Filed 1/8/13 Estate of Silveira CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Estate of JOSEPH F. SILVEIRA, Deceased.	
ANTHONY F. SILVEIRA, Petitioner and Appellant, v. MARY EVELYN SILVEIRA, as Executor, etc., Respondent and Appellant.	A128800 (Marin County Super. Ct. No. PR 032446) ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on December 12, 2012, be modified as follows:

1. On page 19, lines 8-9, after the words "clearly that" delete the words "the document was prepared if not in anticipation of trial then in conjunction with Mary's buy-out in 1981. In either case," so that the sentence reads:

> However, based on the uniformity of the handwriting in entries that span the period from 1964 through 1981, it appears rather clearly that it was not made contemporaneously with the original transfers.

2. On page 20, line 9, after the sentence ending "trial court," add as footnote 8 the following footnote, which will require renumbering all subsequent footnotes:

> [8] Glenn's "concession," referenced by the trial court in its statement of decision and emphasized by Tony in his petition for rehearing, that "it would have been 'unusual' if Mary had been paid only $79,599 to compensate her for what he calculated to be a 2/3 interest upon her departure from the partnership," is not substantial evidence that Mary held a 6.61 percent ownership interest at the time

of her retirement. Mary's willingness to accept less than the value of a two-thirds interest in the partnership is not unusual in the context of this case; it is consistent with her expressed desire to reduce the value of the assets in her estate. Moreover, Tony has not argued that the amount Mary received at the time of her retirement was evidence of the extent of her partnership interest. (On appeal he disputed the estate's argument that Mary's percentage should be calculated on the full $79,595 paid to her, arguing that her ownership interest was properly calculated based on the $43,135 in her capital account on January 1, 1981, and the remaining $37,405 was her share of the profit generated in the first quarter of the year.)

There is no change in the judgment.

The petitions for rehearing are denied.

Dated: ________________________ Acting P. J.

Filed 12/12/12 Estate of Silveira CA1/3 (unmodfied version)

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FIRST APPELLATE DISTRICT

DIVISION THREE

Estate of JOSEPH F. SILVEIRA, Deceased.	
ANTHONY F. SILVEIRA, Petitioner and Appellant, v. MARY EVELYN SILVEIRA, as Executor, etc., Respondent and Appellant.	A128800 (Marin County Super. Ct. No. PR 032446)

Mary Evelyn Silveira, as executor of the estate of Joseph F. Silveira (the estate), appeals from a judgment directing the estate to convey the interest of Joseph Silveira (Joseph) in the Silveira Ranches partnership to petitioner Anthony F. Silveira (Tony) at the book value of that interest. The estate contends the court erred in reforming the applicable partnership agreements to obligate the estate to convey Joseph's 50 percent interest at book value and that the court further erred in calculating the book value of the partnership. Tony has filed a cross-appeal challenging the award of prejudgment interest.

We find no error in the court's reformation of the partnership agreements, but we conclude the court erred in calculating the book value of the partnership. Accordingly, we shall affirm the judgment insofar as it orders reformation of the partnership agreements but reverse and remand the judgment for recalculation of the book value of the partnership.

Factual and Procedural History

The Silveira Ranches partnership owns and operates dairy farms on several sizable acreages in Marin County. The partnership was established in 1953 by a partnership agreement signed by Mary Elizabeth Silveira (Mary) and her seven children, Joseph, Tony, Dolores, George, Carlos, Helen, and Jean. At that time, Mary held a two-thirds interest and each of the children owned a 1/21 interest in the partnership. The partnership agreement includes provisions requiring that any departing partner, or the estate of any deceased partner, sell that partner's interest back to the remaining partners for book value.[1]

The buyout provisions of the agreement were utilized first in 1960, when Helen passed away and again in 1961, when Jean sought to retire. On both occasions the departing partner or her heirs were paid "book value" for their interests in the partnership. In 1968, George withdrew from the partnership pursuant to a settlement agreement resolving litigation between George and the partnership. Under the settlement agreement, the four siblings remaining in the partnership acquired George's interest for substantially more than the book value of his interest. In 1968, when Carlos passed away, the three remaining siblings acquired his partnership interest for book value. Mary did not participate in the acquisition of the departing partner's interests.

[1] Specifically, paragraph 11 of the partnership agreement provides, "Should any party die, become insane, be adjudicated a bankrupt, assign or attempt to assign any of his interest in the partnership, whether voluntarily or involuntarily or by process of law, or elect to retire from the partnership in the manner hereinafter provided for such retirement, then, and upon the happening of said events, the other remaining or surviving parties shall have, and they are hereby granted, the sole and exclusive option and right to purchase on behalf of the partnership the entire interest of such party, at the book value thereof, as herein defined . . . ." Paragraph 12 provides that the "book value of the interest of any of the parties for purpose of computing the price of such interest under the provisions of Paragraph 11 hereof shall be determined by an examination of the partnership accounts, assets and liabilities . . . . In the computation of book value, good will shall not be considered as an asset. Real and personal property shall be valued at the depreciated schedules carried on the books of the partnership."

In 1971, Mary, Dolores, Tony and Joseph executed a supplemental partnership agreement amending the partnership agreement to reflect their agreement that Mary would not be obligated to participate in the buy-out of exiting partners. Consistent with this agreement, the supplemental agreement also modified the buy-out provision in the original agreement to make it a personal obligation of the remaining partners to purchase the interest of any dying or retiring partner.[2]

Beginning in the 1960s, Mary began gifting portions of her partnership interest to the remaining three siblings.[3] When Mary retired in 1981 her remaining interest, by then reduced to less than 7 percent, was also distributed to Dolores, Tony and Joseph.

In 1997, Dolores sued Joseph and Tony, claiming they were failing to properly distribute partnership profits. The lawsuit was settled by an agreement under which Dolores was paid substantially more than book value for her interest in the partnership.

Joseph passed away in April 2003. In July 2003, Tony notified Joseph's wife and the executor of his estate, Mary Evelyn Silveira, that he was exercising his right to purchase Joseph's partnership interest for book value. Mary Evelyn refused to sell Joseph's interest for less than fair market value, and Tony filed the present action seeking an order directing the estate to convey Joseph's interest for book value under the terms and conditions of the amended partnership agreement. The trial court initially granted the estate's motion for judgment on the pleadings, holding that the partnership agreement did not require the conveyance. The court explained that "the petition is based on an unreasonable construction of the partnership agreement and supplemental partnership

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[2] Under paragraph 3 of the supplemental agreement the partners agreed that "the sole and exclusive option and right to purchase on behalf of the partnership the entire interest of the party referred to in line 9 of paragraph 11 of said partnership agreement shall be deemed to be an obligation upon the remaining other or surviving partners to so purchase the interest of such party . . . ." Paragraph 4 confirms that the obligation of the "remaining or surviving partners" is "to purchase the interest of the deceased or retiring partner in accordance with the formula set up for the determination of book value as set forth in said agreement."

[3] The estate disputes the authenticity of these partial distributions, an issue discussed *infra.*

agreement. The 'book value' provision clearly gives remaining or surviving partners the right to purchase other interests 'on behalf of the partnership.' . . . The petition's own allegations show that after Joseph Silveria's death in 2003, the partnership could not continue. (. . . Corp. Code, § 16202 (Partnership is an 'association of two or more persons.')) [¶] Anthony Silveira could not have been purchasing an interest 'on behalf of' a partnership that was due to dissolve after the statutory 90-day period. (See Corp. Code, § 16801.) . . . [¶] . . . The partnership agreement and supplemental agreement are not reasonably susceptible to an interpretation allowing the last surviving partner to buy the deceased partner's interest for himself at book value." (Italics omitted.)

Following entry of judgment, however, the court granted Tony's motion for a new trial and allowed Tony to file an amended petition. The court explained that while it found no error in its decision regarding the enforceability of the express terms of the partnership agreement, there was a reasonable possibility that Tony could amend his complaint to state a cause of action. Subsequently, Tony filed a second amended petition alleging, among other things, a cause of action for reformation. The amended petition alleges, "At the time the partnership agreement was amended by the supplemental agreement, [Tony] and Joseph, together with the other remaining partners, agreed and intended the buy-sell provision, as amended, [to] operate to ensure that the individual partners, either separately or together, purchase the interest of any dying or retiring partner so that the ranch property remain intact and undivided, and the business continue to be operated by one or more of the partners until all had either passed away or retired. . . . [¶] . . . If the agreement and said provision, as drafted, cannot be construed to obligate the second to last remaining partner to sell his/her interest in the partnership to the last remaining partner for book value, as was mutually intended, then there has been a mutual mistake of law. . . . Because of this mutual mistake of law, the agreement should be reformed to reflect the true intent of the parties . . . ."

Trial on the amended petition was conducted in two phases. In the first phase, the court found "by clear and convincing evidence, that the partnership agreement should be reformed to permit application of the book value buy out provisions of the 1953 agreement and the 1971 supplemental agreement to the last surviving partner." Relying on testimony from numerous witnesses establishing that both Tony and Joseph "treated their obligations under the agreement as survivalist in nature and operated with the book value buy out assumption in mind," the court reformed the documents "to reflect the understanding of the then-signing partners that these were survivalist agreements and that the book value of the buyout provision continued to the last partner."[4] In the second phase, the court determined the book value of the partnership.

Judgment was entered on March 22, 2010. Thereafter, the court granted the estate's application for an award of prejudgment interest under Civil Code section 3287, subdivision (a). An amended judgment was entered on June 14, 2010. The estate filed a timely notice of appeal and Tony filed a timely notice of cross-appeal.

Discussion

1. *The court did not err in granting Tony's motion for new trial.*

The estate contends the court lacked jurisdiction to grant Tony's motion for a new trial. It argues that the motion, made under Code of Civil Procedure section 657, was in fact an untimely motion for reconsideration under Code of Civil Procedure section 1008 and that Tony should not be allowed to circumvent the jurisdictional requirements of section 1008. We disagree.

A motion for new trial may be granted based on an "[e]rror in law, occurring at the trial and excepted to by the party making the application." (Code Civ. Proc., § 657, subd. 7.) Although Tony did not request leave to amend prior to filing his motion for new trial, when granting the estate's motion for judgment on the pleadings, the court had denied Tony leave to amend. Under section 647 an order "allowing or refusing to allow an amendment to a pleading" is "deemed excepted to." In *Ramirez v. USAA Casualty Ins.*

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[4] To reform the agreements to reflect this understanding, the court ordered that the language in paragraph 11 of the partnership agreement "be reformed to change 'surviving parties' to 'surviving party or parties' " and that the language in paragraphs 3 and 4 of the supplemental agreement "be reformed to change 'surviving partners' to 'surviving partner or partners.' "

Co. (1991) 234 Cal.App.3d 391, 397, the court held that a motion for new trial may be granted when the trial court has properly granted a motion for judgment on the pleadings but improperly denies the plaintiff leave to amend. (See also *Carney v. Simmonds* (1957) 49 Cal.2d 84, 87-91 [motion for a new trial is proper following entry of judgment on the pleadings].)

Contrary to the estate's argument, the fact that similar relief may be available to a party under Code of Civil Procedure section 1008 prior to entry of judgment (see *Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 943-944) does not preclude relief under Code of Civil Procedure section 657 following entry of judgment. While the statutes undoubtedly share some similarities, each has different procedural and substantive requirements.

The estate's reliance on *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494 is misplaced. In that case, the court rejected the argument that "the general relief mechanism provided in [Code of Civil Procedure] section 473 could be used to circumvent the jurisdictional requirements for reconsideration found in [Code of Civil Procedure] section 1008." (*Id.* at p. 1501.) The court expressly noted, however, that respondent "is not left without a remedy for the purported error. For example, if faced with an adverse final judgment in this case, respondent could raise the issue either on appeal or by bringing a motion for new trial, provided the prerequisites set forth in Code of Civil Procedure section 657 are met." (*Id.* at p. 1502, fn. 4.)

2. *<u>The court did not err in reforming the partnership agreements to reflect the mutual agreement of the parties</u>.*

"As a general rule, a written contract, having been deliberately executed, is presumed to correctly express the parties' intentions. [Citation.] 'The presumption is not conclusive and may be overcome by satisfactory evidence which shows that the written instrument is not in conformity with the true agreement of the parties.' [Citation.] Civil Code section 3399 allows reformation of a contract when, through mistake, it fails to express the true agreement of the parties."[5] (*Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 19.) "In reforming the written agreement, a court may 'transpose[], reject[], or suppl[y]' words [citation], but has ' "no power to make new contracts for the parties" ' [citations]. Rather, the court may only reform the writing to conform with the mutual understanding of the parties at the time they entered into it, if such an understanding exists." (*Hess v. Ford Motor Co*. (2002) 27 Cal.4th 516, 524.)

"When reformation is sought, 'the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.' " (*Appalachian Ins. Co. v. McDonnell Douglas Corp., supra*, 214 Cal.App.3d at p. 19.) "In determining whether a mutual mistake has occurred, a court may consider parol evidence. [Citation.] . . . Extrinsic evidence is necessary because the court must divine the true intentions of the contracting parties and determine whether the written agreement accurately represents those intentions." (*Hess v. Ford Motor Co*., *supra*, 27 Cal.4th at p. 525.)

"The error in the document and the mistake . . . that is the basis for the reformation is established as a question of fact. The person seeking reformation has the burden of proving the true intent of the parties by clear and convincing evidence." (12 Miller & Starr, Cal. Real Estate (3d ed. 2001) Remedies, § 34:14, pp. 63-64.) "The fundamental rule that if there is substantial evidence to support the judgment of the trial court its decision will not be disturbed on appeal applies in reformation cases. On appeal it is assumed that the trial court applied the proper standard, and its conclusion will not be disturbed if supported by substantial evidence." (11A Cal.Jur.3d (2007) Cancellation and Reformation, § 127, pp. 183-184, and cases cited therein, fns. omitted.)

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[5] Section 3399 provides: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

Here, the court found by clear and convincing evidence that the parties made a mutual mistake of law as to the effect of the buy-out provisions in the agreements. The court explained, "Although there is less evidence of the actual intention of the signing partners in 1953, the testimony from that signing was consistent with that of the 1971 signing partners that they considered this to be a 'survivalist' partnership, whereby the last surviving partner could inherit the interest in the ranches. Further, both agreements speak only to a buyout at book value, reflecting the obvious intention of all signers that the share valuation be maintained at an artificially low figure to ensure that the ranches remain in the family. . . . [¶] . . . [T]he testifying witnesses were uniform in their view of the book value buy out provision. At least since the 1971 supplemental agreement, the partners treated their obligations under the agreement as survivalist in nature and operated with the book value buy out assumption in mind. The circumstances surrounding Joseph Silveira's last illness and Tony Silveira's cancer surgery are strong support for that assumption. Seemingly, Tony recognized the possibility that he might not survive his brother and yet refused to negotiate for changes in the tontine[6] aspect of the agreement. Similarly, although Joe often expressed dissatisfaction with the ranch partnership, he made no move to change or renegotiate the agreement and had threatened to outlast his brother. These actions are strongly suggestive of each brother's view that he would survive to exercise the book value buyout prerogative. Similarly the testimony of Mark Cordeiro and others regarding the increased value assigned to Dolores Cordiero's ranch partnership share is evidence of her view that, as the youngest sibling, she had the greater chance to survive her brothers and ultimately assume ownership of the ranches."

The estate does not dispute that over time the partners came to believe the partnership was a survivalist agreement. It argues, however, that there is no evidence that

[6] A "tontine" is defined as "a financial arrangement whereby a group of participants share various advantages on such terms that upon the death or default of any member his advantages are distributed among the remaining members until on the death of all but one the whole goes to him or on the expiration of an agreed period the whole goes to those remaining." (Webster's New Collegiate Dict. (1973) p. 1220, col. 2.)

the partners intended it as such when the agreement was initially drafted in 1953 or when it was amended in 1971. It asserts that the mistaken interpretation regarding the effect of the agreement did not arise until the mid-80's when an attorney for the partnership first raised his concerns. As the trial court observed, however, the conduct of the parties after entering into the contract and prior to any dispute is often "the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co.* (1987) 196 Cal.App.3d 1179, 1189.)

Contrary to the estate's argument, the court did not shift the burden to it to establish the intent of the original signers when it stated, "Finding a lack of evidence to the contrary, this court is compelled to conclude that the parties had agreed to use the book value buy out provision in the operable partnership agreements to wind up and terminate the partnership affairs." The court's statement is merely an acknowledgment of the considerable evidence supporting reformation, which our review of the record confirms, and the "lack of evidence" suggesting a contrary understanding.

The estate also argues that any purported agreement that the buy-out provisions apply to the last partner is inconsistent with the dissolution provisions in the agreements. We disagree. The supplemental agreement does not reference dissolution at all and the original partnership agreement refers to dissolution only twice. First, it states generically, "The partnership shall continue in existence until such time as it may be dissolved by operation of law, the agreement of the parties, or the terms hereof." The second reference provides with respect to the buy-out provision, "In the event that the remaining partners shall elect not to exercise the option herein granted to purchase the retiring partner's interest, all parties shall participate in the winding up and dissolution of the partnership in proportion to their respective interests therein." Neither of these provisions conflict with the reformation ordered by the court. To the contrary, as noted by the court, the language of the agreements supports the claim for reformation.

Finally, the estate asserts that the court abused its discretion in reforming the agreements because the proposed reformation is not in the interests of justice. Citing *County of Marin v. Assessment Appeals Bd*. (1976) 64 Cal.App.3d 319, 325, the estate asserts that “Tony was obligated to prove reformation would result in a contract that was not . . . one-sided, unfair oppressive, harsh, unjust, inequitable and/or unconscionable, but rather, perfectly fair, equal and just.” When interpreting contracts courts are directed to “avoid an interpretation which will make a contract extraordinary, harsh, unjust, inequitable or which would result in absurdity” (*ibid.*, italics omitted), but the reformation here does not run afoul of this principle. The fact that the fair market value of the partnership is considerably greater than the book value does not render the agreement unjust. While there are many reasons one may question the wisdom of such a “tontine” understanding, the parties were well aware of the implications of their agreement and assumed the risk that they or their estates would obtain significantly less than fair market value should they not be the sole surviving partner. The result is no more unfair to Joseph’s heirs than it was to the other siblings. Moreover, contrary to the estate’s suggestion, application of the book value buyout provisions furthers the apparent purpose underlying the partnership agreements, in that it prevents ownership of the ranch properties from being divided or held outside the Silveira family so long as any of the eight family members who were the original partners survives.

The estate also challenges the court’s ruling on each of its affirmative defenses. Initially, it argues that the court’s statement of decision fails to sufficiently explain the legal and factual basis for the court’s rejection of the affirmative defenses. Code of Civil Procedure section 632 provides in relevant part: “In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial.” “ ‘In rendering a statement of decision under Code of Civil Procedure section 632, a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court’s determination would reversible error result. [Citations.] Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings. [Citation.] A failure to find on an immaterial issue is not error. [Citations.] The trial court need not discuss each question listed in a party's request; all that is required is an explanation of the factual and legal basis of the court's decision regarding the principal controverted issues at trial as are listed in the request.' " (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1531.)

Although the court's discussion of the affirmative defenses is cursory, the statement of decision is for the most part sufficient and any inadequacies are harmless. First, the estate asserted that Tony waived his option to buy Joseph's interest by failing to timely exercise that option when Joseph effectively retired after he had a stroke in 1998 or when he was diagnosed with dementia in 2002. The court rejected this defense, stating, "Petitioner did not waive his right to reform; his conduct has been consistent with his contention." Any insufficiency in this statement is rendered harmless by the lack of substantial evidence that the time for Tony to exercise his option began to run prior to Joseph's death. The undisputed evidence establishes that although Joseph stopped participating in the daily operation of the ranch following his stroke, he did not provide notice of his retirement as required by the partnership agreement and in fact, refused to retire and be bought out at book value. Similarly, the estate did not provide substantial evidence that Joseph's diagnosis with dementia was the equivalent of insanity so that Tony knew or should have known he was obligated to exercise his option to buy Joseph's interest within 90 days.

The estate also asserted the defense of unclean hands based on allegations that Tony concealed documents from Joseph, secured Mary Evelyn's signatures on documents without "giving her any opportunity to reflect/protect the estate's interest," and "tried to 'freeze' out the estate by conditioning Tony's tender of what he thought he was owed on the estate's surrender of all its rights." The court acknowledged that there was some "testimony that Tony and his daughter Renee have engaged in various maneuvers to increase the commercial value of the properties while artificially keeping the book value low" but pointed out that they both "denied taking any actions that would be adverse to the interests of respondent." Ultimately the court concluded that "[r]egardless of how these actions are interpreted [they are] relatively irrelevant to the question of whether the parties understood and intended the book value provision to continue to the 'last man' " and that Tony's "conduct does not rise to a level sufficient to cause the claim to be barred by the equitable doctrine of 'unclean hands.' " The record supports this conclusion. The arguments regarding the calculation of book value, including Tony's alleged attempts to artificially suppress that value, were properly considered in the second phase of the trial. Although the book value of the partnership was ultimately determined to be greater than reflected in Tony's tender, the court did not abuse its discretion in finding that his conduct was not so oppressive, unconscionable or inequitable to support a finding of unclean hands.

The estate also argued below and reasserts that the reformation claim, which was not pleaded until the filing of the second amended petition, is time barred. The trial court rejected this defense, stating, "petitioner's reformation claim is not barred by the one-year statute of limitation. The claim was based upon the consistent claim of the petitioner throughout the litigation and relates back to the timely-filed petition." "The relation-back doctrine requires that the amended complaint must (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality, as the original one." (*Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 408-409, italics omitted.) There is no doubt that throughout the proceedings Tony consistently asserted a right to buy Joseph's interest in the partnership at book value. The fact that the second amended petition sought recovery under a new legal theory does not defeat the relation back doctrine. (See *Amaral v. Cintas Corp No. 2* (2008) 163 Cal.App.4th 1157, 1199-1200 ["amendments alleging a new theory of liability against the defendant . . . relate back to the original complaint, so long as the new cause of action is based on the same set facts previously alleged"]; *Lamont v. Wolfe* (1983) 142 Cal.App.3d 375, 378 ["it is the sameness of the facts rather than the rights or obligations arising from those facts that is determinative"].)

Finally, the court rejected the affirmative defenses of laches and judicial estoppel on the ground that the estate had been "aware of the contention from the outset of the litigation." " 'The basic elements of laches are: (1) an omission to assert a right; (2) a delay in the assertion of the right for some appreciable period; and (3) circumstances which would cause prejudice to an adverse party if assertion of the right is permitted.' " (*Getty v. Getty* (1986) 187 Cal.App.3d 1159, 1170.) The estate argues that the doctrine of laches applies because Tony failed to assert a claim for reformation before "[t]he death of five of eight partners who signed the [partnership agreement], three of four who signed the supplemental agreement, and many others who might have been able to shed light on the '*true intent*' . . . ." The record establishes, however, that Tony, as well as everyone else, believed the partnership agreement accurately reflected the survivalist nature of the agreement. Therefore, Tony had no reason to assert a claim for reformation at an earlier date. (See *Magic Kitchen LLC v. Good Things Internat., Ltd*. (2007) 153 Cal.App.4th 1144, 1157 [under the doctrine of laches, delay is measured from the point at which the plaintiff knew, or should have known, of the alleged claim].)

The doctrine of judicial estoppel prevents a party from taking two inconsistent positions in the same or earlier proceedings. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 130-131.) "The doctrine [most appropriately] applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' " (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986–987.) The primary focus of the doctrine of judicial estoppel is on protecting the integrity of the judicial process (*Gottlieb v. Kest, supra,* 141 Cal.App.4th at p. 131), although it may also be used to protect against unfairness between the parties (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 424). Since the initiation of this action Tony has asserted consistently that the partnership agreement authorized his buy-out of Joseph's interest at book value. After his interpretation of the written agreements was rejected by the court, he reasonably sought reformation based on the mutual understanding of the parties. There was no inconsistency in these positions.

3. *<u>The court did not err in denying the estate's request to amend its cross-petition to assert a right to buy out Tony</u>*.

In 2002, Tony placed his interest in the partnership into an *inter vivos* trust, for which he and his wife were trustees, and executed a community property agreement with his wife designating his interest in the partnership as community property. At trial, the estate argued that, assuming reformation was proper, Tony's assignment of his interest to the trust and the related community partnership agreement triggered Joseph's right to buy Tony's interest in the partnership. The court denied the estate's request to amend its cross-petition to plead this claim. The court explained that it "is not persuaded that such a transfer of a property interest to an *inter vivos* trust should be treated as a death, insanity, bankruptcy, assignment or retirement of a partner, in accordance with the original partnership agreement. . . . [P]etitoner's use of a common estate-planning tactic should not be considered a sale or departure from the partnership, as would operate to create a right or obligation in the remaining partner to purchase his interest." On appeal, the estate asserts that its argument is not predicated on Tony's transfer of his interest into the trust but rather on the "non-contingent transfer of interest from Tony to Tony and his wife" under the community property agreement.

Hartzheim v. Valley Land & Cattle Co. (2007) 153 Cal.App.4th 383, relied on by the trial court, is instructive. In that case, plaintiff tenant claimed that the transfer of interests in defendant partnership from the partners to their grandchildren triggered plaintiff's right to purchase property owned by the partnership under a "right of first refusal" clause in its lease. The court rejected this argument, holding that the "intrafamily transfer did not trigger the right of first refusal because it was not made pursuant to a 'bona fide offer from any third party for the purchase' of the property, as required by the parties' agreement." (*Id*. at p. 386.) In so holding, the court noted that it "must look through the formalities of the transaction to determine its true nature. [Citation.] Courts will not tolerate schemes designed to avoid a contractual right. [Citation.] On the other hand, legitimate business or personal reasons, untainted by an intent to avoid a contractual preemptive right, weigh in favor of finding that the right was not triggered by the transaction." (*Id*. at p. 393.) Here, the court properly determined that the designation of Tony's interest in the partnership as community property was not such an assignment of his interest as to trigger the buyout provisions.

4. <u>*The court erred in calculating the book value of Joseph's interest in the partnership*</u>*.*

In the second phase of the trial, the court heard testimony and received evidence from expert witnesses for both sides: Donald Glenn on behalf of the estate and David Baker on Tony's behalf. Relying on Baker's expert opinion, Tony argued that the partnership accountant properly calculated the book value of Joseph's share of the partnership at $694,379. Baker's calculation was based on existing partnership records and the opinion that generally accepted accounting principles (GAAP) are not applicable to the valuation. The estate, relying on Glenn's expert opinion, argued that the book value of Joseph's partnership interest was $3,384,290, utilizing GAAP and based on a full audit of the partnership books dating back to 1953.

The court first issued a statement of decision refusing to "revisit the intricacies of the partnership books in the 1950s," but found that GAAP "would seem to require an analysis of the more recently departing partners' shares." The court concluded that accounting principles bulletin 29 (APB 29) applies to the valuation of the remaining partners' interests after the departure of those partners who departed after 1973, when application of APB 29 became mandatory under GAAP. The court described the requirements of APB 29 as follows: "Generally speaking, APB 29 applies when a departing partner's interest is acquired by the partnership in what is described as a 'non-reciprocal transfer.' If the departing partner's interest is acquired for 25 percent or less of what is then the value of that acquired interest, the remaining partners' capital must be adjusted upward to reflect the value received by the partnership for which compensation was not paid." Although in the trial court Tony opposed the application of GAAP, including APB 29, he does not challenge the court's conclusions in this regard on appeal.

Noting the “equivocal state of the record,” the court allowed the parties to submit “a ‘new’ post-trial calculation” of Joseph’s partnership interest “ ‘using the application of GAAP and APB-29 principles to the[] post-1973 partnership departures.’ ” The court explained, “It is the court’s belief that such an evaluation and application will apply to the interests of departing partners Mary Elizabeth Silveira and Dolores Silveira Cordeiro to arrive at the appropriate valuation for the interest of the estate of Joseph Silveira. As noted above, the accountant experts are instructed not to include the so-called ‘early errors’ in their calculations.”

Tony’s posttrial filing included a factual presentation by Baker setting forth the requested new calculation under the parameters defined in the statement of decision. The estate initially submitted a brief that included only the calculations of the estate’s attorney but belatedly submitted a declaration by Glenn confirming the accuracy of the calculations in the estate’s brief. The court excused the estate’s late submission and accepted “the late Glenn declaration to the extent that it provides something of a factual basis for the October brief submitted by [the estate].”

In its final statement of decision regarding book value, the court accepted Baker’s conclusion that an APB 29 adjustment to the book value of the partnership interests was required following Mary’s departure in 1981, but that no other adjustment was necessary. In addition, the court rejected the estate’s demand that it be reimbursed for approximately $600,000 in losses it attributed to Tony’s decision to continue in the “unprofitable dairy business,” and refused to award damages to compensate the estate because shortly prior to Joseph’s death the partnership granted a waste management firm an easement over ranch property under which payment was to be made on a long term basis. Ultimately, the court calculated the value of Joseph’s 50 percent interest in the partnership at $971,433. Thereafter, the court awarded pretrial interest on the portion of the award that was uncontested.

A. *Evidentiary Issues*

The estate raises two arguments regarding the admissibility of Baker's testimony and declaration. It contends the court erred in allowing Baker to testify because Baker was disclosed as an expert witness 20 days after the disclosure deadline and was not immediately made available for deposition. Baker was, however, timely disclosed as a supplemental expert witness under Code of Civil Procedure section 2034.280, subdivision (a).[7] As explained by Tony, he originally identified the partnership accountant as his nonretained expert and retained Baker as an expert only after the estate disclosed that, contrary to the parties' understanding, it had retained an expert accountant. Baker was made available for deposition and was deposed prior to trial. The estate suffered no prejudice as a result of the supplemental disclosure and the court did not abuse its discretion in allowing Baker to testify.

The estate also argues, without much elaboration, that Baker's posttrial declaration "should never have been considered because it was inadmissible hearsay, contained opinions and 'analysis' that were untrustworthy, inaccurate, not disclosed in deposition or at trial, opinions he was precluded from offering by in limine order, and the estate had no opportunity to confront and cross-examine him about it." Baker's declaration, however, was submitted in conformity with the court's request for additional calculations and was based on evidence presented at trial. The calculations contained in Baker's declaration cannot be distinguished from the additional posttrial calculations submitted by the estate. Under the circumstances, the court reasonably requested and relied on the posttrial submissions by both parties in reaching its final determination of the book value of the partnership.

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[7] Code of Civil Procedure section 2034.280, subdivision (a) provides: "Within 20 days after the exchange described in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject."

B. *Adjustments to the Pre-1973 Partnership Books*

The estate argues that the court erred in refusing to make any adjustments to the partnership books to account for alleged accounting errors in the 1950's. In particular, the estate relies on an approximately $247,000 error that its expert identified in the 1955 balance sheet. Baker, however, explained that the document relied on by the estate was clearly a mistake and conflicted with other financial statements that showed the correct capital balance. The court reasonably observed that it could not "find enough substantiation to justify these ex post facto changes to a balance sheet which has apparently remained essentially unchallenged for over 50 years." We find no error in the court's ruling.

C. *Application of APB 29 to Mary's Partnership Interests*

The court's statement of decision provides as follows with respect to application of APB 29 to Mary's departure from the partnership: "Based upon the testimony of the partnership accountant, Stephen Schulte, and the ledgers he kept during the period, the court concludes that Mary Silveira took income, made gifts and was credited with withdrawals over the periods from 1964 until her departure in 1981, which left her with what the accountant described as a 6.49% share in the Silveira Ranches partnership. [Citations.] Mr. Glenn agreed that the Schulte ledgers showed a reduction in Mary's capital share to zero by 1981. . . . He agreed that his analysis ignored that reduction. . . . From an overall review of the circumstances and testimony in this case, the court is persuaded that Mary Silveira had been withdrawing and gifting over substantial portions or percentages of her partnership share to her partners and children over the eighteen or so years before her departure in 1981. The court has accepted the APB 29 calculation of petitioner's expert witness, David Baker, which uses the March 31, 1981 partnership financial statement as the basis for a (departure) calculation of Mary Elizabeth's partnership share at 6.61% and applies that percentage to make an APB 29 adjustment to the partnership capital account for future buyouts."

The estate contends there is no substantial evidence to support the trial court's finding that Mary had transferred all but 6.61 percent of her interest to the remaining three partners prior to retiring in 1981. We agree. Contrary to the trial court's finding, Schulte's ledger and deposition testimony do not establish that Mary was gifting ownership interests rather than interests in her capital account to her children. There is no direct evidence in the record indicating when Schulte's "ledger" was created. However, based on the uniformity of the handwriting in entries that span the period from 1964 through 1981, it appears rather clearly that the document was prepared if not in anticipation of trial then in conjunction with Mary's buy-out in 1981. In either case, it was not made contemporaneously with the original transfers. Moreover, Schulte's deposition testimony does not establish that the transfers to her children were transfers of ownership rather than capital. Schulte merely testified that the transfers, which were characterized on the books as "capital contributions," were " 'in fact, just transfers of interest from Mary Silveira to her children who remain partners.' " While Glenn agreed that the document prepared by Schulte showed a substantial reduction in Mary's capital account by 1981, he did not agree that her share of the capital account was necessarily equal to her ownership share. At trial, Glenn explained the difference as follows: "There is a withdrawal of cash by Mary, which she then gifts to one or more of the children. That reduces her capital account, it's treated as any other capital draw. [¶] Then there is the act of transferring a partnership ownership percentage to another child or children. So when we are talking about transferring a partnership interest versus making a gift to the children of cash withdrawn from the partnership, two different things." Glenn interpreted Schulte's ledger as reflecting gifts of cash from her capital account rather than a transfer of ownership interest. Glenn's conclusion is supported by substantial uncontroverted evidence. The partnership income tax returns state explicitly that until 1981 Mary held a 66.6 percent ownership interest and that income and losses were allocated based on this percentage. The agreement signed by Mary and the children at the time of her buyout in 1981 states that as of the date of the agreement, ownership of the partnership, and the property and assets owned by the partnership, was vested six-ninths in Mary and oneninth in each of the three children. Finally, Schulte testified in his deposition that following Mary's departure in 1981, the children were required by law to create a new partnership with a new partnership number because Mary retired with a greater than 50 percent ownership interest in the partnership. Glenn's interpretation is also consistent with the evidence that by 1981, Mary's capital account was reduced to $43,135, out of the total partnership capital of $652,250. In contrast, Baker's conclusion rests solely on the document prepared by Schulte, characterized as a "ledger," and the deposition testimony cited by the court. As indicated above, this evidence does not provide a competent foundation for Baker's opinion or support the factual finding of the trial court. The court erred in calculating the APB 29 adjustment following Mary's departure based on the premise that in 1981 she held only a 6.61 percent interest in the partnership rather than a 66.6 percent interest. Hence, the judgment must be reversed in this regard and remanded for recalculation.

D. *Application of APB 29 to Dolores's Partnership Interests*

The trial court relied on Baker's declaration in concluding that no APB 29 adjustment was required after Dolores's departure. Baker explained that he calculated the fair market value of Dolores's interest at the time of her departure by first adding Mary's APB 29 adjustment to the value of the partnership's capital account and then calculating the fair market value of Dolores's one-third interest ($5.960.542 million). He then compared her departure price ($1.6 million) to 25 percent of fair market value ($1.490.136 million). Because Dolores was paid more than 25 percent of the fair market value, no further adjustment was required under APB 29. The estate argues that it was unfairly prejudiced by Baker's belated assertion that no APB 29 adjustment was required. We do not believe there was any prejudice, however, since the court gave both parties equal opportunity to present their calculations after it had ruled on the applicability of GAAP and APB 29. Nor was there any error in failing to apply a "present value discount" to the $1.6 million that was paid to Delores because a portion of that amount was in the form of a promissory note. Nor can we say that the court erred in rejecting the estate's contention that in calculating the "boot" adjustment arising out of the payout to Dolores that exceeded the book value of her interest,[8] the partnership accountant overstated the value of the partnership's depreciable personal property and undervalued the real property, which had the effect of over-allocating the "boot" to depreciable assets. According to Glenn, the result of the misallocation improperly reduced the book value of Joseph's share by $78,330. However, the court accepted the partnership accountant's allocation, on which it was entitled to rely. Moreover, we note that both Joseph and Tony were actively participating in the partnership at the time of Dolores's departure and apparently did not challenge the allocation at that time.

Although we thus reject the respects in which the estate challenges the calculations made upon the departure of Dolores, the need for an APB 29 adjustment upon her departure must be reconsidered in light of the increase in the APB 29 adjustment following Mary's departure.

5. *The court did not err in denying the Estate's claims for additional damages*.

At trial, the estate argued that Tony breached his fiduciary duty by continuing in the "unprofitable dairy business" and that the estate is entitled to $600,000 in damages to remedy this breach. The court rejected this argument. Noting that this issue was first raised in the estate's closing brief and was not discussed during the phase two trial, in the statement of decision the court explained its decision as follows: "The evidence does suggest that [Tony] was essentially the 'managing partner' at the ranch after Joe had suffered a stroke and was unable to participate in ranch management. Apparently, the partnership has continued to be, at least nominally, in the 'milk ranch business' as suggested in the partners' original partnership agreement of 1953. . . . Although the original agreement allowed for operation of 'other businesses,' there are probably reasonable arguments that can be raised for or against the partnership's continuation in

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[8] According to the statement of decision, "The partnership accountant . . . explained that 'boot' was 'paying something more than the valuation of the . . . partner's interest.' " The estate characterizes a "boot adjustment" as "the difference between book value and what a departing party actually receives."

the dairy business. However, reviewing the history of the partnership and the inherent difficulty in valuing hypothetical business alternatives, this court is not persuaded that Joseph Silveira did not agree with or ultimately acquiesce in any decision to continue in the family's one-half century of operation in the 'milk ranch business.' The court has not been provided with any substantial basis for calculation of damages for what may be considered a missed business opportunity." We see no error in the court's analysis.

The estate also argues the court erred in denying its request for 50 percent of the future income under a contract entered into shortly prior to Joseph's death. The trial court described the estate's argument as follows: "In respondent's view, Tony was taking advantage of Joe when, in November of 2002, his representatives asked respondent (then Joe's wife) to approve a contract (actually an 'Amended Agreement') which the partnership's lawyers had negotiated with Redwood Landfill to allow an easement over the Silveira Ranches property for $40,000 per month (plus a minimum annual 'quarrying fee' of $35,000) beginning March 1, 2002, and extending, with CPI adjustments, through February 28, 2031. . . . Respondent contends that the contract, coming as it did within months of Joe's death, should have been 'front loaded' or structured with greater payments for Joe or his heirs, rather than with benefits extended over time." Rejecting the estate's breach of fiduciary duty argument, the court found that "the negotiated agreement would seem to have been appropriate to the health of the partnership. Nothing was done by Tony to 'freeze out' Joe or appropriate his interests. Although partners may have fiduciary obligations, the lease signing would not appear to have violated these obligations or, for that matter, equitable considerations." Later, the court observed, "The negotiation of a lease that provided another $40,000 per month to the Silveira Ranches partnership would seem to have been an economically sensible, and perhaps property-saving, decision that the court will not revisit. In particular, there is no evidence to suggest that any 'front-loaded' contract would have been acceptable to the Redwood Landfill negotiators who were, presumably, hoping to reduce their own ongoing, short-term operating expenses with a shorter route to the highway." The court also rejected the estate's additional argument that "the court's actions in reforming the partnership agreement to conform to its ‘last man standing’ premise should be balanced by an equitable award of damages to Joe’s estate by reason of the extra benefit that the waste management lease will provide to Tony and his heirs over time.” The court acknowledged the general rule that “ ‘a court will not grant equitable relief unless the plaintiff acknowledges or provides for the defendant’s equitable rights *arising from the same subject matter*’ ” but concluded that “[t]he cause of action for reformation of the original partnership agreement is completely separate and distinct from any analysis of the relative benefits afforded by the waste management lease.” The court added that it saw no “reason to modify this recent leasehold contract in an attempt to provide an equitable balance for the impact of the concepts described in the old partnership agreement. The court’s rulings cannot meld the family decisions of fifty years ago with more recent decisions of the remaining partner into something more equitable to that that remain affected by them.”

On appeal, the estate does not challenge the court’s ruling that Tony breached no fiduciary duties, but suggests that the court erred by failing to award equitable damages. It argues, “But for the order reforming the agreement, the estate would have been entitled to half the income stream – worth more than $16 million through February 28, 2031. Where, as here, [Mary] Evelyn had no meaningful opportunity, before she signed [the contract], to protect Joe’s interests or those of [his] beneficiaries, the court compounded the ‘outrage’ of giving the agreement a ‘tontine’ effect by its further error in concluding that the estate’s equitable rights ‘do not arise from the same subject matter.’ ” (Italics omitted.) While there is no gainsaying the harsh consequences of the tontine arrangement, as we have previously concluded, that is what the parties knowingly intended and agreed to. Since the entry of the long term contract was apparently in the best interest of the partnership and involved no breach of fiduciary duty, we cannot say that the court abused its discretion in refusing to compel Tony to provide additional compensation to the estate as a condition of the reformation.

6. *The court did not err in awarding prejudgment interest.*

"[Civil Code] section 3287 provides that a party may recover prejudgment interest on an amount awarded when the damages are certain, or capable of being made certain by calculation, and the right to recover those damages is vested. [Citation.] If the statutory conditions are satisfied, the court must award prejudgment interest. [Citation.] The purpose of prejudgment interest is to compensate the prevailing party for the loss of money during the period before the judgment is entered." (*Tenzera, Inc. v. Osterman* (2012) 205 Cal.App.4th 16, 21.)[9]

Here, the trial court denied the estate's request for prejudgment interest on the full amount of the judgment, finding that the book value of Joseph's interest was not "certain, or capable of being made certain by calculation" within the meaning of Civil Code section 3287, subdivision (a). However, the court granted the estate's alternative request for prejudgment interest on $471,311.25, the price that Tony had offered to pay the estate for Joseph's partnership interest. The court explained, "Petitioner tendered this amount to respondent, and it appears he never disputed this as the minimum amount owed. To this extent, the value of Joseph Silveira's interest was 'certain or capable of being made certain by calculation.' " The court concluded, "Petitioner did not address respondent's alternative request in his brief and did not challenge respondent's mathematical calculations. Accordingly, the court will enter an amended judgment including a prejudgment interest award of $195,781.40."

Both parties challenge the court's award of prejudgment interest. In his cross-appeal, Tony contends that there is no legal basis for the court's partial award of prejudgment interest.[10] The estate contends the court erred in failing to award interest on

[9] Civil Code section 3287 provides in relevant part: "(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

[10] Although in the trial court Tony suggested that his tender defeated the estate's claim for prejudgment interest, the estate disputed his assertion that the tender was

the full amount of the judgment based on equitable factors. We disagree with both arguments.

While it is generally acknowledged that " 'where an accounting is required in order to arrive at a sum justly due, interest is not allowed,' " courts have not "foreclose[d] the possibility of prejudgment interest in an accounting action where equity demands such an award." (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc*. (1983) 149 Cal.App.3d 901, 908-909; see also *Luchs v. Ormsby* (1959) 171 Cal.App.2d 377, 388 ["A partner may collect interest where partnership funds have been wrongfully withheld"]; *Lacy Mfg. Co. v. Gold Crown Mining Co.* (1942) 52 Cal.App.2d 568, 579 [where a dispute exists with regard to part but not all of a claim, that dispute does not render the amount of the claim uncertain and the debtor can avoid liability for interest by tendering the amount actually due].) Since Joseph's death, Tony has acknowledged that the estate was entitled to Joseph's share of the book value of the partnership. The amount that Tony offered the estate was acknowledged to be due the estate and this amount was not uncertain. The prejudgment interest awarded by the court properly compensates the estate for use of those funds during the period it was deprived of that amount. The court did not, however, abuse its discretion in refusing to award prejudgment interest on the remaining portion of the award, the precise amount of which, even at this point, remains uncertain.

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unconditional, as required to preclude an award of prejudgment interest, and Tony has not reasserted that contention on appeal.

Disposition

The judgment is affirmed insofar as it orders reformation of the partnership agreements but reversed and remanded for recalculation of the book value of the partnership consistent with this opinion. The parties shall bear their own costs on appeal.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.