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No. 71714-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

GABRIEL LEE,

Appellant,

v.

CAROL KENNARD,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE REGINA S. CAHAN

BRIEF OF APPELLANT LEE

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I. INTRODUCTION

Gabriel Lee challenges the trial court's enforcement of a maintenance escalator in a separation agreement the trial court found "completely one-sided and no doubt substantively unfair" at the time it was executed. The trial court wrongly believed it was compelled to enforce the maintenance escalator because while substantively unfair, it found the agreement was procedurally fair. The trial court's decision is contrary to this court's previous decision in this case and to both RCW 26.09.070(3), which provides that an agreement that is "unfair at the time of execution" is not binding on the court, and Supreme Court precedent that "either substantive or procedural unconscionability is enough to void a contract." *Hill v. Garda CL Northwest, Inc.*, 179Wn.2d 47, 55, ¶ 14, 308 P.3d 635 (2013), *cert. denied*, 134 S. Ct. 2821 (2014).

After finding that laches barred Carol Kennard's request for retroactive enforcement of the escalator because her 8-year delay in seeking to enforce the escalator was "fundamentally unfair" to Lee, who was "financially prejudiced" by the delay, the trial court in any event should not have used the cumulative increase in the CPI from the date of the agreement in calculating Lee's current maintenance obligation. Even if the trial court could enforce the maintenance

escalator, it therefore erred in increasing Lee's maintenance obligation by over one-third going forward, based on the increase in the CPI since 2000. And because it rejected Kennard's motion to enforce the maintenance escalator retroactively and her request for "past due" maintenance, the trial court erred in awarding her attorney fees under RCW 26.18.160.

This Court should reverse the trial court's decision enforcing the maintenance escalator, or at a minimum reverse and remand for the trial court to re-calculate Lee's maintenance obligation based only on the increase in the CPI between 2008 and 2011. Finally, this Court should vacate the fee award to Kennard and award fees to Lee.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order on Cross Motions for Summary Judgment on Remand. (CP 373-83) (Appendix A)

2. The trial court erred in finding that the "methodology employed by Mr. Lester Feistel in his Declaration to be the proper methodology to calculate the maintenance payments." (Finding of Fact (FF) 23, CP 379-80)

3. The trial court erred in concluding that “if the procedural fairness prong is satisfied, then even if the court finds that the agreement is substantively unfair, it is still valid and binding.” (Conclusion of Law (CL) 1, CP 380)

4. The trial court erred in concluding that “since the agreement is still valid and binding, the escalation clause shall apply to current maintenance from the time Respondent filed this action on October 18, 2011. The escalation shall be determined by the methodology outlined in Lester Feistel’s Declaration.” (CL 4, CP 382)

5. The trial court erred in concluding that “[g]iven that the court found the agreement was procedurally fair and remains valid and binding at least for prospective maintenance payments, the [wife] is entitled to attorney’s fees incurred on the maintenance issue in the initial proceedings, on appeal and on remand.” (CL 5, CP 382)

6. The trial court erred in entering its Order on Motion for Past Due Spousal Maintenance and for Attorney Fees. (CP 951-52) (Appendix B)

7. The trial court erred in entering its Order Denying Petitioner’s Motion for Reconsideration. (CP 410) (Appendix C)

III. STATEMENT OF ISSUES

1. RCW 26.09.070(3) provides that a separation agreement is not binding if the court finds the agreement was unfair at the time of execution. Our Supreme Court has held that substantive unconscionability alone can make an agreement unenforceable. Did the trial court err in enforcing an agreement it found “completely one-sided” and “no doubt substantively unfair” based on its belief that its finding of “procedural fairness” compelled it to the enforce the agreement?

2. After finding that laches barred retroactive enforcement because the ex-wife’s 8-year delay in seeking to enforce a CPI maintenance escalator was “fundamentally unfair” to the ex-husband, who was “financially prejudiced” by the delay, did the trial court then err by calculating the ex-husband’s current maintenance obligation using the cumulative increase in the CPI since the agreement was executed?

3. Did the trial court err in awarding attorney fees to the ex-wife as the prevailing party in her “enforcement” action when it rejected retroactive enforcement of the maintenance escalator and the ex-wife’s request for a judgment for “past due” maintenance and interest on the grounds of laches? Should this court award attorney

fees to the ex-husband in defending against the ex-wife's "unreasonable" and "strategic" delayed enforcement of a "completely one-sided" and "no doubt substantively unfair" "astronomical" maintenance provision?

IV. STATEMENT OF FACTS

A. Lee, *pro se*, entered into a separation agreement that grossly favored Kennard, obligating Lee after a 20-year marriage to pay almost half his income as maintenance for 21 years, with a CPI-based escalator clause.

Appellant/cross-respondent Gabriel Lee, now age 58, and respondent/cross-appellant Carol Kennard, now age 67, married on July 22, 1979. (CP 30, 114-15) They separated on February 15, 1999, when they were ages 43 and 51. (CP 30, 114-15) Lee is a cardiologist. (CP 31) Kennard, who has a Masters degree in speech pathology, had left the work force when the parties' younger child was born to care for their two children, who were ages 12 (DOB 6/26/1986) and 7 (DOB 8/26/1991), at the time of separation. (CP 36, 114)

Kennard, "easily subject to depression," was distraught over the parties' separation. (CP 32) Kennard "relentlessly and emphatically" told Lee that she "felt abandoned, betrayed, and impoverished by [the] separation and that the breakdown of [the]

marriage was [Lee's] fault." (CP 31-32) Lee was "extremely worried" about Kennard's emotional condition and its impact on the children, who resided primarily with Kennard. (CP 31) Lee feared that "disturbance to [Kennard]'s emotional state incident to a divorce trial could continue for some time and be highly deleterious to [their] children, even possibly contributing to permanent long term or psychological harm." (CP 31) Because of Lee's concern for Kennard and the children's well-being, he believed it was necessary to "prove to her that she and the children would be financially secure" after the divorce, and although represented by counsel, agreed to negotiate an agreement directly with Kennard, who claimed she "did not want to involve attorneys." (CP 32)

Lee agreed to pay Kennard maintenance of \$9,000 per month from February 2000 through December 2020 – a duration of almost 21 years, longer than the parties' less than 20-year marriage. (CP 33) Lee was earning approximately \$233,000 annually – \$19,416 per month – and this maintenance obligation was over 46% of his gross monthly income before child support was paid. (CP 33, 120) Absent any adjustments, the value of the total maintenance award was \$2,259,000. (CP 33)

The parties also agreed on child support. (CP 33) Under the “standard calculation,” Lee would have been required to pay \$572 in child support for both children. (CP 121) However, Lee agreed to a monthly transfer payment of \$1,750 (\$875 for each child) – more than three times the standard calculation. (CP 115, 121) Lee also agreed to contribute approximately \$458 a month to GET accounts for both children, increasing his monthly child support obligation to over \$2,200. (CP 117, 435-41)

Lee was left with \$8,216 in his household after paying his support obligations, while Kennard had \$10,750 in her household just in family support payments from Lee. The parties agreed to an escalator clause, allowing adjustment of both child support and spousal maintenance every three years “based upon the cost of living index, all urban consumers for the greater Seattle and Everett area.” (CP 70, 117)

Neither party owned separate property, and their community estate was worth less than \$300,000. (CP 31, 37-40) In addition to the substantial maintenance and child support awards, Lee agreed that Kennard receive 86% of the marital estate, more than \$254,000, including the family residence, all Washington Mutual accounts and certificates of deposits, a Schwab stock account, and

half of Lee's Group Health retirement, excluding his 401K. (CP 38-39, 69) Lee received his Group Health 401K, half of the Group Health retirement, and any bank accounts in his name – in all, assets valued at \$42,000. (CP 39-40, 70)

Kennard's counsel, Hank Finesilver, prepared a Property Settlement Agreement reflecting the parties' oral agreement, and provided the agreement to Lee's counsel, Janet Watson. (CP 83) Watson advised Lee in writing that it was her "considered opinion that this agreement is so far outside the range of probable outcomes of trial on financial issues and so far against your financial interests as to violate the substantive dissolution law of this state." (CP 83) Watson explained that a showing of "fairness" in marital settlement agreements is necessary "to ensure that the spouses, both of whom are presumably both highly emotionally impacted by the marital dissolution at a time they are compelled by circumstances to engage in the most important negotiation of their financial and parental lives, are not subjected to unfair overreaching or to unfair treatment of themselves arising from a sense of remorse or guilt concerning the marital breakdown." (CP 83)

Watson noted that in her "15 years of practice, including several in this era of instant cyber-wealth, [she has] never seen, nor

seen in the appellate court records of this state, a spousal maintenance award so large in proportion to the husband's earnings, nor for a period of time exceeding that of the marriage itself." (CP 86) Watson expressed particular concern over the maintenance and child support escalator clauses based on the CPI, noting that it "places the lion's share of the risk and hardship for generating an adequate future income, including the risk of inflation as to Carol (and not you), on you alone: your maintenance payments are tied to an inflation measure, so that in the event of inflation, she would suffer 0% decrease in her real earnings, and your decrease would be inflation rate x two." (CP 86)

Watson cautioned Lee that the "long term effect of this agreement is highly likely to be your personal relative impoverishment and inability to adjust your work and lifestyle." (CP 86) Watson advised Lee that she would withdraw as counsel if he insisted on entering the agreement, noting that it "is so far outside the range of expectation of results by trial (which sets the parameter of what is 'fair' for settlement purposes as well) that in my opinion, it would be below an acceptable standard of professional practice for an attorney to encourage and facilitate the execution of this agreement." (CP 87)

Watson followed up in a second letter, reiterating her concern that the agreement was not fair. (CP 89) Watson advised Lee that while she was “capable and willing to negotiate a fair agreement” on his behalf, it appeared that he was “committed” to entering the agreement regardless. (CP 89) Watson told Lee that she could not “ethically remain as your counsel,” because the “course of action you have decided on [] is so far divergent from my professional opinion of what you should do.” (CP 89) Watson withdrew as Lee’s counsel on January 25, 2000. (CP 30)

With a looming trial date of March 13, 2000, and without legal counsel, Lee signed the separation agreement prepared by Kennard’s counsel, and the accompanying decree of dissolution and findings of fact *pro se*, on February 9, 2000. (CP 30, 72, 991, 995) On February 11, 2000, Kennard’s counsel presented the agreement and the Decree of Dissolution for entry *ex parte*. (CP 30) Other than boilerplate language in the findings stating “the distribution of property and liabilities as set forth in the decree is fair and equitable” (CP 991), there is no evidence that the superior court commissioner who entered the decree and findings had considered the fairness of the underlying agreement, including its maintenance provision, or that the agreement was even presented to the

commissioner prior to entry of the decree and findings. Neither the findings nor decree set out the terms of the parties' agreement, and instead merely "incorporate" the agreement "by reference." (See CP 987-91, 992-95)

B. Eleven years after the separation agreement was executed, Kennard for the first time sought to enforce the escalator clause. The trial court refused to enforce the escalator as contrary to law.

After final orders were entered on February 11, 2000, Lee consistently and timely paid his maintenance and child support obligations to Kennard. (CP 32, 377-78) Lee in fact paid more than was required under the child support order, continuing to pay support after the children graduated from high school while also providing 100% of the children's post-secondary support. (CP 40-41, 43-44)¹ Although the parties contemplated that Kennard would obtain employment after the divorce, she never did, and instead lived off her property and maintenance awards.² (CP 36) Kennard

¹ Lee paid Kennard the transfer payment amount for the older child after he graduated from high school. Lee gave the transfer payment amount for the younger child directly to the child, who had begun living with Lee and his wife during her senior year of high school. (CP 43-44)

² It is no surprise that Kennard did not pursue paid employment. Under the agreement her counsel drafted, spousal maintenance would be "reduced one dollar for every two dollars [she] earns in excess of \$5,000 per year" (CP 70), giving her no incentive to find employment.

later sold the family residence awarded to her for a “substantial profit” from which she alone benefitted. (CP 31, 32, 376)

There was no further litigation between the parties for over a decade after they divorced. While the agreement had provided for adjustment of both child support and spousal maintenance every three years, Kennard waited until October 2011, when the younger child was 21,³ to seek a judgment for “past due” child support and maintenance, based on Lee’s failure to make the CPI adjustment over the past 11 years. (CP 36) Kennard sought a principal judgment of \$167,493 for “past due” maintenance, plus statutory 12% interest of \$64,310.38 (CP 310), and a principal judgment of \$9,828 for “past due” child support, plus statutory 12% interest of \$5,878.98. (CP 311)

Kennard also sought to enter a QDRO to divide Lee’s Group Health retirement. The agreement drafted by Kennard’s attorney stated that the Group Health retirement account would be divided

³ The parties’ older child was age 26 and in medical school when Kennard filed her motion. Kennard had contributed nothing to his post-secondary or medical school education; Lee paid for all of his post-secondary education and continued to pay their son a monthly “stipend” while he was in medical school. Confronted with the cost of defending Kennard’s demand for an additional quarter of a million dollars in child support and maintenance 12 years after separation, Lee was forced to stop the older child’s “stipend” after Kennard filed her motion for “past due” support. (CP 43)

pursuant to a QDRO “which accompanies this Agreement.” (CP 69) But Kennard’s counsel had not prepared or presented a QDRO when the agreement was executed. (See CP 308-09) Almost 12 years later, Kennard’s attorney without notifying Lee sent Group Health a proposed QDRO that would have awarded Kennard half of Lee’s retirement “as of the date of this Order.” (CP 322) After the plan administrator approved the proposed QDRO, Kennard’s counsel presented it to Lee. (CP 309)

Lee refused to sign the QDRO, which would have awarded Kennard half of his current Group Health retirement account, including 12 years of post-separation contributions and earnings. (CP 309) Kennard moved for adoption of the proposed QDRO in conjunction with her request for “past due” maintenance and child support, as well as attorney fees. (See CP 49) In response, Lee sought to vacate those portions of the final orders requiring automatic adjustment based on the cost of living index under CR 60, and objected to the proposed QDRO. (See CP 49-50, 169)

King County Superior Court Judge Deborah Fleck considered both parties’ motions. Judge Fleck concluded that CR 60(b) was “unavailable” to Lee, but that the CPI-based escalator clauses for both maintenance and child support were unenforceable. (CP 172-

74) In particular, with regard to the maintenance escalator, Judge Fleck found that the “escalator clause [was] not based on the needs of the wife, or the ability of the husband to pay and did not contain a cap.” (CP 173)

Judge Fleck also refused to enter the QDRO proposed by Kennard because “it attempted to achieve a result contrary to the terms of the property settlement agreement and agreed decree.” (CP 175) Judge Fleck modified the QDRO to segregate the retirement as of the date of the parties’ separation, and sanctioned Kennard’s counsel under CR 11 for “his improper QDRO submission.” (CP 50, 175)

C. On Kennard’s appeal, this Court held that the maintenance escalator can be enforced “unless the separation agreement is set aside” because it was “unfair at the time of execution.”

Kennard appealed. On September 16, 2013, this Court affirmed in part and reversed in part. (CP 47-60) This Court affirmed the trial court’s decision refusing to enter Kennard’s proposed QDRO, which would have divided Lee’s pension at its value 12 years after the parties separated. (CP 54-57) This Court also affirmed the award of CR 11 sanctions against Kennard’s attorney for preparing a proposed QDRO that was “clearly contrary

to the original decree and was therefore neither well grounded in fact nor warranted by existing law.” (CP 57)

This Court affirmed the trial court’s decision setting aside the child support escalator, holding that “nowhere [in the statute] does it allow escalation clauses tied solely to the CPI [consumer price index] as a basis for child support increases.” (CP 52) However, it reversed the trial court’s decision setting aside the maintenance escalator, holding that while a trial court may not impose a CPI escalator on maintenance, parties are free to make such agreements. (CP 53-54) “Unless it is found unfair at the time of execution, the court must enforce that agreement according to its terms.” (CP 54)

With regard to attorney fees, this Court held that “assuming on remand that the settlement agreement is not found to have been unfair at the time it was made, the trial court should award Kennard her reasonable attorney fees incurred solely to the maintenance issue in the initial proceeding, on appeal, and on remand.” (CP 58) This Court “remand[ed] the issue of the maintenance escalator to the trial court. Unless the separation agreement is set aside, Kennard is entitled to an award of reasonable attorney fees incurred related solely to the maintenance

issue, in the prior proceeding below on appeal, and on remand.”

(CP 60)

D. On remand, the trial court found that the separation agreement was “completely one-sided” and “no doubt substantively unfair,” but enforced the maintenance escalator on the grounds of “procedural fairness.”

On remand, Kennard asked the trial court to enter a judgment for past due spousal maintenance based on the escalator clause and for attorney fees. (CP 137) Kennard asserted that, retroactively applying the cost of living adjustment, Lee owed \$253,285.20 for past due maintenance, plus \$122,673 in statutory interest (CP 143), and that based on the 34.88% rise in the CPI between 2000 and 2013 Lee’s current monthly maintenance obligation should be \$12,139.20. (CP 143)

Lee asked that the maintenance escalator not be enforced because the agreement was substantively unconscionable at the date of execution under RCW 26.09.070(3). (CP 1) Lee further argued that Kennard should be barred by the equitable doctrine of laches from enforcing the maintenance escalator when she failed to enforce it in the 11 years since the decree was entered. (CP 1-2)

Judge Fleck had retired by time the case was remanded, and King County Superior Court Regina Cahan heard the parties’ cross

motions on remand. (CP 373) The trial court “interpreted the plain meaning of the Court of Appeals decision as mandating the trial court to make a determination whether the settlement agreement was unfair at the time of execution.” (CP 375) Pursuant to this Court’s mandate, the trial court identified the issues before it as: “whether (1) the settlement agreement was not ‘unfair’ at the time it was made, (2) if not ‘unfair,’ determine the amount of the escalator clause as it applies to maintenance; and (3) determine the amount of fees regarding the maintenance issue only.” (CP 375)

The trial court found that the separation agreement was “completely one-sided and no doubt is substantively unfair” at the time it was executed. (CP 380) The trial court found that the division of property, which left Kennard with 86% of the parties’ assets, “was not a fair and equitable distribution of community property,” and that the “astronomical maintenance and child support awards” further “aggravated” the inequity of the property distribution. (CP 380)

Despite finding the separation agreement substantively unfair, the trial court believed the agreement was nonetheless “valid and binding” because the “procedural fairness prong is satisfied,” as Lee had been “fully aware of the terms of the agreement and freely

entered the agreement contrary to strong legal advice.” (CP 380-81) The trial court declined to consider Lee’s argument that a substantively unconscionable agreement should not be enforced because “that decision is more suitable for the appellate courts within a policy discussion.” (CP 381)

The trial court therefore enforced the maintenance escalator clause, but denied Kennard’s request for retroactive application and “past due” maintenance. (CP 381-82) The trial court found there were no “reasonable grounds” for Kennard’s failure to enforce for the last eight years, and that her delay in enforcing this provision had damaged Lee, who “made prospective retirement investment decisions” during the decade that Kennard did not enforce the adjustment. (CP 379) The trial court also found that “a COLA enforcement judgment would result in substantial loss of [Lee]’s retirement (401K) savings.” (CP 379)

The trial court noted that had Kennard pursued enforcement earlier, Lee could have sought to modify his child support obligation and possibly relieved himself from paying “more than 300% of the Washington state chart amount.” (CP 376, 379) Finally, the trial court concluded that it would be “fundamentally unfair for [Kennard] to strategically sit on her rights while accruing 12%

interest while [Lee] has abided the terms of the agreement and would be financially prejudiced by the retroactive application of the COLA escalation clause.” (CP 382)

While the trial court denied Kennard’s request for retroactive application of the escalation clause, it granted her request for prospective application beginning October 18, 2011, when she first filed her motion. (CP 382) Based on the cumulative increase in the CPI since 2000, the trial court determined that the cost of living adjustment increased Lee’s maintenance obligation by \$2,718 from November 2011 through January 2012 and by \$3,139.20 thereafter, increasing his current monthly maintenance obligation from \$9,000 to \$12,139.20. (CP 139-43, 382) Based on these cumulative calculations, the trial court held Lee owed Kennard \$92,419 for the increase in maintenance since she filed her motion in 2011, plus \$14,117.11 in statutory interest, and awarded Kennard fees of \$20,538. (CP 910, 958)

Both parties appeal. (CP 956, 960)

V. ARGUMENT

A. A substantively unconscionable separation agreement should not be enforced under the law of the case, RCW 26.09.070, and case law precedent.

1. The law of the case authorized the trial court to refuse to enforce the maintenance escalator when it found the agreement was unfair at the time of execution.

On remand, the trial court is expected to “exercise its discretion to decide any issue necessary to resolve the case” *Marriage of Rockwell*, 157 Wn. App. 449, 453, ¶ 6, 238 P.3d 1184 (2010); this Court’s mandate “must be strictly followed and carried into effect according to its true intent and meaning as determined by the directions given by this court.” *Ethredge v. Diamond Drill Contracting Co.*, 200 Wash. 273, 276, 93 P.2d 324 (1939). The trial court here was to enforce the maintenance escalator “*unless* [the agreement] is found unfair at the time of execution.” *Lee v. Kennard*, 176 Wn. App. 678, 687-88, ¶ 16, 310 P.3d 845 (2013) (emphasis added). Consistent with this Court’s mandate, the trial court was to consider whether the agreement should be “set aside” as “unfair at the time it was made.” *Lee*, 176 Wn. App. at 687-88, 691, 693, ¶¶ 16, 25, 29; (CP 375: “This court interpreted the plain meaning of the Court of Appeals decision as mandating the trial

court to make a determination whether the settlement agreement was unfair at the time of execution.”).

To resolve whether the maintenance escalator should be enforced, the trial court had to consider the agreement’s fairness on remand. *Rockwell*, 157 Wn. App. at 453, ¶ 6 (court on remand was required to consider fairness of property division given proper characterization of assets before it). The trial court apparently, and wrongly, concluded that it was required to find both substantive and procedural unfairness before it could refuse to enforce the maintenance provisions of the separation agreement. But this is contrary not only to the law of this case, which did not require the trial court to find *procedural* unfairness to refuse to enforce the maintenance escalator, but to both RCW 26.09.070 and case law precedent governing the enforceability of substantively unconscionable agreements. The trial court erred in enforcing the maintenance escalator once it found that the agreement was “no doubt substantively unfair” and “completely one-sided.” (CP 380, 381)

2. RCW 26.09.070 gives the trial court authority to refuse to enforce a maintenance agreement that it finds substantively unfair.

RCW 26.09.070(3) provides that a separation contract “shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, *that the separation contract was unfair at the time of its execution.*” (emphasis added) Once a court “finds that the separation contract was unfair at the time of its execution,” it has authority to make its own decision on maintenance and property division. RCW 26.09.070(4). In this case, once the trial court found that the separation agreement was “no doubt substantively unfair” at the time of its execution (CP 381), it should not have enforced the agreement, specifically the maintenance escalator that the trial court found “only aggravated the inequities of the situation.” (CP 380) *See Marriage of Olsen*, 24 Wn. App. 292, 600 P.2d 690 (1979); *Hansen v. Hansen*, 24 Wn. App. 578, 602 P.2d 369 (1979); *see also Partnership of Rhone/Butcher*, 140 Wn. App. 600, 166 P.3d 1230 (2007), *rev. denied*, 163 Wn.2d 1057 (2008).

In *Olsen*, Division Two affirmed the trial court's decision refusing to enforce the provision of a separation agreement that would have prevented modification of the agreed maintenance award. The court held that it was "convinced that under Washington law a trial court is never absolutely bound to enforce an agreement between a husband and wife regarding support payments." *Olsen*, 24 Wn. App. at 295-96. The court held that the trial court properly refused to enforce a contract for fixed support that resulted in "unreasonable or disproportionate hardship or loss for the encumbered spouse." *Olsen*, 24 Wn. App. at 300.

The appellate court also affirmed a trial court's decision refusing to enforce an unfair separation agreement that provided for unmodifiable maintenance in *Hansen*. The trial court noted that the agreement, drafted by an attorney who served as both a religious and legal counselor to the parties, failed to take into account the husband's financial state and failed to divide the parties' rights in the husband's pension. *Hansen*, 24 Wn. App. at 580-81. Division Three held that RCW 26.09.070 "does not require the court to enforce the terms of an unfair agreement," and the trial court "has authority to modify an agreement for spousal support if

it finds that the agreement is unfair, even though the agreement expressly precludes modification.” *Hansen*, 24 Wn. App. at 582.

Finally, in *Rhone/Butcher*, a couple ending a committed intimate relationship reached an agreement to distribute half the woman’s retirement to the man through a QDRO. A year later, after discovering that the retirement could not be divided by QDRO because the parties had never been married, the man filed a motion seeking substitution of other assets. The trial court ruled that the man was entitled to an award equal to the amount he would have received had the retirement been divisible by QDRO. Citing RCW 26.09.070(3), Division Three affirmed, holding that “once it was discovered that Mr. Butcher could not receive his share of the retirement fund through a QDRO, the court likely did not find the distribution just and equitable. Accordingly, the court properly exercised its discretion in entering an order that provided for substitution of other assets to satisfy the award.” *Rhone/Butcher*, 140 Wn. App. at 607, ¶ 13.

Here, once the trial court found that the separation agreement was substantively unfair at the time of its execution under RCW 26.09.070(3), it should have refused to enforce the maintenance escalator under RCW 26.09.070(4). As argued below,

the trial court improperly concluded that this substantively unfair agreement was somehow “saved” and that it was compelled to enforce the agreement because it was “procedurally fair.” (CP 380-81) Because it is apparent the trial court believed it had no discretion to refuse to enforce the agreement, this Court should remand with directions for the trial court to reconsider its decision enforcing the maintenance escalator. *See Estate of Jones*, 11 Wn.2d 254, 261-62, 118 P.2d 951 (1941) (trial court’s failure to exercise its discretion requires remand); *Marriage of Rockwell*, 157 Wn. App. at 453, ¶ 6.

3. “Procedural fairness” cannot save a substantively unconscionable agreement.

RCW 26.09.070 does not require a trial court to enforce a substantively unconscionable agreement that is purportedly procedurally fair. Allowing spouses to reach agreements “to promote the amicable settlement of disputes attendant upon their separation” does not deprive a court of its authority to exercise its discretion to refuse to enforce an agreement that it concludes was “unfair at the time of its execution” under RCW 26.09.070(1), (3). Recent Supreme Court cases confirm that substantive

unconscionability alone is sufficient to make *any* agreement unenforceable, regardless of its claimed procedural fairness.

Marital agreements are contracts, governed by the principles of contract law. *Marriage of Burke*, 96 Wn. App. 474, 477, 980 P.2d 265 (1999). “It is a well settled rule that courts of equity will not enforce contracts that are illegal, against public policy, or unconscionable.” *Marriage of Olsen*, 24 Wn. App. at 299; *see also Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 321, ¶ 6, 211 P.3d 454 (2009) (“ordinary” contract defenses to enforcement include unconscionability), *rev. denied*, 167 Wn.2d 1019 (2010). Our Supreme Court confirmed that “substantive unconscionability alone” can make an agreement unenforceable in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, ¶ 18, 103 P.3d 773 (2004).

In *Adler*, our Supreme Court addressed for the first time whether a party challenging a contract’s enforceability must show both substantive and procedural unfairness. The Court answered “no,” holding that “in some instances, individual contractual provisions may be so one-sided and harsh as to render them substantively unconscionable despite the fact that circumstances surrounding the parties’ agreement to the contract do not support a

finding of procedural unconscionability. Accordingly we now hold that substantive unconscionability alone can support a finding of unconscionability.” *Adler*, 153 Wn.2d at 346-47, ¶ 18 (*citations omitted*); *see also Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 317-19, 322, ¶¶ 36, 41, 103 P.3d 753 (2004) (substantively unconscionable damage limitation clause in telephone contract was unenforceable even though the agreement was not procedurally unfair).

“[A]n agreement is substantively unconscionable when it is one-sided, overly harsh, shocks the conscience, or is exceedingly calloused.” *Gorden v. Lloyd Ward & Associates, P.C.*, 180 Wn. App. 552, 564-65, ¶ 21, 323 P.3d 1074 (2014). Once the court finds that a contract is substantively unconscionable, it is “unnecessary to reach the issue of procedural unconscionability,” and the contract should be set aside. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 402, ¶ 46, 191 P.3d 845 (2008); *see also Hill V. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 55, ¶ 14, 308 P.3d 635 (2013) (“either substantive or procedural unconscionability is enough to void a contract”); *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 603, ¶ 5, 293 P.3d 1197 (2013) (setting aside an arbitration agreement when

the party seeking to avoid agreement only alleged substantive unconscionability).

Here, the trial court found that the separation agreement was “completely one-sided” and “no doubt substantively unfair,” due in part to the “astronomical maintenance and child support awards [that] only aggravated the inequities of the situation.” (CP 380, 381) The trial court nevertheless enforced the agreement after finding that the agreement was procedurally fair, relying on the “two-prong test” requiring both substantive *and* procedural unfairness to invalidate an agreement first announced in *Hamlin v. Merlino*, 44 Wn.2d 851, 866-67, 272 P.2d 125 (1954). But (if it ever did), *Hamlin* does not now compel enforcement of this unfair maintenance agreement under RCW 26.09.070.

In *Hamlin*, our Supreme Court held “that the unlimited power, which the contract purported to give [the 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 [the husband] the burden of proving that [the wife] fully understand the nature and significance of the contract, and that she freely and

voluntarily entered into it.” 44 Wn.2d at 866-67. This holding has been interpreted to create a “two-prong” test that (in theory)⁴ allows enforcement of a substantively unfair agreement entered with sufficient procedural safeguards.

The Supreme Court most recently set out the *Hamlin* test in *Marriage of Bernard*:

Under the first prong, the court determines whether the agreement is substantively fair, specifically whether it makes reasonable provision for the spouse not seeking to enforce it. If the agreement makes a fair and reasonable provision for the spouse not seeking its enforcement, the analysis ends; the agreement is enforceable. If, however, the agreement is substantively unfair to the spouse not seeking enforcement, the court proceeds to the second prong.

Under the second prong, the court determines whether the agreement is procedurally fair by asking two questions: (1) whether the spouses made a full disclosure of the amount, character, and value of the property involved and (2) whether the agreement was freely entered into on independent advice from counsel with full knowledge by both spouses of their rights. If the court determines the second prong is satisfied, then an otherwise unfair distribution of property is valid and binding.

⁴ In reality, only one published case has enforced a substantively unfair separation agreement under the “two-prong” test set out in *Hamlin*. *Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977) (*but see* Horowitz, J. dissenting).

165 Wn.2d 895, 902-03, ¶¶ 14, 15, 204 P.3d 907 (2009). Whether substantive unfairness alone could invalidate an agreement between spouses was raised in *Bernard*, but the Supreme Court found “it unnecessary to entertain [the] argument because the prenuptial agreement at issue is both substantively and procedurally unfair, and the application of a different analysis would not alter the outcome here.” *Marriage of Bernard*, 165 Wn.2d 895, 903, ¶ 17, 204 P.3d 907 (2009).

The “application of a different analysis” *would* alter the outcome here, however. First, our courts have never applied the “two-prong” test to the maintenance provisions of a separation agreement; consistent with *Olsen* and *Hansen* the enforceability of agreed maintenance provisions are subject to review for substantive fairness. *See* Arg. § A.2, *supra*. This Court in any event should reject the “two-prong” test of *Hamlin* and its progeny as a path to

enforce a substantively unconscionable separation agreement,⁵ and take the opportunity to hold that as in any other area of the law, contracts between spouses that are substantively unconscionable should not be enforced regardless of claimed procedural fairness.

There is no reason unfair separation agreements should be more aggressively enforced than contracts between third parties. Divorcing spouses are entitled to at least the protection against unfair contract provisions that the court extends to nursing home employees, *Adler*, 153 Wn.2d at 347, ¶ 18; telephone customers, *Zuver*, 153 Wn.2d at 317-19, ¶ 36; or parties to “debt adjustment”

⁵ This Court should in particular decline to follow Division Two’s decision in *Marriage of Shaffer*, 47 Wn. App. 189, 194, 733 P.2d 1013, *rev. denied*, 108 Wn.2d 1024 (1987), which skipped the substantive “prong” altogether, holding that the *only* test in determining the enforceability of a separation agreement under RCW 26.09.070 is procedural fairness. The *Shaffer* court concluded that the adoption of RCW 26.09.070 in 1973 “granted new freedom for marital partners to divide their property as they see fit, the old rule allowing the court to disregard the property division made by the parties in their agreement if the division does not conform to the trial court’s view of an equitable property distribution, is no longer appropriate.” 47 Wn. App. at 193, 194. To the same effect is Division Three’s decision reviewing the enforceability of an agreed property distribution in *Marriage of Cohn*, 18 Wn. App. 502, 569 P.2d 79 (1977). Division One has never adopted the reasoning of *Shaffer* or *Cohn* in a published decision, and it should not do so now. As argued in the text, RCW 26.09.070 is not so limited, the procedural fairness test can validate only agreed property divisions, not maintenance, and since 2004 substantive unconscionability alone should invalidate any agreement.

contracts. *Gandee*, 176 Wn.2d at 603, ¶ 5; *Gorden*, 180 Wn. App. at 564-65, ¶ 21.

Divorcing spouses (and, especially, their attorneys) should not be encouraged to seek or impose “one-sided and harsh” terms in a separation contract simply because the other spouse has had the opportunity to consult with counsel. The parties’ special fiduciary responsibilities to one another should make it harder, not easier, to enforce an unconscionable separation agreement. *Seals v. Seals*, 22 Wn. App. 652, 655, 590 P.2d 1301 (1979) (fiduciary relationship between husband and wife does not cease upon contemplation of divorce); *see also Marriage of Sievers*, 78 Wn. App. 287, 310, 897 P.2d 388 (1995). Because the trial court found that the agreement here was “completely one-sided” and “no doubt substantively unfair” due to its “astronomical” child support and maintenance provisions, this Court should vacate the judgments against Lee, and hold that the maintenance escalator cannot be enforced given the trial court’s findings.

B. After properly ruling that Kennard was barred from retroactive enforcement of the maintenance escalator, the trial court erred in giving her the benefit of the cumulative percentage increase in the CPI since 2000.

Even if this one-sided, substantively unfair agreement is enforceable, the trial court nevertheless erred in calculating the amount of the judgment and establishing the new maintenance payment. The trial court properly rejected Kennard's motion for retroactive enforcement of the maintenance escalator on the grounds of laches. (CP 381-82) Based on the trial court's ruling that the maintenance escalator only applies to "current maintenance from the time [Kennard] filed this action on October 18, 2011" (CP 382), only the percentage increases between 2008 and 2011 should have been applied to adjust maintenance.

As the trial court found, Kennard "was aware of her right to seek adjustment" in the previous years; she unreasonably delayed enforcing this right; her delay resulted in "irrevocable and detrimental" "damage" to Lee, who could have sought to modify his child support obligation in the preceding years; it was "just fundamentally unfair" for Kennard to "strategically sit on her rights" while Lee more than abided the terms of the agreement; and retroactive enforcement would "financially prejudice" Lee. (CP 381-

82) Accordingly, the trial court properly ruled that the “escalation clause shall apply to current maintenance from the time [Kennard] filed this action on October 18, 2011.” (CP 382) The trial court then erred by applying the cumulative percentage increases in the CPI from the time the agreement was first executed to the maintenance adjustment in 2011 and thereafter. (See CP 139-43, 382)

The separation agreement provides that maintenance “shall be adjusted every three years based upon the cost of living index.” (CP 70) This calculation for the three years preceding Kennard’s 2011 motion would have increased Lee’s monthly obligation by \$615. (See CP 916-19) Instead, the trial court used the cumulative increase in the CPI since 2000 to adjust maintenance, increasing Lee’s maintenance obligation in 2011 by \$2,718 – an over 30% increase over his (already “astronomical”) \$9,000 monthly maintenance obligation, and over 440% more than a 3-year adjustment. (CP 910) Lee’s monthly obligation then increased to \$3,139.20, starting on January 1, 2012 – a nearly 35% increase. (CP 910)

Laches is intended to “prevent injustice and hardship” when a party unreasonably delays pursuing enforcement of a right she was otherwise entitled. *Marriage of Barber*, 106 Wn. App. 390,

397, 23 P.3d 1106 (2001) (reversing judgment against mother for reimbursement of overpaid daycare expenses, and remanding for the trial court to consider whether father's demand for reimbursement is barred by laches). The trial court's decision here fails to prevent the injustice and hardship that laches is intended to prevent by giving Kennard the benefit of the percentage increase in the CPI during those years that she "unfairly" and "strategically" "sat on her rights" to Lee's detriment. Even if this unfair separation agreement is enforceable, this Court should reverse and remand to recalculate the judgment and adjustment to properly reflect the trial court's finding of laches.

C. The trial court erred in awarding attorney fees to Kennard, as she did not substantially prevail. Given the trial court's laches findings, Lee is entitled to his fees under RCW 26.18.160 below and in this Court.

The trial court erred in awarding attorney fees to Kennard for her efforts in pursuing enforcement of the maintenance escalator under RCW 26.18.160 because she did not substantially prevail. RCW 26.18.160 allows an award of costs to the "prevailing party" in an action to enforce a maintenance order. "If both parties prevail on major issues, neither is a prevailing party entitled to

attorney fees.” *Marriage of Nelson*, 62 Wn. App. 515, 519, 814 P.2d 1208 (1991).

Kennard did not substantially prevail; she sought a judgment of \$376,000 based on her claim that she was owed “past due” maintenance and entitled to retroactively enforcing the maintenance escalator and she received less than a third of her requested judgment. (*Compare* CP 137 and CP 951) The trial court rejected Kennard’s request for retroactive enforcement of an unfair agreement and agreed with Lee that she was barred by the equitable doctrine of laches. (CP 381) As the trial court found, “it is just fundamentally unfair for [Kennard] to strategically sit on her right while accruing 12% interest while [Lee] has been financially prejudiced by the retroactive application of the COLA escalation clause.” (CP 381-82)

Because Kennard could not retroactively enforce the maintenance escalator, she was not “owed” any past due maintenance under the agreement when she filed her motion in 2011. In effect, she was successful only in prospectively adjusting maintenance under RCW 26.09.170. An action for adjustment is not an “enforcement” action for which attorney fees should be available under this court’s earlier decision, which authorized an

award of fees only if the trial court found the agreement was fair (CP 58), or RCW 26.18.160. *See Oblizalo v. Oblizalo*, 54 Wn. App. 800, 805-06, 776 P.2d 166 (1989) (RCW 26.18.160 does not apply to motion to modify support); *Rains v. DSHS*, 98 Wn. App. 127, 989 P.2d 558 (1999) (ex-wife not entitled to RCW 26.18.160 fees in action by husband for determination whether Italian support order was enforceable), *rev. denied*, 141 Wn.2d 1013 (2000).

Kennard was unsuccessful in her motion to enforce the unfair separation agreement for “past due” maintenance. Therefore, she did not “prevail” and was not entitled to attorney fees under this Court’s earlier decision or RCW 26.18.160. In fact, Lee was the prevailing party in Kennard’s enforcement action, because he successfully defended against her claim that he owed past due maintenance based on her claim for retroactive adjustment of the escalator clause. Although RCW 26.18.160 provides that an “obligor party may not be considered a prevailing party” for purposes of an award of fees “unless the obligee acted in bad faith in connection with the proceeding,” the trial court’s findings of Kennard’s “unreasonable” “strategic” delay in seeking enforcement are tantamount to a finding of bad faith. Accordingly, Lee, not Kennard, should be awarded fees. RAP 18.1.

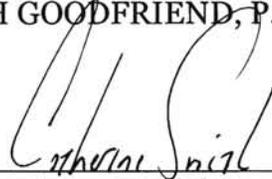
VI. CONCLUSION

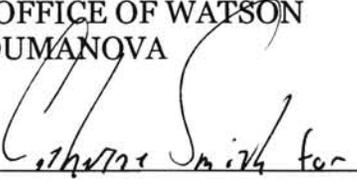
This Court should reverse and remand to the trial court to vacate the judgments awarded against Lee for maintenance and attorney fees because the separation agreement was unfair and should not be enforced. If this Court holds that the agreement is enforceable, it should vacate the attorney fee award because Kennard was not the prevailing party, and remand for recalculation of maintenance applying the change in the CPI for only the three years prior to Kennard's 2011 motion, and this Court should award attorney fees to Lee on appeal.

Dated this 1st day of December, 2014.

SMITH GOODFRIEND, P.S.

LAW OFFICE OF WATSON
& TOUMANOVA

By:  _____

By:  _____

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Attorneys for Appellant Lee

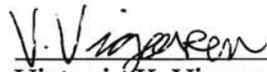
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 1, 2014, I arranged for service of the foregoing Brief of Appellant Lee, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-File
Janet Watson Law Office of Watson & Toumanova 108 S Washington St Ste 304 Seattle WA 98104-3406	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
H. Michael Finesilver Attorney at Law 207 E Edgar St Seattle WA 98102-3108	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Deliver <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

DATED at Seattle, Washington this 1st day of December, 2014.



Victoria K. Vigoren

FILED
KING COUNTY, WASHINGTON

JAN 30 2014

SUPERIOR COURT CLERK
BY Janie Smoter
DEPUTY

Superior Court of Washington
County of King

In Re Marriage of:

No. 99-3-03079-0SEA

Gabriel Lee ,

Petitioner

Order on Cross Motions for
Summary Judgment on Remand

and

Carol Kennard,

Respondent

This matter came on for hearing on December 24, 2013 before the undersigned, Judge Regina Cahan on Order of Remand (issued October 15, 2013 to Hon. Judge Deborah Fleck, retired November 31, 2013) from Division I of the Court of Appeals. The petitioner/father was represented by Janet Watson, and the respondent/mother was represented by H. Michael Finesilver (f/k/a Fields). On Remand, the parties filed cross motions for summary judgment. Respondent moved for imposition of judgment and attorney fees. Petitioner moved for declaratory judgment barring enforcement of the spousal maintenance automatic escalator clause on the basis that the marital contract is

Order on Remand on Cross Motions
For Summary Judgment - Page 1 of 11

1 unconscionably unfair and that the Respondent should be barred from obtaining a
2 judgment on the basis of laches
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4 **I. EVIDENCE PRESENTED**

5 On remand, the Court reviewed the following pleadings submitted to the court¹:

- 6 1. Petitioner's Motion for Summary Judgment on Remand;
- 7 2. Legal Memorandum of Movant Lee in Support of Motion for Summary Judgment
8 on Remand;
- 9 3. Supporting Declaration of Movant Gabriel Lee re: Remand and attachments;
- 10 4. Sealed Financial Source Documents of Petitioner
- 11 5. Memorandum in Opposition to Motion for summary Judgment and attachments;
- 12 6. Response Declaration of Carol Kennard to Motion for Summary Judgment;
- 13 7. Declaration of Counsel regarding Legal Fees and attachments;
- 14 8. Respondent's Financial Declaration;
- 15 9. Sealed Financial Source Documents of Respondent;
- 16 10. Reply Declaration of Respondent Gabriel Lee re: Motion for Summary Judgment;
- 17 11. Reply Declaration of H. Michael Finesilver (FKA Fields) and attachments;
- 18 12. Corrected Declaration of Counsel Regarding Legal Fees
- 19 13. Response To Petitioner's Fee Request Declaration of Gabriel Lee re: Petitioner's
20 Judgment Calculation in Response to Petitioner's Motion for Judgment;
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- 22

23 ¹ The parties filed cross motion and each referred to themselves as Petitioner in their respective motions.
24 The titles of the documents are listed as stated on the pleading. In this Order, the court maintains the
original case caption and refers to the parties as follows: Petitioner/father and Respondent/mother.

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14. Reply Declaration of Lester Feitel and attachments;
 15. Second Corrected Declaration of Counsel regarding Legal Fees

II. ORDER

Now, Therefore, it is hereby **ORDERED, ADJUDGED AND DECREED** that the Motion for Summary Judgment is Granted in Part and Denied in Part. Judgment shall issue as explained below and the Court has awarded reasonable attorney fees related to spousal maintenance.

The Court of Appeals remanded the issue of the maintenance escalator clause to the trial court to determine whether (1) the settlement agreement was not "unfair" at the time it was made² (2) If not "unfair", determine the amount of the escalator clause as it applies to maintenance; and (3) determine the amount of attorneys' fees regarding the maintenance issue only.

NOW, THEREFORE the court makes the following findings of fact³:

1. The parties married on July 22, 1979 and separated approximately February 15, 1999. The parties had a long- term 20-year marriage, approximately 235 months.
2. The settlement agreement included a maintenance award of \$9,000 /month with the escalator provision at issue in this case for 21 years (251 months), longer than

² The parties disagreed whether the first issue as described by this court was truly at issue. Respondent argued that this issue was time barred pursuant to *In re the Marriage of Hulscher*, 143 Wn. App. 708, 180 P.3d 199 (2008), that under the merger doctrine, the only proper challenge would be to set aside the agreement under a CR 60 analysis, and reference to fairness is merely dicta. This court interpreted the plain meaning of the Court of Appeals decision as mandating the trial court to make a determination whether the settlement agreement was unfair at the time of execution.

³ These are all undisputed or uncontroverted facts.

1 the marriage itself. The total maintenance award is \$2,259,000 (without COLA
2 adjustments).

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4 3. In the 2000 settlement agreement, the Respondent/mother received the family
5 home located in Bellevue, WA. This was recently sold for a substantial profit.

6 4. Uncontroverted evidence on remand established that the Respondent/mother
7 received approximately \$254,000 and the Petitioner/father \$42,000 (86% and
8 14% respectively) of the community property as constituted when the Settlement
9 Agreement was signed on February 9, 2000.

10 5. Additional uncontroverted evidence submitted on remand confirmed that neither
11 party had any separate property on February 9, 2000 and that both parties were
12 aware of all property owned by each spouse at that time. Neither party claimed
13 or now claims "undisclosed assets".

14 6. The Agreed Child Support Order required Petitioner to pay \$875 per child. (This
15 required the Petitioner to pay more than 300% of the Washington state chart
16 amount then in effect.) It appears from the worksheet that the father's standard
17 calculation was \$672.13 and given health care credit the presumptive transfer
18 payment was \$572.13 for *both* children. Petitioner instead agreed to monthly
19 child support of \$1,750.00 (\$875 per child) (without the COLA adjustment that the
20 appellate court affirmed was invalid.)
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22 7. The agreement also required the Petitioner/ father to pay monthly GET
23 (Guaranteed education tuition) contributions for each child totaling \$458/month.
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8. The Agreed Child Support order required the parties to share post-secondary expenses.
 9. Petitioner was represented by counsel during initial negotiations. There was full disclosure of assets and debts. Petitioner had full opportunity to obtain values of assets. Legal counsel advised Petitioner that the proposed settlement agreement was not fair and equitable. His counsel wrote him two letters that outlined in detail why in her professional opinion the proposals were not fair. Moreover, his counsel explained that she would need to withdraw if he chose to proceed because she could not represent to a court that the agreement was a fair and equitable distribution of property. Petitioner was fully aware of the terms of the agreement and freely entered the agreement contrary to legal advice. He had the full benefit of the advice of competent legal counsel prior to his signing the agreement, which he did voluntarily and intelligently, more than two months before the scheduled trial.
 10. Petitioner has paid the base \$9,000 per month spousal maintenance every month since February, 2000.
 11. Uncontroverted evidence on remand established that Respondent complied with the provision of the Settlement Agreement that he pre-fund both children's college tuition by making monthly post-dissolution contributions to each child's GET account. The oldest child has completely depleted his tuition account and is now a physician. The youngest, now age 22, is still a student. She continues to

1 receive \$875 per month directly from Petitioner/father and uses her GET fund for
2 tuition.

3
4 12. Although she was well aware of the details in the Agreement, Respondent did not
5 seek to enforce the "every three years prospective CPI adjustment" provision of
6 the agreed maintenance until filing a motion on October 18, 2011 to enforce the
7 CPI adjustments retroactively to 2003.

8 13. Neither party petitioned the court prior to October, 2011, to modify the Agreed
9 Child Support order adopted by the court February 11, 2000.

10 14. The children's maternal grandparents made substantial contributions to the
11 children's post-secondary educational expenses.

12 15. The Petitioner made substantial contributions, continuing at present for the
13 younger child, to the children's post-secondary educations. Contributions
14 included continuing the \$875 per child "base" transfer support to each child after
15 majority.

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17 16. The Respondent did not make any contributions to the children's GET account.

18 17. The Respondent was represented by counsel when she signed the agreement.
19 Counsel fully informed Respondent of her legal rights and obligations. The
20 agreement itself provided clear and actual notice to the Respondent of the
21 escalation clause regarding maintenance. There were also e-mails presented
22 that confirm Respondent's knowledge of her rights. The Court finds that the
23 Respondent was clearly well aware of the COLA escalation clause of the
24

1 maintenance provision and her avenues to pursue it.

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3 18. There was no evidence presented as to any reasonable grounds for the
4 Respondent to have delayed eight years before filing for enforcement of the
5 COLA adjustment in maintenance and a request for retroactive payments.
- 6 19. The delay in enforcement would result in the accrual of prejudgment monthly
7 interest of 12% retroactively for the last eight years. (Respondent claimed this
8 was \$375,959.03 in her Motion for Judgment: Re Past Due Spousal Maintenance
9 and Attorney Fees.)
- 10 20. Meanwhile, the Petitioner cannot retroactively seek adjustment of child support.
11 Petitioner had the right to prospectively seek modification of child support while
12 the children were dependent but no longer has the right because child support
13 may not be retroactively modified.
- 14 21. Similarly, Petitioner funded both of his children's GET accounts fully and has paid
15 substantially more than 50% the educational costs of the children. He cannot
16 retroactively alter the amounts already paid.
- 17 22. Petitioner made prospective retirement investment decisions during the years
18 2003-2011. Uncontroverted evidence established that A COLA enforcement
19 judgment would result in a substantial loss of Petitioner's retirement (401K)
20 savings.
- 21 23. The court finds the methodology employed by Mr. Lester's Feistel in his
22 Declaration to be the proper methodology to calculate the maintenance
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24

1 payments.

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3 24. Declarations of counsel substantiate reasonable attorneys' fees and costs in the
4 amount of \$19,048.00. Counsel included calculations using two different methods,
5 hourly and per page. Counsel requested the lesser of the two amounts and the
6 court finds the amount requested reasonable. At oral argument, Petitioner's
7 counsel conceded the amount requested was reasonable. The figure awarded is
8 only for the maintenance issue and did not include fees for the QDRO or child
9 support issues.

10 ***The court makes the following Conclusions of Law:***

- 11 1. There is a two prong test to determine whether an RCW 26.09.070(3) marital
12 settlement agreement is "unfair": (1) substantive fairness; specifically, whether the
13 agreement makes reasonable provision for the spouse not seeking to enforce it;
14 and (2) procedural fairness; specifically, whether the spouse made full disclosure
15 of the amount at issue and whether the agreement was freely entered into on
16 independent advice from counsel with full knowledge by both spouses of their
17 rights. If the procedural fairness prong is satisfied, than even if the court finds that
18 the agreement is substantively unfair, it is still valid and binding.
- 19
20 2. The Court finds that the division of property was not a fair and equitable
21 distribution of community property and the astronomical maintenance and child
22 support awards only aggravated the inequities of the situation. The court finds that
23 the agreement was substantively unfair. However, the Petitioner was fully aware
24

1 of the terms of the agreement and freely entered the agreement contrary to strong
2 legal advice. The court finds that the procedural fairness prong is satisfied;
3 consequently, the agreement is valid and binding.⁴
4

5 3. Evidence on remand is sufficient under the clear, cogent and convincing standard
6 that Petitioner's motion for retroactive enforcement of the Agreement's automatic
7 spousal maintenance escalator clause should be DENIED on the basis of laches:

8 (a) The Respondent was aware of her right to seek adjustment and enforcement
9 of the "every three years prospective" maintenance increase at all times
10 since 2000. Nevertheless, Respondent delayed and did not seek to
11 enforce this right until October, 2011;

12 (b) There was no reasonable grounds for the Respondent's delay; and

13 (c) Respondent's delay resulted in damage to the Petitioner --irrevocable and
14 detrimental change of the Respondent's financial position. He no longer has
15 the ability to modify child support or educations costs already paid. At this
16 point, Petitioner could not recoup or terminate the \$1750 per month
17 pre-majority child support transfer payment that he paid when the standard
18 calculation was less than \$700/ month. Similarly, Petitioner cannot recoup
19 the educational support he has funded to his children. Finally, it is just
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21
22 ⁴ Petitioner urged this court to revisit the issue raised by the Respondent in In re Marriage of Bernard, 165
23 Wn 2d 895 en banc (2009), specifically to decline to enforce a marital contract that is substantively unfair
24 even if it procedurally fair. Although this agreement is completely one-sided and no doubt is substantively
25 unfair, this court is not in the position to ignore the Washington State Supreme Court's decision in Bernard
relying on In re Marriage of Matson, 107 Wn 2d 479, 482-3 (1986). If the reasoning of that case is to be
somehow extended, that decision is more suitable for the appellate courts within a policy discussion.

1 fundamentally unfair for Respondent to strategically sit on her rights while
2 accruing 12% interest while Petitioner has abided by the terms of the
3 agreement and would be financially prejudiced by the retroactive application
4 of the COLA escalation clause.
5

6 4. Although the retroactive application of the COLA escalation clause has been
7 barred by laches, both parties agreed at oral argument that the prospective
8 application of the escalation clause would not be affected by a laches defense.
9 Therefore, since the agreement is still valid and binding, the escalation clause
10 shall apply to current maintenance from the time Respondent filed this action on
11 October 18, 2011. The escalation should be determined by the methodology
12 outlined in Lester's Feistel's Declaration. (Given that the base year is now 2011
13 and not 2003, the actual calculations would not be the same given interest but the
14 same methodology should be applied.) Respondent shall prepare a Judgment
15 and Proposed Order with the appropriate calculations for maintenance arrears
16 from October 2011- present and then identify the new maintenance amount
17 determined by the same methodology discussed.
18

19 5. Given that the court found that the agreement was procedurally fair and remains
20 valid and binding at least for prospective maintenance payments, the Respondent
21 is entitled to attorney's fees incurred on the maintenance issued in the initial
22 proceedings, on appeal and on remand. Petitioner shall pay reasonable attorneys'
23 fees in the amount of \$19,048.00.
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6. Respondent shall submit a judgment and Proposed Order as to the new
maintenance calculation and attorneys' fees that complies with this Order within
ten days of this Order. Counsel shall provide a copy to opposing counsel first and,
if possible, submit an agreed order.

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DONE IN OPEN COURT this 30th day of January, 2014.



Judge Regina S. Cahlan

FILED
KING COUNTY, WASHINGTON

APR 21 2014

SUPERIOR COURT CLERK
BY Gary Povick
DEPUTY

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In Re the Marriage of:

GABRIEL Y. LEE,

Petitioner,

and

CAROL ANN KENNARD,

Respondent.

NO. 99-3-03079-0 SEA

ORDER ON MOTION FOR PAST
DUE SPOUSAL MAINTENANCE
AND FOR ATTORNEYS FEES

I. Judgment Summary

A.	Judgment creditor	<u>Carol Ann Kennard</u>
B.	Judgment debtor	<u>Gabriel Y. Lee</u>
C.	Principal judgment amount	<u>\$ 92,491.20</u>
	from October 2011 through March 2014.	
D.	Interest to date of judgment	<u>\$ 14,117.11</u>
E.	Attorney fees	<u>\$ 19,048.00</u> 20,539.00
F.	Costs	\$ _____
G.	Other recovery amount	\$ _____
H.	Principal judgment shall bear interest at 12 % per annum	
I.	Attorney fees, costs and other recovery amounts shall bear interest at 12% per annum	
J.	Attorney for judgment creditor	<u>H. Michael Finesilver (aka Fields)</u>
K.	Attorney for judgment debtor	<u>Janet Watson</u>
L.	Other:	

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II. ORDER

THIS MATTER having come on duly and regularly for hearing before the undersigned Judge/Court Commissioner to the above entitled court; petitioner being represented by Janet Watson, and the respondent being represented by H. Michael Finesilver (f/k/a Fields); the court having reviewed the records and filed herein and deeming itself fully advised in the premises; Now, Therefore, it is hereby **ORDERED, ADJUDGED AND DECREED** that:

1. A judgment is hereby entered for past due spousal maintenance in the amount of \$106,608.31. *(92,491.20 principal + \$14,117.11 interest) * 20,538.00*
2. A judgment is hereby entered for attorney fees in the amount of \$19,048.00.
3. Per the agreement of the parties, spousal maintenance shall be paid by Petitioner to Respondent in the amount of \$12,139.20 until January of 2015. Commencing February 2015, the cost of living increase shall be added to the base spousal maintenance of \$9,000 per month.

** The court previously ordered Petitioner to pay Respondent \$19,048.00. There were an additional \$1,450.00 interests to litigation. Judgment. See total for 244 fees 1-17-14*

DONE IN OPEN COURT this 17th day of April, 2014. *Ally fees \$20,538.00*



JUDGE/COURT COMMISSIONER
REGINA S. CAHAN

Presented by: _____ Copy received; approved for entry;
notice of presentation waived:

H. Michael Finesilver (aka Fields)
WSBA #5495
Attorney for Respondent

Janet Watson,
WSBA #15442
Attorney for Petitioner

FILED
KING COUNTY, WASHINGTON

FEB 26 2014

SUPERIOR COURT CLERK
BY Gary Povick
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

GABRIEL LEE,

Petitioner,

vs.

CAROL ANN KENNARD,

Respondent.

NO. 99-3-03079-0 SEA

**ORDER DENYING PETITIONER'S
MOTION FOR RECONSIDERATION**

(Clerk's Action Required)

THIS MATTER came before the court on Petitioner's Motion for Reconsideration noted for 2/24/2014 of the court's January 30, 2014 Order. The court reviewed the files and records, including Petitioner's Motion for Reconsideration, IT IS HEREBY ORDERED that Petitioner's Motion for Reconsideration is DENIED.

DATED this 25th day of February, 2014.



Judge Regina S. Cahan
King County Superior Court

ORIGINAL

ORDER DENYING PETITIONER'S MOTION
FOR RECONSIDERATION - Page 1 of 1

Judge Regina S. Cahan
King County Superior Court
Maleng Regional Justice Center
401 Fourth Ave N
Kent, WA 98032