WRITTEN DECISION – NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re: PEDRO HERRERA, Debtor _____ AGUEDA PONS, Plaintiff, v. PEDRO HERRERA, Defendant. _____ AND RELATED CROSS-CLAIM. _____	BANKRUPTCY NO: 16-02852-MM7 CHAPTER: 7 ADV. NO: 16-90131-MM MEMORANDUM DECISION REGARDING BIFURCATED ISSUES OF COMMUNITY PROPERTY AND ADMINISTRATIVE CLAIM; ORDER GRANTING DEFERRED ABSTENTION FROM UNRESOLVED ISSUES IN ADVERSARY PROCEEDING DATE: October 3 and 4, 2017 JUDGE: Margaret M. Mann

This consolidated nondischargeability and claim objection proceeding involves the complicated interface between family law and bankruptcy law. After extensive pretrial hearings to narrow the issues as required under Fed. R. Bankr. P. 7016, *see McCargo v. Hedrick*, 545 F.2d 393, 401 (4th Cir. 1976), the court conducted a trial on October 3 and 4, 2017 on three bifurcated issues: (1) whether 9662 Deer Trail Place, San Diego, CA 92127 ("Deer Trail") was the community or separate property of Debtor Pedro Herrera ("Debtor") and his ex-spouse Agueda Pons ("Pons") on the petition date; (2) whether a 2004 Lexus GX470 ("Lexus") was community or separate property on the petition date; [1] and (3) whether Debtor owes Pons a priority claim under 11 U.S.C. § 507(a)(1).[2] The court then heard argument regarding whether, when, and to what extent it should abstain from hearing the remaining marital issues pending.

The court heard testimony at trial from several witnesses and considered documentary evidence detailing the property transactions regarding Deer Trail and the Lexus. The court also evaluated the parties' briefing regarding presumptions applicable to marital property under California law. Based upon these proceedings, the court enters this Memorandum Decision as its findings of fact and conclusions of law in this matter pursuant to Fed. R. Bankr. P. 7052. It concludes that Debtor does not owe Pons a priority claim, Deer Trail and the Lexus are community property, and abstention is proper only after all claims filed by other creditors are resolved.

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[1] At trial, Debtor also presented evidence and argument in support of his position that a 2008 Nissan Xterra was his separate property. However, on July 19, 2017, this court granted Wells Fargo Dealer Services relief from stay to allow it to repossess this vehicle (Main Bankruptcy, Doc. 152). Because there is no value for the estate to be derived from the Nissan, at the final pre-trial conference the court found it would abstain from hearing issues in connection with the vehicle, including Debtor's claim that Pons owes him $11,798.55 in reimbursement of expenses for taking the vehicle in December 2014. Neither Pons nor Trustee provided any evidence or argument on the Nissan at trial.

[2] All statutory references are to Title 11 of the United States Code unless otherwise stated.

I. Pretrial Process

The court required the parties to present their cases-in-chief by declaration under a July 27, 2017 pretrial order. After review of these presentations, the court conducted a final pretrial hearing on September 28, 2017 where it made certain rulings on the evidence and found certain facts to be undisputed. The court, at that time, denied as procedurally improper Debtor's request that Pons pay all of his costs and fees associated with this proceeding under 28 U.S.C. § 1927.

II. Background

Pons and Debtor, who were married in 1987, separated on February 12, 2014. They are currently parties to the Superior Court of California—County of San Diego, Family Law Division, Case No. D547548 ("Divorce Case") filed by Pons on February 24, 2014. The Family Court entered a judgment of dissolution for status only on December 11, 2015, but had not yet divided the parties' assets when this case was filed. This is not their first divorce case; Debtor filed one other in 2002 against Pons, which was dismissed.

The Divorce Case has not been free of controversy. On March 6, 2015, the state court entered an order that contained a finding that Debtor was "emotionally abusive" to Pons based only on Pons' testimony that Debtor made "unreasonable threats" and there was an "invasion of her bedroom without her permission." Debtor did not refute Pons' claims because his attorney did not file responses he had prepared. The state court ordered Debtor to vacate Deer Trail, where both parties had been residing, as of January 1, 2015. At the hearing on this matter, the judge complained he was "a little bit frustrated insofar as the evidence provided to the court is based on some generalities." The state court judge also noted that he was unsure that "feeding dogs cat food is necessarily domestic violence." The findings were somewhat hypothetical. The judge stated, "I do think ***if*** there were unreasonable threats, invasion of her bedroom without her permission, that could be emotionally abusive." Pons' Trial Ex. 2, Adversary, Doc. No. 73-1, p. 16 (emphasis added).

During most of their marriage Pons, who has only a high school education, did not work outside the home. Instead, she cared for their two children, now adults, who each had type 2 diabetes. Debtor was the sole income earner. He has an electrical engineering degree and his career involved developing software for the navy and other customers under independent contracts and through the community property business Metasoft, LLC ("Metasoft").

The parties bought and lived in a number of homes during their marriage. First, they jointly purchased 350 NW 84 Ct., #606, Miami, Florida. Then, in 1995, they acquired 2480 Kaley Walk, Kennesaw, Georgia ("Kaley Walk") titled in Debtor's name as his sole and separate property, which was later sold for a loss. A year later, they purchased 12032 Caneridge Road, San Diego, California ("Caneridge") titled to Debtor as his "sole and separate property." To confirm Debtor's separate title on Caneridge, Pons executed two quitclaim deeds on February 26 and November 24, 1998.

Debtor and Pons bought Deer Trail titled in Debtor's name as "a married man, as his sole and separate property" on February 10, 2003. The note and deed of trust for the property were also in Debtor's name alone. The down payment used to purchase Deer Trail came from Debtor encumbering Caneridge in a loan taken out only by him. At the time of purchase, Pons signed an "Interspousal Transfer Deed" transferring Deer Trail to Debtor as his sole and separate property. The parties lived in Deer Trail together until they separated.

This case, filed on May 11, 2016, is Debtor's third bankruptcy. Debtor first filed a Chapter 7 petition in the Southern District of Florida, Case No. 92-1001-RAM, and received a Chapter 7 discharge on April 24, 1992. Pons also received a Chapter 7 discharge in 1992 in a separate case, Southern District of Florida, Case No. 92-14765-AJC. Debtor's next bankruptcy was a Chapter 7 petition filed in this court on May 7, 2012, Case No. 12-06626. Debtor received a discharge in that case on August 7, 2012 and is not entitled to receive a discharge in this case, mooting Pons' discharge claims. Trustee sold Deer Trail on November 9, 2016 and is holding $205,205.06 for distribution

in this case.

Pons filed a proof of claim in this case on September 1, 2016 in the amount of $284,142.98, which she asserted to be nondischargeable. Pons later amended her claim on September 25, 2017, on the eve of trial, to increase it to $380,303.69, claiming the fraudulent transfer of assets; a share of community assets; unpaid health insurance; unpaid child and spousal support; and the loss of her homestead exemption. Pons' amended claim asserts a secured status resulting from a lis pendens recorded on February 28, 2014 in connection with the Divorce Case.

Over time, Pons' support claims have been far from consistent. Her original claim included a $10,330.57 spousal support priority claim, which was reduced in her amended claim to approximately $2,059.51: $923.94 for spousal support health insurance payments and $1,135.57 (plus 10% interest) for a portion of a priority child support payment due June 2015. Pons' claim for health insurance payments is based on payments Debtor made, but which were later returned to him when Pons' cancelled her insurance policy. Pons, however, does not dispute that when she cancelled the policy she received a refund from the insurance company of $1,908.01, which would cover Debtor's $1,135.57 payment deficiency in full with a surplus of $303.36. Pons' child support claim is based upon Debtor's payment of only a prorated amount for June 2015. The parties' son, Matthew, turned 18 on June 11, 2015, the same date that he graduated from high school. Pons objects to the prorata payment, arguing she is entitled to a full June payment.

At trial, Pons also requested the court order Debtor pay $53,944 plus 10% interest for unpaid spousal support for the post-petition period, based only on the court's equitable authority under § 105(a).

III. General Observations Regarding the Credibility of Witnesses

The court heard the testimony of Debtor, Pons, Krystin Herrera,[3] and Laurence

[3] To avoid confusion among the family members, the court will refer to Ms. Herrera by her first name. No disrespect is intended.

Brunson, and finds all intended to be truthful. That said, the court did not find the witnesses to be equally credible. The testimony was highly emotional as it involved family issues and the family witnesses were each biased by the strong emotions they experienced.

The court found Laurence Brunson to be a credible witness on what he observed regarding the family interactions. But his observations were limited and were given little weight for this reason.

Krystin's testimony regarding her father's alleged mistreatment of his family was not credible. She was very young at time of these events and her diabetes affected her recall. Krystin's admitted limited personal knowledge about Debtor and Pons' financial arrangements also negatively affected her credibility.

Pons' testimony was also less credible than Debtor's, due to the lack of detail she could recall and her admitted memory problems. Whether due to her emotional state or otherwise, she also exaggerated her descriptions of the facts at issue and was unable to provide specifics on instances of violence she claimed were commonplace. Her memory problems are exemplified by her assertion of a $10,330.57 support claim that could not ultimately be supported in any amount. The court also finds Pons' claim that she did not know she was required to turn over the Lexus to the Trustee incredible as it was contradicted by documentary evidence. Finally, Pons' claim that Debtor falsified the notarizations on three separate deeds executed in connection with Deer Trail and Caneridge was not supported by any other evidence and seems fanciful given the highly regulated notary industry.

In contrast to Pons' memory, Debtor's memory of events was corroborated by his recall of detail and by the contemporaneous records he kept.

IV. Analysis

A. Whether Deer Trail is Community Property

The characterization of property as separate or community is determined as of the petition date under applicable state law. *In re McCoy*, 111 B.R. 276, 279 (B.A.P. 9th

Cir. 1990). In general, whether property is separate or community depends on (1) the "operation of various presumptions, particularly those concerning the form of title" and (2) a determination of whether the spouses have transmuted the property in question. *In re Obedian*, 546 B.R. 409, 412 (Bankr. C.D. Cal. 2016).

1. Legal Title Presumption

Deer Trail was purchased and always held by Debtor as a married man as his sole and separate property.[4] These facts create a "legal title" or "record title" presumption codified at Cal. Evid. Code § 662 that Deer Trail was separate property. However, this title presumption is not the only presumption at issue. California's title presumption must be considered with the "community property presumption" codified at Cal. Fam. Code § 760. The community property presumption requires courts characterize property "acquired during marriage" as community property unless it is traceable to a separate property source. *In re Valli*, 58 Cal. 4th 1396, 1400 (2014); Cal. Const., art. I. § 21.

In this case, Deer Trail was acquired during marriage and the community property presumption would apply, making Deer Trail presumptively community property. Since both the record title and the community property presumptions are arguably applicable and conflict, the court must determine which is controlling. The California Supreme Court in *Valli* determined the community property presumption is paramount where there is a conflict, as is the case here. 58 Cal. 4th at 140 (the "record title presumption does not apply 'when it conflicts with transmutation statutes'"). The record title presumption now largely "has no place in the characterization of property in actions between spouses." *Id. See also Brace v. Speier (In re Brace),* 566 B.R. 13, 19 (B.A.P. 9th Cir. 2017) ("Although there may be instances where the record title presumption could apply to marital property . . . as a general rule, California's

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[4] California law also provides that property acquired during marriage "in joint form" is presumed to community property under Cal. Fam. Code § 2581; however, neither Deer Trail nor the Lexus were ever held in "joint form." This presumption is thus inapplicable.

community property presumption applies in disputes in bankruptcy involving the characterization of marital property."). *Valli* thus overturned the prior Ninth Circuit law set forth in *Fadel v. DCB United LLC (In re Fadel)*, 492 B.R. 1, 11 (B.A.P. 9th Cir. 2013) (title presumption trumped community property presumption and realty titled to husband as his sole and separate property was not community property because wife failed to overcome the title presumption and show the form of title was the result of undue influence). For this reason, Debtor's record title to Deer Trail as his separate property does not overcome the community property presumption.

2. *Source of Property Used to Purchase Deer Trail*

Debtor, despite not being represented by counsel, attempted to rebut the community property presumption by proving Deer Trail was purchased with his separate property. *In re Marriage of Cooper*, 247 Cal. App. 4th 983, 994 (2016) (*citing In re Marriage of Haines*, 33 Cal.App.4th 277, 290 (1995)) (the party seeking to rebut the community property presumption may do so only by providing "credible" evidence that the property was purchased using a separate property source identified in Cal. Fam. Code § 770); *see also In re Marriage of Bonvino,* 241 Cal. App. 4th 1411, 1423 (2015). Separate property is identified in Cal. Fam. Code § 770 and includes all property owned by a person before marriage; all property acquired during the marriage by gift, bequest, devise or descent; and rents, issues, and profits from a spouse's separate property.

Deer Trail was purchased on February 26, 1998 with the proceeds from two loans. First, a purchase money loan in Debtor's name only encumbering title to Deer Trail and, next, a loan for a down payment taken out by Debtor's name only, and secured by an interest in Caneridge.

Loan proceeds acquired during marriage are presumed to be community property. *Bonvino*, 241 Cal. App. 4th at 1423. This presumption can only be rebutted by a showing "the lender intended to rely solely upon a spouse's separate property and did in fact do so." *Grinius,* 166 Cal.App.3d at 1187. *Grinius* cited earlier cases which summarily set forth a "general rule" that loans are separate when they are secured by

separate property. *See Gudelj v. Gudelj,* 41 Cal. 2d 202, 210 (1953) ("funds procured by the hypothecation of separate property of a spouse are separate property of that spouse"); *Bank of Cal. v. Connolly*, 36 Cal. App. 3d 350, 375, (1973) ("Ordinarily funds borrowed by hypothecation of a spouse's separate property are also separate property."); *Hicks v. Hicks*, 211 Cal. App. 2d 144, 153 (1962) ("The proceeds of a loan obtained upon the credit of separate property, whether because of its hypothecation as security for repayment, or in reliance upon its ownership by the lender, are separate funds."). But the court in *Grinius* noted that, in all cases citing this general rule, courts characterized loan proceeds as separate "only when direct or circumstantial evidence indicated the lender relied *solely* on separate property." *Id.* (emphasis added).

There was no testimony or evidence from the lender indicating what it relied on in making the Deer Trail loans. With the exception of Kaley Walk, Debtor testified that he could no longer access the loan applications on any of the properties acquired during the marriage. Adversary, Doc. 66-14, pg. 16. Debtor testified that when he refinanced his first and second mortgages on Caneridge taken out in his name only, Wells Fargo sought to obligate Pons as an obligor under the mortgage. She declined, and Wells Fargo chose to make the loan regardless. This purely circumstantial supportive evidence, however, is offset by the undisputed fact that the parties' income was all community property and, at least for Kaley Walk, the standard loan application required Debtor to include his income on the loan application. While Debtor testified that Pons did not sign any of the loan applications on properties titled in his name alone and Pons had no recollection whatsoever of the loan applications, the court cannot infer from these scanty facts that the lender relied solely on separate property in making the Deer Trail loans.

The facts here are much like those in *Bonvino*, 241 Cal. App. 4th at 1424. There, the husband's salary was the primary source of income listed on the loan application to buy a home that was titled as his sole and separate property even though it was acquired during marriage. *Id.* That fact, combined with the husband's failure to present

other evidence that the lender intended to rely solely on his separate property in making the loan, meant that the loan proceeds were considered community property, even though he made a separate property contribution in the down payment. *Id.* While the husband in *Bonvino*, *id.*, failed to raise the issue of rebuttal of the presumption and Debtor here presented evidence attempting to rebut the community property loan presumption, Debtor cannot overcome the presumption absent sufficient evidence. *Grinius*, 166 Cal. App. 3d at 1187 (without satisfactory evidence of the lender's intent, the general presumption prevails). Because Debtor failed to establish that the loans used to acquire Deer Trail were made by the lender's "sole" reliance on his separate property, the Deer Trail loans cannot be considered separate property loans.

While Debtor argued the Deer Trail down payment loan was a separate property loan because it was secured by Caneridge, which was Debtor's separate property, the fact that Caneridge is Debtor's separate property would not be sufficient to meet Debtor's burden of demonstrating the lender relied *solely* on separate property. However, the court also notes that Debtor failed to demonstrate that Caneridge was his separate property. This too supports the court's conclusion that Deer Trail was purchased with community property.

Like Deer Trail, Caneridge was purchased during the marriage and is presumed to be community property unless its purchase is traceable to a separate property source (while Caneridge was titled in Debtor's name alone, as stated above, the legal title presumption would not apply as it would conflict with the community property presumption). Caneridge was purchased with a $16,406.70 down payment, of which approximately $9,800 was loaned to Debtor by his mother, Clara Herrera, from her cash savings. Debtor claims to have offered to pay his mother her money back in later years, but she would never accept it. Debtor did not identify a separate property source for the remainder of the deposit, which would presumptively be community property. The remainder of the Caneridge purchase price was paid from a loan that was, like the Deer Trail loan, taken out in Debtor's name alone. However, like the Deer Trail loan, Debtor

failed to demonstrate the Caneridge lender relied solely on Debtor's separate property because the evidence indicates the lender likely relied on Debtor's community property income in making the loan. Thus, like the spouse in *Bonvino*, Debtor's separate property contribution to the Caneridge deposit is not sufficient to demonstrate it was purchased with separate property. For this reason, the court must apply the community property presumption to Caneridge as well as Deer Trail. In addition, while Pons executed Quitclaim Deeds transferring Caneridge to Debtor, for the same reasons set forth below regarding the Deer Trail Interspousal Deed, the court cannot find the Caneridge Quitclaim Deeds transmuted the property into Debtor's separate property. The court, thus, cannot find that Caneridge was Debtor's separate property or that the Deer Trail down payment loan was secured by Debtor's separate property. Instead, the court finds the Deer Trail loan was secured by the parties' community property interest in Caneridge and, for this reason as well, the Deer Trail down payment loan was a community property loan and the Deer Trail purchase is not traceable to a separate property source.

Because Deer Trail was acquired largely from community property, Debtor has not established he purchased the property from a separate property source.

3. Transmutation

Because the community property presumption applies, Deer Trail is community property unless Debtor and Pons validly transmuted it into Debtor's separate property. A valid transmutation of property requires an express declaration in writing that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected. Fam. Code § 852(a); *see also In re Marriage of Barneson,* 69 Cal. App. 4th 583, 588 (1999). Where a transmutation advantages one spouse over the other, there is also a presumption of undue influence, which Debtor would need to rebut in order for this court to find the transmutation is valid. *In re Marriage of Fossum,* 192 Cal. App. 4th 336, 344 (2011). Debtor has the burden both of proving by preponderance of evidence that the transmutation meets the technical requirements of Fam. Code

§ 852(a), and of rebutting the presumption of undue influence, if applicable. *In re Marriage of Burkle*, 139 Cal. App. 4th 712, 730 (2006) ("The presumption of undue influence is regularly applied in marital transactions in which one spouse has deeded property to the other.").

a. Express Declaration Requirement

To be a valid transmutation under § 852(a), a transmutation document must be an "express declaration" of a transfer. Cal. Fam. Code § 852(a) requires that the document "contain language which expressly states that the characterization or ownership of the property is being changed." *Estate of MacDonald*, 51 Cal. 3d 262, 272, 272 (1990) (interpreting identically worded predecessor to § 852(a)); *Valli*, 58 Cal. 4th at 1400-01. Without such express language, the transmutation document is inadequate. *See Wolf v. Collins (In re Collins)*, 2016 Bankr. LEXIS 3286 at *8 (Bankr. S.D. Cal. Aug. 29, 2016) (a grant deed in which spouses took title "as joint tenants" did not contain an express declaration sufficient to transmute the property under § 852(a)); *Obedian*, 546 B.R. at 422.

The Interspousal Deed Pons signed on February 7, 2003 in connection with Deer Trail stated:

> For a valuable consideration, receipt of which is hereby acknowledged, Agueda M. Herrera, spouse of grantee, herein grants to Pedro Herrera, a married man, as his sole and separate property [Deer Trail].

This statement expressly provides that the ownership of the property is being changed and is therefore sufficient to meet the requirements of Fam. Code § 852(a). *See also Levy v. Levy (In re Levy)*, No. A143686, 2016 Cal. App. Unpub. LEXIS 8373 at *12 (Nov. 23, 2016) (interspousal deed met the express declaration requirements of § 852(a) but did not transmute the property because it was procured by undue influence).

b. Debtor's Advantage

Even though the deed meets the technical requirements of a proper

transmutation under Fam. Code § 852(a), Debtor must still prove either that Pons was not disadvantaged by the transaction or that there was no undue influence. Courts find that a spouse gained an advantage over the other where: (1) their position improved, (2) they obtained a favorable opportunity; or (3) they otherwise gained, benefited, or profited. *Burkle*, 139 Cal. App. 4th at 730; *In re Marriage of Delaney*, 111 Cal.App.4th 991,996 (2003) (a mere benefit is not enough; for the presumption of undue influence to apply, the advantage one spouse receives must "disadvantage" the other spouse).

Pons was disadvantaged by the transfer of her community property interest in Deer Trail to Debtor because the property was purchased with community funds of which she was deprived, particularly since Pons' share of Debtor's community property earnings from Metasoft were also used to make payments on the Deer Trail loan. Pons also relinquished her right to profit from her community interest in these monies. These disadvantages were not offset by the parties' attempt to transfer the risk of liability to Pons from the transaction. The court rejects Debtor's claim that he was actually the disadvantaged party because Deer Trail was a "high risk" investment and the parties agreed he was to be solely liable in the event of any default on the mortgage. Deer Trail was sold at a gain. *See also Levy*, 2016 Cal. App. Unpub. LEXIS 8373 at *12 (evidence that the acquisition of a property was a financial risk was insufficient to show the spouse in which title was place was not advantaged in acquiring it as separate property).

The court finds that the parties knowingly tried to shield Pons from liability and require Debtor to bear the risk of poor credit, as detailed below. But these efforts were ineffective. Since the Caneridge and Deer Trail loans were acquired during marriage, Pons' community property was liable for repayment of these loans under Fam. Code § 910. *See Lezine v. Sec. Pac. Fin. Serv., Inc.*, 14 Cal.4th 56, 64 (1996). In general, "[e]xcept as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt." Fam. Code, § 910(a). In

Lezine, 14 Cal.4th at 64, the wife did not execute the loan documents secured by community property. As such, the security interest was ineffective to formally encumber her community property interest. *Id.* But the lender was entitled to obtain a judgment against the community property to satisfy her liability under Fam. Code § 910. *Id.* As applied here, Pons' share in the equity in Deer Trail could have been used by the lender to pay any deficiency permitted by law and her community property interest in Debtor's income would also have been liable for any such deficiency. This disadvantaged Pons.

c. Undue Influence

As Pons was disadvantaged when she executed the Interspousal Deed, it is presumed that the transmutation was the result of undue influence. *In re Marriage of Fossum,* 192 Cal. App. 4th 336, 344 (2011) ("If one spouse secures an advantage from [a] transaction, a statutory presumption arises under section 721 that the advantaged spouse exercised undue influence and the transaction will be set aside."); Cal. Fam. Code § 721(b) (spouses occupy a confidential and fiduciary relationship with each other which "imposes a duty of the highest good faith and fair dealing"). When a presumption of undue influence arises, the transaction will survive a legal challenge only if the advantaged spouse can establish that their advantage was not gained in violation of their fiduciary duties and that the disadvantaged spouse's action "was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of the transaction." *Fossum*, 192 Cal. App. 4th at 344 (citations omitted).

Debtor testified he and Pons purchased both Deer Trail and Caneridge to be his separate property pursuant to a "decade's long mutual agreement" that he would maintain their residences as his sole and separate property and Pons would be "relieved of any financial liability or credit risk from the mortgage payments." Debtor claims this agreement resulted from their separate chapter 7 bankruptcy filings in 1992 in Florida where Pons decided that she no longer wanted to be at risk of owing any debt that could cause her to file bankruptcy again. As a result, Debtor was to take title to all of the properties that required the incurrence of substantial debt, but also be the sole

party personally liable for that debt. Pons testified that no such agreement existed.

The court finds it credible that the parties had such an arrangement. Pons did avoid involvement in two additional bankruptcy cases Debtor filed after 1992. Notably, Pons argues the oral 1992 agreement is not a valid transmutation agreement since it was not in writing and she is correct. But the existence of the agreement corroborates Debtor's position that Pons signed the Interspousal Deed "freely and voluntarily." Debtor's testimony is also supported by other evidence on the record regarding the signing of these deeds.

When Caneridge was purchased, Pons signed a quitclaim deed transferring her interest to Debtor. Six months later, on November 30, 1998, to take out a loan to renovate Caneridge, Pons signed a second quitclaim deed re-affirming that Caneridge was Debtor's sole and separate property. And, on February 10, 2003, Pons signed an Interspousal Deed of her interest in Deer Trail to Debtor. Pons therefore signed not one, but three, different deeds transferring her interest in real property to Debtor and her testimony regarding the circumstances under which these deeds were signed was not credible.

Pons did not remember any specifics of signing the deeds, but summarily stated that she did not sign them in front of any notary. It seems farfetched that three different notaries would violate the law by notarizing deeds without verifying Pons' identity. The court finds that with each of the loan transactions on both Caneridge and Deer Trail, Pons was explained the legal consequences of signing the deeds by the escrow company at closing and her signature was notarized. This evidence supports Debtor's contention Pons' freely and voluntarily signed the Interspousal Deed.

Debtor also corroborates the intentional nature of Pons' transmutation by providing two examples in which Pons and Debtor retained the property in their joint names. The first was their home in Florida which they sold at a loss and which led to both parties needing to file bankruptcy. The other property was an investment townhouse located at 10370-53 Scripps Poway Parkway, San Diego CA which was

acquired by encumbering Caneridge. Debtor, on October 30, 2001, took out a second mortgage under his name only in the amount of $32,700 to purchase and upgrade this property. Title was held as "Pedro Herrera and Agueda Herrera, husband and wife as joint tenants." Since the townhouse was likely to yield a large profit, Debtor testified that Pons wanted it held under both names to ensure she received the benefits of co-ownership. That property was sold less than two years later on December 8, 2003 and the parties received a $89,725 net gain. Pons did not refute this testimony.

Pons asserts in response that the Interspousal Deed could not have been freely and voluntarily signed because she was the victim of Debtor's domestic violence as was found in the Divorce Case. But, for a number of reasons, the court did not find the evidence presented at trial regarding the alleged domestic violence credible. The state court found only potential emotional abuse and its finding, at least in part, was based on Debtor's failure to file a response which Debtor's blames on his attorney. The Family Court's domestic violence finding was therefore by default and was not necessarily and actually litigated. As such, the court does not give it preclusive effect or much weight. *See Lucido v. Superior Court,* 51 Cal. 3d 335, 366 (1990) (preclusion not applied to finding in one hearing to another proceeding where different issues and policies were involved). The only other evidence of domestic violence presented at trial was Pons and Krystin's testimony, which the court did not find credible for the reasons set forth above.

The court also gives little weight to Debtor's three references to Deer Trail as the community residence during the Divorce Case, which Debtor explained was the fault of his attorney. He referred to Deer Trail as the family residence at trial, and he lived there until the family court ordered him to vacate.

For these reasons, the court finds that Pons freely and voluntarily signed the Interspousal Deed for Deer Trail. But this is not the end of the analysis and the court is not persuaded that Debtor demonstrated that Pons signed the deed "with full knowledge of all the facts" or a "complete understanding of the effect of the transaction" sufficient to overcome the presumption of undue influence. There was no evidence at trial that Pons,

with her limited education and work experience, consulted, or had the opportunity to consult, any lawyers or another independent party who could explain to her the consequences of the Interspousal Deed. Instead, both Pons and Debtor suffered under the misapprehension of the law discussed above: that Pons was free of liability for the loans. As such, neither she nor Debtor had full knowledge of all of the facts, and the Interspousal Deed was by operation of the presumption identified above ineffective to transmute Pons' community property interest into separate property.

As a result of the applicable presumptions under California law, the court finds Deer Trail is community property.

B. Whether the Lexus is Community Property

Debtor and Pons purchased the Lexus on August 22, 2012 and title to the Lexus has been held in Debtor's name since that time. The Lexus has been in Pons' exclusive use and possession since March 2014 (after the parties filed for divorce). Pons and Trustee agree the Lexus is community property because it was acquired during the marriage and is property of the estate under § 541(a)(2). Pons ignored Trustee's several requests that she turn over the Lexus, and her claim that she was unaware of the numerous turnover demands is not credible.

Debtor argues the Lexus is his sole and separate property because he paid $10,000 to redeem the vehicle under 11 U.S.C. § 722 in a prior bankruptcy (Case No. 12-06626). He therefore argues that he is entitled to the diminution in value since the separation. The court rejects this argument since the community or separate nature of property is determined at the time of acquisition. *Bonvino*, 241 Cal. App. 4th at 1422. Whether Debtor is entitled to a contribution claim will be determined in state court when the court abstains from hearing the remainder of this dispute.

The court finds the Lexus is community property. Pons conceded she was not entitled to a claim under § 502(d) until she turned over possession of the Lexus since she admitted the Lexus is community property.

C. Whether Pons is Owed Child Support

In her supplemental brief, Pons provided no authority for her claim that Debtor owed child support for the entire month of June 2015 even though Matthew turned 18 and graduated from high school on June 11. Pons' argument that "the State Court Order expressly provides that the Debtor was obligated to make monthly payments of child support on the first of each month. . ." and that therefore Debtor was obligated to make a full, instead of partial, payment, confuses two issues. The support order addressed the timing of payment and the amount of a full monthly payment, not when the payment obligation ceased. That was determined by statute. Cal. Fam. Code § 3901(a) ends the child support obligation upon the child's 18th birthday or high school graduation.

Pons' argument is an unreasonable interpretation of the order.

D. Whether Pons has a Claim for Post-petition Spousal Support

Pons' claim for $53,944 plus 10% interest for unpaid spousal support for the period since Debtor filed bankruptcy on May 11, 2016 is a post-petition support obligation, rather than a claim against the estate. *See Burnett v. Burnett (In re Burnett)*, 646 F.3d 575, 582 (8th Cir. 2011) (child and domestic support claims that arose post-petition are not claims against the estate under § 502(b)(5)). The court rejects Pons' argument under *In re Slyman*, 234 F.3d 1081, 1087, n. 5 (9th Cir. 2000), that it should order under § 105(a) that Pons holds a nondischargeable debt for these post-petition debts. The Ninth Circuit in *Slyman* did not actually hold that post-petition nondischargeable debts can be paid out of property of the estate since that issue was not raised on appeal.

E. Whether Pons is a Secured Creditor

Pons contends that her recording of a lis pendens in the family law proceeding gave her secured status in this case. The court disagrees. A lis pendens is a recorded document giving constructive notice that an action affecting title or right to possession of the real property described in the notice has been filed. *Kirkeby v. Superior Court*, 33 Cal. 4th 642, 647 (2004). Recording a valid lis pendens does not operate as an

"encumbrance." *Cal-Western Reconveyance Corp. v. Reed*, 152 Cal. App. 4th 1308, 1318-19 (2007); *Gladstone v. Schaefer (In re UC Lofts On 4th, LLC)*, Nos. SC-14-1287-JuKlPa, SC-14-1320-JuKlPa, 2015 Bankr. LEXIS 3009 at *37 (B.A.P. 9th Cir. Sep. 4, 2015) ("[U]nder California law, a notice of lis pendens does not make the person who recorded it a secured creditor."); *see also United States v. Sec. Tr. & Sav. Bank*, 340 U.S. 47, 49-50 (1950) (attachment liens provide creditors only a potential right or a contingent lien giving them a right to proceed against property upon obtaining a judgment). Instead, a lis pendens merely gives constructive notice to subsequent bona fide purchasers sufficient to prevent purchasers from acquiring an interest superior to the creditor after judgment is entered. *In re Lane*, 980 F.2d 601, 603 (9th Cir. 1992). Pons is not a secured creditor.

F. Distributions from the Estate

Even if Deer Trail is community property, it is property of the estate under § 541(a)(2). Thus, it may be used to pay administrative expenses as justice requires under § 726(c)(1). *See also In re Hicks*, 300 B.R. 372, 378 (Bankr. D. Idaho 2003). In this case, justice requires Trustee's administrative expenses be paid since he provided a benefit by liquidating Deer Trail, which gave rise to the funds at issue. *See* Or. Re Trustee's Mot. Sell Real Property, Nov. 8, 2016, Main Bankruptcy, Doc. No. 77; Tentative Ruling, July, 5, 2017, Main Bankruptcy, Doc. No. 149, pg. 10-11. The Deer Trail sales proceeds are also liable for the community debts and justice requires payment of the administrative expenses of the estate because this administration facilitated the payment of community liabilities. The court also notes Pons has not been fully cooperative with Trustee, including by failing to turn over the Lexus and has increased administrative costs. While the administrative expenses will be paid from the proceeds of Deer Trail before they are divided between the parties, this determination is without prejudice to any other allocation of these expenses in the Divorce Case after abstention.

In this Chapter 7 case, Trustee has the obligation to collect assets to pay valid

claims against the estate. 11 U.S.C. § 704(a)(1). When Deer Trail was sold, the trustee was required to pay the mortgage arrearage that had accumulated post-petition because Pons did not pay the mortgage as ordered by the state court. One of the assets of this case is the estate's rights to recover those payments from Pons. Trustee calculates that amount to be $19,398.98.This amount will be deducted from Pons' share of Deer Trail. Thereafter, the estate's interest in the proceeds can be used to pay Debtor's post-separation debts under § 726(c)(2). As a matter of state law, specifically Fam. Code § 910(b), post-separation debts can only be paid from the liable spouse's share of community proceeds. *In re McCoy*, 111 B.R. at 279. Unsecured creditor claims, including the tax claims, will be paid only from Debtor's share.

G. Abstention

The court will abstain from deciding the remaining family law issues that do not affect the administration of the estate. As stated in *MacDonald,* 755 F.2d at 717, "[i]It is appropriate for bankruptcy courts to avoid incursions into family law matters out of consideration of . . . deference to our state court brethren and their established expertise in such matters." *See also In re Cohen,* No. 2:14-cv-08939 SJO, 2015 U.S. Dist. LEXIS 136595, at *9 (C.D. Cal. Oct. 5, 2015). This court is hesitant to resolve the spouses' claims against each other in the divorce, except to the extent necessary to pay the claims of the creditors.

The court cannot conclude the administration of this estate until it is fully administered. The Metasoft proof of claim is one issue that may delay administration of this case. The company Metasoft is clearly a community property asset under the evidence, and its claim needs to be resolved before Trustee can divide the remaining assets among the spouses.

V. Conclusion

The court concludes that both the Lexus and Deer Trail are community property and that Pons has no priority or administrative claims against the estate. The court will delay entry of its abstention order until Trustee files his notice of intent to distribute this estate.

IT IS SO ORDERED.

Dated: November 13, 2017

MARGARET M. MANN, JUDGE
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In re Pedro Herrera
Bankruptcy Case No. 16-02852-MM7
Adv. Case No. 16-90131-MM

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION REGARDING BIFURCATED ISSUES OF COMMUNITY PROPERTY AND ADMINISTRATIVE CLAIM; ORDER GRANTING DEFERRED ABSTENTION FROM UNRESOLVED ISSUES IN ADVERSARY PROCEEDING

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

Pedro Herrera
8025 SW 107 Ave. #213
Miami, FL 33173

Franchise Tax Board
Bankruptcy Sec. MS A340
PO Box 2952
Sacramento, CA 95812

Internal Revenue Service
PO Box 7346
Philadelphia, PA 19101-7346

Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on November 13, 2017.

Michele McConnell

Michele McConnell, Judicial Assistant