

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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IN RE THE MARRIAGE OF:

LONNIE ROSENWALD, Respondent

v.

DAVID ROWE, Appellant

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BRIEF OF APPELLANT

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**I. Statement Of The Case:**

This appeal involves the validity of certain provisions of an agreement between the parties, executed on October 22, 2009, an award of attorney fees and the striking of a trial date.

David Rowe and Lonnie Rosenwald began dating in 2008. (CP 440). Later that year they became engaged to be married when he gave her an engagement ring. (CP 440) They began cohabiting in January 2009. (CP 440). They occupied her home with her two children. At that time they were both employed. (CP 471). David lost his job two months later. (CP 477). Lonnie continued to work as an attorney (CP 228).

In May 2009, Lonnie insisted upon a pre-nuptial agreement. (CP 472). David was still unemployed, and did not obtain a job offer until December 2009. (CP 227 and 229). Instead of apportioning their living expenses based upon incomes, and the number of persons in the household, the draft of the proposed agreement required that he contribute to half the living expenses and half her monthly mortgage payments, (CP 270).

The proposal also contained a provision that characterized all earned income as the separate property of the person earning it. (CP 270). Thus it precluded the building of a community estate unless there would

be a subsequent agreement to create one. (CP 227, 247, 270 and 271). This was initially agreeable to David until he consulted a lawyer. (CP 75, 622 and 348-349).

HE went to attorney Wolfgang Anderson in Seattle, who had represented him in his divorce. (CP 230). He authorized Mr. Anderson to send her attorney a letter in June 2009, protesting that the provision precluding the creation of a community estate amounted to signing him up to marital bondage while at the same time having to pay half of all costs, and must be corrected (CP 348-349). Mr. Anderson received no reply to his letter. (CP 230). Ms. Rosenwald's reaction to the letter was to insist that Mr. Rowe obtain no further legal advice from his attorney (CP 234).

In subsequent direct negotiations between the parties, the only changes Ms. Rosenwald was willing to accommodate were some provisions that would allow him to remain in the home if she pre-deceased him, that she would pay him \$15,000 in cash if the relationship terminated less than five years, or \$30,000 in cash, for transition costs, if it terminated after five years or more. A provision was also added that the relationship would not be considered terminated until they had gone through at least ten joint counseling sessions (CP 271 and 272).

Ms. Rosenwald would not budge from the provision that precluded the building of a community or joint estate nor from the requirement that housing and other lifestyle expenses be shared equally. (CP 75 and 229). She removed her engagement ring and told him he would have to move out of the home unless he signed. (CP 622). He had no job, no prospect of a job and, no resources. (CP 622). He could not afford to rent another place. He would have been homeless. (CP 622). He had no choice but to sign regardless of legal advice to the contrary. (CP 75 and 622). She only put the ring back on when he acquiesced. (CP 231)

At the time of the signing the agreement, he had exhausted his unemployment benefits and his credit, and for a period of time had been unable to pay his disproportionate half share of the expenses that the agreement required. He had to borrow these funds from Ms. Rosenwald and repay them later before paying on his other debts. (CP 74).

When attorney Anderson saw the final draft when he and Mr. Rowe had a final meeting. He was so upset with Mr. Rowe for his refusal to accept any further legal advice and his insistence that Mr. Anderson sign that he would only sign in red ink as a protest. (CP 75, 642, 643, 645 and 654 to 657).

Although he had earned \$100,000 in 2008, at the time the agreement was executed, David Rowe was unemployed, had a car worth \$13,000 with a \$10,000 car loan against it, a one third ownership in encumbered unimproved land trust in South Africa of undetermined value, a bank account with \$2,000 and \$27,500 in credit card debt. (CP 279). Attorney Rosenwald was practicing and earning \$359,881 per year and had a \$2.8 million estate which included a 401k worth \$30,000. She had earned no restricted stock (RSP's). (CP 228 and 277-278)

It was not until December 2009 that he was offered a job. In June 2011, the parties announced their forthcoming marriage the following month and sent out invitations to a formal ceremony at which there was a sign indicating the wedding of the couple. (CP 73, 80 and 82). In March of 2013 he lost his job. (CP 228) In May 2013, she asked him to leave. (CP 228) They agreed to condense the ten joint counseling sessions required by the October 22, 2009, agreement to occur before the relationship was to be deemed terminated, into 13 hours of joint counseling over a period of two consecutive days with a therapist in Bellingham. (CP 623). There was only one brief morning session when they initially met together, then broke off to meet with the counselor separately for the balance of the morning. (CP 623). Mr. Rowe testified that the counselor informed him

that Ms. Rosenwald refused to meet any further. (CP 611-613). Ms. Rosenwald testified that it was the counselor who refused to counsel them any further. (CP 320-324). The therapist did not provide a declaration, but was under subpoena for trial. (CP 756).

Mr. Rowe moved from the Mercer Island residence to her Whidbey Island home in June, and moved out in July 2013. (CP 228). After unsuccessful negotiations over financial issues pertaining to termination of the relationship (CP 234), he filed a petition for decree of legal separation in February of 2015. In it, he sought spousal maintenance, attorney fees, as well as an equitable division of assets (CP 1-4).

In November 2015, she filed a motion for summary judgment as to the validity and enforceability of the October 22, 2009 agreement. He filed a counter motion to declare the agreement invalid and unenforceable. (CP 438 and 439). At the time of the summary judgment hearing, Mr. Rowe had no job, no prospect of a job, no savings, severe health problems at age 62, including a hole in the macula of both his eyes (CP 228). He was over \$25,000 in debt, and was a public charge, on Medicaid and receiving food stamps. (CP 227 and 394-395). She was earning over \$541,000 per year and had built up an estate worth \$7 million or \$15 million depending upon each party's opinion of value (CP 228 and 427).

This included stock entitlements through her employer, acquired while the parties lived together, the vested value of which was \$1,730,313 based upon the value provided by the company (CP 680-690) and a 401k which included employer matches to her contributions of considerably greater value than at the time they executed the agreement. (CP 227 and 317 and 624)

Her earnings and bonuses were deposited into her Bank of America account (CP 427). From that account she spent \$138,000 to acquire a Mexico Partnership in a condominium and furnishings. (CP 319).

At the summary judgment hearing the court was aware of a pending motion to declare the parties status as being married. (CP 438-439). The court was also aware of Washington cases that hold that parties in the State of Washington can be considered married even though, as here, they did not obtain a marriage license. (CP 499-501).

The court granted her motion for summary judgment and awarded her \$86,000 in attorney fees since the agreement included a provision that reasonable fees were to be awarded to defend enforcement of the agreement. (CP 273). Her attorney charged her \$525 per hour. (CP 557). The hearing occurred on December 18, and the order was entered on

December 21, 2015. (CP 696-700). He then filed a timely motion for reconsideration. (CP 730-747). His motion for a declaratory judgment as to the marriage status which had been set for hearing in January 2016 was stricken leaving the issue for resolution at trial. (CP 696-700).

Before the decision on the motion for reconsideration was entered, Ms. Rosenwald filed a motion to strike the February 2016 trial date. Mr. Rowe opposed the motion. (CP 753-782). An order was entered on January 13, 2016 denying reconsideration and granting the motion to strike the trial date. This appeal followed.

## **II. Assignments Of Error.**

### **A. Assignment Of Error #1: Granting The Motion To Strike The Trial Date.**

Issues Pertaining to Assignment of Error 1:

1. Whether a trial was necessary to determine when the relationship terminated and whether Lonnie Rosenwald owed David Rowe \$15,000 or \$30,000 under the pre-nuptial agreement.
2. Whether a trial was necessary to determine whether the parties were married and thereby whether spousal maintenance and or an award of attorney fees based

upon the financial resources of both parties, pursuant to RCW 26.09.140 was warranted.

**B. Assignment Of Error #2: Granting the Motion For Summary Judgment That The October 22, 2009 Agreement Is Valid and Enforceable.**

Issues related to assignment of error #2:

1. Whether the October 22, 2009 agreement was unconscionable in substance.
2. Whether the October 22, 2009 agreement was unfair in substance
3. Whether the October 22, 2009 agreement was entered into in a procedurally unfair manner.
4. Whether there were genuine issues of material fact that precluded the granting of the summary judgment motion.
5. Whether the court failed to view the evidence in a light most favorable to David Rowe as the Non Moving Party.

**C. Assignment Of Error #3: Awarding Any Attorney Fees To Lonnie Rosenwald**

**D. Assignment of Error #4: Awarding An Unreasonable Amount Of Attorney Fees To Lonnie Rosenwald.**

**III. Argument**

**A. Assignment Of Error #1: Striking The Trial Date**

The determination that the agreement of October 22, 2009 was valid and enforceable did not dispose of all issues before the trial court. A court cannot award spousal maintenance or attorney fees in a committed intimate relationship (*Connell v. Francisco*, 127 Wash.2d 339, 898 P.2d 831(1995)). However, if deemed married, the trial court could award spousal maintenance under RCW 26.09.090 and attorney fees based upon financial need and ability to pay under RCW 26.09.140.

That they were married, that spousal maintenance and an award of fees should be awarded to David were all pled in his petition for a decree of legal separation. (CP 1-4). No summary determination had been made as to whether the parties were or were not married. The court was aware of Washington case law that has recognized couples as being legally married even though no marriage license had been obtained. (CP 499).

The court was also aware that a year and a half after the agreement was signed the couple had sent out formal wedding invitations to family and friends announcing their wedding ceremony to occur on July

9, 2011. They hosted a lavish dinner at a University of Washington Botanical Gardens facility, officiated by a Seattle District Court Judge. (CP 73). A sign outside the immediate area of the ceremony notified all who attended that this was the location of “David and Lonnie’s Wedding”. A picture of that sign and of the ceremony was used as evidence. (CP 73 and 83).

During the ceremony they exchanged wedding rings and vows and Lonnie announced to the guests a “welcome to the other wedding of 2011” the other wedding being that of Prince William of the English royal family. (CP 625).

During the month following the ceremony the couple shared “wedding photos” and each changed their individual Facebook accounts under the category relationship status from “single” to “married.” (CP 73, 102, and 104). As late as March 2013 Lonnie affirmed that marriage enhances love. (CP 73 and 107).

In May 2015, she filed a discovery Protective Order Motion on the basis that David’s claims they were married were false. This motion was denied. During her deposition, Ms. Rosenwald did not deny that her assertions under penalty of perjury regarding their announcement of

marriage she made in her Protective Order Motion were false. (CP 314 and 315).

Another dispute not resolved by the summary judgment order was whether the agreement requires Lonnie Rosenwald to pay David Rowe \$15,000 or \$30,000. The trial court acknowledged its awareness of these issues during the summary judgment hearing (RP 35). Her order striking the trial date left them unresolved as well.

Whether a trial date should be stricken is an issue of law. (*Keck v. Collins*, 181 Wash.App 67, 325 P.3d 306 (2014)). As such whether the trial date should have been stricken is determined de novo by the appellate court. Even if that were not the case, the trial court abused its discretion by striking the trial date. There were clearly issues warranting a trial, the validity of the October 22 agreement notwithstanding. The order striking the trial date should be reversed and the court directed to reset a trial date.

A final reason why the trial date should not have been stricken is that the motion for summary judgment as to the validity of the October 22, 2009 agreement should have been denied.

**B. Assignment Of Error #2: Granting Summary Judgment As To The Validity And Enforceability Of The October Agreement.**

**1. There Was Evidence That Assets Acquired During The Period Of Cohabitation Were Worth Nearly \$2 million.**

In the absence of an agreement to the contrary “...all property acquired during a meretricious relationship is presumed to be owned by both parties.” *Connell v. Francisco*, 127 Wn.2d 339 at 351, 898 P.2d 831 (1995). Earned income during the period of co-habitation is community like in nature. Therefore any assets acquired by means of that income belong to the couple, not to the person through whom the assets are acquired using community property law by analogy. *In Parentage of GW-F and AW-F* 170 Wash.App 631, 285 P.3d 208 (2012), 170 Wa App 631 at 637, 285 P.3d 208 (2012).

Substantial property was acquired during the period of time the parties’ cohabitated. Lonnie Rosenwald’s earnings increased from \$359,881.00 in 2009 to \$541,458.00 in 2014. (CP 228 and 427). She deposited all earned income in to her Bank of America checking and savings account. (CP 427). During that time the following assets were acquired:

Although the current value of her 401 k was not in the record, there was evidence that she contributed the maximum allowed by law (CP 317-318) plus a fifty percent match by her employer. Vested Restricted Stock

was worth over \$1.7 million. (CP 680-690). \$138,000 was invested in a Mexican Partnership owning a condominium and furniture (CP 319).

From the Bank of America account she also spent over \$30,000 on improvements to the Mercer Island and Whidbey Island real properties (CP 427). David either supervised or personally performed labor on those projects, saving significant costs of hiring someone:

As To The Mercer Island Home:

He supervised the installation and helped design the new bathroom, the new landscaping at the home. (CP 76-77). He purchased, delivered, removed, and installed two sets of barrier rocks for the home. (CP 77). He also researched and did vendor evaluations and selected and supervised the installation of a new dishwasher and the removal of a tree stump on the property. (CP 76). He researched and selected the color and purchased the materials for the house painting. He managed and supervised the house painting, both the interior and exterior of the home. (CP 76). He purchased materials and did the labor to restore a water damaged chimney. He repaired several areas of dry wall in the home. (CP 76).

He did the selections, purchases and labor of a door and door frame removal and replacement, installation of the electronic pet door, installation of the keyless entry lock.

As To The Whidbey Island Summer Property

He designed and managed the installation of the new concrete decorative driveway for the home. He researched, purchased, delivered and did the installation of the kitchen floor removal and its replacement (CP 77) as well as a hot tub cover removal device. He researched, selected the vendor, provided labor and supervised the removal of trees from the property. (CP 77).

Thus, the agreement, if valid, potentially deprives Mr. Rowe of an equitable interest of monetary value due to the cost and contribution to the increased value of the properties. (See *Elam v. Elam*, 97 Wash.2d 811, 650 P.2d 213 (1982)).

**2. The Standards That Govern The Validity of Pre-Nuptial Agreements Also Govern Agreements For Couples In A Committed Intimate Relationship**

The standards that govern the enforceability of prenuptial agreements are the same as to those between unmarried cohabitants. *In Parentage of GW-F and AW-F* 170 Wash.App 631, 285 P.3d 208 (2012).

*In re the Marriage of Bernard*, 165 Wash.2d 895, 204 P.3d 907 (2009) makes clear that if an agreement is fair in substance it is valid and enforceable; if unfair in substance then the court is to evaluate whether it was entered into in a procedurally fair manner. There is one notable exception: where a provision is deemed unconscionable in substance.

**3. Where A Provision of an Agreement Is Unconscionable In Substance, It Is Void; Procedural Fairness Is Not Reached.**

If a particular provision of an agreement is unconscionable in substance, it is unenforceable as a matter of law even if entered into in a procedurally fair manner. See *Adler v. Fred Lind Manor*, 153 Wn.2d 331 at 346-47, 103 P.3d 773 (2004). See also *McKee v. AT&T Corp.*, 164 Wn.2d 372, 402, 191 P.3d 845 (2008); and also *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 55, 308 P.3d 635 (2013).

*Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013) involved setting aside the arbitration provision of an agreement even though other provisions were enforceable. In *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 317-319, 322, 103 P.3d 753 (2004) the court determined substantively unconscionable a limitation clause in a telephone services contract and therefore unenforceable even though the agreement was not procedurally unfair and even though other

provisions of the contract were not deemed unconscionable. Thus if a particular provision of a contract is unconscionable it is void and unenforceable even if the balance of the contract is not.

#### **4. The Agreement Is Unconscionable In Substance**

##### **a. Since It Was Interpreted To Preclude An Award of Spousal Maintenance And Whether The Parties Were Married Was In Dispute And Unresolved.**

There is no case law in the State of Washington that directly holds that the principles that govern the unconscionability of a provision of contracts apply to those executed by prospective spouses or cohabitants. However, marital agreements are contracts governed by the principles of contract law. *In re the Marriage of Burke*, 96 Wn. App. 474, 477, 980 P.2d 265 (1999). Unconscionability is a question of contract law.

However, “It is a well settled rule that courts of equity will not enforce contracts that are illegal, against public policy, or unconscionable.” *Matter of Marriage of Olsen*, 24 Wash.App. 292 at 299, 600 P.2d 690; see also *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 321, 211 P.3d 454 (2009): “ordinary contract defenses to enforcement include unconscionability.”

The state of Colorado has determined : “We hold that, even though an antenuptial agreement is entered into in good faith, with full disclosure and without any element of fraud or overreaching, the maintenance provisions thereof may become voidable for unconscionability occasioned by circumstances existing at the time of the marriage dissolution” *Newman v. Newman*, 653 P.2 728 at 734 (1982). The court clarified: “It is not unrealistic to recognize that the health and employability of the spouse may have so deteriorated during a marriage that to enforce the maintenance provisions of an antenuptial agreement would result in the spouse becoming a public charge. *Newman supra* at 735 (1982).

Washington’s State Supreme Court, similarly observed, that one purpose of spousal maintenance is to avoid a divorcing spouse from becoming a public charge. See, *Thompson v. Thompson*, 82 Wa.2d 352, 510 P.2d 827 (1973).

Here the trial court was made aware that at the time of the summary judgment hearing there was a pending motion for a declaratory judgment set before trial to determine whether the parties are legally married. (RP 4).

Counsel for Lonnie Rosenwald argued that the agreement precludes an award of spousal maintenance. (RP 35). Although the court announced that it would not rule on that issue, (RP 35), by striking the trial date, knowing that their marriage status was in dispute and undetermined, the court inferentially accepted Ms. Rosenwald's contention that the agreement precludes the trial court from awarding any spousal maintenance. (RP 35)

However, with that reading of the agreement, the court should have deemed the agreement unconscionable in substance as did the Colorado court. The trial court's decision must be reversed.

**b. Since The Provision Precluding the Creation of What Would Be A Substantial Community Estate Leaves Mr. Rowe Financially Destitute.**

“[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, 323 P.3d 1074 (2014). Here, David Rowe, as the disadvantaged party, leaves the relationship as destitute financially as he was when the agreement was executed. She leaves the relationship with an estate worth several times more, a subsequent inheritance notwithstanding, than at the

time of the agreement while she earned over \$541,000 per year, \$1.7 million in restricted stock vested during the course of the relationship and a 401 k of considerably greater value. (CP 316-317 and 427)

The agreement required equal contributions to the living expenses and housing costs of four people, even while he was unemployed, and rendered any earnings the separate property of the earner. At the end of the relationship it left David Rowe as a public charge with no recourse. The agreement should be deemed unconscionable in substance.

#### **5. The Agreement is Unfair in Substance**

If not deemed unconscionable in substance, at the very least the agreement is substantively unfair. Division I of the Court of Appeals observed, whether a provision is unfair in substance is a question of law to be reviewed de novo. Unfairness depends whether it makes reasonable provision for the disadvantaged party. *Matter of Marriage of Foran*, 67 Wash.App 242, 834 P.2d 1081 (1992).

Where both parties were in private practice as PhD Psychologists for several years, the effect of an agreement that the fruits of what each earned was separate property did not leave either partner in a grossly disproportionate financial position upon termination of the relationship “...both held the same education and the same earning potential.”

*Parentage of GWF and AWF* supra at 647 (2012). Dr Finch who sought to invalidate their agreement "...had her own savings account and her own investments as did Dr. Weider." *Parentage of GWF and AWF* supra at 645 (2012).

The court distinguished *In re Marriage of Bernard* 165 Wash.2d 895, 204 P.3d 907 (2009) where "... there was a significant disparity in the pre-marriage wealth of the parties." *Parentage of GWF and AWF* supra at 647 (2012).

"It is not fair to ask a party who comes in to the marriage destitute, to leave the marriage equally destitute and perhaps at a time when age, health, and foregone career opportunities dictate that he or she can no longer acquire assets by virtue of employment, to leave a marriage in a worse position." *In re Marriage of Foran*, 67 Wa App 242 at 255, 834 P.2d 1081 (1992). Thus the court held: "We hold that the Foran contract, which placed no restrictions upon James' opportunity to preclude the acquisition of community property and to enrich his \$1.2 million estate at the expense of the community was patently unreasonable. *In re Marriage of Foran*, supra at 256-257 (1992).

There the husband was a successful real estate developer who by the terms of their agreement could devote substantial time and energy to

enhancing his separate property because his earnings during the relationship were deemed separate by the agreement. His wife was only able to earn enough to pay for basic living expenses. The effect of the October 2009 agreement, was to significantly increase Ms. Rosenwald's financial resources, while Mr. Rowe's financial circumstances were even worse than those of Ms. Foran.

In its oral decision the court observed the case law requires a showing that the agreement "...makes reasonable provision for the one not seeking to enforce it." (RP 32). It then observed, he was essentially paying rent and not anything towards her principle and interest. (RP 32). Her mortgage payments were \$1,168 (CP 232). He was to pay \$730 (CP 232), plus an equal share of other living expenses (CP 270). To that extent her view of the evidence was inaccurate.

The court then went on to observe that the agreement made provision for him after termination of the relationship, \$15,000 or \$30,000 for transition costs (RP 32). But this observation reveals that the court failed to invoke the proper legal standard. Whether the agreement made any provision for the disadvantaged party is not the standard. Whether the provision made a reasonable allocation of property for David Rowe as the

disadvantaged party is the proper standard to apply. The court failed to invoke that standard.

*In Foran* supra, the wife came in to the marriage with \$8,200. Mr. Foran built up a considerable separate estate through what would have been community earnings, but for the agreement. At the time the agreement was signed she had an estate of \$8,200, while he had \$1,198,500. The agreement signed precluded the creation of community property. It provided Mr. Foran the option to increase his separate property at the expense of the community, which he took advantage of. This was deemed as substantively unfair since it did not make reasonable provision for the wife as disadvantaged spouse. Nor did it do so here.

In *In re Marriage of Matson*, 107 Wa.2d 479, 730 P.2d 668 (1986), the agreement provided that all income and earnings of James Matson derived from his separate estate during the marriage would remain his separate property. Whether the agreement made reasonable provisions for the disadvantaged spouse was determined by looking at their relative circumstances at the time of trial.

At the time of trial, Judith Matson owned only her personal effects, while James Matson had approximately \$830,000 in assets. Since earnings were separate by the terms of the agreement the result was that it

failed to make adequate provision for the wife. It was deemed so “grossly disproportion instead of fair.” (*Matson supra* at 488). The same circumstances again present themselves here. The evidence viewed in a light more favorable to David Rowe as the non-moving party, that the agreement is in substance fair was not demonstrated as a matter of law.

At the time the agreement was signed Mr. Rowe was unemployed. Mr. Rowe reduced his travel for work at Ms. Rosenwald’s insistent that he not travel. (CP 227). All he had was his car, subject to car payments, and a third ownership in unimproved property in South Africa subject to numerous encumbrances. She was earning \$359800 a year and with two homes and an estate well over \$2.8 million. (CP 228).

At the time of the summary judgment hearing he was unemployed, on welfare and his vision was deteriorating with macular holes in both eyes requiring surgery. (CP 228 and 434) During the relationship she had changed jobs, received profit sharing and unrestricted stock. At the time of the summary judgement hearing she was earning \$541,000 a year and amassed an estate of over \$15 million. The agreement allowed her to contribute nothing to the community estate with impunity, while requiring him to pay for half of her separate property debt, namely all household expenses, and her mortgage on her Mercer Island home that she later sold.

As with *Bernard supra* and *Matson supra*, the agreement precluded the creation of a community estate, while providing her the ability to substantially increase her separate property at the expense of the community. Although the court's order indicates that it acknowledged the obligation to view the evidence in a light most favorable to the non moving party (CP 698) it obviously failed to do so.

Thus, this agreement was unfair in substance because it was grossly disproportionate and did not make reasonable provision for David Rowe as the disadvantaged party to property, as a matter of law.

**6. The Agreement Was Procedurally Unfair Due To Economic and Psychological Duress And Coercion.**

Although prenuptial agreements are not discouraged, the parties "...must exercise the highest degree of good faith..." *Hamlin v. Merlino*, 44 Wa.2d 851 at 864, 272 P.2d 125 (1954). This is because "parties to a pre-nuptial agreement do not deal at arm's length with each other. Their relationship is one of mutual trust and confidence." *Hamlin v. Merlino, supra* at 864 (1954). Thus, to be upheld, they must be entered into "...without...overreaching on the part of the spouse who initiates the agreement." *In re Marriage of Matson*, 107 Wa2d 479, 730 P.2d 668 (1986).

In this Summary Judgment, the court failed to place the burden of proof as to good faith on Ms. Rosenwald. The burden of proof shall be upon the party asserting the good faith. (RCW 26.16.210). Here the court determined that the agreement was entered into in a procedurally fair manner without directly addressing the issue of coercion or duress. By observing that it was freely entered into because he had the benefit of legal counsel (RP 33) the court conflated the issue of knowingly entered into, (advise of counsel) with the duress employed in getting him to agree, and reject his lawyer's advice (CP 75).

“The purpose of independent counsel is more than simply to explain just how unfair a given proposed contract may be; it is for the primary purpose of assisting the subservient party to negotiate an economically fair contract.” *Matter of Marriage of Foran*, supra at 254. Attorney Anderson was not permitted to negotiate on David's behalf. He received no reply from Lonnie's attorney.

The court order's glib reference to “freely” entered into, reflects the trial court's complete failure to acknowledge the evidence of duress and coercion in a light most favorable to the non moving party. *Maki v. Aluminum Bldg. Products*, 73 Wash.2d 23, 436 P.2d 186 (1968).” (*Morris v. McNicol*, 83 Wash.2d 491 at 494, 519 P.2d 7 (1974). After receipt of his

lawyer's letter insisting that the provision making the building of a community estate impossible, she took off her ring, and threatened to kick him out unless he signed with those provisions left intact. She only agreed to provide minor changes from her original proposal in dispute. She insisted that he only use his lawyer as a signator to enhance the enforceability of the agreement. (CP 231).

Our State Supreme Court determined a prenuptial agreement as being procedurally unfair due to public humiliation: "faced with the choice of the humiliation of calling off a wedding..." *In re Marriage of Bernard supra* at page 901). The threat of homelessness and the removal of her engagement ring rendered him economically and emotionally vulnerable unless he signed the contract was the height of duress and coercion, with the evidence and all inferences therefrom viewed in a light most favorably to him.

She denied that he would be homeless if he left, with no evidence to support that denial (CP 514). She did not deny that she took off her ring, nor that she told him he would have to leave unless he signed. (CP 311). She did not deny his testimony that she only put it back on once he relented and agreed to sign (CP 311).

Thus, on the legal issue of coercion, there was no genuine issue of material fact. If the court had done what it purported to do by the terms of its order, looking at the evidence in a light most favorable to David Rowe and all inferences therefrom, with the evidence of coercion not refuted, the court should have denied the motion for summary judgment.

**7. Genuine Issues of Material Fact Warranted Denial Of The Motion For Summary Judgment.**

Appellate review of orders on motions for summary judgment are reviewed de novo. *Michael v. Mosquera-Lacy*, 165 Wa.2d 595 at 601, 200 P.3d 168 (2008). “Moreover, the burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him. *Barber v. Bankers Life & Casualty Co.*, 81 Wash.2d 140, 500 P.2d 88 (1972); *Welling v. Mount Si Bowl, Inc.*, 79 Wash.2d 485, 487 P.2d 620 (1971). A material fact is one in which the outcome of the litigation depends. (*Balise v. Underwood*, 62 Wash.2d 195, 381 P.2d 966 (1963). A genuine issue can only be created by admissible evidence and not mere allegations. (*Baldwin v. Sisters of Providence in Washington, Inc.* 112 Wash.2d 127, 769 P.2d 298(1989)). The burden of proving, by

uncontroverted facts, that no genuine issue exists is upon the moving party.” *LaPlante v. State*, 85 Wash. 2d 154 at 158, 531 P. 2d 299 (1975)

Ms. Rosenwald failed to meet her burden to prove by uncontroverted facts that the issues raised by Mr. Rowe are not genuine. There are in fact several material issues of fact that makes a trial necessary. The disputes of fact were genuine and material because they either pertain to the enforceability of the agreement or the amount owed under the agreement. This is particularly so, in light of the duty to look at the evidence in a light most favorable to David Rowe as the non moving party. They are:

1. Whether Ms. Rosenwald told him not to accept any further advice of counsel before signing what she insisted upon.
2. Whether Ms. Rosenwald threatened to kick him out of the house if he obtained any further advice from his attorney after receipt of his lawyer’s letter, or refused to sign the agreement.
3. Whether he would have been homeless if he had refused to sign.

4. Whether Mr. Rowe refused to honor the requirement of the equivalent of the ten joint counseling sessions required by the agreement before the relationship were to be deemed terminated or whether the counselor refused to provide any further counseling.
5. Whether the \$1,700,000 in vested restricted stock was for service already performed or for service to be performed in the future.

**C. Assignment of Error #3**

**The Request For Fees Should Have Been denied.**

Attorney fees cannot be awarded in a committed intimate relationship dispute. *Foster v. Thilges*, 61 Wash. App 880, 812 P.2d 523 (1991). The only basis for the award was the provision in the October 22, 2009 agreement that allowed for an award of “reasonable attorney fees” to the party having to defend or enforce the agreement. Since the summary judgment motion seeking validation and enforcement of the agreement should have been denied, there was then no legal basis to award fees at that point in the legal proceeding. The award should be reversed.

**D. Assignment of Error #4**

**The Award of \$86,000 In Attorney Fees Was Unreasonable.**

To determine the reasonableness of a fee award the court is to weigh the following factors: In calculating a fee award a court should consider: “(1) the factual and legal questions involved; (2) the time necessary for preparation and presentation of the case; and (3) the amount and character of the property involved. *Abel*, 47 Wash.2d at 819, 289 P.2d 724.” (*In re Marriage of Knight*, 75 Wash.App 721, 880 P.2d 71 (1994). The only evidence before the court was that Lonnie Rosenwald’s attorney charges \$525 an hour and her legal assistant \$200. (CP 557). His attorney disputed the reasonableness of this rate based on his experience of over 40 years of experience in family law in the Seattle community charging a rate of \$280 per hour and his paralegals were charged out at \$120 per hour. (CP 691-693).

The court is required to make a determination of the reasonableness of the rate charged, if, as here, it is challenged. *Matter of Marriage of Van Camp*, 82 Wash.App 339 at 342, 918 P.2d 509 (1996). It failed to do so.

Finally, the award of the fee amount was beyond the relief sought in her motion. Her motion merely sought an award of fees. (CP 157). The

motion did not provide notice of an amount requested and there was no evidence in support of the motion that reconstructed an amount of an award. That was only submitted in a reply declaration. King County Local Rule 7 requires that reply declarations be limited to evidence contained in the response declaration to a motion: “Any documents in **strict reply** shall be similarly filed and served no later than 12:00 noon on the court day before the hearing.”(Emphasis supplied, KCLR 7(4)e).

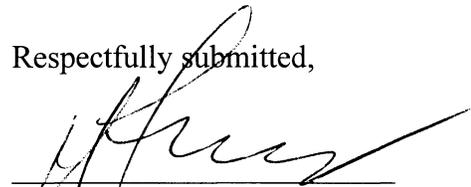
The award should be reversed.

**V. Attorney Fees on Appeal**

David Rowe requests attorney fees and costs on appeal.

DATED this 1 day of June, 2016.

Respectfully submitted,



H. Michael Finesilver  
(f/k/a Fields)  
Attorney for Appellant  
W.S.B.A. #5495

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

<b>DAVID ROWE,</b>	)	
	)	
Appellant,	)	DECLARATION OF
	)	SERVICE
v.	)	
	)	
<b>LONNIE ROSENWALD,</b>	)	
	)	
Respondent,	)	
_____	)	

I, Amy Spring, state and declare as follows:

I am a Licensed Legal Intern in the Law Offices of Anderson, Fields, Dermody & Pressnall, Inc., P.S. On the 1st day of June, 2016, I placed true and correct copies of the Brief of Appellant via legal messenger to:

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Shelby R. Frost Lemmel  
Master Law Group, PLLC  
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Bainbridge Island, WA 98110  
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2016 JUN - 1 AM 11:38  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF  
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE  
AND CORRECT.

DATED at Seattle, Washington, on this 1st day of June, 2016.

A handwritten signature in black ink, appearing to read 'Amy Spring', written over a horizontal line.

Amy Spring  
ID #9127462

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