Filed 7/3/12 Marriage of Downing CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| In re Marriage of ERIC and SABRA DOWNING. | 2d Civil No. B236110<br>(Super. Ct. No. D337323)<br>(Ventura County) |
| ERIC DOWNING,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SABRA DOWNING,<br><br>Defendant and Appellant. | |

Wife appeals an order denying her motion to set aside a default judgment of dissolution of marriage brought pursuant to Family Code section 2122.[1] We affirm.

[1] All statutory references are to the Family Code unless otherwise stated.

## FACTS

Husband filed a petition for dissolution of marriage on December 29, 2009. The petition alleged the parties were married on May 5, 1999, and separated on November 1, 2008, a period of approximately nine years and six months. Wife was served with the petition on December 31, 2009.

Husband filed a request for default on May 13, 2010. His community property declaration shows the family residence in Ventura as the only community asset. Its fair market value is listed as $334,000, and the amount of debt as $500,000. The proposal for division of the residence lists 0.00 for each party.

Default judgment was entered on June 24, 2010. The judgment ordered Husband to pay spousal support of $2,600 per month until 2019; it stated that the parties agree to sell their residence and divide the proceeds equally; and it provided that any pension plan shall remain the sole and exclusive property of the party in whose name the pension plan exists. Notice of entry of judgment was mailed on June 24, 2010.

On May 26, 2011, Wife filed a motion to set aside the judgment and for sanctions. The motion was based on Husband's alleged fraud, perjury, and failure to disclose, and Wife's mental incapacity and duress.

In support of her motion, Wife declared: She suffers from multiple medical conditions including chronic migraines, fibromyalgia, chemical sensitivities and degenerative nerve disease. When she was served with the petition for dissolution and notice of entry of judgment, she was too ill to comprehend the documents. Husband was aware of how ill she was. She never received the disclosures, or the request for default or the judgment.

Wife declared that her health required that she live near the ocean. Husband would place her in a hotel, make sure she had the necessities, and assist her with her basic needs. On April 12, 2009, he moved her into her current home, and told her he wanted a divorce.

Wife states, now that she has been living near the ocean, her health has improved. She can now comprehend the information she had received.

In opposition to the motion, Husband declared: From October 2009, Wife was fully capable of caring for herself. He does not believe Wife's statement that she was too ill to read the judgment. She was personally served with summons and petition for dissolution.

Husband admitted the judgment does not divide the community property portion of his pension. He stated that he is willing to pay for a Qualified Domestic Relations Order dividing the community portion of his pension.

Husband also admitted that the $500,000 he listed as a mortgage on the family residence was a "'placeholder.'" He inadvertently neglected to insert the correct amount before filing the paperwork. He pointed out the amount is irrelevant because the judgment provides that the property will be sold and the proceeds divided equally.

Husband said that he has never denied Wife access to any of the community or her personal property located in the family home. Most of the furniture in the home is hers. She has always known she can pick it up anytime she wanted. He even offered to put it in storage for her; she declined the offer.

Husband declared his income is $6,844 per month. He received a discretionary bonus in 2010 of $21,000. He does not know whether he will receive a bonus in 2011.

Husband pays Wife $2,600 per month as support. He also paid Wife's separate property credit card debt of $16,000.

The trial court found to the extent there was some nondisclosure or an element of perjury, the judgment was not materially affected. The court also found Wife failed to carry her burden of showing fraud, duress or mental incapacity. By stipulation, the court set aside the judgment waiving community interest in any pension plan. In all other respects, the court denied the motion.

## DISCUSSION

### I

Section 2122 allows the trial court to set aside a judgment after the period provided in Code of Civil Procedure section 473 upon a showing of fraud, perjury, duress, mistake of law or fact in a stipulated or uncontested judgment, or a failure to disclose as required by section 2100 et seq.

Before the trial court can grant relief, the court must "find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief." (§ 2121, subd. (b).)

The party seeking to have the judgment set aside has the burden of proof. (*In re marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 88.) We review the trial court's decision for an abuse of discretion. (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682.)

Here Husband admitted the failure to disclose his pension fund and the amount of the debt secured by the family residence. The trial court found that any such failure to disclose or perjury did not materially affect the judgment. The finding is supported by the record.

Husband stipulated to set aside the judgment as to his pension fund. The judgment provides that the family residence will be sold and the proceeds divided equally. Thus the amount of debt secured by the residence is not material.

Wife argues the family residence has no value because the mortgage exceeds its market value. Assuming that to be true, Wife does not explain how the failure to disclose a valueless asset can materially affect the judgment.

Wife complains that Husband continues to reside in the family residence without ever placing it on the market. Wife fails to explain how marketing a valueless asset could possibly assist her. Wife's own declaration shows that she cannot live in the family residence. She claims she must live near the ocean.

Wife argues there is substantial evidence of perjury and fraud.

"In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. [Citation.] The trier of fact is not required to believe even uncontradicted testimony. [Citation.]" (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

Wife argues Husband's declaration in opposition to her motion admitted there were household furnishings and her personal property, yet he failed to list them as assets. But Husband declared that Wife has free access to all of those assets. He even offered to put them in storage for her. Again, Wife does not show how the failure to disclose the assets can materially affect the judgment.

Wife argues Husband failed to disclose checking and savings accounts. Wife points out that Husband declared after paying off Wife's credit card debt, the parties had only $3,000 in their joint savings and checking account. But Wife fails to mention that the credit card debt Husband paid was over $16,000 in Wife's separate debt incurred after their separation. Husband's point is that Wife greatly benefited by the payment of her separate debts, and that Wife's benefit overwhelmed by a large margin any community interest she may have had in the parties' joint accounts. Wife presents no credible evidence to show Husband is wrong. Thus she failed to show that the judgment was materially affected.

Wife points out that Husband listed wages of $6,844 per month on his income and expense declaration without supporting documentation. Wife also complains Husband reported his discretionary bonus as zero on his income and expense declaration, whereas it was actually $34,000. But Wife produces no evidence to show Husband's wages were not in fact $6,844 per month. In addition, Husband's income and expense declaration filed in May 2010 states, "Discretionary

bonus in December." Husband could not have known then how much the bonus would be.

Wife points out that in the petition for dissolution, Husband inserted "9" for the years of marriage, and left the number of months blank. She claims he should have filled in nine years, eleven months. Assuming that to be so, Wife fails to show how it would have made a material difference.

Wife claims it is undisputed that income for the year 2008 was $126,233 and for 2009, $117,676. But Wife confuses undisputed evidence with credible evidence. The only evidence that supports Wife's claim is her own unsupported declaration. The trial court is not required to find even undisputed evidence credible. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028.)

Wife contends the trial court erred in concluding section 2122 only authorizes the trial court to set aside the judgment, not the default. But because Wife failed to carry her burden of showing she is entitled to any relief, we need not decide the question.

II

Wife contends the trial court erred in concluding the policy favoring the finality of judgments outweighs the policy of assuring the proper division of community property and adequate spousal support.

But the trial court concluded only that section 2120, subdivision (c) acknowledges the public policy in favor of finality of judgments. That is manifestly true. Section 2121, subdivision (b) provides that a judgment cannot be set aside unless the moving party shows the alleged grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of relief. Such a showing of prejudice is not only mandated by statute, it is mandated by the California Constitution. (Cal. Const., art. VI, § 13; *In re Marriage of Steiner and Hosseini* (2004) 117 Cal.App.4th 519, 526.)

Wife appears to believe that merely showing a failure to disclose is enough to have the judgment set aside. But section 2121, subdivision (b) and the

California Constitution provide it is not enough. Wife must also show that had the proper disclosures been made, she would have obtained a more favorable judgment. She has failed to make such a showing.

III

Wife contends the trial court abused its discretion in denying spousal support and attorney fees.

The trial court did not deny Wife spousal support. The judgment provided for spousal support of $2,600 per month until July 2019. The court simply refused to modify the judgment.

Wife argues the court should have set aside the termination date. Wife's argument is apparently based on her claim that she was unable to work during her marriage and will not be able to work in the future. The only support for her claim is a doctor's note of August 1, 2011, labeled "Per patient's request," and stating only, "Sabra Downing unable to attend court in the mornings due to medical condition." That hardly requires the trial court to modify the 2019 termination date.

Wife also argues that the trial court entered judgment for spousal support without a "prove up" hearing, and never made any of the findings required by section 4320. But now that the time has expired to set aside the judgment under Code of Civil Procedure section 473, the burden falls on Wife to prove the amount of spousal support was wrong. (§ 2121, subd. (b)); *In re Marriage of Kieturakis*, *supra*, 138 Cal.App.4th at p. 88.) Wife has failed to do so.

The trial court did refuse to award attorney fees, stating that each party would bear his or her own fees. The court gave no reason for denying Wife's request for fees. We have little doubt, however, that the trial court's decision was based on the ground that her motion as a whole was so lacking in merit as to border on the frivolous.

Section 2030, subdivision (c) authorizes the trial court to award attorney fees and costs "reasonably necessary" to maintain or defend proceedings

after entry of judgment. A trial court may properly conclude that fees to maintain a motion bordering on the frivolous are not reasonable necessary.

Wife's motion was successful in one respect. Husband agreed to set aside the judgment with respect to his pension. The trial court, however, acted within its discretion in denying her attorney fees. We affirm. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

John R. Smiley, Judge

Superior Court County of Ventura

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