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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

WESTCOT B. STONE, III, Plaintiff and Appellant, v. BETTE W. STONE, Defendant and Respondent; ELIZABETH STONE, Objector and Appellant.	B239097 (Los Angeles County Super. Ct. No. BC357108)

APPEAL from a judgment of the Superior Court of Los Angeles, Robert L. Hess, Judge. Affirmed in part, reversed in part, and remanded with directions.

Olsen & Olsen and Casey A. Olsen for Plaintiff and Appellant.

Elizabeth Stone, in pro. per., for Objector and Appellant.

Holland & Knight and Linda M. Rottman for Defendant and Respondent.

Appellants unsuccessfully sought to vacate a stipulated judgment entered in the underlying action. On appeal, they contend the judgment is void for want of subject matter and personal jurisdiction over two parties to the pertinent settlement agreement. They also maintain that the judgment is void because the settlement agreement contains illegal provisions. In view of these claims of error, they assert the trial court erred in granting an award of attorney fees to respondent as the prevailing party under a provision of the settlement agreement. Although we reject most of appellants' contentions, we conclude two provisions of the settlement agreement are unlawful, although severable from the agreement. Because they are severable, we conclude the judgment is valid and enforceable with the severance of the provisions. We therefore affirm in part, reverse in part, and remand with directions to the trial court to sever the unlawful portions of the judgment.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Appellant Westcot B. Stone III (Westcot) and respondent Bette W. Stone (Bette) married in April 1956.[1] There are two children from the marriage, appellant Elizabeth Stone (Liz) and Westcot B. Stone IV (Wes), each of whom is now an adult.[2] Prior to the marriage, Westcot owned commercial real estate and other interests that he had inherited; in addition, during the marriage, Westcot and Bette acquired substantial assets.

In August 2006, Westcot initiated the underlying action against Bette, asserting claims for breach of fiduciary duty, fraud, and rescission. His complaint alleged that in 1995, Bette deceived him into signing an agreement that purportedly transmuted a parcel of property on Wilshire Boulevard that he owned as separate

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[1] Because the parties on appeal share a surname, we refer to them by their first names.

property (the Wilshire property) into community property. In February 2007, Westcot commenced a separate second action against Bette regarding the Wilshire property, seeking to quiet title and other relief. His complaint in the quiet title action also alleged that Bette had improperly claimed to him that the 1995 agreement transmuted the Wilshire property into community property.

In March 2007, following a mediation in the underlying action, Westcot and Bette executed a "Stipulation re Settlement." They agreed that the Wilshire property was Westcot's separate property, and several other properties were "assigned" to Liz and Wes. The stipulation also provided that it was enforceable under Code of Civil Procedure section 664.6,[3] that Westcot and Bette would execute mutual releases of all claims, and that a "definitive agreement" would be prepared within 30 days reflecting the stipulation. The trial court issued an order to show cause regarding the settlement, but the matter was repeatedly continued because the parties encountered difficulties in drafting the final settlement agreement.

In early October 2007, Westcot's counsel told the trial court in the quiet title action that although no formal notice of a settlement had been filed, the case had been settled. Shortly afterward, on October 9, 2007, Westcot dismissed the quiet title action with prejudice.

On March 31, 2008, Westcot, Bette, Wes, and Liz executed an agreement entitled, "Settlement Agreement and Mutual General Release." The agreement also was signed by attorneys representing, respectively, Westcot and Liz, and Bette and Wes. It also states the parties' intent "to provide a full settlement and

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[2] Wes is not a party to this appeal.

[3] All further statutory citations are to the Code of Civil Procedure unless otherwise indicated.

discharge of all claims and disputes which ha[d] arisen among the parties," including but not limited to Westcot's actions against Bette.

Aside from requiring Westcot to dismiss his two actions against Bette with prejudice, the agreement contained numerous provisions regarding the Wilshire property and other properties, and a limited liability company called Elkiwe, LLC (Elkiwe). It nullified the 1995 agreement, identified the Wilshire property as Westcot's separate property, declared other properties to be Westcot's and Bette's community property, and assigned ownership interests in Elkiwe to Wes and Liz. The agreement further provided for the management of the properties and Elkiwe, as well as for their distribution upon the parties' deaths or the dissolution of Westcot's and Bette's marriage (if that were to occur). In addition, the agreement obliged Westcot and Bette to pool their income in a checking account over which Bette had primary control. It also provided that the trial court in the underlying action was to have continuing jurisdiction to resolve disputes arising out of the agreement. In connection with such disputes, the agreement authorized an award of attorney fees to the prevailing party.

On April 28, 2008, Westcot filed a stipulation in the underlying action regarding the settlement agreement. The stipulation, which was signed by Westcot, Bette, Wes, Liz, and their counsel, provided that an attached copy of the settlement agreement "may be introduced into evidence . . . in any action relating to the [s]ettlement [a]greement." On the next day, April 29, 2008, the trial court conducted a hearing on the order to show cause regarding the settlement. Following the hearing, the court entered a stipulated judgment signed by Westcot, Bette, Wes, Liz, and their counsel dismissing the action with prejudice. The judgment provided that the court retained jurisdiction "to resolve any and all issues arising out of the provisions of the [s]ettlement [a]greement."

In September 2008, Bette filed a petition for dissolution of marriage. Later, in February 2009, the family court concluded that the settlement agreement and the stipulated judgment in the underlying action were valid and enforceable, and ordered Westcot and Bette to carry out the terms of the settlement agreement. A partial judgment regarding marital status was entered in December 2009.

In June 2011, the family court filed its statement of decision following a trial on bifurcated issues regarding spousal support and the division of property. The family court concluded that because the settlement agreement had merged into the judgment in the underlying action, it was binding on Westcot and Bette in the dissolution action under the doctrine of res judicata. In addition, the family court found the settlement agreement was a valid transaction between Westcot and Bette under Family Code section 721, which imposes fiduciary obligations on spouses regarding the management and control of community property (*In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 992). A proposed judgment was submitted, which the family court entered in September 2011. In October 2011, the family court vacated the judgment in order to consider Westcot's objections to the proposed judgment

On November 3, 2011, Westcot filed a motion in the underlying action to set aside the judgment. He maintained the judgment was void for lack of subject matter jurisdiction and personal jurisdiction over Wes and Liz. He also argued that defects in the settlement agreement rendered the judgment void. Liz joined in the motion, but maintained she was not a party to the action. Bette opposed the motion.

On January 26, 2012, following a hearing, the trial court denied the motion. The court stated: "I am fundamentally unpersuaded by the arguments that were made, and I think . . . all these years down the line, [it] is a little bit late when there

have been all these other orders . . . in the family law court . . . ." The court continued: "The parties entered into this with their eyes wide open, everybody represented by counsel, and we have got [the signatures of the] counsels representing them . . . on these documents." The court further found that Bette was the prevailing party on the motion, and ordered Westcot to pay her an award of $15,592 in attorney fees. This appeal followed.[4]

DISCUSSION

Appellants contend the stipulated judgment is void because (1) the trial court lacked subject matter jurisdiction over some of the disputes resolved by the settlement agreement, (2) the trial court had no personal jurisdiction over Liz and Wes, and (3) the settlement agreement contains unenforceable terms. In addition, appellants contend (4) that the trial court erred in issuing the fee award to respondent. As explained below, we reject these contentions.[5]

A. *Principles Governing Our Review*

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[4] The ruling on the motion to vacate and the fee award are appealable orders. Although parties ordinarily waive their right to take a direct appeal from a judgment entered pursuant to a settlement (see pt. A., *post*), they do not thereby waive their right to appeal from postjudgment rulings regarding the enforcement of the judgment. (See *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 359.) Furthermore, the general rule barring an appeal from the denial of a nonstatutory motion to vacate a judgment is inapplicable when, as here, the motion asserts that the judgment is void. (*Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 690-691.) The fee award is appealable as a final ruling on a collateral matter, that is, a ruling that directs "the payment of money or performance of an act" and is "dispositive of the rights of the parties" with respect to the collateral matter. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.)

[5] We observe that the parties raise many disputes regarding the correctness of the family court's findings and conclusions. As the family court's determinations are not before us, we address only those contentions directed at the rulings by the trial court in the underlying action.

Although parties ordinarily waive their right to a direct appeal from a judgment by consenting to it, a judgment of this type is subject to collateral attack on various grounds, including that it is void. (*Cadle Co. II, Inc. v. Sundance Financial, Inc.* (2007) 154 Cal.App.4th 622, 625.) A judgment that is void on the face of the record may be set aside at any time. (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 206, pp. 811-812.) Judgments are void when there is a lack of jurisdiction over the subject matter or the person. (*People v. American Contractors Indemnity Co*. (2004) 33 Cal.4th 653, 660.) In addition, as explained below, they may be void in some circumstances, when the trial court has acted in "excess of jurisdiction" (*ibid*.), that is, when the court has subject matter and personal jurisdiction, but "'"has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites."' [Citation.]" (*Conservatorship of O'Conner* (1996) 48 Cal.App.4th 1076, 1088, disapproved on another ground in *Donovan v. Rrl Corp*. (2001) 26 Cal.4th 261, 280.)

Although errors in excess of jurisdiction usually render a judgment voidable, rather than void, they support the vacation of a stipulated judgment as void in exceptional situations. (*In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 988.) Errors in the application of the substantive law, by themselves, ordinarily do not render a judgment void. (*In re Marriage of Mansell* (1989) 217 Cal.App.3d 219, 229.) "A stipulated judgment . . . in excess of the court's jurisdiction may not be collaterally attacked absent unusual circumstances or compelling policy considerations. [Citations.] Thus, appellate courts have repeatedly allowed acts in excess of jurisdiction to stand when the acts were beneficial to all parties and did not violate public policy [citations] or when allowing objection would countenance a wholly unacceptable trifling with the courts. [Citations.] On the other hand,

appellate courts have voided acts in excess of jurisdiction when the irregularity was too great or when the act violated a comprehensive statutory scheme or offended public policy. [Citations]." (*In re Marriage of Jackson, supra*, 136 Cal.App.4th at pp. 988-989.)

Even when a stipulated judgment is based on a settlement agreement containing a significantly unlawful provision, the judgment itself is not void as a whole if the provision is severable from the agreement. Whether a contract is severable or divisible depends upon the "intention of the parties." (*Yeng Sue Chow v. Levi Strauss & Co.* (1975) 49 Cal.App.3d 315, 326.) A contract is indivisible when "it appears [the parties'] engagements would not have been entered into except upon the clear understanding that the full object of the contract should be performed." (*Ibid*.) Thus, a contract is properly divisible if the consideration can be "apportioned." (*Simmons v. Cal. Institute of Technology* (1949) 34 Cal.2d 264, 275) or the illegal provision of the contract can be segregated from its legal purposes (*Templeton Development Corp. v Superior Court* (2006) 144 Cal.App.4th 1073, 1084 (*Templeton Development*)). Accordingly, when the unlawful provision is severable, the appropriate remedy is to excise it and enforce the remainder of the judgment. (*Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495, 502.)

To the extent the trial court considered extrinsic evidence in denying the motion, we examine the record for substantial evidence to support the court's factual findings, whether express or implied.[6] (*Timney v. Lin* (2003)

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[6] Although a party attacking a judgment ordinarily is required to show that the judgment is void without "going outside the record or the judgment roll" (8 Witkin, *supra*, § 12, at p. 595), our review encompasses extrinsic evidence submitted in connection with the motion. Generally, the opponent of the challenge to the judgment forfeits the benefit of the rule barring extrinsic evidence by failing

106 Cal.App.4th 1121, 1126 (*Timney*); *Rackov v. Rackov* (1958) 164 Cal.App.2d 566, 570.) However, to the extent the denial implicates pure issues of law regarding the interpretation of the settlement agreement and judgment or the legality of the settlement agreement's provisions, we resolve the issues de novo. (*Timney*, *supra*, 106 Cal.App.4th at p. 1126.)

Insofar as our inquiry requires us to interpret the agreement and judgment, we apply established principles. Generally, "[s]ettlement agreements and consent judgments are construed under the same rules that apply to any other contract. [Citations.] 'Contract interpretation presents a question of law which this court determines independently. [Citations.] [¶] A contract must be interpreted to give effect to the mutual, expressed intention of the parties. Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone.' [Citation.] '[T]he parties' expressed objective intent, not their unexpressed subjective intent, governs.' [Citation.]" (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 47.)

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to object to the introduction of such evidence. (8 Witkin, Cal. Procedure, *supra*, § 13, at pp. 596-597.) Here, appellants submitted extrinsic evidence in support of the motion to vacate. In response, Bette asserted evidentiary objections to appellants' showing, but raised no objection based on the rule barring extrinsic evidence. Indeed, in opposing appellants' motion, Bette offered items of extrinsic evidence, including the family court's June 2011 statement of decision. At the hearing on appellants' motion, the trial court discussed the showings and did not expressly rule on Bette's evidentiary objections. The court thus impliedly overruled appellants' evidentiary objections. (*Pelayo v. J. J. Lee Management Co., Inc.* (2009) 174 Cal.App.4th 484, 493.) Because Bette did not rely on the rule barring extrinsic evidence and has not reasserted her evidentiary objections on appeal, we may consider all the extrinsic evidence submitted in connection with appellants' motion. (9 Witkin, Cal. Procedure, *supra*, Appeal, §§ 333, 701-702, pp. 384, 769-772.)

In connection with appellants' motion to vacate the judgment, the parties submitted no extrinsic evidence bearing on the meaning of the terms of the settlement agreement and the judgment at issue on appeal. Moreover, the agreement states that it is a complete expression of the parties' agreement and that no parole evidence is admissible to interpret it. These provisions limit the use of parol evidence to construe the agreement. (*Grey v. American Management Services* (2012) 204 Cal.App.4th 803, 806-807). Accordingly, our interpretation of the agreement and judgment relies on the intent of the parties, as expressed within agreement and judgment.

B. *Section 664.6*

Because appellants' contentions hinge in part on whether the stipulated judgment complied with section 664.6, we begin our analysis by examining that statute. Section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

This statute "was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.) Although a settlement agreement "has the attributes of a judgment in that it is decisive of the rights of the parties and serves to bar reopening of the issues settled" (*Gorman v. Holte* (1985) 164 Cal.App.3d 984, 988), it is not fully equivalent to a judgment (*Mares v. Baughman* (2001) 92 Cal.App.4th 672, 676-677). As our Supreme Court has explained, prior to the enactment of section 664.6, appellate courts recognized

three methods for enforcing an agreement to settle an action within the action itself, namely, a motion for summary judgment, an amendment to the pleadings to assert the settlement agreement as a defense, and a nonstatutory motion to enforce settlement agreements reached at judicially supervised settlement agreements. (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 904.) "With the enactment of section 664.6, the Legislature not only endorsed the nonstatutory motion procedure . . . , but expanded it beyond the context of judicially supervised settlement conferences." (*Id*. at p. 905.)

Here, the signatories to the settlement agreement did not expressly invoke section 664.6 in seeking the entry of the judgment. Nonetheless, the trial court's conduct was subject to section 664.6, since that statute provides the sole procedure by which a judgment may be entered by stipulation in an action when, as here, no party seeks summary judgment or leave to amend the pleadings. (*Davidson v. Superior Court* (1999) 70 Cal.App.4th 514, 528-529.) Neither appellants nor respondent dispute that section 664.6 provided the actual procedural basis for the stipulated judgment, although they disagree over whether the court adequately complied with its terms in entering the judgment.

Generally, "[a] court ruling on a motion under . . . section 664.6 must determine whether the parties entered into a valid and binding settlement. [Citations.] . . . If the court determines that the parties entered into an enforceable settlement, it should grant the motion and enter a formal judgment pursuant to the terms of the settlement. [Citation.]" (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182-1183.) However, nothing in section 664.6 authorizes the court to enter a void judgment, notwithstanding the parties' consent. (*Timney, supra*, 106 Cal.App.4th at pp. 1126-1129.)

C. *Subject Matter Jurisdiction*

Appellants contend the stipulated judgment is void because the trial court in the underlying action lacked subject matter jurisdiction over all of the disputes resolved by the settlement agreement. The settlement agreement required Westcot to dismiss both the underlying action and the quiet title action, and also resolved other unspecified disputes among the signatories to the agreement. Appellants argue that the court's subject matter jurisdiction in the underlying action was insufficient to authorize a judgment encompassing Westcot's quiet title action and the unspecified disputes. As explained below, they are mistaken.[7]

The term "subject matter jurisdiction" refers to "the inherent authority of the court involved to deal with the case or matter before it." (*Conservatorship of O'Connor*, *supra*, 48 Cal.App.4th at p. 1087.) Lack of this fundamental form of jurisdiction means "'an entire absence of power to hear or determine the case . . . .' [Citations.]" (*In re Marriage of Hinman* (1992) 6 Cal.App.4th 711, 716-717, quoting *In re Christian J.* (1984) 155 Cal.App.3d 276, 279.) Such jurisdiction

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[7] In connection with appellants' challenges to the trial court's subject matter and personal jurisdiction, they assert that Liz and Wes are parties to the settlement agreement, as opposed to third party beneficiaries. Although Bette unsuccessfully maintained in the dissolution action that Liz and Wes are third party beneficiaries, her brief in this appeal does not dispute that Liz and Wes are parties to the agreement. For purposes of our analysis, we assume -- without deciding -- that appellants are correct. As explained below, appellants' jurisdictional challenges fail, notwithstanding this assumption.

We also note that the parties dispute whether the settlement agreement was merged into the stipulated judgment. Generally, when a settlement agreement is merged into a judgment, the agreement is no longer independently enforceable, and "the value attaching to the [agreement] itself is only historical." (See *In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 656.) We do not address or decide whether the settlement agreement remains separately enforceable, as the resolution of that question is irrelevant to our analysis.

cannot be created by waiver or estoppel. (2 Witkin, Cal. Procedure, *supra* Jurisdiction, § 13, pp. 585-588.)

Here, appellants do not dispute that the trial court in the underlying action had subject matter jurisdiction over Westcot's claim against Bette for breach of fiduciary duty and the other claims raised in the action. They maintain only that the court's subject matter jurisdiction did not authorize it to enter a stipulated judgment encompassing other disputes. Accordingly, the key issue is whether a court with subject matter jurisdiction over an action may enter a section 664.6 judgment that resolves disputes beyond those raised in the pleadings.

We find guidance in *Landeros v. Pankey* (1995) 39 Cal.App.4th 1167 (*Landeros*). There, two tenants leased a house for a period of three years, beginning in 1989. (*Id*. at p. 1170.) Their landlords initiated an unlawful detainer action against them, alleging they had failed to pay rent for two months in 1992. (*Ibid*.) The action was resolved by a stipulated judgment based on a written agreement that was narrowly confined to the action and which lacked "any comprehensive language typically employed to indicate a settlement of any and all issues in dispute." (*Id*. at p. 1171.) Later, the tenants sued their landlord for breach of the warranty of habitability, alleging that the house was unsafe and defect-ridden during the entire period they occupied it. (*Id*. at p. 1169.) The trial court sustained a demurrer to their complaint without leave to amend on the ground that collateral estoppel arising from the judgment in the unlawful detainer action barred the action.[8] (*Id*. at p. 1170.)

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[8] Generally, "'[r]es judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation

The appellate court reversed, concluding that the collateral estoppel effect of the judgment could not be determined in the context of a demurrer, as "[a] prior stipulated or consent judgment is subject to construction as to the parties' intent." (*Landeros*, *supra*, 39 Cal.App.4th at p. 1172.) The court reasoned that the parties may have intended to resolve *all* disputes related to the occupancy, notwithstanding the absence of express terms manifesting this intent in the settlement agreement. (*Ibid*.) The court stated: "The absence of manifest intention on the face of the instrument would not necessarily prevent defendants from proving on remand, . . . as a matter of fact, that the parties intended the unlawful detainer judgment *to settle their entire relationship*." (*Ibid*., italics added.)

Although *Landeros* addressed application of the doctrine of collateral estoppel to a stipulated judgment, its holding demonstrates that a trial court with subject matter jurisdiction over an action may properly enter a stipulated judgment resolving disputes beyond those raised in the action. *Landeros* reflects the well-established principle that "a stipulated judgment may properly be given collateral estoppel effect, at least when the parties manifest an intent to be collaterally bound by its terms." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664; see Rest.2d Judgments, § 27, com. e, p. 257 ["In the case of a judgment entered by confession, consent, or default, . . . [t]he judgment may be conclusive . . . with respect to one or more issues, if the parties have entered into an agreement manifesting such an intention."].) This principle would be barren if a court with subject matter jurisdiction over an action could not enter a

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of issues argued and decided in prior proceedings.' [Citation]." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, fn. omitted.)

judgment pursuant to a settlement agreement that resolves disputes beyond those raised in the pleadings.

An earlier case, *Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 Cal.App.3d 1182 (*Stevenson*), reached a similar result in applying section 664.6. In *Stevenson*, the plaintiffs in two related actions against distinct groups of defendants entered into a global settlement of the actions with all the defendants. After the plaintiffs declined to honor the settlement, the trial court in one of the actions issued an enforcement order under section 664.6 encompassing *both* actions. (*Id*. at pp. 1186-1187.) The appellate court rejected the plaintiffs' contention that the trial court lacked subject matter jurisdiction to enforce the global settlement, noting that section 664.6 authorizes courts to "enter judgment pursuant to the terms of the settlement." (*Stevenson*, at pp. 1189, 1191-1194.)

Here, the settlement agreement and stipulated judgment unmistakably manifest the signatories' intent not only to resolve Westcot's claims against Bette in the underlying action, but also to "settle their entire relationship" (*Landeros*, *supra*, 39 Cal.App.4th at p. 1172). In view of the authority we have discussed, the trial court did not lack subject matter jurisdiction to enter the judgment in accordance with the terms of the settlement agreement.

Appellants contend the trial court in the underlying action lacked subject matter jurisdiction to enter a section 664.6 judgment encompassing the quiet title action because that action had been dismissed before the entry of the judgment. We disagree. The cases upon which appellants rely stand for the proposition that a trial court may not enter a section 664.6 judgment in an action after it has been fully dismissed, absent a timely request that the court retain jurisdiction. (*Walton v. Mueller* (2009) 180 Cal.App.4th 161, 168-172; *Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1008; *Wackeen v. Malis* (2002) 97 Cal.App.4th 429,

437-438; *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 206; *Stevenson*, *supra*, 167 Cal.App.3d at p. 1192.) That is not the situation here. In this case, the trial court expressly retained subject matter jurisdiction regardless of the dismissal of the quiet title action, even though both actions concerned the Wilshire property. (See 2 Witkin, Cal. Procedure, *supra*, Jurisdiction, § 429, pp. 1081-1082 [when two actions are filed regarding the same subject in the superior court of a single county, each judge has jurisdiction to rule on the matters before him or her].)

Pointing to *Housing Group v. United Nat. Ins. Co.* (2011) 90 Cal.App.4th 1106 (*Housing Group*), appellants also contend the court lacked subject matter jurisdiction to enter a judgment encompassing unspecified disputes resolved by the settlement agreement because no litigation was pending regarding these disputes. In that case, several parties executed a settlement agreement and filed a petition in San Francisco Superior Court, seeking a judgment under section 664.6. (*Id*. at pp. 1108-1109.) Although no prior action had been filed in that court involving the parties or their disputes, a judge acted on the petition and entered the requested judgment. (*Id*. at pp. 1109-1110.) The appellate court reversed, concluding that section 664.6 did not "allow parties who have no case pending in a court to obtain a judgment from that court." (*Id*. at p. 1113.)

Here, unlike *Housing Group*, the section 664.6 judgment was entered while the underlying action was pending between Westcot and Bette. Moreover, as explained below (see pt. D., *post*), the trial court correctly determined that Wes and Liz were subject to its personal jurisdiction for purposes of a judgment binding on them. Accordingly, the court had subject matter jurisdiction to enter a judgment encompassing the unspecified disputes, as this reflected the intent of the parties to the settlement agreement.

D. *Personal Jurisdiction*

Appellants contend the trial court in the underlying action lacked personal jurisdiction over Liz and Wes, for purposes of a section 664.6 judgment, because they were never formally named as parties to the underlying action before the judgment was entered. We reject this contention.

Generally, jurisdiction over a person is necessary for the validity of any judgment that imposes monetary obligations on the person or obliges the person to act in a certain manner. (2 Witkin, Cal. Procedure, *supra*, Jurisdiction, § 107, pp. 681-682.) Under California law, an individual not named in the pleadings in an action may submit to the trial court's personal jurisdiction by making a general appearance in the action. (*Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1029.) An individual "may make a general appearance in an action by '"various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person. [Citation.] What is determinative is whether [the individual] takes a part in the particular action which in some manner recognizes the authority of the court to proceed." [Citation.]' [Citation.]" (*Id*. at pp. 1028-1029, quoting *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1147.)

An instructive application of these principles is found in *People v. Ciancio* (2003) 109 Cal.App.4th 175 (*Ciancio*). There, a group of ex-prison inmates classified as sexually violent predators filed motions in superior court, alleging that they were entitled to appropriate housing and treatment. (*Id*. at pp. 186-187.) As a result, the court issued an order to show cause to several entities, including the California Department of Mental Health (DMH), which had not been formally named as a party in the proceedings. (*Id.* at pp. 187-188.) In response, DMH asserted that it was not a party, but nonetheless opposed the order to show cause on the merits. (*Id*. at pp. 187-188.) After the court ordered DMH to provide

continuing care for the ex-inmates, DMH asserted on appeal that the court lacked personal jurisdiction to issue the order. (*Id*. at pp. 181, 192.) The appellate court rejected this contention, reasoning that DMH's response to the order to show cause arguing the merits constituted a general appearance. (*Id*. at pp. 192-193.) As a result, the order was thus binding on DMH regardless of "whether or not DMH was the real party in interest or otherwise a party to the proceedings." (*Id*. at p. 193.)

We reach the same conclusion here. Liz and Wes appeared in the underlying action through counsel and acknowledged the trial court's authority to act in the matter. They did so by executing the April 28, 2008 stipulation and the stipulated judgment, which asked the court to retain jurisdiction to enforce the settlement agreement. For this reason, the trial court had personal jurisdiction over them, even though they were not named as parties in the pleadings and were not formally joined as parties.[9]

Appellants assert the court lacked the kind of personal jurisdiction over Liz and Wes mandated in section 664.6, despite their conduct. Their argument relies on the portion of the statute that provides: "If *parties to pending litigation* stipulate, . . . the court . . . may enter judgment pursuant to the terms of the settlement. If requested by *the parties*, the court may retain jurisdiction *over the parties* to enforce the settlement . . . ." (§ 664.6, italics added.) They maintain that

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[9] For the first time on appeal, Liz asserts that the trial court erred in various other respects, including finding that she was represented by counsel when she signed the settlement agreement and stipulated judgment. Because she did not raise these contentions in her opening brief, they are forfeited. (*Campos v. Anderson (*1997) 57 Cal.App.4th 784, 794, fn. 3.) In any event, we would reject her contention regarding her representation by counsel. Because she signed the agreement and judgment which state that she had counsel, there is substantial evidence to support the trial court's finding that she was represented by counsel.

the statute, on its face, limits the court's authority to enter a judgment and retain jurisdiction to "parties to [the] pending litigation."

We have not been cited to, nor have we found, a published decision that has addressed whether section 664.6 authorizes a judgment binding on signatories to a settlement agreement who, although not formally named as parties in the action, nonetheless make a general appearance in it and seek a judgment under the agreement. However, it is unnecessary for us to resolve this question, since appellants have not shown that the judgment is void, even if it is defective under section 664.6. Although appellants frame their contention in terms of the absence of personal jurisdiction, it is properly viewed as an assertion that the court acted in excess of its jurisdiction, that is, that it violated a statute in entering the judgment. Generally (see pt. A., *ante*), errors in the application of a statute do not render a judgment void on collateral attack unless they are "too great," violate a "comprehensive statutory scheme," or "offend[] public policy." (*In re Marriage of Jackson*, *supra*, 136 Cal.App.4th at p. 989.) That is not the case here.

In an apparent effort to show that the purported irregularity in the judgment is fatal, appellants argue that the judgment binds Liz and Wes, even though they lacked any obvious interest in the underlying action -- which concerned the Wilshire property -- when the judgment was entered. We reject this assumption. Liz and Wes acquired interests in the Wilshire property through the settlement agreement, which resolved interlocking issues among the signatories. These issues concerned Liz's and Wes's interests in Westcot's and Bette's community and separate property -- including the Wilshire property -- prior to and upon their death. The agreement provides that Westcot and Bette may neither sell nor encumber their property during their lifetime without Liz's and Wes's consent. It also obliges Westcot and Bette to execute testamentary documents reflecting that

Liz and Wes are to receive shares of their property. In view of these terms, Liz and Wes have interests in the Wilshire property that they were entitled to assert or defend in litigation. (*Continental Vinyl Products Corp. v. Mead Corp.* (1972) 27 Cal.App.3d 543, 549 [holder of contractual rights to interests in property may intervene in actions regarding title to property]; *Brown v. Superior Court* (1949) 34 Cal.2d 559, 563 [right established by contract to make a will entitles possessor to bring action for declaration or other relief].) Accordingly, when the stipulation and stipulated judgment were filed, Liz and Wes had cognizable interests in the Wilshire property.

For this reason, the irregularity -- if any -- in the judgment resides solely in the failure of the settlement agreement signatories to secure Liz's and Wes's status as formal parties to the action before a consent judgment was requested. Even if it were the case -- which we do not decide -- that section 664.6 judgments are limited to parties formally identified as such in the action, the purported defect in the judgment is insufficient to render it void. As we have explained (see pt. B, *ante*), in enacting section 664.6, the Legislature endorsed the prior nonstatutory procedure for entering stipulated judgments based on settlement agreements. Under that procedure, trial courts were permitted to enforce settlement agreements against nonparties who agreed to the settlement, had an interest in the pertinent action, and made an appearance in it. (*Phelps v. Kozakar* (1983) 146 Cal.App.3d 1078, 1081-1084 [global settlement agreement of two actions was enforceable against individual not named as a plaintiff or defendant in the actions, as she had an interest in the subject matter of the litigation and appeared in the an action to oppose enforcement of the settlement agreement].) Furthermore, in *Stevenson*, the appellate court affirmed a section 664.6 judgment binding on individuals not formally named as parties in the action. (*Stevenson*, *supra*, 167 Cal.App.3d at

pp. 1185-1190.) Accordingly, the purported irregularity in the judgment in the underlying action does not significantly affront the purposes and policies underlying section 664.6. We thus discern no error in the judgment rendering it void.[10]

E. *Terms of Settlement Agreement*

We turn to appellants' contention that the settlement agreement contains unlawful provisions that render the judgment void. Generally (see pt. A., *ante*), errors and defects in a settlement agreement do not support a collateral attack on the judgment unless they constitute a significant affront to a statutory scheme or public policy. As we explain, appellants have identified no nonseverable defect in the settlement agreement meeting this demanding standard.

1. *Checking Account Funds as Community Property*

Appellants contend the settlement agreement is unenforceable because it requires funds in a joint checking account owned by Westcot and Bette to remain community property after a divorce. Under the agreement, Westcot and Bette are obliged to pool income from their properties and other sources into a single joint checking account "as community property" and disburse the funds for specified purposes, including the payment of business expenses related the properties. In addition, the agreement states that if the marriage is dissolved, the agreement's provisions "shall remain in full force and effect during [their] joint lifetimes . . . ,

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[10] Appellants also argue that this conclusion would permit strangers to an action to obtain a stipulated judgment addressing disputes wholly unrelated to the action. They assert: "All that is required is that [the strangers] locate individuals who are parties to a pending case. The strangers can then include their disputes . . . in a settlement agreement reached in connection with [the] pending case, and . . . seek entry of a judgment." No such consequence flows from our conclusion, as we do not interpret section 664.6, but merely assess whether the purported error here supports a collateral attack on the judgment.

during the lifetime of the survivor of them, and upon the survivor's death." Appellants argue these terms are unlawful because the account funds cannot remain community property after a divorce. We do not agree.

Because settlement agreements are contracts, a writing is enforceable under section 664.6 if the parties agreed to terms addressing all material matters with sufficient certainty to render specific enforcement appropriate. (*Weddington Productions, Inc. v. Flick, supra*, 60 Cal.App.4th at pp. 810, 815-816.) It is not necessary that every term be stated in the contract. (See *Elite Show Services, Inc. v. Staffpro, Inc.* (2004) 119 Cal.App.4th 263, 269.) Provided omissions in the settlement agreement do not introduce excessive uncertainty, a court may use principles of contract interpretation "to determine incidental matters, so long as such matters do not alter or vary the terms of the agreement. [Citation.]" (*Ibid.*, quoting *King v. Stanley* (1948) 32 Cal.2d 584, 588, disapproved on another point in *Patel v. Liebermensch* (2008) 45 Cal.4th 344, 351, fn. 4.)

Here, the settlement agreement does not describe in full detail the operation of the pooling provision after a divorce. When a marriage ends, community property must be distributed to the spouses. (*In re Marriage of Walrath* (1998) 17 Cal.4th 907, 924). Although the agreement -- which was executed while Westcot and Bette were married -- specifies that the account funds are to be held as community property, it does not characterize the manner in which Westcot and Bette must hold the funds after a divorce.

We conclude that this lack of detail does not render the settlement agreement unenforceable. Because Westcot and Bette agreed that their duties toward each other would continue throughout their lifetimes, after a divorce they are obliged to hold the funds in a manner closely reflecting the funds' pre-divorce status as community property, that is, Westcot and Bette must take appropriate action to

hold the funds as joint tenants or tenants in common. Accordingly, we discern no fatal uncertainty in the settlement agreement.[11]

Appellants suggest that holding the funds in a joint tenancy or tenancy in common cannot be reconciled with other provisions of the agreement giving Bette primary control over the account funds. Under these provisions, Bette is authorized to write checks on the account only for the specified purposes, namely, the payment of expenses related to their real estate assets, and the disbursement of funds into Westcot's and Bette's own separate accounts for their personal use. Westcot is permitted to write checks for the specified purposes only if Bette fails to do so in a timely manner. Bette and Westcot also are required to report to each other regarding their disbursement of the funds. If either party disburses the funds for uses not specified in the agreement, the other party is authorized to seek judicial relief.

Appellants argue that these provisions are "inconsistent with the intent to hold an undivided interest in income" as joint tenants or tenants in common. However, joint tenants and tenants in common may agree to limit their respective access to or use of the pertinent property without destroying the joint tenancy or tenancy in common. (*Hammond v. McArthur* (1947) 30 Cal.2d 512, 516 ["[J]oint tenants may contract with each other concerning the exclusive possession and division of income from the property and this will not necessarily terminate the joint tenancy"]; see *Tom v. City and County of San Francisco* (2004) 120 Cal.App.4th 674, 677 [recognizing contracts among tenants in common to accord exclusive use of portions of property to individual tenants in common].) For this

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[11] Although the family court's determinations are not subject to our review in this appeal, we note that the family court reached the same conclusion on this issue.

reason, the provisions in question do not conflict with Westcot's and Bette's obligation to hold the account funds as joint tenants or tenants in common after their divorce.

2. *Bette's Primary Control Over Checking Account Funds*

In a related contention, appellants assert that the provisions giving Bette primary control over the account funds establish an unlawful conservatorship over Westcot. We disagree.

Under Family Code sections 721 and 1100, spouses have fiduciary duties to each other with respect to the management and control of community property. (Fam. Code, §§ 721, subd. (b), 1100, subd. (e).) These statutes provide that spouses are involved in a fiduciary or confidential relationship akin to that between nonmarital business partners; accordingly, each is subject to "a duty of the highest good faith and fair dealing," and "neither shall take any unfair advantage of the other" (Fam. Code, § 721 subd. (b)). Furthermore, spouses must make full disclosure of material facts relevant to "all assets in which the community has or may have an interest and debts for which the community is or may be liable . . . , upon request." (Fam. Code, § 1100, subd. (e).) However, although each spouse has the right to manage and control community property, one spouse may properly exercise primary management and control over business-related community property, on condition that significant transactions regarding the property are disclosed to the other spouse. (Fam. Code, § 1100, subd. (d).) These fiduciary duties exist until the community assets and liabilities "have been divided by the parties or by a court." (Fam. Code, § 1100, subd. (e).) Although Westcot and Bette divorced in December 2009, no final judgment has been entered regarding

the division of the community property and assets. Accordingly, they remain subject to fiduciary duties to each other.[12]

Under the Family Code, spouses may enter into an agreement regarding the management and control of community property, provided that the agreement respects their fiduciary duties, gives neither spouse an unfair advantage, and reflects no undue influence. (*In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 729-734.) These criteria are satisfied here. Although Bette has primary control over the account funds, she is obliged to use them for specified purposes to which Westcot and Bette have agreed, and report her activities to Westcot; if she fails to make timely payments or misuses the funds, Westcot may make the payments himself or seek other relief. Furthermore, the agreement itself was the product of lengthy negotiations during which Westcot and Bette were represented by counsel. We thus see no defect in the provisions giving Bette primary control over the checking account funds.[13]

3. *Westcot's Pension Benefits*

Appellants contend the term in the settlement agreement requiring that Westcot pool his income in the checking account contravenes federal law, insofar

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[12] The family court apparently determined that under the settlement agreement, Westcot and Bette have fiduciary duties toward each other that continue throughout their lifetime after their divorce. Because it is unnecessary for us to decide whether the settlement agreement imposes such duties on them, we do not do so.

[13] For similar reasons, the provisions do not impose a conservatorship on Westcot after the termination of Westcot's and Bette's marital fiduciary duties, regardless of whether -- as the family court found (see fn. 12, *ante*) -- they have postdivorce fiduciary duties to each other. As joint tenants or tenants in common with respect to the account, they may properly give primary control over the account to Bette (see pt. E.1., *ante*).

as it encompasses pension benefits from his former employment as an airline pilot. The pension is subject to the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.)(ERISA), which contains a provision barring the assignment and alienation of pension benefits (29 U.S.C. § 1056(d)(1)). Appellants argue that the judgment is void because the pooling requirement violates the anti-alienation provision in ERISA. We reject this contention.

As explained in *In re Marriage of Shelstead* (1998) 66 Cal.App.4th 893, 898-899, the anti-assignment provision controls the allocation of pension benefits upon the dissolution of marriage: "Congress included the [anti-assignment] provision to protect employees and their dependents from the participant's financial improvidence and to ensure benefits were available upon retirement. [Citation.] [¶] Shortly after ERISA's enactment, courts began grappling with the question whether the transfer of pension benefits incident to a divorce was a prohibited assignment or alienation. . . . [¶] Seeking to address this and other issues, Congress enacted an amendment to ERISA . . . [¶] . . . Congress took a two-step approach. First, it declared the transfers of pension benefits between spouses in a divorce context *were* prohibited alienations within the meaning of the [anti-assignment] provision. [Citation.] Second, Congress created a limited exception to the rule, providing the [anti-assignment] provision 'shall not apply if the order [allocating benefits] is determined to be a qualified domestic relations order [(QDRO)].' [Citation.]" (*Ibid*., fn. omitted.)

Here, appellants assert that the pooling requirement is unlawful because it required (1) a division of the pension during Westcot's and Bette's marriage and (2) the continued pooling of the pension after their divorce without the issuance of a QDRO. As explained below, they have identified no error rendering the judgment void.

Appellants' contention is moot insofar as it attacks the operation of the pooling requirement before the December 2009 divorce, as appellants did not seek to vacate the judgment in the underlying action until November 2011. Moreover, we would reject this portion of the contention were we to address it on the merits. The purpose of the anti-assignment provision "is to protect an employee from his own financial improvidence in dealings with third parties." (*American Tel. & Tel. Co. v. Merry* (2d Cir. 1979) 592 F.2d 118, 124*; In re Williams* (C.D. Cal. 1999) 50 F.Supp.2d 951, 956.) Our research has disclosed no case establishing that during marriage, a benefit recipient may not enter into an agreement with a spouse to use pension benefits to pay community obligations. Under these circumstances, any defect in the operation of the pooling requirement prior to December 2009 is not fatal to the judgment. (See *In re Marriage of Mansell*, *supra*, 217 Cal.App.3d at pp. 229-230 [stipulated division of husband's retirement benefits in dissolution action, though potentially erroneous under current federal law, did not render judgment allocating property void because stipulation complied with holdings of federal courts when entered].)

Appellants fare no better insofar as they attack the operation of the pooling requirement after the dissolution of the marriage. The settlement agreement contains no provision requiring them to pool the pension benefits after a divorce in the absence of a QDRO, and the record establishes that the family court has, in fact, issued a QDRO encompassing the benefits. Although appellants suggest that a new QDRO may be required to maintain the ongoing operation of the pooling provision, this potential defect in the existing QDRO is properly presented to the family court. Nothing before us establishes that the pooling requirement *itself* "violate[s] a comprehensive statutory scheme or offend[s] public policy," for

purposes of establishing that the judgment is void. (*In re Marriage of Jackson, supra*, 136 Cal.App.4th at p. 989.)

4. *Social Security Benefits*

Appellants also contend that the pooling requirement contravenes federal law, insofar as it encompasses Westcot's and Bette's social security benefits. Regarding the benefits, appellants do not challenge the operation of the pooling requirement before Westcot's and Bette's divorce. Instead, they argue that the requirement is unlawful insofar as it obliges Westcot and Bette to continue pooling their benefits after the divorce. We agree, but conclude that the unlawful portion of the pooling requirement is severable from the settlement agreement.

Social security benefits are not a community asset that state courts may allocate when a marriage ends. (*In re Marriage of Hillerman* (1980) 109 Cal.App.3d 334, 345; *In re Marriage of Cohen* (1980) 105 Cal.App.3d 836, 843.) Furthermore, the benefits are subject to an anti-assignment statute that provides in pertinent part: "Payments of benefits due or to become due . . . shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." (38 U.S.C. § 5301(a)(1).)

As explained in *Nelson v. Hiess* (9th Cir. 2001) 271 F.3d 891, 895, under the anti-assignment provision, social security recipients cannot bind themselves to allocate their future benefits to others. Although they control benefits already received, they may not consent to the use of "funds that accrue in the future," as that is "directly contrary" to the anti-alienation provision. (*Ibid*.) For this reason the anti-alienation provision "precludes consent to a taking of future benefits."

(*Ibid*.; see also *Simmons v. Simmons* (S.C. Ct.App. 2006) 634 S.E.2d 1, 3-4 [spouses' agreement regarding division of social security benefits after divorce is unenforceable under anti-assignment provision].) Accordingly, the pooling requirement is unlawful insofar as it encompasses Westcot's and Bette's postdivorce social security benefits.

Bette's reliance upon *Lopez v. Washington Mutual Bank* (9th Cir. 2002) 302 F.3d 900 is misplaced. There, the plaintiffs held checking accounts under an agreement that permitted the bank to pay overdrafts from its own funds and then take funds later placed in the account. (*Id*. at p. 903.) After overdrafts, the bank accepted social security benefits placed in the accounts by direct deposit. (*Ibid*.) When the plaintiffs claimed the agreement contravened the anti-assignment provision, the Ninth Circuit disagreed, concluding that each deposit after an overdraft was merely "a voluntary payment of a debt incurred," as the agreement did not require the continued placement of benefits in the accounts. (*Id*. at pp. 903-904, 908.) In contrast, the pooling requirement obliges Westcot and Bette to share their postdivorce social security benefits in the future.

Although the pooling requirement is unlawful in this respect, the judgment is not void in its entirety because the defect is severable. In determining whether a contract provision is subject to severance or restriction, "'"[c]ourts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate."'" (*Templeton Development, supra*, 144 Cal.App.4th at p. 1084, quoting *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074.)

The purpose of the settlement agreement, viewed as a whole, was to resolve disputes among the parties by providing for the ownership, management, and disposition of several properties and business entities, and establishing a mechanism for managing Westcot's and Bette's income stream. In an effort to shield the agreed-upon remedies from future challenge, the parties included an severability provision, which states: "Should any provision of this [a]greement be found to be unlawful, void or for any reason unenforceable, such provision shall be deemed severable from, and shall in no way affect the validity or enforceability of, the remaining provisions of the [a]greement." The unmistakeable intent of this provision is to secure the severability of unlawful provisions, to this extent this is possible. (See *Oakland-Alameda County Coliseum Authority v. CC Partners* (2002) 101 Cal.App.4th 635, 646, disapproved on another ground in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1361] .)

In view of the goal of the settlement agreement and its terms regarding the pooling of Westcot's and Bette's income, the defect is severable. The pooling provisions require that income placed into the joint account must be paid out for specified purposes, *including* the placement of funds in Westcot's and Bette's personal accounts. Eliminating the pooling requirement regarding social security benefits would thus mark only an incidental change -- if any -- in the flow of the benefits. Accordingly, the unlawful portion of the pooling requirement is collateral to the main purpose of the settlement agreement and severable from it.

Pointing to *Elnekave v. Via Dolce Homeowners Assn.* (2006) 142 Cal.App.4th 1193 (*Elnekave*), appellants argue that no unlawful provision of the settlement agreement is severable. They are mistaken, as *Elnekave* is factually distinguishable. In that case, the owners of a water-damaged condominium sued their neighbors in the condominium complex and the condominium owners

association. (*Id*. at p. 1195.) The plaintiffs, the defendants' insurer, and an association employee, entered into a settlement requiring the insurer to pay the plaintiffs $60,000 on behalf of the neighbors and $65,000 on behalf of the association; in addition, the parties were to exchange mutual releases of potential claims, including claims that the association or the plaintiffs had violated the pertinent covenants, codes, and restrictions (CC&Rs). (*Ibid*.)

After the trial court entered a section 664.6 judgment, the appellate court reversed, holding that no proper representative of the association had accepted the agreement. (*Elnekave*, *supra*, 142 Cal.App.4th at p. 1199.) In so concluding, the court rejected the plaintiffs' contention that the payment of the settlement funds on behalf of the neighbors was a severable portion of the agreement, stating: "Under this contention, we would be peeling off one portion of the settlement, leaving the fate of the other -- the enforceability of the CC&R's -- in limbo." (*Id*. at p. 1200.) The court thus determined that the settlement payment was not divisible from the agreement's purpose of ending the disputes among the parties. As explained above, that is not true of the unlawful portion of the pooling provision. In sum, the unlawful provision is properly severed from the stipulated judgment.

5. *Consent Provision*

Appellants contend the settlement agreement contains an unlawful term that permits Westcot and Bette to violate their fiduciary duties to each other. Under the agreement, Westcot and Bette may not sell, encumber, or transfer their property during their lifetime without the consent of each signatory to the agreement. The agreement further states: "All such consents may be unreasonably withheld." Appellants argue that this "unreasonable veto" term contravenes Westcot's and Bette's fiduciary duties to each other. We agree that the term is defective, but

conclude that it is severable.[14] As noted above (see pt. E.2., *ante*), spouses are subject to mutual fiduciary duties with respect to the management and control of community property. (Fam. Code, §§ 721, subd. (b), 1100, subd. (e).) The "unreasonable veto" term cannot be reconciled with these duties, insofar as it purports to permit Westcot or Bette to veto a property transaction, regardless of the veto's consequences for the other spouse. Westcot's and Bette's fiduciary duties bar each from taking "any unfair advantage of the other." (Fam. Code, § 721, subd. (b).) Public policy disfavors the waiver of such statutorily-imposed duties. (See *In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1064-1065.) For this reason, the term is unlawful to the extent that it purports to permit a veto that unduly advantages the nonconsenting spouse.

Nonetheless, the defect in the settlement agreement is severable. The evident purpose of the provision limiting transfers of Westcot's and Bette's property is to ensure that absent special circumstances, the property will eventually pass to Liz and Wes. Restricting the "unreasonable veto" term so that it is inapplicable to Westcot and Bette will not materially modify the provision, as Liz and Wes remain free to withhold their consent to any transfer they regard as injurious to their interests. The unlawful portion of the "unreasonable veto" requirement is thus collateral to the purposes of the settlement agreement and severable from it.[15]

6. *Terms Regarding the Negotiation of the Settlement Agreement*

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[14] Although appellants note that Wes has asserted his right to withhold consent under the "unreasonable veto" term, they do not argue that the term is unlawful insofar as it applies to Liz and Wes. Accordingly, appellants have forfeited any such contention.

[15] We note that the family court reached a similar conclusion regarding the "unreasonable veto" term.

Appellants also contend the settlement agreement contains other unlawful provisions by which Westcot and Bette agreed to "contract away" their fiduciary duties to each other. Appellants argue that these terms constitute an unlawful waiver of Westcot's and Bette's fiduciary duties of disclosure to each other. As explained below, appellants have identified no defect rendering the judgment void.

The agreement contains several terms regarding the negotiation of agreement and its enforcement. In a section entitled "General Provisions," the parties state that they understood the agreement prior to executing it and conducted an adequate investigation of the facts. They further agree that some facts might have been "overlooked or concealed," that they "assume the risk" that the facts they believed might not be true, and that the agreement will remain enforceable notwithstanding such errors. In addition, "to preclude any claim that a party was . . . fraudulently induced to execute [the a]greement," they state that they have placed no reliance on any party's failure to make any statement or disclosure.

It is well established that the terms in question are ineffective to achieve their evident purpose, namely, to forestall claims that the settlement agreement was induced by fraud. Section 1668 of the Civil Code provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, . . . whether willful or negligent, are against the policy of the law." This provision encompasses intentional and negligent misrepresentation. (*Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1471-1473.) Accordingly, as Witkin explains: "A party to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract, either that no representations have been made, or that any right that might be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence

of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, *including the waiver provision*." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 304, p. 330.)

Nonetheless, the mere presence of the terms in the settlement agreement does not render it void or unenforceable. In *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 291 (*Hinesley*), the plaintiff asserted a claim of fraud in the inducement against his landlord, alleging that when he leased commercial space in a shopping center, the landlord's agent told him that other units in the shopping center would be occupied by businesses likely to attract heavy "foot traffic." (*Id*. at p. 292.) The lease in question contained a provision stating that the plaintiff had not relied on any representation regarding other tenants. (*Id*. at p. 297.) After the landlord obtained summary judgment on the plaintiff's fraud claim, the appellate court determined that although the lease provision could not immunize the landlord from fraud claims, its presence in the lease was relevant to whether there had, in fact, been fraud. (*Id*. at pp. 301-302.) The court affirmed summary judgment, reasoning that the evidence -- including the "no oral representations" clause -- established the *absence* of fraud in the inducement. (*Id*. at pp. 302-304.) In view of *Hinesley*, the presence of the terms in the settlement agreement does not -- by itself -- constitute a basis for setting aside the agreement or the judgment, even though the terms cannot shield the agreement from challenges that it was induced by fraud.[16] (See also *In re Marriage of Burkle*,

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[16] A related contention asserted by appellants fails for similar reasons. In addition to agreeing to the terms discussed above, the parties to the settlement agreement stated: "The parties have entered into this [a]greement voluntarily, freely and without any undue influence on the part of any party to this [a]greement or any attorney." Appellants argue that this term is unlawful. We disagree. Assuming -- without deciding -- that the term is legally ineffective to bar claims of

supra, 139 Cal.App.4th at pp. 721, 754 [trial court properly enforced property agreement between spouses containing recitations neither party relied on other spouse's representations regarding property].)

F. *Fee Award*

Appellants contend the trial court incorrectly issued the fee award to Bette as the prevailing party on their motion to vacate the judgment. We disagree. The court's ruling is reviewed for abuse of discretion. (*Leamon v. Krajkiewcz* (2003) 107 Cal.App.4th 424, 431.) Although we have identified two minor errors in the denial of appellants' motion to vacate the judgment, we see no abuse of discretion in the court's identification of the prevailing party.

DISPOSITION

The ruling on the motion to vacate the judgment is reversed only to the extent the judgment (1) requires Westcot and Bette to pool their postdivorce social security benefits (paragraph E.1 of the settlement agreement), and (2) permits them to withhold their consent unreasonably to transactions regarding the pertinent properties (paragraph F.1 of the settlement agreement), insofar as the withholding of consent contravenes their fiduciary duties to each other. The matter is remanded to the trial court with directions to modify the judgment to sever these two provisions. The ruling on the motion to vacate and the fee award are affirmed in all other respects. Respondent is awarded her costs on appeal.

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fraud or undue influence, its mere presence in the agreement is not improper, as it constitutes potential evidence that there was no fraud or undue influence. (See *In re Marriage of Burkle*, *supra*, 139 Cal.App.4th at p. 736 [trial court's finding that property agreement between spouses was not product of undue influence was

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.

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supported by substantial evidence, including recitations in agreement that neither party had obtained unfair advantage].)