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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of ROKSANA SAFAIE
and ALI KHASHAYAR.

ROKSANA SAFAIE,

Appellant,

v.

ALI KHASHAYAR,

Respondent;

MAJID SALIM,

Respondent.

A145249

(Contra Costa County
Super. Ct. No. D93-04344)

Roksana Safaie (Wife) and Ali Khashayar (Husband) were married until 1993, when Wife obtained a judgment by default. In or around 2012, Wife moved for division of an omitted asset, alleging Husband hid various assets acquired during their marriage and transferred them to third parties, including Majid Salim. Salim was joined as a party. The trial court denied Wife's motion, finding the assets at issue could not be divided as quasi-community property because Husband was not domiciled in California during the relevant period. Wife challenges the trial court's domicile finding. Alternatively, she argues Husband consented to the application of California law as to the purported quasi-community property. We affirm.

I. BACKGROUND¹

Wife and Husband were married in Iran in the 1960's. Wife moved to California in 1982. Starting in or around 1983, Husband began living with Wife in California for a few months out of the year. Husband testified he would enter the United States once a year on a 90-day tourist visa, and would not overstay its limits. Wife asserted that, at one point, Husband lived in California for about six months, but she also testified Husband was only there for about two to three months at a time.

In 1987, Wife filed for divorce in Nevada. Husband was represented by counsel in the proceedings, but did not produce any evidence. In 1987, the Nevada court issued a decree of divorce. It did not divide or award any property, or make any findings as to Husband's residence or domicile.

Soon after the divorce, the parties jointly purchased a home in Lafayette. The parties remodeled the Lafayette residence, in part to facilitate Wife's operation of a day care center in the home. Wife explained they bought the house because Husband wanted to get back together with Wife. From 1987 to 1991, Husband lived with Wife when he stayed in the United States. However, as before, Husband would only visit the United States for two or three months out of the year on a tourist visa. Husband lived in Teheran for the remainder of the year.

On September 16, 1991, Husband and Wife remarried. In April 1993, Husband filed a civil suit against Wife's brother. Husband's address was listed as the Lafayette residence.

¹ Wife's citations to the reporter's transcript are often inscrutable. For example, she cites to page numbers that either do not exist or do not appear in the volume to which she is citing. Further, the date and volume of the reporter's transcripts cited by Wife often do not correspond. To the extent we can find the pages to which Wife is citing, those pages generally do not provide support for the factual assertions in her briefing. Due to the inadequacies of Wife's record citations, we rely on the factual findings recited in the order on appeal. In any event, even if Wife's factual assertions were correct, she still cannot prevail on her appeal.

On September 3, 1993, Wife filed for dissolution, alleging the parties separated in August 1992. Wife alleged she had been a resident of California for at least six months, but made no allegation with respect to Husband's residency. Based on Wife's representation that she did not know Husband's whereabouts when he was in the Middle East, the court allowed service by publication. A judgment by default was obtained on December 30, 1993.

In 2005, Husband obtained a "green card" from the United States government. He still travels to Iran frequently.

In July 2012, Wife moved for an order to set aside the judgment of dissolution on the grounds of fraud and misappropriation of quasi-community assets. In a declaration attached to the request, Wife asserted Husband had engaged in real estate transactions without her knowledge and transferred assets to third parties, including Salim, in order to misappropriate the couple's quasi-community property. She also asserted Husband had been convicted of fraud and theft in Iran and had systematically transferred assets for the express purpose of defrauding creditors. Husband asserted Wife was aware of his Iranian real estate transactions. Wife later joined Salim as a party to the dissolution proceeding for the purpose of investigating transfers of the allegedly misappropriated quasi-community property.

The court dismissed Wife's motion, but granted her leave to amend to seek division of an omitted asset pursuant to Family Code section 2556. Wife did so. The third party claim against Salim was bifurcated and the claim against Husband came to trial. The trial court heard testimony between December 2013 and August 2014, much of which concerned various real estate transactions in Iran, the value of the properties involved, and the fate of the sales proceeds.

After the close of evidence, Husband filed a "motion to dismiss . . . due to lack of evidence that [Husband] was domiciled in California during the marriage." Husband argued there was a lack of evidence he was domiciled in California during the marriage, and therefore the trial court lacked the power to divide the out-of-state property at issue.

The trial court permitted Husband to provide further testimony on the issue, and deferred ruling until all the evidence was heard.

In a March 26, 2015 order, the trial court held Wife failed to prove Husband was domiciled in California as of either the 1993 California divorce petition or the judgment, because she did not show that, at those times, Husband intended to remain in the United States, rather than return to Iran. The court also questioned whether Wife could bring an omitted asset motion in this case because the property at issue may have been acquired during the parties' first marriage, which was dissolved by a Nevada court. The court speculated Wife's only remedy might be to seek to set aside the Nevada judgment, but concluded it was unnecessary to reach this issue given the resolution of the domicile issue.² Based on these findings, the trial court denied Wife's motion to allocate the omitted assets. This appeal followed.

II. DISCUSSION

Wife argues the trial court erred in finding Husband was not domiciled in California. The issue is dispositive of whether California law applies and the assets at issue may be divided as quasi-community property. We review the trial court's determination of Husband's domicile under the familiar substantial evidence standard,³ and find no error. We also reject Wife's contention that, notwithstanding Husband's

² Wife challenges the trial court's statements regarding the Nevada judgment. Like the trial court, we need not and do not reach the issue.

³ Wife argues the trial court's findings should be reviewed de novo because domicile goes to jurisdiction, i.e., the power of the court to adjudicate the quasi-community property claims. Wife does not cite any authority supporting the contention domicile findings are subject to de novo review, and in any event, the argument is contrary to the prevailing case law. (See *In re Marriage of Tucker* (1991) 226 Cal.App.3d 1249, 1259 [reviewing trial court's determination of domicile under substantial evidence standard]; *Cooper v. Cooper* (1969) 269 Cal.App.2d 6, 7–8 [same].) Moreover, to the extent the location of Husband's domicile presents a mixed question of law and fact, it primarily requires application of experience with human affairs. Such questions are reviewed under the substantial evidence test. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

domicile, he consented to the application of California law and its treatment of quasi-community property.

Family Code section 125 defines quasi-community property as all real or personal property, wherever situated, which is acquired in one of the following ways: (1) “[b]y either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition”; or (2) “[i]n exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.”

Family Code section 125 provides an exception to the general rule that “personal property acquired by a spouse during marriage while domiciled in a common law state does not lose its character as the separate property of the acquiring spouse upon a change of domicile to a community property state.” (*In re Marriage of Roesch* (1978) 83 Cal.App.3d 96, 106.) The statute may be constitutionally applied only where “(1) both parties have changed their domicile to California, and (2) after the change of domicile the spouses seek a legal alteration of their marital status in a California court.” (*Fredericks v. Fredericks* (1991) 226 Cal.App.3d 875, 878.) “Unless both of these conditions exist, the interest of the State of California in the status of the property of the spouses is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privileges and immunities clause of article IV, section 2, of the federal Constitution.” (*Roesch*, at p. 107.)

The pertinent issue here is whether Husband was domiciled in California during the relevant period. “While a person may, at any given time, have more than one residence, he or she may have only one domicile at a time.” (*In re Marriage of Tucker* (1991) 226 Cal.App.3d 1249, 1258 (*Tucker*)). “ ‘[D]omicile’ is the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning, but which the law may also assign to him constructively.” (*Smith v. Smith* (1955) 45 Cal.2d 235, 239.) “[O]nce a domicile has been established, it

is presumed to continue until a new one has been acquired. [Citations.] In order to establish a new domicile, a person must show “(1) physical presence at the new location with (2) an intention to remain there indefinitely.” ’ ’ (Tucker, at pp. 1258–1259.)

The trial court found Husband was not domiciled in California because his presence here was “regular, but not constant.” The court explained: “The witnesses substantially agree that [Husband] was in California each year, for two to three months. He obtained only tourist visas, which allowed only a three month visit. There was no evidence that he sought a longer-term visa until well after the relevant time periods. [Wife] obtained permission to serve him by publication by representing to the court that he went to the [M]iddle [E]ast for months at a time, and she had no way to locate him. These habits continued before, during, and after the California divorce, and his behavior does not show that he decided to forego [*sic*] Iran for California.” The court rejected Wife’s contention that Husband was domiciled in California because he bought and remodeled a home in the state: “It does seem clear that [Husband] wanted [Wife] and his children to have an appropriate residence. But he did not actually join them, nor is it proven that he intended to join them, as of the time of the second divorce. While the purchase of a community residence, even if he did not live there more than a few months a year, might be considered important, it is not dispositive.”

Wife now argues Husband was domiciled in California because his family moved here in the early 1980’s, Husband lived with them for so long as he could through a tourist visa, Husband purchased and improved a residence in California, and Husband only stopped coming to California because he was the subject of a criminal investigation in Iran. Wife also asserts Husband expressed an interest in purchasing a restaurant in California, and he listed the family’s California residence as his address in a 1993 lawsuit. Wife concedes she failed to present evidence concerning many factors which could be considered in determining Husband’s domicile, including where he voted, where he participated in organizational associations, and where he maintained a driver’s license, but she contends the balance of factors favored a finding that Husband was domiciled in California.

We are not convinced. As the trial court found, the fact Husband only visited California for two to three months out of the year is powerful evidence he did not intend to remain here indefinitely. Husband can only have one domicile, and we are hard pressed to find the family's California residence was that domicile when he only spent a fraction of his time there and showed no interest in staying there longer. In any event, since the standard of review is substantial evidence (*Tucker, supra*, 226 Cal.App.3d at p. 1259), we cannot reverse the trial court's domicile finding merely because some evidence existed to support a contrary conclusion. On substantial evidence review, we “ ‘must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court.’ ” (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) “ ‘We may not substitute our view of the correct findings for those of the trial court; rather, we must accept any reasonable interpretation of the evidence which supports the trial court's decision.’ ” (*Ibid.*) In this case, it was not unreasonable for the trial court to find Husband was not domiciled in California.

Alternatively, Wife argues we should find the purportedly omitted assets are subject to division under California law because Husband failed to object to the trial court's jurisdiction until the conclusion of trial. The argument is unavailing. We concede Husband waived any right to assert the trial court lacked personal jurisdiction when he entered a general appearance in this matter. However, as the trial court held, Husband's general appearance did not amount to a waiver of his right to argue for a proper choice-of-law rule. (See *Tucker, supra*, 226 Cal.App.3d at p. 1256 [husband's failure to object to California's jurisdiction over divorce proceedings did not preclude husband from arguing California's quasi-community property rules did not apply].) Moreover, it was not inconsistent for Husband to concede personal jurisdiction and venue were proper in California while arguing his domicile was located elsewhere.

Wife's authority on this point is inapposite. In *In re Marriage of Sarles* (1983) 143 Cal.App.3d 24, the court affirmed the exercise of jurisdiction over a military pension

because the husband had stipulated to such jurisdiction. (*Id.* at p. 29.) No such stipulation was entered here.

In re Marriage of Jacobson (1984) 161 Cal.App.3d 465 (*Jacobson*) is another dissolution case involving the disposition of a military pension. The Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) gives state courts the power to divide military pensions according to state law if the service member consents to the jurisdiction of the court. (*Id.* at pp. 469–470.) The trial court found the husband, a domiciliary of Iowa, consented to jurisdiction in California in a July 1980 stipulation. (*Id.* at pp. 468–470.) The appellate court held that even if that stipulation had been abrogated, the husband consented to jurisdiction by entering a general appearance and failing to file a motion to dismiss on forum non conveniens grounds. (*Id.* at p. 470.) The court also rejected the husband's contention that California's interest was insufficient to justify its reclassification of the pension as community property. (*Id.* at pp. 471–472.) The court reasoned that because the FUSFSPA "provides consent as an alternative to domicile," all due process requirements had been met: "wife's domicile, husband's consent (as an alternative to domicile) and wife's request to the marital status." (*Jacobson*, at p. 472.) In contrast, here, the assets at issue are not governed by the FUSFSPA or any comparable law which provides for consent as an alternative to domicile.⁴

III. DISPOSITION

The trial court's order denying the motion to allocate omitted assets is affirmed. The parties shall bear their own costs on appeal.

⁴ Moreover, other courts have rejected *Jacobson*'s interpretation of the FUSFSPA. (See *Tucker, supra*, 226 Cal.App.3d at p. 1256 ["a member of the military . . . may both agree California has jurisdiction over nonpension issues and at the same time argue California has no power to divide his or her military pension".])

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.

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