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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re the Marriage of JOSEPH and  
TERESA PEREZ.

JOSEPH PEREZ,

Respondent,

v.

TERESA PEREZ,

Appellant.

E062440

(Super.Ct.No. IND1102186)

OPINION

APPEAL from the Superior Court of Riverside County. Gregory J. Olson,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

La Quinta Law Group and Timothy L. Ewanyshyn for Appellant.

Joseph Perez, in pro. per, for Respondent.

Joseph Perez and Teresa Perez were married in April 2003. In December 2011,  
they separated, and Joseph filed this divorce proceeding. After a trial, the trial court

entered judgment dissolving the parties' marriage, identifying their separate and community property, and dividing the community property.

Teresa appeals. She challenges the trial court's refusal to hold Joseph in contempt for violating an interim attorney fee order. We will conclude that this refusal is not appealable.

Teresa also challenges the trial court's findings regarding the house that Joseph owned before marriage, Joseph's 401(k) retirement account, Joseph's Fidelity Investments account, the insurance proceeds from a totaled vehicle, Joseph's payment of community expenses after separation, and attorney fees. Finding no error, we will affirm.

## I

### REFUSAL TO HOLD JOSEPH IN CONTEMPT FOR FAILURE TO PAY ATTORNEY FEES

Teresa contends that the trial court erred by refusing to hold Joseph in contempt for his failure to comply with an interim order to pay her attorney fees.

#### A. *Additional Factual and Procedural Background.*

The trial court entered an interim order directing Joseph to pay \$4,000 in attorney fees. Thereafter, Teresa changed attorneys.

Some months later, Teresa filed an OSC, seeking to have Joseph held in contempt for failure to pay the fees. Joseph filed a demurrer to the OSC. In support of the demurrer, he introduced evidence that Teresa's former attorney had agreed to accept \$3,000 as full payment. Joseph had written a check for \$3,000 and had turned it over to

his own attorney. Meanwhile, however, Teresa’s former attorney had been arrested, so he never picked up the check. Joseph argued that Teresa’s former attorney was the real party in interest, not Teresa. Alternatively, he also argued that the fee order was too uncertain or ambiguous to be enforced.

After hearing argument, the trial court sustained the demurrer and dismissed the contempt proceeding. It ruled, in part, that the fees were payable to Teresa’s former attorney, not to Teresa.

B. *Appealability.*

Preliminarily, Joseph argues that Teresa failed to file a notice of appeal from the trial court’s order. He points out that she did not check the box on her notice of appeal that would have indicated that she was appealing from the order dismissing the contempt proceeding.

We do perceive an issue as to appealability, but it is more fundamental than a mere failure to check the correct box.

“Contempt judgments (both judgments holding a party in contempt and those refusing to hold a party in contempt) . . . are *not* appealable. [Citations.]” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 2:29, pp. 2-22—2-23.) “This is not to say that contempt judgments are immune from appellate review. But the *only* method of obtaining review is by petition for extraordinary writ (habeas corpus, certiorari or prohibition). [Citations.]” (*Id.*, at ¶ 2:30, p. 2-23.) A

contempt judgment is not reviewable at the conclusion of the underlying action. (*Imuta v. Nakano* (1991) 233 Cal.App.3d 1570, 1584, fn. 18; cf. Code Civ. Proc., § 906.)

Teresa did not file a timely writ petition. Accordingly, we cannot review the order dismissing the contempt proceeding.

## II

### FINDING THAT THE MARITAL RESIDENCE WAS JOSEPH'S SEPARATE PROPERTY

Teresa contends that the trial court erred by finding that the marital residence was Joseph's separate property.

#### A. *Additional Factual and Procedural Background.*

Before the marriage, Joseph bought a house in Indio. The total purchase price was \$288,000. He paid \$28,000 down and took out a loan for \$258,000.<sup>1</sup>

During the marriage, the parties lived in the house and made mortgage payments from community funds.

In 2005, 2007, and 2010, Joseph took equity out of the house, twice by refinancing it and once by taking out a home equity loan. The proceeds were used to pay community expenses.

As of the date of separation, the outstanding balance of the loan was approximately \$258,000.<sup>2</sup>

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<sup>1</sup> This adds up to \$286,000, rather than \$288,000. The record does not explain the \$2,000 discrepancy, but it is not material.

At the time of trial, the value of the house was either \$290,000 (according to Joseph) or \$325,000 (according to Teresa’s expert witness).

The trial court ruled: “[T]he residence was purchased by [Joseph] before the marriage and is his separate property. The community did make payments during the marriage, but the house was refinanced multiple times to pay expenses for the benefit of the community that resulted in no change in the mortgage balance owed from the time of marriage to the time of separation. . . . [T]he refinancing . . . did not change the nature of the property from a separate to a community interest.”

B. *Discussion.*

Teresa argues that she had a community property interest in the house because community property was used to make the mortgage payments during the marriage.

“When community property is used to reduce the principal balance of a mortgage on one spouse’s separate property, the community acquires a pro tanto interest in the property. [Citations.] This well-established principle is known as “the *Moore/Marsden* rule.” [Citations.]” (*In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1287.)

The “separate property percentage interest is determined by crediting the separate property with the down payments and the full amount of the loan, less *the amount by*

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[footnote continued from previous page]

<sup>2</sup> There was also evidence that the outstanding loan balance was somewhat lower — approximately \$247,134.22. However, “[i]n reviewing evidence on appeal, all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences must be indulged in order to uphold the trial court’s finding. [Citation.]” (*In re Marriage of Hill & Dittmer* (2011) 202 Cal.App.4th 1046, 1051.)

*which the community property payments reduced the principal balance of the loan . . . .*

This sum is divided by the purchase price for the separate property percentage share . . . .

The community property percentage interest is found by dividing *the community property payments on the loan principal* by the purchase price . . . .” (*In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 437, italics added.)

Here, the trial court reasoned that, while the community property payments did reduce the balance temporarily, the community made negative “payments” when the property was refinanced and the proceeds were used to pay community expenses; thus, over the course of the marriage as a whole, the community property payments did not reduce the principal balance.

This reasoning seems sound; certainly Teresa does not identify anything wrong with it. She does argue that there is no evidence that the proceeds of the various refinancings were used to pay community expenses. However, Joseph testified to this, and there was no contradictory evidence. “Substantial evidence to sustain a finding may consist of testimony of a party or other single witness. [Citation.]” (*In re Marriage of Kahan* (1985) 174 Cal.App.3d 63, 68.)

We therefore conclude that the trial court did not err by ruling that the house remained Joseph’s separate property.

### III

#### FINDING REGARDING THE COMMUNITY PROPERTY INTEREST

##### IN JOSEPH'S 401(K)

Teresa contends that the trial court erred in calculating the community property interest in Joseph's 401(k).

A. *Additional Factual and Procedural Background.*

Joseph had a 401(k) through his employer, the Kroger Co. The account was established before the marriage. It was vested, but Joseph could not withdraw funds from it without a penalty until he was 59 1/2.

On the date of marriage, the 401(k) was worth \$121,963.72. At that time, it was invested in two particular mutual funds, plus Kroger stock and cash. During the marriage, Joseph contributed \$59,986 to the 401(k). On the date of separation, the 401(k) was worth \$428,466.70. At that point, it was invested in two different mutual funds, as well as Kroger stock and cash.

The trial court ruled: "The 401k account was valued at \$120,000.00 at [the] time of marriage and \$56,000.00 was added during the marriage. At the time of the separation, the account value was \$428,466.00. It is clear that the added value of \$250,466.00 includes a community property interest. The court takes note that [Joseph] continued to buy and sell stock within the 401k account, and that the \$250,000.00 value appreciation during the marriage did not occur without his intervention. The court finds that the community property interest is roughly one third the added value of the

investments during the marriage.” It concluded: “[T]he community interest in [Joseph’s] 401k is \$83,489.00.<sup>3</sup> The Court awards [Teresa] \$41,744.50 as her separate property interest in [Joseph]’s 401k account.”

B. *Discussion.*

“[N]o particular formula need be adopted in allocating retirement benefits between the separate and community estates. ‘[T]he court has very broad discretion to fashion an apportionment of interests that is equitable under the circumstances.’ [Citations.] [¶]

The apportionment method employed, however, must be reasonable and fairly representative of the relative community and separate contributions. [Citations.]”

(Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2015)

¶ 8:1114, pp. 8-362-8-363, italics omitted.)

“Generally, all forms of income produced by an asset (business profits, interest from investments, proceeds from sale or hypothecation, etc.) take on the character of the property from which they flow. Simply stated, ‘rents, issues and profits’ are community property if derived from community assets and separate property if derived from separate assets. [Citations.]” (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*,

¶ 8:330, p. 8-126.)

“The fruits of a spouse’s expenditure of time, talent and labor during marriage and before separation are community property, while any intrinsic increase in separate

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<sup>3</sup> I.e., one-third of the \$250,466.00 gain.

property is separate property. Thus, where a spouse has devoted time, talent and labor to a separate property asset during marriage, profits derived therefrom must be apportioned to the community and profits derived from the separate capital are apportioned to separate property. [Citations.]” (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 8:336, p. 8-128.)

Here, the trial court seems to have reasoned that the community property contribution (\$59,986) was approximately one-third of the separate property contribution (\$121,964.72). Accordingly, it found that one-third of the appreciation during the marriage (one-third of \$250,466, or \$83,489) was community.

Teresa asserts that the trial court made two related errors: (1) it erroneously found “that the increase in value was largely due to [Joseph] buying and selling stock,” and (2) it erroneously treated these efforts by Joseph as separate property rather than as community property. The problem with this argument is that the trial court did not give Joseph any premium for his efforts. It apportioned the 401(k) based strictly on the dollar amounts of the respective separate and community property contributions to the account.

Admittedly, the trial court did state that the increase in value “did not occur without [Joseph’s] intervention.” However, this double negative falls short of a finding that Joseph’s efforts “largely” caused the increase. Moreover, because the trial court apportioned the 401(k) based strictly on the separate and community dollar contributions, without any adjustment for Joseph’s efforts, it seems to have found that those efforts

were *not* material. Precisely because, as Teresa contends, there was insufficient evidence that Joseph caused the increase, it did not err.

Teresa also seems to argue that, because the asset mix in the account changed between 2003 and 2011, all of the assets that were new in 2011 were necessarily community. Not so. It is apparent that Joseph simply reallocated the account as between stock, mutual funds, and cash. Thus, he traced it back adequately to its original separate and community sources.

#### IV

#### FINDING THAT JOSEPH DID NOT BREACH ANY FIDUCIARY DUTY

Teresa contends that the trial court erred by finding that Joseph did not breach any fiduciary duty.

“[S]pouses occupy a confidential and fiduciary relationship with each other. [Citation.] The nature of this relationship ‘imposes a duty of the highest good faith and fair dealing’ on each spouse as to any interspousal transaction. [Citation.] ‘If one spouse secures an advantage from the transaction, a statutory presumption arises . . . that the advantaged spouse exercised undue influence and the transaction will be set aside.’ [Citations.]” (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 343-344.)

Teresa identifies three asserted breaches:

1. Having Teresa deed her interest in the marital residence to Joseph.
2. Selling stock from the 401(k).
3. Depositing a check for the insurance proceeds of a totaled vehicle.

We discuss these seriatim.

A. *Deed to the Marital Residence.*

1. *Additional factual and procedural background.*

As already discussed (see part II, *ante*), the trial court found that the marital residence was Joseph's separate property.

Joseph testified that in 2005, when he refinanced the house, the lender required him to have Teresa deed any interest that she might have in the house to him.

Accordingly, Teresa signed such a deed.

Teresa testified that, a month or two before the date of the deed, she was seriously injured in a car accident. She also testified that she did not remember signing the deed.

In her post-trial brief, Teresa claimed that having her sign the deed was a breach of fiduciary duty. The trial court rejected this claim, finding that "the refinancing process . . . did not result in a breach of fiduciary duty on [the] part of [Joseph] . . . ."

2. *Discussion.*

We will assume, without deciding, that a spouse may have fiduciary duties to the other spouse even when dealing with his or her own separate property. Even so assuming, however, Teresa had no interest in the marital residence. The lender required the deed as part of the refinance, just to make sure that Teresa could not claim any interest in the property. Thus, Joseph did not obtain any unfair advantage by having her sign the deed.

B. *Sale of Stock from the Fidelity Account.*

1. *Additional factual and procedural background.*

Before the marriage, Joseph opened an account with Fidelity Investments. He did not add any funds to it during the marriage. After the separation, he sold some of the stock in the Fidelity account for \$6,134.88. He used the money to pay bills — “to survive.”

In her post-trial brief, Teresa claimed that this sale was a violation of the automatic temporary restraining order (ATRO) and a breach of fiduciary duty. The trial court rejected this claim, finding that “[Joseph]’s Fidelity Investment[s] account was started before the marriage and is his separate property. His selling of stock after separation to pay for living expenses and attorney fees does not arise to an ATRO breach of fiduciary duty.”

2. *Discussion.*

In this appeal, Teresa does not claim that the sale of stock was an ATRO violation. She does claim that it was a breach of fiduciary duty, but she never explains how or why. Accordingly, she has forfeited this contention. (*Carr v. Rosien* (2015) 238 Cal.App.4th 845, 856, fn. 6.)

Teresa also claims that Joseph failed to introduce any “documentary evidence . . . that any of th[e] value [in the Fidelity account] was in existence as of [the] date of marriage,” and hence, the trial court should have found that it was entirely community.

However, Joseph's testimony that he funded the Fidelity account before the marriage was sufficient. (See *In re Marriage of Kahan, supra*, 174 Cal.App.3d at p. 68.)

C. *Totaled Vehicle.*

1. *Additional factual and procedural background.*

During the marriage, in 2010, Joseph bought a new Chevy Cobalt, to be used by his children from a previous marriage. It was in Joseph's name. The insurance was also in his name.

After the separation, the car was totaled. The insurance company gave Joseph a check for \$13,826. It was made payable jointly to Joseph and Teresa. Joseph deposited the check in his checking account. Somehow, however, Teresa got a hold put on the check, so it did not clear. The insurance company reissued the check, but again a hold was put on it, so it did not clear.

In her post-trial brief, Teresa claimed that the deposit was a breach of fiduciary duty. The trial court's ruling did not expressly address this claim; however, it did not give Teresa any remedy for the asserted breach.

2. *Discussion.*

The evidence indicated that Joseph never actually received any of the insurance proceeds; both checks never cleared. Thus, Joseph received no unfair advantage and the trial court did not err by declining to award Teresa any portion of the proceeds. (See Fam. Code, § 1101, subds. (g) & (h) [prescribing remedies for breach of fiduciary duty based on value of "asset . . . transferred in breach of the fiduciary duty"].)

## V

### REIMBURSEMENT ORDER

In a two-sentence argument, Teresa contends that the trial court erred by “order[ing] [her] to reimburse [Joseph] . . . \$2,652.00 for community expenses paid by him after separation, even though there was not substantial evidence for this finding.”

She has forfeited this contention by failing to support it with reasoned argument and citation of authority. (*Carr v. Rosien, supra*, 238 Cal.App.4th at p. 856, fn. 6.) Separately and alternatively, she has also forfeited it by failing to discuss any of the evidence bearing on this issue. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881-882.)

## VI

### REFUSAL TO AWARD ATTORNEY FEES AFTER TRIAL

Teresa contends that the trial court erred by refusing to award attorney fees at the close of trial.

#### A. *Additional Factual and Procedural Background.*

Before trial, Teresa filed an order to show cause (OSC) in which she sought a further award of attorney fees. On the date set for the hearing on the OSC, the trial court ordered: “Issues to be addressed at trial.”

In her trial brief, Teresa indicated that she was seeking attorney fees. Joseph, in his trial brief, indicated that he opposed her request. At trial, however, neither of the parties presented any evidence regarding attorney fees. After both sides rested, the trial

court even observed, “I haven’t heard anything about attorney’s fees . . . .” Neither side asked to reopen.

Later, the trial court ruled, “No evidence was presented to the Court during trial to award attorney fees. . . . [E]ach party will pay their own attorney fees.”

B. *Discussion.*

Teresa argues that her OSC papers “included the requisite information for an attorney fee award . . . .” The trial court, however, had ordered that the issue be determined at trial. And at trial, Teresa was required to introduce admissible, nonhearsay evidence to support her claim. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1354-1357.) She did not do so.

If only out of an excess of caution, we also note that Teresa’s OSC papers did not actually include sufficient evidence. She stated, under penalty of perjury, that she was seeking \$2,000 in fees, and that she had incurred a total of \$14,452 in fees since the beginning of the representation. She did not supply any information about her attorney’s billing rate, his experience, the nature of the litigation, or why the fees were just, necessary, and reasonable, even though this information is required by court rule. (Cal. Rules of Court, rule 5.427(b)(2).)<sup>4</sup>

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<sup>4</sup> At oral argument, Teresa’s counsel argued that some of this information was actually before the trial court. He cited a declaration that he had filed in support of a previous request for attorney fees; however, it was never introduced into evidence in connection with the particular request for attorney fees that is at issue. He also cited Teresa’s most recent income and expense declaration and noted that, under Local Rule 5153 of the Riverside Superior Court, she was required to serve an updated income and expense declaration at least 10 days before trial. This does not mean, however, that it

[footnote continued on next page]

We therefore conclude that the trial court did not err by declining to award attorney fees.

VII  
DISPOSITION

The judgment is affirmed. Joseph is awarded costs on appeal against Teresa.

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RAMIREZ  
P. J.

We concur:

MILLER  
J.

CODRINGTON  
J.

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*[footnote continued from previous page]*

was actually in evidence. Teresa did not formally introduce it and did nothing, even informally, to draw the trial court's attention to it. In any event, while it did reveal her attorney's billing rate, it still did not reflect his experience, the nature of the litigation, or why the fees were reasonable.