



In Re Marriage of Murray and Cary Lynn Lobel. v. Cary Lynn Lobel

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Marriage of Lobel

CA4/3

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OPINION

In this marital dissolution action mental illness tragically felled a wife and mother, whose condition significantly deteriorated following the couple's separation. In separate criminal proceedings based on the wife's alleged violation of temporary protective orders that required her to stay away from her former husband, their children, and the family home, the court found the wife incompetent to stand trial. Unfortunately, mental health experts offer a grim prognosis and expect the wife likely will need lifetime institutional care.

In this setting, we are asked to review a number of the trial court's rulings regarding a premarital agreement the couple executed, the amount of temporary spousal support the court ordered the husband to pay, and the amount of permanent spousal support the husband must pay to cover the cost of the wife's institutional care. Specifically, appellant Cary Lynn Lobel challenges the trial court's rulings upholding the couple's premarital agreement that denied her a community property interest in virtually all of respondent Murray Lobel's substantial financial resources.¹ Cary also challenges the trial court's rulings setting the amount of temporary and permanent spousal support and the court's decision to reduce Cary's permanent spousal support to zero in December 2013 based on the expectation that Cary's family could obtain governmental assistance to cover the cost of her care. Finally, Cary argues numerous rulings and comments the trial court made during these lengthy proceedings demonstrate a judicial bias against her that requires us to reverse the entire judgment.

We affirm the trial court's judgment based on the substantial discretion the court possessed in making its rulings and the careful deliberation the record shows the court undertook in making each ruling. As for the claim of judicial bias, we conclude Cary forfeited that claim by failing to raise the issue in the trial court.



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I

FACTS AND PROCEDURAL HISTORY

A. Cary and Murray's Engagement and Prenuptial Agreement

Murray is an owner, officer, and employee of Lobel Financial Corporation, a consumer finance company he operates with his brothers. He met Cary in June 1996. At the time, she worked as a copier salesperson and also held a part-time job at Macy's department store.

Murray asked Cary to marry him in late 1996. Approximately two or three months after their engagement, Cary moved into Murray's apartment and he (1) paid virtually all of Cary's living expenses; (2) paid Cary's credit card bills; (3) paid off the loan on Cary's car; and (4) purchased a new convertible BMW for her. Although she continued working after she first moved in with Murray, Cary quit her jobs approximately two or three months before the wedding.

Shortly after he proposed, Murray told Cary he wanted a prenuptial agreement. The couple discussed the issue two or three times, with Cary expressing her preference against the agreement. Murray, however, insisted and deposited money into a bank account for Cary to hire an attorney of her choice to review the prenuptial agreement Murray's attorney had prepared.

Cary selected Attorney Brian Tatarian to review and explain the proposed prenuptial agreement. Tatarian received a draft of the agreement from Murray's counsel in early February 1997. On March 18, 1997, Tatarian and Cary discussed the proposed agreement "from top to bottom" during a two-hour phone conversation.

On April 4, 1997, Tatarian met with Cary for approximately three hours to further discuss the proposed agreement. He again went through the agreement with Cary "from top to bottom," explaining what her rights would be with and without the agreement. He explained that "by signing this Agreement, you shall not be entitled to the work, energy, or efforts of your prospective husband from the date of your marriage forward except to the very small extent set forth for living expenses and equity in the family home which is clearly set forth in the Agreement. This means that it is my opinion that you shall not be able to share in the growth or additional value of your prospective husband's business in the future, notwithstanding the fact that the additional value of this property and/or business asset may be greatly enhanced by your prospective husband's energy and efforts during the course of your marriage. . . . [¶] In short, the 'income' o[f] your prospective husband . . . shall be deemed the separate property of your prospective husband during the entire course of your marriage, which is not consistent with California community property laws as I have discussed with you and which I believe is unfair." Tatarian also advised Cary not to sign the agreement with the expectation that she later could have it invalidated.



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During this meeting, Tatarian suggested numerous revisions to the agreement and asked Cary if she wanted him to submit his proposed revisions to Murray's attorney. Cary, however, "made clear that she did not desire any changes after [her and Tatarian's] lengthy discussions with regard to the contents of the Agreement." Cary also instructed Tatarian not to investigate Murray's assets and liabilities.

Tatarian strongly urged Cary not to sign the proposed prenuptial agreement "because of the many rights [she was] waiving and/or giving up forever." Nonetheless, he agreed to sign the agreement with Cary because she convinced him she understood the agreement and she "genuinely wish[ed] to execute it and be bound by its terms." During the meeting, Tatarian hand delivered to Cary a letter further explaining his objections to the proposed prenuptial agreement and Cary signed an acknowledgment that she understood Tatarian's advice. Cary then signed the "Premarital Agreement" (the Agreement) and Tatarian signed a certification stating he fully explained the Agreement to Cary. Murray and his counsel signed the Agreement a few days later.

The Agreement explained that Murray had an estimated net worth of approximately \$17.2 million and Cary had an estimated net worth of approximately \$1,200. By signing the Agreement, both Cary and Murray waived "any right to disclosure of the property and financial obligations of the other party beyond the disclosures provided by this Agreement." As Tatarian explained to Cary, the Agreement provided "there shall be no community property or community property income as a result of their marriage" but for two minor exceptions regarding a small community property interest in any family residence purchased during the marriage and a joint bank account used to pay living expenses.

B. Cary and Murray's Marriage and Separation

Cary and Murray wed on May 3, 1997. In April 1998, Murray purchased a home for the couple in Newport Coast. He made a \$550,000 down payment and took a purchase money loan for the remaining \$1 million of the purchase price. The couple has two children born in 2000 and 2004. Cary did not work outside the home during the marriage, but instead devoted her time to the couple's children.

After several years of marriage, Cary began to exhibit signs of mental illness with increasing frequency. For example, during a trip to Las Vegas in February 2007, Cary told Murray that Henry Samueli arranged the two shows they attended as part of Samueli's efforts to seduce her. Cary also claimed the people sitting near them in a restaurant were "'trackers'" Samueli used to watch her every move.

The couple separated on February 15, 2007, when Murray moved out of the family home and left Cary with custody of the children. At the time, the family home's value had increased to approximately \$5 million, with approximately \$4 million in equity. Murray filed a petition to dissolve the marriage on



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March 8, 2007.

C. Cary's Arrests and Mental Deterioration

A few days after Murray filed for divorce, Cary drove to the Beverly Hills Police Department with the couple's children. She informed the police she came to Beverly Hills because Samueli had "'paid-off'" all Orange County law enforcement agencies and therefore she could not obtain any help there. She reported Samueli had placed a "'nanobot'" in her brain and was tracking her. Based on her conduct, the police concluded Cary posed a danger to herself and others, and therefore placed her on a 72-hour protective hold at Cedar Sinai Hospital under Welfare and Institutions Code section 5150. The police alerted Murray, who took custody of the children.

While Cary remained in protective custody, Murray applied ex parte for an order (1) granting him exclusive use of the family home; (2) granting him sole custody of the children; and (3) prohibiting Cary from having any contact with the children. The court granted Murray's application.

Cedar Sinai Hospital discharged Cary on March 16, 2007, with a diagnosis of "delusional disorder, mixed type, with erotomanic and grandiose features." Two weeks later, while Cary visited her family in Northern California, police placed her on a second protective hold. A Northern California hospital discharged Cary on April 2, 2007, with a diagnosis of "[m]ajor depressive disorder, severe with psychotic features."

Two weeks later, the police arrested Cary for violating the court order to stay away from the children because she entered the family home at 2:00 a.m., while the children and Murray were asleep. In the ensuing criminal proceedings, the court issued a domestic violence protective order prohibiting Cary from contacting the children unless authorized by a court order.

In May 2007, Murray stipulated to allow Cary to have monitored visits with the children on the condition that she obtain treatment from an agreed-upon mental health professional and follow the professional's recommendations regarding treatment and medication. Disputes, however, soon ensued regarding custody and visitation. Cary stopped seeing the agreed-upon mental health professional and the visitation monitor reported that Cary made inappropriate comments to the children about the court proceedings and accused the monitor of being under contract with Samueli to take her children away.

In November 2007, the court appointed a psychiatrist to conduct an independent child custody evaluation and assist Cary in obtaining mental health treatment. After conducting his initial evaluation, the appointed psychiatrist arranged treatment for Cary and recommended monitored visitation with the children. Unfortunately, Cary's condition continued to deteriorate and her delusional behavior increased. In May 2008, the appointed psychiatrist informed the court Cary no longer had the ability to assist her counsel in the dissolution action due to her deteriorating mental



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condition. Accordingly, on its own motion, the court appointed a guardian ad litem for Cary to assist her counsel. In June 2008, the appointed visitation monitor suspended Cary's visits with the children because the monitor found Cary's conduct negatively affected the children.

In July 2008, Cary violated the protective orders in the dissolution action and the criminal proceedings when a neighbor spotted her in the side yard of the family home and phoned the police. When the police arrived, Cary fled in her vehicle and led the California Highway Patrol on a 60-mile, high-speed chase. After numerous attempts, officers finally succeeded in stopping Cary when they rammed her vehicle after she exited the freeway.

After this incident, Murray sought a domestic violence prevention restraining order requiring Cary to stay away from the children, their school, Murray, his work, and the family home. The court granted the restraining order and made it effective for five years. Moreover, during a hearing on Murray's application, the court consulted with the appointed psychiatrist and ordered Cary into protective custody for a third hold under Welfare and Institutions Code section 5150. The court in the criminal proceedings against Cary also issued a second domestic violence criminal protective order requiring Cary to stay away from Murray and the children.

In April 2009, the court in the criminal proceedings found Cary incompetent to stand trial and referred her to a mental health facility for evaluation. The court allowed Cary to remain out of custody while her counsel and mental health officials located an appropriate facility. In July 2009, however, the criminal court took Cary into custody based on her failure to cooperate with the placement efforts. Cary remained in the Orange County Jail until November 2009, when Sylmar Health and Rehabilitation Center admitted her for evaluation. Cary remained in the Sylmar facility throughout the remainder of the trial court proceedings.

D. The Bifurcated Trial Regarding the Agreement's Validity

Cary asserted numerous challenges to the Agreement's validity. The court bifurcated all issues regarding the Agreement and set them for a separate trial in November 2008, which took place after her arrests for violating the protective orders but before the criminal court found her incompetent to stand trial.

Two weeks before the bifurcated trial, Cary's counsel applied ex parte to continue the trial date because Cary refused to participate in trial preparation and engaged in "extremely irrational" behavior, including attempting to fire her accounting expert. Cary's lawyer argued her conduct and mental condition rendered her unavailable to testify and therefore the court should continue the trial because she was an essential witness. The trial court denied the continuance request because there was no evidence Cary's condition would improve.

The court conducted a five-day trial on the Agreement, receiving numerous exhibits and hearing



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testimony from Murray, Tatarian (the attorney who advised Cary regarding the Agreement), and Cary's mother. Cary's counsel called her to testify, but Cary asserted her Fifth Amendment privilege against self-incrimination and refused to testify based on the criminal proceedings pending against her. Both her counsel and guardian ad litem advised Cary regarding the critical need for her to testify, and her guardian ad litem assured Cary she would object to any questions that might relate to the pending criminal proceedings. Cary nonetheless refused to testify.

Based on Cary's refusal to testify, her lawyer renewed his request to continue the trial. The court again denied the motion, finding Cary's refusal to testify based on the pending criminal proceedings did not constitute good cause for a continuance. The court also rejected the argument that Cary lacked the necessary capacity to make the decision whether to testify.

On November 24, 2008, the trial court rejected all of Cary's challenges to the Agreement, finding Cary failed to present evidence supporting many of her challenges because she refused to testify. In October 2010, the court entered its judgment on the issues relating to the Agreement and Cary timely appealed.

E. Spousal Support

One month after Murray filed for divorce, Cary sought an award of temporary spousal support. In May 2007, the parties stipulated to continue the hearing on Cary's order to show cause and that Murray would make a one-time payment of \$20,000 to be credited against his support obligations. In June 2007, the parties again stipulated to continue the hearing and to monthly temporary spousal support in the amount of \$30,000. Cary and Murray agreed the court would retain jurisdiction to retroactively adjust the amount of temporary support at trial.

Throughout the remainder of 2007 and most of 2008, the court repeatedly continued the hearing on Cary's order to show cause while the parties focused on child visitation issues and Cary's mental health. During this period, Cary filed four income and expense declarations claiming monthly expenses ranging from \$24,350 to \$95,887 and Murray continued paying \$30,000 in temporary spousal support each month.

In September 2008, the court expressed concern over Cary's claimed expenses and therefore ordered her guardian ad litem to submit a budget listing Cary's actual monthly expenses. Between September 2008 and April 2009, the court again continued the hearing on Cary's spousal support request several times as her guardian ad litem and attorney struggled to determine Cary's actual expenses. During this period, Cary filed three income and expense declarations claiming monthly expenses ranging from \$58,581 to \$72,819 and Murray continued paying \$30,000 in temporary spousal support each month. In March 2009, Cary and Murray stipulated to monthly expenditures of approximately \$77,000 in 2005 and \$64,000 in 2006. They also stipulated that Murray's income enabled the couple to save or invest approximately \$145,000 per month in 2005 and \$285,000 per month in 2006.



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In April 2009, the court reduced Cary's temporary spousal support to \$20,000 per month after learning the court in the criminal proceedings found her incompetent to stand trial and ordered her admitted to a mental health facility for evaluation. The court found Cary would not have the same monthly expenses while she was in a mental health facility. In July 2009, the court further reduced Cary's temporary spousal support to \$11,000 per month for the same reasons.

In August 2009, counsel informed the court Cary was in the Orange County Jail awaiting admission to an appropriate mental health facility for evaluation. The court therefore further reduced Cary's temporary support to \$7,500 per month because of Cary's reduced expenses while she was in jail. As stated above, the Sylmar Health and Rehabilitation Center admitted Cary for evaluation in November 2009.

Following Cary's admission to the Sylmar facility, the court reappointed the psychiatrist who conducted the child custody evaluation to conduct a new mental health examination of Cary in conjunction with the doctors at the Sylmar facility. The appointed psychiatrist made his final report to the court in June 2010, explaining that, even with medication, Cary's condition likely would not improve enough to allow her to stand trial in the criminal proceedings or obtain gainful employment in the foreseeable future.

In September 2010, the court made the following orders regarding Cary's temporary support: (1) it increased the support to \$10,000 per month to cover all expenses associated with Cary's treatment at the Sylmar facility and (2) ordered Murray to make a one-time support payment of \$11,000 to cover all arrearages for Cary's treatment at the Sylmar facility. The court also appointed an independent expert to advise it regarding the requirements Cary must meet to qualify for any governmental programs that would pay the expenses associated with her institutional care.

In November 2010, after the court-appointed expert testified regarding public assistance for the costs associated with Cary's institutional care, the court entered a final ruling on all spousal support issues. As to temporary support, the court set support at the amounts previously ordered and denied Cary's request for a retroactive increase. As to permanent support, the court ordered Murray to pay \$10,500 per month until December 1, 2013, when his support obligation would fall to zero. As security for the permanent support, the court ordered Murray to maintain a \$500,000 life insurance policy with Cary as the beneficiary.

The court retained jurisdiction to modify the support award after December 1, 2013. It explained its purpose in stopping support at that point was to provide Cary's family or any other representative sufficient opportunity to apply for and obtain governmental assistance to pay the cost of Cary's institutional care. If governmental assistance could not be obtained, the court instructed Cary's representatives to ask the court to modify its support award. The court entered its final judgment in February 2011 and Cary timely appealed.



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II

DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion in Denying Cary's Request to Continue Trial

Trial dates are "firm" and continuances are "disfavored." (Cal. Rules of Court, rule 3.1332(a) & (c); *Lewis v. Neptune Society Corp.* (1987) 195 Cal.App.3d 427, 429.) "Continuances are granted only on an affirmative showing of good cause requiring a continuance." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823.) Circumstances that may indicate good cause for a continuance include an essential witness's or a party's unavailability "because of death, illness, or other excusable circumstances." (Cal. Rules of Court, rule 3.1332(c)(1), (2).) "Reviewing courts must uphold a trial court's choice not to grant a continuance unless the court has abused its discretion in so doing." (*Marriage of Falcone & Fyke*, at p. 823.)

Cary contends the trial court abused its discretion in denying her request to continue the bifurcated trial on the Agreement's validity because she was an essential witness who was unavailable to testify. Cary argues she was unavailable because (1) she exercised her constitutional right against self-incrimination and refused to testify based on the criminal charges pending against her, and (2) her mental health condition prevented her from testifying. Cary, however, failed to provide any authority or explanation to support her position. To the contrary, the record and controlling authorities reveal Cary was available to testify, but chose not to do so.

The privilege against self-incrimination may be asserted in civil proceedings, but it does not support a blanket refusal to testify. (*In re Marriage of Sachs* (2002) 95 Cal.App.4th 1144, 1151.) "[A] person claiming the Fifth Amendment privilege must do so with specific reference to particular questions asked or other evidence sought. . . ." (*Ibid.*) The privilege "must generally [be] assert[ed] on a question-by-question basis." (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1555.) "No person other than a defendant [in a criminal action] has a right to refuse to be sworn as a witness." (*Ibid.*) "[T]he burden is on the party or witness [invoking the privilege] to show that the testimony or other evidence could tend to incriminate him or her." [Citations.] (*Marriage of Sachs*, at pp. 1151-1152.)

Here, Cary improperly asserted a blanket refusal to testify when the facts suggest the topics on which she would have been questioned had little chance of incriminating her in the pending criminal proceedings. The bifurcated trial related to the Agreement's validity. Her trial attorney planned to question her on the circumstances surrounding the Agreement's execution in 1997, whether a confidential relationship existed between her and Murray at that time, whether Murray exercised any undue influence over Cary in 1997, Murray's disclosure regarding his income and assets, and whether Murray breached the Agreement. The criminal proceedings focused on whether Cary violated the protective orders requiring her to stay away from the children and the family home, events that took place a decade after Cary signed the Agreement. Cary made no showing how questions regarding the



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Agreement could possibly lead to incriminating information relating to her violation of the protective orders. To the extent any specific questions sought potentially incriminating information, Cary could have asserted her privilege against self-incrimination on those specific questions. Accordingly, Cary failed to show her refusal to testify based on her privilege against self-incrimination rendered her unavailable.²

Cary also failed to establish her mental health issue rendered her unavailable to testify. A witness is incompetent to testify only if the witness is (1) "[i]ncapable of expressing himself or herself concerning the matter so as to be understood" or (2) "[i]ncapable of understanding the duty of a witness to tell the truth." (Evid. Code, § 701, subd. (a)(1), (2); *People v. Anderson* (2001) 25 Cal.4th 543, 572-573.) Mental illness does not render a witness incompetent to testify unless the illness prevents the witness from communicating or understanding the duty to tell the truth. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1140-1141 [witness suffering from head injuries and bipolar disorder competent to testify], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. McCaughan* (1957) 49 Cal.2d 409, 419-421.)

Cary made no showing and presented no authority establishing her mental condition prevented her from expressing herself or understanding the duty to tell the truth. To the contrary, the record supports the conclusion Cary was competent to testify. Before refusing to testify based on her privilege against self-incrimination, Cary took the customary oath and swore to tell the truth without any questions or reservations. She then coherently communicated with the court as it questioned her to determine whether she understood the impact her refusal to testify would have on her case. Based on her responses, the trial court expressly found Cary understood the nature of the proceedings and the impact her refusal to testify would have on her case, but nonetheless chose not to testify. The court also observed, "I can't help but notice she was talking to her guardian ad litem through[out] the proceedings telling her to interpose objections and ask questions during the proceedings." Cary's interaction with the court and her conduct during the relevant proceedings demonstrate a clear ability to express herself and an understanding of her duty to tell the truth.

At trial, Cary asserted the court's questions regarding her decision not to testify inadequately supported the court's determination she was competent to make the decision whether to testify. Cary, however, failed to present any authority or evidence to support that contention in the trial court, and has not renewed that argument on appeal. Accordingly, we deem the argument waived. (*People ex rel. Totten v. Colonia Chiques* (2007) 156 Cal.App.4th 31, 35 fn. 1 [argument waived on appeal by failing to raise it in opening brief]; *Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1422, fn. 6 [argument waived on appeal "by failing to provide this court with relevant authority or argument"].)

In sum, the record shows the trial court did not abuse its discretion in denying Cary's request for a continuance.



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B. The Agreement Was Enforceable

In ruling the Agreement was enforceable, Cary contends the trial court made several erroneous findings that require us to reverse the trial court and remand for a new trial on the Agreement's validity. Specifically, Cary contends the court erred in finding (1) no confidential relationship existed between her and Murray when they signed the Agreement and therefore she bore the burden to show she did not enter into the Agreement voluntarily; (2) Murray's disclosures regarding his property and financial obligations satisfied Family Code section 1615's³ disclosure requirements; (3) the Agreement limited Cary's community property interest in the family home to a total of \$60,000, rather than \$60,000 for each year Murray owned the home; (4) the Agreement did not encourage divorce and therefore did not violate public policy; and (5) Murray did not breach the Agreement by failing to continue funding a joint bank account throughout the marriage.

1. Cary Failed to Establish a Confidential Relationship at the Time She Signed the Agreement

Marriage is statutorily defined as a fiduciary relationship that "imposes a duty of the highest good faith and fair dealing on each spouse" and therefore spouses may not take unfair advantage of one another. (§ 721, subd. (b); *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 27 (*Bonds*).) When spouses enter into any agreement that benefits one spouse over the other, this fiduciary relationship requires the advantaged spouse to bear the burden of showing he or she did not obtain the agreement through undue influence. (*Bonds*, at p. 27.) This fiduciary relationship, however, does not arise until a couple marries. (*Ibid.*)

When a couple enters into a premarital agreement that benefits one person over the other, no fiduciary relationship is presumed. (*In re Marriage of Dawley* (1976) 17 Cal.3d 342, 355 (*Dawley*) ["Parties who are not yet married are not presumed to share a confidential relationship"].) The disadvantaged person bears the burden to show he or she did not enter into the agreement voluntarily (*Bonds*, supra, 24 Cal.4th at p. 27) unless the evidence shows a confidential relationship existed relating to the agreement before the couple married (see *Dawley*, at p. 355; *Hogoboom & King*, Cal. Practice Guide: Family Law (The Rutter Group 2010) ¶ 9:150, p. 9-40 (rev. # 1, 2008) (hereafter *Hogoboom & King*)). If the disadvantaged person establishes a confidential relationship relating to the agreement, the burden shifts to the advantaged person to show he or she did not obtain the agreement through undue influence. (*Ibid.*)

"A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation may exist although there is no fiduciary relation; it is particularly likely to exist where there is a family relationship or one of friendship or such a relation of confidence as that which arises between physician and patient or priest and penitent." [Citation.] [¶] The confidential relationship and obligations arising out of it are, therefore, dependent upon the existence of confidence and trust The prerequisite of a confidential relationship is the reposing of trust and confidence by one person



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in another who is cognizant of this fact." (*Vai v. Bank of America* (1961) 56 Cal.2d 329, 337-338, italics added (*Vai*).) "[A] 'confidential relationship' may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship." [Citation.]" (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1160.) Whether a confidential relationship exists is a factual question for the trial court. (*Id.* at p. 1161; *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 383.)

Cary contends the trial court erred in finding no confidential relationship existed between her and Murray when they signed the Agreement because she was "totally dependent on Murray." Cary points to evidence showing that after they became engaged, she moved into Murray's apartment, he paid virtually all of her living expenses, and he bought her a new BMW. Cary also quit both her jobs a few months after moving in with Murray. She emphasizes she was only 22 years old at the time, had no college education, and worked at Macy's department store, while Murray was 32 years old, had a college degree, and worked as an officer of Lobel Financial Corporation. Although these facts show Murray may have been more sophisticated and that Cary became financially dependent on Murray within a few months of their engagement, they do not show that Cary reposed trust and confidence in Murray regarding the Agreement, or that Murray accepted Cary's trust and confidence and "purport[ed] to act or advise with [Cary's] interest in mind." (See *Vai*, supra, 56 Cal.2d at pp. 337-338.)

The trial court found no evidence of a confidential relationship because Cary refused to testify and therefore did not present any evidence showing she placed her trust in Murray to advise her or act in her best interest regarding the Agreement. To the contrary, the evidence showed Cary hired Tatarian as her independent counsel to advise her regarding the Agreement. Tatarian reviewed and explained the Agreement to Cary at length, suggested numerous changes to the Agreement that Cary rejected, and strongly urged Cary not to sign the Agreement. Other than conversations regarding Murray's desire for a prenuptial agreement, Cary points to no evidence showing she and Murray ever discussed the substance of the Agreement. Cary also failed to present any authority holding that financial dependence alone created a confidential relationship relating to premarital agreements. In short, the record supports the trial court's finding a confidential relationship did not exist between Cary and Murray when they signed the Agreement.

2. Murray Made All Required Disclosures Regarding His Property and Financial Obligations

When Cary and Murray signed the Agreement in 1997, section 1615 made a premarital agreement unenforceable if one party "was not provided a fair and reasonable disclosure of the property or financial obligations of the other party." (Former § 1615, subd. (a)(2)(A), as enacted by Stats. 1992, ch. 162, § 10, p. 500.) In 2001, the Legislature amended that section to provide a premarital agreement was unenforceable if one party failed to provide "a fair, reasonable, and full disclosure" of his or her property and financial obligations. (§ 1615, subd. (a)(2)(A), as amended by Stats. 2001, ch. 286, § 2, p. 2317, italics added.)

Cary contends the version enacted in 2001 applies retroactively and required Murray to make a full



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disclosure regarding his property and financial obligations. Cary argues Murray failed to make a full disclosure and therefore section 1615 rendered the Agreement unenforceable. We need not decide which version of the statute applies in this case because Cary waived her right to require any disclosure beyond that provided in the Agreement.

Both versions of section 1615 require the party seeking to invalidate a premarital agreement to "prove" he or she "did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided." (§ 1615, subd. (a)(2)(B), as enacted 1992 and amended 2001.) As the trial court found, the Agreement includes multiple provisions waiving Cary's right to any disclosure regarding Murray's property and financial obligations beyond that provided in the Agreement. For example, section 2.1⁴ states, "Cary hereby expressly and voluntarily waives any right to disclosure of Murray's property and financial obligations beyond the disclosure provided herein."⁵ Accordingly, even assuming Murray failed to fully disclose his property and financial obligations to Cary, she waived her right to any disclosure beyond that provided in the Agreement and therefore Cary may not rely on section 1615 to invalidate the Agreement.

Cary does not dispute that she waived the right to receive disclosures beyond those that Murray provided and therefore cannot invalidate the Agreement under section 1615. She nonetheless argues the trial court erred in failing to invalidate the Agreement because Murray provided inaccurate disclosures, which violated a warranty clause in the Agreement that his listed property and financial obligations were accurate. Specifically, Cary contends Murray breached his warranty because he (1) failed to disclose he owned an interest in his parents' retirement home in Corona del Mar and (2) represented his income for 1995 was approximately \$430,000 when his true income was nearly \$1.9 million.⁶ We disagree.

Section 2.1 of the Agreement states, "It is understood that the figures and amounts of property and financial obligations set forth in Exhibit 'A' are approximate and not necessarily exact, but they are intended to be reasonably accurate and are warranted to be the best estimates of such figures and amounts." (*Italics added.*) Unlike section 1615, this provision did not require Murray to make any disclosure. Rather, section 2.1 merely stated Murray warranted the disclosures he made were his best estimates. Accordingly, although Murray testified he inadvertently failed to disclose his interest in his parents' retirement home, that failure did not breach the warranty he made in section 2.1. Moreover, the trial court found this omission was immaterial based on Murray's testimony that he did not consider the home to be his property because he contributed just \$10,000 toward its purchase when his net worth (as disclosed to Cary) exceeded \$17 million. Cary does not challenge this finding.

Any claimed inaccuracy in Murray's disclosure regarding his 1995 income likewise did not breach section 2.1. The warranty in section 2.1 did not apply to Murray's disclosure regarding his income; instead, it applied only to the assets and liabilities Murray disclosed in exhibit "A" to the Agreement, which did not include his salary, bonuses, or other income as an employee, officer, and owner of



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Lobel Financial Corporation. Murray made the disclosure regarding his income in section 2.5, which does not include any warranty similar to that made in section 2.1.

Moreover, Cary misstates the evidence regarding Murray's disclosure and 1995 income. Section 2.5 states Murray's 1995 income from his employment was \$96,000 and his 25 percent share of Lobel Financial Corporation's 1995 profits was more than \$1.3 million, meaning Murray disclosed an income exceeding \$1.4 million rather than the approximately \$430,000 Cary contends he disclosed.⁷ Cary's argument that Murray's 1995 income was \$1.9 million relies on significant income from interest and other sources besides Murray's employment with Lobel Financial Corporation. Section 2.5 only purports to disclose Murray's income from his employment and his share of Lobel Financial Corporation's profits, not income from other sources. As discussed above, Cary waived her right to receive any disclosures beyond those made in the Agreement.

3. The Trial Court Properly Interpreted the Agreement to Limit Cary's Community Property Interest in the Family Home to \$60,000

With just two exceptions, the Agreement states "there shall be no community property or community property income as a result of [Cary and Murray's] marriage." One of those two exceptions provided Cary with a limited community property interest in any family home Murray purchased during the marriage. In pertinent part, the Agreement's section 3.9 provided as follows: "Cary shall acquire a 2.0% interest in the equity of said residence each year on the anniversary date of the purchase of the residence up to a maximum of 50% of said equity not to exceed the sum of \$60,000.00. This right of Cary to acquire a 2.0% interest in the equity of said residence each year on the anniversary date of the purchase of the residence up to a maximum of 50% of said equity not to exceed the sum of \$60,000.00 shall continue each year consecutively so long as the parties continue to reside together as husband and wife and no action to terminate their marriage by legal proceedings has been commenced by either party."

The trial court found this language to be "crystal clear" and interpreted it to limit Cary's community property interest in the family home to a total of \$60,000, no matter how many years Cary and Murray remained married or how much home equity accrued during the couple's marriage. Cary contends the trial court should have interpreted section 3.9 to limit her home equity interest to \$60,000 per year. Because eight years elapsed between the date Murray purchased the home (April 1998) and the date the couple separated (March 2007), Cary's interpretation would entitle her to \$480,000 (8 years times \$60,000 per year) based on the \$4 million in equity that existed when the couple separated.⁸ Although we do not agree with the trial court's finding that section 3.9's terms are "crystal clear," we agree with the court's ultimate interpretation that section 3.9 limits Cary's community property interest in the family home to a total of \$60,000.

Our goal in interpreting the Agreement is to give effect to Cary and Murray's mutual intent at the time they entered into the Agreement. (Civ. Code, § 1636; Founding Members of the Newport Beach



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Country Club v. Newport Beach Country Club, Inc. (2003) 109 Cal.App.4th 944, 955.) We determine that intent from the Agreement's language alone if the language is clear and explicit, and does not produce an absurd result. (Civ. Code, § 1638; DVD Copy Control Assn., Inc. v. Kaleidescape, Inc. (2009) 176 Cal.App.4th 697, 712.) We review the trial court's interpretation of the Agreement de novo unless the interpretation turned on the credibility of extrinsic evidence. (Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 865 (Parsons); DVD Copy, at p. 713.) Even under a de novo review standard, we must determine the trial court's interpretation was erroneous before we may reverse its judgment. (Parsons, at p. 866; Sayble v. Feinman (1978) 76 Cal.App.3d 509, 512-513 (Sayble).)

The two sentences from section 3.9 quoted above define Cary's interest in the family home. The first sentence defines the percentage of the home's equity Cary acquired each year and both the maximum percentage and maximum dollar amount Cary could acquire during the marriage. Specifically, the first sentence states Cary acquired a two percent interest in the home's equity each year "up to a maximum of 50% of said equity not to exceed the sum of \$60,000.00." Because the \$60,000 limit is part of the clause defining the maximum percentage Cary could acquire during the marriage, we interpret it as defining the maximum dollar figure she could acquire during the marriage, not the maximum dollar amount she could acquire each year. The result Cary urges requires us to apply the \$60,000 limit found at the end of the sentence to the two percent annual limit found at the beginning of the sentence, rather than the 50 percent lifetime limit that immediately precedes the \$60,000 limit. Cary offers no grammatical or other justification for this result and principles of contractual interpretation support the opposite result. (See ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co. (2007) 147 Cal.App.4th 137, 150 ["The last antecedent rule provides that ""qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote"""].)

In fact, Cary's argument does not address the first sentence. Instead, she focuses exclusively on the second sentence, which states that Cary's acquisition of equity "shall continue each year consecutively so long as the parties continue to reside together as husband and wife and no action to terminate their marriage by legal proceedings has been commenced by either party." Because the words "shall continue each year consecutively" follow immediately after "a maximum of 50% of said equity not to exceed the sum of \$60,000.00," Cary contends the \$60,000 figure refers to the amount she acquired each year (i.e., consecutively), not the maximum dollar amount she acquired during the marriage (i.e., cumulatively). We do not agree.

The reference to the percentages and dollar amount Cary acquired at the beginning of the second sentence is an elongated, and admittedly confusing, means to generally refer to Cary's right to continue acquiring an interest in the home's equity throughout the marriage. The second sentence defines what events terminate Cary's right to continue acquiring equity in the home; it does not define the limits on the percentage or dollar amount she acquired each year or during the entire marriage, a subject which was addressed in the first sentence. If we construe the second sentence as defining both the maximum amount Cary acquired and the events that terminate her acquisition of



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equity in the home, the first sentence becomes surplusage. We, however, must construe the Agreement as a whole and give effect to every part. (Civ. Code, § 1641; *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 503 [the effect of Civil Code section 1641 "is to disfavor constructions of contractual provisions that would render other provisions surplusage"].)

Finding nothing in the record to convince us that the trial court's interpretation of section 3.9 was erroneous, we affirm its interpretation that section limited Cary to a total of \$60,000. (*Parsons*, 62 Cal.2d at p. 866; *Sayble*, supra, 76 Cal.App.3d at pp. 512-513.)

4. The Agreement Did Not Violate Public Policy

Although a couple contemplating marriage may validly contract regarding their rights and obligations "in any of the property of either or both of them whenever and wherever acquired" (§ 1612, subd. (a)(1)), California's public policy to foster and protect marriage renders a premarital agreement void if its terms encourage or promote divorce (*Dawley*, supra, 17 Cal.3d at pp. 349-350). (See also *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, 46-47, 51-52.) As the Supreme Court explained in *Dawley*, "Neither the reordering of property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends the public policy favoring and protecting marriage. It is only when the terms of an agreement go further -- when they promote and encourage dissolution, and thereby threaten to induce the destruction of a marriage that might otherwise endure -- that such terms offend public policy." (*Dawley*, at p. 358.)

Applying this rule, *In re Marriage of Noghrey* (1985) 169 Cal.App.3d 326 (*Noghrey*), invalidated a premarital agreement that required the husband to give his wife ""the house in Sunnyvale and \$500,000 or one-half my assets, whichever is greater, in the event of a divorce."" (Id. at p. 329.) The Court of Appeal invalidated the agreement as against public policy because the wife was "encouraged by the very terms of the agreement to seek a dissolution, and with all deliberate speed, lest the husband suffer an untimely demise, nullifying the contract, and the wife's right to the money and property. [¶] . . . [¶] . . . The prospect of receiving a house and a minimum of \$500,000 by obtaining the no-fault divorce available in California would menace the marriage of the best intentioned spouse." (Id. at p. 331.)

In re Marriage of Bellio (2003) 105 Cal.App.4th 630, however, demonstrates that not all premarital agreements requiring a payment upon divorce violate public policy. The agreement in *Bellio* required the husband to pay the wife \$100,000 "if 'the marriage terminate[d] due to divorce or death of [the husband]." (Id. at p. 632.) The agreement explained the purpose was to compensate the wife for the monthly spousal support payments from a prior marriage that she would forfeit by remarrying. (Ibid.) Accordingly, the \$100,000 payment provision did not encourage divorce because it merely ensured that a divorce or the husband's death did not place the wife in a worse financial position than if she had remained single. (Id. at p. 635.) As the *Bellio* court explained, "[t]he provision was the product of 'realistic planning that takes account of the possibility of dissolution,'" rather than a serious threat to



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a viable marriage. (Ibid.)

Here, Cary contends the Agreement's provision granting her two percent of the equity in the family home each year violated public policy because it encouraged Murray to divorce her and prevent her interest in the home's equity from continuing to grow. This argument assumes (1) Murray had an obligation to purchase a home in which Cary could acquire an increasing interest and (2) Cary's interest in the home's equity would necessarily continue to increase each year the couple remained married. Both of these assumptions are incorrect.

First, the Agreement provided that if Murray purchased a home for the couple to live in, Cary would acquire a two percent interest in the home's equity for each year Murray owned the home. The Agreement allowed Murray to prevent Cary from acquiring any interest in the home's equity by simply never purchasing a home in the first place. Accordingly, we do not view this provision as providing Murray with an incentive to divorce Cary.

Second, the monetary limit the Agreement placed on the amount of equity Cary could acquire in the home prevented her interest from continuing to grow each year. As explained above, section 3.9 limited the equity Cary could acquire in the home to a maximum of \$60,000, no matter what percentage of the equity she acquired based on the marriage's length. Once Cary reached that monetary limit, the value of her interest in the home's equity could not increase any further regardless of how long she remained married to Murray. Although the record does not reveal when Cary's interest in the home's equity reached \$60,000, it is clear Cary reached that limit quickly because Murray's downpayment created \$550,000 in equity on the date he purchased the home and the equity rose to approximately \$4 million by the time the couple separated eight years later. Accordingly, Murray had no incentive to divorce Cary to prevent her from continuing to receive two percent of the home's equity each year because the Agreement's limitation on the equity Cary could acquire prevented her interest from continuing to grow. We agree with the trial court's conclusion that this provision did not violate public policy.

5. Murray Did Not Breach the Agreement

The Agreement also allowed Cary to acquire a community property interest in a joint bank account used to pay the couple's joint living expenses. Cary contends Murray breached the Agreement because he stopped funding this joint account and therefore the entire Agreement is void. Cary, however, failed to cite any evidence or provide any authority to support this contention.

Section 5.3 states that Murray and Cary "contemplate" opening a joint bank account to pay their joint living expenses and that all contributions to the account shall be transmuted into community property. The section further provides that Murray and Cary will contribute to the account "on an 'as needed' basis, to support the parties in their accustomed manner of living."



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Cary contends Murray testified that he ceased funding the joint account, but she pointed to no specific language in section 5.3 that required Murray to fund the account at any particular level or for any particular length of time. Similarly, she did not cite any evidence showing Murray failed to provide her with sufficient funds during their marriage to support Cary in the couple's accustomed manner of living. Even assuming Murray breached section 5.3, Cary provided no authority showing that breach would void the entire Agreement. The trial court properly rejected this challenge.

C. Temporary Spousal Support

Cary attacks the trial court's temporary spousal support award on two fronts. First, she argues the court based its order on an erroneous legal standard. Second, Cary argues the court abused its discretion in setting the amount of temporary spousal support.

1. The Trial Court Applied the Appropriate Legal Standards Regarding Temporary Spousal Support

"Generally, temporary spousal support may be ordered in 'any amount' based on the party's need and the other party's ability to pay." (In re Marriage of Wittgrove (2004) 120 Cal.App.4th 1317, 1327 (Wittgrove).) It "'is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations.' [Citation.]" (In re Marriage of Murray (2002) 101 Cal.App.4th 581, 594 (Murray).) The parties' "accustomed marital lifestyle" is the "benchmark for a temporary spousal support award." (Wittgrove, at pp. 1327, 1328.) "[T]he amount of a temporary spousal support award lies within the [trial] court's sound discretion, which will only be reversed on appeal on a showing of clear abuse of discretion." (Id. at p. 1327.)

Before 2001, the trial court's broad discretion to order temporary support in "'any amount'" (§ 3600) was limited only by "the moving party's needs and the other party's ability to pay"; no statutory guidelines constrained the court's discretion. (Murray, supra, 101 Cal.App.4th at pp. 594-595 & fn. 10; Wittgrove, supra, 120 Cal.App.4th at p. 1327.) In 2001, however, the Legislature amended section 3600 to require the trial court to consider any documented history of domestic violence when making a temporary spousal support award.⁹ (In re Marriage of MacManus (2010) 182 Cal.App.4th 330, 336 (MacManus).)

Accordingly, although the trial court retains its broad discretion to award temporary support in any amount subject only to the parties' "general 'need' and 'ability to pay'" (Wittgrove, supra, 120 Cal.App.4th at p. 1327), the court also must consider "[d]ocumented evidence of any history of domestic violence" that may exist (§§ 3600, 4320, subd. (i); MacManus, supra, 182 Cal.App.4th at p. 336). In exercising its broad discretion to award temporary spousal support, a trial court may rely on a documented history of domestic violence to either reduce or increase the amount of temporary spousal support it otherwise would have awarded based on the parties' need and ability to pay. (See MacManus, at pp. 337-338.)



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Cary contends the trial court applied an erroneous legal standard in deciding her temporary support request because it awarded only an amount sufficient to cover her "'bare necessities'" without considering the standard of living she enjoyed during her marriage to Murray. Cary, however, failed to cite any evidence in the record to support this contention.

Apparently, Cary believes the trial court limited the award to her bare necessities because the court ordered her to submit a budget showing her actual monthly expenditures and refused to award her all the expenses she identified in her income and expense declarations. She is mistaken. The court ordered Cary to submit a budget listing her actual expenditures only after it questioned her income and expense declarations because they included unreasonable and nonexistent expenses. The court explained it ordered Cary to submit the budget so it could determine Cary's reasonable monthly expenses "commensurate with the martial standard of living."

The court's ruling rejecting some of the expenses Cary claimed and requiring her to submit a budget listing her actual expenses does not establish the court applied an erroneous legal standard. To the contrary, it shows the court gave Cary every opportunity to show what her true "needs" were under the controlling legal standard. Indeed, the record is replete with statements by the court showing it understood Cary's temporary support request was governed by the "marital standard of living," the parties' "needs" and "ability to pay," and the desire to "maintain the status quo." Moreover, as explained below, the trial court also properly considered Cary's documented history of domestic violence in deciding her temporary support request. In short, the record does not support Cary's contention the court applied an erroneous legal standard.

2. Cary Failed to Show the Trial Court Abused Its Discretion in Setting the Amount of Her Temporary Spousal Support

Cary contends the trial court abused its discretion in setting temporary spousal support because the amount it awarded bore no relationship to the standard of living Cary enjoyed during her marriage. This argument, however, assumes the marital standard of living was the only factor to be considered in deciding Cary's temporary spousal support request. It was not.

As explained above, section 3600 also required the trial court to consider any history of domestic violence involving Cary and Murray. (§§ 3600, 4320, subd. (i); MacManus, supra, 182 Cal.App.4th at p. 336.) The trial court expressly found Cary had a documented history of domestic violence based on the domestic violence restraining orders in both this action and the criminal proceedings. The court expressly relied on those legal proceedings in setting the amount of Cary's spousal support, stating it took that history "into account in determining what's equitable."

Cary does not challenge the trial court's findings regarding her domestic violence history nor its reliance on that history in setting the amount of her temporary spousal support. Indeed, Cary's briefs flatly ignored the domestic violence issue and made no attempt to address its impact. Without



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addressing the trial court's reliance on her domestic violence history, Cary cannot meet her burden to establish the court abused its discretion. (Wittgrove, *supra*, 120 Cal.App.4th at p. 1327 [temporary spousal support "will only be reversed on appeal on a showing of clear abuse of discretion"].)

Cary's failure to address her domestic violence history as a ground for reducing her temporary spousal support eliminates the need to address in detail her various contentions regarding the purported inadequacy of the trial court's temporary support award. In short, Cary contends the trial court abused its discretion in setting the amount of temporary spousal support because she could not maintain the marital standard of living based on the amount the court awarded. This contention, however, assumes the trial court was required to accept Cary's claims regarding the amount of support she needed to maintain the marital standard of living and that she essentially could spend whatever amount she wished because Murray made a significant amount of money. She provides no authority to support these assumptions.

According to Cary, the trial court should have awarded her \$91,000 per month in temporary spousal support for the period before she entered the Orange County Jail and Sylmar Health and Rehabilitation Center and \$55,000 per month for the period after she entered these facilities. Instead, the court awarded her \$30,000 per month before she entered the facilities and between \$20,000 and \$7,500 per month after she entered the facilities. Cary based the amount of her temporary spousal support request on her income and expense declarations and the parties' stipulation regarding the family's monthly expenses and savings before she and Murray separated. This evidence, however, does not support her request.

The trial court rejected Cary's income and expense declarations as lacking credibility and found many of the expenses she claimed to be unreasonable. The record supports that finding. In October 2007, Cary filed an income and expense declaration claiming more than \$95,000 in monthly expenses that included numerous family expenses that Murray was paying and other inflated items. Before entering the Orange County Jail in July 2009, Cary filed five additional income and expense declarations claiming monthly expenses ranging from approximately \$76,000 or \$59,000. These declarations claimed several of the same expenses as Cary's October 2007 declaration.

For example, some of these declarations claimed \$19,300 in rent and mortgage payments, \$3,000 in real property taxes, and \$2,900 in home maintenance and repairs despite the fact Murray lived in the family home and paid all of the associated expenses while Cary rented a separate home for \$7,300 per month. The declarations also claimed various expenses relating to the children, but Murray had custody of the children while Cary had no or only limited visitation rights. Without explanation, Cary's declarations also claimed numerous credit card bills that she continued to run up, her attorney fees for the criminal proceedings, and tax liabilities that Cary failed to pay with the funds she received.

The parties' stipulation regarding the family's preseparation monthly expenses also does not support



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Cary's substantial temporary spousal support request. As with Cary's income and expense declarations, the preseparation monthly expenses include numerous family expenses that Murray paid post-separation and therefore could not be considered in setting the amount of support Cary needed to maintain the marital lifestyle.

In short, Cary failed to cite any credible evidence showing she could not maintain the marital standard of living based on the \$30,000 she received each month in temporary spousal support. The trial court had broad discretion to decide the amount of temporary spousal support and Cary failed to meet her burden to establish the court abused that discretion.

D. Permanent Spousal Support

Cary attacks the trial court's ruling regarding permanent spousal support on three grounds. She contends the trial court abused its discretion in (1) setting the amount of permanent spousal support at a level sufficient only to cover the cost of her institutional care; (2) reducing the permanent spousal support to zero on December 1, 2013; and (3) requiring Murray to name Cary as the beneficiary on a life insurance policy only until her permanent spousal support drops to zero.

1. The Trial Court Did Not Abuse Its Discretion in Setting the Amount of Cary's Permanent Spousal Support

"An award of [permanent] spousal support is a determination to be made by the trial court in each case before it, based upon the facts and equities of that case, after weighing each of the circumstances and applicable statutory guidelines. [Citations.] In making its [permanent] spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320, with the goal of accomplishing substantial justice for the parties in the case before it. 'The issue of [permanent] spousal support, including its purpose, is one which is truly personal to the parties.' [Citation.]" (In re Marriage of Kerr (1999) 77 Cal.App.4th 87, 93 (Kerr).)

"In awarding [permanent] spousal support, the court must consider the mandatory guidelines of section 4320." (Kerr, supra, 77 Cal.App.4th at p. 93.) "In balancing the applicable statutory factors, the trial court has discretion to determine the appropriate weight to accord to each." (In re Marriage of Cheriton (2001) 92 Cal.App.4th 269, 304 (Cheriton).) "Once the court does so, the ultimate decision as to amount and duration of [permanent] spousal support rests within its broad discretion and will not be reversed on appeal absent an abuse of that discretion. [Citation.] 'Because trial courts have such broad discretion, appellate courts must act with cautious judicial restraint in reviewing these orders.' [Citation.]" (Kerr, at p. 93.)

Section 4320 identifies 14 factors a trial court must consider in ordering permanent spousal support. These factors are (1) each spouse's ability to maintain the marital standard of living; (2) contributions to the supporting spouse's education, training, or career; (3) the supporting spouse's ability to pay



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support; (4) the needs of each spouse based on the marital standard of living; (5) the obligations and assets of each spouse; (6) the duration of the marriage; (7) the supported spouse's ability to engage in gainful employment without unduly interfering with the children's interests; (8) the age and health of the spouses; (9) documented evidence of any history of domestic violence; (10) tax consequences; (11) the balance of hardships; (12) making the supported spouse self-supporting within a reasonable period of time; (13) an abusive spouse's criminal convictions; and (14) any other factors the court deems just and equitable.¹⁰ (§ 4320, subds. (a)-(n).)

Echoing her challenge to the trial court's temporary spousal support award, Cary contends the court abused its discretion in setting the permanent spousal support amount by "solely addressing Cary's absolute minimum expenses to sustain her existence and not ordering spousal support on the totality of Family Code §4320 factors." This argument significantly misrepresents the court's ruling.

After hearing all of the parties' evidence and argument, the trial court set Cary's permanent spousal support at \$10,500 per month. In making that ruling, the court provided the parties with a lengthy explanation for its ruling, noting the unique circumstances of this case and addressing each of the 14 factors section 4320 identifies. For example, the court made findings regarding Murray and Cary's wealthy standard of marital living; their ages, health, and length of marriage; Murray's wealth and ability to pay spousal support; Cary's unemployability based on the doctors' prognosis that her mental condition likely would render her completely disabled for the remainder of her life; Cary's substantial need for support because her disability requires indefinite institutional care; Murray's and Cary's relative hardships, and the tax consequences of the court's permanent support ruling.

The trial court also found Cary had a history of domestic violence under section 4320, subdivision (i), and that she likely would have been convicted of domestic violence if the criminal court did not find her incompetent to stand trial. Finally, as additional factors the court deemed just and equitable under section 4320, subdivision (n), the court found Murray had paid nearly \$500,000 in fees for Cary's lawyers, accountants, and guardian ad litem, he was solely responsible for the children, and he paid all community bills. The court carefully weighed all these factors before arriving at its decision to set Cary's permanent monthly spousal support at \$10,500, which covered all medical and other bills for her residence and treatment at Sylmar Health and Rehabilitation Center and any other minor expenses.

Cary does not challenge any of the court's findings under section 4320, nor does she provide any argument regarding their impact on her permanent spousal support award. Without addressing the statutorily required findings the court made to support its permanent support award, Cary cannot meet her burden to establish the court abused its discretion in setting permanent spousal support at the specific amount it selected. (In re Marriage of Schaffer (1984) 158 Cal.App.3d 930, 935 ["only a clear abuse of . . . discretion will justify a reversal" of a permanent spousal support award].)

2. The Trial Court Did Not Abuse Its Discretion in Ordering Cary's Permanent Support to Drop to



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Zero on December 1, 2013

The same legal standards that govern a trial court's decision regarding the amount of permanent spousal support also govern its decision regarding the duration of the support. In other words, the court must consider all the section 4320 factors, but it possesses broad discretion in weighing each factor and deciding the award's duration in each case. (Kerr, *supra*, 77 Cal.App.4th at p. 93; *In re Marriage of Wilson* (1988) 201 Cal.App.3d 913, 916 (Wilson) ["Wide discretion is vested in the trial court in determining the amount and duration of spousal support"]; *Hogoboom & King*, *supra*, at ¶ 6:820, p. 6-302.3 ["so long as the statutory factors are considered and weighed (as applicable in a given case), the ultimate decision -- as to amount, duration and whether to retain spousal support jurisdiction -- rests within the court's broad discretion" (original italics)].)

The court's discretion includes the authority to step down the amount of spousal support over time (Cheriton, *supra*, 92 Cal.App.4th at p. 304) and to terminate support on a future date (Wilson, *supra*, 201 Cal.App.3d at p. 920; *In re Marriage of Heistermann* (1991) 234 Cal.App.3d 1195, 1201-1202; § 4330, subd. (a)).

In *Wilson*, the trial court terminated the wife's spousal support on a future date despite the fact the husband had the ability to continue supporting the wife and the wife could not support herself because a brain injury she suffered during the marriage rendered her permanently disabled. (Wilson, *supra*, 201 Cal.App.3d at p. 916.) In addition to the wife's need and the husband's ability to pay, the court considered the marriage's length (five years 10 months), that the couple married in their 40's after establishing their own lives, the wife's unemployment during the marriage did not affect her earning capacity, the wife did not contribute to the husband's career, and the husband paid support for four years 10 months. After considering all these circumstances and "balance[ing] the equities" the court decided "the obligation to assist [the wife] should shift from [the husband] to society."¹¹ (Id. at pp. 917-918.)

The Court of Appeal affirmed because the wife's inability to support herself was just one of the statutory factors section 4320 required the trial court to weigh in making its decision. (Wilson, *supra*, 201 Cal.App.3d at pp. 919-920.) As the Wilson court explained, "Once the trial court logically and reasonably applies section [4320], all that remains for the appellate court is a review for potential abuse of discretion. Because [the record showed] the trial court carefully weighed all [the statutory] factors, the decision to terminate support including medical coverage was not an abuse of discretion given the totality of circumstances." (Wilson, *supra*, 201 Cal.App.3d at p. 920.)

Here, the trial court's order reduced Cary's permanent spousal support to zero after three years (i.e., on December 1, 2013), but it retained jurisdiction to modify that order until Cary's death, her remarriage, or further order. The court explained its purpose was to provide Cary, her family, or other representatives adequate time to apply for and obtain governmental assistance to cover the cost of Cary's institutional care. The court further stated that he expected Cary or a representative to



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make a motion to extend her spousal support if Cary could not secure governmental assistance by the deadline.

The record here shows the trial court followed Wilson's prescription and carefully weighed all the section 4320 factors in making its permanent spousal support order. The trial court acknowledged Cary cannot support herself because her mental condition renders her permanently disabled, while Murray has the ability to continue supporting Cary. The trial court found Cary's unemployment during her marriage did not affect her ability to find work and care for herself (her mental condition did), Cary did not contribute to Murray career, Murray will pay post-separation support for a period well over half the marriage's length,¹² and Murray had no legal obligation to support Cary for the rest of her life. Murray and Cary have two children, but Murray has had custody and paid all their expenses since separation, and will continue to do so. The trial court also found Cary had a history of domestic violence against Murray that it must consider in making the spousal support award.

Again, Cary does not challenge any of the court's findings regarding the section 4320 factors, nor does she argue the court's findings do not support its decision to terminate her permanent support in December 2013. Accordingly, because the record shows the trial court "logically and reasonably" applied each of the section 4320 factors, we must conclude the trial court did not abuse its discretion in deciding to terminate Cary's spousal support. (Wilson, *supra*, 201 Cal.App.3d at p. 920.)

Cary challenges the court's decision to terminate her support solely on the ground the court improperly speculated she could obtain governmental assistance to cover the cost of her institutional care before her support terminated. According to Cary, no evidence supports that speculation and therefore we must reverse the court's decision to terminate support. We disagree.

"'[O]rders for changes in support to take effect in the future must be based upon reasonable inferences to be drawn from the evidence, not mere hopes or speculative expectations.' [Citations.] [Fn. omitted.]" (In re Marriage of Smith (1978) 79 Cal.App.3d 725, 740, *italics added* (Smith).) In upholding an order reducing the wife's support to \$1 after four years, the Smith court explained, "While perhaps not entirely unspeculative, it can be inferred that wife should conclude her schooling and receive her degree within four years. Although there is no evidence of the amount she would then be able to earn, it is reasonable to infer her marketable skills will then be significantly greater and she will be in a position to accept employment on a full-time basis." (Ibid.)

Here, the trial court appointed a deputy county counsel as an independent expert to investigate and report on the requirements Cary must meet to obtain governmental assistance for the cost of her institutional care and the process she must go through to obtain that assistance. The deputy county counsel testified that Cary could obtain governmental assistance if her assets and income placed her at or below the poverty level. He explained the application process takes several months and can require multiple appeals, but Cary could apply before her spousal support terminated and the governmental programs would consider a court order showing Cary's spousal support income would



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terminate on a date certain. The deputy county counsel believed the governmental programs would cover the costs of Cary's treatment at Sylmar Health and Rehabilitation Center.

This testimony supports the reasonable inference that Cary could qualify for and obtain governmental assistance by the time her three years of permanent support ends. Admittedly, obtaining governmental assistance for Cary is not a foregone conclusion because of Murray's substantial resources, but Cary has no resources of her own and the trial court's judgment ending Murray's legal obligation to support Cary should bolster her efforts to obtain aid. Moreover, the trial court retained jurisdiction to extend its permanent support award if Cary cannot obtain governmental assistance by the court's deadline. As the Smith court explained, "[A]n order for automatic reduction in the amount of spousal support, which is itself modifiable, does not involve nearly as great a risk as an order terminating support by which the court loses jurisdiction to effect any modification should its expectations prove unjustified." (Smith, *supra*, 79 Cal.App.3d at p. 740.)

3. The Trial Court Did Not Abuse Its Discretion in Requiring Murray to Name Cary as the Beneficiary on a Life Insurance Policy Only Until Her Permanent Support Drops to Zero

Unless the parties otherwise agree, an order for permanent spousal support terminates upon the supporting spouse's death. (§ 4337.) Accordingly, "where it is just and reasonable in view of the circumstances of the parties," the trial court "may" include in a permanent spousal support award an order requiring the supporting spouse to establish an annuity, life insurance policy, or trust for the supported spouse's benefit "so that the supported spouse will not be left without means of support in the event that the spousal support is terminated by the death of the party required to make the payment of support." (§ 4360, subd. (a).) Whether to include an order under section 4360 in a permanent spousal support award is vested in the trial court's discretion. (*In re Marriage of Ziegler* (1989) 207 Cal.App.3d 788, 793 (Ziegler).)

Here, the trial court's permanent spousal support award included the following order under section 4360: "For the period of time when [Murray] is obligated to make the payments of spousal support, as opposed to the reservation, he's ordered to have a \$500,000 policy of insurance which will cover [Cary's] hospitalization" Cary contends the court abused its discretion in requiring Murray to maintain the life insurance policy only until her permanent spousal support drops to zero.¹³ According to Cary, the court should have required Murray to maintain the policy for the entire period the court retained jurisdiction to modify permanent spousal support. We discern no abuse of discretion.

"The stated purpose of the statute is to insure that 'the supported spouse will not be left without means for support in the event that the order for support is terminated by the death of the party required to make the payment of support.' In other words, the statute's purpose is to insure support is provided for the supported spouse after the obligor dies." (Ziegler, *supra*, 207 Cal.App.3d at p. 793, original italics; § 4360, subd. (a).)



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The court's order requires Murray to pay permanent spousal support only until December 2013 and the life insurance policy the court ordered ensures Cary will continue to receive support if Murray dies before that date. No need exists for the policy to remain in effect after that date because Murray has no obligation to pay any support after that date. Accordingly, the court's order fully satisfies section 4360's purpose.

If the trial court later exercises the jurisdiction it reserved and orders Murray to pay support beyond December 2013, it also could order Murray to maintain the life insurance policy beyond that date. There is no current need for the policy to extend beyond December 2013 and nothing in the court's reservation of jurisdiction required the court to extend the policy beyond the date on which Cary's support falls to zero.

E. The Trial Court Did Not Err in Charging Cary \$110,000 for All Items She Removed from the Couple's Vacation Home

Cary and Murray owned a vacation home at Lake Tahoe. Shortly after Murray filed for divorce, Cary moved all the furniture and household items in the vacation home to the house she rented in Newport Beach. In dividing the couple's limited community property, the court charged Cary's share \$110,000 as the value for this property. The court found Cary breached her fiduciary duty to Murray by taking this property and therefore she should be charged with its value "as a sanction."¹⁴

Cary contends the trial court abused its discretion in "sanctioning" her in this manner because (1) she had the right to use the community property and therefore did not breach her fiduciary duty to Murray, and (2) the evidence showed the court should have valued the property at \$50,000. We disagree.

The trial court did not sanction Cary, but rather merely charged her with the property's current value when the court divided the couple's community property. In other words, because Cary took the property for her own use, the court essentially allowed Cary to keep the property by charging her with both her 50 percent interest and Murray's 50 percent interest. This is no different than the treatment given any other community property item that is assigned solely to one spouse in the property division.

Cary's true objection appears to be to the \$110,000 value the court gave this property, but substantial evidence supports that valuation. Murray testified the furniture, furnishings, and other items Cary took from the vacation home cost approximately \$220,000, but the property should be discounted by 50 percent "for usage and age." Accordingly, Murray valued the property at the time he testified as \$110,000 and the court accepted that testimony as the property's current value.

Cary failed to offer any evidence of her own regarding the property's value. Instead, she relied exclusively on a schedule of assets Murray signed that valued the vacation home's "[h]ousehold



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items" at \$50,000. Cary argued the court should have used that figure as the property's value, but Murray testified that value did not include the vacation home's furniture.

In sum, although the trial court's statement of decision on this issue included words such as "sanction," "breach of fiduciary duty," and "replacement value," the evidence showed the court simply assigned the property Cary took to her community property share and accepted Murray's testimony regarding the property's current value. Cary fails to establish the court erred. (See *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 906-907 ["It is the ruling, and not the reason for the ruling, that is reviewed on appeal"].)

F. Cary Forfeited Any Challenge to the Judgment Based on Purported Judicial Bias

Cary contends we should reverse the trial court's judgment because the judge who made all rulings relating to the Agreement, temporary and permanent spousal support, property division, and attorney fees and expenses was biased against her and therefore denied her a fair trial. According to Cary, numerous rulings and statements the judge made during the nearly two and one-half years he presided over this case demonstrate judicial bias that required the judge to recuse himself. Cary, however, forfeited any challenge to the judgment based on this ground by failing to raise the issue in the trial court.

Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii) states, "A judge shall be disqualified if . . . : [¶] . . . [¶] A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Any party seeking to disqualify a judge on this ground, or any other ground identified in Code of Civil Procedure section 170.1, must do so "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification."¹⁵ (Code Civ. Proc., § 170.3, subd. (c)(1).) "This strict promptness requirement is not to be taken lightly, as a failure to comply constitutes forfeiture or an implied waiver of the disqualification." (*Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337 (Tri Counties); *In re Steven O.* (1991) 229 Cal.App.3d 46, 54 (Steven O.)) ["Failure to comply with this requirement constitutes an implied waiver of the disqualification"]. "The matter cannot then be raised for the first time on appeal." (Steven O., at p. 54.)

"The purpose of the requirement that alleged grounds for disqualification be asserted at the earliest practicable opportunity is that ""[i]t would seem . . . intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not."" [Citations.] In other words, '[a] party should not be allowed to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result.' [Citation.]" (*Tri Counties*, supra, 167 Cal.App.4th at pp. 1337-1338; *Steven O.*, supra, 229 Cal.App.3d at p. 55 ["This promptness requirement is not to be taken lightly, especially when the party delays in challenging the judge until after judgment. Otherwise, a



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defendant can sit through a first trial hoping for an acquittal, secure in the knowledge that he can invalidate the trial later if it does not net a favorable result").)

Cary points to a handful of statements and rulings the judge made during the nearly two and one-half years he presided over this action. Nearly all of the statements and rulings occurred many months and even years before the judge made his final ruling and entered his final judgment. Cary, however, failed to object to the judge's comments or rulings and did not employ any procedure for challenging the judge based on alleged bias. Accordingly, Cary forfeited any right to challenge the judge or his rulings on this ground. (Moulton Niguel Water Dist. v. Colombo (2003) 111 Cal.App.4th 1210, 1218 [party waived claims of judicial bias based on comments the trial judge made because the party failed to object to or challenge the judge in the trial court].)

To the extent Cary contends the grounds for disqualification she asserts also establish the trial judge violated her due process right to an unbiased judge, Cary forfeited that challenge for the same reasons discussed above: "It is true that [Code of Civil Procedure] section 170.3, subdivision (d), does not bar appeal from a final judgment on constitutional grounds of judicial bias. [Citation.] Nevertheless, a litigant should seek to resolve such issues by the required statutory means and 'his negligent failure to do so may constitute a forfeiture of his constitutional claim.' [Citation.] This is particularly true in civil cases where 'a constitutional question must be raised at the earliest opportunity or it will be considered to be waived.' [Citations.]" (Tri Counties, supra, 167 Cal.App.4th at p. 1339 ["We conclude petitioner's due process claims were forfeited by this dilatory conduct"]; People v. Brown (1993) 6 Cal.4th 322, 336.)

III

DISPOSITION

The judgment is affirmed. In the interest of justice, each party shall bear their own costs on appeal.

WE CONCUR: O'LEARY, P. J. FYBEL, J.

1. For clarity, "we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. [Citation.]" (In re Marriage of Balcof (2006) 141 Cal.App.4th 1509, 1513, fn. 2.)

2. Moreover, "a civil defendant does not have the absolute right to invoke the privilege against self-incrimination." (Fuller v. Superior Court (2001) 87 Cal.App.4th 299, 305.) Because the privilege does not protect a party from civil liability, when it is applied in civil proceedings "it is done from the standpoint of fairness, not from any constitutional right." (Blackburn v. Superior Court (1993) 21 Cal.App.4th 414, 425.) "A party or witness in a civil proceeding 'may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it. [Citations.]' [Citation.]" (Fuller, at p. 306.)



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3. All future statutory references are to the Family Code unless otherwise noted.

4. All references to a section number including a decimal point are to sections of the Agreement, not to Family Code sections. A section reference's context will make clear whether the reference is to a Family Code section or a section of the Agreement.

5. Similarly, section 1.3 states, "Each party to this Agreement voluntarily and expressly waives any right to disclosure of the property and financial obligations of the other party beyond the disclosures provided in this Agreement. . . . [¶] . . . [¶] The parties acknowledge that they have been advised by their attorneys and they are aware of their rights to request full disclosure with respect to the assets, liabilities and issues relevant to this Agreement. . . . Notwithstanding such advice, each party hereto has knowingly, voluntarily, intelligently and free from fraud or duress, waived his and her rights to conduct such evaluation"

6. Cary also contends Murray breached the warranty by failing to disclose he held a 25 percent interest in two commercial properties. The record citations Cary relies on to support her contention establish that Lobel Financial Corporation, not Murray, owned the property at the time Murray and Cary entered into the Agreement. Cary does not contend the Agreement required Murray to disclose assets owned by Lobel Financial Corporation.

7. Section 2.5's language is admittedly confusing regarding Murray's share of Lobel Financial Corporation's profits. It states, "Murray's current income from his employment is approximately \$96,000.00, plus approximately 25% of the year end profits of LOBEL FINANCIAL CORPORATION, which in 1995 was approximately \$1,330,625." Cary apparently construed this language to mean Lobel Financial Corporation's total profits were \$1,330,625 and Murray received 25 percent of those profits, or \$332,656.25. Murray, however, testified the \$1,330,625 figure referred to his 25 percent share of the profits rather than the total profits. Cary does not dispute this evidence.

8. Cary actually claimed nine years of equity or \$540,000 (9 years times \$60,000 per year), but she miscalculated the number of years for which she acquired equity in the home. She argued she acquired an interest for nine years based on the time that elapsed between the date she married Murray and the date they separated. Section 3.9, however, states the acquisition period for Cary's interest in the home runs from the date Murray purchased the home, not the date the couple married.

9. Section 3600 now authorizes an award of temporary support in "any amount that is necessary for the support of the wife or husband, consistent with the requirements of subdivisions (i) and (m) of Section 4320 and Section 4325" Section 4320, subdivision (i), requires the trial court to consider "[d]ocumented evidence of any history of domestic violence" when ordering spousal support. Section 4320, subdivision (m), provides, "The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325." Section 4325, subdivision (a), establishes a "a rebuttable presumption affecting the burden of proof that any award of temporary or permanent spousal support to the abusive spouse otherwise awardable pursuant to the standards of this part should not be made."

10. In its entirety, section 4320 states, "In ordering spousal support under this part, the court shall consider all of the



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following circumstances: [¶] (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following: [¶] (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment. [¶] (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties. [¶] (b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party. [¶] (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living. [¶] (d) The needs of each party based on the standard of living established during the marriage. [¶] (e) The obligations and assets, including the separate property, of each party. [¶] (f) The duration of the marriage. [¶] (g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party. [¶] (h) The age and health of the parties. [¶] (i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party. [¶] (j) The immediate and specific tax consequences to each party. [¶] (k) The balance of the hardships to each party. [¶] (l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties. [¶] (m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325. [¶] (n) Any other factors the court determines are just and equitable."

11. In stating its ruling, the trial court explained, "'My question . . . that I'm faced with is at what point in time does the obligation to assist Mrs. Wilson become one of society's as distinguished from an obligation that is Mr. Wilson's, and I find that it is society's at this point in time.'" (Wilson, supra, 201 Cal.App.3 at p. 916.)

12. Specifically, Murray paid temporary support for three and one half-years and the court's support order required Murray to pay permanent support for an additional three years. These six and one-half years are approximately two-thirds as long as the marriage, which lasted nine years nine months.

13. Cary also contends the trial court abused its discretion in setting the policy amount at only \$500,000. Cary's challenge to the policy's amount, however, merely incorporates her challenge to the permanent spousal support amount the court set. A \$500,000 policy more than covers the three years of permanent support the court ordered and therefore Cary's challenge to the policy amount fails for the same reasons as her challenge to the support amount.

14. In its entirety, the statement of decision explained the court's ruling on this issue as follows: "The Court finds the value of the furniture, furnishings, and art in [Cary's] possession from the residence located at 1610 Upper Bench Road, Alpine Meadows, California has a replacement value of \$110,000. [Cary] shall be charged said sum in the division of the



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community property. The Court finds [Cary] removed said items from the Upper Bench Road residence. By removing the furniture, furnishings, and art, [Cary] breached her fiduciary duty to [Murray]. [Murray], in turn, replaced the furniture, furnishings, and art. [Cary] is charged, as a sanction, the value of \$110,000 for the replacement value because it is a vacation home which is normally sold with the furniture, furnishings, and art."

15. Code of Civil Procedure section 170.3, subdivision (d), also requires that any appellate challenge regarding a trial judge's disqualification must be promptly asserted by a writ of mandate: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. . . ."

