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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of PAUL KELLER and ANNE KRESL	B222462 (Los Angeles County Super. Ct. No. BD461940)
PAUL KELLER, Petitioner, Appellant and Cross-Respondent v. ANNE KRESL, Respondent and Cross-Appellant.	

APPEAL and CROSS-APPEAL from orders of the Superior Court of Los Angeles County. Alan Haber, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Honey Kessler Amado for Petitioner and Appellant.

Law Offices of Marjorie G. Fuller and Marjorie G. Fuller for Respondent and Cross-Appellant.

INTRODUCTION

This is an appeal and cross-appeal from orders modifying obligations due under a stipulated judgment providing for community property division as well as spousal and child support. We reverse.

FACTUAL AND PROCEDURAL SUMMARY

Paul Keller and Anne Kresl were married on April 5, 1997, and they separated almost ten years later on April 1, 2007.[1] Their daughter Alexandra was born in March 1995.

In May 2008, Paul and Anne entered into a stipulated judgment, specifying division of property as well as spousal and child support.

Paragraph 9 of the stipulated judgment identifies 25 "business community assets" and provides as follows:

"(i) The business community assets of the parties consist of shareholder, partnership and limited liability membership interests in various real estate development business projects ('Projects') conducted by [Paul], which as of the parties' date of separation are owned equally (50/50) by the parties. The Projects are in various stages of completion. Distributions from the Projects, in accordance with the particular Project's operating or partnership agreement, typically occurs upon completion of the development. . . .

"(ii) Without in any way negating either party's community property ownership rights in the various entities referenced in this Stipulated Judgment, distributions of Project revenues to the parties, in accordance with the terms of the Project's particular operating agreement, occurs upon completion of the Project. Since each of the Projects is currently in development the court finds that the parties recognize that significant

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[1] For ease of reference, we identify the parties by their first names as the parties themselves have done. (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2.)

post[-]separation efforts will be undertaken by [Paul] to complete development. As such, the parties have agreed and the court therefore orders that a fair and equitable split of Project receipts derived from operations and capital events giving credit to both the community interests of the parties and subsequent separate property services to each project undertaken by [Paul] shall be as follows:" The judgment then sets forth different percentages due Paul and Anne when future distributions for each of the Projects are made. Generally, project distributions due Anne were to be paid within 14 days of the close of a capital event (i.e., sale or refinance), with interest from the date of distribution to the particular entity. Paul, a real estate developer, was appointed sole manager and representative of the community for each of the entities holding title to the business community assets and acknowledged his ongoing fiduciary duties to Anne pursuant to Family Code sections 721 and 1100 et seq.

According to Paragraph 14 of the Stipulated Judgment, "The Court makes the following orders regarding spousal support:

"a) Commencing on September 1, 2007, [Paul] shall pay to [Anne] the sum of $40,000 per month as and for spousal support . . . . Said support shall continue until the first of the following occurs: [Anne] remarries; either party dies, further order of Court; or August 31, 2009. Said spousal support shall not be taxable as income to [Anne] and shall not be deductible by [Paul].

"b) If by September 1, 2009, the Court's jurisdiction over spousal support from [Paul] to [Anne] has not otherwise terminated, then commencing September 1, 2009, [Paul] shall pay to [Anne] $20,000 per month as and for spousal support . . . . Said support shall continue until the first of the following occurs: [Anne] remarries; either party dies; further order of Court; or August 31, 2011. Said spousal support shall not be taxable as income to [Anne] and shall not be deductible by [Paul].

"c) If by September 1, 2009, the Court's jurisdiction over spousal support from [Paul] to [Anne] has not otherwise terminated, then commencing September 1, 2009, and

in addition to the agreed-upon amount ordered in Paragraph 14(b), above, [Paul] shall pay to [Anne] $20,000 as an *advance against* [*Anne's*] *interest in the Projects* pursuant to Paragraph 9 of this stipulated Judgment, to be repaid by [Anne] to [Paul] out of [Anne's] net share of the last such project; however, [Anne] shall have no obligation to reimburse [Paul] for any of these [$20,000] per month advances if upon completion of payment for all of the Projects listed in paragraph 9, above, [Anne] has received less than $5,000,000 (gross) total distributions from all such Projects. Said *payments* . . . shall continue until the first of the following occurs: [Anne] remarries; either party dies; *further order of Court*; or August 31, 2011. Said *payments* shall not be taxable as income to [Anne] and shall not be deductible by [Paul].

"d) If by August 31, 2011, the Court's jurisdiction over spousal support from [Paul] to [Anne] has not otherwise terminated, and if by such date [Anne] has received $5,000,000 or more in gross receipts from the projects described in paragraph 9 of this Stipulated Judgment, then on such date the Court's jurisdiction over spousal support from [Paul] to [Anne] shall terminate absolutely and forever. However, if by August 31, 2011, the Court's jurisdiction over spousal support from [Paul] to [Anne] has not otherwise terminated and if by such date [Anne] has not received $5,000,000 or more in gross receipts from the projects described in paragraph 9 of this Stipulated Judgment, then spousal support as in years three and four shall continue until the earlier of August 31, 2013 (i.e., two more years) or such time as [Anne][2] has received $5,000,000 or more in gross receipts from the projects described in paragraph 9 of this Stipulated Judgment, in the amounts of support *and advances* stipulated and ordered in paragraph 14(c), above. Notwithstanding anything to the contrary contained herein, if by August 31, 2013, the Court's jurisdiction over spousal support from [Paul] to [Anne] has not otherwise

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[2] The judgment identifies "Petitioner" (Paul) at this point, but both Paul and Anne agree the judgment should refer to Anne ("Respondent") instead.

terminated, then on such date the Court's jurisdiction over spousal support from [Paul] to [Anne] shall terminate absolutely and forever." (Italics added.)

Paul and Anne agreed that Alexandra's primary residence would be with Anne, and Paul would pay child support in the amount of $5,000 per month, plus all uncovered medical expenses and extracurricular activities.

The parties executed their Stipulated Judgment on May 7, 2008, and it was filed with the court six days later (on May 13, 2008).

Nine months later, in February 2009, Paul filed an Order to Show Cause for Modification of Child and Spousal Support, claiming that "due to significant deterioration in the real estate and credit markets," he was no longer able to pay $45,000 per month in support. In addition to $5,000 in monthly child support, he said, "I agreed to pay [Anne] the sum of $40,000 per month as non-taxable spousal support. On September 1, 2009, my spousal support obligation is automatically modified to $20,000 per month plus the further sum of $20,000 per month to be personally advanced by me *and ultimately charged to* [*Anne*] *against her share of business asset proceeds when such proceeds are eventually realized*, if the court still has jurisdiction over the issue." (Italics added.)

In his declaration, Paul further stated: "The monthly amount of child and spousal support was not predicated on my Income and Expense Declaration executed April 21, 2008; the document [attached as an exhibit to his declaration] evidences a significant loss. . . . The support amounts were based on my borrowing ability. Consistent with our marriage, I utilized my credit line through Urban Partners and other sources to fund our lifestyle, with the expectation that the loans would be paid off when certain real property developments were sold. This method allowed for a continued stream of funds with which to live." "As a result of the significant deterioration in the real estate and credit markets, I no longer have the ability to borrow from the credit facilities that I have utilized for years, namely, City National Bank and another investment LLC. No other

business sources for financing are readily available." His supporting income and expense declaration indicated his income was "N/A" and his average monthly cash flow was $22,962 while his monthly expenses (excluding taxes) totaled about $47,500. He said the only "significant" cash he had received in the previous year was about $1,600,000 from his share from the sale of one of the business community assets pursuant to the stipulated judgment.

In May, the parties stipulated to the appointment of Hon. Alan B. Haber (Ret.) as "Temporary Judge (Judge Pro Tem)" to hear and determine all issues between them.

Anne opposed the requested modification. According to Anne's declaration, she and Paul had spent an "arduous" nine months in mediation at Paul's request. "Paul told me that we were not going to spend a fortune on attorneys' fees and forensic accountants and that we should each hire an attorney who was not a 'heavy litigator.'" (Both Anne and Paul were represented by family law and business attorneys.) She said she trusted him to be fair and equitable with her and Alexandra and Anne followed his instructions. Paul negotiated the purchase of Anne's $5.45 million home in Montecito in July 2007 and said the price range was reasonable given the amount of money Anne would receive in the divorce. Paul also negotiated and co-signed the loan for the purchase. Paul and his business attorney (Ellis Stern) told Anne "in no uncertain terms" that she could expect to receive over $15 million from the real estate projects she and Paul owned which would allow her to support herself. Because she had just "locked into needing a set amount of money," she rejected Paul's initial offer which would have provided no spousal support.

According to Anne, Paul had his assistant work up the family's monthly expenses during marriage and told Anne the expenses averaged about $80,000 per month. Paul said he and Anne should divide that figure in half so Anne's and Alexandra's living

expenses should be $40,000.[3] Based on the assumption she was going to receive "a great deal of money"—at least $5,000,000 from the real estate projects, she agreed to limit spousal support to no more than six years notwithstanding their 10-year marriage. "Our support was premised on the fact that since there were six (6) years left until Alexandra graduated from high school and went to college, Paul and I would split those six (6) years of spousal support 50/50. As a good faith compromise, we agreed that Paul would pay me $40,000 per month for the first two (2) years [before she collected her share of the asset distributions]; we would divide it $20,000/$20,000 (with my portion coming via advances from Paul against property distributions) during the third and fourth years, and I would pay $40,000 per month for the last two (2) years." Paul was fully aware of her living expenses, including the mortgage on the house in Montecito, Anne said, and the support order was tailored with her expenses in mind.

"Since I had no guarantee of when I would receive my portion from our real estate projects, we agreed that Paul would 'advance' me the money for my half of the estimated family expense ($20,000) from September 2009 to September 2011. This arrangement is continued from 2011 to 2013 or until I received $5 Million from our projects. We agreed that if I did receive $5 Million, I would 'reimburse' Paul the $20,000 of the $40,000 he was paying as an 'advance' of my one-half of the living expense (which was called 'support' in the Stipulated Judgment). In other words, $20,000 of the $40,000 that Paul is to pay me from September 1, 2009 through August 2013 is going to be an advanced distribution of my share of the division of community projects. . . . To ensure fairness, we agreed that if I did not receive $5 Million from the sale of the projects, I would not be forced to reimburse Paul for any of the $20,000 advances. . . . My hope was once the projects were sold, I would have enough money to maintain Alexandra's and my living

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[3] In her declaration, Anne said the $80,000 figure was "conservative" and noted Paul's own April 2008 income and expense declaration showed expenses of $60,000 but said she wanted to reach an agreement.

expenses without any support from Paul. . . . I would be able to maintain my living expenses based on the millions I was to receive from these projects."

According to Anne's declaration, "After months of arduous negotiations, Paul and I agreed to a complicated payout structure which intertwined support with the division of the community estate. The payout structure was specifically designed to provide me with sufficient monthly support to sustain our living expense while affording Paul the benefit of completing the real estate development projects and allowing for the fruition of their respective profit margin[s]. . . .

"Since the support payments were intended as an 'advance' against my interest in the various real estate projects, and since a significant drop occurred in the third year, Paul and I agreed that the payments were not taxable income to me or deductible to Paul as it would have triggered tax consequences for Paul. Moreover, our intent was to tie in the support payments directly to the community division payoff amount of at least $5 Million.

"Paul and I agreed that every penny of the 'advances' of $20,000 per month would be repaid as an offset from my interest in the division of community property. It was never intended that I retain the funds once the projects were sold unless I had not received $5,000,000. This intricate and detailed arrangement was negotiated for the sole purpose of allowing Alexandra and me to maintain our standard of living while Paul retained our investments in the various real estate projects."

Although Paul's original support obligation was to pay $40,000 per month through August 31, 2009, Anne said he had unilaterally cut support to $20,000 per month as of April 1, 2009 and owed her arrearages of $112,500.[4]

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[4] Anne also noted that the email Paul had attached to his August 17, 2009 declaration evidenced the fact that Paul was pressuring her to sign the agreement at the same time he now claimed he was suffering financially.

In its order dated September 22, 2009 (ultimately filed on February 18, 2010), based on its review of the stipulated judgment, the court observed: "I found that I was dealing with support issues with somewhat intertwining of community property issues, both prospective and future matters. The [i]ntertwining of the parties[']agreement was that [Paul] would 'advance' [Anne] funds for her half of the estimated family expenses. The advance agreed upon in the Stipulation required monthly advances by [Paul] to [Anne] in the sum of $20,000 over and above the child and spousal support from two time periods: September 2009 through 2011, and through 2013. *According to the terms of the Stipulated Judgment, $5,000,000 was allocated [to Anne] as community property, with all of the required monthly $20,000 advances to be a debit against* [*Anne's*] *$5,000,000 community property asset*. (Italics added.)

"At the outset, I find that the use of the Dissomaster program in determining modification of child and spousal support in this case cannot by itself be the basis for the modification issues. To a large extent the $20,000 advances and its impact plays [sic] a significant role in determining whether modification is in order. I find that some modification of the support amounts set forth in the Stipulated Judgment are [sic] justified and reasonable under all of the circumstances. Some of the evidence that was presented established that [Paul] has suffered some diminishment in his business, and current income. However, I find it difficult to understand how [Paul] was able to sustain approximately eight to nine months of monthly expenses totaling $45,858 during a period according to his Income and Expense Declaration, . . . that he claimed monthly income of $22,000 plus for this eight to nine month period. My finding is that the evidence presented did establish that [Paul] has had a material change in his monthly income since April 2009. However, to some extent the $143,000 income received by [Paul] for the first three months of 2009 skews the overall income. Unfortunately, the disparity between the forensic accountants' claims have made it difficult to completely understand [Paul's] 2009 monthly expenses for the better part of 2009.

"Since I have found that the $20,000 advances are essentially support issues, I find that an appropriate modification of $20,000 advances should temporarily be stayed with certain provisions. [Paul] is required to provide to [Anne] and her counsel, monthly documents containing all of [Paul's] income and receipts. I emphasize that this stay is subject to review, and if such documents are not received, the Court retains jurisdiction to modify and/or determine that the stay shall be revoked.

"My order is that [Paul] shall continue to pay to [Anne] the existing spousal support sum of $20,000 per month on the same dates as currently set in the Stipulated Judgment. I also order that all of the Stipulated Judgment terms regarding [Paul's] obligation to supplement certain . . . expenses for the parties[']' daughter Alexandra shall remain in place. In making my decisions regarding spousal support and child support, I have considered that with the uncontroverted evidence that [Anne] receives a monthly sum of $8,149 according[] to her income and expense declaration, no modification of the existing $20,000 and $5,000 agreement [is warranted]. The ne[]t effect is that [Anne] would be left with at least $33,149 monthly. This Order is to commence forthwith on the same dates for [Anne's] receipt of child and spousal support. . . . [¶] My further decision and further Order concerning the $20,000 advance is as follows[:] [T]he Court shall retain complete jurisdiction as to the $5,000,000 community property asset owing to [Anne] for the reason that the advance amounts are essentially spousal support issues. Furthermore, I order that all other spousal support issues are within the Court[']s jurisdiction until such time that [Paul] has met each and every [one] of his financial obligations to [Anne]."[5]

Paul then filed a motion for clarification and reconsideration of the court's order. As relevant, he said (1) the court did not have jurisdiction to order a stay of spousal

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[5] Paul was also ordered to pay arrearages of $112,500 by January 1, 2010, and to pay $8242 by November 1, 2009, as he had expressly agreed at the hearing. This order was dated September 22, 2009 with proof of service from ADR Services on this date; the document was later filed in the trial court on February 18, 2010.

support pursuant to paragraphs 14.c and 14.d; (2) the court did not have jurisdiction to order monthly accountings by Paul to Anne; (3) the court did not properly address the issue of retroactivity of spousal support; and (4) the court did not have jurisdiction to extend the time of spousal support from Paul to Anne pursuant to the absolute waiver provisions of the stipulated judgment (among other requests for reconsideration and/or clarification). In her response, Anne said Paul had failed to present new facts and the court acted within its jurisdiction in ordering Paul to submit monthly accountings, to pay arrearages and to pay in accordance with his stipulation on the record at trial.

As Paul requested, the court issued "orders re: requests for clarification and reconsideration of previous orders regarding child and spousal support issues dated September 22, 2009." The court rejected Paul's calculation of $7,922 as a reasonable sum for both child and spousal support, "particularly since [Paul] spends approximately two-thirds of his claimed monthly income [$23,835]," determining instead "the only fair and reasonable sum for child support should remain as $5,000 per month, and spousal support for the sum of $7,000. Accordingly, . . . the aggregate sum of $12,000 per month is the appropriate amount that [Paul] should pay forthwith to [Anne]."[6] "All references made in my previous [o]rder of September 22, 2009 regarding the matter of $20,000 advances should not have been dealt with or resolved and are deemed void. . . . Furthermore, the issues of community property issues between the parties raised in the September proceedings should not have been raised and . . . should not have [been] discussed [in the prior o]rder, and any such matters are deemed voided."

Paul then disputed that he was obligated to pay the $20,000 advances pursuant to the order on reconsideration, and Anne sought clarification. Anne also filed notice of appeal from the December 2009 order (filed in February 2010), and Paul cross-appealed. Paul also appealed from the reconsidered September 2009 order and Anne cross-

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6 This order was dated December 21, 2009, and bears proof of service from ADR Services on that date; the order was later filed in the trial court on March 5, 2010.

appealed. In July 2010, the trial court confirmed: "My finding in this matter, after reviewing my notes and documents regarding the advances in the sum of $20,000 monthly, is that [Paul] is obligated to pay to [Anne] monthly per said sum." Anne then dismissed her appeal from the December 2009 order (filed February 22, 2010), and the remittitur issued in December 2010.

Paul's appeals from both the December 2009 order of reconsideration and the original September 2009 order remain pending along with Anne's protective cross-appeal from the original September 2009 order in the event the December 2009 order is reversed pursuant to Paul's appeal.

DISCUSSION

Paul's Appeal from the December 2009 Order.

According to Paul, the judgment is ambiguous as to whether the reimbursable "advances" described in paragraphs 14.c and 14.d are spousal support or property distributions. In Paul's view, the "'advances' carry all the indicia of spousal support" and were properly modifiable upon a showing of changed circumstances. If the advances are spousal support he says, given that the trial court found a change of circumstances, the trial court erred by declining to address whether to modify or terminate the advances. In the alternative, he argues, although the court is without jurisdiction to modify a property distribution, even assuming the paragraph 14.c and 14.d "advances" are property, the court could nevertheless modify or terminate them as they do not impact the property distribution.

General Legal Principles Governing Modifications of Spousal Support and Property Division.

"'Modification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order. [Citations.] Change of circumstances means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. [Citations.] It includes all factors affecting need and the ability to pay." (*In re Marriage of McCann*

(1996) 41 Cal.App.4th 978, 982 [48 Cal. Rptr. 2d 864].) ‘A trial court considering whether to modify a spousal support order considers the same criteria set forth in Family Code section 4320 as it considered in making the initial order.’ (*In re Marriage of West* (2007) 152 Cal.App.4th 240, 247 [60 Cal. Rptr. 3d 858].)

“Section 4320 provides:

“In ordering spousal support under this part, the court shall consider all of the following circumstances:

“(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

“(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

“(2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

“(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

“(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

“(d) The needs of each party based on the standard of living established during the marriage.

“(e) The obligations and assets, including the separate property, of each party.

“(f) The duration of the marriage.

“(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

"(h) The age and health of the parties.

"(i) Documented evidence of any history of domestic violence … .

"(j) The immediate and specific tax consequences to each party.

"(k) The balance of the hardships to each party.

"(l) The goal that the supported party shall be self-supporting within a reasonable period of time. …

"(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325.

"(n) Any other factors the court determines are just and equitable." (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396-398.)

"Appellate review of orders modifying spousal support is governed by an abuse of discretion standard, and such an abuse occurs when a court modifies a support order without substantial evidence of a material change of circumstances." (*In re Marriage of McCann*, *supra*, 41 Cal.App.4th at pp. 982–983; see *In re Marriage of West*, *supra*, 152 Cal.App.4th at p. 246 ['A spousal support order is modifiable only upon a material change of circumstances since the last order,' and '[w]here there is no substantial evidence of a material change of circumstances, an order modifying a support order will be overturned for abuse of discretion']; *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 480 [274 Cal. Rptr. 911] ['Absent a change of circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order.'].) "'So long as the court exercised its discretion along legal lines, its decision will not be reversed on appeal if there is substantial evidence to support it.'" (*In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 412 [6 Cal. Rptr. 2d 791].)" (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 398.)

Unlike support, however, as Paul concedes, "The general rule is that once property is divided and the judgment is final, the court loses jurisdiction to modify or alter the division of the property." (*In re Marriage of Farrell* (1985) 171 Cal.App.3d 695, 702 ["The division of assets and liabilities cannot be modified after it has become final unless

there is an explicit reservation of jurisdiction to do so"]; *Hamilton v. Hamilton* (1949) 94 Cal.App.2d 293, 298 [this rule also applies where the judgment is based on an agreement].)

"When a property settlement agreement is presented for approval in a divorce action and it is not clear whether payments therein provided are part of the division of property or are in the nature of alimony, the court should receive evidence and clearly and concisely make its determination in the decree of divorce. When the decree of divorce approves the agreement and incorporates it as a part of the decree and orders the payment of money as provided in the agreement but does not clearly determine whether such payments are part of the division of property or in the nature of alimony then in any subsequent proceeding the question is to be determined from the decree, including the agreement as a part thereof, and the intention of the parties as expressed therein. Of course, if the agreement is ambiguous the court should receive extrinsic evidence in aid of its interpretation as in other cases . . . . If it appears that it was the intention of the parties to definitely, fully and permanently adjust and settle their property rights, and the provision for support and maintenance constitutes an integral and important element in the amicable adjustment of the property rights of the parties, the court is without power to thereafter modify the decree. (*Adams v. Adams*, 29 Cal.2d 621 [177 P.2d 265]; [additional citations omitted].)" (*Hamilton v. Hamilton, supra,* 94 Cal.App.2d at pp. 298-299 ["We think it unequivocally appears from the agreement in the case at bar that the monthly payments to the wife were a part of the division of property and not alimony. After the interlocutory decree became final the court was without power to vacate or modify its provisions."].)

As a preliminary matter, we note that Paul's claim on appeal that the stipulated judgment is ambiguous is contrary to his position in the trial court. There he asserted "parol evidence is inadmissible" because "[t]he parties' Judgment is clear, explicit and unequivocal. The document speaks for itself. As such, any interpretations of the Judgment should be based on what is maintained within the four corners of the document

alone. If the evidence is not in the Judgment, then it is inadmissible when considering the terms of same." Anne says it would be unfair to permit Paul's new theory to be reviewed on appeal.

In any case, to the extent Paul now argues the judgment is ambiguous, extrinsic evidence is admissible to aid in interpretation, but not to vary the meaning of a written agreement. "Unless a more specific statute otherwise provides, agreements between spouses and prospective spouses are construed under the statutory rules governing interpretation of contracts generally . . . ." (Hogoboom and King, California Practice Guide: Family Law (The Rutter Group 2011), ¶ 9:115, p. 9-36.6, citing Civil Code § 1635 et seq.; *Marriage of Simundza* (2004) 121 Cal.App.4th 1513, 1518 [stipulated judgment of dissolution], additional citations omitted.)

As explained in *Winet v. Price* (2004) 4 Cal.App.4th 1159, "We begin by noting the oft-stated rule that parol evidence is properly admitted to construe a written instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.' (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37 [69 Cal.Rptr. 561, 442 P.2d 641, 40 A.L.R.3d 1373].) The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract. (*Blumenfeld v. R. H. Macy & Co*. (1979) 92 Cal.App.3d 38, 45 [154 Cal.Rptr. 652].) Different standards of appellate review may be applicable to each of these two steps, depending upon the context in which an issue arises. The trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to

prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact. (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598 [250 Cal.Rptr. 299].) Thus the threshold determination of ambiguity is subject to independent review. (*Equitable Life Assurance Society v. Berry* (1989) 212 Cal.App.3d 832, 840 [260 Cal.Rptr. 819].)

"The second step--the ultimate construction placed upon the ambiguous language--may call for differing standards of review, depending upon the parol evidence used to construe the contract. When the competent parol evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld as long as it is supported by substantial evidence. (*Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1084 [258 Cal.Rptr. 721].) However, when no parol evidence is introduced (requiring construction of the instrument solely based on its own language) or when the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the writing. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839].)" (*Winet v. Price, supra*, 4 Cal.App.4th at pp. 1165-1166.)

To the extent there is ambiguity in the language used to describe the $20,000 "advances," the fact remains that the parties agreed in the stipulated judgment that payment of these "advances" "shall continue until the first of the following [specified events, including] further order of Court." In other words, the parties expressly agreed that the payment of these "advances" was subject to modification. Because the trial court concluded in its December 2009 order that "the matter of $20,000 advances should not have been dealt with or resolved," "the issues of community property issues between the parties raised in the September proceedings should not have been raised and . . . should not have [been] discussed [in the prior o]rder, and any such matters are deemed voided," we reverse the December 2009 order and remand for the trial court to determine whether any modification of the $20,000 per month advances is appropriate.

The Trial Court Is Bound to Give Effect to the Parties' Intent and Reasonable Expectations As Expressed in the Stipulated Judgment Executed Just Nine Months Before Paul Filed his OSC.

"'[A] marital settlement agreement is a contract between the parties. [Citations.] Where the agreement permits modifications, those modifications require a showing of a change in circumstances. [Citations.] Moreover, in determining what constitutes a change in circumstances the trial court is bound to give effect to the intent and reasonable expectations of the parties as expressed in the agreement,' and, thus, 'the trial court's discretion to modify the spousal support order is constrained by the terms of the marital settlement agreement.' (*In re Marriage of Anninger* (1990) 220 Cal.App.3d 230, 238 [269 Cal. Rptr. 388].) In *In re Marriage of Norvall* (1987) 192 Cal.App.3d 1047, 1061 [237 Cal. Rptr. 770], the appellate court held that evidence of income produced from a community property source awarded to the wife in a stipulated settlement agreement did not constitute substantial evidence of a material change of circumstances to justify a reduction in the husband's spousal support obligation." (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 398.)

"Similarly, in *In re Marriage of Rabkin* (1986) 179 Cal.App.3d 1071, 1081 [225 Cal. Rptr. 219], the appellate court reversed an order reducing the husband's spousal support obligation, stating in part: 'We have concluded that none of these factors furnished a proper basis for the trial court's $ 250 per month reduction in wife's permanent spousal support. As for the sale of the family residence and wife's resulting right to receive approximately $1,800 in monthly mortgage payments, such right constituted the single major asset awarded to wife as her one-half share of the community property. The parties' agreement, which was very carefully drafted by skilled attorneys, provided that wife would receive her share of the community property and spousal support. *It makes no more sense to reduce wife's spousal support because she received her rightful share of the community property than it would to increase wife's spousal support because husband received his rightful share of the community property. . . .* (*In*

re Marriage of Dietz, supra, 176 Cal.App.4th at p. 399, italics added.)

Likewise, in this case, in determining whether a material change of circumstances had occurred, necessary to support a modification of Paul's spousal support obligation, the trial court is required to "give effect to" Paul and Anne's "intent and reasonable expectations . . . as expressed in the agreement" they entered into nine months before Paul filed his OSC. (*In re Marriage of Aninger, supra,* 220 Cal.App.3d at p. 238.) The stipulated judgment reflects Paul and Anne's bargained-for exchange through which they agreed how they would divide their assets, including their business community assets, as well as provide for Anne's support. (*In re Marriage of Dietz, supra,* 176 Cal.App.4th at p. 399.)

First and foremost, regarding the parties' mutual intent, the stipulated judgment reflects the parties' expectations with respect to spousal support. If the second $20,000 "advance" over and above the first $20,000 straight spousal support payment was also simply spousal support just like the first $20,000, there would have been no reason to treat it separately in the stipulated judgment. Moreover, Anne was to retain the advances and did not have to reimburse Paul if she did not receive at least $5,000,000 in property distributions from the projects—her share of business community assets.

In paragraph 9 of their stipulated judgment, Paul and Anne expressly agreed to the percentages each would receive in the division of their "business community assets," but "[w]ithout in any way negating either party's community ownership rights in the various entities referenced in the Stipulated Judgment," further agreed that because the listed projects were "currently in development" and "significant post[-]separation efforts will be undertaken by [Paul] to complete development," "*distribution* of Project revenues to the parties, in accordance with the terms of the Project's particular operating agreement, occurs upon completion of the Project." (Italics added.)

Then in paragraph 14, the parties agreed to certain "orders regarding spousal support." Pursuant to paragraph 14.a, commencing on September 1, 2007, Paul was obligated to pay Ann the sum of $40,000 per month "as and for spousal support . . . .

Said support shall continue until the first of the following occurs: [Anne] remarries; either party dies, further order of Court; or August 31, 2009. Said spousal support shall not be taxable as income to [Anne] and shall not be deductible by [Paul]."

Pursuant to paragraphs 14.b and 14.c, however, the judgment provided: "If by September 1, 2009, the Court's jurisdiction over spousal support from [Paul] to [Anne] has not otherwise terminated, then commencing September 1, 2009:" (1) "[Paul] shall pay to [Anne] $20,000 per month *as and for spousal support* . . . ," and (2) "in addition to the agreed-upon amount ordered in paragraph 14(b), above, [Paul] shall pay to [Anne] $20,000 per month *as an advance against* [*Anne's*] *interest in the Projects pursuant paragraph 9 of this stipulated Judgment, to be repaid by* [*Anne*] to [*Paul*] *out of* [*Anne's*] *net share of the last such project*; however, [Anne] shall have no obligation to reimburse [Paul] for any of these $20,000 *advances* if upon completion of payment for all of the Projects listed in paragraph 9, above, [Anne] has received less than $5,000,000 (gross) total distributions from all such Projects." "Said spousal support" as described in paragraph 14.b and "[s]aid payment" as described in paragraph 14.c "shall continue until the first of the following occurs: [Anne] remarries; either party dies; *further order of Court*; or August 31, 2011." Similarly, "[s]aid spousal support" under paragraph 14.b and "[s]aid payments" under paragraph 14.c "shall not be taxable as income to [Anne] and shall not be deductible by [Paul]."[7]

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[7] Further, pursuant to paragraph 14.d, "If by August 31, 2011, the Court's jurisdiction over spousal support from [Paul] to [Anne] has not otherwise terminated, and if by such date [Anne] has received $5,000,000 or more in gross receipts from the projects described in paragraph 9 of this Stipulated Judgment, then on such date the Court's jurisdiction over spousal support from [Paul] to [Anne] shall terminate absolutely and forever. However, if by August 31, 2011, the Court's jurisdiction over spousal support from [Paul] to [Anne] has not otherwise terminated and if by such date [Anne] has not received $5,000,000 or more in gross receipts from the projects described in paragraph 9 of this Stipulated Judgment, then spousal support as in years three and four shall continue until the earlier of August 31, 2013 (i.e., two more years) or such time as [Anne] has received $5,000,000 or more in gross receipts from the projects described in paragraph 9 of this Stipulated Judgment, in the amounts of support *and advances*

The stipulated judgment expressly acknowledged the uncertainty of Paul's income, and notwithstanding the length of their marriage (during which Paul worked outside the home while Anne was home with their daughter), the stipulated judgment provides that spousal support would be paid in the manner described in paragraph 14 and would absolutely terminate at that time "notwithstanding that *she* may have a material change of economic or other circumstances."[8] (Italics added.)

Moreover, the judgment also expressly provided for the *division* of the business community assets as defined under the agreement with *distributions* to occur on a deferred basis so as to allow for each project's completion while providing for Anne's support for the specified term. Consistent with the provision that the "advances" were "advances against [Anne']s interest in the Projects pursuant to paragraph 9," the judgment further specified that such advances were "to be repaid by [Anne] to [Paul] out of [her] net share of the last such project," except that she would "have no obligation to reimburse [Paul] for any of these $20,000 per month advances if upon completion of payment for all of the Projects listed in paragraph 9, above, [Anne] has received less than $5,000,000 (gross) total distributions from all such Projects." In other words, the $20,000 advances were Anne's share of *property,* advanced by Paul, subject to reimbursement by Anne so long as she ultimately received at least $5,000,000 from the Projects. Consistent with the parties' stipulated judgment providing that Anne would receive no less than $5,000,000 in distributions from the projects identified in the list of

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stipulated and ordered in paragraph 14(c), above. Notwithstanding anything to the contrary contained herein, if by August 31, 2013, the Court's jurisdiction over spousal support from [Paul] to [Anne] has not otherwise terminated, then on such date the Court's jurisdiction over spousal support from [Paul] to [Anne] shall terminate absolutely and forever." (Italics added.)

[8] "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made." (Code Civ. Proc., § 1864.)

the parties' business community assets, Anne would only avoid the obligation to repay Paul for the advances if her effectively guaranteed $5,000,000 minimum share of the projects was not received as contemplated. As Paul concedes, modifying the advances cannot alter the *amounts* due Anne in the division of their business community assets—only the timing of such payments, which will be a matter for the trial court's consideration.

While we have determined that, by its terms, the stipulated judgment expressly provided that the "advances" were subject to modification in light of the parties' inclusion of the "further order of Court" language, in assessing whether modification is appropriate with respect to the $20,000 advances, the trial court is "bound to give effect to the intent and reasonable expectations of the parties as expressed in the agreement," and as such, "the trial court's discretion to modify the spousal support order is constrained by the terms of the marital settlement agreement." (*In re Marriage of Anninger, supra*, 220 Cal.App.3d at p. 238; *In re Marriage of Dietz, supra,* 176 Cal.App.4th at p. 398)

Paul's Appeal and Anne's Cross-Appeal from the September 2009 Order.

Paul says the September 2009 order must be reversed because the trial court lacked jurisdiction to stay the "advances" because they were spousal support, not property distributions. Anne argues that if the trial court's reconsidered order is reversed and the original order is reinstated, the portion of that order staying the payment of the $20,000 monthly advances of community property distribution from Paul to Anne should be reversed as well. She says Paul himself argued the trial court had erred in this regard in filing his motion for reconsideration and the trial court agreed when it reconsidered the original order and voided the original stay order.

For the same reasons we have determined the December 2009 order must be reversed, we conclude the September 2009 order should be reversed. We note that the trial court, in evaluating Paul's claimed change of circumstances, initially stayed the $20,000 advances subject to Paul's accounting and later repayment while keeping the full

$20,000 spousal support payment in place (meaning Anne would receive $20,000 per month at the time, and would still receive the advances due her but at a later date), and in its reconsidered order, after determining it could not modify the $20,000 advances, reduced Anne's spousal support to $7,000 per month. While we have determined the "advances" are subject to modification under the terms of the parties' stipulated judgment, it remains the trial court's province to determine whether such modification is appropriate and to what extent.

DISPOSITION

The orders dated December 21, 2009 (and filed March 5, 2010) and September 22, 2009 (and filed February 18, 2010) are reversed and the matter is remanded to the trial court with directions to determine whether modification of the $20,000 advances is warranted. The parties are to bear their own costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**