H046035

COURT OF APPEAL
STATE OF CALIFORNIA

Sixth Appellate District

In re Marriage of

MINGMING MOU,
Appellant,

vs.

JEFFREY GRIMES,
Respondent.

Appeal from Santa Clara County Superior Court
Case No. FL174815
Hon. Roberta Hayashi

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal is brought by Appellant Mingming Mou ("Ming") against her (now) ex-husband, Respondent Jeffrey Grimes ("Jeff"), because Ming disagrees with how Santa Clara County Superior Court Judge Roberta S. Hayashi made findings of fact in characterizing community property and exercised judicial discretion in setting spousal support. Although those issues are run-of-the-mill, the appeal presents questions of appealability and waiver.

During marriage, Ming borrowed $299,936 from her family in China. Ming and Jeff planned to buy a home with the money, but decided against it. Ming held the borrowed funds in a brokerage account containing other community property. The gains and losses in the account were reported as income to the parties on their tax returns until they separated in 2015. In a bifurcated trial on the characterization of the money, the trial court characterized the funds in the brokerage account as a community asset, and the obligation to repay Ming's family a community debt. Ming challenges that ruling, claiming the ownership of the money reverted to her relatives when the parties decided not to purchase a house, and she had been investing the money for their benefit. The trial court did not believe her explanation. Because Ming borrowed the money during marriage, substantial evidence supports the finding that the money is a community asset and the obligation to repay the loan is a community debt.

Second, Ming argues that the step-down order for permanent spousal support was an abuse of discretion. In assessing Ming's need for spousal support, the trial court found that (1) Ming is a working professional with a demonstrated earning capacity up to $123,257 per year, (2) Ming failed to make good faith efforts to find work after separation, and (3) Ming received temporary spousal support before trial at a higher amount and greater duration than was warranted due to her failure to seek work earlier. After considering the factors in Family Code section 4320, spousal support was set at $3,000 per month for one-and-a-half years (plus 20% of any income earned by Jeff above $300,000 per year), stepping down to $2,000 per month for two additional years. The trial court reserved jurisdiction to award further spousal support to Ming until December 1, 2026, which could be extended if a material change in circumstances warranted a modification of the amount or duration of support. These were reasonable judgments based on the evidence that should not be disturbed on appeal.

The standard of review for factual findings and exercises of discretion prevent a disgruntled litigant from filing an appeal for a second bite at the apple. The challenged rulings are supported by substantial evidence and do not exceed the bounds of reason. The orders should be affirmed.

II. ISSUES ON APPEAL

(1) Can an appeal be taken from the order characterizing community property and setting spousal support?

(2) Is there substantial evidence for the finding that the $299,936 were the proceeds of a loan acquired during marriage?

(3) Was the spousal support order an abuse of discretion?

III. STANDARD OF REVIEW

A fundamental principle of appellate review is that an appealed judgment or order is presumed to be correct. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-09.) "All intendments and presumptions are indulged to support [the appealed judgment or order] on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

(A) Findings of fact are reviewed for substantial evidence.

"If the trial court's resolution of [a] factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) The key question is whether, on the entire record, "there is substantial evidence, contradicted or uncontradicted, which will support the [trial court's] determination." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.) An appellate court will accept the evidence most favorable to the appealed order as true. (*In re Michael G.* (2012) 203 Cal.App.4th 580, 595.)

The only finding of fact challenged by Ming relates to the characterization of the money she received from her relatives as a loan. None of the findings regarding spousal support were alleged to lack substantial evidence in the Opening Brief.

(B) Awards of spousal support are reviewed for abuse of discretion.

An award of spousal support is reviewed for abuse of discretion. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 283 (*Cheriton*).) An abuse of discretion occurs when the trial court "exceeds the bounds of reason" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566) or its ruling is "so irrational or arbitrary that no reasonable person could agree with it" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773). As observed in *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876: "We could … disagree with the trial court's conclusion, but if the trial court's conclusion was a reasonable exercise of its discretion, we are not free to substitute our discretion for that of the trial court." (*Avant! Corp., supra,* 79 Cal.App.4th at pp. 881-82.)

(C) A miscarriage of justice must be shown.

Even when error is shown, a judgment must be affirmed unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 (*F.P.*).) There is a miscarriage of justice when it is reasonably probable the appealing party could have achieved a more favorable result had the error not occurred. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) A miscarriage of justice is never presumed, absent "structural error" that prevents a reviewing court from evaluating prejudice. (*F.P., supra,* 3 Cal.5th at p. 1108; Code Civ. Proc., § 475.)

IV. PROCEDURAL HISTORY

Jeff filed a Petition for Dissolution on April 15, 2016. (A.A. p. 4.)[1] Ming responded on May 31, 2016. (A.A. p. 7.)

The Findings and Order After Hearing on Spousal Support and Division of Scottrade Account (the "Order") was entered on May 24, 2018. (A.A. pp. 41-52.) On July 23, 2018, Ming filed a notice of appeal from the Order. (A.A. p. 54.)

A further Findings and Order After Hearing was entered October 29, 2018, ordering Ming to transfer one-half of the funds in the Scottrade account to Jeff, and for Jeff to pay Ming directly for his one-half share of the debt to her family members on the loan. (R.A. pp. 5-6.)[2]

By stipulation, a judgment was entered January 23, 2019, incorporating the Order and resolving other property issues by agreement (the "Judgment"). (A.A. pp. 62-64.) Ming did not appeal from the Judgment or the order of October 29, 2018.

V. APPEALABILITY

(A) The spousal support order is appealable.

The spousal support portion of the Order is appealable per the Family Code.[3] (§ 3554 [support orders appealable]; Code of

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[1] "A.A." refers to Appellant's Appendix filed May 7, 2019.

[2] The Findings and Order After Hearing filed October 29, 2018, is not part of the Appellant's Appendix or Appellant's Supplemental Appendix. It is made part of the record on appeal by Respondent's Appendix ("R.A.").

[3] Undesignated statutory references are to the Family Code.

Civ. Proc., § 904.1, subd. (a)(10) [appeal may be taken from order made appealable by Fam. Code].)

(B) The interlocutory property order is not appealable.

An appeal may be taken from a final judgment or an order made appealable by statute. (Code Civ. Proc., § 904.1, subd. (a).) Appellate jurisdiction depends on there being an appealable judgment or an appealable order as defined by statute. (*In re Marriage of Lafkas* (2007) 153 Cal.App.4th 1429, 1432 (*Lafkas*).) In *Lafkas*, the husband appealed from an order in a marital dissolution action on a bifurcated issue characterizing his business interest as community property. No appeal was taken from the final judgment. The *Lafkas* court explained: "Although the order on the bifurcated trial resolved some of the issues concerning [the business], it did not resolve all of them, and issues concerning other property were still pending. … Thus, the order appealed from is merely preliminary to a final order characterizing, valuing, and dividing all the marital assets." (*Lafkas, supra,* 153 Cal.App.4th at p. 1433, fn. omitted.) The *Lafkas* court dismissed the appeal because the order was not appealable and no certificate of probable cause was obtained for an immediate appeal. (*Id.,* at p. 1432; see Fam. Code, § 2025 [certification of bifurcated issue for appeal]; Cal. Rules Ct., rule 5.392(d) [motion to appeal if probable cause certificate granted].)

Similarly, *In re Marriage of Ellis* (2002) 101 Cal.App.4th 400 (*Ellis*) held that a post-judgment order finding a community interest in a medical subsidy was not appealable because the

order made no final division of that interest. In *Ellis*, the Court stated that the appealed order was "only preliminary to actually" dividing the community property, so the ruling could only "be reviewed upon appeal from the subsequent final judgment on reserved issue that actually divides the asset." (*Ellis, supra,* 101 Cal.App.4th at p. 403.)

Instead of waiting for a final judgment, Ming appealed from the Order. She claims the Order qualifies under the " 'collateral order doctrine' [which allows for a direct appeal] when a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act…." (A.O.B. p. 5, citing *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 (*Skelley*).) The citation to *Skelley* is correct on the spousal support portion of the order, but not as to the ruling on the characterization of the loan as community property. *Skelley* involved an appeal of an order on temporary spousal support and a denial of attorney's fees and costs. (*Skelley, supra,* 18 Cal.3d at p. 367.) When *Skelley* was decided, there was no express statutory authority for a direct appeal of a temporary spousal support order, but historically such orders were considered appealable. (*Id.,* at pp. 367-368.) The *Skelley* court held: "When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. [Citation.]" (*Id.,* at p. 368.)

The collateral order doctrine has been extended to orders other than for support. (*Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 900-905 (*Muller*) [discussing development of the doctrine].) But that does not mean all family law orders are appealable. Limiting the orders and judgments that can be reviewed is essential because " 'piecemeal disposition and multiple appeals in a single action would be oppressive and costly….' [Citation.]" (*Muller, supra,* 172 Cal.App.4th at p. 903.) "[T]he essence of the collateral order doctrine is that the matter concluded by the order should be truly 'distinct and severable from the general subject of the litigation….' [Citation]. It is only then that a piecemeal disposition and multiple appeals in a single action will be avoided." (*Id.,* at p. 904.)

Ming's appeal of the community property ruling fails the *Muller* test because the characterization of the loan proceeds and debt was only one part of the community estate. The Order was a necessary step toward dividing the estate, not a distinct and severable ruling from the rest of the property issues. The Order did not resolve all of the issues about the Scottrade account in which the loan proceeds had been deposited. The trial court directed the parties how to divide the account, given Ming's "withdrawals totaling $67,800 plus the amounts that would have been earned on those withdrawals had the funds remained in the Scottrade account…." (A.A. p. 45:12-15.) Those calculations required further work by the parties and possibly a hearing if they could not agree on the final division. Just as in *Lafkas* and

Ellis, the characterization of the funds Ming acquired from her family as community property was preliminary to the division of the remaining proceeds in the Scottrade account and the investment income the parties would have earned on the account had Ming not withdrawn money from the account after separation. Ultimately these issues were resolved by the Findings and Order After Hearing filed October 29, 2018 (R.A. pp. 4-6) [dividing the proceeds in the Scottrade account], and the Judgment (A.A. pp. 62-64) [awarding the remainder of the Scotttrade account to Ming, resolving other property issues, and agreeing that Ming owed Jeff money to make an overall equal division of the community estate].

Ming made no request for an immediate appeal of the property order. (See Fam. Code, § 2025 [certification of bifurcated issue for appeal]; Cal. Rules Ct., rule 5.392(d) [motion to appeal if probable cause certificate granted].) Therefore, her appeal of that interlocutory ruling should be dismissed.

(C) Ming's appeal of the property order could be deemed a writ petition.

A premature appeal may be deemed a petition for extraordinary writ in the appellate court's discretion. (See, *In re Marriage of Doherty* (2002) 103 Cal.App.4th 895, 898 [dismissing appeal but treating appeal as a writ petition] and *Ellis, supra,* 101 Cal.App.4th at p. 404 [same]; but see *Lafkas, supra,* 153 Cal.App.4th at p. 1434 [declining to treat imperfect appeal as a writ because that "power should be exercised only in unusual circumstances"].) Here, a final judgment has been entered so

there is no risk of piecemeal disposition or multiple appeals. This Court could excuse Ming's error by treating her appeal of the property ruling as a writ petition.

(D) No waiver occurred when Ming stipulated to the Judgment.

The opening brief does not address whether Ming may appeal from the Judgment when it was entered by stipulation. The Judgment states it is "uncontested" and resolves property division and spousal support according to a "settlement agreement, stipulation for judgment, or other written agreement." (A.A. pp. 63, § 2; A.A. 64, §§ 4.l.(4), 4.m.(1).) The Judgment incorporates the Order by reference, without mentioning the pending appeal or conditioning Ming's agreement to the Judgment on the outcome of the appeal. (See A.A. pp. 66:15-16, 67:24-68:2.) It is unclear from the face of the Judgment whether Ming agreed to the Order by incorporating it into the stipulated Judgment, or if she merely consented to the entry of a final judgment in conformity with the Order.

A party cannot appeal from an order or judgment he or she agreed to. (*Howeth v. Coffelt* (2017) 18 Cal.App.5th 126, 131 [no appeal from a judgment entered by consent]; *In re Shaver's Estate* (1900) 131 Cal. 219, 221 [dismissing appeal from decree distributing estate because appellants consented to the distribution].) But that rule does not apply when the party did not benefit directly from the judgment. (*Lee v. Brown* (1976) 18 Cal.3d 110, 114-118 [denying motion to dismiss appeal because accepting a homestead exemption from the proceeds of an

execution sale did not waive right to appeal]; *In re Marriage of Brockman* (1987) 194 Cal.App.3d 1035, 1044-1045 [acceptance of $10,000 and vehicle per judgment did not waive wife's right to appeal because it is inconceivable she might have received less if a reversal occurs].) There is also no requirement to object to a ruling when it would be a futile act. (See *City of Long Beach v. Farmers & Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, 784-785 [no waiver of right to appeal by failure to object when objection would have been an idle act], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 531-532, fn. 7.) Finally, an appeal is allowed from a stipulated judgment if the version entered differs from the terms of the settlement. (*Machado v. Myers* (Cal. Ct. App., Aug. 16, 2019, No. D073824) 2019 WL 4273854, at p. 5 [denying motion to dismiss appeal from stipulated judgment that varied from terms of stipulation].)

Here, a waiver should not be found because it appears Ming consented to the entry of a judgment in conformity with the Order. There is no indication that she consented to the Order in doing so.

VI. STATEMENT OF FACTS

Jeff and Ming were married in January 2004. (A.A. pp. 65:21-22, 70:20.) They have two sons. (A.A. pp. 64, 70:21-22.) Ming has undergraduate and graduate degrees in finance. (R.T. p. 66:3-6.) For most of the marriage, Ming worked full-time as an in-house treasury analyst for corporations. (R.T. pp. 66:6-9, 105:23-26.) Jeff is an engineering manager at a technology

company. (R.T. p. 89:15-17.) The parties separated in July 2015. (A.A. pp. 65:21-22, 70:20.)

(A) Ming borrowed $299,936 from her family during marriage.

In 2013, Jeff and Ming were renting a house in Palo Alto and considered purchasing a home. (R.T. pp. 8:6-8, 15:12-17, 88:19-21.) Ming told Jeff that her family members in China would provide funds so they could purchase a home. (R.T. pp. 9:5-9, 11:25-26.) Ming's family members transferred $299,936 to Ming. (R.T. pp. 18:16-23, 168:24-26, 168:28, 188:20-24.) The money was received by Ming in her Wells Fargo account, which she transferred to her Scottrade brokerage account. (R.T. pp. 12:3-5, 168:18-21). Ming's attorney acknowledged the money was a loan:

> [The] money was originally borrowed from [Ming's] family members. At the time it was borrowed, it was intended to be used to help the parties as a loan for the down payment on a piece of property they were looking to purchase…. [Ming] discussed with [Jeff] that this was money that they would be borrowing and that they would be responsible to repay the money.

(R.T. pp. 168:18-169:3 [offer of proof by Ming's trial attorney]; R.T. pp. 188:20-189:5 [adopting statements as testimony].)

The $299,936 was never repaid to Ming's family; instead Ming invested the money. (R.T. pp. 169:8-12, 188:20-189:5.) Ming deposited the funds in an unsegregated account with community property. (R.T. p. 43:16-20 [joint forensic accountant].) Ming and

Jeff paid all taxes on the dividends, interest, and capital gains on the invested funds. (R.T. pp. 13:10-13, 17:2-4.)

The trial court asked for clarification whether Ming's initial plan was to use the borrowed funds "to purchase what would ultimately be a community property home by both parties?" (R.T. p. 172:12-14.) Ming's attorney responded: "Yes. It was going to be a purchase that would have been a community property home and the debt would have been community property then had … the full amount been brought in and invested in that way, the couple would have been responsible to repay that $299,000. However, when they did not invest the money jointly [by purchasing a home], [Ming] kept that money in an individually titled account of her own on her relatives' behalf." (R.T. p. 172:15-22.) Because the parties did not use the $299,936 to purchase a home, Ming claimed that the money reverted to the property of her family—even though she held onto the funds for over two years. (R.T. p. 172:15-22; see also A.O.B. p. 14.)

The only evidence presented to support her theory was Ming's testimony she told Jeff, in spring 2014, that she offered repayment to her family members, but they told her to invest the money on their behalf (R.T. pp. 173:20-176:2, 178:13-18.) The court asked Ming to describe the details of her offer of repayment and the arrangement to act as a custodian of the funds, but her memory was uncertain and her testimony unclear. (See R.T. pp. 173:20-175:14.)

No testimony was offered by Ming's family members who made the loan, nor were the family members joined. (R.T. pp.

190:23-191:2, 201:1-17.) Ming alluded to a "casually draft[ed]" agreement with her family showing the $299,936 was a gift or loan, and Ming's counsel said there were "written notes between [Ming and her relatives] informally" about the money—but she offered no documents into evidence. (R.T. pp. 191:4-13, 202:10-17.) Ming acknowledged there is nothing "in writing authorizing [her] to invest money on their behalf" and there was no discussion with her relatives on who would pay taxes on any gains. (R.T. pp. 175:28-176:14.)

The trial court found that the money Ming received from her relatives were borrowed funds with a repayment obligation to her relatives.

> The Court finds that the Parties received the sum of $299,936 as a loan to both of them for the purpose of buying a community home…. [Ming] contends that the monies were loaned to her individually, by her family, to buy the Parties' home that they would jointly own. There is no documentation provided to the Court which evidence such a loan, who was the borrower, or what the terms of repayment (if any) would be. [Ming] contends that after the Parties did not buy a home in 2014, her family entrusted her with the money to invest for them. Again, there is no documentation that such investment agreement existed, or that the characterization of the funds from 'loan' to 'managed investment' had changed. While [Ming] is an experienced financial analyst, she is not a licensed broker dealer or trained to be such, [and] there is no record that she segregated the funds in the Scottrade Account or would have been able to track gains or losses to the funds

> purportedly entrusted to her by her family. Significantly, all gains and losses on these funds loaned to the community were treated as belonging to the Parties. [¶] The Court finds that the $299,936 was and is a loan to the community, made for a community purpose, and orders that this debt obligation shall be equally divided between the Parties, with each Party to take possession of one-half of the principal amount of the loan and also assume as his/her separate liability the obligation to repay [Ming's] family the sum of $149,968 each.

(A.A. pp. 71:25-72:24.)

(B) The trial court received evidence regarding the marital standard of living, Ming's earning capacity, and her need for spousal support.

Prior to separation, the family lived in a leased residence in Palo Alto. (A.A. p. 46:4-5.) They owned a townhouse in San Francisco, which they rented out. (A.A. p. 46:4-5.) During marriage, the family enjoyed a middle to upper-middle class lifestyle. (R.T. pp. 93:25-94:1.) In winters, the family often skied at Lake Tahoe. (R.T. p. 94:7-8.) In springs or summers, they went to Disneyland in Southern California or sometimes to farther destinations, like Disney World in Florida (once) and Hawaii (once). (R.T. p. 94:8-11.) The parties drove a 2005 Subaru Legacy station wagon, which they purchased new (R.T. pp. 94:20-21, 95:6-9); a used 2002 Lexus, which they purchased in 2008 (R.T. p. 94:21-22); and a 2012 Porsche 911, which they purchased in 2013 (R.T. p. 94:23-24). One of their sons attended private school. (R.T. pp. 97:26-98:1.) The family did not dine out much—about once per month—and, when they did, they would eat at places like

Cheesecake Factory and spend no more than $70 per meal in all. (R.T. p. 98:19-23.)

Jeff worked long hours during marriage to achieve success, which he was able to do because Ming took on greater responsibility for child care. (A.A. p. 47:14-16.) Jeff earns a salary of $230,000 per year, a discretionary bonus and stock units from his employer that vest over time. (R.T. pp. 89:15-17, 91:3-15.) After separation, his earnings were between $400,000 to $500,000 per year, perhaps more depending on the value of the stock units. (A.A. p. 48:21-24.)

Ming has undergraduate and graduate degrees in finance. (R.T. p. 66:3-6.) She is fluent in English and Mandarin. (A.A. p. 46:24-25.) Ming worked consistently for 15 years before and during marriage, taking time off for pregnancy or family leave. (A.A. p. 46:9-11.) Her occupation is a treasury analyst for corporations. (R.T. pp. 66:6-9, 105:23-26.) A treasury analyst is a "mid-level managerial contributor position" (R.T. p. 71:1-2), "well above entry level" who manages accounts and prepares budgets (R.T. 66:14-16). In 2013, Ming earned $133,139 and, in 2014, she earned $132,390. (R.T. p. 68:15-16.) She worked a partial year in 2015 and earned $88,468. (R.T. p. 68:16-17.) There was a two-year gap in employment that started when the parties separated, which did not result from a devotion to domestic duties. (A.A. p. 47:6-9.)

Vocational expert Richard Lyness testified that Ming is "a knowledgeable and pleasant professional" who "comes across well" and has a "consistent work history" with "recognizable and

well-known companies…." (R.T. pp. 66:9-10, 69:6-10, 106:10-12.) Mr. Lyness concluded that Ming is "readily employable" and "capable of working toward becoming self-supporting…" (R.T. pp. 69:18-20, 80:4-5.) He added that the job market is "robust" with "a range of available jobs that are appropriate" for Ming. (R.T. p. 69:24-26.) Within a 25-mile radius, Mr. Lyness located 32 positions. (R.T. p. 74:8-11.) The "conservative range" of Ming's earning capacity is $101,008 to $123,257 (R.T. pp. 70:1-15, 72:16) and she is capable of rising to a treasury manager, which is the position immediately above a treasury analyst (R.T. pp. 78:2-5, 80:8-10.) Even if Ming earned that much, it would not maintain the marital standard in Silicon Valley. (A.A. p. 48:16-18.) Although Ming received assets from the divorce that she can invest, the income on those investments would not be enough to maintain the marital standard of living. (A.A. p. 49:1-5.)

The trial court found that Ming did not make good faith efforts to return to full-employment after separation, which placed a financial hardship on Jeff by burdening him with higher than normal support payments to Ming due to her unemployment:

- "[Ming]'s testimony with regard to her separation from employment in 2015 makes clear that work was still available to her to perform, but that she had told her employer that she needed 'more flexibility' in order to balance the employer's needs with her need to take additional time to focus on marital and family demands. The Court finds that

this was not an involuntary termination of employment, but more of a mutual separation." (A.A. p. 50:1-5.)

- "[Ming's] efforts [to find new employment] were not appropriately and fully focused on her job search, her applications were primarily on-line and showed a lack of follow-up, diligence, or other behavior consistent with a good faith job search. The Court further finds that had she made such effort, she would have been employed within 12 months from commencing a diligent search, i.e. by August 1, 2016." (A.A. p. 50:12-16.)

- The Court issued a "seek work order" on May 24, 2016, and ordered the imputation of income in early 2018. (A.A. p. 50:6-7.) "Only after she was ordered to be imputed with income of $90,000 per year, did [Ming] resume work at a rate of $96,000, almost $40,000 per year less than her last full year's rate of pay, and just slightly above the imputed earnings rate." (A.A. p. 50:7-9.)

- Due to her failure to make good faith efforts to find employment at her earning capacity, "[Ming] has benefitted from temporary spousal support throughout the marital dissolution process, which was at a higher level and for a greater duration than was warranted under the facts of this case. (A.A. pp. 49:25-50:1.)

- "In addition, because of her unemployment, [Ming] was not required to contribute to the financial support of the

Parties' children, thus imposing a further burden on [Jeff]." (A.A. p. 50:17-18.)

(C) A permanent spousal support order was made, allowing Ming to seek additional support on a showing of changed circumstances.

Jeff was ordered to pay spousal support to Ming commencing June 1, 2018, until "[Ming]'s remarriage, further court order, written agreement or November 30, 2026 (the last day of the month in which the Parties' youngest child turns 18)…." (A.A. p. 51:7-11.) Base monthly spousal support was set at $3,000 per month for June 1, 2018, to December 31, 2019, which is the last day of the year in which Jeff's stock units that were "granted prior to the parties' separation will presumably vest. [Citation.]" (A.A. p. 51:12-13, fn. 3.) As additional spousal support, Jeff was ordered to pay 20 percent of any income he earned over $300,000 per year in 2018 and 2019. (A.A. p. 51:13-14.) The trial court defined income broadly for this purpose and stated it includes cash or stock bonuses received by Jeff "on or before March 15, 2020 for work or services performed by [Jeff] prior to December 31, 2019 … to avoid a circumstance where the employer defers additional income from 2019 into 2020, causing a reduction in the spousal support that would otherwise be paid under this order." (A.A. p. 51:16-22.)

For January 1, 2020, to December 31, 2021, spousal support was set at $2,000 per month, then reducing to $1 per month from January 1, 2022, to November 30, 2026. (A.A. pp. 51:23-52:1.) The award "may be modified as to amount upon a

showing of changed circumstances." (A.A. p. 52:2.) The duration of the award may also be extended for changed circumstances if Ming files a request by December 1, 2026. (A.A. p. 52:3-17.)

VII. DISCUSSION

(A) Substantial evidence supports the finding that the loan proceeds and debt are community property.

Ming admitted she borrowed $299,936 from her relatives, which is ample evidence for the finding that the money was a loan. (See R.T. pp. 168:20-169:3, 172:12-173:10, 188:20-24.) The loan was taken for the community purpose of purchasing a home. (R.T. pp. 9:5-9, 72:12-15, 188:20-24.) This testimony supports the finding that the funds Ming borrowed are a community asset and the obligation to repay Ming's relatives is a community debt.

Ming's main grievance is the trial court did not find credible her claim that the ownership of the $299,936 pivoted back to her family when the home was not purchased. Ming claims the trial court had to accept her account because:

> [Ming's] testimony that after the couple did not buy the house her relatives instructed her to manage the funds for them in the U.S. (because they could not open a U.S. brokerage account) [citation] was credible, reasonable, and was the *only* solid evidence about [Ming]'s agreement with her relatives with respect to those funds.

(A.O.B. p. 14, emphasis in original.)

Ming misunderstands the substantial evidence rule. Trial courts have "a right to believe or disbelieve the testimony of any

witness" and appellate courts "will not weigh the evidence, pass upon the credibility of the witnesses, nor substitute its judgment thereon for that of the trial court. [Citation.]" (*Karas v. Karas* (1951) 107 Cal.App.2d 135, 138.) Ming called none of her family members as witnesses to testify. She alluded to the existence of writings with family members regarding the loan, but never presented that evidence. (R.T. pp. 191:4-13, 201:12-202:20.) Ming could not accurately recount the date her family members agreed for her to hold and invest their money; Ming vacillated from "I don't remember" to 2013 to 2014. (R.T. pp. 175:15-178:18.)

The trial court did not believe Ming's testimony, noting the parties had paid income taxes on the money as if it belonged to them. (A.A. pp. 44:18-19, 72:18-19.) The court stated "there is no documentation that [an] investment agreement existed" and "no documentation that … the characterization of funds from 'loan' to 'managed investment' had changed" (A.A. pp. 44:13-15, 72:13-15; R.T. pp. 175:15-176:16.) These findings are supported by substantial evidence and should be affirmed.

The characterization of the loan proceeds was a correct application of the law because the loan proceeds were acquired during marriage. "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." (§ 760.) To qualify as an exception to section 760, a statute must define the separate property of a spouse. (*In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1407 (conc. op. of Chin, J.) [overcoming section 760 requires "evidence

showing that another statute makes the property something other than community property"].) Property acquired during marriage by gift or inheritance is separate property. (§ 770, subd. (a).) Ming did not claim that the property was her separate property by gift or inheritance. Instead, she testified that the money belonged to her relatives and she was just holding it for them. The court did not believe her.

The characterization of the debt as community was also correct. "Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse … during marriage, … regardless of whether one or both spouses are parties to the debt…." (§ 910, subd. (a).) Ming borrowed money from her relatives during marriage so the repayment obligation is a community debt. Therefore, the ruling on the loan proceeds and debt should be affirmed.

(B) The spousal support award does not exceed the bounds of reason.

Ming claims "the court's determination of the amount and duration of support was so arbitrary as to require reversal under the applicable abuse of discretion standard." (A.O.B. p. 19.) That argument is unavailing because the trial court has wide discretion in ordering spousal support.

1. The trial court considered the Family Code section 4320 factors.

Family Code section 4320 lists 14 factors that a trial court must consider when ordering spousal support.[4] (§ 4320.) After the trial court considers these factors, " 'the ultimate decision as to amount and duration of spousal support rests within its broad

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[4] § 4320 provides: "In ordering spousal support under this part, the court shall consider all of the 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.… (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.… (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) All documented evidence of any history of domestic violence.… (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.… (n) Any other factors the court determines are just and equitable."

discretion….' [Citation.]" (*Cheriton, supra,* 92 Cal.App.4th at p. 283, quoting *In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93.)

Here, the trial court listed and analyzed the applicable factors. (A.A. pp. 45-52, 73-80.) Having done so, it was "within the broad discretion of the trial judge to fix the amount and duration of spousal support." (*In re Marriage of Baker* (1992) 3 Cal.App.4th 491, 496 (*Baker*).) In *Baker*, the husband appealed an order requiring him to pay spousal support because there was no termination date or step-down in amount. (*Ibid.*) In rejecting the husband's claim in *Baker*, the Court stated:

> The court possesses broad discretion in balancing [the section 4320 factors], and making a determination whether or not to divest itself of jurisdiction over spousal support on a certain date. Considering the myriad of factual circumstances which the trial court must consider in making its order, it is the rare case … where a court is duty bound to exercise its discretion in only one way. [Husband]'s arguments on appeal, in effect, ask us to review the evidence anew, determine the weight to be given each factor … and use our own independent judgment in deciding whether jurisdiction should be terminated in this case. This we cannot do. We are neither authorized nor inclined to substitute our judgment for the judgment of the trial court.

(*Baker, supra,* 3 Cal.App.4th at p. 496.)

Ming is asking this Court to reweigh the section 4320 factors and substitute its judgment for the trial court's on the

amount and duration of spousal support. That is not the role of a reviewing court.

2. The marital standard of living did not have to be stated in dollars.

Ming complains the ruling fails to "specify what income [Ming] … actually need[s] to maintain the marital standard of living." (A.O.B. p. 19.) This argument misapprehends the concept of marital standard of living. It is not a rigid numerical standard. (See *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 491 (*Smith*) ["marital standard of living" is "not intended to specifically spell out or narrowly define a mathematical standard"]; *In re Marriage of Weinstein* (1991) 4 Cal.App.4th 555, 565 [marital standard sets no floor for spousal support awards].) Instead, it is "a general description of the [parties'] station in life" and "is satisfied by the everyday understanding of the term in its ordinary sense, i.e., upper, middle or lower income." (*Smith, supra,* 225 Cal.App.3d at p. 491.)

Here, the trial court described the marital standard as middle to upper-middle class. (A.A. pp. 46:3, 74:3; R.T. pp. 93:25-94.1.) There was no need to quantify the amount Ming needed to live at the marital standard. The trial court understood that Ming could not support herself at the marital standard based on her own income, which was considered in weighing the section 4320 factors. (A.A. pp. 48:16-18, 49:1-5.) The fact that parties cannot maintain themselves in two separate households at the marital standard after separation on the same income they shared while living together "is a truism in most dissolved

marriages." (*In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090, 1107.) There is no legal preference that the marital standard "be maintained for its own sake" in setting spousal support. (*In re Marriage of Ficke* (2013) 217 Cal.App.4th 10, 24.) "The Legislature has never specified that spousal support must always meet the needs of the supported spouse as measured by the marital standard of living." (*Smith, supra,* 225 Cal.App.3d, at p. 488.) "[T]he trial court may fix spousal support at an amount greater than, equal to or less than what the supported spouse may require to maintain the marital standard of living, in order to achieve a just and reasonable result under the facts and circumstances of the case." (*Ibid.*)

The base monthly spousal support awarded to Ming—$3,000 per month stepping down to $2,000 per month (R.T. pp. 51:12-23, 79:12-23)—is similar to what Ming requested in temporary spousal support; namely, $2,521 per month. (A.S.A. p. 257 [trial exhibit G], see "Santa Clara" number representing guideline temporary spousal support [Super Ct. Santa Clara County, Local Rules, rule 3(C) Temporary Spousal Support Formula].)[5] Ming was also awarded 20 percent of Jeff's income over $300,000 per year in 2018 and 2019. (A.A. p. 51:13-14.) That additional support could be significant based on Jeff's post-separation earnings of $400,000 to $500,000 per year and depending on the value of his stock units. (A.A. p. 48:21-24.)

[5] The Appellant's Supplemental Appendix filed July 17, 2019, is referred to as "A.S.A."

3. The step-down in support was within the trial court's discretion.

Ming argues she received "a mere three-and-a-half years" of support, which she believes was an abuse of discretion. (A.O.B. p. 19.) Her argument is premised on the period following the Order (from June 1, 2018 through December 31, 2021), ignoring the three years of temporary spousal support she received after separation (July 2015) and the reservation of jurisdiction to increase the amount and duration of support if Ming showed a change in circumstances warranting it. One reason for the step down in the support was that "[Ming] has benefitted from temporary spousal support throughout the marital dissolution process, which was at a higher level and for a greater duration than was warranted under the facts of this case." (A.A. pp. 49:25-50:1, 77:25-78:1.)

Just because the parties were married for 11 years did not require the trial court to award support for any particular duration. No rule requires the trial court to retain indefinite jurisdiction in every long marriage. (*In re Marriage of Ostrander* (1997) 53 Cal.App.4th 63, 65–66 (*Ostrander*).) Section 4336 provides for the retention of indefinite jurisdiction over spousal support in a long marriage, unless the court has expressly terminated the right of spousal support or the parties have agreed in writing to such a termination: "Except on written agreement of the parties to the contrary or a court order terminating spousal support, the court retains jurisdiction indefinitely [over spousal support] … where the marriage is of

long duration." (§ 4336, subds. (a.) & (b) [rebuttable presumption that a marriage of 10 years or more is a marriage of long duration].) In *Ostrander*, the issue was whether the trial court retained indefinite jurisdiction over spousal support in a lengthy marriage because there was no express reservation of jurisdiction in the order. The *Ostrander* court held:

> Family Code section 4336, subdivision (a) is clear and unambiguous in providing two mechanisms for divesting the court of its jurisdiction over spousal support issues in cases of long-term marriages. The parties may agree to such termination, or the court may order it. In either case, only specific language of termination will divest the court of its fundamental jurisdiction. [Citations.] Contrary to Husband's argument, under section 4336 retention of jurisdiction is the rule; it is divestment of jurisdiction which requires an affirmative act.

(*Ostrander, supra,* 53 Cal.App.4th at pp. 65–66.)

Here, the trial court retained its jurisdiction to order Jeff to pay spousal support to Ming in a higher amount and for a longer duration than set forth in the Order. (A.A. p. 52:2-17.) Jurisdiction over spousal support would terminate only if Ming does not successfully move for additional support prior to December 31, 2026. The step-down to $1 is a common practice to retain jurisdiction over spousal support to enable the supported party to request an extension of support if needed. "Where a court intends to retain jurisdiction even though it expects the supported spouse to be self-supporting, it commonly reduces support to $1 as an indication that jurisdiction is retained.

[Citation.]." (*In re Marriage of West* (2007) 152 Cal.App.4th 240, 249.) A step-down order "may be appropriate 'even upon the dissolution of a "lengthy" marriage.' " [Citation.]" (*Cheriton, supra,* 92 Cal.App.4th at p. 311.)

The award is a reasonable exercise of discretion. While a different judge may have balanced the equities in a different way, it was the trial court's prerogative to make an award of support it believed was appropriate to both parties. It cannot be said that the ruling exceeds the bounds of reason.

4. No miscarriage of justice has been shown.

It is the appellant's burden to articulate how the outcome would have been different had the alleged errors not been made. (See *Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963 ["Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial"].)

Ming concludes the Order should be reversed with directions "to increase the award of long-term spousal support to an amount sufficient to maintain the marital standard of living for at least until June of 2026 following this long-term marriage" (A.O.B. pp. 21-22), without explaining why the trial court had to make such an order.[6] None of the section 4320 factors are dispositive. No authority requires the trial court to award

[6] Ming apparently concedes that a June 2026 termination date would be appropriate, if a higher amount of support had been ordered.

support at the martial standard until June 2026. Ming wants this Court to reweigh the section 4320 factors and substitute its judgment for the trial court's discretion, which is not the purpose of an appeal.

VIII. CONCLUSION

The Order should be affirmed.

Dated: October 4, 2019 WALZER MELCHER LLP

By: /s/
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CERTIFICATE OF WORD COUNT

I certify, under Rule 8.204(c)(1) of the California Rules of Court, the attached brief contains less than 14,000 words according to the program used to create this document, excluding tables, certificates and the cover page.

Dated: October 4, 2019 WALZER MELCHER LLP

By: /s/
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PROOF OF SERVICE

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 5941 Variel Avenue, Woodland Hills, California 91367.

On October 4, 2019, I served the foregoing document described as **RESPONDENT'S BRIEF** upon the following by placing a true copy thereof in sealed envelopes addressed as follows:

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I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

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