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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LESLIE OSINOFF, Plaintiff and Appellant, v. KAREN HUTER, Defendant and Appellant.	2d Civil No. B233539 (Super. Ct. No. SD039348) (Ventura County)

Former spouses Leslie Osinoff (Husband) and Karen Huter (Wife) appeal the characterization and value of three marital assets. Husband argues that the couple's Thousand Oaks residence and a $100,000 loan to finance its renovation are assets and liabilities of the community. Wife contends that Husband's general contractor business should be valued as of the date of their separation (rather than the date of trial). We agree with each. We modify the judgment accordingly, reverse and remand for further proceedings to value the business, and affirm the judgment in all other respects.

FACTS AND PROCEDURAL HISTORY

A. *Facts*

Husband and Wife married on May 27, 2006. Early the next year, Wife contributed at least $77,000 of her own money toward purchasing a single-family home on Stuart Circle in Thousand Oaks (the residence). Both Husband and Wife intended that the residence would be the marital home. They nevertheless decided to purchase and finance the residence in Husband's name alone and subsequently to transfer the title back to both spouses. The grand deed and deed of trust accordingly vested title in Husband as "a married man as his sole and separate property." Wife also executed an interspousal transfer deed ceding any interest in the residence to Husband.

Three months later, Husband and Wife executed an interspousal transfer deed. This second deed transferred the residence from Husband to "[Husband] and [Wife], Wife of Grantor." At the same time, Husband and Wife also executed a Declaration of Homestead exemption. The exemption referred to Husband and Wife as "joint owners." The spouses attempted to record both documents, but the Recorder's Office rejected them because the documents did not list the parties' middle names. Neither spouse recorded corrected documents.

Husband and Wife thereafter renovated the residence. They financed the renovation with $100,000 of Wife's separate property and with a $100,000 loan from Husband's mother, who was at that time legally incompetent. Both spouses participated in planning the renovation, and Husband's general contracting business did the work.

The parties separated on August 18, 2009. A few days earlier, on August 10, 2009, Husband filed a Cessation of Notice to shorten the time subcontractors could file liens; in that notice, Husband listed himself as the residence's "Owner." Husband also applied for a restraining order against Wife on August 18, 2009, and referred to the residence as "my home." A few months later,

on November 16, 2009, husband recorded a deed purporting to transfer the residence from himself to the Leslie Osinoff Trust.

B. *Procedural History*

Divorce and dissolution proceedings commenced. The parties resolved the disposition of most of their assets and liabilities. Three issues remained: (1) the characterization of the residence; (2) the characterization of the $100,000 loan from Husband's mother; and (3) the value of Husband's business.

Prior to trial, Wife moved to value Husband's business as of the date of separation (August 18, 2009) rather than the date of trial (March 4, 2011). The trial court denied the motion. The court found that Wife "had not met the burden of proof to use an alternate valuation date." The court accordingly used the default valuation date—that is, the date of trial—"pursuant to Family Code section 2552 [, subdivision] (a) and the case law supporting that."[1]

The parties' positions regarding the characterization of residence evolved over the course of litigation. In their initial court filings, Husband listed the residence as his separate property, and Wife listed it as her community property. By the time of trial, however, the parties had swapped positions. This was likely prompted by the parties' stipulation tying the valuation of Husband's business to the characterization of the residence. If the residence were determined to be Husband's separate property, the business would be valued at $320,500; if community property, the business would be valued at $104,500. This meant that Husband owed Wife more if the residence were declared his separate property.

The case proceeded to bench trial in stages on March 4, 2011. At the end of the first stage, the court ruled the residence was Husband's separate property. The court was "not impressed by the fast and loose nature of lenders that advise people to get loans . . . not taking into account the community property . . .

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

consequences of such choices." The court reasoned that "the deeds, the loans, Declarations of Disclosure of each party to a lesser extent, the statements by the parties in their restraining order actions, and the post-separation conduct of [Husband] in transferring the property to his own separate trust" meant the property was Husband's separate property. The court placed no weight on Wife's involvement with the renovation. But the court noted that "[i]f this case had involved a long term marriage under a few different facts, from an equity standpoint alone, there would be a need for the property to be a community property type of asset."

Based on that finding, the court ordered Husband to pay Wife $236,250. The court calculated that amount by awarding wife: (1) one-half of the stipulated value of the business ($320,500), which came to $160,250; and (2) the full value of the equity in the residence, which the parties stipulated was $76,000.[2] Because the residence was Husband's separate property, the court ruled in the second phase that the debt to Husband's mother for improvements to that property was his separate debt as well.

DISCUSSION

We review the factual findings underpinning the trial court's characterization for substantial evidence, but engage in de novo review where "'the issue of characterization to be given (as separate or community property) . . . requires a critical consideration, in a factual context, of legal principles and their underlying values . . . .'" (*In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 734.) We review a trial court's selection of a valuation date for an abuse of discretion. (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 624 (*Duncan*).)

[2] The court awarded the full value of the equity, rather than half its value, to offset Wife's contribution of $77,000 of her separate property in purchasing the residence.

A. *Characterization of the Residence*

The characterization of marital property often turns on how we apply and resolve conflicts among a hierarchy of legal presumptions. This case is no different.

The baseline presumption directs us to presume that property acquired during the marriage is community property. (§ 760.) This presumption yields to a second presumption that requires us to give presumptively controlling weight to the form of title in which property is held. (Evid. Code, § 662; *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 186, 189 (*Brooks*).) Together, these presumptions seem to lead to the conclusion that the residence is community property. The baseline presumption points us to characterizing the residence as community property because Husband and Wife acquired it while married. But the parties vested title to the residence in Husband "as his sole and separate property." This presumptively renders the residence Husband's separate property, except that the parties subsequently vested title in themselves as "Husband and Wife." This second transfer presumptively takes us back to the conclusion that the residence is community property.

Wife offers three overarching reasons why, in her view, the last portion of our analysis is flawed. First, she contends that the form-of-title presumption *cannot* be invoked a second time. Relying on *Brooks, supra*, 169 Cal.App.4th 176, Wife argues that the title presumption may only be used once per marriage for any item of property. *Brooks* does not so hold. *Brooks* addressed the validity of a transfer of property held as a separate property of one spouse to a third party; it did not involve successive changes in title between spouses.

Second, Wife argues that the title presumption *should not* be invoked a second time because the transfer did not lawfully transmute the property back into community property. Wife begins with the contention that the parties' inability to record the second grand deed renders it void. However, recording is not necessary to

make a transfer effective *between the signatories* to the transfer—in this case, Husband and Wife. (Civ. Code, § 1217; Evid. Code, § 622.) Wife next argues that the second deed did not comply with the procedural requirements for interspousal transfers, which are called "transmutation[s]." (§ 852.) We are not persuaded because a duly executed grant deed has long been sufficient to meet the statutory requirement that an interspousal transfer expressly state that the characterization or ownership of the property is being changed. (*Estate of Bibb* (2001) 87 Cal.App.4th 461, 463, 468-469 [so holding]; *In re Marriage of Lund* (2009) 174 Cal.App.4th 40, 50 [explaining transmutation standard].) Wife lastly asserts that the transfer did not convert the residence to community property because it vested title in "Husband and Wife"—not "Husband and Wife *as community property*." We conclude that the language "Husband and Wife" sufficiently conveys the spouses' intention to convert the residence into community property, at least in the absence of any further specification of the form of title (such as a joint tenancy or tenancy in common). We accordingly need not decide whether the statutory presumption that jointly acquired property constitutes community property (§ 2581) also compels this result. (Compare *In re Delaney* (2003) 111 Cal.App.4th 991, 997 [limiting § 2581 to newly acquired property] with *In re Marriage of Weaver* (2005) 127 Cal.App.4th 864-865 [applying § 2581 to already acquired property].)

Even if we were to accept Wife's arguments and decline to treat the second, interspousal deed as an independently valid transfer invoking the form-of-title presumption a second time, that second deed is still significant. That is because the second transfer, as a minimum, rebuts the presumption arising from the initial acquisition of the residence in Husband's name alone. The presumption arising from the form of title may be rebutted by clear and convincing evidence of an agreement of the parties that "the title reflected in the [initial] deed is not what the parties intended." (*Brooks*, *supra*, 169 Cal.App.4th at p. 189.) The second deed

constitutes such evidence because it indicates a mutual intention to convert the residence back to joint ownership.

Wife's final set of arguments urges that we place no weight on the second transfer because that transfer is either (1) trumped by the further presumption of undue influence or (2) eclipsed by clear and convincing evidence that the spouses intended the property to be Husband's separate property. We disagree. Interspousal transfers are presumed to be the product of undue influence (and hence invalid) notwithstanding the title presumption. (§ 721; *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293, 301.) However, this presumption is only triggered by transfers advantaging one spouse over another. (*In re Marriage of Matthews* (2005) 133 Cal.App.4th 624, 629.) In this case, Wife is not in a position to complain about undue influence because, at the time the second grand deed was executed, *Husband* was the spouse disadvantaged by ceding his separate property interest in the residence to the community. We also do not find clear and convincing evidence in the record indicating any mutual intent by the parties to treat the property as separate property because the spouses' conduct after the second deed points in different directions.

B. *Debt to Husband's Mother*

A debt incurred for the benefit of the community is community debt. (Cf. § 2625.) Because the loan from Husband's mother was "most[ly]" used to renovate the residence and that asset is community property, the debt is a community debt. Wife argues that the loan is unenforceable, but she forfeited this argument by not raising it until now.

C. *Valuation Date for Husband's Business*

In her appeal, Wife argues that the trial court erred in refusing to grant her request to value Husband's general contracting business as of the date of separation.

Husband argues that we may not consider Wife's appeal. Husband first asserts that we lack jurisdiction. However, we may entertain any issues raised on appeal from a final judgment unless the issue is immediately appealable. (*Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 822.) Because orders fixing the valuation date are not immediately appealable (Code Civ. Proc., § 904.1), we have jurisdiction over this issue. Husband also contends that Wife's stipulation to the business's value estops her from assailing the date of valuation. Because the court's ruling on the date of valuation preceded and precipitated the parties' stipulation on the same issue, Wife may challenge the earlier ruling. (*Burrow v. Pike* (1988) 190 Cal.App.3d 384, 393.)

On the merits, the default rule is to use the date of trial. (§ 2552, subd. (a).) Of course, a court may, "for good cause shown" and "to accomplish an equal division of the community estate of the parties in an equitable manner," select any other date after the spouses' separation. (*Id.*, at subd. (b).) We have uniformly held there is "good cause" to use the date of separation itself when the asset to be valued is a "professional practice" or "small personal service business[] which rel[ies] on the skill and reputation of the spouse who operates" it. (E.g., *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1291; *Duncan*, *supra*, 90 Cal.App.4th at pp. 625-626.) We have adopted this rule because the date of separation is "the cutoff date for the acquisition of community assets." (*In re Marriage of Stevenson* (1993) 20 Cal.App.4th 250, 253-254 (*Stevenson*).) Because the value of a small personal service business is largely the product of the owning spouse's personal efforts, changes in the value of such business should accrue to the benefit (or detriment) of the owning spouse.

Husband argues that his general contracting business falls outside this rule. However, general contractors operate personal service businesses. (*Stevenson*, *supra*, 20 Cal.App.4th at pp. 254-255; see also *Bing v. Bing* (1959) 168 Cal.App.2d 348, 350.) Husband further contends that his business has suffered losses due to the

downturn in the economy rather than any intentional conduct by him to devalue the business. But this rule applies even when the business's value is not tied "exclusively" to the owner's personal efforts (*Duncan*, *supra*, 90 Cal.App.4th at p. 627), and even when there is no evidence of intentional efforts to devalue the business (*Stevenson*, *supra*, at pp. 254-255).

DISPOSITION

We reverse the trial court's judgment, and remand the cause to the trial court for a hearing on valuation of the business and, thereafter, for entry of judgment otherwise consistent with our ruling. We affirm the judgment in all other respects.

Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED.

HOFFSTADT, J.*

We concur:

GILBERT, P. J.

PERREN, J.

* Assigned by the Chairperson of the Judicial Council.

Roger L. Lund, Judge

Superior Court County of Ventura

Brian M. Moore for Plaintiff and Appellant Leslie Osinoff.

Meghan B. Clark and Bobette Fleishman for Defendant and Appellant Karen Huter.