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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of SARA A. and
DOUGLAS R. McCLINTOCK.

SARA A. McCLINTOCK,

Appellant,

v.

DOUGLAS R. McCLINTOCK,

Respondent.

G044197

(Super. Ct. No. 06D010000)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Michael J. Naughton, Judge. Affirmed. Motion for judicial notice. Motion granted.

Sara A. McClintock, in pro. per., for Appellant.

Douglas R. McClintock, in pro. per., for Respondent.

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INTRODUCTION

Ultimately, this is a simple case. The trial court inadvertently signed an order which materially modified a family law judgment distributing certain community retirement accounts. The order gave the Wife a larger share of those accounts. The judgment had, by contrast, provided for an equal distribution. But the judgment had never been challenged in the trial court or appealed. It was final. The subsequent order giving the Wife the larger share was void. Because it was void, the trial court could set it aside at any time, which is what it did. In fact, in setting aside the order, the trial judge made a point that he never intended to sign it in the first place.

This is the *Wife's* appeal from the order vacating the order which awarded her the unequal share of certain community retirement accounts. Because the original order giving her a disproportionately large portion of the retirement accounts was never final, we affirm the trial judge's decision to vacate that order.

While the parties are self-represented, each is a lawyer. We refer to the parties (respectively, appellant Sara McClintock and respondent Douglas McClintock) by their generic roles as Wife and Husband. All undesignated statutory references are to the Family Code.

FACTS

1. The Two Judgments and the One Order Leading to this Appeal

a. the July 1, 2008 judgment

Husband and Wife's dissolution case was called for trial on February 13, 2008. That day Husband's attorney told the court Husband had checked himself into a hospital in Massachusetts for treatment of severe depression. The court refused to grant a continuance without proof of Husband's claimed mental disability. The case was trailed for a day. The next day Husband's attorney presented a letter faxed by a physician. The trial judge stated the letter convinced him that Husband was unable "to act on his own

behalf.” The court appointed Michelle West as Husband’s guardian ad litem (depending on the context, “West” or “the guardian”). It continued trial for three months to allow West to become familiar with the case.

West and Husband’s counsel negotiated a stipulated judgment on reserved issues with Wife’s counsel. Paragraph 11 of the stipulated judgment enumerated a number of retirement accounts. It provided that each account was to be “divided equally between the parties.” The judgment was filed July 1, 2008. The notice of entry of the July 1 judgment was served on Husband’s attorney July 1, 2008. Sixty days thereafter expired on September 30.

b. the October 1, 2008 judgment

All the remaining issues were negotiated and settled in September. The settlement resulted in another judgment “on reserved issues.” This one was filed October 1, 2008. As regards the equal division of the various retirement accounts, the October 1, 2008 judgment provided that all the terms of the July 1, 2008 judgment “to the extent not modified by the terms” of the October 1, 2008 judgment were to “remain in full force and effect.” A review of the October 1, 2008 judgment reveals that no provision affected the equal division of the retirement accounts. Notice of entry of this reserved judgment of October 1, 2008, was served October 15, 2008.

c. the October 6, 2008 order

By late September 2008 the stock market was generally in severe decline. Wife was worried that Husband had done nothing to actually divide the various retirement accounts. Wife sought an order to force Husband to make the division. Wife’s counsel gave ex parte written notice on September 29, 2008, to the guardian and Husband’s attorney which resulted in shortening time for the hearing on the order. The notice said: “Considering the state of the stock market, and considering Mr.

McClintock's mental status, Ms. McClintock stands to suffer irreparable harm if she does not obtain her portion of these assets *immediately*. [¶] . . . I will be appearing with an ex parte application . . . to obtain an order that the above accounts *actually be divided*, and that Ms. McClintock receive her portion of said accounts prior to Wednesday, October 1, 2008 at 5:00 p.m." (Italics added.)

Likewise, a supplemental declaration filed by her attorney argued that the guardian had "little control" over Husband. Therefore "the court must make the orders requested in order to allow the assets to be divided pursuant to the terms of the Judgment."

The proposed order submitted with the moving papers, however, did not simply require "the assets to be divided pursuant to the terms of the Judgment" or that they "actually" be divided. Rather, the order sought to make Husband transfer to Wife 50 percent of the *value* of the various accounts "as of July 1, 2008."

The hearing on Wife's request occurred on October 6, 2008. The record in this appeal contains no indication that the guardian or Husband's attorney filed any opposition papers or even presented oral argument against the request. The minute order reflects that the parties merely submitted "on the pleadings."

The transcript of the October 6, 2008 hearing reveals that neither Husband's guardian nor his attorney mentioned anything about the change from "equal division" to 50 percent of the value of the various accounts "as of July 1, 2008." Both the guardian and Husband's attorney were focused on the need to divide the accounts without Husband's signature. Husband's attorney would later admit that Husband had not "had an adequate defense to the application."

And, at the hearing, Wife's counsel gave no indication that the order contemplated any substantive change in the July 1, 2008 judgment. (Or the October 1, 2008 judgment as it incorporated the July 1, 2008 judgment.) Just the opposite in fact. Wife's attorney told the court: "My client can't go back and redo the judgment."

The trial court granted the motion. The resulting October 6, 2008 order (hereinafter, the “October 6 order”) required Husband “or” West (as distinct from Husband himself) to take all steps to transfer to Wife her 50 percent share “as of July 1, 2008” into the enumerated accounts. In fact, as to one of the accounts (a Janus IRA), the order explicitly required Husband to guarantee its value as of July 1, 2008. The order said: “To the extent that said IRA has decreased in value since July 1, 2008, [Husband] shall owe [Wife] further equalization” from certain funds held in trust.

d. attacks on the October 6 order

Husband quickly realized the implications of the October 6 order, even if his attorney or guardian hadn’t. Within the week he wrote a letter to his guardian. He complained he hadn’t even been *told* of the hearing on the motion by his guardian or his attorney. In November 2008, he filed a motion in his own name seeking to vacate the October 6 order. His points and authorities were quite clear that the change to valuation “as of July 1” would result in a windfall to Wife at his expense. He asserted that he had not even been asked by Wife, her counsel, his guardian, or his own attorney to divide the accounts since the July 1, 2008 judgment, though some accounts (six accounts with Ameriprise and one with Fidelity) had already been divided equally in the period July 1 through September 9.

Husband also filed a notice of appeal in his own name on December 2, 2008. The notice of appeal said it was from the October 1, 2008 judgment “and all interim orders.” The notice of appeal established docket number G041273 in this court.

Meanwhile, the hearing on the motion to vacate the October 6 order was set for December 12, 2008. On that day there was a stipulation that provided: (a) the motion to vacate was to be denied, but (b) the court on its own motion would permit Husband to file a motion to reconsider the October 6 order as long as it was on file on or before January 12, 2009. The appeal in docket number G041273 remained pending at the time.

Husband made the January 12, 2009 deadline in the trial court. That day (again in his own name), he filed a motion to set aside the October 6 order. The motion included the declaration of Husband's now former attorney to the effect that the attorney had indeed "failed to notify" Husband of the motion which resulted in the October 6 order. The declaration also admitted that Husband had not had "an adequate defense" to that order.

Husband's motion, however, would not be heard for another year. In fact, in addition to the December 2, 2008 notice of appeal, Husband would file another notice of appeal in April 2009. That notice of appeal became this court's docket number G041885.

Both appeals were dismissed by an order of this court in September 2009 because the guardianship was still in effect. The order said Husband "lacks standing to appeal." The remittitur for both cases came down in November 2009.

With the return of the remittitur, the trial court finally heard Husband's motion to vacate the October 6 order. Wife's opposition focused mainly on the lack of standing theory on which this court had dismissed the two earlier appeals.

The hearing lasted several days. Testimony, including that of West, was taken. The trial court made the decision that "Ms. West will be relieved" and Husband's motion would be granted as soon as "proceedings are over."

West remained the guardian into February 2010. She prepared a proposed order making the appropriate adjustments in the division of the retirement accounts in light of the court's indicated return to an equal division, rather than Wife receiving 50 percent of the value "as of July 1, 2008." Her proposed order was signed by Judge Michael J. Naughton and filed March 9, 2010.

In July 2010 the trial court considered the problem of attorney fees. While the attorney fee question is not otherwise at issue in this appeal the minute order would have, in passing, some insightful comments about the problem with the October 6 order.

Those comments bear quotation. Our quotation picks up the court's narrative where the court has just noted the several appellate matters which Husband had filed: "[Wife], in the meantime, submitted an order which this Court did not intend to make and inadvertently signed which made the [Husband] the guarantor of the values of all of the stocks and tax deferred accounts as of July of 2008. The Respondent recognized the problem, but had difficulty in resolving i[t] because the Court lost jurisdiction to correct the error while the case was on appeal. In legal procedure, this is a good example of being hoisted on one's own petard."

e. judicial notice

We grant Wife's request, filed December 5, 2011, to take judicial notice of various documents. These are:

(1) Husband's notice of appeal in number G041273, showing that he filed a notice of appeal on December 2, 2008.

(2) A proof of service showing that Wife's counsel served Husband's guardian and her counsel with a file-stamped copy of the October 6 order that very day.

(3) Husband's civil case information statement filed in number G041885, showing that the appeal in that case was directed against the October 6 order, with the notice of appeal filed in April 2009.

(4) A complaint, filed March 2011, and a second amended complaint, filed September 1, 2011, in a separate civil case, *McClintock v. West*, case number 30-2011-00457082. The action is by Husband against his now former guardian. In the second amended complaint, Husband alleges that his guardian "willfully failed" to file any opposition to the motion that resulted in the October 6 order. Husband also alleges that he demanded his guardian seek to vacate the October 6 order including filing an appeal of it.

On our own motion we have also taken judicial notice of the motions to dismiss the appeals in docket numbers G041273 and G041885, i.e., our own files concerning this case (see Evid. Code § 452, subd. (d)). We also take judicial notice of the motion to consolidate those two appeals, and the respective oppositions to those motions.

DISCUSSION

Wife makes no argument in favor of the substance of the October 6 order. She does not argue it was equitable. She does not argue that the trial judge intended to make a change to the division of the retirement accounts. She does not argue even that Husband's guardian or attorney knew what they were doing when they offered no opposition to it. The case that she suggests legitimizes the order, *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987 (*Hokanson*), does no such thing. *Hokanson*, at most, stands for the proposition that if a judgment requires that a community asset be sold "for the best price reasonably obtainable," the party in possession *might* be liable for attorney fees which the other party incurs if the party in possession delays in setting a price at which the asset will be sold. (See *id.* at pp. 900, 992-994 [where wife, in possession of family house, insisted on listing house at above market price, wife's violation of fiduciary duty to other spouse required husband receive attorney fees for efforts to finally get house sold at market price].) *Hokanson* certainly does not stand for the proposition that a final (even if interlocutory) judgment providing for equal division of a community asset could be substantively changed after finality.

Rather, Wife argues: The October 6 order was not void, because the trial court still had jurisdiction over the subject matter and the parties. It was only voidable, because the order was "in excess" of its jurisdiction, i.e., the trial court had no power to act as it did. (See *Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1088 [generally addressing differences between void and voidable orders].) Since the October

6 order was only voidable, timely action had to be taken to set it aside. (See *Lee v. An* (2008) 168 Cal.App.4th 558, 565-566.) And since the guardian did not act to set the October 6 order aside within six months (see Code Civ. Proc., § 473), the trial court had no power to set aside the October 6 order at all.

The answer to Wife's argument is that the October 6 order is in fact void, not just voidable. The July 1, 2008 judgment which it substantively changed was, by October 1, final. Notice of entry of judgment of the July 1, 2008 division of the retirement accounts was served that very day. The equal division provision of that judgment has *never* been challenged in either the trial or appellate court.

Moreover, at least two statements by Wife estop her from claiming that the moving papers behind the October 6 order were in some way a timely challenge to the July 1, 2008 judgment: First, in her notice of motion, Wife asserted that the purpose of the October 6 order was to *implement* the July 1, 2008 division, as distinct from *alter* it. (The notice of motion said that its purpose was to have the retirement accounts "actually be divided," as distinct from valued as of July 1, 2008.) Second, at trial her attorney told the court that Wife was not seeking to "redo the judgment."

The July 1, 2008 judgment, in short, was final by October 1, 2008. That judgment did not expressly reserve jurisdiction to divide property at a later date. Because it was not challenged, it became "a final and conclusive adjudication of the property rights of the parties." (*In re Marriage of Brown* (1976) 15 Cal.3d 838, fn. 13 (*Brown*); *Decker v. Occidental Life Ins. Co.* (1969) 70 Cal.2d 842, 848 (*Decker*) ["Since in the divorce case the trial court had the power to, and did, make an immediate disposition of the subject property and since such disposition, not having been challenged by either of the parties by an appeal from the interlocutory decree, is now final and conclusive upon them, the questions whether the court erred in so doing and what rule of construction should be applicable to ambiguous interlocutory decrees, are not before us in this case."]); *In re Marriage of Farrell* (1985) 171 Cal.App.3d 695, 702 (*Farrell*) ["The division of

assets and liabilities cannot be modified after it has become final unless there is an explicit reservation of jurisdiction to do so.”].) Wife has no answer to what *Brown, Decker* and *Farrell* necessarily hold as a rule of decision about the finality of the July 1, 2008 judgment.

Thus under Wife’s own rationale, the October 6 order was void, as distinct from merely voidable. And a void order can be set aside any time. (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 661.)

DISPOSITION

The order of March 9, 2010 is affirmed. Husband shall recover his costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O’LEARY, P. J.

BEDSWORTH, J.