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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of MICHAEL and CYNTHIA
HARVEY.

MICHAEL STEVEN HARVEY,

Respondent,

v.

CYNTHIA MARIE HARVEY,

Appellant.

F070672, F071535

(Super. Ct. No. 457566)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Loretta Murphy Begen, Judge.

Law Offices of Goss & Goss, Mark A. Goss, and Michael A. Goss for Appellant.
Shore, McKinley & Conger, John H. McKinley, and Aaron S. McKinney;
Jay-Allen Eisen Law Corporation and Jay-Allen Eisen for Respondent.

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This is a consolidated appeal from interlocutory orders of the Stanislaus County Superior Court.

Respondent Michael Steven Harvey and appellant Cynthia Marie Harvey¹ married on February 14, 1988. Three years later, Michael, a chemist, founded Enviro Tech Chemical Services, Inc. (ETCS), a chemical manufacturing company. By 2010, the Harveys jointly owned 825 shares in ETCS, amounting to 68.9 percent of the outstanding common stock. On March 14, 2011, they signed a “Shareholder Buy-Sell Agreement” (some capitalization omitted; hereafter Agreement), which provides, inter alia, for the transfer of Cynthia’s interest in ETCS shares to Michael in the event of a divorce.

On November 10, 2011, Michael petitioned for dissolution of marriage. The superior court granted his request to bifurcate the issue of the Agreement’s enforceability. A bench trial on the matter commenced July 10, 2013. The parties stipulated the Agreement advantaged Michael, raising a presumption he exerted undue influence over Cynthia. Michael also moved to exclude as irrelevant testimony from Cynthia’s expert witness. In a September 17, 2014, statement of decision, the court concluded Michael rebutted the presumption of undue influence, granted his motion to exclude expert testimony, and upheld the Agreement.

Thereafter, Cynthia filed a request for order (RFO)² seeking a ruling that her interest in the ETCS shares was to be appraised in accordance with the Family Code rather than the valuation method described within the Agreement.

¹ Henceforth, where appropriate, we identify the parties individually by their first names to avoid confusion. No disrespect is intended. (*Estate of Austin* (2010) 188 Cal.App.4th 512, 514, fn. 1; *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

² In a family law proceeding, an RFO is the equivalent of a motion or notice of motion. (See Cal. Rules of Court, rule 5.92(a)(1)(A) [Request for court order; responsive declaration]; see also Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2016) ¶ 5:290a, p. 5-147 [“Although this terminology is unique to family law practice, it does not effect any change in motion practice.”].)

In an April 23, 2015, statement of decision, the superior court denied her motion holding Section 8 (Sale on Marital Dissolution or Separation of Shareholder) of the Agreement requires the shares to be valued pursuant to the formula set forth in Section 10 of the Agreement.

On appeal, Cynthia contends the superior court erred by (1) finding Michael rebutted the presumption of undue influence; (2) granting Michael's motion to exclude her expert witness's testimony; and (3) denying her RFO. Pursuant to rule 5.392(b), of the California Rules of Court, the superior court granted certification for immediate appellate review. We granted Cynthia's motions to appeal and, on our own motion, consolidated the actions.

Michael moves to dismiss this appeal on the basis Cynthia waived her right thereto.

We deny Michael's motion to dismiss this appeal and affirm the superior court orders.

STATEMENT OF FACTS

I. Pertinent provisions in the Agreement.

The Agreement reads, in part:

“Section 8. Sale on Marital Dissolution or Separation of Shareholder.

“A. Provisions for Divorce. For purposes of this Section 8, MICHAEL HARVEY shall be deemed to be the owner of the Shares owned by the [Michael and Cynthia] Harvey [Revocable] Trust [dated December 20, 2010].

“Any decree of dissolution, separation maintenance agreement, or property settlement between a Shareholder and his or her respective spouse shall include either of the following two (2) provisions:

“(1) A provision that the Shareholder shall purchase from his or her respective spouse and the spouse shall sell to the Shareholder, upon the terms and conditions provided in this Section, every interest the spouse has in the Shareholders' shares in [ETCS]; or

“(2) A provision granting to the separated or divorced Shareholder, his or her respective spouse’s (or former spouse’s) entire interest in the shares of [ETCS] as a part of the division of the community property of the marriage pursuant to the . . . Family Code.

“**B. Option To Buy Spouse’s Interest.** If neither of the above provisions is included, and a decree of dissolution, a separate maintenance agreement, or a property settlement between Shareholder and his spouse grants the spouse shares in [ETCS], then the divorced or separated Shareholder shall be required to purchase from his spouse or ex-spouse (‘spouse’) and the spouse shall be obligated to sell, the shares of [ETCS] granted to him pursuant to the decree of dissolution, separate maintenance agreement, or property settlement agreement at the price set forth in Section 10 and upon the terms and conditions set forth in Section 11 of this Agreement. Such sale shall close within the later of sixty (60) days after the date of the decree of dissolution, separate maintenance agreement, or property agreement granting shares to the spouse is executed. If such sale does not close within that period, the divorced Shareholder shall provide notice of such failure to the Secretary of [ETCS] and the other Shareholders.

“**C. Effect of Failure To Purchase.** If the Shareholder fails to purchase the shares from his or her spouse within the period specified in the foregoing subsection, first [ETCS] and then the other Shareholders shall have the option to purchase any or all the shares of the divorced Shareholder and the shares of the spouse of the divorced Shareholder. Such option shall be exercisable from the date notice of the existence of such option is received by [ETCS] and the other Shareholders and in accordance with the price and terms set forth in Sections 10 and 11, and in the time periods and manner of exercise as set forth in Sections 5.B. through 5.G. of this Agreement with such notice constituting a ‘Triggering Event.’

[¶] . . . [¶]

“**Section 10. Valuation.** The purchase price to be paid for the Shares which are subject to purchase shall be the fair market value of the interest in [ETCS] which are represented by such Shares, all as determined under this paragraph. For purposes of this paragraph, the fair market value of the interest in [ETCS] which is subject to purchase shall be agreed on by the selling Shareholder or his or her successor in interest and [ETCS] and remaining Shareholders within thirty (30) days of the event giving rise to the right to purchase (the ‘Negotiation Period’). If the parties do not agree on a new value within the Negotiation Period, the value of the selling Shareholder’s interest (and the value represented by the Shares which are

subject to purchase) shall be determined by appraisal as follows: The remaining Shareholder (on the one hand) and the selling Shareholder or his or her successor in interest shall each appoint an appraiser to appraise the Shares which are subject to purchase within fifteen (15) days after the expiration of the Negotiation Period. If either party fails to select an appraiser within the time required by this Section, the fair market value of the Shares which are subject to purchase shall be conclusively deemed to equal the appraisal of the appraiser timely selected by the other. The two appraisers as timely designated shall confer within five (5) days thereafter to designate and appoint a third appraiser who shall be the 'Final Arbitrator Of Value' if the same is required hereunder. If two appraisers are properly appointed, they shall confer to agree on a value. If the two appraisers cannot agree on a value within ninety (90) days after the expiration of the aforementioned ten (10) day period they shall each provide a written designation of their determination of value of the shares which are subject to purchase and the following provisions shall apply:

“(i) if the difference between the lower determination of value and the higher determination of value by the two appointed appraisers is less than 15%, the average of the two appraisals shall be the final determination of value;

“(ii) if the difference between the lower determination of value and the higher determination of value by the [two appointed appraisers] is greater than 15%, the Final Arbitrator of Value shall determine which of the first two (2) appraiser[s] most closely approximates the actual value of the shares which are subject to purchase within fifteen (15) days thereafter based on the information provided by the two previous appraisers and whose determination as to the value of the shares which are subject to purchase shall be binding on all parties. The Final Arbitrator of Value shall not have discretion to select a value other than one of the two values provided by the first two appraisals hereunder.

“The selling Shareholder and [ETCS] shall share equally the fees and expenses of the appraiser jointly named by the parties, but each party shall be responsible for the fees and expenses of any appraiser named solely by that party. Each party shall bear their own expenses in presenting evidence to the appraisers. In determining the purchase price, the appraisers appointed under this Agreement shall consider all opinions and relevant evidence submitted to them by the parties, or otherwise obtained by them, may consider appropriate discounts or bonus values represented by the interests which are subject to purchase, and shall set forth their determination in writing together with their opinions and the considerations

on which the opinions are based, with a signed counterpart to be delivered to each party. Real estate and improvements shall be valued at fair market value, machinery and equipment shall be valued at replacement cost or at fair market value, whichever is lower; inventory shall be valued at cost or market, whichever is lower; receivables shall be valued at their face amount less an allowance for uncollectible items that is reasonable in view of the past experience of [ETCS] and a recent review of their collectibility; all liabilities shall be deducted at their face value; and a reserve for contingent liabilities shall be established. Any appraisal hereunder shall be as of the last day of the month which is prior to the month in which the Triggering Event or other event giving rise to an option or mandatory obligation to purchase hereunder. The appraiser shall use such appraisal standards as are customary for a business similar to [ETCS].”

An accompanying “Spousal Consent to [the Agreement]” (some capitalization omitted), signed by Cynthia on March 14, 2011, reads:

“I acknowledge that I have read the foregoing Agreement and that I know its contents. My spouse is a party to that Agreement. To the extent that I own any community property interest, quasi community property interest, or any other interest in [ETCS], now or in the future, I agree to be bound by the terms and provisions of the Agreement.

“I am aware that pursuant to the provisions of the Agreement, my spouse, and in certain cases, I, agree to sell some or all of the interest of my spouse or my interest, if any, in [ETCS] on the occurrence of certain events. I hereby consent to the sale, approve of the provisions of the Agreement, and agree that all interests that may now or hereafter be held by my spouse and myself to the extent that an interest in [ETCS] is community property or to the extent I may acquire an interest in [ETCS], are subject to the provisions of the Agreement and that I will take no action at any time to hinder the operation of the Agreement. If I become the owner of an interest in [ETCS] at any time in the future, I further acknowledge that my interest will be subject to all the terms and conditions of this Agreement and that I will be obligated to hold and sell any interest in [ETCS] pursuant to this Agreement.

“I have been advised to seek independent legal advice for myself as an individual from other than Petrulakis Jensen & Friedrich, LLP, a California limited liability partnership, and any of its attorney employees, with respect to my signing this consent. I understand that it would be wise for me to enter into this consent only after obtaining independent legal advice. I enter into this consent after very careful reflection and

contemplation. If I enter into this consent without having sought independent legal advice, I have done so knowing of the risks associated with such action and have intelligently assumed such risks to avoid incurring legal fees, and for other reasons. Such decision to avoid incurring such fees at the expense of incurring such risk is a personal decision based upon a variety of factors.”

II. Bench trial.

a. Michael’s testimony.

Michael, president and chief executive officer of ETCS, testified he and Cynthia contemplated establishing an estate and succession plan sometime in late 2009 or early 2010. Their primary concerns were to safeguard their personal wealth and avoid business disruption in case something happened to Michael or another shareholder. The Harveys consulted Burt Clements, a financial representative specializing in insurance and estate and business planning. Clements advised them to hire an attorney and recommended, inter alios, Matt Friedrich, an estate planning specialist. Friedrich was retained following a face-to-face interview with Michael.

The Harveys and Friedrich met multiple times between July and September 2010. They considered preparing an agreement incorporating “triggering events.” One such triggering event was divorce. Michael testified:

“[Friedrich] said that he has done a lot of these agreements before, and he wants to do what the clients want to do. And usually with a company like ours where we had a majority stake in a thriving company and we wanted to preserve the company, . . . in the event of a dissolution or divorce, . . . in order to avoid the disruption in the company and possible sale or disintegration of the company, . . . the shares normally go to one spouse or another. [¶] . . . [¶] . . . [H]e asked us if we wanted to include that type of approach. [¶] . . . [¶] [Cynthia] and I discussed it and we agreed yes.”

On December 9, 2010, Michael received a copy of the draft Agreement in the mail. He also received this draft via e-mail, which he printed and placed on Cynthia’s desk at work. Between December 9 and December 20, 2010, Michael asked Cynthia whether she had “any issues, questions, [or] problems” with the draft Agreement. She

replied, “[N]o.” On the other hand, Michael found “a couple minor typos” and asked Friedrich to fix them.

On December 20, 2010, the Harveys visited Friedrich’s office to sign estate planning documents, namely their revocable trust, irrevocable trust, wills, springing powers of attorney, and health care directives. In addition, Michael and Cynthia each received a copy of the draft Agreement for review, which included the spousal consent form. Michael remembered Friedrich talked about the draft Agreement for five to 10 minutes:

“Keeping in mind . . . our objective was to do the estate planning, [Friedrich] went over the [Agreement] in outline form. It was basically header by header, section by section. And he didn’t get into a line-by-line description at all. We just listened and he described to us what was in there based on all of our discussions from the last few meetings.”

Friedrich did not want the Harveys to sign the draft at that point so they would have “the opportunity to see another attorney and get [his or her] opinion because [the Agreement] affected [them] . . . financially, both as a couple and individuals.”

More than once between December 20, 2010, and March 14, 2011, Michael asked Cynthia whether she had read the draft Agreement, had any questions or concerns, and was “going to see another attorney to get another point of view.” Cynthia stated she “didn’t have time” to either read the agreement or confer with a separate attorney.

On March 14, 2011, the Harveys signed the Agreement. At the time, Cynthia did not appear confused or express any reservations about the Agreement. She did not indicate that “she did not want to sign the [Agreement] because she wanted to get independent counsel[.]”

Michael described Cynthia’s demeanor during the aforementioned meetings with Friedrich:

“She was very engaged. She didn’t fall asleep. She paid attention, asked intelligent questions, . . . what about this, what about that. And she was involved in the process. And when [Friedrich] would ask us a question as

to what direction we wanted to go as a couple, typically we would talk about it: [Cynthia], . . . how do you feel? Which one of these? Do you want to go, you know, which direction? And I would agree or disagree and then eventually would give him an answer.”

b. *Friedrich’s testimony.*

Friedrich and the Harveys met on at least five occasions in 2010: once on July 7th, once on September 16th, once on November 17th, once on November 29th, and once on December 20th. At the July 7, 2010, meeting, they discussed various aspects of succession planning:

“We talked about what would you want to happen with the business if somebody passed away. We talked about the fact that given the then current estate tax law, . . . there would be a significant amount of tax to pay if somebody passed away. We talked about the possibility that a co-owner could pass away or potentially sell their shares to somebody else

“So we talked about the business both in the context of what would happen in an estate tax scenario or death scenario, as well as other events that would cause a transfer of shares. [¶] . . . [¶]

“. . . We talked about triggering events, a transfer by gift, a transfer by sale, what categories or classes of people would be permissible transferees in those circumstances. A transfer that occurred through a bankruptcy court proceeding, a transfer that occurred by divorce, a transfer that would occur by death. Perhaps somebody putting a lien against their shares. So that’s the range I think of what we talked about.”

At one of the aforementioned meetings, Friedrich talked about a potential conflict of interest with respect to the Agreement:

“I don’t know if we discussed this at the particular July 7th meeting, so let’s be clear there, but I know that we discussed that in preparing the [Agreement], there are lots of different triggering events that occur and that their interests may not be aligned in terms of what they might want to happen on certain events. And so I have a conflict in that as well. And there’s also various assumptions that I make after my discussion in terms of preparing the draft and then discussing it with them. And, you know, one of those areas where they have a distinct conflict is in the event of a divorce.”

On December 9, 2010, Friedrich mailed and e-mailed a copy of the draft Agreement to Michael. On December 20, 2010, Friedrich and the Harveys reviewed the draft, including the spousal consent form. Friedrich recalled:

“I went through the [draft Agreement] . . . section by section with [Michael and Cynthia each] having a copy [of] . . . and flipping through the document. Not reading every section word for word, but explaining the purpose of each section and how it worked and what some of the alternative provisions could be if they wanted to . . . handle things differently than I had handled them in the draft.”

Friedrich also advised the couple to seek outside counsel. He specified:

“I did have that discussion at the time we reviewed the actual draft of the [Agreement] because at that point we had already gone through the events. I prepared a draft; there was something for them to physically look at. We went through the agreement which included a discussion of what would happen if there was a divorce and the need for a spouse to sign essentially an acknowledgement page that they should seek separate counsel because I can’t represent them in that regard. [¶] . . . [¶]

“ . . . [W]hen I discussed the divorce context and the triggering event that . . . [Michael] would be the . . . shareholder who has the opportunity to make the purchase, I discussed that it should be reviewed by other counsel. . . . [¶] . . . [¶] . . . [Michael] and [Cynthia] . . . could decide to handle it differently. . . . [A]s I discussed with [Cynthia] with the estate plan, . . . there’s no privilege between the two of us and I don’t represent one versus the other. And they had a desire to have that event be a triggering event in the agreement, but . . . it’s not something I can represent them on in terms of . . . how that works.”

Following the December 20, 2010, meeting, Friedrich made minor changes to the Agreement, such as correcting shareholders’ names. “[P]rovisions relating to marital dissolution, valuation, and payment change” remained the same “from the time that the initial draft was sent on December 9th until it was signed . . . on March 14th, 2011[.]”

Over the course of the estate and succession planning, Friedrich noted Cynthia was “engaged in the process,” “understood the substance and the context of the various meetings,” and “was generally understanding [of] what was going on.” He never

observed Michael “exerting any pressure . . . in regard to th[e] draft [A]greement” or otherwise “being aggressive or demanding towards [Cynthia.]”

c. Cynthia’s testimony.

Cynthia, who began as a file clerk and receptionist for ETCS, subsequently created the company’s human resources department. Her responsibilities included hiring and firing workers, signing paychecks, managing the front office staff and customer service representatives, implementing harassment prevention and substance abuse testing programs, negotiating contracts with health care, dental, and vision providers, administering the 401(k) plan, and handling other personnel-related matters.

According to Cynthia, Friedrich did not go over the draft Agreement at the December 20, 2010, meeting, did not inform her about a potential conflict of interest, and did not advise her to seek independent counsel. Between December 9, 2010, and March 14, 2011, Cynthia never discussed the terms of the draft Agreement with Michael. Furthermore, “[n]o one ever said anything to [her] about divorce or purchasing [her] shares.”

On March 14, 2011, Cynthia was asked by Michael to stop by the office and sign “a mountain of paperwork,” including the Agreement. She “didn’t read the documents because . . . [she] felt that . . . anything that was drawn up at that point was for [her and Michael] and [their] best interest for the company.” Cynthia “didn’t feel guarded” and “trusted the team that [they] had hired to protect [her].” In addition, she was preoccupied with other concerns, including the recent death of her mother and the poor health of her father, her father-in-law, and Michael himself.

Cynthia admitted she generally read documents before signing them. She did not dispute she had an opportunity to read the Agreement before she signed it, pointing out Michael never prevented her from doing so. Cynthia conceded she signed the Agreement voluntarily and Michael did not force her to sign it.

d. *Michael's motion to exclude expert testimony.*

At a June 25, 2013, deposition, John Iacopi, a certified public accountant and Cynthia's expert witness, remarked, "I intend to testify [at the bench trial] that I believe the [Agreement] . . . is oppressive toward [Cynthia]." Iacopi detailed the grounds for his opinion.

On March 10, 2014, the sixth day of trial, Michael moved to exclude Iacopi's testimony as irrelevant, given the parties' stipulation that the Agreement advantaged Michael and the presumption of undue influence was raised. In her opposition, Cynthia asserted Iacopi's testimony on "the nature and degree of the unfair advantage obtained by [Michael] over [Cynthia]" was relevant "to the Court's determination as to whether or not [Cynthia]'s consent to [the Agreement] was freely, knowingly, and voluntarily made with an understanding of its effect." The superior court excluded Iacopi's testimony.

e. *September 17, 2014, statement of decision.*

The superior court found Michael overcame the presumption of undue influence:

"The parties in *Holliday* [v. *Holliday* (1964) 230 Cal.App.2d 622] were negotiating divorce terms prior to filing an actual dissolution petition. Both parties were familiar with the community property and neither chose to perform any appraisals. Following judgment, Wife sought to set aside the property settlement claiming that although Husband did not hide any assets from her, the value of their relative property awards was not even. Essentially, Wife argued that Husband was required to disclose both the existence and value of each community property item. The appellate court rejected this argument, noting there was no evidence Husband had failed to disclose anything that was known to him.

"With regard to the case at bar, the holding in *Holliday* implies that [Michael] did not have an affirmative duty to understand and explain every aspect of the [Agreement] to [Cynthia]. So long as he did not conceal or misrepresent any aspect of the [Agreement], the only question is whether [Cynthia] understood the facts and legal effect of the [Agreement].
[¶] . . . [¶]

"In [*Vai v. Bank of America* (1961) 56 Cal.2d 329], the parties owned over \$1.2 Million in community assets that were actively managed by Husband.

They entered into a property settlement agreement under which Wife received less than \$200,000 worth of the community assets (although she was relieved of any child support obligation for the parties' daughter). The appellate court found that Husband knowingly misrepresented the value of various community property assets. For example, he represented a vineyard as being worth \$200 an acre when he had already accepted a down payment on sale of the vineyard for \$800 an acre. Husband also convinced Wife not to engage in formal litigation and discovery by claiming he was in poor health and would not be able to take the strain. The appellate court noted that Wife was represented by counsel, but still rescinded the property settlement agreement, noting that Husband should not be permitted to use his management of the community property as a weapon to cheat Wife out of her fair share simply because she had legal counsel.

“[Cynthia] relies on this case to support her assertion that [Michael] has not overcome the presumption of undue influence. However, *Vai* involved a husband who was actively and intentionally misrepresenting the value of community property for the purpose of obtaining more than his fair share. *Vai* does not suggest a spouse who manages community property assets has an affirmative duty to advise the other spouse of the exact value of every community property item. It simply stands for the proposition that a spouse cannot knowingly misrepresent such information. The *Holliday* case discussed above suggests that a spouse need only disclose what he or she knows. There is no duty for one spouse to conduct an appraisal of community property assets for the other. . . . [¶] . . . [¶]

“In the case at bar, [Cynthia] is an intelligent and savvy business professional. She has developed and implemented several business plans and procedures for ETCS. She understands the importance of thoroughly reading documents which affect the business of the company. Although she does not have the scientific education and training [Michael] has, she was still knowledgeable about almost all aspects of the community property business.

“There is no evidence before the Court that [Michael] ever misrepresented anything about the community property business. Section 8 of the [Agreement] states that [Michael] would be able to purchase [Cynthia]'s interest in ETCS in the event the parties divorced; Section 10 of the [Agreement] indicates how the shares would be valued for the purpose of marital dissolution, but no amount of value was ever specified. Although [Michael] clearly has an advantage in the [Agreement], the Court does not find that he obtained an unfair advantage in the agreement. The

[Agreement] specifically provides a method by which [Cynthia] would be equitably compensated for her interest in the community property business.

“The uncontroverted testimony of Mr. Friedrich indicated that he explained each of the provisions of the draft [Agreement]. [Cynthia] asked him several questions and appeared fully engaged in the meeting. Mr. Friedrich did not observe any behavior from [Michael] that appeared to oppress or manipulate [Cynthia]. He believed that she understood the explanation of each provision that he provided.

“[Cynthia] was advised on several occasions to obtain independent legal counsel, and at one point she indicated she would. She had several months to do so. For whatever her reasons were, [Cynthia] chose not to follow Mr. Friedrich’s advice to seek independent counsel. She never told [Michael] she needed more time to talk to another lawyer or to more carefully consider the provisions of the agreement. [Cynthia] testified that she voluntarily signed the agreement and was under no threat or duress at the time she signed it. For [Cynthia] to assert at this late date that she never would have signed the agreement had she obtained counsel and actually read the agreement, strikes the Court as disingenuous.” (Italics omitted.)

The court granted Michael’s motion to exclude Iacopi’s testimony:

“[Cynthia] asserted that Mr. Iacopi’s testimony would show the degree to which [she] would be disadvantaged in the division of the community property interest in ETCS now that the value of the business has grown considerably since the [Agreement] was signed by the parties [Cynthia] maintained that when the agreement was signed, she and [Michael] were operating as a ‘fiduciary unit’ with regard to their rights versus the rights of unrelated business partners; she had no idea how much she would be disadvantaged in the then unforeseen event of a divorce.

“. . . [Michael] noted that because he had already stipulated that the [Agreement] advantaged him and disadvantaged [Cynthia], he recognized that he bore the burden of proving that [Cynthia] had freely and voluntarily signed the agreement in spite of the disadvantage to her. Therefore, Mr. Iacopi’s testimony was not relevant.

“The Court has thoroughly read Sections 8, 10[,] and 11 of the [Agreement]. . . . The provisions of these sections set forth the method by which the ‘fair market value of the interest in [ETCS]’ would be calculated in the event of a marital dissolution. In the Court’s view, the methodology provides a fair and equitable method by which [Cynthia] would be compensated for her community interest in [ETCS]. The fact that [ETCS]

is now worth considerably more than it was at the time the agreement was signed does not change the methodology contained in the [Agreement]. [Cynthia]’s interest, no matter how large the amount, will still be determined based on the fair market calculus contained in the agreement. The Court therefore finds that Mr. Iacopi’s testimony on the issue of unfair advantage is not relevant, and the motion to exclude his testimony is GRANTED.” (Italics omitted.)

III. Posttrial.

On November 3, 2014, Cynthia filed an RFO requesting a finding that the Agreement required her shares be appraised pursuant to the Family Code. She asserted:

“Under Section 8A of the Agreement, in the event of the parties’ divorce, [Michael] would be deemed the owner of the shares and [Cynthia] would receive her half of the community value. [Nowhere] in Section 8A does it provide that the valuation method will be in accordance with Section[] 10 . . . of the Agreement. In fact, a consistent reading of the Agreement and Section 8A makes it clear that in the event of a divorce, [Michael] would retain the entire interest in the shares ‘as part of the division of the community property of the marriage pursuant to the . . . Family Code.’ As such, any family law valuation of the community property must be in accordance with the Family Code.”

Michael filed a responsive declaration opposing Cynthia’s request. Oral argument was held on November 17, 2014. The superior court denied Cynthia’s request:

“[Cynthia]’s [RFO] asks the Court to determine the applicability of the parties’ . . . [Agreement] regarding ETCS, a community property asset. Specifically, [Cynthia] asks the Court to interpret the [Agreement] as requiring that any ETCS shares awarded to [Michael] be valued pursuant to the . . . Family Code rather than Section 10 of the [Agreement]. [Cynthia] contends Section 10 of the [Agreement] is inapplicable because Section 8 does not reference Section 10. [¶] . . . [¶]

“[Cynthia]’s argument is without merit. Section 8[, subdivision A.](1)[,] provides that, in the event of a divorce in which [Michael] is not awarded 100% of the ETCS shares owned by the Harvey Trust, [Cynthia] ‘shall sell to [Michael] upon the terms and conditions provided by this Section, every interest [Cynthia] has’ in the ETCS shares. The term[] ‘Section’ clearly refers to all of Section 8, and Section 8(B) expressly provides that in the event [Cynthia] is obligated to sell shares to [Michael], the shares’ value shall be determined pursuant to Section 10. Thus, Section 8 expressly

provides that any shares purchased by [Michael] shall be valued pursuant to the formula set forth in Section 10. . . .”

DISCUSSION

I. Michael’s motion to dismiss appeal.

Michael moves to dismiss this appeal on the basis Cynthia waived her right thereto. He states Cynthia was “actively engag[ed] in the unique appraisal and valuation arbitration procedures established [in Section 10 of] the Agreement” pending appeal and thus “compl[ie]d with the very Agreement she challenges on appeal”³ Cynthia does not dispute that she participated in the appraisal process pending appeal.

We deny Michael’s motion. A party who voluntarily complies with or satisfies a judgment impliedly waives the right to appeal. (*Lee v. Brown* (1976) 18 Cal.3d 110, 115; *Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1040.) However, such a waiver is implied only where the compliance or satisfaction is the product of a settlement or coupled with an agreement not to appeal. (*Lee v. Brown*,

³ Michael also claims “various species of estoppel,” none of which are appropriate in the instant case.

First, Michael cites case law for the proposition that acceptance of the benefits of an award estops an appeal from that award. However, in his subsequent “Reply Memorandum of Points and Authorities,” he emphasizes he “does not claim [Cynthia] accepted the benefits of the orders she appeals”

Next, Michael argues “[Cynthia’s] actions are inconsistent with the arguments she makes in her [appellate] briefs.” To the extent he is relying on the doctrine of judicial estoppel (see *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 448-449), such a remedy is “extraordinary” and “must be ‘applied with caution and limited to egregious circumstances’ ” (*id.* at p. 449). We do not believe the circumstances in this case warrant this remedy.

Finally, citing the doctrine of equitable estoppel, Michael states he “reli[ed] on [Cynthia]’s voluntary participation at every step of the appraisal and valuation arbitration procedure called for by the [Agreement].” However, he fails to analyze the other elements of equitable estoppel. (See *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) An appellate court is not required to examine undeveloped claims. (*City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670, 679, fn. 8; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

supra, at p. 115; *Ryan v. California Interscholastic Federation*, *supra*, at p. 1040; *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 745.) Here, there is no evidence of a settlement or an agreement not to appeal between the parties, and Michael does not claim otherwise.

II. The superior court’s finding that Michael rebutted the presumption of undue influence.⁴

The issue of “whether the spouse gaining an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence.” (*In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 632, citing *Weil v. Weil* (1951) 37 Cal.2d 770, 788; accord, *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 737.)

“ ‘Substantial evidence’ is evidence of ponderable legal significance, evidence that is reasonable, credible[,] and of solid value.” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651, citing *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 (*Kuhn*)). “The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.” (*Roddenberry v. Roddenberry*, *supra*, at p. 652, citing *Kuhn*, *supra*, at p. 1633.) In making this

⁴ Cynthia contends the September 17, 2014, statement of decision was inadequate as a matter of law because the superior court “failed to make requisite findings and fairly disclose its rationale.” We disagree. A statement of decision “need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision.” (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1125; cf. *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1127, 1129 [minute order enumerating legal conclusions and lacking any explanation does not constitute a proper statement of decision].) The superior court’s September 17, 2014, statement of decision met this threshold.

To the extent Cynthia contests the superior court’s findings, the substantial evidence rule governs. (See *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.)

determination, the reviewing court “must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all reasonable inferences.” (*Kuhn, supra*, at pp. 1632-1633, italics & fn. omitted.)

“ ‘[W]here the findings are attacked for insufficiency of the evidence, [a reviewing court’s] power begins and ends with a determination as to whether there is any substantial evidence to support them; . . . [it] ha[s] no power to judge . . . the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.’ [Citations.]” (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518, italics omitted; see *In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328-329 [“[A] daunting burden [is] placed on one who challenges the sufficiency of the evidence to support a trial court finding.”].)

“Undue influence is a contract defense based on the notion of coercive persuasion.” (*In re Marriage of Starr* (2010) 189 Cal.App.4th 277, 284.) One type of conduct that constitutes undue influence is “the use of confidence or authority to obtain an unfair advantage” (*ibid.*, citing Civ. Code, § 1575, subd. 1), which is “triggered by one party’s breach of a confidential relationship” (*In re Marriage of Starr, supra*, at p. 284).

“[I]n transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other.” (Fam. Code, § 721, subd. (b).) “When an interspousal transaction advantages one spouse, ‘[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.’ [Citation.]” (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293; accord, *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 84 (*Kieturakis*); see *In re Marriage of Mathews, supra*, 133 Cal.App.4th at p. 629 [“Generally, a spouse obtains an advantage if that

spouse's position is improved, he or she obtains a favorable opportunity, or otherwise gains, benefits, or profits."].)

Since the parties in the instant case stipulated the Agreement advantaged Michael, our concern is whether the presumption of undue influence was rebutted.

“When a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse’s action ‘was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of’ the transaction. [Citations.]” (*In re Marriage of Burkle, supra*, 139 Cal.App.4th at pp. 738-739; accord, *Kieturakis, supra*, 138 Cal.App.4th at p. 84.) “The advantaged spouse must show, by a preponderance of evidence, that his or her advantage was not gained in violation of the fiduciary relationship.” (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 344; see *In re Michael G.* (1998) 63 Cal.App.4th 700, 709-710, fn. 6 [preponderance of the evidence standard requires trier of fact to believe the existence of a fact more probable than its nonexistence].)

The record, viewed in the light most favorable to Michael, shows the Harveys met Friedrich at least five times in 2010 to discuss and hash out the details of their estate and succession plans with respect to ETCS. During these meetings, Cynthia asked intelligent questions, exhibited comprehension of the subject matter, and was otherwise fully engaged. She was apprised divorce was a common triggering event in buy-sell agreements for community property businesses and the customary approach to such an event was to transfer all shares to one spouse to avoid business disruption. Cynthia then consented that divorce be a triggering event in the Agreement, and consented to designating Michael as the spouse to acquire the shares. She later received a copy of the draft Agreement, the substantive terms of which remained unchanged through the March 14, 2011, signing. At the December 20, 2010, meeting, Friedrich reviewed the draft Agreement with Cynthia and explained “the purpose of each section,” “how [each

section] worked,” and “some . . . alternative provisions . . . if [the Harveys] wanted to . . . handle things differently.” She was further advised to consult independent counsel before signing the Agreement in view of a potential conflict of interest. Between December 2010 and March 2011, Cynthia never raised any issues or concerns with the agreement. On March 14, 2011, she signed the Agreement freely and voluntarily. Moreover, Cynthia also signed the spousal consent form, in which she avowed she read and familiarized herself with the Agreement, was aware of and approved provisions under which she agreed to sell her interest in ETCS shares upon the occurrence of certain events, was advised to consult independent counsel and apprised of the risks of signing the consent form without availing herself of such a consultation, and agreed to be bound by the terms of the Agreement.⁵ At no point did Michael exert any force or pressure on her. Hence, we find substantial evidence Cynthia entered into the Agreement freely and voluntarily and with full knowledge of the relevant facts.

With regard to whether the disadvantaged spouse possessed a complete understanding of the effect of the transaction, as noted, the record shows Cynthia was advised to consult independent counsel before signing the Agreement in view of a potential conflict of interest. Between the time she was advised and the time she signed the agreement, about a three-month period, she did not confer with a different attorney because she “didn’t have time.” Nothing in the record indicates Michael, Friedrich, or someone else prevented Cynthia from seeing another attorney. In addition, Cynthia’s capacity was never in question. Under these circumstances, we cannot fault Michael if Cynthia did not fully understand the import of signing the Agreement. His legal obligation was to *either* “make full and fair disclosure of all that the other spouse should know for . . . her benefit and protection concerning the . . . effect of the transaction, *or* . . .

⁵ Such acknowledgements alone have been found to forestall a presumption of undue influence. (See, e.g., *Kieturakis, supra*, 138 Cal.App.4th at p. 90.)

deal with the other spouse at arm's length, giving . . . her the *opportunity* of independent advice.” (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 88, italics added, citing *In re Estate of Cover* (1922) 188 Cal. 133, 144.)⁶ Cynthia was undeniably afforded ample opportunity, with no interference on Michael's part, to consult independent counsel and chose not to do so. Self-inflicted ignorance does not preserve the presumption of undue influence. Substantial evidence supports the finding the presumption was rebutted.

III. The exclusion of Iacopi's expert testimony.

An appellate court generally reviews a superior court's ruling to exclude expert testimony for abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773; *Staub v. Kiley* (2014) 226 Cal.App.4th 1437, 1445; *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.) “A ruling that constitutes an abuse of discretion has been described as one that is ‘so irrational or arbitrary that no reasonable person could agree with it.’ [Citation.]” (*Sargon Enterprises, Inc. v. University of Southern California, supra*, at p. 773; see *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 [“ ‘Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered.’ ”].) “ ‘The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.’ [Citations.]” (*Denham v. Superior Court, supra*, at p. 566.)

⁶ We point out Cynthia cites *Smith v. Lombard* (1927) 201 Cal. 518, 524-525, *Combs v. Combs* (1946) 75 Cal.App.2d 903, 904-905, and *Estate of Brimhall* (1943) 62 Cal.App.2d 30, 34 for the erroneous proposition that “[p]roof . . . the aggrieved spouse had separate legal counsel, or the opportunity to obtain such advice, does not rebut the undue influence presumption.” These cases actually held that proving the disadvantaged spouse had the benefit of independent counsel is not the only way to rebut the presumption of undue influence.

At a June 25, 2013, deposition, Iacopi opined the Agreement was “oppressive” toward Cynthia and indicated his intent to testify to such at trial. Michael sought to exclude this testimony as irrelevant in light of the parties’ stipulation the Agreement advantaged Michael. In her opposition, Cynthia asserted Iacopi’s testimony on “the nature and degree of the unfair advantage obtained by [Michael]” related “to the Court’s determination as to whether or not [Cynthia]’s consent to [the Agreement] was freely, knowingly, and voluntarily made with an understanding of its effect.” In granting Michael’s motion, the superior court focused on the fairness of the valuation mechanism in the Agreement. It does not appear the superior court addressed the points raised by the parties.

Ultimately, a reviewing court is “required to uphold [a discretionary] ruling if it is correct on any basis, regardless of whether such basis was actually invoked.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32, citing *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329; accord, *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.)

Iacopi’s testimony was not needed to establish the Agreement advantaged Michael because that fact was not in dispute. (See *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1286 [no error in excluding evidence the defendant made lawful tenders to subcontractors and received rejections because parties stipulated to those matters].) Iacopi’s testimony was also not needed with respect to whether Cynthia freely, voluntarily, and knowingly entered into the Agreement. While “[a] properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert’s opinion will assist the trier of fact” (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510, citing Evid. Code, § 801, subd. (a)), expert opinion should be excluded “ “when ‘the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness’ ” ’ ” (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 291). A person’s mindset can be evaluated by resort to common knowledge without the

aid of expert testimony. (See, e.g., *Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1293, 1303 [regarding psychotherapist’s belief a patient posed a serious threat of inflicting grave bodily injury].) Therefore, we conclude Iacopi’s expert testimony was properly excluded.

IV. Applicability of Section 10 of the Agreement.

Generally, an appellate court interprets a written instrument de novo. (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 372; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *In re Marriage of Kelkar* (2014) 229 Cal.App.4th 833, 845.)

“A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting” (Civ. Code, § 1636; accord, *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 (*Waller*).) “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible” (Civ. Code, § 1639; accord, *Waller, supra*, at p. 18.) “The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.” (Civ. Code, § 1638; accord, *Waller, supra*, at p. 18.)

In her RFO, Cynthia argued Section 8, subdivision A., is not subject to Section 10 at all and valuation must be “in accordance with the Family Code.”

Under subdivision A.(1) of Section 8, in the event of a divorce in which Michael is not granted Cynthia’s interest in ETCS shares as part of the decree of dissolution, separation maintenance agreement, or property settlement, the decree, agreement, or settlement must allow Michael to buy Cynthia’s interest “upon the terms and conditions provided in this Section” (See *ante*, at p. 3.) The phrase “this Section” clearly refers to Section 8 in its entirety and is not susceptible to another interpretation. (See Civ. Code, § 1644 [“The words of a contract are to be understood in their ordinary and popular sense”]; see also *Prudential Ins. Co. of America, Inc. v. Superior Court* (2002) 98 Cal.App.4th 585, 599; *Lunardi v. Great-West Life Assurance Co.* (1995) 37

Cal.App.4th 807, 820 [court will not engage in strained or tortured interpretation of contractual language in order to fabricate an ambiguity where none exists].) Section 8, by way of subdivisions B. and C., specifies Cynthia’s interest in ETCS shares must be purchased “at the price set forth in” or “in accordance with the price and terms set forth in” Section 10. (See *ante*, at p. 4.) Section 10—titled “**Valuation**”—sets forth the mechanism by which to determine “[t]he purchase price to be paid for [ETCS] Shares which are subject to purchase” (See *ante*, at pp. 4-6.)

Section 8, subdivision A.(1), by virtue of its “terms and conditions provided in this Section” language, encompasses Section 10.

Cynthia insists such an interpretation of Section 8, subdivision A.(1), would transform subdivision A.(2) into “meaningless surplusage language.” It does not. Subdivision A.(2), which contains the distinctive phrase “as a part of the division of the community property of the marriage pursuant to the . . . Family Code” (see *ante*, at p. 4), applies in the event of a divorce in which Michael *is* granted Cynthia’s interest in ETCS shares as part of the division of the community property. Our interpretation of subdivision A.(1), which concerns a different scenario, does not render subdivision A.(2) extraneous.

DISPOSITION

The interlocutory orders are affirmed. Costs on appeal are awarded to respondent.

DETJEN, Acting P.J.

WE CONCUR:

FRANSON, J.

SMITH, J.