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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of WILLIE and
SUSAN POINDEXTER.

2d Civ. No. B280160
(Super. Ct. No. 1414259)
(Santa Barbara County)

WILLIE POINDEXTER,

Appellant,

v.

SUSAN POINDEXTER,

Respondent.

*“It occasionally happens that the division of property or the award of support [in a marital dissolution case] . . . is inequitable when made due to the nondisclosure or other misconduct of one of the parties.”*¹ This is such a case.

¹ Family Code section 2120, subdivision (b), italics added. All statutory references are to the Family Code unless otherwise specified.

Willie Poindexter petitioned for dissolution of his long-term marriage to Susan Poindexter.² Susan did not respond to the petition and a default judgment was entered. The trial court also entered an order forfeiting Susan's community property interest in Willie's retirement account.

Susan filed a request for order (RFO) setting aside the default judgment and the subsequent order based on fraud, perjury, duress, mental incapacity and Willie's failure to comply with disclosure requirements. (See § 2122, subds. (a)-(d), (f).) Following a two-day evidentiary hearing, the trial court granted the RFO. It found that Willie, "knowing of [Susan's] disability and her inability to support herself, took advantage of [her] mental disability to craft a grossly one-sided Default Judgment. Thereafter, when [Susan] was most vulnerable, he convinced her to give up her community interest in his retirement account for a fraction of its worth."

Willie contends the trial court abused its discretion by setting aside the default judgment and order. We disagree and affirm.

FACTS AND PROCEDURAL BACKGROUND

Susan and Willie were married in May 1993. Prior to the marriage, Susan and her mother owned a home located at 1005 N. Milpas Street in Santa Barbara (the Milpas property). In 1998, Willie was added to the title to facilitate a refinance of the property.

Willie petitioned for dissolution in November 2012. When Susan did not appear in the action, Willie requested a default judgment. He declared that the sole community asset was the Milpas property. He stated the only separate property was some household furniture (to be awarded to Susan) and exercise equipment (to be awarded to Willie). Willie did not account for Susan's separate property interest in the Milpas property. He also

² We refer to the parties by their first names to avoid confusion. No disrespect is intended.

stated there was no issue of spousal support even though he had been the primary wage earner during the marriage and Susan's mental health issues had prevented her from working on a regular basis. Indeed, at the time Willie requested the default judgment, Willie was employed as a county probation officer while Susan was unemployed and undergoing mental health treatments.

On March 7, 2014, the trial court entered Willie's proposed default judgment. The judgment terminated the court's jurisdiction to award spousal support and ordered the sale of the Milpas property. When the property was sold in July 2014, Willie kept half of the equity proceeds -- approximately \$240,000. Susan received the other half.

After the default judgment was entered, Willie faxed a stipulation to Susan. Willie proposed to pay Susan \$50,000 in exchange for her community property interest in his retirement account. Willie represented the value of the retirement account was \$86,585, and said that he was willing to give Susan more than 50% of that amount because he felt it was fair. Susan signed the stipulation, unaware that the actual value of the retirement account was between \$668,000 and \$834,000.

Willie subsequently filed the stipulation and proposed order regarding the "omitted asset." The document represented that Susan and Willie "settled our marital dissolution action by Judgment Dissolution. Part of our equitable settlement was the agreement that [Susan] would give up any and all right she had to [Willie's] Santa Barbara County Employees' Retirement System account." The document then noted that "[i]t has come to our attention that the portion of the agreement between us awarding all right, title and interest in the [retirement account] to [Willie] was omitted from the Marital Settlement Agreement." The trial court

accepted the stipulation on August 15, 2014, and issued the order divesting Susan of any interest in the retirement account.

On December 30, 2015, Susan filed an RFO pursuant to section 2122 to set aside the default judgment and subsequent order. Susan argued Willie had committed fraud by failing to disclose the retirement account in his default request and in later inducing Susan to execute a stipulation disclaiming her interest in the account. (*Id.*, subd. (a).) She also contended that Willie had committed perjury in procuring the default judgment. (*Id.*, subd. (b).) In addition, Susan alleged duress (*id.*, subd. (c)), and claimed Willie was aware that she suffered from a mental condition which rendered her unable to understand, appreciate and act upon the proceedings so as to protect her interests. (*Id.*, subd. (d).) Finally, Susan asserted that Willie violated the statutory disclosure requirements. (*Id.*, subd. (f).)

Both Willie and Susan testified during the evidentiary hearing, and the declaration of Susan's former psychiatrist, Dr. Michael Geis, was received into evidence. Willie called two percipient witnesses, David Galloway and Terence Alemann.

Willie testified that he retired in March 2016 and that he receives \$54,000 annually from his retirement account. Susan works part-time and earns between \$300 and \$1,200 per month.

Alemann served as the real estate broker for the sale of the Milpas property and Susan's purchase of her modular home. He testified that Susan was emotionally unstable during those transactions. Alemann explained, "I'm not a psychologist by any means, but there was definitely a lot of emotional days, some days with crying and some really hard days." Alemann chose not to work with Susan during her "bad days." "[W]hen [he] interacted with Susan [he] wanted to make sure that she was clearly understanding what we were doing, able to see the house, make a clear decision."

After considering the testimony and documentary evidence, the trial court “conclude[d] that the judgment of dissolution failed to equitably dispose of community and separate property and failed to provide for fair and sufficient spousal support.” It found that Susan was mentally incapacitated during the dissolution proceedings in that she suffered from bipolar disorder, severe and debilitating clinical depression, and an anxiety disorder which prevented her from taking action. The court noted that Susan was often bedridden, unable to maintain employment and suffered from hallucinations. It emphasized Dr. Geis’s “professional opinion that in 2013, [Susan] was incapable of understanding legal documents and the relevance to her, and even if she could understand the documents, she was incapable of acting on them, she was mentally and emotionally paralyzed. Having treated [Susan] for a period in excess of three years, it is my opinion that with increasing stressors in her life, the lack of access to mental health therapy, her mental condition would only worsen. In that, it is my opinion she was unable to understand and act on legal requirements at the time I stopped seeing her in 2013. It is my opinion her inability to understand and act on legal requirements likely only got worse without regular and intensive treatment.”

The trial court further found that Susan’s signature on the August 2014 stipulation was procured under duress. Not only did Willie misrepresent the value of his retirement account, but he also was aware that Susan was moving out of the Milpas property into an inadequate trailer, that she did not have a source of income and that she continued to suffer from her mental incapacity.

With respect to the fraud allegation, the trial court determined that Willie “repeatedly misrepresented the value and extent of community assets and the status of spousal support, which was a fraud on the Court and [on Susan].” In addition, Willie

misrepresented the value of his retirement account to be “a fraction of its true value.” Susan relied on the misrepresentations to her detriment.

The trial court also found that Willie perjured himself by making false representations to the court under oath. “As examples, [Willie] variously underrepresented the value of or failed to list his retirement account and claimed it as his separate property, and stated that there were no issues regarding support.” In addition, Willie failed to comply with the disclosure mandates. “He admitted his disclosures were inadequate and acknowledged his disclosures as to the retirement were inaccurate. He also conceded the judgment should be set aside as to the division of the retirement account.”

Based on these findings, the trial court concluded pursuant to section 2121, subdivision (b) 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.” The court reserved the issue of attorney fees pending a noticed motion. Willie appeals.

DISCUSSION

Standard of Review

Trial courts have discretion to set aside a judgment pursuant to section 2122. (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.) “The trial court’s exercise of discretion will not be disturbed on appeal in the absence of a clear showing of abuse, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice. [Citations.] “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” [Citations.] The burden is on

the complaining party to establish abuse of discretion. [Citations.] The showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion. [Citations.]” (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682 (*Rosevear*).) If substantial evidence supports the court’s ruling, there is no abuse of discretion. (*In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1382-1383.)

Application of Section 2122

Section 2120, subdivision (a) provides: “The State of California has a strong policy of ensuring the [equal] division of community . . . property in the dissolution of a marriage . . . and of providing for fair and sufficient . . . spousal support awards. These policy goals can only be implemented with full disclosure of . . . assets, liabilities, income, and expenses . . . and decisions freely and knowingly made.”

Section 2122 allows the trial court to set aside a judgment, or any part or parts thereof, on any one of six statutory bases, namely, where the judgment was the result of (1) actual fraud, (2) perjury in connection with financial disclosures filed by the parties, (3) duress, (4) mental incapacity, (5) mutual or unilateral mistake (in the case of stipulated or uncontested judgments only), or (6) the noncompliance with financial disclosure requirements as provided in section 2100 et seq. (§ 2122, subds. (a)-(f); see *Rosevear, supra*, 65 Cal.App.4th at p. 684.)

In contrast, “[s]ection 1101 creates a right of action and specific remedies for the breach of a spouse’s fiduciary duty ‘that results in impairment to the claimant spouse’s present undivided one-half interest in the community estate.’ (§ 1101, subd. (a); [citation].) A section 1101 action may be brought separate from or in conjunction with a dissolution action. (§ 1101, subd. (f).) Section 1101, subdivisions (g) and (h) provide remedies for a spouse’s

breach of fiduciary duty.” (*In re Marriage of Schleich* (2017) 8 Cal.App.5th 267, 277.)

Willie contends the trial court improperly applied section 2122 in setting aside the order regarding the retirement account. He claims that section 1101 provides the remedy for breach of fiduciary duty of disclosure for determination of a community interest in assets that were unadjudicated or omitted from the judgment. His position is that section 2122 does not apply because the order divesting Susan of her interest in his retirement account is not a judgment.

Susan responds that Willie waived this issue by failing to raise it in the trial court. While appellate courts do have discretion to consider a legal issue raised for the first time on appeal, they “are more inclined to do so when matters of important public interest or public policy are involved.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1654.) In this case, “we perceive no pressing public interest or policy in favor of reaching the issue.” (*Ibid.*) We therefore deem the issue forfeited.

Even if the issue were not forfeited, Willie would not prevail. Section 2122 is not as restrictive as he claims. It provides that “[t]he grounds and time limits for a motion to set aside a judgment, *or any part or parts thereof*, are governed by this section” (§ 2122, italics added.) The order regarding the retirement account altered the terms of the default judgment and thus became a part of the judgment. Indeed, the judgment provides that “[j]urisdiction is reserved to make other orders necessary to carry out this judgment.” The subsequent order was made in furtherance of the judgment. (See *In re Marriage of Walker* (2012) 203 Cal.App.4th 137, 146, fn. 3 [rejecting trial court’s assertion that family law “orders’ were not subject to . . . section 2122 because they were orders rather than judgments”].)

In addition, as Willie concedes, section 2120 et seq. applies when a party is seeking to undo or modify a property division judgment that adjudicated particular assets and/or liabilities. (*In re Marriage of Georgiou & Leslie* (2013) 218 Cal.App.4th 561, 574.) That is what occurred here. The trial court accepted Willie's stipulation and, in so doing, awarded him the entire retirement account. Section 2121, subdivision (a) provides that in dissolution proceedings, "the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof, *adjudicating support or division of property*, . . . based on the grounds, and within the time limits, provided in this chapter." (Italics added.) Having previously adjudicated the division of the retirement account pursuant to the parties' stipulation, the court was entitled to consider relieving Susan from that order on the grounds set forth in section 2122. Willie has not shown that section 1101 was the only remedy available to Susan.

Susan's Mental Incapacity

The trial court set aside the judgment and subsequent order based, in part, on Susan's mental incapacity during the period of the dissolution proceedings. (§ 2122, subd. (d).) Willie contends the court failed to take into consideration all the material facts and documents in evidence in reaching this conclusion. He also claims that the evidence cited by the court does not support a finding of mental incapacity.

Although section 2122, subdivision (d) does not define "mental incapacity," Civil Code section 38 provides that a "person entirely without understanding has no power to make a contract of any kind." "[E]ntirely without understanding" has been construed as the inability to understand the nature, purpose and effect of the transaction in which the person is engaged. (*Burgess v. Security-First Nat'l Bank* (1941) 44 Cal.App.2d 808, 818.)

The trial court found that “[f]rom the age of 17 and throughout the twenty-one year long-term marriage, [Susan] suffered extreme mental health challenges. It is uncontested her mental health problems resulted in [Susan] remaining bedridden and unable to face the outside world for significant periods, including during the time spanning the dissolution proceedings. She was also largely unemployed during the marriage due to her mental disability. Her mental disabilities included severe clinical depression, anxiety disorder, bipolar disorder and hallucinations. [Willie] admitted he was aware of the mental disorders and that [Susan’s] mental problems were contributing factors to his decision to seek dissolution of the marriage.” The court further noted that Susan “suffered from suicidal ideation and on several occasions attempted suicide. [Susan’s] self-described mental condition, confirmed by [Willie], was also confirmed by clinicians and third parties.”

In making these findings, the trial court relied in large part on the declaration of Dr. Geis, who treated Susan from May 2009 through March 2013. Noting that the petition for dissolution was filed in November 2012 and resolved in August 2014, Willie claims Dr. Geis’s opinion was outdated and did not accurately reflect Susan’s mental condition after March 2013. He points to a September 2014 medical assessment by Dr. Constance Ratliffe which suggests that Susan’s mental condition had improved and that her symptoms were mild to moderate. Susan testified, however, that she went to see Dr. Ratliffe because she was feeling suicidal.

Although Dr. Geis stopped seeing Susan in March 2013, he had been her treating psychiatrist for three years. He opined that Susan “was unable to understand and act on legal requirements at the time [he] stopped seeing her in 2013.” He further stated: “It is

my opinion her inability to understand and act on legal requirements likely only got worse without regular and intensive treatment.”

As stated in *In re Casey D.* (1999) 70 Cal.App.4th 38, “[i]t is the trial court’s role to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence. We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence.” (*Id.* at pp. 52-53.) This principle of due deference to the trial court applies equally to the consideration of expert testimony. (See *People v. Poe* (1999) 74 Cal.App.4th 826, 831 [appellate court’s role is not “to redetermine the credibility of experts or to reweigh the relative strength of their conclusions”].) Here, the only expert evidence regarding Susan’s mental capacity during the period of the dissolution proceedings was Dr. Geis’s declaration. Dr. Ratliffe’s assessment did not occur until after the dissolution proceedings had concluded. Thus, the court was free to reject the assessment or to find it outweighed by other evidence, including Dr. Geis’s declaration, Susan’s testimony regarding her mental illnesses and Willie’s testimony that Susan’s irrational and inappropriate conduct became progressively worse after 2014. (See *Gibson v. Cobb* (1965) 236 Cal.App.2d 226, 234.)

Willie argues that the fact that Susan contacted an attorney during the dissolution proceedings shows that she was not mentally incapacitated. The trial court found, however, that this fact “does not militate against the severity of [Susan’s] illness,” as “[s]he was unable to even complete the task of retaining the lawyer.”

Willie also contends that Susan was not mentally incapacitated because she was able to sign documents to sell the

Milpas property and to purchase her modular home. Susan testified, however, that she did not have the ability to review and understand the documents she was given at that time.

Susan further testified that when she stopped taking one of her medications (Suboxone) in January 2014, she started seeing things and had to learn to walk and talk again. She said she could not eat and felt as if she had the flu every day. This lasted for four to six months.

We conclude that, at most, Willie has set forth contradictory evidence that “simply affords an opportunity for a difference of opinion” regarding Susan’s mental capacity. (*Rosevear, supra*, 65 Cal.App.4th at p. 682.) This is insufficient to satisfy Willie’s burden of showing an abuse of discretion. (*Ibid.*) Indeed, Willie concedes in his opening brief that “Susan’s mental condition could be considered a satisfactory excuse for not defending the divorce action, but that excuse ended in September 2014.”

Duress

“Duress” is not defined in section 2122 or elsewhere in the Family Code. According to case law, duress “is shown where a party ‘intentionally used threats or pressure to induce action or nonaction to the other party’s detriment. [Citation.]’ [Citations.]” (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84.) Similarly, duress “can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. [Citation.]” (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644.)

Here, the trial court found that Willie obtained Susan’s signature on the stipulation as a result of duress. (§ 2122, subd. (c).) It explained that Willie approached Susan when she “was at her most vulnerable, at the time she was moving out of the family

home into an inadequate trailer without any source of income. And he did so by misstating the value of his retirement account and in furtherance of his scheme to deny [Susan] her community property interest in his retirement account.”

Willie argues that Susan was not vulnerable because she was moving into a fully paid-for modular home and had \$139,000 in the bank, mostly from the sale of the Milpas property. Even if this is true, there is no question that Willie severely underrepresented the value of his retirement account. He told Susan it was worth \$86,520, and that he was being “fair” by giving her \$50,000 -- more than half that amount. In truth, the community asset was worth between \$668,000 and \$834,000. This misrepresentation constituted duress because it was sufficiently coercive to cause Susan to agree to an unfavorable contract. (*CrossTalk Productions, Inc. v. Jacobson, supra*, 65 Cal.App.4th at p. 644.) No reasonably prudent person would have accepted \$50,000 in lieu of a 50% share in an asset worth as much as \$834,000. Under these circumstances, the trial court did not abuse its discretion by setting aside the order based on duress.³

Fraud and Perjury

Section 2122, subdivision (a) defines “actual fraud” as a ground to set aside a judgment “where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding.” The trial court found that Willie committed actual fraud by “repeatedly

³ Willie argues that Susan was precluded from setting aside the judgment and order based on mental incapacity and duress (§ 2122, subds. (c), (d)) because of her delay in filing the RFO. It is undisputed, however, that Susan filed the RFO within the two-year limitations period for seeking relief under subdivisions (c) and (d).

misrepresent[ing] the value and extent of community assets and the status of spousal support, which was a fraud on the Court and [on Susan], resulting in an erroneous and unfair judgment. He represented the value of his retirement account to be \$86,520, a fraction of its true value. [Susan] relied on that representation in signing the Stipulation. [Susan's] mental incapacity tolled the one year statute of limitation until she was ultimately represented by counsel in late 2015."

Section 2122, subdivision (b) states: "An action or motion based on perjury in the preliminary or final declaration of disclosure, the waiver of the final declaration of disclosure, or in the current income and expense statement shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury." The trial court found that Willie had committed perjury by making knowingly false representations in his submissions to the court. The court explained: "As examples, [Willie] variously underrepresented the value of [his retirement account] or failed to list his retirement account and claimed it as his separate property, and stated that there were no issues regarding spousal support. The various documents signed under penalty of perjury were contradictory. Over the course of the dissolution, [Willie] included fewer and fewer assets either as separate or community property. It appears that the Stipulation was a result of [Willie's] need to obtain County approval of his retirement payments rather than reaching a fair distribution of the account he previously claimed as his separate property or excluded from declarations altogether. And he repeatedly stated under oath his distribution of assets and liabilities as well as the lack of any issue regarding [spousal] support was fair when it was not. The one year statute is tolled as set forth above."

Substantial evidence supports the trial court's findings with respect to both fraud and perjury. Willie perpetrated a fraud on the court when he omitted the retirement account in his request for a default judgment and represented that the property division was fair and equitable and all-inclusive of community assets. He also committed fraud when he convinced Susan to sign a stipulation proposing to give her more than half the value of his retirement account. Not only did Willie fail to disclose the actual net value of the account, but he also was aware that Susan was despondent and vulnerable at the time.

With respect to perjury, Willie filed two property declarations. The first one declared under penalty of perjury that the retirement account had a gross and net fair market value of \$86,585. This was false. Willie also claimed he was entitled to 100% of the retirement account even though he knew it was a community asset.

The second property declaration omitted the retirement account entirely. In a sworn statement, Willie declared under penalty of perjury that the property declaration "is a true and correct listing of assets and obligations and the amounts shown are correct." Willie knew this was false because his earlier property declaration had included the retirement account.

Finally, substantial evidence shows that Susan's RFO to set aside the judgment based on fraud and perjury was timely. The issue of when Susan discovered or should have discovered Willie's fraud and perjury are questions of fact, reviewed for substantial evidence. (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 833.) Although the limitations period is one year, the trial court found the period was tolled based on Susan's mental incapacity. Susan did not actually discover the fraud and perjury until she met with an attorney in late 2015. The evidence

sufficiently supports the court's finding that the RFO was timely filed in December 2015.

Failure to Disclose Assets

Section 2102, subdivision (a) provides: "From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the assets and liabilities of the other party, including, but not limited to, the following activities: [¶] (1) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes." (See § 2122, subd. (f).)

The trial court determined Willie failed to comply with these disclosure requirements. Willie "admitted his disclosures were inadequate and acknowledged his disclosures as to the retirement were inaccurate. He also conceded the judgment should be set aside as to the division of the retirement account." Based on Willie's admissions alone, the court was justified in setting aside the judgment and order.

Susan's Interest in the Milpas Property

Willie contends the order setting aside the judgment must be reversed because Susan has not demonstrated that she has a separate property interest in the Milpas property. To support this contention, Willie submits evidence that was not presented to the trial court. Susan responds that the court has yet to adjudicate the extent of Susan's separate property interest in the Milpas Property and, as a result, it is not a proper subject of review. We agree with Susan. The issue before us is whether the trial court properly set aside the judgment and order based upon the section 2122 factors.

Given our conclusion that the court did not abuse its discretion in that regard, the court must resolve on remand the issues of spousal support and property division. It is premature to reach those issues here.⁴

DISPOSITION

The order setting aside the default judgment and order regarding the retirement account is affirmed. Susan shall recover her costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

⁴ We deny Willie's motion for judicial notice and motion to accept new evidence and make new findings under Code of Civil Procedure section 909, both of which were filed on February 1, 2018.

James E. Herman, Judge
Superior Court County of Santa Barbara

Nancy K. Udem, for Appellant.

Jarrette & Walmsley, Robert R. Walmsley and Marlea F.
Jarrette, for Respondent.