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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Marriage of C. VICTOR WYLIE and CATHERINE A. WYLIE	B277812 (Los Angeles County Super. Ct. No. WED035151)
C. VICTOR WYLIE, Respondent, v. CATHERINE A. WYLIE, Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Matthew St. George, Commissioner. Affirmed.

Catherine A. Wylie, in pro. per., for Appellant.

Sullivan Law & Associates, Richard P. Sullivan and Steve Ra for Respondent.

Appellant Catherine A. Wylie (Catherine) appeals the trial court's ruling granting the motion of her former husband, respondent C. Victor Wylie (Victor), to enter a final judgment dissolving their marriage nunc pro tunc. The judgment was backdated to March 1980, the date when an interlocutory judgment resolving property, custody and support issues was entered. Victor had twice remarried in the intervening years, and contended the failure to have the final judgment entered earlier was the product of negligence or inadvertence. On appeal, Catherine, appearing in propria persona, contends the request should not have been granted because: (1) Victor was at fault for failing to seek entry of the final judgment earlier; (2) the final judgment was entered without hearing; (3) the court failed to exercise its discretion; (4) the court failed to consider her request for "affirmative relief"; (5) the governing statute precludes entry of a final judgment nunc pro tunc when it appears an appeal will be taken; and (6) the judgment prejudiced her right to seek a new division of property or seek additional support for the couple's adult disabled son. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Catherine and respondent Victor were married in December 1969 in Florida. In 1973, the couple moved to California, where Victor worked as a physician and Catherine gave birth to their only child, Christopher. In

1978, Victor filed a petition for divorce. In February 1979, Catherine filed a response.

On March 13, 1980, an interlocutory judgment of dissolution of marriage was entered.[1] The interlocutory judgment divided the couple's property, and provided that Victor was to pay $100 per month toward the cost of daycare for Christopher and $900 per month in spousal support. It gave the couple joint legal custody of Christopher, and divided physical custody nearly equally.[2] The interlocutory judgment form contained a printed warning stating that it was not "a final dissolution of marriage" and that "the parties are still married." It further stated: "[O]ne of the parties must submit a request for final judgment on the form prescribed by [former] Rule 1288. Neither party may remarry until a final judgment of dissolution is entered." (Capitalization omitted.) On May 4, 2011, the court

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[1] The interlocutory judgment stated that it was approved pursuant to the couple's marital settlement agreement, but the marital settlement agreement is not included in our record.

[2] A partial transcript of an October 1991 family court hearing submitted by Catherine indicated that by that time, Catherine had full custody of Christopher and support had been modified. Catherine was represented by separate counsel at the hearing. The docket sheet reflects that more than one request for modification of custody and support had been filed between 1982 and 1991.

prepared a Certificate of Clerk stating that no final judgment had been entered.[3]

Victor married for the second time in 1982. That marriage ended in 1986. In 1990, he married for the third time. In 2015, when applying for Social Security, Catherine learned that no final judgment of dissolution had been entered and wrote to Victor.

In March 2016, Victor filed a request to enter a judgment of dissolution nunc pro tunc to March 13, 1980. He stated in his declaration that he was surprised to learn that the final judgment had not been entered, that he had begun living as a single man in 1980 when the interlocutory judgment was filed, and that he had not received the May 2011 clerk's certificate. He asked that the court enter the judgment of dissolution nunc pro tunc to avoid injustice and legitimize his current marriage.

Catherine, acting in propria persona, opposed the motion. She contended the lack of a final judgment was the result of Victor's negligence. She further contended that the interlocutory judgment had not been the product of a fair trial, and that it had resulted in an inequitable division of the couple's assets and inadequate awards of alimony and child support. She stated that she had not been represented by counsel, that the document reflecting her appearance and the interlocutory judgment had been prepared and filed by Victor's attorney, and that she had not been present in court

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[3] The copy of the document in the record does not indicate where or to whom it was mailed.

on the day the interlocutory judgment was filed. She outlined the mental and physical difficulties experienced by their now adult son, Christopher, and expressed the hope that denial of the request could result in his obtaining financial assistance from his father. Finally, she alleged that Victor's second marriage had failed and that he was living with a new partner.

At the hearing, Catherine was sworn and invited to give testimony about "anything [she would] like to raise . . . ." Catherine re-visited matters raised in her opposition. The court explained to Catherine that the issues raised in her opposition did not provide a basis to refuse the request to enter the final judgment nunc pro tunc, and were more appropriately addressed in a motion to set aside the interlocutory judgment. The court further explained that entry of the final judgment would not preclude her from pursuing a claim for arrears in spousal or child support. The court granted the request and entered the final judgment of dissolution nunc pro tunc to March 30, 1980. Catherine appealed.

DISCUSSION

We begin with a brief discussion of the system that prevailed in California when this couple originally sought to dissolve their marriage. From the early 1900's until abolished by the Legislature in 1983, California law provided for two judgments (often called decrees) in marital dissolution proceedings: interlocutory and final. (11 Witkin,

Summary of Cal. Law (11th ed. 2017) Marriage, § 125, pp. 169-170, § 126, p. 171.) The interlocutory judgment provided a judicial ruling that the parties were entitled to a dissolution of their marriage and determined property and support rights. (*Ibid.*; *Borg v. Borg* (1938) 25 Cal.App.2d 25, 29; *Harrold v. Harrold* (1954) 127 Cal.App.2d 582, 583-584.) The final judgment severed the marital relationship, but could not be entered until a period of time had passed -- at the relevant time, six months from the date of the service of the summons or appearance of the respondent -- "to allow an opportunity for reconciliation." (11 Witkin, *supra*, § 125, at p. 169.)

The two judgments were not entwined. Once an interlocutory judgment adjudicating support and property division issues was entered, the parties had a right to appeal, move for a new trial, or seek relief under section 473 of the Code of Civil Procedure; if the parties did none of those things, the interlocutory judgment became final and was res judicata on all the questions it determined. (*In re Marriage of Hanley* (1988) 199 Cal.App.3d 1109, 1118; *Grant v. Superior* (1963) 214 Cal.App.2d 15, 20; *Overell v. Superior Court* (1938) 29 Cal.App.2d 418, 420.) Even if no final judgment had been entered, the interlocutory judgment was "a conclusive adjudication and . . . res judicata with respect to all issues determined." (*Leupe v. Leupe* (1942) 21 Cal.2d 145, 148.) By the same token, re-opening the interlocutory judgment following, for example, presentation of evidence of extrinsic fraud, had no impact on the decree terminating the

marital relationship, which "remain[ed] in effect." (*In re Marriage of Modnick* (1983) 33 Cal.3d 897, 910 [wife's discovery, more than a year after entry of the interlocutory judgment, that husband had concealed community assets allowed court to re-open property and support issues, but did not affect final adjudication of their marital status]; see *Hull v. Superior Court* (1960) 54 Cal.2d 139, 147 ["Severance of a personal relationship which the law has found to be unworkable and, as a result, injurious to the public welfare is not dependent upon final settlement of property disputes"].)

In 1935, trial courts were given the statutory power to backdate the final judgment dissolving the marriage. (See *In re Marriage of Mallory* (1997) 55 Cal.App.4th 1165, 1171, 1178; *Macedo v. Macedo* (1938) 29 Cal.App.2d 387, 389-390.) The original statute -- former Civil Code section 133 -- provided that whenever the parties in a divorce action were entitled to a final judgment, but by "mistake, negligence, or inadvertence" the final judgment had not been entered and no appeal had been taken from the interlocutory judgment or motion for a new trial made, the court could cause a final judgment to be entered as of the date the judgment could first have been entered. (Stats. 1935, ch. 407, p. 1459.) The primary purpose of this grant of statutory power was acknowledged to be the "'validat[ion of] otherwise void marriages [in order to] relieve the parties to such marriages from the stigma and other consequences of bigamous relationships into which they might innocently fall by reason

of oversight or neglect to have a final decree entered.'" (*Estate of Casimir* (1971) 19 Cal.App.3d 773, 780, quoting *Estate of Hughes* (1947) 80 Cal.App.2d 550, 553.) As explained in *Macedo v. Macedo*, as a result of "setting an interval of time between the divorce and a subsequent marriage, . . . [m]arriages were entered into in ignorance [of the lack of a final decree], and the rights of children and of property were sometimes affected"; "to correct this situation and to moderate the harshness of the effect of such oversight," the Legislature "enacted [former] section 133 of the Civil Code" which "makes valid a marriage which otherwise was invalid by a nunc pro tunc decree." (*Macedo v. Macedo*, *supra,* at pp. 390-392.)[4]

In 1939, the Legislature added a provision allowing courts to backdate interlocutory judgments. Former Civil Code section 131.5 provided that where "by mistake,

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[4] Catherine asserts that Victor's relationship with his third wife has ended, leaving no need to legitimize the marriage. Historically, the breakdown of a subsequent marriage did not provide a ground for denial of a request for entry of the final judgment nunc pro tunc. It was not unusual for a party to seek nunc pro tunc entry of a final judgment of dissolution of a first marriage while a subsequent marriage was in the process of dissolving, in order to protect the rights that arose during the later marriage. (See, e.g., *Macedo v. Macedo*, *supra*, 29 Cal.App.2d at p. 389; *Overby v. Overby*, *supra*, 154 Cal.App.2d at pp. 813-814; *Ringel v. Superior Court* (1942) 54 Cal.App.2d 34, 35.) It was said that "it is the duty of the courts to validate the [successive] marriage rather than to find ways of destroying it." (*Overby v. Overby*, *supra*, at p. 816.)

negligence or inadvertence" the interlocutory judgment had not been signed filed or entered, the court could "cause the interlocutory judgment to be signed, dated, filed and entered . . . as of the date when the same could have been signed, dated, filed and entered originally" on a showing that "no appeal is to be taken in the action or a motion for a new trial made . . . ." (Stats. 1939, ch. 332, § 1, p. 1672.)

In 1969, the Civil Code was re-organized, section 133 became section 4515, and section 131.5 became section 4513. (Stats. 1969, ch. 1608, pp. 3326-3327; see *Estate of Casimir*, *supra*, 19 Cal.App.3d at p. 779, fn. 4.) In 1983, when the dual judgment system was abolished, section 4515 was repealed, and section 4513 was re-written "to conform the nunc pro tunc power to the new single judgment procedure . . . ." (*In re Marriage of Mallory*, *supra*, 55 Cal.App.4th at p. 1178, fn. 11; see Stats. 1983, ch. 1159, § 4, p. 4385.) Accordingly, references to interlocutory judgments were deleted and the new language stated that where the court had determined that a decree of dissolution ought to have be granted, but by mistake, negligence or inadvertence, the judgment had not been entered, the court could cause the judgment to be entered as of the date when it first could have been entered, "if it appears to the satisfaction of the court that no appeal is to be taken in the action or motion made for a new trial, to annul or set aside the judgment or for relief under Chapter 8 (commencing with Section 469) of Title 6 of Part 2 of the Code of Civil Procedure." (Stats.

1983, ch. 1159, pp. 4383-4384.)[5] In 1992, the Family Code was created, and section 4513 of the Civil Code became section 2346 of the Family Code (section 2346). (Stats. 1992, ch. 162, § 10; see *In re Marriage of Mallory*, *supra*, at p. 1178.)[6]

Against this background, we address Catherine's claim that the court erred in granting Victor's motion to enter the final judgment of dissolution of their marriage nunc pro tunc under section 2346. Victor submitted a request for entry of judgment, stating that he was surprised to learn no final judgment had been entered, and that believing he was single, he had twice re-married. Catherine contends that Victor was negligent for failing to heed the warning on the form that the interlocutory judgment did not constitute a final dissolution of the couple's marriage. Catherine's contention is unavailing. The current statute, as did all its

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[5] Chapter 8 of Title 6 of Part 2 of the Code of Civil Procedure includes the procedures for re-opening a judgment and obtaining relief from default.

[6] Family Code section 2346 provides: "(a) If the court determines that a judgment of dissolution of the marriage should be granted, but by mistake, negligence or inadvertence, the judgment has not been signed, filed, and entered, the court may cause the judgment to be signed, dated, filed, and entered in the proceeding as of the date when the judgment could have been signed, dated, filed, and entered originally, if it appears to the satisfaction of the court that no appeal is to be taken in the proceeding or motion made for a new trial, to annul or set aside the judgment, or for relief under Chapter 8 (commencing with Section 469) of Title 6 of part 2 of the Code of Civil Procedure."

predecessors, permits entry of the final judgment nunc pro tunc where the failure to ensure it was entered was the result or "negligence, or inadvertence." (§ 2346.) Courts have said that "[I]nadvertence and negligence may consist of a lack of heedfulness or attentiveness by refraining from doing the proper thing, and by failing to act when action is required." (*Kern v. Kern* (1968) 261 Cal.App.2d 325, 335; accord, *In re Marriage of Mallory*, *supra*, 55 Cal.App.4th at p. 1180; *Hurst v. Hurst*, *supra*, 227 Cal.App.2d at p. 867.) Moreover, "delay in the entry of the final judgment of divorce beyond the time when such judgment could have been obtained is a sufficient basis for finding inadvertence and negligence when the party entitled to such final judgment had no valid reason for such delay." (*Hurst v. Hurst*, *supra*, at p. 867.) Finally, where the moving party has remarried prior to seeking entry of the final judgment, a presumption arises that he or she did not deliberately enter into an invalid marriage. (*Kern v. Kern*, *supra*, at pp. 335-336; *Hamrick v. Hamrick* (1953) 119 Cal.App.2d 839, 848.) As no evidence was presented that Victor's actions were deliberate or that he had reason for delay, his declaration provided substantial evidence that the failure to seek entry of the final judgment was the result of negligence or inadvertence. Consequently, the trial court's decision to grant the request must be upheld. (See *Menge v. Brown* (1959) 173 Cal.App.2d 6, 19 [existence or non-existence of mistake, negligence or inadvertence are questions of fact to be determined by trial court].)

Catherine contends the entry of a judgment nunc pro tunc contravenes Family Code sections 2346, subdivision (d) and 2336. Section 2346, subdivision (d) provides: "The court shall not cause a judgment to be entered nunc pro tunc as provided in this section as of a date before trial in the matter, before the date of an uncontested judgment hearing in the matter, or before the date of submission to the court of an application for judgment on affidavit pursuant to Section 2336." Family Code section 2336 outlines the procedures for having a trial by affidavit, and also states: "No judgment of dissolution or of legal separation of the parties may be granted upon the default of one of the parties." Catherine points out that there was no trial preceding the entry of the interlocutory judgment, and claims she made no appearance. However, the record reflects Catherine appeared in the dissolution proceeding by filing a response in February 1979. It further reflects that the couple entered into a marital settlement agreement, rather than undergo trial. (See 11 Witkin, Summary of Cal. Law*, supra,* Marriage, § 333, at p. 404 ["On dissolution, in lieu of a court determination of support [citation] and property rights [citation], a marital settlement agreement may be made by the spouses, providing for a division of property, or for the payment of a sum of money at once or in installments, or for both. . . . It is usually approved by the court and incorporated in the judgment [citations]"].) Although Catherine claims to have been pressured by Victor's counsel to "sign something," she does not deny signing the marital settlement agreement or

filing a response. Moreover, as the record further reflects, she appeared after entry of the interlocutory judgment to seek modification of support and custody, and was at least for a time, represented by counsel. Accordingly, nothing in Family Code section 2346, subdivision (d), or section 2336 precluded granting the request for entry of final judgment.

Catherine contends the court erroneously failed to exercise its discretion to deny the request. Under the former two-judgment system, once the interlocutory judgment had been granted, the entry of the final decree essentially became a ministerial act on the part of the court unless there was evidence the parties had reconciled during the intervening period. (See, e.g., *Lane v. Superior Court* (1930) 104 Cal.App. 340, 345 ["Where an interlocutory decree has been granted, and upon the application for a final decree no intervening facts appear to show a change in the status or relation of the parties, the entry of a final decree becomes something in the nature of a ministerial act on the part of the court, and mandamus may be invoked to compel it to perform its duty" (italics omitted)]; *Nacht v. Nacht* (1959) 167 Cal.App.2d 254, 260, 261 [describing former Rules of Court requiring party moving for entry of final decree to submit affidavit stating that "the parties 'have not become reconciled,' and 'have not lived or cohabited together'"; if evidence of reconciliation is found, court "must deny the entry of the final decree"]; *Angell v. Angell* (1948) 84 Cal.App.2d 339, 342 ["There can . . . be no doubt that, where, after the entry of the interlocutory the parties have

cohabited, the entry of the final decree is not a mere ministerial act but becomes a judicial act in the performance of which the trial court may use its discretion"].) Neither party presented evidence of reconciliation. Accordingly, the trial court had no basis to refuse to enter the final judgment of dissolution.

Citing *In re Marriage of Tamraz* (1994) 24 Cal.App.4th 1740, Catherine contends the court failed to consider her request for "affirmative relief." In *Tamraz*, the husband filed an action for dissolution of marriage and the parties entered into a marital settlement agreement to resolve property and support issues. Unbeknownst to the wife, the husband reneged on his promise to have an interlocutory judgment entered based on the marital settlement agreement. Years later, when the wife sought to have the interlocutory judgment entered nunc pro tunc, the husband sought to unilaterally dismiss the dissolution action. The court held that the husband could not dismiss the action while the wife's request for affirmative relief -- her motion for entry of judgment based on the marital settlement agreement -- was pending, citing Code of Civil Procedure section 581. (*In re Marriage of Tamraz, supra,* at pp. 1746-1747.) At the time of the hearing in the instant case, Catherine had no request for affirmative relief pending. Her only submission to the court had been an opposition to Victor's motion, based on objections to the decades-old interlocutory judgment. Accordingly, *In re Marriage of Tamraz* and the rules on which it relies are not pertinent.

Catherine contends the court erred in granting the request because section 2346 instructs the trial court to grant a request to enter the final judgment nunc pro tunc only if "it appears to the satisfaction of the court that no appeal is to be taken in the proceeding or motion made for a new trial, to annul or set aside the judgment, or for relief under Chapter 8 (commencing with Section 469) of Title 6 to Part 2 of the Code of Civil Procedure." As discussed, in 1983, Civil Code section 4515, governing issuance of final judgments of dissolution nunc pro tunc under the former dual judgment system, was repealed when the Legislature did away with the dual judgment system, leaving a single statute (former Civil Code section 4513, now Family Code section 2346) addressing the court's power to issue judgments nunc pro tunc under the single judgment system. (Stats. 1983, ch. 1159, §§ 4, 6, pp. 4383-4385.) The former statute precluded entry of a final judgment of dissolution nunc pro tunc if an appeal or other request for modification *had been* taken but not resolved. The current language precludes entry of a judgment nunc pro tunc if it appears that an appeal *will be* taken or other attempt will be made to obtain reversal of a determination made prior to the final judgment. Catherine apparently reads this language to preclude the entry of judgment nunc pro tunc because in the proceedings below, she raised objections to the 1980 interlocutory judgment and continues to do so before this court. We are not persuaded. Nothing in the language or history of section 2346 and its predecessor statutes suggests

a party may veto the entry of a judgment of dissolution nunc pro tunc merely by threatening to mount a long-delayed challenge to the underlying interlocutory judgment. Neither in the 35 years since its entry nor in the proceedings below did Catherine present viable legal grounds for challenging the interlocutory order. Accordingly, the court was not precluded from granting Victor's request.

Finally, Catherine continues to raise issues pertaining to the March 1980 interlocutory judgment, contending as she did below that she was pressured into agreeing to it, that she was not represented by counsel, that the property and support awards were inadequate and unfair, and that the couple's disabled son was and is in need of more financial assistance than was provided. As we have discussed and the trial court explained, any issues relating to property and support were part of the interlocutory judgment and are not properly raised in a proceeding held to determine the status of the marriage. Catherine had the opportunity to seek revisions to the interlocutory judgment over the years, and the record reflects that the couple did modify it when Christopher was still a child. Granting the request to backdate the termination of the couple's marriage validated Victor's second and third marriages. Denying it would not have provided a basis to re-open the issues resolved in the interlocutory decree and award additional financial relief to Christopher or Catherine.

DISPOSITION

The judgment is affirmed. Victor is awarded his costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.