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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

BUNNY ALBAUGH,

Plaintiff and Appellant,

v.

CHARLES LEON BREWER et al.,

Defendants and Respondents.

E057636

(Super.Ct.No. CIVDS903736)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster,  
Judge. Affirmed.

Gary S. Redinger for Plaintiff and Appellant.

Bryant C. MacDonald for Defendants and Respondents.

Plaintiff and appellant Bunny Albaugh (wife) appeals from the October 19, 2012, judgment in favor of her children, defendants Charles Leon Brewer (son) and Bunny Christine Arlotti (daughter, collectively referred to as the children), on her verified complaint to set aside a quitclaim deed and quiet title to certain real property she claims

was awarded to her (but never conveyed) in the dissolution proceedings with her ex-husband, Alvin Leon Brewer (husband). We affirm.

## I. PROCEDURAL BACKGROUND AND FACTS

Wife married husband on October 11, 1958. There were three children of the marriage: daughter, son, and Allen L. Brewer. By 1974, a dissolution action was initiated, and on March 7, 1977, an interlocutory judgment of dissolution of marriage was filed in the County of Santa Clara. According to the interlocutory judgment, wife was to receive real property and residence thereon located at 12716 Douglas Street in Yucaipa (real property), subject to its encumbrance. Further, wife was to pay husband “the sum of \$10,000.00, within 60 days of trial, at such time as [husband] conveys all of his interest in the . . . real property . . . .”<sup>1</sup>

On May 3, 1979, husband’s attorney sent a letter to wife “to effectively terminate all proceedings in the marriage” by conveying husband’s interest in the real property upon wife’s payment of \$10,000. There is no evidence in the record as to what action was taken as a result of husband’s attorney’s letter; however, on March 17, 1980, a final judgment of dissolution of marriage was filed, noting that it was to be “entered nunc pro tunc as of . . . March 10, 1977.”<sup>2</sup> A June 11, 1987, letter suggested that no action had

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<sup>1</sup> Two pieces of real property were mentioned; however, the other is irrelevant to our discussion.

<sup>2</sup> Wife requests this court take judicial notice of the final judgment filed on March 17, 1980. The children oppose this request. The request is granted, as we may take judicial notice of a court record pursuant to Evidence Code section 452, subdivision (d)(1).

been taken, because in this letter, wife offered to pay husband the \$10,000 over a 10-year period at an interest rate of two and one-half percent in exchange for husband conveying his interest in the real property to her. Again, the record is void of any evidence as to whether or not this offer was accepted or whether wife ever paid the money to husband.

On February 13, 2006, husband quitclaimed his interest in the real property to the children.<sup>3</sup> Three years later, on March 20, 2009, wife filed a verified complaint against the children to cancel the quitclaim deed and quiet title to the real property. She claimed that the interlocutory judgment filed in March 1977 conveyed the real property to her such that the quitclaim deed is null and void. The children filed their answers and the matter proceeded to a court trial.

Both sides waived having a court reporter for opening statements and presentation of evidence.<sup>4</sup> On August 31, 2012, closing arguments were presented. The trial court indicated its tentative decision to rule in favor of the children on the grounds the interlocutory judgment contemplated that both wife and husband would do something, not that the judgment would act as a deed that actually transferred the real property. The court opined that the interlocutory judgment was an order of the court, “and the actual method of enforcement . . . is a motion or action to enforce the order . . . .” The court was satisfied that wife had paid husband \$10,000; however, it opined that she failed to

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<sup>3</sup> Husband died after this conveyance.

<sup>4</sup> The physical evidence is limited to the interlocutory decree and a few letters evidencing correspondence between the parties’ attorneys.

timely enforce the court's order to transfer husband's interest in the real property to her and thus "an action on an order of the court after ten years cannot be brought."

After taking the matter under submission, on October 12, 2012, the trial court entered judgment in favor of the children, awarding them costs in the amount of \$1,180. There is no statement of decision explaining the trial court's reasons for ruling in favor of the children. Wife appeals.

## II. EFFECT OF THE INTERLOCUTORY JUDGMENT

Wife contends that "as a matter of law, the recording of the interlocutory judgment and final judgment act as a deed on the real property in [her] favor." Each of her subsequent arguments stems from this contention. First, she asserts that "[w]hen the family court judge signed the interlocutory judgment, he acknowledged that it was an instrument," which, upon recordation, "affected the title to the real property."<sup>5</sup> Second, wife argues that the children received both constructive and actual notice of the conveyance of the real property by virtue of the filed judgment. Third, she maintains that because the judgment awarding the real property to her arose from a family court proceeding, it remained "enforceable until paid in full or otherwise satisfied" and was not

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<sup>5</sup> She cites Civil Code sections 1215 (defining conveyance) and 1216 (setting forth the means of revoking an instrument to convey), along with Government Code section 27282 (a recorded instrument conveying real property provides constructive notice to subsequent purchasers). While the judgment was filed in both Santa Clara and San Bernardino Superior Courts, there is no evidence it was ever recorded.

subject to expiration.<sup>6</sup> Finally, wife claims the marital settlement agreement in the interlocutory judgment was enforceable without the need for entry of a judgment.

Our interpretation of the effect of the interlocutory judgment resolves all of wife's claims. We begin by considering the interlocutory judgment to be a contract between husband and wife. (*Lane v. Lane* (1953) 117 Cal.App.2d 247, 251 [“An interlocutory decree of divorce is, so far as it determines the rights of the parties, a contract between them [citations], and ‘[the] interpretation of such a decree is a question of law.’ [Citation.]”]; *Becker v. Becker* (1950) 36 Cal.2d 324, 326 (*Becker*).) Absent any ambiguity in the decree, we conduct de novo review of its terms. (*In re Marriage of Richardson* (2002) 102 Cal.App.4th 941, 949; *Fox v. Fox* (1954) 42 Cal.2d 49, 52 [“In the absence of conflicting extrinsic evidence, the interpretation placed upon the agreement by the trial court is not binding on this court on appeal”].)

Considering the interlocutory decree a contract, it is apparent that the parties obtained mutual rights and were under mutual obligations, i.e., wife was to pay a certain sum in return for which husband was to convey his one-half interest in the real property. These promises were mutually concurrent and were to be performed within 60 days of trial. While the terms of the decree should have been performed during the 60-day period, they were not. We will assume that time was not of the essence; however,

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<sup>6</sup> She cites Family Code section 291 (judgment under Family Code is enforceable until satisfied), Civil Code section 880.240 (the interest of a person in real property is not subject to expiration), and *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429.

performance should have been within a reasonable time thereafter. (*Becker, supra*, 36 Cal.2d at p. 326.)

Here, the trial court was “satisfied that it is more likely than not that [wife] did make the \$10,000 payment.”<sup>7</sup> However, the trial court found payment of the \$10,000 to be irrelevant, because it did “not find that it was directly related to the transfer of the property.” The court opined that “even if—[wife] hadn’t paid it . . . we would still be arguing the same issue.” We disagree. In our view, the language in the interlocutory decree was clear: “[Wife] shall pay [husband] the sum of \$10,000.00, within 60 days of trial, at such time as [husband] conveys all of his interest in the . . . real property described in Paragraph 4 . . . (b) above.” Thus, upon wife’s payment of the \$10,000, husband was obligated to transfer his interest in the real property to her.<sup>8</sup> His failure to do so warranted action on wife’s part.

Because husband and wife incorporated the terms of their property settlement into the interlocutory and final decrees of dissolution, their agreement (or contract) merged into the decree. “[A]s soon as incorporated into the decree *the separation agreement is superseded by the decree, and the obligations imposed are not those imposed by contract,*

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<sup>7</sup> “As far as the payment is concerned—there isn’t a whole lot as far as payment is concerned, but I’m satisfied that it is more likely than not that she did make the \$10,000 payment. I didn’t find anything that was compelling to refute her testimony of paying it or—there was another witness—I forgot her name—who indicated that there was a payment. I think it was her sister, if I remember correctly. But it appears that there was at least enough there to make it more likely than not that the 10,000 was paid.”

<sup>8</sup> Because we conclude the interlocutory judgment contemplated an exchange of \$10,000 for the real property, we reject wife’s claim that it acted as a deed for the real property.

*but are those imposed by decree, and enforceable as such. Once the contract is merged into the decree, the value attaching to the separation agreement is only historical.'*

(Emphasis added.) And it should logically and justly follow therefrom that thereafter there is no right of action on the agreement incorporated in the decree.” (*Hough v. Hough* (1945) 26 Cal.2d 605, 609-610.) “Merger, then, replace[d] the obligations of the contract with those of the decree.” (*Zastrow v. Zastrow* (1976) 61 Cal.App.3d 710, 714.) Accordingly, to enforce the terms of her agreement with husband, wife must file an action to enforce the decree. (*Ibid.*)

“A judgment or order made or entered pursuant to [the statutory provisions governing family law] may be enforced by the court by execution . . . or contempt, or by any other order as the court in its discretion determines from time to time to be necessary.” (Fam. Code, § 290.) “Thus, the Family Code generally confers on the trial court broad discretion to select appropriate enforcement remedies and terms; and, in exercising that discretion, to take the equities of the situation into account [citations].” (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2013) ¶ 18:1.5, p. 18-1.)

Here, the trial court reasoned that because wife had waited too long (more than 10 years) to seek enforcement of the interlocutory judgment regarding the transfer of interest in the real property, she was now precluded from doing so. Citing the most recent version of Family Code section 291 (section 291), subdivision (a), wife asserts that the judgment awarding the real property to her is enforceable until satisfied. This section, in relevant part, provides: “A . . . judgment for possession . . . of property that is made or

entered under this code, including a judgment for child, family, or spousal support, is enforceable until . . . otherwise satisfied.” (§ 291, subd. (a) [Stats. 2006, ch. 86, § 4 (Assembly Bill No. 2126), amended Stats. 2007, ch. 130, § 87 (Assembly Bill No. 299), effective Jan. 1, 2008].) As the children note, “[wife] is asserting that this section would have prevented reliance on any statute of limitations to deny [her] claim in the trial court.” However, since the date of entry of the interlocutory judgment, there have been various versions of section 291. Under predecessor statutes, a 10-year limitations period would have applied. (Fam. Code, former § 291 [Stats. 2000, ch. 808, § 25]; Civ. Code, former § 4384 [Stats. 1982, ch. 497, § 16, operative July 1, 1983].) Thus, we must determine whether section 291 may be applied retroactively.

“A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so.” (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) We may find that intent expressed in the statutory language or in the legislative history. (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 222.) The operation of a statute is considered to be retroactive if it would substantially change the legal effects of past events. (*Western Security Bank v. Superior Court, supra*, at p. 243.) Looking at section 291, there is no indication in its text that the Legislature intended the statute to be retroactive. At least one court has held that section 291’s open-ended enforcement period does not apply to family law judgments and orders entered into before the statute’s 2006 operative date if they are for “possession or sale of property.” (*Schelb v. Stein* (2010) 190 Cal.App.4th 1440, 1451 (*Schelb*).) We agree with the *Schelb* court’s analysis. In the absence of

section 291 the trial court exercises its discretion when considering whether to enforce a Family Code judgment. In doing so, the court considers the equities of the situation. (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 18:4, p. 18-6.)

“The absence of a statutory limitations period on the enforcement of Family Code judgments generally [under current law] does not preclude application of the equitable doctrine of *laches*—the defense of unreasonable delay in taking enforcement action to the prejudice of the judgment debtor.” (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 18:5, pp. 18-6, 18-7.) “Laches may bar relief in equity to those who neglect their rights, where such neglect operates to the detriment of others. [Citation.] Given its nature as an equitable defense, however, there are recognized limits on application of the doctrine of laches. For one thing, the doctrine ‘is not applied strictly between near relatives [such as spouses].’ [Citations.] More generally, ‘laches is not technical and arbitrary and is not designed to punish a plaintiff. It can only be invoked where a refusal would be to permit an unwarranted injustice. Whether or not the doctrine applies depends upon the circumstances of each case.’ [Citation.] [¶] “‘The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.’” [Citations.] [¶] . . . [¶] ‘Laches implies that the plaintiff should have done something earlier.’ [Citation.] Whether the plaintiff should have acted sooner depends on the circumstances of the particular case.” (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1417-1418.)

The question of whether or not wife is guilty of laches is a question of fact for the trial court. Because there is no statement of decision,<sup>9</sup> we must infer that the trial court decided the issue in favor of the children as the prevailing parties and our review is limited to determining whether there is substantial evidence to support that implied finding. (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928.) Applying this standard, we conclude the record supports the trial court's implied finding that laches was established. From 1977 through February 13, 2006, when husband quitclaimed his interest in the real property to the children, wife never sought to enforce the interlocutory judgment. In fact, even this action does not seek enforcement of the judgment, but rather to set aside the quitclaim deed and quiet title to the real property. Thus, to date, wife has not brought any action to enforce the judgment. However, delay alone is insufficient to support a finding of laches. There must be both unreasonable delay and prejudice. (*Nicolopoulos v. Superior Court* (2003) 106 Cal.App.4th 304, 312.) Given the fact that wife has yet to seek any action to enforce the judgment, unreasonable delay is clearly present.

As to prejudice, the facts that husband's interest in the real property was transferred to the children in 2006 and that he is now deceased constitute evidence of prejudice. Thus, we conclude that the judgment, long since final, cannot now be enforced

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<sup>9</sup> Although the trial court expressed its tentative thought that the limitation period was 10 years ("As far as an action to enforce the order of the court, I think that has expired. I think an action on an order of the court after ten years cannot be brought. It's essentially a statute of limitations. As such . . . [wife] is precluded from bringing any action at this time"), this thought was never conveyed in the judgment.

against the children to affect the status of the parties or allocation of property rights. The more than 30-year delay in taking any action is profoundly unreasonable on its face, and prejudicial to both husband and the children. As such, the judgment awarding husband's interest in the real property to wife is unenforceable due to wife's lack of diligence.

### III. DISPOSITION

The judgment is affirmed. Costs are awarded to respondents.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.