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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of STEVEN and KIMBERLY HUNTER.	B292985 (Los Angeles County Super. Ct. No. KD087738)
STEVEN M. HUNTER, Appellant, v. KIMBERLY HUNTER, Respondent.	

APPEAL from a judgment of the Superior Court of the County of Los Angeles, H. Don Christian, Commissioner. Affirmed, in part, reversed, in part, and remanded with instructions.

Kearney | Baker and Gary W. Kearney, for Appellant.

Charles J. Morris, Jr., for Respondent.

I. INTRODUCTION

When Steven Hunter (Steven) petitioned for dissolution of his marriage to Kimberly Hunter (Kimberly), disputes arose concerning the parties' separate and community property. Following a bench trial, the court entered a judgment that, among other things, characterized and divided certain of the parties' property. On appeal from the judgment, Steven challenges the trial court's authority to order the sale of a vacation home and a recreational vehicle. He also challenges court's finding that Kimberly was entitled to reimbursement for her separate and community property expended to improve the vacation home and invest in two of Steven's real estate development projects. Finally, he contends the court failed to divide a community credit line debt assigned solely to him and failed to rule on two of his reimbursement claims. We affirm the judgment, in part, reverse, in part, and remand with instructions.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Marriage, Separation, and Dissolution Proceedings*

Steven and Kimberly married on December 9, 2006, and separated on December 1, 2013. Steven filed a petition for dissolution of marriage and the case then proceeded through several years of litigation. When settlement discussions broke down, the matter was tried to the court beginning on August 7, 2017, primarily on disputes over the division of separate and community property. Prior to and during trial, the parties stipulated that their respective exhibits could be marked

and received in evidence without further foundation. The court heard testimony over the course of six days, ending on December 8, 2017. We will discuss the testimony related to the issues raised on appeal in the Discussion section below.

B. *Intended Statement of Decision, Objections, and Hearing*

Following the close of evidence, the trial court requested that the parties submit closing argument briefs and proposed statements of decision by February 23, 2018, and indicated that, upon receipt of those submissions, the matter would be deemed submitted. The record does not include Steven's trial brief, closing argument brief, or the parties' proposed statements of decision.

On March 27, 2018, the trial court issued its intended statement of decision, which it stated would become the statement of decision, pursuant to California Rules of Court, rule 3.1590(c), unless within ten days, either party filed and served a document that specified controverted issues or made proposals not included in the tentative decision.

On April 23, 2018, Steven filed objections to the intended statement of decision. Among other things, Steven contended that the trial court had failed to rule on his request for reimbursement of $102,750 in community expenses paid postseparation to preserve many of the community assets, including insurance for Kimberly and her children. Steven further objected that the trial court had failed to rule on his request for reimbursement of community funds that were spent to improve, maintain, and preserve Kimberly's separate property, a single-family residence in Thousand Oaks, California (the

Capitan property). Steven further challenged a number of the trial court's findings. Kimberly filed a response to the intended statement of decision on or about April 23, 2018.

On June 8, 2018, the trial court held a hearing on the parties' objections to the intended statement of decision. The record, however, does not include a reporter's transcript of that hearing, a settled or agreed statement, or a minute order reflecting the trial court's rulings, if any, on the parties' objections. Nor does the record reflect whether the trial court adopted the intended statement of decision as its final statement of decision.

C. *Judgment, New Trial Motion, and Appeal*

On July 19, 2018, the trial court entered a judgment that incorporated certain, but not all, portions of the intended statement of decision.[1]

On August 3, 2018, Steven filed a notice of intention to move for new trial and on August 13, 2018, he filed his supporting memorandum of points and authorities. Kimberly opposed the motion on September 4, 2018. Because the trial court did not rule on the motion within the statutory time limit, the motion was deemed denied by operation of law. (Code Civ. Proc. § 660, subd. (c).)

On September 26, 2018, Steven filed a timely notice of appeal from the judgment.

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[1] The intended statement of decision is 13 pages long. The court's attachment to the Judicial Council form judgment is four pages long.

III. DISCUSSION

A. *Legal Principles*

In marital dissolution cases involving disputes over the separate or community character[2] of the spouses' property, "there is a general presumption that property acquired during marriage by either spouse other than by gift or inheritance is a community property unless traceable to a separate property source." (*In re Marriage of Haines, supra*, 33 Cal.App.4th at pp. 289–290.) But "'[t]he presumption . . . may be overcome. [Citations.] Whether or not the presumption is overcome is a question of fact for the trial court.' (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 611–612 . . . .) "'Where funds are paid from a commingled account, the presumption is that the funds are community funds. [Citations.] In order to overcome this presumption, a party must trace the funds expended to a separate property source. [Citation.] This issue presents a question of fact for the trial court and its finding will be upheld if supported by substantial evidence.'" (*In re Marriage of Higinbotham* (1988) 203 Cal App.3d 322, 328 . . . ; [citations].)" (*In re Marriage of Ciprari* (2019) 32 Cal.App.5th 83, 94–95.) The party contesting the community character of

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[2] "Characterization . . . refers to the process of classifying property as separate, community, or quasi-community." (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 291.) ""[T]he character of property as separate or community is fixed as of the time it is acquired. The character so fixed continues until it is changed in some manner recognized by law, as by agreement of the parties."" (*Calloway v. Downie* (1961) 195 Cal.App.2d 348, 352.)

property bears the burden of overcoming the presumption. (*In re Marriage of Mix, supra*, 14 Cal.3d at p. 611.)

B. *Presumption of Correctness/Standard of Review*

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) An appellant must affirmatively establish error by an adequate record. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609; *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) In the absence of a proper record on appeal, the appealable judgment or order is presumed correct and must be affirmed. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296.)

Code of Civil Procedure sections 632 and 634, however, "set forth the means by which to avoid application of these inferences in favor of the judgment. When the court announces its tentative decision, a party may, under section 632, request the court to issue a statement of decision explaining the basis of its determination, and shall specify the issues on which the party is requesting the statement; following such a request, the party may make a proposal relating to the contents of the statement. [Fn. omitted.] Thereafter, under section 634, the party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. [Fn. omitted.]" (*In re Marriage of Arceneaux, supra*, 51 Cal.3d at p. 1133.)

Although a court has the option of converting a tentative decision to a statement of decision, by stating it will be deemed as such, absent a formal request for a statement of decision (Cal. Rules of Court, rule 3.1590, subd. (c)(4)), "a trial court's tentative or memorandum decision is no substitute for a statement of decision." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268.) Rather, "a trial court retains inherent authority to change its decision, its findings of fact, or its conclusions of law at any time before entry of judgment and then the judgment supersedes any memorandum or tentative decision or any oral comments from the bench." (*Ibid.*)

"[W]e apply the substantial evidence standard to the trial court's factual findings as to the existence and character of the parties' property. By contrast, the trial court's determination of what legal principles apply is subject to our de novo review." (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1421 (*Bono*).)

C. *Analysis*

Steven raises numerous challenges to the trial court's judgment, contesting its orders regarding various assets and debts. We discuss each argument below, and include a brief description of the facts, viewed in the light most favorable to the court's judgment.

1. Sonoita Property

In April 2006, prior to the parties' marriage, Steven purchased an undeveloped lot located on Sonoita Avenue in Topok, Arizona (the Sonoita property), for $90,000. In 2010, he

and Kimberly decided to "put a modular home on the property" to serve as a vacation home. Kimberly contributed approximately $135,000 from her separate property to purchase a manufactured home that was eventually placed on the lot. Steven contributed approximately $61,000 toward the project.

The judgment provides that, "[Steven] purchased the Sonoita [p]roperty prior to the marriage for $90,000.00 from his separate property funds . . . . Since the [Sonoita] property is in the name of [Steven], the Court shall retain jurisdiction over the sale, distribution and characterization of the proceeds from any potential sale. If the parties agree that [Steven] may buy-out [Kimberly's] interest in the property, the property needs to be re-appraised by an agreed upon real estate appraiser. In any event, [Kimberly] shall be entitled to reimbursement for the $135,000.00 separate property contribution and one-half of all community investment."

In his opening brief, Steven contends that the trial court erred when it ordered the sale of the Sonoita property.[3] According to Steven, once the court found that the Sonoita

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[3] Steven's contention may be based on paragraph 6 of the trial court's Judicial Council form judgment which was checked by the court and reads: "**Sale of Property.** The following property will be offered for sale and sold for the fair market value as soon as a willing buyer can be found, and the net proceeds from the sale will be ____ divided equally ____ other (*specify*): [¶] (See attached)." On the attachment to the judgment, under "Paragraph 6. — Sale of property," subparagraph (a) lists the Sonoita property. The text of that subparagraph, however, specifies that "the Court shall retain jurisdiction over the sale, distribution and characterization of the proceeds from any potential sale."

property was his separate property, it had no jurisdiction to compel him to sell it, citing *In re Marriage of Hebbring* (1989) 207 Cal.App.3d 1260. In response, Kimberly argues that the trial court did not order the sale of the Sonoita property. In reply, Steven appears to concede that the trial court did not order the sale of the Sonoita property, but nevertheless maintains that the court's retention of jurisdiction over the sale is unauthorized under the Family Code.[4]

It is clear from the judgment that the trial court did not order Steven to sell the Sonoita property and thus did not err as claimed in the opening brief. As to Steven's argument that the trial court erred in retaining jurisdiction over the sale, we do not consider this argument as Steven raised it for the first time in his reply brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542.)

Steven next contends that the trial court erred in finding that Kimberly was entitled to reimbursement of $135,000. According to Steven, the trial court should have characterized Kimberly's $135,000 investment in the manufactured home—prior to its installation on Steven's unimproved lot—as a community asset *at purchase* that was transmuted to Steven's separate property when it was subsequently affixed to his unimproved lot.[5] Once the court properly characterized the

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[4] All further statutory references are to the Family Code, unless otherwise indicated.

[5] Steven supports this contention with cites to, among other authorities, the Mobilehomes-Manufactured Housing Act of 1980

manufactured home, Steven argues that the court was then required under *Bono, supra*, 103 Cal.App.4th at page 1409 to analyze whether the community-funded improvements to Steven's unimproved lot increased the value of that separate property, such that the community acquired a pro tanto interest in it.

There is nothing in our record to suggest that Steven ever raised this argument with the trial court for consideration. As noted, Steven did not include in the record either his trial brief or closing argument brief. And, although Steven did include his objections to the trial court's intended statement of decision, those objections did not raise these contentions of legal error.[6] Thus, Steven has forfeited his argument on appeal. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.)

2. Steven's Requests for Reimbursement

At the time of her marriage, Kimberly owned the Capitan property. During the marriage, she leased, maintained, repaired, and sold that property, receiving approximately $326,000 in sales

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(Health & Saf. Code, § 18000 et seq.) and The Manufactured Home Property Tax Law (Rev. & Tax. Code, § 5800 et seq.).

[6] Instead, in response to the trial court's proposed reimbursement orders concerning the Sonoita property, Steven complained only that (1) the trial court erred by characterizing his $60,000 contribution to the improvement of the Sonoita property as community property; (2) the court had no justification to order a sale of his separate Sonoita property; and (3) the proposed buy-out option was based on an incorrect valuation and should have only included the value of the improvement.

proceeds as her separate property. Steven testified that exhibit 13 was "a spread sheet of expenses paid either personally by [him] or by the community" on Kimberly's separate Capitan property, both before and after it was leased, but prior to its sale. Steven also testified that he made certain payments, postseparation, to maintain assets including for auto and health insurance for Kimberly and her children.

Steven contends on appeal that because he raised the trial court's failure to mention his requests for reimbursements in his objections to the intended statement of decision, we must reverse so that the court can make findings and a decision on these claims. We disagree.

Although Steven contends that the trial court erred in failing to resolve his claims for reimbursement, there is no record of how the trial court ruled on Steven's objections to the intended statement of decision. Nor does the record reflect whether the trial court adopted the intended statement of decision as the final statement. Notably, the judgment does not indicate any such adoption.

Steven seems to assume that the intended statement of decision became the trial court's final statement of decision. The intended statement, however, provided that it would become the statement of decision, "unless within ten (10) days either party files and serves a document that specifies controverted issues or makes proposals not covered in the Memorandum of Intended Decisions." Steven did file an objection to the intended statement of decision. Although he filed it more than 10 days following the trial court's filing of the intended statement of decision, the trial court permitted the filing and held a hearing on the objections. Thus, the condition precedent to the intended statement of

decision becoming the final statement of decision, that is, the failure of a party to file a document in objection, did not occur. Based on the record before us, we affirm the trial court's implicit denial of Steven's requests for reimbursement on the grounds that Steven has failed to establish error by an adequate record.

3. Assignment of Entire $26,000 Credit Line Debt to Steven

Steven opened a $100,000 line of credit secured by property located at an address on Lunes, in La Verne, California (the Lunes property), which Steven had purchased prior to marriage and the trial court found to be his separate property. On September 13, 2011, Kimberly withdrew the entire $100,000 balance on the credit line without Steven's knowledge. Kimberly eventually repaid all but approximately $26,000 of her withdrawal. Kimberly used $26,000 on a variety of living expenses for Steven, Kimberly, and her children.

The judgment ordered that Steven was solely responsible for this debt. Steven contends that the trial court violated section 2550[7] when it assigned the entire outstanding credit line balance to him without offset. Because the credit line balance was incurred during the marriage, Steven maintains that it was a

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[7] Section 2550 provides: "Except upon the written agreement of the parties . . . in open court, or as otherwise provided in this division, in a proceeding for dissolution of the marriage . . . , the court shall, either in its judgment of dissolution of marriage, . . . , or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally."

community obligation that the trial court was required to divide equally between the parties.

Kimberly counters that sections 2550 and 2551[8] do not require the trial court to divide each community debt equally; they require the court to divide the community estate equally. Because the court retained jurisdiction over assets and debts of the parties that have yet to be divided, Kimberly argues that Steven has failed to show that the assignment of the entire credit line balance to him was erroneous.

Kimberly appears to concede that the credit line balance is a community obligation that was subject to division under sections 2550 and 2551. She also seems to suggest that the trial court's failure to divide the debt at trial by way of offset or otherwise was not erroneous because the court retained jurisdiction generally to assign and divide other unspecified assets and liabilities at a later date. But section 2550 provides that "the court *shall*, either in its judgment of dissolution . . . or at a later time *if it expressly reserves jurisdiction* to make such a property division," divide the community estate—i.e., the assets and obligations of the estate—equally. Here, the judgment assigned the credit line debt to Steven, but it did not equally divide that debt between the parties by way of offset. Moreover, the trial court did not expressly reserve jurisdiction to make such an offset. Because the court failed to comply with section 2550,

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[8] Section 2551 provides: "For the purposes of division and in confirming and assigning the liabilities of the parties for which the community estate is liable, the court shall characterize liabilities as separate or community and confirm or assign them to the parties in accordance with Part 6 (commencing with Section 2620)."

Steven is entitled to a limited reversal on this issue for the purpose of modifying the judgment to divide the credit line debt equally between the parties.

5. Toy Hauler

Steven testified that in September 2006, prior to marriage, he purchased a 29-foot recreational vehicle and that, in March 2007—i.e., after marriage—he traded in that vehicle for a larger, 39-foot recreational vehicle (the Toy Hauler). He made the payments on the loan for the Toy Hauler, as well as the payments for "maintenance costs and expenses."

Kimberly submitted an exhibit that indicated both the 29-foot recreational vehicle and the Toy Hauler were purchased during the parties' marriage. The exhibit also summarized the monthly loan payments made on the Toy Hauler and indicated that Steven "made all payments noted above."

The judgment provided, "The [Toy Hauler] is ordered sold and the net proceeds distributed as follows: one-half each after [Steven] is credited with the reasonable expenses to maintain the hauler during the pendency of this matter. The Court retains jurisdiction to resolve any disputes as to the terms of sale and appropriate division of the proceeds, if any." In its intended statement of decision, the trial court found: "[The Toy Hauler] was purchased by [Steven] *prior to marriage*." (Italics added.)

Steven argues that because the trial court found that he purchased the Toy Hauler prior to marriage—despite what he acknowledges to be undisputed evidence to the contrary—it was his separate property as a matter of law. Steven therefore

concludes that the trial court had no jurisdiction to order the sale of that separate property asset.

There are two problems with Steven's argument. First, the judgment does not include any finding that the Toy Hauler is separate property; and that judgment superseded the intended statement of decision's reference to Steven's purchasing the Toy Hauler prior to marriage. (See *Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at p. 268.) Second, even if the trial court had concluded that Steven purchased the Toy Hauler prior to marriage, we would affirm the order regarding its disposition because the uncontroverted evidence demonstrated that Steven had purchased the Toy Hauler during the marriage. Thus, to the extent the trial court concluded that the Toy Hauler was separate property, there was insufficient evidence to support that conclusion. Therefore, Steven cannot complain that he was prejudiced by the court's order to sell that asset, which was presumptively community property. (Code Civ. Proc., § 906.)

6. Reimbursement to Kimberly for Community Assets and Services Expended on Santa Clarita Projects

Steven testified about two of his personal development projects in Santa Clarita (the Santa Clarita projects) which he described as "handshake" agreements with clients in which he invested money and professional services. The work he performed "was to help [the clients] get entitlements with the City of Santa Clarita to develop [multi-unit apartment projects] on the property." He claimed that all the money he invested

came from his separate property accounts, and that the amounts he invested were shown on his exhibit 1 spreadsheet.[9]

Kimberly testified that she was aware of the Santa Clarita projects and that there was "some investment going on in Santa Clarita," but admitted that she "knew very limited information [about those projects]." Steven did not inform Kimberly when he contributed money to those investments. Kimberly's exhibit G listed payments made by Steven on the Santa Clarita projects from January 11, 2007, to December 1, 2008. Based on exhibit G, the total amount of the payments made on those projects during the marriage was $64,732.12.

The judgment awarded Kimberly a $38,317 reimbursement for "Santa Clarita 9 and 27." (Emphasis omitted.)

According to Steven, there was insufficient evidence to support the judgment because his evidence on this issue was largely uncontroverted and defeated Kimberly's claim for reimbursement and, in any event, Kimberly's evidence, exhibit G, did not show that she was entitled to the amount awarded by the court. Kimberly counters that Steven's testimony—that the time and money he spent on the Santa Clarita projects were his separate property—was not credible and contrary to applicable law. She maintains that her uncontroverted exhibit G showing all the community payments made on these projects was sufficient evidence to support the trial court's reimbursement award. She does not address, however, the fact that her exhibit G shows only $64,732.12 in community expenditures (for a total community share of $32,366.06), whereas the court awarded Kimberly $38,317 in reimbursement for such expenditures.

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[9] Steven's exhibit 1 was not included in the record.

We agree with Steven that exhibit G, alone, does not support an order of reimbursement for $38,317 and instead supports an order of reimbursement for $32,366. Nonetheless, without a final statement of decision, and given the voluminous evidence of the parties' financial contributions during the marriage, we conclude that Steven has not met his burden of demonstrating that the appealable judgment is incorrect. (*Maria P. v. Riles, supra*, 43 Cal.3d at pp. 1295–1296.)

V. DISPOSITION

The judgment is reversed, in part, and remanded with instructions to modify the order assigning the credit line debt to Steven so as to instead characterize that debt as community debt and to thereafter comply with section 2550. The judgment is affirmed in all other respects. No costs are awarded on appeal.

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.