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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of ELIZABETH and
PHILIP PACCIONE.

ELIZABETH PACCIONE,

Respondent,

v.

PHILIP PACCIONE,

Appellant.

D068665

(Super. Ct. No. ED86642)

APPEAL from an order of the Superior Court of San Diego County, Robert O. Amador, Judge. Affirmed.

Stephen Temko and Dennis Temko for Appellant.

Hahn Loeser & Parks and Rupa G. Singh for Respondent.

In February 2014, the court issued a statement of decision (SOD) following a 13-day bench trial in a divorce proceeding between Elizabeth O'Neill (O'Neill), previously Elizabeth Paccione, and Philip Paccione (Paccione). The SOD divided the entirety of the community estate and instructed O'Neill to prepare a judgment consistent with the

holdings therein. Due to excusable neglect, the judgment was never entered but the court continued to issue additional orders carrying out the holdings in the SOD. Nearly a year later, in a response to a request for order filed by O'Neill, Paccione suddenly asserted the SOD was not a final order due to the missing judgment and asked the court not to issue any further orders carrying it out. After hearing argument from the parties, the court issued an order concluding Paccione waived this argument by failing to raise it over the course of the previous year, determining the SOD was therefore a final order, and ordering the remaining marital funds distributed in accordance with the holdings in the SOD.

On appeal, Paccione presents a single issue, arguing the court erred as a matter of law in concluding the SOD was a final order. Because Paccione had not previously taken any action disputing the finality of the SOD, and instead had substantially complied with at least one subsequent order carrying out the SOD, we conclude the court correctly determined he waived or forfeited his right to dispute the finality of the SOD. We therefore affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Elizabeth O'Neill, then Elizabeth Paccione, filed a petition for dissolution of her marriage to Philip Paccione in 2011. Following a 13-day trial, the court issued a tentative ruling from the bench and directed each party to submit a proposed SOD, which they did. On February 23, 2014, the judge signed the proposed SOD as submitted by O'Neill. The signed SOD divided the entirety of the community estate between the parties. It assigned all rights and liabilities related to an ongoing litigation concerning a business started

during the marriage to Paccione, awarded sanctions against Paccione for withdrawing community funds to pay for the litigation, and divided certain financial accounts and a classic car collection evenly between the parties. With respect to the car collection, the court directed the parties to cooperate in the sale of the cars and stated the court would appoint an auctioneer to sell the cars if the parties could not reach agreement. Finally, the SOD directed O'Neill's counsel to prepare a judgment containing the ruling as set forth therein and reserving jurisdiction over spousal support.

Shortly thereafter, Paccione's attorney advised him the court had signed the SOD submitted by O'Neill. Another attorney he had retained in a limited capacity advised him the time to appeal would begin to run upon entry of the judgment but also made clear he had not been retained with respect to any appeal, was not aware of the current procedural posture of the case, and had not researched the law regarding appeals in this context recently. Paccione advised both attorneys he was looking for a new divorce attorney and directed them not to sign the judgment. The case was subsequently transferred to another division and it appears the court never entered the judgment.

In June 2014, the court issued an order confirming the sale of the classic car collection at auction for a set price and requiring Paccione to execute all necessary documents to comply with the sale. Paccione substantially complied with the order and the majority of the cars were sold. In late November, O'Neill filed a request for order regarding three remaining cars not included in the sale, as well as a request to award her \$120,000 of the car proceeds to cover the sanctions awarded in the SOD. In his response, filed in January 2015, Paccione refuted the finality of the SOD for the first time, arguing

he was still able to appeal because the judgment had not yet been entered, and asking the court not to make any "new" orders carrying out the SOD.

At a hearing on the request for order, O'Neill's counsel argued she had prepared the judgment and sent it to the judge that issued the SOD but the case had been transferred and the judgment likely got lost. The court asked the parties to brief the issue and, after hearing further argument, concluded it had carried out a substantial part of the SOD when it confirmed the sale of the cars at auction and, because Paccione had not attempted to stay or appeal that order but had instead attempted to negotiate a more favorable settlement, he had waived his right to dispute the finality of the SOD. Thus, although, due to excusable neglect, the court had not entered a judgment following the SOD, the SOD was a final, appealable order. The court also ordered the remaining marital funds distributed in accordance with the holdings in the SOD.

DISCUSSION

Paccione asserts the court erred in determining the SOD was a final order, both because it was not a final order and because the trial court lacked the authority to determine it was. O'Neill argues the trial court did have the authority to do so and, regardless, Paccione forfeited this argument through his own conduct. For the reasons set forth herein, we conclude Paccione either waived or forfeited his argument the SOD was not a final order and that his arguments on appeal are not persuasive in light of this forfeiture. We therefore affirm the order.

A. Waiver

It is a well-established principle that a party may not assent to a ruling and then complain of the ruling on appeal. (*Cushman v. Cushman* (1960) 178 Cal.App.2d 492, 498 (*Cushman*)). In *Cushman*, for example, the defendant in a divorce proceeding was precluded from appealing an order awarding a \$1 per month alimony on the grounds the complaint did not request alimony after allowing the court to proceed on plaintiff's assertion the parties had agreed to a \$1 alimony pending further order of the court. (*Id.* at pp. 494, 499.) Courts have applied this same principle in numerous contexts and with respect to numerous arguments. (See, e.g., *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 948-949 [appellant forfeited any argument regarding the court's procedure in dismissing certain causes of action pursuant to a motion in limine by acquiescing to the procedure without objection]; *In re Dakota S.* (2000) 85 Cal.App.4th 494, 502 [listing numerous cases in which the failure to request or object to certain procedures resulted in waiver in the dependency context]; *Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 [refusing to augment the record on appeal where appellants were aware of the amended complaint they sought to add to the record but invited error by failing to bring it to the lower court's attention]; *In re Christian J.* (1984) 155 Cal.App.3d 276, 278 [minor waived his right to contest the qualification of a judge by failing to raise a peremptory challenge and acquiescing to the judge's jurisdiction throughout the proceedings]; *Conservatorship of Joseph W.* (2011) 199 Cal.App.4th 953, 967 [although court erred in conducting a court trial, petitioner waived or forfeited error by participating in the court trial without

objection].) Similarly, a party forfeits his or her claim of error by not bringing the error to the trial court's attention in a timely manner. (*Avalos v. Perez* (2011) 196 Cal.App.4th 773, 776.) The rationale behind this rule is that parties would otherwise be encouraged to remain silent until it was too late to rectify the error, thereby requiring the court to overturn the judgment. (*Ibid.*)

Here, Paccione remained silent and acquiesced to the court proceeding as if the SOD was a final order for nearly a year before objecting. On June 5, 2014, months after the court issued the SOD, the court confirmed the sale of vehicles at auction for a set price as contemplated in the SOD and ordered appellant to execute all documents necessary for the sale. Although Paccione was aware a judgment had not been entered, he did not argue the SOD was not final, object to the court treating it as such or raise the issue of the missing judgment, but instead cooperated in the sale of the cars as ordered. The court also held at least five other hearings after the SOD was entered and Paccione did not question the finality of the SOD or the missing judgment at any of these hearings either. By proceeding in this manner and allowing the court to make further orders carrying out the SOD without objection, Paccione waived his right to argue, months later, the SOD was not final.

Paccione argues he did preserve the issue by raising it in January 2015. However, to avoid forfeiture, an objection must be timely. (See, e.g., *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 564 [objection regarding expert testimony forfeited where permitting party to raise the issue nearly one year after the close of evidence would be fundamentally unfair]; *Rayii v. Gatica* (2013)

218 Cal.App.4th 1402, 1412 [failure to object to allegedly prejudicial statements until following day resulted in forfeiture].) Here, Paccione did not raise the issue for months after the court had taken significant steps in carrying out the SOD. In particular, the court had already confirmed the sale of the cars at auction, an action it could not reverse months later. Paccione presents no authority, nor are we aware of any, indicating he could overcome a previous waiver or forfeiture by raising the issue months later in response to a subsequent request for order. To the contrary, allowing him to do so would vitiate the purpose of the doctrine of forfeiture.

Further, Paccione has also waived any substantive arguments regarding the subsequent orders of the court carrying out the SOD. Both the June 5, 2014 order, which required Paccione to perform the acts of selling the cars and executing title, and the June 22, 2015 order from which he now appeals were separately appealable collateral orders. (See *In Re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 [concluding an order requiring performance of an act was separately appealable as a collateral order].) The June 22, 2015 order was also appealable as either a postjudgment order or a final judgment as it concluded the SOD was a final order. (Code Civ. Proc., § 904.1(a)(1)-(2).) Paccione did not appeal the June 5, 2014 order, and, although he did appeal the June 22, 2015 order, he did not make any substantive arguments regarding the provisions of that order awarding certain monies to each party in accordance with the SOD. By failing to do so, Paccione also either waived, in a secondary manner, or rendered moot any argument regarding these further orders carrying out those in the SOD.

B. Paccione's Remaining Arguments

Paccione makes several other arguments disputing the court's conclusion the SOD was a final order. None of these arguments is persuasive in light of the foregoing waiver.

First, despite asking the trial court to find the reverse, Paccione argues the trial court did not have the authority to find the SOD was a final order. Paccione contends the cases cited by O'Neill only confer discretion on a reviewing court—not the lower court—to consider an SOD a final order, but those cases are not instructive because there the appellate courts were addressing whether an appeal taken from an SOD was timely and appropriate. (See, e.g., *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901 [concluding reviewing court has discretion to consider an SOD a final order for the purpose of appeal]; *Pangilinan v. Palisoc* (2014) 227 Cal.App.4th 765, 769 [same].) Here, Paccione did not appeal the SOD and, thus, did not present the issue of whether such an appeal was timely or appropriate to either the trial court or this court. Instead, Paccione asked the court to determine whether the SOD was a final order and the trial court concluded it was because Paccione forfeited his right to argue it was not. For the reasons discussed above, the trial court did not err in so doing.

Next, Paccione argues he could not have appealed from the SOD previously because it contemplated further action by ordering O'Neill's counsel to prepare a judgment. (See *Jordan v. Malone* (1992) 5 Cal.App.4th 18, 21 [concluding a statement of decision requiring the preparation of a judgment was not final].) However, had he appealed, the reviewing court would have had the discretion to treat it as a final order under these specific facts as it was signed, filed, and clearly intended to constitute the

court's final decision on the merits. (See *Pangilinan, supra*, 227 Cal.App.4th at p. 769.) More importantly, though, Paccione had several other avenues available for addressing the finality of the SOD, including: (1) raising the issue sooner with the lower court, such as in response to the June 2014 order; (2) moving the court to enter a judgment himself as the court suggested in *Jordan, supra*, at page 21; (3) filing a writ petition asking this court to prevent the trial court from issuing further orders carrying out a nonfinal order; or (4) moving for a new trial on the SOD under Code of Civil Procedure section 659, subdivision (a)(1). Paccione did none of these and instead allowed the court to proceed without objection for nearly a year before disputing the finality of the SOD. As a result, the court correctly concluded he waived any argument the SOD was not final.

Paccione also argues we should not apply an estoppel theory to preclude him from appealing the SOD, relying on *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660. In *Hollister*, the California Supreme Court concluded it lacked authority to assume jurisdiction over an untimely appeal, even where estoppel or excuse favored allowing the appeal to go forward. (*Id.* at p. 674.) The court also disagreed with a previous case, *In re Morrow* (1970) 9 Cal.App.3d 39, in which the court concluded respondents were estopped from arguing an interpretation of the pertinent Civil Code would preclude the appeal as untimely because they did not raise the argument in a motion to dismiss in another case. (*Hollister, supra*, at p. 672.) In both cases, the issue before the court was whether the appeal at issue was timely, and the court in *Hollister* concluded it was without jurisdiction to alter the statutory time to appeal via excuse or estoppel. (*Id.* at p. 674.) Here, there is no question before us regarding the timeliness of

the present appeal, or any excuse for deviating from the statutory timelines, and, thus, *Hollister* is not applicable.

Finally, Paccione argues a determination he waived his right to challenge the SOD as a final order would amount to an adoption of a new rule that we should not apply retroactively. Once again, however, this argument misconstrues the issue on appeal. The trial court did not decide, nor do we here, that estoppel precludes Paccione's right to appeal. The trial court decided, and we confirm, Paccione forfeited the right to argue the SOD was not a final decision by allowing the court to proceed as if it was without objection. The waiver or forfeiture of an argument by failing to object or acquiescing is not a new rule. (See, e.g., *Cushman, supra*, 178 Cal.App.2d at p. 498.) Therefore, our decision here does not retroactively apply a new rule.

DISPOSITION

The order is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

HALLER, J.