

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of CHET and ROBERTA
CABOTAGE WILLIAMS.

2d Civil No. B244201
(Super. Ct. No. FL030344)
(San Luis Obispo County)

CHET WILLIAMS,

Appellant,

v.

ROBERTA CABOTAGE,

Respondent.

Chet Williams appeals an order granting a post-judgment motion filed by his former wife Roberta Cabotage Williams (Cabotage) to divide a pension which was not divided in the judgment that dissolved their marriage. We conclude, among other things, that: 1) Cabotage had a statutory right to divide the pension in a post-judgment proceeding, 2) the parties' stipulation for judgment may not be interpreted to forfeit her community property interest in the pension, and 3) it may not be applied to divest the court of jurisdiction to perform its duty to achieve an equitable division of community property. We affirm.

FACTS

On August 5, 2004, the superior court issued a judgment of dissolution of the marriage of Williams and Cabotage. The parties made a division of their marital property in a "Stipulation for Judgment." The stipulation contained a provision relating to Williams' pension - a community property asset.

The stipulation provided, "Within 180 days of entry of Judgment of Dissolution of Marriage herein, the parties shall jointly retain an appropriate professional to determine the community interest in the Husband's Frito-Lay pension; however, the entire cost of the pension valuation shall be borne solely by the Wife. The Husband is required to fully cooperate so that the valuation may be completed quickly and efficiently.

"Upon receipt and review of the valuation, the Husband shall have the option to buy-out the Wife's interest in his pension so as to preserve his full pension benefit to himself. The Husband must execute his pension buy-out option no more than 180 days following receipt of the valuation.

"Should the Husband fail to buy-out the Wife's interest in his pension for any reason, the parties may resolve the matter via any agreed means or by court decision via properly noticed motion.

"The parties agree that the Court shall retain jurisdiction over division of the Husband's Frito-Lay pension only. Such jurisdiction shall terminate without further action of any party on the second anniversary of the Judgment date herein."

On February 23, 2012, Cabotage filed a motion/order to show cause seeking to divide the pension. She claimed the "parties have never valued the pension" and Williams did not exercise his "option to buy out" her interest in it. She alleged that she and Williams were unable to agree on a division, and consequently she sought a court division of the asset.

Williams filed an opposition claiming the trial court lacked jurisdiction to divide the pension. The trial court granted Cabotage's motion. It ruled that the pension was an undivided community property asset; that the court had jurisdiction in a post-

judgment proceeding; and that in the "interests of justice," it was appropriate to divide this asset.

DISCUSSION

Incomplete Record

Williams challenges the trial court's express and implied factual findings in favor of Cabotage. But he did not produce a complete record. We do not know what evidence, factual showings, admissions or concessions the parties made at the hearing because there is no reporter's transcript. In addition, Williams did not obtain a settled statement. Consequently, we must presume the court's findings are supported by matters that are not before us.

"A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent" (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) But even on the record we have, the result does not change.

Jurisdiction to Divide the Pension

Williams contends the trial court did not have jurisdiction to consider a post-judgment motion to modify the original dissolution judgment involving his pension. He notes that judgment was filed on August 5, 2004.

But the trial court found the pension was an undivided asset and that it retained jurisdiction to divide it post judgment. The court was correct. Family Code section 2556 provides, in relevant part, "In a proceeding for dissolution of marriage, . . . the court *has continuing jurisdiction* to award community estate assets . . . to the parties that have not been previously adjudicated by a judgment in the proceeding."¹ (Italics added.)

There is a statutory procedure for Cabotage to file a post-judgment motion to divide an undivided community asset. Section 2556 provides, "A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain

¹ All statutory references are to the Family Code.

adjudication of any community estate asset . . . omitted or not adjudicated by the judgment." Section 2556 does not have a time limitation on the court's continuing jurisdiction to divide community assets post judgment. "[E]ven where there is an ostensible, final and complete judgment the parties may nonetheless litigate issues of property rights that are not expressly adjudicated by that judgment." (*In re Marriage of Dunmore* (1996) 45 Cal.App.4th 1372, 1379, fn. 6.)

Did the Stipulation Bar Relief or Forfeit Cabotage's Property Rights?

Williams contends the parties' stipulation for judgment barred relief for Cabotage after August 5, 2006. He notes that there is a two-year provision which states, "The parties agree that the Court shall retain jurisdiction over division of the Husband's Frito-Lay pension only. Such jurisdiction shall terminate without further action of any party on the second anniversary of the Judgment date herein." He also highlights a second provision which provides, "It is the express intention of the parties that any *asset inadvertently omitted* above should accrue to the party who enjoys primary possession of the asset." (Italics added.)

Williams argues that because Cabotage did not file her motion before August 5, 2006: 1) the trial court lost jurisdiction, 2) Cabotage forfeited her right to divide the pension, and 3) this community asset became his sole property as a result of her untimely motion.

The pension was expressly identified as a community asset in the judgment, and the judgment contained a procedure for the parties to divide it. Consequently, the pension does not fall within the category of "inadvertently omitted" property. More importantly, the next provision in the stipulation provides, "Notwithstanding the immediately preceding paragraph, the parties expressly exempt from the above distribution the Husband's Frito-Lay pension."

The two-year provision may not be applied to bar Cabotage from bringing litigation to divide the pension or as a forfeiture of her community property rights. As the trial court correctly found, "[N]othing in the judgment awards him the pension in the

event Wife failed to file a motion or otherwise resolve the issue within two years." The stipulation allowed him to buy her interest in the pension, but Williams did not do so.

Consequently, Cabotage's community property interest in this pension did not expire on August 5, 2006. The pension remained as property that was "left unadjudicated by decree of divorce," and consequently Cabotage and Williams continued to hold it as "tenants in common." (*Henn v. Henn* (1980) 26 Cal.3d 323, 330.) Her right to divide it in judicial proceedings is established by decisional law (*id.* at pp. 329-333) and by a subsequent statutory enactment (§ 2556).

The trial court also rejected Williams' claim that Cabotage forfeited her rights. It said, "There is no basis to find that the interests of justice require that [Cabotage] forfeit her community interest in the pension." Williams has not shown the court erred by finding such a forfeiture would be inequitable. Family law courts are "courts of equity." (*In re Marriage of Klug* (2005) 130 Cal.App.4th 1389, 1403.) "[E]quity abhors forfeitures." (*Fickbohm v. Knaust* (1930) 103 Cal.App. 443, 445.) The agreement did not provide that there would be a change in any party's pension interest two years after entry of judgment. A forfeiture of an interest should not be implied. In interpreting the parties' agreement, "the construction which avoids a forfeiture should be favored." (*Brant v. Bigler* (1949) 92 Cal.App.2d 730, 734.) The trial court's decision is consistent with this rule.

Williams contends he and Cabotage "expressly preempted provisions of Family Code § 2556." (Boldface omitted.) But the agreement did not include a waiver of Cabotage's right to bring a section 2556 motion. Nor did she waive her right to bring an independent action to divide the pension after August 5, 2006. (See *Henn v. Henn*, *supra*, 26 Cal.3d 323.) "[T]he right to pursue claims in a judicial forum is a substantial right and one not lightly to be deemed waived." (*Marsch v. Williams* (1994) 23 Cal.App.4th 250, 254.) Even if the stipulation could impose a two-year time limit on the judgment, it could not impede Cabotage's independent statutory right to reopen that judgment by filing her section 2556 motion.

Did the Stipulation "Preempt" the Court's Jurisdiction?

Williams claims the trial court should have interpreted the agreement as expressing the parties' intent to "preempt" the court's jurisdiction. But he has not shown from this incomplete record why the court could not reasonably find the parties did not have such an intent. He cites one part of the stipulation and claims that after two years the court has no power to provide further relief. But another provision of the stipulation vests the court with the power to vacate the judgment. It provides, "[W]e understand that noncompliance with our *disclosure obligations* will result in *the court setting aside the judgment in this matter.*" (Italics added.) The trial court could reasonably find this provision showed the parties' intent that the court would retain equitable jurisdiction to provide a remedy for an unfair division of property post judgment.

Cabotage also contends the parties intended that a condition precedent to invoking the two-year provision would be cooperation in dividing the pension. She claims Williams is estopped from asserting the two-year time limit because he did not disclose pension information and deliberately obstructed and delayed her efforts to divide that asset. She argues the time periods in the stipulation were consequently tolled because of his conduct.

Williams disputes Cabotage's claims. But there is no transcript of the hearing. Because of the incomplete record, we cannot assume the trial court impliedly found for Williams on these claims. (*Null v. City of Los Angeles, supra*, 206 Cal.App.3d at p. 1532.)

Courts will not enforce stipulations that have the impact of undermining a strong public policy or violating a party's statutory rights. (*In re Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020, 1029-1030.) Agreements to preclude courts from exercising their continuing jurisdiction in marital dissolution cases have been declared unenforceable in a number of contexts. (*In re Marriage of Bereznak* (2003) 110 Cal.App.4th 1062, 1069; *In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 990.) California has a strong public policy of achieving an equitable distribution of marital property in dissolution proceedings. (*In re Marriage of Barnes* (1987) 43 Cal.3d 1371,

1377-1378.) Section 2556 represents a major part of that policy. Courts will not enforce marital property agreements that result in windfalls that conflict with the Family Code. (*In re Marriage of Mehren & Dargan* (2004) 118 Cal.App.4th 1167, 1171; *Diosdado v. Diosdado* (2002) 97 Cal.App.4th 470, 474.) The trial court correctly ruled that adopting Williams' position would prevent the court from exercising its continuing statutory duty to achieve an equitable division of property. It would also undermine a strong state policy and promote an injustice by forfeiting Cabotage's entire interest in the pension. (*Marriage of Barnes*, at pp. 1377-1378; see also *Henn v. Henn*, *supra*, 26 Cal.3d at pp. 329-333.) ""[T]he court cannot surrender its duty to see that the judgment to be entered is a just one"" (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 725.)

The order is affirmed. Costs on appeal are awarded in favor of the respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Patrick J. Perry, Judge
Superior Court County of San Luis Obispo

Wayne Philips Law, Wayne Philips for Appellant.

Roberta Cabotage, in pro. per., for Respondent.