

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

In re the Marriage of KATHLEEN M. and
MICHAEL S. KALE.

KATHLEEN M. KALE,
Respondent,

v.

MICHAEL S. KALE,
Appellant.

C068705

(Super. Ct. No. FL 339515)

Michael S. Kale appeals from a postjudgment order of the trial court wherein the court found Michael owes Kathleen M. Kale “one-half of his PERS payment each month” according to the terms of a marital settlement agreement. The court also ordered Michael to pay to Kathleen arrears totaling \$6,170 and to execute a qualified domestic relations order “dividing the PERS account.”

Michael contends the monthly benefits he receives from the Public Employees’ Retirement System (PERS) are disability benefits, not the retirement benefits

contemplated in the marital settlement agreement. Accordingly, he argues the court erred in ordering him to pay half of those benefits to Kathleen. Without a reporter's transcript of the hearing in this matter, however, we can find no error.

I.

BACKGROUND

Michael has elected to proceed on a clerk's transcript. (Cal. Rules of Court, rule 8.121.) Thus, the appellate record does not include a reporter's transcript of the hearing in this matter. This is referred to as a "judgment roll" appeal. (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082-1083; *Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 207.)

The limited record we have establishes that Michael and Kathleen were married in September 1984. In January 1985, Michael began working as a police officer for the City of Stockton. He was injured on the job before he completed five years of service with the police department.

In October 1990, Michael began collecting \$1,700 per month as "permanent disability" from his job with the City of Stockton Police Department. Nearly 13 years later (in May 2003) the parties separated.

The Judgment

In July 2006, the parties executed a 20-page marital settlement agreement drafted by Antonio R. Garcia, Esq. Garcia did not represent either Michael or Kathleen, but acted as a "mediator/facilitator" and scrivener. That agreement was incorporated into a final judgment dissolving the parties' marriage on July 27, 2006.

Included in the final judgment were the following provisions:

"1. Community Property Assets.

"[¶] . . . [¶] c. Public Employee's [*sic*] Retirement System Benefits earned by [Michael] through his employment with the City of Stockton Police Department.

“[¶] . . . [¶] 3. [Kathleen]’s Property. [Michael] hereby transfers and assigns to [Kathleen], to be held hereafter as her sole and separate property, all of his right, title, and interest in and to the following community property assets:

“[¶] . . . [¶] d. One half (1/2) the Public Employee’s [sic] Retirement System Benefits earned by [Michael] through his employment with the City of Stockton Police Department. Said Retirement Benefits shall be divided pursuant to a Qualified Domestic Relations Order.”

Beginning in 2006, Michael paid to Kathleen one-half of the monthly benefits he earned through his employment with the City of Stockton Police Department. In January 2011, after meeting with an attorney, Michael stopped making those payments to Kathleen. According to the letter Michael’s attorney sent to Kathleen, Michael stopped making the payments because “the benefit [Michael] receives is for the disability he suffered and is not related to a retirement. It does not, therefore, appear . . . that this is a divisible benefit.”

Kathleen’s attorney responded, arguing that what Michael received was a “disability **retirement** through California Public Employees’ Retirement System,” as such, Kathleen was entitled to half of the benefits under the terms of the judgment. She also noted that support was calculated based on Kathleen receiving these benefits. She demanded Michael resume paying the monthly benefit to Kathleen.

Kathleen’s Motion to Enforce the Judgment

Kathleen then filed a motion to enforce the judgment. In support of her motion, Kathleen filed a declaration indicating she was awarded half of the benefits Michael earned while working for the City of Stockton Police Department, without regard to whether those benefits were community property or disability benefits. She noted it was Michael’s idea that she receive half of those benefits, and “since separation” Michael had been giving them to her.

Kathleen argued Michael was trying to “redo” their agreement but the time to set aside the judgment had passed. Kathleen thus asked the court to order Michael to execute a “Stipulated Domestic Relations Order re: Division of California Public Employees’ Retirement System Benefits.” She also asked the court to order Michael to pay the arrears accumulated since January 2011 and order him to pay her attorney fees on the motion.

Days later, Kathleen filed another motion asking for verification of Michael’s monthly income. As part of that motion, she asked the court to increase her monthly spousal support “[i]n the event the Court determine[s]” she was not entitled to half of the benefits Michael earned while working for the City of Stockton Police Department. She again asked for attorney fees.

Michael responded to Kathleen’s motion with the following: “I consent to the following order: [¶] Remain as per the parties[’] Marital Settlement Agreement.” He too asked for attorney fees, claiming Kathleen’s motions were “frivolous and unsupported by law or equity.”

Kathleen’s motions were heard by the trial court on May 3, 2011. The parties each were represented by counsel and the court considered both documentary evidence and testimony from Michael and Kathleen. Following the hearing, the court issued a written decision finding that, under the terms of the judgment, Kathleen was entitled to one-half of the benefits Michael earned while working for the City of Stockton Police Department.

The Decision

In reaching its decision, the trial court noted Kathleen’s allegation that it was Michael “who offered to pay one-half of his Stockton Police Department (‘SPD’) benefits during their negotiations” The court found that allegation “to have support in the [judgment] itself in that the SPD provision is not limited to ‘benefits earned during the marriage.’” The court also noted the parties agreed Michael would pay to Kathleen \$639

per month in spousal support until July 2010, at which time support would increase to \$941 per month. Spousal support would then terminate on July 1, 2013.

The court found the benefits at issue were in fact disability benefits and thus Michael's separate property. Accordingly, "the court would not have had the power to divide [those] benefits had the court been called upon to do so." Nevertheless, the court ruled, "parties are free to dispose of their property by agreement in order to resolve their case in any manner they see fit, and the court should not interfere with their ability to do so."

The court acknowledged that Michael and Kathleen "may have been mistaken about the characterization of the disability benefits as community property"; however, they were advised to seek counsel regarding the nature of their property and waived the right to do so. Moreover, the court found, division of Michael's disability benefits was "part of the overall division of all of the parties' property, community and separate."

The trial court found incredible Michael's claim that the provision awarding Kathleen "one half (1/2) the Public Employee's [sic] Retirement System Benefits earned by [Michael] through his employment with the City of Stockton Police Department," did not contemplate the disability benefits Michael earned while working for the City of Stockton Police Department. The court noted these disability benefits were the only benefits Michael earned while working for the City of Stockton Police Department. And, for the 16 years prior to negotiating the marital settlement agreement, these were the only benefits Michael had been receiving as a result of his employment with the City of Stockton Police Department.

The trial court thus concluded that "[b]arring evidence of fraud, duress, or other conduct violative of Family Code § 2122, the court [was] bound to accept the parties' stipulations with regard to the disposition of their property" The court then found "no legal or equitable basis to set aside the Marital Settlement Agreement entered into by both parties, or to delete or amend the provision dividing [Michael's] disability benefits,

and rules that said provision is enforceable,” and Michael’s “request to reform the [marital settlement agreement] is barred by time.”

Accordingly, the trial court ruled that Michael owes Kathleen “one-half of his PERS payment each month pursuant to the [marital settlement agreement].” The court also ordered Michael to pay Kathleen \$6,170 in arrears, to sign the qualified domestic relations order dividing the PERS account within 30 days, and to pay Kathleen \$750.00 in attorney fees. Michael appeals from that order.

II.

DISCUSSION

A. *Interpreting the Stipulated Judgment*

A judgment that was not written by the trial court but only recites the agreement of the parties must be interpreted as any other written agreement. (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439; see also *In re Marriage of Trearse* (1987) 195 Cal.App.3d 1189, 1194-1195.) Thus, such a judgment “must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” (Civ. Code, § 1636.) The language of that judgment “is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.” (Civ. Code, § 1638.)

When interpreting such a judgment, “the intention of the parties is to be ascertained from the writing alone, if possible” (Civ. Code, § 1639.) However, “[p]arol or extrinsic evidence is admissible to resolve an ambiguity. [Citations.] In such cases, the court engages in a two-step process: ‘First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine “ambiguity,” i.e., whether the language is “reasonably susceptible” to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is “reasonably susceptible” to the interpretation urged, the extrinsic evidence is

then admitted to aid in the second step--interpreting the contract. [Citation.]’ [Citation.]” (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710.)

Here, the disputed language of the judgment characterizes the “Public Employee’s [sic] Retirement System Benefits earned by [Michael] through his employment with the City of Stockton Police Department” as community property and assigns to Kathleen one-half of the same. Michael contends the monthly benefits he receives as a result of his employment with the City of Stockton Police Department are disability benefits, not retirement benefits. Thus, Michael contends the benefits are not community property and, under the plain language of the judgment, Kathleen is not entitled to half of those benefits.

In drafting their agreement, the parties used the phrase “retirement system benefits.” After trial, the trial court found Michael was not receiving *retirement* benefits as a result of his employment with the City of Stockton Police Department but was instead receiving *disability* benefits, benefits which the court acknowledged were Michael’s separate property. The court nevertheless found the terms of the agreement required Michael to give Kathleen half of his monthly disability benefits.

In this, a judgment roll appeal, we must presume the trial court properly executed its duty in interpreting the judgment to give effect to the parties’ mutual intent at the time they drafted the marital settlement agreement. (See Evid. Code, § 664 [it is presumed that official duty has been regularly performed]; see also *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583-584 [we must adopt all inferences in favor of the judgment].) That is, we must presume the trial court provisionally considered the extrinsic evidence offered by Kathleen and determined the disputed language was reasonably susceptible to her proffered interpretation before admitting the evidence to interpret the judgment. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39; *Winet v. Price, supra*, 4 Cal.App.4th at p. 1165.)

We must also presume the evidence first provisionally considered and then admitted, supports the trial court's finding that when the parties (neither of whom is a lawyer) agreed Kathleen would receive one-half of the "retirement systems benefits" Michael earned while working for the City of Stockton Police Department, they intended to divide the *only* benefits Michael earned while working for the City of Stockton Police Department - his disability benefits. (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154.) Accordingly, on this record, we can find no error.

B. Transmutation

Michael also argues the judgment cannot transmute his separate property disability benefits to community property. Michael did not raise this argument in the trial court; he cannot raise it for the first time on appeal. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501; *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 912.)

C. Sanctions

Kathleen seeks sanctions against Michael on the ground that this appeal is frivolous. We disagree. Code of Civil Procedure section 907 provides that an appellate court may award sanctions if it appears that an appeal was frivolous or taken solely for delay. A frivolous appeal is one that "is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) An appeal is not frivolous simply because it is without merit. (*Ibid.*)

This appeal raises numerous issues regarding parole evidence and the interpretation of stipulated judgments. While the appeal ultimately was not successful it was by no means frivolous. Kathleen's request for sanctions is, therefore, denied.

III.

DISPOSITION

The order of the trial court is affirmed. Costs are awarded to Kathleen. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BLEASE, Acting P. J.

We concur:

MAURO, J.

DUARTE, J.