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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of KIM N. ANDREWS
and BARBARA SWARTZ-ANDREWS.

KIM N. ANDREWS,

Respondent,

v.

BARBARA SWARTZ,

Appellant.

G049946

(Super. Ct. No. 05D010183)

O P I N I O N

Appeal from postjudgment orders of the Superior Court of Orange County,
Clay M. Smith, Judge. Affirmed.

Barbara Swartz, in pro. per., for Appellant.

Law Offices of Jan Mark Dudman and Jan Mark Dudman for Respondent.

* * *

Barbara Swartz (Barbara)¹ appeals from two postjudgment orders, one denying her motion to delay disbursement of certain funds from a retirement account to respondent former husband Kim N. Andrews (Kim) and a second granting Kim's motion to order payment of his share of funds from another retirement account. She contends the court erred because both rulings allowed Kim to "double-collect" from those funds. She also asserts that the court wrongfully refused to accept additional information she offered at the hearing, thereby "threaten[ing] censorship." Further, she argues the court accepted an argument of Kim's lawyer, thereby "proffering [the lawyer her] attorney, against her will." Finally, she argues the court erred by failing to order Kim pay certain outstanding administrative fees allegedly owed as to these accounts. Finding no error, we affirm.

Barbara raises several additional issues concerning the judgment and prior proceedings. As we discuss below, Barbara did not timely appeal from the judgment or those other proceedings and we cannot consider those arguments.

FACTS AND PROCEDURAL HISTORY

The parties were married in July 1991. In September 2005 the parties separated and in October 2009, the dissolution judgment (Judgment) was filed.

The Judgment provided that an attorney the parties agreed upon was to draft QDRO's (qualified domestic relations order) for three delineated accounts, including a thrift savings plan/VA account (TSP Account) and an E*Trade individual retirement account (E*Trade Account), with each party paying half the fees. The court reserved jurisdiction over the QDRO's. The parties ultimately retained Rand Borresen (Borresen) as the QDRO attorney.

Barbara was also ordered to pay to Kim an equalization payment of \$110,000, to be paid from any of three delineated accounts. The parties were awarded

¹ We refer to the parties by the first names for convenience and clarity, not out of any disrespect.

their respective community property interests in the three accounts. After the ordered payments were made, the balance of the three accounts was to be Barbara's separate property.

The Judgment noted Kim's attorney, Jan Mark Dudman (Dudman), held certain sums in his trust account for the benefit of both parties. He was authorized to make any of the payments set out in the Judgment from his trust account.

Borensen prepared a QDRO for the TSP Account, which the court signed. Subsequently, when the TSP Account would not accept that QDRO and a first amended QDRO, a second amended QDRO for the TSP Account was filed after being signed by the parties and their lawyers. This ordered payment to Kim of his share from the TSP Account.

A QDRO for the E*Trade Account was also filed after being signed by the parties and the lawyers. This ordered payment of Kim's share out of the E*Trade Account.

At some undesignated time, Barbara filed a chapter 13 bankruptcy.

Thereafter Barbara filed a motion to block payment of Kim's share of the TSP Account (TSP Motion). The basis of that motion was her belief the amount to be disbursed to Kim had not been properly calculated. As detailed in the discussion below, in January 2014 the court denied the TSP Motion and ordered the funds released immediately.

In January 2014 Kim filed a motion to have his share of the E*Trade Account distributed to him (E*Trade Motion). He asked the court order Barbara to cooperate by signing a joint letter to the plan to explain the distribution. As explained in the discussion, the court granted the E*Trade Motion.

Barbara filed a notice of appeal of the orders on the TSP Motion and the E*Trade Motion. She set out in detail over three pages the reasons for her appeal, mainly reiterating the arguments she made at the hearings on the motions.

Additional facts are set out in the discussion.

DISCUSSION

1. Violation of Court Rules

As a preliminary matter, we must note several deficiencies in Barbara's briefs. California Rules of Court, rule 8.204(a)(2)(C) (all further citations to rules will be to the California Rules of Court) requires Barbara to "[p]rovide a summary of the significant facts" rather than merely evidence favorable to her position.

"A party who challenges the sufficiency of the evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient. [Citation.]' [Citation.] '[W]hen an appellant urges the insufficiency of the evidence to support the findings it is [her] duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. [She] cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked [her] responsibility in this respect.' [Citation.]" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409, italics omitted.)

If an appellant fails to fulfill this burden we may consider the argument forfeited. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) And we are "entitled to indulge in a presumption that the evidence sustains the determination of the trial court.' [Citations.]" (*Estate of Hilton* (1996) 44 Cal.App.4th 890, 922.)

Further, rule 8.204(a)(1)(B) requires every issue raised to have a separate heading and be supported by argument and legal authority if available. Although there are headings in Barbara's briefs, arguments often are mixed indiscriminately throughout, many repeated a number of times under various headings, significantly hindering our review.

Rule 8.204(a)(1)(C) requires a brief to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter

appears.” Most of Barbara’s arguments rely on facts for which no record reference is given. And of the few references she does include, many are incorrect or refer to documents not included in the record. Further, Barbara includes a substantial amount of alleged testimony and rulings that have no basis in the record.

Failure to comply with the court rules is a ground for forfeiture of claims. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 53.)

Nevertheless, to the extent we understand the claims and they are otherwise proper, we will consider them. If Barbara intended to make any other arguments or claims they are forfeited for lack of separate headings, authority, or reasoned legal argument. (*Provost v. Regents of University of California, supra*, 201 Cal.App.4th at p. 1294 [“we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument”].)

Barbara is held to these requirements even though she is representing herself. “Pro. per. litigants are held to the same standards as attorneys. [Citations.]” (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.)

One of many of Barbara’s arguments is that the family law court violated her constitutional rights by not affording her special rights as a pro. per. litigant and by demonstrating “bias per se.”

As support she cites *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, which she claims stands for the proposition the Santa Ana superior court was “unduly prejudicing the interests of pro se divorce litigants.” *Alan S.* does not support her position. It dealt with whether a court, given the particular facts of the case, was required to take live testimony in a family law writ proceeding. (*Id.* at p. 258.) It had nothing to do with reassessing the parties’ financial positions, including the wherewithal to retain counsel.

Likewise *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, on which Barbara also relies, does not help her cause. She claims *Elkins* required the court to reassess her financial status relative to her ability to retain a lawyer. To the contrary, *Elkins* struck down a local rule prohibiting live testimony in family law trials. (*Id.* at p. 1356.)

2. *Limited Issues on Appeal*

In addition to the principal arguments on appeal regarding the TSP and E*Trade motions as discussed below, Barbara raises a laundry list of other claims.² Essentially, she complains about every decision that did not go her way. Many, as best we can determine, arise out of the judgment or hearings well prior to the decisions on the motions before us.

For example, she claims Dudman inserted in the handwritten settlement agreement provisions she had not agreed to. She also maintains the “draft judgment” was voidable because she never signed it and the court failed to ensure she knew what she signed. She makes very specific factual arguments as to why the court’s determination of the parties’ financial condition, valuation of her practice and the like were erroneous, maintaining she was “over-assessed” for spousal support, attorney fees, and equalization payments. Additionally, she asserts the court erred by failing to docket its order Dudman prepared the settlement agreement that was incorporated into the judgment.

She also contends Dudman positioned “himself as trustee over community assets and withdrawing funds without court orders,” filed frivolous litigation against her, failed to disclose conflicts of interest, and committed fraud, for which he must pay damages and sanctions.

² Most of these claims are not supported by record references nor within discrete headings. We are unable to understand if any of them relate to the two motions before us. For any that are, they are forfeited based on the violations of the court rules as discussed above.

Further, she argues the court was biased against her because it did not rule in her favor and failed to consider certain evidence. She maintains her constitutional rights were violated when, after one of her attorneys withdrew, the court did not ask if she needed time to retain another lawyer. Also, she was held responsible for malpractice committed by two of her former lawyers. And the court denied her the right to cross-examine Dudman based on statements he made regarding valuation of her practice.

These issues have not been timely raised. Barbara's motion to set aside the judgment was denied in April 2010. Her postjudgment order to show cause to modify spousal support was filed in July 2010 and, according to the reply brief, denied in April 2011.

To be timely, a notice of appeal generally must be filed, at the latest, 180 days after entry of judgment or an appealable order. (Rule 8.104(a)(1)(C), (e).) Thus, the above issues needed to be appealed years before the time the instant appeal was filed.

If a party does not timely appeal from a final judgment or appealable interim order, the ruling is res judicata and it may not be reviewed on a later appeal of another appealable order. (See *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 637-638.) That order or judgment becomes final and binding for all purposes, even if erroneous. "A court acts in excess of jurisdiction 'where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.'" (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 598.)

Barbara raises two arguments as to why we may consider these several claims, both of which we reject. First, she contends the judgment was interlocutory or interim. That is not the case. The judgment was final. If the court retained jurisdiction to ensure compliance with provisions of the judgment, that was the limit of its power. It

did not have the authority, under the guise of equity, to modify any provision of the judgment.

Likewise, we are not persuaded by Barbara's contention that, because the judgment was procured by extrinsic fraud, she may argue the issues in this appeal. Extrinsic fraud occurs where a party is deprived of the opportunity to present her claim or defense to the court, or in some manner fraudulently prevented from fully participating in the proceeding. (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 140.)

Barbara's motion to set aside the judgment was based on extrinsic fraud. There is no evidence she lacked or was denied the opportunity to file her motion to set aside the judgment or appear at the hearing. She had her day in court. The same is true with respect to the motion to modify spousal support. If she did not agree with the decisions, she had 180 days to appeal them. The time for doing so has long since passed.

*3. Challenges to Orders on TSP Motion and E*Trade Motion*

a. TSP Motion

In her documents in support of this motion to block payment of Kim's share of the TSP Account, Barbara stated she believed calculations of what was owed were incorrect. On the date of the hearing, she filed an opposition to Kim's response. As the trial court advised Barbara, that was not a timely filing.³

Barbara explained the lawyer that prepared the original request did not include "important facts" setting out the "real issues." That was her purpose in filing the reply. She contended her reply showed Kim was already being paid from the TSP Account through the bankruptcy court. She stated Kim had refused to withdraw his claim

³ The court did consider her late-filed declaration but did not consider the 14 "requests for relief" included in it since they should have been part of her original request. These requests ranged from keeping her address secret from Kim to an order Dudman repay her all the money he had been paid from the bankruptcy estate. Contrary to Barbara's argument the court did not refuse to file the documents. She has not shown it erred in failing to consider the entire declaration.

for payment in the bankruptcy court. She believed he was trying to be paid through both the bankruptcy court and the family law court. That was why she had filed the TSP Motion.

Kim's attorney advised the TSP Account was not included in the bankruptcy estate because it was exempt. The bankruptcy court had ordered payments for the equalization payment set out in the judgment. Kim made an offer of proof and testified that even after all payments made to date, Barbara still owed him money. If there were any overpayments, he would repay them immediately.

The court characterized Barbara's TSP Motion as misleading and "border[ing] on being deceitful." The motion said nothing about the bankruptcy proceeding or the possibility Kim had already been paid through the bankruptcy. The TSP Motion merely stated the calculations as to what Kim was due were inaccurate. The judge observed that "based upon what [Barbara had] told [him] this morning, there's not a word of truth in [the reply]." The court concluded that filing the TSP Motion "was merely a tactic to block the distribution," which she had successfully done.

It issued an order requiring the plan to immediately release Kim's share of the TSP Account. It further ordered that if Kim had been overpaid his share through the bankruptcy proceeding, he was to "forthwith" reimburse Barbara and such amounts; the court retained jurisdiction over this issue.

*b. E*Trade Motion*

In this motion, Kim asked the court to order Barbara to sign a joint letter of instructions to the plan as to how his share of the proceeds should be paid. At the hearing, Barbara again raised the issue of Kim's double payments, arguing he was being paid through the bankruptcy court and he had no basis for additional payment. She also challenged the language of the letter to be sent to E*Trade, claiming the instructions ordering the plan to sell shares to pay Kim his share was wrong. There was enough

money without a sale and Kim's purpose was to have her lose money. Therefore she would not agree to it.

The court granted the E*Trade Motion, signing an order requiring E*Trade to sell whatever shares were necessary to be able to pay Kim his share of the E*Trade Account. It reiterated that after the payment to Kim, the balance of the E*Trade account was Barbara's separate property. The court also ruled that if Kim had been overpaid in the bankruptcy court, he was to immediately reimburse Barbara. The court again retained jurisdiction over this issue.

c. The Rulings Were Proper.

Barbara raises two main objections to the rulings on the TSP and E*Trade motions. First, she contends they allowed Kim to collect twice, once from the TSP and E*Trade accounts and again from the bankruptcy estate.⁴ The record does not support this claim. The orders on both motions specifically required Kim to reimburse Barbara for any overpayments. There was simply no error.

Barbara's second objection is that Kim has not paid the fund manager his share of administrative fees. This argument fails as well. Barbara points to nothing in the record showing disbursement of funds to Kim from the TSP and E*Trade accounts was conditional on his payment of administrative fees. Moreover, this issue was not raised in either of her motions. In addition, she does not direct us to any evidence in the record substantiating her claim fees are even owed. Thus, her appeal fails on this argument as well.

The legal authority for her argument is also unpersuasive. *Miles v. Okun* (Nov. 9, 2006, G035376) [nonpub. opn.] is an unpublished opinion that may not be relied

⁴ Barbara also mentions the court somehow allowed Dudman to double collect his fees from both the QDRO's and the bankruptcy estate. She failed to provide any support for this claim either through a record reference or reasoned argument. Thus this claim is forfeited.

on or cited as authority. (Rule 8.1115(a).) Further, Barbara failed to explain why she believed *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634 supported these claims, and we could not find any relevance.

4. Sanctions

Barbara included a request for sanctions in her reply brief. This was not sufficient to raise the issue; she was required to file a motion. (Rule 8.276(a), (b); *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 858-859.)

The request is further inappropriate because it seeks sanctions for alleged improper behavior by Kim and Kim's lawyer in the trial court. Sanctions on appeal are limited to a party's pursuit of a "frivolous" or "dilatatory" appeal or unreasonable violations of court rules. (Rule 8.276(a) [grounds for appellate sanctions]; Code Civ. Proc., § 907 [appellate costs recoverable for frivolous appeal or one filed merely for delay].) None of these grounds are alleged here. The request for sanctions on appeal is denied.

DISPOSITION

The orders are affirmed. Kim is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.