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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of SHIRLEY FERER and AARON FERER.	
SHIRLEY FERER, Appellant, v. AARON FERER, Respondent.	A132383 (San Mateo County Super. Ct. No. FAM 089839)

Shirley Ferer appeals from the final judgment dissolving her 26-year marriage to Aaron Ferer and adjudicating their respective property rights. She presents three contentions, all of which deal with property issues. We conclude these contentions are without merit, and we affirm.

BACKGROUND

The first notable thing about the record before us is the herculean efforts expended by Temporary Judge Richard C. Berra. The second is the inadequacy of the record as originally filed by appellant.

The trial court's register of this action shows that appellant commenced this proceeding with the dissolution petition filed on May 25, 2006, almost exactly five years before the final judgment was entered by Judge Berra. The register further shows that proceedings between the parties were acrimonious and protracted. Not all of that history

is relevant or needs to be summarized here. The following narrative will attempt to include only the pertinent events and information necessary to resolve appellant's contentions.

The first of the three statements of decision prepared by Judge Berra was filed on October 29, 2008. The pertinent language of its 11 pages was as follows (with minor nonsubstantive editorial changes added by us):

"This matter came on for trial on September 10, 11, and 18, 2008 . . . . The trial was limited to the bifurcated issue of the characterization of numerous Crown Life annuity policies created with Respondent's (hereinafter 'Aaron') separate property funds in the name of Petitioner (hereinafter 'Shirley'). The parties stipulated . . . that the monies received from the surrender of [three specified] annuity policies . . . traced to Aaron's premarital separate property, namely his interest in a Budget Rent A Car franchise. Further, Shirley waived any claim to an interest in said business or the sale proceeds under any theory . . . . Shirley further waived any claim that there was a transmutation by virtue of any estate planning documents or commingling. [¶] . . . The character of the annuities placed in Shirley's name is the sole issue bifurcated for trial." (Fn. omitted.)

After reviewing the parties' contentions, Judge Berra then made the following findings of fact:

"1. The parties were married on May 31, 1980 and separated on May 3, 2006.

"2. Aaron owned a 33.5% interest in a Budget Rent A Car franchise prior to the date of marriage. Shirley has agreed there is no community interest of any kind in this franchise.

"3. In April 1983, Aaron sold his interest in Budget Rent A Car for $4,900,000. He received a promissory note payable with interest only at 12% per annum with all principal due and payable on or before January 5, 1989.

"4. The aforesaid promissory note produced approximately $588,000 in annual interest income and said earnings were used primarily for family living expenses.

"5. In January 1989 when the note came due, Aaron desired to replace the income that the notes generated. Aaron consulted with Paul R. Castagna, who is a Registered Representative, Insurance Agent, and Stock Broker. Mr. Castagna suggested he deposit the principal of the note in a Crown Life single premium settlement annuity and multiple Crown Life single premium deferred annuities. This program afforded Aaron the widest degree of flexibility and replaced a significant amount of the interest income otherwise lost when the note was paid. However, Mr. Castagna informed Aaron that he had to title some of the annuities in his wife's name because the insurance company had a threshold amount of insurance they would allow on any single person. No one ever told Aaron that this might create a gift of Aaron's separate property to Shirley.

"6. In January 1989, when the promissory note from Budget Rent A Car was paid, the funds (approximately $4,900,000) were deposited in Aaron's Bank of America account. Shirley has agreed that these funds were Aaron's separate property. On the same day, Aaron caused approximately $3,000,000 to be electronically transferred to Crown Life Insurance Company for a $1,000,000 (approx.) single premium settlement annuity in his sole name and twenty $100,000 single premium deferred annuities in his sole name.

"7. At the same time, Aaron caused $2,000,000 to be transferred electronically from the same bank account to Shirley's Bank of America account. Shirley agrees that this transaction did not change the character of the funds and there was no gift. Immediately thereafter Aaron (pursuant to Mr. Castagna's recommendations) instructed Shirley to authorize the electronic transfer of the aforesaid $2,000,000 to Crown Life Insurance Company for twenty $100,000 single premium deferred annuities in her name.

"8. Aaron never signed any document related to the transfer of moneys into Shirley's account, or thereafter when the annuities were created. The only document that exists is the Transfer Payment Order (Trial Exhibit 4), which neither party signed.

"9. Throughout the marriage and up to January 2003, the community utilized the income from these annuities of approximately $13,000,000 to meet community expenses

and investments. The original $4,900,000 remained in various single premium and deferred variable annuities in Aaron's and Shirley's names.

"10. In January 2003, when Aaron turned 59 1/2 and insurance company rules were changed concerning the amount of insurance on anyone person's life, it became financially more prudent to have all of the annuities in Aaron's sole name. The primary reason was that since Aaron was now 59 1/2 years of age, he could withdraw funds from the annuities without having to pay a 10% penalty. If the policies had remained in Shirley's name and since she was not yet 59 1/2, they would not only pay ordinary income tax on any withdrawals but they would also pay a 10% penalty. Shirley executed three transfer forms transferring the existing annuity policies in her name to Aaron (Trial Exhibit 13). She executed these forms freely and voluntarily.

"11. In January 1989, at the time the annuities were put in Shirley's name, Aaron never told Shirley (or, anyone else) that he was making a gift of the $2,000,000 used to purchase the annuities in her name nor did he tell Shirley or anyone else that it was not a gift. Mr. Castagna testified, without contradiction, that he did not intend that implementing his recommended financial plan would result in a gift to Shirley. He also testified that Aaron never led him to believe that he intended a gift and he testified that everyone's conduct was consistent with the fact that the annuities in Shirley's name were simply held that way for convenience and they were always Aaron's.

"12. Shirley, throughout the marriage, never exercised any indicia of control or ownership of the annuities in her name, save and except for signing documents as requested by Aaron and Mr. Castagna. To the contrary, Aaron and Mr. Castagna exercised all control over and with respect to the annuities, including those in Shirley's name, at all times. Aaron did not intend to make a gift to Shirley by either depositing the $2,000,000 into her bank account in arranging for the 20 $100,000 annuity policies to be issued in her name. The annuities in Shirley's name were treated identically with the annuities in Aaron's name.

"13. In 2003, when Shirley executed the transfer forms (Trial Exhibit 13) she did not read the forms nor was she coerced or forced into signing the forms. She signed them

freely and voluntarily. Further neither Aaron nor Mr. Castagna indicated to her that she was entitled to discuss the execution of the transfer forms with a lawyer nor did they prevent her from seeking the advice of an attorney. Shirley never asked to be allowed to review the documents with an attorney. Shirley never asked Mr. Castagna what the effect of executing the transfers was nor did Mr. Castagna volunteer any information. Shirley confirmed that throughout the marriage she always signed whatever document Aaron asked her to sign and almost never read those documents and never asked questions about them. Shirley never told anyone she considered the annuities in her name to be her separate property. She never inquired of either Aaron or Mr. Castagna about the annuities. Mr. Castagna testified that he had no 'duty' to Shirley because she was never his client and all of the transactions were simply part of his plan to manage Aaron's money."

Judge Berra then set out his "Findings And Order," as follows:

"TRANSACTIONS OCCURRING JANUARY 1989:

"As stated above, Shirley contends that Family Code Section 852 does not apply to the transactions that occurred in January 1989. Shirley's contention is that 'in this situation Evidence Code section 662 applies and the presumption of title has not been overcome by clear and convincing' evidence. Aaron contends that Family Code Section 852 does apply.

"Shirley argues that there are no California cases on point and that this is a matter of first impression. The only case that Shirley has cited is a federal Bankruptcy case entitled *Hanf v. Summers* (9th Cir. BAP 2002) (affirmed in *In re Summers* (2003) 332 F.3d 1240). In *Summers* the Bankruptcy Court was required to interpret California law. The Bankruptcy Court found that when Husband and Wife purchased a home with community funds and took title as joint tenants the form of title controlled the character. The federal Ninth Circuit Court of Appeals stated that the issue therein was a case of first impression. The Circuit Court of Appeals found that '[T]here are no California cases specifically addressing when transmutation occurs or when the requirements of Section 852(a) must be met. However, application of Section 852(a) only to interspousal

transactions, rather than to acquisitions of property from third parties, is consistent with the legislative purpose of the statute.' Thus, when debtor and her husband took title to real property in joint tenancy using community funds to purchase the residence, the Circuit Court of Appeals found that the presumption of title (joint tenancy) controls and any transmutation rules set forth in Family Code Section 852(a) do not apply since this was an acquisition from a third party and not a transaction between spouses.

"A brief overview of the law pertinent to this matter seems to be in order. The presumption of Family Code Section 760 that property acquired during marriage is community property somewhat easily gives way to the presumption of Evidence Code Section 662 that title gives rise to a rebuttable presumption of its status or character. This presumption cannot be rebutted simply by tracing nor testimony of an undisclosed intention. To rebut the presumption it requires the higher standard of burden of proof in that the evidence to rebut the presumption must be 'clear and convincing' of a communicated intention, agreement or a common understanding that ownership is other than as indicated by title.

"Notwithstanding, transactions between spouses which advantage one spouse over the other create a presumption of undue influence (*In re Marriage of Delaney* (2003) 111 Cal.App.4th 991) and as a result Family Code Section 721 invalidates the transaction unless the advantaged spouse can prove by a preponderance of the evidence that the transaction was freely and voluntarily entered into by the disadvantaged spouse *with the full knowledge or the effect of the transfer*.

"Further, Evidence Code Section 662 alone does not determine characterization where an alleged transaction between spouses is contested. Instead, the more specific rules governing effective transmutations control. If the formalities of Family Code Section 852 are not met, the presumption that title controls as set forth in Evidence Code Section 662 does not apply. It should be noted here that in this case it was uncontroverted that if Family Code Section 852 is applicable there was no writing as required by Section 852.

"Generally a transmutation between spouses changes the character of property spouses already own. Spouses can convert separate property to community, community to separate and separate to separate. However, the formalities of Family Code Section 852 must be met.

"Judge William P. Hogoboom and Justice Donald B. King, the authors of the Family Law California Practice Guide, seem to agree with William W. Bassett, the author of California Community Property Law who was quoted in *Summers* that the initial acquisition of property from a third person does not constitute a transmutation and is not subject to Family Code Section 852. None of these authors cite any California case law for this proposition.

"Spouses can indicate their intent with respect to the character of the property they acquire by specifying the form of title or they can later transmute the character of the property as between themselves. A transfer of property between spouses is not necessarily a 'transmutation' that changes characterization or ownership. A transmutation to be effective, however, must adhere to the provisions of Family Code Section 852.

"There are three California cases which are not precisely on point but are instructive on how to view the contentions of the parties in this case. The first case is *Estate of McDonald* (1990) 51 Cal.3d 262. Although this case was a death case, and like *Summers* is not a California family law case, at least it is a California Supreme Court case and not a Federal case interpreting California law. *McDonald* held that husband's transfer ('roll-over') of commingled funds from his pension to 3 newly created IRA accounts in his sole name was subject to Civil Code Section 5110.730 (Family Code Section 852's predecessor) and if there was no writing as required by Section 5110.730 that transmuted the character of the pension from community to his separate property there was no transmutation. The three accounts ostensibly were acquired from a third party and the court applied Civil Code Section 5110.730 and did not apply Evidence Code Section 662 to the transfer of the IRAs. The creation of three new IRAs from an admittedly community property pension is reasonably similar to this case.

"Similarly, in *Estate of Petersen* (1994) 28 Cal.App.4th 1742, the Fifth District Court of Appeal held that the use of community funds to acquire several *annuity contracts* did not alter the character of the funds to that of Joint Tenancy. Because the annuity contracts were purchased with community funds and even though the contracts provided for a right of survivorship, the community character, unlike *Summers*, was not altered to that of Joint Tenancy. The reasoning of the *Petersen* court seems to be that annuities are akin to contracts of deposit of funds between a depositor and a financial institution such as a bank, savings and loan, or credit union and although the insurance company is not identical to such an institution the court held that 'Metropolitan Life is a "like organization." ' This court can see no distinction between Metropolitan Life and Crown Life.

"Finally, in *Estate of Barneson* [(1999)] 69 Cal.App.4th 583, the First District Court of Appeal held that husband's transfer of his separate property stock to his wife's name and the journaling of his stock in 'street name' into his wife's account was subject to Family Code Section 852 and did not transmute his separate property stock to the separate property of his wife and Evidence Code Section 662 did not apply, because there was no writing with the appropriate transmutation language. The court explained: '*McDonald*'s interpretation of the "express declaration" language in [Fam. Code § 852(a)] can be viewed as effectively creating a "presumption" that transactions between spouses are not "transmutations," rebuttable by evidence the transaction was documented with a writing containing the requisite language.' (*Id*. at p. 593.)

"Applying the findings and law set forth above to the case tried herein, this court makes the following conclusions:

"1. The presumption of Evidence Code Section 662 that the annuity contracts in Shirley's name were her separate property was rebutted by 'clear and convincing' evidence in that there was a clear understanding that ownership was not that of Shirley's separate property. Aaron never transmuted the character of the annuities purchased in Shirley's name and they remained his separate property.

“2. There was no gift of Aaron’s separate property funds to Shirley when the annuities were placed in her name. Most, if not all, of the elements of a gift were absent.

“3. The transaction wherein Aaron’s separate funds were used and the annuities were placed in Shirley’s name advantaged her. After sharing in the benefit of the income generated by the use of Aaron’s separate funds throughout the marriage, her position that the money that funded the annuities in her name were her separate property is at best disingenuous and at worst is a violation of Family Code Section 721.

“4. *In re Marriage of Delaney* and Family Code Section 721 should apply to the transaction in January 1989. When Aaron made his decision to use his separate property for the benefit of the family he did not have full knowledge of the possible effect of the transaction nor the claim Shirley would make as to the effect of the transaction.

“5. Notwithstanding the foregoing and regardless of whether any of the aforesaid conclusions are incorrect or unsubstantiated by the evidence, if Family Code Section 852 does apply to this transaction, the evidence was uncontroverted that there was never a writing signed by either party that complied with the dictates of section 852 and *Barneson*, and as a result there was no change in character when the annuity transaction occurred using Aaron’s separate funds.

“6. Based on the holdings of *McDonald*, *Petersen* and *Barneson* as cited hereinabove all transactions in 1989 did not change the character of Aaron’s separate property and remain Aaron’s separate property.

“TRANSACTIONS OCCURRING JANUARY 2003:

“Based on the findings and law set forth herein, the court makes the following conclusions:

“1. This was a transaction contemplated in Family Code Section 852.

“2. If Shirley had an interest in the annuities at the time she executed the transfer documents, she was the disadvantaged spouse and Aaron was advantaged by the transaction. If she had no interest, then Aaron obtained no advantage by the transaction.

“3. The evidence is clearly sufficient to show that the transfer was freely and voluntarily entered into. In fact, Shirley so stipulated. She was not coerced or forced to

sign the transfer forms. She chose not to read the transfer forms despite having the opportunity to do so. While she was not advised to seek the advice of an attorney before signing the documents, likewise she was not prevented from doing so. She chose not to ask Mr. Castagna nor Aaron any questions about them. She just signed them when asked to do so. Any presumption of undue influence was rebutted.

"4. Because Shirley failed to read or question the transfer forms, the court cannot find by a preponderance of the evidence that she entered into the transaction/signed the transfer documents with the full knowledge of the effect of the transfer, except to the extent that her entire participation in the annuity process from 1989 thru 2003 showed that she clearly understood that she had no interest in the annuities and that they were Aaron's.

5. Notwithstanding findings 1, 2, and 3, the court does not have to determine whether Shirley's failure to read or question the transfers constitutes a valid defense to them because the effect of the transactions is moot. The signing of the transfer documents had no effect on their characterization herein because Shirley had no interest in the policies, separate or community, to transfer to Aaron.

"ORDER

"All annuities purchased with Aaron's separate property proceeds from the sale of his interest in the Budget Rent A Car franchise regardless of whose name in which they were titled are Aaron's separate property, as were the proceeds received therefrom."

Judge Berra's second statement of decision was filed on March 22, 2010. As relevant here, the pertinent language of its seven pages is as follows:

"This matter came on for trial on November 2, 2009 . . . with respect to the bifurcated issue of whether Respondent [Aaron] should receive reimbursement of approximately $5,000,000 pursuant to the dictates of *In re Marriage of Epstein* (1979) 24 Cal.3d 76 . . . . By stipulation, said trial was conducted with direct evidence being submitted by declarations, subject to cross-examination. Both parties submitted voluminous trial exhibits. [¶] . . . [¶]

"After considering the pleadings filed herein, the testimony of the parties' trial exhibits and closing argument of counsel, and good cause appearing, the court issues the following statement of decision:

"The narrow issue before this court is Aaron's right to reimbursement for his using $5,059,242 of his separate property assets postseparation to pay off a community property obligation in the form of a line of credit to Greater Bay Bank. This court has previously found the annuities from which the funds were used to make said payment to be Aaron's separate property. Shirley conceded at this trial that Aaron had used his separate property to pay off a community property obligation, postseparation. Although this satisfies the *prima facie* showing required for Aaron to be reimbursed, Shirley's arguments as to why reimbursement should not be granted were primarily the following:

"That Aaron's postseparation conduct vitiates his *Epstein* claim.

"That Aaron was not entitled to reimbursement because the debt was incurred in fulfillment of his duties pursuant to Fam. Code § 4300 to support his family.

"That Aaron was not entitled to reimbursement because all money spent by the parties throughout their marriage constituted 'necessaries of life' and thus reimbursement was barred by Fam. Code §§ 913-914. In fact, at Shirley's request, the parties submitted posttrial briefs on this issue, namely, do all expenses incurred by a couple during marriage qualify as 'necessaries of life' pursuant to Fam. Code § 914? In her brief Shirley raised some additional arguments which are also addressed herein.

"The line of credit was incurred for a variety of purposes but primarily for investments made during the marriage. Because this debt was incurred during marriage and before the date of separation it is presumed to be a community debt. No evidence to the contrary was introduced at trial and Shirley conceded as much.

"The income from Aaron's separate property annuities was used by the parties during the marriage for living expenses. The annual income from the annuities was substantial, sometimes in excess of $500,000 per year.

"The parties lived an extravagant lifestyle which included a 10,000 square foot mansion in Hillsborough. Aaron was in charge of the parties' finances, but made efforts

to keep Shirley informed. They financed their lifestyle through a combination of Aaron's efforts as the manager of restaurant investments, income from the annuities, and investment income from the many business opportunities he pursued during marriage. He certainly never breached his statutory obligation to support his family. Although Shirley argues that Aaron somehow breached his fiduciary duty by not receiving W-2 income during marriage, this argument is rejected by the court. The community accumulated significant wealth not only through his efforts, but also his ability to leverage assets and invest wisely. Shirley's Exhibit N shows that as of June 8, 2006, the estate had total equity (net worth) of $13,845,949. Through his efforts Aaron supported his family in a lavish fashion and suggesting that his failure to receive it as W-2 income somehow makes it less honorable is not a good faith argument. In addition, even if this court were to accept Shirley's premise, she failed to meet her burden in that she did not provide evidence as to Aaron's W-2 income throughout the marriage. The argument that he failed to support Shirley after separation is also rejected. Pursuant to the order of October 4, 2006, both parties received $10,000 per month in draws from community assets/income. Shirley never made a subsequent motion for spousal support.

"Shirley's argument that it is unreasonable to reimburse Aaron for the use of his separate property to satisfy a community obligation is rejected. Prior to using his separate annuities to pay the line of credit to Greater Bay Bank, Aaron tried diligently to avoid having the loan called. Aaron testified to his efforts to try to convince Shirley of the need to sell the residence commencing in 2003. The family residence was a very large and lavish house in which only the two parties resided. The residence had significant equity and a very large debt service to maintain. Had they sold it, their financial statement would have been improved and they would have been able to renew the line of credit either with Greater Bay Bank or another lender. There were no minor children living in the residence at the time. Shirley refused to agree. After the dissolution commenced, Shirley continued to resist selling it. Judge Cretan noted in his orders of November 29, 2006 and March 29, 2007, that she was being unrealistic regarding the sale of the residence and the orders reflected the court's willingness to 'entertain fee requests

against [her]' if she continued to do so. When the residence was finally sold pursuant to court order, it had lost significant value.

"Aaron's separate property annuities were cashed in and the funds used to satisfy the Greater Bay Bank line of credit . . . . As shown on trial Exhibit N, the community had more than enough assets available to satisfy the obligation. However, most of the community's assets were illiquid and could only have been liquidated at significant discounts in value. Had Aaron done so, he would have preserved his separate property annuities and the issue of *Epstein* credits would not have arisen. Community assets would have been used to satisfy community obligations and Aaron's separate property would have been intact. This also answers Shirley's claim that Aaron's using his separate property as opposed to community assets to pay the obligation was a choice he made so as to preserve his *Epstein* claim. As to Shirley's suspicion that Aaron delayed the payment of the Greater Bay Bank obligation until after separation so as to preserve his right of reimbursement, she introduced no credible evidence to support it and given the availability of significant community assets to satisfy the obligation, it is a moot argument. Thus, the court sees nothing inequitable or unreasonable about recognizing his right of reimbursement. Moreover, the community received the benefit of the substantial income generated by Aaron's separate property annuities throughout the marriage. Thus, there is nothing inappropriate in recognizing Aaron's right of reimbursement pursuant to *Epstein* or Fam. Code § 2626.

"Shirley's contention that reimbursement should be denied because every dollar spent by the parties for any purpose during marriage constitute 'necessaries of life' within the meaning of Fam. Code § 914 is rejected. Such an interpretation would render the reimbursement rules of *Epstein* and Family Code Section 914(b) meaningless and is inconsistent with the holdings in *Ratlaff v. Portillo* (1971) 14 Cal.App.3d 1013, *In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090 and *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 828. As stated above, Aaron supported his family extremely well. There is no evidentiary basis for any finding that Aaron mishandled and

misused community funds during marriage. There is certainly no evidence to deny reimbursement based on a finding of unclean hands.

"Shirley's argument that *Epstein* reimbursement should be denied pending determination of her postseparation claims is denied. Said claims are reserved for future determination.

"Based on the foregoing, Aaron's request for $5,059,242 in reimbursement is granted." (Fns. omitted.)

The last of Judge Berra's decisions was filed on March 17, 2011. It took 11 pages to dispose of "all remaining issues." As relevant here, its pertinent language is as follows:

"This matter came on for trial on all remaining issues . . . on February 9, 2011 and February 10, 2011. . . . The court received testimony of both parties and their witnesses. The court also received numerous exhibits and took judicial notice of pleadings and declarations filed in earlier proceedings. The parties submitted their written closing arguments . . . and the court having considered all of the foregoing renders its . . . Decision as follows:

"A. Background Facts: [¶] . . . [¶]

"B. Issues: [¶] . . . [¶]

"C. Value and Disposition of Remaining Community Assets and Liabilities:

"Respondent's [Aaron's] testimony and his Schedule of Assets and Debts which was tab A of his Exhibit 1 were uncontested and unrefuted by Petitioner [Shirley]. Petitioner offered no contrary evidence. As a result the court finds that the remaining community assets and debts are as follows:

"[Inventory of property totaling approximately $740,000.]

"The disposition of these assets will be as set forth later in this Statement of Decision.

"D. Confirmation of Respondent's Separate Assets and Liabilities:

"Again, in view of no contrary testimony or evidence presented by Petitioner, all assets and liabilities not otherwise set forth above which are listed in Respondent's

aforementioned Schedule of Assets and Liabilities . . . shall be confirmed to Respondent as his sole and separate property and with respect to the liabilities, he shall assume and indemnify and hold Petitioner harmless therefrom.

"E. Confirmation of petitioner's Separate Assets and Liabilities:

"All clothing, personal effects and personal property in the use and possession of Petitioner and all bank accounts in her name and credit cards in her name shall be confirmed to her as her sole and separate property. With respect to any debts or liabilities in her name she shall assume and indemnify and hold Respondent harmless therefrom.

"F. Respondent's *Epstein* reimbursement request:

"By previous order, this court has determined that Respondent's separate property annuities were liquidated in the sum of $5,059,242 to pay community debts postseparation and said debts were not in lieu of support or for the necessaries of life. Thus, Respondent should be reimbursed from the community, to the extent there is community, for said amount subject to Petitioner's fiduciary duty breach claims, her reimbursement claims or *Watts* claims. Petitioner offered no evidence to substantiate her claim that Respondent violated his fiduciary duty to her (see section H. hereinafter), any reimbursement she may have or her *Watts* claims (see section I. hereinafter). As a result, the court grants Respondent's claim of reimbursement to the extent of the community as listed in section C. above and all such assets shall be confirmed in their entirety to Respondent rather than be equally divided between the parties. Respondent shall be solely responsible for all the listed community obligations and shall assume and hold Petitioner harmless and indemnify her therefrom. By such confirmation the remainder of his reimbursement shall be extinguished.

"G. Respondent's Claims of breach of fiduciary duty by Petitioner:

"Refusal to sell family residence:

"Throughout the marriage Respondent was a successful 'managing spouse' and during the later years of the marriage the parties, as a result, were able to live a fairly lavish lifestyle. The foundation for this lifestyle primarily came from Respondent's proceeds from the sale of his premarital separate property rental car agency which were

invested in annuities which this court has determined were Respondent's separate property. Through Respondent's efforts, encouraged and assisted by his business 'advisors,' Respondent built a highly leveraged high risk investment portfolio, a lot of which was invested in restaurants by leveraging the family home. It would appear that the basic premise was that real estate would be secure and always appreciate.

"Sometime in 2003 to 2004 Respondent and his business 'advisors' decided that the best course of action was to sell the family residence. This would protect his separate property annuities and the parties' cash flow and they could use some of the money from the sale to retire some of the debt. It would mean, however, that they would have to downsize their residence. As one could expect, Petitioner resisted this plan. This issue ultimately led to the demise of the marriage and the parties separated in May 2006 and Petitioner filed for Dissolution. Early on in the Dissolution proceeding Respondent sought court assistance to force the residence to be sold. The residence was ultimately sold in the fall of 2007. Respondent contends that Petitioner's resistance to the sale was reckless and grossly negligent and cost the community at least $2,500,000 if not more.

"This court finds that this was a situation created by Respondent wherein both parties were riding the high risk bandwagon and Respondent now charges that Petitioner violated her fiduciary duty to him by not wanting to get off the high risk bandwagon at the same time he did.

"Respondent's argument that her behavior in not agreeing to sell the house before they separated was reckless and/or grossly negligent is not persuasive. Although it is clear that Petitioner is a highly intelligent person, in fact, she wasn't represented by counsel. It can be argued that this may have been a bad investment decision on her part. However, to do that one has to have the benefit of hindsight. One can only speculate what Respondent's position would have been had the real estate market continued to appreciate during this time. Nevertheless, at the time this was not necessarily a reckless or grossly negligent decision by Petitioner.

"Once the parties separated and the court ordered the residence to be sold . . . , Petitioner certainly can be criticized as being uncooperative in the sale of the residence

and her behavior did not meet the standard required by Family Code Section 271. Despite the fact that Respondent would prefer for tactical reasons that this court not sanction Petitioner pursuant to Family Code Section 271, but would prefer the court to find that she violated her fiduciary duty to Respondent with respect to selling the house, the facts adduced at trial and Respondent's arguments do not support such a finding.

"Respondent's request to find Petitioner violated her fiduciary duty to him with respect to the sale of the family residence is denied.

"Petitioner's sale/disposition of the family furniture:

"The facts are clear that Petitioner sold or gave away most of the contents of the family residence without written agreement of Respondent or court order. It also appears from the testimony that she received approximately $65,000 from the sale of the furniture and that during a hearing in which the court was marshalling assets to acquire funds for this litigation, she sat mute and did not inform the court that she had sold and/or given away the furniture. However, Petitioner testified and there was no contrary evidence, that she used the funds for her attorney fees and costs. While this testimony is suspect, there was no clear and convincing evidence introduced by Respondent to the contrary. Petitioner's accounting for the total amount she has spent and/or incurred to date for her fees and costs was incomprehensible at best and at worst was deliberately obfuscated. Nevertheless, this court finds that Petitioner did not violate the ATROs [automatic temporary restraining orders] and did not violate her fiduciary obligations to Respondent.

"Notwithstanding, Petitioner's behavior at the hearing mentioned above in not informing the court that the furniture had already been disposed/sold and her seemingly misdirected responses to her accounting for the entirety of her fees to date would and should subject her to the sanctions set forth in Family Code Section 271.

"Petitioner's refusal to renew the LOC [Line of Credit] leading to the loss of a $3 M Life Insurance Policy:

"The facts for this claim by Respondent all arose after the Dissolution was filed and while Petitioner was represented by counsel. The facts are equally clear that Petitioner's counsel advised her not to sign the renewal until he got more information.

As soon as her counsel got more information he advised her to sign and according to the documents presented at trial, Petitioner did so immediately. Respondent contends this is no defense and Petitioner should have known a Notice of Default was already filed and that she should have ignored her counsel's advice and signed the renewal documents earlier. This is not persuasive. Respondent's claim is denied.

"Petitioner's refusal to sell Grill Concepts Stock:

"This situation and claim is not too dissimilar to the one immediately above. During a time that the ATROs were in place and one where Respondent's counsel advised petitioner and her counsel that there was a potential buyer for the stock (apparently at a good price if one looks at the situation in hindsight) but that Respondent would not advise whether he thought this was a good deal, Respondent now contends that she violated her fiduciary duty to him by not agreeing to sell the stock.

"Respondent's claim is denied.

"Petitioner's Bad Faith Actions During the Dissolution Proceeding:

"This court does not believe this is a fiduciary duty issue and will deal with it in the Fees Section herein below.

"H. Petitioner's Breach of Fiduciary Duty Claims by Respondent:

"Petitioner made general claims that Respondent violated his fiduciary duty to her which she then specified in her closing argument. In both instances, however, she presented no evidence that would substantiate such a claim, except that apparently these investments lost money. She listed Verona Partners $2,612,430; Hyannis Port Capital $300,000; Chianti LLC $1,896,000 and AGL Life Insurance $1,256,239, but produced little or no evidence that would substantiate her claim. Her claim is denied.

"*Watts* Claims:

"Both parties made claims that the other party should be charged a use value for the postseparation use of community residences. Petitioner sought to charge Respondent for residing in the Utah residence since separation and Respondent sought to charge Petitioner for residing in the family residence for 14 months until it was sold. These claims are denied. First, and foremost, the rental value of the family home is so much

greater than the Utah home that even though Petitioner only resided there a little over a year that rental value would clearly offset the rental value of the Utah home for Respondent's use which was for a much longer period of time. Secondly, the community paid the expenses for the family residence while Respondent's postseparation income paid for the expenses of the Utah home and that reimbursement claim would further offset any differences. Finally, under the circumstances of this case it simply would not be equitable to charge either party a use value for either residence.

"J. Spousal Support:

"Petitioner is 62 and Respondent is 68. Petitioner never worked outside the home during the 24 years of marriage. Respondent's Income and Expense declaration as well as his testimony indicate he has income each month of approximately $12,000. His expenses are somewhat higher each month. Petitioner has no income and although she is quite accomplished in the charitable planning area, she does not appear to have any readily employable skills. There was no evidence introduced from which the court could consider how long it would take Petitioner to acquire such skills either.

"The court has considered all the relevant factors of Family Code Section 4320 and finds that although the marital standard of living was fairly lavish and that it seems unlikely that Petitioner could attain that standard on her own, Respondent clearly doesn't have the ability to support [her] at the marital standard of living (or any standard of living) at this time. This is especially true since Respondent is receiving all of the remaining community assets because of his *Epstein* reimbursement claim. This is a long term marriage, there are no minor children, the ages are as stated above and although Petitioner testified to some health issues there was no testimony that either party was incapable of employment of some kind.

"The goal that the supported party (Petitioner) be self-supporting within a reasonable period of time (half the length of marriage) would seem to be unattainable. Nevertheless, Petitioner is advised that she is expected to do all that she can to earn as much income as she can.

"Based on the foregoing, this court orders Respondent to pay Petitioner the sum of $5,000 per month as and for spousal support commencing March 1, 2011 payable on the first day of each and every month thereafter until the death of either party, the remarriage of Petitioner or court order. As and for additional spousal support, Respondent shall pay Petitioner an amount equal to 40% of any realized income (active or passive) received by him in any month in excess of $12,000.

"Attorney Fees and Costs:

"Family Code section 2030: Based upon the allocation of the assets in this case as set forth above, Respondent will have a substantial net worth and Petitioner's net worth will be nominal. From Petitioner's testimony however, the court cannot tell if she still has outstanding attorney's fees and costs. It is clear however, that she has paid from the community significant fees in this matter. It appears that she has paid at least $500,000 and maybe as much as twice that amount. Since the court is not charging her with having received that amount in the division of the community assets, it can be said that Respondent has contributed his half of the community funds she has paid, which would be somewhere between $250,000 to as much as $500,000. That amount is a sufficient contribution by Respondent and no additional fee contribution by Respondent will be ordered.

"Family Code Section 271: Petitioner's behavior during these proceedings such as referenced above with respect to the furniture and resisting the sale of the family residence during these proceedings and in addition, but not mentioned above, her behavior in the regrettable domestic violence incident that occurred at the Capellini restaurant would certainly subject her to Family Code Section 271 sanctions. However, under the circumstances of this case it would most certainly create an unreasonable hardship for her. An award of fees as sanctions pursuant to Family Code Section 271 against Petitioner is denied." (Fns. omitted.)

REVIEW

Judge Berra's statements of decision were quoted at great length for a purpose. They demonstrate that the proceedings were protracted and bitterly contested—and

thoroughly analyzed. All of the statements recite that both sides produced mountains of testimony and documentation to address numerous issues. Yet appellant has provided a reporter's transcript for only one of the proceedings, the one leading to the second of Judge Berra's statements of decision. This paucity of background will prove severely disadvantageous to appellant, who is representing herself.

Appellant advances three contentions. The first is that "The trial court committed reversible error by failing to apply Family Code Section 2550 given the inequities between appellant and respondent's respective positions." The second is that "The trial court committed reversible error in failing to characterize various annuities granted to appellant during the marriage as appellant's separate property." The third is that "The court committed reversible error in awarding any *Epstein* claim of reimbursement to respondent."

Family Code section 2550 provides: "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally." This statute expresses only a general rule. (See *In re Marriage of Wiener* (2003) 105 Cal.App.4th 235, 239.) Its opening language proves that the rule is subject to exceptions. An *Epstein* reimbursement is one such exception: " 'The rule denying reimbursement in the absence of an agreement therefor is based largely on the presumption the paying spouse intended a gift. [Citations.] . . . When the parties have separated in anticipation of dissolution of the marriage, the rational basis for presuming an intention on the part of the paying spouse to make a gift is gone. [¶] . . . [¶] So, we are persuaded the rule disallowing reimbursement in the absence of an agreement for reimbursement should not apply and that . . . a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution.' " (*In re Marriage*

of Epstein, *supra*, 24 Cal.3d 76, 84.) This principle is now codified in Family Code section 2626, which is part of the "division" mentioned in Family Code section 2550, i.e., Division 7 of the Family Code, covering "Division of Property," and extending from section 2500 to section 2660. Thus, allowance of an *Epstein* reimbursement credit is not contrary to Family Code section 2550.

Appellant's second and third contentions also involve a presumption, specifically, the presumption that the annuities in her name were her separate property. That presumption, codified in Evidence Code 662, can, like most presumptions, be overcome by tracing the source of the funds that were used to purchase the annuities. (See *In re Marriage of Walrath* (1998) 17 Cal.4th 907, 918; *In re Marriage of Green* (1989) 213 Cal.App.3d 14, 22-23.) In his first statement of decision, Judge Berra found that respondent had overcome the presumption. "[I]t is axiomatic that the issue of whether the evidence is sufficient to overcome the presumption is a question of fact whose determination will not be overturned on appeal if supported by substantial evidence." (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 496.) More precisely, we have held that "Whether the spouse claiming a separate property interest has adequately traced an asset to a separate property source is a question of fact for the trial court, and its finding must be upheld if supported by substantial evidence." (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 823; accord, *In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1057-1058; see *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 849 ["Appellate review of a trial court's finding that a particular item is separate or community property is limited to a determination of whether any substantial evidence supports the finding."].)

The issue of the annuities was heard over three trial days. No reporter's transcript for any of those dates is a part of the record on appeal. Also lacking are the exhibits to which Judge Berra referred in his first statement of decision. These omissions doom appellant's attempt to overturn Judge Berra's determination that the annuities remained respondent's separate property. "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be

conclusively presumed correct as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence. [Citations.]" (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

The crucial parts of Judge Berra's decision were that the presumption of Evidence Code section 662 had been rebutted because respondent had produced clear and convincing evidence, and that appellant "clearly understood that she had no interest in the annuities and that they were Aaron's." It is obvious that, not having the evidence before us, we cannot undertake to review whether that evidence was legally sufficient.

The same result largely obtains with respect to Judge Berra's decision to allow *Epstein* reimbursement to respondent. That decision was also predicated on the issues of how assets are characterized and whether money spent by respondent could be traced. Although we do have the reporter's transcript, we do not have the "voluminous trial exhibits" mentioned by Judge Berra. It must be presumed that those exhibits support Judge Berra's decision. (*Hughes v. De Mund* (1936) 7 Cal.2d 504, 505-506; *Maguire v. Leeds* (1946) 74 Cal.App.2d 697, 709.)

We feel constrained to comment further. Even if appellant had produced a record not subject to the deficiencies just noted, she would still be obliged to follow the same rules of appellate procedure that govern attorneys. (*City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 819.) Appellant would still be required to persuade us by discussing *all* of the evidence produced in connection with the findings or conclusions she is challenging, on penalty of having the point summarily denied against her. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888; *In re Marriage of Steiner & Hosseini* (2004) 117 Cal.App.4th 519, 530.) The same consequence would follow from failing to support any legal argument. (*In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1392-1393; *Harding v. Harding* (2002) 99 Cal.App.4th 626, 635.) She could not merely reiterate arguments made to Judge Berra. (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531.) Nor could she shift to respondent the burden of defending

the judgment. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102), or assume that this court would "comb the record on [her] behalf" (*In re Marriage of Fink*, *supra*, at p. 888) if she failed to comply with the rules requiring close citation to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.)

DISPOSITION

The motions to augment the record are granted. The judgment is affirmed.

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Richman, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.