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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re the Marriage of DANIEL and SALLY
MAKIEVE.

C075577

DANIEL MAKIEVE,

(Super. Ct. No. SDR 0034550)

Respondent,

v.

SALLY NUNLEY,

Appellant.

After judgment was entered on a marital settlement agreement, the wife moved to set aside the judgment, arguing that the husband did not disclose all of his income because he did not disclose money paid on his behalf into a retirement fund. The trial court denied the motion to set aside because, among other things, the wife failed to file the motion to set aside within the time prescribed by statute.

On appeal, the wife, representing herself, contends the trial court erred. However, she fails to raise the timeliness issue properly in her opening brief, and she fails to establish that the trial court's timeliness determination was incorrect. We therefore affirm.

BACKGROUND

Sally Nunley and Daniel Makieve were married on May 21, 1983, and separated on June 26, 2009, after 26 years of marriage. During the marriage, Daniel went to medical school and became a doctor. The judgment of dissolution entered on September 23, 2011, incorporated a marital settlement agreement dated June 24, 2011. The agreement provided that Daniel would pay Sally \$3,750 per month in spousal support. The agreement also covered child support, but no issue regarding child support is raised in this appeal.

The marital settlement agreement noted that Sally was attending school to obtain a master's degree and a teaching credential. Citing Family Code section 4320, the agreement stated the goal that Sally would be self-supporting within a reasonable period of time and that spousal support could be modified up or down in 2012 after a review under *In re Marriage of Richmond* (1980) 105 Cal.App.3d 352 (*Richmond*).

Sally filed a motion to set aside the judgment on September 21, 2012, two days less than one year after entry of judgment based on the marital settlement agreement and 15 months after the effective date of the marital settlement agreement. The motion does not appear in the clerk's transcript on appeal, but the trial court referenced the motion in later proceedings. According to the court, the motion to set aside the judgment was based on "Daniel's alleged undisclosed income amounts and contributions to retirement." While this matter was pending, the parties agreed to reduce Daniel's spousal support to Sally, but that reduction is not material to this appeal.

After three days of hearings and submission of closing briefs from the parties, the trial court issued a proposed statement of decision, denying Sally's motion to set aside

the judgment based on the marital settlement agreement. The court cited two grounds for denying the motion to set aside the judgment: (1) Sally failed to file her motion to set aside the judgment within the time allowed under Family Code section 2122 and (2) Daniel did not breach any fiduciary duty to Sally and withhold income information.

After denying the motion to set aside the judgment, the court engaged in a *Richmond* review of spousal support. Based on this review, the court ordered Daniel to pay Sally \$3,250 in spousal support, subject to later modification based on Sally's progress in getting a teaching position and becoming self-sufficient.

Later, the trial court ruled on objections to the statement of decision and made the order final.

Sally appeals, representing herself.

DISCUSSION

Sally failed to file her motion to set aside the judgment within the time allowed by statute. That failure, by itself, requires us to affirm the trial court's order. In this Discussion, we hold that Sally failed to raise properly the issue of whether her motion to set aside the judgment was timely. We also hold that, even assuming Sally's briefing properly raised the issue, the briefing does not establish that the trial court was wrong.

A. *Background*

Family Code section 2122, subdivision (f) allows a party to a marital settlement agreement to move to set aside the judgment based on the agreement for failure to make required disclosures of income, which is what Sally alleges against Daniel. However, the same provision limits when such an action to set aside the judgment may be filed, as follows: "An action or motion based on failure to comply with the disclosure requirements shall be brought within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply." (Fam. Code, § 2122, subd. (f).) The trial court held that Sally had all the information she needed to

determine Daniel's income, including contributions to retirement, on June 30, 2011, which was more than one year before she filed her motion to set aside the judgment.

“ ‘[Family Code] Section 2122 sets out the *exclusive grounds and time limits* for an action or motion to set aside a marital dissolution judgment.’ (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 684, italics added.) ‘Unlike traditional equitable set-aside law where “laches” is the only time limit on relief . . . , [Family Code section] 2120 et seq. accommodates the public policy interest in putting an end to litigation and ensuring the “finality” of family law judgments by setting absolute deadlines on obtaining a post-[judgment] set-aside. Once the statutorily-prescribed period expires ([Fam. Code, § 2122]), set-aside relief is not available and the judgment is effectively final for all purposes.’ [Citation.]” (*In re Marriage of Georgiou & Leslie* (2013) 218 Cal.App.4th 561, 571, italics omitted.)

Here, the court found that Sally failed to file her motion in time, as follows: “Sally claims that she did not receive Daniel's 2010 tax return until June 30, 2011, after the settlement was reached, and began to question the support amounts in the judgment after consulting with an attorney in October of 2011. However, given the wealth of information turned over to [] Sally's counsel prior to June 30, 2011 [reference to trial exhibits], the fact that she was represented at the time, and the fact that she had the benefit of [the forensic accountant's] expertise, she should have discovered any alleged fraud on the date she received the 2010 tax return. Her failure to reasonably and timely act upon this ‘new’ information from the 2010 tax return, and then filing a motion to set aside over a year later in this Court's view falls outside the statutory time frame under [Family Code section] 2122.” (Fn. omitted.)

B. *Failure to Raise the Issue Properly*

Sally fails to make a proper argument that the trial court erred by finding that her motion to set aside the judgment was untimely. The Rules of Court require an appellant to state each point raised in a heading or subheading. (Cal. Rules of Court, rule

8.204(b).) None of Sally's headings or subheadings assert error in the finding that the motion to set aside the judgment was untimely. Instead, Sally attempts to go straight to the merits of the motion. Sally has therefore forfeited consideration of this decisive point, meaning her appeal is without merit.

C. *Untimeliness of Motion*

In any event, even assuming for the purpose of argument that Sally has properly raised the issue, the trial court was correct that the motion to set aside the judgment was untimely. Sally argues that she "was unaware of the retirement movement and amounts until after the [Qualified Domestic Relations Order] had been calculated in October of 2011. The request to overturn support was made less than a year later on 21 September 2012, well within the guideline timeframe."

The problem with this argument is that the relevant timeliness inquiry is not whether Sally was aware of contributions made to Daniel's retirement account. Instead, as the trial court noted, the relevant inquiry is when "the complaining party either discovered, or *should have discovered*" the failure to disclose income. (Fam. Code, § 2122, subd. (f), italics added.) Sally had the tax returns; she was represented by counsel; and she had an expert forensic accountant. To promote finality in marital dissolution proceedings, the law requires diligence in using the resources and information that were available to Sally. In October 2011, when Sally says she first became aware of the alleged failure to disclose income, a motion to set aside the judgment would have been timely. But the motion filed in September 2012 was not timely.

Sally also claims that, over time, her own forensic accountant became a hostile witness and that he was hired to evaluate Daniel's business rather than the marital standard of living. These allegations, even if true, do not change the analysis. Sally (1) had the information in June 2011, (2) at least began to recognize its import in October 2011, but (3) failed to file a motion to set aside the judgment until September 2012.

Sally’s remaining contentions address the merits of her motion—that is, whether Daniel failed to disclose income information to Sally. She argues that the judgment based on the marital settlement agreement should be set aside because Daniel did not disclose all of his income, including contributions to retirement. At this point, however, she cannot make those arguments because it is too late. (*In re Marriage of Georgiou & Leslie, supra*, 218 Cal.App.4th at p. 571.) We therefore do not consider whether Daniel actually failed to disclose income.

DISPOSITION

The order is affirmed. The parties will bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NICHOLSON, Acting P. J.

We concur:

MURRAY, J.

RENNER, J.