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No. 57296-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re the Marriage of

J. THOMAS BERNARD

Appellant/Respondent

and

GLORIA BERNARD

Respondent/Petitioner

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
(The Honorable Helen L. Halpert)
(The Honorable Greg Canova)

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APPELLANT'S REVISED OPENING BRIEF

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

Appellate asserts the following assignments of error.

1. **The Trial Court erred in entering its Order of April 29, 2005 partially granting respondent's motion for summary judgment.**
2. **The Trial Court erred in making the following October 26, 2005 Findings of Fact and Conclusions of Law.¹**

¶ 2.5 Agreement:

On July 7, 2000 the parties executed a Prenuptial Agreement. Respondent executed the agreement before petitioner. Petitioner signed the document after the rehearsal dinner in the late evening hours on that date.

1. Husband is an extremely successful business owner. Wife was hired by husband in March 1994.
2. The parties became engaged in late 1998 or early 1999.
3. Husband's net assets were approximately \$25 million and wife's were approximately \$8,000.
4. At the time of the engagement husband informed wife that it would be necessary to enter into a prenuptial agreement.
5. Husband began working with his attorney on the drafting of a prenuptial agreement in January 2000.
6. Husband repeatedly informed wife that she needed to find independent counsel to represent her and to negotiate with husband's attorney.
7. Wife took no action to find an attorney for several months, **in part because she believed that she needed a draft agreement to bring to an attorney.**

¹ The entire Findings of Fact and Conclusions of Law (CP 1814-16, 1817) are set forth above to provide context. Error is assigned to those parts that are set out in **bold font**.

8. On June 20, 2000 wife was provided a draft agreement. It was not a complete agreement, as it had blanks in provisions regarding death or dissolution and did not purport to be so. **Unlike the agreement ultimately signed this agreement provided that the earnings of each spouse would be community property. It was substantially different than the agreement ultimately provided to wife's attorney late on July 5. Wife read through parts of the agreement.**

9. The June 20, 2000 draft agreement was provided only 18 calendar days before the wedding. The Fourth of July Holiday also fell during the interim period. **The draft was received too late to provide time for meaningful negotiation and full advise [sic].**

10. **Wife's failure to find an attorney after June 2, 2000 and before July 5, 2000 did not amount to a voluntary relinquishment of her right to the assistance of independent counsel in the negotiation of the agreement.**

11. **On July 5, 2000 wife contacted Marshal [sic] Gehring**, an attorney, through another employee of husband. She met with the attorney, Marshall Gehring, that day. Wife did not supply the June 20, 2000 draft to her attorney as he said he would obtain it from Richard Keefe, husband's attorney.

12. On the night of July 5, 2000 wife's attorney received a draft document by fax from husband's attorney. This document basically is the one that was signed on July 7.

13. **On July 6, 2000 wife's attorney reviewed the proposed agreement. His review was limited to major areas as he did not have time to review the agreement in detail. He did not have time to and did not make a financial analysis of the agreement.**

14. On July 6, 2000 wife's attorney spoke to husband's attorney about several specific concerns he had with the proposed agreement.

15. On the morning of July 7, 2000, Mr. Gehring faxed a letter to wife, copied to husband's attorney, outlining his five major areas of concerns. Mr. Gehring advised wife not to sign the agreement but also told wife that he recognized that this might not be practical from

her perspective. Wife's attorney indicated to wife that a side agreement to negotiate the five areas of concern could perhaps be entered into between the parties.

16. The wife signed the prenuptial agreement the evening of July 7, 2000 after the rehearsal dinner at the Seattle Tennis Club had concluded. The parties' wedding ceremony was set for the afternoon of the next day at the Seattle Tennis Club with approximately 250 invited guests.

17. On July 8, 2000 at the Seattle Tennis Club the parties signed a side agreement to negotiate **regarding only the five specific points set forth in Mr. Gehring's letter of July 7, 2000.** The letter **required** that any amendment be executed not later than October 7, 2000.

18. **Husband acknowledges that the prenuptial agreement standing alone is substantively unfair and did not make fair and reasonable provision for wife in the event of death or dissolution.** Husband contends that the First Amendment later executed cured **this** defect.

19. **By summary judgment order dated April 29, 2005, the court had previously concluded that the Prenuptial Agreement executed July 7, 2000 and the First Amendment to it executed August 28, 2001 were substantively unfair to wife who is the economically disadvantaged party in that the agreements taken together did not make a substantively fair provision for wife in the event of death or dissolution.**

20. Wife had worked for husband for approximately six years prior to the marriage and was familiar with his assets and liabilities. Her familiarity with husband's assets and liabilities made further formal disclosure beyond the exhibits to the prenuptial agreement unnecessary. This constitutes full disclosure of financial assets by both parties.

21. **The July 7, 2000 agreement severely limited wife's community property rights. The agreement effectively allowed husband to control the creation of community property. Only wife's salary and, in effect, \$100,000 of the husband's salary was**

considered community property. Any value accruing by reason of husband's labors on his separate property business were his separate property.

22. Wife's attorney made every effort to advise wife of the problems of the proposed agreement, but the amount of time available and the other circumstances present after he received the complete agreement and before the wedding ceremony prevented him from being able to fully advise her of all her rights or to negotiate an economically fair contract.

23. Because of the impending wedding wife was faced with the choice of the humiliation of calling off a wedding or signing a substantively unfair document.

24. Wife contributed to the procedural defects but the court specifically finds that wife's psychological makeup has no legal relevance in terms of establishing duress, coercion or whether her decision to sign was voluntary.

25. It is undisputed that wife had the legal capacity to enter into a contract in the traditional sense.

26. Wife did not sign the July 7, 2000 agreement after receiving independent advice and with full knowledge of its legal consequences. Considering all of the circumstances, wife did not voluntarily and knowingly waive her rights to a fair, just and equitable division of property by signing the agreement.

27. Following the signing of the July 7, 2000 agreement and the July 8, 2000 "side letter," [sic] negotiations were limited to only the five points in the side letter. Wife had no reason to believe the entire agreement was open for renegotiation and, by the terms of the "side letter," it was not. There was no opportunity to renegotiate the agreement as a whole to create an agreement that made substantively fair provisions for wife in the event of death or dissolution. A substantively fair agreement was no longer possible as the terms of the "side letter" so limited the areas of negotiation. Procedural fairness that would otherwise allow a knowing and intelligent waiver of a substantively fair agreement could not do so under these circumstances. As the

scope of the negotiations allowed by the "side letter" were so specifically limited, the fact that there was sufficient time for independent review and for the advice of counsel was insufficient to cure the defects of the first agreement.

28. After hearing all of the evidence, the court affirms the prior ruling on partial summary judgment rendered April 29, 2005. The July 7, 2000 agreement as amended by the first amendment dated August 28, 2001 did not make substantively fair provisions for wife in the event of death or dissolution, i.e., they are not substantively fair.

29. The deadline in the side letter of October 7, 2000 for the execution of the first amendment was abandoned.

¶ 3.2 Agreement Not Enforceable:

1. The husband has not met his burden of proving that the agreements are either substantively fair, or absent that, were procedurally fair. Substantive fairness is evaluated as of the date of signing and not as the date of separation.

2. The Prenuptial Agreement signed July 7, 2000 and the first amendment signed August 28, 2001 are not enforceable.

3. Washington law does not assign the burden of proving the enforceability of a prenuptial agreement by gender. The test for enforcement of a prenuptial agreement under Washington law is gender blind.

4. The test of enforceability of a prenuptial agreement under Washington law does not discriminate against men.

5. An order should be entered herein declaring the prenuptial agreement signed July 7, 2000 and the first amendment signed August 28, 2001 unenforceable and without legal effect.

6. This case should proceed to trial on property, maintenance and other financial issues.

3. **The Trial Court erred in entering its Order of October 26, 2005 declaring the prenuptial agreement and first amendment to prenuptial agreement to be unenforceable.**
4. **The Trial Court erred in entering its October 26, 2005 Order denying appellant's motion for reconsideration.**
5. **The Trial Court erred in setting a trial date for resolution of dissolution property issues by its Order of October 26, 2005.**
6. **The Trial Court erred in granting respondent's attorney fees in the Orders of December 12, 2005 (two orders) and March 14, 2006.²**

II. Issues Pertaining to Assignment of Error

1. Was it error for the Trial Court to enter partial summary judgment on April 29, 2005 because of the existence of disputed genuine issues of material fact as to, for example:

- contract integration, and the reasonableness and fairness of the integrated Agreement; and
- Whether there was adequate consideration for the Agreement?

2. Is the fairness and reasonableness of a marriage agreement never to be measured at the time enforcement is sought instead of when it was entered into? When was the fairness and reasonableness of the Agreement in this short-term marriage to be measured?

3. Under all of the circumstances, and on de novo review, was the Agreement of July 7, 2000 and August 28, 2001 fair and reasonable?

4. Under all of the circumstances, and on de novo review, did respondent voluntarily enter into the August 28, 2001 Agreement?

5. Did the August 2001 Agreement ratify the July 7, 2000 Agreement?

6. Under all of the circumstances, including respondent's attorney's recommendation that she sign the First Amendment, which she signed, did respondent voluntarily enter into the July 7, 2000 Prenuptial Agreement as ratified by the August 28, 2001 First Amendment?

7. What is the significance of the notary acknowledgement of respondent's signature and her attorney's certificate that form part of the First Amendment? To what extent can appellant rely on them?

8. Is appellant entitled to specific performance of the Agreement and are the parties required to arbitrate the property issues in this action?

(...continued)

² Judge Halpert recused herself from this case following her unsuccessful effort to mediate a settlement of this matter. Judge Greg Canova was then assigned to it. He entered the March 14, 2006 Order. CP 2390.

9. Under principals of equity, should respondent be allowed to accept and retain the significant property and gifts she received because she signed the Agreement and now seeks to invalidate that Agreement?

10. Did respondent violate her duty of confidentiality and fair dealing by secretly harboring a belief that she could get out of the Agreement despite signing it?

11. Under the nuptial Agreement, was respondent entitled to the attorney fees that have been awarded to her?

12. Is appellant entitled to review as a matter of right, or alternatively to discretionary review, of the Trial Court's decisions in this case?

III. STANDARD OF REVIEW

The Trial Court's grant of partial summary judgment in this case is reviewed de novo to determine if respondent is entitled to summary judgment as a matter of law or if there is any genuine issue of material fact that would defeat summary judgment. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003).

This case is about the enforceability of pre- and post-marriage agreements under the "two prong" test "*Matson/Foran test*" of *In re*

Marriage of Matson, 107 Wn.2d 479, 482-83, 730 P.2d 668 (1986) and *In re Marriage of Foran*, 67 Wn. App. 242, 249, 834 P.2d 1081 (1992).³

The standard of review of legal issues is de novo and, therefore, this Court may substitute its judgment for that of the Trial Court. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

The first part of the two prong *Matson/Foran* analysis is entirely a question of law unless there are factual issues which must be resolved in order to enable the court to interpret the meaning of the contract. *In re Marriage of Foran*, 67 Wn. App. at 252, n.7; *see also, Berg v. Hudesman*, 115 Wn.2d, 657, 668, 801 P.2d 222 (1990).

The standard of review for the second prong of the *Matson/Foran* test is also treated as a question of law to be viewed in light of the Trial Court's undisputed findings, or those which are supported by substantial evidence and support the court's ultimate conclusion. *Foran* at 251.

III. SUMMARY OF THE CASE AND ARGUMENT

This was a short term marriage of about 54 months. The wife, who is highly educated, had virtually no assets when she married her multi-millionaire husband.

³ A Prenuptial Agreement of July 7, 2000, a side letter of July 8, 2000 and a post-marriage Amendment of August 28, 2001, are the subject of this appeal.

After stalling for months to retain an attorney to represent her in the prenuptial agreement negotiations, the wife finally employed an attorney virtually on the eve of her wedding. By then, it was too late for her attorney to negotiate for his client or do little more than critique the existing draft agreement prepared by the husband's attorney, which he did in a letter to his client in which he recommend that she not sign the agreement. She signed it anyway and married the next day.

Because of the circumstances, the parties also signed a side agreement on the day of their wedding agreeing to amend the Prenuptial Agreement after they returned from their honeymoon.

After their return, and following a series of negotiations that spanned over a year, during which the wife's attorney's pre-marriage objections to the Prenuptial Agreement were resolved, the wife's attorney advised that she sign the Amendment. She signed the Amendment about 14 months after her wedding. In the attorney certificate signed in connection with the Amendment, the wife's attorney certified he had fully advised his client of her property rights and the legal significance of the Amendment and that his client acknowledged her complete understanding of the legal consequences and terms of the Amendment. At the same time, the wife's signature on the Amendment was acknowledged by a notary who attested that the wife

acknowledged to the notary that she signed the Amendment as her free will and voluntary deed for the uses and purposes mentioned in the Amendment.

The Amendment also ratified the Prenuptial Agreement and was integrated with it to form one Agreement.

Before signing the Amendment, the wife and her attorney discussed her “outs” if she later wanted to try to get out of her agreements and that she could successfully renounce the agreements because she lacked “bargaining power” when she signed the Amendment.

The husband knew nothing of this. While he insisted he and his wife needed a nuptial agreement because of their hugely disparate wealth, he believed his wife had signed the Amendment in good faith, as did he. Consequently, the marriage continued, as did the wife’s job at the husband’s company, and the husband continued to follow the Agreement and to shower gifts and other financial rewards on his wife and her children, all of which she accepted.

After about 50 months of marriage, the wife walked out on her husband, started a divorce action and renounced her marriage Agreement.

On April 29, 2005, Judge Helen Halpert granted partial summary judgment in favor of the wife declaring that the July 7, 2000 Prenuptial Agreement (singular), as a matter of law, did not make fair and reasonable

provision for the wife.⁴ The Court also rejected the husband's motion to arbitrate property issues as required by the Agreement.

The Court did not consider the reasonableness and fairness of the integrated Agreement which did make a fair and reasonable provision for the wife. The Court then erroneously set a trial on the sole issue of whether the wife had "voluntarily" entered into the nuptial "agreements" (plural) pursuant to the second prong of the *Matson/Foran* test. In doing this, the court deprived the husband of the benefit of his right to a first prong analysis of the integrated Agreement.

Moreover, whether there was, in fact, an integration and, if so, whether the integrated Agreement was in fact fair and reasonable under all of the circumstances, were material disputed issues of fact that precluded partial summary judgment.

Following trial, the Court found the wife had not voluntarily entered into the two agreements. It also recognized it was "making new law" by not applying existing law to the resulting integrated Agreement.

Subsequent attorney fee orders were entered at the wife's request, contrary to the terms of the marriage agreements.

⁴ In so ruling, the Trial Court considered only the July 7, 2000 Agreement as this Order states, in part: "The court is satisfied that the agreement [singular], as a matter of law, does not make fair and reasonable provision for [the wife]." Clerk's Papers 1104. Therefore, she was entitled to partial summary judgment.

Assuming defects in the negotiation procedure and substance of the original July 7, 2000 Prenuptial Agreement, those defects were cured when the wife signed the August 28, 2001 Amendment on the advice of her attorney. The integrated Agreement fully satisfied the first prong of the *Matson/Foran* test in that, as a whole, it made reasonable and fair provision for the wife. The Trial Court disagreed believing that, however fair the integrated Agreement may be, the wife lacked bargaining power when she signed the Amendment. Therefore, her execution of the Amendment was not voluntary under the second prong of the *Matson/Foran* test. In essence, the Trial Court erroneously allowed the second prong of the *Matson/Foran* test to trump the first prong as to the Amendment.

The Trial Court's resulting refusal to enforce the arbitration clause was erroneous and inconsistent with existing law. The subsequent awards of attorney fees were also contrary to the parties' Agreement.

The case was then set for a trial on property division issues and Tom Bernard appealed.

By a ruling on January 3, 2006, the Commissioner of the Court of Appeals held this matter was appealable as a matter of right, because of the Trial Court's denial of the husband's arbitration demand. Gloria reserved her right to contest this ruling in this appeal.

IV. STATEMENT OF THE CASE⁵

Gloria Bernard⁶ was 50 years old when she married Tom Bernard on July 8, 2000. RP Vol. I, 44:9.⁷ Tom was 56. RP Vol. II, 151:21-22.

Tom Bernard is a successful property development business owner. CP 1814,⁸ Findings, ¶2.5-1. His net worth at the time of marriage was about \$25 million. CP 1814, Findings, ¶2.5-3.

Gloria Bernard is highly educated with a masters degree in business. RP Vol. I 29:11 to 30:4; Trial Exhibit 128.⁹ She is also a licensed real estate broker, RP Vol. I, 30:5-7, with broad business experience, *Id.* at 30:8 to 32:16, RP Vol. V, 4:17 to 5:13, including her work on complex matters in Tom's business. RP Vol. I, 33:9 to 35:5; 39:23 to 40:15; RP Vol. V, 5:14 to 7:20, Trial Exhibit 130. In about 1994, Gloria started working for Tom. CP

⁵ Appendix I consists of a set of time lines for this case submitted in closing argument by Tom Bernard. CP 1748-57. Also included is Gloria Bernard's rebuttal to the timeline. CP 1740-43. While we disagree with much of the rebuttal, any material disagreement can be addressed in our Reply Brief. Meanwhile, these timelines are submitted for the Court's convenience and use. A typographical error on CP 1751.

⁶ For simplicity, the parties will sometimes be referred to by their first names in this Brief.

⁷ Report of Proceedings ("RP") transcripts have been prepared, and are referenced in this brief as follows:

- September 6, 2005—RP Vol. I
- September 7, 2005—RP Vol. II
- September 8, 2005 Morning Session—RP Vol. III.
- September 8, 2005 Afternoon Session—RP Vol. IV
- September 12, 2005—RP Vol. V
- September 30, 2005—RP Vol. VI
- October 26, 2005—RP Vol. VII

⁸ Clerk's Papers ("CP").

1814, Findings ¶2.5-1. While there, she advanced in the company and her responsibilities grew. RP Vol. I, 35:8 to 38:3; RP Vol. II, 154:15 to 156:1. Despite this, her net worth at the time of marriage was only about \$8,000. CP 101; CP 1814, Findings, ¶2.5-3.

Tom's first wife passed away in April, 1998. RP Vol. I, 38:7-8; RP Vol. II, 156:3. He and Gloria started dating in late 1998 and became engaged in about 1999. RP Vol. I, 38:9-15; RP Vol. II, 156:8-14, RP Vol. III, 27:6-17; CP 1814, Findings, ¶2, 5-2.

Their early engagement discussions included Tom's desire for a prenuptial agreement. RP Vol I, 38:16 to 39:11, 93:20-24; RP Vol. II, 156:15 to 157:7; RP Vol. III, 27:18 to 28:19; RP Vol. V, 11:22 to 12:9; CP 1814, Findings, ¶2.5-4. Tom started working on a prenuptial agreement with his attorney, Richard Keefe, in about January, 2000. RP Vol. II, 85:12-23; CP 1814, Findings, ¶2.5-5; Trial Exhibit 141.¹⁰ Nothing of substance occurred until May. RP Vol. II, 86:16 to 87:2, 119:2 to 121:11. In May, Mr. Keefe prepared a checklist, or a "roadmap," of the drafting process. RP Vol. II, 87:3-9, 88:6-14, 122:18 to 123:7, 162:22 to 163:15; Trial Exhibit 140. This checklist included the names of several well regarded attorneys

(...continued)

⁹ The Trial Exhibits and papers filed after Appellant's initial Designation of Clerk's Papers were ordered by a Supplemental Designation of May 17, 2006.

¹⁰ Mr. Keefe's file on this matter is in Trial Exhibits 110 and 112.

for Gloria's consideration. RP Vol. II, 88:15 to 89:10, 165:3 to 168:12. The checklist issues, including the need for Gloria to engage an attorney, and an explanation of why she needed to do that, were also discussed in a June 8 phone call with Mr. Keefe and Tom and Gloria. *Id.* 89:21 to 92:10; 123:11 to 124:22, 174:6 to 175:25; CP 1814, Findings, ¶2.5-6.¹¹ It was also separately discussed between Tom and Gloria, RP Vol. II, 170:9-18, as were other related issues. *Id.* at 177:25 to 183:18.

According to Tom, time passed between May 24 and July 3 because he wanted to give Mr. Keefe both his and Gloria's drafts together— assuming she would at last have retained a lawyer to prepare her draft. RP Vol. II, 173:18-25. Keefe still needed another attorney to talk with. RP Vol. II, 180:4-5. But, Gloria continued to stall. *Id.* at 174:1-5; *see, also*, Trial Exhibits 140 and 142.

According to Gloria, the next discussion she had about a prenuptial agreement was toward the end of June, 2000. RP Vol. I, 40:16 to 41:13, 94:12-19. She told a witness that she received the first draft of the prenuptial agreement three weeks before the wedding. RP Vol. IV, 62:15-19; *see also*,

¹¹ After this, Gloria still refused to engage a lawyer, and did not call any attorney recommended by Mr. Keefe because she did not want to use any lawyers recommended by Keefe, RP Vol. II, 167:17 to 168:19, they were not nice people, RP Vol. III, 34:18 to 38:10, and because they were too expensive. *Id.* However, Tom told Gloria he would fully reimburse her for her lawyer expenses. *Id.* at 34:18 to 36:12, 62:1-6. Expense was not an issue.

RP Vol. V, 30:19-21, 33:9 to 34:12; Trial Exhibit 10. At the time, she still did not have an attorney, RP Vol. I, 94:14-24, and had made no effort to find one because she claimed she did not know whom to call. *Id.* at 94:20 to 95:10. She also falsely denied she had ever been given the names of possible lawyers who could represent her by either Tom or Mr. Keefe. *Id.* at 95:11-15. Contrary to the evidence, and the Trial Court's Findings, Gloria falsely denied being repeatedly told she needed to engage an attorney before the end of June, 2000. *Id.* at 40:24 to 41:19; CP 1814, Findings, ¶2.5-6 and 7; *see also*, RP Vol. II, 165:3 to 172:3; RP Vol. III, 34:18 to 38:10; RP Vol. V, 12:10 to 13:3. She had, however, previously retained a lawyer for her first divorce. RP Vol. I, at 95:16 to 96:5, and had often worked with lawyers in her business affairs. RP Vol. V, 28:13 to 30:11. She was no stranger to lawyers.

She finally retained attorney Marshall Gehring on virtually the eve of her wedding. RP Vol. I, 41:20 to 42:3, 96:6 to 97:12. Mr. Gehring was experienced in reviewing and advising clients about prenuptial agreements and related issues. RP Vol. I, 74:6 to 81:15; Trial Exhibit 135, *compare* RP Vol. I, 80:5-10; RP Vol. II, 61:24 to 62:1.

Mr. Keefe and Mr. Gehring talked for the first time on July 3. *Id.* at 92:22 to 93:12; Trial Exhibit 141; *but cf.* RP Vol. II, 116:21 to 118:16, 131:14 to 132:15.¹²

Gloria first met with Mr. Gehring on July 5 for 10 to 15 minutes in her office. RP Vol. I, 42:4-15, 98:4-14. Then they went to lunch with some of her friends. *Id.* at 42:10-15, 98:24 to 99:2. According to Gloria, this was the only time she ever met with Mr. Gehring. *Id.* at 98:15-16. In their conversation, Gloria told Mr. Gehring she already had a draft prenuptial agreement and offered him a copy. He declined the offer stating he would wait to receive one from Mr. Keefe. *Id.* at 98:17-21.

While the time was short before the marriage, Mr. Gehring agreed to review the proposed prenuptial agreement which Mr. Keefe faxed to him later on July 5. *Id.* at 86:4-13. Curiously, in view of Gloria's earlier offer to give him her draft, Mr. Gehring testified at trial that he did not know if Gloria had seen a prior draft. *Id.* at 90:15-18. Mr. Gehring contacted Gloria that same day to obtain information about her and about what she wanted him to do. *Id.* at 83:4 to 86:13. Gloria said she wanted him to look over the draft agreement and advise her about it. *Id.* at 84:8 to 86:10. Gloria testified that Mr. Gehring told her not to bother about even reading the draft

¹² Mr. Gehring testified he was initially contacted to represent Gloria on July 5, 2000. RP Vol. I, 81:16 to 82:17. However, Mr. Keefe's records show a discussion with Gehring on
(continued . . .)

agreement since they only had time to deal with four or five things in it. *Id.* at 47:6-14. The next day, Mr. Gehring started to review the draft and concluded he could not evaluate the financial data for full disclosure. *Id.* at 86:14 to 87:15, 89:9-24.¹³ On July 6, Gloria again talked with Mr. Gehring. *Id.* at 99:20-24. She recalls a telephone discussion with him in which he explained the short term and long term marriage implications of the draft agreement and that it did not adequately provide for her in the long term. *Id.* at 99:25 to 100:9. It was “fair in near term” but not “in the long term.” RP Vol. II, 93:13 to 94:1.

Gehring spoke with Mr. Keefe on July 7 and wrote a letter that same day to Gloria expressing his concern about the draft agreement. RP Vol. I, 87:22 to 88:8, 90:19 to 91:12; RP Vol. II, 94:2-16; Trial Exhibit 102.¹⁴ A copy of this letter was faxed to Mr. Keefe. RP Vol. I, 105:24-25. Gloria saw the letter that afternoon before the wedding dress rehearsal. RP Vol. I, 102:2 to 105:2; RP Vol. II, 49:12-23.

(...continued)

July 3. RP Vol. II, 92:22 to 93:1; Trial Exhibit 141.

¹³ The question of full disclosure under the second prong of the *Matson/Foran* test, discussed below, was never an issue in this case because Gloria was fully aware of Tom's finances and it was she who prepared Tom's financial disclosure that was made part of the Prenuptial Agreement at CP 62, 86-100. RP Vol. II, 157:8 to 158:17, 159:25 to 161:3; RP Vol. III, 33:7 to 34:11; Trial Exhibit 101. Gloria also prepared Tom's financials for his business. RP Vol. II, 157:8-13, 177:17-24.

¹⁴ Mr. Gehring's file in this matter is Trial Exhibit 108.

Among other things, the letter pointed out flaws that Mr. Gehring believed existed in the draft prenuptial agreement and he recommended that Gloria not sign it. RP Vol. 1, 45:1-8, 145:20-25; Trial Exhibit 102. While Mr. Gehring “told” Gloria to sign the Prenuptial Agreement in a telephone conversation on July 6, RP Vol. I, 45:9 to 46:21, by the time she actually signed it on July 7, she knew Mr. Gehring was advising her not to sign it. *Id.* at 46:22 to 47:19. She signed it anyway. *Id.* at 43:10-13; RP Vol. II, 52:5-6. She claimed the Agreement she signed was the only draft that she ever saw. RP Vol. 1, 51:16-21. But we know that too was false. RP Vol. V, 32:22 to 34:16; Trial Exhibit 10.

Before signing the Prenuptial Agreement, Mr. Gehring told Gloria there was going to be a “side letter” about amending the Prenuptial Agreement, after her honeymoon. RP Vol. 1, 45:16-18. Mr. Gehring did not believe he saw the side letter until it was sent to him by Mr. Keefe some time after it was signed. *Id.* at 108:5-12. However, Mr. Gehring’s file, Trial Exhibit 108, page 32-34 shows he had a draft of the side letter before then. RP Vol. I, 142:3 to 150:2.

Gloria and her attorney believed the side letter would commit the parties to amending the Prenuptial Agreement to deal with Mr. Gehring’s concerns as set out in his July 7 letter. RP Vol. II, 50:4-23, 134:16-25; RP Vol. III, 48:2-20. Even Tom agreed the Prenuptial Agreement needed to be

amended and supported the side letter idea. RP Vol. III, 31:15 to 32:21. The side letter then evolved, RP Vol. II, 96:21 to 97:10, and did not limit what could be negotiated. *Id.* at 95:8-15, 97:18-24, 134:16 to 136:10. Anything would be fair game. *Id.* at 135:9-10.

The “side letter,” or “side agreement,” was prepared and signed before the wedding on July 8. RP Vol. I, 47:20-25, 68:18-25; RP Vol. II, 94:17 to 95:15; RP Vol. III, 17:6-14, *see also* RP Vol. 1, 106:3-11; Trial Exhibits 103 and 127.¹⁵ Gloria said she did not even read it until “a couple of years later.” RP Vol. 1: 55:12.

On what was apparently the day of the wedding, Mr. Gehring learned from his client that she had signed the Prenuptial Agreement and concluded she had not read his related July 7 letter. *Id.* at 105:21 to 106:15, 107:16 to 108:4.

After returning from her honeymoon, Gloria did nothing to press for the amendment. *Id.* at 52:14-21. It was not a priority for her. RP Vol. II, 42:10 to 43:10; RP Vol. III, 10:19 to 11:5.¹⁶ She also claimed Tom failed to raise the issue. RP Vol. 1, 52:22 to 53:11. No one was in a hurry to do the amendment. RP Vol. III, 49:1-8.

¹⁵ This was the second marriage for both. Tom’s first wife, Jackie, had died; Gloria’s first marriage ended in divorce. Tom had one son of his prior marriage, Jamie. Gloria had two children of her prior marriage, Marcellis and Crystal. RP Vol. III, 21:20 to 22:6.

Consistent with the side letter, in about September 2000, Mr. Keefe and Mr. Gehring engaged in a series of negotiations aimed at amending the Prenuptial Agreement. Gloria testified she did not know about them, RP Vol. 1, 56:14-23, despite receiving copies of correspondence between the two attorneys. *Id.* at 57:21 to 58:14, 59:16 to 60:8; *see* Trial Exhibits 131 and 132.

On about September 28, 2000, Mr. Keefe spoke with Mr. Gehring and faxed him a draft amendment. RP Vol. I, 109:9 to 110:17; Trial Exhibit 136. This was the first of several exchanges between the two attorneys. RP Vol. I, 110:18 to 111:4. Keefe and Gehring were trying to prepare a fair marriage agreement by dealing with the points raised in Gehring's July 7 letter and whatever other points might come up. RP Vol. II, 95:9-15.

Mr. Gehring says he also met with Gloria to discuss the amendment and his effort to try and "fix" the defects in the Prenuptial Agreement, especially as referenced in his July 7 letter. RP Vol. 1, 111:5-13, 112:2 to 113:22; Trial Exhibit 102.¹⁷

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¹⁶ There was nothing to prevent Gloria from engaging any attorney she wanted during this time. *See*, RP Vol. I, 115:11-14; RP Vol. III, 62:7-21.

¹⁷ The 90 day completion date set out in the side letter, Trial Exhibit 103, was not firm, and was ignored by all. RP Vol. I, 113:7 to 114:25; RP Vol. II, 27:10-23; RP Vol. III, 12:13-22.

The First Amendment addressed the issues raised in Mr. Gehring's July 7 letter. RP Vol. I, 122:9-23; 123:9-23; Trial Exhibit 102. Tom and Gloria also discussed the fact that everything was on the table until a final agreement was reached. RP Vol. III, 18:10 to 19:2. According to Tom, the Amendment had to work for everybody. *Id.* at 51:12-25.

Between July 7, 2000 and August 28, 2001, Mr. Gehring and Gloria discussed how an amendment could be satisfactory to both parties. RP Vol. I, 124:5 to 125:14. They talked two to three times, sent "stuff back and forth" and Mr. Gehring presumed Gloria read the "documents and understood them."¹⁸ He testified: "She's a very smart lady. She knows what they say, I'm sure." *Id.*

On November 27, 2000, after several discussions with Mr. Keefe, Mr. Gehring wrote Mr. Keefe, with a copy to Gloria, and stated the proposed First Amendment was "acceptable" in that it "resolved the difficulties" expressed in his July 7, 2000 letter, Trial Exhibit 102. RP Vol. I, 115:15 to 119:15; Trial Exhibit 108, pages 028 and 131; Appendix II. In it, he asked that Mr. Keefe send him the document so he could obtain Gloria's signature.

¹⁸ Gloria testified she only saw Mr. Gehring three times. RP Vol. II, 55:4 to 57:5, and had only one or two phone calls with him. *Id.* at 60:4-5. *Compare* RP Vol. I, 98:15-16.

On December 1, 2000, Mr. Keefe sent Gehring two execution copies of the First Amendment in accordance with Mr. Gehring's letter of November 27. RP Vol. I, 126:15-17; Trial Exhibit 137.¹⁹

Mr. Gehring was unclear why, but formalization of the First Amendment still remained incomplete for many months while the ball was in his court. RP Vol. III, 13:17-25. Then, on July 13, 2001, Mr. Keefe sent Mr. Gehring a revised draft of the First Amendment for his review. A copy was also given to Gloria. RP Vol. III, 13:23 to 14:7; Trial Exhibit 138. Mr. Gehring "presumed" the First Amendment had not been completed because Tom had not signed off on it. *Id.* at 127:7-17. But the truth is that Gloria was not ready to sign it. RP Vol. III, 13:23 to 14:7, 15:24 to 16:11.²⁰

Mr. Gehring could not remember the input he had about any modification to the draft amendment after November, 2000, RP Vol. I 127:18-22, though he considered the process to be a negotiation, RP Vol. I, *Id.* at 132:3-10, and prepared a "redline" of new draft revisions. RP Vol. I, 127:25 to 129:24, 151:3-7; Trial Exhibit 139. He also knew

¹⁹ Between July and December, 2000, Mr. Gehring billed seven hours in this matter. RP Vol. I, 137:17 to 138:9; Exhibit 108, pages 81-82. Between December 1, 2000 and August 17, 2001, he billed four hours. *Id.* at 137:17-21.

²⁰ Trial Exhibit 132, a letter from Mr. Gehring to Gloria of August 17, 2001, expressly refers to provision of the amendment Gloria had "approved last November," when she had the execution copies of the Amendment.

changes were being made beyond the scope of the side letter and that Tom had doubled the fund he had created for Gloria in the Amendment. *Id.* 129:7-24.²¹ He also discussed them with his client. *Id.* at 128:4-13. The substantial evidence is, however, that Mr. Gehring knew before the First Amendment was signed that nothing in the side letter limited the Amendment to only the issues addressed by the side letter and that new issues had been added to the draft Amendment by Tom. With this knowledge, he still advised Gloria to sign the First Amendment, which she did. Despite this, the Trial Court erroneously held Gloria and her attorney had no reason to believe the entire agreement was open for re-negotiation. RP Vol. VI:13:24-25. *See, e.g.*, Findings ¶2.5-27.

On August 28, 2001, Gloria signed the First Amendment. RP Vol. I, 60:9 to 62:3; Trial Exhibit 104. This time at Mr. Gehring's urging because he believed the Amendment made "substantial improvements" to the July 7, 2000 Prenuptial Agreement. RP Vol. I, 132:16-19, 133:11-17;

²¹ Mr. Gehring was inconsistent in his answer about his involvement in the "negotiations" leading up to the First Amendment. He even testified that "the only thing that we were permitted to address in the First Amendment was the specific objections that I had raised in my letter of July 7....I could not address anything other than that by virtue of the agreement the parties had made. [Trial Exhibit 103]." RP Vol. II, 33:10-16. But, we know that was not true as, for example, the redlined Trial Exhibit 139 clearly shows other issues were being included in the draft amendment—which Mr. Gehring and his client ultimately signed and in which he certified his client had been fully advised. Trial Exhibit 104, page 6. Tom also testified at length about what benefits the First Amendment provided to Gloria that were not included in the Prenuptial Agreement. *See*, RP Vol. III, 20:1 to 25:1, 58:9-18.

Trial Exhibit 108, page 10; Appendix III. He signed it as well. RP Vol. I, 133:3-10. Her signature was acknowledged by a notary who attested that she signed the Amendment as her “free and voluntary act....” RP Vol. I, 61:18 to 62:3; Trial Exhibit 104, page 5; Appendix IV. The Amendment also contained a certification from Mr. Gehring that he had fully advised Gloria about her property rights and the consequences of signing the Amendment. RP Vol. I, 130:13 to 131:24; Trial Exhibit 104, page 6; Appendix IV. This was consistent with his responsibility to be sure Gloria knew what she was signing. RP Vol. I, 134:18-24. He even explained the arbitration provision, RP Vol. II, 18:8 to 21:10, and that the First Amendment “reaffirmed” the Prenuptial Agreement. *Id.* at 24:1-4, 36:15 to 39:3.²² Mr. Gehring also described Gloria as being “very crafty” and that “she knew what was going on here.” RP Vol. I, 131:16-20.²³

Despite his approval of the Amendment and advice that Gloria sign it, Mr. Gehring never believed the situation was “satisfactory” but he was not too concerned about this because Gloria “had a lot of outs if she needed outs,” including her ability to get out of the agreement if she wanted by getting a court to declare it unenforceable. RP Vol. I, 119:17 to

²² *See, also*, CP 83-85, the Summary of Examples of Property Rights that was in the Prenuptial Agreement for Gloria’s consideration.

121:25. He believed there were certain things in the process she could bring to bear “if she wanted to get out of the agreement.” RP Vol. I, 120:17-25.²⁴ Gloria understood this as well. *Id.* at 121:1-7.

Despite the certification and acknowledgment contained in the First Amendment, Gloria denied at trial that Mr. Gehring had adequately advised her about the First Amendment and that she understood what she was signing. RP Vol. I, 62:4 to 63:1; *compare* RP Vol. V, 27:2-17. She claimed that his contrary certification in the First Amendment was “false.” RP Vol. I, 62:7 to 63:1. When pressed she claimed she could not remember if Mr. Gehring ever consulted with her about the First Amendment, RP Vol. I, 64:2 to 66:3, and that Mr. Gehring did not even offer to meet with her to explain her rights before she signed the First Amendment. *Id.* at 57:6-15.²⁵

Ultimately, the “crafty” Gloria settled for what was in the First Amendment because, according to her attorney, it came down to “how

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²³ Mr. Gehring also testified that, possibly unknown to anyone other than himself, it was not his job to determine the “fairness” of the agreements. RP Vol. II, 15:3-21. *Compare, In re Marriage of Foran*, 67 Wn. App. at 255, n.14.

²⁴ Mr. Gehring testified he and his client “didn’t really have a lot of bargaining position....” relative to the First Amendment. RP Vol. I, 116:10 to 117:25; RP Vol. V, 17:11-25. None of this is, however, expressed in any contemporaneous documents. Indeed, the exact opposite is expressed in Trial Exhibits 104 and 132. *See, also*, RP Vol. V, 25:5-9.

much is the fight worth to your marriage and everything else.” RP Vol. I, 131:25 to 132:15.

Over a month after the First Amendment was signed, Gloria sent a copy back to Richard Keefe with a letter stating: “Thank you for your help on this somewhat emotional legal document.” RP Vol. I, 66:4 to 67:8; RP Vol. II, 57:16-21; Trial Exhibit 133.

On about September 10, 2004, Gloria moved out of the family home. CP 4. She claims the marriage was defunct as of January 1, 2005. *Id.* She filed for divorce on February 4, 2005 and asked that the nuptial agreements be declared invalid. CP 6. Tom responded and counterclaimed on May 27, 2005, alleging that the marriage became defunct on September 10, 2004. CP 1106-1007.

A Notice of Intent to Arbitrate was formally served on petitioner on April 4, 2005. CP 134-188, 436.

One of Gloria’s defenses to enforcement of her nuptial agreements was that she was under “duress” when she signed them. To support this theory, she engaged Dr. Stuart Greenberg, a licensed psychologist. Dr. Greenberg testified at the trial. RP Vol. IV, 4. Dr. Greenberg assessed

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²⁵ Indeed, Gloria testified the only private meeting she and Mr. Gehring ever had was for 10 to 15 minutes in July, 2000 before there was ever a prenuptial agreement draft to review. RP Vol. I, 63:9-23.

Gloria's competency to contract when she signed the July 7, 2000 Prenuptial Agreement. *Id.* at 12:3-9, 14:16-18.²⁶ After conducting a battery of tests on Gloria, and talking with collaterals suggested by Gloria (but not with Mr. Gehring who was not suggested), RP Vol. IV, 65:23 to 66:15, Dr. Greenberg produced a written report. Trial Exhibit 6. In it, and at trial, Dr. Greenberg expressed his opinion that Gloria was competent to sign the contract. *Id.* at 14:19-23, 20:1 to 21:1.

The Trial Court found Gloria Bernard, at all relevant times, possessed the legal capacity to enter into a contract in the traditional sense and that her psychological make up had no legal significance in terms of duress, coercion or whether her decision to sign the Agreement was voluntary. CP 1814, Findings, ¶s 2.5-24 and 25.²⁷

On February 14, 2005, Tom Bernard moved to stay these proceedings and proceed to arbitration under RCW 7.04.030. CP 49. On March 2, Gloria moved to determine the validity of the arbitration agreement. CP 194, 417, 568. On April 1, she moved for partial summary judgment, CP 302, which was granted on April 29, 2005. CP 1103. By the same order, the Court denied the motion to stay. *Id.*

²⁶ He did not evaluate Gloria's competency or level of duress in August, 2000, when she signed the First Amendment. RP Vol. IV, 14:24 to 25:4.

²⁷ In this connection, there is no finding that Tom tried to trick or manipulate Gloria into signing an agreement. The contrary is true. RP Vol. VI, 2:12 to 3:16.

Following a four day trial, the Court gave her oral decision on September 20, 3006. In it, she commented that this “was one of the most difficult decisions I’ve had to make in my 15 year career as a judge.” RP Vol. VI 2:3-5. She further stated this was a difficult case because Gloria “very much contributed to the procedural defects . . . [and] steadfastly resisted Tom’s encouragement to find an independent attorney in a timely manner.” *Id.* at 10:3-9.

In ruling against appellant’s motion for reconsideration, the Trial Court stated in response to a suggestion that the Court’s ruling essentially creates new law as follows:

“Oh, I’m sure it does. That’s absolutely correct, it creates new law, because there is no case in Washington dealing with an unfair agreement and then a second agreement limited to scope, but I would completely agree it creates new law.”

RP Vol. VII, 10:5-10.

The Agreement also provides that the prevailing party in an action to enforce the Agreement shall be entitled to reasonable attorney fees and costs. CP 76-77, ¶20. Moreover, in any divorce proceeding, each party was to be responsible for his or her attorney fees. CP 73, ¶12(d). The attorney fee Orders in this case, CP 1285, 2064 and 2390, are contrary to the Agreement.

The Court of Appeals accepted this appeal by a Commissioner’s Ruling on January 3, 2006.

V. ARGUMENT²⁸

A. Public Policy Favors Fair And Reasonable Marriage Agreements Or Those Which, While Not Fair And Reasonable, Are Nonetheless Voluntarily Entered Into Following Full Disclosure.

Prenuptial agreements are not contrary to public policy if freely and voluntarily made. *Friedlander v. Friedlander*, 80 Wn.2d 293, 299, 494 P.2d 208 (1972). They are generally regarded as being conducive to marital tranquility and the avoidance of future disputes. *In re Marriage of Matson*, 41 Wn. App. 660, 663, 705 P.2d 817 (1985), *aff'd* 107 Wn.2d 479, 730 P.2d 668 (1986). Such agreements are also not reviewed as closely where the challenging party had the benefit of independent counsel. *Matson*, 41 Wn. App. at 664.

In deciding the validity of a prenuptial agreement, the court looks to the “two prong test” of *In re Marriage of Matson*, at 107 Wn.2d 482-83 and *In re Marriage of Foran*, 67 Wn. App. 242, 249, 834 P.2d 1081 (1992) which provide a starting point for the analysis of this case as follows:

The validity of a prenuptial agreement is evaluated by means of a 2-prong analysis:

First, the court must decide whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement. If the court makes this finding, then the analysis ends and the agreement may

²⁸ See, generally, RP Vols. VI and VII.

be validated. . . . The second prong of this analysis involves two tests . . .

(1) whether full disclosure has been made by [the parties] of the amount, character and value of the property involved, and (2) whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights.

Foran at 249. This is the “*Matson/Foran* test.”²⁹

The proponent of the agreement has the burden of proving its validity. *In re Estate of Crawford*, 107 Wn.2d 493, 496, 720 P.2d 675 (1986); *Friedlander, supra*, 80 Wn.2d at 300; RCW 26.16.210.

B. Contract Principals And Special Rules Apply To Marriage Contracts.

Contracting parties should be bound by their agreements. *See, Nat’l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973). This is especially true here where Gloria had her own independent attorney representing her for the over 14 month period of negotiations concerning the parties’ integrated marriage Agreement.

In addition to ordinary contract principals, certain other rules apply to marriage agreements because the parties occupy a confidential relationship and must deal with each other in good faith. *See, generally, Kenneth W. Webber, Family and Community Property Law*, 19

²⁹ Appendix V contains a side-by-side comparison of how the First Amendment changed the Prenuptial Agreement. Appendix VI is an analysis of the facts of this case as compared to the facts of *Matson* and *Foran* and the Trial Court’s oral Findings and Conclusions in RP Vol. VI. CP 1770; CP 1783-96.

Washington Practice, §16.2 (1997). Consequently, while there must be “consideration” for such agreements, it must be more than the classic “peppercorn.”

The adequacy of consideration is addressed by the *Matson/Foran* test. *See also, Hamlin v. Merlino*, 44 Wn.2d 851, 131-32, 272 P.2d 125 (1954) (the test of fair dealing applies to both antinuptial and postnuptial contracts). The adequacy and fairness of consideration for marital agreements includes a review of the respective values of the estates of the parties, issues concerning their children, who prepared the agreement, the business experience of each party, etc.. *Hamlin*, at 44 Wn.2d 133. Mutual waivers may also be adequate consideration. *Friedlander, supra*, at 80 Wn.2d 300; *see also, Peste v. Peste*, 1 Wn. App. 19, 459 P.2d 70 (1969) (wife who had repeatedly been advised to engage an attorney waived certain property rights).

Consideration for a prenuptial agreement was explained in *Friedlander v. Friedlander*, 80 Wn.2d 293, 300, 494 P.2d 208 (1972) as follows:

Marriage is not only adequate, but is consideration of the highest value.

But other adequate and fair consideration will also support a marital agreement³⁰ such as mutual waivers.³¹

³⁰ *Hamlin v. Merlino*, 44 Wn.2d at 865.

³¹ *Friedlander*, 80 Wn.2d at 300.

To the extent courts tend to consider marriage as the consideration for a prenuptial agreement, any adequate and fair consideration will support a post-marriage agreement. *See, In re Estate of Wahl*, 99 Wn.2d 828, 830, 664 P.2d 1250 (1983) (community property agreement). Indeed, as to any of these agreements, even if unfair, they will be enforced if entered into voluntarily and with full information. *In re the Estate of Crawford, supra*, 107 Wn.2d at 496.

Determination of the adequacy and fairness of consideration for a marriage agreement may be difficult, highly abstract and subjective. This was confirmed by the Trial Court. *See, e.g.*, RP Vol. VII, 2. It is also a question of law, in the absence of factual issues. To the extent it is an issue of law, this Court may substitute its judgment for that of the Trial Court.

By their very nature, pre- or post-nuptial agreements are to be performed in the future. Everyone who enters a long-term agreement knows future circumstances can change: an agreement that initially seemed desirable might ultimately prove to be unfavorable. These are the risks the contracting parties routinely assume. The possibilities of illness, children, financial gain or loss, and numerous other events can occur in the course of a marriage and they cannot be regarded as unforeseeable. If parties choose to address such matters in their marriage agreements, they should be viewed as not wanting to chance the foreseeable risk of negative events that might otherwise alter the happiness of their marriage.

C. The Trial Court Failed To Properly Consider Whether The Integrated Marital Agreement Was Fair And Reasonable.

Words in a written agreement are generally given their “ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). To determine the parties’ intent in a written agreement, the Washington Courts employ the context rule, as articulated in *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990); *see also, Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351, 103 P.3d 773 (2004). Here, the parties clearly intended to amend their Prenuptial Agreement and ratify that which was not amended, thereby integrating the two agreements. Moreover, if there is any doubt about this, it was a question of fact as to intent and interpretation that precluded partial summary judgment. *See, State v. E.A.J.*, 116 Wn. App. 777, 785, 67 P.3d 518 (2003); *Barovic v. Cochran Electric Co. Inc.*, 11 Wn. App. 563, 565, 524 P.2d 261 (1974).

The Court’s April 29, 2005 Order that the July 7, 2000 Prenuptial Agreement was unfair as a matter of law did not take into account application of the August 28, 2001 First Amendment. It should have and must be reversed.

By concluding that the “agreement” (singular)³² was unfair as a matter of law, the Court disregarded the integrated Agreement and

³² See page 2, line 11 of the April 29 Order. CP 1104. The Trial Court tried to respond to this argument in Findings of Fact 2.5-19, CP 1815. However, her April 29 Order says what it says. It addresses on an agreement, not agreements, and you cannot unring a bell.

application of the first prong test to the entire agreement.³³ The Court then compounded the error by finding there was a factual dispute as to the “agreements” (plural)³⁴ and setting a trial as to whether the “agreements” were voluntarily entered into.³⁵ In doing so, the first prong of the *Matson/Foran* test was never properly applied to the First Amendment.

The Trial Court also erroneously concluded the fairness of the Agreement is to be evaluated when it is signed and not the date of separation. CP 1817; Conclusion of Law 1. In assessing this issue, one authority has written:

As the law evolves, the review of challenged antenuptial agreements for procedural and substantive fairness is becoming more stringent than that traditionally accorded ordinary contracts. Courts look for financial disclosure and representation of the parties by independent counsel. A fairness review of ordinary contracts is reasonably limited to the time of execution. In reviewing antenuptial agreements which are not likely to be enforced until long

³³ The agreements must be read together as one in view of:

- the substantial financial amendments the First Amendment made to the Prenuptial Agreement that were approved by Mr. Gehring; and
- the language in the First Amendment ratifying the Prenuptial Agreement. That language, at paragraph 8, reads: “8. Except as specifically amended or modified by this Amendment, the [Prenuptial] Agreement shall remain in full force and effect as fully as if this Amendment had not been executed.” Directly below this ratification, petitioner signed her name. These two contracts were intended to be integrated into a single Agreement. An integrated agreement is a writing the parties intend to be the final expression of the terms of their agreement. *Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986); citing RESTATEMENT (SECOND) OF CONTRACTS §209(1) (1981).

When read as a whole, the integrated Agreement is fair and reasonable for petitioner.

³⁴ See page 2, lines 13-14 of the Order. CP 1104.

³⁵ The July 7, 2000 “side letter,” Trial Exhibit 103, was also an agreement to create another agreement.

after they are made, there is a need for some safety valve to relieve parties from contracts which have become unfair due to changed circumstances in the interim. The evolving legal response is a fairness at the time of enforcement.

Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 Journal of the American Academy of Matrimonial Lawyers, 1, 5 (1992) (see also, footnotes 147-156 concerning the division of states as to the appropriate time for measuring substantive fairness). Because this was a short term marriage,³⁶ see, Robert W. Winsor, *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, Washington State Bar News, 14 (January, 1982), related consequences should have been considered by the Court. They were not and that was error. Consideration of the short term marriage consequences in relation to the issue of fairness was also an issue of fact that precluded summary judgment under CR 56.³⁷ For this reason, the Court should not have granted partial summary judgment and bifurcated this case leaving unresolved the economic circumstances of the parties. See, e.g., *In re Marriage of Matson, supra*, 107 Wn.2d at 491, Pearson J. concerning.

By disregarding application of the first prong test of fairness to the integrated Agreement, the Trial Court severely undermined the function and reliability of prenuptial agreements. Parties may not enter such agreements, and may not marry, if they cannot expect the court's to follow

³⁶ Even Mr. Gehring believed the Prenuptial Agreement, standing alone, was fair in the near term. RP Vol. II, 93:13 to 94:1; Trial Exhibit 102.

³⁷ Mr. Gehring stated the Prenuptial Agreement was "fair and equitable insofar as the near term is concerned." Trial Exhibit 102.

the rules about analyzing such agreements. And, where the parties follow the rules, their agreements should be strictly enforced. If parties view an agreement as reasonable at the time of its inception, as evidenced by their having signed it, following advice from their respective attorneys, they should be foreclosed from later trying to evade its terms by asserting retroactively that it was not in fact reasonable, especially after receiving the intervening benefit of the agreement. Here, the Prenuptial Agreement contained repeated provisions to the effect that the parties were fully informed. *See, e.g.*, the acknowledgements at Paragraphs 1.(a), (b) and (c), (e), CP 64; and Paragraph 16, CP 76; *see also* the attorney certificates and notarizations which form a part of the First Amendment, CP 108-109, and the entire integrated Agreement.

D. The Integrated Agreement Was Fair And Reasonable.

Gloria in 50 years of her life was only able to accumulate a net worth of \$38,000 when she married Tom.³⁸ When Tom married, he had a net worth of over \$25,000,000. The Agreement promised to provide Gloria with a life-style she had never experienced and ultimate wealth beyond anything she could have otherwise hoped for. *See, e.g.*, Appendix III.

Tom testified he would not have married Gloria if she had not entered into their Agreement, RP Vol. II, 170:6-8, and she would never

³⁸ \$30,000 of her net worth was the wedding ring given to her by Tom. RP Vol. I, 44:10-16; CP 101.

have married the “financially responsible” husband she desired. RP Vol. IV, 59:2-12. Tom also testified if the integrated Agreement had not been created, he and his wife would not have had a good relationship. RP Vol. III, 21:15-16. Without it, the marriage would not have continued— because it would have looked like Gloria was out to get his money. *Id.* at 24:21 to 25:1, 52:1-13. Because they had an Agreement, he “opened up [his] pocket book and heart and everything for Gloria and her kids and her family.” *Id.* at 21:16-19. For example, because she signed the First Amendment, he continued paying the money required by the Agreement and also paying educational and living expenses for Gloria’s two children, a total expense that exceeded \$225,000. *Id.* at 22:7 to 23:18. They also traveled and he purchased cars for Gloria and her children. *Id.* at 23:19 to 24:20.³⁹

E. Gloria Voluntarily Entered Into the Agreement.

The First Amendment addressed Mr. Gehring’s objection to the Prenuptial Agreement and he recommended that Gloria, therefore, sign the First Amendment, which she did.

The acknowledgement of her signature was prima facie evidence that it was executed by Ms. Bernard freely and voluntarily for the uses and purposes set forth in the instrument. RCW 64.08.050. Tom could rely on that representation. The same is true about Mr. Gehring’s certification

³⁹ Some of these expenses were made before the First Amendment and some after. For example, Tom purchased a new \$60,000 BMW for his wife a month before she moved out. RP Vol. III, 24:6-9, *see also*, 57:5-10.

which was intended to “avoid the risk that a court at a later time will disagree that the agreement makes a fair provision for a spouse....”

Kenneth W. Webber, *Family and Community Property Law*, 19 Washington Practice, §16.2 (1997).

Gloria complains that the First Amendment lacked consideration in that she was already married and had no bargaining power to negotiate any favorable changes to the Prenuptial Agreement. This argument fails for several reasons, including: (1) the First Amendment was largely designed to accommodate Mr. Gehring’s concerns with the Prenuptial Agreement as expressed in his July 7, 2000 letter; (2) it “fixed” those concerns; (3) Mr. Gehring then recommended that she sign the Amendment even after he identified the new changes proposed by Tom; and (4) the financial return to Gloria for signing the First Amendment was significant. *See, e.g.*, Appendix V. In short, there was adequate consideration for the First Amendment.

F. There Is No Evidence Tom Had Any Knowledge Of Any Infirmities In Gloria’s Ability To Voluntarily Enter Into The Agreement.

Here, unlike the wife in *Friedlander*, Gloria Bernard received a full and fair disclosure of all financial and property facts and had independent legal advice and was fully informed of her rights. *Compare, Friedlander, supra*, 80 Wn.2d at 302-03; *see, also, In re Madden’s Estate*, 176 Wash. 51, 58-9, 28 P.2d 280 (1934).

Gloria signed the nuptial contracts following advice to her by her attorney.⁴⁰ In one instance, she ignored that advice (and signed the Prenuptial Agreement anyway) and, in the other, she followed it (by signing the First Amendment). All of this was accomplished with her having the advice of her independent attorney.

The Agreement was formed by the parties before and after their marriage. In these circumstances, *In re Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977) provides instruction. During the *Hadley* marriage, the parties entered into a series of property agreements. The wife did not have independent legal advice when she signed the agreements, though she had access to counsel, and even retained an independent attorney, but did not receive his advice because she failed to provide necessary information to her attorney. In response, the court remarked that Mr. Hadley should not be punished because his wife neglected to follow through with her independent counsel's request for information. She had the opportunity to obtain the advice of independent counsel but failed to exercise her opportunity.⁴¹ The same is more true here. Not only did Gloria have the opportunity to obtain

⁴⁰ Absent equitable considerations, the law in this state has long been that a party who voluntarily signs a contract cannot get out of it, even if she failed to read it or was ignorant of its contents. *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973). The papers signed by petitioner were a contract with her husband. She cannot unilaterally back away from them. Tom relied on his wife's good faith when she signed the agreements and when he negotiated them—especially including the First Amendment.

⁴¹ In *In re Marriage of Cohn*, 13 Wn. App. 502, 510, 569 P.2d 79 (1977), the court also stated it was unfair to penalize the husband for the wife's failure to request further information about pre- and post-marriage agreements that she signed.

the advice of independent counsel, she actually received it over a 14 month period.

The purpose of independent counsel is to assist the subservient party to negotiate an economically fair agreement. *Foran*, 67 Wn. App. at 254; *see also*, CP 1814, Findings ¶2.5-6. It is also to ensure that a disadvantaged spouse knows and understands the statutory and common law rights that are being altered when entering a marital agreement. *Matson*, 107 Wn.2d at 488. While there is no requirement in these situations that independent counsel actually be obtained, *Cohn*, 18 Wn. App. at 508, Tom was entitled to rely on the fact that: (1) his wife had independent counsel; (2) her attorney advised her appropriately; (3) his wife's entering into the First Amendment was pursuant to her attorney's advice and, therefore, voluntary; and (4) the resulting integrated Agreement, as approved by his wife's attorney, was fair and reasonable. Gloria's contrary understanding, not communicated to Tom, that she had "outs" if she wanted to get out of her agreement, is at the very least, contrary to the duty of confidentiality and fair dealing that one spouse owes another, and—at the most—an intentional deception.

Gloria should be bound by what she signed. Tom should not be punished because Gloria persistently stalled in obtaining an attorney until it was too late for any attorney to effectively negotiate a prenuptial agreement that could be fair for her.⁴² He should not be punished when he negotiated

⁴² The Trial Court erroneously excused Gloria's failure to timely obtain her own attorney and thereby frustrate the negotiation process. *See, e.g.*, CP 1814-17, Findings of Fact 2.5-6, 7, 10, 11, 12, 13, 14, 15, 21, 22 and 24. The "Catch 22" in all of this for Tom was
(continued . . .)

and entered into the First Amendment in good faith, saw that his wife also entered into it on the advice of her attorney, and then continued his marriage and his marriage motivated actions. Finally, he should not be punished in light of his wife's bad faith in entering into the Agreement.

Tom is entitled to specific performance of the Agreement and arbitration of all issues in this matter.

G. Equity Prevents Petitioner From Repudiating Her Marriage Agreement.

Aside from formal ratification, as we have here by virtue of the First Amendment, delay, silence, acquiescence, retention of benefits resulting from the Agreement, recognition of validity or a combination of these elements may also yield a ratification. *See, e.g., Whitman Realty & Inv. Co. v. Day*, 161 Wash. 72, 296 Pac 171 (1931). *See, also, Bair v. Spokane Sav. Bank*, 186 Wash. 472, 58 P.2d 819 (1936).

Here, during her marriage, Gloria took full advantage of the marriage benefits which Tom provided based, in material part, on his belief in the existence of an Agreement. These were benefits she would not have enjoyed if she had not signed the Agreement and had she not been married to Tom. These benefits included: extravagant trips and vacations, both with and without her husband; a very comfortable

(...continued)

that Gloria Bernard's persistent refusal to timely obtain counsel created, in the Trial Court's judgment, an unfair Prenuptial Agreement that could never be "fixed" under the terms of the "side letter" and ultimate First Amendment endorsed by Mr. Gehring. *See*, CP 1816, Findings of Fact 2.5-27. In the words of the Trial Court, "you cannot unring a bell." RP Vol. VI, 13:20-21.

lifestyle; expensive cars; exclusive club memberships; a lovely house; being named the beneficiary of a \$1,000,000 life insurance policy on her husband's life; over \$250,000 spent by Tom on Gloria's children; cash she took when she separated; etc. During this short marriage, Tom also spent hundreds of thousands of dollars each year on his family, as required by the Agreement—and beyond what the Agreement required.

Under all of the circumstances, it is hugely inequitable to allow Gloria to enjoy, and even retain, the benefit of her bargain and now reject that bargain in an effort to obtain still more money from Tom. *Cf.*, *Wagers v. Goodwin*, 92 Wn. App. 876, 964 P.2d 1214 (1998) (equitable estoppel principals can preclude former spouse from share in pension).⁴³

Here, Gloria accepted all of the benefits of the marital Agreement. Tom relied on her signing the Agreement to provide those benefits. Tom will clearly suffer great injury if Gloria is allowed to repudiate her Agreement. She should not be allowed to do so.

H. This Is An Appeal As A Matter Of Right Under RAP 2.2.⁴⁴

1. Denial of a motion to arbitrate is appealable as a matter of right.

The July 7, 2000 Prenuptial Agreement provides, in part, that “All disputes arising out of or in connection with this Agreement or any future

⁴³ Part of Gloria's Agreement was a waiver of any attorney fee claim. Under the circumstances of this case, that waiver did not violate public policy and should be enforced. *Compare, In re Marriage of Burke*, 96 Wn.2d 474, 980 P.2d 265 (1999) (litigation of parenting plan issues).

⁴⁴ Respondent has reserved her right to object to the consideration of this appeal. Therefore, appellant addresses his appeal rights under RAP 2.2 and 2.3.

property division of property then owned by the parties in an action to divide their marriage or otherwise....” shall be resolved by binding arbitration before the American Arbitration Association.⁴⁵ Parties who assert that an arbitration agreement is procedurally unconscionable or unenforceable, have to rebut the Washington Common law presumption that one who accepts a written contract knows and asserts its contents. *Luna v. Household Finance Corp.*, 236 F.Supp.2d 1166, 1174 (W.D. Wash. 2002) (arbitration compelled where a party to arbitration agreement could not establish fraud, misrepresentation or other wrongful act concerning formation of the arbitration contract).

In initiating these proceedings, petitioner breached her Agreement. *Lake Washington School District No. 414 v. Mobile Modules Northwest, Inc.*, 28 Wn. App. 59 621 P.2d 791 (1980) (other party is entitled to stay the proceedings).

Mr. Bernard demands arbitration pursuant to his Agreement.

Under RCW 7.04.010, the parties may agree by contract, in writing, to submit their property division issues to arbitration.⁴⁶ The agreement to settle a dispute by arbitration is exclusive of all other methods of resolving

⁴⁵ Appellant concedes the enforceability of the requirement to arbitrate the Bernard’s property division issues in a divorce proceeding is dependent on the over-lying enforceability of the Prenuptial Agreement, as amended, pursuant to the *Matson/Foran* test. However, if an arbitration dispute involves an interpretation of the agreement, the proper interpreter of the agreement is the arbitrator, not the superior court. *Munsey v. Walla Walla College*, 80 Wn. App. 92, 96, 906 P.2d 988 (1995). Therefore, it was error for the Trial Court to not stay the proceedings at least for the purpose of obtaining this “interpretation.”

⁴⁶ RCW 7.04 has now been repealed and replaced by RCW 7.04A.010 *et. seq.*

the issues. *Fisher Flouring Mills Co. v. United States*, 17 F.2d 232, 234-35, (1927). Arbitration must be pursued before either party can resort to the courts. *Jackson v. City of Walla Walla*, 130 Wash. 96, 101, 226 P. 487 (Ninth Cir. 1924); public policy support agreements to arbitrate. *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997). *Lake Washington School Dist. No. 414 v. Mobile Modules Northwest, Inc.*, supra at 61.

A party to an arbitration agreement must pursue the remedies provided in the agreement before seeking relief through the courts. *Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 162, 516 P.2d 1028 (1973).

Here, we have an arbitration agreement that requires “All disputes arising out of or in connection with this Agreement or concerning any future division of property...shall be resolved in Seattle....” by alternate dispute resolution. Petitioner claims this agreement is invalid. That claim itself, if pursued, must be resolved by the alternate dispute resolution process, and not by a court, as it “arises out of or in connection with” the agreement to seek relief by alternate dispute resolution, and not the courts. *See, Munsey v. Walla Walla College, supra*. The Trial Court committed error in ruling otherwise.

Given Gloria’s admission in her motion papers, in paragraph 6 of her February 3, 2005 Temporary Orders Declaration, that “the only employment contract I had was included in our Pre Nuptial (sic) Agreement....,” RP Vol. I, 67:11 to 68:11, it is clear, despite her current contrary and situational protestations, that even she believed she had a nuptial “Agreement,” as late

as her February 3, 2005 declaration in this case. Trial Exhibit 134, page 5:17-18. Her October 1, 2001 note to Richard E. Keefe, Trial Exhibit 133, forwarding the signed Amendment to Mr. Keefe clearly shows her belief that she had entered into “legal documents.”

Moreover, the Trial Court’s granting of partial summary judgment under prong one of the *Matson/Foran* test, and the Court’s ruling last September that the agreement is unenforceable, if not a “final judgment,”⁴⁷ is clearly a decision determining this action under RAP 2.2(3).⁴⁸

Decisions about the scope of RAP 2.2(3) are made on a case by case basis. Here, the Court rejected appellant’s right to arbitrate the property division issues in this case. Tom Bernard’s motion to compel arbitration and stay the court proceedings affected a substantial right. Denial of the motion is appealable as a matter of right. *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 43-44, 17 P.3d 1266 (2001); *Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 783 P.2d 1124 (1989).

2. Rejection of this appeal will create a waste of judicial resources.

⁴⁷ Appellant concedes the ruling does not dispose of all issues as to all parties in this action. But, the remaining Superior Court proceedings deal with property division issues and are, therefore, similar to *Seattle First Nat’l Bank v. Marshall*, 16 Wn. App. 503, 557 P.2d 352 (1976) where a summary judgment was held to be a “final judgment” even though post-judgment property valuation issues remained.

⁴⁸ Here, the Court disregarded the procedural fairness that gave rise to the First Amendment as required by prong two, by a finding of unfairness under prong one, there was no need for a prong two trial. Under the Court’s “new law” ruling, prong one trumped prong two. This is not the law in Washington State.

It will also be a waste of judicial and client resources to proceed to trial of the property issues and only then appeal from all of the Court's rulings. This is because: (1) the Superior Court is not the forum the parties choose for their divorce and property division issues; and (2) if the appeal is successful, the result will require that the property division be re-done in arbitration with attendant costs.

I. If This Matter Is Not Appealable As A Matter Of Right, This Court Should Grant Discretionary Review Under RAP 2.3.

1. The requirements of RAP 2.3(b) are met in this case.

Aside from the reasons set out above, which form an independent basis for discretionary review, review should be granted under RAP 2.3(b) because:

- The Superior Court, in rejecting application of the *Matson/Foran* two prong test to the parties' entire contract and in finding against Tom on prong two, committed an obvious error that renders further proceedings useless (RAP 2.3(b)(1));
- The Trial Court granted partial summary judgment and otherwise ruled in this matter based upon an impermissible interpretation of the law in the face of disputed material facts;⁴⁹ and

⁴⁹ See, e.g., *New Meadows Holding Co. v. Wash. Water Power Co.*, 34 Wn. App. 25, 659 P.2d 1113 (1983) (partial summary judgment granted on theory not based on case law); *Giordono v. McNeilab, Inc.*, 35 Wn. App. 221, 666 P.2d 384 (1983) (summary judgment granted based on impermissible inference).

- The Superior Court committed probable error which substantially altered the status quo and fundamentally limited Tom's right to arbitrate the resolution of property issues in this matter. RAP 2.3(b)(2).⁵⁰

RAP 2.3(b)(1) permits discretionary review when "the superior court has committed an obvious error which would render further proceedings useless." A property division trial for the Bernards will be useless if a subsequent appeal reverses the Trial Court's determination about the validity of the Agreement. If that occurs, the parties will be required to arbitrate dissolution issues pursuant to their Agreement.

RAP 2.3(b)(2) provides that discretionary review may be accepted when "the superior court has committed probable error and the decision of the superior court substantially alters the status quo....." Judge Halpert conceded she was creating new law. This, if given precedential value, will substantially alter the status quo of the law concerning all nuptial agreement law in Washington. To this point, parties could rely on the *Matson/Foran* test when negotiating such agreements. The Trial Court's rulings in this case cast doubt on this and create uncertainty where certainty is necessary.

⁵⁰ See, e.g., *Kelsey v. Mutual of Enumclaw Ins. Co.*, 44 Wn. App. 49, 720 P.2d 858 (1986) (discretionary review granted on denial of motion to require arbitration because decision deprived party of contractual right to arbitrate).

2. The basis for granting review set out in RAP 2.3(d) is also met in this case.

The RAP 2.3 considerations for granting discretionary review also support review in this case. For example:

- The Trial Court's decisions are admittedly, and in significant part, in conflict with existing and long-settled higher court case law, including application of the *Matson/Foran* two prong test. RAP 2.3(d)(1);
- The Trial Court's decision deprives appellant of his due process and other constitutional rights as established by case law. RAP 2.3(d)(2),⁵¹ and
- The Trial Court's decision involves issues of great public interest as to the substance and procedure required for pre-nuptial and post-nuptial agreements. RAP 2.3(d)(3).

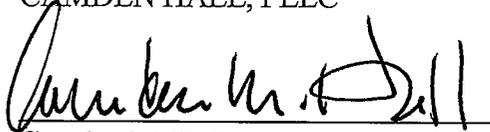
V. CONCLUSION

This Court should consider this appeal for the reasons indicated above. In the exercise of its review power, this Court should reverse the Trial Court and remand this case to the arbitration process to which the parties agreed.

DATED: July 3, 2006.

Respectfully submitted,

CAMDEN HALL, PLLC



Camden M. Hall, WSBA No. 146

Attorneys for Appellant, J. Thomas Bernard

⁵¹ See the briefing on this issue in the material submitted by appellant to this Court on December 5, 2005.

DECLARATION OF SERVICE

Charlotte M. Henry declares as follows: I am over the age of 18, not a party to this action, and competent to testify about the matters herein. By the end of the day on July 3, 2006, I will have served, or had served, this Appellant's Opening Brief and Declaration of Service upon the following individuals in the manner indicated below:

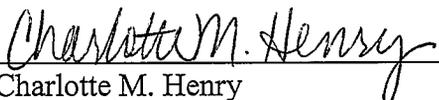
Catherine W. Smith
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900 Fourth Avenue, Suite 3250
Seattle, WA 98164-1072
 Via Messenger

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: July 3, 2006 at Seattle, Washington.


Charlotte M. Henry

APPENDIX I

FILED
KING COUNTY, WASHINGTON

SEP 12 2005

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SUPERIOR COURT OF WASHINGTON COUNTY OF KING

In re the Marriage of:

GLORIA BERNARD,

and

J. THOMAS BERNARD,

Petitioner,

Respondent.

The Honorable Helen Halpert

No. ⁰⁵ 043-01335-8 SEA

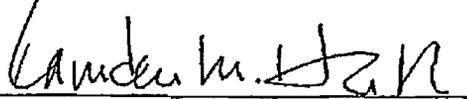
DOCUMENTS USED IN CLOSING
ARGUMENT

Attached are the chronologies used by respondent in the closing argument held on
September 12, 2005.

DATED: September 12, 2005.

Respectfully submitted,

CAMDEN HALL, PLLC



Camden M. Hall, WSBA No. 146
Attorneys for Respondent

DOCUMENTS USED DURING CLOSING ARGUMENT
ON SEPTEMBER 12, 2005 - 1

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SEATTLE, WASHINGTON 98154 ♦ 206-749-0200

ORIGINAL

AOB Appendix A002

In re Bernard

General Fact Chronology

Authored by:

**Camden M. Hall
Camden Hall, PLLC**

Monday, September 12, 2005

Fact Chronology

9/12/2005 12:16 PM

Date & Time	Fact Text	Source(s)
Wed 01/26/2000	Keefe call regarding prenuptial agreement; obtain and mail materials; strategy; confer with Brad Evans and related "materials"	Exhibit 141; Exhibit 112 (p. 0391-0424_
Thu 05/18/2000	Keefe calls from Tom Bernard; discuss prenuptial issues; strategy	Exhibit 141
Tue 05/23/2000	Keefe review prenuptial materials; prepare checklist	Exhibit 141
Wed 05/24/2000	Keefe Checklist Sent to Tom Bernard	Exhibits 140, 142
Wed 05/24/2000	Keefe draft checklist for prenuptial agreement; initial outline of agreement	Exhibit 141
Thu 06/08/2000	Keefe telephone call with Tom Bernard and Gloria Bernard regarding checklist; necessity for independent review and outline of prenuptial agreement	Exhibit 141
Thu 06/08/2000	Keefe email to Craig Nim asking him to send another copy of the prenuptial checklist to Tom Bernard because he has lost the one Nim had earlier sent to him	Exhibit 112 (p. 0382)
Thu 06/08/2000	Keefe 3 page fax at 10:00 a.m. to Tom Bernard Bernard of "Pre-nuptial checklist memorandum"	Exhibit 112 (pp. 00480-84)
Mon 06/19/2000	Keefe draft prenuptial agreement	Exhibit 141
Tue 06/20/2000	Keefe revise and finalizes draft of prenuptial agreement; call and e-mail client	Exhibit 141
Tue 06/27/2000	Keefe meet Tom Bernard; review and analyze ...; prenuptial agreement; related matters	Exhibit 141
Thu 06/29/2000	Keefe research re prenuptial or status agreement; strategy; telephone call with Tom Bernard	Exhibit 141
Thu 06/29/2000	Keefe has conference with Joe Gaffney re prenuptial agreement	Exhibit 141
Fri 06/30/2000	Keefe call Tom Bernard about prenuptial issues	Exhibit 141
Fri 06/30/2000	Keefe 24 page 10:52 a.m. fax to Tom Bernard Bernard and Gloria Bernard Whitehead of Draft Prenuptial Agreement	Exhibit 112 (p. 0479)
Mon 07/03/2000	Tom Bernard emails response to Keefe Checklist providing in part: that Gloria Bernard "...plans to use her attorney of long standing, who handled her divorce and has done other work for her, through the years. This is:....."	Exhibit 142; 112 (p. 0435-466)
Mon 07/03/2000	Keefe call Tom Bernard regarding prenuptial; also call Glorias counsel; revisions to document	Exhibit 141
Mon 07/03/2000	Tom Bernard 7 page fax to Keefe of "copies financial statements Tom Bernard & Gloria Bernard"	Ex 112 (p. 0647-478)
Tue 07/04/2000	Keefe calls and drafting of prenuptial agreement; revising; letter; strategy; return to Seattle	Exhibit 141
Tue 07/04/2000	Email to Keefe from Tom Bernard setting meeting ofr July	Exhibit 112 (p. 0430-34)

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AOB Appendix A004^{Hal/C}

Fact Chronology

9/12/2005 12:16 PM

Date & Time	Fact Text	Source(s)
**	5 and stating, in part: "Gloria Bernard still does not have her attorney lined up. Hopefully, this will still work out okay. she did not want to try one of the three attorneys you suggested, She is working on it."	**
Wed 07/05/2000	Keefe and Gehring ^{Gehring} conference with client	Exhibit 141
Wed 07/05/2000	Keefe calls e-mails, negotiations and drafting prenuptial agreement; meet with Tom Bernard, Gloria Bernard's attorney	Exhibit 141
Wed 07/05/2000	Keefe sends letter to Gehring sending the Prenuptial Agreement "for your review" and indicating that Tom Bernard has not had a chance to review the draft at about 4:52 p.m.	Exhibit 108 (pp. 100038-80 with Gehring edits; Exhibit 112 (p. 0359)
Wed 07/05/2000	Gehring time sheet showing he spend 7 hours on the "Prenuptial Agreement Review and Consultation between July 5, 2000 and December 1, 2000	Exhibit 108 (p. 10082)
Wed 07/05/2000	Keefe fax to Gehring of 44 pages	Exhibit 112 (p. 0005)
Thu 07/06/2000	Keefe negotiations, revisions to prenuptial agreement, side letter, Tom Bernard and Gloria Bernard's attorney	Exhibit 141
Thu 07/06/2000	Keefe fax to Gehring of 4 pages	Exhibit 112 (p. 0005)
Thu 07/06/2000	Keefe 9:24 a.m. 4 page fax to Gehring forwarding "...revised pages 1-3 of Schedule A to the Proposed Prenuptial Agreement. . . ."	Exhibit 112 (p. 0354-55)
Thu 07/06/2000	Keefe 4:51 p.m. 44 page fax to Gehring of "Prenuptial Agreement, Schedules A and NB, and Legal Descriptions"	Exhibit 112 (p. 0356)
Fri 07/07/2000	Prenuptial Agreement Executed by Gloria Bernard and Tom Bernard	Exhibit 101
Fri 07/07/2000	Tom Bernard Bernard Signs the Side Agreement	Exhibit 103
Fri 07/07/2000	Gehring letter to Gloria Bernard stating concerns about the Prenuptial Agreement and telling her not to sign it	Exhibits 102; 108 (pp.. 100006-100009, 100035-37)
Fri 07/07/2000	Keefe calls; letters; e-mails; finalize prenuptial agreement and side letter	Exhibit 141
Fri 07/07/2000	Keefe faxes "proposed [Side Agreement] letter to Gehring to implement the idea we discussed. Tom Bernard suggests you review it with Gloria Bernard" at about 2:14 p.m.	Exhibit 108 (pp. 100032-34)
Fri 07/07/2000	Keefe fax to Gehring of 3 pages	Exhibit 112 (p. 0005)
Fri 07/07/2000	Keefe 3 page fax to Tom Bernard of "Letter to Ms. Whitehead at 1:40 p.m., 1:45 p.m. 2:15 p.m. with Side Agreement draft	Exhibit 112 (p. 0342-47)
Fri 07/07/2000	Gehring 7:51 a.m. fax to Keefe of 4 pages re "Bernard Prenuptial Agreement" forwarding a copy of his July 7, 2000 letter to Gloria Bernard Whitehead advising her to	Exhibit 112 (p. 0348-51)

Fact Chronology

9/12/2005 12:16 PM

Date & Time	Fact Text	Source(s)
**	not sign the Prenuptial Agreement	**
Fri 07/07/2000	Keefe 10:24 a.m. 5 page fax to Tom Bernard of "Fax received from Marshall Gehring F. Gehring"	Exhibit 112 (p. 0352-53)
Sat 07/08/2000	Bernard Wedding	Exhibits 127; 105
Sat 07/08/2000	Gloria Bernard Bernard signs Side Agreement	Exhibit 103
Mon 07/10/2000	Keefe review file, propose changes, draft revisions to First Amendment	Exhibit 141
Mon 08/14/2000	Keefe prenuptial agreement; follow up with M. Gehring and client	Exhibit 141
Sat 08/19/2000	Keefe Prenuptial Agreement - call Tom Bernard; discuss finalization of agreement	Exhibit 141
Thu 08/31/2000	Keefe faxes "2 letters to Ms. Whitehead" to Tom Bernard at 2:54 p.m.--not clear what letters were faxed	Exhibit 112 (p. 0295)
Mon 09/11/2000	Keefe call Tom Bernard, discuss prenuptial and related matters	Exhibit 141
Mon 09/18/2000	Keefe follow up with Tom Bernard on amendment to prenuptial agreement	Exhibit 141
Thu 09/28/2000	Keefe faxes Gehring 10 pages including 4 page draft of the First Amendment at 11:44 a.m., 11:58 a.m. and 12:03 p.m.	Exhibits 136; 108 (p. 10029-31; 0275-76; 0278-79)
Thu 09/28/2000	Keefe draft and revise amendment to prenuptial agreement, exhibits, fax to client and Mr. Gehring	Exhibit 141
Thu 09/28/2000	Keefe fax to Gehring of 11 pages	Exhibit 112 (p. 0006)
Thu 09/28/2000	Keefe file first draft of First Amendment to Prenuptial Agreement	Exhibit 112 (pp. 0524-531)
Fri 10/06/2000	Keefe prenuptial agreement; call Tom Bernard regarding status of amendments to agreement	Exhibit 141
Wed 11/01/2000	Keefe call Marshall Gehring follow up on prenuptial agreement changes	Exhibit 141
Wed 11/01/2000	Keefe fax to Gehring of 4 pages at 10:59 a.m.	Exhibit 112 (p. 0006; 0273)
Thu 11/16/2000	Keefe confer with Tom Bernard ; call M. Gehring; amend prenuptial agreement	Exhibit 141
Mon 11/27/2000	Gehring sends Keefe (with cc to Gloria Bernard) letter stating existing draft of first Amendment will be acceptable to Gloria Bernard and should resolve the difficulties set out in his July 7, 2000 letter (Exhibit 102)	Exhibits 131; 108 (p. 10028)
Thu 11/30/2000	Keefe review amendment to prenuptial agreement; letter to Marshall Gehring	Exhibit 141
Fri 12/01/2000	Keefe forwards execution copies fo First Amendment to Gehring	Exhibits 137; 108 (p. 100023)
Fri 12/01/2000	Gehring time sheet showing the spend 4 hours on	Exhibit 108 (p. 100081)

Fact Chronology

9/12/2005 12:16 PM

Date & Time	Fact Text	Source(s)
**	"Prenuptial Agreement changes -- review and consultation" between December 1, 2000 and August 17, 2001	**
Tue 02/20/2001	Keefe call Tom Bernard ; review proposed changes to prenuptial agreement; strategy	Exhibit 141
Fri 03/02/2001	Keefe revise First Amendment to Prenuptial Agreement; call Tom Bernard	Exhibit 141
Mon 05/07/2001	Keefe call Tom Bernard; strategy on finalization; call Marshall Gehring	Exhibit 141
Tue 06/26/2001	Keefe return call from Tom Bernard regarding prenuptial agreement, scheduling	Exhibit 141
Wed 06/27/2001	Keefe meet Tom Bernard ; review prenuptial agreement and related matters	Exhibit 112 (p. 0004)
Thu 07/05/2001	Keefe review and analyze prenuptial agreement; first amendment; Tom Bernard's comments; draft revision; strategy	Exhibit 141
Mon 07/09/2001	Keefe draft revisions to prenuptial agreement; review original agreement; possible changes, strategy	Exhibit 141
Tue 07/10/2001	Keefe review file; proposed changes; draft revisions to First Amendment	Exhibit 112 (p. 0004)
Wed 07/11/2001	Keefe call Tom Bernard, discuss prenuptial, timing, amendments, finalize and fax draft to Tom Bernard with exhibits	Exhibit 141
Thu 07/12/2001	Keefe call Tom Bernard and meet with Tom Bernard; discuss. . . questions, finalize prenuptial agreement	Exhibit 141
Fri 07/13/2001	Keefe sends revised First Amendment - August 28, 2001 to Gehring for review; Tom Bernard to give Gloria Bernard a copy	Exhibits 138; 104 (pp. 100011-22 with Gehring signature on 100017)
Wed 08/01/2001	Keefe calls with Tom Bernard , Marshall Gehring ; revisions to first amendment to prenuptial agreement	Exhibit 141
Thu 08/02/2001	Keefe work on prenuptial agreement amendment	Exhibit 141
Thu 08/02/2001	Keefe fax to Gehring of 14 pages of "First Amendment to Prenuptial Agreement - clean and red lined copies (not including attachments" reflecting the "differences between the First Amendment prepared last winter (and provided to Mr. Gehring in December) and the current amplified version...."	Exhibit 112 (pp. 0006, 0501-516)
Wed 08/08/2001	Keefe call Marshall Gehring ; follow up on prenuptial agreement	Exhibit 141
Tue 08/14/2001	Keefe prenuptial agreement follow up with Marshall Gehring and Tom Bernard	Exhibit 112 (p. 0004)
Fri 08/17/2001	Marshall Gehring signs First Amendment	Exhibit 104
Fri 08/17/2001	Gehring letter (cc to Keefe) to Gloria Bernard advising her	Exhibits 141; 108

Fact Chronology

9/12/2005 12:16 PM

Date & Time	Fact Text	Source(s)
**	to sing First Amendment; Gehring signs First Amendment	(pp.100005; 100010)
Tue 08/28/2001	Everyone else signs the First Amendment	Exhibit 104
Mon 10/01/2001	Gloria Bernard writes Keefe "than you" letter forwarding signed copy of First Amendment	Exhibit 133
Fri 09/10/2004	Date of Separation	Exhibit 105
Thu 02/03/2005	Gloria Bernard files Declaration in support of temporary relief stating (at page 5:17-18) that "The only employment contract I had was included in our Pre Nuptial Agreement."	Exhibit 134
Fri 02/11/2005	Tom Bernard Bernard Notice of Intent to Arbitrate	Exhibit 107
Thu 03/10/2005	Dr. Dr. Stuart Greenberg interview with Gloria Bernard Bernard	[Exhibit 7 (pp. 47-59)]
Tue 03/29/2005	Gloria Bernard Bernard notes for Dr. Dr. Stuart Greenberg	[Exhibit 7 (pp. 60-64)]
Fri 04/01/2005	Greenberg Report	Exhibit 6

In re Bernard

***Keefe-Gehring Contacts Fact
Chronology***

Authored by:

**Camden M. Hall
Camden Hall, PLLC**

Monday, September 12, 2005

Fact Chronology

9/12/2005 12:23 PM

Filter: Linked Issues = "Contacts with Gehring initiated by Keefe" (27 of 84)

Date & Time	Fact Text	Source(s)
Mon 07/03/2000	Keefe call Tom Bernard regarding prenuptial; also call Glorias counsel; revisions to document	Exhibit 141
Wed 07/05/2000	Keefe calls e-mails, negotiations and drafting prenuptial agreement; meet with Tom Bernard, Gloria Bernard's attorney	Exhibit 141
Wed 07/05/2000	Keefe sends letter to Gehring sending the Prenuptial Agreement "for your review" and indicating that Tom Bernard has not had a chance to review the draft at about 4:52 p.m.	Exhibit 108 (pp. 100038-80 with Gehring edits; Exhibit 112 (p. 0359)
Wed 07/05/2000	Keefe fax to Gehring of 44 pages	Exhibit 112 (p. 0005)
Thu 07/06/2000	Keefe negotiations, revisions to prenuptial agreement, side letter, Tom Bernard and Gloria Bernard's attorney	Exhibit 141
Thu 07/06/2000	Keefe fax to Gehring of 4 pages	Exhibit 112 (p. 0005)
Thu 07/06/2000	Keefe 9:24 a.m. 4 page fax to Gehring forwarding "...revised pages 1-3 of Schedule A to the Proposed Prenuptial Agreement. . . ."	Exhibit 112 (p. 0354-55)
Thu 07/06/2000	Keefe 4:51 p.m. 44 page fax to Gehring of "Prenuptial Agreement, Schedules A and NB, and Legal Descriptions"	Exhibit 112 (p. 0356)
Fri 07/07/2000	Keefe faxes "proposed [Side Agreement]letter to Gehring to implement the idea we discussed. Tom Bernard suggests you review it with Gloria Bernard" at about 2:14 p.m.	Exhibit 108 (pp. 100032-34)
Fri 07/07/2000	Keefe fax to Gehring of 3 pages	Exhibit 112 (p. 0005)
Fri 07/07/2000	Gehring 7:51 a.m. fax to Keefe of 4 pages re "Bernard Prenuptial Agreement" forwarding a copy of his July 7, 2000 letter to Gloria Bernard Whitehead advising her to not sign the Prenuptial Agreement	Exhibit 112 (p. 0348-51)
Mon 08/14/2000	Keefe prenuptial agreement; follow up with M. Gehring and client	Exhibit 141
Thu 09/28/2000	Keefe faxes Gehring 10 pages including 4 page draft of the First Amendment at 11:44 a.m., 11:58 a.m. and 12:03 p.m.	Exhibits 136; 108 (p. 10029-31; 0275-76; 0278-79)
Thu 09/28/2000	Keefe draft and revise amendment to prenuptial agreement, exhibits, fax to client and Mr. Gehring	Exhibit 141
Thu 09/28/2000	Keefe fax to Gehring of 11 pages	Exhibit 112 (p. 0006)
Wed 11/01/2000	Keefe call Marshall Gehring follow up on prenuptial agreement changes	Exhibit 141
Wed 11/01/2000	Keefe fax to Gehring of 4 pages at 10:59 a.m.	Exhibit 112 (p. 0006; 0273)
Thu 11/16/2000	Keefe confer with Tom Bernard ; call M. Gehring; amend prenuptial agreement	Exhibit 141
Thu 11/30/2000	Keefe review amendment to prenuptial agreement; letter	Exhibit 141

Fact Chronology

9/12/2005 12:23 PM

Filter: Linked Issues = "Contacts with Gehring initiated by Keefe" (27 of 84)

Date & Time	Fact Text	Source(s)
**	to Marshall Gehring	**
Fri 12/01/2000	Keefe forwards execution copies fo First Amendment to Gehring	Exhibits 137; 108 (p. 100023)
Mon 05/07/2001	Keefe call Tom Bernard; strategy on finalization; call Marshall Gehring	Exhibit 141
Fri 07/13/2001	Keefe sends revised First Amendment - August 28, 2001 to Gehring for review; Tom Bernard to giive Gloria Bernard a copy	Exhibits 138; 104 (pp. 100011-22 with Gehring signature on 100017)
Wed 08/01/2001	Keefe calls with Tom Bernard , Marshall Gehring ; revisions to first amendment to prenuptial agreement	Exhibit 141
Thu 08/02/2001	Keefe fax to Gehring of 14 pages of "First Amendment to Prenuptial Agreement - clean and red lined copies (not including attachments" reflecting the "differences between the First Amendment prepared last winter (and provided to Mr. Gehring in December) and the current amplified version...."	Exhibit 112 (pp. 0006, 0501-516)
Wed 08/08/2001	Keefe call Marshall Gehring ; follow up on prenuptial agreement	Exhibit 141
Tue 08/14/2001	Keefe prenuptial agreement follow up with Marshall Gehring and Tom Bernard	Exhibit 112 (p. 0004)
Fri 08/17/2001	Gehring letter (cc to Keefe) to Gloria Bernard advising her to sing First Amendment; Gehring signs First Amendment	Exhibits 141; 108 (pp.100005; 100010)

FILED

THE HON. HELEN HALPERT

2005 SEP 13 PM 4:30
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

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

In re the Marriage of:
GLORIA BERNARD,
Petitioner,
and
THOMAS BERNARD,
Respondent.

NO. 05-3-01335-8 SEA
RESPONSE TO RESPONDENT'S
CLOSING ARGUMENT TIME LINE

Apparently because of the haste with which it was prepared, the closing argument Fact Chronology handed up by Respondent has numerous errors which need to be corrected. The best source of information to support the corrections comes from Exhibit 112, pages 003-006, Client Detailed Time and Expense Report from Foster Pepper & Shefelman.

Date & Time	Fact Text	Source(s)
Wed 01/26/2000	Correction: There is no reference in the billing to conferring with "related materials."	Exhibit 112, p.3
Thu 05/18/2000	Correction: Text erroneously indicates that there are multiple calls to Dick Keefe from Tom Bernard. Billing text reviews "call from Tom."	Exhibit 112, p.3
Wed 05/24/2000	Correction: "Keefe Checklist sent to Tom Bernard": although the Checklist is dated May 24, 2000, there is nothing in Dick Keefe's file showing that it was sent to Tom Bernard	Exhibit 1, Exhibit 112
Wed 05/24/2000	Correction: This is a duplication of the prior entry. There is one billing entry for May 24 which states "Draft checklist for prenuptial agreement; initial outline of agreement."	Exhibit 112, p. 3

RESPONSE TO RESPONDENT'S
CLOSING ARGUMENT TIME LINE - 1

ORIGINAL

LAW OFFICE OF
JERRY R. KIMBALL
3250 UNION BANK OF CALIFORNIA
900 FOURTH AVENUE
SEATTLE, WASHINGTON 98164
AOB Appendix A012
(206) 587-5701

Date & Time	Fact Text	Source(s)
Thu 06/08/2000	The Fact Text correctly reflects the billing but does not indicate that it was only for .4 hour	Exhibit 112, p.3
Thu 06/08/2000	Correction: There is no separate billing for this event, and it was part of the .4 billing noted above.	Exhibit 112, p.3
Thu 06/08/2000	<i>Correction: Again, this is a repetition of the prior two entries, apparently an attempt to make it look like more steps were taken than were actually taken. At p.5, Exhibit 112 reflects the fax charge for June 8 for three pages. It also reflects two different copy charges for four pages each time. Certainly these were all part of the same event.</i>	Exhibit 112, p.6
Mon 06/19/2000	This is an accurate rendition of the billing reference at p.3 of Exhibit 112. The time spent on the project, 11 days after the Checklist conversation and with no intervening activity, was 1.5 hours.	Exhibit 112, p.3
Tue 06/20/2000	<i>Correction: The text is correct. What it does not reflect is that the total time spent on revising and finalizing the draft of the prenuptial agreement, calling and e-mailing to Tom Bernard was 48 minutes. There was never a fax of 24 pages. Rather, there was a fax of 20 pages that was sent to Tom Bernard's office on June 20, 2000. While Mr. Hall's reference to 24 pages is consistent with the fax cover sheet, however the billing reference that is recorded electronically from the fax machine shows 20 pages transmitted. What portions of the intended transmission on June 20, 2000 that were not received is unknown.</i>	Exhibit 112, p.3
Tue 06/27/2000	Correction: There is no such event that occurred. The event reflected occurred June 27, 2001 and is shown at p.5 of Mr. Hall's Fact Chronology.	Exhibit 112, p.3
Thu 06/29/2000	Again, the entry is correct to reflect that 21 days after the Check-list conversation, Mr. Keefe and Mr. Bernard speak for the second time. The total time devoted to the event on that date was 12 minutes.	Exhibit 112, p.3
Thu 06/29/2000	The Fact Text entry appears correct. However, it fails to note that the conference with Mr. Gaffney regarding the prenuptial agreement was 12 minutes or less in duration.	
Fri 06/30/2000	The text is correct, but it fails to reflect that this call, occurring on the Friday before the four-day July 4 weekend, eight calendar and three business days before the wedding, lasted six minutes or less.	

RESPONSE TO RESPONDENT'S
CLOSING ARGUMENT TIME LINE - 2

LAW OFFICE OF
JERRY R. KIMBALL
3250 LINCOLN BANK OF CALIFORNIA
900 FOURTH AVENUE
SEATTLE, WASHINGTON 98164
AOB Appendix A013
(206) 587-5701

Date & Time	Fact Text	Source(s)
Fri 06/30/2000	Correction: There was no fax to Tom and Gloria Bernard on June 30. This is erroneous. At p.5 of Exhibit 112 all of the faxes are reflected. There was never a fax of 24 pages. Rather, there was a fax of 20 pages that was sent to Tom Bernard's office on June 20, 2000. While Mr. Hall's reference to 24 pages is consistent with the fax cover sheet, however the billing reference that is recorded electronically from the fax machine shows 20 pages transmitted. What portions of the intended transmission on June 20, 2000 that were not received is unknown.	Exhibit 112, p 3 and 6.
Mon 07/03/2000	Correction: The e-mail was at 7:15 p.m. on July 3. The first page of the e-mail ends with the following: "Gloria is trying to contact an attorney now, everyone's out of town. Tom" The reference to Gloria planning to "use her attorney of long standing" is at p.448 of Exhibit 112 and shows that there was no name for this attorney. Further, that portion of the e-mail is shown as having been prepared and dated July 1, 2000. See p.436 of Exhibit 112.	Exhibit 112, pp.435, 436 & 488
Mon 07/03/2000	The fact text is correct. The entry is erroneous in that there is no evidence that Gloria had an attorney on July 3 for Dick Keefe to call. At 7:15 p.m. that date, Tom Bernard informs Keefe that Gloria still does not have an attorney. That she did not have an attorney is supported by Tom Bernard's e-mail to Richard Keefe July 4, 2000 at 7:34 p.m., where he indicates "Gloria still does not have her attorney lined up. Hopefully this will still work out okay. She did not want to try one of the three attorneys you suggested. She is working on it." Thus, although Mr. Keefe's billing would tend to reflect that she did have an attorney, other evidence makes it clear that it was simply a billing error.	Exhibit 112, p.435 Exhibit 112, p.430
Mon 07/03/2000	Mr. Keefe's billing does reference a telephone call with Tom Bernard. That is part of the 2.3 hours that he billed for on July 3, 2000.	Exhibit 112, p.3
Wed 07/05/2000	Mr. Hall has five events listed for this date. Four of them are what occurred in Mr. Keefe's office, during which he spent 4.5 hours of time on the task and his partner, Mr. Gaffney, spent .4 hour on the tasks. Mr. Keefe's billings also reflect that he met with "Tom, Gloria's attorney." Mr. Keefe in his deposition testimony clarified this billing entry at p.35, lines 16-22, where the question and answer were as follows: "Question: Did you meet with an attorney who was acting on behalf of Gloria? "Answer: I don't believe so. I think we only dealt by telephone. And this may have been an imprecise entry. It was, because I don't ever recall meeting personally with Mr. Gehring. We talked on the phone a number of times."	Deposition of Richard Keefe, Exhibit 5, p.35

RESPONSE TO RESPONDENT'S
CLOSING ARGUMENT TIME LINE - 3

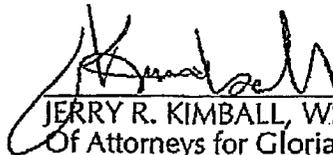
LAW OFFICE OF
JERRY R. KIMBALL
3250 UNION BANK OF CALIFORNIA
900 FOURTH AVENUE
SEATTLE, WASHINGTON 98164
AOB Appendix A014
(206) 587-5701

Date & Time	Fact Text	Source(s)
Thu 07/06/2000	This is confusing as the fax cover sheet, p.355 of Exhibit 112, shows a time of 9:28 p.m. The fax confirmation sheet shows a time of 9:24 a.m. Presumably, the machine entry is correct. This was a fax of the latest revisions by Tom Bernard to his financial disclosure, Schedule A to the prenuptial agreement.	
Fri 07/06/2000	Mr. Hall's Chronology has nine events listed for this date. The order in which they appear is not consistent with the chronology in which they occurred.	Exhibit 112, p. 3
Mon 07/10/2000	This is the Monday following the wedding. There was no billing entry or record in Mr. Keefe's records of him having done any of the things listed. There is an entry reflecting the same text for July 10, 2001, a year after the wedding.	Exhibit 112, p. 4

The Fact Chronology offered by Mr. Hall regarding the contacts between Richard Keefe and Marshall Gehring also contains similar errors. For example, the July 3, 2000 telephone call between Dick Keefe and Marshall Gehring that is part of the erroneous billing by Dick Keefe did not occur. Further, consistent with the prior time line, Mr. Hall has segregated occurrences on a single day as numerous events.

DATED this 13th day of September, 2005.

Respectfully submitted,



JERRY R. KIMBALL, WSBA #8641
Of Attorneys for Gloria Bernard

APPENDIX II

MARSHALL F. GEHRING
ATTORNEY AT LAW
25825 - 104TH AVENUE S.E. (#375)
KENT, WASHINGTON 98031

REGISTERED ATTORNEY
U.S. PATENT & TRADEMARK OFFICE

631-4453 VOICE
639-9495 FAX

November 27, 2000

Area Code 253

Richard E. Keefe
Attorney at Law
1111 Third Avenue (Suite 3400)
Seattle, WA 98101

Re: Bernard Prenuptial Agreement

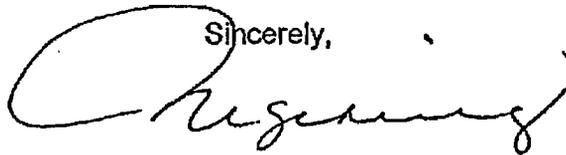
Dear Mr. Keefe:

I believe that your most recently proposed First Amendment to the Prenuptial Agreement of the parties will be acceptable to Gloria and should resolve the difficulties I perceived in the draft original agreement, as expressed in my letter to Gloria dated July 7, 2000.

May I suggest that you send me the final documents for signature. I will pass them along to Gloria, and she can pass them along to Tom, who will return the documents to you for appropriate distribution.

Thank you for working with me to bring this matter to a successful conclusion.

Sincerely,



Marshall F. Gehring

cc: Gloria Bernard

AOB Appendix A0178 100028

APPENDIX III

MARSHALL F. GEHRING
ATTORNEY AT LAW
25825 - 104TH AVENUE S.E. (#375)
KENT, WASHINGTON 98031.

REGISTERED ATTORNEY
U.S. PATENT & TRADEMARK OFFICE

631-4453 VOICE
639-9495 FAX

August 17, 2001

Area Code 253

Gloria L. Bernard
1421 Shenandoah Drive East
Seattle, WA 98112

Re: Amendment to Prenuptial Agreement

Dear Gloria:

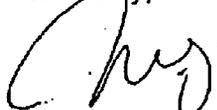
I have reviewed the enclosed First Amendment to Prenuptial Agreement that was prepared by Dick Keefe. This document basically expands upon, and clarifies, several of the provisions of the amendment agreement that you approved last November.

As you know, and as expressed in my letter to you dated July 7th, 2000, I had a number of concerns relative to the draft prenuptial agreement that I reviewed at that time. These concerns were in part addressed by changes to the final Prenuptial Agreement. They are further addressed in this Amendment to the Prenuptial Agreement. As far as you are concerned, I believe that the enclosed Amendment will make substantial improvements to the existing Prenuptial Agreement; and for that reason, you should sign it.

You and Tom both need to sign the enclosed Amendment document; and you both need to have your signatures notarized. Liz Jogtich can do that for you. When signed and notarized, please send the document to Dick Keefe.

At your convenience, I will be happy to meet with you and review with you the amended agreement in detail.

Sincerely,



Marshall F. Gehring

cc: Richard E. Keefe
Attorney at Law

AOB Appendix A019
100010

APPENDIX IV

FIRST AMENDMENT TO PRENUPTIAL AGREEMENT

This is the First Amendment ("Amendment") to the Prenuptial Agreement dated July 7, 2000, ("Agreement") between Gloria L. Whitehead ("Wife") and J. Thomas Bernard ("Husband"). The Agreement was negotiated and executed by Wife and Husband shortly before they were married in Seattle, Washington, on July 8, 2000. Each of the parties was represented by counsel in these negotiations, Husband by Richard E. Keefe of Foster Pepper & Shefelman, and Wife by Marshall F. Gehring. As part of these negotiations, Mr. Gehring sent Wife the letter dated July 7, 2000, a copy of which is attached hereto as Exhibit A; and Husband delivered to Wife the letter dated July 7, 2000 (prepared by Mr. Keefe) a copy of which is attached as Exhibit B.

The parties entered into the Marriage with the intent and understanding that as soon as reasonably practical upon return from their honeymoon, counsel would prepare and the parties would enter into this Amendment.

NOW, THEREFORE, in consideration of the mutual agreements and covenants stated herein and pursuant to Exhibit B, Husband and Wife agree that the Agreement shall be amended as of the date of the Marriage as follows:

1. Paragraph 5 shall be amended and restated to read as follows:

"5. Community and Joint Property; and Earnings/Salary.

(a) Subject to the provisions of subparagraph (b) below, during the existence of the marital community of the parties, all wages, salary or remuneration for services or labor (collectively, "Salary") earned by either shall be community property; provided, however, Salary (and the parties' community property) shall not ever include any stock, stock options, stock warrants, stock rights, or other equity or debt securities issued by a party's employer or related entity, any interest in any stock option plan, employee stock ownership plan or other plan offering a party a proprietary interest in such party's employer or a related entity, which rights or benefits arise out of the employment relationship and is in the nature of compensation (present or deferred) for services; nor shall Salary include any draws, distributions or remuneration to Husband attributable to or arising out of his time and energy expended to manage or oversee his separate property real estate ventures or separate property investment account (as more fully described in subparagraph (b) below).

The parties further agree that any funds deposited after Marriage in a tenancy-in-common, joint tenancy or tenancy by the entirety account wherein they are the only tenants shall be community property, and if any funds are held in joint-tenancy-with-rights-of-survivorship or as tenants by the entirety where the parties are the only tenants, then the proceeds shall pass to the survivor on the death of one of the parties. All property purchased with funds from a joint tenancy, tenancy-in-common or tenancy by the entirety account or from community funds shall, to the extent so purchased, be held by the parties as community property.

will
~~write~~ ATB SPB

(b) The Parties recognize that it will be necessary for Husband to expend considerable time and energy to manage and oversee his separate property real estate ventures and separate property investment account, but that it will be very difficult if not impossible to determine the exact amount and value of such efforts. Accordingly they have agreed that:

.. would ATB SPB

(i) None of such efforts shall be considered "services or labor" under subparagraph (a), nor shall the fruits or proceeds of any thereof be deemed or imputed to be salary or community property; rather the fruits and proceeds of such efforts shall be and remain Husband's Separate Property; and

(ii) In recognition and in lieu thereof Husband has agreed as provided below to:

1. Provide his separate property residence to the community for its residence (without charge);
2. Fund the maintenance, upkeep, repair, tax and insurance payments for this residence (which is debt-free) from his Separate Property;
3. Fund the Household Operational Account and the Joint Living Bank Accounts; and the Special Joint Account for Gloria Whitehead from his Separate Property; and
4. Agreed to the provisions for Wife on termination of the marriage and death.

(c) The parties acknowledge that their Salary shall, as above stated, be community property and shall be used for such purposes as they may, from time to time, agree; provided, however, that in the event the parties are unable to agree on the use of such Salary, each party shall be free to use that party's share of his or her Salary for such purposes as he or she may desire as fully as if such share of that party's Salary were separate property."

2. Paragraph 7 shall be amended and restated to read as follows:

"7. Joint Bank Accounts.

(a) The parties shall continue to maintain their present personal checking and savings and stock market accounts (if any) as their own separate property, adding "Separate Property" nomenclature to each of those account names.

The present Household Operating (Bank) Account (presently in the joint name of J. Thomas Bernard and Diane Viars, Bernard Household Manager) shall become the Community Property Household Operating Account, for payment of household operating expenses, such as: food, utilities, telephone, bedding, towels, decorative plants, and the like (household consumables) and shall be reimbursed from the Joint Living (Bank) Account, to be established as a Tenants In Common account between Gloria and Tom Bernard. There shall be created a residence and beach house property maintenance and improvement account (Husband's Separate Property)

AOB Appendix A022

ATB

Property; in the names of J. Thomas Bernard and Diane Viars) for the upkeep, remodeling, improvement, or maintenance of the Broadmoor home or the Beach house property; which account shall be reimbursed as needed from time-to-time by Husband from his Separate Property.

The Joint Living (Bank) Account shall be the Community Property of Gloria and Tom Bernard. Items purchased and paid for from this account (unless reimbursed by either party from an account that is Separate Property, shall be to pay for the normal living expenses of Gloria and Tom Bernard. This Joint Living Account (or re-named) shall be the repository of one-half (1/2) of Gloria Bernard's salary, bonuses, and income from her employment by Bernard Development Company or others (to be Community Property when deposited), and a fixed sum of one hundred thousand dollars (\$100,000.00) per year deposited by Tom Bernard (also to become Community Property, when deposited). Funds deposited by Tom Bernard are to include salary (if any) earned from his employment, and if funds from Tom's salary are insufficient, additional funds to reach the amount of one hundred thousand dollars (\$100,000/year) from his Separate Property, are to be deposited into this account, for the use and benefit of the Community Estate. Funds deposited into the Joint Living Account by either party (unless identified as a loan, acknowledged in writing by both parties) shall automatically become Community Property, used to pay costs and expenses considered by the parties to be acceptable for payment from Community Property funds. A monthly record shall be kept of all expenses paid to and from the Joint Living Account, including identification of any personal loans (if any) made to the Joint Living Account, and repayment of those loans.

(b) The parties each further acknowledge that some or all of their respective separate property earnings, income from, or portions of, their respective separate property may be contributed to The Joint Living Bank Account or another Bank Account in their joint names (which includes the nomenclature "Community Property Account"; collectively, the "Community Property Accounts"). Notwithstanding the other provisions of this Agreement, the parties intend that upon the marriage the balance in the Community Property Accounts ONLY and future contributions to these accounts and monies on deposit therein shall be community property."

3. Paragraph 9(c) of the Agreement shall be amended by changing the period at the end thereof to a semicolon and adding the following:

"subject to the rights of each party to use that party's share of his or her Salary for any such purpose as provided in paragraph 5(c) above."

4. Paragraph 10(a) shall be amended and restated to read as follows:

"(a) Life Insurance. Each party does in particular disclaim any interest, present or prospective, in any policies of life insurance, or the proceeds thereof, heretofore issued or hereafter to be issued upon the life of the other, the beneficiaries of which are the respective children of such insured, or a trust for their present or future benefit, but only to the extent the premiums for any such policies have been paid with separate funds."

5. The second sentence of paragraph 12 (c) shall be amended by deleting the period, inserting a semicolon, and adding the following:

"and on the sixth, seventh, eighth, ninth and tenth anniversary dates of the Marriage, an additional \$80,000 (Eighty Thousand Dollars) will be deposited by Husband from his separate property funds to the Special Account, or Husband may, in lieu of any such cash payment, elect to designate on any such anniversary date of the Marriage, other of his separate property assets that he, in his reasonable discretion, deems appropriate, and are of at least the same value (net of encumbrances) as such cash payment, which shall become the property of Wife upon termination of the Marriage."

6. Paragraphs 14(g)(ii) and (iii) shall be amended and restated as follows:

"(ii) Neither party shall be liable for the debts or liabilities of the other incurred before marriage.

(iii) Either party may retain or obtain credit in his or her name alone. However, any such credit which is used for other than reasonable and proper community purposes shall be the separate obligation of the party using such credit."

7. Paragraph 15(a) shall be modified as follows:

a. Existing subparagraphs (iv) and (v) shall become, respectively, (v) and (vi); and

b. Insert the following new subparagraph (iv):

"An additional \$400,000 which shall, at Husband's election, be in the form of insurance on his life, or other of his appropriate separate property assets designated and valued by him (net of encumbrances) in his reasonable discretion."

8. Except as specifically amended or modified by this Amendment, the Agreement shall remain in full force and effect as fully as if this Amendment had not been executed.

Dated as of August 28, 2001.

Flora Z. Bensch
Wife

Alvin Bensch
Husband

STATE OF WASHINGTON)

COUNTY OF KING)

) ss. *28*

On this 28 day of August, 2001, before me, the undersigned, a notary public in and for the state of Washington, duly commissioned and sworn appeared Gloria L. ^{Barnard} ~~Whithead~~ to me known to be the individual who executed the within instrument, and acknowledged to me that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Dated this 28 day of August, 2001.



Karen Peterson
(Signature of Notary)

KAREN PETERSON
(Legibly Print or Stamp Name of Notary)

Notary public in and for the state of Washington,
residing at Fall City

My appointment expires 7-14-2004

STATE OF WASHINGTON)

COUNTY OF KING)

) ss.

On this 28 day of August, 2001, before me, the undersigned, a notary public in and for the state of Washington, duly commissioned and sworn appeared J. Thomas Barnard, to me known to be the individual who executed the within instrument, and acknowledged to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Dated this 28 day of August, 2001.



Karen Peterson
(Signature of Notary)

KAREN PETERSON
(Legibly Print or Stamp Name of Notary)

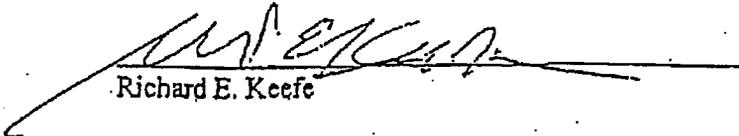
Notary public in and for the state of Washington,
residing at Fall City

My appointment expires 7-14-2004

CERTIFICATION OF ATTORNEYS

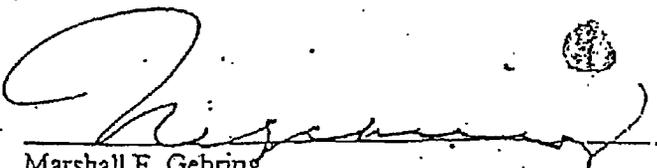
I, Richard E. Keefe, hereby certify that I am a duly licensed attorney, admitted to practice law in the state of Washington; that I have consulted with J. Thomas Bernard, who is a party to the foregoing First Amendment to Prenuptial Agreement dated July 7, 2001, which Prenuptial Agreement was made in contemplation of his marriage to Gloria L. Whitehead, and that I have fully advised him of his property rights and of the legal significance of the foregoing agreement; that he has acknowledged his full and complete understanding of the legal consequences and of the terms and provisions of the foregoing agreement.

DATED: August 28, 2001.


Richard E. Keefe

I, Marshall F. Gehring, hereby certify that I am a duly licensed attorney, admitted to practice law in the state of Washington; that I have consulted with Gloria L. Whitehead who is a party to the foregoing First Amendment to Prenuptial Agreement dated July 7, 2001, which Prenuptial Agreement was made in contemplation of her marriage to J. Thomas Bernard, and that I have fully advised her of her property rights and of the legal significance of the foregoing agreement; that she has acknowledged her full and complete understanding of the legal consequences and of the terms and provisions of the foregoing agreement.

DATED: 8/17, 2001.


Marshall F. Gehring

MARSHALL F. GEHRING
ATTORNEY AT LAW
2375 - 100TH AVENUE S.E. (107)
KENT, WASHINGTON 98011

REGISTERED ATTORNEY
U.S. PATENT & TRADEMARK OFFICE

July 7, 2000

(31-44) VOICE
(31-44) FAX
Area Code 253

Gloria L. Whitehead
1421 Shenandoah Drive East
Seattle, WA 98112

Re: Prenuptial Agreement

Dear Ms. Whitehead:

Late Wednesday afternoon, I received from Mr. Keefe (Mr. Bernard's attorney) a copy of the proposed Prenuptial Agreement between you and Mr. Bernard. I reviewed the proposed agreement late yesterday afternoon and evening; and, in a telephone conversation with Mr. Keefe late yesterday afternoon, I discussed with him some of my initial concerns. Because of the time constraints placed on me relative to this matter, my review has been limited to identifying provisions in the agreement that are unfavorable to you and which I recommend be changed. I did not make any type of financial analysis; nor did I make attempt to confirm the accuracy of the exhibits to the Agreement. Mr. Keefe is an excellent and well-known attorney; and I feel confident that those exhibits are correct.

The purpose of the Prenuptial Agreement is to provide for a division of your assets and liabilities, and Mr. Bernard's assets and liabilities, in four situations: near term death of either party; near term divorce initiated by either party; long term death of either party; and a long term divorce initiated by either party. Generally speaking, near term refers to the first several years of the marriage; and long term refers to a time period eight or more years after the marriage. In my opinion, the Agreement prepared by Mr. Keefe (with the few exceptions noted below) is fair and equitable insofar as the near term is concerned. However, for the long term, I believe that some improvement is needed to protect your interests and realize what I assume is your mutual goal of a fair and equitable arrangement that will cover all eventualities.

The following are my concerns with the proposed Prenuptial Agreement:

- a. Referring to paragraph 15a, on Mr. Bernard's death, you will receive \$100,000 in then-year dollars, your separate property, one-half of the community property, the balance in your Special Joint Account in then-year dollars, and "access" to the Bernard home for "not to exceed one year". This is okay for the short term. But lets say you have been married for 15 years and you are no longer able to earn a living due to age or health considerations. To the best of my knowledge, you have no retirement other

Gloria L. Whitehead

Page -2-

then Social Security; and there are no provisions for your long-term medical care. How do you live? And where do you live after your one-year in the Bernard house? Will you be able to afford to stay in the house for that one year? Given your age, it is my opinion that your health and welfare needs should be reasonably provided for after your marriage has "matured" and until your death. Hopefully, your marriage will bring additional prosperity to Mr. Bernard; and the cost of his providing for this long term care will be insignificant within the grand scheme of his estate.

b. Referring to duplicative paragraphs 9b and 12d, you waive any claim or right to spousal support or maintenance. Again, in the near term, that is not unreasonable. In the long term, however, given no modification to the Agreement in accordance with my recommendation in paragraph 1 above, I think that provision is unreasonable. Lets take the situation where, after 10 years, with you disabled in some fashion and not able to work, Mr. Bernard leaves the marriage for a younger woman. In that case, you have nothing other than your separate property, one-half of the community property, and maybe the balance in the Special Joint Account. No place to live ... no retirement other than Social Security ... no medical care ... and you have no right to ask for spousal support or maintenance even if you are totally disabled with, for instance, Alzheimer's. In my opinion, the Agreement should provide you, after your marriage has "matured" and until your death, with the right to petition the court for an award of reason lifetime support or maintenance unless such is otherwise provided to you.

c. Paragraph 9c addresses children of a prior marriage. You will not be able to spend anything other than separate property funds on your children's health, support, maintenance, or education. Any obligations you have to your children will not involve Mr. Bernard; and any obligations or other support cannot be "paid from community earnings or community property". Presumably, gifts to your children also cannot be made or paid for from community earnings or community property and will have to be made or paid for from your separate property funds, if any exist. My problem with this paragraph is that it precludes you from spending any part of your yearly earnings from your labor (i.e. your salary) on your children because your earnings are community property. In my opinion, you should be free to spend your one-half of your community property earnings (salary) anyway you want.

d. Paragraph 10a addresses life insurance. You disclaim any interest in any policy on Mr. Bernard where the beneficiaries of the policy are his children or a trust for his children. On its face, that is okay. The problem is, that by the statement "whether or not during the marriage of the parties the premiums thereon are paid with community funds", you are authorizing the use of community funds to pay the life insurance premiums. In other words, Mr. Bernard can use community funds to pay for life insurance that you have no interest in whatsoever, but you cannot use those same

Exhibit A
Page 2 of 3

AOB Appendix A028

July 7, 2000

Gloria L. Whitehead
1421 Shenandoah Drive East
Seattle WA 98112

Re: Prenuptial Agreement

Dear Gloria: ♪

We have executed our Prenuptial Agreement dated July 7, 2000 ("Agreement") with the specific understanding that upon our return from Italy we and our attorneys will use their best efforts to negotiate in good faith and execute an amendment to the Agreement covering the following matters:

Items (c), (d) and (e) in Mr. Gehring's letter of July 7, 2000 (copy attached) which we both agree are fair and should be incorporated into the Agreement;

Regarding Item (a) of Mr. Gehring's letter, we agree a fair solution is to amend the Agreement to provide you an additional \$400,000, in the form of insurance or other appropriate assets; and

Regarding Item (b) of Mr. Gehring's letter, we agree that a fair solution is to amend the Agreement to provide you in lieu of any claim for spousal support or maintenance the following additional assets upon termination of the marriage under paragraph 12: "on the sixth, seventh, eighth, ninth and tenth anniversary dates of the marriage an additional \$80,000 (eighty thousand dollars) will be made available for wife by cash addition to the Special Account for Gloria (Whitehead) Bernard - or by designating other appropriate assets; i.e., a total of \$400,000 will be provided for wife (in addition to the amounts presently provided in the Agreement)."

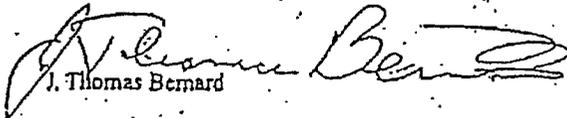
Finally, we agree that:

Until and unless an Amendment to the Agreement is executed, the Agreement shall be in full force and effect as presently written; and

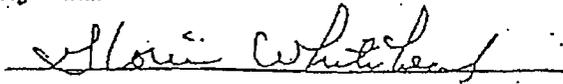
If the Amendment contemplated hereby is not executed by October 7, 2000, this letter shall terminate and the Agreement shall remain in full force and effect (as if this letter had never been written or signed).

Please sign and return the enclosed copy of this letter to confirm our agreement.

Sincerely,


J. Thomas Bernard

Enclosure/ Signed Prenuptial Agreement

Agreed and Accepted: 

Date: July 8, 2000

AOB Appendix A029

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APPENDIX V

Bernard Nuptial Agreement Comparison

<p align="center">Prenuptial Agreement --July 7, 2000</p>	<p align="center">Gehring Letter-- July 7, 2000</p>	<p align="center">Side Agreement--July 8, 2000</p>	<p align="center">First Amendment to Prenuptial Agreement -- August 28, 2001</p>
<p>Para. 5(a) Subject to the provisions of subparagraph (b) below, during the existence of the marital community of the parties, all wages, salary or remuneration for services or labor (collectively, "Salary") earned by either shall be community property; provided however, Salary (and the parties' community property) shall not ever include any stock, stock options, stock warrants, or debt securities issued by a party's employer or related entity, any interest in any stock option plan, employee stock ownership plan or other plan offering a party a proprietary interest in such party's employer or related entity; which rights or benefits arise out of the employment relationship and is in the nature of compensation (present or deferred) for services.</p> <p>The parties further agree that any funds deposited after Marriage in a tenancy-in-common, joint tenancy or tenancy by the entirety account wherein they are the only tenants shall be community property, and if any funds are held in joint-tenancy-with-rights-of-survivorship or as tenants by the entirety where the parties are the only tenants, then the proceeds shall pass to the survivor on the death of one of the parties. All property purchased with funds from a joint tenancy, tenancy-in-common or tenancy by the entirety account or from community funds shall, to the extent so purchased, be held by the parties as community property.</p> <p>(b) The Parties recognize that it will be necessary for Husband to expend considerable time and energy to manage and oversee his separate property real estate ventures, but that it well (sic)</p>			<p>Para. 5(a) Subject to the provisions of subparagraph (b) below, during the existence of the marital community of the parties, all wages, salary or remuneration for services or labor (collectively, "Salary") earned by either shall be community property; provided however, Salary (and the parties' community property) shall not ever include any stock, stock options, stock warrants, stock rights, or other equity or debt securities issued by a party's employer or related entity, any interest in any stock option plan, employee stock ownership plan or other plan offering a party a proprietary interest in such party's employer or related entity; which rights or benefits arise out of the employment relationship and is in the nature of compensation (present or deferred) for services; <u>nor shall salary include any draws, distributions or remuneration to Husband attributable to or arising out of his time and energy expended to manage or oversee his separate property real estate ventures or separate property investment account (as more fully described in subparagraph (b) below).</u></p> <p>The parties further agree that any funds deposited after Marriage in a tenancy-in-common, joint tenancy or tenancy by the entirety account wherein they are the only tenants shall be community property, and if any funds are held in joint-tenancy-with-rights-of-survivorship or as tenants by the entirety where the parties are the only tenants, then the proceeds shall pass to the survivor on the death of one of the parties. All property purchased with funds from a joint tenancy, tenancy-in-common or tenancy by the entirety account or from community funds shall, to the extent so purchased, be held by the parties as community property.</p>

Bernard Nuptial Agreement Comparison

<p>be very difficult if not impossible to determine the exact amount and value of such efforts. Accordingly they have agreed that:</p> <p>(l) None of such efforts shall be considered "services or labor" under subparagraph (a), nor shall the fruits or proceeds of any thereof be deemed or imputed to be salary or community property; rather the fruits and proceeds of such efforts shall be and remain Husband's Separate Property; and</p> <p>(ii) In recognition and in lieu thereof Husband has agreed as provided below to:</p> <ol style="list-style-type: none"> 1. Provide his separate property residence to the community for its residence (without charge); 2. Fund the maintenance, upkeep, repair, tax and insurance payments for this residence (which is debt-free) from his Separate Property; 3. Fund the Household Operational Account and the Joint Living Bank Accounts; and the Special Joint Account for Gloria Whitehead from his Separate Property; and 4. Agreed to the provisions for Wife on termination of the marriage and death. 		<p>(b) The Parties recognize that it will be necessary for Husband to expend considerable time and energy to manage and oversee his separate property real estate ventures and separate property investment account, but that it would be very difficult if not impossible to determine the exact amount and value of such efforts. Accordingly they have agreed that:</p> <p>(i) None of such efforts shall be considered "services or labor" under subparagraph (a), nor shall the fruits or proceeds of any thereof be deemed or imputed to be salary or community property; rather the fruits and proceeds of such efforts shall be and remain Husband's Separate Property; and</p> <p>(ii) In recognition and in lieu thereof Husband has agreed as provided below to:</p> <ol style="list-style-type: none"> 1. Provide his separate property residence to the community for its residence (without charge); 2. Fund the maintenance, upkeep, repair, tax and insurance payments for this residence (which is debt-free) from his Separate Property; 3. Fund the Household Operational Account and the Joint Living Bank Accounts; and the Special Joint Account for Gloria Whitehead from his Separate Property; and 4. Agreed to the provisions for Wife on termination of the marriage and death. <p>(c) The parties acknowledge that their Salary shall, as above stated, be community property and shall be used for such purposes as they may, from time to time, agree; provided, however, that in the event the parties are unable to agree on the use of such Salary, each party shall be free to use that party's share of his or her Salary for such purposes as he or she may desire as fully as if such share of that party's Salary were separate property.</p>
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Bernard Nuptial Agreement Comparison

<p>Para. 7 Joint Bank Accounts. (a) The parties shall continue to maintain their present personal checking and savings and stock market accounts (if any) as their own separate property, adding "Separate Property" nomenclature to each of those account names.</p> <p>The present Household Operating (Bank) Account (presently in the joint name of J. Thomas Bernard and Diane Viars, Bernard Household Manager) shall become the Community Property Household Operating Account, for payment of household operating expenses, such as : food, utilities, telephone, bedding, towels, decorative plants, and the like (household consumables) and shall be reimbursed from the Joint Living (Bank) Account, to be established as a Tenants In Common account between Gloria and Tom Bernard. There shall be created a residence and beach house property improvement account (Husband's Separate Property, in the names of J. Thomas Bernard and Diane Viars) for the upkeep, remodeling, improvement, or maintenance of the Broadmoor home or the Beach house property; which account shall be reimbursed from time-to-time by Husband from his Separate Property.</p> <p>The Joint Living (Bank) Account shall be the Community Property of Gloria and Tom Bernard. Items purchased and paid for from this account (unless reimbursed by either party from an account that is Separate Property, shall be to pay for the normal living expenses of Gloria and Tom Bernard. This Joint Living account (or re-named) shall be the repository of all of Gloria Bernard's salary, bonuses, and income from her employment by Bernard Development Company or others (to be Community Property when deposited), and a fixed sum of one hundred thousand dollars (\$100,000.00) per year</p>		<p>Para. 7 Joint Bank Accounts. (a) The parties shall continue to maintain their present personal checking and savings and stock market accounts (if any) as their own separate property, adding "Separate Property" nomenclature to each of those account names.</p> <p>The present Household Operating (Bank) Account (presently in the joint name of J. Thomas Bernard and Diane Viars, Bernard Household Manager) shall become the Community Property Household Operating Account, for payment of household operating expenses, such as : food, utilities, telephone, bedding, towels, decorative plants, and the like (household consumables) and shall be reimbursed from the Joint Living (Bank) Account, to be established as a Tenants In Common account between Gloria and Tom Bernard. There shall be created a residence and beach house property maintenance and improvement account (Husband's Separate Property, in the names of J. Thomas Bernard and Diane Viars) for the upkeep, remodeling, improvement, or maintenance of the Broadmoor home or the Beach house property; which account shall be reimbursed as needed from time-to-time by Husband from his Separate Property.</p> <p>The Joint Living (Bank) Account shall be the Community Property of Gloria and Tom Bernard. Items purchased and paid for from this account (unless reimbursed by either party from an account that is Separate Property, shall be to pay for the normal living expenses of Gloria and Tom Bernard. This Joint Living account (or re-named) shall be the repository of one-half (1/2) of Gloria Bernard's salary, bonuses, and income from her employment by Bernard Development Company or others (to be Community Property when deposited), and a fixed sum of one hundred thousand dollars (\$100,000.00) per year deposited by Tom Bernard (also to become Community Property, when deposited). Funds</p>
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Bernard Nuptial Agreement Comparison

<p>deposited by Tom Bernard (also to become Community Property, when deposited). Funds deposited by Tom Bernard are to include salary (if any) earned from his employment, and if funds from Tom's salary are insufficient, additional funds to reach the amount of one hundred thousand dollars (\$100,000/year) from his Separate Property, are to be deposited into this account, for the use and benefit of the Community Estate. Funds deposited into the Joint Living Account by either party (unless identified as a loan, acknowledged in writing by both parties) shall automatically become Community Property, used to pay costs and expenses considered by he (sic) parties to be acceptable for Community Property funds. A monthly record shall be kept of all expenses paid to and from the Joint Living Account, including identification of any personal loans (if any) made to the Joint Living Account, and repayment of those loans.</p> <p>(b) The parties each further acknowledge that some or all of their respective separate property earnings, income from, or portions of, their respective separate property may be contributed to The Joint Living Bank Account or another Bank Account in their joint names (which includes the nomenclature "Community Property Accounts"; collectively, the Community Property Accounts"). Notwithstanding the other provisions of this Agreement, the parties intend that upon the marriage the balance in the Community Property Accounts ONLY and future contributions to these accounts and monies on deposit therein shall be community property.</p>		<p>deposited by Tom Bernard are to include salary (if any) earned from his employment, and if funds from Tom's salary are insufficient, additional funds to reach the amount of one hundred thousand dollars (\$100,000/year) from his Separate Property, are to be deposited into this account, for the use and benefit of the Community Estate. Funds deposited into the Joint Living Account by either party (unless identified as a loan, acknowledged in writing by both parties) shall automatically become Community Property, used to pay costs and expenses considered by he (sic) parties to be acceptable for payment from Community Property funds. A monthly record shall be kept of all expenses paid to and from the Joint Living Account, including identification of any personal loans (if any) made to the Joint Living Account, and repayment of those loans.</p> <p>(b) The parties each further acknowledge that some or all of their respective separate property earnings, income from, or portions of, their respective separate property may be contributed to The Joint Living Bank Account or another Bank Account in their joint names (which includes the nomenclature "Community Property Accounts"; collectively, the Community Property Accounts"). Notwithstanding the other provisions of this Agreement, the parties intend that upon the marriage the balance in the Community Property Accounts ONLY and future contributions to these accounts and monies on deposit therein shall be community property.</p>
	<p>9 b and 12d—Waiver of claim for spousal support or maintenance. "The Agreement should provide you, after your marriage has "matured" and until your</p>	

Bernard Nuptial Agreement Comparison

<p>Para. 9 (c): <u>Children of a Prior Marriage.</u> Each party shall be solely responsible for providing for the health, support, maintenance or education, if any, of his or her respective children born before the date of the Agreement, solely from his or her separate earnings or separate property, and no such obligations shall be that of the other party, of the marital community or paid from community earnings or community property. For purposes of this paragraph, a legally adopted child shall be treated as a natural child, provided the adoption occurred prior to the child's eighteenth (18th) birthday, and a child of one party who is legally adopted prior to his or her eighteenth (18th) birthday by the other party shall be deemed a child born of the Marriage. Each party hereby indemnifies and holds harmless the other party from any liability imposed by applicable law which would not have been incurred had this paragraph been effective to prevent imposition of such liability.</p>	<p>death, with the right to petition the court for an award of reason lifetime support or maintenance unless such is otherwise provided to you."</p>	<p>"...which we both agree are fair and should be incorporated into the Agreement"</p>	<p>Para. 9 (c): <u>Children of a Prior Marriage.</u> Each party shall be solely responsible for providing for the health, support, maintenance or education, if any, of his or her respective children born before the date of the Agreement, solely from his or her separate earnings or separate property, and no such obligations shall be that of the other party, of the marital community or paid from community earnings or community property. For purposes of this paragraph, a legally adopted child shall be treated as a natural child, provided the adoption occurred prior to the child's eighteenth (18th) birthday, and a child of one party who is legally adopted prior to his or her eighteenth (18th) birthday by the other party shall be deemed a child born of the Marriage. Each party hereby indemnifies and holds harmless the other party from any liability imposed by applicable law which would not have been incurred had this paragraph been effective to prevent imposition of such liability; <u>subject to the rights of each party to use that party's share of his or her Salary for any such purpose as provided in paragraph 5(c) above.</u></p>
<p>Para. 10 (a) <u>Life Insurance.</u> Each party does in particular disclaim any interest, present or prospective, in any policies of life insurance, or the proceeds thereof, heretofore issued or hereafter to be issued upon the life of the other, the beneficiaries of which are the respective children of such insured, or a trust for their present or future benefit, whether or not during the marriage of the parties the premiums thereon are paid with community funds or otherwise.</p>	<p>Para. 10(a)--life insurance-- "you disclaim any interest in any policy on Mr. Bernard where the beneficiaries of the policy are his children or a trust for his children.--you are authorizing the use of community funds to pay he life insurance premiums. "You should reject this paragraph as written and insist than life insurance policies of the benefit of his</p>	<p>"...which we both agree are fair and should be incorporated into the Agreement"</p>	<p>Para. 10 (a) <u>Life Insurance.</u> Each party does in particular disclaim any interest, present or prospective, in any policies of life insurance, or the proceeds thereof, heretofore issued or hereafter to be issued upon the life of the other, the beneficiaries of which are the respective children of such insured, or a trust for their present or future benefit, <u>but only to the extent the premiums for any such policies have been paid with separate funds.</u></p>

Bernard Nuptial Agreement Comparison

<p>children be paid fro from this separate property funds."</p>			<p>Para. 12 (c). A bank account (or established elsewhere as husband and wife may agree, for investment purpose) shall be created, called the Special Joint Account for Gloria (Whitehead) Bernard. This account shall be a joint account in the names of Gloria Bernard and Tom Bernard. As long as they shall be married and continuously living together for a period of ten consecutive years, Tom Bernard shall deposit an initial fifteen thousand dollars (\$15,000) and an additional \$15,000 each year (on or about their wedding anniversary), for investment as directed by Gloria Whitehead. This shall be a POD (to be closed and paid on death) account, payable to Gloria Whitehead (as her separate property) upon the death of J. Thomas Bernard, closed and payable to the estate of Gloria Bernard (as her separate property), if not closed earlier, following Tom Bernard's deposit of \$150,000 into this account.</p>
<p>Para. 12 (c). A bank account (or established elsewhere as husband and wife may agree, for investment purpose) shall be created, called the Special Joint Account for Gloria (Whitehead) Bernard. This account shall be a joint account in the names of Gloria Bernard and Tom Bernard; and on the sixth, seventh, eighth, ninth and tenth anniversary dates of the Marriage, an additional \$80,000 (Eighty Thousand Dollars) will be deposited by Husband from his separate property funds to the Special Account, or Husband may, in lieu of any such cash payment, elect to designate on any such anniversary date of the Marriage, other of his separate property assets that he, in his reasonable discretion, deems appropriate, and are of at least the same value (net of encumbrances) as such cash payment, which shall become the property of Wife upon termination of the Marriage. As long as they shall be married and continuously living together for a period of ten consecutive years, Tom Bernard shall deposit an initial fifteen thousand dollars (\$15,000) and an additional \$15,000 each year (on or about their wedding anniversary), for investment as directed by Gloria Whitehead. This shall be a POD (to be closed and paid on death) account, payable to Gloria Whitehead (as her separate property) upon the death of J. Thomas Bernard, closed and payable to the estate of Gloria Bernard (as her separate property), if not closed earlier, following Tom Bernard's deposit of \$150,000 into this account.</p>	<p>Para. 14 (g) (iv) Neither party shall be liable for the debts or liabilities of the other incurred before marriage. (v) Either party may retain or obtain credit in his or her name alone. However, any such credit which is used for other than reasonable and proper community purposes shall be the separate</p>	<p>Para. 14 (g) (iv) Neither party shall be liable for the debts or liabilities of the other incurred before marriage. (v) Either party may retain or obtain credit in his or her name alone. However, any such credit which is used for other than reasonable and proper community purposes shall be the separate</p>	<p>Para. 12 (c). A bank account (or established elsewhere as husband and wife may agree, for investment purpose) shall be created, called the Special Joint Account for Gloria (Whitehead) Bernard. This account shall be a joint account in the names of Gloria Bernard and Tom Bernard. As long as they shall be married and continuously living together for a period of ten consecutive years, Tom Bernard shall deposit an initial fifteen thousand dollars (\$15,000) and an additional \$15,000 each year (on or about their wedding anniversary), for investment as directed by Gloria Whitehead. This shall be a POD (to be closed and paid on death) account, payable to Gloria Whitehead (as her separate property) upon the death of J. Thomas Bernard, closed and payable to the estate of Gloria Bernard (as her separate property), if not closed earlier, following Tom Bernard's deposit of \$150,000 into this account.</p>

Bernard Nuptial Agreement Comparison

<p>retaining or obtaining such credit.</p>	<p>reject these two paragraphs or insisted that their working be changed to exempt obligations resulting from reasonable and proper community expenditures of any type."</p>	<p>obligation of the party <u>using</u> such credit.</p>
<p>Para. 15 (a) Husband's Death. At the death of Husband, and as a marriage settlement pursuant to RCW 11.12.050, Wife shall received from the Estate of Husband, One Hundred Dollars (\$100) and the following: (i) The balance of the Special Joint Account for Gloria Whitehead' (sic); (ii) The sum of \$100,000 (one hundred thousand dollars); (iii) One-half of the parties' community property; (iv) Her separate property; and (v) Access to the Bernard House (Husband's Separate Property) for a reasonable period of time, not to exceed one year.</p>	<p>Para. 15 (a)--include retirement and long term medical care--housing "after one year"; --"Health and welfare needs should be reasonably provided for after your marriage has "matured" and until your death."--</p>	<p>Para. 15 (a) Husband's Death. At the death of Husband, and as a marriage settlement pursuant to RCW 11.12.050, Wife shall received from the Estate of Husband, One Hundred Dollars (\$100) and the following: (i) The balance of the Special Joint Account for Gloria Whitehead' (sic); (ii) The sum of \$100,000 (one hundred thousand dollars); (iii) One-half of the parties' community property; (iv) An additional \$400,000 which shall, at Husband's election, be in the form of insurance on his life, or other of his appropriate separate property assets designated and valued by him (net of encumbrances) in his reasonable discretion; (v) Her separate property; and (vi) Access to the Bernard House (Husband's Separate Property) for a reasonable period of time, not to exceed one year.</p>
	<p>Enter into an agreement to negotiate the above concerns as soon as practical after your marriage</p>	<p>"...upon our return from Italy we and our attorneys will use their best efforts to negotiate in good faith and execute an amendment to the Agreement covering the following matters...."</p>
	<p>"Until and unless an Amendment is executed, the Agreement shall be in full force and effect as</p>	<p>"The parties entered into the Marriage with the intent and understanding that as soon as reasonably practical upon return from their honeymoon, counsel would prepare and the parties would enter into this Amendment." "...Husband and Wife agree that the Agreement shall be amended as of the date of the Marriage, as follows..."</p>

Bernard Nuptial Agreement Comparison

<p>This Agreement may be amended, altered, modified, rescinded, abandoned or abrogated only by an instrument in writing signed by the parties, or their personal representatives. (pp19)</p>		<p>presently written..."</p> <p>"if the Amendment contemplated hereby is not executed by October 7, 2000, this letter shall terminate and the Agreement shall remain in full force and effect (as if this letter had near been written or signed)."</p>	<p>Except as specifically amended or modified by this Amendment, the Agreement shall remain in full force and effect as fully as if this Amendment had not been executed.</p>
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APPENDIX VI

<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights	
<i>For</i>	<i>Against</i>	<i>For</i>	<i>Against</i>	<i>For</i>	<i>Against</i>
<p>"Unlike the agreement ultimately signed, the June 20th agreement provided that the earnings of each spouse would be community property." Page 6, ll. 2 - 4.</p>	<p>"Tom agrees that the original prenuptial agreement was substantively unfair, he concedes that the agreement did not make fair and reasonable provisions for Gloria, although his position is that the provisions of the first agreement cured this defect." Page 7, ll. 11 - 16.</p>	<p>"This is not a case of the economically favored spouse attempting to trick or manipulate the disfavored spouse into signing an agreement." Page 2, ll. 17 - 20.</p>		<p>"I am satisfied that Tom and his attorney, Richard Keefe, did not engage in an intentional tactic of delay in preparing either the original or first amended agreement." Page 2, ll. 14 - 17.</p>	<p>"... the short period of time that Gloria had to consider the original prenuptial agreement is very problematic." Page 2, ll. 21 - 23.</p>
<p>"The husband asks the court to review the two agreements together and to examine the substantively unfair prong of Matison. That the husband asserts that after the first amendment was signed, the agreement was</p>	<p>"It should be noted that the court, in summary judgment, similarly had concluded that the agreements were substantively unfair." Page 7, ll. 20 - 23.</p>	<p>"Tom is an extremely successful businessman who owns and operates a business park in Preston, Washington. The company has relatively few employees. Gloria, who is a licensed real estate agent, was hired sometime in 1994. Over the years her job had increasing responsibilities. Both, Tom and Gloria, have</p>		<p>"Nor does the court find that Mr. Keefe's late production of part of his file was nefarious." Page 2, ll. 24 - 25.</p>	<p>"Although hampered greatly by the short time frame..." Page 3, ll. 21 - 22.</p>

<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights	
<i>For</i>	<i>Against</i>	<i>For</i>	<i>Against</i>	<i>For</i>	<i>Against</i>
no longer unfair unless issues of voluntariness become irrelevant." Page 13, ll. 14 - 19.	"The agreement signed on July 7 th severely limited Gloria's community property rights." Page 8, ll. 15 - 16.	masters degrees in business administration." Page 4, ll. 11 - 17.	"Tom's assets were approximately \$25 million; Gloria's assets were approximately \$8,000." Page 4, ll. 24 - 25.	"Mr. Keefe testified, and the court accepts as true, that the additional materials admitted into evidence as Exhibit 112 had been misfiled by his office staff and that was only as he was preparing for his deposition that he realized there were missing materials." Page 3, ll. 1 - 6.	"On June 20 th Gloria was provided with a draft agreement." Page 6, ll. 1 - 2.
	"Although all of her salary is considered community property, only \$100,000 of Tom's earnings were placed in the community account." Page 8, ll. 16 - 19.	"There is no question but that Gloria had full knowledge of Tom's financial situation." Page 8, ll. 8 - 9.		"Similarly, Mr. Keefe did not seek to mislead Ms. Bernard... into signing the agreement." Page 3, ll. 7 - 9.	"It was not a complete agreement and did not purport to be so." Page 6, ll. 5 - 6.
	"First, this agreement eliminated Gloria's statutory right to seek a just and equitable	"In fact, she prepared both, personal and business financial statements for him on a		"The court finds that Mr. Keefe never told Gloria that he and his wife had a prenuptial agreement that	"The large formal wedding was scheduled for July 8 th ." Page 6, ll. 14 - 15.

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<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights	
For	Against	For	Against	For	Against
	distribution of assets and debts, her right to seek maintenance, and her right to seek attorneys fees on a "need and ability to pay," basis. Under these circumstances, the court must zealously and scrupulously examine the contract." Page 8, ll. 19 - 25	regular basis." Page 8, ll. 9 - 11.		they ultimately tore up, which according to Mr. Keefe in any case is not true..." Page 3, ll. 9 - 13.	
	"Although the second agreement was much fairer, for example, making substantially more adequate provisions for the wife if the marriage terminated by either death of Mr. Bernard or dissolution after five years of marriage, it did not and could not, pursuant to the side letter, address the part of the agreement that basically ensured			"...the court finds that Mr. Keefe never made any comment about the general tendency of couples to abandon prenuptial agreements after a few years of marriage." Page 3, ll. 13 - 16.	"On July 5 th , for the first time, Gloria contacted an attorney and met with Gehring." Page 6, ll. 15 - 16.

<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights	
For	Against	For	Against	For	Against
	there would be no accumulation of community property, no opportunity for maintenance, and no just and equitable distribution of assets regardless of the length of the marriage." Page 13, l. 25; 14, l. 1 - 10				
	"Gloria's settlement was capped at 400,000, again, regardless of the length of the marriage. And if the marriage were to terminate before the completion of five years, she was entitled to no distribution." Page 14, ll. 11 - 15.			"The court is also satisfied that Mr. Gehring was not a tool of either Tom Bernard or Mr. Keefe." Page 3, ll. 17 - 18.	"Mr. Gehring did receive a draft document by fax from Mr. Keefe on the night of July 5 th ." Page 6, ll. 18 - 20.
	"Substantive unfairness is a term of art, and as indicated above, the court must zealously and scrupulously			"The fact that Ms. Jovitch-Lundeen, an employee of Tom's, recommended Mr. Gehring to Gloria did not, in any way, diminish his independence." Page 3, ll.	"The July 5 th draft document is, basically, the document that was eventually signed on July 7 th ." Page 6, ll. 20 - 21.

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<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights	
For	Against	For	Against	For	Against
	examine an agreement that purports to limit a spouse's statutory rights at death." Page 14, ll. 16 - 19. "Even if the term of the second agreement had been presented to Gloria on July 5 th as part of the original agreement, the agreement would have been substantively unfair." Page 14, ll. 19 - 22.			19 - 21.	
				"...it is clear that Mr. Gehring took his ethical and professional obligation to represent Gloria extremely seriously." Page 3, 22 - 24.	"Mr. Gehring reviewed the document and spoke to Mr. Keefe on July 6 th concerning several specific concerns, including the possibility of drafting a side agreement to address some of the areas he believed were most troubling." Page 6, 22 - 25; page 7, l. 1.
				"At the time of their engagement Tom informed Gloria that he felt, given the disparity of their assets, it would be necessary to enter into a prenuptial agreement." Page 4, l. 25; 5, ll. 1 - 3.	"The prenuptial agreement was signed on the evening of July 7 th ." Page 7, ll. 8 - 9.
				"Tom began working with his attorney, Richard Keefe, in January 2000 on the drafting of the agreement." Page 5, ll. 4 - 6. "Mr. Keefe told Tom on a number of occasions that	"The side agreement, basically a letter agreeing to re-negotiate five specific points, was signed July 8 th , the day of the wedding." Page 7, ll. 9 - 11. "However, as recognized by Marriage Of Foran, "The

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<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights		
For	Against	For	Against	For	Against	
				Page 5, ll. 14-16. "Her testimony that she could locate no family lawyers during this time period is unconvincing." Page 5, ll. 16-18. "Sometime between May 24 th , 2000, and June 8 th , 2000, Tom provided Gloria with the names of three lawyers, Rita Bender, Bill Kinzel, and Tom Hamerlinek, whom Mr. Keefe had recommended as appropriate independent attorneys." Page 5, ll. 19-23.	Page 9, ll. 19-21. "Further, Gloria, because of the impending wedding, was somewhat in a box." Page 9, ll. 21-23. "Even had Gloria the time and inclination to spend the day before her wedding dealing with legal matters, her choice at that point was the humiliation of calling off a wedding or signing a substantively unfair document." Page 9, ll. 23-25; page 10, ll. 1-2.	
				"Gloria rejected these individuals for a number of reasons, including the fact that they were recommended by Mr. Keefe." Page 5, ll. 23-25. "Gloria read through parts of the agreement." Page 6, l. 6.	"However, unlike here, in Knoll, the wife had been provided with a draft of the agreement seven months before the wedding." Page 10, l. 25; page 11, ll. 1-2. "The June 20 th draft agreement was provided a mere 18 days before the wedding." Page 11, ll. 3-4.	
				"She did not supply the June 20 th draft agreement to Mr. Gehring at that meeting." Page 6, ll. 16-	"It was substantially different than the agreement ultimately provided to Gloria's attorney on July 5 th ." Page 11, ll. 4-6.	

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<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights	
For	Against	For	Against	For	Against
				18.	<p>"The court cannot find that Gloria's failure to find an attorney after June 20th and before July 5th, when she contacted Mr. Gehring, amounted to a voluntary relinquishment of her right to independent counsel." Page 11, ll. 6 - 10.</p> <p>"Mr. Keefe and Tom Bernard were likely motivated by a desire to insulate the couple from having to directly negotiate sensitive financial matters." Page 11, ll. 11 - 14.</p> <p>"The court was struck that, both, Gloria and Tom appear to place high value on romance, but whatever their motives, even the June 20th draft agreement was received too late, and certainly by July 5th, when Mr. Gehring received a more complete draft, there was no real time for negotiation and full advice." Page 11, ll. 14 - 20.</p> <p>"Those problems compounded</p>
				<p>"Mr. Gehring faxed Ms. Bernard a letter outlining his five major concerns and advised her not to sign the agreement." Page 7, ll. 1 - 3.</p> <p>"He also recognized that this might not be practical from her perspective and indicated that a side agreement to negotiate these areas could perhaps be entered into between the parties." Page 7, ll. 3 - 7.</p> <p>"Certainly Gloria did ultimately have an attorney, Marshall Gehring, who made every effort, given the very short period of time available to him, to advise Gloria with the problems with the proposed agreement." Page 9, ll. 2 - 6.</p> <p>"This is a difficult case,</p>	

AOB Appendix A047

<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights	
<i>For</i>	<i>Against</i>	<i>For</i>	<i>Against</i>	<i>For</i>	<i>Against</i>
				because Gloria very much contributed to the procedural defects." Page 10, ll. 3 - 4.	because Gloria understandably felt that calling off a large wedding, probably her only choice if she elected not to sign, would have been humiliating and embarrassing." Page 11, ll. 20 - 23.
				"Whether as a result of her psychological makeup, as testified to by Dr. Greenberg, or for some other reason, Gloria steadfastly resisted Tom's encouragement to find an independent attorney in a timely manner." Page 10, ll. 5-9.	
				"As an aside, the court specifically concludes that Gloria's psychological makeup has no legal relevance in terms of establishing duress or coercion or even particularly in determining whether her decision was voluntary, as that term is used in <u>Mattson and Foran</u> . Page 10, ll. 9 - 14.	
				"It is undisputed that Gloria had the legal capacity to	"In summary, the court is satisfied that Gloria Bernard

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<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights	
For	Against	For	Against	For	Against
				enter into a contract." Page 10, ll. 14 - 15.	did not sign the July 7 th agreement after receiving independent advice and the full knowledge of its legal consequences. It was not signed voluntarily." Page 12, ll. 9 - 13.
				"The Mattison court emphasized that independent counsel is not always required and discussed in detail the facts of an Oregon case, <u>Marriage of Knoll</u> , as an example of a situation where the party seeking to uphold the agreement was able to establish that he acted with the highest degree of good faith, candor, and sincerity, such that counsel was not required." Page 10, ll. 16 - 23.	"The first draft of the amended agreement was not provided to Mr. Gehring by Mr. Keefe until September 28 th , only a few days before the October 7 th deadline." Page 13, ll. 1 - 4.
				"In <u>Knoll</u> , as here, the wife had repeatedly been urged to consult with an independent attorney." Page 10, ll. 23 - 25.	"There were a few drafts back and forth, with Mr. Bernard asserting a provision that efforts he made managing his separate investment accounts were not to be considered a community asset." Page 13, ll.

AOB Appendix A049

<u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		<u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		<u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights		
<i>For</i>	<i>Against</i>	<i>For</i>	<i>Against</i>	<i>For</i>	<i>Against</i>	
					4-7.	
				<p>"This case is not unique. As recognized again in <u>Koran</u>, it is not uncommon for the economically disadvantaged spouse to be reluctant to obtain independent counsel even when repeatedly urged to do so." Page 11, ll. 24--25; 12, ll. 1--3.</p> <p>"The <u>Koran</u> court went on to point out a solution to this dilemma. The parties seeking to enforce a prenuptial agreement can draft a substantively fair agreement, certainly a solution that is not inconsistent with the fiduciary duties owed between spouses." Page 12, ll. 3--8.</p> <p>"The next issue is the impact of the first amendment to the prenuptial agreement. The side letter, which I've also referred to as the side agreement, which was incorporated into the</p>		
					<p>"This was not one of the original five negotiated points." Page 13, ll. 7--8.</p>	

AOB Appendix A050

<p><u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.</p>	<p><u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved</p>	<p><u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights</p>
For	Against	Against
For	For	For
Against	Against	Against
		<p>original prenuptial agreement, provided that the parties would re-negotiate five specific points, and that any re-negotiation must be completed by October 7th, 2000. When the couple returned from their honeymoon, Gloria had no interest in discussing amendment to the prenuptial agreement. She believed that it was more important that the couple become comfortable in their marriage." Page 12, ll. 14 - 25.</p>
		<p>"Mr. Gehring testified that he believed his ability to negotiate was limited to the five points raised in the side letter." Page 13, ll. 8 - 11.</p>
	<p>"Finally, the wife asserts that the timing of the presentation of the draft of the first amendment is an example of the husband's attempt to manipulate her into signing an agreement without the opportunity to</p>	<p>"It is unclear whether he noticed the insertion of the new clause." Page 13, ll. 11 - 13.</p>

AOB Appendix A051

<p><u>Substantive Fairness:</u> <u>Prong One</u> whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.</p>	<p><i>For</i> <i>Against</i></p>	<p><u>Procedural Fairness:</u> <u>Prong Two, subpart A</u> whether full disclosure has been made by [the parties] of the amount, character and value of the property involved</p>	<p><i>For</i> <i>Against</i></p>
<p><u>Procedural Fairness:</u> <u>Prong Two, subpart B</u> whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights</p>	<p><i>For</i></p>	<p><i>Against</i></p>	<p><i>Against</i></p>
	<p>consult counsel and consider the implications fully. She thus urges that the first amendment fails prong two of the <u>Mattison</u> test. This is not accurate." Page 14, ll. 23 - 25; 15, ll. 1 - 4.</p>	<p>"First of all, by this time the wife had independent counsel." Page 15, ll. 5 - 6.</p>	<p>"There is no way to go back and unring this bell. The agreement signed on July 7th was, both, substantively and procedurally unfair." Page 13, ll. 20 - 22. "The side letter limited negotiation to five specific points and the wife had no reason to believe that the entire agreement was open for re-negotiation." Page 13, ll. 22 - 25. "The court, therefore, concludes that neither the July 7th, 2000 prenuptial agreement nor the August 28th, 2001 agreement are enforceable." Page 15, ll. 17 - 19.</p>
		<p>"She could have initiated negotiations instead of waiting for the receipt of a draft." Page 15, ll. 6 - 8.</p>	
			<p>"More significantly, it is clear that neither party felt the October 7th deadline was binding. As stated by the court in <u>Bassan v. Investment Exchange</u>, 83 Wn. 2d 922 (1974), at page 933, "A written contract may be modified by the subsequent conduct of the</p>

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Substantive Fairness: Prong One whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement.		Procedural Fairness: Prong Two, subpart A whether full disclosure has been made by [the parties] of the amount, character and value of the property involved		Procedural Fairness: Prong Two, subpart B whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights	
For	Against	For	Against	For	Against
				parties." Page 15, ll. 8 - 13.	
				"The evidence here is completely clear through the conduct of both parties and their attorneys that the deadline on the side letter had been abandoned." Page 15, ll. 13 - 16.	
				"There was no procedural unfairness." Page 15, l. 16.	"But I didn't find any additional unfairness that I found...that you just couldn't go back and unring the bell." Page 16, ll. 24 - 25; 17, ll. 1 - 3.
				"I found the first amendment did satisfy the voluntary prong but that it was just too late because the whole agreement was unfair, that you couldn't just go back." Page 16, ll. 21 - 24.	"I specifically found that by the time we got to the second prong, there were not timing issues, and there was independent counsel, but there just wasn't much left to negotiate, so you couldn't artificially just look at that." Page 17, ll. 3 - 8.

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