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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RICHARD STEVEN LOUGH, Defendant, Cross-complainant and Appellant, v. RODGER LOUGH, Defendant, Cross-defendant and Respondent.	B229119 (Los Angeles County Super. Ct. No. NC050332)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph E. DiLoreto, Judge. Affirmed as modified.

Buchalter Nemer, Robert M. Dato; HamptonHolley, George L. Hampton IV and Colin C. Holley for Defendant, Cross-complainant and Appellant Richard Steven Lough.

Callahan Law Corporation, Rebecca Callahan; Snell & Wilmer and Richard A. Derevan for Defendant, Cross-defendant and Respondent Rodger Barrett Lough.

Richard Lough appeals the trial court's judgment in his action against his mother Vinetta Lough and his brother Rodger Lough for fraud, breach of contract, breach of fiduciary duty, indemnity, and an accounting. On appeal, he contends the court erred in numerous respects in adopting the findings of a court-appointed referee determining issues relating to the parties' extensive real estate holdings, compensation due Rodger, and the extent of equalizing payments due Richard. We affirm the judgment as modified to provide that postjudgment interest runs from the date of entry of judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Richard and Rodger's mother Vinetta[1] was born in 1914 and widowed in 1958, when Richard and Rodger were eight and 11 years old, respectively. Vinetta's husband Darwin had been a real estate developer; after his death, in the 1960's, Vinetta began to invest in Southern California real estate with the help of a friend, Dana Poulsen. Vinetta purchased run-down houses in foreclosure, repaired them, and rented them out. As a result, over the years, Vinetta amassed a large real estate portfolio that included both income and non-income properties worth several million dollars. Her two sons began to participate in her empire after they became adults. Generally, Richard contributed capital, while Rodger assisted his mother in managing and renovating properties.

Richard became a CPA and began working at Coopers & Lybrand in 1972. Rodger became a dentist in 1978, and in the 1980's, Vinetta asked Rodger to help manage her properties full time, so Rodger gave up his dental practice. Pursuant to Richard's advice, Vinetta put Richard and Rodger's names on some of the properties for estate planning purposes, although the parties orally agreed that the properties would continue to belong to Vinetta and returned to her upon her request.

The parties kept an operational bank account, which they called the "R&R Account" (for "Richard" and "Rodger") into which the proceeds of the properties were distributed, the expenses associated with the properties were paid, and into which Richard

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[1] We refer to the parties, who share the same last name, by their first names in order to avoid confusion.

and Rodger made contributions. At times, they used separate accounts for specific projects. Beginning in mid-1980 until approximately 2005, Rodger began to receive a monthly stipend on account of his work on the properties in the amount of $4,000; later, the stipend increased to $5,000. According to Rodger, this stipend was not "full compensation" for his work on the properties.

1. Vinetta's Complaint and Richard's Cross-Complaint

In October 2007, Vinetta commenced an action against Richard and Rodger for financial elder abuse, breach of fiduciary duty, breach of contract, declaratory relief, and partition by sale, and sought to recover title to properties in her portfolio where title had been transferred to Richard and Rodger. At issue were the following 18 properties:

1. Unimproved property on Latigo Canyon Road in Malibu consisting of 193 acres entitled for development by the Coastal Commission (Malibu Acreage).

2. Residential real property located on Bayview in Sunset Beach (Bayview).

3. Unimproved property on Portshead Road in Malibu consisting of 1.56 acres in a residential community with private beach access rights (Point Dume).

4. Unimproved property located on Shangri La Drive in Beverly Hills consisting of one-half acre that is rented and improved as a garden by the next-door property owner (Shangri La).

5 and 6. Improved real property located at 220 and 222 Clarissa, Avalon, Catalina Island, consisting of two side-by-side bungalows (Clarissa).

7. Improved real property located at 319 Flint Avenue, Long Beach, consisting of a single-family residence built by Vinetta where Rodger resides with his family (Flint Street House).

8 and 9. Unimproved real property located at 317, 321, and 323 Flint Avenue, Long Beach (Flint Lots).[2]

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[2] 323 Flint was not listed on the reference order, but was later included in the parties' settlement.

10. Improved real property located at 6936 Pacific View Drive, Los Angeles, consisting of a single-family residence built by Vinetta that its rented out to third parties (Pacific View).

11. Unimproved real property located in Fresno, California, consisting of 900 acres of ranch land in which Vinetta had a two-thirds interest (Fresno Ranch).

12. Improved real property located at 20214 South Walnut Drive East, Diamond Bar, consisting of a single-family residence that its rented out to third parties (Walnut).

13. Improved real property located at 1946 Lynda Lane, West Covina, consisting of a single-family residence that its rented out to third parties (Lynda Lane).

14. Improved real property located on California Place in McCloud, California, consisting of a single-family house (McCloud House).

15 and 16. Unimproved real property consisting of two lots located on Main Street in McCloud, California (McCloud Lots).

17. Unimproved real property located in Lancaster, California (Lancaster Land).

18. Unimproved real property located at 2737 Laurel Canyon Boulevard, Los Angeles ("Amor" or Laurel Canyon Property).

Vinetta alleged that Richard and Rodger had honored the oral agreement regarding these properties by depositing rents, issues and profits from the properties into Vinetta's bank accounts and permitting Vinetta to make all decisions concerning the properties, including whether they were rented, sold, or improved. In 2006, Richard stopped honoring the agreement, and asserted certain properties belonged to him.

Richard cross-complained against Vinetta and Rodger, claiming that Vinetta had defrauded him of ownership of the properties and wrongfully diverted rents to Rodger. Richard alleged that all properties had been acquired jointly by all three with funds based upon their inheritance from Richard and Rodger's father and grandfather, and that all properties were owned 50/50 by Richard and Rodger. In particular, Richard claimed that

Rodger and Vinetta had appropriated the rents from the Shangri La property and permitted Rodger to reside at the Flint House rent-free. In 2005, Richard and Rodger purportedly agreed to begin to divide their joint holdings in into individual holdings, and orally agreed to engage in exchanges of the Clarissa properties and sale of Richard's interest in the West Covina and Diamond Bar properties. Among other things, Richard sought an accounting from Rodger.

2. Settlement

Trial commenced on May 5, 2008. The matter was settled, as evidenced by a judgment entered May 16, 2008, pursuant to which the parties agreed that title to the Bayview Property, Point Dume Lot, Shangri La property, and Laurel Canyon properties was quieted in Vinetta as her sole and separate property.

On May 16, 2008, the parties agreed to a modification of the settlement. The parties agreed to the appointment of a referee pursuant to Code of Civil Procedure section 639 (reference proceedings), and further agreed that Vinetta would relinquish all interest in the remaining 14 properties[3] in favor of Richard and Rodger. With respect to those properties, they agreed that the properties would have a stipulated value as of May 5, 2008, as set forth in the order appointing referee. Richard and Rodger confirmed that the two bungalows located at 220 and 222 Clarissa, Avalon, had previously been deeded to Rodger and Richard, respectively as part of a prior settlement.

Further, the parties agreed Malibu Acres and Fresno Ranch would be sold and the net proceeds divided between Richard and Rodger, and Richard and Rodger would own, 50/50, the Flint Avenue properties, Pacific View, McCloud House, McCloud Lots, and Lancaster Property.

Finally, to the extent Richard and Rodger disputed their respective contributions in four remaining properties (the two Clarissa bungalows, Lynda Lane, and Walnut), the parties agreed to submit the matter to a referee. The court instructed the referee to

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[3] Known as the "R&R Properties."

consider, among other things, monetary contributions made by the parties towards the acquisition, management, improvements, repair, development and entitlement of such properties, as well as any efforts to increase the value of the properties, and to determine the value of such nonmonetary contributions. The referee was to consider any discrepancy in value of the properties divided between Richard and Rodger pursuant to the settlement; all prior agreements between Richard and Rodger regarding the Walnut and Lynda Lane properties, the value of benefits received by Richard and Rodger related to these properties, including any tax benefits, and unreimbursed expenses.

On August 1, 2008, Richard and Rodger agreed to a property settlement in which they agreed to the values of 317, 319, 321, and 323 Flint, Pacific View, the McCloud House, the McCloud Lots, and the Lancaster Land. Further, they agreed that the properties would be divided between them, with Richard receiving the 321 and 323 Flint Lots and the two McCloud Lots. Rodger received the house at 319 Flint and the 317 Flint Lot. The parties agreed to sell and divide the proceeds of Pacific View, the McCloud House, and the Lancaster Land.

3. The Referee's Hearings

The referee conducted 11 days of evidentiary hearings during November and December 2008, culminating in a report dated January 12, 2009. During the hearings, the parties testified as to the following issues, and the referee made the following findings:

(a) Pacific View

The Pacific View property was a lot given to Vinetta. The lot was a hillside lot and required Rodger to hire an engineer to make it suitable for building. Rodger built a house on the lot at a cost between $92,000 and $118,000, all of which was contributed by Vinetta. The parties stipulated to a value of $800,000 for the property, and though Saddington, Rodger's expert accountant, opined the Rodger was entitled to 20 percent of the net profit upon sale and a five percent project manager's fee, plus $30 an hour for Rodger's physical labor in doing interior finish work on the house. Richard's expert witness John Tollman disagreed with Saddington, finding Rodger's figures excessive, but

offered no testimony as to what Rodger's compensation should be. The referee recommended a fee of 20 percent of the net proceeds of sale of the Pacific View property, and denied an owner/builder fee.

(b) Malibu

The Malibu Acreage consists of 193 acres assembled by Vinetta over a period of years. The first 10 acres were a gift from Dana Poulsen in 1978. At Vinetta's request, Rodger contacted neighboring parcel holders and over a period of seven years, acquired another 110 acres; the $240,000 in funds for the purchase came from Vinetta. In 1989, an additional 73 acres were acquired from an adjacent parcel, with Richard paying $178,078 and Rodger $43,978.

Once the acreage was assembled, over a period of four years Rodger obtained the necessary permits to allow development of the acreage. He obtained lot line adjustments, easements for access and utilities, fire department approval for a fire access road, designed floor plans for houses to be built, and obtained necessary permits from Los Angeles County and the California Coastal Commission. The property is permitted for construction on six lots. Once the process was completed in 1994, Rodger insured that the permits were properly renewed. At the time of the referee's report, the property was listed for sale for $8.5 million.

Rodger's accountant, Hugh Saddington, testified that developers who handle entitlement issues usually receive a "success fee" or profit participation fee that can be as much as 40 percent of the net profits. John Andreotti, a real estate developer, also testified as an expert to success fees in the range of 30 to 40 percent for entitlement work. Nonetheless, in this case Saddington adopted a 20 percent figure. The referee adopted Saddington's recommendation of a 20 percent fee from the sales proceeds of the Malibu land.

(c) 220/222 Clarissa

Richard contributed $95,525 towards the purchase of 222 Clarissa (bought in 1993) and $187,200 towards the purchase of 220 Clarissa (bought in 1996). Vinetta

provided the balance of the purchase prices. The properties were 1909 bungalows, and had deficient foundations. The parties rebuilt 222 and 220 Clarissa. Rodger did much of the work himself.

The parties had an undivided one-half interest in both properties; however, pursuant to a prior 2006 agreement, the parties agreed to exchange these one-half interests in an Internal Revenue Code section 1031 (26 U.S.C. § 1031) tax-free exchange such that Richard became the owner of 222 Clarissa and Rodger became the owner of 220 Clarissa.

Due to the fact Richard reported the transfers were of equal value on his tax return, the referee denied Richard's claim of offset for unequal values based on the declarations on Richard's tax returns.

(d) Flint Lots

Vinetta acquired 317 and 319 Flint in 1981 for $45,000. Neither Richard nor Rodger contributed any funds. The lots contained abandoned oil wells, requiring remediation at a cost of $90,000 before construction could take place. Rodger undertook the remediation work and built a house on 319 Flint using proceeds from Vinetta's sale of a non-R&R property; Rodger did some exterior finish work on the house himself. The lot at 317 Flint has the necessary permits and other services (sewer, etc.) required for building. Rodger was awarded 317 and 319 Flint in the June 20, 2008 property division. The referee denied Rodger's claim for compensation for physical labor and management fees because Rodger had been awarded the property and thus was enjoying the benefit of the property's increased value.

Richard and Rodger acquired 321 and 323 Flint in 1996 for $70,000. Richard paid approximately $35,000 of the purchase price and R&R funds paid the balance. Richard claimed his funds were an "interest free advance" on account of Rodger's improvement work. Rodger undertook the remediation work on the lots, which had abandoned oil wells, and entitled them for building, including obtaining site plan reviews and sewer hookups. Richard was awarded 321 and 323 Flint in the June 20, 2008 property division. Saddington recommended physical labor costs be awarded to Rodger of between $40 to

$60 per hour, a five percent manager's fee, and a 20 percent "success" fee. The referee recommended a 10 percent success fee to Rodger because the four lots underwent remediation at the same time and 321 and 323 Flint were factored into the recommendation for 319 Flint.

(e) The "Napkin Agreement"

Pursuant to an informal handwritten agreement (the Napkin Agreement) made in September 2005, Richard and Rodger agreed that Richard would transfer Lynda Lane and Walnut to Rodger for $380,000; the purchase price would be interest free; and the monies would be due upon the sale of the Malibu property. They further agreed to compare Richard's loans and advances with Vinetta's records and any amounts owed would be paid out of the Malibu property.

4. The Referee's Report

The referee made findings on 24 disputed issues. In addition to the findings noted above, the referee also found, as relevant here:

1. At the November 25, 2008 hearing, the parties stipulated that Richard made monetary contributions to the R & R account to cover acquisition costs in the amount of $1,297,269, and Rodger owed $648,635 to equalize Richard's contributions.

2. At the November 25, 2008 hearing, the parties stipulated that Richard was entitled to a credit of $63,000 by reason of Rodger's use of the house at 319 Flint rent-free since November 2004. The court found no further rent was due Richard after the August 1, 2008 property division order.

3. At the November 25, 2008 hearing, the parties stipulated that Richard should be credited with $380,000 on account of the Napkin Agreement when Richard quitclaimed his one-half interest in Walnut and Lynda Lane to Rodger.

4. At the November 25, 2008 hearing, the parties recognized a value discrepancy of $500,000 between Richard and Rodger pursuant to the Division order of August 1, 2008, resulting in the referee recommending a credit to Richard of $250,000. Further, the division order failed to award the Lancaster Land to Rodger; thus, including

the value of this land of $50,000 plus an additional $25,000 Rodger owes to Richard increased the value discrepancy to $275,000.

5. With respect to the McCloud House, although Rodger claimed a five percent project manager's fee for building the house, Rodger did not keep records of his time spent. As the property was to be sold, the referee awarded Rodger 50 percent of the sales proceeds on the belief that the increased value would compensate him for work done.

6. The court awarded various other credits, including $413,940 representing Rodger's salary, to be credited against his nonmonetary contributions; rents Rodger collected from Bayview in the amount of $100,309, to be credited against his nonmonetary contributions; and Richard's payments to Rodger of $30,000 as compensation for work, to be credited against his nonmonetary contributions.

With respect to tax benefits, the referee was unable to make any findings due to the unavailability of the bulk of Richard's tax returns.

5. The Referee's Supplemental Report

After considering objections filed by Richard and Vinetta, on March 26, 2009, the court entered its order on the referee's recommendation. The court adopted the findings and recommendations of the referee with six exceptions, and sent the matter back to the referee. The court requested, among other things, further explanation of Rodger's success fee calculations and ordered Richard to produce his tax returns.

On October 14, 2009, the referee issued his supplemental report and recommendations.

1. The referee stated that the 20 percent success fee was selected for Rodger because "it was deemed the most reliable means to arrive at the value of his work." With respect to the building of the Pacific View house, Saddington testified that Rodger should be compensated three ways, for (1) hours spent constructing the home; (2) a five percent management fee for overseeing contractors; and (3) a 20 percent success fee. As Rodger had not kept time records, Saddington could only rely on estimates; hourly rates were

questionable because Rodger was not a trained contractor; a management fee was inappropriate because Rodger was an owner/builder; thus, a success fee was the most reliable compensation. With respect to the Malibu lots, although no construction was involved, because Rodger kept no time records, it was similarly "difficult, if not impossible, to assign a fixed dollar amount for his efforts." All three experts (Saddington, Andreotti, and Tollman) agreed that a success fee was an acceptable means to compensate someone who had not made a monetary contribution to property but who had created value. The Malibu property was appraised as having an approximate "as is" market value of $3.75 million.

2. Richard's request for $141,363 from Rodger on account of the Clarissa properties was denied. The claim was based upon Richard's total monetary contributions of $282,725, one half of which was $141,363. However, Rodger rebuilt both properties, creating a substantial increase in their value—the parties stipulated 220 Clarissa was worth $650,000 and 222 Clarissa was worth $1 million.

3. Based upon a review of Richard's tax returns, the referee's analysis of the shifting of the tax benefits resulted in a finding that Richard owed Rodger $52,992.

4. With respect to the two sets of Flint lots (317/319 and 321/323), the referee found that 317, 321 and 323 were unimproved lots, while 319 Flint is improved with a residence. Neither Richard nor Rodger contributed any funds to the purchase of 317 and 319 Flint. Thus, Rodger enjoyed the increased value of 317 and 319, offsetting his monetary contribution.

6. Trial Court's Judgment

The trial court's judgment incorporated the referee's findings and the agreements of Richard and Rodger regarding the division of properties. The court found that Richard made monetary contributions of $1,297,269 and was entitled to credit from Rodger of one-half of that amount ($648,635). In addition, Richard was entitled to an additional credit of $481,703 consisting of:

(a) $63,000 for rents from 319 Flint, November 2004 through July 2008.

(b) $9,852 for one-half of payments made from the R&R account for Rodger's taxes.

(c) $41,800 for one-half of rents for Pacific View from June 2005 to July 2008.

(d) $8,947 for one-half of taxes paid for an unrelated property belonging to Rodger.

(e) $206,970 for one-half of the stipend payments made to Rodger during July 1997 through June 2005.

(f) $100,309 representing one-half of the rents for Pacific View from 1984 and 1986 through June 30, 1997.

(g) $30,000 representing reimbursement to Richard for payments to Rodger from his personal account in 1985, 1989 and 1992.

(h) $5,818 for one-half of the rents for the Walnut house from 1996 to 1997.

(i) $9,755 for one-half of miscellaneous expenses of Rodger paid from the R&R account.

(j) $5,252 for one-half of the personal insurance expenses of Rodger paid from the R&R account.

The court awarded credits to Rodger as follows:

(a) $197,766, for one-half of Rodger's monetary contributions of $395,531 to acquire the R&R properties.

(b) $10,332 for one-half of the "hard costs" paid from the R&R account to Richard for the 315 Flint property.

(c) $52,992 for one-half of the discrepancy in tax benefits.

(d) $80,000 for 20 percent of one-half of the stipulated value of the Pacific View House.

(e) $25,000 for 10 percent of one-half of the stipulated value of the 321 and 323 Flint Lots.

(f) 20 percent of the net proceeds of the sale of the Malibu Acres;

Upon the sale of the Malibu Acres, the parties' total credits were to be compared and any discrepancy adjusted.

DISCUSSION

On appeal, Richard contends the court erred in (1) awarding success fee commissions to Rodger; (2) finding that the value of the Clarissa properties offset Richard's claim to an equalizing payment; (3) failing to assign a value to Richard's interest-free advances to Rodger, and in failing to assign a value to Richard's inclusion of Rodger as an owner during periods of rapid appreciation; (3) denying Richard's claim for an equalizing payment due as a result of the use of personal funds to purchase and improve the Bayview Property; (4) finding Richard owes Rodger $52,992 based upon Richard's enjoyment of shifted tax benefits; (5) limiting the scope of the reference to a subset of the R&R properties; (6) failing to award prejudgment interest; and (7) limiting postjudgment interest accrual until after escrow closed on the Malibu property and finding the parties agreed interest must come out of the proceeds of the sale of that property.

I. SUCCESS FEE COMMISSIONS

Richard contends: the record demonstrates he and Rodger carried on a partnership, and thus Rodger may not recover any additional compensation for "sweat-equity" efforts; even if there was not a partnership, the trial court erred in supplanting the parties' agreed method of compensation for a reasonable value computation; the success fee commissions are arbitrary and should not have been based on sales price or current value of the properties; and Richard did not waive his right to contest the success fee commissions. Rodger contends: by agreeing to an accounting, Richard gave up his rights to compensation; Richard waived his right to contest Rodger's right to have his nonmonetary contributions valued; and no evidence supports the finding of a partnership.

A. Existence of Partnership

Ordinarily, a partner is not entitled to compensation from the partnership other than his or her share of the partnership's profits. (*Bardis v. Oates* (2004) 119 Cal.App.4th

1, 14.) "Except as otherwise provided in subdivision (b), the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership." (Corp. Code, § 16202, subd. (a).) The existence of a partnership is a question of fact. (*Filippo Industries, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429, 1444.) "'An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business. [Citation.] Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venturer. [Citations.]'" (*Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 586, quoting *Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 364.)

With respect to partnership property, all property acquired by a partnership is property of the partnership and not the individual partners. (Corp. Code, § 16203.) "A partner may use or possess partnership property only on behalf of the partnership." (Corp. Code, § 16401, subd. (g).) Partnership property is acquired by a partnership when it is either (1) acquired in the name of the partnership, or (2) acquired in the names of one or more partners when the transferring instrument indicates the person's capacity as a partner or the existence of the partnership even if the partnership's name is not indicated. (Corp. Code, § 16204, subd. (a).)

Property is acquired in the name of the partnership when it is acquired by a transfer to the partnership in its name (Corp. Code, § 16204, subd. (b)(1)), transferred to one or more of the partners in their capacity as partners if the name of the partnership is indicated in the transferring instrument (Corp. Code, § 16204, subd. (b)(2)). If these conditions are not met, there is a rebuttable presumption property is partnership property (when the partners fail to express their intent regarding the ownership of property) if the property is purchased with partnership assets. (Corp. Code, § 16204, subd. (c).)

Finally, a partnership is dissolved where, among other circumstances, it is not reasonably practicable to carry on the partnership in conformity with the partnership

agreement. (Corp. Code, § 16801, subd. (5)(C).) Dissolution in such case is an equitable solution to the situation where "bitter and antagonistic feeling between partners has developed to the point that the partners cannot continue the partnership to their mutual advantage." (See *Wallace v. Sinclair* (1952) 114 Cal.App.2d 220, 228.) Profits and losses resulting from the liquidation of partnership must be credited and charged to the partner's accounts; upon dissolution the partnership distributes to a partner an amount equaling credits in excess of charges in the partner's account. (Corp. Code, § 16807, subd. (b).)

Here, the parties had an agreement to share equally in profits; an agreement to match each other's investments; a joint bank account for the R&R properties; and sharing of tax benefits. However, Richard and Rodger had joint tenancy title to the properties, and Vinetta made many decisions relating to the parties' property venture and contributed funds to the properties' acquisition.

These facts support the finding of an existence of a partnership between Richard, Rodger, and Vinetta, and that the properties held in Richard and Rodger's names were actually partnership properties based upon the parties' agreement to share profits, tax benefits, and the existence of the joint bank account. However, the finding of a partnership does not end the compensation inquiry in the manner Richard advocates; rather, the facts indicate the partners (including Vinetta) had serious disputes concerning management of the partnership. Hence, the litigation and the settlement of the matter by agreeing to divide the properties among the partners and submit the remaining issues to the referee. Once the parties did so, the matter became one of dissolution of the partnership, and the referee was within his power to consider the partner's contributions, etc., in order to equitably distribute the property of the partnership.[4]

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[4] Indeed, the order appointing referee provides, "[a]s part of the settlement, the parties have agreed that the Court will retain jurisdiction to hear and determine what is essentially an accounting as between Richard and Rodger with respect to the various contributions each has made, and the various benefits each has received, related to the R&R Properties being divided and/or sold pursuant to the settlement for purposes of

We conclude that to the extent Richard argues he and Rodger had a "pre-existing compensation agreement," such agreement was overridden by the parties' settlement and submission of the matter to a referee. The settlement and agreement to have the referee determine remaining factual issues constituted a novation of any prior agreements. (Civ. Code, § 1530 [novation is the substitution by agreement of a new obligation for an existing one, with the intent to extinguish the latter]; see *Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1181 [settlement agreement superseded original dispute].) A novation is a "new contract which supplants the original agreement and 'completely *extinguishes* the original obligation . . . . ' [Citations.]" (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431.) By agreeing to submit the matter to a referee pursuant to the order appointing referee to determine among other things, monetary contributions made by the parties towards the acquisition, management, improvements, repair, development and entitlement of such properties, as well as any efforts to increase the value of the properties, and to determine the value of such nonmonetary contributions, the parties replaced any prior agreements with the settlement agreement. Thus, Richard cannot rely on any prelitigation compensation agreements to attempt to repudiate the settlement and submission of the matter to the referee. In any event, the facts indicate the referee considered the parties' prior agreements where relevant, including regarding their tax benefit sharing arrangement.

B. Basis of Success Fee Commissions

Richard contends the success fee commissions were arbitrary because they were based upon incorrect factors. We disagree.

1. Factual Background

Rodger's expert Saddington opined that Rodger was entitled to three types of compensation with respect to the Malibu, Flint, McCloud, and Pacific View properties: (1) twenty percent on account of the entitlements obtained, (2) reimbursement for labor;

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ensuring that the division of the R&R Properties is fair and equitable as between Richard and Rodger . . . ."

and (3) a builder/owners' fee. He did not believe Rodger was entitled to a twenty percent entitlement fee with respect to the Clarissa properties because Rodger was not required to obtain any entitlements for those properties. Saddington based his calculations on the parties' money contributions to the property and the net value created by Rodger's efforts. John Andreotti testified as an expert for Rodger that developers who entitle property for building generally get "success fee" compensation up to 30 to 40 percent. Compensation depends upon the difficulty of getting the entitlements to the property.

2. Analysis

"We have no power on appeal to weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or the reasonable inferences that may be drawn from the evidence." (*Navarro v. Perron* (2004) 122 Cal.App.4th 797, 803.) Under our standard of review, "'we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact.'" (*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 449.) Credibility is a matter of judicial discretion and "[e]ven though contrary findings *could* have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.)

The record here indicates that the work Rodger did on the Malibu Acres, Pacific View, and Flint Lots was the type of entitlement work entitling developers to a "success fee" portion of the net profits realized from the development. The experts calculated the success fee from hard numbers: the initial purchase cost of the property and its increased value due to the work Rodger did in obtaining permits, utilities, and other services to put the properties in buildable condition. Ultimately, the referee carefully balanced the expert's testimony and various factors relative to the properties and arrived at Rodger's "sweat" contributions. We therefore conclude that the valuation of Rodger's contribution was not "arbitrary" and was supported by an adequate factual basis.

II. VALUE OF CLARISSA PROPERTIES AS AGREED IN THE 1031 EXCHANGE AND REFEREE'S DENIAL OF AN OFFSET OF RICHARD'S CLAIM TO AN EQUALIZING PAYMENT

Richard argues that the trial court erred in adopting the referee's recommendation to deny Richard a claim for an equalizing payment of $141,363 based upon his contribution of $282,725 in personal funds towards acquisition of the Clarrisa properties. He contends the party's previous Internal Revenue Code section 1031 exchange precludes such a result because Rodger acknowledged that his interest and Richard's interest "were of equal value" on the section 1031 transfer date of January 18, 2006. In addition, Rodger acknowledged that he would "'continue to account for and make all reports to taxing authorities consistent with the foregoing transfer of ownership.'" Having accepted the benefits of a tax-free exchange of properties, Richard contends Rodger is estopped to later claim that he was owed something more. (See *Cooperman v. Cooperman* (Conn. Super. 2004) [2004 Conn. Super. LEXIS 3433 at *7] [party estopped from later claiming that a "like/kind" exchange was inequitable]; see also *Eustace v. Lynch* (1941) 43 Cal.App.2d 486, 490–491 [party accepting benefits of contract is estopped to deny contract's existence].)

A. Factual Background

In January 2006, Richard and Rodger agreed to exchange pursuant to Internal Revenue Code section 1031 their undivided one-half interests in 220 and 222 Clarissa so that Richard became the sole owner of 222 Clarissa and Rodger became the sole owner of 220 Clarissa. As memorialized in their agreement of June 29, 2007, the parties agreed that "on the Transfer Date, Richard's [] interest and Rodger's [] interest were of equal value, [and] neither party intended by making the foregoing transfers to make any type of gift to the other party . . . ."

In making his recommendation regarding the Clarissa properties, the referee found that "[a]ll of Rodger's efforts on [the Clarissa properties] brought about a substantial increase in their respective values which . . . exceeds Richard's monetary contribution."

Based on the stipulated value of $650,000 for Clarissa and the stipulated value of $1 million for 222 Clarissa, the referee denied Richard's claim.

B. Analysis

Richard's argument fails. First, in connection with the 2008 reference order, the parties stipulated to a new value for the properties, thus superseding any agreement regarding value they have made in connection with the 2006 Internal Revenue Code section 1031 exchange. In general, the gain or loss on the sale or exchange of property is taxable. (See 26 U.S.C. § 1001.) One exception to this rule is Internal Revenue Code section 1031 which provides for the nonrecognition of gain or loss in the case of like-kind exchanges of property held for productive use in a trade or business or for investment. "The legislative intent underlying [section] 1031 was that taxpayers should be permitted to avoid present tax liability when exchanging one property for another of like-kind since taxes should not be imposed on a realized gain where the taxpayer maintained a continuity of investment in like-kind property." (*Ravenswood Group v. Fairmont Associates* (S.D.N.Y. 1990) 736 F.Supp. 1285, 1287.) For purposes of section 1031, three things are required: (1) there must be an exchange; (2) the properties exchanged must be of a like-kind; and (3) the property transferred and the property received must be held by the taxpayer for productive use in a trade or business, or for investment. (26 U.S.C. § 1031(a).) Thus, here the purpose of the 1031 exchange was to avoid taxes on the transfer of the parties' respective interests to each other. Although they enjoyed the tax benefits of such transaction at the time, the parties were free to stipulate to a different value for the properties at a later date.

Second, with respect to his request for an equalizing payment for the Clarissa properties, the evidence shows Richard obtained a increase in value $838,637 benefit from 222 Clarissa based upon *Rodger's* renovations ($1 million less Richard's $141,363 contribution), while Rodger obtained a $650,000 total value benefit for his labor from 220 Clarissa. Thus, no equalizing payment is required and the court did not err.

III. ASSIGNMENT OF VALUE TO RICHARD'S ADVANCES TO RODGER AND RICHARD'S INCLUSION OF RODGER AS TITLE OWNER DURING PERIODS OF APPRECIATION

Richard contends the interest he waived on monies he advanced to Rodger was compensation and thus should have been offset against Rodger's claim for nonmonetary contributions. Further, Rodger received additional compensation by being included as a record title owner on properties during periods of rapid appreciation in value, yet the court erred in failing to consider this. As a result, Richard requests that the judgment be reversed with directions to determine a value for the waived interest and a value for the compensation benefit Rodger received by way of Richard's inclusion of him on title, all of which should be offset against Rodger's success commissions. We disagree.

With respect to his first argument, Richard relies on exhibit 1, which set forth Richard's monetary contributions ($1,297,269)[5] to the various properties over the years. From this figure, he imputes an annual seven percent interest charge for the years 1979 to 2008 to Rodger totaling $383,854. To this figure, Richard and adds Rodger's stipulated salary of $377,447 for the years 1984 through 2005, for a total of $761,301. Rather than requesting that Rodger pay him interest, Richard requested the referee to offset such interest against Rodger's claim for nonmonetary contributions, an offset he contends the referee erred in failing to make.

With respect to his second argument, Richard argues the court "erred in failing to recognize the substantial value of the compensation benefit Rodger received by way of Richard's inclusion of Rodger as an owner of title during the periods of rapid appreciation in the value of the properties. . . . [I]n all cases in which Richard paid his personal funds, Rodger benefits from the appreciation in value of land and improvements even though Rodger paid nothing."

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[5] On page 23 of his opening brief Richard lists his total net cash contribution as $1,184,463.

We reject both of these arguments that attempt to reassess the referee's findings by placing a higher value on Richard's capital and devaluing Rodger's labor contribution to the enterprise. With respect to the first argument, expert Saddington recognized the possibility of imputed interest to Rodger based on Richard's contributions, and that such interest was compensation. However, he also testified, "I don't think the business transaction really called for interest . . . . Rodger was putting in his sweat and Richard was putting in his money and they were to share equally in the benefits."

With respect to the second argument, we interpret it to mean that Rodger benefited from the increased value of the properties during periods of appreciation. However, the argument misses that Richard equally benefited from the increased value of the properties during any such period of appreciation, and any gain that Rodger obtained was an unrealized gain because none of the properties had been sold. Rodger's only "benefit" occurred during the reference proceedings, when the referee undertook to value each party's share in the properties, and placed a number on Rodger's labor contributions.

IV. RICHARD'S CLAIM FOR EQUALIZING PAYMENT BASED ON HIS USE OF PERSONAL FUNDS TO PURCHASE AND IMPROVE BAYVIEW PROPERTY AND SCOPE OF REFERENCE

Richard contends the trial court erred in denying him an equalizing payment for the use of his personal funds to purchase and improve the Bayview Property because title to the property was given to Vinetta as part of the May 2008 settlement. He contends he and Rodger jointly owned the Bayview property for over 20 years, and his unmatched monetary contributions improved the value of the property.

Richard also argues the trial court erred in limiting the scope of the reference to a subset of the R&R Properties, which he contends was contrary to the parties' agreement as set forth in the record at the May 5, 2008 hearing. Indeed, he points to the reference order which required the court to consider issues relating to the use of the R&R account, which account was used to service properties other than the R&R properties; the reference order specifically stated that the referee "shall taken into account unreimbursed expenses from the R&R account which benefitted only Richard and Rodger." As a result,

he contends he was unable to put in evidence concerning his claim for contributions to the Point Dume property, the Shangri La property, and other matters.

A. Factual Background

At the May 5, 2008 hearing, the parties placed on the record their settlement with respect to the cross-complaint. The parties agreed that Vinetta would receive as her sole property the Point Dume property, the Shangri La property, the lot on Laurel Canyon, and her house in Huntington Harbor (Bayview). Richard and Rodger agreed to divide the remaining properties, which the parties enumerated for the record; those properties are known as the R&R properties. In the May 16, 2008 judgment, Vinetta received Bayview, and it was not listed as one of the R&R properties in the order appointing the referee.

Nonetheless, at a November 4, 2008 hearing before the commencement of the reference proceedings, Richard argued that the reference order required the referee to consider additional properties beyond the R&R properties in determining the amounts owed to the brothers. The court responded: "Let me try to make it specific, I'm talking about the 14 properties, that's all that was before this court, that's the jurisdictional limit as far as I'm concerned of the reference." Further, the court stated if additional information regarding non-R&R properties were submitted to the referee and "he thinks it's consistent with the court's order, he can consider it. If he doesn't think it's consistent with the court's order, he cannot consider it." Finally, with respect to the settlement, the court stated: "the properties that went to [Vinetta] are hers, period. . . . [¶] Nobody's entitled to any contribution one way or the other, period. If it went to [Vinetta], it's a gift to her . . . ."

B. Analysis

A judgment obtained by stipulation is construed according to ordinary principles of contract interpretation. (*Roden v. Bergen Brunswig Corp.* (2003) 107 Cal.App.4th 620, 624.) Where the language of a writing is unambiguous, its interpretation is solely a judicial function, with the threshold question of ambiguity also a question of law. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Appleton v. Waessil*

(1994) 27 Cal.App.4th 551, 554–555.) In the interpretation of the contract, "parol evidence is only admissible if the contract terms are ambiguous. [Citation.]" (*Appleton*, at p. 554.) "The decision whether to admit parol evidence involves a two-step process. The first is to review the proffered material regarding the parties' intent to see if the language is 'reasonably susceptible' of the interpretation urged by a party. [Citation.] If that question is decided in the affirmative, the extrinsic evidence is then admitted to aid in the second step, which involves actually interpreting the contract. [Citation.]" (*Ibid*.)

In interpreting a contract, we must give effect to the mutual intention of the parties to the extent such intention can be ascertained from the written provisions of the contract. (Civ. Code, § 1636; *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 335.) Whenever possible, the whole of a contract is to be read so that each clause helps to interpret the other and give effect to every part thereof. (Civ. Code, § 1641; *Bear Creek Planning Committee v. Ferwerda* (2011) 193 Cal.App.4th 1178, 1183.) """"[L]anguage in a contract must be construed in the context of that instrument as a whole, [under] the circumstances of [the] case, and cannot be found to be ambiguous in the abstract.""""" (*Nava v. Mercury Casualty Co*. (2004) 118 Cal.App.4th 803, 805.) Finally, we "consider the circumstances under which [the] agreement was made, including its object, nature and subject matter. (Civ. Code, § 1647 . . . .)" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 800.)

Here, the language of the May 16, 2008 judgment and order appointing referee is unambiguous. The judgment provides title to the four properties (Bayview, Point Dume Lot, Shangri La Lot, and Laurel Canyon property) was quieted in Vinetta and further that "to the extent Richard Lough and/or Rodger Lough have held any title or interest in such property, it is declared that they at all times they held such interest in trust for Vinetta Lough." This language makes clear that not only was title quieted in Vinetta, but that any competing claims of Rodger and Richard to compensation or reimbursement in those four properties were wiped out by the May 16, 2008 judgment.

Further, the order appointing referee provides that the subject matter of the reference was, and the referee was to hear evidence regarding, the R&R Properties, which were defined in the order to exclude Bayview, Shangri La, Laurel Canyon, and Point Dume. Thus, the court ordered the referee to consider Richard and Rodger's "respective contributions made and benefits received related to the R&R Properties [excluding Bayview, Shangri La, Laurel Canyon, and Point Dume], and to make a recommendation to the Court as to an accounting as between Richard and Rodger with respect to their various contributions with respect to the R&R Properties [excluding Bayview, Shangri La, Laurel Canyon, and Point Dume] for purposes of ensuring that the division of the said properties is fair and equitable as between Richard an Rodger . . . ." The language "related to the R&R Properties" unequivocally excludes any consideration of Bayview, Shangri La, Laurel Canyon, or Point Dume, or contributions made in connection therewith.

V. INTEREST AWARDS

A. Prejudgment Interest

Richard contends the court erred in failing to award him prejudgment interest because the amounts Rodger owed him were a sum certain which was readily calculable. Richard contends the sums due him stem in large part from the referee's findings that Rodger misappropriated rental proceeds, failed to pay agreed-upon rent for the use of a jointly-owned property, inappropriately used joint bank account funds for his own personal benefit, and failed to match certain monetary contributions as of June 30, 2005, and failing to award prejudgment interest on these amounts will result in Rodger further benefitting from his fraudulent activities.

Here, the trial court denied prejudgment interest because "[t]his was not an action for a sum certain or one which was readily calculable." Prejudgment interest may be awarded where "damages [are] certain or capable of being made certain by calculation," and the right to recover such damages is vested in the plaintiff on a particular day. (Civ. Code, § 3287, subd. (a).) The test of certainty is whether the defendant actually knows

the amount owed or could have computed the amount from reasonably available information. (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 774; *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960.)

The requirement of certainty ensures that "in situations where the defendant could have timely paid the amount demanded and has deprived the plaintiff of the economic benefit of those funds, the defendant should therefore compensate with appropriate interest." (*Wisper Corp.*, *supra*, 49 Cal.App.4th at p. 962.) "Where the amount of damages cannot be resolved except by account, verdict or judgment, interest prior to judgment is not allowable." (*Stein v. Southern Cal. Edison Co*. (1992) 7 Cal.App.4th 565, 573; *Wisper Corp.*, at p. 960.) Thus, in *Overland Machined Products, Inc. v. Swingline, Inc.* (1968) 263 Cal.App.2d 642, plaintiff by letter demanded $29,609.64 in its complaint for parts the defendant had ordered; ultimately the plaintiff recovered $26,076.49. (*Id*. at pp. 645–646.) The court found the sum due was ascertainable from the date of the letter sent, even though there was a slight difference in the damages ultimately awarded. "'The mere fact that there is a slight difference between the amount of damages claimed and the amount awarded does not preclude an award of prejudgment interest.'" (*Id*. at p. 649.) On the other hand, in *Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, the plaintiff landlord sought $55,000 on account of the lessee's damage to the demised premises, but did not provide the lessee with any repair estimates. The parties exchanged correspondence concerning damages, and a settlement offer was made; ultimately, after trial, the landlord recovered $7,836. (*Id*. at pp. 435–436.) The court determined that the amount due was not a sum certain because the lessee was never aware of any amount that would compensate the landlord; further, the amount awarded at trial was inconsistent with a sum certain or capable of being made certain. (*Ibid*.)

Here, the amounts due were not "readily calculable." The action required the calculation of amounts owed based upon the parties' respective contributions of capital and/or labor, and required a complex factual inquiry by a court-appointed referee over numerous dates that included expert testimony. Further, the ultimate amount due could

not be determined until the sale of several properties took place, and required the parties to stipulate to the value of the properties divided between them. The amount Rodger would ultimately owe Richard was hardly certain at the outset of trial.

Nonetheless, Richard contends prejudgment interest is warranted because of Rodger's defalcations for withholding rent and other items, and is further due on the $275,000 property value discrepancy because Rodger knew what he owed Richard for these items at the outset of the referee's proceedings. We disagree. The function of these equitable proceedings was to find a value that would equalize the amounts contributed by the parties to the increase in value of Vinetta's real property portfolio given that their contributions were of a vastly different character (capital versus labor). (See *Chesapeake Industries v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 909 [accounting action prima facie evidence claim is uncertain].) Thus, prejudgment interest is not warranted.

B. Postjudgment Interest

Richard contends the trial court erred in ruling that postjudgment interest does not accrue on the Malibu Acreage until escrow closes, and in finding the parties agreed the interest would come out of the net proceeds of sale.

Pursuant to section 685.010,[6] it is not necessary that the judgment provide for payment of postjudgment interest; the obligation follows automatically. (*County of Alameda v. Weatherford* (1995) 36 Cal.App.4th 666, 670.) Postjudgment interest runs from the date a judgment is originally entered, not from the date it is ultimately upheld on appeal. (Code of Civ. Pro., § 685.020;[7] *Ehret v. Congoleum Corp*. (2001) 87 Cal.App.4th 202, 207; *In re Marriage of Green* (2006) 143 Cal.App.4th 1312, 1321.)

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[6] Code of Civil Procedure section 685.010, subdivision (a) provides, "(a) Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied."

[7] Code of Civil Procedure section 685.020 provides, "(a) Except as provided in subdivision (b), interest commences to accrue on a money judgment on the date of entry of the judgment. [¶] (b) Unless the judgment otherwise provides, if a money judgment is

Here, the trial court's judgment provided that interest would be payable to Richard in the event that Rodger's share was determined to be less than Richard's, and specified that "interest at the legal rate from the date escrow closes on the Malibu Acres" would be "paid to Richard from Rodger's share of the net proceeds from the share of the Malibu Acres." Pursuant to Code of Civil Procedure section 685.010, the trial court erred in specifying that interest would accrue from the date of the close of escrow on the Malibu Acreage. However, nothing in that statute prohibits the trial court from specifying the source of interest, and thus the trial court was within its equitable powers given the nature of the proceedings before it to declare that any interest that accrued would be payable from the proceeds of the Malibu Acreage.

Thus, the judgment must be modified to specify that postjudgment interest runs from the date of the entry of judgment, and is to be paid from the proceeds of sale of the Malibu Acreage.

VI. SHIFTING OF TAX BENEFITS

Richard argues that the trial court erred in adopting the referee's findings on the shifting of tax benefits because (1) the referee's findings were based upon the "inherently flawed methodology" of Rodger's expert Saddington and the court should have used the methodology of Richard's expert Christian Tregellis; and (2) the referee ignored deductions Rodger eliminated by way of not reporting salary and other compensation Richard paid him having a value of $362,447.

A. Factual Background

Richard and Rodger's experts used different methodologies to arrive at the tax benefits due. The referee found that the parties agreed that because Richard was in a higher tax bracket, Richard would take deductions that Rodger could have otherwise taken, and Richard would pay Rodger 50 percent of any tax benefit received through Richard's use of these deductions. Rodger's methodology combined the tax benefits of

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payable in installments, interest commences to accrue as to each installment on the date the installment becomes due."

the venture and divided it by two; Rodger subtracted his allowable deductions from his one-half of combined deductions, and shifted the excess to Richard. Richard and Rodger separately computed their taxes.

On the other hand, Richard's method combined the parties' income and losses using each party's marginal tax rate, and then divided the result by two and assigned equal shares to each party. Richard's method used this figure to calculate Richard's gained tax benefit, Rodger's saved self-employment tax, Rodger's lost tax benefit, and the total tax savings or loss to both of them.

The referee adopted Rodger's method, which resulted in a total benefit to Richard of $213,410, leaving $106,705 due Rodger from Richard; on the other hand, Richard's methodology resulted in Rodger owing Richard $10,221. The referee noted, "Roger's method . . . appears to be a more accurate method . . . ." The referee also took into account Rodger's unreported income of $236,970 for the years 1985 through 2004 and rents Rodger kept from some of the R&R properties in the sum of $125,447, resulted in a savings to Rodger of self-employment tax of $53,713. The referee deducted this amount from the sums due Richard to find that Richard owed Rodger $52,992.

B. Discussion

Richard's challenge to the referee's findings amount to an attack on the sufficiency of the evidence. In determining whether substantial evidence supports a trier of fact's finding, we "are bound by the trial court's credibility determinations" (*Estate of Young* (2008) 160 Cal.App.4th 62, 76) and we must make all reasonable inferences in favor of the finding; we do not reweigh the evidence. (*Little v. Amber Hotel Co*. (2011) 202 Cal.App.4th 280, 292.) If we conclude such substantial evidence exists, "'it is of no consequence that the [fact finder], believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.'" (*Jameson v. Five Feet Restaurant, Inc*. (2003) 107 Cal.App.4th 138, 143, italics omitted.)

Here, the referee adopted Rodger's methodology because the referee found it was more straightforward. It is axiomatic that the order in which different arithmetical

operators are applied to figures can dramatically change the result. By using the parties' marginal tax rate up front and combining the figures, Richard created the illusion that Rodger received a bigger tax benefit than he actually realized. On the other hand, Rodger's methodology did not apply the parties' tax brackets to the figures, and was thus more consistent with the parties' intent, which called for the deductions to be shifted to Richard for his use, and any tax savings by Richard were to be shared with Rodger. Finally, given the intricacies of the tax laws and the multitude of effects a change in a deduction, tax bracket, or the exclusion of self-employment income can have on the ultimate result, the referee, as the factfinder, determined which calculation more accurately reflected the intention of the parties. This was his province. His decision was adopted by the trial court. We find no legal basis to reconsider this determination.

DISPOSITION

The judgment of the superior court is affirmed as modified to provide that postjudgment interest accrues from the date of the judgment and is to be paid from the proceeds of sale of the Malibu Acreage. Respondent is to recover costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.