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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re the Marriage of DAGMAR and
FARID SHAHRIVAR.

DAGMAR SHAHRIVAR,

Appellant,

v.

FARID SHAHRIVAR,

Respondent.

FARDIS SHAHRIVAR,

Respondent,

v.

DAGMAR SHAHRIVAR,

Appellant.

H036883

(Santa Clara County
Super. Ct. No. 1-07-FL139053)

(Santa Clara County
Super. Ct. No. 1-09-CV158229)

Appellant Dagmar Shahrivar challenges a judgment in consolidated family law and civil actions. The court found that her former husband, respondent Farid Shahrivar, was entitled to reimbursement for his separate property contribution to the family home. It also found that Dagmar and Farid were liable to Farid's brother, respondent Fardis

Shahrivar, for repayment of a loan reflected in a promissory note. Dagmar's appeal rests on her claim that there was no credible evidence supporting either of these rulings. We reject her contentions and affirm the judgment.

I. Background

Farid and Dagmar married in 1981. Farid owned a home prior to the marriage as his separate property. He sold that home after he married Dagmar and received separate property proceeds of \$58,770 from its sale. Farid gave these proceeds to his parents to hold for him. Farid and Dagmar purchased the Sheraton home, which was entirely financed by Farid's family. Farid and Dagmar transferred the Sheraton home to Farid's family when they purchased the Valcartier home in 1990. A substantial amount of Farid's separate property funds was used to acquire the Valcartier home. In January 1993, Farid and Dagmar executed a trust agreement that placed the Valcartier home in the trust and expressly acknowledged that 70.32 percent of the Valcartier home was community property and 29.68 percent was Farid's separate property. At the same time, Dagmar and Farid executed a grant deed transferring the Valcartier home into the trust and granting Farid a separate property interest of 29.68 percent in the Valcartier home. In 2003, Dagmar and Farid sold the Valcartier home and used the proceeds to acquire the Clark home.

Beginning in 1986, Fardis had made a series of fund transfers to Farid and Dagmar. Each of these fund transfers was documented in a promissory note as an interest-bearing loan. In 1994, Farid executed an unsecured, interest-bearing promissory note to Fardis for \$126,000 that rolled over all of the amounts that were due on the previous promissory notes to Fardis. The 1994 note, which was signed by Farid but not Dagmar, had a 15-year term and bore interest at 4.25 percent. Some small payments were made on the 1994 note in 1997 and 1999. A series of payments totaling \$41,500 were made on the 1994 note in 2002 and 2003. Fardis also loaned about \$40,000 to Farid

and Dagmar in 2001 when Farid was unemployed for nearly a year; the 2001 loan, which was also documented in an interest-bearing promissory note, was subsequently fully repaid.

Parvin Shahrivar was the mother of Fardis and Farid. Fardis was the “agent” for Parvin’s trust by virtue of a power of attorney, but Parvin was at all times the trustee of the trust. Between 2000 and 2005, Fardis transferred funds from Parvin to Farid and Dagmar every December but one. These funds were deposited in various accounts, including the accounts of the two children of Dagmar and Farid. Most of the transfers were just under \$10,000. Notes were created that purported to document that these transfers were loans. No payments were made to repay these funds except a payment of \$19,700 in July 2006, after Dagmar announced that she wanted a divorce.

Farid and Dagmar separated in December 2006, and Dagmar filed a dissolution action in March 2007. In July 2007, Farid filed a schedule of assets and debts in which he stated that there was a debt to Fardis and that the amount owing was “TBD,” which he defined as “To be Done.” He also stated that, with respect to this debt to Fardis, “Amt owed is on the order of 10,000. Euros).”¹ The Clark property was sold in February 2008, yielding a “net distribution” of \$1.182 million.² Farid claimed that he was entitled to a portion of the proceeds as his separate property because he had funded a portion of the purchase of the Clark home with his separate property share of the proceeds from the sale

¹ It was stipulated that 10,000 Euros was the equivalent of \$13,800 at that time.

² The parties could not agree on the distribution of the proceeds. They agreed that \$540,000 of the proceeds would be placed in a trust account and the remainder divided equally between them. This action was intended to resolve the appropriate disposition of the portion of the proceeds that had been placed in the trust account.

of the Valcartier home. Fardis claimed that he and Parvin were entitled to recover from the proceeds funds that they had loaned to Dagmar and Farid.³

Farid's claim for separate property reimbursement and Fardis's claims were tried to the court. A court appointed expert examined all of the available financial records. The expert testified at trial, as did Dagmar, Farid, and Fardis, but not Parvin. The expert's report was admitted into evidence. While the expert was not able to directly trace the funds from Fardis and Parvin to Dagmar and Farid, he was able to determine that the community's deposits at the relevant times exceeded the community's income by an amount in excess of the funds that had allegedly been loaned to the community by Fardis and Parvin. The expert testified that the transfers from Parvin appeared to be gifts because the circumstances of them were "consistent with a pattern of gifting." He determined that, if Farid had contributed separate property funds of \$136,777 to the purchase of the Valcartier home, he was entitled to separate property reimbursement of \$241,666 from the proceeds.

Farid testified that he prepared the notes for all of the fund transfers from Fardis and Parvin to the community. Farid testified that his July 2007 reference to the amount of the community's debt to Fardis was "a typo" and was not accurate. He had been taking medication at the time that interfered with his memory and made it difficult for him to remember financial details. Farid testified that Fardis "was the person representing [Parvin] on financial matters" so the fund transfers from Parvin consisted of

³ In November 2009, Fardis filed a civil action against Farid and Dagmar seeking to recover from Farid and Dagmar funds due on the 1994 Fardis note and on the series of Parvin notes from 2000 to 2005. The civil action, which Fardis's attorney described as "a straightforward promissory note case," was consolidated with the dissolution action by stipulation. Many of the pleadings are absent from the record. We derive some of the background facts from the court's statement of decision. The parties do not challenge the accuracy of these background facts.

checks written by Fardis on Parvin's trust account. Farid testified that the funds from Parvin were loans not gifts and that he had discussed that fact with Dagmar at the time of each fund transfer.

Dagmar denied that Fardis had loaned any funds to the community except in 2001. She also denied that the community owed any debt to Fardis, and she disclaimed any knowledge of the 1994 note. She asserted that the promissory notes had not been created contemporaneously with the alleged loans but instead had been created after she asked for a divorce to falsely show loans that had never occurred. Dagmar testified that both Farid and Parvin had expressly told her that the nearly annual fund transfers from Parvin almost every December were gifts. Dagmar recalled that Parvin had told her that she was getting older and wanted to transfer part of her estate to them. Dagmar testified that the July 2006 payment to Parvin came about after she told Farid that she wanted a divorce. He told her that they owed Parvin \$19,700, and she agreed that they would send Parvin a check for that amount. Dagmar disclaimed any connection between this payment and the fund transfers from Parvin. Dagmar insisted that the 1993 grant deed that she had signed was void because the trust associated with it had terminated automatically or been revoked by her.

The court issued a statement of decision.⁴ It found that Farid had “a separate property percentage interest in the Clark proceeds of 29.54 [percent]” based on his separate property contribution to its purchase. The court allocated to Farid \$241,177 from the proceeds as his separate property. The court rejected Fardis's claim regarding the transfers from Parvin. The court concluded that the pattern and amounts of the Parvin fund transfers reflected that they were gifts rather than loans, so the community was not

⁴ The court found that “there was an economy of veracity as to portions of each of their [(Farid's and Dagmar's)] testimony. [¶] The testimony of the brothers was clinically presented and questioned by [Dagmar].”

obligated to repay these funds. The court credited Fardis's claim based on the 1994 note. It found that the testimony and the documentation supported a finding that these were valid loans. The "testimony was clinical in supporting the existence of the obligations and his methodology in historically documenting family financial transactions." The court concluded that "the more credible evidence supports the finding of the validity of the existence of the loans between the brothers [*sic*] and the community." The court therefore found for Fardis and awarded him \$135,401 against the community.⁵

Dagmar moved to vacate the court's decision and asked for a new trial. She challenged the court's failure to explicitly rule on the validity of the 1993 grant deed. Dagmar contended that the grant deed was "inseparable" from the trust and that the "cancellation of the Trust cancels the Grant Deed" Dagmar conceded that, if the deed and trust were "independent," the grant deed supported the court's ruling on Farid's separate property claim. Dagmar claimed that the trial court had mistakenly attributed to Fardis Farid's testimony about the creation of the notes documenting the loans from Fardis. The court denied the motion. Dagmar timely appealed.

II. Discussion

A. Separate Property Claim

At trial, Farid asserted two alternative separate property claims. One claim, which depended on the validity of the 1993 grant deed, was that he was entitled to recover from the proceeds of the sale of the Clark home the value of his separate property interest of

⁵ Although no judgment was entered in the civil action, we exercise our discretion to treat the statement of decision as a final judgment since it was clearly intended to be one. (*Pangilinan v. Palisoc* (2014) 227 Cal.App.4th 765, 769.)

29.68 percent in the Valcartier home.⁶ Farid maintained that the 1993 grant deed established a valid transmutation. The other claim, which did not depend on the validity of the 1993 grant deed, was that he was entitled under Family Code section 2640 to recover from the Clark home proceeds the amount of his separate property contribution to the purchase of the Valcartier home. There was a significant difference between the amounts of the two claims. The claim based on the deed was for approximately \$240,000, while the reimbursement claim was for about \$136,000.⁷ Since the court found that Farid was entitled to approximately \$240,000, it impliedly found the 1993 grant deed to be valid.⁸

⁶ Farid did not claim that he had acquired a separate property interest in the Clark home. He claimed that his separate property interest in the Valcartier home entitled him to a share of the proceeds of the sale of the Valcartier home, which he could recover from the proceeds of the sale of the Clark home because the Clark home was purchased with the proceeds of the Valcartier home.

⁷ The difference was attributable to the appreciation in value of the Valcartier home.

⁸ We need not address a small discrepancy in the amount to which Farid was entitled. The expert provided two slightly different sets of figures regarding the Valcartier home purchase, which produced different percentages to be applied to the Valcartier sale price. In one set, he used an adjusted purchase price of \$460,867.28, and identified Farid's separate property contribution to the down payment as \$97,376.85, and Farid's separate property pay-down of a community note as \$39,405. This set of figures produced a separate property percentage of 29.68 percent. (\$97,376.85 plus \$39,405 equals \$136,781.85. \$136,781.85 is 29.68 percent of \$460,867.28.) In the other set of figures, he used a purchase price of \$463,000, and identified Farid's separate property contribution to the down payment as \$97,377 and Farid's separate property pay-down of the community note as \$39,400. The second set of figures produced a separate property percentage of 29.54 percent. (\$97,377 plus \$39,400 equals \$136,777. \$136,777 is 29.54 percent of \$463,000.) The expert seemed to testify that the difference between these two sets of figures was attributable to whether the buyer or the seller paid closing costs. The \$97,376.85 figure was documented, so the \$97,377 figure was clearly an approximation. \$463,000 was the contract purchase price for the Valcartier home. The adjusted purchase price had been calculated by the expert by adding the settlement charges to the purchase price and subtracting various amounts related to the loan that he deemed "not related" to

(Continued)

“A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.” (Fam. Code, § 852, subd. (a).) “Our Supreme Court has interpreted ‘an express declaration’ as language expressly stating that a change in the characterization or ownership of the property is being made. [Citation.] ‘[A] writing signed by the adversely affected spouse is not an “express declaration” for the purposes of [Civil Code] section 5110.730(a) [now Fam. Code, § 852, subd. (a)] *unless* it contains language which expressly states that the characterization or ownership of the property is being changed.’” (*In re Marriage of Starkman* (2005) 129 Cal.App.4th 659, 664.) A grant deed qualifies as an “express declaration” under Family Code section 852, subdivision (a). (*Estate of Bibb* (2001) 87 Cal.App.4th 461, 468.)

Dagmar concedes that a grant deed satisfies the requirements for a transmutation. Her claim is that “[t]he TRUST does not allow the GRANT DEED to survive in whole, or in part, separate from the TRUST” She seems to argue that the trust was terminated by the dissolution of the marriage or by her election to terminate it thereby triggering the distribution provisions of the trust agreement. We can find no support for this argument in the trust agreement. The trust provides that it may be revoked “as to community property” by the “[t]he Trustors, jointly” or “separately by the owning spouse in the case of separate property.” The record does not reflect that Farid ever joined with Dagmar in revoking the trust or revoked it as to his separate property. In any case,

Farid’s separate property share. It was not clear where the \$5 difference in the pay-down came from. It was undisputed that the Valcartier home sold for \$816,400 and that the proceeds were used to acquire the Clark home. Since these figures were pertinent to only Farid’s Family Code section 2640 reimbursement claim, the superior court erred in using the 29.54 percent figure in calculating Farid’s separate property interest in the Valcartier home. Since Dagmar benefitted from this error, it is not relevant to her contentions on appeal.

section 1.01 of the trust agreement, upon which Dagmar relies, does not support her claim that a distribution of the trust's property would invalidate the 1993 grant deed. Section 1.01 states: "Upon a distribution . . . , such property having its original source in community property shall be transferred by the Trustees to the Trustors as the Trustors' community property; and such property, if any, having its original source in separate property shall be transferred by the Trustees as the separate property of the contributing Trustor." This provision, rather than providing that Farid's separate property would be converted to community property, instead provided that his separate property would retain its separate property character after distribution.

Dagmar also contends that the grant deed was invalidated because "subsequently recorded Grant Deeds completely disregard the TRUST GRANT DEED." Her citations to the record in support of this contention do not support it. Nowhere in the more than 60 pages of record to which she cites can we find any relevant *subsequent grant deeds*. Nor is it relevant that title to the Clark home was held entirely as community property. Farid did not claim a separate property interest in the Clark home; he sought only reimbursement of his separate property contribution (his separate property share of the proceeds of the sale of the Valcartier home) to the purchase of the Clark home, a community asset.⁹ Dagmar seems to suggest that the 1993 grant deed was invalidated when she and Farid sold the Valcartier home, but she does not explain why the 1993 grant deed would thereafter cease to serve as an express declaration of a transmutation.

⁹ "In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division." (Fam. Code, § 2640, subd. (b).)

Obviously they no longer held title to Valcartier after they sold it and purchased the Clark home. However, that fact did not retroactively invalidate the transmutation that had been expressly declared in the 1993 grant deed.

In her reply brief, Dagmar suggests that the 1993 grant deed was not a valid transmutation because it was the product of Farid's undue influence. Dagmar's opening brief made no mention of this contention. Since she did not raise this issue in her opening brief, thereby depriving Farid of the opportunity to respond to it, we decline to address this issue. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.)

The superior court did not err in impliedly finding that the 1993 grant deed was a valid transmutation entitling Farid to reimbursement of his separate property share of the proceeds from the sale of the Valcartier home that were used to acquire the Clark home.

B. Fardis's Action

Dagmar contends that the court's ruling on the 1994 note to Fardis is not supported by substantial evidence. She acknowledges that the court's ruling was based on "the credibility of Farid and Fardis Shahrivar's testimony," but she claims that the court could not "disregard" other evidence and credit "testimony of self-serving witnesses" that "the Court has already discredited" in connection with the claims based on the Parvin fund transfers. The other evidence upon which she relies is evidence she presented at trial that Farid had made statements during discovery that the debt to Fardis was only about \$13,000 and that challenged the validity of the note.

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "To

warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment” (*People v. Huston* (1943) 21 Cal.2d 690, 693, disapproved on different point in *People v. Burton* (1961) 55 Cal.2d 328, 352; accord *People v. Maury* (2003) 30 Cal.4th 342, 403; *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 261.)

Here, the court credited the testimony of Farid and Fardis about the 1994 note, the loans that Fardis had made to the community, and the payments that had been made on those loans. This testimony supported a finding that the 1994 note was valid and that the community owed Fardis the remaining unpaid debt. Farid provided an explanation for his misstatements about the amount of the debt to Fardis, which the court was entitled to credit, and the court did not credit Dagmar’s attempt to show that the note was invalid.

The court’s decision on the claim based on the Parvin fund transfers did not require it to reject the claim based on Fardis’s fund transfers. Although both sets of transfers were actually made by Fardis and were reflected in notes created by Farid, several key circumstances of the Parvin fund transfers indicated that those transfers were gifts rather than loans. The Parvin fund transfers generally occurred each December. They were in amounts less than \$10,000, and some of these transfers were deposited in the children’s accounts. According to Dagmar, Parvin expressly told Dagmar that these transfers were gifts. These facts supported the court’s finding that that the Parvin fund transfers were gifts. No similar evidence was presented regarding the Fardis fund transfers. They did not occur each December. The amounts were not limited to under \$10,000, and there was no evidence that these funds were deposited in the children’s accounts. Dagmar did not claim that Fardis had told her that these fund transfers were gifts. These circumstances distinguished the Fardis claim from the Parvin claim.

Moreover, the court was entitled to reject some portions of the testimony of Farid and Fardis and accept other portions. “The trier of fact is entitled to accept or reject all or any part of the testimony of any witness [citations] or to believe and accept a portion of the testimony of a particular witness and disbelieve the remainder of his testimony [citation].” (*Mosesian v. Bagdasarian* (1968) 260 Cal.App.2d 361, 368.) Substantial evidence supports the court’s ruling on Farid’s claim based on the 1994 note.

C. Motion For Sanctions

Fardis asks for sanctions on the ground that Dagmar’s appeal is frivolous. While we agree that Dagmar’s appeal lacks any merit, we do not believe that it is so lacking in merit that it meets the standard that would qualify it as frivolous and merit sanctions. We therefore deny the motion for sanctions.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Grover, J.