Filed 4/26/12 Marriage of Nance CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of GWENDOLYN R. and LARRY B. NANCE.	
GWENDOLYN R. NANCE, Appellant, v. LARRY B. NANCE, Respondent; DELARA NANCE, Respondent.	C066168 (Super. Ct. No. FL780510)

Appellant Gwendolyn R. Nance (wife) appeals from a final judgment of dissolution of her marriage to husband Larry B. Nance (husband), now deceased. Wife contends the trial court exceeded its authority in granting the request of respondent Delara Nance, husband's daughter from another relationship (daughter), to enter a final judgment of dissolution and to

issue the judgment nunc pro tunc. We agree and shall reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Wife's marriage to husband produced one child, Larry Nance II, now an adult (son). In 1982, wife filed a petition to dissolve her marriage to husband. An interlocutory judgment of dissolution was filed on October 5, 1982.

In April 1983, husband, represented by counsel, filed a motion to set aside the interlocutory judgment. In support of his motion, husband filed a declaration wherein he acknowledged that he still needed to obtain a final judgment of dissolution.

On September 21, 1984, a stipulated interlocutory judgment was entered. Litigation between husband and wife continued through 1985. During that time, both husband and wife were represented by counsel. Litigation between the parties ceased after 1985.

During the next 23 years, husband and wife maintained a close relationship. They spoke on the phone and met often for lunch and dinner. Wife told husband whenever she left town on a military assignment and would always call husband if she was not returning home as planned. Wife gave husband paperwork for his Military Identification Card, to which he was entitled as a military spouse. Wife and husband never stopped loving each other.

Nearly 25 years after the interlocutory decree of judgment was filed, husband died intestate. Son was appointed by the probate court to be the administrator of husband's estate.

On April 19, 2010, daughter moved the court for a final judgment dissolving husband and wife's marriage to be entered nunc pro tunc. The matter went to trial in August 2010.

At trial, wife testified about the amicable nature of her relationship with husband after the interlocutory decree of judgment was entered. Wife knew she and husband were not divorced; she understood they never obtained the required final judgment of dissolution.[1]

Son testified that he had frequent contact with husband, and daily contact during the final stages of husband's terminal illness. Son also said husband knew he was still married to wife; indeed, son and husband had discussed this very subject "several times." On several occasions, husband also told son he intended to "get back together formally" with wife.[2]

Daughter testified at trial as well. She said husband "told her that he had left her a 401K account." She offered no testimony about husband and wife's marriage or husband's relationship with daughter's mother.

The court ruled as follows:

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[1] Daughter objected to this statement but the record contains no ruling on the objection. Accordingly, we presume the objection was overruled. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.)

[2] Daughter objected to this testimony as well. Again, the record contains no ruling on the objection and we assume the objection was overruled. (*Reid v. Google, Inc., supra*, 50 Cal.4th at p. 534.)

"As a result of the trial in this matter, several matters are crystal clear.

"1) No final judgment was ever entered

"2) [Husband], intended to award the 401K plan to his daughter, Delara Nance

"3) [Wife's] witnesses [wife] and son Larry James Nance were credible witnesses.

"4) The moving party Delara Nance was a credible witness."

"The court finds as follows:

"1) The original parties distributed the [community property] of the marriage in an agreeable manner.

"2) Each of the original parties was eventually represented by an attorney.

"3) Apart from an amiable relationship between the orig[inal] parties with whom they shared a son, no overt action was taken to reunite as husband and wife.

"4) The court grants the request to enter the final judgment nunc pro tunc to 1/1/86."

"If one is to conclude anything from this ill sitting case, with all the litigation the parties faced between 1983-1985, the parties might well have concluded a final judgment was included. However this is only speculation."

DISCUSSION

I

Standing

Wife raises two claims on appeal. First, she contends daughter had no "authority" (which we construe as standing) to

move the court for a final judgment dissolving wife's marriage to husband nunc pro tunc. Second, she contends that even if daughter had standing, or the court acted on its own motion, there is insufficient evidence to find husband and wife failed to obtain a final judgment of dissolution due to inadvertence, mistake, or neglect.

Daughter counters in part that *wife* lacks standing to appeal the final judgment, as she consented to the judgment and received the benefits of the judgment. At oral argument, daughter further argued that the language purporting to waive wife's right to appeal contained in the stipulated interlocutory judgment stripped wife of standing to appeal the nunc pro tunc entry of the final judgment.[3]

We are not persuaded by daughter's waiver argument. Wife clearly only agreed to refrain from appealing from the "*Stipulated Interlocutory Judgment of Marriage*." The parties were plainly advised that this judgment was *neither* final *nor* constituted a dissolution of their marriage. Wife is not appealing from any of the provisions contained in the stipulated interlocutory judgment, to which she consented and from which she benefited. Instead, she now seeks to contest a final judgment which purported to do, decades after the fact, that which the document to which she had stipulated *expressly*

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[3] "Each of the parties hereby waives the following: [¶] b. The right to appeal from this Stipulated Interlocutory Judgment of Marriage."

declined to do, that is, to end her marriage to husband. She did not waive this right.

We see no need to reach wife's contention regarding daughter's lack of standing.[4] As we explain immediately *post*, the trial court erred in entering a judgment of dissolution nunc pro tunc.

II

Judgment of Dissolution

Family Code section 2346, the relevant portions of which were found in Civil Code sections 4514 and 4513 at the time the interlocutory judgment was entered, permits the trial court to enter a decree of dissolution nunc pro tunc in situations where failure to timely enter the judgment is due to mistake, negligence or inadvertence. (Fam. Code, § 2346, subd. (a).)

"'A mistake of fact is when a person understands the facts to be other than they are; a mistake of law is when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts. [Citation] Inadvertence is defined as lack of heedfulness or attentiveness, inattention, fault from negligence. [Citations.]' [Citation.] Negligence may be passive in character: it may consist in heedlessly refraining from doing the proper thing. When the

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[4] Although we need not analyze the trial court's perplexing assumption that daughter had standing to have a family court judgment entered in her *father's* dissolution case, we note that daughter was not aggrieved by any extant family law order; she was aggrieved, if at all, by her father's intestacy while still married to mother.

circumstances call for activity, one who does not do what he should is negligent. [Citation.] Negligence is sometimes defined as the failure to use ordinary care in the management of one's person or property. [Citation.] The essence of negligence is the failure to exercise due care and take proper precaution in a particular case. [Citation.] In determining the presence or absence of negligence the test is: what would a reasonably prudent person do under similar circumstances? [Citation.] Negligence always relates to some circumstance of time, place, or person. [Citation.]" (*Berry v. Berry* (1956) 140 Cal.App.2d 50, 59-60 (*Berry*).)

Here, the trial court made *no* finding regarding mistake, neglect, or inadvertence. The court found only that the parties never obtained a final judgment and "no overt action was taken to reunite as husband and wife." "The mere failure of a party to apply for a final decree does not constitute mistake, negligence, or inadvertence." (*Berry*, *supra*, 140 Cal.App.2d at p. 60.) Nor does their failure to take overt action to reunite evidence mistake, negligence, or inadvertence.

Moreover, the record does not support a finding that husband or wife failed to obtain a final judgment through mistake, neglect, or inadvertence. In fact, all the evidence at trial indicated wife and husband knew they were married long after the interlocutory judgment was entered. Wife knew they were still married; son testified that husband also knew he and wife were still married. The court found both these witnesses

credible, and daughter offered no evidence to contradict their testimony.[5]

Additionally, husband and wife stipulated to an interlocutory judgment, which contained notice they were obliged to move for a final judgment before their marital status would be dissolved. At the time they signed the stipulated judgment, both parties were represented by counsel. And, neither party ever attempted to remarry, not even when a woman other than wife bore husband another child (daughter).

After hearing the evidence, the trial court found it was "only speculation," to conclude the parties believed their marriage dissolved. We agree.

Aside from statutory authority, courts have inherent power to enter judgments retroactively. A judgment nunc pro tunc, "'"should be granted or refused as justice may require in view of the circumstances of a particular case . . . ."'" (*In re Marriage of Mallory* (1997) 55 Cal.App.4th 1165, 1177; see *Phillips v. Phillips* (1953) 41 Cal.2d 869, 875.) The reason to exercise this power is to preserve the "legitimate fruits" of litigation that would otherwise be lost to the party seeking an antedated judgment. (*Mather v. Mather* (1943) 22 Cal.2d 713, 719; *Scalice v. Performance Cleaning Systems* (1996)

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[5] Daughter attached three exhibits to her motion for a final judgment of dissolution that she claims prove husband believed he and wife were no longer married. Those exhibits, however, were not authenticated and were not admitted at trial. Accordingly, they are not properly part of the record on appeal and we shall not consider them.

50 Cal.App.4th 221, 239.) Here, there is no evidence that either husband or wife believed their marriage was dissolved, or that they even *wanted* their marriage dissolved. Accordingly, no "legitimate fruit" of litigation was lost to either husband or wife. It was, therefore, error to order their marriage dissolved nunc pro tunc.

DISPOSITION

The judgment is reversed and vacated. Costs are awarded to wife. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.