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HIGHLIGHTS

CLIENT RELATIONS

- In this month’s Point of View, Sandra L. Mayberry acknowledges the depression and anxiety frequently suffered by both family law attorneys and their clients, and offers some advice from a therapist for dealing with potentially suicidal clients (see Page 126)

COMMUNITY PROPERTY

- [Wife Was Entitled to Gains on Her Share of Husband’s Retirement Benefits from Date of Stipulated Judgment \(see Page 130\)](#)

DOMESTIC VIOLENCE

- Court Properly Denied Restraining Order against Husband Who Injured Wife While Acting in Reasonable Self-Defense (see Page 134)

SPOUSAL SUPPORT

- Court May Not Order Spouse to Undergo Vocational Examination Absent Pending Support-Related Motion (see Page 139)
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Spousal Support

Court Rules that Provision in Stipulated Judgment Awarding Wife Percentage of Husband’s “Annual Bonus” Applied Only to Performance-Based Discretionary Payments

By Carol Rothstein, Esq.*

In *In re Marriage of Minkin* (No. G052947; Ct. App., 4th Dist., Div. 3. 4/24/17, ord. pub. 5/19/17) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 455, the Fourth District Court of Appeal considered what the parties intended by the term “annual bonus” in 2004, when they stipulated that the husband, Robert, would pay the wife, Patricia, 41 percent of his “annual bonus” as additional spousal support. After Robert changed jobs and his compensation package changed from a salary and potential annual bonus to a more complex arrangement, the parties disagreed as to which components of Robert’s compensation constituted annual bonuses under the stipulated agreement.

In the opinion by Justice Aronson (O’Leary, P. J., Bedsworth, J., concurring), the Fourth District concluded that the words “annual bonus” were ambiguous. After considering the circumstances under which the parties entered into the agreement, the appeals court agreed with the trial court’s interpretation that an “annual bonus” was a discretionary payment based on performance, as argued by Robert, and not all payments in addition to base salary, as argued by Patricia.

Facts and Procedure. Patricia and Robert married in 1978 and separated in 2002. At the time of separation, Robert was an executive at St. Joseph Hospital earning \$300,000 in annual salary, with a potential performance-based bonus of up to 20 percent of his

* Carol Rothstein is the principal author of the CALIFORNIA FAMILY LAW MONTHLY. She is a research attorney in Lafayette, California.

Procedural Posture. The April 2007 child support order required father to pay child support of \$1,000 per month, which included his share of childcare costs. The order included a retroactivity provision, which stated that Mother would notify Father if there were no longer childcare costs and that any modification motion would be retroactive to the date the child was no longer enrolled in childcare. In May 2011, Father moved to modify child support and determine arrearages. He claimed that the children had not been enrolled in childcare since January 2007. Prior to trial, Father propounded discovery on Mother, including requests for admissions. Mother failed to timely respond to the request for admissions and the court deemed the admissions admitted. The trial court awarded Father a \$441 per month childcare credit for the period of January 1, 2007 to May 31, 2011; set child support at \$490 per month, without any childcare add-on, for the period of June 1, 2011 to December 31, 2012; and at \$699 per month, without any childcare add-on, for the period of January 1, 2013 to November 31, 2013, and sanctioned the mother \$1,250 for discovery violations.

Overview. The trial court was empowered under Family Code section 3653, to retroactively modify its April 2007 support order to the date Father filed a motion to modify (May 10, 2011), but no earlier, even though the April 2007 order contained a retroactivity condition. Thus, it was error to award childcare credits beginning before the motion to modify was filed, with the effect of retroactively reducing the arrearages owed under the April 2007 support order for several years preceding the filing of the modification motion. Mother was not estopped from raising the retroactivity issue, even though she did not initially object to the retroactivity condition or otherwise appeal the April 2007 order, because of the important public policy of protecting minor children to ensure that their needs are met when their parents separate. It was proper to deem that, by failing to respond to requests for admissions, Mother, who was representing herself, admitted that she had incurred no childcare costs for almost seven years.

Outcome. The Court of Appeal affirmed in part and reversed in part the order of the trial court.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., §§ 42.03 (retroactive modification of child support orders), 110.14[4][c] (failure to respond to request for admissions).

COMMUNITY PROPERTY

Retirement and Pension Benefits

Wife Was Entitled to Gains on Her Share of Husband's Retirement Benefits from Date of Stipulated Judgment

In re Marriage of Janes

(No. E065668; Ct. App., 4th Dist., Div. 2. 5/23/17)
— Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 462

By Miller, J. (McKinster, Acting P. J., Slough, J., concurring)

The Fourth District Court of Appeal held that a wife who was awarded \$113,392 from the husband's retirement account by the parties' marital settlement agreement, which was attached to the parties' 2010 judgment of dissolution, was entitled to receive that amount plus resulting gains, calculated from the date of the dissolution judgment. The appeals court rejected the husband's argument that awarding the wife the gains was an impermissible modification of the judgment, which was silent as to gains and losses. Although the wife's money remained in the husband's retirement account until 2014, the money became her separate property when the agreement was executed.

Facts and Procedure. Wife and Husband separated in February 2009. Pursuant to their settlement agreement, which was attached to the 2010 judgment of dissolution, Husband agreed to transfer \$113,392 from his 401k retirement account to Wife. The agreement reserved jurisdiction to the superior court to supervise payments and the division of assets pursuant to the agreement.

In February 2014, Wife received a letter from Fidelity Investments ("Fidelity") informing her that Fidelity had been directed by the administrator of the 401k plan, pursuant to a QDRO, to segregate \$113,392 from Husband's account, "with no earnings

calculated through the date of segregation.” Fidelity informed Wife that it had started an account for her in the amount of \$113,392. Wife’s attorney wrote a letter to the plan administrator stating that there was no QDRO and demanding that the Fidelity transaction be unwound. The administrator complied and Wife’s money remained in Husband’s account.

In December 2014, Wife sought the court’s approval of a proposed QDRO directing Fidelity to segregate \$113,392 from Husband’s account, plus gains and losses from the date of separation. Husband opposed Wife’s request, arguing that the dissolution judgment awarded Wife a lump sum amount of \$113,392, without gains or losses.

At the hearing, Husband argued that Wife had been awarded a lump sum from the 401(k) account, rather than a percentage, and that she was therefore not entitled to gains earned on the account. Husband argued that awarding gains amounted to a modification of the dissolution judgment, for which the court lacked jurisdiction. Wife argued that had the money been segregated in 2010, when the judgment was entered, she would have earned the gains on the \$113,392 in her separate account, and that there was no authority supporting Husband’s argument that she was not entitled to any gains while the money remained commingled. The family court ruled that awarding the gains to Wife would not be a modification of the judgment, explaining that Wife’s \$113,392 was her separate property and she was therefore entitled to any gains on it, just as Husband was entitled to the gains on his share of the 401k. The court ordered the husband to execute the QDRO. Husband appealed.

Wife Entitled to Gains on \$113,392 from Date Agreement Was Executed. The appeals court explained that community property becomes separate property upon execution of a marital settlement agreement, and that profits acquired on separate property are separate property [Fam. Code § 770(a)(3)]. It was therefore unnecessary for the judgment to mention gains or losses. In this case, the agreement was executed on April 19, 2010, when the final judgment was filed. As of that date, the \$113,392 became Wife’s separate property and any gains or losses on that money belonged to her. Accordingly, when the family court stated that the gains on Wife’s separate property belonged to her, it was not modifying the judgment.

Marriage of Thorne and Raccina Distinguished.

The appeals court rejected Husband’s claim that *In re Marriage of Thorne and Raccina* (2012) 203 Cal. App. 4th 492 was controlling precedent in this case. In *Thorne*, the parties’ marital settlement agreement gave the wife 16 percent of the husband’s military pension. More than 10 years later, after learning that courts use a time rule to divide pensions, the wife sought to have the judgment of dissolution set aside, asserting that she was entitled to one-half of the pension. The trial court modified the judgment to comply with the time rule and the appellate court reversed on the grounds that the dissolution judgment had become final and the trial court lacked jurisdiction to modify it.

Thorne is distinguishable from the present case, the appeals court wrote, because the wife in *Thorne* was asking the court to change the division of the pension. In the present case, Wife did not ask the court to change the division of the asset, and the trial court did not change anything about the judgment when it stated that Wife was entitled to the gains on her separate property.

Wife Would Be Entitled to Gains Even if Amount Was Intended as Equalization Payment.

The appeals court rejected Husband’s argument that he and Wife had bargained for the certain sum of \$113,392, that the amount was intended as an equalization payment, and that he would have been required to pay Wife \$113,392 even if the account had suffered losses after April 19. The court first noted that there was nothing in the agreement that indicated that the \$113,392 was intended as an equalization payment, and stated that it would be odd to tie the fixed equalization amount to a 401(k) account, which has an inherent possibility of loss. However, said the court, even if the amount was intended as an equalization payment, it would have become Wife’s separate property on April 19, because there was nothing in the agreement indicating that the payment was to be delayed. The fact that the money remained in the 401(k) account did not entitle Husband to the gains earned on Wife’s separate property.

Court Erred in Ordering that Wife Would Receive Gains from Date of Separation. The appeals court agreed with Husband that the court erred in ordering that Wife was to receive gains

from the date of separation, rather than the date of the judgment of dissolution, because property is to be valued as close as possible to the time of trial [Fam. Code § 2552(a)]. If Wife wanted to use the date of separation as an alternative date of valuation, the appeals court wrote, she was required to give the Husband notice that she was seeking the alternative date, including the legal authority supporting her request and the good cause for using the alternative date. However, in this case there was no indication that Wife gave Husband notice that she was seeking an alternative date and there was nothing in Wife's trial brief concerning good cause for an alternative date. The appeals court rejected Wife's contention that Husband forfeited his contention concerning the alternative valuation date because Husband did not object to the alternative valuation date that Wife included in the proposed QDRO. Because Wife failed to properly raise the issue by providing the required notice, Husband could not have forfeited the issue.

Commentary

Stacy D. Phillips & Erica Swenson

Occam's Razor is the problem-solving principle that the simplest answer, with the fewest assumptions, is often the best one. The appellate court in *Janes* seems to have taken this lesson straight from the 14th century. It took the parties' competing, belabored arguments—Husband's assertion that Wife's retirement allocation in the marital settlement agreement was an equalization payment; Wife's position that her gains should be calculated from the date of separation, rather than the date of the agreement; and Husband's claim that allocating Wife appreciation would amount to a modification of the judgment—and distilled them into a simple, elegant solution. At the time the parties entered into the agreement, Wife's \$113,392 share of the retirement account became her separate property. Profits gained from separate property are separate property. From the time at which they entered the agreement, all gains belonged to Wife as her separate property. There was no modification, no alternate date of valuation, and no equalization payment.

Janes also presents another page in the annals of "Time is Not Your Friend"—a lesson in making sure the parties actually carry out the terms of their judgments in a timely fashion.

Many of us were drawn to the law because of our curiosity, our appetite for new and changing problems, and the thrill of the pursuit—like sharks that need to keep swimming in order to breathe. It makes us passionate advocates and ferocious problem solvers, but there is a dark side to that coin. We can have a tendency to grow bored easily and move too quickly to "the next," without tying up all of the loose ends. In this case, once the judgment was finalized and entered, neither the parties nor their counsel followed up on the housekeeping required to effectuate the terms of the judgment. Asset division is tedious. Although asset division is not the attorney's responsibility in many cases, it is very helpful to give clients a checklist of what they need to do to effectuate the terms of their deal and, if appropriate, ask if the client needs your help. As a result of the parties not executing the asset division provisions of their agreement, four years passed between entry of the judgment and the litigation regarding division of a community account. How much time and money was spent on the meet and confer between Wife's attorney and Fidelity, Wife's attorney and Husband's attorney, filing for relief, the initial hearing, the follow up briefing and subsequent hearing, and finally the appeal? It is easy to imagine it ate up any of the appreciation on the amount awarded to Wife in the initial agreement. Could this have been avoided with a closing letter urging the parties to promptly execute the terms of the marital settlement agreement? Possibly. It is also possible that the parties simply did not follow up. These are expensive lessons that can be avoided with timely follow-through.

Finally, the *Janes* opinion provides a concise summary of the law and procedural requirements for a party asserting an alternate date of valuation during trial—a handy cite to keep for your trial brief on alternate date of valuation.

Commentary

Vanessa Kirker Wright

This case reminds us of two things: (1) entry of judgment is only about half-way to the end of the case and (2) sloppiness in drafting will come back and haunt you. All in all, this relatively innocuous case is full of good advice.