In the

Court of Appeal

of the

State of California

FIRST APPELLATE DISTRICT
DIVISION TWO

A134450

GRACE AITCHISON,

Appellant,

v.

DAVID AITCHISON,

Respondent.

APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY
HON. CHARLES B. BURCH · NO. MSD0905412

DAVID AITCHISON'S REPLY BRIEF ON CROSS APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION & STATUTES

CASES

I.

INTRODUCTION

Grace was able to avoid the premarital agreement simply by showing that she signed the agreement without reading it or consulting an attorney. She "didn't think it was a big deal"[1] and assumed that the document entitled "Prenuptial Agreement"[2] would not alter her rights. The court found that David's explanation to Grace that the agreement was "to protect his family business"[3] was not sufficient because the parties were in a confidential relationship, which required David to explain the agreement to her in detail.

No such legal duty existed. The relationship of the parties was common to most engaged couples. The parties were free to contract with each other, like other non-marital partners, without any requirement by David to inform Grace of the legal effect of the agreement. Still, the court concluded that Grace signed the agreement as a result of constructive fraud because Grace placed her trust in David in signing the agreement without reading or understanding it. If it is really this easy to avoid a premarital agreement, parties might as well not enter into them.

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1 RT 1045:8-12.

2 AA vol. 9, tab 114, p. 1518.

3 AA 1188.

The effect of finding a confidential relationship was to shift the burden of proof to David that Grace signed the agreement voluntarily, even though Family Code section 1615, subdivision (a) placed that burden squarely on Grace. There is no substantial evidence to support the finding that the parties were in a confidential relationship. Even if the parties were in a confidential relationship, constructive fraud did not occur because there is no evidence that David used that relationship to gain an unfair advantage over her in the agreement. In fact, the court found that the agreement was not unconscionable.[4]

The agreement basically confirmed and clarified David's separate property rights regarding his family business, which was his separate property anyway under California law. The agreement did not contain a waiver of community property rights outside of David's premarital business and there was no waiver of Grace's right to spousal support. The only provision in the agreement which the court refused to enforce was the requirement that David pay 12% interest to the community on any community funds used during marriage to repay the debt David incurred to purchase stock in his family business. The court, instead, required David to pay the community for the actual appreciation on that stock.

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[4] AA 1184.

Giving the community a fixed interest rate of 12%, even if the stock had become worthless, was reasonable compensation to the community. The provision does not evidence an unfair advantage.

The court ignored the facts recited in the agreement, which are conclusively presumed to be true pursuant to Evidence Code section 622. The recitals state that 1) Grace was given a reasonable opportunity to seek the advice of independent counsel before signing the agreement, 2) that she read the agreement, 3) that the agreement was fully explained to her, and 4) that she was fully aware of the contents and legal effect of the agreement before signing it. Evidence Code section 622 prohibits a court from considering any contrary evidence, absent a showing of fraud or other grounds for recision. The same rule applies on appeal when determining whether a ruling is supported by substantial evidence. The court stated that there was no actual fraud committed, so the recitals are conclusively presumed to be true and are fatal to the court's finding of involuntariness.

A miscarriage of justice occurred because Grace received $174,444 in David's separate property, which would have been confirmed to him had the court upheld the agreement. The judgment should be reversed to that extent, with directions to the trial court to enter a new judgment which confirms the $174,444 to David as his separate property.

II.

DAVID'S OPENING BRIEF CONTAINS SUFFICIENT CITATIONS TO THE RECORD

Grace claims that David failed to make "a single citation to the Reporter's Transcript" in support of the cross-appeal, so David should be treated as having conceded that substantial evidence supports the finding that the premarital agreement was not executed voluntarily. (Appellant's Closing Brief & Cross-Respondent's Brief, p. 32.)

Grace is incorrect. David's opening brief contains a statement of facts relating to the premarital agreement with citations to the record. (See Combined Respondent's & Cross-Appellant's Opening Brief, pp. 5, 18-19.) The opening brief is sufficient to avoid a summary denial of the cross appeal. The fact that he did not repeat those facts in the cross-appeal section of the brief is immaterial.

III.

DAVID'S OPENING BRIEF CHALLENGED THE FINDING OF INVOLUNTARINESS

Grace claims that David has failed to properly appeal the ruling that she signed the premarital agreement involuntarily; she argues that David's cross-appeal is limited to the ruling that the parties were in a confidential relationship. (Appellant's Closing Brief & Cross-Respondent's Brief, p.

32.) Grace claims that "the court's finding of involuntariness stands independently of the existence of a confidential relationship." (*Id.*)

Grace is incorrect. The two issues are interconnected. The finding of involuntariness flowed from the court's determination that the parties were in a confidential relationship. Per the Statement of Decision:

> The court does not find that David actively lied or defrauded Grace, but to the extent that [David's] statements were misleading about the agreement's effect on Grace's rights, Grace's signing of the agreement cannot be said to be voluntary. [¶] The court finds that under the unique circumstances of this case a form of constructive fraud occurred because statements made to Grace misled her into believing that she would suffer no adverse consequences to her community property rights. In making this finding, the court specifically notes that Grace and David could be viewed as having a confidential relationship. [Citations.]

(AA 1188.)

David's opening brief on his cross-appeal challenges the court's ultimate finding that the agreement was not made voluntarily, and its component finding that the parties were in a confidential relationship. The brief states: "Judge Burch's finding of a confidential relationship—and the finding of involuntariness that rested upon it—cannot stand." (See Combined Respondent's & Cross-Appellant's Opening Brief, pp. 85.) Therefore, the opening brief assigns error to both findings.

Grace seems to argue that the mere existence of a confidential relationship is a defense to a premarital agreement. If that is her position,

she is incorrect on the law. Parties in a confidential relationship are free to contract with each other. It is only when a party uses the relationship to gain an advantage over the other that the law will say that consent to an agreement was not freely given. (See, Civ. Code, §§ 1567 (lack of consent to contract) & 1573 (constructive fraud); see also, *Marriage of Bonds* (2000) 24 Cal.4th 1, 27-28.) This point is discussed in more detail below.

IV.

THE TRIAL COURT CORRECTLY PLACED THE BURDEN OF PROOF ON GRACE TO SHOW INVOLUNTARINESS, BUT THEN IMPROPERLY SHIFTED THAT BURDEN TO DAVID

The trial court was correct in assigning the burden of proof on Grace to show that she did not execute the agreement voluntarily as required by Family Code section 1615, subdivision (a). (AA 1184.) The court, however, then gave Grace an evidentiary leg up in meeting her burden by finding that David was under a duty to inform her of the terms of the agreement based on its finding that the parties were in a confidential relationship. David's failure to explain the agreement to Grace in detail was found to be constructive fraud, making her apparent consent to the agreement not real or freely given. The court did not say that it was shifting the burden of proof, but that was the effect. The trial court should have kept the burden of proof on Grace.

A. Proper Assignment of the Burden of Proof is Critical to Determining Whether Substantial Evidence Supports a Judgment

"If an absence of evidence could satisfy the burden of proof, the concept of burden of proof would have no meaning." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654–655.) For example, in a civil case, assume no evidence is presented by either side and the court enters judgment for plaintiff. Under most circumstances, the judgment would not be supported by substantial evidence because the plaintiff had the burden of proof; only a judgment for defendant could stand.

Here, Grace had the burden of proof.[5] The trial court acknowledged that she had the burden of proof to show involuntariness. (AA 1184.) However, the court then required him to prove that he informed Grace about the agreement before her signature would be considered freely given. The shift in burden to David was proper only if the parties were in a confidential relationship and David obtained an unfair advantage in the agreement. Absent such evidence, Grace was required to establish that she

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[5] The party who claims that a premarital agreement is invalid or otherwise unenforceable bears the burden of proof on that allegation. (Fam. Code, § 1615, subd. (a)(1); *Marriage of Bonds, supra*, 24 Cal.4th at p. 27; *Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1502.)

did not sign the agreement voluntarily. If there was a failure of proof on the issue of voluntariness, it means that Grace must lose.

As discussed below, the court confused a close, intimate relationship that exists between every engaged couple with the extreme circumstances which are required to establish a confidential relationship. The court also failed to find that David obtained an unfair advantage. Indeed, the court found that the agreement was not unconscionable.

In assessing whether substantial evidence supports the finding that Grace did not voluntarily sign the agreement, this Court should view the evidence in light of the fact that Grace had the burden of proof on that issue, without the aid of any evidentiary presumptions arising from the relationship of the parties.

B. There is No Substantial Evidence to Support the Finding of a Confidential Relationship

If the facts in this case equate to a confidential relationship, then nearly every couple engaged to be married is also in a confidential relationship. The trial court used everyday circumstances which are customary and typical of engaged couples to conclude that Grace was in a relationship with David that entitled her to special protection under the law, essentially making her immune from any agreement between them.

1. Fiancés Are Not Presumed to be in a Confidential Relationship; the Intent of the Legislature was to Enhance the Enforceability of Premarital Agreements

Engaged couples are not presumed to be in a confidential relationship and they owe no fiduciary duty to one another. (*Marriage of Bonds, supra,* at pp. 27-28.) In *Bonds*, the California Supreme Court distinguished how engaged couples differ from married couples in terms of the legal duty they owe to each other*:*

> [W]e do not agree . . . that a *premarital* agreement should be interpreted and enforced under the same standards applicable to *marital* settlement agreements. First, although persons, once they are married, are in a fiduciary relationship to one another (Fam. Code, § 721, subd. (b)), so that whenever the parties enter into an agreement in which one party gains an advantage, the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293, 39 Cal.Rptr.2d 673), a different burden applies under the Uniform [Premarital Agreement] Act in the premarital setting. Even when the premarital agreement clearly advantages one of the parties, the party challenging the agreement bears the burden of demonstrating that the agreement was not entered into voluntarily. Further, under the Uniform Act, even when there has been a failure of disclosure, the statute still places the burden upon the party challenging the agreement to prove that the terms of the agreement were unconscionable when executed, rather than placing the burden on the advantaged party to demonstrate that the agreement was not unconscionable. Thus the terms of the act itself do not support the Court of Appeal's conclusion that the Legislature intended that premarital agreements should be interpreted in the same manner as agreements entered into during marriage.

(*Marriage of Bonds, supra,* at p. 27, italics in original.)

Clearly, premarital agreements are not tested under the same rules which are applied to marital agreements. Before marriage, there is no fiduciary duty between the couple and they are free to contract with each other. As the Court explained in *Bonds*, if a fiduciary standard were applied to premarital agreements, it would shift the burden of proof to the party wanting enforcement of the agreement and weaken these agreements, which is contrary to the intent of the Legislature in adopting California's version of the Uniform Premarital Agreement Act (Fam. Code, § 1610 et seq.):

> The primary consequences of designating a relationship as fiduciary in nature are that the parties owe a duty of full disclosure, and that a presumption arises that a party who owes a fiduciary duty, and who secures a benefit through an agreement, has done so through undue influence. [Citations.] ... [¶¶]
> Because the Uniform Act was intended to enhance the enforceability of premarital agreements, because it expressly places the burden of proof upon the person challenging the agreement, and finally because the California statute imposing fiduciary duties in the family law setting applies only to spouses, we do not believe that the commissioners or our Legislature contemplated that the voluntariness of a premarital agreement would be examined in light of the strict fiduciary duties imposed on persons such as lawyers, or imposed expressly by statute upon persons who are married. (See Fam.Code, § 721.) Nor do we find any indication that the California Legislature intended to overrule our *Dawley* decision. Although we certainly agree that persons contemplating marriage morally owe each other a duty of fair dealing and obviously are not embarking upon a purely commercial contract, we do not believe that these circumstances permit us to interpret our statute as imposing a *presumption* of undue influence or as requiring the kind of

> strict scrutiny that is conducted when a lawyer or other fiduciary engages in self-dealing. On the contrary, it is evident that the Uniform Act was intended to *enhance* the enforceability of premarital agreements, a goal that would be undermined by presuming the existence of a confidential or fiduciary relationship.

(*Bonds, supra,* pp. 27-29, italics in original, footnote omitted.)

2. The Parties Were Not in a Confidential Relationship

After making it clear that engaged couples are not presumed to be in a confidential relationship and that the intent of the Legislature was to enhance the enforceability of premarital agreements, the Court in *Bonds* discussed the evidence needed to establish a confidential relationship:

> California law also recognizes a lesser degree of confidential relationship that *may* arise, for example, between family members and between friends. (See 1 Witkin, Summary of Cal. Law, supra, Contracts, § 427, pp. 383-384.) In such cases 'mere *lack of independent advice* is not sufficient to raise a presumption of undue influence or of constructive fraud, even when the consideration appears inadequate. But when to these factors is added some other such as great age, weakness of mind, sickness or other incapacity, the presumption arises, and the burden is on the other party to show that no oppression took place.' [Citation.]

(*Bonds, supra,* p. 28, italics in original.)

The facts in this case do not amount to substantial evidence of a confidential relationship. The trial court based its finding on the following: 1) David and his father became dominant figures to Grace, 2) David's father treated Grace as if she was his daughter and she had in essence become part of David's family, 3) Grace lived with and vacationed with

David's family, and 4) she trusted and relied on David and David's father with regard to protecting her interests. (AA 1185 & 1188.) The trial court then concluded:

> Under these facts, the court finds that there existed a confidential relationship where a constructive fraud was possible. In that context, David's statements to Grace that the agreement was to protect the family business (David's version) or that the agreement was to protect the family's right to vote company shares of stock (Grace's version) intentionally did not convey to her the material information that the [agreement] altered important community property rights that she would otherwise have. Under these facts, the court finds that the [agreement] is not enforceable against Grace.

(AA 1189.)

No evidence was presented that Grace had any incapacity or weakness of mind at the time she signed the agreement which would justify a finding of confidential relationship. When Grace signed the agreement, she was 23-years-old. (RT 1045:25.) Grace had earned a bachelor's degree from Pepperdine University. (RT of 12/1/10, 127:12-13.) She completed her bachelor's degree in communications in four years. (RT of 12/7/10, morning session, 77:21 - 78:2.) Grace was the assistant manager of a retail store and "kept getting promoted." (*Id.,*77 8:3-10.) She ultimately worked her way up to the position of district manager. (RT of 12/1/10, 128:8-11.) She did not have any medical or psychological conditions that impaired her ability to read or understand English when she signed the agreement. (RT

of 12/7/10, morning session, 78:18-21.) English is her primary language. (*Id.*, 70:5-10.)

As stated in *Bonds,* there must be a showing of unusual dependence by one party on the other, "such as great age, weakness of mind, sickness or other incapacity" before a confidential relationship may be found. (*Bonds, supra*, p. 28.) That evidence does not exist here.

Grace claims that the key element in finding a confidential relationship is the actual placing of trust and confidence in the other party. (Cross-Respondent's Brief, p. 41.) The placing of trust in confidence does not mandate a finding of a confidential relationship. All parties who are engaged to be married necessarily place a great deal of confidence and trust in one another, yet the *Bonds* decision makes it clear that non-marital partners are not presumed to be in a confidential relationship with one another. Fiduciary duties do not arise just because one party trusts another.

The fact that David and his father treated Grace is if she was part of the family is not evidence of a confidential relationship. It is common, indeed good manners, for persons engaged to be married to be accepted and treated like family even before the marriage takes place. When a couple is engaged to be married, they become dominant figures in each other's lives – arguably the most important people in each other's lives. This is what is

supposed to happen in a normal relationship when two people commit to a lifelong, exclusive bond. Their respective parents, who are soon to be in-laws, are usually important and dominant figures in their relationship too as they prepare to become a new family unit.

While David and his family were comfortable bringing Grace on their family vacations and letting her stay in their home, this goes to the quality of their relationship. It is the type of behavior which a person coming into a family would expect and hope. Would Grace have been in a better position to negotiate or understand the agreement had David's family treated her callously and indifferently? Trust and kindness do not establish a confidential relationship; lack of independence is the key.

C. There is No Substantial Evidence to Show that David Received an Unfair Advantage in the Agreement

Even if the parties were in a confidential relationship, Grace was also required to show that David received an unfair advantage under the agreement before she could avoid the agreement by virtue of constructive fraud. There is no evidence of unfair advantage, and the trial court never found that David received an unfair advantage. Accordingly, there is no legal basis for the finding of constructive fraud.

"Actual fraud and undue influence generally involve active misconduct, such as an intent to deceive, or misrepresentation, by the defendant.... Unlike fraud and undue influence, a constructive fraud claim allows relief for negligent omissions constituting breach of duty in a confidential relationship." (*Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 548, footnotes omitted.) Civil Code section 1573 states that constructive fraud consists of the following circumstances:

> 1. In any breach of duty which, without an actually fraudulent intent, *gains an advantage* to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
> 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

(Civ. Code, § 1573, italics added.)

The party claiming constructive fraud has the burden to establish the prejudice element under Civil Code section 1573. (*Tyler*, *supra*, at pp. 549-550.) "[W]here a confidential relationship exists and the dominant party obtained an advantage from a transaction, it is presumed undue influence was exerted, and the burden shifts to the dominant party defendant to prove the transaction was voluntary." (*Id.,* at p. 550, underlining added.) Therefore, burden-shifting only occurs when the party seeking to avoid the contract establishes the following preliminary facts: 1) confidential relationship and 2) prejudice or unfair advantage.

As explained in the context of undue influence, not any advantage will suffice; it must be an "unfair" advantage. (*Marriage of Burkle* (2006) 139 Cal.App.4th 712, 730-734.) Prejudice is not presumed from the fact that a party in a confidential relationship receives any advantage in a transaction with the other. (*Id.,* at p. 733-734.) The duty owed by parties in a confidential relationship (or spouses for that matter) is akin to the duty owed between business partners. (*Id.*) "[J]ust as it would be patently irrational to presume undue influence in a contract between business partners, it would likewise be unreasonable to presume undue influence in a contract between spouses, unless one of the spouses has obtained an unfair advantage." (*Id.* at 733.)

Logically, if a fair advantage may be taken in an agreement between spouses, then parties engaged to be married may also gain a fair advantage over the other, without being guilty of constructive fraud or triggering a presumption of involuntariness. In judging what is a fair versus an unfair advantage, there is another important distinction to be made between marital agreements and premarital agreements. In a marital agreement, an unfair advantage occurs when a party receives property without consideration. (*Burkle, supra,* at p. 731.) That is not the case with a premarital agreement. Consideration is not required in a premarital

agreement. (Fam. Code, § 1611 (a premarital agreement "is enforceable without consideration.") As the court explained in *Bonds*, "'mere lack of independent advice is not sufficient to raise a presumption of undue influence or of constructive fraud, even when the consideration appears inadequate....'" (*Bonds, supra,* p. 28, italics omitted, underlining added.)

David did not receive an unfair advantage under the agreement. In fact, the court stated that the agreement was not unconscionable. (AA 1184.) The premarital agreement is anemic in scope:

- It confirmed and clarified David's separate property rights which already existed under the law. David had an interest in his family business before marriage. (AA 1518 & 1524.) By law, that interest was his separate property, even without a premarital agreement.[6] There was nothing unfair to Grace about the confirmation of David's premarital interest in the business to David as his separate property in the agreement.

- The agreement identifies and confirms David's separate property obligations. (AA 1519.) This provision protected the community estate from David's debts concerning the family business, and was a form of consideration in Grace's favor.

- There was no waiver of spousal support in the premarital agreement. If David had wanted to gain an advantage over Grace, one would think that he would have requested her to waive all rights to spousal support.

- There was no general waiver of community property rights. David could have easily eliminated all rights to community

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[6] "Separate property of a married person includes . . . All property owned by the person before marriage." (Fam. Code, § 770, subd. (a)(1).)

property under the agreement.[7] Instead, the agreement is limited to his family business. The fact that agreement allows for the creation of community property shows that he was not trying to take advantage of Grace.

- There was no waiver of Grace's right to inherit or other rights as a surviving spouse, except as to David's separate property. David could have disinherited Grace and taken away her right to a probate homestead and family allowance[8], but there is nothing like that in the agreement.

In fact, the agreement provided greater rights to Grace than might have existed under the law had she not signed the agreement. Per the agreement, if community property is used to pay the debt David incurred to purchase stock in his family business , the use of such funds "shall be treated as a loan from the community to [David's] Separate Property, which loans shall bear interest at twelve percent (12%), but not to exceed the maximum legal rate allowable by law at the time of any such loan." (AA vol. 9, tab 114, p. 1519.)

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[7] "Parties to a premarital agreement may contract with respect to all of the following: (1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located. [¶] (3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event. [¶] (7) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." (Fam. Code, § 1612, subd. (a).)

[8] See Fam. Code, § 1612, subd. (a)(3)-(5).

Had the parties married without a premarital agreement, the *Moore/Marsden*[9] rule would have applied. Under that rule, the community would have been entitled to reimbursement for the use of its funds, plus a *pro tanto* share of any appreciation on the stock based on a ratio of the separate versus community contributions. The community gets a relative share of appreciation per *Moore/Marsden* only if the underlying asset, in fact, appreciates. If the separate asset goes down in value, there is no appreciation to divide with the community.

The court acknowledged that "the 12% interest rate appears to be a generous one by today's standards..." (AA 1186.) The agreement did not give David an unfair advantage because it required him to repay the money to the community plus interest at a fixed rate of 12%, even if the stock went down in value or became worthless. The agreement was beneficial to Grace because it avoided the uncertainty of the *Moore/Marsden* rule. It placed the risk of loss on David. He owed 12% interest to the community under the agreement, regardless of whether what happened to the value of the stock. Any advantage to David at the time he executed the agreement was speculative. He would get an advantage only to the extent the stock

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[9] *Marriage of Moore* (1980) 28 Cal.3d 366; *Marriage of Marsden* (1982) 130 Cal.App.3d 426.

appreciated beyond 12%. There was no way to tell when the agreement was made if the stock would go up or down in value. It was just as likely that David would be disadvantaged by the agreement. This is the definition of a bargain.

Since David did not receive an unfair advantage, there was no constructive fraud. The burden of proof was on Grace to show that she did not execute the agreement voluntarily, without the aid of any presumption that David obtained her consent by fraud.

V.

GRACE FAILED TO SHOW THAT HER ASSENT TO THE AGREEMENT WAS NOT VOLUNTARILY GIVEN

After taking away the presumption of involuntariness which was improperly applied by the trial court, there is no solid or reasonable evidence left to support the finding of involuntariness.

A. The Recitals in the Agreement Create Conclusive Presumptions that Grace Acted Voluntarily

Paragraph 11 of the agreement states:

> Each party does hereby warrant and represent to the other that each has been advised and has had the opportunity to be represented in the negotiations for, preparation, and execution of this Agreement by independent counsel of his or her own choice, that he and she have each read this Agreement, that each have had it fully explained to them, and that each is fully aware of the contents hereof and of its legal effect."

(AA 1152, ¶ 11.)

According to Evidence Code section 622: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration." (Evid. Code, § 622.)

> The application of this provision, a codification of the doctrine of "estoppel by contract," is based on the principle that parties who have expressed their mutual assent are bound by the contents of the instrument they have signed, and may not thereafter claim that its provisions do not express their intentions or understanding.

(*City of Santa Cruz v Pacific Gas and Electric Co.* (2000) 82 Cal.App.4th 1167, 1176.)

Of course, Evidence Code section 622 does not bar the assertion of fraud or other grounds for rescission. (*Bruni v Didion* (2008) 160 Cal.App.4th 1272, 1291.) There was no fraud in this case. (AA 1888, "The court does not find that David actively lied or defrauded Grace....") Therefore, the court was mandated to enter findings consistent with the recitals. Any contrary findings cannot be supported by substantial evidence. "'Where the law makes a certain fact a 'conclusive presumption' evidence cannot be received to the contrary. . . .' [Citation.]" (*Williams v. Moon* (1950) 98 Cal.App.2d 214, 217 [dealing with conclusive paternity presumption].)

Therefore, in assessing whether the ruling of involuntariness is supported by substantial evidence, the following facts are deemed to have been conclusively established and no contrary evidence can be considered in aid of that ruling:

- Grace had the opportunity to consult with independent counsel before signing the agreement. (AA 1152, ¶ 11.)
- Grace read the agreement before signing it. (*Id.*)
- Grace had the agreement fully explained to her before signing it and she was fully aware of its contents. (*Id.*)
- Grace understood the legal effect of the agreement when she signed it. (*Id.*)

The finding of involuntariness cannot stand in light of these conclusively presumed facts.

B. The Fact that Grace Was Not Represented by Counsel Does Not Create a Presumption of Involuntariness

In support of its finding that Grace did not sign the agreement voluntarily, the court observed that David never "advised Grace to get a lawyer to advise her regarding the PMA," and "[t]he critical fact is that . . . Grace was unaware the PMA might have the effect of altering her community property rights to her detriment." (AA 1185.)

As the Court stated in *Bonds*:

> [T]he overall purpose of the Uniform [Premarital Agreement] Act [Fam. Code, § 1600

> et seq.] was to enhance the enforceability of premarital agreements, a goal that would not be furthered if agreements were presumed to be of doubtful voluntariness unless both parties were represented by independent counsel.

(*Bonds, supra,* p. 17.)

Here, the trial court placed emphasis on the fact that Grace was unrepresented, calling it a "critical fact." (AA 1185.) Although lack of counsel is a factor to consider, it cannot be used to presume that the agreement is "of doubtful voluntariness" as explained in *Bonds.*[10] Grace had the opportunity to obtain counsel, which she acknowledged in the agreement. (AA 1152, ¶11.) Grace said that she decided to sign the agreement because "Frankly, I didn't think it was a big deal." (RT 1045:8-12.) She admitted that no one prevented her from obtaining an attorney, but she did not know she should retain one. (RT 1041:4-15; 1044:4-7.) The recitals state that she was advised to seek independent counsel of her choosing. (AA 1522, ¶11.) David testified that he told Grace in "general

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It should be noted that the agreement was executed by the parties on April 22, 1987, before the 2002 amendments to Family Code 1615 took effect. The 2002 amendments state that a premarital agreement is deemed to have been made involuntarily if the party seeking to avoid enforcement was not represented by legal counsel. That factor (now Fam. Code, § 1615, subd. (c)) was not a legal requirement in effect at the time this agreement was made, and cannot be applied retroactively. (*In re Marriage of Hill v Dittmer* (2011) 202 Cal.App.4th 1046, 1057; *In re Marriage of Howell* (2011) 195 Cal.App.4th 1062, 1074.) The trial court acknowledged that the 2002 amendment was not retroactive. (AA 1184, ¶1.)

terms" to have an attorney, her father, brother, or somebody look at the agreement for her. (RT 1057:15-19.)

The court's emphasis on Grace's lack of counsel should not have been a critical factor in determining whether she entered into the agreement voluntarily.

C. Grace Cannot Escape Enforcement of the Agreement by Claiming That She Never Read It

The court stated that "Grace signed the agreement without giving it much thought and without having read it." (AA 1185.) Such a finding should not be relevant to voluntariness. "Ordinarily when a person with capacity of reading and understanding an instrument signs it, he may not, in the absence of fraud, imposition of excusable neglect, avoid its terms on the ground he failed to read it before signing it." (*In re Marriage of Hill v Dittmer* (2011) 202 Cal.App.4th 1046, 1055; citing *Bauer v. Jackson* (1971) 15 Cal.App.3d 358, 370.)

A party's negligence in failing to read an agreement does not amount to a mistake of fact that justifies setting aside the agreement. "A person cannot avoid a contract on the grounds that he or she did not read it before signing." (*Stewart v Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, 1688.) A person with capacity of reading and understanding a contract is bound by its contents on signing, in the absence of fraud or undue

influence, and cannot avoid its terms merely by asserting it is contrary to his or her subjective understanding. (*Tarpy v San Diego* (2003) 110 Cal.App.4th 267.)

At the time Grace entered into the agreement, she had a bachelor's degree in communications from Pepperdine University. (RT of 12/1/2010, 127:12-13; RT of 12/7/2010, morning session, 77:21 - 78:2.) She had been employed as an assistant manager of a women's retail store. (RT 12/7/2010, morning session, 78:3-10.) She was familiar with stock options, as she had purchased shares of Limited/Express, the company she was working for prior to marriage. (RT 12/7/2010, morning session, 72:4-9.) Grace was fluent in English. (*Id.*, 70:5-10.) She did not have any medical or psychological conditions that impaired her ability to read or understand the agreement. (*Id.*, 78:18-21.)

Grace's negligence in failing to read the agreement should not permit her to avoid enforcement of the agreement. If that were a sustainable position, rescission would be an appropriate remedy for all parties who decided not to read what they sign.

D. The Admissible Facts Regarding Voluntariness Do Not Amount to Substantial Evidence

The evidence properly before this Court demonstrates that the trial court's finding of involuntariness is not supported by substantial evidence:

- Grace received the agreement two days before signing it, and executed the agreement 10 days prior to the wedding. (RT 1057:24 - 1058:2; RT 1165:20 - 1166:17; RT 1061:2-4.)

- Grace had conversations with David regarding the prenuptial agreement before signing it. (RT 1018:16-19.) David testified that he discussed his desire to have a premarital agreement several months prior to her receiving the first draft. (RT 1053:15-20.) Grace never objected to having an agreement and seemed supportive of the idea. (RT 1054:9-23.) After presenting the agreement, David had a fairly lengthy discussion with Grace about it. (RT 1056:11-16.)

- Grace admitted that she was not forced to sign the premarital agreement. (RT 1040:8-11; RT 1050:21-23; RT of 12/7/2010, afternoon session, 12:7-10.)

- Grace admitted that no one prevented her from obtaining an attorney, but she did not know she should retain one. (RT 1041:4-15; 1044:4-7.) David testified that he told Grace in general terms to have an attorney, her father, brother, or somebody look at the agreement for her. (RT 1057:15-19.) The recitals state that she was advised to seek independent counsel of her choosing. (AA 1522, ¶11.)

- Grace signed the agreement because "Frankly, I didn't think it was a big deal." (RT 1045:8-12.)

The agreement did not come as a surprise to Grace. The evidence presented at trial, even viewed in the best light to Grace, cannot support a finding that she involuntarily signed the agreement.

VI.

REVERSAL IS REQUIRED TO PREVENT A MISCARRIAGE OF JUSTICE

"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., Art. VI, § 13.)

A miscarriage of justice occurred in the amount of $174,444. Had the agreement been enforced, David would have received an equalizing payment[11] from Grace of $598,760. (AA 1805, tab 137, p.6.) Instead, the court invalidated the agreement and set the equalization payment at $424,316. (AA 1817, tab 140, p. 6.)

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[11] The reason Grace owed David an equalizing payment was to compensate him for equity Grace received upon equal division of their residence, which the court ordered to be distributed on December 19, 2011, and for payments David made on her behalf.

VII.

REVERSAL SHOULD BE MADE WITH DIRECTIONS

There is no need for a further evidentiary hearing in the trial court, since this Court can determine the ultimate rights of the parties from the record. (See *Paterno v. State of Calif.* (1999) 74 Cal.App.4th 68, 76.) Reversal with directions is appropriate.

The trial court should be directed to uphold the agreement and enter a judgment in David's favor for an additional $174,444.

VIII.

CONCLUSION

The ruling that the premarital agreement was not signed voluntarily should be reversed. The record is clear as to what David should have been awarded had the agreement been upheld. The trial court should be ordered to enter a judgment with that result.

Dated: April 17, 2013 Respectfully submitted,

WALZER & MELCHER LLP
Christopher C. Melcher, Esq.
Anthony D. Storm, Esq.

IX.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Reply Brief on Cross Appeal is produced using 13-point or greater Roman type, including footnotes, and contains 6,477 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 17, 2013

Respectfully submitted,

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