherwise indicated.

⁸ At the time of the trial court's ruling, section 771 mandated that "[t]he earnings and accumulations of a

the family home be restored to Abdou; (3) whether Abdou should receive the insurance proceeds interpleaded by the Plan as a result of the destruction of the home and its contents; and (4) whether the accounts in Zawahri's name (including the estate administration accounts) should be distributed to Abdou.

Relying upon well-established California cases, the court found that Zawahri and Abdou were not legally separated at the time of his death. The court first noted that spouses cannot be deemed legally separated unless at least one spouse has a subjective intent to end the marriage and there is objective evidence of conduct furthering that intent.⁹ Even a husband and wife living in separate residences are not necessarily separated without the subjective intent to

spouse . . . while living separate and apart from the other spouse, are the separate property of the spouse.” The California Legislature has since eliminated the “living separate and apart” language. Section 771 now provides that “[t]he earnings and accumulations of a spouse . . . after the date of separation of the spouses, are the separate property of the spouse.” The amended statute went into effect on January 1, 2017. (See Gov. Code, § 9600, subd. (a).) The statute applies retroactively as provided by Family Code section 4, subdivisions (c) and (h).

⁹ The court cited *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, 1158–1159 (*Norviel*) for this proposition. Although, as discussed below, the Legislature abrogated *Norviel* when it recently added section 70, the new statute actually codifies this particular holding.

end the marital relationship as evidenced by words or conduct.¹⁰ Citing *Makeig v. United Security Bk. & T. Company* (1931) 112 Cal.App. 138 (*Makeig*), the court further observed that rifts between spouses that may be followed by long periods of reconciliation do not rise to the level of a separation of the spouses. Each marriage is unique, the court noted, and even when spouses live apart, courts will not find a “separation” unless there is evidence of a *complete* breakup of the marriage.¹¹

The court then determined that no credible evidence established that Zawahri and Abdou “were anything but a married couple in every respect.” Testimony at trial revealed that Abdou went to the family home on a regular basis, that she had a key to the home and had a garden there. Zawahri and Abdou “continued to maintain an intimate spousal relationship and had marital relations throughout the entirety of their marriage until [Zawahri’s] murder.” Abdou gave Zawahri a key to her apartment, the couple cooked for each other and their children, and Zawahri

¹⁰ The court cited *In re Marriage of Davis* (2015) 61 Cal.4th 846 and *In re Marriage of Von der Nuell* (1994) 23 Cal.App.4th 730, 736 for this proposition. (As discussed below, section 70 also abrogated *Davis*.)

¹¹ The court cited *Makeig, supra*, 112 Cal.App. 138, *Norviel, supra*, 102 Cal.App.4th 1152, as well as *In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 454 and *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444 for this proposition.

occasionally stayed at Abdou's apartment. When Abdou traveled, Zawahri would have Abdou leave her car at the family home. Zawahri bought groceries for Abdou and gave her money if she needed it. The two shopped together, talked on the phone, had meals at the family home and raised their children together. Zawahri listed Abdou as his wife on hospital admission forms as recently as 2011. She remained a beneficiary to several insurance policies. Zawahri told a friend that he wanted Abdou to take care of their children if something happened to him.

Zawahri also confided in his friend Jesse Cruz.¹² Cruz thus knew about the problems with John and Christopher; he knew with whom each child resided and why; and he knew how Zawahri felt about his relationship with Abdou. Zawahri said he did not want a divorce and considered the pair to be a married couple in all respects. Cruz even knew that Zawahri and Abdou had continued their intimate relationship as well.

In addition to the physical indicia pointing to an intact marriage, financial evidence presented at trial supported the same conclusion. Documents from Zawahri's employer listed Abdou as his spouse and illustrated Zawahri's intent to provide for her and their children. Abdou was the primary beneficiary on Zawahri's investment and retirement accounts and on his life insurance policies. Zawahri also

¹² Trial testimony revealed that Cruz and Abdou were Zawahri's only friends.

listed Abdou as his wife on his passport. Abdou was listed as Zawahri's spouse in documents presented to health care providers and was also listed as his wife on the health insurance policy and the health savings accounts they shared. In short, the court held, "there was no credible evidence presented that the parties intended to separate or otherwise end their marriage." "To the contrary, . . . there are a myriad of indices which . . . point to a viable marriage" between Abdou and Zawahri. The court therefore found that credible evidence established that Abdou and Zawahri "considered themselves to be a married couple, that they loved each other and, that, their intact marital relationship continued until [Zawahri's] murder."

Based on its findings, the trial court entered two orders. In its first order, the court ruled that: (1) Zawahri died intestate on June 7, 2013; (2) Abdou and Zawahri were not separated under Family Code section 771 and remained married as husband and wife for over 30 years until Zawahri's death; (3) Abdou and Zawahri purchased 2036 Yorkshire Avenue in Santa Monica, California; (4) Abdou and Zawahri took title to the Yorkshire property as " 'Samir Zawahri and Randa Abdou, Husband and Wife as Joint Tenants' " pursuant to a deed recorded on January 19, 1996; (5) Although a later deed stated that " 'Randa Abdou, spouse of grantee, hereby grants to Samir Zawahri, a married man as his sole and separate property' "(capitalization omitted) and was executed by Abdou on September 13, 2002, the deed was void and of no force or effect, having been obtained

through undue influence and without consideration;¹³

(6) Accordingly, Abdou was the surviving joint tenant on the Yorkshire property pursuant to the January 19, 1996 deed. Thus, from January 19, 1996, until Zawahri's death on June 7, 2013, legal title of the Yorkshire property was and remained " 'Samir Zawahri and Randa Abdou, Husband and Wife as Joint Tenants.' " As the surviving joint tenant, Abdou was now the sole owner of the Yorkshire property;

(7) All property found at the Yorkshire property after Zawahri's death was to pass to Abdou, as it was acquired during the marriage and was thus community property;

(8) Two bank accounts, a Bank of America account and an HSA Bank account, titled in Zawahri's name were each funded with Zawahri's earnings during marriage and were thus community property. The funds were to be disbursed and paid to Abdou as the surviving spouse;

(9) A bank account opened by the administrators of Zawahri's estate (funded in part by the two bank accounts listed above) was funded with Zawahri's earnings during the marriage and was thus community property. The funds (to the extent they were derived from Zawahri's other accounts) were to be disbursed and paid to Abdou as the surviving spouse;

(10) All accounts in Zawahri's name held at Charles Schwab were funded with Zawahri's earnings during marriage and were thus community property. The funds were to be

¹³ Zawahri told Abdou that the documents he asked her to sign on September 13, 2002, were merely to refinance the residence.

disbursed and paid to Abdou as the surviving spouse;
(11) The proceeds of a Plan insurance policy in the amount of \$230,471 (for fire damage at the Yorkshire property) and \$52,856 (for the contents of the home), less \$4,638 in attorney fees payable to the Plan, belonged to Abdou, as she was the named insured on the policy as well as the surviving joint tenant and the proceeds were community property;
(12) Zawahri left no separate personal property or separate real property. Thus, all property and assets held in Zawahri's name were community property to be distributed to Abdou; (13) All assets in Zawahri's name were assets acquired during marriage and thus community property. Therefore, all assets or property acquired, retrieved, stored or discovered by the administrators for Zawahri's estate were to be distributed to Abdou forthwith without estate administration. The administrators were ordered to distribute all property and assets acquired during the administration of the estate to Abdou, to cooperate in the transfer of community property to Abdou, and to close the administration of the estate.

The Plan interpleaded proceeds from the insurance policy in the amount of \$283,327 (\$230,471 for proceeds related to the fire damage at the Yorkshire property and \$52,856 for proceeds related to the contents of the home) as a result of conflicting claims for the proceeds made the estate of Samir Zawahri on one hand and Abdou on the other.

In interpleading the funds, the Plan incurred attorney fees and costs in the undisputed amount of \$4,638.

Accordingly, in its second order, the court directed the clerk of the Los Angeles Superior Court to pay and distribute \$4,638 from the interpleaded funds to the Plan. The Plan would then be discharged from the case and from liability with respect to this action.

Because Abdou was the named insured of the policy, as well as the surviving joint tenant, and the policy proceeds were community property, the court held that Abdou was entitled to the balance of the interpleaded funds (\$278,689). Accordingly, the court ordered that the clerk of the Los Angeles Superior Court pay and distribute \$278,689 from the interpleaded funds to Abdou.

Appellants challenge the trial court's finding that Abdou and Zawahri were not separated under section 771 and instead remained married as husband and wife until Zawahri died on June 7, 2013. Appellants also contend the trial court erred when it found that Abdou did not engage in spoliation of evidence when she allowed an asbestos abatement crew to dispose of material inside the gutted home. Neither contention has merit.

DISCUSSION

I. Separation Under Section 771

A. *Standard of Review*

Date of separation is a factual issue to be determined by a preponderance of the evidence. (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1493–1494.) “Our review is limited to determining whether the court’s factual determinations are supported by substantial evidence and

whether the court acted reasonably in exercising its discretion.” (*In re Marriage of De Guigne* (2002) 97 Cal.App.4th 1353, 1360.)

Thus, we must accept any finding of the trial court that is supported by substantial evidence and must resolve all conflicts in favor of the prevailing party and indulge in all reasonable inferences in support of the trial court’s finding. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 31–32.) While there may be evidence to the contrary in the record, we are not concerned with such evidence. It does not matter that had the trial court believed other evidence or drawn other reasonable inferences, it might have reached a different conclusion. This court may not substitute its conclusions for those reached by the trial court. (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.)

B. Merits

The trial court found that Abdou and Zawahri were not separated within the meaning of section 771 and instead remained married until Zawahri’s death. As noted above, section 771 has been amended since the trial court’s decision. Previously, section 771, subdivision (a) applied when spouses begin living separate and apart. The phrase “living separate and apart” was itself a term of art, undefined by the Legislature. (*Norviel, supra*, 102 Cal.App.4th at p. 1158.) “As developed through case law, ‘“living separate and apart” meant that the parties’ *physical separation* is the result of a breakdown in the marital relationship.’” (*Ibid.*) Nevertheless, the fact that a husband

and wife lived in separate residences was not determinative. (*Id.* at p. 1162.)¹⁴

Instead, there were two prerequisites to finding that spouses were “living separate and apart” under section 771. “First, at least one spouse must entertain the subjective intent to end the marriage; second, there must be objective evidence of conduct furthering that intent. [Citations.] ‘Simply stated, the date of separation occurs when either of the parties *does not* intend to resume the marriage *and* his or her actions bespeak the finality of the marital relationship.’” (*Norviel, supra*, 102 Cal.App.4th at pp. 1158–1159.) Separation occurs when intent and actions occur simultaneously.¹⁵ (*Id.* at p. 1160.)

¹⁴ In each of the following cases, the court concluded that the parties had not separated within the meaning of the statute, despite living in separate residences. (See *In re Marriage of Baragry, supra*, 73 Cal.App.3d at p. 448; *Makeig, supra*, 112 Cal.App. at p. 144; *Tobin v. Galvin* (1874) 49 Cal. 34; see also *In re Marriage of Hardin, supra*, 38 Cal.App.4th at p. 453; *In re Marriage of Von der Nuell, supra*, 23 Cal.App.4th at p. 737; *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 434.) Decisional law thus clearly established that parties could live apart and yet not be separated.

¹⁵ New section 70 (added by Stats. 2016, ch. 114, § 1) specifically incorporates this test. It defines “date of separation” as “the date that a complete and final break in the marital relationship has occurred,” as evidenced by the spouse’s expression of his or her intent to end the marriage and conduct that is consistent with that intent. The

This date-of-separation test, which section 70 has now expressly adopted, does not ask what the public thinks, but whether at least one of the parties intended to end the marriage and whether there was objective conduct “bespeak[ing] the finality of the martial relationship.” (*In re Marriage of Hardin, supra*, 38 Cal.App.4th 448, 451.) “There must be problems that have so impaired the marriage relationship that the legitimate objects of matrimony have been destroyed and there is no reasonable possibility of eliminating, correcting or resolving these problems.” (*Ibid.*)

“All factors bearing on either party’s intentions ‘to return or not to return to the other spouse’ are to be considered. [Citation.] No particular facts are per se determinative. The ultimate test is the parties’ subjective intent and all evidence relating to it is to be objectively considered by the court.” (*In re Marriage of Hardin, supra*, 38 Cal.App.4th at p. 452.) In other words, “[t]he ultimate question to be decided in determining the date of separation is whether either or both of the parties perceived the rift in their relationship as final.” (*Id.* at p. 453, italics omitted.)

amended section 70 now directs courts to take into account “all relevant evidence” when determining the date of separation. It also abrogated *In re Marriage of Davis, supra*, 61 Cal.4th 846 and *In re Marriage of Norviel, supra*, 102 Cal.App.4th 1152. Both cases had held that living in separate residences was necessary to establish a separation under section 771, while section 70 imposes no such requirement.

“The best evidence of this is their words and actions. The husband’s and the wife’s subjective intents are to be objectively determined from all of the evidence reflecting the parties’ words and actions during the disputed time in order to ascertain when during that period the rift in the parties’ relationship was final.” (*Ibid.*)

There is substantial evidence in the record to support the trial court’s finding in this case. Appellant bore the burden of demonstrating that the couple were separated within the meaning of section 771. Yet, appellant’s witnesses had little to no personal knowledge of the couple’s marriage or their struggles with their son, John. Nor did they know about the financial arrangements Zawahri had established for his family. Marybelle Fayad served as appellant’s main witness. Although she had stayed with Zawahri between 2008 and 2010 during the school year, she spent vacations, summers and holidays away from the home.¹⁶ Thus, it is perhaps unsurprising Fayad did not see Zawahri and Abdou together, as she claimed at trial.¹⁷ Fayad also admitted that she did not know whether Zawahri and Abdou intended to stay married.

¹⁶ Other witnesses, such as Zawahri’s brother and sister, had each visited only once in 20 years. Another brother had never visited at all.

¹⁷ However, Fayad did see Abdou visit John at the home during the afternoons, thus confirming that Abdou still had access to the home.

In addition to finding that the witnesses did not have a close relationship with Zawahri, the trial court further found that the witnesses were not credible. We note that the trial court is the “sole judge of the credibility of the witnesses [and] may disbelieve them even though they are uncontradicted if there is any rational ground for doing so.” (*Johnson v. Pacific Indem. Co.* (1966) 242 Cal.App.2d 878, 880.)

Furthermore, substantial evidence supports the trial court’s finding. Abdou went to the family home, often daily, and had a key to the home as well as a street parking permit. She also kept a garden at the home, did the family laundry, folded and ironed Zawahri’s pants, and mopped the floors. Abdou brought food over and cooked for Zawahri. The couple continued to have martial relations. Zawahri had the key to Abdou’s apartment. He stayed there on occasion and routinely filled the fridge. If Abdou needed money, Zawahri provided it.

Zawahri’s work documents confirmed that he continued to provide for Abdou financially. Zawahri made all the couple’s investment decisions and made Abdou his primary beneficiary on investment and retirement accounts. Zawahri started and managed Abdou’s IRA account. He also named her as the sole beneficiary on his life insurance policy that he paid for monthly until he died. Zawahri and Abdou were on the same health insurance policy that Zawahri maintained. He also maintained a health savings account for the couple’s benefit.

With respect to health care, Abdou accompanied Zawahri on his hospital visits. Zawahri referred to Abdou on his medical records as his wife as well as his next of kin. He also listed Abdou as his contact person and, in 2011, specifically referred to her as his spouse and authorized representative on the forms.¹⁸ Abdou and her friends testified that Zawahri and Abdou loved one another and did not want a divorce. Abdou made clear that she did not remain in the marriage in deference to her Christian Lebanese background, but because she loved Zawahri.

Given the testimony and documentary evidence at the trial court's disposal, it is clear the court's determination that Zawahri and Abdou loved each other; that Zawahri considered himself to be a married man and conducted himself accordingly, and that the marriage remained intact until he died is supported by substantial evidence. Appellant's repeated contentions that this was not a "normal" marriage is unpersuasive. Indeed, our courts have recognized that human relationships have incalculable permutations and that each marriage is unique. They have thus declined to explicitly define the conduct sufficient to establish the date of separation. Instead, "[a]ll factors bearing on either party's intentions 'to return or not to return to the other spouse' are to be considered[] [citation] . . . [and n]o particular facts are per se

¹⁸ In 2008, Zawahri listed Abdou as his wife on his passport and certificate of naturalization.

determinative.” (*In re Marriage of Hardin*, *supra*, 38 Cal.App.4th at p. 452.)

The courts have nevertheless tried to distill the kinds of objective conduct that should be weighed in this calculus. One factor is whether the parties have ceased sharing a marital home (*Norviel*, *supra*, 102 Cal.App.4th at p. 1163), although the fact that the spouses have physically separated and taken up new addresses is not dispositive—especially given the recent amendment of section 771—and can be overcome by contrary evidence showing there was not a complete and final break in the marital relationship. (*In re Marriage of Marsden*, *supra*, 130 Cal.App.3d at p. 434.) The courts also consider whether, notwithstanding the parties’ residential separation, they have continued their conjugal relations (*In re Marriage of Von der Nuell*, *supra*, 23 Cal.App.4th at p. 736), maintained their family life, (*In re Marriage of Baragry*, *supra*, 73 Cal.App.3d at p. 447), or continued to act jointly in financial matters. (*Norviel*, at p. 1161.) All these hallmarks of married life are present in this case.

Furthermore, the couple’s reason for living apart—to protect their sons’ physical safety and best deal with John’s severe mental illness—is both understandable and eminently reasonable. Appellant’s contention that the couple should have lived under one roof while John was committed to an institution in 2007 is unavailing. John’s stay was temporary and the couple would have had to again locate a second residence for Abdou once he returned.

Appellant's other contention that Abdou could have moved back into the family home once Christopher turned 18 and was theoretically capable of living on his own is similarly unpersuasive. Appellant fails to cite any evidence in the record demonstrating that Christopher was self-supporting at that age or that such an arrangement would have been in his or the family's best interests.

The trial court plainly used the now codified "date of separation" test by requiring at least one spouse have a subjective intent to end the marriage as well as objective evidence of conduct furthering that intent. Nevertheless, appellant claims the trial court used an incorrect test by adding an *extra* requirement, namely, that the parties had to be actively pursuing a formal legal dissolution before the court could find a section 771 separation.¹⁹ However, this alleged requirement appears nowhere in the court's ruling. Rather, the court found that there were no actions taken by Zawahri or Abdou to support appellant's contention that they intended to dissolve their marriage. Indeed, the court concluded, there was no credible evidence that the either spouse intended to separate or otherwise end their marriage. Observing that one marker of separation is absent in a case is not the same thing as requiring its presence, however.²⁰

¹⁹ It is undisputed that Zawahri and Abdou were legally married until Zawahri died.

²⁰ Appellant also describes the three tests it maintains courts have used when determining a separation date, urging us to reject the test expressly adopted by the

Finally, although appellant recites contradictory evidence, often without citation, in support of its claim that the spouses were separated, we must resolve all conflicts in favor of the prevailing party and indulge in all reasonable inferences in support of the trial court's finding. (*In re Marriage of Bonds, supra*, 24 Cal.4th at pp. 31–32.) Applying this standard of review, it is clear that sufficient evidence supported the trial court's finding here.

II. Alleged Spoliation of Evidence

Appellant claims that Abdou intentionally directed the destruction of evidence in 2013 when she cooperated with an asbestos abatement company tasked with remediating the family home after the arson. Appellant also claims that Abdou's cooperation violated a court order barring the parties from disposing of any personal property without a prior court order. Appellant moved for sanctions against Abdou nearly two years after this alleged destruction. After full briefing by both sides, the court denied the motion. The court also addressed the motion in its statement of decision, reiterating that Abdou had not violated the court's order barring disposal of personal property—or any court order for that matter—and that appellant had presented no evidence of spoliation of evidence or insurance fraud.

Legislature when amending section 771 and to use a different standard. This we decline to do.

A. Standard of Review

In general, a trial court's ruling on an in limine motion is reviewed for abuse of discretion. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493; *Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392.) This standard of review involves abundant deference to the trial court's ruling. Thus, when examining the ruling, we ask only whether it exceeds the bounds of reason or is arbitrary, whimsical or capricious. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479.) Moreover, if we find that evidence was improperly excluded, the error is not reversible unless “ ‘it is reasonably probable a result more favorable to the appellant would have been reached absent the error.’ ” (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432.)

B. Merits

The fire set by John left the Yorkshire property in a dangerous state. The house was completely blackened, inside and out. Debris littered the premises and the roof had collapsed. The home was yellow tagged and boarded up. Because she was named on the insurance policy, the insurance adjuster, Bob Mallham (Mallham), asked Abdou to meet with him at the home. They met there in July 2013, just weeks after the murders. When Abdou entered the home, the outlines of her husband's and son's bodies were still visible on the ground. Abdou sobbed and collapsed upon entering the home. When she was able to return later that

day, Abdou searched the house for any legible documents and intact photos, saving what she could.²¹

According to Mallham, the home contained asbestos and lead, which needed to be removed before a child snuck into the home and became sick from inhaling the substances. Indeed, Mallham said he would have been held liable had he not immediately started the abatement process. He also testified that because Abdou was named on the insurance policy, she had a duty to cooperate with him and facilitate the abatement. Mallham testified that Abdou did in fact cooperate during the abatement process and did not instruct anyone to destroy any evidence.²² Appellant's former attorney was notified before the abatement actually began to update him on the process. This attorney was also in direct contact with the insurance company attorney and approved payment for the asbestos abatement.

Nevertheless, appellant claims Abdou directed the disposal of Zawahri's personal papers after removing documents and photos from the home. While appellant contends the house contained "no letters, no diaries, no

²¹ Abdou eventually produced more than 2,500 documents and photos in discovery, which were recovered during her search of the house.

²² On August 20, 2013, Abdou hired Superior Abatement Services, Inc. to conduct the abatement. The owner of Superior Abatement stated that Abdou did not instruct anyone to throw away evidence. The only thing the company disposed of was fire debris.

calendars, no appointment books, no telephone message logs, no notes, no will, no anything” when Marybelle Fayad first searched the home in December 2013,²³ there is no evidence that: (1) these items existed in the first place or; (2) if they did exist, they contained proof that either spouse had intended to end their marriage or; (3) if they did exist and contained such proof, they survived the fire intact and undamaged or; (4) if they did exist, and contained such proof, and survived the fire intact and undamaged, they were then ordered destroyed by Abdou.

Given the dearth of evidence supporting appellant’s claim, the trial court did not abuse its discretion in denying the claim. (See *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 14 [without knowing content and weight of allegedly spoliated evidence, it is impossible “to meaningfully assess what role the missing evidence would have played in the determination of the underlying action”].) Moreover, a party moving for sanctions based on spoliation of evidence “must make an initial prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party’s ability to establish an essential element of his claim or defense.” (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1227.) Because no such showing was made here, we affirm the trial court decision.

²³ The house had been vandalized by this time. It is unknown how many times the house was vandalized or by whom.

DISPOSITION

The judgment is affirmed. Randa Abdou is to recover her costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.