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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of BETH ANN and
STEVEN ARTHUR LICO.

BETH ANN LICO,

Appellant,

v.

STEVEN ARTHUR LICO,

Appellant.

A130765

(San Mateo County
Super. Ct. No. FAM-091681)

This appeal has been taken by Beth Ann Lico (Beth) from a judgment that found invalid an agreement by which her husband Steven Arthur Lico (Steven) transmuted his separate property to community property. Beth argues that the transmutation agreement was enforceable, and the trial court also erred by denying her request for an award of attorney fees. We conclude that substantial evidence supports the findings that a presumption of undue influence arose from the transmutation agreement, and was not rebutted by the evidence. We also find that the trial court did not abuse its discretion by denying an award of attorney fees to Beth. Steven has filed a cross-appeal which we need not resolve in light of our finding that the transmutation agreement was invalid. We therefore affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The parties were married in February of 1990, and subsequently had two children. During the marriage Steven was employed as a licensed real estate agent and broker,

working primarily in the field of commercial real estate. Beth “stopped working” and was “at home with the children” for most of the marriage after their first child was born in 1995. She obtained a real estate license and “became a mortgage broker” in 2005.

Steven’s family owned numerous real estate holdings, partnerships, and other business interests in ranches, subdivisions, apartments, commercial and industrial complexes. Steven acquired shares in the Lico family business interests as his separate property by inheritance or gifts from his parents during the marriage. The value of Steven’s separate property interests, while not quantified at trial, were acknowledged as quite extensive. Neither Steven nor Beth knew precisely the nature and extent of Steven’s separate property interests in the Lico family partnerships and other limited liability business entities, although Steven regularly attended family partnership meetings during which his business interests were discussed. He also kept records of the family partnerships. Steven told Beth that neither one of them needed to work because “there was a lot of money” in the family business.

Beth owned considerably less separate property which she acquired prior to the marriage, and received more modest gifts of individual interests in the Lico family holdings from Steven’s father. On one occasion Beth and Steven jointly purchased additional partnership shares in a Lico family property.

In December of 2001, Beth and Steven mutually decided to develop and execute an estate plan for themselves and their children. Steven contacted an estate planning attorney, Jennifer Cunneen, of the law firm of Hopkins and Carley, and arranged an appointment to formulate an estate plan. Prior to the meeting with Cunneen, Beth and Steven reviewed materials provided to them by the attorney, and completed questionnaires that concisely delineated their respective property interests.

Steven and Beth initially met with Cunneen on January 15, 2002, to provide her with their completed questionnaires and explain to her the primary “purpose” of their estate plan: to protect their children in the event “something happened” to them. Cunneen provided them with an overview of the nature and types of trusts available to married couples, as well as the tax and other “benefits of doing an estate plan.”

Information in a “Guide to Basic Estate Planning Techniques” given by Cunneen to Steven and Beth disclosed the concept that revocable trusts left them with “complete power to amend the terms of the trust,” add to or withdraw property from it, or even revoke the trust entirely.

Cunneen testified that at the meeting she mentioned to Steven and Beth “the difference between separate property and community property,” particularly as related to the “tax consequences upon death of separate versus community property” – that is, the advantageous “step up in basis” of community property upon the death of the first spouse. She did not refer to the legal impact of “transmutation issues,” or inform them that the estate plan may change the character of their assets from separate to community property. Cunneen did not recall “having a specific discussion about divorce law” or “what would happen” to their separate and community property interests “if they got a divorce.” Beth and Steven testified that Cunneen did not confer with them about “changing separately held assets to community property,” although Beth gave Cunneen instructions to place her separate property “into the community estate, estate plan.” Nor did Steven and Beth ever discuss among themselves the concept of changing Steven’s separate property interests to community property. Beth testified that during the meeting she and Steven authorized Cunneen to create an estate plan, but did not direct her to change title to their assets.

In March of 2002, Beth and Steven received drafts of the estate plan documents from Cunneen and her paralegal Carol Thole. Steven subsequently reviewed the drafts and provided Cunneen with more information about the nature of his separate property assets as requested. After receiving the draft documents, Beth did not take any further action, review any of the estate planning documents, or contact Cunneen. Beth believed that any assets she and Steven transferred into the trust would become community property. By March of 2002, the parties also signed a conflict waiver and agreed to dual representation of both of them by the law firm of Hopkins and Carley.

In November of 2002, Steven returned the draft estate plan documents to Cunneen. He also identified for Cunneen his separate property interests in family partnerships and

other assets that were listed in Schedule A of the Revocable Trust Agreement as targeted for transfer into the contemplated Lico Family Revocable Trust, although he did not definitively determine which interests were his separate property and which were community property. Cunneen testified that she had a single telephone conversation with Steven in which he asked her to explain the “differences between separate and community property,” and she did so. Otherwise, they had no further contact or discussion with Cunneen about the content of the draft estate plan before a meeting to sign the documents on December 3, 2002. Cunneen testified that after the initial meeting she “talked generally” with Steven “about what was separate or what was community,” and “what the differences were,” but he did not ask her for any advice on the ramifications of the transmutation agreement.

After the nature and extent of the assets to be transferred to the trust were determined, Beth and Steven instructed Cunneen to prepare a document to change the character of their respective property interests from separate to community. Cunneen then drafted a “Community Property Agreement” that was presented at the meeting on December 3, 2002. In the Community Property Agreement Steven and Beth specified that “all property owned by them, regardless of the record state of title, and whether held as trustees or individually, is intended to be held by them as their community property in which each has a present equal and existing interest.” The Community Property Agreement further provides: “This is intended to be a valid transmutation under Family Code [section] 852, of any of the parties’ assets that are not already community property. Each of us understands that to the extent that assets can be traced to inherited or gifted assets, or to assets owned before the date of marriage, such assets are probably either partly or wholly the separate property of the party having the premarital assets, or who inherited assets, or to whom assets were gifted, and that the party holding a separate property interest is by this agreement giving away one-half (1/2) of such separate property interest.” Both parties also explicitly waived “any right to reimbursement under Family Code [section] 2640, which would otherwise create a right, in a spouse who

contributes separate property to the community, to be reimbursed in the event of a marital dissolution, for the value of the property at the date of contribution.”

At the meeting on December 3, 2002, Cunneen read and briefly reviewed the trust documents, including Schedule A, the Last Wills and Testaments, Durable Powers of Attorney, and the Community Property Agreement, with Steven and Beth. Cunneen also gave Steven and Beth the opportunity to ask questions about the content and effect of the documents. The parties offered conflicting testimony on Steven’s understanding of the Community Property Agreement. Beth testified that not only was the document read to them by Cunneen, but Steven expressed his understanding that he was “gifting” his separate property to the community to “share 50/50” in the event of “a breakdown” of the marriage, “and giving away his rights to claim it back.” Steven denied he understood that he was waiving his separate property rights or his right to reimbursement if he and Beth “got a divorce.” Steven also insisted that Cunneen did not explain to him the Community Property Agreement or the waiver of his right to reimbursement for contributions of separate property to the community. Neither Beth nor Steven voiced any objections or made any inquiries about the substance of the trust documents during the meeting.

The parties signed the trust documents, including the Community Property Agreement, on December 3, 2002. The terms of the Lico Family Revocable Trust thereby created transmuted all the separate property of the parties to community property, and waived their rights to reimbursement (Fam. Code, § 2640) upon dissolution of marriage.¹ Steven subsequently obtained assignments of all of his interests in the Lico family partnership and membership interests into the Lico Family Revocable Trust. The parties separated in September of 2006, and Beth filed a petition for dissolution in October of 2006.

The trial court held a bifurcated trial on the issue of the enforceability of the Community Property Agreement executed by the parties.² The court found that while the

¹ All further statutory references are to the Family Code unless otherwise indicated.

² The parties stipulated to appointment of a “Temporary Judge” to resolve all pending issues in the dissolution action.

agreement itself complied with statutory requirements, Beth failed to overcome the presumption of undue influence associated with the transmutation of Steven's separate property assets to community property. This appeal by Beth followed, and Steven has filed a protective cross-appeal.

DISCUSSION

In her appeal Beth claims the Community Property Agreement is legally binding on the parties, and must be enforced to grant her a community property interest in Steven's separate property assets placed in the Lico Family Trust. She argues that the transmutation agreement complies with section 852, and did not grant her an "unfair advantage" so as to raise the presumption of undue influence that applies to transactions between spouses. She also presents the alternative argument that even if a presumption of undue influence arose from the transaction, it was rebutted by the evidence presented. In addition, Beth complains that the trial court erred by failing to award her attorney fees. In his appeal, Steven requests that we review the trial court's denial of his request to impose sanctions on Beth for obstreperous litigation conduct that increased the parties' costs, contingent upon our reversal of the ruling on the transmutation agreement.

I. The Validity of the Community Property Agreement under Section 852.

We first examine the validity of the Community Property Agreement as a transaction that changed the character of the parties' assets from separate to community property. "Both before and during marriage, spouses may agree to change the status of any or all of their property through a property transmutation. (§ 850.) A transmutation is an interspousal transaction or agreement that works a change in the character of the property." (*In re Marriage of Campbell* (1999) 74 Cal.App.4th 1058, 1062.) "Section 850, subdivision (b), provides that married persons may transmute the separate property of either spouse into community property "by agreement or transfer," subject to the provisions of sections 851 to 853. Section 852, subdivision (a), provides: "A transmutation of real or 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." Our Supreme Court has interpreted an

“express declaration” as language expressly stating that a change in the characterization or ownership of the property is being made. [Citation.] . . .’ [Citation.]” (*In re Marriage of Holtemann* (2008) 166 Cal.App.4th 1166, 1172.)

“In deciding whether a transmutation has occurred, we interpret the written instruments independently, without resort to extrinsic evidence.” (*In re Marriage of Starkman* (2005) 129 Cal.App.4th 659, 664.) “As a general rule, factual findings that underpin the characterization determination are reviewed for substantial evidence. ‘Appellate review of a trial court’s finding that a particular item is separate or community property is limited to a determination of whether any substantial evidence supports the finding.’ [Citations.] [¶] But de novo review is appropriate where resolution of ‘the issue of the characterization to be given (as separate or community property) . . . requires a critical consideration, in a factual context, of legal principles and their underlying values, the determination in question amounts to the resolution of a mixed question of law and fact that is predominantly one of law.’ [Citations.]” (*In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 734.)

The trial court found that the Community Property Agreement complied with section 852, and we agree.³ The Community Property Agreement contains the requisite express declaration that unambiguously indicates a change in character or ownership of property, and does not indicate that Steven was misinformed or misled as to the consequences of the transaction. (*In re Marriage of Holtemann, supra*, 166 Cal.App.4th 1166, 1172; *In re Marriage of Starkman, supra*, 129 Cal.App.4th 659, 664.)

II. The Presumption of Undue Influence.

We proceed to the more difficult issues presented in this appeal, which focus on the presumption of undue influence that attaches to marital transactions. Beth presents several arguments related to the trial court’s decision to invalidate the Community Property Agreement due to “the imposition of the presumption of undue influence.” First, she contends that as a matter of law, if a transmutation agreement satisfies the

³ Steven does not argue otherwise.

requirements of section 852, as the parties' Community Property Agreement did, the presumption of undue influence does not apply at all. She also asserts that the presumption of undue influence, even if applicable to valid transmutation agreements, did not arise in the present case because she did not gain an "unfair" advantage over Steven by the terms of the Community Property Agreement. Finally, she claims the presumption of undue influence was adequately rebutted by the evidence presented.

A. The Presumption of Undue Influence in Marital Transmutation Agreements.

Beth argues that the trial court erred by requiring her to rebut the presumption of undue influence in interspousal transactions found in section 721. She reasons that Steven's "knowing consent had been established as a matter of law, by the section 852(a) transmutation" agreement, and therefore the court's "decision to impose the presumption of undue influence" on her was error. The inquiry is a straightforward one: If a transmutation agreement meets the statutory requirements of section 852, is the presumption of undue influence that attaches to marital transactions foreclosed?

"[T]he fiduciary relationship between husband and wife is expressly described in Family Code section 721, particularly as it relates to transactions between themselves." (*In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 729.) "Family Code section 721, subdivision (b) provides in part that 'in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other.' In view of this fiduciary relationship, '[w]hen an interspousal transaction advantages one spouse, "[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.'" [Citation.]" (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 84.)

"The prerequisite elements for the statutory presumption under section 721 to apply are: (1) there exists an interspousal transaction; and (2) one spouse has obtained an advantage over the other. [Citation.] Generally, a spouse obtains an advantage if that

spouse's position is improved, he or she obtains a favorable opportunity, or otherwise gains, benefits, or profits.” (*In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 629.)

Beth asserts that application of the presumption of undue influence to transmutation agreements contravenes the purpose of section 852 to provide formalities that govern interspousal transmutions to enhance the increasing certainty associated with the determination whether a valid transmutation has in fact occurred, (*Estate of MacDonald* (1990) 51 Cal.3d 262, 268), and is unnecessary given the statutory requirements that offer spouses “sufficient protection for the inherently unequal transfer that occurs in every transmutation.” Her position is that proof of “compliance with section 852(a) concludes the inquiry,” and the transmutation agreement must be found valid.

We are not persuaded that section 852, subdivision (a) was intended to abrogate the fiduciary relationship of spouses to each other, or the fundamental rule embodied in section 721 that when a transaction between them provides an advantage to one spouse the transaction is presumed to have been induced by undue influence. Compliance with section 852, subdivision (a), establishes the essential validity of a transmutation agreement, but does not extinguish the marital fiduciary relationship. While sections 721, subdivision (b), and 852, subdivision (a), both “protect marital transactions from the same adverse influences,” the two statutes have separate requirements that are separately evaluated. (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1112.) Property transmutions by spouses that comply with section 852 remain subject to special standards of disclosure based on their confidential and fiduciary relationship under section 721, and must “comport with the rules controlling the actions of persons occupying confidential relations with each other.” (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293.) Where one spouse has gained an advantage over another by a transmutation agreement, compliance with the requirements of section 852, subdivision (a), cannot abrogate the protections afforded to married persons and denigrate the public policy of the state, embodied in the section 721 presumption of undue influence. (*In re*

Marriage of Delaney (2003) 111 Cal.App.4th 991, 997–998; *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 592–593; *In re Marriage of Haines, supra*, at p. 302.)

In *In re Marriage of Barneson, supra*, 69 Cal.App.4th 583, 588, this court declared that “the broad question whether a valid transmutation of property has taken place depends not only on compliance with the provisions of section 852 but also upon compliance with rules governing fiduciary relationships. [Citation.] ‘When an interspousal transaction advantages one spouse, “[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.” [Citation.] “Courts of equity . . . view gifts and contracts which are made or take place between parties occupying confidential relations with a jealous eye.” [Citation.]’ [Citation.] Thus, the requirements of section 852 are prerequisites to a valid transmutation but do not necessarily in and of themselves determine whether a valid transmutation has occurred.” (See also *In re Marriage of Lund* (2009) 174 Cal.App.4th 40, 55.) We conclude that any interspousal transmutation of property, even one that complies with section 852, is still subject to examination of the transaction for undue influence under section 721, subdivision (b).

B. The Application of the Presumption of Undue Influence to the Parties’ Community Property Agreement.

We turn to Beth’s contention that the presumption of undue influence was not triggered by the transmutation agreement in the present case. She asserts that the evidence must establish “an ‘unfair’ advantage” before the presumption of undue influence is imposed, not merely an “‘unequal’ ” distribution of property between the spouses, as was found by the trial court. She further argues that the Community Property Agreement did not grant her an unfair advantage, but rather operated to the benefit of both parties, particularly given the mutual “potential tax benefit” they received through their estate plan.

Section 721, subdivision (b) “establishes that with respect to property transactions, married couples are subject to the same standards of disclosure toward each other applicable to any confidential fiduciary relationship. As a consequence, when any

interspousal transaction advantages one spouse to the disadvantage of the other, the presumption arises that such transaction was the result of undue influence.” (*In re Marriage of Delaney, supra*, 111 Cal.App.4th 991, 996.) “The presumption of undue influence arises if three elements are shown: a confidential relationship, active participation [by the spouses] in the preparation of the [challenged transaction], and undue profit accruing to the beneficiary. If those elements are shown, a presumption of undue influence arises and the will proponent has the burden of proving no undue influence. However, ‘[i]t is for the trier of fact to determine whether the presumption will apply and whether the burden of rebutting it has been satisfied.’ [Citation.]” (*In re Marriage of Burkle, supra*, 139 Cal.App.4th 712, 734, fn. 11.)

Beth is correct in proposing that under section 721, subdivision (b), a finding of undue influence requires evidence of an “ ‘unreasonable advantage’ ” or “ ‘unfair advantage’ ” taken by one spouse over the other. (*In re Marriage of Saslow* (1985) 40 Cal.3d 848, 863–864.) The language of the statute specifies that a spouse is presumed to have induced a transaction through undue influence only if he or she, “has obtained an ‘unfair advantage’ from the transaction.” (*In re Marriage of Burkle, supra*, 139 Cal.App.4th 712, 732, italics added.)

“ ‘But, where one spouse admittedly secures an advantage over the other, the confidential relationship will bring into operation a presumption of the use and abuse of that relationship by the spouse obtaining the advantage.’ ” (*In re Marriage of Haines, supra*, 33 Cal.App.4th 277, 296, quoting from *In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 88.) Transfers of marital property “without consideration, necessarily raise a presumption of undue influence, because one spouse obtains a benefit at the expense of the other, who receives nothing in return. The advantage obtained in these cases, too, may be reasonably characterized as a species of unfair advantage.” (*In re Marriage of Burkle, supra*, 139 Cal.App.4th 712, 731.) “[A] contract between spouses that ‘advantages one spouse’ [citation], and therefore raises a presumption the transaction was induced by undue influence, is a transaction in which one spouse obtains an unfair

advantage over the other.” (*Id.* at p. 734, quoting from *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 28.)

“ ‘Generally, a fiduciary obtains an advantage if his position is improved, he obtains a favorable opportunity, or he otherwise gains, benefits, or profits.’ [Citation.] The spouse advantaged by the transaction has the burden of dispelling the presumption of undue influence.” (*In re Marriage of Kieturakis, supra*, 138 Cal.App.4th 56, 84; see also *In re Marriage of Lange* (2002) 102 Cal.App.4th 360, 364.) “In every transaction between a husband and wife in which one party obtains a possible benefit, equity raises a presumption against its validity and ‘ ‘casts upon that party the burden’ ’ of proving compliance and overcoming the presumption. [Citations.]” (*In re Marriage of Mathews, supra*, 133 Cal.App.4th 624, 630.) “ ‘The marriage relationship alone will not support a presumption of undue influence by one spouse over the other where the transaction between them is shown to be fair. But, where one spouse admittedly secures an advantage over the other, the confidential relationship will bring into operation a presumption of the use and abuse of that relationship by the spouse obtaining the advantage.’ ” (*In re Marriage of Haines, supra*, 33 Cal.App.4th 277, 296.)

On its face, the Community Property Agreement required the parties to mutually transmute their separate property into community property. In effect, the transaction greatly benefitted Beth and commensurately disadvantaged Steven. While both parties obtained potential tax benefits and provided for the security of their children, the Community Property Agreement further benefitted Beth alone in this proceeding by granting her community property rights to Steven’s previously extensive separate property holdings in his family’s real property and business interests. The transaction as a whole unequally and unfairly operated to grant Beth a considerable financial advantage, and thereby raised the statutory presumption of undue influence. (See *In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1519–1520; *In re Marriage of Mathews, supra*, 133 Cal.App.4th 624, 629; *In re Marriage of Delaney, supra*, 111 Cal.App.4th 991, 995–997, *In re Marriage of Lange, supra*, 102 Cal.App.4th 360, 364–365.)

C. The Rebuttal Evidence.

“ “When a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse’s action ‘was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of’ the transaction.” [Citation.]’ [Citation.] The advantaged spouse must show, by a *preponderance of evidence*, that his or her advantage was not gained in violation of the fiduciary relationship. [Citation.] ‘ “The question ‘whether the spouse gaining an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence.’ ” [Citation.]’ [Citation.]” (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 344, italics added; see also *In re Marriage of Kieturakis, supra*, 138 Cal.App.4th 56, 84.)

The trial court found, and the record before us establishes, that Steven freely and voluntarily entered into the Community Property Agreement, and Beth took no action to unduly influence him to transfer his separate property assets to the community. The court’s decision that the presumption of undue influence was not rebutted is based exclusively on a finding that Steven did not understand or appreciate the impact of the transmutation, despite the lack of any wrongdoing by Beth.

We agree with the trial court that the lack of evidence of any actual undue influence exerted by Beth does not rebut the section 721, subdivision (b) presumption. “Section 721 never mentions undue influence.” (*In re Marriage of Starr* (2010) 189 Cal.App.4th 277, 283.) “ “The influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity, but is that influence which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust which he has in the devotion and fidelity of the other. . . .’ [Citations.]” (*Id.* at p. 285.) “ “When an interspousal transaction advantages one spouse, “[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.” [Citation.] . . .’ ” (*In re Marriage of Lund, supra*, 174 Cal.App.4th 40, 55, quoting from *In re Marriage of*

Haines, supra, 33 Cal.App.4th 277, 293.) The resulting presumption of undue influence “means the transaction was not free and voluntary.” (*Starr, supra*, at p. 289.) Beth’s burden was not to disprove any exertion of undue influence or blame on her part, but rather to dispel the presumption by evidence that the disadvantaged spouse entered into the transaction “freely and voluntarily” with a full knowledge of all the facts and with a complete understanding of the effect of the transaction. (*In re Marriage of Mathews, supra*, 133 Cal.App.4th 624, 630; see also *In re Marriage of Kieturakis, supra*, 138 Cal.App.4th 56, 84.)

The trial court found that Steven freely and willingly executed the Community Property Agreement as part of the parties’ estate plan, but did not have the necessary comprehensive appreciation of the transaction. While conflicting and somewhat indefinite testimony was presented on the issue of Steven’s understanding of the Community Property Agreement, particularly the effect of the transaction on his existing separate property rights, substantial evidence supports the trial court’s finding. Neither party had any prior experience or familiarity with family law matters. Also, the evidence indicates they were exclusively focused on estate planning issues and consequences, to the apparent exclusion of any consideration of dissolution concerns.

Although the parties signed a waiver of any conflict of interest, Steven was not represented or advised by independent counsel. Nothing in the record indicates that their shared attorney, Cunneen, who acknowledged her lack of expertise in family law matters, embarked on a program to insure that her clients were fully advised of the effect of the transmutation on their property interests in the event of dissolution. The import of the Community Property Agreement was not discussed with the parties, nor was it reviewed with them before it was signed. To the contrary, the transmutation document was drafted and presented to Beth and Steven for the first time at the meeting on December 3, 2003. Beth and Cunneen testified that the Community Property Agreement was read during the meeting, along with a myriad of other Lico Family Trust documents, but no evidence was presented that an explanation of the transmutation of property was given to the parties.

Nor does the evidence demonstrate that Steven had an opportunity to separately consider or evaluate the Community Property Agreement before he signed it.

The lack of any clarification of the ramifications of Community Property Agreement is significant for several reasons in the present case. First, Steven was not even entirely certain of the nature, extent, or legal characterization of the Lico family property interests he transferred into the trust. Further, he was incorrectly advised that the trust documents were revocable, and was never told that he had the option, unless waived, to retain his right to reimbursement for his contribution of separate property to the community (§ 2640). Finally, Steven’s testimony that he neither understood nor realized the impact of the estate plan and Community Property Agreement was accepted by the trial court. “The trial court’s determination of credibility is binding on this court. We may neither reweigh the evidence nor reevaluate the credibility of witnesses.” (*In re Marriage of Roe* (1993) 18 Cal.App.4th 1483, 1488.)

Beth submits that the decision in *In re Marriage of Lund*, *supra*, 174 Cal.App.4th 40, 50–51 (*Lund*), is dispositive here. In *Lund*, a transmutation agreement found to comply with section 852, was also challenged as the product of undue influence. On appeal, the husband claimed the trial court’s finding of fact—that the wife failed to rebut the presumption of undue influence—was not supported by substantial evidence. (*Lund*, *supra*, at pp. 55–56.) The trial court’s ruling in *Lund* that the wife successfully demonstrated her husband entered the transaction voluntarily with an understanding of all relevant facts, but failed to rebut the presumption that he did not understand the legal effect of the transaction, was found on appeal to lack the support of substantial evidence. (*Id.* at p. 56.) The reversal of the trial court’s finding was based on the husband’s signature on the document that expressed his understanding and approval of its provisions, along with the absence of ambiguity in the transmutation agreement and the husband’s “attestation to his understanding of the agreement,” all of which “served to rebut the presumption that he did not understand the legal import of the agreement.” (*Ibid.*)

We realize, as the court did in *Lund*, that the Community Property Agreement is a straightforward, comprehensible document, in accordance with section 852. In contrast to *Lund*, however, Steven did not testify to his understanding of the legal import of the agreement. To the contrary, he claimed he was not informed of and did not entirely appreciate the effect of the Community Property Agreement on his separate property rights. And under the particular facts presented here, we cannot equate the mere reading of the document to Steven with his *full* understanding of it. A classic case of conflicting evidence was presented on Steven's understanding of the transmutation agreement. "Our task is to determine whether there is any substantial evidence, contradicted or not, that supports the trial court's conclusion, 'even if [we] would have ruled differently had [we] presided over the proceedings below, and even if other substantial evidence would have supported a different result.'" [Citation.]" (*Vanderkous v. Conley* (2010) 188 Cal.App.4th 111, 121.)

The trial court's finding that Beth failed to rebut the presumption of undue influence is supported by at least substantial evidence. Therefore, the trial court did not err by refusing to enforce the Community Property Agreement.

III. The Denial of an Award of Attorney Fees.

Beth also complains in her appeal of the trial court's failure to award her attorney fees and costs pursuant to sections 2030 and 2032. She argues that the trial court failed to properly consider Steven's "unliquid" assets – his "\$197,000 IRA account" and his "family partnership interests and LLCs" – in determining the parties respective incomes and abilities to pay. She maintains that the "total value" of Steven's available assets is "substantial," and the court's failure to award her attorney fees "was reversible error."

"Subdivision (a)(1) of Family Code section 2030 permits the trial court to order one party to pay the other party's attorney fees 'if necessary based on the income and needs assessments' to 'ensure that each party has access to legal representation to preserve each party's rights.' The court may order payment of 'whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.'" (*Ibid.*) The court may award

attorney fees and costs ‘where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.’ (Fam. Code, § 2032, subd. (a).)” (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1082; see also *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 253.) “ “ “ “ “The basis for awarding attorney’s fees is that each party must have access to legal representation in order to preserve all of his or her rights.” ’ [Citation.] Thus, a trial court must consider the respective incomes and needs of the parties, including all evidence concerning income, assets and abilities, in exercising its discretion to award attorney’s fees. [Citations.]” ’ [Citation.]” (*In re Marriage of Hobdy* (2004) 123 Cal.App.4th 360, 371.)

Pursuant to section 2030, subdivision (a)(2), “ ‘Whether one party shall be ordered to pay attorney’s fees and costs for another party, and what amount shall be paid, shall be determined based upon, (A) the respective incomes and needs of the parties, and (B) any factors affecting the parties’ respective abilities to pay. A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward.’ ” (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1313.) Section 2030 focuses on “the parties’ ‘*respective incomes and needs*’ and ‘*respective abilities to pay.*’ [Citations.]” (*Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633, 643.)

“The family court has considerable latitude to make a just and reasonable fee award.” (*In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1054.) Beth “bears the burden of showing the court abused its discretion by failing to award her any attorney fees.” (*Kevin Q. v. Lauren W., supra*, 195 Cal.App.4th 633, 644.) “[T]he allowance of attorneys’ fees in a dissolution proceeding is a matter best determined by the trial court in the exercise of judicial discretion and, in the absence of a clear showing of abuse of discretion, such determination will not be disturbed on appeal.” (*In re Marriage of Gonzales* (1975) 51 Cal.App.3d 340, 344.) “Thus, we affirm the court’s order unless ‘no judge could reasonably make the order made. [Citations.]” ’ [Citations.]” (*In re*

Marriage of Duncan (2001) 90 Cal.App.4th 617, 630.) “ [A] ruling otherwise within the trial court’s power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law.

[Citations.]’ [Citation.]” (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392.)

The record compellingly reveals that both parties incurred extensive attorney fees in the litigation of the validity of the Community Property Agreement, an issue of great significance in the dissolution proceeding. Beth is in need of funds to pay the fees and costs she has incurred, but so is Steven. The income and expense evidence presented to the trial court reveals that both parties have considerable indebtedness. Steven has greater income than Beth, but also greater expenses. Beth asserts that the trial court improperly failed to consider Steven’s family separate property assets and IRA account funds in determining his ability to pay an award of attorney fees. However, the court properly considered Steven’s *current* income and assets *available* to him to pay an attorney fees award, including his investment and income-producing properties. (See *In re Marriage of Tharp, supra*, 188 Cal.App.4th 1295, 1313–1314; *In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 933; *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1167–1168.) The court was not required to speculate on Steven’s future income.

Beth has also managed to maintain access to legal representation to present her claims. The record before us reflects an exercise of discretion by the court and a consideration of the appropriate factors as set forth in sections 2030 and 2032. (*Alan S. v. Superior Court, supra*, 172 Cal.App.4th 238, 242.) Based on the evidence presented, while we acknowledge that Beth may have marginally greater need than Steven for funds to pursue the litigation, we do not find that the trial court’s ruling amounts to an abuse of discretion. (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 902.)

IV. Steven’s Request for Imposition of Sanctions.

Steven has pursued a “protective cross-appeal” in which he seeks reversal of the trial court’s denial of his request for sanctions pursuant to section 271, in the event we

