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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re the Marriage of MARK D. and ELEANOR J. DE LOS COBOS.	B237332 (Los Angeles County Super. Ct. No. GD043561)
MARK D. DE LOS COBOS, Respondent, v. ELEANOR J. DE LOS COBOS, Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Lou Katz, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part; reversed in part with directions.

Law Office of John A. Tkach and John A. Tkach for Appellant.

County Law Center and Marc A. Duxbury for Respondent.

INTRODUCTION

Mark and Eleanor De Los Cobos were married on May 19, 1990 and separated more than 15 years later on August 1, 2005.[1] They had no children. Mark filed a petition for dissolution of marriage on November 21, 2008, and Eleanor filed her response on February 10, 2009. After a trial on September 13, 2011, the trial court entered a judgment dissolving the marriage and adjudicating various property rights. In this appeal Eleanor challenges only the court's findings that the parties' family residence, which Mark quitclaimed to Eleanor as her separate property, was community property, and that each party received half of the proceeds of an investment property that Mark sold in 2006. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Trial*

During the marriage the parties purchased a family residence in West Covina. The grant deed recorded on December 17, 1991 reflects that Mark and Eleanor took title to the property as joint tenants.

In 2000 Mark began to buy and sell real estate. On May 10, 2001 Mark and Eleanor, "husband and wife as joint tenants," quitclaimed the family residence to Eleanor, "a married woman as her sole and separate property." Mark testified that he quitclaimed his interest in the West Covina property to Eleanor because their lender told them that his "credit score was not as good as hers" and if he were not on title and "quitclaimed off [they] could get a better rate." Mark said he did not intend to give up his community property interest in the West Covina property. In other words, Mark did

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[1] We will refer to the parties by their first names to avoid confusion. No disrespect is intended. (*In re Marriage of Campi* (2013) 212 Cal.App.4th 1565, 1567, fn. 1; *In re Marriage of Sivyer-Foley & Foley* (2010) 189 Cal.App.4th 521, 523, fn. 1.)

not intend the transfer of his interest in the house to Eleanor to be a real transfer, but merely part of the parties' efforts to mislead their lender.[2]

Eleanor painted a markedly different picture. She testified that Mark told her he would quitclaim the West Covina property to her, he was trying to acquire an investment property in Azusa, and there would be an exchange. When asked why Mark signed the quitclaim deed, Eleanor answered: "An assumption that it's a gift, an exchange for whatever future property that he will buy." Mark acknowledged that the word "gift" is written on the quitclaim deed, but he claimed that he could not recognize the writing.

Although Mark attempted to acquire the Azusa property in 2001, he did not actually acquire it until 2004. On September 24, 2004 the seller executed a grant deed transferring the Azusa property to Mark, a married man as his sole and separate property. On September 28, 2004 Eleanor executed an interspousal transfer grant deed granting any interest she has in the Azusa property to Mark, "a married man as his sole and separate property." Eleanor testified that she gave up her right to the Azusa property "[b]ecause [Mark] told me it was for his investment." She thought the agreement was that she would keep the West Covina property and Mark would keep the Azusa property.

Mark could not recall having such an agreement with Eleanor. He claimed that Eleanor quitclaimed her interest in the Azusa property "in the normal course of business." He stated, "we had agreed that's how I did my real estate business," and that "every property I was involved [with] she would quitclaim on." Mark explained that "depending on the title company I would use they would usually have to do it as sole and separate property in order for me to transact business. Again, this was agreed upon in the marriage that I would do this. She was involved. She knew all the deals."

On May 10, 2005 Eleanor executed a deed of trust securing a $196,200 home equity line of credit from Citibank on the West Covina property. The parties recorded

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[2] If, as Mark testified, someone from the lender suggested transferring title to Eleanor, then Mark and Eleanor were actually conspiring with their lender to defraud the United States rather than misleading their lender.

this deed on May 18, 2005. The parties obtained this line of credit so that Mark could draw on it to pay for repairs and improvements to the Azusa property. Mark drew on the line of credit over time as he "needed the money to make the repairs" on the Azusa property until he sold it. Although only Eleanor signed the deed, both her name and Mark's name appeared on the line of credit statements from Citibank.

On October 18, 2005 Mark executed a short form deed of trust listing Eleanor as beneficiary and referencing a $50,000 promissory note to Eleanor. Mark stated he did so because he was using funds from the line of credit on the West Covina property to improve the Azusa property, and Eleanor was concerned that Mark would not use the Azusa property proceeds to pay back the line of credit. To make Eleanor feel secure, Mark gave her a note and deed of trust secured by the Azusa property to show he would pay back the funds he used.

Sometime after the parties separated, and without telling Eleanor, Mark changed the mailing address on the Citibank line of credit statements to his address because he "needed to get [his] mail." As of November 10, 2005 the parties had not yet borrowed any money on the line of credit. Thereafter, Eleanor wrote a check for $10,582.27 in November 2005, a check for $10,582.27 in January 2006, and a check for $21,164.54 in May 2006. Eleanor made each check payable to a contractor who had performed work on the Azusa property. Unbeknownst to Eleanor, who was no longer receiving Citibank statements for the line of credit, Mark also took advances totaling $32,700 on the line of credit.[3] As of August 10, 2006 the total outstanding balance on the line of credit was $75,540.45.[4] Only Eleanor made payments on the line of credit.

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[3] Mark testified that he withdrew $30,000 to $40,000 from the line of credit and could not remember Eleanor writing three checks totaling $50,000 to contractors.

[4] Mark did not agree at trial that he used all of the money drawn against the line of credit for the Azusa property. He suggested that Eleanor also used funds from the line of credit, but he had no proof that she had done so.

Eventually Eleanor called Citibank to find out why she was no longer receiving bank statements for the line of credit. When she heard the outstanding balance on the automated system, she was shocked. She talked to someone at the bank who advised her that the bank was mailing the statements to Mark's address.

After making this discovery, Eleanor asked Mark who would be responsible for paying off the balance of the line of credit. Mark said he would pay back whatever he withdrew from the account. According to Eleanor, Mark agreed to pay $100,000 to cover all of the money he borrowed. This amount also included $25,000 for money that had been taken out of Eleanor's paycheck to pay for Mark's Lasik surgery and for adoption fees they had paid when they planned to adopt.

On August 21, 2006, a little more than one year after the parties separated, Mark sold the Azusa property for $530,000. The Seller's Final Settlement Statement reflected a payoff of $50,000 to Eleanor, as well as settlement fees of $50,000 to Eleanor "per agreement." After all of the deductions, Mark received $98,985.69. The final statement reflects two $50,000 payments to Eleanor: one for the promissory note that Mark had given her and one for money Mark had borrowed from Citibank on the equity line of credit. Mark testified: "As far as I'm concerned it was 50-50 community property and that was her fair share of this house, and I felt that was 50 percent hers."

Eleanor claimed that while the Azusa property was in escrow, she and Mark had a telephone conversation during which they discussed the money Mark was going to repay her. They also discussed that the Azusa property would be Mark's and the West Covina property would be hers.

In conjunction with the closing of escrow on the Azusa property, Mark signed numerous documents. One of these was an "Agreement Concerning Marital Property" (postnuptial agreement) that Eleanor's trial counsel drafted. The postnuptial agreement referenced a quiet title action that Eleanor had filed against Mark (*De Los Cobos v. De Los Cobos*, Los Angeles Superior Court case No. BC356927).[5] It also provided that

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[5] The record is silent on the details of Eleanor's quiet title action.

"[e]ach party acknowledges and represents to the other, for the other to rely on in entering into this Agreement, that each party considers the execution of this Agreement a determination of their marital and/or community property rights concerning" the West Covina property. The postnuptial agreement further provided that in consideration for dismissal of the quiet title action, Eleanor would own the West Covina property as her sole and separate property. The parties signed this postnuptial agreement on August 18, 2006. Mark, who was not represented by counsel, claimed that he did not know he was signing a postnuptial agreement.

B. *Trial Court's Ruling and Judgment*

The trial court ruled: "With respect to the West Covina property, let's talk about this a little bit, gentlemen. I find with respect to Exhibit 9, the so-called post-nuptial agreement, there's nothing about this that I understand and nothing about this that I'm buying. I don't find either party's testimony about this to be particular[ly] credible at all. I don't think it's credible that [Mark] just kind of signed it in a stack of stuff and doesn't really remember it. However, I don't find it credible at all, even a little, that [Eleanor] had it done and yet there was no conversation about it before or since. And, oh, yeah, he must have known about it because the escrow officer explained everything. This whole thing just stinks, and I don't get it in any way at all, even a little. It says on page 2 that Party A and Party B acknowledge that they have been represented by independent counsel. We know that [Mark] didn't have counsel. We know that [Eleanor] did have counsel, but apparently her litigation position is that she didn't have counsel. So all the court can do is throw its arms up in the air and say I'm not giving this any weight. This is nothing other than it makes me distrust everything [Eleanor] says, and I also distrust everything [Mark] says. I think I'm completely not getting the whole story here . . . . With respect to the West Covina property I am not inclined to enforce the grant deed because the only testimony that I have about the purpose of the grant deed was that it was to facilitate this real estate flipping business, the quitclaim deed in favor of [Eleanor], to facilitate this real estate flipping business, and if [Eleanor] had really taken title many

years before there would have been no need for this post-nuptial agreement. And again, I don't believe [Eleanor], and I don't find her to be credible and view her testimony with suspicion, and although I tend to view [Mark's] that way too, at least his explanation makes sense. In addition [Eleanor's] idea — and there's — there was a sense throughout the entire proceeding that these two conducted themselves with separate finances, but nobody every came out and said that, and the parties are proceeding as though the community property law were in effect. They're seeking to enforce their rights under California community property law. So therefore I do not find that they had separate finances. So at the end of the day it appears that each party has received about half of the Azusa property, and I find that based upon the entire course of conduct between the parties, what I can glean from whatever tiny, tiny little bits of something approaching the truth may have been sprinkled throughout this interesting afternoon of story telling, I find that the West Covina residence is community property, and it was purchased during the marriage . . . ."

The trial court entered judgment on September 13, 2011 adjudicating the rights of the parties on a variety of issues. Under the heading "COMMUNITY PROPERTY" the court listed the West Covina and Azusa properties. The court found that "the West Covina property is community property and it was purchased during the marriage." The court ordered counsel "to meet and confer regarding valuation" and "reserve[d] jurisdiction over the value of the marital residence." With respect to the Azusa property, the court noted, "Each party has received half of the Azusa property." The court further determined that "[o]n the second line of credit, [Eleanor] has been reimbursed. [Mark] bears no further responsibility for making payments on the line of credit to the extent that they represent advances made prior to the closing of the Azusa property." Finally, the judgment provides: "The Court could not make heads or tails of the post-nuptial agreement with any confident, credible admissible testimony. The Court has no choice but to give it no effect whatsoever."

DISCUSSION

A. *The West Covina Property*

Eleanor challenges the trial court's finding that the West Covina property was community property.[6] As best as we can discern from her briefs, Eleanor argues that Mark had the burden of demonstrating that the transaction in which he quitclaimed his interest in the West Covina property to her was unfair and that, because Mark failed to meet his burden, the trial court should have awarded the property to her as her separate property. Eleanor is mistaken.

Evidence Code section 662 (section 662) codifies the common law "form of title" presumption. "Under the 'form of title' presumption, the description in a deed as to how title is held presumptively reflects the actual ownership status of the property." (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 344; *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 189.) Section 662 creates a presumption rebuttable only by clear and convincing evidence that title to property is held as specified in a deed. (*In re Marriage of Starr* (2010) 189 Cal.App.4th 277, 282; *In re Marriage of Brooks & Robinson*, *supra*, at p.189.)

Under Family Code section 721 (section 721), however, transactions between spouses "are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners . . . ." (*Id*., subd. (b); see *In re Marriage of Starr*, *supra*, 189 Cal.App.4th at

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[6] "For the purpose of division of property on dissolution of marriage . . . , property acquired by the parties during marriage in joint form, including property held in . . . joint tenancy, . . . is presumed to be community property." (Fam. Code, § 2581.) Thus, we presume the West Covina property was community property at the time of its acquisition by the parties. Neither party contends otherwise.

p. 281.) "Because of this, our courts have long held that when an interspousal transaction advantages one spouse, public policy considerations create a presumption that the transaction was the result of undue influence. [Citation.] A spouse who gained an advantage from a transaction with the other spouse can overcome that presumption by a preponderance of the evidence. [Citation.]" (*In re Marriage of Starr, supra,* at p. 281; accord, *In re Marriage of Fossum, supra*, 192 Cal.App.4th at pp. 343-344; *In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 631.) When these two statutory presumptions conflict, as they do in this case, section 721 prevails over section 662. (*In re Marriage of Fossum, supra,* 192 Cal.App.4th at pp. 344-345; *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 997-998; *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 283.)

"The prerequisite elements for the statutory presumption under section 721 to apply are: (1) there exists an interspousal transaction; and (2) one spouse has obtained an advantage over the other. [Citation.] Generally, a spouse obtains an advantage if that spouse's position is improved, he or she obtains a favorable opportunity, or otherwise gains, benefits, or profits. [Citation.]" (*In re Marriage of Mathews, supra,* 133 Cal.App.4th at p. 629.)

Mark and Eleanor entered into an interspousal transaction by signing a quitclaim deed transferring the family residence in West Covina to Eleanor as her sole and separate property, thus effecting a transmutation. (Fam. Code, § 850 et seq.; see *In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at p. 191 ["'A "transmutation" is an *interspousal* transaction or agreement that works to change the character of property the parties[] *already own*.'"]; *In re Marriage of Haines, supra,* 33 Cal.App.4th at p. 293 [transmutation is "an interspousal transaction or agreement which works a change in the character of the property"].) As a result of this transaction Eleanor received an advantage over Mark—the West Covina property became her separate property. Therefore, she had the burden to overcome the presumption of unfair advantage by establishing that Mark's "signing of the quitclaim deed was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of its effect of making the residence

[Eleanor's] separate property." (*In re Marriage of Mathews, supra,* 133 Cal.App.4th at p. 630; accord, *In re Marriage of Fossum, supra,* 192 Cal.App.4th at p. 345; *In re Marriage of Haines, supra,* 33 Cal.App.4th at p. 296.)

In the trial court, neither party mentioned the section 721 presumption or any other presumption. In its oral ruling the trial court did not expressly conduct a section 721 analysis, and the trial court did not issue a statement of decision because neither party asked for one. The trial court stated that it did not believe either party, castigated both sides for "storytelling" instead of testifying, and effectively concluded that everything was community property.

On appeal we presume the judgment of the lower court is correct. (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1093; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) The burden is on the appellant to demonstrate reversible error. (*Aguayo v. Amaro* (2013) 213 Cal.App.4th 1102, 1109; *In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1484.) "Because we review the correctness of the judgment, and not the court's reasons, we must affirm the judgment if it can be supported on any legal theory, even if the trial court misapplied or misunderstood the law." (*Aguayo*, *supra*, at p. 1115.)

In addition, a party "cannot rely on the trial court's oral comments or announcement of intended decision to impeach its judgment." (*In re Marriage of Green* (1989) 213 Cal.App.3d 14, 20.) Statements by the trial court during the trial are not a substitute for a statement of decision. Even if such comments suggest that the trial court misunderstood the applicable law, "[a]bsent contrary indication in the final judgment or statement of decision, the appellate court will assume that, during the period before rendition of judgment, the trial court realized any error and corrected it." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268.) And "[w]here, as here, no statement of decision was requested, all intendments will favor the trial court's ruling and it will be presumed on appeal that the trial court found all facts necessary to support the judgment." (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 649, fn. omitted; accord, *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 104.) The only issue on appeal

is whether the implied findings are supported by substantial evidence. (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148, fn. 11.)

Implied in the trial court's judgment characterizing the West Covina property as community property is a finding, based on the rebuttable presumption in section 721, that the quitclaim deed was invalid because Mark executed it as a result of undue influence. As the appellant, Eleanor has the burden of demonstrating reversible error. (*California Pines Property Owners Assn. v. Pedotti* (2012) 206 Cal.App.4th 384, 392.) To meet this burden, she must show that the trial court's implied finding that she failed to rebut the presumption of undue influence under section 721 is not supported by substantial evidence. (See *In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1519-1520 [appellant had the burden of showing the trial court's "implied finding that [the appellant] did not rebut the presumption" of undue influence under section 721 "by a preponderance of the evidence" was not supported by substantial evidence].) Eleanor has made no attempt to do so, however, because she mistakenly asserts that Mark had the burden of proving that the transaction was unfair. Although we have the discretion to treat the sufficiency of the evidence issue as waived (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 949), we elect to resolve the issue (see *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 451, fn. 4).

Mark testified that the reason he decided to quitclaim his interest in the West Covina property to Eleanor was that "[o]ur lender told us if I wasn't on title since my credit score was not as good as hers that if I quitclaimed off we could get a better rate." He therefore admitted that his decision to transfer the property to Eleanor was voluntary, intentional, and for a specific reason. Although the trial court found both Mark and Eleanor not particularly credible, it was undisputed that Mark was in the business of buying and selling real estate and, to assist him in conducting his business, he routinely arranged for Eleanor to quitclaim her interest in the investment properties that he purchased. Mark also testified that he had "entered into contract on quite a few, maybe six or eight," contracts to purchase real property. It is a very reasonable if not inescapable inference from these facts that Mark understood the significance of the

quitclaim that he executed in favor of Eleanor. He knew exactly what he was doing and why he was doing it: to get better loan terms. He executed the quitclaim deed not because of any undue influence by Eleanor, but because of the business needs of his real estate investment venture. This substantial evidence rebuts the section 721 presumption. Therefore, Eleanor was entitled to the West Covina property as her separate property. (See *In re Marriage of Fossum*, *supra*, 192 Cal.App.4th at p. 345; *In re Marriage of Mathews*, *supra*, 133 Cal.App.4th at p. 630; *In re Marriage of Haines*, *supra*, 33 Cal.App.4th at p. 296.)[7]

B. *The Azusa Property*

Eleanor quite understandably does not challenge the trial court's finding that the Azusa property was community property at the time Mark sold it.[8] Eleanor also does not challenge the trial court's finding that Citibank was reimbursed for the amounts it had advanced from the line of credit, and that Mark had no further responsibility "for making payments on the line of credit to the extent that they represent advances made prior to the closing of the Azusa property." She does take issue, however, with the court's finding that she and Mark each "received half of the Azusa property." She argues that she was entitled to but did not receive one-half of the net proceeds from the sale of the Azusa property. She is legally and economically correct.

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[7] Because we conclude that the West Covina property is Eleanor's separate property by virtue of the quitclaim deed executed by Mark, we do not reach the issue of whether the trial court properly disregarded the postnuptial agreement.

[8] As previously noted, the trial court expressly found that the West Covina property was community property. Although the court did not expressly state that the Azusa property was community property when Mark sold it, such a finding is contained in the judgment. The court listed the Azusa property under the heading of "Community Property" and then stated, "Each party has received half of the Azusa property." This finding reflected the court's belief that each party had received what the trial court believed was an equal share of the proceeds from the sale of the community property.

The $100,000 that Eleanor "received" upon the closing of escrow represented money that she and Mark borrowed from the line of credit and that should have been used to pay Citibank first, before any distribution of the net sale proceeds. The $100,000 from escrow was not for her, but was to repay on behalf of the community the money the community had borrowed to finance the development of the investment property. Therefore, because the net proceeds from the sale were $98,985.69, Eleanor should have received one-half of this amount, or $49,492.85, separate and apart from the $100,000 that went to repay Citibank.[9]

DISPOSITION

That portion of the judgment characterizing the West Covina property as community property is reversed. The trial court is ordered to amend the judgment by awarding the West Covina property to Eleanor as her separate property. That portion of the judgment finding that each party received half of the Azusa property is also reversed. The trial court is directed to amend the judgment by awarding Eleanor one-half of the net proceeds from the sale of the Azusa property, or $49,492.85. In all other respects, the judgment is affirmed. Eleanor is to recover her costs on appeal.

SEGAL, J.[*]

We concur:

WOODS, Acting P. J. ZELON, J.

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[9] Eleanor does not challenge the portions of the judgment adjudicating issues relating to retirement benefits, personal property, and Mark's 401(k).

[*] Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.