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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of CHRISTOPHER and COZETTE LIVINGSTON.	B269563 (Los Angeles County Super. Ct. No. BD556660)
CHRISTOPHER LIVINGSTON, Appellant, v. COZETTE LIVINGSTON, Respondent.	

APPEAL from orders of the Superior Court of Los Angeles County. Timothy Patrick Dillon, Judge. Reversed with directions.

Harry Lester Holmes; Gaglione, Dolan & Kaplan, Robert T. Dolan and Amy J. Cooper for Appellant.

Cozette Livingston, in pro. per., for Respondent.

The trial court entered a final judgment of dissolution as to appellant Christopher Livingston and respondent Cozette Livingston.[1] The judgment included the parties' stipulated judgment of dissolution (Stipulation), which governed the parties' division of property upon their divorce. Soon after judgment, however, the parties became locked in a dispute over the proper disposition of real estate located in Washington (the Washington property), which they owned as community property while married. The Stipulation awarded the Washington property to Christopher as his separate property, but also required the property to be put in "trust" for the benefit of the parties' two sons, while also acknowledging Christopher's right to sell the property. Christopher sought an order on the issue from the trial court. Over Christopher's objection, the trial court interpreted the Stipulation to require Christopher to place the Washington property in an irrevocable trust for the benefit of the parties' sons. We conclude the trial court misinterpreted the Stipulation and did not give effect to all its parts. Accordingly, we reverse the trial court's order requiring Christopher to place the Washington property in an irrevocable trust.

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[1] For clarity and for consistency with the parties' briefs, we refer to the parties using their first names. No disrespect is intended.

Christopher also sought an order for reimbursement from Cozette for purported damage and items improperly removed from the family's home in Lakewood, California (the Lakewood property). Because the trial court denied Christopher's request on a ground not asserted by Christopher and without addressing Christopher's actual argument, we remand to the trial court for further proceedings addressing Christopher's Lakewood property claims.

BACKGROUND

In January 2012, after more than 18 years of marriage, Christopher and Cozette separated and Christopher filed for divorce. They have two sons, who were 16 and 17 years old at the time of their parents' separation. For approximately three years following separation, Cozette and the children lived at the Lakewood property, while Christopher lived with his parents. During that time, Christopher paid the mortgage, insurance, and taxes on the Lakewood property as well as voluntary spousal support to Cozette.

1. The parties execute a settlement agreement and the trial court enters a stipulated judgment of dissolution.

In December 2013, Christopher, Cozette, and their counsel signed the parties' settlement agreement, which was handwritten on a court form and appears to have been prepared by multiple people. Christopher's attorney filed the settlement agreement with the trial court on December 18, 2013.

Based on the parties' settlement agreement, counsel for Cozette prepared the Stipulation. Christopher, his attorney, Cozette, and her attorney signed the Stipulation in May and June 2014.

On September 18, 2014, the trial court entered a judgment of dissolution (judgment), which attached and incorporated the Stipulation into the judgment. The judgment ordered the parties to comply with the Stipulation, and the trial court reserved jurisdiction "to make other orders necessary to carry out this judgment."

The Stipulation governs the parties' division of property. Relevant here, paragraph 2(c) of the Stipulation awarded the Washington property to Christopher as his separate property: "The following property, whether community or separate, is awarded/confirmed to [Christopher] as the separate property of [Christopher] . . . . [¶] . . . [¶] c. The real property located at 1938 Beachview Way, Kettle Falls, Washington (including all encumbrances thereon, to include the capital gains/taxes)" (i.e., the Washington property). The Stipulation also includes a section addressing the "equalization of division of property and debt." In that section, paragraph 9 provides Christopher "shall forthwith place the Washington Property in trust for the benefit of the parties' two children. Should [Christopher] sell the Washington Property, [Cozette] has the right of first refusal to match the going offer." The Stipulation did not specify a particular type of trust for the Washington property.

Paragraph 2(b) of the Stipulation awarded to Christopher as his separate property the Lakewood property. Under the equalization section, however, paragraph 8 of the Stipulation provided Cozette "shall maintain possession of the Lakewood Property until" Christopher paid to Cozette $10,000. The Stipulation also stated Christopher and Cozette waived both "*Watts* credits for post-separation use[,] possession or control of any community property" (paragraph 4) as well as "the right to

receive credits and reimbursements of every nature" (paragraph 7).[2]

2. Christopher attempts to remove Cozette from the title of the Washington property, to put the Washington property in trust for their sons, and to sell the Washington property.

Two months after judgment, in November 2014, Christopher took steps to remove Cozette from the title of the Washington property. He wrote a letter to the Stevens County, Washington, Treasurer requesting that Cozette be removed from the title. He attached the judgment, including the Stipulation, to his letter. The treasurer's office responded, stating not only that "[e]xcise must be completed to change ownership" but also that Christopher would have to record either a quitclaim deed or the judgment of dissolution.

In February 2015, Christopher signed a listing agreement with a realtor in Washington to sell the Washington property.

At some point, in compliance with the Stevens County Treasurer's requirements for change of ownership, Christopher asked Cozette to sign a real estate excise tax affidavit so that he could remove her from title to the Washington property. Initially, Cozette refused to sign the document. In a March 12, 2015 letter to Christopher, she referenced the Stipulation, stating

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[2] Briefly, *Watts* and *Epstein* claims concern a spouse's or the community's rights to reimbursement for use of community property or payment of community obligations during the postseparation-prejudgment period. (*In re Marriage of Watts* (1985) 171 Cal.App.3d 366 ["usage charges"]; *In re Marriage of Epstein* (1979) 24 Cal.3d 76 ["payment credits"]; see *In re Marriage of Jeffries* (1991) 228 Cal.App.3d 548, 552–553.)

Christopher was required to put the Washington property in trust for their sons. Because the real estate excise tax affidavit was not a trust, she would not sign it. In response, on March 17, 2015, Christopher wrote Cozette, stating he was "fully aware of [his] obligations" and was attempting to fulfill them. That same day, he spoke with an employee at the Stevens County Treasurer's office, who confirmed that, in order to put the Washington property in trust for their sons, first, Cozette had to sign the real estate excise tax affidavit so that she could be removed from the title. Then, Christopher would have to sign a separate real estate excise tax affidavit in order to put the Washington property in a trust for the children. Christopher again asked Cozette to sign the affidavit. He noted that if she did not sign it, he would return to court so she could sign it there. He also stated that if he did "not put [the Washington property] into trust for the boys then you can take me back to court to force me to do it. Please do not make this any more difficult than it has to be."

Also on March 17, 2015, Christopher contacted his brother, who is an attorney, to inquire about creating a trust. Christopher explained he had to put the Washington property in a trust "at the very least soon." His brother stated he could create the trust that week, but for unknown reasons did not.

After consulting with her attorney, Cozette signed the real estate excise tax affidavit on April 3, 2015. Christopher also signed the affidavit, which stated the Washington property would be placed in a trust for the benefit of their sons and, if Christopher decided to sell the Washington property, Cozette had a right of first refusal. The affidavit did not specify a particular type of trust for the Washington property.

Later that month, on April 28, 2015, Christopher wrote Cozette to let her know he had received an offer from a third party to purchase the Washington property. He asked Cozette if she would exercise her right of first refusal. The next day, Cozette responded, inquiring as to the offer price. On April 29, 2015, Christopher and the third party buyer signed an addendum to the purchase and sale agreement acknowledging Cozette's right of first refusal. The following day, Christopher e-mailed and wrote a letter to Cozette, explaining the offer to purchase the Washington property and again asking if she would exercise her right of first refusal.

One week later, Cozette e-mailed Christopher, their attorneys and Christopher's realtor, stating she was "very surprised" by, and did not agree to, the sale of the Washington property. She indicated Christopher had always refused to sell the Washington property and instead, according to Cozette, "wanted to put [it] into trust for the kids; therefore, I agreed and made it part of the divorce. Last month, you told me in a letter that you planned on putting the property into trust while you actually had the property on the market for sale. You even told [our son] today in an e-mail that you've been working on selling the property ever since we went to court for the divorce, which means that you agreed to the terms of the divorce knowing that you planned on selling the property right away. Again, I am calling your actions 'fraud' and feel that you've taken advantage of me and misrepresented yourself in the divorce. [¶] I do not agree to what you are doing. I will not be signing anything, including the paperwork you'll need in order to sell the property. Giving me one week to try to obtain funding to purchase the property is unrealistic and insensitive. I will do what I can

legally to make sure the property is put into trust for the kids and not sold."

3. Christopher files a request for an order seeking to enforce the Stipulation and to effectuate the sale of the Washington property. He establishes a trust.

In light of Cozette's refusal either to exercise her right of first refusal or to sign paperwork to facilitate the sale of the Washington property, Christopher filed an unsuccessful ex parte request for an order on May 19, 2015, asking the trial court to enforce the terms of the judgment and to order Cozette to execute documents permitting the sale of the Washington property.

On May 26, 2015, Christopher filed a noticed request for an order seeking the same relief. Cozette filed her response, stating she would agree to the Washington property being placed in a "trust" for the benefit of their sons or, in the alternative, to the net proceeds of the sale of the Washington property being divided equally between her and Christopher. In a supporting declaration, Cozette stated that prior to the parties' settlement agreement, Christopher refused her suggestion to sell the Washington property, saying instead he wanted to keep it for their sons. Cozette stated the parties then agreed to put the Washington property in trust for the benefit of their sons, which is reflected in the settlement agreement and Stipulation and was the only reason she agreed to give up her share of the Washington property. According to Cozette, "The parties' intent at the time [of executing the settlement agreement] was to give up their interest in the [Washington] property so that it be transferred to their children." As to her right of first refusal if Christopher decided to sell the Washington property, Cozette stated that provision gave her "the right of first refusal to

purchase the property from the trust" and "was to ensure that the property, or its market value, remains for the benefit of the children." In her response to Christopher's request for order, Cozette did not specify a particular type of trust into which she believed the Washington property should be placed.

On June 12, 2015, Christopher established the Christopher S. Livingston Living Trust (Trust). On June 16, 2015, Christopher transferred, among other things, his interest in the Washington property to the Trust and directed that, in the event of his death, the first successor trustee distribute the trust property to Christopher's two sons in equal shares.

On June 16, 2015, Christopher filed a response to Cozette's declaration. Christopher noted he had established the Trust for their children and attached a copy of the Trust. He stated that, during their settlement negotiations, Cozette had proposed awarding the Washington property to Christopher in order "to equalize [his] substantial Watts/Epstein claims, as [he] had paid the note on the residence, while also paying family support, for over two years. In further consideration thereof, we agreed that I would pay [Cozette] a lump sum of $10,000 and $3000.00 in [her] attorney's fees. I have complied with these terms as well."

The trial court held a hearing on Christopher's request for an order on June 24, 2015. At the hearing, counsel for Christopher emphasized the Stipulation awarded the Washington property to Christopher as his separate property and the parties had negotiated that the Washington property would be put in trust on an interim basis only. Christopher also addressed the court and explained he had tried to establish a trust prior to filing his request for an order. He was following the procedures as directed by the Stevens County Treasurer's office,

but ran into delays when Cozette refused to sign necessary paperwork. By the time Cozette had completed the paperwork, Christopher had received a third party offer to purchase the Washington property, which was surprising because his broker had indicated it could take more than two years for the property to sell. Christopher also told the trial court he believed the Stipulation awarded him the Washington property as his separate property in exchange for his waiver of significant *Watts* and *Epstein* claims. He understood the trust provision to ensure the Washington property would pass to his sons if he owned the property at the time of his death.

Cozette's counsel argued the Stipulation was not ambiguous and no parol evidence was necessary for its interpretation. Counsel stated the Stipulation was clear on its face and indicated the parties intended the Washington property to be for the benefit of their children. Cozette's attorney further stated that Christopher intended to revoke the trust, sell the Washington property, and keep the proceeds for himself.

The trial court denied without prejudice Christopher's request to execute the Washington property purchase and sale agreement. The trial court ordered Christopher to create an irrevocable trust, naming the two sons as beneficiaries, and to execute and record a deed transferring the Washington property to the irrevocable trust. The trial court saw an ambiguity in the interplay between Stipulation paragraph 2(c) (which awarded the Washington property to Christopher as his separate property) and paragraph 9 (which required Christopher to place the Washington property in trust for the benefit of the children) and, for that reason, made its order "without prejudice to further

proceedings depending on what happens in the future concerning this trust and the negotiations between the parties."

Two days after the June 24 hearing, Christopher attempted to transfer by quitclaim deed the Washington property into the Trust. In a series of e-mails with a Washington "closing agent," Christopher discussed the necessary steps to transfer the Washington property into the Trust. Christopher copied Cozette, her attorney's office, his brother, and others on the series of e-mails. Cozette responded, stating, "I'm not sure what Christopher is trying to do here; however, the trust he set up has been rejected by the judge and he cannot sell the property with this revocable trust, he must set-up an irrevocable trust listing the kids as the sole beneficiaries of the trust." As a result, the closing agent put the matter on hold until receipt of a court-approved trust.

On September 21, 2015, the trial court entered the order after hearing prepared by counsel for Cozette. The court denied without prejudice Christopher's requests, stating he had failed to provide proof he had transferred the Washington property into an irrevocable trust for the benefit of his sons. That same day, Christopher filed an objection to the trial court's order, arguing that at the hearing the court had not required the Washington property be placed in an irrevocable trust.

4. Christopher files a second request for an order seeking to enforce the Stipulation, to effectuate the sale of the Washington property, and to require Cozette to pay for property damage to and fixtures taken from the Lakewood property.

On November 10, 2015, Christopher filed a second request for order, requesting the trial court to enforce the terms of the

judgment to execute a quitclaim deed, and to order Cozette to pay for property damage to and items taken from the Lakewood property and attorney fees. Christopher argued the Stipulation awarded the Washington property to him as his separate property and clearly contemplated that he could sell the property. According to Christopher, the parties agreed he would receive the Washington property as his separate property because he had waived all *Watts* and *Epstein* claims despite having paid a significant amount of spousal support to Cozette as well as the Lakewood property mortgage, insurance, and taxes for almost three years postseparation while Cozette had lived there rent free.

Christopher also argued Cozette breached her fiduciary duty to him when she left the Lakewood property in disrepair and improperly removed certain fixtures from the home. Christopher itemized the repairs he had paid for or would be paying for as well as the fixtures taken. He sought over $7,000 in reimbursement from Cozette.

Cozette opposed Christopher's second request for order, arguing the trial court had ordered Christopher to transfer the Washington property into an irrevocable trust for the benefit of their sons but he had failed to do so. She also disputed Christopher's claims that she left the Lakewood property in disrepair or was responsible for any repairs or fixtures.

On December 22, 2015, the trial court held a hearing on Christopher's second request for an order. In response to the court's question as to the reason for requiring the Washington property be transferred to a trust if that trust was not irrevocable, Christopher's attorney explained the trust was simply an interim measure. Christopher also stated he would not

have agreed to the Stipulation had it required the Washington property be transferred to an irrevocable trust. The trial court held that, in order for the trust provision to have meaning, the trust must be an irrevocable trust. The court also held the Stipulation was silent as to the condition of the Lakewood property and, therefore, Cozette was not liable for any damage or items taken from that property.

Two days after the hearing, and on its own motion, the trial court vacated its December 22 order to the extent it ruled on the Washington property issues and set a hearing for further argument and testimony on those issues only. At the second hearing, held January 27, 2016, counsel for Christopher reiterated that the Washington property was awarded to Christopher as his separate property in exchange for his waiver of significant *Watts* and *Epstein* claims and the parties had agreed to the trust provision as an interim measure so that "should something happen to [Christopher] then there is a device in place that the property would go to the children." Christopher understood that, if he kept the Washington property, a trust would ensure the property passed to his sons at his death, but if he wanted to sell the Washington property, he could without restriction, other than Cozette's right of first refusal. Counsel explained that paragraphs 2(c) and 9 of the Stipulation are not incompatible; however, if the trust must be irrevocable, contrary to the parties' intent, then a conflict arises.

Cozette testified she had believed Christopher would never sell the Washington property and that the property would go to their sons. If Christopher remarried, she did not want his new wife to have the Washington property. Cozette stated she would

not have agreed to the Stipulation if she had known Christopher would sell the Washington property "right away."

The trial court held paragraphs 2(c) and 9 of the Stipulation only made sense together if the required trust was an irrevocable trust. The court explained Christopher can "enjoy the [Washington] property for his lifetime and use it and enjoy it, or he could sale [*sic*] it, but that the proceeds would be confined to the trust for the benefit of the boys. [¶] It just doesn't make sense to the court [Christopher's] interpretation that you would establish . . . a revocable trust, not irrevocable, for the benefit of the boys and that at any time [Christopher] could withdraw the property and take the property and sale [*sic*] it for his own benefit."

The trial court also stated it could admit extrinsic evidence to the extent it supported a reasonable interpretation of the Stipulation. The court found Christopher's interpretation of the Stipulation to be unreasonable because, according to the court, Christopher's interpretation ignored the clause that a trust be formed for the benefit of the children. The trial court also held the "undisclosed subjective intentions of the parties are not extrinsic [evidence]." Although the trial court stated it did "not feel that there has been extrinsic evidence admitted and certainly none that would change the court's view as to the meaning of those two clauses in the [Stipulation]," the court also stated it "rel[ied] on the letter from March of 2015 which was attached to [Cozette's] declaration which says if, basically if [Christopher] does not put 'it', meaning the Washington property into trust for the boys, then you can take me back to court to force me to do it. [¶] And as I read that, that reinforces the notion that this was something that had meaning, placing the property into trust for

the benefit of the boys had meaning and was something that was enforceable."

In its January 27, 2016 minute order, the trial court ruled, "The Washington property shall be placed in an IRREVOCABLE TRUST for the reasons stated on the record."

5. Christopher appeals.

On January 7, 2016, Christopher filed a notice of appeal from the trial court's December 22, 2015 order. Christopher did not file a notice of appeal from the trial court's January 27, 2016 order.

DISCUSSION

1. Appealability

To the extent Christopher challenges the trial court's order with respect to the Washington property, his notice of appeal was premature. Christopher filed his notice of appeal on January 7, 2016, challenging the trial court's postjudgment order dated December 22, 2015, which denied Christopher's second request for order in its entirety. But on December 24, 2015, the trial court vacated that order to the extent it ruled on the Washington property issues and set that matter for further hearing. The trial court did not vacate its December 22 order with respect to the Lakewood property issues. The trial court held the further hearing with respect to the Washington property on January 27, 2016, and issued a new order that same day, again denying Christopher's request and ordering the Washington property be transferred to an irrevocable trust. Christopher did not file a notice of appeal from the trial court's January 27, 2016 order.

The parties have not addressed the propriety or timeliness of the appeal. "The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling,

but before it has rendered [an appealable order], as filed immediately after entry of [the appealable order]." (Cal. Rules of Court, rule 8.104(d)(2); *id.*, rule 8.104(e).) As long as an appealable order or judgment was entered, there is no doubt concerning which ruling appellant challenges, and respondent was not misled to her prejudice, we have discretion to entertain a premature appeal. (*Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 69.) We exercise our discretion here and construe Christopher's premature notice of appeal challenging the trial court's rulings with respect to the Washington property as taken from the court's January 27, 2016 order.

2. The Washington Property

a. Applicable law

In construing the Stipulation as incorporated into the judgment, we employ the statutory rules governing interpretation of contracts generally. (*In re Marriage of Hibbard* (2013) 212 Cal.App.4th 1007, 1012–1013.) " 'The interpretation of a written instrument is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect.' " (*In re Marriage of Facter* (2013) 212 Cal.App.4th 967, 978.) We conduct an independent review of the Stipulation. (*Marriage of Hibbard*, at p. 1012.)

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) If possible, the intent is to be ascertained solely from the language of the contract itself. (*Id.*, § 1639.) And if reasonably practicable, the entire contract is to be construed so as to give effect to every part, using each clause to interpret the

other. (*Id.*, § 1641.) "Particular clauses of a contract are subordinate to its general intent." (*Id.*, § 1650.) Any repugnancy in a contract "must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." (*Id.*, § 1652.)

"As has often been restated: ' "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] If contractual language is clear and explicit, it governs. [Citation.] On the other hand, '[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.' [Citations.]" [Citation.] "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." ' " (*In re Marriage of Hibbard*, *supra*, 212 Cal.App.4th at p. 1013.) Language in a contract must be interpreted as a whole and in the circumstances of the case, and cannot be deemed ambiguous in the abstract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264–1265; see Civ. Code, §§ 1641, 1647.)

"An agreement is not ambiguous merely because the parties (or judges) disagree about its meaning. Taken in context, words still matter. . . . '[W]ritten agreements whose language appears clear in the context of the parties' dispute are not open to claims of "latent" ambiguity.' " (*Abers v. Rounsavell* (2010) 189

Cal.App.4th 348, 356.) "[W]hether proffered extrinsic evidence renders a contract reasonably susceptible to ambiguity is a judicial function to be decided initially by the trial court, and independently by the appellate court. [Citation.] 'The threshold issue of whether to admit the extrinsic evidence—that is, whether the contract is reasonably susceptible to the interpretation urged—is a question of law subject to de novo review.' " (*Id.* at p. 357.)

"Generally, parol evidence is inadmissible where the agreement's terms are unambiguous." (*In re Marriage of Thorne & Raccina* (2012) 203 Cal.App.4th 492, 503.) "In marital dissolution proceedings, extrinsic evidence is 'admissible to ascertain the intent of an agreed . . . judgment of dissolution of marriage to the same extent such evidence would be admissible to ascertain the meaning of any other written agreement.' [Citation.] Under the parol evidence rule, if '[a] term of the agreement is . . . susceptible of more than one reasonable interpretation,' a court may admit extrinsic evidence, but only if 'it supports a meaning to which the language is reasonably susceptible . . . .' [Citation.] 'As a matter of substantive law, extrinsic evidence cannot be relied on to support a meaning to which the agreement is not reasonably susceptible.' " (*Ibid.*)

b. Although not a model of clarity, when read in the context of the parties' dispute, the language and intent of the Stipulation is sufficiently clear.

The trial court found an ambiguity in the interplay between Stipulation paragraph 2(c) (which awarded the Washington property to Christopher as his separate property) and paragraph 9 (which required Christopher to place the Washington property

"in trust" for the benefit of his sons). In light of this perceived ambiguity, the trial court concluded the "trust" referenced in paragraph 9 must be an irrevocable trust; otherwise, the settlement agreement did not make sense. On appeal, Christopher argues the trial court erred in requiring him to place the Washington property in an irrevocable trust. We agree.

As noted above, Christopher and Cozette—with the assistance and advice of their attorneys—agreed to "property division orders," which as the name suggests control the division of property among them. Paragraph 2(c) of the Stipulation falls under those property division orders and unequivocally awarded the Washington property to Christopher as his separate property. Paragraph 2(c) also made clear Christopher would be responsible for any capital gains associated with the Washington property.

Later in the Stipulation, under the "equalization of division of property and debt orders," Christopher and Cozette agreed to "equalize" their division of property. Paragraph 9 of the Stipulation falls within in that equalization section and provided, should Christopher sell the Washington property, Cozette would have "the right of first refusal to match the going offer." Paragraph 9 also required Christopher to place the Washington property in a trust for the benefit of their sons.

Although the Stipulation is not a model of clarity, paragraphs 2(c) and 9 are not incompatible. It is possible to give effect to each of these provisions, giving the words used their ordinary meaning and honoring the parties' intent to divide the community property equally. First, Christopher receives the Washington property as his separate property, which would require Cozette to relinquish any ownership interest she has in that property and would equalize the *Watts* and *Epstein* claims

Christopher waived. Second, Christopher places the Washington property in a trust for the benefit of his sons for as long as he owns that property. Finally, Christopher may sell the Washington property as long as he allows Cozette to exercise her right of first refusal if she so desires. Under this reading of the Stipulation, the trust provision acts as an interim measure to ensure that, if Christopher owned the Washington property at his death, that property would pass to his sons and not, for example, to a second wife or family. This interpretation gives effect both to the parties' stated intent to "equalize" their division of property and to each provision of the Stipulation. (See Civ. Code, §§ 1636, 1638, 1639, 1641.)

The trial court's interpretation of the Stipulation (requiring Christopher to place the Washington property in an irrevocable trust) ignores and in effect makes meaningless the provisions addressing Christopher's right to sell the Washington property. Both paragraphs 2(c) and 9 on their face reveal the parties contemplated Christopher could sell the Washington property. Not only did paragraph 9 give Cozette the right of first refusal should Christopher sell the property, but paragraph 2(c) stated Christopher would be responsible for any "capital gains/taxes" on the Washington property, which would be realized upon sale of the property. The trial court did not explain how its order was consistent or compatible with Christopher's right under the Stipulation to sell the Washington property. Although the court stated Christopher could enjoy the Washington property during his lifetime or sell the property with the proceeds remaining in the irrevocable trust for the benefit of his sons, this does not give effect to the sale provisions. Rather, under the trial court's interpretation, it is the irrevocable trust that could sell the

property, not Christopher. Thus, if we were to accept the trial court's interpretation of the Stipulation, we would have to disregard the sale provisions of the Stipulation, which the canons of contract interpretation counsel against and which we decline to do. (Civ. Code, §§ 1638, 1641, 1643.)

Having independently reviewed the Stipulation, we conclude it is not ambiguous. Instead, the parties interpret the Stipulation differently. Christopher's interpretation is reasonable; Cozette's is not. Under Cozette's interpretation, although Christopher is "awarded" the Washington property as his separate property, he receives no financial benefit from owning the property, yet must bear all the obligations of ownership. Such a result does not make sense.

c. Extrinsic evidence is only proper to support an interpretation to which the Stipulation is reasonably susceptible.

Although extrinsic evidence is not necessary to interpret the Stipulation, if such evidence were required here, the evidence submitted below supports our interpretation of the Stipulation.

Christopher submitted evidence and testimony demonstrating he acted in accordance with his understanding of the terms of the Stipulation. (*In re Marriage of Hibbard*, *supra*, 212 Cal.App.4th at p. 1013 [" ' "subsequent conduct of the parties" ' " relevant to contract interpretation].) He attempted to remove Cozette from title to the Washington property and to transfer the property to a trust for the benefit of his sons. He explained that before he could create the Trust, he received a third party offer to purchase the Washington property, which surprised him because his realtor advised it could take years to sell the property. He informed Cozette of the purchase offer and

asked if she would exercise her right of first refusal. Christopher also expressly noted Cozette's right of first refusal with respect to the Washington property on both the real estate excise tax affidavit and the purchase agreement.

Christopher's evidence and testimony supports an interpretation of the Stipulation to which it is reasonably susceptible. Christopher believed the Stipulation awarded the Washington property to him as his separate property. He understood this was in exchange for his express waiver of significant *Watts* and *Epstein* claims. Christopher believed he could sell the Washington property because it was his separate property. According to Christopher, the Stipulation's trust provision was an interim measure to protect the Washington property so that, if he were to die when he owned the property, it would pass to his children. In part, Cozette supported Christopher's understanding of the Stipulation, specifically his right to sell the Washington property. Not only did Cozette and her attorney sign the Stipulation which clearly contemplated Christopher's right to sell the Washington property, but also when Christopher first told Cozette of the offer to purchase the property, Cozette's first response was to ask the offer amount. Only later did she begin to dispute Christopher's right to sell the Washington property. Additionally, Cozette indicated she did not want the Washington property to pass to a second wife or family, which supports not only placing the property in a trust for the benefit of the children during the time Christopher owns the property, but also the notion that Christopher could *sell* the property to a third party with Cozette having the right of first refusal.

On the other hand, however, Cozette offered evidence and testimony that contradict the provisions of the Stipulation and, therefore, support an interpretation to which the Stipulation is not reasonably susceptible. (See *In re Marriage of Thorne & Raccina*, *supra*, 203 Cal.App.4th at p. 504.) Cozette repeatedly stated she believed Christopher would never sell the Washington property and that the property would pass to their children "at the end of Christopher's life." By rejecting Christopher's ability to sell the Washington property, however, Cozette ignores the sale provisions of the Stipulation.

Cozette's position also shifted over time. For example, Cozette stated the parties always intended that the Washington property would pass to their children and that she would not have agreed to the Stipulation had she known Christopher would sell the property. In her response to Christopher's first request for an order, however, Cozette stated she would agree to the sale of the Washington property if the net sale proceeds were split evenly between her and Christopher. This proposed division of property constitutes a material change not only to the terms of the Stipulation but also to Cozette's stated understanding of the Stipulation. Cozette also testified that, had she known Christopher would sell the Washington property "right away," she would have "negotiated different." This statement implies she would have been amenable to the Stipulation and, in particular, Christopher's sale of the Washington property if he had waited some amount of time before selling the property.[3]

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[3] At oral argument, Cozette stated if Christopher had put the Washington property into a trust first, she would not have challenged his ability to sell the property. In that case, she

And while Cozette's attorney initially argued the Stipulation was not ambiguous and parol evidence was not appropriate, Cozette later claimed the Stipulation was ambiguous and extrinsic evidence was necessary. In any event, these statements are belied by the language of the Stipulation itself, which clearly provides Christopher may sell the Washington property. As such, Cozette's proffered parol evidence "supports a meaning to which the provision is not reasonably susceptible. Thus, the parol evidence is of no moment." (*In re Marriage of Thorne & Raccina*, *supra*, 203 Cal.App.4th at p. 504.)

Other than Christopher's March 17, 2015 letter to Cozette, it is not clear whether the trial court relied on any of the testimony or evidence submitted below. The trial court stated, "even considering extrinsic evidence and even reading very carefully the declarations and listening to the testimony of [Christopher], the court does not feel that there has been extrinsic evidence admitted and certainly none that would change the court's view as to the meaning of those two clauses in the judgment [i.e., Stipulation paragraphs 2(c) and 9]. [¶] And the court is also relying on the letter from March of 2015." In his March 2015 letter, Christopher told Cozette, "If I do not put [the Washington property] into trust for the boys then you can take me back to court to force me to do it." According to the trial court, the March 2015 letter supported the court's conclusion that the Stipulation's trust provision had meaning and was enforceable. While we do not disagree with that general conclusion, we disagree with the trial court's further conclusion that the trust provision required Christopher to place the

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thought he would have distributed "some . . . maybe 50 percent" of the sale proceeds to their children.

Washington property into an irrevocable trust. In the March 2015 letter, Christopher stated neither the type of trust required nor a restriction on his right to sell the property. As explained above, the Stipulation's trust provision has meaning and is enforceable as requiring Christopher to place the Washington property into a revocable trust for as long as he owns the Washington property.

We are not persuaded by Cozette's estoppel arguments. Although Cozette stated Christopher refused to sell the Washington property prior to executing the Stipulation, she cannot reasonably claim to have relied on that statement when the Stipulation she signed with advice of counsel clearly evidences Christopher could sell the property. Similarly, Cozette's judicial estoppel argument fails because there is no evidence Christopher represented to the trial court that he would not sell the Washington property.

Extrinsic evidence may not alter the language of an agreement, but is only relevant to support a meaning to which the agreement is reasonably susceptible. (*In re Marriage of Thorne & Raccina*, *supra*, 203 Cal.App.4th at p. 503.) Because the interpretation of both the trial court and Cozette fails to give effect to the Stipulation's sale provisions and alters the language of the Stipulation by adding the term "irrevocable" to the trust provision, it cannot stand. Contrary to the trial court's finding that Christopher's interpretation of the Stipulation "leaves out" the trust provision, Christopher's interpretation gives effect to every provision of the Stipulation and supports a meaning to which the Stipulation is reasonably susceptible. Accordingly, we conclude Christopher's interpretation is the correct interpretation.

3. The Lakewood Property

a. Applicable law

In his second request for order, Christopher asked the trial court to order Cozette to reimburse him for the costs of repairing the Lakewood property and replacing items Cozette took from the Lakewood property. Christopher's request was based on Cozette's fiduciary duty to Christopher under Family Code section 721. Family Code section 1101 permits a spouse to bring a claim against the other spouse for a breach of that fiduciary duty as well as provides remedies for such a breach of duty. If the spouse bringing the claim demonstrates the other spouse acted with fraud, malice or oppression, the remedies are increased. (Fam. Code, § 1101, subd. (h).) A spouse's fiduciary duty to the other spouse with respect to their community property continues after separation. (See *Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 21 [explaining a spouse "occupies a position of trust [citation], which is not terminated as to [community] assets remaining in his hands when the spouses separate"].)

b. Because the trial court did not consider Christopher's arguments as to the Lakewood property, the matter must be remanded for further proceedings.

At the hearing on Christopher's second request for order, the trial court did not address Christopher's fiduciary duty claim. Instead, the trial court stated the Stipulation was silent as to the condition of the Lakewood property and, therefore, Christopher was not entitled to any relief. As noted above, however, Christopher's position was not based on the Stipulation. It was based on Cozette's statutory fiduciary duty to him as spouse.

Without citation to authority, Cozette argues on appeal the trial court did not have jurisdiction to consider this issue.

Because the trial court did not address these issues, including the threshold jurisdictional issue, we remand to the trial court for consideration of Christopher's claims regarding the Lakewood property.

DISPOSITION

The December 22, 2015 and January 27, 2016 orders are reversed. The trial court is directed to order Cozette Livingston to execute all documents necessary for transfer of the Washington property to Christopher Livingston as his separate property. The trial court is directed to order Christopher Livingston to place the Washington property into a trust for the benefit of the parties' sons for as long as he owns the Washington property. The trust need not be irrevocable. The issues related to the Lakewood property are remanded to the trial court for further proceedings consistent with this opinion. Christopher Livingston is entitled to his costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

I concur:

JOHNSON, J.

ROTHSCHILD, P. J., dissenting:

I disagree with the majority's conclusion that the stipulation unambiguously required Christopher Livingston (Christopher) to create a revocable trust rather than an irrevocable trust. For this reason, I respectfully dissent from that portion of the majority opinion.[1]

I agree with the trial court that the parties must have intended for the trust to be irrevocable in order for the trust provision to be anything other than symbolic. If the trust was revocable, then Christopher was free to establish it one day, and revoke it and sell the property the next. In fact, that is almost exactly what he attempted to do. Christopher established the trust on June 16, 2015, six weeks *after* agreeing to sell the property to a would-be purchaser. The trust had an expected lifespan of no more than two weeks: In order to complete the sale, Christopher needed to revoke the trust no later than June 30. The only practical effect of the trust under Christopher's interpretation was to generate billable hours for his attorneys.

The majority opinion explains that the trust provision has meaning because if Christopher had elected not to sell the property, his children would have inherited the property after his death. This benefit is also illusory. According to the Probate Code, the settlor of a revocable trust may revoke the trust in whole or in part at any time. (Prob. Code, § 15401.) The trust agreement that Christopher established conformed to this rule. It provided that the trust would "be revocable and subject

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[1] I concur with part 3 of the discussion in the majority opinion, pertaining to Christopher's claims regarding the Lakewood property.

to amendment as long as [Christopher] is alive." Thus, even if Christopher had elected to keep the Washington property, nothing would have prevented him from revoking the trust at any time, or amending it to remove his children as beneficiaries.

Nor do I believe it is necessary to interpret the trust as revocable in order to give meaning to other sections of the stipulation. The majority points out that Christopher received the Washington property as a means of equalizing Christopher's waiver of *Watts* claims. This is not inconsistent with an irrevocable trust. In the stipulation, both Christopher and Cozette Livingston (Cozette) agreed to waive their *Watts* claims, and the stipulation does not place a value on the claims each party waived. The sale and tax provisions are also compatible with an irrevocable trust. They would permit Christopher, in his role as trustee, to sell the property, allowing him relief from the burden of taking care of the property. The proceeds of the sale, after accounting for taxes, would remain in trust for the benefit of the children. Furthermore, it is reasonable that Cozette retained a right of first refusal on the sale of the property in order to prevent Christopher from removing the property from the trust by selling it to a friend or relative at an unrealistically low price or that she might want to save it for their children even though they would also get the money from the sale.

In short, the trial court's interpretation of the trust provision is consistent with the remainder of the stipulation. Unlike the majority's interpretation, the trial court's interpretation also allows the trust provision itself to have practical meaning. For this reason, I would accept the trial court's interpretation of the stipulation as the only reasonable interpretation the parties presented. In addition, to the extent

that the stipulation was ambiguous, and that the trial court relied on extrinsic evidence of the parties' intent in reaching its decision, I would affirm the trial court's decision as being supported by substantial evidence. (See *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.)

ROTHSCHILD, P. J.