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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re the Marriage of FAITH LEE  
CLEVINGER and MITCHELL DEAN  
CALLAWAY.

FAITH LEE CLEVINGER,

Respondent,

v.

MITCHELL DEAN CALLAWAY,

Appellant.

E059747

(Super.Ct.No. SBFSS86449)

OPINION

APPEAL from the Superior Court of San Bernardino County. Deborah A. Daniel, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Valerie Ross and Valerie Ross for Appellant.

No appearance for Respondent.

Respondent Faith Lee Clevinger (wife) sought and later obtained a writ of execution in the amount of \$150,000, plus \$79,274 in interest, to enforce the equalization payment contained in her 2008 judgment of dissolution of marriage to appellant Mitchell

Dean Callaway (husband). Husband filed a motion to recall and quash the writ of execution. The trial court denied husband's motion and he appeals, contending the equalization payment in the judgment is not a money judgment subject to a writ of execution. We disagree and affirm.

## I. PROCEDURAL BACKGROUND AND FACTS

Following seven years of marriage to husband, wife petitioned for dissolution on May 13, 2005. On October 29, 2007, the parties stipulated to a distribution of marital assets and a judgment of dissolution, which was not filed with the court until February 15, 2008. Pursuant to the judgment, husband was ordered to pay wife an equalization sum in the amount of \$150,000 on or before December 29, 2007, plus \$4,500 representing spousal support arrears. Husband was to refinance specific property, and wife would be paid directly from escrow. The court retained jurisdiction to make further orders necessary to ensure payment of the total sum of \$154,500 to wife, "including the sale of said property." When husband failed to pay the \$154,000 to wife, on January 16, 2008, wife sought to enforce the judgment by having the court order the property listed and sold.

On July 31, 2008, husband filed a motion to set aside the portion of the judgment that required him to pay an equalization sum of \$150,000.00. He claimed that he was unable to refinance the property and was unable to sell it under the present market conditions without realizing a substantial loss. Husband complained that if he is forced to sell the property in order to pay wife \$150,000, he will lose the entire benefit of the bargain. Thus, alleging a unilateral mistake on his part, husband sought a new order that

would set aside the payment of \$150,000 to wife, and in its place, provide that the net proceeds from the sale of the property be divided equally. Wife filed her response on September 11, 2008. She challenged husband's claims and argued that her decision to accept the \$150,000 equalization payment and dismiss her contempt action against husband for failing to pay support was not easy. According to the "Propertizer" prepared by her attorney, the equalization payment for her was \$210,000.000. However, she agreed to accept \$150,000.00 because she did not have the necessary resources to continue carrying the cost of the litigation. On December 1, 2008, the trial court denied husband's motion.

On April 18, 2013, wife filed a declaration for accrued interest and sought an order for issuance of writ of execution/abstract of judgment. On April 22, 2013, an abstract of judgment was issued. Husband moved to quash the writ of execution on the ground that "the order at issue is not a money judgment." The trial court disagreed and denied husband's motion to quash.

## II. DISCUSSION

Husband contends the equalization payment that he was ordered to pay out of the proceeds from the refinance or sale of the community property is not a money judgment subject to a writ of execution. Rather, he claims that it was merely "a community property division order," subject to contempt proceedings. As such, he argues the trial court possessed the inherent equitable power to recall or quash the improperly issued writ of execution.

In support of his contentions, husband cites several cases involving orders dividing community property. (See *Verner v. Verner* (1978) 77 Cal.App.3d 718, 729-730 [contempt proceeding is an available remedy for enforcement of order dividing community property]; *In re Marriage of Fithian* (1977) 74 Cal.App.3d 397, 405-406 [Fourth Dist., Div. Two] [when a “husband has wrongfully withheld the retirement pay funds belonging to wife, he is a trustee of those funds and subject to the remedies against unfaithful trustees. [¶] . . . husband’s obligation under [an order for deposit in court] . . . may properly be enforced by contempt”]; and *In re Marriage of Thomas* (1984) 156 Cal.App.3d 631, 635, 637 [husband guilty of contempt for intentionally refusing to pay former wife monthly portions of his military retirement as ordered by a final judgment of dissolution].) Husband’s reliance on these cases is misplaced. The judgment at issue here was not an order dividing community property; such division happened previously and separately. Rather, it was an order for husband to pay wife a certain sum of money to equalize the division.

The order at issue required husband to pay wife the sum of \$150,000 on or before December 29, 2007. As such, wife’s award is a money judgment, which bears interest at the legal rate from the date upon which it was due and payable. (*In re Marriage of Pollard* (1988) 204 Cal.App.3d 1380, 1383 [“A money judgment is defined as that part of a judgment requiring the payment of money. [Citation.] Interest commences to accrue on a money judgment on the date it is entered. [Citation.]”].) Interest is proper because husband has had the beneficial use of wife’s share of the community property since 2007 while she has been deprived of the use of her money award. (*Id.* at p. 1384.) The change

in economic conditions is irrelevant. Otherwise, under husband's interpretation, the value of wife's award over the years could be eroded, rendering wife's award illusory and permitting husband effectively to acquire wife's community share without compensation.

### III. DISPOSITION

The judgment is affirmed. The parties shall each bear their own costs on appeal.<sup>1</sup>

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

RICHLI

J.

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<sup>1</sup> Although wife has prevailed on the merits in this appeal, she did so despite failing to file a respondent's brief. We decline, therefore, to award her costs. (California Rules of Court, rule 8.278, subd. (a)(5).)