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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of JANE and MICHAEL
CAREY.

JANE CAREY,

Respondent,

v.

MICHAEL CAREY,

Appellant.

G044406

(Super. Ct. No. 06D004798)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed in part and reversed and remanded in part.

John R. Schilling for Appellant.

Law Offices of Robert M. Dykes and Robert M. Dykes for Respondent.

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Two aspects of a lengthy dissolution judgment are challenged in this appeal. The first will be affirmed. The second will be reversed and remanded for a recalculation of the equalizing payment. In the manner of family law cases, we refer to each of the parties by their first names.

FACTS AND DISCUSSION

1. First Challenge: The Singletree House

The trial court characterized the “Singletree” house in Newport Beach as a mixed asset, part Michael’s separate property, part community property. By characterizing the house as “mixed,” the community share was held to be considerably larger (about \$380,000) than it would have been if it had been characterized as a separate asset, subject to reimbursement to the community for about \$41,000 in reductions in the mortgage made with community funds.

The relevant facts bearing on the Singletree house are these: The house was purchased in December 2000 for about \$1.155 million. Title was only in Michael’s name. The grant deed read: “to Michael R. Carey, a married man as his sole and separate property.” At the time of the mortgage the parties had been married about five years. They would not separate until about six years later. The \$1.155 million consisted of a down payment of \$300,000 and a loan of \$855,000. The \$300,000 down payment was entirely husband Michael’s separate property. Only Michael’s name was on the loan. In fact, Jane told Michael “I’m not going to go on the loan if I’m not going to be on the title.” Despite characterizing the Singletree property as community, the trial judge wrote in his statement of decision: “The court agrees with Respondent that the Singletree house was not acquired in any part with community proceeds.” However, the court reasoned that since the residence was acquired during the marriage, the “community property presumption” applied unless Michael could “prove otherwise.” The quitclaim deed signed by Jane did not prove otherwise. The timing of the signing of the quitclaim

(immediately before the move to Southern California into the Singletree house) showed undue influence.

The trial judge was right, but the correct analysis requires one more layer. The community property presumption (Fam. Code, § 760) operated directly on the proceeds of the loan by which the Singletree house was acquired, not the house itself. Properly speaking, the Singletree house was *acquired* with a combination of a \$300,000 separate property down payment *and* a \$855,000 loan.

The salient issue is the character of the proceeds of the loan, i.e., the source of about 74 percent of the funds used to acquire property. (See *In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 731 [“In the absence of a controlling statutory presumption to the contrary, the character of property as community or separate will be determined by the source of assets used to produce it.”].)

Even though only Michael was on the loan, he was married at the time. Because the loan was made during the marriage, the intent of the lender -- to look to either community income or assets, separate income or assets, or some combination of the two -- controls, regardless of whether the loan was to Michael only. (*Gudelj v. Gudelj* (1953) 41 Cal.2d 202, 210 [“There is a rebuttable presumption that property acquired on credit during marriage is community property. . . . In accordance with this general principle, the character of property acquired by a sale upon credit is determined according to the intent of the seller to rely upon the separate property of the purchaser or upon a community asset.”]; *In re Marriage of Grinius* (1985) 166 Cal.App.3d 1179, 1186 [“the character of credit acquisitions during marriage is ‘determined according to the intent of the lender to rely upon the separate property of the purchaser or upon a community asset’”].)

Michael had his chance to establish that the loan to him was made entirely in reliance upon his separate assets. He did not take advantage of it. He was asked by Jane’s counsel if he had a copy of the loan application. He said no. In fact, his counsel

successfully objected to a line of questioning from Jane's counsel that might have prodded him to bring the loan application to court. None of the trial exhibits lodged with this court include the loan application.

We have been cited to no direct evidence of lender intent. We have not found any in our own review of the record. In the absence of evidence that the lender looked to Michael's separate property assets at the time of the loan (as distinct from what would be his community earnings from his work as a financial adviser), the trial court was correct to apply the community presumption.

The trial court's statement that the property was not "acquired" with community proceeds was infelicitous, but harmless. As noted, Michael has not cited this court to any substantial evidence that the lender only looked to Michael's separate assets in making the loan. The natural presumption, in fact, would have been otherwise. The lender would have been expected to rely on Michael's earnings at the time of the loan, and those earnings were community property.

The parties devote much of their briefing to the ramifications of Jane not being on title. Jane unquestionably signed a quitclaim deed. Michael unquestionably was solely on title. However, there was substantial evidence, in the form of the timing of the signing of the quitclaim deed, that the deed was signed under duress. (See *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996 (*Delaney*) [construing Family Code section 721: "when any interspousal transaction advantages one spouse to the disadvantage of the other, the presumption arises that such transaction was the result of undue influence"].) Jane was presented with the quitclaim deed on the eve of closing. She had no practical choice to say no. Accordingly, whatever presumption that might arise from *title* was rebutted. (See *id.* at p. 997 ["The court concluded that in every such instance, the presumption based on the confidential fiduciary relationship between spouses must prevail over the presumption based on record title."].)

2. The Life Insurance Policy

The second challenge to the judgment involves the proceeds of a certain life insurance policy on the life of Michael's mother. Michael's mother died in 1997. There is no question that the policy paid Michael \$300,000. The evidence was uncontradicted that Michael paid, under the terms of his divorce from his previous wife Kristine, about \$70,000 from that \$300,000. On appeal, Michael now claims that the trial court did not properly take the \$70,000 deduction into account.

Michael is correct. The statement of decision clearly based the calculation of the amount owing the Michael-Jane community on the erroneous assumption that there was \$300,000 to be apportioned between separate and community interests, not \$230,000.

The trial court's math was not readily spelled out in the statement of decision, but there are sufficient numbers to allow us to deduce the trial court's approach. Here is what the trial court wrote: "\$75,724.26 in premiums were paid prior to marriage and \$25,121.20 were paid after marriage. The life insurance payout was \$300,000. Therefore, the community should receive a credit of \$73,731.77. Petitioner [Jane] is therefore awarded the amount of \$36,856.89 from Respondent relating to these life insurance proceeds."

Analyzing the numbers, it is apparent that the trial court took the total amount of premiums on the policy paid prior to the Michael-Jane marriage (\$75,724.26) and added them to the premiums paid after the Michael-Jane marriage (\$25,121.20). The trial judge assumed that all pre-Michael-Jane marriage premiums were separate, and all post-Michael-Jane marriage were community. (That is, came from the Michael-Jane community). The trial judge then calculated the community (post-Michael-Jane marriage) premiums of \$25,121.20 to be 24.91 percent of the total premiums paid. (Total premiums paid were \$100,845.46; \$75,724.26 plus \$25,121.20 equals \$100,845.46.) Twenty-four point ninety-one percent of \$300,000 is \$74,730, which is what the trial

court calculated as the Michael-Jane community share. (We note the trial court later changed the \$73,731 figure to \$74,730.) There was thus no way the trial court figured the community share using the \$230,000 figure instead of \$300,000. Had it done so, the 24.91 percent community share would have been about \$57,293.

As a matter of law, it is the *net* community estate which is divided. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2011) ¶ 8:1000, p. 8.236.5 [“Thus, the ultimate mandate of § 2550 is that the *net* community estate division be equal.”].) By failing to take into account Kristine’s premarriage claim of \$70,000, the court effectively divided property that was not even Michael’s separate property, much less community property. In Jane’s response to Michael’s argument on the policy, she has no answer for the fact that Kristine was owed \$70,000 off the top of the policy, hence that \$70,000 could never have been part of the marital estate, either separate or community, in the first place.

The question remains as to the proper disposition of the issue. The actual Michael-Kristine judgment, in evidence as Exhibit K, declared that \$23,232.13 was be “attributed to petitioner [Kristine] as her separate contribution.” In his opening brief in this case, Michael correctly points out that, as a percentage of total premiums paid, Kristine’s \$23,232.12 was about 23 percent, and may be presumed to have been translated into an actual hard dollar payment of \$69,120. (The figure tallies with Michael’s testimony that Kristine was paid “approximately \$70,000.”)

The net payout during the marriage was \$300,000. Minus the \$69,120, the net pay out which Michael received was \$230,880. The percentage of post-Michael-Jane marriage, i.e., community premiums was 24.91 percent. Twenty-four point ninety-one percent of \$230,880 is \$57,512.21. The judgment therefore errs to the extent that it charges Michael with the receipt of \$74,732 in community funds as distinct from \$57,512.21 in community funds.

DISPOSITION

The judgment is affirmed insofar as it declares the Singletree house to be a mixed asset and allocates community and separate portions to the value of that property at the time of dissolution.

The judgment is reversed to the extent that the \$117,000 equalization payment was predicated on Michael's receipt of \$74,732 in community funds from the life insurance policy instead of the correct figure, \$57,512.21. The matter is remanded to the trial court to enter a judgment which reduces the equalization payment to take into account the correct figure, namely \$57,512.21.

We note that in all other respects the judgment has not been challenged in this appeal. In the interests of justice each side will bear its own fees in this appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.