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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of CONSTANCE  
ANDERSON-MORTON and CHARLES  
MORTON, III.

CONSTANCE ANDERSON-MORTON,  
Respondent,

v.

CHARLES MORTON, III,  
Appellant.

A142965

(Napa County  
Super. Ct. No. 26-54792)

This appeal arises from a postdissolution matter regarding the disposition of the community property of Charles Morton, III, and Constance Anderson-Morton.<sup>1</sup> Charles and Constance entered into an agreement concerning the division of the couple's property. Interpreting that agreement, the trial court initially ordered Constance to transfer a parcel of real property to Charles. However, after Constance moved for reconsideration, the court reversed itself and ordered the couple to sell the property and divide the proceeds among themselves. Charles now appeals the trial court's latter order, arguing, among other things, that he alone is entitled to the real property at issue. We agree and reverse.

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<sup>1</sup> We refer to the parties by their first names to avoid confusion and intend no disrespect.

## I. BACKGROUND

### A. *The Marital Settlement Agreement*

The parties entered into a marital settlement agreement (MSA) on October 27, 2011. The trial court later referred to the MSA as a “disaster,” noting “[t]here are portions that are handwritten in” and “there are portions that are stricken, [but] aren’t initialed,” and it is not clear “if these portions were stricken after the parties signed the MSA or before.” On appeal, it appears all parties agree the handwritten addenda were authorized and executed by the parties. The court also observed that exhibits A and B to the MSA, which set forth the community property transferred to Constance and Charles, respectively, are incomplete.

Relevant to this appeal, paragraph 12 of the MSA describes equalizing payments made by Charles and Constance. Paragraph 12(a), which was struck before the MSA was executed, states Constance provided \$10,900 from her separate property funds as a down payment on a property on Palazzo Way in American Canyon; Constance is entitled to reimbursement for these funds pursuant to Family Code section 2640; and Constance agreed to relinquish her rights to the family home upon receipt of this reimbursement payment.

Paragraph 12(b) states Charles made a prior equalizing payment to Constance to buy out Constance’s community property interest in an undeveloped property on Blue Canyon Court in Fairfield. According to this provision, Charles paid Constance \$32,000; Constance signed an interspousal transfer deed granting the property to Charles; and Charles agreed to remove Constance’s name from the loan on the property within 120 days or, according to a handwritten addendum, “the property will be listed for sale.” Charles later testified that he removed Constance’s name from the mortgage on the property, but not within the 120 days required by the MSA. Another handwritten addendum to the MSA states: “Upon the sale of this property[,] Wife will sign off on the Pallazzo [*sic*] Way property.”

Though paragraph 12 indicates the Blue Canyon Court and Palazzo Way properties are community property, these properties are not listed in exhibits A or B to

the MSA, which pursuant to paragraph 4 of the agreement, are supposed to list all of the community and quasi-community property of the parties. Exhibit A states: “There is no real property to be transferred to Wife.” Exhibit B, which sets forth the community property to be transferred to Charles, includes a heading for real property, but the space underneath is blank.

**B. *Procedural History***

The court entered a judgment incorporating the MSA on November 29, 2011. In August 2013, Charles filed a request for attorney fees and an order directing Constance to sign an interspousal transfer deed conveying her interest in the Palazzo Way property to Charles. After reviewing exhibits A and B of the MSA, the court denied the request without prejudice. The court noted that if Charles refiled his request, he must attach a declaration showing why the Palazzo Way property is his sole and separate property.

On January 6, 2014, Charles filed a stipulation to amend exhibit B to the MSA to reflect the transfer to Charles of the Palazzo Way property, as well as a property described as “the Salton Sea Lot in Imperial County.” About three and a half weeks later, Constance filed an ex parte application to set aside the stipulation. Constance argued the stipulation was invalid because it was not signed by Charles or Constance, but rather by their attorneys. The court granted the request to set aside.

On February 24, 2014, Charles filed a request for the court to order an alternate valuation date for the Palazzo Way property in the event the property was not awarded to him. In a minute order issued March 10, 2014, the court ordered the Palazzo Way property to be transferred to Charles and set a valuation date of November 29, 2011, the date of the judgment. The court also ordered Charles to sell the Blue Canyon Court property immediately. The court did not issue a formal, signed order on the matter.

On April 1, 2014, Constance filed a motion for reconsideration. She argued the court’s failure to consider her brief in its prior ruling constituted new circumstances. The court held a hearing on the matter, but the hearing was not transcribed and a settled statement is not included in the record. In an order issued on May 22, 2014, the court stated it reconsidered its March 10 order sua sponte, and decided to modify it. The court

ordered a valuation date of March 10, 2014 for the Palazzo Way property and directed the property be appraised forthwith. Further, the court ordered that, following the appraisal, the property be sold and the proceeds divided between Charles and Constance. Alternatively, Charles could make an equalizing payment to Constance for her interest in the property.<sup>2</sup>

## II. DISCUSSION

### A. *Adequacy of the Record*

Constance argues Charles's appeal must be dismissed because the record is inadequate. Constance reasons that since there is no transcript of the hearing on the motion for reconsideration and no statement of decision, Charles "cannot point to the action of the Trial Court to which he is appealing." For similar reasons, Constance has moved for sanctions.

Constance's position is meritless. She is correct that the burden is on an appellant to provide an adequate record to assess error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141.) But she has pointed to no authority suggesting an appeal necessarily fails where there is no transcript or statement of decision provided by the trial court. Moreover, other than reciting general statements about the standards of appellate review, Constance has not explained why a transcript or a statement of decision are necessary to adjudicate this particular appeal or to assess the errors asserted in Charles's briefing.

Nor can we discern why the missing transcript or a statement of decision are necessary here. As Constance did not move for reconsideration of the March 10 order on the basis of newly discovered evidence, it is entirely unclear why we would need to review the transcript of the hearing on the motion for reconsideration to resolve this appeal, especially since the transcript of the March 10 hearing and the parties' briefing are included in the record. Moreover, issuance of a statement of decision is neither

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<sup>2</sup> Charles asserts the couple had no equity in the Palazzo Way property at the time of the judgment, and that Constance only asserted a right to the property after it appreciated in value.

required nor proper in this context.<sup>3</sup> (See *Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1026 [statement of decision not required upon decision on a motion].)

Accordingly, we decline to dismiss this appeal on the basis of an inadequate record, and we deny Constance's motion for sanctions.

**B. May 22 Order**

Charles argues the May 22 order must be reversed because (1) the court lacked the power to reconsider its March 10 order, (2) the May 22 order improperly set the valuation date for the Palazzo Way property, (3) the May 22 order improperly gave Constance an interest in the Palazzo Way property, (4) the trial court erroneously failed to reserve jurisdiction to determine credits and setoff payments, and (5) Charles is entitled to attorney fees and costs pursuant to Family Code sections 270 and 271.<sup>4</sup> Though Charles's briefing is far from a model of clarity, we agree the trial court erred in granting Constance an interest in the Palazzo Way property. Because Constance has no interest in the property, its valuation date is irrelevant for the purposes of this action. We also need not consider Charles's procedural arguments concerning the motion for reconsideration. As set forth below, we also reject Charles's arguments concerning setoff payments and attorney fees and costs.

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<sup>3</sup> Statements of decision are issued upon the trial of a question of fact by the court, and they are only required if requested by a party. (Code Civ. Proc., § 632.) Even if a hearing on a motion for reconsideration could be considered a trial (it cannot) and one of the parties requested a statement of decision (they did not), Charles could still proceed with this appeal. In the absence of a statement of decision, we review the entire record to determine whether the judgment is supported by substantial evidence. (See *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1130.)

<sup>4</sup> Charles also argues the trial court lacked jurisdiction to modify the terms of the MSA. This argument assumes Charles is correct and the MSA granted him sole interest in the Palazzo Way property. But if Constance is right and the Palazzo Way property remained unadjudicated because Charles failed to satisfy a condition precedent of the MSA, then the trial court retained continuing jurisdiction to divide the property. (Fam. Code, § 2556.) Either way, the pertinent question is whether the trial court correctly interpreted the terms of the MSA, not whether it exceeded its jurisdiction.

### **1. Disposition of the Palazzo Way Property**

The terms of the MSA determine whether Charles alone has an interest in the Palazzo Way property. “The interpretation of a contract is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence.” (*Morgan v. City of Los Angeles Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 843.) “[W]here . . . the extrinsic evidence is not in conflict, construction of the agreement is a question of law for our independent review.” (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 556.) If extrinsic evidence is in conflict and requires resolution of credibility issues, we apply the substantial evidence test.<sup>5</sup> (*Appleton v. Waessil*, at p. 556.)

“The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the ‘mutual intention’ of the parties.” (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) “The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.” (Civ. Code, § 1638.) “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . .” (*Id.*, § 1639.) “The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” (*Id.*, § 1641.) “A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.” (*Id.*, § 1643.)

We begin, as we must, with the plain language of the MSA. Paragraph 12(b) states: “Husband has made a prior equalizing payment to Wife in order to buy out Wife’s community property interest in [the Blue Canyon Court property]. Pursuant to that

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<sup>5</sup> Constance argues the trial court’s decision was discretionary and therefore should be reviewed for an abuse of discretion. She is correct that the trial court has “considerable discretion to divide community property in order to assure an equitable settlement is reached.” (*In re Marriage of Duncan* (2011) 90 Cal.App.4th 617, 625.) However, the question presented here is not whether the Palazzo Way property was divided fairly, but whether, pursuant to the terms of the MSA, it should have been divided at all.

buyout Husband paid Wife \$32,000.00 in return for the execution of an interspousal transfer deed signed by Wife granting the property to Husband as his sole and separate property. In return Husband agreed to remove Wife's name from the loan on the property. To date Husband has not fulfilled that agreement. Upon signing this agreement Husband will have Wife's name removed from the loan on the property within 120 days of signing the agreement or the property will be listed for sale. Upon the sale of this property Wife will sign off on the Pallazzo [*sic*] Way property." The MSA does not expressly state what should happen to the Palazzo Way property if Charles elects to remove Constance's name from the loan, as opposed to selling the Blue Canyon Court property. Nor does it set forth a deadline for Charles to sell the Blue Canyon Court property.

The question presented here is whether Charles's interest in the Palazzo Way property is subject to a condition precedent,<sup>6</sup> and whether he should be excused from performing that condition precedent. Constance contends Charles needed to remove her from the loan on the Blue Canyon Court property within 120 days or sell that property in order to obtain the Palazzo Way property as his own. Constance further argues that because Charles failed to satisfy either of these purported conditions precedent, the Palazzo Way property remained unadjudicated community property subject to division by the trial court. Charles appears to agree his right to the Palazzo Way property is subject to the sale of the Blue Canyon Court property or removal of Constance's name from the loan within 120 days. However, he argues his performance should be excused or, at the very least, strict compliance with any conditions precedent was not required. Charles did remove Constance's name from the loan, though not within 120 days. According to

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<sup>6</sup> "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." (Civ. Code, § 1436.)

Charles, his delayed performance was acceptable because time was not of the essence and because performance was rendered impossible due to the economic climate.<sup>7</sup>

“The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract.” (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 199.) “[C]onditions precedent are not favored and an agreement will be strictly construed against a party asserting that its provisions impose a condition precedent.” (*Helzel v. Superior Court* (1981) 123 Cal.App.3d 652, 663.)

“The rule is that provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. [Citations.] Instead, whenever possible the courts will construe promises in a bilateral contract as mutually dependent and concurrent.” (*Rubin v. Fuchs* (1969) 1 Cal.3d 50, 53–54.) In determining whether an act is a condition to one party’s duty under the contract, or is a promise the act will occur, courts prefer an interpretation that reduces a party’s risk of forfeiture, unless the event is within that party’s control. (13 Williston on Contracts (4th ed. 2013) § 38:13, at p. 471.) Even if the court determines the language constitutes a condition, “to the extent that its nonoccurrence would cause a disproportionate forfeiture, a court may excuse the nonoccurrence unless its occurrence was a material part of the agreed exchange.” (*Ibid.*, fn. omitted.)

As conditions precedent are disfavored, we are skeptical of the contention that Charles’s right to the Palazzo Way property is subject to one. The MSA’s statement that Charles was required to remove Constance’s name from the loan within 120 days or sell the Blue Canyon Court property, and that “Upon the sale of [the Blue Canyon Court] property[,] [Constance] will sign off on the Pallazzo [*sic*] Way property,” does not unambiguously set forth a condition precedent, especially since the plain language raises

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<sup>7</sup> Charles also argues exhibit A of the MSA shows Constance is not entitled to any portion of the Palazzo Way property, since it states: “There is no real property to be transferred to Wife.” However, Constance is not arguing the Palazzo Way property should be transferred to her, but that it remains adjudicated because Charles failed to satisfy a condition precedent of the MSA.

a number of questions concerning the disposition of the Palazzo Way property if Charles does not sell the Blue Canyon Court property. Another reasonable interpretation of the MSA is that Charles merely promised to either sell the Blue Canyon Court property or remove Constance's name from the loan on that property within 120 days. Under this interpretation, the focus is on whether Charles substantially performed his obligation. The evidence adduced at the March 10 hearing indicates he did. Charles ultimately removed Constance's name from the loan, even though he failed to do so within 120 days. Moreover, there is no evidence in the record that the 120-day requirement was of essence to the agreement.<sup>8</sup>

Even if the MSA does set forth a condition precedent, its nonoccurrence may be excused. As discussed above, there is no indication the 120-day deadline was a material part of the agreement. Further, Charles presented evidence his ability to perform on the agreement was out of his control. At the March 10 hearing, Charles testified he unsuccessfully tried to sell the Blue Canyon Court property. Charles further testified he could not remove Constance's name within 120 days because of various requirements imposed by the lender, and Constance did not complain when he failed to meet the deadlines set forth in the agreement. There is no indication Constance presented contrary evidence on this point. Moreover, Charles's failure to satisfy the purported condition precedent would cause a disproportionate forfeiture as he would lose a significant portion of his interest in the Palazzo Way property.

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<sup>8</sup> When asked why she wanted to be removed from the Blue Canyon Court property, Constance initially testified: "Because I needed to get a divorce. I wanted to leave. [¶] . . . [¶] . . . At the time . . . of the divorce, it was pretty traumatic, and that was all I could think of was leaving. So I had no future plans other than to keep my address of the public court records so that [Charles] could not cause me further harm. And I had no other plans at the time, except to just leave." When later asked a similar question by her own attorney, Constance stated she "couldn't carry [the mortgage] on a single girl's salary," and it appears Constance did not make any postdissolution mortgage payments. Constance also testified Charles ruined her credit by going into default on the Blue Canyon Court property while her name was still on the mortgage.

Accordingly, we find the trial court erred in ordering the parties to sell the Palazzo Way property and split the proceeds. Charles is entitled to take sole possession of the property.

## **2. Credits and Setoff Payments**

Charles argues the trial court erred because “*Epstein/Watts*<sup>9</sup> credits and [Charles’s] principal reduction/buy-down on both properties should have been reserved.” It appears Charles is referring to the rule that postseparation property earnings used to pay preexisting community obligations are reimbursable upon dissolution of a marriage. (See *Epstein, supra*, 24 Cal.3d at p. 84.) Charles’s description of the record is inaccurate. The trial court expressly reserved jurisdiction to award reimbursement credits in an order dated May 22, 2014.

## **3. Attorney Fees and Costs**

Finally, Charles argues the trial court erred in refusing to award him attorney fees and costs. We review the trial court’s decision for an abuse of discretion (*In re Marriage of Jacobs* (1982) 128 Cal.App.3d 273, 288), and find no error.

Charles contends he was entitled to fees and costs pursuant to Family Code sections 270 and 271, because Constance’s evidence “was facile at best,” and because she engaged in dilatory conduct. We are unconvinced. As an initial matter, Charles has pointed to nothing in the record indicating Constance has an ability to pay.<sup>10</sup> Also lacking from Charles’s brief is any citation to the record indicating Constance engaged in sanctionable conduct. Charles’s arguments in this regard appear to be based on unsubstantiated speculation about Constance’s motives. Moreover, while we disagree with Constance’s interpretation of the MSA, we cannot say her position was

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<sup>9</sup> (*In re Marriage of Epstein* (1979) 24 Cal.3d 76 (*Epstein*); *In re Marriage of Watts* (1985) 171 Cal.App.3d 366 (*Watts*)).

<sup>10</sup> (See Fam. Code, §§ 270 [“If a court orders a party to pay attorney’s fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have the ability to pay.”], 271, subd. (a) [“The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed.”].)

unreasonable, especially in light of the ambiguous language of the agreement. As Charles declines to cite to the record, it is also unclear whether a motion for attorney fees was properly before the trial court.<sup>11</sup>

### **III. DISPOSITION**

We reverse the trial court's May 22, 2014 order, and direct the trial court to order Constance to transfer her interest in the Palazzo Way property to Charles. The parties shall bear their own costs on appeal.

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<sup>11</sup> Constance also requests attorney fees under Family Code sections 271 and 2030. Setting aside that Constance failed to appeal the trial court's decision not to award fees and costs, we find her argument lacks merit. Section 271 relief is unavailable as we find Charles's appeal meritorious and there is no indication he frustrated the policy of the law. Family Code section 2030 permits the award of fees to ensure each party has access to legal representation and where there is a disparity in access to funds to retain counsel. (Fam. Code, § 2030, subd. (a)(1)–(2).) However, Constance has pointed to nothing in the record suggesting she has the requisite need or that there is a disparity in the parties' incomes.

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Margulies, J.

We concur:

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Humes, P.J.

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Dondero, J.

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*In re Marriage of Anderson-Morton and Morton*