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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of VICTORIA and
ROBERT BRANTNER.

2d Civil No. B233713
(Super. Ct. No. D310172)
(Ventura County)

VICTORIA BANKS,

Respondent,

v.

ROBERT BRANTNER,

Appellant.

Robert Brantner appeals the judgment of the family court that "characterizes" his post-separation disability benefits as community property. We affirm.

FACTUAL AND PROCEUDRAL BACKGROUND

Robert¹ married Victoria Banks in 1978. They separated in 2004. On the day they separated, Robert stopped practicing law and submitted a claim for disability insurance benefits. It is undisputed that Robert suffers from chronic depression that renders him disabled.

¹ We refer to the parties by their first names for clarity, not out of disrespect.

Robert received disability benefits from 2004 until the time of trial, half of which he paid to Victoria pursuant to a temporary support order. Victoria did not work out of the home during most of the marriage. She became a registered nurse four years after separation. She was earning \$8,000 a month at the time of trial. They were each 61 years old.

The primary issue at trial was whether the parties purchased the disability policies with the intent to provide retirement income to the community. Robert bought the first disability insurance policy before he married Victoria, and bought the second policy the year they married. These "Thrivent" policies provided benefits for limited terms which expired before trial.

Robert bought a third policy in 1989. This "Unum Provident" policy pays about \$10,000 per month for his lifetime, so long as he remains disabled, with periodic cost of living increases. The monthly benefit was about \$12,000 at the time of trial. Robert's treating psychiatrist testified that he does not believe Robert will ever be able to work again as a lawyer or otherwise.

Victoria testified that Robert bought the disability policies as part of their overall retirement plan. According to Victoria, Robert said the purpose of the policies was protection for retirement and he intended "to go out" on disability before age 50 to 55. Victoria said she considered the disability policies "as part of our estate . . . like our house, our stream of income . . . which was going to carry us into our old age. It was going to be our retirement to have these things in place."

Robert testified that the disability policies were not part of a retirement plan. According to Robert, their retirement plan was to "pay off" the mortgages on their home and his office, and to invest in individual retirement accounts (IRAs).

The parties paid off their mortgages in 1989 or 1990. They had about \$920,000 invested in IRAs at the time of trial. They also owned a property in Silver Lake in which their adult children lived. They did not own a pension policy.

The trial court determined that the disability payments were community property and ordered equal division of the payments. Neither party requested a statement of decision.

DISCUSSION

We review the trial court's factual findings regarding the character of the parties' property under the substantial evidence standard, and we review its application of legal principles de novo. (*In re Marriage of Foley* (2010) 189 Cal.App.4th 521, 526.) In the absence of a statement of decision, we presume that the trial court made all necessary factual findings. (*Starr v. Starr* (2010) 189 Cal.App.4th 277, 287-288.)

The characterization of post-separation disability benefits depends on (1) whether the parties bought the policy during the marriage with community funds, and (2) "the extent to which the disability policies at issue were intended to provide retirement protection to both parties in their later years." (*In re Marriage of Saslow* (1985) 40 Cal.3d 848, 862.) The evidence is undisputed that the parties bought the Unum Provident policy during the marriage with community funds. The benefits are community property if it was intended to replace retirement income. (*Ibid.*) But the benefits are separate property if it was intended to "replace postdissolution earnings that would have been the separate-property income of the disabled spouse." (*Id.* at pp. 860-861.)

"[T]he determination of the intent of the parties regarding the purpose of the benefits will not always be easy. However, trial court judges have extensive experience in making such difficult factual determinations." (*In re Marriage of Saslow, supra*, 40 Cal.3d at p. 861.) In *Saslow*, the parties bought disability insurance during the marriage with community funds. There was evidence that they intended the policy to replace retirement income because they had not invested in a retirement plan, they did not contemplate dissolution when they purchased the policies, and, "[w]ith [husband's] long history of psychological problems, he may have been aware that he might not be able to continue the practice of medicine due to his disability." (*Id.* at p. 862.) The

Supreme Court reversed an order characterizing the husband's post-separation disability benefits as separate property, and remanded with directions to the trial court to "determine the extent to which the . . . policies were intended to provide retirement protection to both parties in their later years." (*Id.* at pp. 862.)

Like the husband in *Saslow*, Robert was self-employed and had a long history of psychological problems. Robert has suffered from depression "for years." His treating psychiatrist testified that, after an episode of depression in college, "I don't think it ever really abated completely There were symptoms that were consistent. But it may have gotten a little better and gotten worse and better and worse" Victoria testified that Robert intended to "go out" on disability at age 50 to 55. Robert and Victoria eventually paid off their mortgages and they accumulated sizeable IRAs, but this was not inconsistent with an overall retirement plan that also included the disability policies. That the parties made other provisions for retirement income does not preclude a finding that they intended to supplement the income with disability benefits. (*In re Elfmont* (1995) 9 Cal.4th 1026, 1032-1033.)

Robert's reliance on *Elfmont*, is misplaced. In *Elfmont*, the husband renewed the disability policy after separation, with separate property income, without an intent to provide retirement income to the community. He became disabled about two years later. There is no evidence that Robert renewed any of the disability policies after separation, or used any separate income to pay premiums. He filed his disability claim on the day of separation. Robert argues that he paid premiums for 90 days after separation during a waiting period, but we presume he did so with community funds because he offered no evidence to the contrary. (*In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1586, 1591.)

Like the parties in *Saslow*, Robert and Victoria bought disability policies during the marriage, long before either party contemplated dissolution. There was evidence that Robert was aware he might not be able to continue to the practice of law because of his disability. Substantial evidence supports the trial court's implied finding

that the parties intended the policies to provide retirement protection. We do not consider Robert's contention that the policies were illegal because he did not raise it in the trial court. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.)

DISPOSITION

The judgment is affirmed. Victoria's request for sanctions is denied. Victoria is awarded her costs on appeal.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Ellen Gay Conroy, Judge
Superior Court County of Ventura

Goldenring & Prosser, Peter A. Goldenring, James E. Prosser, and Edwin
S. Clark, for Respondent.

Law Offices of Robert M. Baskin, Charles L. McCutchen, for Appellant.