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Marriage, Money, Notice, and Presumptions

Roger Bernhardt
Golden Gate University School of Law, rbernhardt@ggu.edu

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In re Marriage of Brooks

When I finished reading In re Marriage of Brooks *(reported at p 53), I had a lot of questions about it but no answers, which led me to write this mythical memo to a junior associate. Despite the absence of conclusions, I hope readers can still find it somewhat useful as a checklist of issues to worry about in this confusing field. See also my column* Midcourse Corrections: Love Your Husband But Don't Lend Him Any Money, *26 CEB RPLR 40 (Jan. 2003).—RB*

I want you to prepare me for an interview I am having tomorrow with an old client, Michael Brock, to discuss problems he is having with his house. According to what Michael told me on the phone today, it seems that he and his wife, Anita, purchased a house a few years ago, taking title in her name alone, based on the advice of their loan broker, even though Michael's money was the source of the downpayment. Michael also told me that they had defaulted on their mortgage and that his wife apparently then sold the house, under one of those home equity sales contracts for cash. Anita seems to have vanished with the money, and Executory Cuticle, the purchaser, has told Michael that he has to move out. I want a memo from you on the issues involved.

Potential Claims

First, let's start with what kinds of claims Michael might have against Anita personally. (I know that his fight is with Executory Cuticle rather than against Anita, but if they can be held to take subject to Michael's claims against her, as I will have you analyze below, that makes it worth considering what sorts of claims he does have against her.) Michael said that he believed that the house was community property because they were married, but since the form of title presumption from the deed overcomes the general community property presumption from the marriage, I wonder: Is that the best position for him to take? Can Michael make a better resulting trust or constructive trust claim to the entire title based on the fact that his separate funds were used to acquire a property that was taken under a different name? True, Michael and Anita were married, but since the house was held in her name as her separate property rather than as community property, doesn't that make a trust argument easier to assert?

If you don't think we would get anywhere arguing that the house is really Michael's rather than Anita's, how about arguing that it belongs to both of them, on the ground that those acquisition funds were community assets? Michael said that the money came from his earnings; if those were earnings generated during the marriage, they were community funds. Doesn't the community acquire an interest in separate property of a spouse as it pays for it? Even if it is not treated as an investment by the community, can it be argued that it should be treated as a loan by the community to the sole owning spouse, generating a right of reimbursement? Could Michael testify (since Anita may not be around to contradict him) that he intended to lend Anita the money for her to buy the house in her own name?

Constructive and Inquiry Notice

Our adversary is Executory Cuticle rather than Anita, but some of our claims may also be effective against Executory if we can show that it is not a bona fide purchaser. Can Executory Cuticle be charged with notice, since Michael was living in the house (and apparently Anita was not) at the time that Executory's agent visited and offered to purchase it? Since there is a general duty to inquire of any person in possession as to the nature of his possession, does that mean that Executory's agent should have asked Michael what he was doing there, rather than asking Anita who Michael was? Will that make Michael's simple testimony that he was in the room at the time sufficient, or should he also be prepared to testify that if he had been asked he would have said that he was married to Anita? Should he add that he would have also revealed that all of the money came from him, even if he was asked only about his presence? Should he be prepared to go even further and say that he would have told Executory's agent that the money was definitely not a gift, but rather a loan to Anita or an investment in the house? Does Fam C §1102(c), which creates a presumption of validity for a deed of community property executed by only one spouse when the purchaser took it "in good faith and without knowledge of the marriage relation," impose any additional duty to inquire when a man is in the house?

The Evidence Code Presumption

I assume that Executory Cuticle (and Anita) will attempt to hide behind the presumption of Evid C §662 that legal title is presumed to be beneficial title and the fact that legal title was in Anita's name alone. I know that simply showing that Anita was married to Michael is not enough to overcome that presumption. On the other hand, the presumption is not conclusive—the statute says it can be rebutted by clear and convincing evidence. So can we find any?

First, tell me what it would take to overcome the presumption in the dissolution action itself. Michael cannot testify that he never knew that Anita's name alone was on the deed, but is it enough if he says that he didn't know that the deed described her as a single person? Would it be sufficient if he testified that he felt unduly pressured to let Anita's name be the only one on title so that she wouldn't be angry with him?

If more is needed, how do we show a "contrary agreement or understanding," which the cases seem to require for rebuttal? (See, *e.g., Marriage of Rives* (1982) 130 CA3d 138, 162, 181 CR 572; *Marriage of Haines* (1995) 33 CA4th 277, 292, 39 CR2d 673.) If Michael testified that he and Anita had "agreed" that he had some interest in the house, must his testimony be corroborated? By whom? Anita? Must Michael produce a document to that effect, or can he give clear and convincing testimony about an oral agreement?

Since the judicial requirement adds "understanding" as an alternative to "agreement," can Michael bring himself under that as a substitute standard by testifying that he always "understood" the house to belong to both of them? Must he testify that Anita also had that understanding? Can he testify to that conclusion without having to quote her? If Anita cannot be found, is our case harder or easier? Can a third party corroborate Michael about Anita's understanding?

Second, assuming we can produce evidence that would work against Anita, will it also be effective against Executory Cuticle? Are they more protected by Evid C §662 than Anita is, or does the fact that they can be charged with constructive inquiry notice bring them back down to

her level? I need to know how the clear and convincing standard operates against an inquiry notice principle. Does Michael have to:

- Clearly and convincingly demonstrate that he had an understanding or agreement with Anita; and
- Clearly and convincingly demonstrate that Executory knew of it?

If a court accepts the earlier arguments we made that Michael's possession should have caused Executory to inquire of him, will it be enough to show that those are the responses Michael would have given to Executory's questions, or do we still have to show (to Executory or to a judge) that he was clear and convincing? (I think I am asking whether actual knowledge or constructive notice by a grantee of a claim reduces the need of the claimant to prove the validity of that claim by clear and convincing evidence.)

The client is coming in tomorrow at 10 a.m. and, of course, I will want to study your memo before then. That gives you plenty of time, since it is now only 4 p.m.

Another Good Book for New Lawyers

A Practical Guide To Commercial Real Estate Transactions, by Gregory M. Stein, Mortimer P. Fisher, Jr., and Marjorie P. Fisher (ABA, 2d ed., 2008), describes itself as intended for the new associate whose first assignment might be to draft representations and warranties overnight for a supervising partner too busy to explain anything to him and his next-door associate unable to help since she is away reviewing leases in Detroit. This book declares that it is designed to help the victim navigate a way through that predicament, and I think it does. Indeed, it does considerably more than that. It is denser than any single volume hornbook and more than makes up in practical information for what it lacks in citations (which, always being of a national sort, rarely do local attorneys much good).

The book covers real estate sales, loans, and closings (not leasing). The text is thorough and I did not find any issue uncovered. What was most admirable was the combination of doctrinal text with practical advice in the sections, so that abstract rules were not just thrown at readers, but connected up with suggestions and cautions. That style, especially when combined with some very extensive forms, makes this book valuable not only for the new member of the firm but for the older ones as well. Many of the boxed "comments" look more like afterthoughts, but that does not make them any less useful.

Give a copy of this book to any newcomer to your firm; it will save time and money for everyone.

Community Property

Husband's community property claim failed because he had agreed that property be held solely in wife's name.

In re Marriage of Brooks (2008) 169 CA4th 176, 86 CR3d 624

A few years after their marriage in 1997, Michael Brooks and Annikkawa Robinson purchased a home. Although Robinson contributed no funds to the downpayment, Brooks agreed that the title to the home be held solely in the name of "Annikkawa A. Robinson, a Single Woman," to facilitate financing the purchase, on the advice of their real estate agent. Although the two deeds of trust were in the name of and executed by Annikkawa, Michael made the payments on the

loans they secured. In February 2005, Annikkawa and Michael separated; Annikkawa moved out; and Michael and their son remained in the home, which was in foreclosure. In April 2005, Annikkawa sold the home to Executive Capital Group (ECG), netting $41,851.03 after deducting expenses and payoff of the loans. In January 2006, Michael brought claims, alleging his community property interest, against ECG in the marital dissolution case. The trial court bifurcated the claims against ECG from the family law proceedings, held a bench trial, and awarded the property to ECG as a bona fide purchaser, with title free of any unknown community property claim.

The court of appeal affirmed. The court of appeal applied the "form of title" presumption, that the owner of legal title is presumed to be the owner of full beneficial title, rebuttable only by clear and convincing proof. Evid C §662. The act of specifying Annikkawa's ownership in the original title removed the property from the more general community property presumption. Michael was unable to present any evidence of an agreement or understanding with Annikkawa that the home was other than her separate property. Tracing the source of funds for the downpayment is not sufficient to overcome the form of title presumption. *Marriage of Lucas* (1980) 27 C3d 808, 813, 166 CR 853. Moreover, the case simply contained no facts relating to transmutation or property held jointly. Thus, Michael's claims failed.