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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

VICKY WEI FENG,

Plaintiff and Appellant,

v.

ELLA FUNG,

Defendant and Respondent.

A128002

(Alameda County  
Super. Ct. No. RG08373092)

Vicky Wei Feng obtained a judgment for fraud against Ella Fung's former husband, who fled the country in 2006. She brought this action under the Uniform Fraudulent Transfer Act, Civil Code section 3439 et seq. (UFTA), alleging that Fung used the dissolution proceedings she initiated against her husband to defraud her husband's creditors, including Feng. After a court trial, the trial court found in favor of Fung on all issues. We affirm the judgment.

**I. BACKGROUND**

Feng sued Fung in February 2008, alleging causes of action for violation of the UFTA and declaratory relief. Feng's amended complaint sought compensatory damages of \$702,960.92, plus interest and punitive damages, as well as declarations that cash proceeds from the sale of Fung's former marital residence (Pine Court) and real estate awarded to Fung as separate property during her divorce (Ellery Common) are held in trust for Feng to satisfy her default judgment against Fung's former husband, Joseph Chan.

## **A. *Facts***<sup>1</sup>

Chan is believed to be living in China but his exact whereabouts have been unknown since March 13, 2006. On that date, Chan and his business partner and mistress, Connie Wang, failed to appear for trial in a felony prosecution against them for grand theft and aiding and abetting the practice of medicine—providing medical diagnoses and laser treatments—without a medical license.

Fung and Chan were married in 1979. They purchased the Pine Court residence in 1989 as joint tenants, with a mortgage loan of \$380,000. During the marriage, Fung worked as a physical therapist at Kaiser Hospital. Chan worked as a nuclear engineer until 2000 or 2001, when he changed jobs and became a real estate agent. Fung knew that Chan had a business partner named Camilla (or Carmela) Ho in the real estate business, but she did not know anything about his work, investments, or legal problems. By 2006, Chan and Fung had grown apart and were leading mostly separate lives. She was unaware of his laser surgery business in San Jose and did not learn about Wang or Wang's business and personal relationship with Chan, or the criminal charges against them, until after Chan and Wang absconded in 2006.

Chan called Fung from China shortly after he absconded. He told her he was out of the country and would never be returning. She was shocked and became hysterical when he called. She remembered Chan mentioning a newspaper article that had been published about his court case, and telling her it was not true. He also told her that a particular file cabinet drawer in their house contained a folder with a signed form giving her his power of attorney over the Pine Court property. The special power of attorney form had been signed and notarized on March 10, 2006. Chan and Fung had not previously discussed the power of attorney, and Fung did not understand at first why he had written it. The two had a second conversation a few days later in which Chan told her to give his Honda Civic car to their son. He did not give Fung his telephone number

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<sup>1</sup> We summarize the trial evidence in the light most favorable to the prevailing party. (*Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527, 1531, fn. 1.)

and he made no further attempt to call her or their children. She sent him two or three e-mails in 2006 using his old e-mail address, but he wrote very little in response. These e-mails concerned her personal feelings about what he had done. Chan and Fung did not communicate about what she should do with the Pine Court property.

Feng's judgment against Chan arose from a suit she filed in 2005 against Ho, Chan, and the real estate brokerage office with which they were associated, alleging fraud, negligent misrepresentation, and breach of fiduciary duty. Feng alleged that in 2000, the defendants represented her in the purchase of an investment property in Palo Alto. According to her second amended complaint filed in August 2005, the defendants allegedly misled Feng about the amount of a competing offer made on the property to induce her to raise her bid so that defendants could earn a greater commission. As a result, Feng overpaid for the property and lost money when she was forced to sell it in 2003. She sued the defendants for \$391,000—the difference between what she actually paid for the property and what she could have obtained the property for had she known the true facts—plus unspecified other general damages. The defendants were represented by a San Jose law firm.

Steven Mutnick filed a second civil lawsuit against Chan on March 16, 2006, alleging fraud in connection with Mutnick's purchase of Chan and Wang's laser surgery business in 2004 (hereafter the Mutnick lawsuit).<sup>2</sup> Mutnick's complaint included a cause of action for fraudulent transfer naming Fung as a defendant and seeking to enjoin any

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<sup>2</sup> The criminal information against Chan and Wang, which was filed in December 2005, alleged criminal acts occurring in 2003 and 2004, before Mutnick purchased the business. According to Mutnick's complaint, his dispute with Chan and Wang over the purchase had been in binding arbitration with Judicial Arbitration and Mediation Services (JAMS) until the arbitration was halted pending completion of the criminal proceedings.

further transfer or encumbrance of the Pine Court property.<sup>3</sup> Mutnick had a lis pendens placed on the Pine Court property on March 16, 2006.

Between March and June 2006, Fung learned of three civil lawsuits against Chan in total—the Feng lawsuit, the Mutnick lawsuit, and a third lawsuit by a San Jose landlord for rent allegedly owed by Chan’s business. Fung turned the papers over to an attorney she had hired. On May 17, 2006, Fung filed a petition for dissolution of her marriage to Chan and an income and expense declaration (Judicial Council forms, form FL-150). In her income and expense declaration, Fung did not mention or refer to any of the lawsuits.

After Chan left the country, Fung decided she had to sell the Pine Court residence because she could not continue making the mortgage payments on her income. Due to the lis pendens, Fung entered into a stipulation with Mutnick under which Mutnick withdrew the lis pendens and dismissed Fung from the suit without prejudice in return for Fung’s agreement that if the Pine Court property was sold, one-half of the net sale proceeds would be placed into an interest-bearing account for the benefit of “the creditors of Joseph K. Chan.” The stipulation was signed and entered as an order of the court in the Mutnick lawsuit by Judge William Elfving on June 15, 2006.

Fung sold the Pine Court property for \$1.275 million on July 20, 2006. According to the final closing statement prepared by the escrow company, the net proceeds due to Fung at the closing were \$690,979.47. Fung used \$330,000 of the net proceeds to purchase the Ellery Common property.<sup>4</sup> Fung deposited \$330,368.17 of the proceeds into an interest-bearing account at Union Bank of California (Union Bank) that Fung considered to be a trust account for Chan’s creditors. Before dividing the net proceeds, Fung reimbursed herself for expenses she incurred before the closing to prepare the Pine

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<sup>3</sup> At Chan’s instigation, Fung and Chan had refinanced the Pine Court property in February 2006, with a new loan amount of \$520,000. Mutnick alleged this was part of a plan by Wang and Chan to liquidate their assets and flee the country.

<sup>4</sup> The purchase price of Ellery Common was \$672,000.

Court property for sale, including payments she made to a painter, gardener, and landscaper, as well as the lawyer fees she incurred to have the lis pendens removed.

Fung took title to the Ellery Common property as “ELLA Y. FUNG, AN UNMARRIED WOMAN,” even though she was not yet divorced from Chan. At trial, Fung explained that she checked the box for “unmarried” because there was no box for “divorcing,” and she considered herself unmarried. She also felt that due to the stipulation and order in the Mutnick lawsuit, one-half of the Pine Court proceeds belonged to her alone, and her husband and his creditors had no right to it.

Fung filed a request to enter default in her dissolution proceeding on August 25, 2006. The request stated there had been no changes to Fung’s income and expenses since the May 2006 filing. No property declaration form (Judicial Council forms, form FL-160) listing community assets and debts or proposed judgment was filed with the request. On May 7, 2007, a default judgment of dissolution was entered in Fung’s dissolution case nunc pro tunc as of March 1, 2007.

The judgment entered by Family Law Commissioner John Porter incorporated the following relevant provisions regarding child support and the division of property and debts drafted by Fung’s attorneys: (1) Chan was to pay \$500 per month for Chan and Fung’s high school-age son until he attained age 19 or was no longer living with Fung; (2) Chan and Fung were each to receive “the property presently in their possession,” and “[t]he separate property of each spouse . . . specifically including each party’s one-half separate interest in the proceeds from the sale of the joint tenancy property, [is] confirmed to the party in possession thereof”; (3) each party “from the proceeds of the sale of the joint tenancy property” was to “pay one-half of their children’s college expenses through receipt of a baccalaureate degree,” estimated at \$30,000 per year per child,<sup>5</sup> and Chan’s “one-half share may be further segregated from his share of the proceeds and paid on account of the children’s tuition”; and (4) Chan’s “business” was

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<sup>5</sup> At the time of the divorce filing, Chan and Fung had an adult daughter in college and a 17-year-old son who was about to finish high school.

awarded to Chan as his separate property and he was to hold Fung “harmless from any and all matters relating to the . . . business . . . specifically including the [Mutnick lawsuit].”

Fung made withdrawals from the Union Bank account totaling over \$125,000. Fung testified that she believed all of the withdrawals she made were consistent with the stipulation and order in the Mutnick lawsuit and the dissolution judgment. According to an itemized list Fung provided to the court, the withdrawals included \$4,500 for Chan’s child support arrearages for Chan and Fung’s minor son, \$105,000 for Chan’s share of college expenses for both children, \$5,000 awarded to Fung for attorney fees in the dissolution action, state and federal taxes on the account’s interest income, and 18 car payments of \$493.38, owed on Chan’s automobile. The trial court found that all of the withdrawals were authorized either by the dissolution judgment or Judge Elfving’s order.

On June 29, 2007, Feng obtained a default judgment against Chan for \$702,960.92, representing her cash downpayment of \$535,019.20 for the Palo Alto investment property, plus her cash contributions of \$336,583.69 to carry the property, less the rental income she received and the cash proceeds she obtained when the property was sold, together with her costs of suit. Feng filed this action against Fung on February 2, 2008, and later obtained a restraining order preventing Fung from using any funds in the Union Bank trust account. On November 28, 2008, pursuant to a stipulation between the parties, Union Bank issued a cashier’s check to Fung from the account in the amount of \$211,032.89 in partial satisfaction of her judgment against Chan.<sup>6</sup>

### ***B. Trial Court Decision***

The case was tried to the court based on a set of stipulated facts and the testimony of Fung and Feng. The court found in favor of Fung on all issues. With regard to the application of the UFTA, the court noted that Feng had never been Fung’s creditor and

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<sup>6</sup> There is no substantial evidence in the record that Mutnick ever obtained a judgment against Chan, although Fung apparently had reason to believe he had obtained a judgment in April 2007. If Mutnick did obtain a judgment, there is no evidence he attempted to enforce it against the Union Bank account or by any other means.

Fung had never been in the position of a debtor with respect to Feng. It found that Fung's sale of the Pine Court property was not fraudulent because the sale was made pursuant to Judge Elfving's order that specifically reserved half of the proceeds "for the benefit of the creditors of Joseph K. Chan," which included Feng. In the trial court's view, this negated Feng's claim that Fung intentionally or fraudulently failed to disclose the existence of her lawsuit to Judge Elfving. The court also noted that Feng failed to establish Chan's insolvency. She offered no evidence concerning the financial condition or assets of his real estate business.

The court also rejected Feng's claim that Fung's purchase of the Ellery Common property was fraudulent as to Feng. The court found that (1) Judge Elfving's order in the Mutnick lawsuit authorized her to purchase the property; and (2) her choice to purchase it in her own name was a practical necessity given her husband's unknown whereabouts, and was not for the purpose of hindering his creditors. The court further found that Commissioner Porter's award of the Ellery Common property to Fung as her separate property was neither improper nor constituted a fraudulent transfer. The court found (1) there was no evidence the community benefited from the real estate transaction between Chan and Feng, or that Fung participated in or had any knowledge of Chan's fraud in the transaction; and (2) the family court was therefore entitled to allocate Chan's debts exclusively to Chan under the "innocent spouse" doctrine. The court found that Commissioner Porter understood the proceeds from the sale of the Pine Court property were a community asset in which each spouse had a one-half interest, and was aware of and took into account the interests of Chan's actual and potential creditors when he made his rulings and entered the dissolution judgment. Under Family Code section 916,<sup>7</sup> Feng was not entitled to enforce her judgment against the Ellery Common property.

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<sup>7</sup> With exceptions not relevant here, Family Code section 916 provides that following division of the community estate, a divorced spouse's share of the property is not liable for the debts of his or her ex-spouse: "The separate property owned by a married person at the time of the division and the property received by the person in the division *is not liable for a debt incurred by the person's spouse before or during marriage*, and the person is not personally liable for the debt, unless the debt was

Feng timely appealed from the judgment.

## II. DISCUSSION

On appeal, Feng contends the trial court erred by not holding that the transfers made pursuant to the default judgment of dissolution—principally the disposition of the proceeds from the Chan-Fung marital home—should be set aside as fraudulent, either under sections 3439.04 or 3439.05 of the Civil Code.

As in *Mejia v. Reed* (2003) 31 Cal.4th 657 (*Mejia*), this case involves the interplay between the UFTA and Family Code section 916, the provisions of which were adopted on the premise that “ ‘under most circumstances, after a marriage has ended, it is unwise to continue the liability of spouses for community debts incurred by former spouses.’ ” (*Mejia*, at p. 665, quoting *Dawes v. Rich* (1997) 60 Cal.App.4th 24, 30.) As explained below, while *Mejia* held that property transfers made as part of a marital settlement agreement were subject to the UFTA, we decline to extend *Mejia* to this case, which involves a default dissolution judgment obtained by the nondebtor spouse.

The difficulty in applying the UFTA in this case is illustrated by the contradictory nature of Feng’s UFTA claims. She asserts in her briefing that Chan is the debtor for purposes of the UFTA, yet Fung is the person making the fraudulent conveyance. Thus, Feng relies on *Chan’s* asserted insolvency and whether Chan received reasonably equivalent value for his community property assets in the dissolution, but she asserts *Fung* was the person who acted with fraudulent intent. As part of the evidence of *Fung’s* fraudulent intent, she cites *Chan’s* conduct, including his insolvency and flight from the country. Feng’s fraudulent transfer theory also appears to be based in large measure on the implausible claim that the family court awarded Fung all of the community property assets as her separate property when it is evident she obtained, at most, only half of those assets. As we shall explain, attempting to apply the UFTA in these circumstances is like trying to fit the proverbial square peg into a round hole.

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assigned for payment by the person in the division of the property.” (*Id.*, subd. (a)(2), italics added.)



### **A. Burden of Proof/Standard of Review**

Feng had the burden of proving by a preponderance of evidence that the transfers she challenges were fraudulent. (*Whitehouse v. Six Corp.* (1995) 40 Cal.App.4th 527, 533–534.) With regard to the trial court’s material factual findings, our review is limited to determining whether there was *any* substantial evidence to support them. (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123.) We have no power to reweigh the evidence, evaluate the credibility of witnesses, or resolve conflicts in the evidence. (*Ibid.*) Regarding the application of the law to the facts, “ “[w]e are not bound by the trial court’s stated reasons, if any, supporting its ruling; we review the ruling, not its rationale.” ’ [Citation.]” (*Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450.)

Many of the facts in this case were undisputed. Although we agree in large measure with Feng’s assertion that this case “turns upon the applicability of the UFTA to the undisputed evidence,” we find as a matter of law that Feng was not entitled to relief based on that evidence.

### **B. Civil Code Section 3439.04, subdivision (a)(1)—Actual Fraud**

Civil Code section 3439.04, subdivision (a)(1) provides in relevant part as follows: “A transfer made or obligation incurred *by a debtor* is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if *the debtor* made the transfer or incurred the obligation . . . . [¶] . . . [w]ith actual intent to hinder, delay, or defraud any creditor *of the debtor*.”<sup>8</sup> (Italics added.) Section 3439.01 defines the term “debtor” for purposes of the UFTA as “a person who is liable on a claim,” defines “debt” as “liability on a claim,” and defines “claim” in

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<sup>8</sup> Civil Code section 3439.04, subdivision (a)(2) concerns a species of “constructive fraud” in which the debtor, without fraudulent intent, transfers assets without receiving a reasonably equivalent value while the debtor is either insolvent or likely to become insolvent. (See also Civ. Code, § 3439.05.) Feng’s constructive fraud claims are discussed in the next section.

relevant part as a “right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, [or] disputed[] [or] undisputed . . . .”

In this case, Feng had no lien on any of the property divided in Fung’s marital dissolution proceeding and no debt owed to Feng was assigned to Fung in that proceeding. Without regard to the possible application of the UFTA, the property Fung received by reason of the family court judgment was therefore not liable for any third party debt incurred by Chan during the marriage, nor is Fung personally liable for such debt under Family Code section 916, subdivision (a)(2). Our courts have recognized only a single exception to the finality of Family Code section 916 as against a third party creditor of one spouse—where the creditor alleges *a marital settlement agreement* (MSA) violates the UFTA. (*CMRE Financial Services, Inc. v. Parton* (2010) 184 Cal.App.4th 263, 268–269, citing *Mejia, supra*, 31 Cal.4th 657.)<sup>9</sup> But unlike *Mejia*, this case involves no MSA, nor any other potentially collusive arrangement between the debtor and nondebtor spouses. There was no evidence in the record to suggest, much less prove, that Fung acted in concert with Chan in any way in her dissolution proceeding, or that Chan intentionally defaulted in the dissolution proceeding as a ruse for the purpose of hindering creditors. For his own reasons and of his own accord, Chan simply abandoned whatever property he had left in the United States, and made no provision for either his creditors or his family. We are thus faced with the threshold question of whether *Mejia*’s reasoning extends to these circumstances.

In deciding as a matter of first impression that the UFTA might apply to MSA’s, *Mejia* emphasized the importance of Family Code section 2550, which provides that *except upon the agreement of the parties*, the court in a dissolution must divide the

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<sup>9</sup> The defendant husband in *Mejia* had an extramarital affair that resulted in the birth of a child. (*Mejia, supra*, 31 Cal.4th at p. 662.) In a later divorce proceeding, husband and wife entered into an MSA under which husband transferred all of his interest in jointly held real property to wife, and wife conveyed her interest in husband’s medical practice to him. (*Ibid.*) The plaintiff, the child’s mother, sought a lien against the property based on the UFTA, on the theory that the purpose of the transfer to wife was to prevent plaintiff from collecting future child support. (*Mejia*, at p. 662.)

parties' community estate equally. (*Mejia, supra*, 31 Cal.4th at pp. 665–666.) The court noted that this requirement, when it applied, allowed the court to take the rights of creditors into account. (*Id.* at p. 666.) On the other hand, when the parties agree upon a property division, “no law requires them to divide the property equally, and the court does not scrutinize the MSA to ensure that it sets out an equal division.” (*Id.* at p. 666.) This distinction was critical to the Supreme Court’s reasoning in *Mejia*. It was because MSA’s are *not* reviewed by the court to ensure that community property is equally divided that the *Mejia* court found them subject to being set aside under the UFTA. The court stated: “When the court divides the marital property in the absence of an agreement by the parties, it must divide the property equally (Fam. Code, § 2550), which provides some protection for a creditor of one spouse only. In view of this overall policy of protecting creditors, it is unlikely that the Legislature intended to grant married couples a one-time-only opportunity to defraud creditors by including the fraudulent transfer in an MSA.” (*Mejia, supra*, 31 Cal.4th at p. 668.)

The first complication encountered in trying to extend *Mejia* to a default dissolution judgment obtained by the nondebtor spouse is that the UFTA focuses throughout on the conduct of the *debtor*. The husband in *Mejia* was a debtor whose conduct and intent in transferring property to his wife under an MSA came within the text and purpose of the UFTA. But Fung was not a “debtor” for purposes of the UFTA when she initiated the dissolution action. To qualify as a debtor under the UFTA, Fung had to have been “liable” on Feng’s claim. (Civ. Code, § 3439.01, subd. (e).) But Family Code section 1000, subdivision (a) specifies that “[a] married person is not liable for any injury or damage caused by the other spouse except in cases where the married person would be liable therefor if the marriage did not exist.” Feng makes no claim and presented no evidence that Fung was aware of Chan’s business dealings with her, or played any role in causing her financial loss. Feng’s lawsuit did not name Fung as a defendant and Feng’s judgment was against Chan, not Fung. Feng asserts section 1000, subdivision (a) is inapplicable because it (1) only concerns liability for death, personal injury, and property damage; and (2) is limited to liabilities that do not benefit the community. She cites no

statutory text or other authority supporting that narrow construction. By its express terms, the provision applies to “*any* injury or damage” (italics added) caused by the other spouse’s torts, and it is not limited to acts benefiting the community.<sup>10</sup> And, contrary to Feng’s claim, her judgment against Chan was not based on breach of contract or other nontortious conduct. Her complaint alleged only tort causes of action against Chan—fraud, negligent misrepresentation, and breach of fiduciary duty. (See *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1534 [breach of fiduciary duty is a tort].) Feng admitted at trial that all of her losses were due to fraud. Thus, we reject an essential premise of Feng’s claim, that Fung was a “debtor” for purposes of the UFTA.

It is true that if Chan and Fung had stayed married, the community estate had potential liability for Chan’s debts, including Fung’s tort judgment. (See Fam. Code, § 910 [community estate is liable for debt of either spouse incurred before or during marriage]; Fam. Code § 1000, subd. (b).)<sup>11</sup> We will assume for purposes of further analysis that the potential liability of the community estate made Fung a “debtor” as to Feng under the UFTA even though she would not be considered a debtor under the Family Code. Even under that assumption, Feng’s UFTA claim would still fail.

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<sup>10</sup> Benefit to the community is only relevant under Family Code section 1000 in determining the order in which a creditor must seek to satisfy its claim as between the separate property of the debtor spouse and the community property. (See Fam. Code, § 1000, subd. (b); *11601 Wilshire Associates v. Grebow* (1998) 64 Cal.App.4th 453, 457, fn. 4.)

<sup>11</sup> Family Code section 1000 specifies that a judgment creditor may look to the community estate for satisfaction of a tort judgment against a married person as follows: “(b) The liability of a married person for death or injury to person or property shall be satisfied as follows: [¶] (1) If the liability of the married person is based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the community estate and second from the separate property of the married person. [¶] (2) If the liability of the married person is not based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the separate property of the married person and second from the community estate.” (See also 11 Witkin, Summary of Cal. Law (10th ed. 2005) Community Property, §§ 184–185, pp. 764–767.)

The UFTA would not apply to the dissolution judgment unless that judgment brought about a “transfer” made with the actual intent to hinder, delay, or defraud a creditor. The UFTA defines “transfer” in relevant part as “every mode . . . of disposing of or parting with an asset or an interest in an asset . . . .” (Civ. Code, § 3439.01, subd. (i).) As we construe the judgment, Fung parted with her community property interest in the net proceeds from the sale of the Pine Court property and received in exchange a separate property interest in the Ellery Common property, which she had previously purchased with one-half of such net proceeds pursuant to Judge Elfving’s order. While Feng contends the judgment also improperly awarded Fung all of the funds in the Union Bank account, we disagree. The operative paragraph of the judgment awards “[e]ach party . . . the property presently in their possession . . . . [¶] . . . specifically including each party’s one-half separate interest in the proceeds from the sale of the joint tenancy property . . . .” There would be no reason to refer to “each party’s” one-half interest in the proceeds if all of the proceeds were being awarded to Fung. Furthermore, the provisions of the judgment awarding child support, college tuition, and attorney fees all specify that Chan’s payments are to be made from his proceeds from sale of the joint tenancy property. The child support provision specifically characterizes Chan’s proceeds as his “separate property.” None of these provisions would make sense if, as Feng contends, the judgment awarded all such proceeds to Fung.

In our view, the judgment must be read in conjunction with Judge Elfving’s prior order that one-half of the proceeds from the sale of Pine Court were to be placed in an interest-bearing account for the benefit of Chan’s creditors. Under that order, Fung was merely the trustee of the funds in the Union Bank account, not the party in possession of the funds when the dissolution judgment was entered. The dissolution judgment, although inartfully worded, effectively changed the character of the funds in the account from community property to Chan’s separate property, albeit still subject to Judge Elfving’s order that the funds were for the benefit of Chan’s creditors. Had Fung believed the funds were awarded to her as her sole and separate property she would not have stipulated to paying Feng more than \$211,000 out of the account before this case

was tried, and she would not have been careful to limit her withdrawals from the account to the amounts Chan was ordered to pay under the dissolution judgment, as the trial court found she did.

At bottom, Feng's fraudulent transfer claim cannot be predicated on the family court's division of the community assets, which was equal.<sup>12</sup> The only means the court might have had for affording greater protection to Chan's creditors was in its assignment of Chan's *debts* incurred during the marriage. In fact, Feng does not dispute that Fung was entitled to one-half of the community assets, but contends she should also have been assigned half of Feng's judgment as her debt. Arguably, the family court could have taken this approach to protect Chan's creditors, but failed to do. (See Fam. Code, § 916, subd. (a)(2).)<sup>13</sup> If this is Feng's theory, she would also have to prove that Fung caused the family court to assign all of the community debt to Chan by deliberately failing, with fraudulent intent, to disclose to Commissioner Porter the full extent of the outstanding lawsuits against Chan.

The first problem with a theory based on the family court's assignment of debt is factual. The trial court in this case specifically found that Commissioner Porter *was* aware of the existence of other potential creditors, and of the provision made by Judge Elfving for those creditors. We find the dissolution judgment supports this conclusion. The judgment makes multiple references to Chan's portion of the proceeds from the sale of Chan and Fung's joint tenancy property. It can reasonably be inferred from this that

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<sup>12</sup> If anything, Chan received more of the community estate than Fung. The family court awarded him his business in addition to half of the net proceeds from the sale of the family home. While Feng represents the business was worthless with Chan out of the country, she put in no evidence regarding its value. There is nothing in the record regarding the business's possible assets such as accounts receivable, bank accounts, or real or personal property.

<sup>13</sup> Family Code section 916, subdivision (a)(2) states in relevant part: "The separate property owned by a married person at the time of the division and the property received by the person in the division is not liable for a debt incurred by the person's spouse before or during marriage, and the person is personally liable for the debt, *unless the debt was assigned for payment by the person in the division of the property.*" (Italics added.)

the family court must have been aware of (1) the Union Bank account holding such proceeds; (2) Judge Elfving’s order requiring that it be created; and (3) the purpose for which it existed—the protection of Mutnick and other creditors. Any doubt the family court knew about creditors with potential claims against the community estate was removed by the hold harmless clause in the judgment. That clause required Chan to hold Fung harmless from “any and all matters relating to [Chan’s] business” of which one—the Mutnick lawsuit—was specifically identified by name, location, and case number. The fact that the trial court assigned all of Chan’s debt to the property he received in the dissolution does not in any way prove that the court was misled about the assets and debt to be divided. Correctly or incorrectly, the family court might have decided that Family Code section 2627 required it to assign those potential debts to Chan.<sup>14</sup> The court may also have decided it would be unfair to take Chan’s voluntary, postseparation absence from the country into account in determining the capacity of his business to meet its debts. (See *In re Marriage of Barnert* (1978) 85 Cal.App.3d 413, 423 [community property business may be valued on separation date when one spouse dissipates its value after separation].) In any event, we have no basis for disturbing the trial court’s finding that Fung did not deliberately mislead Commissioner Porter about Chan’s debts.<sup>15</sup>

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<sup>14</sup> Family Code section 2627 provides in relevant part: “Notwithstanding Sections 2550 to 2552, inclusive, and Sections 2620 to 2624, inclusive, . . . liabilities subject to paragraph (2) of subdivision (b) of Section 1000 [i.e., tort liabilities arising from activities not for the benefit of the community] *shall be assigned to the spouse whose act or omission provided the basis for the liability*, without offset.” (Italics added.) Feng admitted all of her losses were caused by fraud. Whether the community benefited from Chan’s fraud was not proven one way or the other in the record before us. For her part, Feng had no knowledge of what Chan did with his commission income, and Fung knew little about Chan’s business activities.

<sup>15</sup> Feng’s claim to the contrary rests on Fung’s failure to itemize the lawsuits against Chan in her income and expense declaration or proposed dissolution judgment. Contrary to Feng’s suggestion, neither document required such an itemization. And while Feng asserts Commissioner Porter was never otherwise made aware of all lawsuits against Chan that Fung knew of, that assertion is unproven in the record before us. Nothing in the record here identified all documents filed and proceedings held in the

But even if we assume the family court was *not* made aware of all of Chan's potential liabilities, Feng's fraudulent conveyance theory would still be fatally flawed. First, the assignment of debt in a family court proceeding, as opposed to the transfer of an asset, does not meet the definition of a "transfer" under the UFTA. The UFTA definition requires that the debtor part with an asset or an interest in an asset. (Civ. Code, § 3439.01, subd. (i).) A debt is the "complete antithesis" of an asset. (*In re Marriage of Eastis* (1975) 47 Cal.App.3d 459, 464.) Thus, the alleged fact that the dissolution judgment assigned potential community debt to Chan's separate property could not by itself support a claim under the UFTA. Second, even if the family court had assigned Fung some portion of Chan's debt to Feng, Feng would not have been able to enforce her judgment against Fung. Third party enforcement of debts assigned to the nondebtor spouse under Family Code section 916, subdivision (a)(3) is subject to a significant restriction: "If a money judgment for the debt is entered after the division, the property is not subject to enforcement of the judgment and the judgment may not be enforced against the married person, unless the person is made a party to the judgment for the purpose of this paragraph." This provision is required as a matter of due process. (*In re Marriage of Braendle* (1996) 46 Cal.App.4th 1037, 1042.) There is no dispute in this case that Feng's default judgment against Chan was entered nearly two months *after* Fung's dissolution judgment. There is also no dispute that Fung was not a party to the judgment, and she had no role whatsoever in defending against Feng's claims. In fact, no defense was offered on Chan's behalf. Under these circumstances, Feng could not have enforced her judgment against Fung under Family Code section 916 *even if* the family court had assigned some part of Chan's debt to Fung.

Feng was also barred from seeking to amend her default judgment to name Fung as a judgment debtor after its entry. "[A]mendments adding additional judgment debtors are appropriate only where it can be demonstrated that the newly added party in fact had

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family court. Furthermore, Feng never articulates exactly what facts Fung was under a duty to disclose about pending lawsuits in which she was not a party.



control of the previous litigation and thus was virtually represented in the lawsuit. [Citation.] But where no claim was made against the new party personally and the new party did not participate in the defense of the action or have any duty to appear and personally defend in that action, the new party cannot be added as a judgment debtor by a postjudgment amendment.” (*Oyakawa v. Gillett* (1992) 8 Cal.App.4th 628, 632 (*Oyakawa*); see also *NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778–779.) In *Oyakawa*, the Court of Appeal held specifically that a judgment creditor could not amend its judgment to add the defendant’s wife as a debtor since she had no involvement with or control over her husband’s defense. (*Oyakawa*, at p. 632.)

In light of Family Code section 916, subdivision (a)(3), Feng cannot establish that the allocation of Chan’s debt or disposition of the marital assets in the dissolution hindered her in enforcing her judgment. The UFTA certainly did not compel Fung to stay married to Chan in order protect potential creditors. She had an absolute right to dissolve the marriage and seek a division of the marital property and support for her children and their educational expenses in a timely manner after Chan’s abandonment of the family. The most the family court could have done to protect Feng’s ability to satisfy her judgment against Chan would have been to assign part of Chan’s potential liability to Fung. But that would still have left Feng with a judgment that was unenforceable against Fung’s share of the community estate under Family Code section 916 since Fung had no opportunity to defend against Feng’s claims. The UFTA does not trump Fung’s due process rights.

As between Feng and Fung, this is not an unfair result. Feng has already received \$211,000 of the proceeds from the sale of Fung’s family home in satisfaction of her default judgment although, through no fault of Fung’s, the actual extent of Chan’s liability or Feng’s loss have never been adjudicated in a contested proceeding.<sup>16</sup> The \$211,000 Feng has received far exceeds the community benefit, if any, Fung may have

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<sup>16</sup> We note that Feng’s complaint sought \$391,000 in damages against three named defendants, including Chan. The record does not disclose the disposition of her claims against the other defendants.

unwittingly shared in by virtue of Chan's commission on the transaction. Whatever uncompensated detriment Feng suffered as a result of Chan's conduct, Fung's losses at his hands are at least as great, and forcing her to sell her home would immeasurably compound them.

**C. Civil Code Sections 3439.04, Subdivision (a)(2)/3439.05—Constructive Fraud**

Feng also claims that the dissolution judgment may be set aside for constructive fraud under Civil Code sections 3439.04, subdivision (a)(2) and/or 3439.05.<sup>17</sup> The former applies to creditors whose claims arise before or after the challenged transfer, while the latter only applies if the creditor's claim arose before the transfer was made. Both require a transfer by the debtor of an asset or of an interest in an asset without receiving reasonably equivalent value.

The constructive fraud provisions of the UFTA have no application here for the same reasons discussed above: (1) Fung was not a "debtor" as defined in the UFTA; (2) Feng's only arguably legitimate objection to the dissolution judgment—that it unfairly failed to assign any of Chan's debt to Fung—involves no "transfer" of an asset or interest in an asset under the UFTA; and (3) no different assignment of Chan's debt by the family court would have made Feng's judgment enforceable against Fung. In addition to these reasons, Feng's constructive fraud claim also fails because Fung, as the debtor under the UFTA, did not give up any asset or interest in an asset in the dissolution proceeding without receiving reasonably equivalent value. To the contrary, she exchanged her one-half community property interest in the proceeds from the sale of the family home for an asset of exactly equivalent value—her interest in the Ellery Common property worth half of the value of such proceeds. In fact, the thrust of Feng's complaint is the opposite of that required by Civil Code sections 3439.04, subdivision (a)(2) and

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<sup>17</sup> Civil Code section 3439.05 provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."

3439.05—that Fung received *more* than equivalent value for what she gave up in the dissolution proceeding considering the community estate’s potential liabilities.

Whatever other remedy Feng might have for the unsatisfied portion of her judgment, the UFTA affords her no remedy against Fung.

### **III. DISPOSITION**

The judgment is affirmed.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

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Banke, J.