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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

In re the Marriage of J. RUSSELL PITTO  
and VALERIE BEHRENDT.

J. RUSSELL PITTO,  
Respondent,

v.

VALERIE BEHRENDT,  
Appellant.

A126802 and A127429

(Marin County  
Super. Ct. No. FL062618)

These appeals<sup>1</sup> by Valerie Behrendt (Valerie), two of the many she has filed in this heavily litigated case, come to us following entry of final judgment on the petition for dissolution of marriage filed by respondent J. Russell Pitto (Russ).<sup>2</sup> We shall affirm the judgment in all respects.

**FACTUAL AND PROCEDURAL BACKGROUND**

In brief, the facts underlying how this relatively short marriage ended in a dissolution that has consumed millions of dollars in legal fees are as follows: When Valerie and Russ first met in December 1994, they were persons of different ages and means — Valerie was 25 years old and a struggling single mother with a one-year old

<sup>1</sup> As explained below (see Discussion at (C)(3)), we dismiss appeal number A126802 and address all issues under appeal number A127429.

<sup>2</sup> For ease of reference only, and with no disrespect intended, we refer to the parties by their first names, as does the post-marital agreement at issue herein.

daughter; Russ was almost twice her age, an experienced and successful businessman who had amassed considerable wealth through his activities as a real estate developer. They began a romantic relationship in 1995, at which time Valerie worked as executive assistant to Russ at his real estate development company, Simeon Properties. During this time, Russ was in the process of divorcing from Sheila Pitto. Russ married Sheila Pitto in 1983 and they had two boys, born in 1986 and 1993.

Valerie and Russ were engaged to be married in 1999 and set the wedding date for September 4 of that year. Russ told Valerie he had just concluded an “amicable” split of his assets with Sheila and that his business, Simeon Properties, was “really starting to take off,” so he did not want to enter marriage with her unless they had a prenuptial agreement that would eliminate community property from their marriage. Valerie was “totally on board” with this approach. When it appeared a prenuptial agreement could not be concluded before the date of the marriage, Russ consulted his attorney, Max Gutierrez. Gutierrez advised Russ to postpone the wedding or go ahead as scheduled with a commitment from Valerie to enter a PMA after the wedding. Russ decided to proceed with the wedding and Valerie agreed they would conclude a PMA afterwards.

Shortly after the wedding, Valerie consulted family law attorney Susan Coates regarding the PMA. Gutierrez sent Coates a copy of the prenuptial agreement the parties had prepared before the wedding along with financial disclosures. Coates advised Gutierrez the language of the prenuptial agreement should be revised to reflect the agreement was now post-marital. She also suggested that the agreement be put on hold until Russ’s marital settlement agreement with Sheila Pitto was finalized, so Coates would have a clearer idea of Russ’s estate and support obligations. Russ agreed to Coates’ proposal to postpone the PMA until a marital settlement agreement with Sheila Pitto was finalized.

The process of formalizing a PMA resumed in October 2002, when Gutierrez sent Coates a draft PMA and financial disclosures, including a copy of Russ’s marital settlement agreement with Sheila Pitto. The PMA went through several more drafts to clarify certain provisions and resolve points of negotiation between the parties, such as

whether Valerie would get to keep the family home if Russ died during the marriage. In March 2005, a “four-way” meeting took place in Gutierrez’s office attended by Russ, Valerie, Gutierrez and Coates to discuss remaining issues. On March 29, 2005, Gutierrez transmitted to Coates via email a “red-line copy” of the PMA showing changes made by Gutierrez following the “four-way” meeting. These included provisions requested by Valerie for an automobile and a lump sum for furnishing expenses in the event of dissolution and a 12-month occupancy in the family residence on the event of Russ’s death. On May 20, Gutierrez authorized his paralegal to transmit to Coates via email the revised PMA, together with an attachment reflecting Ross’s updated financial statement as of April 30, 2005. The text of the email stated, “Please let us know if this agreement is acceptable, and we will prepare execution copies.” On May 27, Gutierrez received an email from Valerie, which was also addressed to Russ and Coates, stating, “Susan [Coates], if you have read it and are fine with it, I am fine with it.” Thereafter, the final PMA document was prepared and each party executed the document on or about June 14, 2005.

Russ filed a petition for dissolution of his marriage to Valerie on June 19, 2006, citing irreconcilable differences. The petition lists the date of the marriage, September 4, 1999, the date of separation, June 1, 2006, and states there are no minor children of the marriage. In December 2007, Russ filed a motion to bifurcate the issue of the validity of a post-marital agreement (PMA) entered into by the parties. In his motion, Russ stated among other things that the PMA controls the characterization and division of marital property at dissolution and asserted that early resolution of the validity and interpretation of the PMA would increase the likelihood of settlement. The trial court granted Russ’s bifurcation motion in February 2008. Prior to the first phase of trial proceedings, both parties filed lengthy trial briefs on the interpretation and validity of the PMA. The first phase of trial proceedings commenced on August 22, 2008. As an initial matter, the parties having already submitted briefs on the meaning of the language in the PMA, the court entertained oral argument on the legal question of the validity of the PMA. After

hearing argument of counsel, the court ruled from the bench, concluding that the PMA constituted a valid transmutation instrument under Family Code,<sup>3</sup> section 852.<sup>4</sup>

Following its ruling on the validity of the PMA, the court heard testimony and received evidence over the course of eight days on issues of whether there was undue influence or duress in the execution of the PMA. The court heard testimony from Russ and Valerie, as well as Max Gutierrez and Susan Coates, the parties' respective attorneys who represented them in the matter of the PMA.<sup>5</sup> In November 2008, the trial court issued its statement of decision (SOD) following the first phase of trial proceedings. In the SOD, the trial court affirmed its oral rulings that the PMA satisfied the requirements of section 852 and that pursuant to the PMA each party waived any community property claim in the earnings, income and acquisitions of the other. The court further concluded Valerie was not unduly influenced to enter the PMA, Valerie was not induced to enter the PMA by fraud or concealment and Russ did not materially breach the PMA.

Phase two of the trial proceedings commenced on April 20, 2009, and was conducted over a four-day period. In phase two, the trial court heard testimony and received evidence concerning the amount due to Valerie under the PMA, permanent spousal support and an educational trust set up by Russ for Valerie's young daughter. After issuing a proposed statement of decision in July 2009 and receiving Valerie's objections to the same, the court issued a phase-two statement of decision (SOD2) on September 9, 2009.<sup>6</sup>

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<sup>3</sup> Further statutory references are to the Family Code, unless otherwise stated.

<sup>4</sup> Section 852 states in pertinent part: "A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." (§ 852, subd. (a).)

<sup>5</sup> We discuss such trial testimony and evidence below as required to resolve the issues raised on appeal, see *post*.

<sup>6</sup> As noted below (see *post*, Discussion (C)(3)), the court mislabeled the statement of decision on phase two as "Judgment Phase Two."

In SOD2, the trial court determined the amount due to Valerie under the PMA and the offsets on that amount due to Russ. Specifically, the court ruled that Valerie was due \$678,904 under the terms of the PMA, offset by reimbursements to Russ of \$29,000 for stock he purchased on behalf of Valerie for her business venture in a company named “Bare Escentuals,” \$25,000 advanced to Valerie under the PMA and \$57,000 in *Epstein*<sup>7</sup> adjustments for the period June 2006 through October 2007. The court also deducted \$389,034 in attorney fees and costs payable by Valerie under Phase One for a net amount due to Valerie under the PMA of \$178,870.

Regarding spousal support, SOD2 notes the parties enjoyed an affluent lifestyle during their marriage and have been living separate and apart since June 2006. Valerie has marketable skills allowing her to earn in the range of \$52,000 per year. Due to an “economic freefall” in real estate, Russ currently has negative cash flow in excess of \$1,000,000. The account upon which Russ draws to keep his business running and to meet mortgage and other obligations is also subject to capital calls on his real estate projects should their incomes fall short of expenses. Russ has real estate holdings that could be liquidated. The court concluded that overall Russ had sufficient resources to pay reasonable support. Regarding the length of the marriage, the court found that the parties harbored hopes of reconciliation after separating and a complete and final break did not occur until June 2007, meaning the marriage lasted seven years and eight months. Based on these and other factors, the court found that although Valerie “has enjoyed a substantial period of support at a relatively high level for three years on a marriage that was, at most, just seven and a half years in duration, it is not inappropriate for Wife to continue to receive [] support while she transitions toward self-supporting status.”<sup>8</sup>

On September 24, 2009, the court held a hearing to address the issue of attorney fees pertaining to phase two of the trial proceedings. On November 24, 2009, the court

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<sup>7</sup> *In re Marriage of Epstein* (1979) 24 Cal.3d 76.

<sup>8</sup> The trial court awarded monthly support decreasing from \$15,000 per month to \$5,000 per month over the period of August 2009-August 2010. (See *post*, Discussion (C)(3).)

filed its findings and orders after hearing. The court rejected Valerie's claim of \$183,000 in attorney fees. Instead, the court awarded Valerie \$85,000 as "a just and reasonable attorney fee award under [Family Code section 2030] for Phase Two." Also, the court awarded Russ \$40,000 in attorneys fees pursuant to section 271.

On November 24, 2009, the trial court also filed a final judgment, incorporating the findings and conclusions from its SOD, SOD2 and its fee orders. Valerie filed the notice of appeal in case number A127429 on January 19, 2010.

## DISCUSSION

### A. *Transmutation Under Family Code Section 852*

#### 1. *Applicable Legal Principles*

A transmutation is "an interspousal transaction or agreement which works a change in the character of the property." (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293.) Whether a valid transmutation has been made is governed by section 852, subdivision (a), which provides: "A transmutation of real or personal property is not valid unless made in writing by an *express declaration* that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." (*Id.* italics added.) Whereas "[a]n 'express declaration' does not require use of the terms 'transmutation,' 'community property,' 'separate property,' or a particular locution [Citation], . . . [t]he express declaration must unambiguously indicate a change in character or ownership of property. [Citation.] A party does not 'slip into a transmutation by accident.' [Citation.]" (*In re marriage of Starkman* (2005) 129 Cal.App.4th 659, 664.) As explained in *Estate of MacDonald* (1990) 51 Cal.3d 262 (*MacDonald*), "a writing signed by the adversely affected spouse is not an 'express declaration' [for transmutation purposes] . . . unless it contains language which expressly states that the characterization or ownership of the property is being changed." (*Id.* at p. 272; *In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1107 (*Benson*) [stating that under *MacDonald* a valid transmutation "necessitates not only a writing, but a special kind of writing, i.e., one in which the adversely affected spouse expresses a clear understanding that the document changes the character or ownership of specific

property”)].) Moreover, “ “[t]he determination whether the language of a writing purporting to transmute property meets the *MacDonald* test must be made by reference to the writing itself, without resort to parol evidence.’ ” (*In re Marriage of Leni* (2006) 144 Cal.App.4th 1087, 1096, citing *Benson, supra*, 36 Cal.4th at p. 1107; see also *id.* at p. 1106 [“the writing must reflect a transmutation on its face, and must eliminate the need to consider other evidence in divining this intent”].) The trial court’s determination of whether a written document constitutes a transmutation is subject to de novo review. (*In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 588.)

## **2. The PMA**

The operative provisions of the PMA are preceded by recitals A-N. Recital B states: “The parties entered into their marriage because of the love and affection each has for the other and neither was interested in acquiring any interest in the property of the other earned prior to the marriage.” Recital C states that just prior to their marriage, Russ and Valerie were negotiating the terms of a Premarital agreement, which could not be concluded because Russ was still involved in proceedings relating to the dissolution of his marriage to Sheila Pitto, and accordingly they deferred the agreement until after their marriage and after Russ concluded the property division from his prior marriage. Recital D states that the parties “desire to resume the process through which they shall define their respective property rights consistent with the understanding which they had reached prior to their marriage and to enter into this [PMA].”

Recital E states that “[e]ach of the parties presently owns property standing in their respective names, the nature and extent of which has been fully disclosed by each to the other” and recitals F and G state that the assets and liabilities of the parties are described in Schedules A (Russ) and B (Valerie) attached to the PMA. Recital I states, “The parties desire that all property owned by either of them at the time of the marriage and all property coming to them from whatever source during the marriage shall be their respective separate property,” and recital L states that “[t]he parties desire that all earnings and income resulting from their personal services, skill, effort and work since the date of the marriage, shall be their respective separate property.”

Recitals J states, “The parties intend that if they are married and living together and neither has filed and served a petition for divorce, dissolution or legal separation at the time of either party’s death, Russ intends to make certain provisions for Valerie at his death.” In the event of divorce, dissolution or legal separation, recital K states that the parties “intend to make certain provisions for Valerie.”

Following the recitals, the PMA states that “in consideration of the premises and the mutual promises contained herein, the parties agree as follows. . . .” The terms of the agreement are set forth in paragraphs 1-19. Paragraph 1 states: “All property, real and personal, of whatsoever nature and wheresoever situated, owned by Russ at the commencement of the marriage or *acquired by him during the marriage, including, but not limited to, all rents, issues, profits and proceeds thereof, and all appreciation in the value of such property and earnings and income occurring during the marriage*, whether or not resulting from his personal services, skill, effort and work, *or from the personal services, skill, effort and work of Valerie*, shall be his separate property and shall be enjoyed by him and shall be subject to his disposition as his separate property in the same manner as though the parties had never entered into the [] marriage. Valerie acknowledges that she understands that, except for this Agreement, *the appreciation, earnings and income resulting from the personal services, skill, effort and work of Russ or Valerie rendered after the marriage would be community property or quasi-community property under the laws of the State of California*, and might be characterized as marital property subject to equitable distribution under the laws of many states of the United States, *but that by this Agreement such appreciation, earnings and income is made his separate property.*” Paragraph 2 is identical to paragraph 1, except that “Valerie” is substituted for “Russ” and the applicable objective pronouns and possessive adjectives change from masculine to feminine.

Paragraph 4 addresses the parties’ agreement in the event of divorce or dissolution of the marriage. Paragraph 4 provides that “in lieu of any property rights to which Valerie might have otherwise been entitled, Valerie will receive in full and complete satisfaction of all property rights” a tax-free lump sum payment consisting of (1) “title to

the automobile then currently being used as her primary mode of transportation, and the sum of \$25,000 for the purpose of furnishing and decorating her new home” and (2) a sum for each year of the marriage plus “a *prorata* portion thereof for any year during which they were married for less than 12 months thereof.” As provided in paragraph 4, the sum for each year of marriage received by Valerie upon termination of the marriage increases with the length of the marriage—\$50,000 per year during the first five years of marriage; \$100,000 per year if the marriage lasts more than 5 but less than 10 years; \$150,000 if the marriage lasts more than 10 but less than 15 years; and \$200,000 for each year after 15 years, with a maximum payment of no more than 25% of the fair market value of Russ’s estate, net of liabilities, at the date of termination of the marriage.

Paragraphs 5 and 6 address the parties’ agreement regarding provisions for Valerie in the event Russ dies during the marriage. Specifically, paragraph 5 provides Valerie shall be entitled to occupy the residence at 70 Peninsula Road, Belvedere, for 12 months rent-free from the date of Russ’s death. Paragraph 6 provides that Valerie shall be entitled to receive a “fractional interest (hereinafter called the marital amount)” equal to 15% of the net value of Russ’s estate if Russ dies during the first 15 years of marriage and 25% of the net value of Russ’s estate if Russ dies after the first 15 years of marriage.

### **3. Analysis**

Valerie contends the PMA does not satisfy the requirements for a transmutation document. However, our *de novo* review of the PMA under the standards set forth above leads us to the opposite conclusion. (See *In re Marriage of Starkman, supra*, 129 Cal.App.4th at p. 664 [in deciding whether a transmutation has occurred, appellate court interprets “the written instruments independently, without resort to extrinsic evidence”].) Rather, interpreting the PMA as a whole (see *In re Marriage of Lund* (2009) 174 Cal.App.4th 40, 51), we conclude that it constitutes a transmutation by which any community property interests inhering in the assets and liabilities described in Schedules A and B at the date of the PMA become the separate property of the respective parties, and all appreciation in the value of such property during the marriage, as well as all each

of the party's earnings and income during the marriage, are the separate property of each party in which the other party has no community property rights.

Our conclusion is founded on the plain language of the PMA, beginning with recitals stating the parties desire that "all property owned by either of them at the time of the marriage and all property coming to them from whatever source during the marriage shall be their respective separate property" and that "all earnings and income resulting from their personal services, skill, effort and work since the date of the marriage, shall be their respective separate property." Schedules A and B list the assets and liabilities that Russ and Valerie "presently owns [] standing in their respective names." Paragraphs 1 and 2 give effect to goals and objectives set forth in the recitals by providing that property owned by Russ and Valerie at the commencement of the marriage, or acquired during the marriage, is each one's separate property. Further, paragraphs 1 and 2 provide that "all appreciation in the value of" such separate property, whether or not the appreciation results from the efforts of one or both parties, also constitutes separate property.

In addition, paragraph 1 states in pertinent part, "Valerie acknowledges that she understands that, except for this Agreement, the appreciation, earnings and income resulting from the personal services, skill, effort and work of Russ or Valerie rendered after the marriage would be community property or quasi-community property under the laws of the State of California, and might be characterized as marital property subject to equitable distribution under the laws of many states of the United States, but that by this Agreement such appreciation, earnings and income is made his separate property." This language reflects a clear understanding on Valerie's part that any community property inhering in the assets and liabilities held by Russ at the time of the PMA is transmuted to his separate property. (See *In re Marriage of Benson*, *supra*, 36 Cal.4th at p. 1107 [stating that a valid transmutation "necessitates . . . a writing . . . in which the adversely affected spouse expresses a clear understanding that the document changes the character or ownership of specific property].) Finally, paragraph 4 (describing the lump sum Valerie receives "in full and complete satisfaction of all property rights" in the event of a

dissolution of the marriage) and paragraphs 5-6 (describing provisions for Valerie in the event Russ dies during the marriage) further evince the parties' intent that Valerie forego any community interests in the marriage in return for the specific benefits provided under the PMA.

In sum, having reviewed the PMA de novo, we conclude the PMA satisfies section 850 because it contains "the requisite express, unequivocal declarations of a present transmutation." (*In re Marriage of Holtemann* (2008) 166 Cal.App.4th 1166, 1173.) Valerie's contentions to the contrary, which we address below, are unpersuasive.

Valerie asserts paragraphs 1 and 2 are ambiguous because they do not describe "what specific property is being made separate property." We disagree. As we concluded above, paragraph 1 clearly provides that any community property that may have accrued in the separate property of Russ at the time of the PMA through the efforts and skill of Valerie "is made" Russ's separate property.<sup>9</sup> No more is required. (See *Benson, supra*, 36 Cal.4th at p. 1100 [noting a writing satisfies the express declaration requirement "if it states on its face that a change in the character or ownership of the subject property is being made"], citing *MacDonald, supra*, 51 Cal.3 at p. 264.)

Also, Valerie argues the PMA did not effect a transmutation because it is merely a "conditional future transmutation" and suggests that any "attempt to transmute future income is prohibited," relying on *In re Marriage of Lund, supra*, 174 Cal.App.4th 40 and *In re Marriage of Holtemann, supra* 166 Cal.App.4th 1166. However, neither case supports the proposition, advanced by Valerie, that a transmutation cannot include future income streams; indeed, case law is to the contrary (see, e.g., *In re Marriage of Holtemann, supra*, 166 Cal.App.4th at pp. 1170 [upholding an agreement stating that "property described in Exhibit A (including any future rents, issues, profits, and proceeds of that property) is hereby transmuted from [husband's] separate property to the community property of both parties"]).

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<sup>9</sup> Similarly, under paragraph 2, any community property inhering in the assets and liabilities held by Valerie at the time of the PMA became her separate property.

Furthermore, Valerie contends that the plain language of the PMA cannot support the trial court's conclusion, which we share, that the PMA transmutes any community property that may have been created into each party's separate property. In this regard, Valerie notes paragraphs 1 and 2 contain identical language stating, as to each party, "All property, real and personal, . . . owned by [RUSS or VALERIE] at the commencement of the marriage *or acquired by* [him or her] during the marriage, . . . shall be [his or her] separate property. . . ." Valerie argues that by law all property *acquired by* a married person during the marriage is community property.<sup>10</sup> Moreover, she continues, the trial court could not reasonably interpret paragraph 2 to find that her community property, arising from Russ's skill and effort, was Russ's separate property. Thus, Valerie concludes the reasonable interpretation of paragraph 1 and 2 is these paragraphs effect a transmutation of "the community property Russ and Valerie acquired by operation of law into their separate property as of the date of the agreement." Valerie also asserts that the trial court could not reasonably interpret the PMA in a manner that preempts the creation of community property where, as here, the PMA was entered into after the marriage took effect.

Her argument lacks merit. As an initial matter, Valerie's suggestion that because the word "acquires" appears in both the PMA and section 760, the statute controls our interpretation of the language in dispute, is at odds with the language of section 760. Patently, section 760 controls in the *absence* of a written agreement such as the PMA. (See § 850 [married persons may agree, inter alia, to transmute community property to separate property of either spouse].)

More tellingly, the interpretation Valerie ascribes to the language of paragraphs 1 and 2 is wholly unreasonable when these reciprocal provisions are considered as a whole and in light of the recitals preceding them. In this regard, the recitals cut against any assumption, crucial to Valerie's position, that the parties intended to enter a community

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<sup>10</sup> Valerie cites section 760, which states: "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property."

property marriage. For example, the recitals state that the parties desire to resume the process that they began in the premarital agreement and specifically state that “all property owned by either of them at the time of the marriage and all property coming to them from whatever source during the marriage shall be their respective separate property.” Moreover, paragraphs 1 and 2 are consistent with the intent of the parties as stated in the recitals. For example, the agreements set forth therein provide that any property owned by either spouse at the time of the marriage or acquired thereafter would be the separate property of each spouse, “*as though the parties had never entered into the [] marriage*” and that separate property includes the appreciation, earnings and income from property owned and acquired by that party resulting from the personal skills, services and efforts of either party. In sum, the comprehensive nature of the agreements on the character of all real and personal property acquired before or after the marriage, coupled with the recitals preceding those agreements, rule out Valerie’s interpretation of the PMA.

Finally, Valerie’s attempt to assign meaning to language out of context is unavailing. According to Valerie, paragraph 2 means community property created by Russ’s efforts became Valerie’s separate property. Again, we disagree. The language Valerie refers to in paragraph 2 addresses the situation where one spouse’s efforts contribute to an increase in the value of the other spouse’s separate property; whereas such an increase in value normally results in a community interest (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 851 [“The community is entitled to the increase in profits attributable to community endeavor”]), here the PMA denominates the increase as the separate property of the original owner.

To recap, we have reviewed the PMA de novo and conclude that the PMA contains “the requisite express, unequivocal declarations of a present transmutation.” (*In re Marriage of Holtmann, supra*, 166 Cal.App.4th at p. 1173.) Rendering our independent interpretation of the PMA without recourse to extrinsic evidence (see *In re Marriage of Starkman, supra*, 129 Cal.App.4th at p. 664), we conclude the PMA effects a transmutation by which any community property interests inhering in the assets and

liabilities described in schedules A and B at the date of the PMA became the separate property of the respective parties, and all appreciation in the value of such property during the marriage, as well as all each of the party's earnings and income during the marriage, are the separate property of each party in which the other party has no community property rights. In light of our interpretation and conclusions on the nature and effect of the PMA, Valerie's remaining assertions that the PMA does not satisfy section 852 necessarily fail.<sup>11</sup>

**B. Undue Influence**

Our conclusion that the PMA meets the requirements of Family Code section 852 does not settle the issue of its validity. For a transmutation between spouses to be valid, it must also satisfy the rules governing fiduciary relationships set forth in Family Code section 721. (See *In re Marriage of Barneson, supra*, 69 Cal.App.4th at p. 588 [“the requirements of section 852 are prerequisites to a valid transmutation but do not necessarily in and of themselves determine whether a valid transmutation has occurred”]). Under section 721, spouses “may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.” (§ 721, subd. (a).) “[I]n transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other.” (§ 721, subd. (b).) “ ‘When an interspousal transaction

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<sup>11</sup> For example, Valerie asserts the trial court erroneously concluded paragraph 4 of the PMA effected a transmutation and that the trial court misinterpreted the PMA as an implied waiver of community property rights in violation of section 852 and section 1500, which states “property rights of husband and wife prescribed by statute may be altered by a . . . marital property agreement.” Any alleged flaws in the trial court's interpretation of the PMA, however, are moot in light of our de novo review of the PMA and conclusion that it satisfies the requirements for a valid transmutation under section 852. Our de novo interpretation of the PMA also negates Valerie's contention that paragraph 4 is ambiguous and unenforceable as to Valerie's property rights upon dissolution.

advantages one spouse, “[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.” [Citation.] “Courts of equity . . . view gifts and contracts which are made or take place between parties occupying confidential relations with a jealous eye.” ’ [Citation.]” (*In re Marriage of Lund, supra*, 174 Cal.App.4th at p. 55.) Further, “ “[w]hen a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse’s action “was freely and voluntarily made, with a full knowledge of all the facts, and with a complete understanding of the effect of” the transaction.’ [Citation.]” (*Ibid.*)

“ “[W]hether the spouse gaining an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence.” ’ [Citation.]” (*In re Marriage of Lund, supra*, 174 Cal.App.4th at p. 55.) Under the substantial evidence standard of review, “ “we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.” [Citations.]’ [Citation.]” (*In re Marriage of Schnabel* (1994) 30 Cal.App.4th 747, 752.)

Here, the trial court found that as the party advantaged by the PMA, Russ “must carry the burden of rebutting the presumption of undue influence” and that he “met his burden of proof that no undue influence existed.” The trial court heard testimony from Russ and Valerie as well as testimony from the attorneys who represented Russ and Valerie during the process of formulating the PMA, Max Gutierrez and Susan Coates, respectively.<sup>12</sup> In its statement of decision, the trial court made express findings on each

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<sup>12</sup> We find no merit in Valerie’s contention that attorney Susan Coates should not have testified because Valerie did not waive the attorney-client privilege. When the client puts the substance of protected communication at issue the courts will imply a waiver of the attorney-client privilege. (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 40; see generally 2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 151, pp. 420-422.) Here, Valerie placed her communications with attorney Coates on the matter of the PMA squarely at issue by claiming she did not voluntarily enter the

of the three factors . . . that rebut the presumption of undue influence: “the transaction was entered into freely and voluntarily, with full knowledge of the facts, and with a complete understanding of its legal effect.” (*In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 739.) Valerie contests the trial court’s finding, contending Russ did not overcome the presumption of undue influence. We find Valerie’s contention unavailing as substantial evidence supports the court’s conclusion that Russ overcame the presumption of undue influence.

The court cited numerous grounds in support of its determination that Valerie entered the agreement freely and voluntarily. For example, the court rejected Valerie’s claim she signed the PMA because Russ threatened to divorce her, deeming “Russ credibly testified, and emails between the parties confirm, that there were other larger issues in their marriage” and finding Valerie’s claim she only signed the PMA to save her marriage “lacks credibility.” The trial court’s ruling on this point is borne out by Russ’s testimony that he and Valerie attended family counseling more than 20 times in 2003 and again in 2005 because “there were many issues. The [PMA] was not that big of an issue. The other things were really important.” Russ identified emails he wrote to Valerie in November 2003, in which he describes perceived emotional deficits in their personal relationship and suggests how they could resuscitate their marriage. Russ stated they were “headed in [the] direction” of separating at that point. Their relationship was back on an even keel in 2004; Russ described 2004 as “a good year for Valerie and I. We were building a house and there was no counseling and we were just moving along.” Indeed, in February 2005, Valerie sent an email to Gutierrez stating, “Let’s get Susan [Coates] and set up a meeting. . . . Russ and I are in agreement on basic points, with just some clarification needed on how to handle my living in the house in the event of [his] death.”

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PMA and did not understand its legal effect, despite specific recitals in the PMA to the contrary. In all events, we conclude substantial evidence supports the court’s finding that Russ rebutted the presumption of undue influence without reference to Coates’ testimony, see *post*.

Furthermore, the court found Valerie's claim that she lacked knowledge and understanding of the agreement was not credible in light of "consultation with no less than three family law specialists, five and a half years of negotiation, several drafts, and plain language in the agreement." On this point, the trial court also found that Valerie had "full access to financial information" and negotiated "several modifications to the PMA." Also, the court found Valerie understood she was giving up community property rights based, inter alia, on evidence of her premarital discussions with Russ, the language of the PMA, and "the scheme of Valerie having set payments after dissolution of the marriage or a percentage of Russ's estate in the event of his death." Last, the circumstances surrounding the execution of the PMA were not coercive; the court noted that when Valerie signed the agreement "she was alone in her kitchen. There was no evidence that Russ exerted either threats or violence at the time she executed the PMA or that she was induced to sign the PMA under circumstances that destroyed her free agency and caused her to act against her will." In sum, substantial evidence supports the trial court's conclusion that Russ rebutted the presumption of undue influence. (See *Burkle*, supra, 139 Cal.App.4th at pp. 739-740.)

### ***C. Financial Disclosures***

Valerie contends the PMA must be set aside because Russ did not make adequate financial disclosures. We conclude that her contention lacks merit.

As noted above, in November 1999, Valerie's attorney, Susan Coates, wrote to Mat Gutierrez, Russ's attorney, asking to defer the PMA until Russ had finalized the division of assets in his ongoing dissolution proceeding with Sheila Pitto. Russ agreed. Subsequently Gutierrez provided Coates with a copy of Russ's Marital Settlement Agreement, along with his 2000 and 2001 personal income tax returns. In October 2003, Gutierrez sent Coates a revised draft of the PMA and an updated financial statement. In May 2005, Gutierrez sent Coates a further updated financial statement along with another draft of the PMA. The financial statements showed a sizeable appreciation in the value of Russ's assets over time. In this regard, the 1998 Balance Sheet shows the value of current assets, investments and personal property totaling around \$6.5 million; the March

2003 Financial Statement shows a net worth of almost \$28 million; and the April 2005 Financial Statement shows a net worth of over \$33 million.

Under California law, “spouses entering into agreements relating to marital assets may not misrepresent or conceal facts materially affecting the value of the marital assets. (Citation.)” (*Burkle, supra*, 139 Cal.App.4th at p. 740.) The record here amply demonstrates that Russ provided complete financial disclosures showing the current value of his assets and liabilities throughout the process of formulating the PMA until its conclusion in June 2005. Valerie, however, does not claim that Russ failed to disclose the existence of assets or that he misstated the value of any assets disclosed: Rather, Valerie claims that Russ’s financial statements failed to disclose the value of any community property which may have existed.

Both the California Supreme Court and California Courts of Appeal have considered and rejected the argument Valerie tenders here. In *Boeseke v. Boeseke* (1974) 10 Cal.3d 844 (*Boeseke*) the California Supreme Court had occasion to address the scope of disclosures required. In that case, after husband died leaving a substantial estate, wife sued to rescind a property settlement agreement adopted by the parties in their earlier divorce proceeding. The trial court concluded that the husband failed to disclose the facts relating to the value, nature and extent of the community assets, and that this nondisclosure constituted concealment of a material fact, breach of fiduciary duty, and fraud. (*Boeseke, supra*, 10 Cal.3d at p. 848.) The Supreme Court reversed. The court observed that while husband did not disclose all facts in his possession relating to the value, nature and extent of the community property, the wife and her counsel nevertheless were fully advised of the property descriptions, were aware some of it was of substantial value, but did not request further facts relating to the value, the nature or the extent of the marital assets. Instead, the wife chose to accept her husband’s offer of settlement “even after being advised by counsel that she should investigate.” (*Id.* at p. 849.) Accordingly, the Supreme Court reversed the trial court’s finding of fraud predicated on lack of disclosure, stating: “[W]hen a spouse, represented by independent counsel, determines to forego a suggested investigation and to accept a proposed

settlement, that spouse may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts. Under such circumstances, the spouse proposing the agreement is under no duty to compel the other to investigate, and the accepting spouse's decision, though ill advised, is binding." (*Boeseke, supra*, 10 Cal.3d at p. 850, fn. omitted.)

Similarly, the appellate court in *Burkle, supra*, rejected a challenge to a PMA based on incomplete disclosures because wife failed to conduct further investigation. In *Burkle*, wife argued a PMA was void because husband failed to mention two pending mergers involving his business entities in the disclosures provided in connection with the PMA. The court stated: "The applicable law is clear. The pertinent rule is that a spouse who foregoes investigation and accepts a proposed settlement 'may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts.' (Citation.)" (*Burkle, supra*, 139 Cal.App.4th at p. 741, citing *Boeseke, supra*.) The court noted "the Burkles agreed to value the marital estate as of June 6, 1997; Ms. Burkle's representatives were offered full access at Mr. Burkle's office to all financial information throughout the negotiations; Ms. Burkle knew about the first merger, which was consummated before she signed the agreement, and she knew Mr. Burkle was working on the second merger; Mr. Burkle testified that documentation on the second merger was available for review by Ms. Burkle's representatives in Mr. Burkle's office; and Ms. Burkle's representatives did not review the information." (*Ibid.*) "Under these circumstances," the court held, "only an actual concealment or misrepresentation would allow Ms. Burkle to avoid her agreement." (*Ibid.*)

*Boeseke* and *Burkle* provide the legal backdrop for our resolution of this issue. Here, Russ provided full disclosure of his financial assets and liabilities. Valerie was advised by counsel that there may be community property inhering in Russ's assets and that Valerie could ask for a forensic accounting to determine the extent of any such community property. Max Gutierrez testified that Susan Coates was entitled to investigate on Valerie's behalf whether any community property existed and that he had a duty to provide any additional financial information requested by Coates, in the interests

of full disclosure. However, Gutierrez did not receive a request from Coates either for an estimate of community property or for any audit procedures to explore the issue. In sum, the record demonstrates Valerie was apprised that there may be community property at the time she concluded the PMA but she decided not to pursue the matter. Under these circumstances, her claim that the PMA is void for failure to disclose must fail. (See *Boeseke, supra*, 10 Cal.3d at p. 850; *Burkle, supra*, 139 Cal.App.4th at p. 741.)<sup>13</sup>

***D. Judgment on Reserved Issues***

As well as appealing from the trial court’s rulings on the validity and enforceability of the PMA, Valerie appeals the trial court’s determinations on several of the issues reserved for the second phase of trial proceedings. We discuss these below.

***(1) Lump Sum Awarded Under the PMA***

Valerie contends the trial court should have awarded \$1,533,288, not \$678,904, as the lump sum amount due to her under paragraph 4 of the PMA in the event of dissolution or divorce. We find the court properly interpreted the language of paragraph 4 and the record supports the trial court’s award of the lump sum amount to Valerie.

As described *ante*, under paragraph 4 the sum for each year of marriage received by Valerie upon termination of the marriage increases with the length of the marriage. For purposes of determining the length of the marriage, paragraph 4 provides that “the marriage will be deemed to have ended on the day that either party files and serves a petition for divorce, dissolution of the marriage or for the legal separation of the parties in the State of California, or any comparable pleading in any jurisdiction outside of the State of California and, after the filing and service of such petition, [the] parties do not reconcile and resume living together and the petition is not dismissed or the party who filed the petition does not abandon prosecution of the action.” Valerie asserts this language reflects three conditions: (1) filing of a petition for divorce or dissolution;

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<sup>13</sup> Based on the same authorities, we also reject Valerie’s related argument that Russ had a fiduciary duty to disclose whether any of his listed assets could be characterized as community property, his breach of said fiduciary duty constituted constructive fraud, and Valerie is entitled to rescission of the PMA on grounds of fraud.

(2) failure to reconcile; and, (3) failure to dismiss or abandon prosecution of the petition. Under Valerie's interpretation of paragraph 4 their marriage did not end until entry of judgment on November 24, 2009, because Russ could have dismissed or abandoned his petition any time prior to entry of judgment.

We reject, as the trial court did, Valerie's strained and unreasonable interpretation of the language of paragraph 4. (See *Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 847-848 ["When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over"].) Patently, the end of the marriage for purposes of paragraph 4 is the date of filing of a petition for divorce or dissolution. In effect, Valerie interprets the language of paragraph 4 to state "the marriage does not end until a reconciliation or abandonment of the petition is rendered impossible by entry of judgment." This is plainly an unreasonable interpretation. To the contrary, the most reasonable interpretation of the PMA is that the length of the marriage was determined by the date Russ filed the present dissolution petition: If the parties had reconciled, or if Russ had dismissed or abandoned his petition, then the date either party filed a subsequent petition for dissolution would determine the length of the marriage. Accordingly, the trial court did not err by finding the marriage ended for purposes of paragraph 4 when Russ filed for dissolution on June 19, 2006.

## **(2) Attorney Fees Under the PMA**

Valerie appeals the trial court's award to Russ of \$354,542 in attorney fees and \$35,396.36 in costs after the first phase of trial proceedings on the enforceability of the PMA, pursuant to Civil Code, section 1717 (section 1717).<sup>14</sup> Specifically, Valerie contends the trial court prematurely awarded attorney fees and erred in determining that

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<sup>14</sup> Civil Code section 1717, subdivision (a) provides as follows:  
(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Russ was the prevailing party under section 1717. Valerie also contends that in determining the fee award the trial court failed to consider her relative ability to pay. We disagree.

In pertinent part, the PMA provides: “If legal action is required to defend the validity of this Agreement, the prevailing party shall be entitled to attorneys’ fees and costs from the other party.” Issues regarding the validity and enforceability of the PMA were contested in the first phase of trial proceedings. At the conclusion of the first phase of trial proceedings, the trial court determined those issues in favor of Russ, concluding in the SOD that the PMA was a valid transmutation document; Valerie entered the PMA freely, knowingly and voluntarily; Valerie was not induced to enter the PMA by fraud or concealment and Russ did not materially breach the PMA. In short, the first phase of trial proceedings addressed multiple issues related to the validity of the PMA and the trial court resolved every one of those issues in favor of Russ. At the conclusion of phase one of the proceeding, there were no remaining issues to be resolved with respect to validity of the PMA and the validity of the agreement was the only grounds for attorney fees and costs provided in the PMA. Thus, the trial court was not required to delay consideration of the propriety of attorney’s fees under the PMA until the conclusion of the entire proceeding. Russ was the prevailing party on the issue of the validity of the PMA. (See *Hsu v. Abbara* (1995) 9 Cal.4th 863, 877 [determining the prevailing party involves “a relatively uncomplicated evaluation of the parties’ comparative litigation success”].)<sup>15</sup>

Valerie’s contention that the trial court was required to consider her relative ability to pay in determining the amount of the fee award, pursuant to sections 2030-2032 of the Family Code, also lacks merit. The trial court awarded attorney fees and costs to Russ as

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<sup>15</sup> In all events, even taking into consideration the outcome on the issues contested in the second phase of trial proceedings, we would still affirm Russ as the prevailing party because Valerie achieved none of her litigation objectives on this suit. (See *Hsu v. Abbara, supra*, 9 Cal.4th at p. 876 [holding that in deciding the prevailing party on the contract, the court compares “the relief awarded on the contract claim . . . with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements and similar sources”].)

the prevailing party on a contractual dispute, pursuant to section 1717, not under the Family Code. Thus, the trial court was not required to consider Valerie's relative ability to pay in determining the amount of the award. (See *In re Marriage of Sherman* (1984) 162 Cal.App.3d 1132, 1140 [because attorney fee award "emanated from the contractual relationship of the parties and not from their relationship under the Family Law Act," the trial court did not err by precluding husband from introducing evidence regarding his ability to pay the award]; see also Raye & Pierson, 2 California Civil Practice, Family Law Litigation, (2003) § 10:6, [where marital agreements specify that the prevailing party is entitled to recover reasonable attorney's fees and costs in any action for breach of the agreement, "fees and costs [are] recoverable as 'costs of suit' under Civ. Code § 1717, and the prevailing party may recover without any showing of need and ability to pay"]; Hogoboom & King, California Practice Guide: Family Law (The Rutter Group 2011) ¶ 14:275 [Family Code fee statutes inapplicable where "parties have agreed to a recovery of fees and costs in an action arising under the contract, [because] the contract itself provides an alternative basis for fees and costs award[ed]"].)<sup>16</sup>

### (3) *Spousal Support*

Valerie contends that the trial court's order of permanent support should be reversed because the court modified the support order while the matter was on appeal. Our review of the chronology leading to the court's entry of judgment in this matter

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<sup>16</sup> The authorities cited by Valerie all involve attorney fee disputes under the Family Code—none involve an attorney fee award based on contract, pursuant to section 1717. (See *In re Marriage of O'Connor* (1997) 59 Cal.App.4th 877, 883 [noting trial court considered parties' relative circumstances in denying wife's request for attorney fees under prior Family Code, section 2032; *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 631 [same]; *In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 933 [order denying wife's request that husband pay \$5,000 for her fees and costs on his motion to terminate support not an abuse of discretion under Family Code section 2030 in light of the fact that wife is by far the wealthier spouse]; *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1215 [abuse of discretion for trial courts "to deny motions for pendente lite attorney fees and costs in marital dissolution proceedings without considering the needs of the requesting spouse and the ability to pay of the spouse against whom the award is sought"].)

disposes of Valerie's contention that the court modified support while that issue was on appeal. Following the second phase of trial proceedings, the trial court filed its findings and conclusions on September 9, 2009, in an order labeled "Judgment Phase Two." Valerie filed a notice of appeal (NOA) from "Judgment Phase Two," which became appeal No. A126802. Subsequently, the trial court filed the final judgment on November 24, 2009. In issuing its final judgment, the court realized the document labeled "Judgment Phase Two" was actually its statement of decision on the issues tried in phase two of the proceedings. The final judgment incorporated, without change, the spousal support provisions as set forth in the statement of decision. Valerie appealed from the final judgment, which became appeal No. A127429.

Thereafter, Valerie filed a motion in this court to consolidate appeals A126802 and A127429. Russ declined to stipulate to the consolidation on the grounds A126802 was taken from a non-appealable order and should be dismissed. We granted Valerie's motion and consolidated the appeals for purposes of briefing, argument and decision, but we also directed counsel to address in their briefing "whether the 'judgment' that is the subject of the appeal in A126802 is an appealable order." (See order filed March 1, 2010.) Valerie has simply ignored our directive. In compliance with our directive, Russ argues the "judgment" is not appealable because it is actually a statement of decision, not the final judgment. We agree. (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901 [whereas "[r]eviewing courts have discretion to treat statements of decision as appealable when they must, as when a statement of decision is signed and filed and does, in fact, constitute the court's final decision on the merits[,] [citations] . . . a statement of decision is not treated as appealable when a formal order or judgment does follow, as in this case".]) Accordingly, appeal number A126802 is dismissed and all issues addressed herein fall under appeal number A127429. Valerie's contention that the court "modified" the support order during a "pending appeal" is not only meritless but it is also moot.

Nor are there any grounds for reversal in the trial court's determination of the amount and duration of spousal support, as asserted by Valerie. "Wide discretion is

vested in the trial court in determining the amount and duration of spousal support. [A trial court's] discretion must be exercised along legal lines, taking into consideration the circumstances of the parties, their necessities and the financial ability of the husband. Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all circumstances before it being considered. [Citations.] . . . [¶] Thus, an appellate court must act with cautious judicial restraint in reviewing these orders. [Citation.] 'An abuse of discretion will be perceived [only] if . . . it can fairly be said that no judge would . . . make the same order under the same circumstances.' [Citation.]" (*In re Marriage of Wilson* (1988) 201 Cal.App.3d 913, 916-917.)

Here the trial court exercised its considerable discretion, considering each of the applicable statutory factors set forth in Family Code, section 4320 (section 4320) relevant to the determination of the amount of spousal support.<sup>17</sup> The trial court set out its

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<sup>17</sup> Section 4320 states, "In ordering spousal support under this part, the court shall consider all of the following circumstances:

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

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

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

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

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

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

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

(f) The duration of the marriage.

extensive findings on these factors in its statement of decision. For example, regarding section 4320, subdivision (e) (the obligations and assets, including the separate property, of each party), the court found: “At trial, Wife presented evidence that Husband has substantial equity in his residence and in his Colorado home, as well as the ability to rent out the Colorado home to create income. Husband also has numerous other real estate holdings, some with equity, others with none and all with compromised values at this time. The existence of these separate properties, albeit with uncertain values, is nonetheless an indication that were these properties liquidated, the values and equity are sufficient to pay reasonable support to Wife for a reasonable amount of time. Based on its findings under section 4320, the trial court concluded that “[i]t is not inappropriate for Wife to continue to receive [] support while she transitions towards self supporting status” and ordered support of \$15,000 per month from August 1, 2009 to November 30, 2009; \$10,000 per month from December 1, 2009 to May 31, 2010; and \$5,000 per month from June 1, 2010 to August 31, 2010, with support to terminate at that point. Having reviewed the trial court’s findings on the statutory factors relating to spousal support, we conclude the trial court did not abuse its discretion in setting the amount and duration of spousal support.

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- (g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.
  - (h) The age and health of the parties.
  - (i) Documented evidence of any history of domestic violence . . . .
  - (j) The immediate and specific tax consequences to each party.
  - (k) The balance of the hardships to each party.
  - (l) The goal that the supported party shall be self-supporting within a reasonable period of time. . . .
  - (m) The criminal conviction of an abusive spouse . . . .
  - (n) Any other factors the court determines are just and equitable.”

**(4) Family Code Section 271 Attorney Fees**

Valerie contends the trial court abused its discretion by awarding Russ \$40,000 in attorney fees after the second phase of trial proceedings, pursuant to Family Code, section 271.<sup>18</sup> Here again, we conclude there is no merit to her contention.

In his request for attorney fees under section 271, Russ asserted that Valerie “made no effort to reasonably compromise or reduce the cost of the litigation” and as a consequence he has incurred approximately \$1,000,000 in total attorney’s fees and costs, including \$600,000 in non-contract issues. Russ asked the court to award him “the amount of the net PMA benefit” due to Valerie under the court’s judgment, which amounted to \$167,530.

In ruling on Russ’ fee request, the trial court found that Valerie’s attorney “*has* maintained an unrelenting campaign of aggressive and unreasonable litigation.” In this regard, the court stated Valerie’s “tactic” of litigating without compromise began when her counsel responded to Russ’s newly appointed counsel’s request for a continuance on the initial support motion by threatening to seek an *ex parte* order *advancing* the date of the hearing unless Russ met certain financial concessions. This continued with Valerie’s practice of filing numerous motions, “including repeated motions to reconsider without any statutory basis.” Given Valerie’s litigation tactics, the court “ultimately appointed a discovery referee to manage discovery and attend depositions.” The court stated

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<sup>18</sup> Family Code section 271 (section 271) provides in pertinent part: “Notwithstanding any other provision of this code, the court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. *An award of attorney’s fees and costs pursuant to this section is in the nature of a sanction.* In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties’ incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney’s fees and costs is not required to demonstrate [] financial need for the award.” (Family Code, § 271, subd. (a) [italics added].)

discovery sanctions were imposed against Valerie and/or her counsel by both itself and the discovery referee. The court also noted Valerie's "unrestrained filings of writs or appeals" totaling eight or more over the course of the litigation through March 2009. The court further stated it had repeatedly admonished Valerie she would receive no more pendente lite attorney fees "until the 'runaway train' was stopped and reason restored," but Valerie and her counsel remained "undaunted" and have "latched onto Husband with terrier-like ferocity," racking up attorneys fees of \$1,000,000 in the process. Concluding that "if this is not a case requiring an award of fees under [section 271] [] then no such case could ever exist," the court next considered the amount of the award.

Against this backdrop, the court first considered section 271's directive that a party must have the ability to pay the fees levied. The court noted that [d]espite receiving the equivalent of \$25,000 in monthly support for three years Wife has only \$10,000 in her savings account. . . . She will receive funds under the PMA per this court's ruling and needs based fees under Family Code § 2030. . . . Wife therefore has the ability to pay fees awarded under [section 271]. This court is not to impose a sanction that will result in an unreasonable financial burden, (citation) but the sanction should have significance. This court believes that a sanction of \$40,000 . . . while only a small portion of the excessive fees incurred by Husband due to Wife's litigation tactics, is reasonable and appropriate in light of Wife's overall financial circumstances."

Two precepts guide us in vetting the propriety of the court's fee award—the exercise of a trial court's discretion will not be disturbed unless it appears that there has been a miscarriage of justice and the burden is on the party complaining to establish an abuse of discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Valerie asserts abuse of discretion on the grounds that the fees awarded under section 271 were actually awarded to punish her for filing an action against Russ in her capacity of Trustee for her daughter's educational trust. This is belied by the fact the trial court did not even mention the Trust action in its section 271 order. Indeed, contrary to Valerie's assertion, the trial court's stated reasons for imposing fees under section 271 "reflect a correct understanding of the relevant legal standards and principles." (*In re Marriage of*

*LaMusga* (2004) 32 Cal.4th 1072, 1105 [“[A] reviewing court must examine the trial court’s stated reasons for an exercise of discretion to determine whether those reasons reflect a correct understanding of the relevant legal standards and principles.”].) In sum, Valerie has failed to demonstrate that the trial court’s award of fees under section 271 was a miscarriage of justice. (*Denham v. Superior Court, supra*, 2 Cal.3d at p. 566 [“unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power”].)

#### DISPOSITION

The judgment is affirmed. Attorney fees and costs on appeal are awarded to respondent.<sup>19</sup>

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Jenkins, J.

We concur:

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McGuinness, P. J.

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Pollak, J.

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<sup>19</sup> On August 12, 2011, appellant filed a request that we take judicial notice of *Fireman’s Fund Insurance Company v. Superior Court* (2011) 196 Cal.App.4th 1263 (*Fireman’s Fund*). On August 19, 2011, appellant filed a request that we take judicial notice of *In re Marriage of Prentis-Margulis v. Margulis* (2011) 198 Cal.App.4th 277 (*Margulis*). Respondent filed a response to appellant’s motions for judicial notice on August 24, 2011. We have reviewed both *Fireman’s Fund* and *Margulis*, and conclude neither case warrants any change in the analysis set forth above. Accordingly, appellant’s motions for judicial notice are denied as moot.