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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In re Marriage of Slotkin
Gail Slotkin,
Petitioner,
vs.
Mark Slotkin,
Respondent.

Case No.: BD 531307

**RESPONDENT'S TRIAL BRIEF FOR
THE BIFURCATED TRIAL ON THE
VALIDITY OF THE PARTIES'
PREMARITAL AGREEMENT**

TRIAL DATE: January 31, 2013
Time: 8:30 a.m.
Dept: 2

[TRIAL BRIEF BEING LODGED
PURSUANT TO L.R. 5.15(b); PER
STIPULATION OF THE PARTIES AND
ORDER OF THE COURT ALL
MOTIONS *IN LIMINE* ARE TO BE
FILED DIRECTLY IN DEPARTMENT 2
ON OR BEFORE 1/29/2013]

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I. Introduction

This is a trial involving the validity of the premarital agreement that was executed by Gail Slotkin (“Gail”) and Mark Slotkin (“Mark”) on March 26, 1993 (the “Agreement”). For the convenience of the Court, a copy of the fully executed Agreement is attached hereto as Exhibit No. 1. Not only was Gail represented by an extremely experienced family law attorney (Mr. Ira Friedman) when she negotiated and then voluntarily signed the Agreement, but she was a savvy businesswoman who had experience with contracts, real estate, legal matters, and dealing with lawyers.

The only reason this matter is going to trial is because twenty years after the fact Gail has come down with an acute case of buyer’s remorse about entering into the Agreement, and about the limitations it imposes on her spousal support. Since the California Supreme Court decided *In re Marriage of Pendleton & Fireman* over a decade ago, however, a clear body of case law has developed which renders Gail’s assault on the Agreement and the limitations it imposes on her spousal support untenable.¹

¹ In the landmark case *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, the California Supreme Court held that under the UPAA a premarital agreement may waive spousal support without violating public policy. There have been several recent holdings which confirm that limitations or waivers of spousal support provisions in premarital agreements are valid and enforceable. See *In re Marriage of Howell* (2011) 195 Cal.App.4th 1062, 1077–78 (Court of Appeal finds that a complete waiver of spousal support was valid and enforceable and holding that because 1612(c) was not promulgated until 2002 that it did not apply retroactively to premarital agreements executed prior to that date); *In re Marriage of Melissa* (Dec. 3, 2012, G045899 & G046261) __ Cal.App.4th __ [p. 16] [2012 WL

1 Putting aside all of the recently reported cases which undermine Gail's attempt
2 to have the Agreement set aside, there is uncontroverted evidence that Gail has spoiled
3 critical evidence pertaining to the very issues she now wishes for this Court to
4 adjudicate. As described in detail below, when the parties' marriage was in trouble and
5 litigation was plainly imminent in 2008, Gail went to Mr. Ira Friedman's office and
6 demanded to retrieve her entire file from his office. Mr. Friedman obliged Gail's
7 demands by, among other things, surrendering control of the entire file to her in 2008
8 without keeping a copy for his office. As Gail admitted to at her deposition, after
9 obtaining possession of Mr. Friedman's file she then took actions that destroyed the
10 integrity of her file by failing to properly preserve it and/or prevent it from being
11 mixed-up with other documents and files. In short, Gail has caused key evidence in
12 this case to be spoiled on the very issues she is insisting be adjudicated here.
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18 Not only has Gail spoiled key evidence, but she has further suppressed relevant
19 evidence by refusing to produce documents from Mr. Friedman's file based on her
20 assertion that they are privileged. Because Gail is contending that Mr. Friedman either
21 did not competently represent her and/or that he was not independent counsel,
22 however, she cannot assert privilege to prevent "disclosure that is essential for a fair
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26 6012835] (holding same); *In re Marriage of Hill & Dittmer* (2011) 202 Cal.App.4th
27 1046 (affirming validity of a premarital agreement and holding that amendments
28 to Fam. Code, § 1615 of the UPA implemented in 2002 do not retroactively
apply to premarital agreements entered into prior to that date).

1 adjudication of the action.”² In other words, Gail cannot have her cake and eat it too. If
2 she wanted to assert in this trial that Mr. Friedman did not properly represent her
3 and/or that he was not independent counsel, it was incumbent on her to have both
4 properly maintained his file (which she did not do) and produce it in its entirety (which
5 she also did not do).
6
7

8 Even if Gail’s spoliation of evidence was not fatal to her case (which it is), recent
9 holdings involving spousal support waivers and/or limitations in premarital
10 agreements that were executed in 1993 make clear that such provisions (when
11 voluntarily entered into) are valid and enforceable. While it is not at all uncommon for
12 parties who have agreed to limitations to spousal support to regret doing so years later,
13 it is well-settled that “judicial erasure of a competent adult’s signature on an agreement
14 does not serve the purpose of the law of contracts, i.e., to protect the reasonable
15 expectation of the parties.” *In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 67.
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19 This is a case that has already consumed far too much judicial resources. Even a
20 cursory review of the LASC case file or docket will reveal that this has been a
21 contentious matter from the get-go. It is readily apparent from Gail’s verbose responses
22 to discovery concerning issues relating to the premarital agreement as well as her
23 voluminous stack of irrelevant trial exhibits that her trial strategy is going to be to
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² *2,022 Ranch, LLC v. Superior Court* (2003) 113 Cal.App.4th 1377, 1395 *disapproved*
on other grounds by *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725).

1 throw as much spaghetti as she can against the wall hoping that something will stick.
2 Gail has included over 81 exhibits in her exhibit list, most of which have absolutely
3 nothing at all to do with the issues that are relevant to this bifurcated trial.³ The trial
4 court should preclude Gail from unduly protracting these proceedings by limiting her
5 from introducing irrelevant exhibits and/or testimony that violates Evidence Code
6 § 352.
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9 Mark, on the other hand, has designated only 29 exhibits in his exhibit list.
10 Those exhibits demonstrate that the Agreement was the result of a negotiated process in
11 which Gail was advised by experienced family law counsel, including Certified Family
12 Law Specialist Mr. Ira Friedman. Mark's exhibit list appropriately begins with the
13 seven drafts of the premarital agreement that were circulated between the parties before
14 they executed the eighth draft of the Agreement. The final, executed premarital
15 agreement is found on Mark's Exhibit List as his eighth exhibit because it was the
16 eighth draft of the agreement that was circulated between the parties. Mark's other
17 exhibits include, among other things, the letters that were exchanged between counsel
18 before the Agreement was executed. Those communications demonstrate that the
19 Agreement was the product of an arm's length negotiation.
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27 ³ Mark will be filing motions *in limine* and objecting to the introduction of many of
28 the exhibits in Gail's Exhibit List which includes such irrelevancies as the parties'
wedding guest list, pictures from the wedding, invitation lists, etc.

1 II. Summary of Facts

2 A. The Parties

3 1. Gail Slotkin was a savvy businesswoman & licensed real estate agent who had
4 experience with contested legal matters when she executed the Agreement.

5 When Gail executed the Agreement she was 32 years old. (Gail Depo., 11:20–22).
6 Prior to marriage, Gail had held jobs selling advertising, selling real estate, and as a
7 producer’s assistant on multiple television shows. (Gail Depo., 36:12–40:21). She had
8 earned her Bachelors of Science degree in broadcasting from Arizona State in 1983.
9 (Gail Depo., 22:1–5).

10
11 At the time she executed the Agreement in 1993, Gail was savvy when it came to
12 contracts and legal matters. She applied for, and obtained her real estate license in 1987,
13 and has kept that license in good standing ever since.⁴ (Gail Depo., 22:6–23:4).
14 Moreover, prior to marriage, Gail was no stranger to contested legal proceedings or
15 interacting with attorneys. At her deposition, Gail recounted involvement in at least
16 five civil disputes, and was represented by counsel in at least three of those matters.
17 (Gail Depo., 12:6–14:17). Prior to entering into the Agreement, Gail had experience

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23 ⁴ To stay active, a real estate broker must renew his or her license every four years.
24 Bus. & Prof. Code, § 10153.7. In addition to paying a renewal fee, a realtor must
25 complete 45 hours of continuing education and then pass a final examination in
26 order to renew (which includes a heavy emphasis on matters involving contract
27 law). Bus. & Prof. Code, § 10170.5. The continuing education requirements
28 require realtors to take courses on the legal aspects of real estate law (including
contract formation), trust fund accounting and handling, capital formation, and
business opportunities. *Id.*

1 negotiating contracts as she had done so when she appeared in a national television
2 commercial, in connection with employment contracts, and when she had appeared on
3 a national game show. (Gail Depo., 17:17–21:7).

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6 **2. Mark Slotkin had previously been married and divorced, and informed Gail**
7 **early on in the courtship that he would want a premarital agreement and that**
8 **she would have to be represented by counsel.**

9 This was Mark’s second marriage, and also his second premarital agreement.
10 (Mark Depo., vol.2, 17:9–19:3). Mark credited his first premarital agreement, which was
11 honored by his first wife Robin, with enabling him and his first wife to maintain a
12 friendship that continues to this day. (Mark Depo., vol.2, 17:9–19:3).

13
14 From the earliest phase of the courtship, Mark informed Gail early on in the
15 courtship that if they got married there would have to be a premarital agreement, due
16 to his separate property estate and the disparity in their financial positions. (Mark
17 Depo., vol.2, 25:5–25). Mark shared with Gail that he had had a premarital agreement
18 with his first wife, and that he would want and need one with her too. (Mark Depo.,
19 vol.2, 25:10–22).

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23 Mark took reasonable steps to assure that the parties would enter into a valid
24 premarital agreement. Those steps began with him retaining counsel, and then making
25 sure that Gail had her own attorney so that the parties could negotiate at arm’s length.
26 (Mark Depo., vol.2, 61:22–64.6). Although in 1993 there was yet no formal requirement
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1 under California law that required Gail to have independent counsel,⁵ Mark prudently
2 insisted Gail be represented by independent counsel. (Mark Depo., vol.2, 67:1–4).
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4 **B. The parties were represented by independent counsel in connection with the**
5 **negotiations that resulted in the Agreement.**

6 **1. Mark was represented by Attorney Ron Kabrins.**
7

8 In December 1992, Mark hired Attorney Ron Kabrins to prepare and negotiate a
9 premarital agreement with Gail. Mark had previously worked with Mr. Kabrins to
10 prepare his will and other legal documents. (Kabrins Depo., 7:1–25). After Mark
11 engaged him, he supplied Mr. Kabrins with some sample premarital agreements that
12 contained terms he wished to be incorporated in his agreement with Gail. (Kabrins
13 Depo., p.127:13–18).
14
15

16 Mr. Kabrins specialized in matters involving trusts and estates, and had
17 previously prepared a few premarital agreements. (Kabrins Depo., 12:16–13:17). To
18 assure that things were done properly, Mr. Kabrins consulted with Certified Family
19 Law Specialist, Mr. Mel Ross, in preparing and negotiating the Agreement. (Kabrins
20 Depo., p.13:10–17).
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23 Mr. Kabrins has meticulously preserved his file after all of these years, and he
24 still has a copy of one of the original executed agreements. (Kabrins Depo., p.55:8–18).
25
26 While Mr. Kabrins file contains protected work product, including most of his attorney

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28 ⁵ Family Code, § 1612(c) instituted, among other things, the independent counsel
requirement, operative January 1, 2002.

1 notes, it is intact after all of these years and should enable the Court to easily discern
2 that the Agreement was the result of a negotiated process that spanned several months.
3

4 **2. Gail consulted with several attorneys and ultimately hired Mr. Ira Friedman**
5 **who represented her in connection with the execution of the Agreement.**

6 Gail has admitted that she received the first draft of the premarital agreement
7 from Mark by no later than the first week of January 1993. (Gail Depo., 152:17–24). At
8 that time, Gail also admits recalling that Mark told her she would “need to get an
9 attorney.” (Gail Depo., 145:1–9). Gail further admits that she sought out legal counsel.
10

11 The record demonstrates that Gail consulted with several family law attorneys,
12 including Ron Anteau, Irv Osser, and Bob Nachshin before she ultimately formally
13 retained Mr. Friedman. (Gail Depo., 200:22–202:18). Even though Gail claims that she
14 never formally engaged anyone but Mr. Friedman, at least two of the other attorneys
15 contacted Mr. Kabrins on Gail’s behalf. (Gail Depo., 189:6–192:2, 206:17–208:3; Trial
16 Exhibit No. 509).
17

18 The record also establishes that even before she formally engaged counsel, Gail
19 had formed her own views of terms she thought should be included in the premarital
20 agreement. For example, Gail submitted an initial term sheet to Mr. Kabrins dated
21 January 20, 1993 that included terms she wanted to be included in the premarital
22 agreement. (Trial Ex. No. 511). Pursuant to that term sheet, Gail wanted Mark to obtain
23 a life insurance policy and name her as beneficiary; to increase in the amount of post-
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1 dissolution spousal support; and to provide her a 10% interest in several of Mark's
2 businesses. (Trial Ex. No. 511). Based on Mark's mixed response to the demands Gail
3 made in her letter, she decided that she "need[ed] to get a lawyer right away." (Gail
4 Depo., 198:20-199:8).

5
6 Gail admits she ultimately hired Mr. Friedman. While Gail now evidently
7 regrets that she used Mr. Friedman, she in fact selected a very experienced family law
8 attorney. As his resume demonstrates, Mr. Friedman has been a certified family law
9 specialist since 1983. (Friedman Depo., 7:7-12). He is a fellow of both the American
10 Academy of Matrimonial Lawyers and the International Academy of Matrimonial
11 Lawyers. (Trial Ex. No. 521). He served as a *judge pro tempore* for the Los Angeles
12 Superior Court as well as the Beverly Hills and Los Angeles municipal courts from
13 1980-2000. (Trial Ex. No. 521). He has also been retained on a number of occasions as
14 an expert witness in the field of family law. (Friedman Depo., 13:8-17:28). He has
15 served as a lecturer on family law matters on scores of occasions. (Trial Ex. No. 521).

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22 **3. The negotiations resulting in the Agreement took place over 3 months.**

23 By the time Gail had retained Mr. Friedman, there had already been *five separate*
24 *proposed drafts* of the Agreement. As demonstrated by the successive drafts, the
25 proposed Agreement evolved considerably. For example, in the first draft, the main
26 benefit to Gail in the event of dissolution is \$25,000 annually in spousal support. (Trial
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1 Ex. No. 501). By the final, executed Agreement, an entire section entitled “Benefits to
2 Gail” had been added to the agreement. (Trial Ex. No. 508). Her benefits included a \$1
3 million life insurance policy on Mark’s life, naming Gail as beneficiary; the right to all
4 weddings gifts, including money, as her separate property; reimbursement of \$6,000 for
5 the purchase of her engagement ring; and, in the event of dissolution, spousal support
6 of at least \$37,500 per year for every year of marriage and premiums on medical
7 insurance and automobile insurance, as well as an automobile of commensurate value
8 to the one she owned prior to the marriage. (Trial Ex. No. 508). The record makes clear
9 that these modifications to the prior drafts were the result of the communications
10 between the attorneys for Gail and Mark.

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15 The two attorneys ultimately involved, Mr. Friedman and Mr. Kabrins,
16 exchanged telephone calls and letters regularly. (See Trial Exhibit No. 509). A further
17 three proposed drafts were also exchanged in this time. (See Trial Exhibit Nos. 506–08.)
18 Beginning March 23, 1993, Mr. Kabrins believed that the Agreement had been finalized.
19 (Trial Ex. No. 515). However, Mr. Friedman persisted on further concessions and
20 demanding proof that Mark had taken out a life insurance policy before Gail finally
21 signed. (See Trial Ex. No. 516.) Finally, Gail and Mark signed the final version of the
22 Agreement on March 26, 1993. (Trial Ex. No. 508).
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1 C. The parties adequately disclosed their assets and liabilities to one another, and
2 validly waived the right to obtain any more disclosures than were made by
3 one another.

4 Attached to the Agreement were the parties' personal balance sheets. Beginning
5 with the first letter from one of Gail's attorneys to Mr. Kabrins on January 7, 1993, the
6 topic of financial disclosure was part and parcel of the ongoing communications
7 between the sides. (Trial Ex. No. 510). Mark produced documents showing the extent
8 of his personal property as well as his financial obligations, which became Exhibit A to
9 the Agreement. (See Trial Ex. No. 508). Moreover, even though it was not required by
10 Former Civil Code § 5315, which required only "a fair and reasonable disclosure of the
11 *property or financial obligations* of the other party," Mark also disclosed his cash flow.
12 (See Trial Ex. No. 508).

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There is no question that Mark adequately disclosed all of his property and
financial obligations pursuant to the personal balance sheet which he attached to the
Agreement as Exhibit A. The personal balance sheet did not omit any of the several
illiquid and valuable assets that Mark owned as of the date of marriage. Mark
disclosed, and attached to the Agreement as Exhibit A, a financial statement dated
November 30, 1992. (Trial Ex. No. 508). According to the statement, Mark's total assets
totaled just over \$70 million. (Trial Ex. No. 508). However, only \$157,000 of his assets
was cash. (Trial Ex. No. 508). The rest of Mark's separate property (as revealed in his
personal balance sheet) was comprised of holdings that were illiquid assets, and not

1 readily susceptible to valuation. For example, he had over nine real property holdings,
2 and ownership interests in several privately held companies. (Trial Ex. No. 508.) There
3
4 were no appraisals done on the real estate. Mark had founded Antiquarian Traders in
5 1977. It owned antiques that were stores in a 100,000 square foot warehouse. There
6
7 were thousands of pieces with a value somewhere around \$10 million. Many of these
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9 pieces had been purchased well over 10 years before the marriage, and it was difficult
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11 to place a value on them. The valuation of Antiquarian Traders on the balance sheet
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13 was simply a best guess. Mark also documented his financial liabilities, consisting
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15 primarily of mortgage debts, to the sum of nearly \$29 million. (Trial Ex. No. 508.)

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17 Gail puts considerable emphasis on the fact that Mark had previously generated
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19 a property and financial obligations statement dated November 15, 1992 that reflected a
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21 higher net-worth than the disclosure that was attached to the Agreement. While it is
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23 true that Mark circulated a copy of this other balance sheet to Mr. Kabrins, the fact that
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25 there were two compiled balance sheets assigning different values to Mark's illiquid
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27 (and hard to value) assets is hardly the evidentiary boondoggle Gail now makes it out
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29 to be. There is no evidence that the values that Mark assigned to his illiquid assets in
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31 his compiled November 15 statement are any more accurate than the one that was
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33 attached to the Premarital Agreement. Significantly, both of the compiled balance
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35 sheets fully disclosed all of Mark's illiquid assets at the time. Nothing under the
36
37 existing law that governed premarital agreements in 1993 required parties to go to the

1 expense and burden of hiring appraisers or forensic accountants to value things like real
2 property or privately held interests in corporations.
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4 Not only was Mark under no legal obligation under the UPAA (as it existed back
5 in 1993) to obtain valuations of his illiquid assets from appraisers or forensic
6 accountants, but the parties made expressly clear in the Agreement that “even if the
7 nature, extent or value of the other party’s property and income is substantially and
8 materially in excess of the amounts reflected or indicated by [their personal balance
9 sheets] and/or otherwise disclosed to such party, such fact would have no bearing on
10 such party’s decision to enter into this Agreement.” (See Trial Exhibit 508, ¶2). The
11 record demonstrates that Mr. Friedman was satisfied with Mark’s disclosure statement
12 and in fact proposed adding language to the Premarital Agreement that made it clear
13 the parties were simply providing “to the best of their abilities . . . the probable value”
14 of the assets listed in their personal balance sheets. (See Trial Exhibit 508, Recital B to
15 Agreement). Pursuant to the holding of *In re Marriage of Hill & Dittmer* (2011) 202
16 Cal.App.4th 1046 such language constitutes a waiver of the obligation to make any
17 more detailed disclosure, and that is the end of the matter.
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24 Gail also produced a statement of her assets, although her disclosure is much less
25 detailed. (Trial Ex. No. 508). While Gail discloses, for example, three separate bank
26 accounts and a trust, there are no details about the amount of money in any of them.
27 (Trial Ex. No. 508). In short, Gail did not disclose the amount of her assets or liabilities,
28

1 except to say that she had \$2,000 worth of liabilities in charge accounts. (Trial Ex. No.
2 508).

3
4 **D. The provisions from the Agreement that Gail now intends to take issue with**
5 **in this trial.**

6 The Agreement is 9 pages and includes 5 recital paragraphs and 16 numbered
7 paragraphs. The Agreement uses clear, unambiguous language that lays out the rights
8 and responsibilities of the parties in simple terms. Of particular relevance are the
9 provisions relating to post-dissolution spousal support and the provision of attorneys'
10 fees in disputes arising out of the Agreement.
11

12
13
14 **1. The Agreement includes a limitation on the amount of spousal support Gail is**
15 **to receive.**

16 Paragraph 7 of the Agreement limits the amount of spousal support that Gail is
17 to receive. Under that provision, Gail is to obtain \$3,125 a month for a maximum
18 duration of the total number of years of the marriage.⁶ Paragraph 7 states in relevant
19 part:
20

21
22 "LIVING ALLOWANCE-SUPPORT. In the event a termination of the
23 marital relationship takes place by way of dissolution, legal separation or
24 annulment (defined herein to occur upon filing of a Petition for
25 Dissolution of Marriage), GAIL shall not be entitled to any spousal
26 support from MARK except as provided herein, namely, that MARK shall

27 _____
28 ⁶ The Agreement also provides that Mark's obligation to provide spousal support
would terminate if Gail remarried or cohabitated with an adult male for a period
of 90 days or more.

1 pay to or for the benefit of GAIL as spousal support, the following:

2 A. The sum of \$37,500 per annum, payable monthly, plus *additional spousal*
3 *support* of \$750 per month for each child born to the Parties.

4 Said payments under subparagraph A, B, C above of this paragraph 7
5 shall commence on the first day of the month following separation and
6 shall continue until GAIL's death, remarriage, cohabitation with an adult
7 male . . . , or for a period of one year for each year of marriage, whichever
8 shall first occur." (Trial Ex. No. 508, ¶ (7)). (Emphasis added).

9 This provision fixed spousal support at a minimum of \$3,125 per month,
10 regardless of Mark's future ability to pay. Moreover, although the Agreement provides
11 for an *additional* amount of spousal support for each child born to the parties, this is
12 expressly made *spousal support* and *not* child support. In fact, it was Gail's attorney, Mr.
13 Friedman, who requested that the spousal support be increased in the event that
14 children were born of the marriage. (Trial Ex. No. 514).

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18 **2. The Agreement calls for Mark to pay Gail's reasonable attorneys' fees, but not**
19 **for disputes arising out of her challenging the validity of the Agreement.**

20 Two separate provisions dictate the handling of attorneys' fees. First, the
21 Agreement expressly obligates Mark to pay reasonable attorney's fees as follows:

22
23 "Subject to the limitations set forth in Paragraph 10 below, MARK shall
24 pay GAIL's reasonable attorneys fees incurred by her for any dissolution
25 proceedings." (Trial Ex. No. 508, ¶ (7)(E)).

26 This provision, like the spousal support provision, does not hinge on Mark's
27 future ability to pay, nor is the provision limited to instances where Gail prevails on her
28

1 claims. Paragraph 10 states that the parties shall bear their own attorneys' fees for any
2 disputes regarding the validity of the Agreement:
3

4 "ATTORNEY'S FEES. The Parties have reached a complete understanding
5 as to terms and conditions of this Agreement. Accordingly, if a dispute
6 arises between the Parties hereto concerning the validity of this
7 Agreement, each Party shall be responsible for his or her own attorney's
8 fees, court costs, and expenses incurred." (Trial Ex. No. 508, ¶ (10)).

- 9 **3. The Agreement expressly acknowledges that the parties have made fair and**
10 **reasonable disclosures of their assets and liabilities, and expressly waives any**
11 **rights to further disclosures.**

12 Paragraph 2 of the Agreement includes clear and explicit acknowledgement that
13 Mark and Gail were familiar with, and had received fair and reasonable disclosures of
14 the other's property and liabilities:
15

16 "DISCLOSURE. Each of the Parties acknowledges and declares that he or
17 she is familiar with the nature, extent, and value of the property which the
18 other party claims to own, hold or have interest in and his or her earnings
19 and income as of the date of this Agreement. Each of the Parties further
20 acknowledges that even if the nature, extent, or value of the other party's
21 property and income is substantially and materially in excess of the
22 amounts reflected or indicated by Exhibits "A" or "B" and/or otherwise
23 disclosed to such party, such fact would have no bearing on such party's
24 decision to enter into this Agreement." (Trial Ex. No. 508, ¶ (2)).

- 25 **4. The Agreement contains a savings clause that preserves all provisions of the**
26 **Agreement that are not held invalid.**

27 The Agreement also provides that "In the event that any one or more of the
28 provisions of this Agreement shall be invalid, illegal, or unenforceable, all other

1 provisions hereof shall be given effect separately therefrom and shall not be affected
2 thereby.” (Trial Ex. No. 508, ¶ (14)).
3

4 **5. The Agreement contains a merger and incorporation clause that precludes the**
5 **use of oral representations or modifications to alter it.**

6 The Agreement is fully integrated:

7
8 “MODIFICATION. This Agreement contains the entire Agreement
9 between the Parties. Any oral representations or modifications herebefore
10 or hereafter made concerning this Agreement shall be of no force or effect;
11 provided, however, that this Agreement may be altered in the future only
12 by a WRITTEN Agreement of the Parties, signed by both Parties, which
13 refers specifically to this Agreement.” (Trial Ex. No. 508, ¶ (16)).

14 The integration clause is important in this matter because the Agreement itself
15 unambiguously states that Gail is waiving certain of her rights, so any assault on the
16 Agreement would have to be done with extrinsic evidence. The integration clause
17 would preclude introduction of such extrinsic evidence.
18

19 **E. Gail has spoiled key evidence in the case by her mishandling of Mr.**
20 **Friedman’s file and has further sought to prejudice Mark by not complying**
21 **with her agreement to make herself available to complete her deposition as**
22 **she promised on the record to do.**

23 **1. Gail has spoiled the Friedman File.**

24 Although Gail evidently intends to claim at trial that her assent to the Agreement
25 was involuntary, she has spoiled critical evidence that her assent was voluntary. In
26 January 2008, Gail, contemplating a divorce, collected her entire file from Ira
27 Friedman’s office (the “Friedman File”). (Gail Depo., p.89:21–91:9.) Although she
28

1 hadn't talked to Friedman since he represented her in connection with the Agreement,
2 in 2008 she insisted on getting her entire file from his office because her relationship
3 with Mark was getting "worse and worse." (Gail Depo., p.91:13-19.) She evidently
4 thought she should begin "keeping everything pertaining to the marriage" because she
5 believed that a divorce was likely. (Gail Depo., p.95:3-12.) However, rather than
6 carefully preserve the Friedman File for use in litigation, she destroyed the file's
7 integrity by mixing it up with a variety of other files in a large plastic bin that contained
8 hundreds if not thousands of pages of other documents. (Gail Depo., p.95:3-96:14). It
9 would not have been hard for Gail to produce the Friedman File. She never made any
10 effort to produce the file through discovery or at deposition, so it is obvious that she
11 believes its contents would likely damage her case. The Court should enter appropriate
12 sanctions against Gail for this spoliation of evidence, and Gail should be estopped from
13 contesting that the Agreement is valid and enforceable.
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19 At her deposition, Gail admitted that she did not carefully preserve the Friedman
20 File after she retrieved it from Mr. Friedman's office:
21

22
23 Q: I'm just trying to ask for Ira Friedman's [records] in particular.

24 A: It just got dumped into the big file.

25
26 Q: So you dumped his file into the bigger file of documents?

27 A: Right. Yes.
28

1 * * *

2 Q: This is in a bigger box? Describe - -

3
4 A: It was in a plastic tub.

5 Q: Okay. So about how many other documents would you - - how big is the
6 plastic tub?

7 A: About four feet.

8
9 Q: Okay. And was that plastic tub pretty much filled with other documents?

10 A: Yes.

11
12 **Q: Okay. And you dumped the documents you received from Ira Friedman**
13 **into that plastic tub, correct?**

14 **A: Yes.** (Gail Depo., p.95:13-18; p.96:3-14) (emphasis added).

15
16 Gail admitted at her deposition that as a result of mixing the Friedman file up
17 with other documents that she couldn't discern what documents the Friedman File
18 originally contained before she dumped them in with her other files. (Gail Depo.,
19 p.99:9-102:2.) In fact, she admits "didn't go through it one by one. I may have just
20 glanced at it." (Gail Depo., p.102:7.) Moreover, Gail admitted that for over two years
21 after she got the Friedman File, she continued to throw documents into the large plastic
22 bin she had, causing the various documents in that bin to become hopelessly
23 intermingled with one another. (Gail Depo., p.98:5-14; p.99:20-23.)
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1 Because Gail insisted on the immediate return of her file, Mr. Friedman obliged
2 Gail by not retaining a copy of it on his own. (Ira Friedman Depo., p.18:3.) At his
3 deposition, Mr. Friedman produced a one-page document verifying that his *entire* file
4 had been turned over to Gail. (Trial Ex. No. 522.) He also testified that he did not retain
5 a copy of the file after Gail insisted upon its immediate return. (Ira Friedman Depo.,
6 p.17:7). Not surprisingly, now nearly twenty years after the Agreement was executed,
7 Mr. Friedman had no independent recollection of working with Gail, or of the
8 negotiations that resulted in the Agreement being finalized. (Ira Friedman Depo.,
9 p.20:11). Without having the benefit of his file to review, Mr. Friedman was unable to
10 recall virtually any of the circumstances surrounding the work he performed for Gail.
11 (Ira Friedman Depo., p.26:8). Nor could Mr. Friedman even recall what his file
12 contained without being able to review it. (Ira Friedman Depo., p.18:4). Consequently,
13 and as a result of Gail's spoiling this evidence there is now no way of telling what the
14 Friedman File contained, or what advice, counsel, or attention that Mr. Friedman
15 provided to Gail in the course of negotiating the Agreement. Accordingly, Gail's
16 deliberate acts of spoiling the Friedman File have serious ramifications for these
17 proceedings.
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1 **2. Gail reneged on her agreement to complete her open deposition prior to trial,**
2 **further prejudicing Mark’s rights here.**

3 The trial Court made clear when it sent this matter to Department 2 that it
4 expected the parties to complete their depositions on the Agreement prior to trial. Gail
5 submitted to one day of deposition testimony. At the end of Gail’s deposition
6 proceeding, the parties agreed to postpone the end of her testimony since the hour was
7 late. (Gail Depo., pp.255:5–257:1). Gail agreed then to finish her deposition and to work
8 in good faith to do so before the upcoming bifurcated trial date. (Gail Depo., pp.255:5–
9 257:1). However, as Mark’s counsel has made clear in multiple letters to Gail’s counsel,
10 Gail has reneged on that promise and has refused to make herself available prior to this
11 trial. This refusal is prejudicial to Mark, and the Court should take her refusal to
12 complete her deposition into account during this trial.

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18 **III. Argument**

19 Gail bears the burden to prove that the Agreement is not valid. However, a
20 review of the Agreement shows that it contains no provisions that are contrary to public
21 policy. Under the circumstances surrounding the execution of the Agreement, namely
22 Gail’s representation by independent counsel, the length and nature of the negotiations,
23 and Gail’s business savvy, there is no question that Gail executed the Agreement
24 voluntarily. She did so after having been given a fair and reasonable disclosure of
25 Mark’s estate. Moreover, due to these same reasons, it is readily apparent that the
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1 Agreement was not unconscionable at the time it was executed. Therefore, the Court
2 should hold that the Agreement is valid.
3

4 **A. Gail bears the burden to prove that the Agreement, which she admits she**
5 **signed, should now be invalidated by the Court.**

6 According to the law in place at the time the Agreement was executed—March
7 1993—the party seeking to avoid enforcement of a premarital agreement bears the
8 burden of proof. Former Civ. Code, § 5312. The Uniform Premarital Agreement Act
9 (the “Act”), operative January 1, 1986, governs the Slotkins’ Agreement.⁷ The Act
10 permitted parties to a premarital agreement to contract with respect to property rights
11 and any other matter not in violation of public policy or criminal statute. *See* Former
12 Civil Code § 5312. The Act also explicitly placed the burden of proof on the party
13 seeking to avoid enforcement of premarital agreements. Former Civil Code § 5315; *In re*
14 *Marriage of Bonds* (2000) 24 Cal.4th 1, 19 (discussing legislature’s intent to place the
15 burden of proof on the party seeking to invalidate a premarital agreement).
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21 Although the Act was amended in 2002, those amendments are not retroactively
22 applicable. *In re Marriage of Howell* (2011) 195 Cal.App.4th 1062, 1077 (enactment of
23 § 1612, subd. (c) not retroactive); *In re Marriage of Hill & Ditmer* (2011) 202 Cal.App.4th
24 1046, 1055–56 (amendment of § 1615 not retroactive). Thus, “[t]he law applicable to the
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26
27 ⁷ See Stats. 1985, ch. 1315, § 3. The Act was first enacted as Civil Code § 5300 *et*
28 *seq.*, and was reenacted without substantive change as Family Code § 1600 *et seq.*,
operative January 1, 1994. See 23 Cal.L.Rev.Comm. Reports 1 (1993).

1 validity and enforcement of premarital agreements turns on the date of execution.” *In*
2 *re Marriage of Melissa* (Dec. 3, 2012, G045899 & G046261) __ Cal.App.4th __ [p. 16] [2012
3 WL 6012835] (*quoting* Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter
4 Group 2012) ¶9:141, p. 9-36.16). The parties executed the Agreement in March 1993,
5 and therefore the laws in force as of 1993 are controlling.
6
7

8
9 **1. The Act permitted limits on spousal support, and allowed parties to contract**
10 **on any topic not contrary to public policy or criminal statute.**

11 Premarital agreements executed pursuant to the Act may contain limitations, or
12 even complete waivers, of spousal support. *In re Marriage of Pendleton & Fireman, supra,*
13 24 Cal.4th at 53. In *Pendleton*, the California Supreme Court acknowledged that
14 premarital waivers of spousal support, like premarital waivers of property rights, are
15 not contrary to public policy. *Id.* Moreover, California law favors enforcement of a
16 premarital agreement so long as it was “entered into voluntarily by parties who are
17 aware of the effect of the agreement.” *Id.*
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21 **2. The Act was intended to encourage the enforceability of premarital**
22 **agreements, and specifically the enforceability of provisions that limit or**
23 **waive spousal support.**

24 The California Supreme Court has made clear that the provisions of the Act were
25 intended to enhance the enforceability of spousal support limitations in premarital
26 agreements. *In re Marriage of Pendleton & Fireman, supra,* 24 Cal.4th at 53 (“[T]oday the
27 availability of an enforceable premarital agreement may in fact encourage rather than
28

1 discourage marriage"); *In re Marriage of Bonds, supra*, 24 Cal.4th at 14; *In re Marriage of*
2 *Howell* (2011) 195 Cal.App.4th 1062, 1072 ("Instead, as *Pendleton* recognized there was a
3 shift in public policy towards enforcement of such provisions"). Therefore, the Act as it
4 existed in 1993 should be construed to protect premarital agreements, provided that the
5 parties to an agreement have otherwise complied with the requirements of the day.
6

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8
9 **3. The Act emphasizes disclosure rather than fairness to prevent endless re-**
10 **litigation whenever a party has a change of heart about a previous validly-**
11 **executed agreement.**

12 In the context of prenuptial agreements, fairness, for better or worse, is not the
13 touchstone. Instead, the focus is on disclosure of assets, so that a voluntarily executed
14 premarital agreement is enforceable "as long as the objecting party knew or should
15 have known of the other party's assets." *In re Marriage of Bonds, supra*, 24 Cal.4th at 16–
16
17 17. Accordingly, there are three narrow issues presently before this Court: (1) does any
18 provision of the Agreement violate public policy; (2) was the Agreement executed
19 voluntarily; and (3) did Gail receive an adequate disclosure of Mark's property and
20 financial obligations? If Gail proves she did *not* receive an adequate disclosure, then
21 she must also prove that the Agreement was unconscionable at the time it was
22 executed, in order to invalidate the Agreement. *See* Former Civil Code § 5315.
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1 **B. No subject matter in the Agreement violates public policy or limits the rights**
2 **of the Slotkin children to support, and therefore no part of the Agreement is**
3 **invalid.**

4 Parties to a 1993 premarital agreement were permitted to contract on any topic,
5 including personal rights and obligations, that is not in violation of public policy or a
6 criminal statute. Former Civ. Code, § 5312. Although Gail has asserted previously that
7 the Agreement should be invalidated because its provisions are contrary to public
8 policy, an examination of the relevant portions of the Agreement shows that no such
9 concerns are valid.
10

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13 **1. The provision fixing spousal support is permitted because premarital**
14 **agreements in 1993 may limit or even waive spousal support.**

15 The Agreement *fixes* spousal support to at least \$3,125 per month. A premarital
16 agreement executed after January 1, 1986 may limit or even waive spousal support
17 entirely without violating public policy. *In re Marriage of Pendleton & Fireman* (2000) 24
18 Cal.4th 39, 49. Moreover, as demonstrated by the recent Court of Appeals decision, *In*
19 *re Marriage of Hibbard* (Jan. 15, 2013, A135901) __ Cal.App.4th __ [p. 10] [2013 WL
20 151180], agreements that fix a minimum level of spousal support are binding on *both*
21 parties, regardless of a change in a party's ability to pay. In *Hibbard*, the appellate court
22 affirmed a trial court's refusal to terminate spousal support where the parties had
23 previously executed a marital settlement agreement that set a minimum support level
24 of \$2,000. *Id.* at __ [p. 2]. The husband had argued that spousal support should be
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1 terminated because he had become disabled and was no longer able to pay even the
2 minimum amount. *Id.* In affirming the trial court’s refusal to terminate spousal
3 support, the appellate court held that “despite intervening, possibly unfair, changes of
4 circumstance,” courts do not have the power to modify contractually-fixed spousal
5 support. *Id.* at __ [p. 8]. Therefore, the spousal support provision of the Agreement is
6 binding on both parties, and does not violate public policy.
7
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9
10 **2. Gail’s nonsensical argument that the Agreement illegally limits child support**
11 **has no basis in fact because the Agreement does not even mention child**
12 **support.**

13 Gail’s argument that the Agreement should be invalidated because it supposedly
14 limits child support is completely without legal or factual merit. In her *Response to*
15 *Respondent’s Form Interrogatories, Set Two*, Gail repeatedly presented this argument as
16 part of her indiscriminate objections to Mark’s form interrogatories. Gail claimed that
17 paragraph (7)(A) of the Agreement, which provides for *additional spousal support* for
18 each child born Mark and Gail, somehow limits the right of the Slotkin children to
19 support. While it is true that “[t]he right of a child to support may not be adversely
20 affected by a premarital agreement,”⁸ Gail’s *own* attorney insisted on the increase in
21 spousal support for any children born of the marriage, and explicitly specified “[t]his is
22 separate and apart from any provision for child support.” (Trial Ex. No. 514.)
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⁸ Former Civ. Code, § 5312, subd. (b).

1 Therefore, the Agreement does not limit the right of the Slotkin children to support, and
2 thus does not run afoul of any public policy concerns.
3

4 **3. The waiver of attorney’s fees in any disputes concerning the validity of the**
5 **Agreement is likewise valid because it is not contrary to public policy and has**
6 **nothing to do with the right of the Slotkin children to support.**

7 Courts have consistently upheld the right of parties to waive attorneys’ fees,
8 provided that such waivers do not implicate the welfare of any children in the marriage.
9 *In re Marriage of Joseph* (1990) 217 Cal.App.3d 1277, 1284–85 & fn.4 (distinguishing
10 between spousal support disputes (subject to waiver) and child support disputes (not
11 subject to waiver). The Agreement’s waiver of attorneys’ fees is limited to a waiver of
12 costs in connection with disputes as to the validity of the Agreement. This in no way
13 implicates child support or child custody because, as shown above, the Agreement
14 simply does not contemplate those subjects. Therefore, neither the attorneys’ fee waiver
15 nor any other provision of the Agreement is invalid.
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20 **C. The Agreement is enforceable because Gail’s assent to it was voluntary, and**
21 **the Agreement was not unconscionable.**

22 Under the Act as it existed in 1993, premarital agreements could be rendered
23 unenforceable under just two narrow circumstances: (1) the party seeking to avoid
24 enforcement proves that the agreement was not entered voluntarily; or (2) the party
25 seeking to avoid enforcement proves that he or she did not receive a fair and reasonable
26 disclosure of the other’s assets and liabilities, *and* that the agreement was
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1 unconscionable at the time it was executed. Former Civ. Code, § 5315. The record
2 demonstrates that Gail cannot prove either narrow condition in order to invalidate the
3 Agreement, least of all because the Agreement was only executed after months of
4 extensive give-and-take negotiations.
5

6
7 **1. Clearly the Agreement was voluntarily executed because each side had the**
8 **benefit of independent counsel and the Agreement was only finalized after**
9 **months of negotiations and at least eight drafts.**

10 While the presence or absence of any particular factor is not dispositive, several
11 important considerations inform the determination of voluntariness, including: the
12 presence of independent counsel, the length of time the challenging party had to review
13 the agreement, and the level of education and intelligence of the parties. *In re Marriage*
14 *of Pendleton & Fireman, supra*, 24 Cal.4th 39, 53–54. Gail has admitted that prior to her
15 marriage she had earned both a bachelor’s degree and a realtor’s license. She also had
16 extensive experience in previous litigation, as well as in business matters. Moreover,
17 Mark’s undisputed testimony shows that he made his desire for a premarital agreement
18 clear early on in his relationship with Gail, well before their nearly year-long
19 engagement. Finally, Gail had the important benefit of independent counsel. The
20 Agreement took months to negotiate, in part because of changes that Gail requested.
21 There is no doubt the Agreement here was “entered into voluntarily by parties who are
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1 aware of the effect of the agreement.” *In re Marriage of Pendleton & Fireman, supra*, 24
2 Cal.4th at 53.

3
4 **a. Gail’s misguided reliance on duress and fraud to invalidate the Agreement**
5 **fails because those claims require a showing of intent that is not present**
6 **here.**

7 Both fraud and duress, as affirmative defenses to contracts, involve an
8 intentional deprivation of a party’s free will. To prove duress, Gail must prove that
9 Mark intentionally used threats or pressure to induce Gail’s assent such that she had no
10 reasonable alternative to succumbing. *In re Marriage of Balcof* (2006) 141 Cal.App.4th
11 1509, 1523. Likewise, to establish an affirmative defense of fraud, Gail must prove that
12 Mark knowingly made a misrepresentation with intent to deceive. *Byrum v. Brand*
13 (1990) 219 Cal.App.3d 926, 947. The record bears out no direct or circumstantial
14 evidence that Mark ever intended to coerce or deceive Gail into signing the Agreement.
15 Nor does the record show any possible motivation for Mark to do so. Mark informed
16 Gail that he wanted a premarital agreement well before the parties entered negotiations.
17 Mark also told Gail several times that she needed to retain independent counsel in
18 negotiating the Agreement, which she did. There was no intent to coerce or to deceive,
19 much less actual coercion or deception.
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25 Moreover, the claims of fraud and duress require contradictory showings of fact.
26 By arguing both defenses, Gail claims simultaneously that she was deprived of her free
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1 will in signing the Agreement, and also that she was convinced to freely sign the
2 Agreement by Mark’s purported misrepresentations. This demonstrates the lack of
3 either coherence or merit in Gail’s challenge. Gail cannot present an articulate theory
4 because the truth is that the Agreement was voluntarily executed following months of
5 negotiation between two parties who each had independent counsel.
6
7

8
9 **b. There is no presumption of undue influence in a premarital agreement**

10 Unlike married persons, parties to a premarital agreement do not owe each other
11 a strict fiduciary duty. *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 29 (“On the contrary,
12 it is evident that the Uniform Act was intended to enhance the enforceability of
13 premarital agreements, a goal that would be undermined by presuming the existence of
14 a confidential or fiduciary relationship”). While a confidential relationship can be
15 imposed by statute such as between married persons,⁹ or implied by case law such as
16 between a parent and child,¹⁰ a confidential relationship only exists when “one of the
17 parties is duty bound to act with the utmost good faith for the benefit of the other
18 party.” *Estate of Llewellyn* (1948) 83 Cal.App.2d 534, 561–62.
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28 ⁹ Family Code, § 721.

¹⁰ *In re Eakle’s Estate* (1939) 33 Cal.App.2d 379, 388.

1 **2. Gail cannot viably argue that the Agreement was unconscionable because she**
2 **cannot show that there was an inadequate disclosure of Mark’s property and**
3 **financial obligations.**

4 A failure of disclosure is “a necessary predicate to considering the issue of
5 unconscionability.” *In re Marriage of Bonds, supra*, 24 Cal.4th at 15 (the challenging party
6 must show “that he or she did not have actual or constructive knowledge of the assets
7 and obligations of the other party and did not voluntarily waive knowledge of such
8 assets and obligations”). There is no evidence to suggest that Mark’s disclosure of his
9 property and financial obligations was anything other than the “fair and reasonable”
10 disclosure required by Former Civil Code § 5315. It is also implausible that Gail, who
11 had been a licensed realtor for over 5 years when she executed the Agreement, did not
12 understand that Mark’s real estate holdings were not readily convertible to liquid
13 assets, or that she did not understand that the valuations associated with his real estate
14 holdings were estimates. Additionally, assuming *arguendo* that Mark’s disclosures were
15 inadequate (which they were not), Gail expressly waived any right to further disclosure
16 in Paragraph 2 of the Agreement.
17

18 **3. Even if Gail could show an inadequate disclosure, the Agreement was not**
19 **unconscionable at the time it was executed because there was no oppression or**
20 **surprise, and the terms of the Agreement are not overly one-sided.**
21

22 In addition to demonstrating a failure of disclosure, Gail would have to show
23 both procedural and substantive unconscionability at the time the Agreement was
24 executed. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83,
25

1 114; Former Civil Code § 5315 (unconscionability of premarital agreement measured at
2 time agreement is executed). Procedural unconscionability involves a showing of
3 oppression or surprise. *Armendariz, supra*, 24 Cal.4th at 114. Substantive
4 unconscionability, on the other hand, focuses on ‘overly harsh’ results. *Id.* However,
5 under the circumstances in which the Agreement was signed, neither form of
6 unconscionability was present. As demonstrated above, Gail was neither oppressed nor
7 ambushed. Given that she was represented by such experienced counsel, there is no
8 colorable argument that the Agreement was procedurally unconscionable. Likewise the
9 Agreement cannot be said to be completely one-sided just because Gail now wants a
10 better deal. Gail demanded and received many benefits under the Agreement,
11 including an increase in the amount of post-dissolution spousal support. She did not
12 get everything she asked for, but neither did Mark. There was not even the specter of
13 unconscionability in the execution of the Agreement, and Gail’s insistence on a trial
14 here is an unnecessary waste of the parties’ resources as well as this Court’s resources.

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21 **D. Gail should be precluded from arguing that her assent to the Agreement was**
22 **involuntary because she has spoiled evidence relevant to whether or not she**
23 **had independent counsel.**

24 The Court should preclude Gail from asserting that her assent to the Agreement
25 was involuntary as a sanction for Gail’s spoliation of evidence. Spoliation is the
26 destruction or significant alteration of evidence, or the failure to preserve evidence in
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1 pending or reasonably foreseeable litigation. *Reeves v. MV Transp., Inc.* (2010) 186
2 Cal.App.4th 666, 681. Relief from spoliation is available where the party who had
3 control over the evidence fails to take reasonable steps to preserve the evidence. (*Id.* at
4 681–82.) Available relief can include a negative inference instruction at trial, or, if the
5 destruction occurs after litigation has commenced, evidentiary sanctions. (Evid. Code,
6 § 413; Code Civ. Proc., §§ 2023.010 & 2023.030). The court has broad discretion to
7 impose a sanction that is appropriate under the circumstances on a case by case basis.
8 *Puritan Ins. Co. v. Superior Court* (1985) 171 Cal.App.3d 877, 884 (trial court properly
9 excluded expert witness testimony based on examination of item that was subsequently
10 lost by the expert); *Thor v. Boska* (1974) 38 Cal.App.3d 558 (trial court abused discretion
11 by not sanctioning defendant for spoliation of critical evidence); *Reeves v. MV Transp.,*
12 *Inc.* (2010) 186 Cal.App.4th 666, 682 (job applicant entitled to adverse inference where
13 employer knowingly—but without intent to suppress the evidence—destroyed job
14 applications).

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22 **1. The Friedman File has been irreparably spoiled by Gail’s actions.**

23 Gail spoiled her attorney’s files by “dumping” them in a large plastic bin that
24 contained numerous other documents. The Friedman File is vital to the issues of
25 whether Gail had independent, competent counsel when she negotiated the Agreement,
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1 and whether her assent to the Agreement was voluntary. Gail's actions have destroyed
2 critical evidence in this case.

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4 Gail was obligated to preserve the integrity of the Friedman File because the
5 Slotkins' marriage was clearly in trouble at the time she insisted on having the
6 Friedman File turned over to her, and a marital dissolution proceeding was foreseeable.
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8 *Reeves v. MV Transp., Inc., supra*, 186 Cal.App.4th at 681 (observing that a party must
9 preserve evidence whenever that evidence is relevant to an issue in pending or
10 reasonably foreseeable litigation).

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13 **2. Gail put her representation by Mr. Friedman in issue, creating an implied**
14 **waiver of attorney-client privilege.**

15 "The in issue doctrine creates an implied waiver . . . when [the privilege's holder]
16 tenders an issue involving the substance or content of a protected communication. . . ."
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18 *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 363 ("This doctrine stems from
19 considerations of fairness."). Despite the clear evidence that Gail was represented by
20 independent counsel when she negotiated and signed the Agreement, Gail now seeks to
21 avoid enforcement of the Agreement by claiming that her assent was not voluntarily
22 given. Yet Gail has claimed privilege to withhold critical evidence regarding Mr.
23 Friedman's professionalism, independence, and competence. (*See Trial Ex. No. 523*
24 (*Gail's privilege log*)). This is fundamentally unfair. Since Gail carries the burden of
25 proof, and because she has brought the facts of her representation by Mr. Friedman into
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1 issue, the Court should infer that the purportedly-privileged documents would tend to
2 show that Gail received competent, independent counsel from Mr. Friedman.

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4 **3. Evidentiary sanctions are appropriate here, given Gail's actions.**

5 Gail is the party who is asking the Court to invalidate the parties' duly executed
6 Agreement, and therefore Gail bears the burden of proof to show why the Agreement is
7 not valid. Yet, Gail's failure to preserve the integrity of the Friedman File now prevents
8 Mark from obtaining a fair trial on the very issue raised by Gail. Evidence Code § 413
9 authorizes the trier of fact to infer that evidence that has been willfully suppressed by a
10 party would have tended to harm that party's case. *See also Thor v. Boska, supra*, 38
11 Cal.App.3d 558, 565 (discussing remedies for spoliation generally). Because of the
12 nature of spoliation, willful suppression may be inferred from circumstantial evidence.
13 *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 992. The Court can
14 and should therefore infer that the Friedman File, both in its original form, and the
15 documents now claimed as privileged, contained evidence that would have shown that
16 Gail voluntarily entered into the Agreement.

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IV. Conclusion

For the foregoing reasons, Mark asks that the Court hold that the Agreement is valid and binding on the parties.

DATED: January 24, 2013

Respectfully submitted,

BRIAN J. KRAMER, P.C.

By:  _____

Brian J. Kramer
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