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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of TERESA TSUEI and
MARK TSUEI.

TERESA TSUEI,
Respondent,

v.

MARK TSUEI,
Appellant.

A134557

(San Mateo County
Super. Ct. No. FAM0112748)

I. INTRODUCTION

In this marital dissolution proceeding, Mark Tsuei seeks to appeal from the trial court's order designating an elisor to execute documents necessary to effectuate the sale of the family residence. Respondent Teresa Tsuei has filed a motion to dismiss the appeal on the ground that the order appealed from is not appealable. We will grant the motion to dismiss the appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND¹

Teresa² filed for dissolution in March 2011 and requested a determination of property rights. Mark's response requested the same, i.e., dissolution and determination of property rights. The marital property includes the family residence in Hillsborough.

In May 2011, due to dire financial circumstances, Teresa moved for appointment of an elisor to facilitate sale of the home because she could not secure Mark's cooperation. The parties stipulated to allow Mark to purchase the property under certain conditions. Failing that, the property was to be listed for sale with all reasonable offers considered; the parties could seek ex parte relief for any unresolved conflicts regarding the sale. On August 9, 2011, the stipulation was entered as an order. Mark did not appeal that order.

In September 2011, Teresa again moved for appointment of an elisor because Mark had failed to purchase the property or allow its sale to qualified buyers who had offered to buy it. The court entered an order on October 4, 2011, giving Mark an additional chance to purchase; otherwise the court "shall accept" the buyers' offer and "will sign" on Mark's behalf. Mark did not appeal that order.

In November 2011, Teresa moved for a revised order with more specific language. On November 9, 2011, the court entered a more detailed order, again giving Mark another chance to buy the property; otherwise, "the Court shall appoint a Court Clerk to act as an Elisor. The Elisor is authorized to execute all documents necessary to effectuate

¹ In support of the motion to dismiss, Teresa has submitted the declaration of her counsel, Charles Kagay, and a contemporaneously filed volume of documents from the trial court record of this action. Kagay declares that "[n]o document necessary to procure the record on appeal has been filed. On February 24, 2012, the San Mateo Superior Court filed a notice of default for appellant's failure to designate the record." As a result, Kagay states, preparation of the record "has not begun."

² As is customary in family law cases, we will refer to the parties by their first names for clarity and convenience. No disrespect is intended.

the sale of the real property [¶] . . . The Elisor is ordered to convey title to the real property by execution of the Grant Deed on behalf of Respondent. . . .” At that time, the purchasers were offering \$2.5 million to purchase the property. Mark did not appeal that order.

In December, Teresa requested an order designating an elisor to execute the necessary papers for the sale because the purchasers had lowered their offer from \$2.5 million to \$2.3 million. On December 14, 2011, the court entered an order revising the November 9, 2011, order to allow the sale at the reduced price. The order again authorized the elisor to “execute all documents necessary to effectuate the sale of the real property. . . .”

On February 9, 2012, Mark filed a notice of appeal from the December 14, 2011, order. No briefing has yet been filed in the appeal.

Teresa filed the motion to dismiss the appeal on March 8, 2012. Mark filed no opposition.

III. DISCUSSION

The December 14, 2011, order is not appealable for the fundamental reason that it is interlocutory in nature, and no appeal may be taken from an interlocutory order unless expressly authorized by statute. Pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1), an appeal may be taken from a final judgment but not from an interlocutory order. “The intent of Code of Civil Procedure section 904.1 ‘. . . is to codify the *final judgment rule*, or rule of *one final judgment*, a fundamental principle of appellate practice in the United States. The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly and that a review of intermediate rulings should await the final disposition of the case.’ ” (*In re Marriage of Griffin* (1993) 15 Cal.App.4th 685, 687; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 96, pp. 158-159.) A judgment is final when it terminates the litigation between the

parties on the merits of the case and leaves nothing to be done except enforcement by execution. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304; *In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1216.) On the other hand, “ ‘where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.’ ” (*Olson v. Cory* (1983) 35 Cal.3d 390, 399; *In re Marriage of Corona, supra*, 172 Cal.App.4th at p. 1216.)

Here, it is abundantly clear that much remains to be done in this case. The December 14, 2011, order simply designates an elisor to execute documents for the sale of a residence, one item of marital property. It does not resolve the marital status of the parties or the division of their property. (See, e.g., *In re Marriage of Griffin, supra*, 15 Cal.App.4th at p. 689 [no appeal from an order denying a motion to correct the valuation of certain items of community property where spousal support and other property issues had yet to be resolved].)

Among the enumerated exceptions to the one final judgment rule is that an appeal may be taken from “an order made appealable by the provisions of the . . . Family Code.” (§ 904.1, subd. (a)(10).)³ However, none of those provisions provides for an appeal from an order designating an elisor to execute documents.

Finally, an interim order may be appealable as a collateral order if: (1) the subject of the order is, in fact, collateral to the subject of the litigation; *and* (2) it is final as to the

³ Family Code section 2025 provides: “Notwithstanding any other provision of law, if the court has ordered an issue or issues bifurcated for separate trial or hearing in advance of the disposition of the entire case, a court of appeal may order an issue or issues transferred to it for hearing and decision when the court that heard the issue or issues certifies that the appeal is appropriate.” We are informed by Teresa, and Mark does not dispute, that the court has not bifurcated any issues or certified that an appeal is appropriate. Moreover, no motion to appeal the decision on the bifurcated issue has been filed in this court. (See Cal. Rules of Court, rule 5.180, subd. (d)(1).) Therefore, this provision does not apply.

collateral matter. (See Eisenberg, et al., Cal. Practice Guide: Civil Appeal & Writs (The Rutter Group 2011) ¶ 2:77, citing *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119; *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297-298.)⁴ The order in question satisfies neither of these elements.

First, “[i]f an order is ‘ “important and essential to the correct determination of the main issue” ’ and ‘ “a necessary step to that end,” ’ it is not collateral. (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1227.)” (*San Joaquin County Dept. of Child Support Services v. Winn* (2008) 163 Cal.App.4th 296, 300.) The instant matter is a divorce action in which the parties have requested division of property by the court. The order pertains to the sale of one item of marital property pursuant to earlier stipulation of the parties; it is, therefore, “a necessary step” toward division of the property and is not a collateral matter.

Second, an interim order is not final if “further judicial action is required on the matters treated in the . . . order.” (*Steen v. Fremont Cemetery Corp.*, *supra*, 9 Cal.App.4th at p. 1228.) Here, further judicial action pertaining to the sale itself is required, as the order explicitly provides for matters such as transfer of the net sales proceeds to a trust account, future disbursement only by court order or written agreement of the parties, and retention of jurisdiction by the court in the meantime. Thus, the order is not final within the meaning of the collateral order doctrine.

⁴ We note that a split of authority exists as to whether a third element is required for an interim order to be appealable as a collateral order, i.e., that the order directs the payment of money by the appellant or the performance of an act by or against the appellant. (See *Muller v. Fresno Community Hosp. & Medical Center* (2009) 172 Cal.App.4th 887, 899-902, and cases discussed therein, including *Sjoberg v. Hastorf*, *supra*, 33 Cal.2d at p. 119 and *Meehan v. Hopps* (1955) 45 Cal.2d 213, 215-217[.] We express no opinion on this matter because, whether or not the order must direct payment of money or performance of an act, the order at issue is neither collateral nor final and thus is not a collateral order.

IV. DISPOSITION

The motion to dismiss is granted and the appeal is dismissed. Respondent shall recover her costs on appeal.

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Haerle, Acting P.J.

We concur:

Lambden, J.

Richman, J.