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66828-5

NO. 66828-5-I

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COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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DONNA M. KELLAR,

Appellant,

vs.

THE ESTATE OF KENNETH L. KELLAR,

Respondent.

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BRIEF OF APPELLANT

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Michael L. Olver, WSBA #7031  
Christopher C. Lee, WSBA #26516  
Kameron L. Kirkevold, WSBA #40829  
Attorneys for Appellant  
Helsell Fetterman LLP  
1001 4<sup>th</sup> Avenue, Suite 4200  
Seattle, WA 98154  
(206) 292-1144

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## I. INTRODUCTION

Appellant Donna M. Kellar (“Mrs. Kellar”) met Kenneth Kellar (“Mr. Kellar”) in 2000. Mrs. Kellar worked in a Blaine, Washington café as a waitress. She generally knew of Mr. Kellar as a wealthy business person in Whatcom County, but had no particular knowledge of him or his business. They dated briefly and were married a year later.

Mr. Kellar proposed just weeks before the date they were married, and asked Mrs. Kellar to sign a prenuptial agreement. Mrs. Kellar first received a copy of the prenuptial agreement only eight days before their marriage on September 19, 2001. The prenuptial agreement had been drafted by Mark Packer, who was at that time Mr. Kellar’s long time attorney and is currently a co-personal representative of the Estate of Mr. Kellar. Despite, earlier advice from Mr. Packer to Mr. Kellar that there should be a full and complete financial disclosure, the prenuptial agreement did not contain any financial disclosures or schedules. The prenuptial agreement severely restricted Mrs. Kellar’s rights and Mrs. Kellar did not have appropriate legal advice nor reasonable opportunity to review the prenuptial agreement. The prenuptial agreement was substantively and procedurally unfair.

Four years later in 2005, Mrs. Kellar learned for the first time that Mr. Kellar’s real net worth was. To her astonishment, Mrs. Kellar learned

that Mr. Kellar had a net worth of \$93 million. Mrs. Kellar and Mr. Kellar remained married until Mr. Kellar's death in December 2009.

Following his death Mrs. Kellar commenced an action to challenge the prenuptial agreement. Mrs. Kellar and Mr. Kellar's estate brought cross-motions for summary judgment. Mrs. Kellar appeals the various rulings which denied her motion for summary judgment and granted the Estate's motion for summary judgment based on estoppel or ratification of the prenuptial agreement.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred when it denied Mrs. Kellar's Amended Motion for Partial Summary Judgment regarding the invalidity of the prenuptial agreement dated February 11, 2011. CP 74-77.

2. The trial court erred in granting the Estate's Motion for Partial Summary Judgment Regarding Estoppel and Ratification, dated February 11, 2011. CP 71-73.

3. The trial court erred in granting the Estate's Motion to Strike Portions of the Declaration of Donna M. Kellar, dated February 11, 2011. CP 78-75.

4. The trial court erred in denying Mrs. Kellar's Motion for Reconsideration, dated March 10, 2011. CP 6-8.

5. The trial court erred in granting the Estate's Motion for Attorney Fees, Costs, and Expenses dated September 1, 2011. CP 2009-2013.

6. The trial court erred in entering the Final Judgment on May 6, 2011. CP 689-691.

**B. Issues Pertaining to Assignments of Error**

1. Under *Marriage of Matson*, 107 Wn.2d 479, 730 P.2d 668 (1986), was the prenuptial agreement void *ab initio* as a matter of law when it was entered into without full disclosure of the respective assets of the parties; without adequate time to consider the agreement; and without Mrs. Kellar understanding her legal rights with regard to the establishment of the agreement?

2. Did the trial court err when it ruled that Donna Keller ratified the prenuptial agreement 4 years after it was signed by failing to contest it while she was still married, even though a void agreement cannot be ratified, *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.3d 871 (2010), and under *In re Estate of Crawford*, 107 Wn.2d 493, 730 P.2d 675 (1986) as a matter of public policy "the economically subservient spouse could not be expected to challenge the dominant spouse during his lifetime"?

3. Did the trial court err when it ruled that Donna Keller was

now estopped from taking the legal position that the prenuptial agreement is invalid when she testified regarding the existence of a prenuptial agreement before the South Dakota Gaming Commission in 2005 even though she did not testify that the prenuptial agreement was “valid”, and even if she had, such an assertion would be a question of law, not fact, which does not preclude her from taking an apparently inconsistent legal position in a later court hearing under *King v. Clodfelter*, 10 Wn. App 514, 521, 518 P.2d 206 (1974)?

4. Did the trial court err in granting the Estate’s motion for summary judgment because questions of material fact existed with regard to Mr. and Mrs. Kellar’s abandonment of the terms of the prenuptial agreement?

5. Did the trial court err in striking portions of Mrs. Kellar’s declaration when statements as to the declarant’s own actions, understandings, and beliefs as well as documents are not barred by RCW 5.60.030, the Dead Man’s Statute?

6. Did the trial court err in denying Mrs. Kellar’s Motion for Reconsideration when, through the actions of the Estate, new evidence became available which showed that Kenneth Kellar and his attorney, and not Donna Kellar, were responsible for the assertions regarding the existence of the prenuptial agreement at the 2005 Gaming Commission’s

hearing which was the reason the trial court held that Mrs. Kellar was estopped from asserting the invalidity of the prenuptial agreement?

7. Did the trial court err in finding in the judgment that the prenuptial agreement was valid when summary judgment was granted to the Estate because Donna Kellar was estopped from challenging the prenuptial agreement?

8. Was the award of attorney's fees and costs an abuse of discretion?

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

Kenneth L. Kellar ("Mr. Kellar") died testate on December 18, 2009. His will was admitted to probate on January 4, 2010, in Whatcom County under cause number 10-4-00002-3. On May 25, 2010, Donna Kellar ("Mrs. Kellar"), the surviving spouse of Mr. Kellar, filed a Petition for Declaratory Relief challenging the prenuptial agreement under a separate cause number 10-2-01582-1. Mrs. Kellar also filed additional petitions addressing different issues under different cause numbers, 10-4-00265-4, Petition for Declaratory Relief Re: Denial of Creditor's Claim, and 10-2-01835-9, Petition for Community Property Reimbursement.

Originally the various petitions filed by Mrs. Kellar had been assigned to different trial judges. The Estate requested and the trial court

consolidated the three petitions filed by Mrs. Kellar under cause no. 10-2-01582-1, the cause number from which the current appeal and cross-appeal arise.

On October 29, 2010, the issues raised by the various petitions were bifurcated for procedural purposes and the court ruled that the parties would first try the issues related to the validity of the prenuptial agreement. Mrs. Kellar filed a motion for partial summary judgment regarding the validity of the prenuptial agreement, and the Estate filed a cross-motion for partial summary judgment regarding estoppel and ratification, and a separate motion for partial summary judgment regarding the validity of the prenuptial agreement. The trial court granted the Estate's Motion for Summary Judgment re estoppel and ratification and denied Mrs. Kellar's Motion for Summary Judgment. CP 71-77. Initially, because the trial court held that Mrs. Kellar was estopped from challenging the validity of the prenuptial agreement and there were questions of fact that precluded a ruling on the validity of the agreement, the court denied both parties motions for summary judgment on the question of validity. CP 74-77. In the Final Judgment, however, the court made a ruling that the agreement was valid, thus reversing its prior ruling. CP 652 at ln 7-8. At the Summary Judgment hearing the trial court granted the Estate's Motion to Strike Portions of the Declaration of Donna

M. Kellar. CP 78-85. Mrs. Kellar's later motion for reconsideration of the Summary Judgment Orders was denied, and attorneys' fees and costs in excess of \$250,000 were assessed against her. CP 6-7 and CP 693-696.

**B. Statement of Facts**

Mr. Kellar and Mrs. Kellar met sometime in September or October 2000, and began dating on and off shortly thereafter. CP 390. At the time of their meeting, Mr. Kellar was a wealthy, sophisticated business mogul, and Mrs. Kellar was waitressing in a small café in Blaine, Washington. CP 390. On September 2, 2001, Mr. Kellar asked Mrs. Kellar to go to South Dakota to get married. CP 390. Within days of proposing to Mrs. Kellar, Mr. Kellar asked her to sign a prenuptial agreement, on which he had been working with Mr. Packer, his personal attorney, for about three months. CP 412. According to one set of books, Mr. Kellar's net worth at the time was \$93 million dollars. CP 449. and earned income of approximately \$950,000/per year. CP \_\_\_\_.

While Mrs. Kellar was generally aware of Mr. Kellar's wealth, she had no knowledge of the extent of his wealth, his income, or his liabilities. CP 390. Mrs. Kellar had never before seen a prenuptial agreement, although she had been married twice before. Mrs. Kellar had graduated from high school and supported herself working as a waitress at the Harbor Café, where Mr. Kellar was a customer; she was not

knowledgeable about legal matters, and was unsophisticated about business matters. CP 390. Mr. Kellar had significant experience with attorneys in his business dealings and had negotiated a prenuptial agreement in at least one of his prior marriages.

At Mr. Kellar's suggestion, the parties met with Ron Morgan ("Mr. Morgan"), a local attorney/mediator in Bellingham, WA to discuss the prenuptial agreement. CP 455. Mr. Kellar and Mrs. Kellar met with Mr. Morgan without counsel present on September 6, 2001, for about 30 minutes. Mrs. Kellar did not recall having a copy of a draft prenuptial agreement at the mediation. CP 446. The first time she saw a draft was sometime after it was hand delivered to her attorney Matt Peach's office on September 11, 2001, 8 days before the wedding. CP 447.

Mr. Morgan testified in his deposition that he had no specific recollection of a draft prenuptial agreement being used in mediation (CP 468); had no recollection of a discussion of Mr. Kellar's net worth (CP 463); was certain that no list of property was presented or discussed (CP 465); and recollected that Mr. Kellar was the dominant party during "mediation" (CP 467). Mr. Morgan further testified that he certainly would not have given legal advice to either party. CP 464. The only documentary evidence from the mediation was a short letter from Mr. Morgan to Mr. Packer and Mr. Peach dated September 6, 2001. CP 455.

Mrs. Kellar's counsel at the time, Matt Peach, was provided with no information regarding Mr. Kellar's assets, income or liabilities. CP 427. Mr. Peach did not discuss with Mrs. Kellar what disclosures should be provided to her prior to entering a prenuptial agreement. CP 429. He did not discuss with Mrs. Kellar the concept of separate property, community property or jointly-owned property, or what her legal rights would be if she married without a prenuptial agreement. CP 429. He did assist Mrs. Kellar in editing a sentence of the prenuptial agreement to conform to the discussions Mr. Kellar and Mrs. Kellar had with Mr. Morgan regarding her receipt of \$25,000 per year (the amount she earned as a waitress at the time) for every year they were married in the event they divorced or Mr. Kellar passed away. CP 407, 456.

The prenuptial agreement was signed by Mr. Kellar and Mrs. Kellar on September 14, 2001, just 5 days prior to their marriage. CP 405. The two flew to Deadwood, South Dakota and were married on September 19, 2001, which was only 18 days after the engagement, only 13 days after the "mediation", only 8 days after Mrs. Kellar first saw a draft of the agreement, and only 5 days after she signed the agreement. CP 390-392. At Mr. Kellar's insistence, Mrs. Kellar did not inform anyone of the prenuptial agreement's existence or the pending wedding. CP 392.

The agreement drafted by Mr. Packer was exceedingly imbalanced.

In the agreement, Mrs. Kellar (a) waived all interest in accumulated community property; (b) waived any right to community income; (c) waived her right to pursue spousal maintenance; (d) waived her right to use community property for any purpose; and (e) gave Mr. Kellar veto power over the creation of community property by stipulation that Mr. Kellar had to agree to the creation of any community property. CP 406-407. The agreement waived other rights given to her by statute, e.g., spousal inheritance rights, beneficiary rights to Mr. Kellar's retirement plans, equitable distribution of property in the event of divorce, and "all community property [and] quasi-community property rights." CP 406-407.

Prior to their marriage, Mrs. Kellar did have some assets. She had accumulated five small pieces of real property, single-family residences, that generated income barely sufficient to cover their respective mortgages and had a net worth of less than \$100,000 as the properties were all encumbered. Mrs. Kellar's net assets, however, paled in comparison to those of Mr. Kellar.

Unbeknownst to Mrs. Kellar or her attorney Matt Peach, in 2001, Mr. Kellar had approximate holdings in excess of \$93 million dollars (CP 449); had business and personal investments throughout the United States and the Caribbean; and a net income in 2001 of \$961,152 (CP 451).

Mr. Kellar also operated and owned a number of casinos in South Dakota when he married Mrs. Kellar. CP 43. South Dakota limited the number of licenses that an individual could own. CP 43. In support of his business, Mr. Kellar would have employees and relatives apply for licenses for his use in opening more casinos. CP44. These applications were submitted by Mr. Richard Pluimer (“Mr. Pluimer”), who was also a long time attorney for Mr. Kellar in South Dakota. CP 44.

Four years after they were married in 2005, Mr. Kellar told Mrs. Kellar to apply for three gaming licenses to open more casinos. CP 44. According to Mr. Pluimer the intent and purpose of Mrs. Kellar’s application was to benefit Mr. Kellar, as “Mr. Kellar’s primary objective was to have an additional licensee (Donna Kellar) to meet gaming regulations if the holder of one of his then current retail licenses were to resign, be terminated, or any other circumstance giving rise to the need for one or more retail gaming licenses.” CP 45. Because Mr. and Mrs. Kellar were married, the South Dakota Gaming Commission initially denied the written application, believing that the licenses would benefit Mr. Kellar and thus effectively exceed the number of licenses an individual could have. CP45.

In regards to the Gaming Commission action, according to Mr. Pluimer, “Mr. Kellar was the one who primarily directed the scope of the

engagement.” CP 46. Allegedly representing Mrs. Kellar, but actually acting on behalf of Mr. Kellar, Mr. Pluimer submitted a request for a hearing to review the denial of Mrs. Kellar’s application. CP45. Mr. Pluimer stated that he primarily represented Mr. Kellar throughout the process. CP 46. Mr. Pluimer developed the legal arguments for the challenge prior to any consultation with Mrs. Kellar, and instructed her how to testify, particularly with regard to the separate nature of Mr. and Mrs. Kellar’s assets and liabilities. Mr. Pluimer stated in his affidavit:

My only recollection of any direct conversation with Donna Kellar was a meeting a few days before the Gaming Commission hearing to review the exhibits and testimony that had been developed to be presented to the Commission.

CP 46 (emphasis added).

Mrs. Kellar was an unsophisticated person only having limited experience with attorneys and legal matters. Mr. Pluimer argued to the Gaming Commission that it was permissible to issue new gaming licenses to a spouse of an individual who already had gaming licenses when the spousal relationship was subject to a prenuptial agreement. CP 46.

At the hearing, Mr. Pluimer presented the prenuptial agreement as an exhibit. Mr. Pluimer asked Mrs. Kellar to identify the document. CP 493. As instructed by Mr. Pluimer, Mrs. Kellar testified:

This is a prenuptial Ken and I had before we

married, so that we could each protect our own assets, as there was – it was important to me to keep our financials separate and because of a prior marriage, I had financial problems and I didn't want that to happen again, and because Ken had a substantial amount of money, I'm sure he wanted to protect his assets as well, so we always kept our assets and everything, our financials separate.

CP 493.

At no time did Mrs. Kellar ever testify that the prenuptial agreement was “valid”. Nor would it have mattered if she had since such a statement would be merely a statement of Mrs. Kellar's belief on a matter of law. (See *infra* at IV C).

Mrs. Kellar further testified that she and Mr. Kellar kept certain assets separate and they did not touch each other's money. CP 499.

Based on instructions by Mr. Pluimer, she testified that certain monies that Mr. Kellar had invested into properties held in her name were gifts to her. CP 499.

The Gaming Commission asked whether Mr. Kellar would ever financially benefit from Mrs. Kellar's licenses. In response, Mr. Pluimer argued that there might be situations where Mr. and Mrs. Kellar could legitimately contract such that Mr. Kellar somehow financially benefited from Mrs. Kellar's gaming licenses, but such situations would be subject to the Gaming Commission's approval and consent. CP 540-541. At the conclusion of the Gaming Commission hearing, a request was made for an

updated financial statement of Mr. Kellar. Mr. Kellar provided Mr. Pluimer with a copy of his 2001 financial statement, with the understanding that said statement was to be forwarded to the Gaming Commission. CP 46. The financial statements provided by Mr. Kellar to the Gaming Commission were the first information regarding Mr. Kellar's net worth that Mrs. Kellar had ever seen. CP 392. She was shocked.

Following the hearing, the Gaming Commission granted the application. CP 46. Mr. Pluimer and the Gaming Commission's counsel waived the issuance of findings of fact and conclusions of law, and the Gaming Commission issued a declaratory ruling. CP 561-564. Although the validity of the prenuptial agreement was not before the Commission, and had not been disputed by any of the parties to the hearing, the declaratory ruling included dicta that Mr. and Mrs. Kellar's prenuptial agreement was valid. CP 563-564.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

The standard of review for summary judgment orders is *de novo*. *Hadley v. Maxwell*, 144 Wn.2d 306, 310, 27 P.3d 600 (2001). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When reviewing an order of summary judgment, the court engages in the

same inquiry as the trial court, considering the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002). Factual issues may be decided on summary judgment “ ‘when reasonable minds could reach but one conclusion from the evidence presented.’ ” *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 47, 846 P.2d 522 (1993) (quoting *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989)). The appellate court has authority to reverse a summary judgment order in one parties’ favor and remand the case to trial with instructions to enter final judgment in favor of the other party. *Underwriters v. Travelers*, 161 Wn. App. 265, 286, 256 P.3d 368 (2011); *Duc Tan v. Le*, 161 Wn. App. 340, 366, 254 P.3d 904 (2011).

In this case, Mrs. Kellar seeks an order not only reversing the trial court but ruling as a matter of law that the Kellar prenuptial agreement presented eight days before the wedding; with no disclosure of assets; and that substantially limit the rights of Mrs. Kellar is void as a matter of law.

**B. The Prenuptial Agreement Was Not Substantively nor Procedurally Fair .**

It is settled law that, “[t]he validity of prenuptial agreements in this state is based on the circumstances surrounding the execution of the

agreement.” *In re Marriage of Bernard*, 165 Wn.2d 895, 904, 204 P.3d 907 (2009); citing *In re Marriage of Zier*, 136 Wn. App 40, 47, 147 P.3d 624 (2006).

Under well established case law, when determining the validity of a prenuptial agreement, the court must first decide whether the agreement is substantively fair- whether it provides a “fair and reasonable provision for the party not seeking enforcement of the agreement.” *Marriage of Matson*, 107 Wn.2d 479, 482, 730 P.2d 668 (1986). That is, was the instant agreement fair to Mrs. Kellar at the time it was executed?

If the Court finds that the agreement is not fair and reasonable on its face, the Court then analyzes whether the prenuptial agreement was procedurally fair: (1) whether full disclosure has been made by both parties of the “amount, character and value of the property involved, and [2] whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights.” *Id.* at 483; *Matter of Marriage of Foran*, 67 Wn. App 242, 249, 834 P. 2d 1081 (1992). (emphasis added).

1. The Estate bears the burden of proving that the prenuptial agreement was valid.

In disputes involving the validity of a spousal agreement such as a prenuptial agreement, the well settled law in Washington State is that the

burden of proving the validity of the agreement is on the party asserting such validity, that is, Ken Kellar's estate. This rule is supported by both state statute and the common law.

A Washington statute places the burden of proof on the party seeking to enforce a spousal agreement. RCW 26.16.210 states, "In every case, where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith."

In addition to the statute, Washington courts have repeatedly asserted the rule that the burden of proving the validity of an inequitable agreement is on the party attempting to enforce the agreement.

*Friedlander*, 80 Wn.2d at 300; *see also In re Marriage of Bernard*, 165 Wn.2d at 204; *Matter of Estate of Crawford*, 107 Wn.2d at 730.

The Estate must meet a heavy burden of proof by presentation of substantial evidence that is clear and satisfactory. According to the Court in *Foran*, the second prong of the *Matson* test, that the agreement must have been entered into intelligently and voluntarily, must be "supported by substantial evidence". *Matter of Marriage of Foran*, 67 Wn. App. at 251.

The burden of establishing that a spousal agreement was entered into intelligently and voluntarily is much the same as the standard for establishing the separate character of property:

The burden rests upon the spouse asserting the separate character of the property acquired by purchase during the marriage status to establish his or her claim by clear and satisfactory evidence... The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose. Separate funds used for such a purpose should be traced with some degree of particularity.

*Hamlin v. Merlino*, 44 Wn.2d 851, 862-863, 272 P.2d 125, 131 (1954).

Like the spouse relying on the availability of separate funds as proof of his use of such funds to purchase property, the Estate must provide more substantial evidence of Mrs. Keller's knowledge of Mr. Keller's assets than a reliance on a brief and illusory sentence in the agreement stating that such information had been made available. The prenuptial agreement, however, is so wholly unfair that the Estate cannot meet its burden.

2. The Kellar prenuptial agreement is not substantively fair.

Whether the agreement makes a fair and reasonable provision for the challenging spouse "is entirely a question of law unless there are factual disputes that must be resolved in order for a court to interpret the meaning of the contract." *In re Marriage of Bernard*, 165 Wn.2d at 902.

The Washington Supreme Court, in *Friedlander* cautioned that while prenuptial agreements “freely and intelligently made” were conducive to marital tranquility, they were to be “scrupulously reviewed” in order to avoid the attendant dangers of abuse. *Id.* at 301. The Supreme Court pointed out that in view of the dangers of abuse inherent in these agreements, the relationship of the parties was of “primary importance,” reminding us that an engagement to marry creates a “confidential relationship.” *Id.* Unlike an ordinary arm’s-length contract negotiation wherein each party is generally responsible for educating himself about the terms and details of the other’s position, the parties to a prenuptial agreement do not deal at arm’s-length, but rather have a duty of “good faith, candor and sincerity in all matters bearing upon the proposed agreement.” *Id.*

Even prior to *Friedlander*, the Washington State Supreme Court set forth guidance in determining the substantive fairness of a prenuptial agreement. In *Hamlin v. Merlino* a prenuptial agreement was challenged following the death of the wife. The *Hamlin* court invalidated the prenuptial agreement because it allowed the husband to unilaterally secure for his separate estate, property which otherwise would belong to the community. *Hamlin*, 44 Wn. 2d at 866. (The September 14, 2001 agreement herein guarantees the same unilateral and fatal power to Mr.

Kellar, CP 408, ¶ 6.) It was this provision which the *Hamlin* court focused on as indicating “unfairness” and establishing the husband’s breach of the trust created by the confidential relationship, and thereby imposing on the husband the burden to prove procedural fairness in entering into the agreement:

[T]he unlimited power, which the contract purported to give [husband] to unilaterally secure for his separate estate property which would otherwise belong to the community, indicated unfairness and a breach of trust by reason of the existing confidential relationship of the parties to the proposed marriage, and imposed upon [husband] the burden of proving that [wife] fully understood the nature and significance of the contract, and that she freely and voluntarily entered into it.

*Id.* at 866-867.

The Washington State Supreme Court, on similar facts to those before this court, held that the prenuptial agreement, on its face, was not fair and reasonable as a matter of law. *Id.*; *See also Whitney v. Seattle-First National Bank*, 90 Wn.2d 105, 108, 579 P.2d 937 (1978) (acknowledging that the agreement in *Hamlin* did not include a fair and reasonable provision for the wife).

In *Bernard, supra*, the Court found a prenuptial agreement invalid even after an amendment to try and make it more equitable, when the agreement limited the potential accumulation of community assets and did

not provide for a significant distribution to the wife upon dissolution.

*Bernard*, 165 Wn.2d at 905. The Court stated:

Here, the community property consisted of half of [wife's] salary, which was controlled by [husband], and in effect \$100,000 of [husband's] earning per year. In addition, the prenuptial agreement limited [wife's] inheritance rights, prevented [wife] from seeking spousal maintenance, prevented [wife] from using community property to assist her children, and sheltered [husband] from liability for any debts incurred by [wife].... The prenuptial agreement as amended remedied some of these problems, but overall made provisions for [wife] disproportionate to the means of [husband], and limited [wife's] ability to accumulate her separate property while precluding her common law or statutory claims on [husband's] property. The agreement as amended is substantively unfair.

*Id.* *Bernard* holds as a matter of law that a prenuptial agreement is substantively unfair if the provisions for the wife are disproportionate to the means of the husband.

In the present case, the Kellar prenuptial agreement is even more draconian, and a more significant breach of trust than the *Hamlin* and *Bernard* agreements. It was impossible for Mrs. Kellar, Mr. Morgan or Mr. Peach to negotiate “a fair and reasonable provision” for Mrs. Kellar without knowing that Mr. Kellar had a net worth of \$93,000,000 and an income of almost \$1,000,000 per year, compared to Mrs. Kellar’s \$100,000 net worth and income of \$25,000 per year. Similar to *Hamlin*,

Mr. Kellar's prenuptial agreement severely limited the creation of community property, but it also eliminated entirely Mrs. Kellar's community property rights, and granted Mr. Kellar a veto power over the creation of any future community property because community property could only be formed by the agreement of both spouses. CP 408, ¶ 6.

Like *Bernard*, the provisions for Mrs. Kellar were very disproportionate to the means of Mr. Kellar. Considering the size of Mr. Kellar's estate and income, the provisions for Mrs. Kellar were a mere pittance. Mrs. Kellar was to receive only \$25,000 for each year of marriage, (the same amount of income she would have earned at the Blaine coffee shop) and if the marriage lasted more than 5 years, Mrs. Kellar received an additional \$500,000 which was to be divided into 20 yearly payments of \$25,000 each. Thus, under the disproportionate terms of the agreement, if Mr. and Mrs. Kellar divorced or Mr. Kellar passed away, Mrs. Kellar would be entitled to only \$725,000 paid out over a 20 year period if she had been married to Mr. Kellar for at least five years. This equates out to 0.779% of Mr. Kellar's estate at the time they entered into the agreement. The \$25,000 per year that Mrs. Kellar received for each year of marriage represented 2.601% of Mr. Kellar's annual income at the time they entered into the agreement. Compared to the \$480,576 per year to which she would have been potentially entitled under

community property laws as one-half of the community income, the terms of the prenuptial agreement were as unfair as an attorney could make them.

The prenuptial agreement drafted by his long time attorney permitted Mr. Kellar to devote all his time during marriage to business matters without any community benefit whatsoever. The agreement kept all income during marriage as separate, and prevented any claim for spousal maintenance. Similar provisions were condemned as a matter of law by the *Matson* court. *Matson*, 107 Wn.2d at 486. Mr. Kellar's agreement is patently unfair on its face when viewed in light of Mrs. Kellar's community property rights under Washington Law. *See Bernard*, 165 Wn.2d at 904 ("an agreement disproportionate to the respective means of each spouse, which also limits the accumulation of one spouse's separate property while precluding any claim to the other spouse's separate property, is substantively unfair") citing *Matson*, 107 Wn.2d at 486 and *Friedlander*, 80 Wn.2d at 301.

3. The Kellar prenuptial agreement is not procedurally fair.

As an initial matter, Mrs. Kellar signed the agreement only five days prior to the marriage, and only one week after first receiving a draft of the agreement. Such a limited time for review and consideration of a prenuptial agreement is per se fatal. (*See discussion in section d, infra.*)

The procedural fairness analysis also considers several other factors: (1) full disclosure of the amount, character and value of the parties' property; (2) whether the contract was voluntarily signed, with effective independent legal advice; and (3) with full knowledge of each spouse's property rights. *Matson*, 107 Wn.2d at 483. In addition, the court considers: "The bargaining positions [and sophistication] of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date are some of the factors involved in the circumstances surrounding the document signing." *Id.* at 484. The weakness of Mrs. Kellar's subservient position was exploited on each of these issues.

- a. *Mr. Kellar did not fully disclose the amount, character and value of his property.*

The burden of proof establishing full disclosure of fairness rests upon the party asserting the pre-nuptial agreement is valid and enforceable, that is, the Estate and there exists a presumption that the non disclosure was deliberate:

[W]here the provisions made for the wife is disproportionate to the property of the husband, a presumption arises that the contract was procured by deliberate concealment of the amount and value of the husband's property; and the husband or those claiming under him against the wife have the burden of showing that she had full knowledge of the value of her interest in the husband's property,

or that the circumstances were such that she reasonably should have had such knowledge.

*Friedlander*, 80 Wn.2d at 300 (emphasis added). The *Friedlander* presumption being in this case in favor of Mrs. Kellar, the Estate must meet a heavy burden of proof. The Estate has produced no evidence to rebut this presumption beyond one sentence in the agreement itself.

The Kellar prenuptial agreement does not list a single asset or liability for Mr. Kellar. CP 405-411. Mr. Kellar and Mr. Packer were both well aware that full disclosure of all property was essential to the enforceability of a prenuptial agreement. Mr. Packer stated as much in a letter to Mr. Kellar on June 20, 2001, regarding a draft prenuptial agreement prepared three months prior to Mr. Kellar's proposal of marriage that includes standard schedules of assets and liabilities. CP 412. Mr. Packer instructs Mr. Kellar that "complete disclosure of the financial status of each party to the other before signing and proof thereof" would be essential to avoiding later problems. *Id.* The draft prenuptial agreement included exhibits titled "Exhibit A- Financial Statement for Kenneth L. Kellar" and "Exhibit B- Financial Statement for [Blank]" CP 419-420. The financial exhibits in the draft prenuptial agreement were blank and did not include any financial information. They were a standard part of the draft prenuptial agreement that Mr. Packer was intending to use

with Mr. Kellar, but significantly to this review, all of the financial exhibits were excluded from the final draft.

Despite the recommendations of Mr. Packer, there was no disclosure of assets in the prenuptial agreement itself, and there is no evidence that Mr. Kellar ever provided any of his financial information to Mrs. Kellar. Under *Friedlander*, a presumption arises that the contract was obtained through “deliberate concealment” of the husband’s financial status when the provisions made for the wife are disproportionate to the husband’s property. The Estate must overcome the presumption that the financial exhibits were intentionally excluded from the final contract, and that Mr. Kellar deliberately concealed his financial status from Mrs. Kellar. *Friedlander*, 80 Wn.2d at 300.

In its Response to Petitioner’s Interrogatories and Requests for Production, the Estate stated that only Ken Kellar, Donna Kellar, and possibly Ron Morgan “have knowledge about Ken Kellar’s disclosure to Donna Kellar of the nature and extent of his property before September 14, 2001.” CP 438 at Interrogatory No. 6.

Mrs. Kellar testified that she received no disclosure from Mr. Kellar. Mr. Morgan does not recall any such disclosure of the parties’ property. And of course Kenneth Kellar is dead and left no documentation supporting any disclosure. Although Mr. Packer prepared the prenuptial

agreement and advised his client that “complete disclosure” and “proof thereof” was required, nothing in Mr. Packer’s testimony nor legal files suggests that any disclosure was ever made.

b. *Mrs. Kellar did not receive effective, independent legal counsel.*

A party does not have assistance of effective, independent counsel if that party’s attorney failed in his or her “primary purpose of assisting the subservient party to negotiate an economically fair contract.” *Foran*, 67 Wn. App. at 254. A failure of effective representation by counsel will occur where a party is merely advised by counsel, and not fully represented during the negotiations. *In re Marriage of Bernard*, 137 Wn. App 827, 835-36, 155 P.3d 171 (2007).

As demonstrated in his deposition, and in the documents from Mark Packer’s file, Mrs. Kellar’s attorney, Matt Peach, had no participation in the negotiation of the prenuptial agreement. He had no knowledge of Mr. Kellar’s assets or income and he merely sent a single letter to Mark Packer (CP 286) confirming Mrs. Kellar’s understanding as she had been told at the “mediation” that she would receive \$25,000 per year, her annual income at that time, for every year of marriage. CP 286.

c. *Mrs. Kellar was not aware of her legal rights prior to entering into the prenuptial agreement.*

Under the *Foran* test, a party does not have full disclosure of his or

her legal rights where the party's attorney failed to provide accurate legal advice. *Bernard*, 137 Wn. App at 836.

As Mrs. Kellar's attorney, Matt Peach testified that he had no recollection of ever advising Mrs. Kellar about her legal and equitable rights in the absence of a prenuptial agreement. Nor did she receive any such advice from Mr. Morgan during the mediation. As *Friedlander* stated, prenuptial agreements must be "freely and intelligently made". *Friedlander*, 80 Wn.2d at 301. From a procedural standpoint, a prenuptial agreement could only be intelligently entered if each spouse had full knowledge of his or her respective rights. *Matson*, 107 Wn.2d at 482. Mr. Kellar's intentional non disclosure of assets and insistence on secrecy in the face of an imminent wedding hamstrung Mr. Peach in his ability to adequately advise Mrs. Kellar. Therefore, just as in *Friedlander*, the prenuptial agreement at issue is "void in its inception." *Friedlander*, 80 Wn.2d at 301.

- d. *The prenuptial agreement was procedurally unfair because Mrs. Kellar signed the final contract only five days before the wedding.*

Washington courts have consistently invalidated prenuptial agreements where the marriage immediately followed the negotiation and execution. *See, e.g. In re Marriage of Bernard*, 165 Wn.2d at 906-07 (agreement received "only a few days before the wedding" and spouse had

seen a draft version of the agreement 18 days before the wedding); *In re Estate of Crawford*, 107 Wn.2d at 497-98 (agreement signed “only 3 days before the wedding”); *In re Marriage of Matson*, 107 Wn.2d at 486-87 (presentation of agreement 4 days before the wedding and signing of the final agreement the night before the wedding characterized as an “extremely short” time period); *Friedlander*, 80 Wn.2d at 295-96 (agreement was signed two days before the marriage); *In re Marriage of Foran*, 67 Wn. App. At 248 (spouse knew that an agreement was being prepared more than two weeks before the marriage and signed the agreement on day before leaving on the wedding trip that would culminate in marriage 7 days later). Here, whereas Mr. Kellar had a draft of the agreement nearly 3 months prior to signing the document, Mrs. Kellar saw the document only one week before the wedding and signed it only 5 days before the wedding. Such procedural unfairness is wholly inequitable and per se fatal to the agreement. *In re Marriage of Bernard*, 165 Wn.2d at 906-07 (18 and 2 days respectively); *Foran* (signed 7 days before wedding).

Because parties are reluctant to postpone or cancel their wedding, sufficient time is required to not only seek counsel, but also “to negotiate an economically fair contract.” *Foran*, 67 Wn. App 252. The view taken by Washington’s courts is supported by national standards that assume

that the presentation of a proposed agreement less than 30 days before the marriage creates a presumption of invalidity. *See* American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 7.04(3)(a). CP 477. Under national and Washington law, Mrs. Kellar had insufficient time to consider the prenuptial agreement.

**C. Mrs. Kellar was Wrongly Estopped From Challenging The Validity of the Prenuptial Agreement.**

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007), quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). The heart of the doctrine is the prevention of inconsistent positions as to facts, and it does not require consistency on points of law. *King v. Clodfelter*, 10 Wn. App. 514, 521, 518 P.2d 206 (1974).

When deciding whether to apply judicial estoppel, Washington courts look to three factors:

- (1) Whether a party’s later position is clearly inconsistent with its earlier position;
- (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and
- (3) whether the party seeking to assert an

inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

*Arkinson*, 160 Wn.2d at 538-39.

These factors are not an exhaustive formula and additional considerations may guide a court's decision. *Arkinson*, 160 Wn.2d at 539.

The Supreme Court of Washington State explicitly pointed to six factors that may be relevant considerations:

(1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change.

*Markley v. Markley*, 31 Wn.2d 605, 615, 198 P.2d 486 (1948), quoting 19 Am. Jur. 709, Estoppel, § 73; *see also Arkinson*, 160 Wn.2d 539.

The Estate must show that all three factors set forth in *Arkinson* are satisfied before judicial estoppel can be applied. Further, if additional factors set forth in *Markley* are not satisfied, the court in its discretion may decide that judicial estoppel does not apply. The Estate cannot show that even one of the *Arkinson* factors can be satisfied, and the *Markley* factors also weigh against the application of judicial estoppel.

1. The question of the validity of Mr. Kellar's prenuptial agreement is a question of law and is therefore not subject to the limitations of judicial estoppel.

The doctrine of judicial estoppel “concerns itself with inconsistent assertions of fact, not with inconsistent positions taken on points of law.” *CHD, Inc. v Taggart*, 153 Wn. App 94, 102, 220 P.3d 229 (2009) (party not prohibited from changing its legal position; citing *see Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009)); *King v. Clodfelter*, 10 Wn. App. at 521 (where the Estate first attempted to bar evidence prohibited by the Dead Man’s Statute, it was not prohibited from changing its position and later waiving the statute); *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 244 P.3d 32 (2010) (position on appeal, though representing a different legal argument than one presented in a prior proceeding, was not estopped).

This position is consistent with one of the purposes of judicial estoppel, which is to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes. *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001). It is not possible for a party to perjure themselves by making a mistake, or changing a position as to an issue of law; therefore, parties are not judicially estopped from doing so. The validity of Mr. Keller’s prenuptial agreement is a question of law, and is therefore not subject to the prohibition of judicial estoppel.

The administrative hearing before the gaming commission was conducted six years ago, and there have been new facts and circumstances that have resulted in Mrs. Keller's realization that, as a matter of law, the prenuptial agreement was not valid at the time it was created. Thus, because the issue of the validity of the prenuptial agreement is a point of law, judicial estoppel does not apply.

2. The Estate Cannot Establish that the Three Arkinson Factors Have Been Met

- a. *Mrs. Kellar's position before the South Dakota Gaming Commission is not "clearly inconsistent" with her current position.*

Mrs. Kellar's testimony at the Gaming Commission as crafted by Mr. Kellar's attorney, Mr. Pluimer, was limited to the existence of the agreement and the purpose of the agreement. CP 492-493. Her testimony that she and Mr. Kellar signed the prenuptial agreement does not address the *Friedlander* criteria which are the subject of this dispute, in any respect. *Friedlander*, 80 Wn.2d 293. She never testified that she had full disclosure before signing; that she had sufficient time to consider the agreement; or whether she had sufficient advice of independent counsel. Not one of the *Friedlander* criteria was addressed in her testimony to the Gaming Commission, and therefore she cannot now be estopped from presenting testimony regarding those criteria.

- b. *The South Dakota Gaming Commission is not a judicial body nor was the Commission misled.*

The proceeding before the South Dakota Gaming Commission was not a judicial proceeding. First, Mrs. Kellar appeared before a board of officers, whose employee appeared as the “opposing party”. Second, the hearing before the South Dakota Gaming Commission was an administrative hearing. Third, the validity of the prenuptial agreement was not at issue. The party “opposing” the gaming application was not seeking to invalidate the prenuptial agreement. Though the commission issued a decision regarding whether gaming licenses could be properly issued to Mrs. Kellar, the hearing resulted in no judgment. The Gaming Commission had no authority to rule on the validity of a prenuptial agreement. Finally, Mr. Kellar, and the Estate as his successor in interest, were not parties to that action, and are not now entitled to judicial estoppel.

- c. *Mrs. Kellar does not gain an unfair advantage or impose an unfair detriment to the Estate if not estopped.*

In the event that the issue of the validity of the prenuptial agreement must be decided in court (because the Estate had no interest in the prior matter), neither Mrs. Kellar nor the Estate would gain an unfair advantage, nor have an unfair detriment imposed upon them.. If, as the Estate argues, the action before the Gaming Commission was for the

benefit of Mrs. Kellar, than it cannot be said that Mr. Kellar, or the Estate as his successor in interest, had anything to gain or lose from the prior action. The Estate had no connection with the matter before the Gaming Commission. Therefore, Mrs. Kellar's legal position before the gaming commission is irrelevant to the present action because it cannot be said that her legal position in the prior action could have had any effect, either beneficial or detrimental, as between the parties to this action.

3. The *Markley* factors also weigh in favor of reversing the ruling on estoppel.

A review of the six *Markley* factors demonstrates that this court should not apply judicial estoppel.

a. *The validity of the prenuptial agreement was not at issue before the Gaming Commission.*

The first *Markley* factor requires that the inconsistent position must have been successfully maintained. Mrs. Kellar, however, did not try to defend the validity of the prenuptial agreement. It is, therefore, impossible to say that Mrs. Kellar "successfully maintained" the validity of the prenuptial agreement before the Gaming Commission.

b. *There was no judgment.*

The second *Markley* factor requires that a judgment on the issue must have been rendered. *Markley*, 31 Wn.2d at 614-615. A judgment presupposes a judicial hearing. No judgment issued because the Gaming

Commission hearing was not a judicial hearing. Nor was any judgment on the issue of validity entered, because the *Friedlander* factors were not issues before the commission.

*c. Arguing that an agreement is invalid is not inconsistent with testifying to what an agreement should do.*

Simply put, there is nothing inconsistent, judicially troubling, or unfair about Mrs. Kellar's position before the gaming commission. She testified that she had a prenuptial agreement. She does not now deny that fact. The Estate admits that she did not testify that the agreement was valid. CP 94. The "validity" of the prenuptial agreement is a question of law for the Court in this matter to determine independent of Mrs. Kellar's testimony regarding the existence of a prenuptial agreement.

*d. The parties and questions must have been the same*

The issues are not the same. The issue before this court is the validity of the prenuptial agreement. The issue before the Gaming Commission was whether to issue gaming licenses.

The parties are not the same. The parties in this case are Mrs. Kellar and Mr. Kellar's estate. The parties before the Gaming Commission were Mrs. Kellar and the Gaming Commission's own counsel.

*e. Mr. Kellar could not have been misled or changed his position.*

Either Mr. Kellar believed and adhered to the provisions of the prenuptial agreement or he did not. Mrs. Kellar's testimony before the Gaming Commission could not alter this.

*f. There is no change of position.*

The sixth *Markley* factor states that "it must appear unjust to one party to permit the other to change." Again, there was no change in position, and even if there had been, no injustice has been done to Mr. Kellar.

**D. Mrs. Kellar Did Not Ratify the Prenuptial Agreement.**

A prenuptial agreement cannot be ratified during marriage. "The validity of prenuptial agreements in this state is based on the circumstances surrounding the execution of the agreement." *In re Marriage of Bernard*, 165 Wn.2d at 904. Therefore, actions and circumstances occurring after the execution of a prenuptial agreement have no bearing on the validity of the agreement.

The following quote from *In re Estate of Crawford* is highly instructive:

The personal representative also asserts that the wife should be barred by laches from challenging the prenuptial agreement. The failure to attack a contract for a period of time does not constitute laches. There must also be injury resulting to one

party from the other's delay in order for laches to bar the challenge to the prenuptial agreement. *Jones v. McGonigle*, 327 Mo. 457, 37 S.W.2d 892 (1931). *In re Flannery's Estate*, 315 Pa. 576, 173 A. 303 (1934) involved the repudiation by the survivor of a prenuptial agreement after a 14-year marriage where the agreement eliminated all rights of the wife in the decedent's estate. It was held that laches could not prevail as a defense to the survivor's challenge since the economically subservient spouse could not be expected to challenge the dominant spouse during his lifetime. By adopting the rule of the *Flannery* case we do not wish to encourage post-death challenges to prenuptial agreements. They are valid and binding if entered into fairly, freely and intelligently under the criteria we have set forth. *In re Marriage of Matson, supra*. However, the passage of time during a marriage, standing alone, will not support laches as a defense to a challenge to an agreement.

*In re Estate of Crawford*, 107 Wn.2d at 501.

The contractual principal of ratification cannot be applied to prenuptial agreements because the validity of a prenuptial agreement cannot be analyzed under general contract law principals. *See In re Estate of Crawford*, 107 Wn.2d at 497. "Parties to [a marital] agreement do not deal at arm's length with each other. Their relationship is one of mutual trust and confidence. They must exercise the highest degree of good faith, candor and sincerity in all matters bearing on the proposed agreement." *Hamlin*, 44 Wn.2d at 864.

The trial court held that Mrs. Kellar ratified the prenuptial agreement in 2005 when she learned of Mr. Kellar's assets when his 2001 financial statement was provided to the South Dakota Gaming Commission in connection with Mrs. Kellar's application for gaming licenses, which application had only been undertaken at Mr. Kellar's direction. This holding was error.

“A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, [the party] remains silent or continues to accept the contract's benefits.” *Snohomish County v. Hawkins*, 121 Wn. App. 505, 510–11, 89 P.3d 713 (2004), *review denied*, 153 Wn.2d 1009, 111 P.3d 1190 (2005). The party must act voluntarily and with full knowledge of the facts. *Id.* at 511. First, the principle of ratification is inapplicable to prenuptial agreements that govern the rights of spouses at end of the marriage. The benefits do not accrue until the marriage is terminated by death or divorce.

Second, the prenuptial agreement was void at its inception and cannot be ratified. *See South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.3d 871 (2010) *quoting Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552, 567, 19 S.Ct. 817, 43 L.Ed. 1081 (1899) (“A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guaranty the bonds of another

corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly ultra vires, unlawful and void, and incapable of being made good by ratification or estoppel.”).

Even if the failure to provide financial information prior to the execution of the prenuptial agreement is a condition that can be corrected and then later ratified, the failure to provide financial statements goes only to one aspect of substantive and procedural fairness. The provisions in the prenuptial agreement which set forth Mrs. Kellar’s marital rights are so draconian that the prenuptial agreement fails the test of substantive fairness. *Bernard*, 165 Wn.2d at 904. To the extent that ratification must be knowing, Mrs. Kellar’s later awareness of Mr. Kellar’s financial assets and liabilities does not remedy her lack of the full knowledge of his and her respective property rights. *Matson*, 107 Wn.2d at 483. The contractual relationship that arises during the creation of a prenuptial agreement is not an arm’s-length transaction. The knowing requirement of ratification extends to knowledge of her rights, which would otherwise exist in the absence of a prenuptial agreement. *See Hawkins*, 121 Wn. App. at 511.

Finally, because the prenuptial agreement governed the creation of community property and other marital rights, whether the parties continued to uphold the terms of the agreement is not answered by

whether Mrs. Kellar ratified the prenuptial agreement in 2005. Nor does it address the question of whether Mr. and Mrs. Kellar had abided by or abandoned the terms of the prenuptial agreement since 2001. These are material issues of fact that were not addressed by the trial court such that the question of what is the effect of Mrs. Kellar's ratification on the Kellar's respective marital rights is not answered. If not reversed outright, remand is necessary to determine whether apart from being a "valid" agreement, whether the agreement is enforceable.

**E. The Court Erred in Granting the Estate's Motion to Strike Portions of Mrs. Kellar's Declaration.**

RCW 5.60.030 (the "Dead Man's Statute") provides that:

in an action or proceeding where the adverse party sues or defends as . . . legal representative of any deceased person . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . person . . .

It is black letter law that the Dead Man's Statute does not bar three critical and substantial areas of evidence: (1) one's own observations and own acts; (2) one's feelings and impressions; and (3) documents.

1. Mrs. Kellar's testimony regarding her own acts are not barred by the dead man's statute.

The case of *Lennon v. Estate of Lennon*, 108 Wn. App. 167, 29 P.3d 1258 (2001) *affirmed* long standing case law that a party may testify

to his or her own acts. *Boettcher v. Busse*, 45 Wn.2d 579, 582, 277 P.2d 368 (1954) (“testimony by a party in interest as to the performance of labor or the rendition of services for the decedent is not prohibited under the statute as a transaction with the decedent.”); *An how v. Furth*, 13 Wn. 550, 554, 43 P. 639 (1896) (“The testimony of respondent that he worked at the house of the intestate and the character of the work performed by him was not testimony in relation to a ‘transaction had by him with, or any statement made to him by,’ such intestate. Such testimony related solely to acts of the witness alone, and was, we think, entirely competent.”).

Mrs. Kellar can testify as to her own acts and what she did and why she did it when the prenuptial agreement was signed. In *Slavin v. Ackman*, 119 Wn. 48, 204 P. 816 (1922), the court admitted a letter reasoning that:

She testified that she had received the letter herein as set out. We have held that such testimony is not a testimony as to a transaction with a deceased person. (Cited cases omitted). “She also testified as to the acts which she did in conformity with the letter.”

*Slavin*, 119 Wn. at 50-51 citing *An How*. Mrs. Kellar may testify that she *did not* receive financial information just as Mrs. Slavin could testify that she *did* receive a letter.

2. Mrs. Kellar’s testimony regarding her own impressions are not barred by the dead man’s statute.

The law on interpreting “acts performed” goes beyond merely stating acts, payments, and writings. “However, the deadman’s statute does not prevent an interested party from testifying regarding his or her own feelings or impressions.” *Lennon*, 108 Wn. App at 175 citing *Jacobs v. Brock*, 73 Wn.2d 234, 237-38, 437 P.2d 920 (1968), in which Mrs. Jacobs provided a very detailed level of care to Dr. Brock, including daily enemas. *Jacobs*, 73 Wn.2d at 235. She testified that they “were to receive the Lake Crescent property for their services.” *Id.* at 236. Her husband was asked and answered famously:

“Why didn’t you submit a statement to Dr. Brock?”  
(Answer: “I was always given the impression that we were getting the lake property for looking after him.”)

*Id.* at 237

The Court held that “Mr. Jacob’s statement did not reveal a statement made by the decedent nor did it relate to a transaction.” *Id.* at 237 (citing cases that a decedent must be able to contradict the statement). “Clearly, Mr. Jacob’s statement of his own feelings or impressions does not come within this definition.” *Id.* at 238; *see also Dwelly v. Chesterfield*, 88 Wn.2d 331, 334, 560 P.2d 353 (1997); and *Lappine v. Lueurell*, 13 Wn. App. 277, 534 P.2d 1038 (1975). Mrs. Kellar may

testify about her impressions and feelings surrounding the signing of the prenuptial agreement, including the short time frame and pressure to get the agreement signed before the wedding.

3. Documents are not barred by the dead man's statute.

Generally, the statute only bars the admission of testimony, not documents. *Thor v. McDearmid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991); *Bentzen v Demmons*, 68 Wn. App. 339, 346, n.6, 842 P.2d 1015 (1993) (allowing admission of financial documents); *Wildman v Taylor*, 46 Wn. App. 546, 550-551, 731 P.2d (1987); see *Erickson v Kerr*, 125 Wn.2d 183, 188, 883 P.2d 313 (1994). This reasoning is in accord with the express language of the statute, which prohibits testimony, and does not at all mention documents. An interested party may identify a decedent's handwriting and that letters and lease agreements could be introduced but that the Dead Man's Statute only barred parties' "testimony about the meaning of the lease provisions or the letter." *Wildman*, 46 Wn. App. at 553.

In addition, *Osteen v. Estate of Wineburg*, 30 Wn. App 923, 934-935 (1982) allowed Mrs. O'Steen to testify as to the loss of a document and decedent's signature on the document. Mrs. Kellar can testify that she saw a financial disclosure of Mr. Kellar's assets in 2005 and conversely that she did not see such a list in 2001.

The documentation available from the files of Mr. Peach and Mr. Packer regarding the prenuptial agreement are not barred by the Dead Man's Statute, and demonstrates that there was neither full disclosure by Mr. Kellar of the amount, character and value of the property involved, nor was the agreement entered into fully and voluntarily on independent advice and with full knowledge by both parties of their rights.

4. The Estate has waived any right they may have had to prevent Donna Kellar's testimony regarding the prenuptial agreement.

The bar of the Dead Man's Statute may be waived by the adverse party by failure to object, by cross-examination that is not within the scope of direct examination, and by testimony favorable to the estate about transactions or communications with the decedent. *Thor*, 63 Wn. App. 193.

The Estate has the burden of proving that Mrs. Kellar "had full knowledge of the value of her interest in [Mr. Keller's] property..." *Friedlander*, 80 Wn.2d at 300. In an attempt to meet this burden of proof, the estate has, without any evidence, alleged that Mrs. Keller was provided with this knowledge by osmosis of an undetermined character prior to signing the agreement. In fact, if the Estate were not asserting that Mrs. Keller had full knowledge of Mr. Keller's property, it would be conceding that the agreement was procedurally unfair under the *Matson*

test, and therefore invalid. *Matter of Marriage of Matson*, 107 Wn.2d 479. The Estate has alleged that Mr. Kellar fully disclosed the value of his assets to Mrs. Kellar prior to executing the prenuptial agreement.

By alleging that Mr. Kellar fully disclosed the value of his assets to Mrs. Kellar, the estate has opened the door on this issue and waived any protections it may have had under the Dead Man's Statute as to that issue. The Estate has cited the case of *Botka v. Estate of Hoerr*, 105 Wn. App 974, 21 P.3d 723 (2001) for the proposition that Mrs. Kellar may not present testimony that that Mr. Kellar did not provide her with full disclosure of his net worth (ie a negative assertion). CP 380. Although the Estate's interpretation of *Botka* is wholly incorrect, the case itself is helpful.

In *Botka*, the Court found that the defendant Estate's allegation that the plaintiff had no right to enter the Decedent's home when the injury occurred, "opened the door" for the plaintiff to testify to discussions she had with the decedent which demonstrated that she did have such right. *Id.* at 981. Here, because it is expected that the Estate will rely heavily on *Botka*, it is important to include the following excerpt in its entirety:

The deadman's statute may be waived by an adverse party by (a) failure to object, (b) cross-examination which is not within the scope of direct examination,

or (c) testimony favorable to the estate about transactions or communications with the decedent. The deadman's statute precludes not only positive assertions that a transaction or conversation with the decedent took place, but also testimony of a "negative" character denying interactions with the decedent. Such negative testimony by an adverse party in the context of a summary judgment motion constitutes a waiver of the deadman's statute and opens the door to rebuttal from the interested party. In *Bentzen v. Demmons*, we concluded that the defendant's statements that his deceased aunt never told him of the existence of an oral agreement between his aunt and the plaintiff effectively implied that the agreement never existed, thereby waiving the deadman's statute and opening the door for rebuttal.

*Botka* at 980-981. (emphasis added).

Thus, when an estate (or other adverse party) makes an assertion regarding a transaction between the decedent and a party in interest, whether that assertion is positive or negative, they open the door to that subject matter and waive the Dead Man's Statute such that the party in interest is permitted to offer testimony to rebut the estate's assertion.

By asserting that Mr. Kellar somehow provided Mrs. Kellar with adequate disclosure, the Estate thereby waived any protections it may have had in preventing Mrs. Kellar from testifying to the circumstances surrounding said disclosure. Under *Bentzen* and *Botka*, Mrs. Kellar should have been permitted to provide testimony to rebut the Estate's

assertion that Mr. Kellar presented her with an adequate disclosure of his assets prior to executing the prenuptial agreement.

**F. The Court Should Have Granted Mrs. Kellar's Motion to Reconsider Based on Newly Discovery Evidence on the Ratification/Estoppel Issue.**

1. The newly discovered evidence was previously unavailable.

Under CR 59, a decision or order may be vacated and reconsideration granted for any one of the following causes materially affecting the substantial rights of such parties:

...(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;...

(9) That substantial justice has not been done.

*See, e.g. Sligar v. Odell*, 156 Wn. App. 720, 233 P.3d 914 (2010) (finding a motion for reconsideration warranted either on grounds of new evidence which could not have been presented before, or substantial justice not being done).

On October, 4, 2010, the Estate, as a party to the ancillary probate proceedings in Lawrence County South Dakota, filed a Request to Prohibit Public Access to Information. *See* CP 35. As part of said request, the Estate asked the Court to “prohibit access to their Brief in Opposition to Motion to Disqualify and to their Affidavit...” *Id.* This motion was heard on October 14, 2010, and granted by separate Court Orders dated October

21, 2010 (CP 38) and December 21, 2010 (CP 40). Thus, pursuant to said orders the case record was sealed, including the Affidavit of Richard A. Pluimer Regarding Joint Representation of Kenneth L. Kellar and Donna Kellar which had been submitted by the Estate in that matter. CP43. The affidavit was unavailable to Mrs. Kellar at the time of the Estate's Motion on Summary Judgment. However, on February 16, 2011, when the Estate filed its Motion for Attorney Fees they included the Affidavit as part of an exhibit to compel Mrs. Kellar to reimburse the estate for certain attorneys fees and the Affidavit was presented to the trial court for the first time.

2. The newly discovered evidence would have affected the court's decision on summary judgment.

The Affidavit shows that, contrary to the Estate's assertions on Summary Judgment, the entire process surrounding the testimony before the South Dakota gaming licenses was conducted under the initiative and for the sole benefit of Kenneth Kellar, and that Mrs. Kellar was merely a tool to be used. Mr. Kellar was the driving force behind the pursuit of gaming licenses in Mrs. Kellar's name. *See* Affidavit of Richard Pluimer, CP 43-47. The licenses were for the sole benefit of Mr. Kellar. Mrs. Kellar had extremely minimal involvement in the entire process. *Id.* Mrs. Kellar's only involvement was to meet with Mr. Kellar's attorney one time, only several days prior to the hearing, so that she could be instructed

on how to testify. *Id.* She then went before the Commission and described her understanding of the purpose of the prenuptial agreement as Mr. Kellar's attorney had instructed her. CP 46, ¶ 17; CP 492-493. The affidavit of Mr. Kellar's attorney for the Gaming Commission matter shows that in all respects Mrs. Kellar was simply a pawn in Mr. Kellar's ongoing manipulation of the South Dakota Gaming Laws. The affidavit flatly rebuts the Estate's earlier allegations to the trial court.

The Estate's argument, as well as the trial court's ruling on summary judgment, relied on the theory that Mrs. Kellar asserted inconsistent legal positions by arguing that the prenuptial agreement was valid in the South Dakota Gaming Commission appeal to obtain a financial advantage for herself. That it is not valid now. The Estate alleged that she gained a financial benefit by asserting contradictory legal arguments. This argument was the most compelling factor in the trial court's ruling. The court stated, "... Mrs. Kellar in law, in order to keep the integrity of this judicial system and the quasi-judicial system of the state of South Dakota, must say you cannot take an inconsistent position, you cannot with knowledge of his assets say it's valid and I want it enforced and I'm entitled to my gambling license, and then take a totally inconsistent position in front of this court." February 9, 2011, Report of Proceedings 7:15-22. In addition, the trial court stated that "She should

not be allowed to take the position to give her an advantage in South Dakota, the three gambling licenses that she obtained and now has, and also get an advantage in this case with these inconsistent positions.” *Id.* at 7:4-8. However, the Pluimer Affidavit shows that Mrs. Keller did not undertake the application for the gaming licenses, or appeal the initial decision, on her own behalf; she did not assert inconsistent legal positions; and did not gain any advantage by asserting inconsistent legal positions. They were done by and for Mr. Kellar as to the driving force.

Overall, the Affidavit was critical evidence establishing that the Estate made false allegations regarding the individual roles of Donna and Kenneth Kellar in the Gaming Commission appeal. Furthermore, the Affidavit supports Mrs. Kellar’s overall contention that Mr. Kellar was the dominant member in the marriage and that Mrs. Kellar was routinely placed in a servient position to Mr. Kellar, both in the situation with the Gaming Commission, and in regards to the establishment of Mr. Kellar’s prenuptial agreement as a whole. With regard to the gaming application, Mr. Kellar used Mrs. Kellar to further his own business interests in South Dakota. As the servient spouse, Mrs. Kellar was not in a position to refuse to help Mr. Kellar acquire three more casino licenses. Taking into account the newly discovered evidence, the trial court should have reversed it’s

holdings on summary judgment by estoppel and ratification and declared the prenuptial agreement invalid.

**G. The Trial Court Abused Its Discretion in Awarding Attorney's Fees and Costs to the Estate and in the Amount of the Award.**

1. A trial court's award of attorney's fees will be reviewed for an abuse of discretion. *Emmerson v. Weilep*, 126 Wn. App. 930, 940, 110 P.3d 214 (2005). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Id.* Here, the trial court abused its discretion in both the award of the fees and the amount of the award.

On February 25, 2011, the Court heard the Estate's motion for attorneys' fees. The Court determined that "what it must focus on" is to "carry out Mr. Kellar's intent so as long as no loss is realized to the estate and that can be done in this case by the award of attorney fees expended by the estate in defending the prenuptial agreement." The trial court's basis for awarding attorneys' fees was to fulfill Mr. Kellar's intent. This is not a sound basis for awarding attorneys' fees. The trial court based its award of fees to the Estate on an attempt to enforce the intent of the testator as to the in terrorem clause in Mr. Kellar's will, which the trial court had already ruled was invalid as against public policy. February 25, 2011, Report of Proceedings 36:6-14 and 34:9-11 respectively. The court ruled that because the in terrorem clause could not be enforced to preclude

Mrs. Kellar from inheriting, the court would instead award \$259,861.61 in attorneys fees and costs against Mrs. Kellar to accomplish the “testators intent” when drafting the invalid in terrorem clause. Thus, because the court could not take away Mrs. Kellar’s inheritance through the in terrorem clause in the will, the court abused its discretion in taking away \$259,861.61 of her own separate assets to offset what could not be done legally through disinheritance. The trial court committed a clear abuse of discretion by circumventing the acknowledged boundaries of the law as described by the trial court itself, and awarding fees as a means to partially disinherit Mrs. Kellar when such disinheritance was not otherwise permitted.

2. The amount of fees awarded by the trial court was also an abuse of discretion. The trial judge stated that if he were defending the Estate in this matter, “I honestly don’t believe that I’d work more than, this is probably being kind of liberal, but I don’t think I’d work more than fifteen days on it at eight hours a day.” February 25, 2011, Report of Proceedings 39:21-40:1. That would be a total of 120 hours. However, the final award of fees, \$250,000 at \$365.00 per hour, equates out to an award of 684.93 hours of work. That is 5.7 times greater than what the court initially considered reasonable. Even if the trial court were to have reconsidered its first position, a 570% increase over what the court

initially suggested as a reasonable amount of time is a shocking result that represents a clear abuse of discretion.

Therefore, because the court awarded fees based on unsound principals specifically acknowledged to have been done with the intent to subvert the bounds of the law, and because the fees were 570% greater than the court initially thought reasonable, the award of fees and the May 6, 2011, final judgment should be overturned on appeal.

**H. Mrs. Kellar Requests Attorneys' Fees and Costs on Appeal.**

Should Mrs. Kellar prevail on appeal, Mrs. Kellar requests that she be awarded her fees and costs on appeal and that the trial court's order and judgment regarding fees to the Estate be vacated. The party that substantially prevails at appeal shall be entitled to an award of costs. RAP 14.2. The prevailing party may also be granted fees on appeal if they are allowed under relevant authorities. RAP 18.1 (a).

This appeal and lawsuit arose under Washington's probate code, and both the relevant portions of the Trust and Estate Dispute Resolution Act (TEDRA), RCW 11.96A.150(1) and RCW 4.84.330 provide authority for a discretionary award of fees to the prevailing party. If Mrs. Kellar would have been allowed attorney's fees at trial she may recover on appeal as well. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). If Mrs. Kellar prevails in this appeal, the previous award of fees

to the Estate should be reversed and Mrs. Kellar should be awarded her fees and costs on appeal.

## VI. CONCLUSION

For the reasons set forth above, Mrs. Kellar respectfully requests that the Court of Appeals reverse the trial court's grant of the Estate's motion for summary judgment on ratification and estoppel; grant Mrs. Kellar's motion for summary judgment on the invalidity of the prenuptial agreement; reverse the trial court's award of attorneys' fees and costs to the Estate; vacate the judgment of the trial court; award her fee on appeal; and remand the matter to the trial court for further proceedings consistent with the ruling by this Court.

HELSELL FETTERMAN LLP

By: 

Michael L. Olver, WSBA No. 7031

Christopher C. Lee, WSBA No. 26516

Kameron L. Kirkevold, WSBA No. 408291

Attorneys for Donna M. Kellar

**CERTIFICATE OF SERVICE**

I, MICHELLE N. WIMMER, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.
2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4<sup>th</sup> Avenue, Suite 4200, Seattle, WA 98154.
3. In the appellate matter of Donna Kellar v. the Estate of Kenneth L. Kellar, I did on September 27, 2011 (1) cause to be filed with this Court the Appellant's Brief; (2) cause Appellant's Brief to be delivered via messenger, to the following recipients: J. Bruce Smith, Barron, Smith, Daugert, PLLC, 300 North Commercial, P.O. Box 5008, Bellingham, WA 98227-5008, who are counsel of record of Respondent and Cross-Appellant; and to Joseph J. Straus, Schwabe, Williamson & Wyatt, 1420 5<sup>th</sup>, Ave Ste 3400, Seattle, WA 98101-2339, who are counsel of record for Respondent and Cross-Appellant and to James C. Haigh via email.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: September 27, 2011

  
MICHELLE N. WIMMER