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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of MARY and FRANK
E. NOBLE.

MARY NOBLE,

Respondent,

v.

FRANK E. NOBLE,

Appellant.

D059868

(Super. Ct. No. DMB01450)

APPEAL from an order of the Superior Court of San Diego County, Maureen F. Hallahan, Judge. Affirmed.

The family court entered a stipulated judgment in 2003 that requires the parties to contribute to college accounts for their two children. The issue on appeal is whether the court erred by entering an order in 2011 requiring one party's compliance with the judgment, on the ground the parties' settlement agreement incorporated in the judgment

does not satisfy the criteria of Code of Civil Procedure¹ section 664.6 since neither of the parties signed it and one of them did not appear in court to orally consent. We conclude the court did not err. The judgment supersedes the settlement agreement, and the time within which the judgment could be challenged under section 664.6 expired long ago. Because the underlying judgment is valid, the order of enforcement is also valid.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2002 Mary Noble petitioned for the dissolution of her 11-year marriage to Frank Noble.² Two sons were born to them, the first in 1992 and the second in 1994. In June 2002 the family court entered a stipulated order on a parenting plan. The parties shared legal custody of the children, and Mary had their primary physical custody. The court ordered Frank to pay a total of \$800 per month in child support.

In March 2003 the court entered a stipulated partial judgment. The parties both waived spousal support. They also agreed to the disbursement of approximately \$370,000 from the sale of the community residence, and to the manner in which Frank would satisfy child support arrearages and future payments. The court retained jurisdiction over all other issues, and the parties acknowledged there were outstanding tax issues for resolution at trial.

¹ Further undesignated statutory references are also to the Code of Civil Procedure unless otherwise specified.

² To avoid confusion, we refer to the parties by their first names.

In August 2003 a trial commenced on reserved issues. The parties each had legal representation. Mary attended the hearing, but Frank, who is an attorney himself, did not. His attorney, Frank Nageotte, advised the court he had spoken with his client "just a few moments ago by telephone, and we do have a complete settlement of all remaining issues." Nageotte recited the terms of the settlement on the record. He offered to draft a settlement agreement for approval by Mary's attorney, Sharon Blanchet, and added, "I do have authority from my client to enter into this agreement." Blanchet then questioned Mary and she agreed to be bound by the settlement agreement.

In November 2003 the court entered a judgment on reserved issues, which incorporates the settlement agreement Nageotte prepared. The agreement confirms that Nageotte "represented to the Court that he was authorized by husband to enter into said stipulation." The agreement provides the parties would continue to equally share the cost of health insurance for their sons; Frank would pay a certain amount to Mary for his portion of health insurance premiums and uninsured medical expenses for the children through a certain date; neither party would obtain non-emergency health care for the children without prior notice; Mary would waive her claim for reimbursement of child care expenses incurred before a certain date; and she would dismiss a pending domestic violence case against Frank.

Further, the agreement provides for the equal division of approximately \$224,000 remaining in Blanchet's trust account. From that amount, Frank was to deposit \$9,000 into each of two "educational trust accounts for the benefit of the parties' children." Additionally, before each child began college, Mary was to deposit \$9,000 into each of

the accounts. The parties were to jointly invest and manage the accounts for the children's benefit.

As to outstanding state and federal taxes, the stipulation provides they will be equally divided and to the extent possible paid from the remainder of the parties' shares of the \$224,000 disbursement. It was anticipated that Mary would have sufficient funds to fully pay her half of the taxes, but Frank would have a remaining balance on his half.

Blanchet signed the settlement agreement as approved, but neither party signed it. The stipulation was incorporated in the judgment, and the judgment reserves jurisdiction to the court "to make other orders necessary to carry out this judgment." The same date the judgment was entered, the court clerk sent a notice of entry of judgment to each of the parties. Frank did not challenge the validity of the judgment.

In December 2010 Mary, in propria persona, instigated order to show cause (OSC) proceedings to enforce the terms of the November 2003 judgment. She sought reimbursement for Frank's 50 percent share of health insurance premiums and uncovered medical and dental expenses for the younger child. The application also states: "I request I be named the trustee on our sons' 529 [26 U.S.C. § 529 (hereafter 529)] college savings accounts. Currently, [Frank] is the account holder but he has been unwilling to provide me with any information regarding the accounts. We were each to be the trustee of one account but that is not how the accounts were set up. I further request that I be provided with the monthly account statements since December, 2003 to the present." Further, the application states, "I request the funds remaining in our [older son's] 529

college savings account be released to me for use for his college expenses at the University of Oregon."

During the OSC proceedings Frank represented himself. In February 2011 he submitted a declaration that stated Mary never presented him with a bill for medical or dental expenses for either child, he had no obligation for any bill because she did not give him prior notice of any non-emergency medical or dental care for either child, and she did not send him any documentation for insurance premiums. The declaration claimed Mary never funded college accounts for the children. It also stated, "Neither of the college accounts can be changed to Mary as trustee to the extent both of the accounts have been closed and all funds expended. All available cash assets have been dissipated." Further, it stated, "I have provided Mary all information regarding the closed accounts. I do not have any of the account statements from 2003 to the present. Those accounts have been closed and, therefore, I am not the accountholder on any account."

In March 2011 Frank filed a second declaration, which largely echoed his first declaration. In April 2011 he filed a third declaration, in which he argued for the first time that the November 2003 judgment cannot be enforced under section 664.6 because the parties did not sign the settlement agreement incorporated in the judgment and Frank did not appear at the hearing to orally consent to the agreement.

At a hearing in April 2011, the court rejected Frank's argument because he never moved to set aside the November 2003 judgment. The court issued an order requiring him to pay Mary \$1,025 for the younger child's orthodontia as a medical necessity. It also ordered him "to open a 529 College Fund for each of the children and deposit

\$9,000.00 in each account by 6/01/11." Mary was to be designated sole trustee for the accounts.

DISCUSSION

Frank challenges the court's order, insofar as the children's college accounts are concerned, on the ground the November 2003 stipulated judgment does not satisfy the criteria of section 664.6. He submits that since the judgment is invalid, the court's April 2011 order is also invalid. The issue is one of law we review independently. (*Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162.)

Section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (§ 664.6.) Section 664.6 applies to proceedings under the Family Code. (Fam. Code, § 210; *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 900; *In re Marriage of Armato* (2001) 88 Cal.App.4th 1030, 1035-1038.)

Ordinarily, "an attorney can bind his client in any step in an action by his agreement entered upon the minutes of the court." (*Bemer v. Bemer* (1957) 152 Cal.App.2d 766, 771.) In *Levy v. Superior Court* (1995) 10 Cal.4th 578 (*Levy*), however, the California Supreme Court held the term "parties" as used in section 664.6 does not include a party's attorney. The court explained: "Because the settlement of a lawsuit is a decision to end the litigation, it obviously implicates a substantial right of the litigants

themselves. Given this circumstance and section 664.6's focus on settlement, we conclude that in providing for an enforcement mechanism for settlements by 'parties,' the Legislature intended the term to literally mean the litigants personally." (*Levy, supra*, at p. 584.) "The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations of the settlement." (*Id.* at p. 585.)

Section 664.6 simply provides "a summary, expedited procedure to enforce settlement agreements when certain requirements that decrease the likelihood of misunderstandings are met." (*Levy, supra*, 10 Cal.4th at p. 585.) Section 664.6 is not the exclusive means of enforcing a settlement agreement. Even when the summary procedure of section 664.6 is unavailable, a party can ordinarily seek to enforce a settlement agreement through more cumbersome procedures, such as a motion for summary judgment or a breach of contract action. (*Levy, supra*, 10 Cal.4th at p. 586, fn. 5; *In re Marriage of Assemi, supra*, 7 Cal.4th at p. 904.)

It is true that the November 2003 stipulated judgment does not meet the section 664.6 criteria. Neither Mary nor Frank signed the settlement agreement, and Frank did not appear before the court to consent to the agreement. Moreover, California Rules of Court, rule 5.116 provides that in family law proceedings a stipulation for judgment must be signed by the parties. The court's entry of the November 2003 stipulated judgment appears to be in error.

Frank, however, did not timely challenge the judgment. "Once a property settlement agreement has been incorporated into a judgment of dissolution, the agreement merges into and becomes *superseded by the decree*, and the value attaching to the document itself is only historical." (*In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 656, italics added.) "Marital settlement agreements merged into . . . judgments become part of a judgment and enforceable by contempt." (*In re Marriage of Jones* (1987) 195 Cal.App.3d 1097, 1104.) " 'Merger . . . replaces the obligations of the contract with those of the decree [and] the merger itself has extinguished the contract's obligations.' " (*Ibid.*)

"[A] judgment purportedly entered upon a stipulation when no stipulation authorizing such exists, or the provisions of which go beyond the terms of the stipulation upon which it purportedly is based, may be set aside . . . , because in reality it is not a stipulated judgment." (*Harris v. Spinali Auto Sales, Inc.* (1962) 202 Cal.App.2d 215, 217-218.) As in civil actions generally, a family law litigant may challenge a judgment incorporating a settlement agreement under section 473 on the ground of mistake, inadvertence, surprise, or excusable neglect. (§ 473, subd. (b); Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2011) ¶ 9:446, p. 9-98.13.) A motion for such relief must be made within a reasonable time, not to exceed six months from the date of entry of judgment. (§ 473, subd. (b).)

After the time limitation of section 473 has expired, "relief from a family law support or property division judgment is available *only* on the *grounds* and within the *time limits* specified in [Family Code section] 2122." (Hogoboom & King, *supra*,

¶ 9:446, p. 9-98.13.) Among the grounds for relief are "mistake, either mutual or unilateral, whether mistake of law or mistake of fact" (Fam. Code, § 2122, subd. (e)), and actual fraud (Fam. Code, § 2122, subd. (a)). Both grounds are subject to a one-year limitations period. (Fam. Code, § 2122, subds. (e), & (a).)

The family court correctly rejected Frank's reliance on section 664.6 at the OSC proceedings. He was notified of entry of the November 2003 judgment. He could have then challenged the judgment for noncompliance with section 664.6 (see, e.g., *Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1257-1260 (*Critzer*); *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 304-306; *Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1163; *Johnson v. Department of Corrections* (1995) 38 Cal.App.4th 1700, 1705-1708), but he opted not to do so. "After entry of a judgment incorporating a marital settlement agreement, *any ground for avoiding the agreement must be pursued by statutory remedies to set aside the judgment*, coupled with a motion to vacate the 'tainted' portions of the underlying agreement." (Hogoboom & King, *supra*, ¶ 9:446, p. 9-98.13, italics added; *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1070-1072.) Frank presumably had no quarrel with the judgment, as his declaration indicates he actually opened and funded college accounts for his sons, although he later withdrew the funds.³

³ Mary's respondent's brief asserts the "original educational trust accounts were created and funded as stipulated in 2003."

Frank's reliance on *Critzer, supra*, 187 Cal.App.4th 1242, is misplaced. In *Critzer*, the Critzers, owners of a townhome, had a dispute with their neighbor, Enos, over a window he installed in his townhome. The Critzers ultimately sued Enos, his successor in interest, and the homeowners association. After the case was assigned out to trial, a settlement was purportedly reached and its terms were read into the record. Three of the five parties consented in court to the settlement. Months later, when the parties reached an impasse on the terms of a written agreement, the homeowners association brought a motion to enforce the settlement under section 664.6. The trial court granted the motion, and the Critzers appealed. The appellate court reversed, concluding the trial court lacked authority under the summary procedure of section 664.6 to enforce any settlement, since there was neither an oral settlement all parties agreed upon, nor a written settlement agreement signed by all parties. (*Critzers*, at pp. 1246-1247.) *Critzer* is in a different procedural posture than the instant case. The Critzers challenged the enforcement judgment in a timely manner, unlike Frank, who raised section 664.6 for the first time more than seven years after judgment was entered.

Moreover, we are unpersuaded by Frank's assertion his inaction is immaterial because the November 2003 judgment is void on its face since it does not comply with section 664.6. A party may challenge a void judgment or order at any time. A judgment is void when the issuing court lacked fundamental jurisdiction. "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of . . . authority over the subject matter or the parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 (*Abelleira*); *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215,

1225; § 473, subd. (d).) A judgment is void on its face "when the defects appear without going outside the record or judgment roll." (*County of San Diego v. Gorham, supra*, 186 Cal.App.4th at p. 1226.)

In contrast, a court acts in excess of jurisdiction "where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*Abelleira, supra*, 17 Cal.2d at p. 288.) "Action 'in excess of jurisdiction' by a court that has jurisdiction in the 'fundamental sense' . . . is not void, *but only voidable*."

(*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1088, disapproved on another point in *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 280.) A party seeking to set aside a voidable judgment must act before the matter becomes final. (*Lee v. An* (2008) 168 Cal.App.4th 558, 565-566.)⁴

The court here had fundamental jurisdiction. Frank does not suggest the court lacked jurisdiction over the parties. Further, the court has subject matter jurisdiction over child support matters, and "to approve a stipulated agreement by the parents to pay for the support of an adult child." (Fam. Code, § 3587.) We reject Frank's argument the court lacked subject matter jurisdiction over college accounts because the March 2003

⁴ Frank does not claim the November 2003 judgment resulted from extrinsic fraud. "Extrinsic fraud occurs when a party is deprived of the opportunity to present a claim or defense to the court as a result of being kept in ignorance or in some other manner being fraudulently prevented by the opposing party from fully participating in the proceeding." (*County of San Diego v. Gorham, supra*, 186 Cal.App.4th at pp. 1228-1229.) Indeed, Frank's attorney drafted the stipulation incorporated into the judgment.

stipulated partial judgment expressly reserved only the matter of tax treatment for trial. "The principle of 'subject matter jurisdiction' relates to the inherent authority of the court involved to deal with the case or matter before it." (*Conservatorship of O'Connor, supra*, 48 Cal.App.4th at p. 1087.) Issues pertaining to the division of assets and liabilities are commonly intertwined, and the resolution of one issue may require adjustments on other issues such as support.

To any extent the November 2003 judgment was *voidable* because statutory prerequisites under section 664.6 were unmet, Frank did not timely assert his rights. Thus, the court's April 2011 order requiring him to comply with the judgment by funding college accounts is proper.

DISPOSITION

The order is affirmed. Mary is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

NARES, J.