Filed 12/16/11 Marriage of Noghrestchi and Williams CA1/4

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| In re the Marriage of CHAHRAM NOGHRESTCHI and WENDELYN D. WILLIAMS.<br><br>CHAHRAM NOGHRESTCHI,<br>Respondent and Cross-Appellant,<br>v.<br>WENDELYN DOROTHEA WILLIAMS,<br>Appellant and Cross-Respondent. | A127508 & A128389<br><br>(Contra Costa County Super. Ct. No. D0802228) |

Wendelyn Dorothea Williams (Wendy)[1] appeals from a judgment in a dissolution action, and her former husband, Chahram Noghrestchi (Chahram) appeals an order granting Wendy's motion for contractual attorney fees. Wendy contends the trial court erred in ruling she was not entitled to compensatory and punitive damages and prejudgment interest. We find no error in these rulings. We agree, however, that the trial court erred in failing to enforce a promissory note. In his consolidated cross-appeal,

[1] We refer to the parties by their first names for consistency with the trial court's usage. We mean no disrespect.

Chahram contends the trial court erred in awarding Wendy contractual attorney fees and failed to rule on his request for attorney fees. We find no error or abuse of discretion on these issues.[2]

## I. BACKGROUND[3]

Chahram and Wendy met in July 2005, and married on July 30, 2006. Wendy is a United States citizen. Chahram is a legal resident alien, with citizenship in Iran, France, and Canada. Wendy is a wealthy woman, but did not live in a lavish manner. Chahram was employed as an engineer. He had a residence in Mountain View and two rental properties in Fresno. The couple's marriage was effectively over by the end of 2007.

### A. The Premarital Agreement

Before their marriage, Chahram and Wendy met with a financial mediator. The parties agree that Chahram was troubled by the disparity in their wealth. According to Wendy, she offered to give Chahram $100,000 per year. Chahram said he would prefer a lump sum of $1,000,000 in order not to feel " 'financial scarcity.' " Wendy was taken aback by the request, and they had no further discussions with the mediator.

A week before the marriage, Chahram and Wendy entered into a premarital agreement. The agreement included a waiver of reimbursements pursuant to Family Code,[4] section 2640 (paragraph 15.3), and a provision that the form of title would

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[2] Wendy has submitted "Cross-Respondent's Objections to Certain Improper Material in Cross-Appellant's Closing Brief." Her objections have been noted and considered. She also opposed Chahram's motion to augment the record with the parties' lists of trial exhibits. After we granted the motion, Wendy filed a "Cross-Respondent's Request to Convert Opposition to Cross-Appellant's Motion to Augment to an Objection to the Proffered Evidence." We grant this request. After considering the objections to the additional material, we conclude they are well taken, and accordingly have not considered the additional material in conjunction with this appeal.

[3] The parties do not challenge the factual findings of the trial court for purposes of this appeal, and, as they did in their briefs on appeal, we will draw on those findings for much of our recitation of the factual background.

[4] All undesignated statutory references are to the Family Code. All rule references are to the California Rules of Court.

conclusively determine the character of any property which they purchased after marriage, regardless of the source of funds used for acquisition (paragraph 16.1). These provisions favored Chahram to Wendy's detriment. Wendy testified that Chahram made clear he would not sign the agreement if it did not contain these provisions.

**B. The $1,000,000 Promissory Note**

A few days after the wedding, Wendy gave Chahram a check for $1,000,000. The check bore the notation "gift," and was accompanied by a card attesting to her love for him and her desire to share her "bounty" with him. She did not consult with an attorney or accountant about the tax consequences of the gift, assuming it was tax free because she and Chahram were married. Earlier in the year, she had given Chahram $12,000, which she understood was the maximum annual tax-free gift to a non-spouse.[5]

On December 9, 2006, however, Wendy learned the $1,000,000 gift was subject to gift tax of $450,000 because Chahram was not a United States citizen. She spoke with her attorney and accountant, and told Chahram about the problem. She said the gift would have to be " 'unwound' " so she would not have to pay gift tax, and that he would need to give the money back unless they could structure the transaction in a way that was not taxable. When Wendy told Chahram he would have to return the money, Chahram begged her to "consult with her accountants to find a way to allow him to keep the money without paying the tax." Both Wendy and Chahram agreed it was in the family's best interest to avoid paying the gift tax. Wendy would not have made the gift had she known it was taxable.

Wendy was advised there were three options that would prevent her from having to pay gift tax: Chahram could give back the money; Chahram could pay the gift tax from the $1,000,000; or they could recast the transaction as a loan which would be forgiven in annual installments. They chose the third option; Chahram " 'jumped at' " this option and signed a promissory note. The note had a face value of $880,000,

[5] Wendy had made many gifts in the past, but had always structured them so as to be tax-free.

representing the forgiveness of $120,000 for the year 2006. Wendy forgave another $120,000 of the note in February 2007. The marriage was effectively over by the end of 2007, and Wendy did not forgive any more of the amounts due under the note.

**C. Purchase of the Happy Valley House**

Wendy lived in Berkeley before the marriage. At the time of the marriage, Chahram had remodeled his Mountain View house with the intent to sell it, but it was not ready to go on the market.

According to Wendy, Chahram had originally agreed to live with her in her Berkeley house for two or three years, but soon after the marriage he began pressuring her to buy another house with him. At Wendy's suggestion, they consulted a realtor and soon found a house they wanted on Happy Valley Road in Lafayette (the Happy Valley house). Another couple was making an offer on the house, and Chahram and Wendy had to act quickly.

Chahram's Mountain View house was not yet listed for sale, and Wendy testified that the agreement to buy the Happy Valley house was conditioned on Chahram's promise to contribute the proceeds of the sale of the Mountain View house when he received them. Chahram and Wendy made an offer on the Happy Valley house in October 2006, and bought it for $2,920,000. Both the couple's realtor and a family friend testified that Chahram had said he would contribute the proceeds of the sale of the Mountain View house toward the cost of the Happy Valley house. Chahram, on the other hand, testified that he had promised to contribute the sales proceeds only to the expenses of remodeling the Happy Valley house, and a former colleague testified that Chahram had told him he was contributing to the cost of the remodel only, rather than to the acquisition of the house. The trial court concluded from the testimony that Chahram "was promising one thing to WENDY and her friends, and telling his own friend something else."

Chahram and Wendy had many discussions about the form of title of the Happy Valley house, and consulted counsel. Wendy testified she wanted to take title in the name of her trust and add Chahram's name to the title after he contributed the proceeds of

the sale of his Mountain View house, but Chahram insisted on taking joint title from the inception. Chahram contended the parties had always intended to own the property jointly from the inception. Wendy ultimately agreed to take title to the Happy Valley house as community property. She paid the entire cost of acquiring the property.

Chahram knew that under the premarital agreement, the form of title would mean he had half ownership of the property, regardless of the source of funds used to acquire it. Wendy testified that the effect of the premarital agreement " 'wasn't in the forefront of [her] mind' " when they took title, and there was no evidence her accountants or attorneys were aware that by the terms of the agreement, the form of title would be controlling as to ownership, and would effectively convert Wendy's separate property to community property.

Chahram's Mountain View house was sold in March 2007. Wendy testified that Chahram was evasive when she asked him how much money he had received for the house, and he avoided answering her when she asked him for the money. According to Wendy, Chahram later told her he had agreed to contribute only to the cost of the remodel, and only to the extent Wendy matched his contributions. Chahram never gave Wendy the proceeds of the sale of the Mountain View house, although he made sporadic deposits into the couple's joint bank account for other purposes.

The Happy Valley house was sold for $2,200,000 in 2009, after the parties separated.

**D. Trial Court's Findings and Ruling**

The trial court[6] found that Chahram had promised to contribute the proceeds of the sale of the Mountain View house to the acquisition of the Happy Valley house; that the promise induced Wendy to acquire the property and take title in joint form; that Wendy

[6] By stipulation of the parties, the matter was heard by a temporary judge. The stipulation states that the "Issues to be Submitted" are "All issues necessary for a complete determination of the cause, as determined by the pleadings on file and which are now at issue, together with such additional issues as may arise prior to a complete disposition of the matter."

would not have done so without the promise; and that Chahram did not intend to perform at the time he made the promise. The court found Chahram had violated his fiduciary duties to Wendy and committed actual fraud, and that Wendy's consent to transmute $2,920,000 of her separate property into community property was obtained by that fraud.

The court ruled that the community held the property as constructive trustee for Wendy. In addition, Wendy requested compensatory damages in the amount of the decline in the value of the Happy Valley house and out-of-pocket expenses; punitive damages; and prejudgment interest. The trial court denied these requests. In doing so, it noted that due to the decline in the value of the Happy Valley house, limiting the remedy to a constructive trust did not make Wendy whole, and agreed that the result was unfair. The court concluded, however, that it was limited to the remedies specifically prescribed by the Family Code.

As to the promissory note, the trial court found Wendy intended to give Chahram $1,000,000 when she gave him the check on August 4, 2006, that the transaction was completed on that date, and that she made a mistake of fact about the tax consequences of the gift. The court concluded that in order to unilaterally rescind a gift on the ground of mistake of fact, the mistake must go to the very reason for making a gift, and that Wendy's mistake did not concern the nature of the gift itself. The court also found that although Wendy acted in good faith and did not intend to take advantage of Chahram, a presumption of undue influence arose from the fact that the promissory note had the effect of converting a completed gift of $1,000,000 into an obligation to repay $880,000 plus interest, and that Wendy had not met her burden to demonstrate the transaction was made voluntarily, with full knowledge of the facts, and a complete understanding of the effect of the transaction. (See *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 999-1000 (*Delaney*).) The court therefore found the promissory note to be unenforceable, and rejected as outside of its authority Wendy's request that it rescind the $1,000,000 gift.

The trial court ordered Wendy to contribute $35,000 to Chahram's attorney fees pursuant to section 2030, and to bear the entire cost of the private judge's fees.

### E. Attorney Fees

In post-trial proceedings, Wendy moved for prevailing party attorney fees, based on Civil Code section 1717 and an attorney fee clause in the premarital agreement. The trial court awarded her $85,000 in prevailing party fees. The court denied Chahram's request under section 2030 for attorney fees incurred in opposing the motion.[7]

## II. DISCUSSION

### A. Compensatory and Punitive Damages

In addition to the constructive trust, Wendy sought an award of damages to compensate her for the decline in the value of the Happy Valley house—which she sold for $2,200,000, $720,000 less than she paid for it—plus out-of-pocket expenses and punitive damages. While acknowledging that a constructive trust did not make Wendy whole, the trial court concluded it was limited by rule 5.104 to the remedies specifically prescribed by the Family Code, and that the Family Code did not authorize an award of compensatory or punitive damages.

Rule 5.104, which applies to proceedings under the Family Code for, among other things, dissolution of marriage (see rule 5.10(2)), provides: "Neither party to the proceeding may assert against the other party or any other person any cause of action or claim for relief other than for the relief provided in these rules, Family Code sections 17400, 17402, and 17404, or other sections of the Family Code."[8]

Wendy does not contend the Family Code or the rules governing family law proceedings authorize a claim for compensatory or punitive damages in these circumstances. Rather, she contends that as a court of general jurisdiction, a family law court may decide any issues submitted to it, and that the parties agreed to litigate the

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[7] In addition to the trial court's earlier order that Wendy pay $35,000 for Chahram's attorney fees in the dissolution action pursuant to section 2030 and 100 percent of the fees for the private judge, the court had previously made another order requiring Wendy to pay $25,000 for Chahram's *pendente lite* attorney fees and costs.

[8] Section 17400, 17402, and 17404 deal with child support obligations, which are not at issue here.

questions of whether she should be awarded compensatory and punitive damages for Chahram's fraud in connection with the purchase of the Happy Valley house.

As Wendy points out, " 'family court' refers to the activities of one or more superior court judicial officers who handle litigation arising under the Family Code. It is not a separate court with special jurisdiction, but is instead the superior court performing one of its general duties." (*In re Chantal S.* (1996) 13 Cal.4th 196, 201.) Moreover, the rule that a party to a family court proceeding may assert only claims authorized by the Family Code and the family law rules is subject to an exception. "Normally, the jurisdiction of the trial court in a dissolution proceeding is limited to division of community property [citation]. It does not extend to the resolution of disputes regarding transactions which occurred before the marriage. However, since both parties have apparently ' "voluntarily submitted the matter to a court having general jurisdiction to pass upon the question . . . under pleadings which properly raise[] [the] issue" ' [citation], it was permissible for the trial court to render judgment on this issue. [Citation.]" (*In re Marriage of Saslow* (1985) 40 Cal.3d 848, 865-866 (*Saslow*).) The issue in *Saslow* was whether the trial court erred in not requiring a husband to reimburse a wife for funds she allegedly loaned to him before their marriage. (*Id*. at p. 865.) *Saslow* relied on *Porter v. Superior Court* (1977) 73 Cal.App.3d 793, 795-796, 805, which noted that spouses could try the issue of the validity of a deed of the husband's separate property from himself to himself and his wife in joint tenancy—a transfer he contended was induced by the wife's fraud—in a dissolution action, rather than a separate civil action, if they chose to do so.

Similarly, the husband in *In re Marriage of Gagne* (1990) 225 Cal.App.3d 277, 279, challenged the family law court's jurisdiction to adjudicate a loan agreement the spouses had entered into before marriage. The wife had loaned the husband money from her separate property for the down payment on their house, with the understanding that on demand or when the house was sold, he would repay her, with interest. When the husband filed for dissolution, both spouses listed the house as an asset subject to division, and the wife asked the court to confirm the assets used to purchase the house as her separate property. (*Id*. at p. 280.) The husband took the position that the premarital loan

could only be adjudicated in a separate civil action. (*Id*. at p. 282.) The Court of Appeal first concluded that as part of its statutory authority to divide the spouses' separate property, the family law court was empowered to inquire into and decide the precise extent of each party's interest. (*Id*. at pp. 282-285.) As an independent ground to affirm the judgment, the court concluded that in failing to object before trial to the wife's request for the court to confirm as her separate property the assets contributed to the purchase of the family residence, the husband had voluntarily submitted the matter for its decision. (*Id*. at pp. 286-287.)

Here, Wendy is not contending the trial court in the dissolution action had authority to divide property between the spouses based on transactions that took place before or after the marriage, but that it could properly award compensatory damages for the reduced market value of the Happy Valley house and incidental expenses, as well as punitive damages for Chahram's fraud. She has drawn our attention to no cases in which a family court concluded it could properly award these remedies, which have nothing to do with the characterization or division of marital property.

The parties differ on whether they voluntarily submitted the issue of compensatory and punitive damages for the trial court's determination. The trial court found that Wendy sought monetary and punitive damages in her pleadings and at trial. In our view, the evidence that Wendy properly raised the issue of her entitlement to tort damages is weak, at best.

Wendy's pre-trial Separate Statement of Controverted Issues listed as an issue to be resolved at trial: "[Chahram] failed to contribute the sales proceeds from his Mountain View, California residence to the purchase of the [Happy Valley house] and, therefore, [Chahram] is not entitled to share in any of the sales proceeds from the sale of the [Happy Valley house] or otherwise benefit from the purchase of the property, is not entitled to remain on title to the property and/or is liable to [Wendy] for monetary damages."

Wendy argued in her trial brief that when one spouse breaches an agreement with the other spouse, "the aggrieved spouse has all of the remedies that the law and equity

provide to remedy the situation, plus a variety of statutory family law remedies." She then asked the trial court to impose a constructive trust on the Happy Valley house. In her reply trial brief, she argued, "The most suitable and oft-used remedy is to impose a constructive trust on Chahram's interest [on the Happy Valley house]. Another possible remedy is damages, enhanced under Family Code [section] 1101."[9] Husband did not argue that the trial court lacked authority to award damages.

During trial, after Chahram's former colleague testified that Chahram had said he was contributing to the cost of the remodel only, rather than the acquisition of the house, Wendy moved to amend her pleadings to assert a claim for intentional misrepresentation based on the discrepancy between Chahram's statements to Wendy and his statements to his colleague. Her counsel stated, "In terms of remedies, we will ask for maximum remedies and punitive damages . . ." Chahram's counsel objected, and the trial court stated that once the colleague's testimony had been admitted to prove a prior consistent statement, Chahram was "then bound by whatever implications that evidence may have for the case." In arguing for amendment, Wendy's counsel indicated it was not clear from the pleadings that she was making a claim for intentional misrepresentation, and "that may have an impact on remedies." The court replied, "Well, I understood that to be part of the breach of fiduciary duty allegation, which is a very broad allegation." Wendy's counsel added that the pleadings did not mention punitive damages, and said he wanted Chahram to be on notice that Wendy was requesting them. The court said, "You may proceed."

In closing, Wendy's counsel argued that based on Chahram's fraud, Chahram "should get no relief in equity, enhanced damage under Family Code [sections] 1101 and 721, and he should walk out of here as empty handed as he came in, because the act of

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[9] Section 1101 provides remedies for breaches of fiduciary duty between spouses. Those remedies include an award of half of any asset undisclosed or transferred in breach of the fiduciary duty (§ 1101, subd. (g)), or, where the breach involves oppression, fraud or malice (Civ. Code, § 3294), an award of 100 percent of the value of any asset undisclosed or transferred in breach of the fiduciary duty (§ 1101, subd. (h)).

deceiving someone to spend $3 million, especially because what we know now was at the top of the market, is not a forgivable act between [Chahram] and [Wendy]."[10]

During trial, Chahram acknowledged that Wendy had raised the issue of promissory fraud. In his closing argument, counsel for Chahram argued that if the court found he had committed fraud in connection with the Happy Valley house, it could make Wendy whole by deducting part or all of the proceeds of the Mountain View house from Chahram's share of the value of the Happy Valley house.

Thus, there are hints in this record that Wendy sought compensatory and punitive damages under a tort theory, rather than solely the remedies available to her under family law. However, the record does not show that she expressed her intention to rely on those theories of recovery clearly enough to put Chahram on notice that he needed to raise a specific jurisdictional objection to the trial court considering tort remedies. And even if we were persuaded that *Wendy* properly raised that issue, the record does not support a conclusion that *Chahram* voluntarily submitted the issues for resolution by the trial court. We would be reluctant to conclude otherwise on such a slim basis, particularly in light of the lack of case law allowing damages in circumstances such as these, in which the issue is neither the characterization of property as separate or community nor the proper division of such property, but the propriety of tort and punitive damages. Indeed, the court in *Sosnick v. Sosnick* (1999) 71 Cal.App.4th 1335, 1339, stated, "Given finite family law jurisdiction, a tort action claiming damages cannot be joined with or pleaded in a dissolution proceeding. However, a tort claim can be *consolidated* with a *pending* dissolution action under suitable circumstances. [Citations.]" (See also *In re Marriage*

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[10] Section 721 provides that spouses may enter into transactions with each other, subject to the rules governing fiduciary relationships, and that their confidential relationship has the same rights and duties of nonmarital business parties, including, but not limited to, providing each spouse access to books regarding the transaction, rendering true and full information upon request, accounting to the spouse, and holding as trustee any benefit or profit derived from any transaction regarding community property without consent of the other spouse.

*of McNeill* (1984) 160 Cal.App.3d 548, 557, overruled on other grounds in *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 451, fn. 13.)[11]

In the circumstances, we agree with the trial court's conclusion that the issues of compensatory and punitive damages were not properly before it, and conclude the trial court properly declined to award such damages in this action.

**B. Prejudgment Interest**

Wendy also contends the trial court erred in concluding she was not entitled to prejudgment interest on the value of the portion of the Happy Valley house that Chahram held in constructive trust for her. Wendy sought $538,720 in prejudgment interest.[12]

For her claim that she is entitled to prejudgment interest, Wendy relies on Civil Code section 3288, which provides: "In an action for the breach of an obligation not arising from contract, and *in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury*." (Italics added.) According to Wendy, the trial court should have awarded prejudgment interest under this provision on her financial losses due to Chahram's fraud and breach of fiduciary duty. She also argues that under *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 1004, 1009-1011 (*Doppes*), prejudgment interest is available unless expressly prohibited by a statutory scheme.

In *Doppes*, our Supreme Court concluded the trial court had jurisdiction to award prejudgment interest under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.). (*Doppes, supra*, 174 Cal.App.4th at pp. 1009-1011.) The court noted that Civil Code section 3287 provided that every person who is entitled to recover damages that were certain, or capable to being made certain, was entitled to recover

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[11] Wendy brought a protective action in the San Mateo County Superior Court for fraud and deceit, breach of fiduciary duty, negligent misrepresentation, and breach of contract.

[12] She calculated this amount as statutory prejudgment interest of the $2,920,000 value of the Happy Valley house from November 28, 2006 through the date of judgment and on $89,787.50 from June 24, 2008, which she described as the "date of last proven expense" through judgment.

prejudgment interest. (*Doppes*, 174 Cal.App.4th at p. 1009.) The court considered the Song-Beverly Consumer Warranty Act and concluded that nothing in it barred recovery of prejudgment interest; to the contrary, the act provided, " 'The remedies provided by this chapter are cumulative and shall not be construed as restricting any remedy that is otherwise available . . . .' " (*Doppes*, 174 Cal.App.4th at p. 1010.)

The crucial difference between this case and *Doppes* is that here, rule 5.104 provides that neither party may assert "any . . . claim for relief other than for the relief provided in these rules" or in the Family Code. Wendy has drawn our attention to nothing in the Family Code authorizing an award of prejudgment interest on community property that the trial court finds was held in constructive trust for one spouse.

Wendy's reliance on *In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 92-93 (*Cream*), does not persuade us that the trial court had discretion to award prejudgment interest on Chahram's portion of the value of the Happy Valley house. The spouses in *Cream* owned a unique property known as the Old Faithful Geyser. (*Id*. at p. 84.) Although each party was prepared to submit an appraisal valuing the property at $800,000, the husband offered to have it awarded to him at significantly above the market price. The trial court ordered a nonbinding private auction between the parties, in which each party would bid for the one-half interest of the other, with the proviso that if the successful bidder could not close escrow within 90 days, the property would be sold to the other party at his or her highest offer. The husband prevailed in the auction, with a bid of $600,000, and the trial court valued the property at $1,200,000 and rendered judgment. After the husband was unable to close escrow, the wife bought his interest for $596,000, the amount of her highest bid. (*Id*. at pp. 84-85.) The court of appeal concluded this procedure was improper and remanded the matter to the trial court to fix the fair market value of the property as of the date the parties made their bids. The court concluded, "If the price [the wife] paid exceeded the fair market value of one-half the property as of that date, [the husband] shall be ordered to pay her the difference, plus interest from the date of her payment." (*Id*. at pp. 92-93.) Unlike the interest Wendy claims here, the interest in *Cream* was effectively *post-judgment* interest—that is, interest

on an amount the wife paid pursuant to a court order, not interest accruing from the time of the wrongful act in question. Bearing in mind the restriction of rule 5.104, *Cream* does not persuade us that the trial court had discretion to award over half a million dollars in prejudgment interest from the date of Chahram's breach of fiduciary duty.

Wendy argues the issue of prejudgment interest is properly before the court because both parties requested such interest in their pleadings. We have already concluded, however, that the trial court properly concluded it could consider only family law remedies, and that compensatory and punitive damages were not before it. The parties' boilerplate prayers for prejudgment interest do not confer on the trial court discretion to award interest on this family law remedy, where neither the family court rules nor the Family Code do so.

Nor do we find Wendy's citation to the legislative history of section 1101, subdivision (g), persuasive. Section 1101 provides that a spouse has a claim against the other spouse for a breach of fiduciary duty that causes an impairment in the claimant spouse's one-half interest in the community estate. (§ 1101, subd. (a).) Subdivision (g) provides for remedies, which "shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs." An earlier version of this subdivision included the sentence, "However, in no event shall interest be assessed on the managing spouse." (Stats. 1992, ch. 162 (Assem. Bill No. 2650), § 10, pp. 464, 497-498.) This final sentence was removed in a 2001 amendment. (See Stats. 2001, ch. 703 (Assem. Bill No. 583), § 1, pp. 5493-5495.)[13]

Wendy has submitted legislative history of the 2001 statutory amendment that indicates the bill would provide that the remedies for a breach of fiduciary duty not amounting to fraud may, in the court's discretion, include the assessment of interest. These comments in the legislative history, however, refer to a version of the amended

[13] The assets in question were not undisclosed or transferred in breach of a fiduciary duty, and hence section 1101 is not directly applicable to the dispute before us.

statute that was *not* enacted, which would have expressly provided, "In addition, the court, in its discretion, may assess interest." In the absence of any clear direction from the Legislature that prejudgment interest is available on community property subject to a constructive trust, even if that trust was imposed as a result of a spouse's fraud or breach of fiduciary duty, we will not reverse the trial court's decision on this issue.

**C. Promissory Note**

Wendy contends the trial court erred in refusing to enforce the promissory note or, in the alternative, in refusing to order rescission of the $1,000,000 gift to Chahram. According to Wendy, she had the right to rescind the gift because she made a fundamental mistake as to the tax consequences of the gift and would not have made the gift had she been aware of those consequences. As a result, she contends, her forbearance to seek immediate return of the money served as consideration for the promissory note, and no presumption of undue influence arose.

The trial court concluded that Wendy did not have the right to unilaterally rescind the $1,000,000 gift, and therefore the transaction benefited only Wendy by allowing her to avoid $450,000 in gift tax. The court was unpersuaded by Wendy's argument that the transaction resulted in " 'mutually agreeable' " advantages, or that it also benefited Chahram by potentially keeping that $450,000 in the family for other uses.

Section 721, subdivision (b) provides in part, "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.] '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. [Citation.] The presumption can be

dispelled 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.]' [Citation.]" (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 84; see also *Delaney*, *supra*, 111 Cal.App.4th at p. 996; *In re Marriage of Lange* (2002) 102 Cal.App.4th 360, 364.)

The "advantage" that creates a presumption of undue influence "must necessarily be an unfair advantage." (*In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 730 (*Burkle*).) As the court there explained, "Taking 'advantage of another' necessarily connotes an unfair advantage, not merely a gain or benefit obtained in a mutual exchange." (*Id*. at p. 731.) "[A] mere benefit is not enough; the advantage must operate 'to the disadvantage' of the other spouse." (*Ibid*.) Whether an interspousal transaction gives one spouse an unfair advantage, and whether a spouse who gained an advantage has overcome the presumption of undue influence are questions for the trier of fact. (*Id*. at pp. 734, 737.)

The trial court here concluded that the fact that Wendy was allowed to potentially avoid the gift tax *in itself* raised the presumption of undue influence, placing on her the burden to show the transaction was made voluntarily, with full knowledge of the facts, and complete understanding of its effect. The court rejected her argument that Chahram also benefited. In doing so, the court reasoned, "At the end of the day, by reason of this interspousal transaction, a completed gift of $1 million to CHAHRAM was converted into an obligation requiring him to pay WENDY $880,000 plus interest."

Wendy argues the trial court's ruling was based on the erroneous conclusion that she was not entitled to rescind the $1,000,000 gift based on her factual mistake about the gift's tax consequences. A gift can be rescinded if it was induced by a mistake about a " 'basic fact.' " (*Earl v. Saks & Co.* (1951) 36 Cal.2d 602, 609 (*Earl*).) As our Supreme Court stated in *Earl*, " '[a] mistake which entails the substantial frustration of the donor's purpose entitles him to restitution. No more definite general statement can be made as to what constitutes a basic mistake in the making of the gift. The donor is entitled to restitution if he was mistaken as to the . . . identity or essential characteristics of the gift.'

[Citation.]" The court in *Reid v. Landon* (1958) 166 Cal.App.2d 476, 483 (*Reid*), expanded on this rule, explaining that a mistake of fact "must be one material to the contract. The mistake must be such that it animated and controlled the conduct of the party; go to the essence of the object in view and not be merely incidental. *The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved* [citations]." (Italics added.) We must accept the trial court's determination of whether one has acted under a mistake of fact if it is supported by substantial evidence. (*Walton v. Bank of California* (1963) 218 Cal.App.2d 527, 543 (*Walton*).)

Wendy contends the "basic fact" about which she made a mistake was the taxable nature of the gift: She intended to give a tax-free gift of $1,000,000, she contends, and mistakenly made a *taxable* gift of that amount. The court in *Walton* discussed the consequence of a mistake as to liability for gift tax. The plaintiff there brought an action to rescind an irrevocable *inter vivos* trust, contending, among other things, that she had been mistaken about her liability for gift taxes. (*Id*. at pp. 530, 543-544.) The trial court found that at the time the plaintiff entered into the trust agreement, she was not operating under any mistake of fact as to her gift tax liability, and the Court of Appeal concluded the trial court properly accepted the evidence supporting that finding. (*Id*. at pp. 543-544.) The court found, however, that the trial court had erred in sustaining an objection to a question as to whether the plaintiff would have signed the trust agreement if she had known she would have to pay gift tax. In doing so, the court stated, "It was the general purpose of the question to establish plaintiff's state of mind at the time the trust document was executed, plaintiff's theory being, among other things, that she did not think she was making an irrevocable gift in trust *or one involving the payment of taxes*, and did not intend to make such a gift. . . . However, plaintiff's answer would have merely created an additional minor conflict in the evidence. . . . [T]here was substantial evidence that [plaintiff] was informed of the nature and effect of the transfer in trust, that she was making an irrevocable transfer of her assets *and that this would be subject to a gift tax*.

In light of all this evidence, the error was not prejudicial." (*Id*. at pp. 544-545, italics added.)

The court in *Walton* went on to conclude that a discrepancy between the estimate of the amount of gift tax the plaintiff had been told she would owe ($75,000) and the amount she actually owed ($92,500) did not constitute a mistake of fact on which the plaintiff could rely. (*Id*. at p. 545.) The court applied the standard set forth in *Reid*: The mistake must be one material to the contract, it must animate and control the conduct of the party, and it must go to the essence of the object in view as opposed to being merely incidental. That is, "but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved [citation.]' " (*Id*. at pp. 545-546.) The court noted that the plaintiff was motivated to create the trust not for tax purposes, but to free herself from the demands of her children, and that the evidence did not indicate her decision to create the trust was predicated on an understanding that the tax liability would not exceed the $75,000 estimate. (*Id*. at p. 546.) The court concluded, "Where the trust is created solely or principally for a tax purpose, the mistake as to the tax consequence is a material one. In the instant case, however, there is no evidence that the trust was created to minimize taxes [citations] or that it was motivated by a tax purpose. We are therefore not persuaded that in light of the evidence plaintiff created the trust on the rigid basis of a $75,000 gift tax liability *and that she would not have done so if she had been informed of a liability of $92,500*." (*Id*. at p. 547 (italics added).)

The trial court here concluded that Wendy intended to give Chahram a $1,000,000 gift, and went on, "There is no doubt that she made a mistake of fact regarding the tax consequences of the gift to CHAHRAM. However, case law is clear that in order to unilaterally rescind a gift on the ground of mistake, the mistake must go to the *very reason* for making a gift. WENDY's mistake was as to the tax consequences of the gift, not the nature of the gift itself. Avoidance of tax was not the purpose of the gift—love was. As between CHAHRAM and WENDY, it was Wendy's responsibility to obtain advice about the consequences of the gift she intended to make. The gift was a

completed transaction on August 4, 2006 when CHAHRAM accepted and deposited the check in his personal bank account."

The court also concluded the evidence showed Wendy was "horrified" when she learned in December 2006 that she would owe $450,000 in gift tax because of Chahram's citizenship status, that she told Chahram she was sorry, but she could only give him $120,000 per year, that Chahram asked her to find a solution that would allow him to keep the money, and that he was happy when she told him her accountants had found a solution. The only reasonable inference from the trial court's findings is that Wendy would not have given Chahram the gift of $1,000,000 had she known the gift was subject to gift tax, and Wendy so testified.

We conclude the trial court's view of a party's right to rescind a gift based on a mistake of fact was too restrictive. We accept the trial court's finding that Wendy was motivated not by the desire to avoid taxes, but by love, in deciding to give Chahram the money. However, when Wendy had made other gifts in the past, including one to Chahram before their marriage, she had always made it a point to structure them so as to avoid liability for gift taxes. From this it appears that her intent had always been to make *tax-free* gifts. In the circumstances, the record shows that Wendy operated under a mistake of fact under the rule expressed in *Walton* and *Reid*.[14]

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[14] Where rescission is sought based on mistake of fact, such a mistake must not be the result of the neglect of a legal duty. (*Reid, supra,* 166 Cal.App.2d at p. 483; *Lawrence v. Shutt* (1969) 269 Cal.App.2d 749, 765; see Civ. Code, § 1577.) More than ordinary negligence is required to show neglect of a legal duty, however; rather, "the party seeking to rescind must be guilty of gross negligence—'the want of even scant care or an extreme departure from the ordinary standard of conduct.' " (*Harris v. Rudin, Richman & Appel* (2002) 95 Cal.App.4th 1332, 1342 (fn. omitted); see also *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 283 ["a mistaken party's failure to exercise due care does not necessarily bar rescission . . ."].) Although Wendy "uncharacteristically" did not seek legal or tax advice before making the gift and hence did not learn from her advisors until later that Chahram's citizenship status made the gift taxable, there is no basis to conclude this failure amounted to gross negligence.

It is well settled that forbearance to assert a legal right, including the right to rescission, is legal consideration for a contract. (*Armstrong World Industries, Inc. v. Superior Court* (1989) 215 Cal.App.3d 951, 957; *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 551.) Under these facts, Wendy's forbearance to seek rescission of the gift served as consideration for the transaction in which the gift was "unwound" and the parties entered into the promissory note.

Further, all the evidence supports a conclusion that *Chahram*, too, believed Wendy could rescind the gift. Chahram did not assert he was entitled to retain the gift despite Wendy's mistake. Instead, he "implored [Wendy] to find a solution which would enable him to keep the money," "jumped at" the only option that would allow him, potentially, to keep the entire sum, and was grateful for it. The only rational conclusion is that Chahram believed and understood that Wendy could rightfully demand that he give the money back, and he happily signed the promissory note to avoid having to do so.

On the facts presented, we see no basis to conclude that the transaction gave Wendy an *unfair* advantage over Chahram, or indeed, that he was disadvantaged. It is true, as the trial court found, that Wendy benefited by not having to pay the gift tax. Chahram also received a benefit, however, by being able to keep the money with the promise that the loan would be forgiven at the maximum legal rate during the couple's marriage. Both Wendy and Chahram agreed that it was in the family's best interest to avoid paying the gift tax. Additionally, there is no evidence that Chahram did not understand the purpose or the terms of the note; there was only his assertion that the transaction was a sham and never intended to be enforced by Wendy. The trial court found otherwise. It concluded that although the parties never "expected" the note to be enforced, "[Wendy] neither intended to harm CHAHRAM nor to commit tax fraud. She intended to enter into a *legitimate* transaction which would enable her to make good on her gift to CHAHRAM without triggering a tax consequence." (Italics added.)

In the absence of an unfair advantage, the presumption of undue influence does not arise. (*Burkle, supra,* 139 Cal.App.4th at p. 730.) We therefore conclude the trial court erred in refusing to enforce the promissory note.[15]

**D. Issues Related to Attorney Fees**

***1. Background***

The premarital agreement included an attorney fee clause (paragraph 30) that provided in pertinent part: "In the event that court action is undertaken to resolve any disputes about the provisions of this Agreement, the party prevailing in such proceeding shall be entitled to recover from the other reasonable attorney fees and costs necessarily expended in such undertaking, as determined by the court."[16]

In December 2008, before trial, Chahram's counsel informed Wendy's counsel that Chahram intended to invoke this clause to seek attorney fees. Chahram took the position that Wendy had breached the premarital agreement by refusing to concede that the Happy Valley house was community property and by not conceding that she had waived her claimed under section 2640 for her separate property contribution to the acquisition of the Happy Valley house. In his reply trial brief, Chahram sought an award of attorney fees under the premarital agreement, as well as under sections 2030 and 271, subdivision (a). He argued that his assets had been diminished substantially by the litigation, and that he was entitled to contractual attorney fees because Wendy had taken "various legal positions which [were] contrary to the provisions of the [premarital] agreement."

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[15] One of the factors the trial court considered in awarding Chahram $35,000 in attorney fees under section 2030 for his expenses in the dissolution action was the fact that he was keeping the entire $1,000,000 gift from Wendy. As a result of our decision in this appeal, Chahram will not be entitled to keep that entire amount. Nothing we say herein is intended to affect any right Chahram may have to seek modification or augmentation of the fee award. (See § 2030, subd. (c).)

[16] The parties stipulated that the premarital agreement was valid.

After trial, Wendy moved for attorney fees under Civil Code section 1717, which governs contractual attorney fees. She contended Chahram had taken the position during trial that the premarital agreement conclusively established his community property interest in the Happy Valley house and required the court to confirm to him a one-half interest in the property. As Wendy pointed out, Chahram's reply trial brief argued that the court should make this determination "consistent with the facts and evidence [ ] but also consistent with the provisions of the [premarital] agreement they signed prior to marriage."[17] Wendy also contended that Chahram had taken the position at trial, particularly in his reply trial brief, that he was entitled to contractual attorney fees under the premarital agreement.

Wendy sought $112,262.38 as reasonable attorney fees for work related to the Happy Valley house that was done after Chahram invoked the attorney fee clause in December 2009 and before the trial court's tentative ruling.

In his responsive papers, Chahram sought an award of the attorney fees he incurred in responding to Wendy's motion. Although he acknowledged that he had the funds to pay his own fees, he argued that in view of the disparity of his wealth and Wendy's, such an award was proper under section 2032.[18]

In its initial Order after Hearing, filed February 22, 2010, the trial court ruled that Wendy was entitled to an award of attorney fees. The court noted that the premarital agreement was raised defensively—that is, that Chahram argued that under the premarital agreement the form of title on the Happy Valley house created a conclusive presumption that it was held as community property—but ruled that based on that defense, the trial was a dispute " 'about a provision of the Agreement,' " and that the fact that the contract

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[17] One of Chahram's trial briefs had also argued that Wendy could not challenge the community property title of the Happy Valley house based on oral conditions because the premarital agreement provided that written title was determinative.

[18] In order to ensure that each spouse has access to legal representation, section 2030 and 2032 authorize the trial court to require one spouse to pay all or a portion of the attorney fees of the other spouse, where the award and its amount are just and reasonable under the relative circumstances of the parties.

was raised defensively was not a bar to the invocation of the attorney fee provision. Moreover, the trial court concluded, the attorney fee provision was not rendered ineffective by the fact that Chahram's fraud "took the transaction out of contract," ruling "[r]eciprocity is required as a matter of legislative intent [under Civil Code section 1717], and prevailing party fees are available to defendants who successfully prove that there was no enforceable contract to begin with. If the contractual terms were tendered by the losing party, fees are still available, and mandatory, for the prevailing party."

The court also rejected Chahram's argument that Wendy was not entitled to contractual attorney fees because she prevailed on a fraud claim rather than on the contract. The court stated, "[T]he underlying action in this matter was the characterization of real property. The interpretation and applicability of the Agreement was a key component of CHAHRAM's case and placed the contract squarely before the court."

The court ruled Chahram should pay only those fees attributable to litigating the issues related to the contract claim, and not those attributable to developing Wendy's tort theory. The court found that while there was some overlap between the two issues, they were not so intertwined as to be impossible to apportion, and apportionment was required. The court continued, "The court has reviewed the fee declarations carefully. It is unable to determine from the face which of the fees regarding HAPPY VALLEY were related to defending CHAHRAM's contract claim, and which were related to pursuing WENDY's fraud/breach of fiduciary duty claim." The trial court therefore directed Wendy's counsel to "review their fee records, and prepare supplemental declarations, including backup data as appropriate, segregating the fees which can be identified as incurred in opposing and defeating CHAHRAM's contract claim in the underlying dissolution action."

The trial court also denied Chahram's request for attorney fees. The court first stated, in connection with granting Wendy contractual attorney fees, "[T]he court does not believe it is required to perform a need and ability to pay analysis under [section] 2030, or a hardship analysis under [section] 271 in assessing the reasonableness of an

attorney fee award under Civil Code [section] 1717. However, in an excess of caution, the court takes judicial notice of CHAHRAM's Income and Expense Declaration, wherein he indicates that, despite the recent purchase of a new residence, he has $316,500 in cash or liquid assets, and he invests $6,363 per month in savings and other investments." After ordering Wendy's counsel to submit supplemental declarations to support her request for contractual attorney fees, the court ordered, "CHAHRAM's request for fees pursuant to [section] 2030 is denied."

In response to the initial order after hearing, Wendy's counsel submitted a supplemental declaration stating that the fee request had been modified to remove fees that arguably related solely to work not required to overcome Chahram's contract claim, particularly litigation of the question of whether a transmutation of property requiring a writing had taken place. (§ 852.) Wendy argued that to defeat Chahram's arguments under the premarital agreement, she had to show that although the agreement gave Chahram *title* to the property, Chahram had engaged in tortious conduct whose consequences were outside the scope of the premarital agreement, and that the premarital agreement did not waive the fiduciary duties of the spouses. (See § 721.) As a result, she argued, she had to prove she was entitled to more than would be available under the premarital agreement, whether under a theory of breach of contract, breach of fiduciary duty, or fraud. She submitted a revised fee analysis which she contended eliminated fees incurred to litigate issues under section 852, which requires a writing to show a transmutation of property between spouses, and reducing the fees of one of her law firms to the extent they exceeded those of other counsel in the action. Based on these revisions, Wendy's amended attorney fee request was $97,953.50.

On April 9, 2010, the court filed a second Order after Hearing. The second order incorporated the findings and orders contained in the initial order. The court went on to note that rather than making a specific apportionment between her fees for the contract defense and for the tort and breach of fiduciary duty claims, Wendy had "made modest adjustments to her original claim," and also pointed out that Wendy's fraud claim arose only during trial, and "thus, a relatively small portion of her fees litigating [the Happy

Valley house] issue are attributable to the fraud claim." The court continued: "Since WENDY has declined to reallocate her fees between the contract (and defenses to it) and the fraud claim, the court has done so itself. In estimating the fees relating to the defenses to the contract claim, the court has considered the following: [¶] a. The timing of the fraud claim, which arose mid-trial; [¶] b. The fees incurred to develop WENDY's breach of fiduciary duty and [section] 721 theories were based on much of the same factual evidence which supported the fraud claim; [¶] c. The numerous other claims and legal theories advanced by WENDY before, during, and after trial; [¶] d. The amount of trial time allocated to the acquisition and characterization of HAPPY VALLEY as opposed to other issues, including the promissory note, gift tax exclusion, other disputes regarding HAPPY VALLEY, and reimbursements." The court ordered Chahram to pay $85,000 in contractual attorney fees to Wendy's counsel.

***2. Contractual Attorney Fees***

Chahram contends the trial court erred in awarding contractual attorney fees because the action sounded in tort, and was not an action "on the contract" for purposes of Civil Code section 1717, which governs the reciprocity of contractual attorney fees in actions on a contract.[19] As this court has pointed out, "California courts construe the term 'on a contract' liberally. ' "As long as the action 'involve[s]' a contract it is ' "on [the] contract" ' within the meaning of [Civil Code] section 1717. [Citations.]" [Citations.]' [Citation.] Where an attorney fee clause provides for an award of fees incurred in enforcing the contract, the prevailing party is entitled to fees for any action 'on the contract,' *whether incurred offensively or defensively*. [Citations.] Such fees are properly awarded under [Civil Code] section 1717 'to the extent that the action in fact is an action to enforce—*or avoid enforcement of*—the specific contract.' [Citation.]"

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[19] Civil Code section 1717, subdivision (a), provides in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

(*Turner v. Schultz* (2009) 175 Cal.App.4th 974, 979-980, italics added; accord *Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97, 107-108; see also *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1603 [defendant entitled to its attorney fees defending claim in which plaintiff sought to enforce his rights under contract].)

Although acknowledging that his trial brief raised paragraph 16.1 of the premarital agreement, Chahram contends it was raised only as "a defense to Wendy's anticipated claim of undue influence," a defense Wendy did not raise, rather than as an independent claim. This contention understates the extent of Chahram's reliance on the premarital agreement at trial. Rather than simply raising the premarital agreement in a preemptive response to an anticipated defense on Wendy's part that Chahram had exercised undue influence, Chahram argued that Wendy could not challenge the community property title of the Happy Valley house because paragraph 16.1 of the premarital agreement mandated that written title was determinative. Chahram argued: "Section 16.1 is the strongest possible statement that Wendy and Chahram could have made regarding the inviolateness [of] the written title of any real property owned by them acquired during marriage. This section makes it clear that there can be no interest in real property that is not in writing. Any argument by Wendy that there are oral conditions attached to the Happy Valley [R]oad title must, as a matter of law and contractual interpretation, fail because of the unequivocal language to the contrary in her and Chahram's [premarital agreement]." Chahram also contended that under the premarital agreement, Wendy had waived her statutory right to reimbursement of her separate property contribution to the Happy Valley house. (§ 2640.) The premarital agreement was so central to Chahram's theory of the case that his counsel began his closing argument by discussing the agreement, particularly the two provisions that he contended were "important to us in this case": the paragraph in which the spouses waived their right to reimbursement of their separate property contributions to jointly-titled property (§ 2640), and the paragraph providing that the form of title would conclusively determine the character of property acquired after marriage. Indeed, in his reply trial brief, Chahram took the position that Wendy had

taken positions contrary to the premarital agreement and therefore he was entitled to an award of attorney fees under the agreement.[20]

On this record, the trial court properly concluded that in order to prevail, Wendy was required to defend against Chahram's claims based on the premarital agreement, and that the dispute accordingly fell within the contractual attorney fee provision, which applied to actions "undertaken to resolve any disputes about the provisions of this Agreement." (See *Finalco, Inc. v. Roosevelt* (1991) 235 Cal.App.3d 1301, 1306-1308 [plaintiff who prevailed on cause of action to enforce note also entitled to fees for time spent defending cross-complaint based on non-contract causes of action because defense essential to recovery on contract].)

We are not persuaded otherwise by the cases Chahram cites. Our Supreme Court in *Stout v. Turney* (1978) 22 Cal.3d 718, 730 (*Stout*), ruled that a tort action for fraud arising out of a contract for the sale of real property was not an action " 'on a contract' " within the meaning of Civil Code section 1717. Here, on the other hand, the question is not whether Chahram's fraud itself triggered the attorney fee provision, but whether the position he took in litigation—that the premarital agreement precluded Wendy's claims regarding the Happy Valley house—required her to defend against claims regarding the agreement in order to avoid enforcement of the contract as interpreted by Chahram. In *Loube v. Loube* (1998) 64 Cal.App.4th 421, 428-431, the court concluded that an action for legal malpractice was not an action " 'on the contract' " for purposes of awarding attorney fees; although professional negligence constituted both a tort and a breach of contract, reasoned the court, "appellants did not bring suit 'on the contract.' They brought suit for negligence." (*Id*. at p. 429.) Here, the provisions and effect of the premarital agreement itself were at issue as a result of the position Chahram took, as he

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[20] Chahram argues that the inapplicability of the premarital agreement's attorney fee provision is shown by the fact that he did not make a request for fees. He did in fact assert his right to contractual attorney fees in his pretrial briefing. After the trial, of course, he was in no position to bring a motion seeking fees because he did not prevail on the issues related to the Happy Valley house.

recognized himself in declaring his own intention to seek contractual attorney fees. (See *Del Mar v. Caspe* (1990) 222 Cal.App.3d 1316, 1336.) And, as we have explained, the trial court ruled that the fees Wendy incurred pursuing her *tort* claims were not recoverable under the agreement's fee provision.

***3. Allocation of Fees***

Chahram contends the trial court abused its discretion in fixing the amount of the attorney fee award. He argues that Wendy's counsel were unable to determine which portion of their fees were attributable to the contract claim, as opposed to the tort claim, as the trial court had directed, and there was no substantial evidence to support the trial court's decision to set the fee award at $85,000.[21] According to Chahram, the premarital agreement was a small part of the case and played a minor role in the trial court's Statement of Decision in the dissolution action, and the amount of time devoted to the contract defense could not support the trial court's ruling.

Consistent with the purpose of Civil Code section 1717, "the trial court has broad authority to determine the amount of a reasonable fee." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The fee-setting inquiry "ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at a fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary. [Citation.]" (*Ibid.*) Chahram does not contend that the fees Wendy seeks were based on an unreasonable hourly rate, or that they did not reflect time spent on issues related to the Happy Valley house; rather, he contends the evidence does not support the trial court's conclusion that $85,000 in fees were attributable to *contractual* issues rather than tort issues in connection with that transaction, and that fees

[21] Chahram goes so far as to suggest the trial court's allocation was "based upon its licking its finger and holding it up to the wind."

attributable solely to Wendy's tort claims were not compensable under Civil Code section 1717. (See *Stout, supra,* 22 Cal.3d at p. 730; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1259 [contractual attorney fees not available in action for fraud].)

"Civil Code section 1717 limits recovery to attorney fees 'incurred to enforce the provisions of [the] contract' which provides for attorney fees. 'Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under section 1717 only as they relate to the contract action. [Citations.]' [Citation.]" (*Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1641-1642 (*Nazemi*).) However, "[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130; see also *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.)

" ' "An award of attorney fees is a matter within the sound discretion of the trial court and absent a manifest abuse of discretion the determination of the trial court will not be disturbed. [Citation.]" [Citation.] . . . "Discretion is abused in the legal sense 'whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence.' [Citations.]" [Citation.]' [Citation.]" (*Nazemi, supra,* 5 Cal.App.4th at p. 1642.)

We see no abuse of discretion in the trial court's allocation. Chahram raised the premarital agreement in an attempt to defeat Wendy's argument that he was not entitled to half the value of the Happy Valley house. The trial court could reasonably conclude that much of the time Wendy spent on the issues related to the Happy Valley house transaction were necessary to defeating Chahram's contract claim.

We recognize that the allocation of $85,000 to the contract claim appears to have been to some extent an estimate. Such awards have been upheld in the past. In *Boquilon v. Beckwith* (1996) 49 Cal.App.4th 1697, 1722-1723, in considering an award of statutory attorney fees, the court found no abuse of discretion in the trial court's determination that

50 percent of the plaintiffs' counsel's time was spent on issues on which the plaintiffs prevailed. And in *Nazemi*, which considered attorney fees under Civil Code section 1717, the court noted with approval that the trial court appeared to have engaged in some apportionment in awarding only $5,000 for 65.5 hours of attorney time. (*Nazemi, supra*, 5 Cal.App.4th at p. 1642.) Here, likewise, we cannot say that the trial court's award exceeded the bounds of reason or contravened the evidence. (See *ibid*.)

***4. Chahram's Request for Attorney Fees***

Chahram contends the trial court failed to rule on his request pursuant to section 2030 for the attorney fees he incurred in defending against Wendy's motion for attorney fees. Chahram is incorrect. As Wendy points out, the trial court explicitly denied his request.

Chahram argues in his reply brief that the trial court's ruling was an abuse of discretion. "The court may award attorney fees under section 2030 'where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.' (§ 2032, subd. (a).) [¶] 'In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in [s]ection 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.' (§ 2032, subd. (b).)" (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 629 (*Duncan*).)

As *Duncan* goes on to explain, "The parties' 'circumstances' as described in section 4320 include assets, debts and earning ability of both parties, ability to pay, duration of the marriage, and the age and health of the parties. Further, '[i]n assessing

one party's relative "need" and the other party's ability to pay, the court may consider all evidence concerning the parties' current incomes, assets, and abilities, including investment and income-producing properties.' [Citations.] [¶] '[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal.' [Citation.] Thus, we affirm the court's order unless ' "no judge could reasonably make the order made. [Citations.]" ' [Citations.]" (*Id*. at p. 630, fn. omitted.)

Chahram contends the trial court failed to analyze the circumstances of the parties in making its determination. The record suggests otherwise. As we have explained, in discussing Wendy's request for contractual attorney fees, the trial court stated: "[T]he court does not believe it is required to perform a need and ability to pay analysis under [section] 2030, or a hardship analysis under [section] 271 in assessing the reasonableness of an attorney fee award under Civil Code [section] 1717. However, in an excess of caution, the court takes judicial notice of [Chahram's] Income and Expense Declaration, wherein he indicates that, despite the recent purchase of a new residence, he has $316,500 in cash or liquid assets, and he invests $6,363 per month in savings and other investments."[22] While this statement was brief, and was made in connection with *Wendy's* request for attorney fees, it indicates the trial court considered the parties' circumstances when it ruled that Wendy was entitled to contractual attorney fees and denied Chahram's request for fees pursuant to section 2030. On this record, we conclude Chahram has not met his burden to show the trial court abused its discretion in denying his request for attorney fees—that is, that no judge could reasonably have made such an order. (See *Duncan*, *supra*, 90 Cal.App.4th at p. 630.)

[22] Although Chahram suggests he could not have been investing that amount out of his monthly income, he acknowledges that these figures were derived from his Income and Expense Declaration.

## III. DISPOSITION

The judgment is reversed to the extent the trial court refused to enforce the promissory note. The cause is remanded for any necessary further proceedings consistent with this opinion. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

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RIVERA, J.

We concur:

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REARDON, Acting P.J.

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SEPULVEDA, J.