

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS
Marriage of Grubaugh and Ross CA1/4**

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

In re the Marriage of KURT GRUBAUGH
and COLLEEN ROSS.

KURT GRUBAUGH,

Respondent,

v.

COLLEEN ROSS,

Appellant.

A140883

(Marin County
Super. Ct. No. FL 1203625)

I. INTRODUCTION

Colleen Ross and Kurt Grubaugh¹ were married in January 1995. In August 2012, Kurt filed a petition for dissolution of marriage. In July 2013, Kurt requested an order from the court, seeking summary adjudication of his claim that no community property existed. In this appeal, Colleen challenges the trial court order finding that parties had entered into a valid and enforceable antenuptial agreement, more commonly called a prenuptial or premarital agreement. According to Colleen, Kurt failed to produce sufficient evidence that the prenuptial agreement was a valid and enforceable agreement. We conclude otherwise and affirm.

¹ As is customary in marital proceedings, the parties on appeal refer to themselves by their first names. We adopt this convention for the sake of clarity and intend no disrespect. (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2.)

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Initial Proceedings*

The parties were married on January 2, 1995 and separated on January 1, 2001. On August 7, 2012, Kurt filed a petition for dissolution of marriage. Soon after filing the petition, Kurt propounded various discovery requests. In the course of responding to such requests, Colleen admitted that “[o]n December 30, 1994, the parties entered into an Antenuptial Agreement, the validity of which remains to be determined.” Colleen further admitted that based on her then-existing recollection, attorney Suzanne Will drafted the prenuptial agreement. Colleen also admitted that she signed the agreement and that her signature was notarized. In response to a request for admission that she read the agreement before signing it, she responded as follows: “I do not recall reading the Antenuptial Agreement prior to signing it ¶] The only people present at the time of signing were: [Kurt] and Suzanne Will” She further denied that she understood the meaning and effect of the prenuptial agreement at the time she signed it.

B. *Request for Summary Adjudication*

On July 30, 2013, Kurt filed a request for an order to summarily adjudicate the validity and enforceability of the prenuptial agreement. In support of his request, Kurt filed a memorandum of points and authorities and a separate statement of undisputed facts. He also submitted a sworn declaration, which included a copy of the prenuptial agreement.

According to Kurt, he and Colleen met in Arizona in 1984. They lived together in Scottsdale and Phoenix before moving to Mill Valley, California. Colleen was a talented and successful artist. During the couple’s first ten years together, Colleen “earned considerably more money” than Kurt. She was represented by Hanson Galleries, which exclusively exhibited and sold her work. By 1994, Colleen owed a home in Mill Valley, she had a large retirement fund, and her daughter attended a private school. Colleen had two vehicles, a baby grand piano, handcrafted Italian furniture, as well as her artwork collection and supplies.

During the early years of their relationship, Kurt's employment was not as lucrative as Colleen's career. He worked as an account representative for typesetters, sold art supplies, and worked in sales at trade shows. He then went to work building custom cabinetry in Sausalito, where he earned a modest income. Kurt eventually became conversant in computers. By the fall of 1993, just prior to signing the prenuptial agreement, Kurt obtained a position at Twentieth Century Fox, in Phoenix, Arizona, as a systems administrator in an animation studio.² The job offered health insurance to employees and their families.

By the end of 1994, Hanson Galleries no longer extended health insurance coverage to Colleen. According to Kurt, the parties decided to get married so that Colleen and her daughter could be covered by his health insurance. Kurt stated that Colleen had been divorced twice before and she had told him in "numerous conversations" that she did not want to comingle assets and income. Colleen selected attorney Suzanne Will, who agreed to prepare a prenuptial agreement. Kurt read the agreement prepared by Suzanne Will, which he understood "meant that all of Colleen's assets and all of her income would remain hers," and that his assets and income would remain his. At that time, Kurt's assets were minimal, consisting of a 10-year old car, a computer, some books, and woodworking tools, and a small 401k plan (worth less than \$10,000).

According to Kurt, he and Colleen met at Suzanne Will's office on December 30, 1994 to talk about the prenuptial agreement. Kurt and Colleen each signed the agreement and initialed the bottom of each page; a notary then signed and acknowledged the agreement. Kurt states that he kept the original agreement in a locked box.

On Monday, January 2, 1995, Kurt and Colleen, along with Colleen's daughter, Krysta, went to the Marin County Civic Center to get a marriage license. A clerk performed a simple wedding ceremony outside on the lawn behind the cafeteria. No

² During this time, Kurt lived with his mother in Scottsdale, Arizona during the week and he flew home to Mill Valley most weekends.

photographs were taken and no family (other than Colleen's daughter) or friends were present.

In 1995, Kurt accepted a job with Microsoft in Seattle, Washington. Colleen and Krysta relocated with Kurt to Washington. During his 13 years with Microsoft, Kurt, earning more money than he had ever earned before, participated in the company's 401k plan.

In 1997, Kurt and Colleen purchased a house in Sammamish, Washington. Colleen used approximately \$240,000 from the sale of her Mill Valley home as the down payment. Kurt paid the mortgage and other expenses, eventually paying off the house in 2002. When the house was sold in 2012, Kurt authorized the repayment of the \$240,000 down payment to Colleen. The remaining proceeds of \$371,817 remain in a trust account.

In 2001, Kurt's mother died and left him approximately \$140,000. At this time, Colleen and Krysta wanted to move back to California. After much discussion, Kurt decided to use his inheritance to purchase a house in Marin County for Colleen and Krysta to live in (hereafter "the San Anselmo property"). Colleen contributed about \$10,000 of her separate funds, an amount Kurt expected to be refunded to Colleen upon the resolution of their divorce. As part of the escrow, Colleen signed an Interspousal Transfer Deed, acknowledging that it was and is Kurt's separate property. According to Kurt, Krysta was a young adult at that time and she wanted to establish credit in her name, so he agreed to add her name to the mortgage and title so that she could establish her own credit history.

The parties have lived separately since 2001, when Colleen and Krysta moved back to California. At first, Kurt frequently visited them in California, and on occasion Colleen visited Kurt in Washington. Sometime in 2009, Kurt scanned the original Antenuptial Agreement document and saved it to his computer. The original document disappeared after one of Colleen's visits to Kurt in Washington.

Also in 2009, Krysta signed and recorded a grant deed, transferring her interest in the San Anselmo property back to Kurt. When Kurt's father died in 2009, he and his

sister inherited the family farm in Ohio. Kurt and his sister sold the farm in 2012, and they are in the process of having the remaining parcel subdivided.

In her opposing declaration, Colleen maintained that the prenuptial agreement was a false document. Colleen stated that she and Kurt knew Suzanne Will and her husband socially in 1994 and 1995. According to Colleen, the only marital agreement that Suzanne Will drafted was a post-marital agreement after the parties were married in 1995. Colleen adamantly denied the existence of a premarital agreement.

Colleen explained that when the existence of a premarital agreement first came up in discovery, she signed responses acknowledging the validity of the December 30, 1994 document. Colleen averred that Winter & Ross, her former attorneys, drafted the discovery responses without having contacted Suzanne Will. Colleen remembered that she and Kurt entered into an agreement, but the exact timing was unclear to her. According to Colleen's declaration, she "had difficulty recalling the events of 1994 and 1995."

After dismissing Winter & Ross, Colleen retained Lance Russell to represent her. Mr. Russell then contacted Suzanne Will, who averred that the only marital document she ever prepared was a post-marital agreement after the parties were married. Based on this newly discovered information, Colleen amended her prior discovery responses to state that the only marital agreement between the parties that was drafted by Suzanne Will was a post-marital agreement.

Colleen objected to the prenuptial agreement on the grounds that it was "a false document" that she "never agreed to." Colleen explained that at the time of the purported prenuptial agreement, she was "a highly successful professional artist with clients throughout the world[,] including Michael Jackson, George Lucas, Nicholas Cage, Brooke Shields, Teri Hatcher, Jane Seymour, Delta Burke, Al Green . . . and others." Not only did the prenuptial agreement fail to include her significant assets, it included terms to which she never would have agreed.

Colleen further described her "harrowing and unsettling" interaction with the notary who purportedly signed the prenuptial agreement. According to Colleen, upon

meeting with notary Maria Pineda, she was asked to remove her glasses. When Colleen asked why, Ms. Pineda stated that “ ‘you are on camera.’ ” Ms. Pineda then escorted Colleen into a “4’ x 4’ closet space,” and locked the door behind her, leaving her alone in the small confined space. When Ms. Pineda finally opened the door, she led Colleen into a small office. Colleen showed her the acknowledgment page of December 30, 1994 agreement, and before Colleen could say anything, Ms. Pineda “blurted out. ‘That is my legal signature. It is all legal. If you take me to court, I will swear it is legal.’ ” When Colleen explained that she was only there to make a copy of her journal/ledger for December 30, 1994, Ms. Pineda “immediately cut [her] off,” explaining that that she only kept records “ ‘for five years,’ ” and had “ ‘destroyed’ ” all of her journals/ledgers that were more than five years old. Ms. Pineda failed to appear at her noticed deposition.

In her declaration, Colleen further stated that the 2001 Interspousal Transfer Deed regarding the San Anselmo property was “contained in a large stack of documents that [she] was asked to sign at the realtor’s office.” Colleen asserted that she had “never seen this document before” and had not discussed this document with Kurt. Colleen added that she was “pressured by the realtor [] to sign all [of] the documents,” and that she did not have the “opportunity to review or consult with anyone” before signing the documents.

Colleen also asserted that she and Kurt had reached a written agreement regarding many issues, including the San Anselmo property. In support of this assertion, she submitted a document entitled, “ ‘Kurt Grubaugh’s Promise to Colleen Ross,’ ” which Kurt signed before a notary on May 14, 2012. In this document, Kurt promised, among other things, to: 1) divide his 401k retirement and provide Colleen with 50 percent of the proceeds; 2) to provide Colleen with a revised copy of his will indicating that Krysta is the sole inheritor of the San Anselmo property; and 3) to restore Krysta’s name on the deed to the San Anselmo property in 2015.

Colleen submitted a declaration from Suzanne Will, who now works as regional counsel for the United States Department of Veterans Affairs. In her declaration, Ms. Will explained that she drafted a post-marital agreement for Colleen and Kurt. Ms. Will,

however, no longer had either a hard copy or electronic version of the draft post-marital agreement. Ms. Will was adamant that she had no part in drafting the December 30, 1994 prenuptial agreement.

Colleen also submitted a declaration from Lloyd Cunningham, a forensic document examiner. Mr. Cunningham stated that he was retained by Colleen's attorney to determine whether Colleen's signature on the prenuptial agreement was genuine or the product of some form of physical or electronic cut and paste fabrication. His examination and comparison of Colleen's alleged signature on the prenuptial agreement and samples of her known signature "revealed that *no conclusion* can be reached as to whether the questioned signature is genuine or non-genuine." However, with respect to Exhibit A of the prenuptial agreement, entitled "Major Separate Property," Mr. Cunningham's examination revealed illegible marks that did not appear to be product of copier or scanner defects. Rather, Mr. Cunningham opined that these marks suggest that "there was typewritten and/or handwritten material . . . which was intentionally removed."

In reply, Kurt filed a declaration from Ms. Pineda, in which she unequivocally stated that she notarized and acknowledged the signatures of Colleen and Kurt on the December 30, 1994 document. Ms. Pineda further averred that she no longer had the notary journal associated with the December 30, 1994 date and that she believed she sent the journal to the Secretary of State.³ Ms. Pineda's declaration did not mention Colleen's visit to her office.

C. Trial Court Ruling

In its December 5, 2013 tentative ruling, the trial court noted that Kurt's "request as framed" for summary adjudication was "unusual."⁴ Rather, the trial court explained that the usual course for determining the validity of a premarital agreement is for the matter to proceed as a bifurcated proceeding. The court then stated that it was agreeable

³ It is unclear from the record whether the parties attempted to contact the Secretary of State to locate/retrieve the journal.

⁴ We grant Colleen's request to take judicial notice of the trial court's tentative ruling. (Evid. Code, § 452.)

to deciding the matter based on the written submissions to date. The court then ruled as follows: “If the parties seek an evidentiary hearing on the matter, they shall appear and a date shall be set. If no such evidentiary hearing is requested, then please notify the court that the matter is submitted.” The parties stipulated in court to proceeding as a submitted matter.

On January 7, 2014, the trial court issued its findings and order regarding the validity of the prenuptial agreement. The trial court upheld the validity of the agreement, ruling that the technical requirements had been met and that Colleen’s claims of fraud were not substantiated. In so ruling, the court discussed several factors that formed the basis of its decision to reject Colleen’s claim of fraudulent conduct. First, the court noted that the agreement was signed and notarized, with the notary stating, under the penalty of perjury, that it is her valid signature on the document. The court added that Colleen’s “ ‘harrowing experience’ with the notary [was] not objectively ‘harrowing,’ and the fact that she describes it as such indicates she may have a very oblique view of situations.”

Second, the court found that Colleen’s claim that her signature was a forgery or the product of an electronic “cut and paste” was not supported by her own expert. Rather, the expert was unable to render a definitive opinion on this issue.

Third, the court found it “odd” that Colleen claimed there was a post-marital agreement, not a premarital agreement, yet she failed to provide the court with even a copy of such document. Further, the court explained that the fact that Ms. Will recalled drafting only a post-marital agreement did not mean that the premarital agreement was not prepared by someone else, or signed by the parties before marriage. Accordingly, the court concluded that the existence of a possible post-marital agreement did not undermine the validity of the agreement that was “actually before the court.”

Fourth, the court found Kurt’s version of events to be logical. Colleen had been married twice before, owned a home, had a thriving art career and responsibility for a child. Whereas, Kurt “was younger, had a[n] underwhelming employment history and had just started his first decent job.” The court further remarked: “That [Colleen] would want a premarital agreement, and have one prepared, makes sense. The fact that the

parties married with no fanfare shortly thereafter conforms to [Kurt's] version that they were trying to avail themselves of the insurance benefits in his new job and is in keeping with the businesslike aspects of the premarital agreement.”

Fifth, the court found that Colleen's claim that Kurt's recollection of signing the agreement in Ms. Will's office in December 1994, when Ms. Will asserts that such a meeting was an impossibility, “does not render the agreement false.” Rather, the court noted it appeared that “both parties have foggy recollections.” Colleen originally affirmed the premarital agreement until her “ ‘ recollection was refreshed’ ” by Ms. Will. Also, Kurt originally recalled signing the agreement in Ms. Will's office in December 1994, but later admitted he might not be accurate as to the timing.

Sixth, the court found that Colleen's claim that the prenuptial agreement failed to accurately disclose her significant assets did not invalidate the agreement. In so finding, the court noted that it was Colleen who “had the assets and potential at the time the parties married—not [Kurt].” As such, the court explained that “[a]ny defense to the agreement based on [the] failure to disclose would rest with [Kurt], not [Colleen].” Finally, the court noted that the prenuptial agreement states that Colleen made a video tape reflecting her possessions prior to marriage. The prenuptial agreement provides: “The contents and video images of the video tape are incorporated herein and made a part hereof. [Kurt] acknowledge[d] that the items depicted therein are entirely [Colleen's] separate property.”

II. DISCUSSION

A. *Standard of Review*

The parties are at odds regarding the nature of the proceedings in the trial court. Colleen argues the proceeding below, in which the parties agreed to proceed on the papers, is tantamount to a submitted, contested matter. Colleen contends that the trial court abused its discretion in finding that the premarital agreement was valid and enforceable and that she voluntarily executed it.

Kurt, on the other hand, contends that the matter proceeded as a summary adjudication (Code Civ. Proc., § 437c) and that the matter must be affirmed because he

“carried his burden of persuasion that there is no triable material issue of fact,” and Colleen failed to raise a triable issue of material fact regarding the validity of the prenuptial agreement.

The procedure used below does not easily fit into any established methods of judicial decisionmaking. The trial court used a summary procedure, which was agreed to by all, to determine the validity of the prenuptial agreement. Whatever one calls the procedure, the trial court simply tested Kurt’s allegations and evidence against applicable law. The court found them sufficient to support his claim that the parties voluntarily entered in a valid and enforceable premarital agreement.

We review factual findings of the trial court for substantial evidence, examining the evidence in the light most favorable to the prevailing party. (*In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 40.) In reviewing evidence on appeal, all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences must be indulged in order to uphold the trial court’s finding. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 31.) In this regard, it is well established that the trial court weighs the evidence and determines issues of credibility and these determinations and assessments are binding and conclusive on the appellate court. (*In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 160.)

“In determining the voluntariness of a premarital agreement, a reviewing court should accept such factual determinations of the trial court as are supported by substantial evidence. (See *In re Marriage of Dawley* [(1976)] 17 Cal.3d [342,] 354-355 [undue influence is a question of fact; trial court’s finding that a party entered into a prenuptial agreement ‘voluntarily’ implied a finding that there was no undue influence, and the finding was supported by substantial evidence]; *In re Marriage of Alexander* (1989) 212 Cal.App.3d 677, 682 [determination as to extrinsic fraud in connection with a marital settlement agreement is accepted on appeal if supported by substantial evidence]; *Estate of Cantor* [(1974)] 39 Cal.App.3d [544,] 548 [trial court’s finding that a party knowingly waived spousal rights in a premarital agreement was supported by substantial evidence]) (*In re Marriage of Bonds, supra*, 24 Cal.4th at p. 31.)

“Further, under the familiar tenets of the substantial evidence rule, ‘ ‘ ‘In reviewing the evidence on . . . appeal all conflicts must be resolved in favor of the [prevailing party], and all legitimate and reasonable inferences indulged in [order] to uphold the [finding] if possible.’ ” [Citation.]’ (*In re Marriage of Bonds, supra*, 24 Cal.4th at p. 31.) “ ‘[T]he power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*’ [Citation.]” (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.)

B. Substantial Evidence Supports the Trial Court’s Finding that the Agreement is Valid

Colleen insists that she did not voluntarily execute the prenuptial agreement. In support of this assertion she cites to many factors, including, among other things, that (1) the attorney who purportedly prepared the agreement adamantly denied ever creating a prenuptial agreement for the parties; (2) the agreement failed to list her significant assets; (3) Kurt produced an altered copy of the agreement; and (4) the notary failed to retain her journal recording when the alleged transaction took place.

Although Colleen launches a multi-front attack on the validity of the prenuptial agreement, her basic position is that the trial court erred in finding the agreement to be valid in the face of her contrary evidence. Our role on appeal, however, is not to reweigh the evidence. (See *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450.) Moreover, we cannot disregard evidence believed by the trial court unless that evidence is inherently improbable. (*People v. Mayberry* (1975) 15 Cal.3d 143, 150; *People v. Gunn* (1959) 170 Cal.App.2d 234, 239.) “While an appellate court can overturn a judgment when it concludes the evidence supporting it was ‘inherently improbable,’ such a finding is so rare as to be almost nonexistent.” (*People v. Ennis* (2010) 190

Cal.App.4th 721, 728 .) “The ‘inherently improbable’ standard for rejecting testimony on appeal is not merely an enhanced version of implausibility . . . [but] means that the challenged evidence is ‘unbelievable per se’ . . . , such that ‘the things testified to would not seem possible.’ ” (*Id.* at p. 725.) To be rejected as inherently improbable, the testimony must be physically impossible or obviously false without resort to inference or deduction. (*Id.* at p. 728; *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 261; *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1293.) Testimony is not inherently improbable when (1) the testimony is merely contradictory or inconsistent (*People v. Swanson* (1962) 204 Cal.App.2d 169, 173); (2) the testimony is merely “subject to justifiable suspicion” (*People v. Huston* (1943) 21 Cal.2d 690, 692-693, overruled on another point in *People v. Burton* (1961) 55 Cal.2d 328, 352); or (3) the testimony merely describes “ ‘unusual circumstances’ ” (*People v. Gunn, supra*, 170 Cal.App.2d at p. 238).

Here, it was not inherently improbable for Colleen and Kurt to have signed a prenuptial agreement on December 30, 1994 prior to their marriage on January 2, 1995. By all accounts, Colleen was a successful artist, with substantial assets. She had been married twice before and had a child to support. Kurt, on the other hand, had not yet come into financial success and had very few assets to protect. He did, however, have something Colleen needed, which was health insurance coverage. That the parties married without fanfare, supports a reasonable inference that the parties married so that Kurt’s insurance benefits could be extended to Colleen and her daughter. It is also reasonable to infer that Colleen, as the party with more to protect, would have wanted a prenuptial agreement in this instance.

Colleen argues the December 30, 1994 agreement was not valid because it could not have been prepared, as Kurt suggests, by Suzanne Will. However, the evidence that Suzanne Will prepared only a post-marital agreement for Colleen, does not make it inherently improbable that someone else prepared a prenuptial agreement. Additionally, as the events occurred more than 20 years ago, it is reasonable to infer that Kurt may have mistakenly believed Suzanne Will had prepared a prenuptial agreement, as opposed

to a post-marital agreement. Colleen's initial discovery responses reflect a similar mistaken recollection about the nature of Ms. Will's involvement.

There is no evidence that Colleen's initials and signature on the prenuptial agreement were the product of forgery. Colleen's own expert was unable to make such a conclusion. That this expert also opined that the document may have been altered does not establish that Colleen's initials and signature were forged.

By this same token, the failure to enumerate Colleen's assets does not otherwise invalidate the agreement. It is undisputed that Colleen had more to protect at the time of the marriage. Any defense to the prenuptial agreement based on a failure to disclose would rest with Kurt, not Colleen. (See Fam. Code, § 1615, subd. (c)(3).)

Colleen's additional argument, assailing the character of the notary, is not persuasive. The trial court found the notary's declaration, submitted under penalty of perjury, to be credible. We will not second-guess this assessment. (*Whyte v. Schlage Lock Co.*, *supra*, 101 Cal.App.4th at p. 1450.) Although a reasonable inference of suspicious activity by the notary can be drawn from the fact that the notary failed to appear at her deposition and did not refute Colleen's allegations about her "harrowing" experience at the notary's office, a reasonable inference can also be drawn the notary had no motive to lie or otherwise to falsify her records. We must draw an inference favoring the judgment. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.) Drawing the latter inference, nothing in the record suggests that the notary had a motive to lie about acknowledging the prenuptial agreement.⁵

In sum, the evidence submitted below, viewed in the light most favorable to the judgment, supports the finding that a valid prenuptial agreement had been executed by the parties.

⁵ We similarly reject Colleen's assertion that the trial court erred in denying her request for evidentiary sanctions "against [the] notary." The trial court acted well within its discretion in implicitly denying this request. (*In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108.)

III. DISPOSITION

The judgment is affirmed. Kurt is entitled to recover his costs on appeal.

REARDON, J.

We concur:

RUVOLO, P. J.

STREETER, J.