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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TYLER H. SLAVIN, as trustee, etc.,

Plaintiffs and Appellants,

v.

SHEREEN SLAVIN,

Defendant and Respondent.

D059982

(Super. Ct. No. 37-2008-00152003-  
PR-TR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Julia C. Kelety, Judge. Affirmed as modified.

In this probate matter, plaintiffs and appellants Tyler H. Slavin and Parker M. Slavin, as co-trustees of the HMR Irrevocable Trust dated 1/21/98 (the Trust), and their father Randall Slavin (Randall; together, Appellants) appeal an order enforcing a written, court-approved settlement agreement that they entered into with the moving party, their mother, respondent Shereen Slavin (Respondent), concerning disputes over certain

provisions of the Trust and also disputes arising in the dissolution action between the parents. (Prob. Code,<sup>1</sup> § 17200; Code Civ. Proc., § 664.6.) Previously, the probate court granted a different motion by Appellants to approve the parties' September 2010 settlement agreement (the agreement), which included procedures for modifying the loan on or selling the family residence (Lockett property; the subject property). This agreement recognizes the Trust has an ownership interest in the subject property, even though title to it and the loan were still held solely by Respondent pursuant to an earlier refinancing arrangement completed during the marriage, in her name. The agreement provided for a six-month period for Appellants to modify the existing loan, but they were unable to do so. The subject motion by Respondent claimed Appellants breached that requirement in the agreement, and other requirements, such that its additional terms should now be enforced, allowing her to sell the property.

On appeal, Appellants contend the probate court erred in issuing this "enforcement order," by finding they were in breach of the agreement, and the court should have allowed them a "reasonable" extension of time, as provided by paragraph 6 of the agreement, for procuring the loan modification. Appellants argue they were excused from performance of their obligations, because Respondent's conduct made it impossible or impracticable for them to negotiate with the lender for modification of the loan. (See

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<sup>1</sup> All further statutory references are to the Probate Code unless noted. This record does not show that this probate action was ever consolidated or coordinated with the family law action, *In re Marriage of Slavin* (Super. Ct. San Diego County, 2006, No. D500225) (the divorce case). The procedural status of that divorce case is unclear from this record, which arises from the probate action.

*Christin v. Superior Court* (1937) 9 Cal.2d 526, 533 [definition of impossibility].)

Appellants further argue the probate court should not have allowed Respondent to act as a real estate agent listing the property for sale on behalf of herself as the titleholder.

We first evaluate the appealability of the enforcement order, which implements the previous order that approved the agreement (the approval order), but without designating it to be the equivalent of a "judgment," according to the terms of Code of Civil Procedure section 664.6. The agreement expressly refers to the procedures of Code of Civil Procedure section 664.6 and provides that the probate court approving the agreement retained jurisdiction to enforce it. For purposes of applying that statutory provision, we are satisfied that the enforcement order amounts to a postjudgment order that followed a proceeding that finally resolved the issues pending between the parties, so that as properly modified and amended, the enforcement order is an appealable one. (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1183 (*Hines*) ["Absent a formal entry of judgment, an appellate court may amend an order to include a judgment if the effect of the order is to finally determine the rights of the parties in the action."]; see pt. I, *post*.)

On the merits, the record supports the probate court's interpretation of this agreement, and the court had an adequate basis in the evidence to determine that Appellants had breached the terms of the agreement. The enforcement order appropriately allows the parties to adhere to the provisions in the agreement allowing sale of the property. We affirm the enforcement order, as it is modified and amended to specify that the signed and approved settlement agreement between the parties is

tantamount to a judgment for purposes of applying Code of Civil Procedure section 664.6.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. Creation of Trust; Filing of Probate Petition; Global Settlement Agreement*

In 1998, the Trust was created by Respondent as the trustor with the agreement of her then-husband, Randall. They have two sons, Parker and Tyler (now the co-trustees and young adults) and a daughter, (a minor; together, the offspring), who are the beneficiaries of the Trust. Respondent also served as the trustee, and the subject property was purchased by the Trust as the family residence in 1999. Randall and Respondent refinanced the property and the Trust quitclaimed the property to Respondent in 2001. Respondent's loan on the subject property from Bank of America (the lender) has been in default off and on for many years.

In 2006, Respondent and Randall began their contentious divorce case. In 2008, Parker and Tyler brought a probate court petition for instructions to remove Respondent as the trustee and appoint a successor, on grounds that she had breached her fiduciary duty by misappropriating Trust property and failing to pay its property taxes. (§ 17200.) In November 2009, the probate court granted the petition, first appointing an independent trustee, but after six months, named Parker and Tyler as co-trustees. The offspring were still living in the subject property, along with Randall.

Randall and Respondent continued to litigate the dissolution and Trust matters, and Randall filed lis pendens in the divorce proceedings. The property taxes had been in default since at least 2008, and the lender was pursuing foreclosure proceedings on the

loan. In May 2010, Randall negotiated with the lender to modify the loan, but Respondent did not agree and the modification was not processed. Respondent, who is a real estate agent, listed and planned to sell the family residence, with title listed in her name.

In July 2010, the family court issued orders authorizing the sale and requiring Randall and the offspring to leave the subject property so it could be marketed and sold, but apparently the orders have not been enforced.<sup>2</sup>

In September 2010, Appellants and Respondent entered into a global settlement of the probate and family court petitions, providing in relevant part for Randall and the offspring to remain in the subject property while he was modifying the loan, and for Respondent to transfer title to the Trust when this was accomplished. Respondent conceded in the agreement that the Trust has an ownership interest in the subject property. The agreement states in paragraph 6 that if the loan were not brought current and modified within the 180 days allowed after the execution of the agreement, the time "shall be reasonably extended by all parties to account for delays caused by the lender's modification approval process."<sup>3</sup> The lender was not a party to the agreement.

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<sup>2</sup> The only family court orders in the record date from April 14 and July 8, 2010, authorizing Respondent to sell the subject property, and granting kick out orders regarding Appellants. This appellate matter must be resolved upon the record provided from the probate court proceedings.

<sup>3</sup> The parties continue to dispute when the 180 days' extension should begin to run, from the dates of the execution by the parties, or the October 5, 2010 date of approval by the probate court, or some unspecified date of approval by the family court. This controversy need not be resolved for purposes of review. There are also controversies

Alternatively, refinancing to remove Respondent's name from the loan within two years was allowed by the agreement's paragraph 7.

Under paragraphs 11 and 13, Appellants would be deemed to be in breach of the agreement if the mortgage was not kept current, the property taxes were not paid, and the loan was not modified within 180 days. Upon a failure by Appellants to cure the breach after notice, the property was to be sold, with Respondent acting as the real estate agent.

In September 2010, Appellants brought a petition in probate court for approval of the agreement, and to modify the Trust by stipulation, to correct the successor trustee information and to make other agreed-upon technical changes. The probate court approved the agreement in October 2010 (the approval order), including its provision that the court would retain jurisdiction for enforcement purposes, under Code of Civil Procedure section 664.6. Although the parties represent that the family court also approved the agreement, the record does not reflect such an order of approval.

#### *B. Motion to Enforce Settlement Agreement*

In May 2011, Respondent sought an ex parte order to compel Appellants' compliance with the agreement and their cooperation with the sale of the subject property. Appellants filed opposition and the matter was set for a noticed hearing on June 10, 2011. Both the supporting and opposing papers included declarations making many accusations of wrongdoing by the other side, and numerous exhibits about each

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about separate sums payable to Respondent from Randall under the agreement, but they are beyond the scope of this appeal.

others' supposed lack of cooperation and nonadherence to the agreement's terms and deadlines.

Respondent, the moving party appearing in pro per, told the court she still held sole title on the property, even though the Trust owned the property, and the 2001 marital refinancing deal giving her title was done so that Randall could evade his creditors. She argued that the parties always intended that the Trust be used for family expenses, and she did so while trustee. As of April 2010, the family court in the divorce case had tentatively treated the subject property as belonging to Respondent, not to the Trust. The September 2010 agreement provided for the Trust to have an ownership interest and for her to transfer title when the loan was modified.

As of the June 2011 hearing date, the loan was still in default (over \$140,000, from 25 months of nonpayment, some of which predated the settlement agreement), and Appellants' 180 days to modify it had expired. Randall was also litigating his own bankruptcy, but no stays were in effect. In the lender's pending foreclosure efforts from the past three years, it had recently sent a defective foreclosure notice and then reissued it, giving the Trust a few more months to modify the loan. The lender had paid the back property taxes, which almost doubled the monthly mortgage payment amount (now \$5,200). Randall continued to claim Respondent should still be responsible for the unpaid taxes that had accrued before the September 2010 agreement.

At the hearing, the main dispute was over the adequacy of Randall's efforts to modify the loan. He reapplied after his May 2010 application fell through when Respondent refused it, but then the lender denied the application in May 2011 as

repetitive ("gaming the system"). Randall contended Respondent had prevented him from achieving the modification to comply with the agreement, by withdrawing her consent for him to work with the bank. Respondent argued Randall had gone beyond her permission, by changing the contact information with the bank.

The probate court heard argument and also had both Randall and Respondent Shereen sworn as witnesses, to give their accounts of the problems in the deal. According to the attorney for Appellants, Randall had recently sent postdated checks to the bank (lender) along with a letter of intent by a private lender, but the bank had not accepted them, preferring current cashier's checks. Appellants contended it was not advantageous to sell the property at a "fire sale price," and more time should be granted, under their interpretation of the settlement agreement.

Respondent argued she did not have to quitclaim her interest to the Trust until escrow closed in the third party sale she was attempting to arrange (or in another sale), and she said the Trust ownership issue was not actually settled in court, although she admitted she had agreed to the settlement as a whole. The probate court responded that the Trust was to be the seller of the property, as provided in the agreement, and Respondent should fix that title problem. The court acknowledged that some of the agreed-upon provisions of the agreement were less than clear, but stated that both parties would be equally required to abide by it.

The probate court specifically inquired of each party whether the provisions of paragraph 11 of the settlement agreement had been complied with, and then determined that Randall and the Trust were in breach of paragraph 11.1, requiring the loan to be kept

current; paragraph 11.2, requiring property taxes to be paid; and paragraph 11.4, modifying the loan within 180 days of execution of the agreement, which time period had passed. The court rejected Appellants' argument that it had been impossible for them to accomplish the modification because of Respondent's interference, and in any case, such an argument did not account for the other demonstrated breaches of other provisions of the settlement agreement, concerning nonpayment of the mortgage and taxes. Under paragraph 11.7, the receipt of a notice of foreclosure allowed paragraph 13 of the agreement to become operative, enabling Respondent to market and sell the property. The court determined that Respondent had given Randall adequate notice of the breach, as required by the agreement.

The probate court's written ruling stated that Randall and the co-trustees were in breach of the settlement agreement, by failing to keep the mortgage payments current on the loan, failing to keep the property tax payments current, and failing to modify the loan. A notice of foreclosure had been received from the lender, which also constituted a breach of the agreement by Appellants. The court required Appellants to vacate the property, and first to make it available for inspections for the pending sale that Respondent had arranged. The court ordered all parties to cooperate with the sale process pursuant to the agreement's terms.

Appellants filed notices of appeal in this case of both the June 2011 enforcement order, as formalized in July 2011, and also the August 2011 order requiring them to file an undertaking. (§§ 1300, 1304; Code Civ. Proc., § 904.1, subd. (a)(10).)<sup>4</sup>

## DISCUSSION

Appellants seek de novo review of the probate court's interpretation of the agreement, by referring to some unspecified ambiguity in the agreement as operating in their favor (apparently concerning the reasonable extension of time). They claim on appeal that we should reverse the enforcement order with directions to the probate court to interpret the agreement as giving Appellants authorization to further negotiate with the lender, and to grant an extension of time to do so.

We first address an issue of appealability, then set forth standards for interpreting the settlement agreement and apply them to this record.

### I

#### *APPEALABILITY*

This appeal of the enforcement order is based upon the court's order approving the settlement agreement. The agreement provided that the parties would not object to court approval, and enforcement under Code of Civil Procedure section 664.6 was anticipated. As relevant here, Code of Civil Procedure section 664.6 provides that parties to pending

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<sup>4</sup> The issues concerning the amount of the undertaking were hotly disputed in the probate court and in motions in this court, including the appropriateness of Randall's incurring more private debt on the property, but those issues are not directly raised in this appeal. We previously allowed Appellants to reinstate the appeal after their opening brief was filed late. We also granted Respondent's requested calendar priority, to place the matter on the first available calendar for oral argument.

litigation may stipulate to settlement of a case, and "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." (Italics added.) In this appellate record, only two incomplete copies of the approval order (dated Oct. 5, 2010) are provided, without any indication that a formal judgment implemented the order.

Under Code of Civil Procedure section 904.1, subdivision (a)(10), an appeal may be taken "[f]rom an order made appealable by the provisions of the Probate Code. . . ." Section 1304, subdivision (a) of the Probate Code authorizes appeals from orders in trust matters, such as orders that deal with the internal affairs of a trust pursuant to section 17200. The statutorily defined class of appealable orders in probate matters does not specify a "judgment," as contemplated by Code of Civil Procedure section 664.6, since ordinarily, probate matters are resolved through orders. (§ 1300 et seq.)

In any case, "it is well established that a probate order's appealability is determined not from its form, but from its legal effect." (*In re Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 755; *Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1125–1126.) An appellate court will deem probate orders to constitute "a final judgment for purposes of appeal when . . . they have all the earmarks of a final judgment." (*Miramontes-Najera, supra*, at p. 755.) Where a challenged order is the only judicial ruling regarding the subject settlement, and "nothing remains for judicial consideration," and there is "no other avenue for appellate review," then such circumstances justify treating the order as an appealable final judgment. (*Ibid.*)

We accordingly determine that the underlying approval order was equivalent to a final judgment, and should be treated as such for purposes of evaluating the subsequent enforcement order. The rights of the parties in the probate action were determined with finality. Even without any formal entry of judgment, "an appellate court may amend an order to include a judgment if the effect of the order is to finally determine the rights of the parties in the action." (*Hines, supra*, 167 Cal.App.4th 1174, 1183.) We accordingly modify the enforcement order and will require the probate court to amend it, to designate the approval order as an appealable judgment. We next evaluate the merits of the enforcement order.

## II

### *APPLICABLE STANDARDS*

As explained in *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810 (*Weddington*), an order enforcing a settlement agreement pursuant to the summary procedures of Code of Civil Procedure section 664.6 is reviewed under the following standards:

"Factual determinations made by a trial court on a section 664.6 motion to enforce a settlement must be affirmed if the trial court's factual findings are supported by substantial evidence. [Citations.] Other rulings are reviewed de novo for errors of law." (*Weddington, supra*, 60 Cal.App.4th 793, 815.)

Contract principles apply to such agreements: "A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. [Citation.] An essential element of any contract is 'consent.' [Citations.] The

'consent' must be 'mutual.' [Citations.]" (*Weddington, supra*, 60 Cal.App.4th 793, 810-811.)

A settlement is valid, binding, and enforceable under Code of Civil Procedure section 664.6 if the parties agreed to all material settlement terms. (*Hines, supra*, 167 Cal.App.4th 1174, 1182.) "The court ruling on the motion may consider the parties' declarations and other evidence in deciding what terms the parties agreed to, and the court's factual findings in this regard are reviewed under the substantial evidence standard." (*Ibid.*)

In general, a judge who is familiar with a particular settlement, through the conduct of previous proceedings relating to it, "may consult his or her memory" in ruling on the enforceability of the settlement. (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1460.) This probate judge heard both Appellants' petition to approve the settlement agreement, and Respondent's motion to enforce it. The court's factual findings and legal rulings in those respects are entitled to deference on appeal, to the extent they are supported by substantial evidence.

In addition to having the approved written agreement before it, the probate court took the sworn testimony of Randall and Respondent to explain their respective understandings about the settlement duties and how they should perform them. This amounted to admission of extrinsic evidence that was offered to show whether the document's terms were reasonably susceptible of the particular meanings promoted by the parties. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912-913 (*Morey*)). "[W]here the interpretation of the contract turns upon the credibility of conflicting extrinsic

evidence which was properly admitted at trial, an appellate court will uphold any reasonable construction of the contract by the trial court." (*Id.* at p. 913.)

### III

#### *INTERPRETATION OF AGREEMENT; RULING ON BREACH*

Appellants generally rely upon Civil Code section 1511 to argue that any lack of performance of the agreement on their part was excused by the manner in which Respondent interfered with their May 2011 negotiations with the lender, or her earlier failure to cooperate with the modification of the loan that Randall sought in May 2010, before the agreement for settlement was reached. Civil Code section 1511, subdivision 1, provides that a party's prevention of performance by another party excuses the nonperformance. (*Hines, supra*, 167 Cal.App.4th 1174, 1184-1185.) Although Civil Code section 1511 appears in the portion of the Civil Code relating to extinction of obligations (tit. 4, Civ. Code, § 1473 et seq.), specifically, chapter 3, "Prevention of Performance or Offer," Appellants are not arguing that the settlement agreement was extinguished, merely that they did not breach it. They combine their argument that they were prevented from performing the agreement with their claim that Respondent's conduct estops her from enforcing the same agreement. (See *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 500 [function of estoppel].) However, it was Appellants who originally brought the petition in probate court for approval of the agreement, and both parties apparently desire to enforce it, but in different ways.

Appellants' claim of excuse from performance is premised on alleged circumstances of impossibility or impracticability that were caused both before and after

the agreement was reached, when Respondent withdrew their authorizations to talk to the lender. Appellants cite to the traditional equitable principle discussed in *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 299-300, that the law will not require impossibilities. (Civ. Code, § 3531.) "Impossibility means not only strict impossibility but also impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." (*Board of Supervisors, supra*, at pp. 299-300.) Modern case law will "recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense." (*Christin v. Superior Court, supra*, 9 Cal.2d 526, 533; see 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 830, pp. 918-919.)

These commentators further explain that when this contract defense is based upon "impossibility 'in the nature of things' [Civ. Code, § 1597] . . . the impossibility must be in the nature of the thing to be done ('objective impossibility'), and not in the inability of the promisor to do it." (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 830, p. 918; italics omitted.) Further: "Where the promise is to do one of two or more things, in the alternative, and one becomes unlawful or impossible, the contract will usually be interpreted to impose a duty to do the act that is possible. In other words, impossibility in an alternative contract ordinarily destroys merely the freedom of choice. [Civ. Code, § 1451; citations.]" (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 834, p. 922; italics omitted.)

Basic contract principles provide: "A person cannot take advantage of his or her own act or omission to escape liability; if the person prevents or makes impossible the

performance or happening of a condition precedent, the condition is excused." (1 Witkin, Summary of Cal. Law, *supra*, § 821, pp. 910-911, and cases cited; italics omitted.)

However, "if the contract expressly allows the defendant's act that prevents performance of the condition, the plaintiff has no cause for complaint, because he or she has assumed the risk." (*Ibid.*)

In this light, these issues boil down to whether substantial evidence supports the court's key findings, as they are summarized in the reporter's transcript: Randall and the Trust engaged in conduct that was in breach of the agreement's paragraph 11.1, requiring the loan to be kept current; paragraph 11.2, requiring property taxes to be paid; and paragraph 11.4, modifying the loan within 180 days of execution of the agreement, which time period had passed. The court was not required to accept Appellants' argument that it had been impossible for them to accomplish the modification as a result of Respondent's "interference," in light of other evidence that independently, they had made ineffectual attempts to provide postdated checks to the lender, contrary to its requirements, and they had supplied only an informal letter of intent from a proposed lender to establish that they would be able to bring the loan current.

The agreement did not prevent Appellants from either modifying the existing loan or refinancing through another lender, but the record shows they were unable to accomplish that, nor did they show any extensive efforts were made to comply with their obligations. To claim the excuse of "impracticability," they had to demonstrate there was "extreme and unreasonable difficulty, expense, injury or loss involved." (*Board of Supervisors v. McMahon, supra*, 219 Cal.App.3d at pp. 299-300.) The probate court

could reasonably have interpreted the agreement as allowing or requiring Appellants to take other, alternative steps to avoid falling into breach of the agreement, and even though it was not objectively impossible to do so, they did not. We will uphold the probate court's construction of the agreement's terms and its factual findings where they are reasonable and supported by the evidence. (*Morey, supra*, 64 Cal.App.4th 904, 912-913; see 1 Witkin, Summary of Cal. Law, *supra*, § 834, pp. 921-922.)

With respect to the provision in the agreement that the 180 days allowed "shall be reasonably extended by all parties to account for delays *caused by the lender's modification of approval process*," the probate court noted that the provision was confusing and did not explain whether other delay, caused by the parties, was also excused. The court did not interpret the agreement as excusing these particular delays as testified to by the parties. On this record, Appellants cannot demonstrate why the court would have been required to determine that such delays were reasonable or fell within the scope of that extension clause in the agreement.

At the hearing, the probate court made a separate finding that Appellants' claim of impossibility in modifying the loan was inadequate in any case, because that argument failed to account for the other demonstrated breaches of the agreement, concerning nonpayment of the mortgage, property taxes and other sums. Under paragraph 11.7, the recent receipt of a notice of foreclosure allowed paragraph 13 of the agreement to become operative, and this appropriately permitted Respondent to market and sell the property. The court ruled that Respondent had given Randall adequate notice of the breach, as

required. This was also a reasonable construction of the agreement by the court. (*Morey, supra*, 64 Cal.App.4th 904, 912-913.)

Under the applicable standards, substantial evidence supports the probate court's conclusion that the agreement was sufficiently definite to spell out the parties' obligations, "and to determine whether those obligations have been performed or breached. [Citations.] Stated otherwise, the contract will be enforced if it is possible to reach a fair and just result even if, in the process, the court is required to fill in some gaps. [Citation.]" (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623.) On the record before it, the probate court had an adequate basis to enforce the terms of the agreement as it was written, even though some of its agreed-upon provisions were less than clear, as the court acknowledged.

Despite our conclusions that Appellants have failed to support their appellate claims of impossibility or impracticability, as excuses for their failure to abide by the terms of the agreement, we seek to emphasize that we do not condone the extreme lack of cooperation among all of the parties, including Respondent, in dealing with their mutual financial problems. The probate court appropriately directed Respondent to fix the problem of attempting to sell property that was still in her name, since she had not permitted the lender or Appellants to document her previous concession in the agreement that the Trust has an ownership interest in the subject property, within two years after the agreement was reached, when her name was to be removed from the loan. We take the record as we find it, and leave the further implementation of the agreement, which

constitutes a judgment, to the discretion of the probate court. (*Hines, supra*, 167 Cal.App.4th 1174, 1183.)

#### DISPOSITION

The enforcement order is affirmed as modified with directions to the probate court to prepare an amended enforcement order that designates in its paragraph 3 that the signed settlement agreement is court approved and equivalent to a judgment for purposes of applying Code of Civil Procedure section 664.6. Each party shall bear its own costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.