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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

NICOLE NEEDHAM FAIDI,
Plaintiff and Appellant,

v.

WILLIAM H. FAIDI,
Defendant and Respondent.

A136346

**(Marin County
Super. Ct. No. FL1100264)**

Family Code section 721, subdivision (b)¹ (section 721(b)) provides that spouses occupy a confidential relationship 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.” (*Ibid.*) If an interspousal transaction gives one spouse an unfair advantage over the other, California case law holds that section 721(b) creates a rebuttable presumption the transaction was the result of undue influence. (*In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 734 (*Burkle*)). This case requires us to determine which spouse has the burden of making the initial factual showing that a marital agreement gives the other spouse an unfair advantage.

We hold that where substantial evidence supports a finding that a marital agreement provides the parties with mutual advantages, the presumption of undue influence is triggered only by a factual showing that the agreement gives one spouse an

¹ All further undesignated statutory references are to the Family Code.

unfair advantage over the other. The burden of making that factual showing is on the spouse who claims the agreement is unfair. Unless this burden is satisfied, the presumption of undue influence under section 721(b) does not arise.

Nicole Needham Faidi appeals from a judgment upholding the validity of a postnuptial agreement (the Agreement) she executed with her husband, William H. Faidi.² The trial court specifically found Nicole failed to meet her burden of showing William had gained an unfair advantage from the transaction. It found no evidence William had concealed or misrepresented his financial situation, and it therefore held the Agreement enforceable.

Nicole asks us to reverse the judgment, arguing the trial court misallocated the burden of proof on the issue of undue influence. We disagree with Nicole on this point, as well as on the other issues she raises on appeal. Accordingly, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND³

William and Nicole were married on June 4, 2001. Before they married, both William and Nicole worked for a company named BoomBuy, which had been conceived by Nicole's stepfather, who had co-founded the company with William. William's investment in the company was funded by a loan from his parents, and at the time of

² From this point forward, we will refer to the parties by their first names. "We do not intend this informality to reflect a lack of respect." (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2 (*Balcof*).

³ Our understanding of the facts has been hampered by the inclusion of a great deal of extraneous material in the record and by the parties' failure to adhere to the California Rules of Court governing record citation. The record consists of a 30-volume joint appendix, eight volumes of reporter's transcript, and a clerk's transcript. Together, these materials comprise more than 7,000 pages. Despite the size of the record, the parties have provided citations only to the pages of the record, although the rules require that they cite "to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C); see *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 552, fn. 1 [" '[r]ecord citations must refer to the appropriate transcript, its *volume number* and the *exact page number* (e.g., "1 RT 25"). [Citation.]"].) Citation to the tabs in the joint appendix "cannot substitute for proper citation to the volume of the record [Citation.]" (*Id.* at p. 553, fn. 1.)

marriage, William still owed money to his parents on this loan. BoomBuy ceased operations by the end of 2002.

The Faidis' Financial Situation Prior to the Agreement

In the fall of 2002, William's parents gave him several hundred thousand dollars for the downpayment on a house at 129 Golden Gate Avenue in Belvedere, California. William obtained a mortgage on the property. On November 14, 2002, aware that the down payment was a gift to William from his parents, Nicole signed an interspousal transfer deed divesting herself of any interest she may have had in the property. The Golden Gate Avenue property underwent two years of remodeling funded by loans from William's parents. Nicole knew the money came from William's parents and also knew she was not obligated to repay any of those funds.

By December 2002, the couple's monthly living expenses were approximately \$20,000. After BoomBuy dissolved, the couple paid their monthly expenses using money borrowed on a line of credit William's parents made available to him.

In July 2003, William entered into a development agreement with Sunhill Enterprises (Sunhill), a company controlled by his parents. Sunhill owned a shopping center in Fremont, California, and the City of Fremont was interested in developing the surrounding area. William agreed to become the master developer of what was known as the Capital Avenue project. The agreement created an entity called Capitol Avenue Partners, LLC, to do the work on the project, and William and Sunhill each acquired 50 percent of the equity in the LLC. As the developer, William was liable for 50 percent of all of the loans obtained to pursue the project and was also obligated to assume 50 percent of any losses. The agreement provided William with an "aggregate base development fee" of \$1 million. The fee was to be paid as an annual administrative fee in the amount of \$150,000, payable in the amount of \$12,500 per month. The balance of the fee minus the monthly payments advanced was to be paid upon the completion of the work at Fremont Plaza.

In late July 2003, William began receiving the advance of his administrative fee of \$12,500 per month. But the couple's expenses, which had been approximately \$20,000

per month at the end of 2002, had not decreased. By the end of 2003, Nicole was sending William e-mails telling him bills were due but there was no money to pay them. In December 2003, she sent William numerous e-mails regarding the need for money, including one in which she noted their bank account was in “negative territory.” She was aware she and her husband were paying their joint living expenses by tapping into lines of credit arranged by his parents, although only William was obligated to repay those funds.

On or about February 9, 2004, William and Nicole reviewed a document outlining the prospective financial outcomes of the Capital Avenue project. Under the most favorable projection, William would receive 50 percent of a total project profit of \$16 million, while the least favorable projection predicted a \$40 million loss for him. Nicole wrote a note on the document stating that William did not even have the money to pay the \$415,000 in closing costs. Nicole opposed William’s involvement in the project because she thought it too speculative and complex and because she thought William lacked the experience to handle this type of development. Nicole also feared the project would lead to further disputes with William’s family, including his parents.

By April 2004, William, his brother Zack,⁴ and their parents had hired attorneys to address a dispute regarding gas stations in which William and Zack had invested. Zack claimed William owed him hundreds of thousands of dollars in connection with the dispute. Nicole was aware of the dispute and had edited a letter William wrote to his brother regarding it. She also knew William’s parents had become involved and declared that whichever brother was found to be the debtor would suffer severe financial consequences. Nicole reviewed financial information concerning the gas stations so she could provide documentation to a neutral accountant who had been retained to resolve the dispute. In early April 2004, William and Zack executed a document by which they agreed to toll the statute of limitations to file an action regarding their dispute.

⁴ William’s brother’s given name is Zayd, and this is the name used in the documents relating to the dispute between the brothers.

Nicole was also aware of claims made by a woman in England that William owed over \$15 million to the estate of one of William's former clients.⁵ After the client died in 2002, a woman came forward asserting she was the decedent's wife and entitled to the decedent's entire estate. The deceased client's half-brother asserted the estate should go to him. William received calls and correspondence from lawyers for both the alleged wife and the half-brother. In the course of the dispute, the alleged wife filed declarations claiming William was financially obligated to the estate, but William was never formally made a defendant in any lawsuit.

William estimated that in 2003 and 2004, the couple's monthly living expenses exceeded their monthly income by about \$28,000. By April 2004, William owed his parents \$2,169,000. He owned the house at 129 Golden Gate as his separate property, but it was encumbered by two mortgages. According to a summary of William's assets and liabilities admitted into evidence at trial, William's total net worth was a negative \$715,070.51 in March 2004 and a negative \$842,953.77 in April 2004.⁶ At that time, Nicole was fully aware of the state of her husband's finances.

The Agreement

The Agreement was created using a Westlaw template for a premarital agreement,⁷ and the parties signed it on or about April 12, 2004. It states that "each party considers the execution of this Agreement a material inducement and consideration for each party's continuation in their marital relationship" It also provides that its provisions are intended to supersede otherwise applicable law with respect to the "handling, allocation, valuation or distribution of assets" In the Agreement, the parties acknowledge they

⁵ William is both an English solicitor and a member of the California bar.

⁶ The summary lists as "Unknown" both the potential gains and the potential losses from William's investment in the Capital Avenue project.

⁷ This is evident from certain language in the Agreement. In it, the parties purport to recognize that the Agreement is a "marital agreement as defined in California Family Code Section 1610," which defines premarital agreements, and the Agreement refers to the parties' "contemplated marriage."

have had the opportunity to be represented by counsel and “that this Agreement has been read by the parties and is understood.”

In article 3.1 of the Agreement, “the parties acknowledge that William Faidi does not disclose in this Agreement the nature, extent, and value of his property interests, his present business and investment interests, his liabilities, or his present and potential income from various sources.” Nicole “knowingly and voluntarily waive[d] any right to a disclosure.”

The parties expressly stated their understanding that under the Agreement, there would be no community property and that all assets acquired would be the separate property of the party acquiring the assets, regardless of when the asset was acquired. Article 11 of the Agreement is entitled “Separate and Community Obligations.” It provides that all of William’s obligations “secured by, or incurred for the purpose of real property . . . shall remain the separate obligations of William Faidi.” The Agreement states that Nicole shall not be liable for those obligations, and William agreed to indemnify her from them.

Subsequent Events

At some point after April 2004, William and Zack resolved their dispute. An accounting showed that Zack owed William around \$400,000. At the time of the 2012 trial, William had not received any money from his brother as a result of this dispute.

William’s parents sued him in 2006. The litigation arose out of a purchase of properties that took place in 2005 and 2006. By 2008, William and Nicole were out of money and borrowed \$1 million from Nicole’s mother to continue financing the litigation. The litigation was settled in December 2008, with William’s parents paying \$13 million in settlement. Nicole’s mother was repaid from the proceeds of the settlement, and after other expenses were paid, around \$8 million remained.

The threatened English lawsuit against William was dropped in late 2004, when the woman who had alleged William owed money to the estate of his deceased client recanted after realizing she had mistaken William for someone else.

The Action Below

Nicole filed a petition for dissolution on January 14, 2011. The parties stipulated to bifurcate for trial the issues of the validity and enforceability of the postnuptial agreement. In the stipulation, Nicole stated she was contending she never signed the Agreement, and even if it was determined she had, the Agreement was invalid and unenforceable. William contended both parties signed the Agreement, which Nicole had presented to him for his signature. At trial, Nicole's contention changed in that she conceded the last page of the document presented as the Agreement did bear her signature but contended the first nine pages of the document had been substituted for the pages of the document she allegedly signed and that the initials on the first nine pages were not hers. Finally, Nicole urged that even without a finding of fraud, the Agreement was unenforceable because William could not overcome the presumption of undue influence.

Nicole moved the court in limine to find, as a matter of law, that William gained an advantage from the Agreement by transmutation of all community property into his separate property, but the motion was denied. In her motion, Nicole asked the trial court to determine advantage at the time the agreement was made, not in retrospect.

Trial began on June 18, 2012, and concluded on June 27. Much of the testimony came from document and computer forensic experts who addressed only the authenticity of the Agreement.⁸

At the conclusion of the trial, Nicole filed a request for statement of decision consisting of 33 separate inquiries, 10 of which addressed the enforceability of the Agreement. She then filed a supplemental request for statement of decision in which she posed seven additional questions to the court. The trial court announced its tentative decision from the bench on July 20, 2012. Nicole filed 48 separate objections to the

⁸ Much of this testimony appears to have been received by declaration. The parties stipulated that the expert declarations would be received in evidence as direct testimony, subject to in-court cross-examination and redirect examination of the experts.

proposed statement of decision, many of which contained subparts. The trial court filed its written statement of decision on August 14, 2012.

The Statement of Decision

The trial court first found the Agreement presented to the court was authentic and that the parties had signed it.⁹ The court then turned to the question of the enforceability of the Agreement. It noted that Nicole and William could contract with each other regarding property subject to the fiduciary duty imposed by section 721(b). Citing *Burkle, supra*, 139 Cal.App.4th 712, the trial court ruled Nicole had the burden of proving William obtained an unfair advantage from the Agreement, since she was the party claiming unfairness.

The trial court went on to find the parties had little or no community property at the time they signed the Agreement. It also found that at the time the Agreement was executed, Nicole was aware of William's finances, including the fact that the couple had "a serious negative cash flow problem[.]" The trial court concluded that when the Agreement was signed, it was possible William would either soon be bankrupt or earn large sums of money; Nicole "was well aware of both possibilities." The court found there was "absolutely no evidence that [William] misrepresented or concealed material facts" and stated Nicole did not testify to any aspect of his financial dealings she did not know about in April 2004. At the time they entered into the Agreement, Nicole's and William's debts greatly exceeded their assets. The trial court found the Agreement "actually was a good deal for [Nicole] at the time because it protected her from liability on [William's] debts."

The court explained that, "[i]n virtually any agreement or contract, with twenty-twenty hindsight someone comes out ahead." It noted it was required to analyze the issue of unfair advantage as of the date the Agreement was signed. It concluded that in

⁹ Nicole states in her opening brief that she does not challenge this finding. As she no longer contests the validity of the Agreement, we will not discuss any of the voluminous evidence presented on that issue.

hindsight, William had obtained an advantage as a result of the Agreement, but the advantage was not unfair. Accordingly, the court ruled the Agreement enforceable.

Judgment and Appeal

On August 14, 2012, the trial court entered judgment on the bifurcated issue of the validity of the Agreement, and at the same time issued a certificate of probable cause for appeal. (See Cal. Rules of Court, rule 5.392(b), (c).) On September 11, 2012, we granted Nicole's motion to appeal the judgment on the bifurcated issue. (Cal. Rules of Court, rule 5.392(d), (e).)

DISCUSSION

Nicole's principal argument on appeal is that the trial court erred in failing to apply the presumption of undue influence under section 721(b) to the transaction giving rise to the Agreement. She contends the trial court improperly allocated the burden of proof by requiring her to show the Agreement gave William an unfair advantage. Instead, she claims, she should have been given the benefit of the presumption, and William should then have been required to rebut it by proving the Agreement was not the product of undue influence.

Nicole also contends the Agreement's unilateral waiver of disclosure contravenes California law. She further asserts that the Agreement effects an improper retroactive transmutation of community property. Finally, she claims the Agreement should be set aside as unconscionable.

I. *Standard of Review*

Nicole contends we may exercise independent review over the issues raised in this case. Contrary to Nicole's contention, in this appeal only the question of which party bears the burden of proof on the issue of unfair advantage is properly subject to de novo review. (See *In re Marriage of Etefagh* (2007) 150 Cal.App.4th 1578, 1584.)

Nicole's principal argument on appeal, however, is that William obtained an unfair advantage under the Agreement, thus giving rise to the presumption of undue influence under section 721(b). "Whether an interspousal transaction gives one spouse an unfair advantage is a question for the trier of fact." (*Burkle, supra*, 139 Cal.App.4th at

p. 734, fn. omitted.) Consequently, in reviewing a challenge to the trial court's finding that the Agreement did not give William an unfair advantage, we would ordinarily ask only whether that finding is supported by substantial evidence. (See *id.* at pp. 734-736.) In answering this question, “ [t]he power of a reviewing court begins and ends with a determination of whether there is in the record substantial evidence, contradicted or uncontradicted, which supports the result reached; and we must also assume in favor of the determination below the existence of every fact which the trier of facts could have reasonably deduced from the evidence. [Citation.]’ [Citation.]” (*Balcof, supra*, 141 Cal.App.4th at p. 1521.)

The ordinary substantial evidence standard does not apply to this issue, however, since we conclude that Nicole bore the initial burden of showing William obtained an unfair advantage from the Agreement, and the trial court found she had failed to carry that burden. In this case, “ ‘the issue on appeal turns on a failure of proof at trial[.]’ ” (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466 (*Sonic Manufacturing*), quoting *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1528.) Where, as here, the trier of fact concludes the party with the burden of proof did not carry its burden, “ ‘the question for a reviewing court becomes whether the evidence *compels a finding in favor of the appellant as a matter of law.*’ [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) “uncontradicted and unimpeached” and (2) “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” ’ ” [Citation.]” (*Sonic Manufacturing, supra*, 196 Cal.App.4th at p. 466, italics added.) Thus, to prevail on appeal on the issue of unfair advantage, Nicole must demonstrate that the evidence before the trial court compels a finding in her favor as a matter of law. (See *ibid.*)

II. *The Trial Court Did Not Err in Concluding the Agreement Was Enforceable.*

The trial court found that at the time the Agreement was signed, it was entirely possible that William would be bankrupt in the near future, and it was also possible he would earn large sums of money. It found Nicole was well aware of both possibilities. The court summarized its ultimate finding on the unfair advantage issue as follows:

“With hindsight, did [William] obtain an advantage as a result of the . . . Agreement? Yes. Was it an unfair advantage? No.”

Nicole first argues the lower court’s finding that William gained an advantage from the Agreement is sufficient to trigger the presumption of undue influence under section 721(b). Nicole then contends the trial court misplaced the burden of proof by requiring her to demonstrate the advantage William acquired under the Agreement was unfair. Thus, Nicole asserts that because William obtained *an* advantage under the Agreement, the presumption of undue influence was triggered, and it therefore was up to William to prove the Agreement was not procured by undue influence. We reject Nicole’s arguments, because they are based on a misconception of the burden of proof.

A. *Nicole Bore the Initial Burden of Showing William Gained an Unfair Advantage.*

Nicole begins with a conclusory argument that the presumption of undue influence applies to the transaction between her and William. Without reference to the record or discussion of the evidence underlying the trial court is finding that William was not unfairly advantaged by the Agreement, she asserts the presumption was triggered. This is so, because she “waived her interest in unnamed community property earned over the previous three years of marriage and all right to future community property[.]”

Nicole then argues that “[s]ince the presumption of undue influence runs in favor of the disadvantaged spouse, it would be counterintuitive to put the burden on that spouse to prove that the transaction was unfair. That is presumed.” Nicole’s argument begs the question—she simply posits or presumes she is the disadvantaged spouse and is therefore automatically entitled to the benefit of the presumption of undue influence. We disagree for reasons of both fact and law. First, Nicole ignores the trial court’s factual finding that William was not unfairly advantaged. Second, she effectively urges us to depart from established law relating to the operation of presumptions.

In *Burkle*, the court concluded “that 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.”¹⁰ (*Burkle, supra*, 139 Cal.App.4th at p. 734, italics added.) *Burkle* drew this conclusion from the clear language of section 721(b), which “prohibit[s] either spouse from taking ‘any unfair advantage of the other.’ ” (*Burkle, supra*, 139 Cal.App.4th at p. 730, quoting § 721(b).) While *Burkle* held that whether an interspousal transaction gives one spouse an unfair advantage is a question of fact (*ibid.*), it did not expressly state which party bore the initial burden of showing the transaction was unfair, a showing necessary to give rise to the presumption of undue influence in the first instance. (See *id.* at pp. 734-736 [upholding trial court’s refusal to apply presumption of undue influence to postmarital agreement providing advantages to both spouses].) A leading treatise on California family law concludes, however, that where there is “a more comprehensive contractual exchange between spouses, under which both gain different advantages, *the party seeking the benefit of the presumption of undue influence must make a sufficient preliminary factual showing of unfair advantage to the other party in order to raise the presumption.*” (2 Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 2013) ¶ 9:241.2, p. 9-62.15, italics added (Hogoboom and King).) For the reasons that follow, we agree with this conclusion.

“A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.” (Evid. Code, § 600, subd. (a).) Presumptions, therefore, “are conclusions that the law requires to be drawn (in the absence of a sufficient contrary showing) *when some other fact is proved* or otherwise established in the action.”

¹⁰ At oral argument, Nicole’s counsel urged us not to follow *Burkle* and to hold instead that the presumption of undue influence applies whenever one spouse gains *any* advantage in a postmarital transaction. Counsel contended that save for *Burkle*, California cases have uniformly held the presumption of undue influence is triggered whenever a spouse gains an advantage from an interspousal transaction, whether that advantage is unfair or not. Not only did *Burkle* reject the argument Nicole advances here, it also reviewed the cases upon which she relies and concluded all involved some sort of unfair advantage. (*Burkle, supra*, 139 Cal.App.4th at pp. 730-734 [discussing cases]; *id.* at p. 731 “[T]he advantage obtained in these cases . . . may be reasonably characterized as a species of unfair advantage”].) We see no reason to disagree with either *Burkle*’s holding or its well-reasoned analysis of these precedents.

(Assem. Com. on Judiciary, com. on Assem. Bill No. 333 (1965 Reg. Sess.) reprinted at 29B pt. 2 West's Ann. Evid. Code (1995 ed.) foll. § 600, p. 3, italics added.) Thus, a presumption will arise only upon “the presentation of adequate foundational evidence . . . to trigger the initial presumption.” (*Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 462.)

The marital relationship alone does not create a presumption a marital contract was procured by undue influence. (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 88.) Instead, the presumption of undue influence established by section 721(b) “arises only if one of the spouses has obtained an *unfair* advantage over the other.” (*Burkle, supra*, 139 Cal.App.4th at p. 732.) Thus, in cases in which both spouses gain different advantages from an interspousal agreement, the spouse claiming the agreement gives an unfair advantage to the other spouse bears the burden of making an initial evidentiary showing of unfairness. The presumption of undue influence under section 721(b) is triggered only once that factual showing is made. (2 Hogoboom and King, *supra*, ¶ 9:241.2, p. 9-62.15.)

Consequently, before Nicole could receive the benefit of the presumption of undue influence, she had to present “adequate foundational evidence” to show the Agreement gave William an unfair advantage over her. (*Bay Guardian Co. v. New Times Media LLC, supra*, 187 Cal.App.4th at p. 462; see *Burkle, supra*, 139 Cal.App.4th at pp. 732, 734.) This initial showing of unfair advantage is “the predicate for applying a presumption of undue influence in an interspousal transaction” (*id.* at p. 730), and the showing cannot be satisfied merely by alleging the Agreement was unfair. (See *Estate of Velladao* (1939) 31 Cal.App.2d 355, 361 [mere contention that will was unnatural does not give rise to inference that undue influence was exercised].) Thus it was Nicole, not William, who bore the initial burden of presenting evidence sufficient to give rise to the presumption of undue influence.¹¹ (See *Estate of Gelonese* (1974) 36 Cal.App.3d 854,

¹¹ As the court in *Burkle* noted, there are cases which “necessarily raise a presumption of undue influence, because one spouse obtains a benefit at the expense of the other, who receives nothing in return.” (*Burkle, supra*, 139 Cal.App.4th at p. 731.) This is not such

862-863 [parties contesting will as having been procured through undue influence had initial burden of proving elements giving rise to the presumption].) If she failed to make this showing, then the presumption did not attach in the first instance, and the burden remained on her “to prove (without the aid of a presumption) that undue influence was exerted.” (2 Hogoboom and King, *supra*, ¶ 9:242.1, p. 9-62.16.)

B. *The Trial Court’s Finding That William Did Not Obtain an Unfair Advantage Is Supported by Substantial Evidence.*

Having determined Nicole was required to make an initial evidentiary showing that the advantages William allegedly obtained from the Agreement were unfair, we review the record to determine whether Nicole has shown that the evidence before the trial court compelled a finding in her favor as a matter of law. (*Sonic Manufacturing, supra*, 196 Cal.App.4th at p. 466.) We conclude it does not.

Initially, we observe that Nicole’s opening brief does not satisfy her burden of showing error on appeal. “ ‘The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. [Citation.] It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings.’ [Citations.]” (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887 (*Fink*)). To the extent Nicole cites to the record at all, she includes “only evidence favorable to [her] position, ignoring all to the contrary. Such briefing is manifestly deficient.”¹² (*Ibid.*)

a case, however. Here, the trial court specifically found Nicole *did* receive something in return. It found the Agreement “actually was a good deal for [Nicole] at the time” because it gave her protection from liability for William’s debts. The Agreement therefore conferred mutual advantages. (See *In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 73 (*Friedman*) [postnuptial agreement did not favor either party “and protected wife’s property from husband’s creditors”].)

¹² Much of Nicole’s argument on the issue of undue influence consists of a series of rhetorical questions. For example, she asks, “Thus, did the evidence support the finding

Moreover, Nicole focuses on evidence of the later resolution of the risks facing the parties when the agreement was executed. Such evidence is largely irrelevant to the issue of unfairness. In fact, Nicole's own arguments to the trial court recognized this principle. In her June 4, 2012 motion in limine, she contended that if the trial court did not find William obtained an advantage from the Agreement as a matter of law, the court should make "a finding that the advantage to William must be determined at the time of the [A]greement, and . . . exclu[de] . . . evidence after the date of the [A]greement as to the advantage gained by William." Thus, Nicole correctly argued that advantage should be determined as of the date of execution. We agree that the trial court was required to assess the legality of the Agreement as of the time it was made. (*Friedman, supra*, 100 Cal.App.4th at p. 73.)

Nicole tells us William ended up receiving \$13 million from the litigation with his parents.¹³ Critically, the events giving rise to the litigation with William's parents did not occur until well after the April 2004 execution of the Agreement. That action arose out of a purchase of properties that occurred in 2005 and 2006. William's parents sued him in 2006, but the litigation did not settle until years later, and the \$13 million settlement

that the agreement 'was a good deal for [Nicole] at the time because it protected her from liability on [William's] debts'?" She also asks what benefit she got from the Agreement. Her brief does not answer these questions by reference to the record. We remind Nicole that "[i]t is not the task of this court to search the record for evidence that supports the statements in an appellate brief; it is the responsibility of [Nicole] to cite this court to the record evidence." (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1310, fn. 3 (*Tharp*).)

¹³ It is not clear from Nicole's brief who received the money from the settlement. In her statement of facts, she says, "*They* [she and William] received \$13 million from the settlement, from which they invested \$8 million with Ted Lembi." (Italics added.) In contrast, in the argument section of her brief, she claims "*William* ended up receiving \$13 million from the dispute." (Italics added.) Her meager citations to the record do not help us clarify this inconsistency, and we will not comb the 30 volumes of appellant's appendix and 8 volumes of reporter's transcript in search of an answer. (*Tharp, supra*, 188 Cal.App.4th at p. 1310, fn. 3.)

was finally paid in December 2008.¹⁴ William’s receipt of a significant sum of money in settlement of a lawsuit arising from events occurring after execution of the Agreement has no bearing on whether the Agreement gave William an unfair advantage at the time it was signed. (*Friedman, supra*, 100 Cal.App.4th at p. 73 [“Subsequent events, whether unforeseen or fortuitous, and whether they favor one side or the other, should not dictate how [the court] decide[s] the legal issue here presented.”]; see also *Burkle, supra*, 139 Cal.App.4th at p. 734 [trial court reviewed fairness of interspousal agreement as of time it was signed].)

The same is true of Nicole’s reference to the threatened English lawsuit against William. William testified that in the middle of 2003, a woman in England alleged he owed over \$15 million in connection with an estate dispute in that country, and the woman apparently filed declarations to that effect. Nicole was aware of the allegations and was extremely concerned about them. William was never named a defendant in that lawsuit, however, and in late 2004, after the Agreement was signed, the matter was resolved when the woman realized she had mistaken William for someone else and ceased to pursue her claims against him. Here again, Nicole’s “argument works only in retrospect.” (*Burkle, supra*, 139 Cal.App.4th at p. 736, fn. 14.) She seeks to have us judge the Agreement with the benefit of hindsight and urges us to consider events occurring after its execution to determine whether the Agreement represented a fair deal in April 2004. The law does not permit such a retrospective evaluation.¹⁵ (*Friedman, supra*, 100 Cal.App.4th at p. 73.)

¹⁴ Nicole does acknowledge that “[w]hen the Agreement was signed, there was no litigation between William and his parents and none threatened.” This is only logical, since that litigation was premised on events occurring after the execution of the Agreement.

¹⁵ Nicole’s effort to have us consider events postdating the execution of the Agreement also contradicts the position she took in the trial court. In her June 4, 2012 motion in limine, Nicole argued that if the trial court did not find William obtained an advantage from the Agreement as a matter of law, the court should make “a finding that the advantage to William must be determined at the time of the [A]greement, and . . .

Nicole also argues she gained nothing from the Agreement because she had nothing to lose. She claims she had no career or earning capacity and her only asset was an interest in a hobby horse business with total assets of less than \$100,000. William testified, however, that Nicole had bank accounts other than those associated with the horse business, testimony Nicole acknowledges in her statement of facts but does not address in her argument. He also testified Nicole was engaged in real estate development projects with her parents. In any event, we need not delve further into this factual dispute, because Nicole’s failure to provide us with a summary of all the evidence on the issue of her assets compels us to reject her argument. (*In re Marriage of Fink, supra*, 25 Cal.3d at p. 887.)

In essence, in challenging the trial court’s finding that the Agreement benefitted Nicole by protecting her from William’s liabilities, Nicole asks us to reweigh the evidence and make credibility determinations.¹⁶ This we may not do. “Appellate courts ‘do not reweigh evidence or reassess the credibility of witnesses. [Citation.]’ [Citation.]” (*Balcof, supra*, 141 Cal.App.4th at p. 1531.) Those are matters for the trial court, and “[i]t is not our function to retry the case.”¹⁷ (*Sonic Manufacturing, supra*, 196 Cal.App.4th at p. 466.)

exclu[de] . . . evidence after the date of the [A]greement as to the advantage gained by William.”

¹⁶ In her reply brief, Nicole argues the Agreement does not, in fact, protect her from William’s debts and liabilities. This argument does not appear in her opening brief, and we will not consider matters first raised in appellant’s reply brief. (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 692-693.) Nicole also did not object to the trial court’s proposed statement of decision on this basis, and she has therefore forfeited the argument. (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 346.) Moreover, even if one of her 48 lengthy and argumentative objections to the proposed statement of decision could be construed as raising this issue, the trial court was not obligated “to sift through a host of improper [objections] in search of the few arguably proper ones.” (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 559.)

¹⁷ Nicole does not argue in the alternative that if the trial court’s allocation of the burden of proof was correct, she met her burden of showing the Agreement gave William an unfair advantage. Further discussion of that issue is therefore unnecessary.

III. *Nicole Fails to Demonstrate the Invalidity of the Agreement’s Waiver of Disclosure.*

Nicole next challenges the legality of the waiver of disclosure in article 3.1 of the Agreement. The paragraph at issue provides: “3.1. Nondisclosure by Specific Party. At the time this Agreement is executed, the parties acknowledge that William Faidi does not disclose in this Agreement the nature, extent, and value of his property interests, his present business and investment interests, his liabilities, or his present and potential income from various sources. Nicole Faidi knowingly and voluntarily waives any right to a disclosure.” Nicole characterizes this waiver of disclosure as “unilateral” and argues it is contrary to the parties’ fiduciary obligations to each other.¹⁸

Nicole’s argument appears to have both factual and legal components. As a factual matter, Nicole questions the trial court’s finding that she was fully aware of her own and William’s finances at the time the Agreement was made. As a legal matter, she appears to argue that William had a nonwaivable fiduciary duty to disclose all of his assets and liabilities in the Agreement itself, and his failure to do so renders the Agreement unenforceable. We disagree with both arguments.

A. *Substantial Evidence Supports the Trial Court’s Finding That William’s Financial Situation Was Fully Disclosed.*

Turning first to Nicole’s factual argument, she concedes, as she must, that the trial court found she was aware of all of William’s assets at the time the Agreement was signed. She nevertheless claims “there was no evidence that William had disclosed this information to her.” The trial court’s contrary conclusion could not be clearer.

Addressing the question of disclosure, the court stated, “[Nicole] did not testify to *any* aspect of [William’s] financial dealings that she did not know about in April, 2004.

There is *absolutely no evidence* that [William] misrepresented or concealed material

¹⁸ Whether this waiver of disclosure is truly unilateral appears debatable. The very next paragraph of the Agreement states: “Waiver of Right to Disclosure. The parties agree that they enter into this Agreement freely and voluntarily regardless of the nature, extent or total amount of the present or future assets, liabilities, income or expenses of the other, and *each party* voluntarily and expressly waives any right to disclosure of the property or obligations of the other party.” (Italics added.)

facts.” (Italics added.) We review the court’s finding on the adequacy of disclosure for substantial evidence. (See *Burkle, supra*, 139 Cal.App.4th at pp. 743-744.)

As was true of her arguments on the issue of undue influence, Nicole’s opening brief does not summarize and discuss the evidence underlying the trial court’s findings. Her failure to do so forfeits any substantial evidence challenge. (*Fink, supra*, 25 Cal.3d at p. 887.) Moreover, as William points out, the provision of the Agreement to which Nicole objects states only that he was not disclosing his assets, property, and business and investment interests “*in this Agreement[.]*” (Italics added.) The Agreement says nothing about disclosures the parties may have made to each other outside of the Agreement. On this score, William testified Nicole was fully aware of the couple’s finances because she “did all of the banking, banking reconciliation. She knew how much money we were spending and how much – the outflows and she knew the inflows. So she had direct knowledge from the bank statements as well as from discussions with me.” Although Nicole calls William’s disclosures “highly suspect” and “grossly misleading,” she points us to no record evidence that would demonstrate the trial court erred in finding she was aware of all of William’s financial dealings when she signed the Agreement. We therefore conclude this finding is supported by substantial evidence. (*Burkle, supra*, 139 Cal.App.4th at p. 744.)

B. *Nicole Provides No Relevant Legal Authority Prohibiting Waiver of Disclosure in a Postnuptial Agreement.*

Nicole cites various statutory provisions to support her claim the Agreement did not constitute a valid waiver of disclosure. As the trial court noted, however, Nicole cited no direct authority for the proposition that disclosures cannot be waived in a postnuptial agreement such as this one. The same is true of her briefs in this court.

Nicole argues the statutory disclosure requirements of section 2100 et seq. should apply to the Agreement.¹⁹ The court in *Burkle* rejected this argument, holding that

¹⁹ In section 2100, subdivision (b), the Legislature declared, “Sound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery.” Promotion of this policy

“sections 2104 [preliminary declaration of disclosure] and 2105 [final declaration of disclosure] were not intended to and do not apply to a post-marital agreement that was not executed in contemplation of the imminent dissolution of the marriage. . . . The legislative findings and declarations in . . . section 2100 make clear that the statute applies to agreements that contemplate a judgment dissolving the marriage, not agreements that contemplate a reconciliation.” (*Burkle, supra*, 139 Cal.App.4th at p. 746.) As was true of agreement in *Burkle*, the Agreement before us does not contemplate a dissolution of the marriage, but rather its continuation. It states “that each party considers the execution of this Agreement a material inducement and consideration for each party’s continuation in their marital relationship” Consequently, section 2100 et seq. has no application here.

Nicole’s reliance on the fiduciary duties of disclosure imposed by sections 721(b) and 1100, subdivision (e) adds nothing to her argument, because the trial court found that all required disclosures were made. Thus, the court found William had complied with those duties, and as we have explained above, that finding is supported by substantial evidence. Because the trial court expressly found William had fulfilled his duty of disclosure, we need not further address Nicole’s argument that disclosure cannot be waived in a comprehensive postnuptial property agreement affecting marital property rights. (See *Burkle, supra*, 139 Cal.App.4th at p. 742, fn. 21 [declining to consider whether parties to postnuptial agreement may release their fiduciary responsibilities to each other, because trial court found those responsibilities had been fulfilled].)

IV. *Nicole Has Forfeited Her Arguments on the Validity of Transmutation and Unconscionability.*

Nicole argues the Agreement retroactively transmuted all of the couple’s community property into separate property without specifying the property at issue. She

requires “a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest . . . *in the early stages of a proceeding for dissolution of marriage or legal separation of the parties[.]*” (§ 2100, subd. (c), italics added.)

claims this is not a valid transmutation of property under section 852.²⁰ To the extent this argument is based on her claim of lack of required disclosure, it fails because the trial court found no evidence of misrepresentation or concealment, a finding we have upheld. In addition, William argues Nicole forfeited this argument both by failing to raise it below and by changing her theory of the case on appeal. We agree with William.

Nicole asked the trial court to determine as a matter of law that William gained an advantage in the Agreement by the transmutation of community property into his separate property. Thus, in the court below, the transmutation issue was tied to her claim of undue influence, and she argued that “[t]he terms of the [A]greement provide for a transmutation of all community property to William’s separate property, both retroactively and prospectively.” Nicole’s trial brief did not argue the language of the Agreement was insufficient to effect a transmutation, and neither her request for statement of decision nor her supplemental request for statement of decision raised any such transmutation issue. She claims she raised the matter in her objections to the statement of decision, but the cited objection is concerned almost exclusively with the alleged lack of disclosure.²¹ We conclude Nicole “failed to explicitly raise this question first in the trial court, and therefore find that the issue is waived.” (*In re Marriage of Crosby & Grooms* (2004) 116 Cal.App.4th 201, 212.)

Nicole also contends the Agreement is unconscionable under Civil Code section 1670.5, subdivision (a). Nicole does not direct us to anything in the record showing this argument was raised below, and in the absence of such a showing, we must treat the contention as forfeited. (E.g., *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799-801.)

²⁰ Although Nicole does not specify the subdivision of the statute upon which she relies, we assume she is referring to section 852, subdivision (a). It 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.”

²¹ In fact, the objection concludes by arguing, “The Decision should discuss whether you can execute a valid waiver without knowing what it is that you are waiving.”

DISPOSITION

The judgment is affirmed. William shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.