Filed 6/28/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of WARREN and CAROL L. ROSENDALE.	
WARREN ROSENDALE, Respondent, v. CAROL L. ROSENDALE, Appellant.	G031925 (Super. Ct. No. 00D000542) O P I N I O N

Appeal from a judgment and orders of the Superior Court of Orange County, Sheila B. Fell and Francisco F. Firmat, Judges. Affirmed in part, reversed in part, and remanded.

Carol L. Rosendale, in pro. per.; Domestic Law Project and Merritt L. McKeon for Appellant.

Family Law Appellate Associates, Jeffrey W. Doeringer; Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Respondent.

* * *

A man and a woman entered into a premarital agreement shortly before their marriage. Eight years later, the woman was in a life-shattering automobile accident. At one point pronounced dead, the woman survived the accident. However, she suffered brain damage, internal injuries and numerous broken bones. She underwent fifteen reconstructive surgeries and is slated to have many more.

A couple of years after the accident, her husband decided to move on. He filed a petition for dissolution of marriage. He also filed a motion to determine the validity and enforceability of the premarital agreement. In particular, he sought a determination that the waiver of spousal support was enforceable.[1] The court entered an order granting the husband's motion.

The wife later sought reconsideration of the order on the basis of a newly enacted amendment to Family Code section 1612. The amendment added a new subdivision, subdivision (c), to section 1612. The subdivision provides that a premarital waiver of spousal support will not be enforced if enforcement would be unconscionable at the time sought. The court denied the wife's motion and entered judgment.

The wife appeals. She contends that it is unconscionable to treat her as a "disposable spouse" — to cast her off without spousal support once she has been damaged. She argues that it is against public policy to deny her spousal support when she is mentally and physically devastated and unable to earn a living. We agree. Family Code section 1612, subdivision (c) is a codification of existing law. A court will not enforce a premarital waiver of spousal support, whether the premarital agreement is executed before or after the effective date of Family Code section 1612, subdivision (c),

---

[1] The provision at issue states: "In the event that the Parties terminate their present cohabitation arrangement or initiate dissolution of marriage proceedings, neither Party shall be liable to the other for living expenses, food, shelter, medical, dental or pharmaceutical expenses, or other necessities of life except as provided in this Agreement, and each Party waives and releases all rights and claims to receive money, property, or support from the other Party."

if at the time of enforcement it would be unconscionable to do so. We reverse the order enforcing the spousal support waiver and remand to the trial court. We affirm an order concerning the status of certain jewelry and an order and a portion of the judgment concerning attorney fees.

I

FACTS

A. Carol's Condition

The wife, Carol Rosendale, in her declaration dated June 29, 2001, declared in part as follows: "3. On August 23, 1997, while still married to [Warren], I suffered a horrendous automobile accident due to no fault of mine. I suffered life threatening injuries, I was unconscious for 11 days and the doctors gave me survival odds of less than 1%. I was on life support full-time for 5 days. The doctors don't even know how many bones I broke, because there were just too many to count. I suffered permanent injuries that [require] continuous reconstructive surgeries. As of today, I have medical bills [totaling] more than $1,000,000.00. [¶] 4. Among my several injuries, I suffered a broken jaw bone, which was split and lengthened, wrapped in [titanium] and screwed securely. This is a permanent injury. [¶] 5. I also suffered a permanent retina damage to my right eye, which is inoperable. I also have a [titanium] rod, the length of my left leg with vertical and horizontal [titanium] staples screwed in place. As for my right leg, all ligaments were severed and I have an Achilles tendon cadaver implanted. [¶] 6. One of my most serious [injuries] is [damage] to the frontal lobes, which has caused me to suffer from . . . memory loss. I now have [a] terrible memory and have a difficult time retaining any information. [¶] 7. I also suffer from acute pain continuously [which] requires continuous physical therapy. All the injuries I suffered are permanent and I have had numerous reconstructive surgeries, [and others] are yet to be performed. [¶] . . . [¶] 9. I have a lot of medical bills and [they] will probably increase as time goes on. I am

required to have several surgeries, however I am unable to afford them, since [Warren] left me."[2]

In addition, in her February 12, 2002 declaration, Carol stated: "2. In August 1997 I was in a terrible traffic accident. [¶] 3. I was declared clinically dead but, by a true medical miracle, I survived and have had to endure 15 surgeries to date and still need more." She further declared: "7. I incur about $5000.00 drug costs per year and insurance pays about $3000.00. My husband does not pay anything toward the unpaid costs. [¶] 8. I need three to four sessions of physical therapy per week but cannot afford them and my husband refuses to pay them. [¶] 9. I have listed below the injuries I received in the accident: [¶] a. skull-brain trauma . . . damage which has resulted in loss of memory and the inability to concentrate. [¶] b. My face was decloved (crushed) which has resulted in my having to endure over $100,000.00 in reconstructive surgery. I have continuing problems with my jaw (it had to be literally rebuilt), inoperable damage to my retina, reduced vision, constant sinus drainage, loss of smell, and partial hearing loss. [¶] c. chipped vertebrae, 3 herniated disks, and now it has been discovered that my neck actually was broken. [¶] d. both arms were torn from their sockets and I am still undergoing surgery to repair this. . . . [¶] e. left wrist was crushed and as was my right thumb. [¶] f. My chest was crushed with one lung collapsed. [¶] g. My breast tissue was also injured and deformed due to open heart massages. [¶] h. I endured abdominal surgeries for bleeding internally, a potentially fatal condition. [¶] i. I suffered severe injuries to my lower back. [¶] j. My left leg has extensive titanium parts now and my knee was rebuilt. [¶] k. I have over 104 inches of scarring. [¶] l. I lost 2 centimetres [*sic*] from my leg. [¶] m. All the tendons in my right leg were severed, part of my knee was replaced, and I have an Achilles tendon implant. [¶] n. The arch of my left foot was

---

[2] Throughout this opinion, we refer to the parties, Carol and Warren Rosendale, by their first names. This is done for the ease of the reader. No disrespect is intended. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

broken and I am required to wear special shoes. My right foot has constant and chronic pain from a broken ankle. [¶] o. I have had to have extensive dental work because of the accident. [¶] 10. I can no longer work, I am in need of constant medication, and I am in constant and sometimes unbearable pain."

Carol's own declarations are not the only information in the record concerning her injuries. Her mental impairment was obvious to the court. In denying Warren's request for attorney fees, the court stated that while Carol's "conduct would otherwise be sanctionable, her less than coherent state of mind, her confusion and the ensuing interruptions and delays of trial were caused by a brain injury that occurred from an auto accident during the marriage." The court also noted that there was "no conscious misconduct" on Carol's part. In a separate order, the court found that Carol "had an accident in August of 1997 and that she suffered injury and was left with physical and mental injuries."

B. Procedural History

On June 28, 2001, the court bifurcated the issue of the validity of the premarital agreement[3] in an action for the dissolution of the marriage of Carol and Warren. On August 24, 2001, the court ruled the premarital agreement was valid. The

---

[3] Warren contends that the appeal is untimely because Carol "refused" to seek an interlocutory appeal. He cites former California Rules of Court, rule 1269.5 as in effect in 2001. The version of the rule then in effect permitted a party to seek either an order certifying that there was probable cause for immediate appellate review of a bifurcated issue or writ review in the event a certificate of probable cause was denied. We see nothing in that rule indicating that unless a party sought a certificate of probable cause, he or she would lose the right to file a postjudgment appeal. Furthermore, we observe that Carol filed a writ petition (*Rosendale v. Superior Court* (Oct. 17, 2002, G031308) [nonpub. opn.]) with respect to the unconscionability of enforcement of the spousal support waiver. This court declined to hear the writ petition because Carol had an adequate remedy at law in the form of an appeal. Carol's appeal is not untimely.

court neither ruled on whether the premarital agreement was unconscionable at the time enforcement was sought nor ordered that a hearing should be conducted on that issue.

Carol asked the court to reconsider the August 24, 2001 ruling under Code of Civil Procedure section 1008, subdivision (c).[4] She also requested the court to retroactively apply Family Code section 1612, subdivision (c), which became effective on January 1, 2002. (Stats. 2001, ch. 286, § 1.) On April 5, 2002, the court heard Carol's requests. The court declined to apply Family Code section 1612, subdivision (c) retroactively and refused to change the prior ruling. Once more, although again requested to do so, the court neither ruled on whether the premarital agreement was unconscionable at the time enforcement was sought nor ordered that a hearing should be conducted on that issue. Judgment on reserved issues was entered on February 11, 2003.

Carol filed a notice of appeal from the judgment on reserved issues, the August 24, 2001 ruling, and certain other rulings. She now asks this court to review the trial court's interpretation of Family Code section 1612, subdivision (c). She also argues the court never conducted a hearing on whether or not it is unconscionable to enforce the premarital agreement under the circumstances at the time of enforcement. In addition, Carol contends that the court erred in finding a $15,000 necklace was Warren's separate property and asserts that she should have been awarded attorney fees.

II

DISCUSSION

A. Uniform Premarital Agreement Act

The Uniform Premarital Agreement Act (UPAA) as adopted in California, Family Code section 1600 et seq., applies to premarital agreements executed on or after

---

[4] Code of Civil Procedure section 1008, subdivision (c) provides: "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order."

January 1, 1986. (Fam. Code, § 1601.[5]) Of particular importance to this case are sections 1612 and 1615.

Section 1612, subdivision (a) provides in pertinent part: "Parties to a premarital agreement may contract with respect to all of the following: [¶] . . . [¶] (7) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."

Section 1615, subdivision (a) provides: "A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following: [¶] (1) That party did not execute the agreement voluntarily. [¶] (2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party: [¶] (A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party. [¶] (B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided. [¶] (C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party."

Warren contends that the spousal support waiver contained in the premarital agreement was not in violation of public policy, under section 1612, subdivision (a)(7), and satisfies the requirements of section 1615, subdivision (a), because it was not unconscionable when executed. Carol, on the other hand, says that it is neither section 1612, subdivision (a)(7) nor section 1615, subdivision (a) that governs in this instance. She contends it is section 1612, subdivision (c), which was added by amendment in 2001, that is key. (Stats. 2001, ch. 286, § 1.)

Section 1612, subdivision (c) provides: "Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not

---

[5] All subsequent statutory references are to the Family Code, unless otherwise indicated.

enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. . . ." While both Warren and Carol were represented by independent counsel when the premarital agreement was signed, Carol says the agreement is unenforceable under subdivision (c) because enforcement would be unconscionable at this time. Carol urges us to apply subdivision (c) to the premarital agreement at issue, even though it was executed before the date subdivision (c) was added by amendment. Warren says that the retroactive application of the provision is unwarranted.

Warren is correct that "statutes do not operate retrospectively unless the Legislature plainly intended them to do so. [Citations.]" (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) Carol has provided no citation to any authority or legislative history to show that the Legislature intended a retroactive application. However, there was no need for the Legislature to indicate such an intent. As we shall show, the common law in effect at the time section 1612 was amended already provided that a court would not enforce a premarital waiver of spousal support if at the time enforcement was sought enforcement would be unconscionable. (See *ibid.* [Legislature may amend statute to clarify, rather than change, existing law].)

B. Common Law

(1) Spousal support waivers not unenforceable per se

In arguing the common law applicable to the enforceability of premarital spousal support waivers, both parties cite the recent California Supreme Court decision of *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39 (*Pendleton*). In that case, the court considered whether premarital agreements containing spousal support waivers are unenforceable per se. (*Id*. at p. 41.) It held that they are not. (*Ibid.*)

In addressing the question before it, the court undertook a review and analysis of the history of the UPAA. The court noted "that the Legislature had deleted subdivision (a)(4) from section 3 of the Uniform Premarital Agreement Act (Uniform Act) prior to adopting the act in 1985. The omitted subdivision would have expressly permitted the parties to a premarital agreement to contract with respect to modification or elimination of spousal support. [Citation.]" (*Pendleton, supra,* 24 Cal.4th at p. 43, fn. omitted.) "When first introduced on March 7, 1985, Senate Bill No. 1143 (1985-1986 Reg. Sess.) (Senate Bill 1143), the California version of the Uniform Act, included subdivision (a)(4), and thus listed among the permissible subjects of a premarital agreement 'the modification or elimination of spousal support.' The spousal support waiver provision was deleted by amendment. (Assem. Amend. to Sen. Bill No. 1143 (1985-1986 Reg. Sess.) Aug. 28, 1985.) The amendment of Senate Bill 1143 that deleted subdivision (a)(4) simultaneously deleted a provision, subdivision (b) of section 6 of the Uniform Act, which provided: 'If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.' (Sen. Bill No. 1143 (1985-1986 Reg. Sess.) Mar. 7, 1985; Assem. Amend. to Sen. Bill No. 1143 (1985-1986 Reg. Sess.) Aug. 28, 1985.) As enacted, Senate Bill 1143 became Civil Code former section 5315, now Family Code section 1612.)" (*Id.* at pp. 44-45.)

In reflecting on the significance of the Legislature's deletion of subdivision (a)(4) of section 3 of the Uniform Act, the *Pendleton* court made mention of "two reports by the Assembly Subcommittee on Administration of Justice. The first was prepared for an August 19, 1985, hearing on Senate Bill 1143. Senate Bill 1143 repealed prior statutory law governing premarital agreements and enacted the Uniform Act. In the first

report staff advised that California courts did not permit enforcement of premarital agreements on spousal support and recommended deletion 'to allow California case law to continue to prevail on the issue of spousal support in premarital agreements.' (Assem. Subcom. on Admin. of Justice, Rep. on Sen. Bill No. 1143 (1985-1986 Reg. Sess.) for Aug. 19, 1985, hearing, p. 3.) [¶] The second report, prepared after the amendment passed, stated that as a result of the amendment 'California case law would . . . prevail on the issue of spousal support in premarital agreements. [¶] There is a split in authority among the states as to whether a premarital agreement may control on the issue of spousal support. Some states, such as California, do not permit a premarital agreement to control this issue. . . .' (Assem. Subcom. on Admin. of Justice, Rep. on Sen. Bill No. 1143 (1985-1986 Reg. Sess.) as amended Aug. 28, 1985, p. 3.)" (*Pendleton, supra,* 24 Cal.4th at p. 45.)

After reviewing this information, the *Pendleton* court stated that neither of the two legislative reports provided an adequate explanation as to the legislative purpose in omitting subdivision (a)(4) of section 3 of the Uniform Act. (*Pendleton, supra,* 24 Cal.4th at p. 47.) The court pondered two possibilities: "The Legislature may have intended to deny couples the right to enter into any premarital agreement regarding spousal support by adopting what the committee report erroneously described as the existing case law under which premarital waivers would be per se unenforceable. Alternatively, the Legislature may have concluded that policy governing spousal support agreements, having been established by the court in the past, should continue to evolve in the court." (*Ibid.*) Ultimately, the court concluded that the Legislature intended to permit the common law governing premarital waivers of spousal support to evolve in the courts. (*Id*. at p. 49.)

The *Pendleton* court then examined the applicable common law. It completed its analysis by stating that "the common law policy, based on assumptions that dissolution of marriage is contrary to public policy and that premarital waivers of spousal

support may promote dissolution, is anachronistic." (*Pendleton, supra,* 24 Cal.4th at p. 49.) "[W]hen entered into voluntarily by parties who are aware of the effect of the agreement, a premarital waiver of spousal support does not offend contemporary public policy. Such agreements are, therefore, permitted under section 1612, subdivision (a)(7) . . . ." (*Id*. at p. 53.) The court then concluded: "We need not decide here whether circumstances existing at the time enforcement of a waiver of spousal support is sought might make enforcement unjust. It is enough to conclude here that no public policy is violated by permitting enforcement of a waiver of spousal support executed by intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver. Such a waiver does not violate public policy and is not per se unenforceable . . . ." (*Id.* at pp. 53-54, fn. omitted.)

(2) Spousal support waivers unenforceable when unconscionable

So, according to *Pendleton*, premarital waivers of spousal support may be valid. Warren states that *Pendleton* represents the applicable law in effect at the time the premarital agreement at issue was executed and that it does not provide an out for Carol. He does not read the case very closely, however. The *Pendleton* court specifically stated that "[it was] not necessary to decide in [the] case [before it] whether all such agreements are enforceable regardless of the circumstances of the parties at the time enforcement is sought." (*Pendleton, supra,* 24 Cal.4th at p. 41.) In other words, the court simply did not address whether a spousal support waiver contained in an otherwise valid and enforceable premarital agreement might be held unenforceable if it would be unconscionable to enforce it at the pertinent time. That issue was not before the court.

That does not mean that there was no answer to that question in existing case law. The parties have ruminated as to the state of the common law before the effective date of section 1612, subdivision (c), but have provided little discussion of

relevant cases other than *Pendleton, supra,* 24 Cal.4th 39. Nonetheless, we observe that there are cases of interest that help us answer the question.

Wright v. Wright (1957) 148 Cal.App.2d 257 (*Wright*) is one of them. In that case, the wife had suffered from tuberculosis since the age of 16. The disease was far advanced and had taken a substantial toll on her. It affected both of her lungs and resulted in the loss of a kidney. She was placed in a sanatorium for a period of time. At some point, however, the disease became arrested. (*Id.* at p. 259.)

After dissolution proceedings were commenced, the husband and wife, with the assistance of separate legal counsel, entered into a property settlement agreement. Among other things, the parties agreed that the husband would pay the wife $50 per month in spousal support for six months, and $25 per month thereafter. Within the month following the execution of the agreement, the wife saw a doctor, who informed her that a spot had appeared on her lung and that she might be incapacitated. He opined that she would not be able to support herself. The wife sought to be relieved of the spousal support provision to which she had agreed just the preceding month. (*Wright, supra,* 148 Cal.App.2d at pp. 261-262.)

The court agreed to her request. It stated, generally, that "'in actions for divorce there is a very large discretion vested in the trial court in the allowance of permanent support for the wife, where she is granted a divorce, even in the face of contracts of settlement between the parties. Such contracts must be subjected to the examination of a court in the divorce action and derive their sanction from a decree made by the court with knowledge of all the facts.'" (*Wright, supra,* 148 Cal.App.2d at p. 268.) The court held that it would be unconscionable to enforce the spousal support provision against the wife under the circumstances. (*Id.* at p. 271.) (See also *Moog v. Moog* (1928) 203 Cal. 406 [wife contracted tuberculosis and became blind].)

Of course, property settlement agreements, such as the one in *Wright, supra,* 148 Cal.App.2d 257, are distinct from premarital agreements, such as the one

before us, and the two are not treated identically under the law. (*In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 72.) Indeed, "[i]t is well settled that property settlement agreements occupy a *favored* position in California. [Citation.]" (*Ibid.*, italics added.) So, since the spousal support provision contained in the property settlement agreement at issue in *Wright, supra,* 148 Cal.App.2d 257 was held unconscionable, a fortiori the spousal support waiver found in the premarital agreement that Carol and Warren signed may be held unconscionable. In *Wright*, the wife knew at the time that she signed the agreement that she had suffered severe consequences from tuberculosis, which was then dormant but able to recur. She was relieved of the spousal support provision contained in that agreement shortly after executing it. Here, Carol had no reason to foresee the occurrence of a debilitating automobile accident some eight years after signing the agreement. The wife in *Wright* had far more reason to anticipate the return of her tuberculosis than Carol had to anticipate the horrendous turn of events in her life. It would appear to be even more unconscionable to enforce a spousal support waiver against Carol in her situation, than to enforce the spousal support provision to which the wife in *Wright* agreed, considering that the wife in *Wright* had reason to know she could have major medical needs and be unable to work in the future.

The rule of *Wright, supra,* 148 Cal.App.2d 257, that one spouse may be required to support an ill spouse in a manner contrary to the terms of an interspousal agreement, is consistent with public policy as expressed in several Family Code provisions other than section 1612, subdivision (c). Section 4300 requires spouses to support each other, and, as stated in section 4250, subdivision (a), spousal support is a serious legal obligation. Furthermore, subdivisions (h) and (n) of section 4320, require a court, in determining spousal support, to consider the health of the parties as well as any other factors the court determines are just and equitable. (See also *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302 [trial court must consider section 4320 factors]; *Borelli v. Brusseau* (1993) 12 Cal.App.4th 647, 651, 654 [one spouse must care for the

other who is ill].) These statutory provisions underscore the continued importance of spousal support in our modern society, under appropriate circumstances. In that way, they also support the continued application of the rule of unconscionability as reflected in *Wright, supra,* 148 Cal.App.2d 257 and the application of that rule in the premarital agreement context. Courts cannot permit one spouse to discard his or her disabled spouse without providing spousal support, even when a spousal support waiver in a premarital agreement would permit the same, if it would be unconscionable to do so at the time enforcement of the waiver is sought.

C. Alternative Performance

Yet Warren argues he has not failed to provide spousal support for Carol. Rather, he says that while the premarital agreement contains a waiver of ongoing spousal support, it also contains an "alternative performance" in the form of a $100,000 payment to Carol. However, as Carol points out, the premarital agreement does not state that the payment to her of $100,000, if the parties remained married for 10 years, was intended as lump sum payment in lieu of ongoing spousal support. Rather, the provision in question specifically states that "as consideration for CAROL'S prompt execution and transmittal to WARREN of any and all documents reasonably necessary to confirm WARREN'S separate property (including, but not limited to, quitclaim deeds), WARREN shall make a lump sum payment to CAROL in the amount of $100,000.00 upon receipt of all requested documents." The premarital agreement on its face shows that the lump sum payment was intended to make certain that Carol relinquished any conceivable claim to Warren's vast separate property holdings and executed any documents necessary to tidy

up title in his favor.[6] Nothing in the provision at issue indicates that the lump sum was intended as an "alternative" method of providing spousal support.

D. Characterization of Jewelry

Carol also complains about the court's finding that a $15,000 necklace was Warren's separate property. She says the court erred in holding that under section 852 a writing would have been required in order to effectuate the transmutation of the necklace from the separate property of Warren to the separate property of Carol.

As stated in section 852, subdivision (a), "[a] transmutation of . . . personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." However, a writing is not required with respect to a gift of jewelry that does not have a substantial value considering the parties' marital circumstances and is used principally by the spouse to whom the gift is made. (§ 852, subd. (c).) The court ruled: "Based on the circumstances and the income of the parties, I find that this gift would have been a substantial gift and so there should have been a writing. In the absence of a writing, it came from separate property, it remains separate property, especially since there's some evidence that she gave the gift back to him to give to somebody else." In other words, the court found that the exception to the writing requirement, as contained in section 852, subdivision (c), was inapplicable because the gift was one of substantial value.

Carol challenges this finding. She contends that the $15,000 necklace was not of substantial value, by comparison to Warren's total assets. Without citation to the record, Carol asserts his estate is worth "millions." While it is evident from the schedules

---

[6] As the premarital agreement reflects, when Carol and Warren married Warren owned five real properties, substantial stock holdings in three companies, a 52 percent interest in a general partnership, cash, and a "pleasure vessel."

attached to the premarital agreement that Warren's assets at the time of marriage were substantial, we do not have any information on their total value, either then or at the time Warren offered the necklace to Carol. "It is the appellant's burden to demonstrate the existence of reversible error. [Citation.]" (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 766.) It is also the appellant's burden to cite the portions of the record that support his or her argument. (*Schubert v. Reynolds* (2002) 95 Cal.App. 4th 100, 109.) In this case, Carol has done neither. Her testimony that the necklace was worth $15,000, unopposed by any evidence of the dollar-value of Warren's assets, constitutes substantial evidence to support the trial court's finding that the gift had substantial value. (See *In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 160 [substantial evidence standard applied to trial court findings].)

Because we uphold the ruling of the trial court on the basis of section 852, we need not address Warren's additional reasons why the ruling should be affirmed.

E. Carol's Request for Attorney Fees

At the trial court, Carol requested attorney fees in her favor and against Warren under sections 271 and 2030. In her opening brief on appeal, Carol, citing a minute order dated January 13, 2003, contends the trial court never considered her request for attorney fees based on section 271 and fees should have been awarded given her injury and disability. We disagree. The minute order denying her fee request states in pertinent part: "Now [Carol] is requesting attorney fees under [Family Code section] 2030. Her request for attorney fees is denied on several grounds." While the minute order does not specifically reference section 271, in addition to section 2030, the order was clearly intended to address each aspect of Carol's request.

Section 271 enables a court to award attorney fees as sanctions based on the conduct of a party during litigation. As one of the grounds for denying Carol's fee request, the court, in its minute order, stated that "the vast majority of the legal expenses

were caused by [Carol's] litigation of the prenuptial agreement and by her erratic conduct during the course of this litigation. Though this court would not consider her conduct in granting an award of attorney fees against her, this court is considering her conduct in exercising its discretion. Accordingly, [Warren] will not be saddled with her attorney fees." In other words, as to Carol's request that attorney fees be awarded to her under section 271 due to Warren's conduct during litigation, the court found that it was Carol's conduct, not Warren's, that caused the bulk of the litigation expenses. The minute order is clear even without reference to section 271. However, we observe that the judgment on reserved issues, entered February 11, 2003, specifically states that the court denied Carol's request for attorney fees under section 271. The record does not back up Carol's assertion that the court did not consider her request.

To the extent Carol may be basing her assertion of error on the court's denial of her attorney fees request under section 2030, she has also failed to show error on that ground. One of the bases for the court's denial of fees was the attorney fees waiver contained in the premarital agreement. Carol has cited no legal authority to show why the waiver of attorney fees should not be enforced.

F. Pending Motion

This court requested supplemental briefing with respect to the state of the law prior to the amendment of section 1612 to include subdivision (c). In addition to filing two supplemental letter briefs, Carol filed a motion to augment the record to include two items, i.e., a copy of the minute order pursuant to which the court denied her attorney fees request and a copy of a law review article. She filed a prior motion to augment with respect to the same minute order and this court granted the motion. Therefore, the request with respect to that item is moot. The law review article is not an appropriate subject for augmentation under California Rules of Court, rule 12(a), inasmuch as there is no indication that a copy was ever filed or lodged with the trial

court. In the alternative to augmentation, Carol requests that we take judicial notice of the law review article. We decline to do so. However, we deem the article to be a part of Carol's supplemental briefing on appeal.

III

DISPOSITION

We affirm the order with respect to the characterization of the jewelry and the judgment and order with respect to Carol's request for attorney fees. We reverse the order enforcing the waiver of spousal support. The matter is remanded to the trial court to determine whether or not it is unconscionable to enforce the waiver of spousal support against Carol considering her present circumstances. The request to augment is moot as to the minute order and denied as to the law review article. The request for judicial notice is also denied as to the law review article, which we deem to be a part of Carol's supplemental briefing on appeal. The trial court, in its discretion, shall determine whether to award to Carol her attorney fees and costs incurred on appeal.

MOORE, J.

WE CONCUR:

SILLS, P.J.

O'LEARY, J.