2012 IL App (2d) 100696-U
Nos. 2-10-0696, 2-11-0450 & 2-11-1302 cons.
Order filed September 12, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF MARY ANNE DORAN, Petitioner-Appellant, and JAMES DORAN, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 06-D-152 Honorable Stephen J. Culliton, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court was affirmed where the court properly interpreted the parties' marital settlement agreement as providing for modifiable maintenance; did not abuse its discretion in supervising and limiting discovery requests pertaining to a judge who had previously presided over the matter; properly denied the petitioner's second amended motion for reformation of the parties' marital settlement agreement; and did not abuse its discretion in granting the respondent's petition to modify maintenance based upon a 24% decrease in his gross annual income.

¶ 1 In these consolidated appeals, petitioner, Mary Anne Doran, seeks reversal of several orders entered against her and in favor of respondent, James Doran, in the parties' postdissolution proceedings. In particular, Mary Anne challenges (1) an April 14, 2010, order denying her motion

pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2008)) to dismiss James' original petition to modify maintenance; (2) five orders limiting or denying her requests for discovery pertaining to Judge Rodney Equi; (3) an April 13, 2011, order denying her second amended motion for reformation of judgment; and (4) a November 17, 2011, order granting James' first amended petition for modification of maintenance. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Mary Anne and James were married in March 1983 and had three children during their marriage. In January 2006, Mary Anne filed a petition for dissolution of marriage. The parties participated in an out-of-court mediation, which proved unsuccessful. In August 2006, the parties engaged in a pretrial conference with Judge Equi, who was presiding over the matter at the time. The parties again failed to reach a settlement. In November 2006, the parties entered into a joint parenting agreement (JPA). The matter was scheduled for trial on all remaining issues on April 3, 2007, before Judge Equi. That morning, the parties appeared in court and engaged in further settlement discussions. The day ended with the court setting the matter over to the afternoon of the next day, April 4, 2007. The parties returned to court at that time and executed a marital settlement agreement (MSA). The court then entered a judgment of dissolution of marriage, which incorporated the JPA and the MSA.

¶ 4 Four provisions of the MSA are pertinent to this appeal. Article IV provided that James would pay to Mary Anne maintenance in the amount of $35,000 per month for a period of 10 years. Paragraph "C" of that article provided, "The parties hereto covenant and agree that, except as herein otherwise provided, pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage

Act, Article IV of this Agreement shall not be subject to modification in any respect whatsoever." Article IX, entitled "Child Custody, Child Support," provided, "Considering the amount of maintenance being paid to Wife, child support is set at $0.00 per month." Finally, paragraph "I" of article XIII, entitled "Miscellaneous Provisions," provided, "The parties agree that except for provisions pertaining to child support, maintenance, custody and visitation, this Agreement is expressly non-modifiable pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act."

¶ 5 On April 28, 2009, James filed a petition for modification of maintenance based on a substantial change of circumstances. He alleged that he was employed as an attorney and that his practice dealt primarily with transactional matters. He further alleged that, due to the "severe economic downturn in the United States over the last six (6) months and lack of transactional work," his income had declined substantially.

¶ 6 Mary Anne filed a combined motion pursuant to sections 2-615 (735 ILCS 5/2-615 (West 2008)) and 2-619 of the Code to dismiss James' petition. She contended that James' petition must be dismissed pursuant to section 2-615 because it did not allege sufficient facts to plead a substantial change in circumstances. She further contended that James' petition must be dismissed pursuant to section 2-619 because the MSA was unambiguous in providing that maintenance was nonmodifiable.

¶ 7 On September 21, 2009, while her motion to dismiss James' petition was still pending, Mary Anne filed a "Motion for Reformation of Judgment." She alleged that the MSA did not accurately reflect the parties' oral agreement, reached during settlement negotiations, that maintenance would be nonmodifiable. She requested that the MSA be corrected to accurately reflect the parties' original oral agreement.

¶ 8 On April 14, 2010, the trial court granted Mary Anne's section 2-615 motion to strike James' petition on the basis that James had not pleaded sufficient facts to support his allegations of a substantial change in income. The court denied the portion of Mary Anne's motion brought under section 2-619 of the Code. The court determined "as a matter of law" that the maintenance provisions of the MSA were unambiguous and that they provided for modifiable maintenance. On June 10, 2010, the court denied Mary Anne's motion to reconsider the April 14, 2010, order.

¶ 9 James filed a first amended petition for modification of maintenance. Mary Anne did not move to dismiss the amended petition and instead filed an answer. Ultimately, Mary Anne filed a second amended motion for reformation of judgment. Discovery pertaining to James' amended petition was stayed while the parties conducted discovery pertaining to Mary Anne's second amended motion for reformation. The only discovery matters relevant to this appeal are Mary Anne's requests for discovery related to Judge Equi.

¶ 10 Discovery Pertaining to Judge Equi

¶ 11 On November 10, 2010, Mary Anne filed a motion for leave to issue a subpoena for the discovery deposition of Judge Equi. She alleged that Judge Equi had presided over the dissolution action but no longer did so and that he had personal knowledge of the parties' oral agreement and the written MSA by virtue of the pretrial conferences and the routine discussions he had participated in with the attorneys. The trial court initially agreed with Mary Anne that Judge Equi's knowledge may be relevant to her second amended motion for reformation of judgment, and, on November 19, 2010, it granted Mary Anne's motion.

¶ 12 Five days later, on November 24, 2010, the court *sua sponte* entered an order modifying its order and withdrawing leave to issue a subpoena for Judge Equi's deposition. It stated that, while

it was "appropriate under the unique circumstances here presented" to permit inquiry into Judge Equi's knowledge, "[t]he inquiries should *** have been crafted in the most narrow of parameters in order to render no negative or restricting effect on the important role judges play in efforts to reach a reasonable and fair settlement of pending litigation." The court directed Mary Anne to tender to the court and to opposing counsel proposed written questions for Judge Equi. The court clarified that it was not precluding the possibility of taking the discovery deposition of Judge Equi after answers to the written questions were received.

¶ 13 At a status hearing on December 8, 2010, the court denied Mary Anne's oral motion for an order requiring turnover of Judge Equi's pretrial notes, stating that "[w]e can re-visit all of this" after responses to the written questions were received.

¶ 14 Mary Anne subsequently prepared 29 proposed written questions for Judge Equi. At a hearing on December 20, 2010, the court refused Mary Anne's proposed questions and instead stated that it would submit to Judge Equi four questions that the court itself had prepared. The four questions asked Judge Equi whether Mary Anne or James, or any attorney representing either of them, had ever indicated to him that a term of the parties' oral agreement was that the $35,000 per month maintenance provision would be nonmodifiable. Judge Equi gave the same written answer to each question: "I do not recall any such indication or statement advising me of any agreement of any kind. Statements or indications of which I have no independent recollection may have been made in open court on the record."

¶ 15 At a hearing on January 18, 2011, the trial court indicated that, after reviewing Judge Equi's responses, it believed that he had no relevant information and that there was no reason to depose

him. The court denied Mary Anne's oral motions to take the deposition of Judge Equi and for an order requiring him to turn over his pretrial notes.

¶ 16 Following the hearing on January 18, 2011, Mary Anne had a subpoena *duces tecum* issued by the clerk of the circuit court for the production of Judge Equi's pretrial notes. On February 3, 2011, the court *sua sponte* entered an order quashing the subpoena, finding it to be in conflict with its January 18, 2011, order. At a hearing on February 8, 2011, the court raised the issue with Mary Anne's counsel, who explained that he had the subpoena issued because he thought the January 18, 2011, order pertained to discovery only, not to trial. The court clarified that neither Judge Equi nor his pretrial notes would be subpoenaed for purposes of discovery or trial.

¶ 17 Hearing on Mary Anne's Second Amended Motion for Reformation of Judgment

¶ 18 The matter proceeded to trial on Mary Anne's second amended motion for reformation of judgment. Mary Anne testified that her attorneys in the original dissolution proceeding were Richard Johnson and Elizabeth McKillip. She testified that James retained Thomas Else as his attorney at some point after the parties' August 2006 pretrial conference failed to result in a settlement. Regarding the events of April 3, 2007, she testified that the morning began with Judge Equi calling Johnson and Else into his chambers. Shortly thereafter, Johnson returned from chambers and informed Mary Anne that Judge Equi was adhering to his pretrial recommendation of $35,000 per month permanent maintenance with a 50/50 split of marital assets. She said she would accept the proposal, and Johnson left to confer with Else. Johnson returned from his meeting with Else and said James would not agree to $35,000 per month permanent maintenance. Mary Anne testified that Johnson and Else continued conferring, with Johnson coming in and out of the room in which she waited. At some point, Johnson proposed offering to James $35,000 per month nonmodifiable

maintenance limited to 10 years. Mary Anne was pleased with that idea. Johnson left the room again and, when he returned, he informed Mary Anne that he had met face-to-face with James. The trial court prohibited Mary Anne from testifying to what Johnson told her about his meeting with James. However, Mary Anne testified that, at the end of the morning of April 3, 2007, she thought the parties had an reached an agreement on all issues except for a few issues related to taxes and a specific bank account. Her understanding was that the agreement was for $35,000 per month nonmodifiable maintenance for 10 years. She further testified that, when she signed the MSA the next day, April 4, 2007, she understood the maintenance provisions to be nonmodifiable.

¶ 19 McKillip gave a similar account of the events of the morning of April 3, 2007. She testified that she spent the morning waiting in a room with Mary Anne. She further testified that, when she left the courthouse on April 3, 2007, Johnson gave her the task of drafting an MSA that reflected the parties' agreement, including the term that maintenance would be nonmodifiable. She began drafting the MSA by using a sample agreement as a template. She deliberately inserted language into article IV of the agreement to make maintenance nonmodifiable. McKillip testified that she did not intend to include the word "maintenance" in paragraph "I" of article XIII, which contained miscellaneous provisions. On cross-examination, she testified that, had she been aware of the word "maintenance" in paragraph "I," she would have removed it.

¶ 20 Johnson's testimony was consistent with Mary Anne's testimony and McKillip's testimony. He testified that, after Mary Anne authorized him to offer to James $35,000 nonmodifiable maintenance for 10 years, he left the room in which Mary Anne waited and encountered Else in the hallway. Else told Johnson that he should go talk with James directly since James was an attorney. According to Johnson, he found James sitting in a cubicle outside of a courtroom. James agreed to

the proposal of nonmodifiable maintenance of $35,000 per month for 10 years. Johnson returned to the room and informed Mary Anne that they had an agreement on the issue of maintenance.

¶ 21 Johnson also corroborated McKillip's testimony regarding the drafting of the MSA. He testified that he instructed McKillip to draft the MSA to reflect the parties' agreement that maintenance would be nonmodifiable. He also testified that, had he been aware of the word "maintenance" in paragraph "I" of article XIII, he would have removed it.

¶ 22 James testified as an adverse witness during Mary Anne's case in chief. He denied ever receiving an offer of nonmodifiable maintenance. He also denied reaching an oral agreement on April 3, 2007. He testified that no oral agreement was reached until April 4, 2007, when he came to court and indicated that he was willing to accept the terms of the MSA, which he signed later that day. He further testified that he did not see the MSA until April 4, 2007. When he reviewed the MSA with Else, he asked Else about paragraph "I" of article XIII. As a result of that conversation, James understood that the MSA provided for modifiable maintenance. On cross-examination, he denied having any direct communications with Johnson on April 3, 2007.

¶ 23 After Mary Anne rested, James called Else as his only witness. Else denied authorizing Johnson to meet with James alone on April 3, 2007. He testified that, on April 4, 2007, he received the MSA and reviewed it with James. James asked him what would happen if he were unable to make the maintenance payments because he lost his job or became disabled. Else testified that he told James that maintenance was modifiable and that he could petition to modify maintenance if circumstances such as those arose. On cross-examination, Else denied that nonmodifiable maintenance was a term offered during negotiations on April 3, 2007. He further testified that the parties had not reached an agreement when they left court that day.

¶ 24 The trial court took the matter under advisement and, on April 13, 2011, denied Mary Anne's second amended motion for reformation. Regarding the alleged cubicle meeting between Johnson and James, the court found James' testimony and Else's testimony to be more credible that Johnson's testimony. It concluded that Mary Anne had presented no credible evidence that the parties reached an agreement on April 3, 2007, regarding the nonmodifiability of maintenance. The court further noted that the evidence supported the conclusion that the parties did not discuss the modifiability of maintenance on April 4, 2007. Accordingly, the court determined, the only evidence of the parties' agreement was the MSA that was signed on April 4, 2007.

¶ 25 Hearing on James' First Amended
Petition for Modification of Maintenance

¶ 26 After the parties conducted further discovery, the matter proceeded to trial on James' first amended petition for modification of maintenance. James testified that he was a partner at a law firm and specialized in the area of corporate finance. He had exceeded his billable hours requirement for each of the years 2005 through 2010 but nevertheless had experienced a reduction in income beginning in 2008 due to a downturn in the economy. James testified that in 2008 the financial markets crashed, locking up the credit markets. In addition, that year, James lost two of his clients when they were acquired by other financial institutions. He had previously lost another client in 2005 in the same manner. James testified that decisions regarding compensation were made by the firm's executive committee, which assigned partnership units to each partner, representing a percentage of ownership in the firm. According to James, he had 700 partnership units in 2005 and 2006 but that number was reduced to 600 units in 2007 and to 500 units in 2008 where it remained at the time of trial. James' income from the law firm decreased from $1,750,281 in 2006 and $1,789,597 in 2007 to $990,793 in 2008; $1,206,549 in 2009; and $1,268,701 in 2010. He expected

his income from the firm to remain flat in 2011. In addition to income from the firm, for each of the years 2006 through 2010, James reported on his tax returns interest income, dividends, capital gains, farm gain, and other miscellaneous gains or losses. According to his federal tax returns, which were admitted into evidence, James' gross income before deductions was $1,812,797 in 2006; $1,846,889 in 2007; $1,045,955 in 2008; $1,245,439 in 2009; and $1,360,882 in 2010. On cross-examination, James testified that the executive committee had reduced his partnership units in 2007 and 2008 because his performance was not at a "financial level" that supported the higher number.

¶ 27 Mary Anne briefly testified as an adverse witness in James' case. She admitted that she had not sought employment since the judgment of dissolution was entered.

¶ 28 After James rested, Mary Anne testified on her own behalf. She testified that the parties' children were then ages 23, 21, and 18. The oldest had graduated from college, while the two younger children were still in college. On cross-examination, Mary Anne admitted that she would spend less on food now that the children had moved out of the house, but she testified that she continued to provide financial support to the children in other ways.

¶ 29 The trial court took the matter under advisement and, on November 17, 2011, issued its ruling. The court made findings with respect to each of the factors listed in sections 504(a) and 510(a-5) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504(a), 510(a-5) (West 2008)). In particular, the court found that no evidence suggested that the parties' needs, health, or earning capacities had changed. The court placed no significance on the fact that Mary Anne had not sought employment, since it found that the MSA did not contemplate such action on her part. The court found that the evidence implicated only one factor, which was the third factor listed under section 510(a-5) of the Act: "the increase or decrease in each party's income since the

prior judgment or order from which a review, modification, or termination is being sought." 750 ILCS 5/510(a-5)(3) (West 2008). Regarding this factor, the court first found that the original amount of maintenance to which the parties agreed in the MSA was based upon James' 2006 annual income of $1,750,000. This was the amount reflected in Mary Anne's trial memorandum from April 2007 and on the schedule K-1 James received from his law firm for the year 2006 (James had not yet filed his federal tax return for 2006 when the judgment of dissolution was entered). The court then said it would adopt the annual income figures proposed by Mary Anne's counsel, which were $1,046,000 for 2008; $1,245,000 for 2009; and $1,329,000[1] for 2010. The court then said that, based on James' credible testimony, it would consider his income for 2011 also to be $1,329,000. The court found the 24% decrease in James' annual income from 2006 to 2011 to be a substantial change in circumstances. It found that the decrease was not the result of a desire to evade financial responsibility on James' part. Instead, the court found, the reduction was prompted by the nature of James' legal practice, the significant downturns in the economy, the slowing of credit markets, and the loss of three of James' major clients. Because Mary Anne would be "more profoundly impacted" by a reduction in maintenance than James, however, the court reduced maintenance by only 17%, rather than by the full 24%. The court stated that it considered such a reduction to be "a reasonable exercise of my discretion."

¶ 30 Mary Anne timely appealed.

¶ 31 ANALYSIS

[1]It is unclear how Mary Anne's counsel arrived at this number. James' reported gross income for 2010 was $1,360,882. Nevertheless, neither party addresses this minor discrepancy on appeal and we will overlook it.

¶ 32 As stated, Mary Anne appeals from (1) the denial of her section 2-619 motion to dismiss James' original petition to modify maintenance; (2) the denial of her requests for discovery pertaining to Judge Equi; (3) the denial of her second amended motion for reformation of judgment; and (4) the granting of James' first amended petition for modification of maintenance. We address each matter in turn.

¶ 33 Denial of Mary Anne's Section 2-619 Motion to Dismiss

¶ 34 Mary Anne maintains that the trial court erred in determining as a matter of law that the MSA unambiguously provided for modifiable maintenance. The trial court made this determination when it denied Mary Anne's section 2-619 motion to dismiss James' original petition for modification of maintenance. As stated, Mary Anne maintained that James' petition must be dismissed because the MSA unambiguously provided for nonmodifiable maintenance.[2] On appeal, although she concedes

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[2]We note that, although Mary Anne did not raise this defense in her answer to James' first amended petition for modification of maintenance, she has not waived the issue for purposes of appellate review because the trial court's determination amounted to a disposition of her motion on the merits. See 735 ILCS 5/2-619(d) (West 2008) ("The raising of any of the foregoing matters by motion under this Section does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits ***."); *Mogul v. Tucker*, 152 Ill. App. 3d 610, 613 (1987) (holding that the defendant was precluded from raising the affirmative defense of laches in his answer to the plaintiff's amended complaint, where the court had ruled on the merits of the laches defense when it disposed of the defendant's motion to dismiss the plaintiff's original complaint). In addition, because the trial court disposed of the motion on the merits, we have jurisdiction to review this aspect of the trial court's order because it was "a 'step in the procedural progression' "

that articles IV and XIII of the MSA "seem, on their face[s,] to be consistent in creating a maintenance obligation which was subject to modification," she contends that the trial court nevertheless erred in determining that maintenance was modifiable because the court did not perform a "global review" of the agreement. She asserts that a "global review" would have revealed the parties' intent to provide for nonmodifiable maintenance.

¶ 35 The rules of contract construction govern the interpretation of a marital settlement agreement. *In re Marriage of Hall*, 404 Ill. App. 3d 160, 166 (2010). The primary objective is to give effect to the parties' intent. *Hall*, 404 Ill. App. 3d at 166. "When the terms of the agreement are unambiguous, the intent of the parties is determined solely from the language of the agreement." *Hall*, 404 Ill. App. 3d at 166. " '[I]t is a basic principle of contract construction that where two clauses conflict, it is the duty of the court to determine which of the two clauses most clearly expresses the chief object and purpose of the contract.' " *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 166 (2002) (quoting *Harris Trust & Savings Bank v. Hirsch*, 112 Ill. App. 3d 895, 900 (1983)). "In construing a contract, it is presumed that all provisions were inserted for a purpose, and conflicting provisions will be reconciled if possible so as to give effect to all of the contract's provisions." *Mayfair Construction Co. v. Waveland Associates Phase I Limited Partnership*, 249 Ill. App. 3d 188, 200 (1993). The court must view each provision in light of the other provisions and not derive the parties' intent from an isolated clause or provision or from a detached portion of the contract. *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011). Because the interpretation of a contract

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(*In re Marriage of O'Brien*, 2011 IL 109039, ¶ 23 (quoting *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435 (1979))) leading to the final judgment from which Mary Anne appeals.

presents a question of law, our review is *de novo*. *In re Marriage of Hendry*, 409 Ill. App. 3d 1012, 1017 (2011).

¶ 36 Section 502(a) of the Act (750 ILCS 5/502(a) (West 2008)) permits parties to a dissolution of marriage action to settle by agreement disputes regarding property; maintenance; and child support, visitation, and custody. Unless the parties agree otherwise, subsection (b) of section 502 requires the court to include the terms of any such agreement in its judgment of dissolution. 750 ILCS 5/502(b) (West 2008). Subsection (f) of section 502 then provides:

> "Except for terms concerning the support, custody or visitation of children, the judgment may expressly preclude or limit modification of terms set forth in the judgment if the agreement so provides. Otherwise, terms of an agreement set forth in the judgment are automatically modified by modification of the judgment." 750 ILCS 5/502(f) (West 2008).

Accordingly, the parties to a dissolution action may agree that maintenance will be nonmodifiable or that it will be modifiable only under certain terms. *In re Marriage of Schweitzer*, 289 Ill. App. 3d 425, 428 (1997). "When the parties so agree, maintenance may be modified or terminated only under the circumstances specified in the agreement." *Schweitzer*, 289 Ill. App. 3d at 428. The parties' intent to make maintenance nonmodifiable must be "clearly manifested" through express language in the agreement. *In re Marriage of Scott*, 205 Ill. App. 3d 561, 564, 566 (1990).

¶ 37 Here, the trial court reasoned that the MSA unambiguously provided for modifiable maintenance because article IV included the language "except as herein otherwise provided" and article XIII "otherwise provided" that maintenance was modifiable. We agree. Although, to some extent, paragraph "C" of article IV and paragraph "I" of article XIII appear to be in conflict, the conflict is easily reconciled. Paragraph "C" provides that "Article IV of this Agreement shall not

be subject to modification in any respect whatsoever." However, the provision contains language limiting this otherwise broad prohibition against modification—it says "except as herein otherwise provided." Later in the agreement, article XIII provides that "*except for* *** maintenance *** this Agreement is expressly non-modifiable." (Emphasis added.) Thus, article XIII "otherwise provide[s]" that maintenance is modifiable. To the extent that articles IV and XIII conflict, this interpretation reconciles the conflict.

¶ 38 Were we to adopt Mary Anne's interpretation of the MSA, we would violate the maxim that requires us to give effect to all of a contract's provisions if possible, because we would be required to render the word "maintenance" in paragraph "I" of article XIII superfluous. Moreover, Mary Anne's interpretation would require us essentially to ignore the language "except as herein otherwise provided" in paragraph "C" of article IV. Our interpretation, on the other hand, gives effect to all of the agreement's provisions. Because article IV governs both maintenance and medical insurance, article XIII's statement that maintenance is modifiable does not render paragraph "C" of article IV a nullity. Instead, paragraph "C" remains in effect, because, except for its maintenance provisions, article IV remains nonmodifiable. Our interpretation does not ignore the words "except as herein otherwise provided" in article IV or the word "maintenance" in article XIII.

¶ 39 Mary Anne contends that the trial court failed to consider why the parties would have stated in paragraph "C" that article IV "shall not be subject to modification in any respect whatsoever" only to "undo it all" via a provision in article XIII, entitled "Miscellaneous Provisions," which provided that maintenance was modifiable. However, as stated, article XIII did not "undo" all of paragraph "C" because it made only the maintenance provisions of article IV modifiable, while the medical insurance provisions of article IV remained nonmodifiable.

¶ 40 We also reject Mary Anne's contention that a "global review" of the MSA requires a contrary result. Mary Anne contends that, once one considers that the parties chose to set child support at $0 and maintenance at $35,000, while also avoiding the term "unallocated support," it becomes clear that the parties intended to make maintenance nonmodifiable. Under Mary Anne's reasoning, had the parties intended for maintenance to be modifiable, there would have been no need to set child support at $0 or to avoid reference to the term "unallocated maintenance."

¶ 41 Mary Anne's "global review" argument has no merit. Most importantly, we reject the implication that the rule requiring a court to read a contract as a whole permits it to nullify specific, unambiguous provisions in favor of a contrary interpretation that results from a "global review." Furthermore, we disagree with Mary Anne that the parties must have chosen to set child support at $0 and maintenance at $35,000 because they intended to make maintenance nonmodifiable. It may very well be that the parties employed this structure in order to make the entire payment deductible from James' income. However, this tax strategy would not require making maintenance nonmodifiable. See *In re Marriage of Belluomini*, 104 Ill. App. 3d 301, 307-08 (1982) (modifying an award of unallocated support and noting that an effect of the unallocated award was to reduce the respondent's tax burden).

¶ 42 Additionally, we decline to infer from the absence of the term "unallocated support" an intention to make maintenance nonmodifiable. This court recently held that a judgment of dissolution setting maintenance at $15,000 and child support at $0 was impermissible because it "contravene[d] the statutory right to modify child support." *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 128. Thus, even if the $35,000 maintenance award to Mary Anne was not

"unallocated support," it nevertheless could not have been made nonmodifiable considering that child support was set at $0. See *Romano*, 2012 IL App (2d) 091339, ¶ 128.

¶ 43 Based on the foregoing, we affirm the trial court's denial of Mary Anne's section 2-619 motion to dismiss James' original petition to modify maintenance, as well as the court's determination that the MSA unambiguously provided for modifiable maintenance.

¶ 44 Discovery Pertaining to Judge Equi

¶ 45 Mary Anne contends that the trial court abused its discretion in denying her discovery requests pertaining to Judge Equi. Specifically, she appeals from (1) the November 24, 2010, order withdrawing the previously granted leave to issue a subpoena for the discovery deposition of Judge Equi; (2) the December 8, 2010, order denying her oral motion for an order requiring Judge Equi to turn over his pretrial notes; (3) the December 20, 2010, order rejecting her proposed written questions to Judge Equi; (4) the January 18, 2011, order denying her oral motions to take the discovery deposition of Judge Equi and for turnover of his pretrial notes; and (5) the February 3, 2011, order quashing the subpoena *duces tecum* issued on January 18, 2011.

¶ 46 In arguing for reversal of the orders and citing *Thomas v. Page*, 361 Ill. App. 3d 484 (2005), Mary Anne acknowledges the judicial deliberations privilege and the rule that a judge may not be asked to testify about his or her mental impressions or processes in reaching a judicial decision. She maintains that, because the MSA was a "consent decree" reached by agreement of the parties, "there were no judicial deliberations" or mental impressions that were protected from disclosure. Instead, Mary Anne contends, she sought Judge Equi's "understanding of the meaning and impact of the maintenance provisions," as well as "his recollection of conversations he had with the respective attorneys at the trial level," all of which she asserts was discoverable information. She contends that

the trial court "attempted to carve out a special privilege" for Judge Equi when it denied her discovery requests.

¶ 47 James responds that the trial court did not abuse its discretion in denying Mary Anne's discovery requests because, he contends, the court employed a reasonable procedure for determining whether Judge Equi had any information relevant to the reformation proceedings. James asserts that the result of that procedure was a determination that further discovery would have proven futile.

¶ 48 We need not discuss whether either the rule protecting a judge's mental impressions or the judicial deliberations privilege applies here, because we agree with James that the trial court did not abuse its discretion in denying, or at least limiting, Mary Anne's discovery requests. "Under the supreme court rules, trial courts have broad powers to supervise the discovery process." *Atwood v. Warner Electric Brake & Clutch Company, Inc.*, 239 Ill. App. 3d 81, 88 (1992). Illinois Supreme Court Rule 201(c)(2) (eff. July 1, 2002) provides that a court may, on its own initiative and without notice, "supervise all or any part of any discovery procedure." Rule 201(e) further indicates that a court may schedule the sequence of discovery "for the convenience of parties and witnesses and in the interests of justice." Ill. S. Ct. R. 201(e) (eff. July 1, 2002). The rules permit a court on its own motion to enter a protective order "as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. S. Ct. R. 201(c)(2) (eff. July 1, 2002). "The trial court has broad discretion in ruling on discovery matters, and its orders concerning discovery will not be interfered with absent a manifest abuse of such discretion." *Mistler v. Mancini*, 111 Ill. App. 3d 228, 233 (1982).

¶ 49 Here, the trial court originally granted Mary Anne leave to issue a subpoena for the deposition of Judge Equi. However, the court developed concerns over granting leave to conduct

such discovery so freely. As it indicated on the record, the court was concerned that permitting such discovery might have a "chilling effect" on judges' participation in settlement negotiations and might interfere with the settlement process. The court, on its own initiative, decided that, rather than risk having those concerns materialize by ordering Judge Equi to appear for a deposition, it would first determine whether the judge had any relevant information. The court closely supervised this process by submitting limited questions to Judge Equi to determine the existence and the extent of his knowledge. The outcome of the process was a determination that Judge Equi did not recall any indication or statement from the parties or their attorneys that the maintenance provision of the MSA would be nonmodifiable. Based on these results, the court declined to permit Mary Anne to pursue further discovery from Judge Equi. This process was more than reasonable and the trial court did not abuse its discretion in supervising discovery in this manner.

¶ 50 Because we conclude that the trial court acted within its authority in supervising and limiting discovery pertaining to Judge Equi, we also reject Mary Anne's contention that the trial court improperly "attempted to carve out a special privilege" for him.

¶ 51 Denial of Mary Anne's Second Amended Motion for Reformation of Judgment

¶ 52 Mary Anne also contends that the trial court's denial of her second amended motion for reformation of judgment was against the manifest weight of the evidence. Reformation is an action to reform a written agreement to reflect the intention of the parties and the agreement between them. *Suburban Bank of Hoffman-Schaumburg v. Bousis*, 144 Ill. 2d 51, 58 (1991). " 'An action to reform a written agreement rests upon a theory that the parties came to an understanding, but in reducing it to writing, through mutual mistake, or through mistake of one side and fraud on the other, some provision agreed upon was omitted, and the action is to so change the instrument as written as to

conform it to the contract agreed upon, by inserting the provisions omitted or striking out the one inserted by mutual mistake.' " *Suburban Bank*, 144 Ill. 2d at 58-59 (quoting *Harley v. Magnolia Petroleum Co.*, 378 Ill. 19, 28 (1941)). "[W]hat is sought to be reformed is not the understanding between the parties, but rather the written instrument which inaccurately reflects it." (Emphases omitted.) *Briarcliffe Lakeside Townhouse Owners Ass'n v. City of Wheaton*, 170 Ill. App. 3d 244, 251 (1988).

¶ 53 It is presumed that the parties' written agreement reflects their intentions and the agreement between them. *Suburban Bank*, 144 Ill. 2d at 59. In order to overcome that presumption, the party seeking to reform the agreement must prove by clear and convincing evidence that "(1)there was an agreement between the parties; (2) the parties agreed to put their agreement into writing; and (3) a variance exists between the parties' original agreement and the writing." *Briarcliffe Lakeside Townhouse Owners Ass'n*, 170 Ill. App. 3d at 251. We will not disturb a trial court's judgment in an action for reformation unless it is against the manifest weight of the evidence. *Shivarelli v. Chicago Transit Authority*, 355 Ill. App. 3d 93, 100 (2005).

¶ 54 Mary Anne conceded in the trial court that this case did not involve reformation based upon a mistake on one side and fraud on the other. Therefore, we limit our review to the issue of whether she proved reformation based upon a mutual mistake of fact. "A 'mutual mistake of fact' exists for purposes of the reformation of a written instrument, when the contract has been written in terms which violate the understanding of both parties." *In re Marriage of Johnson*, 237 Ill. App. 3d 381, 394 (1992).

¶ 55 We agree with James that the trial court's judgment was not against the manifest weight of the evidence because Mary Anne did not prove by clear and convincing evidence the elements of

reformation based on a mutual mistake. It was undisputed in the trial court that the parties did not discuss on April 4, 2007, whether maintenance would be modifiable or nonmodifiable. In support of her position that the parties reached an oral agreement to that effect on April 3, 2007, Mary Anne refers to James' deposition testimony, which she used at trial to impeach him. James testified at his deposition that he recalled "going home [on April 3, 2007,] and sleeping on an offer" consisting of maintenance of $35,000 per month for 10 years. When asked at his deposition whether the offer was for modifiable or nonmodifiable maintenance, James testified, "I understood it to be non-modifiable." Mary Anne contends that James' deposition testimony was a binding judicial admission that the parties had agreed to nonmodifiable maintenance. Mary Anne's argument has no merit, since James testified at his deposition only that he received an offer for nonmodifiable maintenance on April 3, 2007, not that he accepted the offer.

¶ 56 Mary Anne next asserts that Johnson's testimony proved the existence of an oral agreement on April 3, 2007. Johnson testified that, on the morning of April 3, 2007, Else told Johnson that he should speak directly with James, since James was an attorney. Johnson testified that he found James sitting in a cubicle outside of a courtroom. He asked James if he would be willing to accept nonmodifiable maintenance of $35,000 per month if it were for a term of 10 years. According to Johnson, James said yes. While Johnson's testimony was evidence of an oral agreement reached on April 3, 2007, it was not undisputed. During his testimony, James denied having any conversation with Johnson on April 3, 2007. Additionally, Else denied authorizing Johnson to meet with James alone. The trial court found Else's testimony and James' testimony to be more credible than Johnson's testimony. It would be improper for us to substitute our judgment for that of the trial court

regarding the credibility of witnesses or the weight to be given to the evidence. *In re D.F.*, 201 Ill. 2d 476, 498-99 (2002).

¶ 57 Mary Anne urges that her contention that the parties reached an oral agreement on April 3, 2007, finds support in the attorneys' statements to the court on that date. Mary Anne refers to the statements of "Unidentified Male Speaker 2," whom Johnson identified as himself, and "Unidentified Male Speaker 1," whom Johnson identified as Else.[3] The court hearing to which she refers began with Else asking the court for time "to think about it" because his client "want[ed] to talk to his accountant." The attorneys and the court then discussed whether to come back after lunch or the next day. Else indicated that he did not want his client "saying that I talked him into anything or that I pushed him." The court indicated that the next day would be fine and asked, "[D]o you have an MSA in your pocket that will be fit to prove the case up?" Else responded, "No," and the court stated, "I think somebody ought to be doing that, too." Johnson then offered, "We can prove it up now. We can put it on the record." The trial court rejected this idea, stating that doing so would be a "recipe for disaster when somebody changes their mind." Johnson then indicated that the parties still had not decided "who gets what," and the court said, "Well, you got [*sic*] to work that property stuff out." The court set the matter for the next day, April 4, 2007, at 1:30 p.m., stating, "[W]e will either start the trial or you all will have a written marital settlement agreement signed, sealed and ready to be delivered." Johnson said, "I can try. I can put one together."

[3]While Else testified that he was unable to determine which speaker he was, the transcript suggests that Unidentified Male Speaker 1 was Else. For purposes of this discussion, we will use the attorneys' names as Johnson identified them.

¶ 58 While the April 3, 2007, transcript does suggest that the parties were at least close to reaching an agreement on that date, it does not establish that they had reached an agreement, and it gives no indication of the terms of any purported agreement. The hearing began with Else asking the court for time "to think about it" and later indicating that he did not want his client "saying that I talked him into anything or that I pushed him." This suggests that, even if the parties had negotiated the terms of an agreement, James had not yet given his final assent. Else's testimony at trial supports this inference. He testified that, on April 3, 2007, "We believed we had an agreement in substance." "However," Else testified, "my client wanted to think about it overnight."

¶ 59 Mary Anne further contends that the trial court did not give "appropriate weight" to a "contradiction" between James' two affidavits submitted to the trial court. In the first affidavit, which was attached to James' response to Mary Anne's original motion for reformation of judgment, James stated, "The oral agreement that I reached in the above entitled cause, which is reflected in the Marital Settlement Agreement, which is incorporated in the Judgment for Dissolution of Marriage, was that the maintenance payments to be made by me, in the amount of $35,000.00 per month, were modifiable for statutory cause." In the second affidavit, which was attached to James' response to Mary Anne's second amended motion for reformation of judgment, James stated, "The Marital Settlement Agreement which is incorporated into the Judgment for Dissolution of Marriage in this case is the agreement to which I agreed prior to prove-up." Mary Anne finds it significant that the first agreement explicitly refers to an oral agreement, while the second affidavit does not. We do not share Mary Anne's concern. Regardless of James' phrasing of the statement, in both affidavits, James indicates that he agreed to nonmodifiable maintenance. Thus, the affidavits provide further support for the trial court's judgment.

¶ 60 We also reject Mary Anne's argument that she was entitled to reformation because the word "maintenance" in paragraph "I" of article XIII of the MSA was a scrivener's error. A scrivener's error is a clerical error " 'resulting from a minor mistake or inadvertence *** and not from judicial reasoning or determination.' " (Emphasis omitted.) *Schaffner v. 514 West Grant Place Condominium Ass'n, Inc.*, 324 Ill. App. 3d 1033, 1042 (2001) (quoting Black's Law Dictionary 1349 (7th ed. 1999)). An example of a scrivener's error is a term that is " 'either one-tenth or ten times as large as it should be' " or a missing decimal point. *Estate of Blakely v. Federal Kemper Life Assurance Co.*, 267 Ill. App. 3d 100, 106 (1994) (quoting *S.T.S. Transport Service, Inc. v. Volvo White Truck Corp.*, 766 F.2d 1089, 1093 (7th Cir. 1985)). A court is able to determine from the language of a contract that an alleged scrivener's error was in fact an error if the term is " 'manifestly incongruous' " with the rest of the agreement. *Estate of Blakely*, 267 Ill. App. 3d at 107-08 (quoting *Metropolitan Life Insurance Co. v. Henriksen*, 6 Ill. App. 2d 127, 134 (1955)). For example, a dollar figure that is 700% greater than it should have been is manifestly incongruous if a lower figure is found elsewhere within the contract. *Estate of Blakely*, 267 Ill. App. 3d at 108 (citing *Hanes v. Roosevelt National Life Insurance Co.*, 116 Ill. App. 3d 411, 414 (1983)). Here, there is nothing making the word "maintenance" in paragraph "I" of article XIII "manifestly incongruous" with the rest of the agreement. As discussed above, paragraph "I" in article XIII is entirely congruous with paragraph "C" in article IV because the latter includes the phrase "except as otherwise provided."

¶ 61 Since we cannot determine from the language of the MSA alone whether the word "maintenance" in paragraph "I" was a scrivener's error, we must look to parol evidence to determine whether it was a scrivener's error. See *Estate of Blakely*, 267 Ill. App. 3d at 106 ("The [alleged

scrivener's] error was not evidenced in the writing and cannot be proven now without parol evidence.") Yet, in her reformation action, Mary Anne had the opportunity to prove that the word "maintenance" in paragraph "I" was the result of a mutual mistake. As we determined above, she failed to prove such a mistake. Therefore, Mary Anne's scrivener's error argument falls along with her reformation claim.

¶ 62 Finally with respect to reformation, Mary Anne contends that the trial court imposed the wrong burden of proof, which "put an undue burden" on her and requires reversal. Mary Anne refers to the trial court's statement on the record that her burden of proof was "clear and convincing, which has [*sic*] said to leave no reasonable doubt as to the intention of the parties." She speculates that the court must have relied on *In re Wendy T.*, 406 Ill. App. 3d 185 (2010), in which this court stated that "[c]lear and convincing evidence is defined as the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the veracity of the proposition in question." *Wendy T.*, 406 Ill. App. 3d at 192. Mary Anne maintains that *Wendy T.* is distinguishable because it involved the involuntary administration of psychotropic medication. She contends that the appropriate definition of clear and convincing evidence is more proof than a preponderance, but less proof than beyond a reasonable doubt.

¶ 63 We reject Mary Anne's argument. Courts have used the same definition of clear and convincing evidence as the court in *Wendy T.* in cases not involving the involuntary administration of psychotropic medication. Courts fully define clear and convincing evidence as the court did in *First National Bank of Chicago v. King*, 263 Ill. App. 3d 813 (1994):

> "Clear and convincing evidence has been defined as evidence which leaves the mind well satisfied of the truth of a proposition [citation]; strikes all minds alike as being

> unquestionable [citation]; or leads to but one conclusion [citation]. The term has been most often defined, however, as that 'quantum of proof which leaves no reasonable doubt in the mind of the trier of fact as to the truth of the proposition in question.' [Citation.] Although stated in terms of reasonable doubt, clear and convincing evidence is considered to be more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense. [Citation.]" *First National Bank*, 263 Ill. App. 3d at 818-19.

Accordingly, the trial court's definition of clear and convincing evidence in the present case was not erroneous. The court did not impose the wrong burden of proof.

¶ 64 Granting of James' First Amended Motion for Modification of Maintenance

¶ 65 Mary Anne maintains that the trial court abused its discretion in granting James' first amended motion for modification of maintenance. As stated, the trial court reduced James' maintenance payments from $35,000 per month to $29,000 per month (a 17% decrease) based upon a reduction in James' gross annual income from $1,750,000 to $1,329,000 (a 24% decrease). Mary Anne contends that such a reduction in James' income alone, without evidence that it impaired James' standard of living in any way, was insufficient to establish a substantial change in circumstances. We disagree.

¶ 66 Section 510(a-5) of the Act provides that "[a]n order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances." The section requires courts in all proceedings seeking to modify or terminate maintenance to consider nine listed factors, as well as the factors set forth in section 504(a) of the Act. 750 ILCS 5/510(a-5) (West 2008); *Blum v. Koster*, 235 Ill. 2d 21, 41 (2009). The party seeking modification bears the burden of presenting evidence to demonstrate a substantial change in circumstances. *In re Marriage of Izzo*, 264 Ill. App.

3d 790, 791 (1994). Although the court must consider all of the listed factors, it is not mandatory that the court make specific findings on the record for each of the factors. *Blum*, 235 Ill. 2d at 38. A trial court's decision to modify maintenance will not be disturbed absent a clear abuse of discretion. *Blum*, 235 Ill. 2d at 36. "A clear abuse of discretion occurs when 'the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *Blum*, 235 Ill. 2d at 36 (quoting *People v. Hall*, 195 Ill. 2d 1, 20 (2000)).

¶ 67 "It is well recognized that a substantial change in income of the payor spouse is grounds for modifying maintenance and child support." *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 974 (1997). In *Izzo*, the trial court set unallocated support and maintenance at $1,700 per month. *Izzo*, 264 Ill. App. 3d at 790. After the parties' children were emancipated, the court terminated the child support portion of the award and ordered permanent maintenance of $1,000 per month. *Izzo*, 264 Ill. App. 3d at 790-91. The trial court subsequently denied the respondent's petition to reduce maintenance. *Izzo*, 264 Ill. App. 3d at 791. On appeal, the court noted that, at the time the original unallocated support award was entered, the respondent had an annual income of $52,000 with medical insurance for both himself and the petitioner. *Izzo*, 264 Ill. App. 3d at 791. The respondent's annual income had since been reduced 25% to $39,000, and he was now required to pay $200 per month for the petitioner's medical insurance. *Izzo*, 264 Ill. App. 3d at 791-92. The court stated, "Surely, a reduction of income such as this is the type of substantial change in circumstances contemplated by section 510(a) ***." *Izzo*, 264 Ill. App. 3d at 792. The court held that it was an abuse of discretion to deny the respondent's petition to modify maintenance and ordered the trial court on remand to enter an order reducing maintenance 20% to $800 per month. *Izzo*, 264 Ill. App. 3d at 792; see also *Carpenter*, 286 Ill. App. 3d at 971, 974-75 (holding that a

reduction in maintenance from $1,415 per month to $800 per month plus 20% of any monthly income that exceeded $4,000 was not an abuse of discretion where the respondent's income had decreased from an average of $71,624 per year to between $40,000 and $50,000 per year).

¶ 68 In this case, the record reveals that the trial court considered all of the factors listed in sections 504(a) and 510(a-5) but found the determining factor to be "the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought" (750 ILCS 5/510(a-5)(3) (West 2008)). The court found that James' annual income had decreased 24% since entry of the judgment of dissolution, falling from $1,750,000 to $1,329,000. The court further found the decrease in income to be a substantial change in circumstances. It did not find the reduction to be the result of a desire to evade financial responsibility on James' part. Instead, the court found that the reduction was the result of circumstances outside of James' control, including the significant downturns in the economy, the slowing of credit markets, and the acquisition of three of his major clients. Yet, because Mary Anne would be "more profoundly impacted" by a reduction in maintenance than James, the court reduced maintenance by only 17% despite the 24% reduction in James' income. The court stated that it considered such a reduction to be "a reasonable exercise of [its] discretion." We agree. It cannot be said that the trial court's decision to reduce Mary Anne's maintenance was arbitrary or fanciful or that no reasonable person would have adopted the trial court's view.

¶ 69 We reject Mary Anne's contention that a 24% reduction in James' gross annual income, without evidence that the reduction negatively impacted James' standard of living or ability to make the maintenance payments, could not have been a substantial change in circumstances. Clearly James has a high income and has been able to maintain a certain standard of living despite making

maintenance payments of $35,000 per month. However, this consideration does not preclude a trial court from finding a 24% reduction in gross income to be a substantial change in circumstances. Precluding the trial court from reducing maintenance under the circumstances of this case would permit Mary Anne to continue receiving maintenance payments that were no longer commensurate with James' income. Using the trial court's income figures, the $35,000 per month maintenance payment initially accounted for 24% of James' monthly gross income. In 2011, it accounted for 31.6% of James' monthly income. Following the trial court's reduction in maintenance, the reduced payment accounted for 26% of James' gross monthly income. We cannot say that this result was contrary to Illinois law or was an abuse of discretion.

¶ 70 Because we are affirming the trial court's decision to reduce Mary Anne's maintenance, we need not address her argument that the court erred in denying her motion for a directed verdict at the close of James' case. Not only did James present a *prima facie* case of a substantial change in circumstances warranting a reduction in maintenance, he presented sufficient evidence to prevail on that theory.

¶ 71 CONCLUSION

¶ 72 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 73 Affirmed.