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No. 57296-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

GLORIA BERNARD

Respondent,

vs.

J. THOMAS BERNARD,

Appellant.

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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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I. INTRODUCTION

The husband challenges the trial court's decision, after a 4-day trial, that the parties' marital agreements were substantively and procedurally unfair and unenforceable in this dissolution action. The parties' prenuptial agreement was executed on the eve of their wedding, less than two days after it was presented to the wife's counsel by her future husband, who was also her employer. The husband claims that the admitted substantive unfairness of the prenuptial agreement, which limited and gave the husband control over the creation of community property during marriage and waived the much poorer wife's right to spousal support on divorce, was cured by an amendment entered 14 months after marriage – an amendment that was itself limited by a side agreement, signed on the parties' wedding day, that perpetuated the unfairness of the prenuptial agreement.

The husband brings this appeal now, rather than waiting until the parties' dissolution is finalized, in a transparent attempt to starve the wife into complying with his unreasonable demands that he bear none of the fiduciary responsibilities that marriage inevitably brings. This case presents a textbook example why the courts of the state have never enforced marital agreements that are

substantively or procedurally unfair. Contrary to the noblesse oblige attitude of the opening brief, that the husband is wealthy and the wife is poor is neither a sign of his moral superiority nor a reason the grossly unfair agreement that he demanded but never gave his wife a fair opportunity to negotiate should be enforced. This court should affirm, confirm the award to the wife of her attorney fees on appeal, and remand for an expedited resolution and decree under the Dissolution Act.

II. RESTATEMENT OF FACTS

A. **The Parties Met When The Husband Hired The Wife As His Secretary in 1994.**

Appellant Thomas Bernard and respondent Gloria Bernard (née Whitehead) met in early 1995, when Gloria applied for a job at Thomas' real estate company, Bernard Development. (I RP 35-36) At the time, Thomas was married to his first wife Jackie, with whom he had one son. (I RP 36, 38-39) Gloria was a single mother of two children. (II RP 153)

Thomas hired Gloria to be his secretary and office assistant. (II RP 153) He paid her \$38,000 annually, with a car allowance but no retirement benefits. (V RP 7-8, 10) Thomas promised Gloria that if she stayed with the company she could eventually manage properties, which was her career goal. (I RP 36) Gloria did in fact

begin to take on more responsibility, and over the next five years her role in the company expanded. (I RP 34, 35-36)

B. The Husband Pursued The Wife After His First Wife Died, And Proposed Marriage In April 1999.

Gloria undertook many personal services for Thomas and his family. (V RP 10) When Thomas' wife Jackie became ill with cancer, Gloria took over Jackie's duties at the office. (V RP 6) Gloria helped Jackie while she was in the hospital and took Jackie's parents to doctor appointments when Jackie became too ill to care for them herself. (V RP 10)

In April 1998, Jackie died. (I RP 38) About six months later, Thomas began to pursue Gloria romantically. (II RP 156, V RP 10) In April 1999, Thomas proposed marriage and Gloria accepted. (II RP 156) The parties set their wedding date for July 8, 2000. (See CP 7; I RP 68)

When they became engaged, the parties briefly talked about Thomas' desire for a prenuptial agreement. (I RP 38; CP 2400, Finding of Fact (FF) 2.5(4)) The parties did not discuss the parameters of any prenuptial agreement. (I RP 94) However, Gloria understood that Thomas wanted a prenuptial agreement because he and Jackie had set aside certain assets for their son. (I RP 38) She had no desire to interfere with their plans. (I RP 39)

Thomas testified that he also wanted a prenuptial agreement because of the parties' "big imbalance in assets." (9/7 RP 156-57) As he repeatedly emphasizes in his briefing (See App. Br. 14, 38, 43-44), Thomas is an "extremely" successful businessman, with net assets of \$25 million. (Ex. 101, Schedule A; CP 2400, FF 2.5(1), (3)) At the time of their engagement, Gloria had net assets of \$8,000, excluding the value of her \$30,000 engagement ring. (Ex. 101, Schedule B; CP 2400, FF 2.5(3))

Gloria had regularly received year-end salary increases and bonuses, and she earned \$50-\$60,000 annually by 2000. (V RP 7-8; Ex. 113 at 46) After they became engaged, Thomas told Gloria that she no longer needed bonuses or salary increases, because they were engaged to be married. (V RP 8) Gloria later learned that her salary was on the low end of what she would have received for her services on the open market. (See V RP 9; Ex. 134 at 5)

C. Despite The Husband's Expressed Desire For A Prenuptial Agreement, He Did Very Little To Formalize An Agreement Until June 2000, Shortly Before The Wedding.

1. The Husband's Attorney Began Drafting The Prenuptial Agreement Less than A Month Before The Wedding.

Thomas first contacted his attorney, Richard Keefe, about a prenuptial agreement in late January 2000, eight months after the

parties' initial discussion about Thomas' desire for a prenuptial agreement. (II RP 85; CP 2400, FF 2.5(5)) Thomas advised Gloria to retain an attorney to assist her with negotiations for the prenuptial agreement. (V RP 12) Gloria told Thomas that she expected that he and Mr. Keefe would first prepare a draft of an agreement, and that she would then retain an attorney to review the draft. (V RP 12-13; CP 2400, FF 2.5(7))

After January 2000, Thomas had no further contact with Mr. Keefe regarding a prenuptial agreement until May 18, 2000 – five months after he had first contacted Mr. Keefe and less than two months before the parties' planned wedding date of July 8, 2000. (I RP 68, see Ex. 141 at 1-2) In late May 2000, Mr. Keefe prepared a check list and started an outline for the prenuptial agreement. (II RP 87-88; Ex. 140, 141 at 2) As part of the check list, Mr. Keefe advised Thomas that Gloria should make an appointment with an attorney once he and Thomas prepared a working draft of the prenuptial agreement. (See Ex. 140 at 2) But Mr. Keefe did not start drafting the prenuptial agreement until mid-June 2000 – less than one month before the planned wedding. (See Ex. 141 at 3)

Gloria was busy while waiting to receive a draft of the prenuptial agreement from Thomas' attorney. (V RP 14-15) The

parties vacationed in Thailand in early 2000. (V RP 14; CP 201) Gloria's daughter was preparing for graduation from high school, and Gloria was helping her with college applications, scholarship forms, and financial aid applications. (V RP 14-15) Later, when Gloria's daughter went on a graduation trip, Gloria was left alone to empty the apartment that she and her daughter had shared for five years, so that they could move into Thomas' home. (II RP 73, V RP 14) Gloria was also working full-time for Thomas (II RP 73), and planning the parties' wedding for 250 guests at the Seattle Tennis Club. (I RP 103, II RP 73)

2. The Wife First Received An Incomplete Draft Of The Prenuptial Agreement In Late June 2000, Two Weeks Before The Wedding.

Gloria testified that the parties discussed the prenuptial agreement very little after they became engaged and before she received the first draft. (I RP 94) Thomas testified that he had a difficult time discussing the prenuptial agreement directly with Gloria because she would "choke up and practically cry." (III RP 47) Thomas' testimony supports Dr. Stuart Greenberg's observation that Gloria is "emotionally dependent, she does not do well under the kinds of stress that makes her feel like she's going to

be unloved or betrayed or rejected or abandoned. She is eager to please and is very sensitive to rejection.” (IV RP 21)

The first draft of the prenuptial agreement that Gloria received from Mr. Keefe on June 20, 2000, 18 days before the parties’ wedding, was incomplete. (I RP 94; CP 2400, FF 2.5(8); see Ex. 10) There were several blanks in the draft, including the paragraphs relating to either party’s death during the marriage, life insurance policies, and employee benefits. (See Ex. 10 at 7, 11-12) The trial court found that this “draft was received too late to provide time for meaningful negotiation and full advice.” (CP 2400, FF 2.5(9))

Just as Mr. Keefe suggested, Gloria began to actively look for an attorney after she received this incomplete draft on June 20. (I RP 40-41, II RP 67; see Ex. 140 at 2) Gloria had difficulty finding an attorney who could review a prenuptial agreement on such short notice before the wedding. (II RP 64-66) In early July, Gloria finally located an attorney through a referral from another of Thomas’ employees. (I RP 96; CP 2401, FF 2.5(11))

3. The Wife Retained A “Neighborhood Lawyer,” Who Reviewed A Draft Of The Prenuptial Agreement Received Two Days Before The Wedding In Early July 2000.

Thomas’ employee referred Gloria to Marshall Gehring because “he had the free time” to review the prenuptial agreement. (I RP 96) Mr. Gehring was semi-retired; a self-described “neighborhood lawyer” whose practice was geared towards relatively low cost legal aid for clients in the suburbs. (I RP 73-74, 96) Mr. Gehring testified that he was not in the practice of drafting prenuptial agreements, nor had he attended any CLEs on prenuptial agreements. (I RP 74) Mr. Gehring had consulted with approximately 15 clients on such agreements during his 40 years of practice (I RP 72, 74), and Thomas’ \$25 million estate was the largest estate with which he had ever been involved. (II RP 16) Mr. Gehring’s knowledge of prenuptial agreements came strictly from case law and Washington Practice, and from reading the Uniform Prenuptial Agreement Act – which has not been adopted in Washington. (I RP 74-75)

Gloria met Mr. Gehring for the first and only time on July 5, 2000 – the Wednesday before the Saturday wedding. (I RP 98-99; CP 2401, FF 2.5(11)) They discussed the prenuptial agreement for 10 to 15 minutes. (I RP 98) Gloria advised Mr. Gehring that she

had not had time to fully look over the incomplete draft, because she was preparing for the rehearsal dinner, the wedding, and her Italian honeymoon with Thomas. (I RP 84) Gloria asked Mr. Gehring to review the prenuptial agreement and tell her if there was anything that would prohibit her from signing it. (I RP 84) Gloria did not give Mr. Gehring the incomplete draft provided to her a few days earlier, because Mr. Gehring told her that he would obtain a draft – presumably with the blanks filled in – from Thomas’ attorney. (I RP 98; CP 2401, FF 2.5(11))

Mr. Keefe faxed Mr. Gehring a second draft of the prenuptial agreement that evening, July 5, 2000. (I RP 82; Ex. 108 at 100038; CP 2400-2401, FF 2.5(8), (12)) In his accompanying letter, Mr. Keefe told Mr. Gehring that Thomas had not yet approved the draft he was forwarding to Mr. Gehring. (See Ex. 108 at 100038) The blanks had now been filled in, however. (See Ex. 108 at 100053-54) In fact, this July 5 draft was substantially different from the incomplete draft provided to Gloria on June 20, 2000. (CP 2400, FF 2.5(8); *compare* Ex. 10 to Ex. 108 at 100041-60)

For example, in the draft given to Gloria on June 20, both parties’ earnings were to be considered community property. But the July 5 prenuptial agreement that Mr. Keefe faxed to Mr. Gehring

excluded Thomas' earnings from his business from being considered community property. (*Compare* Ex. 10 at 2-3 to Ex. 108 at 100044-45) Even though Thomas had earned over \$500,000 the previous year, the July 5 draft also for the first time limited his contributions to the community from earnings or any source to \$100,000 a year. (*Compare* Ex. 10 at 3-4 and Ex. 108 at 100045) Although the prenuptial agreement acknowledged that Gloria received a salary from her employment with Thomas' business, it both provided no guarantee of receipt or amount and required that she contribute any earnings to a "joint living account" to be established by the parties. (Ex. 108 at 100045, 100049)

Mr. Gehring began reviewing the 40-page prenuptial agreement on Thursday, July 6, two days before the wedding. (I RP 86) Mr. Gehring found the agreement, which included 16 pages of exhibits, to be "complex." (II RP 12; *see* Ex. 108) Mr. Gehring described the draft he had received July 5 as a "pretty hefty thing," "very substantial in terms of page volume." (I RP 82, 85) Mr. Gehring testified that due to lack of time he made no effort to determine the accuracy of the exhibits to the agreement. (I RP 86)

Mr. Gehring's deadline for reviewing this "substantial" and "complex" agreement was Friday, July 7, 2000 – less than 48 hours

after he first received it. (I RP 89) Mr. Gehring testified that he would have preferred six weeks – or six months – to review the prenuptial agreement. (II RP 7)

4. The Wife’s Attorney Identified Five “Problem” Areas In The Prenuptial Agreement.

On July 7, Gloria was preparing for the rehearsal dinner that evening, creating baskets to hold programs for the wedding the next day, picking up a friend from out of town who was attending the wedding, and going to a spa. (I RP 102-103) In the midst of this prenuptial activity, Gloria received a faxed letter from Mr. Gehring advising her not to sign the prenuptial agreement. (II RP 49-50, Ex. 102) Mr. Gehring faxed the letter to Mr. Keefe the same day. (I RP 102)

In his letter, Mr. Gehring advised Gloria that due to the time constraints, his review of the prenuptial agreement was limited to “identifying provisions in the agreement that are unfavorable” to Gloria. (Ex. 102) Mr. Gehring testified that he did not have the “luxury” to really “think” about the prenuptial agreement. (II RP 12) Had he been give more time, Mr. Gehring testified that he could have “done more” for Gloria in terms of both major and minor things in the prenuptial agreement that were not in her best interest. (II RP 28)

Mr. Gehring identified five specific provisions of the prenuptial agreement as “problems.” (Ex. 102) First, Mr. Gehring pointed out that the prenuptial agreement provided that Gloria would only receive \$100,000, one-half of the community property, and access to Thomas’ separate residence for one year if Thomas died. Second, the prenuptial agreement would prevent Gloria from seeking spousal maintenance if the parties divorced. Third, the prenuptial agreement prevented Gloria from using any community property (including her earnings) to provide assistance to her two young adult children. Fourth, the prenuptial agreement disavowed Gloria’s rights to any proceeds from Thomas’ life insurance policies, even if premiums were paid with community funds. Finally, the prenuptial agreement provided that Thomas would not be liable for any debts or liabilities incurred by Gloria after marriage, even if incurred on behalf of the community. (Ex. 102)

Mr. Gehring testified that he only pointed out what he perceived to be these five “major” problems because of the short time. (I RP 168-169) Had he had enough time, Mr. Gehring testified that he would have gone page by page to address other issues. (I RP 168-169, II RP 3-4; CP 2401, FF 2.5(13))

5. In Addition To The Five “Problems” Identified By The Wife’s Attorney, The Prenuptial Agreement Was Unfair In Several Other Respects.

There were other “major” problems that were not addressed in Mr. Gehring’s letter. For instance, the prenuptial agreement provided that “[a]ll wages, salary and remuneration for services or labor” were community property, but specifically excluded from the definition of “salary” any proceeds from the husband’s “time and energy to manage and oversee his separate property real estate ventures.” (Ex. 101 at 4-5) Since both parties worked in Thomas’ real estate business, the effect of this clause was that Gloria’s modest salary, which itself was determined and paid by Thomas, would be the only community income.

The prenuptial agreement provided that in lieu of any of Thomas’ profits or earnings, services or labor being considered community property, he would allow the community to live in his separate residence, pay for its maintenance and upkeep, fund a household operational account, and partially fund a joint living account. (Ex. 101 at 4-5) Although Thomas had earned over \$500,000 the previous year, the prenuptial agreement provided that Thomas would only be required to contribute \$100,000 per year to the joint living account. (Ex. 101 at 5, Schedule A at 4) Gloria, on

the other hand, was required to deposit all of her salary, bonuses, and other income in the joint living account. (Ex. 101 at 5)

The prenuptial agreement further provided that "[n]otwithstanding 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." (Ex. 101 at 6, emphasis in original) Thus, the only community property accrued during the marriage would be what was left after paying living expenses from the joint living account to which Gloria was obligated to contribute all her earnings. If the parties divorced, the prenuptial agreement provided that the community property was to be divided equally, and that Gloria could not seek spousal support. (Ex. 101 at 10-11)

The prenuptial agreement also undercut Thomas' previous promise to pay for Gloria's daughter's college education, by providing that any such payments "not identified as gifts" would be considered loans, and repayable from the wife's separate estate. (III RP 56; Ex. 101 at 9)

D. The Wife Signed The Prenuptial Agreement The Evening Before The Wedding.

Mr. Gehring testified that the language of the prenuptial agreement reciting that the parties “acknowledge that neither has been rushed or forced into entering this agreement” was inaccurate, because there in fact was a “big rush.” (I RP 166) Because of the “big rush,” the provision reciting that the “parties acknowledge that they have had time to properly evaluate this agreement and that they are ready to proceed and they have specifically discussed its execution” was also inaccurate. (I RP 166-167) Mr. Gehring acknowledged that his advice that Gloria not sign the prenuptial agreement was “probably not practical from [her] viewpoint and that of Mr. Bernard given [their] wedding tomorrow.” (Ex. 102)

In fact, Mr. Gehring never went over the entire prenuptial agreement with Gloria. (V RP 16) Although there were several aspects of the prenuptial agreement that Gloria did not understand, Mr. Gehring told her: “Don’t bother, we don’t have time, I’m only going to focus on about five things and that’s all we have time to deal with.” (I RP 47)

Gloria testified that after she received Mr. Gehring’s letter telling her not to sign the prenuptial agreement, they had a follow up phone call in which he told her to go ahead and sign the

agreement, because it would be amended later. (I RP 45) Mr. Gehring denied ever telling Gloria to sign the agreement (I RP 146), and testified that he would not have recommended that Gloria sign the prenuptial agreement because her bargaining position after the parties were married “really disappears.” (I RP 116, II RP 5-6)

After the rehearsal dinner and an evening of festivities with family and friends, Gloria returned to Thomas’ house between 9:00 and 10:30 p.m. (II RP 51-52) One of Thomas’ employees handed her the prenuptial agreement, which Thomas had already signed. (II RP 51-52) Even though she did not fully understand the prenuptial agreement, Gloria signed it. (I RP 46-47)

The parties’ wedding was scheduled for the following day. (II RP 53) Gloria believed that Thomas would not marry her if she did not sign the prenuptial agreement. (II RP 60) Thomas testified that he would not have married Gloria had she refused to sign the prenuptial agreement (II RP 170), and that he would have announced to the guests assembled at the Seattle Tennis Club that he and Gloria had “some things to work out.” (II RP 30-31)

It would have been impossible for Gloria to continue working for Thomas if she had not signed the prenuptial agreement. (CP 204, also admitted as part of Ex. 113) Gloria and her teenage

daughter, who had already moved into Thomas' house, would have to leave and find a new home. (CP 204) Gloria had not sought financial aid based on Thomas' promise to pay her daughter's college expenses, and it was too late to seek financial aid for her daughter's tuition. (CP 204) Had Gloria not signed the prenuptial agreement, Gloria would be unemployed, she and her daughter would be homeless, and her daughter might not be able to attend college in the fall.

E. On Their Wedding Day, The Husband Presented Wife With A Side Agreement That Limited Any Amendments To The Prenuptial Agreement.

At trial, Thomas agreed that the prenuptial agreement was not "the best thing for all parties." (III RP 32) Having extracted her signature to the prenuptial agreement less than 24 hours before the ceremony, Thomas presented Gloria with a "side agreement" on the day of their wedding. (III RP 8, 9-10, Ex. 103)

The side agreement addressed the five issues raised by Mr. Gehring in his July 7 letter. (Ex. 103) The side agreement accepted three of Mr. Gehring's suggestions for changes to the prenuptial agreement. (Ex. 103) First, to address Mr. Gehring's concern that the prenuptial agreement limited Gloria's ability to assist her adult children with her earnings, the side agreement

adopted Mr. Gehring's suggestion that Gloria be allowed to use one-half of her earnings "anyway [she] wants." (See Ex. 102, 103) Second, the side agreement provided that the premiums for any life insurance policies for the sole benefit of Thomas' son be paid from Thomas' separate property. (See Ex. 102, 103) Third, the side agreement provided that the prenuptial agreement be amended to acknowledge community liability for any obligations incurred by Gloria after marriage for community purposes. (See Ex. 102, 103)

The side agreement also purported to resolve the other two issues raised by Mr. Gehring. In response to Mr. Gehring's concerns for Gloria if Thomas died, the side agreement provided that the prenuptial agreement would be amended to provide an additional \$400,000 to Gloria in the form of insurance or other assets. (Ex. 103) The side agreement also provided that, in lieu of spousal maintenance, Thomas would put \$80,000 into an account for Gloria on the parties' sixth, seventh, eighth, ninth, and tenth anniversary – a maximum of \$400,000. (Ex. 103) If the parties divorced or separated before they had been married ten years, Gloria would receive nothing. If they remained married for more than ten years, the most Gloria would receive from this "special account" was \$400,000 and one-half of the community property. (See Ex. 103)

Mr. Gehring testified that he was not aware of and did not advise Gloria on the side agreement when she signed it. (I RP 108, II RP 23, *but see* I RP 45) Had Mr. Gehring had an opportunity to review the side agreement, he testified that he would not have agreed to limit the scope of any amendment, because he would have liked an opportunity to address other provisions of the prenuptial agreement in more detail. (II RP 23-24)

Although she could not recall whether it was before or after the wedding ceremony, Gloria signed the side agreement. (II RP 54; Ex. 103)

F. The Year After The Parties Married, They Executed An Amendment To The Prenuptial Agreement.

1. The Husband Gave The Wife A Draft Amendment Reflecting The Terms of the Side Agreement Two Weeks Before The Deadline To Amend The Prenuptial Agreement.

The side agreement provided that if an amended agreement incorporating the terms of the side agreement was not reached by October 7, 2000, the prenuptial agreement as drafted would remain in "full force and effect." (Ex. 103) Nothing was done to amend the prenuptial agreement after the parties returned from their honeymoon in Italy. (I RP 52) On September 28, 2000, less than

two weeks before the deadline in the side agreement, Mr. Keefe sent a draft of an amendment to Mr. Gehring for review. (Ex. 136)

The side agreement that Gloria had signed on her wedding day limited the areas of amendment. (II RP 24, 39; Ex.103) Mr. Gehring advised Gloria that since she had already signed the prenuptial agreement, the only points that could be negotiated were those set forth in his July 7, 2000 letter, as addressed by the side agreement. (II RP 39, V RP 17) Thomas testified that if Gloria did not sign the amendment he proposed, the “marriage would not have continued.” (III RP 24)

Mr. Gehring told Gloria that she had almost no bargaining power in these negotiations. (V RP 17) Mr. Gehring believed that Gloria’s goal was “not to get unmarried. It was to get – move on with their family life with Mr. Bernard, and part of it was to get this document, whatever had to be done, get it done and go on...” (II RP 44)

2. Her Options Limited By The Side Agreement, The Wife Signed The Amendment In October 2001.

Gloria and Mr. Gehring spoke twice regarding the amendment. (V RP 18) Mr. Gehring recommended that Gloria sign the amendment, because it would be “better” than if she did not sign it. (II RP 71) Mr. Gehring testified that because Gloria

never should have signed the prenuptial agreement to start with, any amendment “only [tried] to fix something that was already fait accompli.” (II RP 39) Mr. Gehring told Gloria that while the amendment was not satisfactory, she was at least “a little better off” than she was with the prenuptial agreement that she had already signed:

You’ve already signed this. This is the way its going to be. Now, what we’ve done here is tried to get the very best we can get out of this, and get some kind of satisfactory resolution to these. Were they totally satisfactory? No. But in fact, they were a substantial improvement over where she was on the date she signed the agreement, which was July 7 or thereabouts.”

(II RP 41)

While the amendment addressed concerns raised by Mr. Gehring in his July 7, 2000 letter, it still did not address larger problems in the prenuptial agreement, such as the fact that the agreement limited and left the ability to create community property solely in Thomas’ control. (See Ex. 103, 104) Because Mr. Gehring believed that the side agreement limited the parties’ ability to amend the prenuptial agreement, he did not pursue amendments in other areas. (II RP 23, 38-39, 45)

In reality, the amendment prepared by Thomas and his attorney did change the prenuptial agreement in areas other than those identified in Mr. Gehring’s letter – but to Gloria’s detriment.

For example, Thomas further isolated the fruits of his labor from becoming community property by providing that his salary, which would normally become community property, “shall not 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 investment account.” (See Ex. 104 at 1-2)

Mr. Gehring testified that despite the language of the prenuptial agreement, he believed that the agreement did not preclude Gloria from asking for spousal maintenance or an award of a portion of Thomas’ separate property in the event of divorce. (II RP 13-14, 17-18) Mr. Gehring testified that he advised Gloria of this belief. (II RP 13-14, 17-18) Gloria denied receiving this information. (II RP 71)

After several unexplained delays, the parties signed the amendment to the prenuptial agreement on August 28, 2001. (See Ex. 104)

G. The Husband’s Erratic And Controlling Behavior Caused Problems At Home And At Work.

The parties’ marriage was in trouble by the end of 2002. Thomas’ behavior became increasingly problematic – he was controlling, erratic, and verbally abusive, and began to make threats of divorce and withhold money whenever Gloria disagreed

with him. (CP 12, admitted as Ex. 134) The problems in the marriage began to spill over at work, where Thomas undermined and demeaned Gloria. (CP 12)

Gloria also came to believe that she was being undervalued for her work at Thomas' business. (CP 12) Although she was instrumental in his business, Gloria was receiving a below-market salary, and had no equity in the business because of the prenuptial agreement. (CP 14) In 2004, Thomas finally raised Gloria's salary to \$80,000 – her first raise since before the parties were married – but Gloria's skills on the market would have provided compensation between \$110,000 and \$250,000 elsewhere. (CP 14)

Thomas' erratic behavior continued despite the parties' attempt at marriage counseling. (CP 12-13) In September 2004, Gloria moved out of the family home, in hopes that a short separation might help. (CP 13) It did not. Thomas changed the locks, instructed the household manager to not allow Gloria in or near the house, and cut Gloria off from personal and business credit cards and checking accounts. (CP 13) Thomas told Gloria that he had cut her out of his will and removed her as beneficiary of his life insurance policy. (CP 13)

H. Procedural History.

1. The Wife Asked The Court To Set Aside The Marital Agreements.

On February 5, 2005, Gloria filed a petition for dissolution. (CP 3, admitted as Ex. 105) The parties had acquired \$2 million in real estate and nearly \$500,000 in personal property during the marriage, but Gloria had only her car and some meager savings in her name. (CP 14) Thomas had a net worth of more than \$23 million. (CP 14)

Gloria asked the court to set aside the prenuptial agreement, the side agreement, and the amendment, as procedurally and substantively unfair. (CP 5-6) Since Gloria could no longer work for Thomas and she had no other source of income, she also asked the court to award her temporary maintenance in lieu of her regular salary. (CP 16)

2. The Husband Demanded Arbitration Under The Prenuptial Agreement.

On February 11, 2005, Thomas made a demand for arbitration (CP 137, admitted as Ex. 107) based on a provision in the prenuptial agreement that any disputes arising out of the agreement would be subject to arbitration under RCW 7.04.060 and

in accordance with the "AAA Commercial Arbitration Rules with Expedited Procedures." (Ex. 101 at 15-16)

On April 1, 2005, Gloria moved for partial summary judgment that the prenuptial agreement and amendment were substantively unfair. (CP 302) On May 2, 2005, King County Superior Court Judge Helen Halpert entered an order granting Gloria's motion in part, holding that the prenuptial agreement and amendment did not make a fair and reasonable provision for her as a matter of law. (CP 2397) Concluding that there was a factual dispute whether Gloria voluntarily entered into the agreements, the court set a bifurcated trial to resolve the enforceability of the agreements. (CP 2398)

3. After Trial, The Trial Court Struck Down The Marital Agreements On Substantive And Procedural Grounds.

After four days of trial, the trial court found that Gloria did not sign the prenuptial 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." (CP 2402, FF 2.5(26))

The trial court found that Gloria's failure to retain an attorney 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." (CP 2401, FF 2.5(10)) The trial court found that Gloria's attorney was unable to advise her, due to 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." (CP 2402, FF 2.5(22)) The trial court found that the amendment did not cure the prenuptial agreement's defects, because the scope of the negotiations for the amendment were "so specifically limited, the fact that there was sufficient time for independent review [of the amendment] and for the advice of counsel was insufficient to cure the defects of the first agreement." (CP 2402, FF 2.5(27))

At Thomas' request, the trial court also reviewed the prenuptial agreement and the amendment together, and reexamined whether the marital agreements were substantively unfair. (CP 1600-01, VI RP 13) After hearing testimony at trial, the trial court found that the prenuptial agreement severely limited Gloria's community property rights and effectively allowed Thomas

to control the creation of community property. (CP 2402, FF 2.5(21)) The trial court noted that even Thomas acknowledged that “the prenuptial agreement standing alone is substantively unfair and did not make fair and reasonable provisions for wife in the event of death or dissolution.” (CP 2401, FF 2.5(18)) The trial court rejected Thomas’ claims that the amendment cured these defects, finding that the side agreement limited the parties’ ability to amend the agreement. (CP 2401-2402, FF 2.5(18), (27)) By its terms, “the entire agreement was not open for renegotiation,” and a substantively fair agreement was no longer possible as the terms of the side agreement so limited the areas of negotiation. (CP 2402, FF 2.5(27))

The trial court found that while the amendment was fairer to Gloria than the prenuptial agreement, the marital agreements were still substantively unfair as a whole:

Although the second agreement was much fairer... it did not and could not, pursuant to the side letter, address the part of the agreement that basically ensured 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... Even if the terms of the second agreement had been presented to Gloria on July 5th as part of the original agreement, the agreement would have been substantively unfair.

(VI RP 13-14; *see also* CP 2402, FF 2.5(27))

4. The Husband Appealed On The Grounds That The Trial Court Orders Denied His Right To Arbitration.

Thomas filed a notice of appeal of the trial court's orders holding that the prenuptial agreement and amendment were unenforceable because they were both procedurally and substantively unfair. (CP 1930) After the trial court subsequently awarded attorney fees to Gloria (CP 2105-2106), Thomas amended his notice of appeal to include review of the trial court's awards of attorney fees. (CP 2088) This court allowed review as a matter of right because the trial court's orders striking down the agreements had the effect of denying arbitration.

III. ARGUMENT

The courts of this state have always protected economically disadvantaged spouses from agreements, entered into before or after marriage, that are intended to prevent the spouse from receiving a fair distribution of property or support upon dissolution. To date, the result has been that no substantively or procedurally unfair marital agreement purporting to govern property distribution or support on divorce has ever been enforced in the reported case law of this state. The marital agreements at issue in this case demonstrate why the law is as it is, and why this court should affirm

the trial court's decision, confirm the award to the wife of her attorney fees on appeal, and remand for expedited trial.

A. The Agreements Were Substantively Unfair To The Wife.

1. Marital Agreements That Prevent The Creation Of Community Property And Waive Spousal Support Obligations Are Unenforceable.

In determining whether a marital agreement is enforceable,¹ the court first determines whether the agreement provides a fair and reasonable provision for the party resisting enforcement of the agreement. *Marriage of Matson*, 107 Wn.2d 479, 482, 730 P.2d 668 (1986). The trial court held that "the agreement, as a matter of law, does not make fair and reasonable provisions for [the wife]," (CP 2397) and after considering the evidence during a four-day trial found that the prenuptial 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 the husband's anticipated annual salary was considered community property. Any value accruing by reason of husband's

¹ The same analysis governs agreements entered before or after marriage. *Marriage of Hadley*, 88 Wn.2d 649, 654, 565 P.2d 790 (1977). In this brief, references to the marital agreements encompass the prenuptial agreement, signed July 7, 2000, the side agreement, signed July 8, 2000, and the amendment, signed August 28, 2001. Appellant neglected to attach the prenuptial agreement to his opening brief; it is an appendix to this brief.

labors on his separate property businesses were his separate property.” (CP 2402, FF 2.5(21)) After hearing evidence at trial, the trial court also found that the amendment did not cure the defects of the prenuptial agreement, and that viewed together the marital agreements “are not substantively fair.” (CP 2402, FF 2.5(28))

Washington law and substantial evidence supports the trial court’s decision. Indeed, the marital agreements at issue are a classic example of the sort of substantive overreaching that the courts of this state have never tolerated:

In *Marriage of Foran*, 67 Wn. App. 242, 834 P.2d 1081 (1992), this court invalidated a prenuptial agreement under strikingly similar facts, holding that the agreement was economically unfair to the wife as a matter of law. The wife in *Foran* was employed in the husband’s business, earning less than market salary for her services. The agreement at issue in *Foran* made no provision for the marital community to be reimbursed for the value of any financial contributions and personal services made to the husband’s business, and caused the wife to waive any and all equitable interest that the marital community might otherwise acquire by virtue of the expenditure of community funds or community labor for the benefit of the husband’s separate

business. 67 Wn. App. at 250. The agreement at issue in *Foran* also caused the wife to waive any claim against the husband's separate estate in the event of divorce, and all of her statutory rights as a surviving spouse if the husband predeceased her. 67 Wn. App. at 250.

The *Foran* court held as a matter of law that this agreement "was patently unreasonable." 67 Wn. App. at 257. This case presents even more compelling facts of unreasonableness. While the marital agreements in this case acknowledged that the wife received a salary from her employment in the husband's business, neither the receipt nor amount was guaranteed. (Ex. 101 at 9) In fact, once the parties were engaged, the wife no longer received the annual salary increases and bonuses that she had historically received. (V RP 8) Even though the wife procured several valuable leases for the husband's development business, she received no commission for these efforts. (CP 14) While the husband's separate property business and investments increased in value due to the wife's efforts, the community received no benefit other than the wife's modest salary and a tiny fraction of the husband's income. (See CP 13-14)

The wife in this case was also prevented from seeking an equitable lien for her community labor contributions, as the marital agreements barred her from making any claim to Thomas' separate property. (Ex. 101 at 9) The agreements provided that the wife's salary, even if below market, would be the "sole source of compensation" for any "business or professional service she performs for any entity or asset J. Thomas Bernard owns or maintains as his separate property." (Ex. 101 at 9) The agreements prevented the wife from making any claim on the husband's separate estate in the event of his death or the dissolution of their marriage. (Ex. 101 at 9-10)

As in *Foran*, "by virtue of the contract, [the husband's] already substantial wealth could be increased at the expenses of the community." 67 Wn. App. at 255. The trial court thus properly found in this case that the marital agreements "did not make substantively fair provisions for wife in the event of death or dissolution." (CP 2402, FF 2.5(28))

Similar overreaching caused our Supreme Court to hold that a prenuptial agreement that was grossly disproportionate in favor of the husband and deprived the wife of her common law and statutory rights for a just and equitable distribution of property was

substantively unfair in *Marriage of Matson*, 107 Wn.2d 479, 730 P.2d 668 (1986). The Court in *Matson* particularly noted that the agreement at issue in that case, as did the agreements here, allowed the husband to devote substantial portions of his time to the management and reinvestment of his separate property, while all appreciation in value, income, and earnings remained his separate property. (*Compare* Ex. 101 with 107 Wn.2d 486)

That the marital agreements were grossly disproportionate in favor of the party seeking enforcement is at least as evident in this case as in *Foran* and *Matson*. In *Foran*, the wife's net worth was \$8,200 and the husband's \$1,198,500 when the parties executed their prenuptial agreement. 67 Wn. App. at 246. In *Matson*, the wife had her personal effects while the husband's net worth when the agreement was executed was \$330,000, and \$830,000 at the time of trial. 107 Wn.2d at 481. In this case, the wife's net worth, excluding her engagement ring, was \$8,000, and the husband's net worth was \$25 million. (Ex. 101 Schedule A, B) The marital agreements in each of these cases, including this one, were unenforceable because they allowed the husband to increase his disproportionately large separate estate at the expense of the

community, and because they prevented the wife from seeking equitable distribution and support if the marriage was dissolved.

2. The Marital Agreements Were Unfair At The Time Of Execution, And At Separation.

Whether a marital agreement is unfair is to be determined at the time of its execution. See *Marriage of Fox*, 58 Wn. App. 935, 938, 795 P.2d 1170 (1990) (prenuptial agreement substantively unfair based on circumstances “at the time of the execution of the agreement”); RCW 26.09.070 (fairness of separation contract determined “at the time of its execution”). Although the husband argues that the parties’ agreement should be judged as of the date of separation (App. Br. 36-37), he elsewhere appears to recognize the state’s clear statutory and case law directive to look to the date of execution when he argues that prenuptial agreements should be enforced when the “*parties* view an agreement as reasonable *at the time of its inception*.”² (App. Br. 38, emphasis added, see also App. Br. 34)

² Contrary to appellant’s argument, however, this court has held that whether a marital agreement is fair is a question of law and the task of the court, not the parties. *Marriage of Foran*, 67 Wn. App. 242, 251 n.7, 834 P.2d 1081 (1992). Further, the party seeking enforcement of a marital agreement has the burden of proving good faith and fairness to the party resisting enforcement. *Hamlin v. Merlino*, 44 Wn.2d 851, 866, 272 P.2d 125 (1954); RCW 26.16.210.

Leaving aside whether an agreement that waived spousal support could ever be enforced, marital agreements that prevent or limit the acquisition or distribution of community property are unfair. See ***Estate of Crawford***, 107 Wn.2d 493, 496, 498, 730 P.2d 675 (1986). The marital agreements here failed to make a fair and reasonable provision for the wife whether viewed at the time of execution or separation. When the parties separated, the only community property was what remained in the parties' "joint living account," which the marital agreements required the wife to fund while limiting the husband's obligation to do the same. (Ex. 101 at 5) Despite the wife's labor in the husband's business during the marriage, she had received only a minimal salary, while the husband's separate property estate grew. (See CP 13-14) And because the wife's salary was considered community property, she had no ability to procure any separate property of her own. (See Ex. 101 at 4) The marital agreements were unfair at the time of execution, and at separation.

3. The Trial Court Properly Considered The Effect Of The Amendment On The Fairness Of The Prenuptial Agreement.

In arguing that the amendment "cured" any substantive overreaching in the prenuptial agreement, appellant narrowly

focuses on the trial court's April 2005 order granting partial summary judgment that the July 2000 "agreement" (singular) was unfair as a matter of law. (App. Br. 35) Appellant's argument ignores the fact that, at his request (CP 1600-1601), the trial court revisited the issue of substantive fairness after a 4-day trial. The court specifically considered both the prenuptial agreement and the amendment *together*, and found that based on the evidence at trial that given the parties' circumstances the marital agreements did not make a fair and reasonable provision for the wife:

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.

(CP 2401, FF 2.5(28); *see also* VI RP 14)

There is no question of "interpretation" of the terms of marital agreements" that would have precluded summary judgment. (App. Br. 35) The amendment ratified those portions of the prenuptial agreement that made the earlier agreement unfair, and itself made no changes favorable to the wife that were not already addressed in the side agreement signed on the parties' wedding day. In fact, the trial court found that one of the reasons the amendment did not

cure the procedural and substantive defects in the prenuptial agreement was that the amendment merely served to ratify unfair provisions of the prenuptial agreement. (See CP 2402, FF 2.5(27))

B. The Marital Agreements Were Procedurally Unfair To The Wife As A Matter Of Law And Fact.

1. The Marital Agreements Were Not Entered Into Fully And Voluntarily By The Wife With Full Knowledge Of Her Rights.

Because the marital agreements fail the test of economic fairness, the court must “zealously and scrupulously’ examine the circumstances leading up to its execution, with an eye to procedural fairness.” *Foran*, 67 Wn. App. at 251. The burden of proving procedural fairness is on the spouse seeking enforcement of the agreement. *Friedlander v. Friedlander*, 80 Wn.2d 293, 300, 494 P.2d 208 (1972). The two-part test for procedural fairness requires the court to first examine whether full disclosure was made of the amount, character and value of the property involved, and second to determine whether the agreement “was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights.” *Matson*, 107 Wn.2d at 483.

Because neither party challenges the finding that the wife had full disclosure of the husband’s assets based on her employment in his business for six years prior to marriage (CP 2401, FF

2.5(20)), the focus on appeal is whether substantial evidence supports the trial court's findings that the wife did not enter into the marital agreements fully and voluntarily on independent advice and with full knowledge of her rights. When considering whether the circumstances surrounding execution were fair, the court must consider "the bargaining positions of the parties, the sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date." *Matson*, 107 Wn.2d at 484.

Here, the husband provided the prenuptial agreement to the wife with insufficient time before the wedding for her to negotiate an economically fair agreement. (I RP 94; CP 2400, FF 2.5(9)) The amendment could not cure the procedural defects because the wife's ability to negotiate the substantively unfair provisions of the prenuptial agreement was limited by the procedurally defective side agreement. (II RP 39, V RP 17; Ex. 103; CP 2402, FF 2.5(27)) Substantial evidence supports the trial court's findings that the marital agreements were not entered into fully and voluntarily by the wife with full knowledge of her rights.

2. The Husband Gave The Prenuptial Agreement To The Wife With Insufficient Time Before The Wedding For Her To Negotiate An Economically Fair Agreement.

The wife received an incomplete draft of the prenuptial agreement less than three weeks before the wedding. Substantial evidence supports the trial court's finding that this "draft was received too late to provide for meaningful negotiation and full advise [sic]." (I RP 94; CP 2400, FF 2.5(9)) A complete draft of the prenuptial agreement was not provided to the wife's attorney until the evening of July 5, 2000 – less than three days before the wedding. (Ex. 108 at 100038) Substantial evidence also supports the trial court's finding that any review was "limited" and the wife's attorney "did not have time to review the agreement in detail" (CP 2401, FF 2.5(13)) and "prevented him from being able to fully advise [the wife] of all her rights or to negotiate any economically fair contract." (CP 2402, FF 2.5(22))

In *Foran*, this court held that the prenuptial agreement at issue was procedurally unfair in part because the wife was given insufficient time to negotiate an economically fair agreement. 67 Wn. App. 252, fn.10. The prenuptial agreement at issue in *Foran* was given to the wife for the first time a week before the wedding, and two days before the parties were to depart for their wedding

trip. Even though the wife knew that a prenuptial agreement was being prepared at least two weeks earlier, the *Foran* court held that there was insufficient time to negotiate an economically fair contract, noting that the “the only realistic choice would have been to postpone the wedding or to negotiate and enter into the contract after the wedding.” 67 Wn. App. 252, fn.10.

Similarly in *Matson*, our Supreme Court invalidated a prenuptial agreement because the prospect of a delayed wedding prevented the wife from knowingly and voluntarily entering into a prenuptial agreement that was first provided to her four days before the wedding. 107 Wn.2d at 487. Likewise here, the husband provided the prenuptial agreement to the wife with insufficient time before the wedding for her to negotiate an economically fair agreement.

3. The Amendment Did Not Cure The Procedural Defects, Because The Wife’s Ability To Negotiate The Substantively Unfair Provisions Of The Prenuptial Agreement Was Limited By The Side Agreement.

Appellant claims that the procedural defects of the prenuptial agreement were “cured” by the amendment signed 14 months later. (App Br. 41-42) Substantial evidence supports the trial court’s finding to the contrary that 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 agreement." (CP 2402, FF 2.5(27))

Both the wife and her counsel testified that they believed their negotiations of any amendment were specifically limited to those issues raised in the attorney's July 7 letter, which itself was written less than 48 hours after receiving the prenuptial agreement. (II RP 39, V RP 17) Substantial evidence supports the trial court's finding that the "wife had no reason to believe the entire agreement was open for renegotiation and by the terms of the 'side letter,' it was not." (CP 2402, FF 2.5(27))

Indeed, the side agreement signed on the parties' wedding day had resolved the five issues raised by her attorney's July 7 letter. (Ex. 103) The side agreement accepted three of the suggestions made by the wife's attorney and in resolution of the last two issues unilaterally provided that the wife was limited to \$400,000 and one-half of the community property if the husband died or their marriage was dissolved more than ten years after they married. (Ex. 103) The wife and her attorney were precluded from

revisiting those issues and others that were not addressed in the July 7 letter. (See Ex. 103; CP 2402, FF 2.5(27))

The side agreement itself was not entered into under procedurally fair circumstances. The wife signed the side agreement on her wedding day. (V RP 54, Ex. 103) She had even less time to negotiate a fair provision or consult with her attorney than with the prenuptial agreement. Both the wife and her counsel testified that they did not discuss the terms of the side agreement before she signed it. (V RP 23, 54, II RP 39) When the side agreement was signed the wife had already executed the prenuptial agreement, which the husband admits was not in her best interests. (III RP 32)

The wife had “no real choice” but to sign the amendment. (CP 204) As her attorney advised her, it was at least “somewhat better” than the prenuptial agreement she had already signed. (II RP 71) The husband testified that the marriage “would not continue” unless the wife signed the amendment. (III RP 24) If the wife did not sign the amendment she faced being “stuck” with a more egregious agreement or she would become “unmarried” – homeless, jobless, and destitute. (See II RP 41, 44) Substantial evidence supports the trial court’s decision that the “wife did not

voluntarily and knowingly waive her rights to a fair, just and equitable division of property by signing the agreement.” (CP 2402, FF 2.5(26))

C. Marital Agreements Should Be Unenforceable If Either Substantively Or Procedurally Unfair.

1. The Trial Court Followed The Law In Finding That The Amendment Did Not “Cure” The Unenforceable Prenuptial Agreement, But Either Substantive Or Procedural Unfairness Should Prevent Enforcement Of Marital Agreements.

Appellant makes much of the trial court’s comment in ruling on the husband’s motion for reconsideration that her decision “creates new law, because there is no case in Washington dealing with an unfair agreement and then a second agreement limited to scope.” (App Br. 30 *quoting* VII RP 10) But the trial court was doing nothing more than acknowledging that no other Washington case had considered the particular fact situation here, where the husband attempts to “cure” glaring defects in an admittedly unenforceable prenuptial agreement by perpetuating its unfairness in a limited amendment executed after marriage. The husband’s claims that the trial court failed to follow the *Matson* test in rejecting his argument that the amendment was enforceable are baseless.

Even if the trial court had held that a marital agreement would be unenforceable if it was procedurally *or* substantively

unfair, the court should now adopt that analysis as more consistent with the fiduciary responsibilities of spouses toward one another and with the court's obligations to insure a fair and equitable division of property and adequate support on divorce. Encouraging parties to negotiate marital agreements that fail to adequately provide for the economically disadvantaged spouse by allowing enforcement of such agreements if procedural niceties are observed fails to recognize the strong likelihood for abuse in the parties' inherent bargaining inequality.

The two-prong test was first announced half a century ago in *Hamlin v. Merlino*, where our Supreme Court, without citation to authority or further analysis held "that the unlimited power, which the contract purported to give [the husband] to unilaterally secure for his separate estate, property which would otherwise belong to the community, indicated unfairness and a breach of trust by reason of the existing confidential relationship of the parties to the proposed marriage, and imposed upon [the husband] the burden of proving that [the wife] fully understand the nature and significance of the contract, and that she freely and voluntarily entered into it." 44 Wn.2d 851, 866-67, 272 P.2d 125 (1954). The better rule is that

marital agreements should not be enforceable unless they are *both* procedurally and substantively fair.³

Such a rule is also consistent with the Dissolution Act, which only authorizes enforcement of an agreement between spouses “providing for . . . maintenance [and] the disposition of any property owned by both or either of them” that was not “unfair at the time of its execution,” “considering the economic circumstances of the parties and any other relevant evidence.” RCW 26.09.070(1) and (3). The Dissolution Act thus provides no “out” justifying enforcement of a substantively unfair agreement on the grounds of procedural fairness. Instead, the analysis under RCW 26.09.070 is focused on the fairness of the agreement given the parties’ economic circumstances when the agreement is reached.

The trial court followed the law in finding that the amendment did not “cure” the unenforceable prenuptial agreement because the

³ In Wisconsin, for example, a marital agreement is not binding “if it fails to satisfy any one of three requirements: each spouse has made fair and reasonable disclosure to the other about his or her financial status; each spouse has entered into the agreement voluntarily and freely; and the substantive provisions of the agreement dividing the property upon divorce are fair to each spouse.” *Button v. Button*, 131 Wis.2d 84, 99, 388 N.W.2d 546 (1986); W.S.A. §767.255(3)(l); see also *Lee v. Lee*, 35 Ark. App. 192, 195, 816 S.W.2d 625 (1991) (antenuptial agreement will be enforced only when the agreement was freely entered into by both parties, and is not unjust, inequitable, or tainted with fraud); *Gross v. Gross*, 11 Ohio St.3d 99, 105, 464 NE.2d 500 (1984).

marital agreements were both substantively and procedurally unfair. But either substantive or procedural unfairness should prevent enforcement of a marital agreement.

2. As A Matter of General Contract Law, The Marital Agreements Were Unenforceable If Either Substantively Or Procedurally Unfair.

Either substantive or procedural unfairness should invalidate the marital agreement for a second reason: Subject to the parties' special fiduciary responsibilities to one another, marital agreements are contracts governed by the principles of contract law. *Marriage of Burke*, 96 Wn. App. 474, 477, 980 P.2d 265 (1999). The husband was allowed to appeal interlocutory orders striking down the agreements because the prenuptial agreement contained a clause requiring arbitration of any disputes pursuant to the commercial arbitration rules of the American Arbitration Association.⁴ The husband's claim that the agreement to arbitrate is enforceable as a matter of general contract law is a second reason for this court to

⁴ Thus, the husband insists that the issues raised by the parties' dissolution should be resolved by commercial arbitration. The wife obtained leave to argue her motion to modify the commissioner's ruling that the interlocutory orders were appealable given our state Supreme Court's rejection of bifurcated resolution of dissolutions in *Little v. Little*, 96 Wn.2d 183, 634 P.2d 498 (1981). The wife now withdraws that motion. Having been required to fully brief the issues on review, she recognizes that dismissal of review on the basis that the order was not appealable will only further unduly delay final resolution of the parties' marriage.

hold that either substantive or procedural unfairness makes the agreement unenforceable. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.2d 773 (2004).

In *Adler*, the Supreme Court considered an arbitration clause in an employment contract. The Court in *Adler* held that either procedural or substantive unconscionability would make the challenged provisions of the agreement unenforceable. 153 Wn.2d at 347. Thus, unlike the law governing marital agreements, which may (although the wife does not concede this point; see Argument C.1, *supra*) allow enforcement of an agreement entered into with sufficient procedural safeguards even if it is substantively unfair, the trial court's decision in this case must be affirmed as a matter of general contract law if the agreements were either substantively or procedurally unfair.

3. Any Arbitrator Would Be Bound By The Trial Court's Decision That The Substantive Provisions Of The Marital Agreements Are Unenforceable.

Even if this court were to hold that the arbitration provisions of the agreement were enforceable, any arbitrator would be bound by the court's determination that the provisions of the marital agreements governing distribution of property and support are unfair and unenforceable. *Zuver v. Airtouch Communications*,

Inc., 153 Wn.2d 293, 103 P.3d 753 (2004). The Court in **Zuver** held that although the arbitration provisions of a telephone contract were enforceable, the arbitrator would be bound by the court's determination that a damage limitation clause in the agreement was substantively unenforceable. 153 Wn.2d at 322. Likewise here, if the arbitration provisions of the prenuptial agreement are enforceable, any arbitrator would be bound by the court's determination that the substantive provisions of the marital agreements are unenforceable.

D. This Court Should Confirm And Award The Wife Attorney Fees On Appeal.

The trial court awarded attorney fees to the wife to respond to the husband's appeal (CP 2414) on the authority of **Stringfellow v. Stringfellow**, 53 Wn.2d 359, 333 P.2d 936 (1959) (trial court has authority to award "suit money" pending appeal) and RAP 7.2(d). The husband purported to stay the order and continues to withhold the fees ordered paid by the trial court. (CP 2415) While the husband assigns error to the trial court's award of attorney fees, he provides no argument to support his claim. This court should not consider the claimed error because it is not supported by argument or relevant authority, **Fischer-McReynolds v. Quasim**, 101 Wn.

App. 801, 814, 6 P.3d 30 (2000), and should affirm the trial court's award of attorney fees on appeal.

Even if this court were to consider this unbriefed issue, this court should affirm the trial court's award of attorney fees and award fees on appeal under RCW 26.09.140 and RAP 18.1. The wife has limited funds. By his own admission, the husband is a "successful property development business owner" and "multi-millionaire." (App. Br. 9, 14) This appeal is only the latest but not the last salvo in the multi-millionaire husband's campaign to enforce a grossly unfair agreement or, barring that, starve his wife into submission through delay of the final resolution of their dissolution. ***Marriage of Greenlee***, 65 Wn. App. 703, 829 P.2d 1120 (1992) (award of fees is warranted when one party made litigation unduly difficult and increased legal costs for the other party by his actions). This court should affirm the trial court's award of attorney fees to the wife and award the wife her fees on appeal.

IV. CONCLUSION

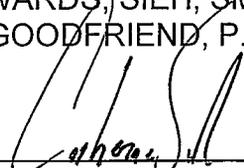
The husband's appeal is premised on his claim that because their marriage provided the wife with "a life-style that she had never experienced and ultimate wealth beyond anything she could have otherwise hoped for" (App. Br. 38), she should now be happy to

leave the marriage destitute. The courts of this state do not allow spouses to evade their fiduciary responsibilities to one another through enforcement of unfair agreements like that the husband extracted here both before and after marriage. This court should affirm the trial court's decisions striking down the marital agreements, confirm the award to the wife of her fees on appeal, and remand for a division of property and determination of support and fees under the equitable principles of the Dissolution Act.

Dated this 1st day of September, 2006.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: _____


Catherine W. Smith
WSBA No. 9542
Valerie Villacin
WSBA No. 34515

LAW OFFICES OF CYNTHIA
B. WHITAKER

By: _____


Cynthia B. Whitaker
WSBA No. 7292

Attorneys for Respondent

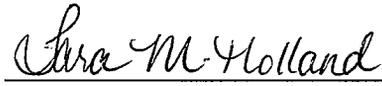
DECLARATION OF SERVICE

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

That on September 1, 2006, I arranged for service of the foregoing Brief of Respondent, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Camden M. Hall Attorney at Law 1001 Fourth Avenue, Suite 4301 Seattle, WA 98154	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Cynthia B. Whitaker Attorney at Law 900 Fourth Avenue, #3250 Seattle, WA 98164-1072	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 1st day of September, 2006.



Tara M. Holland

PRENUPTIAL AGREEMENT

between

GLORIA L. WHITEHEAD and J. THOMAS BERNARD

July 7, 2000

JTB

PRENUPTIAL AGREEMENT

between

GLORIA L. WHITEHEAD and J. THOMAS BERNARD

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PRENUPTIAL AGREEMENT

THIS AGREEMENT is made this _____ day of July, 2000, at Seattle, Washington, between GLORIA L. WHITEHEAD ("Wife"), of 7535 132nd Avenue NE, Kirkland, Washington 98033, and J. THOMAS BERNARD ("Husband"), of 1421 Shenandoah Drive East, Seattle, Washington 98112. Wife is a citizen of the United States of America, and Husband is a citizen of the United States of America.

The parties contemplate legal marriage (the "Marriage") in the near future under the laws of the State of Washington. Each of the parties possesses certain property, has made a full and frank disclosure to the other in relation to its character and amount and has been advised as to his and her respective rights in the event of the Marriage and in the absence of any agreement with the other.

In addition,

At the time of marriage, Husband will possess substantial property both real and personal, most of which is not liquid; while Wife will have modest separate property at that time;

The parties are informed about the nature and extent of each other's property and income. Both Gloria L Whitehead and J. Thomas Bernard are licensed Washington State real estate brokers, and professionally work in the business of real estate development. Their office is on site at our industrial park in Preston, Washington;

Gloria's work history and present activities include marketing and other development support activities; (including property management, lease documentation, accounting, and other management) for commercial/industrial real estate in east King County;

Tom Bernard holds a degree as Engineer of Mines (Colorado School of Mines), and a Master of Business Administration degree from Boston University. Tom is a Licensed Washington State Real Estate Broker;

Gloria Whitehead holds a Bachelor of Science degree and a Certificate of Teaching from the University of Oregon, and a Master of Business Administration degree from City University (Bellevue, Washington). Gloria is a Licensed Washington State Real Estate Broker;

The parties desire to enter into an agreement which will govern and for all purposes apply to their separate and community property irrespective of whether they are living together or living separately, married or divorced, and shall be binding upon the parties for all purposes; and

The parties desire that this Agreement shall only take effect after their lawful marriage to one another.

The parties expressly agree and recognize that this agreement will be binding upon them in the event of their death or if either party shall seek or obtain a divorce from the other.

The parties desire to enter into this agreement with respect to the property owned by each of them and which either of them may hereafter acquire during their relationship. Therefore, they agree:

1. Acknowledgments.

Each party acknowledges that:

(a) Each is fully acquainted with the financial resources of the other through, for example, having received and reviewed the attached property exhibits which constitute a fair and reasonably accurate and complete description of the assets and liabilities of each party, although no formal appraisals of the values noted thereon were undertaken. The parties acknowledge that the values of these property interests change continuously and cannot be precisely accurate as of the exact date of this Agreement, but they are figures which the parties believe have been correct within the recent past. Husband and Wife acknowledge that as of the signing of this Agreement, neither of them has any significant liabilities other than as shown in the exhibits to this Agreement, and the liens which appear of record in connection with the real property covered by this Agreement.

(b) Each has also disclosed the amounts and sources of his or her respective income, and answered all the questions the other, or their respective attorneys or other representatives, have asked about his or her income and assets.

(c) Each has at all times been advised to obtain, and told why they should each have independent counsel. Each has actually obtained and received, the advice of independent financial and legal counsel of his or her own choosing.

(d) Each is entering into this Agreement with the understanding that, except as otherwise provided in this Agreement, the purpose of this Agreement is to preserve, create and maintain separate property estates for one or both parties and to minimize forever the creation or accumulation of community property, especially from the separate assets of the parties. In the event of a dissolution of the marriage of the parties by death or divorce, the parties each intend that, except where otherwise specifically agreed, this Agreement will preclude the parties or their heirs or successors from asserting that the separate character of their respective assets has changed to community character, or that either party by reason of the death of the other or the dissolution of their marriage shall have any right of any kind in the property of the other, except as herein or otherwise is expressly set forth in writing. The parties do

acknowledge that they are making fair and equitable arrangements for each other for those eventualities, as will hereafter be shown and disclosed in this Agreement.

(e) Each party is entering into this Agreement freely, voluntarily and with full knowledge of all material facts, including (but not by way of limitation) the amount and value of the other's separate property and liabilities as characterized by this Agreement. The parties desire to enter into this Agreement in order to avoid discord at the death of the other, or on marriage dissolution, if any, and to protect substantial separate assets for their separate families.

(f) Each believes that he or she is substantially on a par with the other in education and experience.

(g) The parties acknowledge that they have had time to properly evaluate this Agreement and that they are ready to proceed, and they have specifically discussed its execution. They further acknowledge that neither has been rushed or forced into entering into this Agreement.

2. Separate Property and Premarital Period.

(a) General. Any and all property owned or purchased by either party prior to the date of the Marriage and property acquired by either party after the Marriage (i) by gift, bequest, inheritance, legacy, devise or descent; (ii) by purchase with separate property funds; or (iii) the rents, issues, income, dividends, proceeds, gains, profits, and appreciation in value of all such property (and any goodwill or earning capacity related thereto) shall be and remain the separate property of the party originally owning or acquiring such property. Except as otherwise provided in this Agreement, neither party shall have any ownership interest in, or claim by lien or otherwise to, the separate property of the other, and neither shall assert or accept the benefits of any assertion that any of the above-described separate property of the other is community property or quasi-community property.

(b) Waiver of Claims Relating to Premarital Period. Unless otherwise provided, it is expressly agreed that each party waives any claim he or she might otherwise have to any of the other party's property arising out of the period preceding the parties' marriage, whether such claim be based on express or implied partnership, joint venture, constructive or resulting trust, cotenancy, express or implied contract, lien, quantum meruit, unjust enrichment, contribution of services or funds or property, or otherwise.

3. Waiver of Quasi-Community Property Rights. The parties hereby waive those provisions of RCW 26.16 regarding quasi-community property and hereby agree that any property that would be quasi-community property pursuant thereto shall be and remain the separate property of the acquiring spouse.

4. Valuation of Separate Property. Both parties acknowledge that they and their designated representatives and advisors have been offered full access to the books and records of the other party and of all properties in which such other party claims a direct or indirect interest, have had all inquiries concerning the other's property answered in full and have fully satisfied themselves as to the amount, character and value of the other's property. The separate property and its approximate fair market value of Husband is listed on Schedule A attached hereto, together with a statement of that spouse's recent income. The separate property and its approximate fair market value of Wife is listed on Schedule B attached hereto together with a statement of that spouse's recent income.

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. 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.

(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 will be very difficult if not impossible to determine the exact amount and value of such efforts. Accordingly they have agreed that:

(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.

6. Parties Residence. There are presently no existing mortgages and no debt is owing that is secured by the home at 1421 Shenandoah Drive East, Seattle, the home where Gloria and Tom will live. This home shall remain the Separate Property of J. Thomas Bernard, with his own payment (from his own separate income and assets) for all costs and expenses related to furnishing, maintaining and operating this real estate. This home and its furnishings (excepting those furnishings bought and paid for by Gloria Whitehead with her separate funds) is and shall remain the Separate Property and the separate estate of J. Thomas Bernard

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; 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 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 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.

8. Maintenance of Property Status, Records and Income Taxes.

(a) Maintenance of Separate and Community Property Status. Each party shall maintain the separate status of his or her respective separate property and the community status of their community property. Subject only to applicable provisions of this Agreement, the parties shall not commingle separate property with community property, or commingle one party's separate property with the other party's separate property. Any breach of this paragraph (or failure to observe this paragraph) shall not be construed as the abandonment, rescission, abrogation, revocation, amendment or modification of this Agreement, which may be accomplished only by written agreement as provided herein. Gifts from one party to another of a value less than \$5,000 need not be confirmed in writing.

(b) Records and Accounts. The parties agree to segregate separate property assets from community property assets and to maintain appropriate records to distinguish separate property from community property. The fact that one party may give to the other party a general or limited power of attorney allowing the attorney-in-fact to make deposits to and make withdrawals from an account in the name of one party alone shall not change the character of such account, which shall remain as the separate property of the party in whose name the account was originally registered. If the parties jointly rent a safe deposit box, the joint rental arrangement shall not affect the character (separate or community) of assets stored in the box.

(c) Federal Income Tax Liabilities; Other Tax Matters.

(i) Separate and Community Income Tax Liability. Payment of any United States federal income tax resulting from the income, gain or other taxable event with respect to the separate property of a party or such party's separate property earnings shall be the responsibility of that party. The United States federal income tax liability resulting from community property income shall be the liability of the marital community.

(ii) Allocation if Joint Return. If a joint United States federal income tax return is filed, then unless Husband and Wife agree otherwise, the community's and each party's respective share of the tax liability shall be determined through the allocation of their income tax burden pro rata to each party's separate taxable income and the community taxable income in proportion to the three categories of taxable income (i.e., Husband's separate, Wife's separate and the community).

(iii) Allocation of Liability for Income Taxes. Each party shall pay his or her share of the separate United States federal tax liability from his or her separate property. The community property United States federal tax liability shall be paid from community property or equally by the parties from their respective separate property. Should community funds or funds of one party be used to satisfy the tax liability of the other party, the amount of such contribution shall be deemed an unsecured, noninterest-bearing loan from the contributor to the other spouse whose taxes were being paid and shall not entitle the contributor to any interest in or lien on the other spouse's property.

(iv) Reservation of Right to File Separate Return. Each party hereby reserves the right to file a separate income tax return.

(v) Foreign Taxes. Any liability incurred to a foreign jurisdiction (i.e., outside of the United States), shall be the liability of the party whose separate property generated such foreign tax liability, or if the community property produced the foreign tax liability, then that liability shall be allocated to the marital community. Any foreign tax credit allowable by the United States, or deduction allowable by the United States for foreign taxes paid or incurred shall inure to the benefit of the party to whom the foreign tax liability producing such credit or deduction was allocated.

9. Waiver of Rights; Maintenance and Child Support.

(a) Property. Husband and Wife waive, discharge and release any right, title or interest whatsoever either now has or may hereafter acquire in the property of the other (except: any community property rights acquired after the Marriage; and as may be specifically provided in this Agreement); including in the event of a Termination of the Marriage (as defined herein) or otherwise, but not limited to, any right to acquire or to be awarded (i) any interest in the separate property of the other, or (ii) a greater interest.

in community property than that provided herein. Each party agrees that he or she will not make any claim to the contrary. Should community property be consumed through living expenses, neither party will have any right to an offset or lien against separate property for community property consumed.

(b) Support and Maintenance. To the fullest extent permitted by law, each party waives and releases any right or claim he or she may ever have to spousal support, maintenance or alimony, and each party hereby agrees and covenants that in the event of a Termination of the Marriage, he or she shall not assert any such claim.

(i) Child Support. This Agreement shall not release or waive any lawful right or claim to child support for the parties' children.

(c) Children of a Prior Marriage. 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 this 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.

10. Insurance.

(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, whether or not during the marriage of the parties the premiums thereon are paid with community funds or otherwise.

(b) Property and Liability Insurance. The parties acknowledge and agree that property insurance proceeds (including but not limited to casualty and liability insurance) stand in the place of any property insured and that any such property insurance proceeds shall have the same character (community or separate) as the insured property. Community property shall be used to pay premiums on insurance insuring community property; separate property shall be used to pay premiums on insurance insuring separate property.

11. Miscellaneous.

(a) No payments by Gloria (Whitehead) Bernard for the benefit of J. Thomas Bernard or his son James A. Bernard shall be any obligation of Gloria (Whitehead) Bernard or any entity with which she owns or is affiliated, or any obligation of her estate. No income, benefit, ownership or value whatsoever earned from the separate assets established or maintained by Gloria (Whitehead) Bernard shall inure to the benefit of J. Thomas Bernard, his son James A. Bernard, or to the estate of J. Thomas Bernard or the estate of James A. Bernard from the separate property or earnings of Gloria L. (Whitehead) Bernard. The job of Gloria (Whitehead) Bernard as employee of Bernard Development Company (or any other entity owned or controlled by J. Thomas Bernard) automatically includes performing services for Bernard Development Company, BDC Preston Properties One Limited Partnership, South I-90 Limited Partnership, I-90 South, Inc., and all or any new affiliates of those entities or other entities directly or indirectly owned or controlled by J. Thomas Bernard as his separate property, without any additional income or employment, income, or benefit rights whatsoever, owing or due to Gloria (Whitehead) Bernard from J. Thomas Bernard, or emanating from any property or asset J. Thomas Bernard owns or maintains as his separate property. Payments to Gloria (Whitehead) Bernard by Bernard Development Company shall be the sole source of compensation for Gloria (Whitehead) Bernard for any business or professional personal service she performs for any entity or asset J. Thomas Bernard owns or maintains as his separate property.

Following the marriage of Gloria L (Whitehead) Bernard and J. Thomas Bernard, J. Thomas Bernard shall continue to own and establish his separate assets, making his own payments for the personal benefit of himself, his son James A. Bernard (now age 18), and maintaining his own separate banking, insurance, investment relationships, ownership of his own assets and the like, using his own separate money and assets for those purposes. No payments by J. Thomas Bernard for the benefit of or Gloria's son Marcellus J. Whitehead or her daughter Crystal R. Whitehead shall be any obligation of J. Thomas Bernard or any entity with which he owns or is affiliated, or any obligation of the estate of J. Thomas Bernard. No income, benefit, ownership or value whatsoever earned or emanating from the separate assets now or in the future established or maintained by J. Thomas Bernard as his separate assets shall inure to the benefit of Gloria (Whitehead) Bernard, her son Marcellus J. Whitehead, her daughter Crystal R. Whitehead, or to the estate of Gloria (Whitehead) Bernard or to the estate of Crystal R. Whitehead or Marcellus J. Whitehead.

Payments or loans, if any, may (but are not obligated to be made) be made from the Joint Living Account to or for the benefit of the college or trade education of Crystal R. Whitehead, Marcellus J. Whitehead, and James A. Bernard. However, any such payments not identified as gifts shall be loans from the Community Property of Gloria (Whitehead) Bernard and Tom Bernard, repayable from funds from the parent's separate estate, or by those individuals receiving the loaned funds (no interest, ten year repayment term).

(b) Agreement to Sign. Each party agrees from time to time to sign at the request of the other such form of agreement, waiver, or consent as may be required: (i) after the marriage of Husband and Wife; and (ii) after the expiration of the first anniversary of their marriage in order to effectuate the intent set forth in this Agreement that each be able to deal with his or her interest in such plan in favor of his or her designated beneficiary, whether or not that beneficiary is the surviving spouse.

(c) Specific Enforcement. The parties further agree that if either of them fails to sign the agreements, consents, or waivers as described herein, the obligation to sign shall be specifically enforceable by order of a court of competent jurisdiction. Attorney fees and costs incurred in any such action shall be paid by the party refusing to sign.

12. Termination of Marriage.

(a) In the event of a legal separation, divorce, dissolution, annulment or other termination or invalidation of the Marriage other than by death (collectively, "Termination of the Marriage"), each party shall retain and shall be awarded his or her respective separate property in addition to his or her interest in any tangible personal property, including without limitation clothing, jewelry, sports equipment and automobiles. Except as herein expressly provided to the contrary, in the event of a Termination of the Marriage, each party waives, releases and disclaims any right he or she may have (or may acquire) to receive or to be awarded any interest in the other's separate property. Separate Property as referred in this Agreement includes all property that is purchased or acquired through the use of funds or assets that are Separate Property.

(b) In the event of Termination of the Marriage, the existing community property of the parties shall be divided and awarded (after giving effect to liens, encumbrances and community obligations) 50 percent to Husband and 50 percent to Wife. In the event of a Termination of the Marriage, each party disclaims, releases and waives any right he or she may have (or may acquire) to be awarded or to receive a greater interest in the community property than provided in the foregoing sentence.

(c) A bank account (or established elsewhere as husband and wife may agree, for investment purposes) 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) upon her death, and closed and payable to Gloria Bernard (as her separate property), if not closed earlier, following Tom Bernard's deposit of \$150,000 into this account.

(d) Wife, to the most complete extent permitted by law, forever waives any claim for alimony, maintenance or support applicable in any state or jurisdiction; and each party shall be responsible for his or her own attorney fees and costs incurred in any proceeding to terminate the marriage.

13. Additional Transfers. Notwithstanding the provisions of this Agreement, either party may transfer, convey, devise, or bequeath any property to the other. Neither party intends by this Agreement to limit or restrict in any way the right to receive any such transfer, conveyance, devise, or bequest expressly made by the other and evidenced in writing. Gifts of a value of less than \$5,000 need not be confirmed by a writing. Specifically, nothing in this Agreement shall preclude one party from voluntarily making provision for, or granting powers or rights to, the other party in and by the former's last will and testament or codicil thereto or in trust, or by other valid contractual arrangement, including any rights devolving upon a survivor by virtue of joint tenancy property arrangements, or by virtue of any beneficiary designations on life insurance policies, pension plans, and the like.

14. Living Expenses; Investments, Debts and Obligation.

(a) Living Expenses; Debts and Obligations. During the Marriage, all ordinary and necessary living expenses incurred after the Marriage, including, but not limited to, expenses of maintaining the household, shall be paid from the Joint Living Bank Account or from other community funds. Notwithstanding the foregoing, all taxes and capital expenditures made with respect to a party's separate property, and all debts and obligations either Husband or Wife may have at the time of their Marriage shall remain their separate debts and obligations, and shall be satisfied from the obligated party's separate property.

(b) Use of Community or Separate Funds on Other's Debts or Investments. In the event community or joint funds are used to satisfy a party's separate obligation, whether or not existing on the date of the Marriage, or if the nonobligated party's separate property is used to satisfy such an obligation, or if community funds or one spouse's separate property funds are invested in the other spouse's separate property, the same shall be a noninterest-bearing loan from the obligated spouse or owner spouse, as the case may be (collectively, "Obligated Spouse"), which shall be the separate obligation of the Obligated Spouse and shall create a lien on the separate property of the Obligated Spouse payable with interest after the due date, unless otherwise documented by the parties in writing as a gift or as an equity interest; provided however, if the obligation is directly attributable or associated with a specific item of separate property of the Obligated Spouse, it shall only create a lien on that specific item of separate property, but if it is not directly attributable to or associated with a specific item of separate property of the Obligated Spouse, it shall be a lien on all the separate property of the obligated spouse.

(c) Use of Separate Funds on Community Debts or Investments. In the event the separate funds of a party are used to satisfy a community obligation, or if one party's separate property funds are invested in community property, the same shall be a noninterest-bearing loan to the marital community and shall create a lien on the parties' community property payable with interest after the due date, unless otherwise documented in writing as a gift or as an equity interest, provided however, if the obligation is directly attributable or associated with a specific item of community property, it shall only create a lien on that specific item of separate property, but if it is not directly attributable to or associated with a specific item of community property, it shall be a lien on all the community property of the parties.

(d) Labor. All contributions of labor to either party's separate property or to the community property shall be deemed a gift.

(e) Lien. The liens referred to in this paragraph, or otherwise referred to in this Agreement, shall be a lien on the property subject to the lien (and on the appreciation, gains, rents, interest, profits, and proceeds thereof). Such lien shall not entitle the lienholder to a proportion of any increase in value of the property subject to the lien, it being the intent of the parties that a respective party's separate property remain his or her sole and separate property, and that community property remain solely community property, unless the parties otherwise agree in writing. Any such lien shall become due and payable upon the first to occur of: (i) sixty (60) days following the death of either party; or (ii) sixty (60) days following the earlier to occur of: (A) written demand being delivered to the party to be charged, or (B) Termination of the Marriage (as defined in paragraph 11). If any such amount is not paid when due, the unpaid balance shall be deemed to be in default and shall bear interest at the applicable federal short-term rate in effect as of the date of default, determined under Section 1274(d) of the Internal Revenue Code of 1986, as amended, or such lesser rate which is the maximum rate then allowed by applicable law. Any lien resulting from the terms of this paragraph shall lapse if no demand for payment of the lien has been made within 18 months (548 days) of when it became due and payable.

(f) List of Liabilities. The separate debts and liabilities of Husband are listed on Schedule A, and the separate debts and obligations of Wife are listed on Schedule B.

(g) Agreement Regarding Obligations. Accordingly:

(i) Neither party will obligate the separate property belonging to the other party in any manner whatever.

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

(iii) Either party may retain or obtain credit in his or her name alone. However, any such credit shall be only the separate obligation of the party retaining or obtaining such credit.

(iv) As provided in paragraph 9, neither party shall have any liability with regard to the children of the other, whether by way of contract liability, support obligations, statutory obligations, or otherwise.

(h) Hold Harmless. Should any liability be asserted by a third party contrary to the terms of this Agreement, the party who has responsibility for such obligation under this Agreement shall hold the other party (and/or the community, as the case may be) harmless in the amount of such liability and all attorney fees and costs incurred by such party in dealing with the claim of such third party.

15. Death. The following provisions shall apply only if the parties are married at the time of the operative death or deaths:

(a) Husband's Death. At the death of Husband, and as a marriage settlement pursuant to RCW 11.12.050, Wife shall receive from the Estate of Husband, One Hundred Dollars (\$100) and the following:

- Whitehead';
- (i) The balance of the Special Joint Account for Gloria
 - (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.

(b) Wife's Death. At the death of Wife, Wife's Estate shall receive:

- Whitehead;
- (i) The balance of the Special Joint Account for Gloria
 - (ii) One-half of the parties' community property; and
 - (iii) Her separate property.
 - (iv) Husband shall receive his separate property and one-half of the parties' community property.

16. Independent Counsel. Both parties acknowledge and agree that they have been advised to obtain the services of independent counsel of their choice in the course of the negotiations for and in the preparation of this Agreement, and that each has had ample opportunity to do so. The parties further acknowledge that they have read this Agreement, including the attached Exhibit I is incorporated in this Agreement by this reference, have had its contents fully explained to them by counsel, and are fully aware of the contents thereof and of their legal effect and how this Agreement alters his and her rights that would exist but for this Agreement. Counsel for Husband was Richard E. Keefe of Foster Pepper & Shefelman PLLC, 1111 Third Avenue, Suite 3400, Seattle, Washington 98101. Counsel for Wife was Marshall F. Gehring, 25825 104th Avenue S.E., #375, Kent, Washington 98031.

17. Conditions of Agreement. This Agreement shall become effective only after it has been signed by both of the parties and the Marriage has taken place.

18. Effect and Governing Law.

(a) Binding Effect and Washington Law. This Agreement shall bind the parties and their respective heirs, executors, assigns, legal representatives and administrators. Except as required by ERISA, this Agreement shall be interpreted in accordance with the internal laws of the State of Washington without regard to choice or conflict of laws principles, as such laws existed at the date this Agreement was executed. Any provision of this Agreement which is prohibited by law or is unenforceable shall be inoperative and all of the remaining provisions shall continue in effect.

(b) Relocation to Other Jurisdiction. It is anticipated that the parties will live in Washington after their marriage. If they should move to another state or other jurisdiction, any community property (and its proceeds) shall continue to be owned by them equally (as community property, if permitted in that jurisdiction), but in any event with each having an undivided one-half interest therein, and each party's respective separate property (and its proceeds) shall continue to be owned as separate property.

19. Entire Agreement, Amendments, Length of Marriage and Abandonment, Drafter. This is the final and complete Agreement between the parties with respect to their property rights in the community and separate property of each other. There are no other oral or written agreements regarding such rights. This Agreement shall not be affected by the length of the Marriage. 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. This Agreement shall not be construed against Husband as being drafter hereof.

20. Legal Expenses. In any suit, proceeding, action or arbitration to enforce this Agreement or to procure adjudication or determination of the rights of the parties hereto, the most prevailing party, as determined by the applicable tribunal, shall be entitled to recover from the other party reasonable sums as attorney fees, arbitrator fees, mediator fees, expert witness fees, and all other costs and expenses in connection with

such suit, proceeding or action, including appeal, which sums shall be included in any award, adjudication, judgment or decree entered therein.

21. Waiver of Breach. The waiver of any breach of any provision of this Agreement or failure to enforce any provision hereof shall not operate or be construed as a waiver of any subsequent breach by any party.

22. Equitable Enforcement. Because it would be difficult to measure the damages if either party should breach this Agreement or default in his or her obligations under this Agreement, it is agreed that the other party, in addition to any other available remedies or rights, may bring an action to enjoin any breach of this Agreement and/or to obtain specific performance. In such event, the parties expressly waive the defense that damages would be an adequate remedy.

23. Validity and Severance. In the event that any provision of this Agreement is held invalid OR unenforceable, the same shall not affect in any respect whatsoever the validity OR enforceability of any other provision of this Agreement.

24. Durable Power.

(a) Husband shall execute and deliver to Wife a durable power of attorney which shall be limited to making arrangements for and authorizing Wife to arrange for the admission of Husband to a health facility and treatment therein. This shall not include a medical directive.

(b) Wife shall execute and deliver to Husband a durable power of attorney which shall be limited to making arrangements for and authorizing Husband to arrange for the admission of Wife to a health facility and treatment therein. This shall not include a medical directive.

25. Dispute Resolution. All disputes arising out of or in connection with this Agreement or concerning any future property division of property then owned by the parties in an action to divide their marriage or otherwise, shall be resolved in Seattle, Washington, USA, as follows:

(a) Either party may declare the existence of a dispute by delivering to the other party a letter (the "Demand") which (a) clearly identifies the issue or issues in dispute, (b) that party's suggested resolution of the dispute and (c) demands that the other party engage in the dispute resolution procedures established by this Agreement.

(b) The parties may meet within ten (10) days face to face, with their attorneys and other representatives, if desired, to in good faith try to resolve the dispute. Following such meeting, the parties may seek to mediate the dispute on mutually agreeable terms.

(c) If the above fails to produce a settlement within twenty (20) days of the Demand, the dispute shall be resolved by binding arbitration according to the following procedure.

(d) Any claim between the parties arising out of or relating to this Agreement, including, without limitation, any claim based on or arising from an alleged tort and any dispute involving business decisions of the parties, shall be determined by arbitration in Seattle, Washington, USA, commenced in accordance with RCW 7.04.060. There shall be a single neutral arbitrator. If the parties cannot agree on the identity of the arbitrator within twenty (20) days following the Demand, the Presiding Judge of the King County Superior Court shall select the arbitrator from the American Arbitration Association ("AAA") Seattle Large Complex Case Panel (or a person with similar professional credentials). The arbitrator shall be an attorney with more than 15 years experience in real estate or commercial law who resides in the Seattle Metropolitan area.

(e) The arbitration shall be conducted in accordance with the AAA Commercial Arbitration Rules with Expedited Procedures, in effect on the date of the arbitration demand, as modified by this Agreement. There shall be no dispositive motion practice. As may be shown to be necessary to ensure a fair hearing: The arbitrator may authorize limited discovery; and may enter pre-hearing orders regarding (without limitation) scheduling, document exchange, witness disclosure and issues to be heard. The arbitrator shall not be bound by the rules of evidence or of civil procedure, but may consider the parties' writings and oral presentations as reasonable business people would in the conduct of their day-to-day affairs. The arbitrator may require the parties to submit some or all of their case by written declaration or in such other manner or presentation as the arbitrator may determine to be appropriate. The parties intend to limit live testimony and cross-examination to the extent necessary to ensure a fair hearing on material issues. Whether a claim is covered by this Agreement shall be determined by the arbitrator. All statutes of limitation which would otherwise be applicable shall apply to any arbitration proceeding hereunder.

(f) The arbitrator shall take such steps as may be necessary to hold a private hearing within 90 days of the Demand, and to conclude the hearing within three days. The arbitrator's written decision shall be made not later than seven calendar days after the hearing. The parties have included these time limits in order to expedite the proceeding, but they are not jurisdictional, and the arbitrator may for good cause (e.g., a pending mediation) afford or permit reasonable extensions or delays, which shall not affect the validity of the award. In any event, the award must be made on or before seven days after the conclusion of the arbitration hearing. The written decision shall contain a brief statement of the claim(s) determined and the award made on each claim. In making the decision and award, the arbitrator shall apply applicable substantive law to all legal issues and exercise reasonable business judgment to resolve all business issues in the long-term best interests of all the parties.

(g) Absent fraud, collusion or willful misconduct by an arbitrator, the award shall be final, and judgment may be entered in any court having jurisdiction

thereof. The arbitrator may award appropriate injunctive relief or any other remedy available from a judge, including the joinder of parties or consolidation of this arbitration with any other involving common issues of law or fact or which may promote judicial economy, and may award attorney fees and costs to the prevailing party, but shall not have the power to award punitive or exemplary damages.

Executed as of the date written above.

July 7, 2000 :

A. J. Leonard

July 7, 2000 :

Glenn J. Whitehead

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I, _____, hereby certify that I am a duly licensed attorney, admitted to practice law in the state of Washington; that I have consulted with _____ who is a party to the foregoing Agreement dated _____ made in contemplation of her marriage to _____ 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: _____, 2000.



EXHIBIT I

SUMMARY OF EXAMPLES OF PROPERTY RIGHTS

Each party hereby represents that he or she has been advised of the rights he or she would have and enjoy with respect to the earnings and property of the other were he or she to marry the other and survive him or her as his widow or her widower without joining with him or her in the execution of this Agreement. Each party acknowledges that, in such event, except as otherwise modified by agreement, his or her more important rights, under the laws of the state of Washington, would be as follows:

1. Separate Property. Property and pecuniary rights owned by either spouse before marriage and acquired by either spouse afterwards by gift, bequest, devise or descent, with the rents, income, issues and profits therefrom are separate property and shall not be subject to the contracts or debts of the other. Each spouse may manage, lease, sell, convey, encumber or devise by will his or her separate property without the other joining in such management, alienation or encumbrance, as fully and to the same effect as though such spouse were unmarried. RCW 26.16.010 and 26.16.020.

2. Community Property and Quasi-Community Property. All property acquired after marriage by either spouse, except for separate property, is community property or quasi-community property. Quasi-community property is property existing at the death of the first spouse which would have been community property had it been acquired during domicile in Washington, and for all other purposes property characterized as quasi-community property is characterized without regard to the quasi-community property laws. Each spouse immediately has an equal interest in community property acquired during marriage and at the death of the first spouse an equal interest in the quasi-community property. Either spouse, acting alone, may manage and control community property, except neither party may devise or bequeath by will more than one-half (1/2) of community property or quasi-community property, and neither spouse may give community property without the express consent of the other, nor may a spouse within three years of death give quasi-community property and retain certain interests without the consent of the other spouse. Moreover, neither spouse may purchase, sell, convey, or encumber community real property without the other spouse joining in the execution of the instrument by which such real property is affected. Finally, each spouse is limited in his or her ability to create a security interest in community household goods or to acquire, purchase, sell, convey, or encumber business assets where both spouses participate in the management of the business without the consent of the other. RCW 26.10.030 and 26.16.

3. Family Expenses. The expenses of the family and education of the children under 18 years of age, including stepchildren, are chargeable to the community property and to the separate property of both the husband and the wife, and they may be sued jointly or separately, provided that with respect to stepchildren, the obligation ceases upon the termination of the marriage as to the stepparent. RCW 26.16.205. This statute has been

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interpreted by the courts to apply at least to "necessaries," and may be limited to necessities. See *Smith v. Dalton*, 58 Wn. App. 876 (Div. 1 1990). An agreement between the husband and wife generally will not affect the rights of creditors under this statute.

4. Property Rights and Support Upon Separation or Dissolution. In the event of legal separation or dissolution of marriage, the Washington court has jurisdiction over all of the property of the parties, and can enter an order apportioning both community and separate property. The court can order a just and equitable distribution of the property and liabilities based on certain factors. The court could also award child support or spousal maintenance and could require either party to pay a reasonable amount to the other party for the costs, including reasonable attorneys' fees, of maintaining or defending a dissolution proceeding. RCW 26.09.080, 26.09.090 and 26.09.140.

5. Community Property Rights Upon Death. On the death of either spouse, the decedent would own one-half (1/2) of all of the community property and quasi-community property and the surviving spouse would own one-half (1/2) of all of the community property and quasi-community property. RCW 11.02.070 and 26.16.

6. Intestate Succession. In the event either spouse died intestate (that is, without a valid will) with surviving children, the surviving spouse would be entitled to all of the decedent's share of the net community and quasi-community estate and one-half (1/2) of the net separate estate. If the decedent has no surviving children, but was survived by either of his or her parents, or by any of his or her brothers or sisters, the surviving spouse would be entitled to three-quarters (3/4) of the net separate estate of the decedent. If the decedent's parents, brothers and sisters, and children all predecease the decedent, the surviving spouse would be entitled to all of the net separate property of a decedent who died intestate. RCW 11.04.015 and 26.16.

7. Homestead. Upon the death of either spouse, if the decedent owned any interest in homestead property (either as separate or community property), the surviving spouse can petition the court for the mandatory award of up to \$30,000 of equity in such homestead property, in fee simple, exclusive of funeral expense, expenses of last sickness and administration expenses, and exclusive of liens against such property. The homestead property shall be exempt from any claims existing at the decedent's date of death, whether separate or community (except liens against such homestead property). RCW 11.52.020 and 11.52.016.

8. Award in Lieu of Homestead. Upon the death of either spouse, the surviving spouse could be entitled to an award in lieu of homestead of up to \$30,000 exclusive of funeral expenses, expenses of last sickness, and administration, and of liens on the property set off by the award. If the surviving spouse or minor children were entitled to \$30,000 or more in insurance or other property not subject to probate, this award is discretionary. RCW 11.52.010, 11.52.12 and 11.52.016.

9. Spousal Allowance During Probate Administration. Upon the death of either spouse, the survivor would be entitled to a reasonable allowance for his or her support and

maintenance during all or part of the time the decedent's estate is subject to the jurisdiction of the probate court. RCW 11.52.040.

10. Revocation of Pre-Marriage Will by Subsequent Marriage. If, after making a will, the maker marries and a spouse not mentioned in the will or otherwise provided for by the maker is living at the time of the maker's death, the will shall be deemed revoked as to such spouse. RCW 11.12.050. As a result, if a spouse makes no will after this marriage, the spouse shall be entitled to an intestate share of the decedent's estate, as discussed in Section 5 above. See *Estate of Burmeister*, 124 Wn.2d 282 (1994).

11. Right to Administer Community Property. Regardless of whom the decedent's will names as personal representative, the surviving spouse has the right to administer the community property, if he or she applies for appointment within 40 days after the death of the deceased spouse. If anyone else petitions for appointment as personal representative of the deceased spouse's estate within 40 days after the deceased spouse's death, the surviving spouse must be given notice of such petition. RCW 11.28.030.

12. Other Property Rights. On the death of either spouse, the survivor would be entitled to such other and further rights in and to the property and estate of the decedent as are provided by any statutes of the state of Washington which are not hereinabove referred to.

13. Failure to Observe Agreement. If the parties fail to observe a marital property agreement, by doing such things as commingling property, or other actions inconsistent with the agreement, a court may find that the parties abandoned or rescinded the agreement. See *In re the Marriage of Fox*, 58 Wn. App. 935 (Div. 3, 1990).

14. Income Tax Basis Step-Up. Under Section 1014 of the Internal Revenue Code of 1986, as amended, generally the entire community receives a "step-up" or "step-down" in basis to fair market value as of the date of death (or the alternative valuation date, if applicable) for federal income tax purposes on the death of the first spouse to die, not just on the decedent's one-half interest in the community. In contrast, if separate property, only the decedent's interest in separate property receives a step-up or step-down in basis at the decedent's death.

15. Qualified Plans. Under federal law, certain spousal annuity and other provisions added to the Employee Retirement Income Security Act of 1974 by the Retirement Equity Act of 1984 are designed to protect the non-participant spouse's rights under a qualified retirement plan. Basically, these rules require that, unless the non-participant spouse executes appropriate waivers, the non-participant spouse must be the beneficiary of the participant's account and the participant's account under certain types of plans must be paid in the form of a joint- and survivor annuity. The spousal annuity rules do not apply to IRAs.

SCHEDULE A
PRENUPTIAL AGREEMENT
Separate Property and Liabilities of Husband

<u>Description</u>	<u>Location</u>	<u>Approximate Fair Market Value</u>
*All Ownership interests in BDC Preston Properties One Limited Partnership And Bernard Development Company Holdings in Preston (an unincorporated community in unincorporated King County. Approximately 20 acres of land and 300,000 SF Of office/industrial/manufacturing/assembly/shop technology building space, fully leased	I-90/Preston Industrial Park See attached legal description, site plan and property sketch	\$31,500,000, Outstanding Mortgage balance of \$15,412,300 as of 6/15/00
South I-90 Limited Partnership and I-90 South Inc. (General Partner) Lots 1 & 2 located in Preston vacant land, zoned industrial, vested for building permit, Building 4 working drawings complete	I-90/Preston Industrial Park See attached legal description	\$2,400,000
Bernard Farm land Approximately 6 acres Owned in its entirety by Bernard Development Company Zoned AR-35	Near Fall City, an unincorporated Rural Town located in Unincorporated King County See attached legal description and property sketch	\$ 130,000.
Fall City Landing land Approximately 6 acres Zoned Community Business Owned in its entirety by **South I-90 Limited Partnership and I-90 South, Inc, its General Partner	Located in the Rural Town of Fall City, unincorporated King County See attached legal description and property sketch	\$1,700,000
Home at 1421 Shenandoah Drive East	Located in the City of Seattle Residential Community of Broadmoor	\$1,200,000
Other Real Estate Partnership Interests St. James-NC Homes (section 8 Limited Partnership	North Carolina	\$84,000 (at cost)
Cabot, Cabot & Forbes Chicago Partners Limited Partnership (partial interest)	Limited partnership ownership interest in various properties Located nation-wide	\$100,000 (at cost)

Continued on next two pages

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SCHEDULE A
 PRENUPTIAL AGREEMENT
 Separate Property and Liabilities of Husband
 Page 2 of 3

SCHEDULE A (continued)
 PRENUPTIAL AGREEMENT
 Separate Property and Liabilities of Husband

<u>Description</u>	<u>Location</u>	<u>Approximate Fair Market Value</u>
Furniture, fixtures & Equipment of Bernard Development Company	Office at 8150 304 th Avenue SE Preston, WA 98050	\$133,600
Stock Portfolios		
Dain Rauscher-J. Thomas Bernard IRA Account	Held by Dain Rauscher Stock Brokerage Company Bellevue (Sally Gray)	\$33,550
Dain Rauscher - J. Thomas Bernard Personal stock account # 0193	Held by Dain Rauscher Stock Brokerage Company Bellevue (Sally Gray)	\$91,448
FUNDGUARD (Managed Portfolio, Mutual Funds, Bonds & Cash Instruments Balanced Fund) Account held in the name of J. Thomas Bernard	National Account Local Manager Andy Mirkovich Portfolio Strategies, Inc. 10655 N.E. 4 th Ave.. Suite 400 Bellevue, WA 98004	\$1,183,754
Insurance Policies		
Dain Rauscher (cash value)		\$16,972.
Northwestern Mutual Life Insurance Co. Policies		\$64,936.
New England Insurance Company		\$71,886.
Traveler's Insurance Company		\$ 6,100.
Inuit and Indian Artwork	Located at home, 1421 Shenandoah Drive East Seattle, WA. 98112	\$ 350,000
Jewelry	Same Home	\$ 50,000
Furniture, Fixtures, Appliances, Rugs & Antiques	Same Home	\$300,000
Automobiles and Boston Whaler boat and trailer	Located at Broadmoor home and at beach	\$121,000.

SCHEDULE A
 PRENUPTIAL AGREEMENT
 Separate Property and Liabilities of Husband
 Page 3 of 3

Bank Accounts of Bernard Development
 Company (by ownership, assets of JTB)

BDC Preston Properties One Limited
 Partnership & Bernard Development
 Company accounts

Bank of America \$ 1,303.

South I-90 Limited Partnership
 Market rate savings & savings accounts

Company Account
 Bank of America \$63,173.

BDC Preston One Limited Partnership
 Dain Rauscher Account #1101114195588

Dain Rauscher \$323,738.
 (Sally Gray/Bellevue)

Personal Bank Accounts

Personal Bank Accounts \$45,000.
 At Bank of America,
 Wells Fargo Bank
 and U.S. Bank

Bank of America Master
 Account # 2178 \$549,525.

Personal Credit Card Liabilities (estimated)

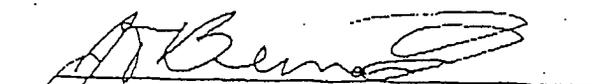
Master Card, Visa, Wells Fargo
 American Express \$8,000. (liability)

*BDC Preston Properties One Limited Partnership is owned 80% by its Limited Partner, J. Thomas Bernard and 20% by its General Partner, Bernard Development Company (a Washington Corporation). J. Thomas Bernard is the sole owner of Bernard Development Company, a Washington Corporation.

**South I-90 Limited Partnership is owned 90% by its Limited Partner, J. Thomas Bernard and 10% by its General Partner, I-90 South, Inc., its General Partner (a Washington Corporation). J. Thomas Bernard is the sole owner of I-90 South, Inc, a Washington Corporation.

Total Assets (Listed Above)	\$40,519,985.
Total Liabilities (Listed Above)	(15,420,300.)
NET WORTH	\$25,099,685.

PREPARED July 5, 2000


 J. Thomas Bernard



SCHEDULE A
PRENUPTIAL AGREEMENT

PERSONAL REVENUE

<u>Description</u>	<u>Amount</u>
<u>J. Thomas Bernard</u>	
Approximate gross personal revenue for 1999	\$544,389.33
Estimated gross personal revenue for 2000	350,000.00

This is a draw from assets owned, for both living expenses, investment purposes, gifts and contributions, not salary or bonus. If J. Thomas Bernard did draw a salary for his work in managing the various entities in which he has an ownership interest, it is best estimated this would be a gross amount of \$100,000/year.

<u>Gloria L. Whitehead</u>	
Approximate gross income for 1999	51,500.08
Estimated gross income for 1999	60,000.00

LEGAL DESCRIPTION
I-90/PRESTON INDUSTRIAL PARK
Building 1, 2, 3 site ±20 ACRES

NORTHERN PACIFIC RAILWAY COMPANY RIGHT-OF-WAY AND THE TRUE POINT OF BEGINNING FOR THIS DESCRIPTION;
THENCE CONTINUING SOUTH $88^{\circ}28'26''$ EAST ALONG THE NORTHERLY MARGIN OF SAID EASEMENT 56.27 FEET;
THENCE NORTH $02^{\circ}24'17''$ EAST PARALLEL WITH THE EASTERLY MARGIN OF SAID FORMER NORTHERN PACIFIC RAILWAY COMPANY RIGHT-OF-WAY 28.85 FEET TO A POINT OF TANGENT CURVATURE CONCAVE TO THE WEST, HAVING A RADIUS OF 75.00 FEET;
THENCE NORTHWESTERLY ALONG SAID CURVE THROUGH AN ARC OF $25^{\circ}58'38''$ AN ARC LENGTH OF 34.00 FEET TO A POINT OF REVERSE CURVATURE WITH A CURVE OF RADIUS 185.00 FEET;
THENCE NORTHERLY ALONG SAID CURVE THROUGH AN ARC OF $25^{\circ}58'38''$, AN ARC LENGTH OF 83.88 FEET TO THE EASTERLY MARGIN OF SAID FORMER RAILWAY RIGHT-OF-WAY;
THENCE NORTH $02^{\circ}24'17''$ EAST ALONG SAID EASTERLY MARGIN 228.68 FEET TO A POINT OF TANGENT CURVATURE CONCAVE TO THE EAST HAVING A RADIUS OF 180.00 FEET;
THENCE NORTHERLY ALONG SAID CURVE THROUGH AN ARC OF $42^{\circ}11'38''$, AN ARC LENGTH OF 132.56 FEET TO THE SOUTHERLY LINE OF THE NORTH 23 ACRES OF THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF SAID SECTION 32;
THENCE NORTH $88^{\circ}35'57''$ WEST ALONG SAID LINE 76.66 FEET TO THE WEST LINE OF THE EAST 30 FEET OF SAID FORMER RAILWAY RIGHT-OF-WAY;
THENCE SOUTH $02^{\circ}24'17''$ WEST ALONG SAID WEST LINE 491.83 FEET TO THE TRUE POINT OF BEGINNING;

ALSO, OVER THE NORTH 100 FEET OF THE WEST 20 FEET OF THAT PORTION OF THE FORMER NORTHERN PACIFIC RAILWAY COMPANY RIGHT-OF-WAY AS IT WAS DEEDED OCTOBER 10, 1891, IN BOOK 130 OF DEEDS AT PAGE 567, RECORDS OF KING COUNTY, WASHINGTON, LYING SOUTHERLY OF THE NORTH 23 ACRES OF THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 32, TOWNSHIP 24 NORTH, RANGE 7 EAST OF THE WILLAMETTE MERIDIAN IN KING COUNTY, WASHINGTON;

ALSO, OVER THE WEST 76.27 FEET OF THE SOUTH 30 FEET OF LOT 1 AND THE WEST 76.27 FEET OF THE NORTH 30 FEET OF LOT 3; ALL IN SHORT PLAT NO. 787033, RECORDED UNDER RECEIVING NO. 8810180798, IN THE NORTHEAST QUARTER OF SECTION 32, TOWNSHIP 24 NORTH, RANGE 7 EAST, W.M.; IN KING COUNTY, WASHINGTON.

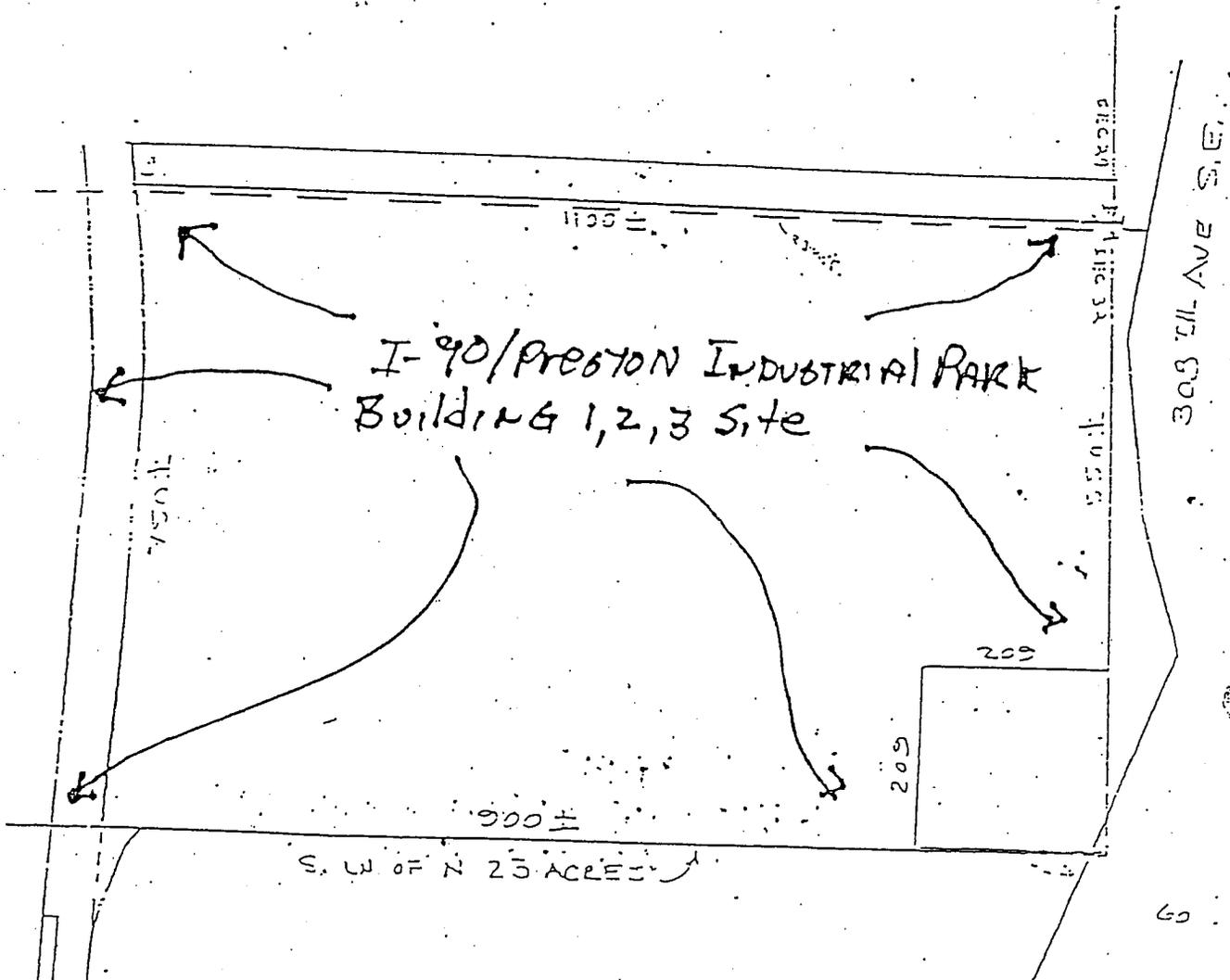
- SEE ATTACHED SKETCHES
ON PAGES 2 & 3

JTB

I-40/PRESTON INDUSTRIAL PARK

The Company has not surveyed the premises described in A-397560

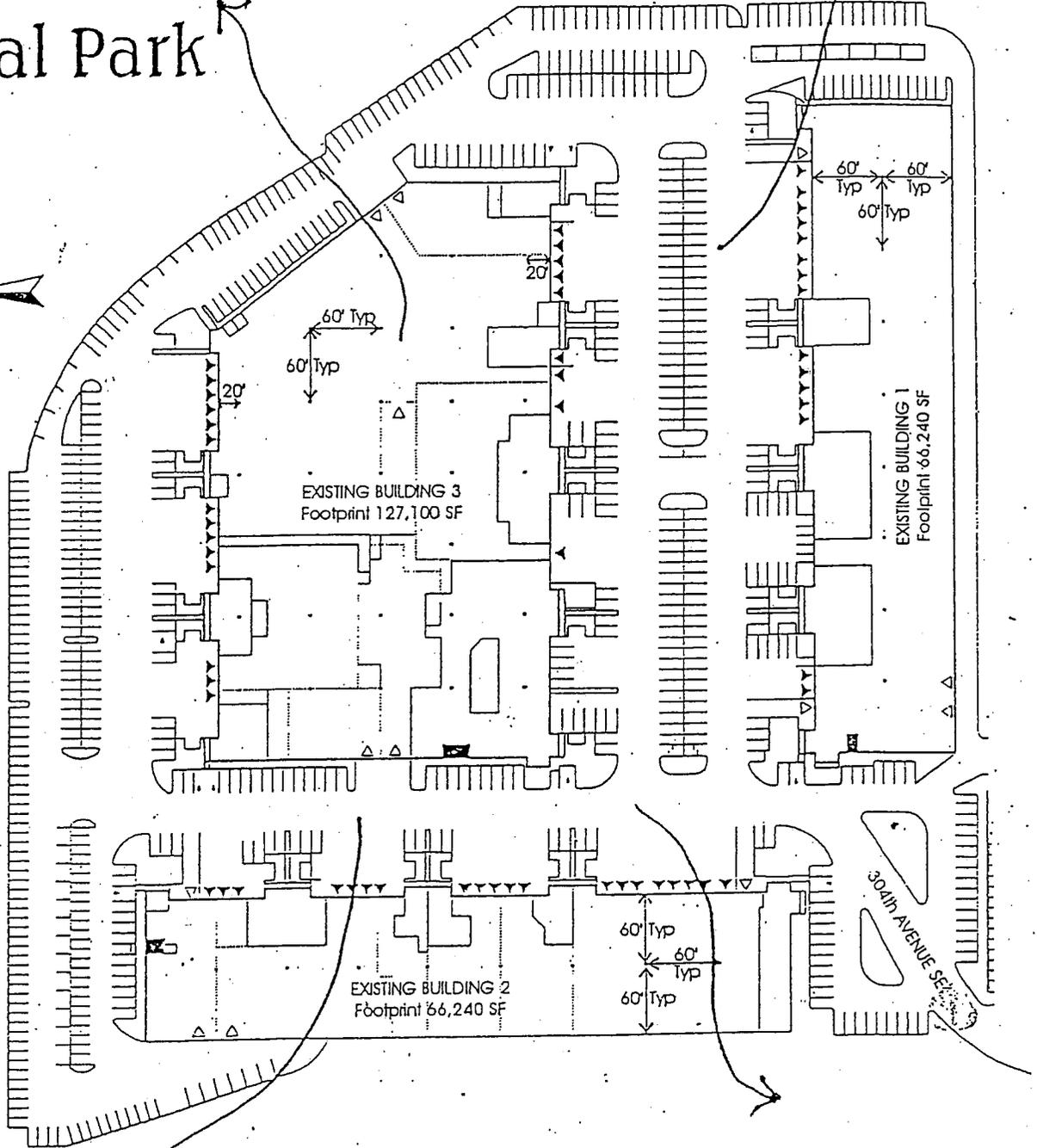
The sketch below is furnished without charge solely for the purpose of assisting in locating said premises and the Company assumes no liability as to the validity, location, or ownership of any easement or other matter shown thereon, nor for the inaccuracies therein, including the accurate location of boundaries, including water boundaries. This sketch does not purport to show all highways, roads and easements adjoining or affecting said premises; nor is it a part or modification of the report, commitment, policy or other title evidence to which it may be attached.



ATB

PROPERTY SKETCH
BUILDING 1, 2, 3 SITE

90/Preston
Industrial Park



EXISTING BUILDING 3
Footprint 127,100 SF

EXISTING BUILDING 1
Footprint 66,240 SF

EXISTING BUILDING 2
Footprint 66,240 SF

SOUTH AVENUE SE

I-90
EXIT
22
SE 82nd St

LEGAL
DESCRIPTION
BERNARD FARM
PROPERTY

ORDER NO. 356829-3

THE LAND REFERRED TO HEREIN IS DESCRIBED AS FOLLOWS:

THAT PORTION OF GOVERNMENT LOT 1 IN SECTION 15, TOWNSHIP 24 NORTH, RANGE 7 EAST, W.M., IN KING COUNTY, WASHINGTON, LYING NORTH OF SOUTHEAST 41ST STREET AND LYING EASTERLY OF NEAL ROAD, EXCEPT THAT PORTION THEREOF LYING WITHIN OR EASTERLY OF SECONDARY STATE HIGHWAY #15-B; EXCEPT THE NORTH 300.

SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

THE DESCRIPTION CAN BE ABBREVIATED AS SUGGESTED BELOW IF NECESSARY TO MEET STANDARDIZATION REQUIREMENTS.

SECTION 15 TOWNSHIP 24 RANGE 7 NE QUARTER NE QUARTER.

- SEE ATTACHED SKETCH ON PAGE 2

ATB

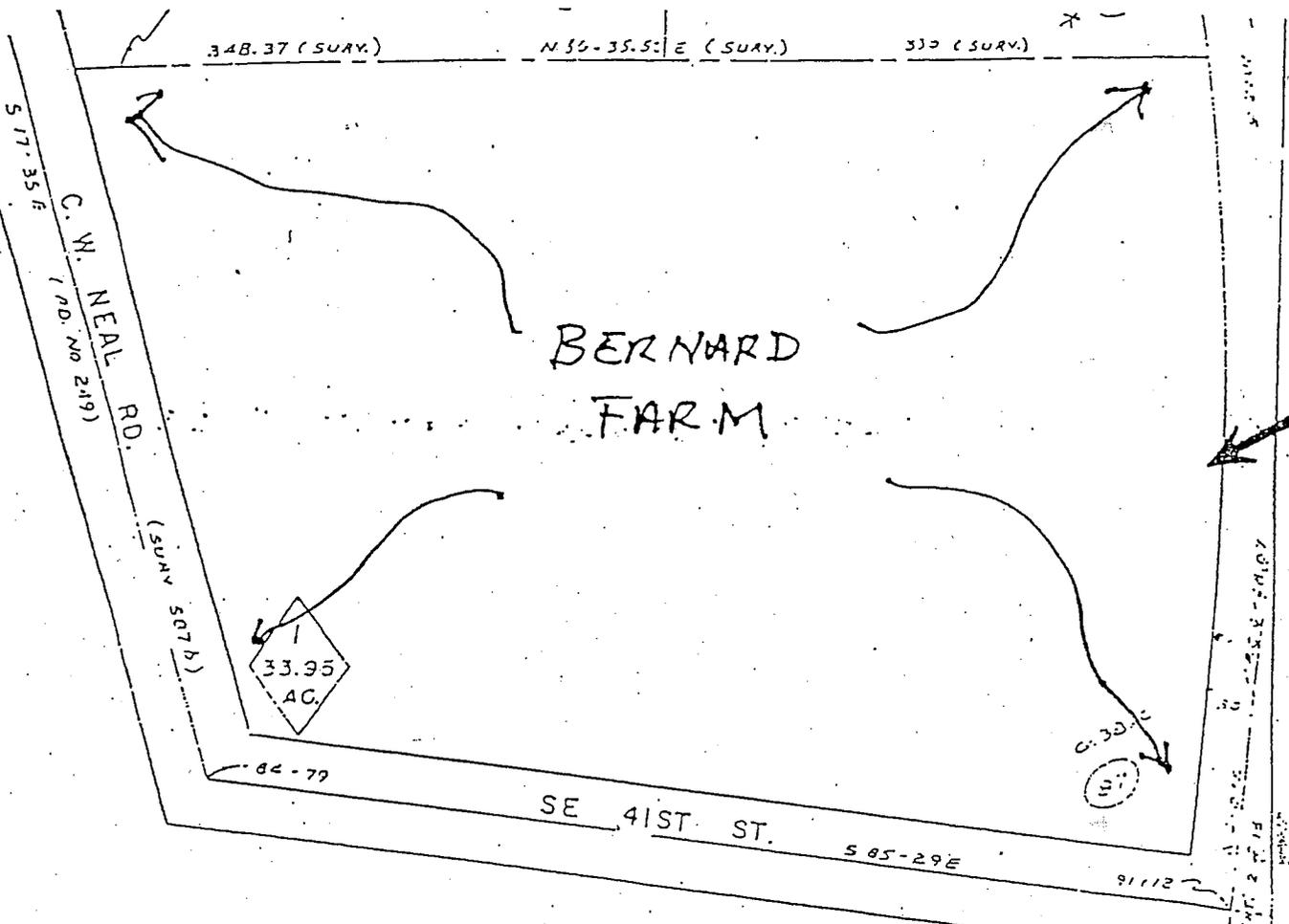
DEKNAKU TITLUM / PROPERTY ORDER NO. 556529-3

NOTICE

This Sketch is furnished as a courtesy only by First American Title Insurance Company and it is **NOT** a part of any title commitment or policy of title insurance.

This sketch is furnished solely for the purpose of assisting in locating the premises and does not purport to show all highways, roads, or easements affecting the property. No reliance should be placed upon this sketch for the location or dimensions of the property and no liability is assumed for the correctness thereof.

SEC 15 TWP 24 RNG 7



BERNARD FARM
PROPERTY SKETCH
PAGE 2 OF 2

R. 203 (S.S. HWY. NO. 15-B)
CITY TO DUVALL & DUVALL NORTH
APPROVAL 3-12-1934
REV. 11-8-1934

ART

BUILDING A SITE LEGAL DESCRIPTION & SITE SKETCH

SITUATED IN THE STATE OF WASHINGTON, COUNTY OF KING AND IS DESCRIBED AS FOLLOWS:

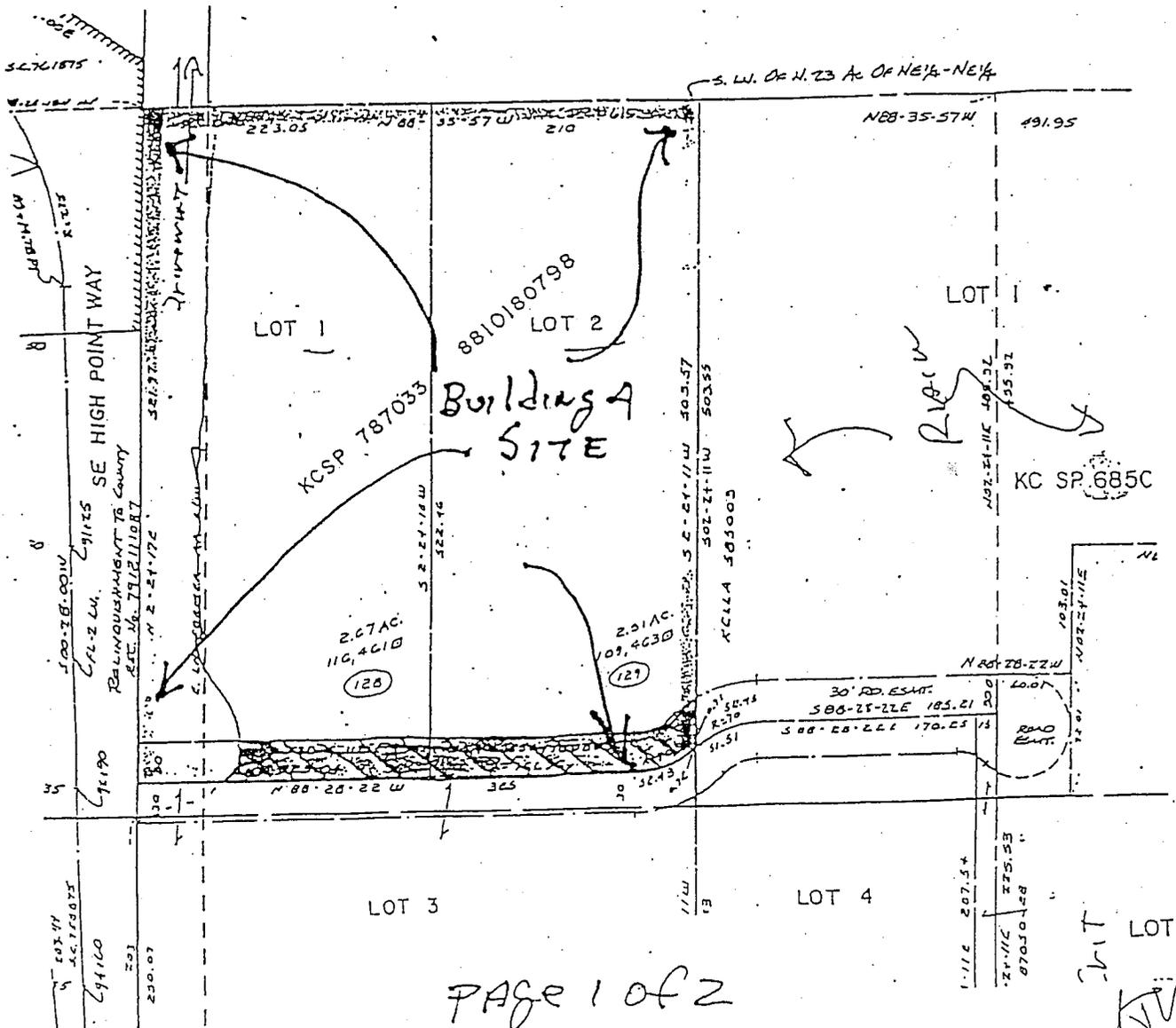
PARCEL A:

LOTS 1 AND 2 OF KING COUNTY SHORT PLAT NO. 787033, RECORDED UNDER RECORDING NO. 8810180798, RECORDS OF KING COUNTY, WASHINGTON.

PARCEL B:

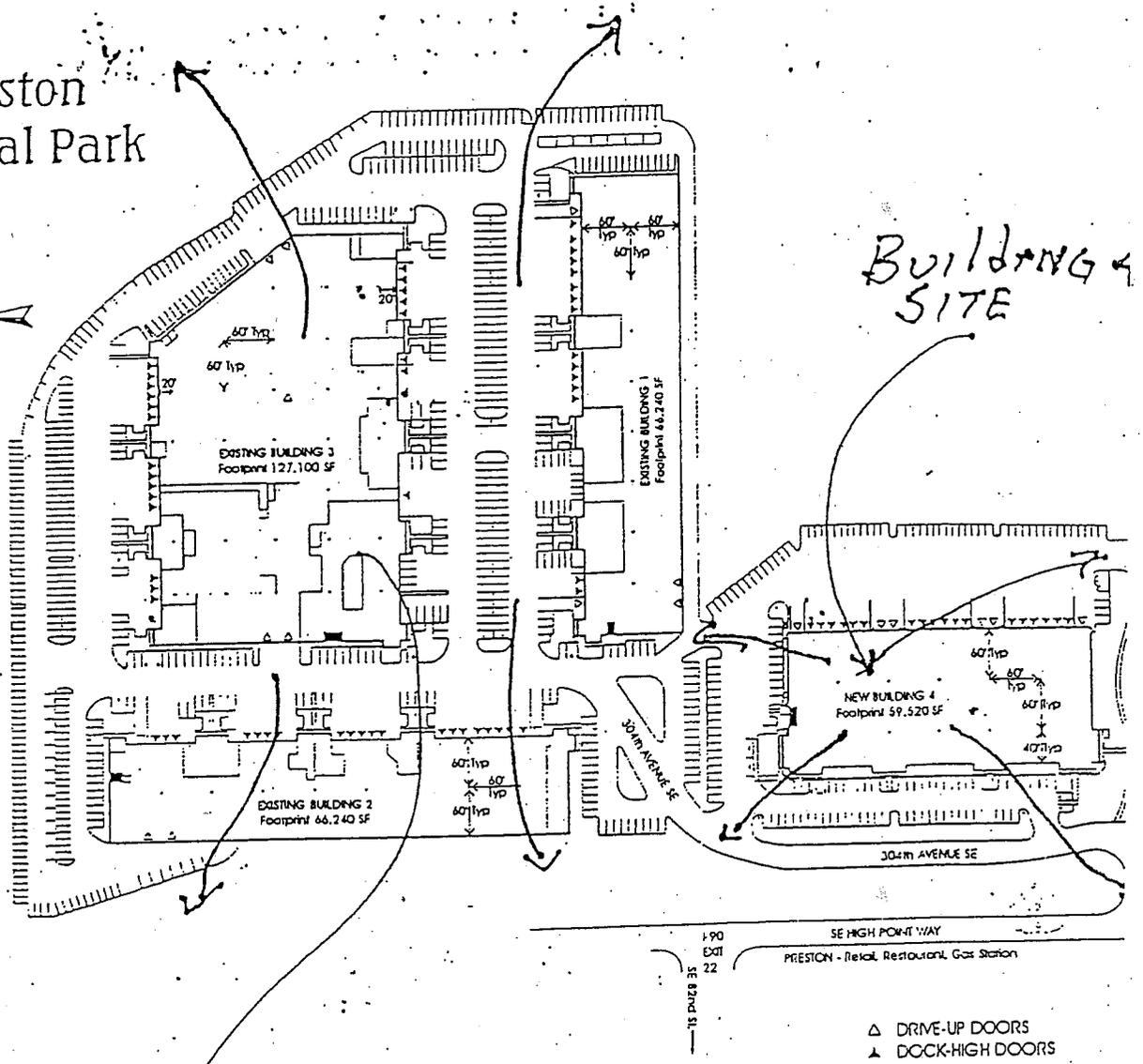
AN EASEMENT OF INGRESS AND EGRESS AS DELINEATED ON THE FACE OF SAID SHORT PLAT;
EXCEPT THAT PORTION LYING WITHIN THE ABOVE DESCRIBED MAIN TRACT.

SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.



BUILDING 4 SITE SKETCH & LEGAL

I-90/Preston
Industrial Park



Building 4
SITE

Building 1,2,3 SITE

AT

LEGAL DESCRIPTION

THE LAND REFERRED TO HEREIN IS DESCRIBED AS FOLLOWS:

• THAT PORTION OF GOVERNMENT LOT 3, SECTION 14, AND GOVERNMENT LOT 3, SECTION 15, TOWNSHIP 24 NORTH, RANGE 7 EAST, W.M., IN KING COUNTY, WASHINGTON, LYING WEST OF THE RAGING RIVER; NORTH OF THE PLAT OF PETERSON'S ADDITION TO FALL CITY, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 28 OF PLATS, PAGE 7, RECORDS OF KING COUNTY, WASHINGTON; AND LYING EAST OF SUNSET HIGHWAY; EXCEPT THAT PORTION CONDEMNED BY THE STATE OF WASHINGTON FOR SR202 IN KING COUNTY SUPERIOR COURT CAUSE NO. 860995.

SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

THE DESCRIPTION CAN BE ABBREVIATED AS SUGGESTED BELOW IF NECESSARY TO MEET STANDARDIZATION REQUIREMENTS. THE FULL TEXT OF THE DESCRIPTION MUST APPEAR IN THE DOCUMENT(S) TO BE INSURED.

SECTION 14, TOWNSHIP 24, RANGE 7, SW QUARTER NW QUARTER;

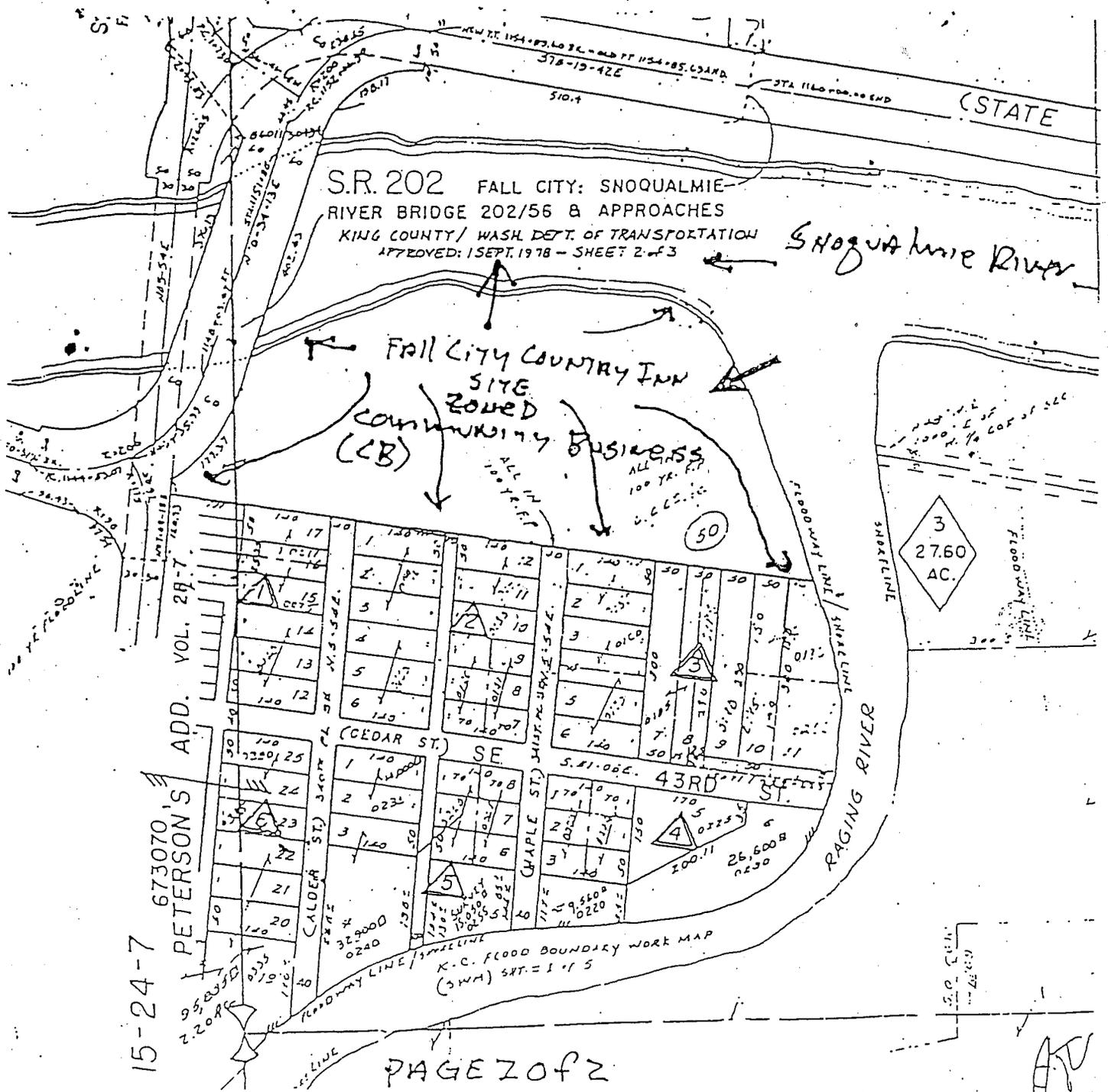
SECTION 15, TOWNSHIP 24, RANGE 7, SE QUARTER NE QUARTER

Property SKETCH

NOTICE

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— Bernard Beach/Cahana Easement Site —

This is the 20' x 22' Site Shown on the Attached Sketch, Lot 61.
Access easements for Tram and stairs cross Lot 61-A and Lot 60.
Benefits Broadmoor Property.

The land referred to in the forgoing Agreement as the Broadmoor Property is situated in the County of King, State of Washington, and described as follows:

Beginning at the northwest corner of Section 27, Township 25 North, Range 4 East, Willamette Meridian, in King County, Washington, and running thence south $89^{\circ}34'47''$ east along the north line of said Section 27, 224.32 feet; thence south 155.77 feet to the southwest corner of the tract herein described and the TRUE POINT OF BEGINNING;

Running thence east 127.26 feet;;

thence north $3^{\circ}54'10''$ west 64.06 feet;

thence south $86^{\circ}05'50''$ west 120.92 feet;

thence south $2^{\circ}19'20''$ west 55.70 feet to the TRUE POINT OF BEGINNING;

ALSO KNOWN AS Tract 306 of the unincorporated plat of Broadmoor, according to the Certificate of Survey recorded in Volume 1251 of Deeds, Page 121, records of King County, Washington

The land referred to in the forgoing Agreement as Lot 61 is situated in the County of King, State of Washington, and described as follows:

Tract 61, Seacoma Beach Division No. 2, according to the Plat thereof recorded in Volume 15 of Plats, page 94, records of King County, Washington;

TOGETHER WITH tidelands of the second class, as conveyed by the State of Washington, lying above the line of extreme low tide, situate in front of, adjacent to, or abutting thereon;

EXCEPT from said tidelands such part as may be included in Seacoma Boulevard;

Situate in the County of King, State of Washington.

The land referred to in the forgoing Agreement as Lot 60-A is situated in the County of King, State of Washington, and described as follows:

Tract 60-A, Seacoma Beach Division No. 2, according to the Plat thereof recorded in Volume 15 of Plats, page 94, records of King County, Washington;

Situate in the County of King, State of Washington.

The land referred to in the forgoing Agreement as Lot 61-A is situated in the County of King, State of Washington, and described as follows:

Tract 61-A, Seacoma Beach Division No. 2, according to the Plat thereof recorded in Volume 15 of Plats, page 94, records of King County, Washington;

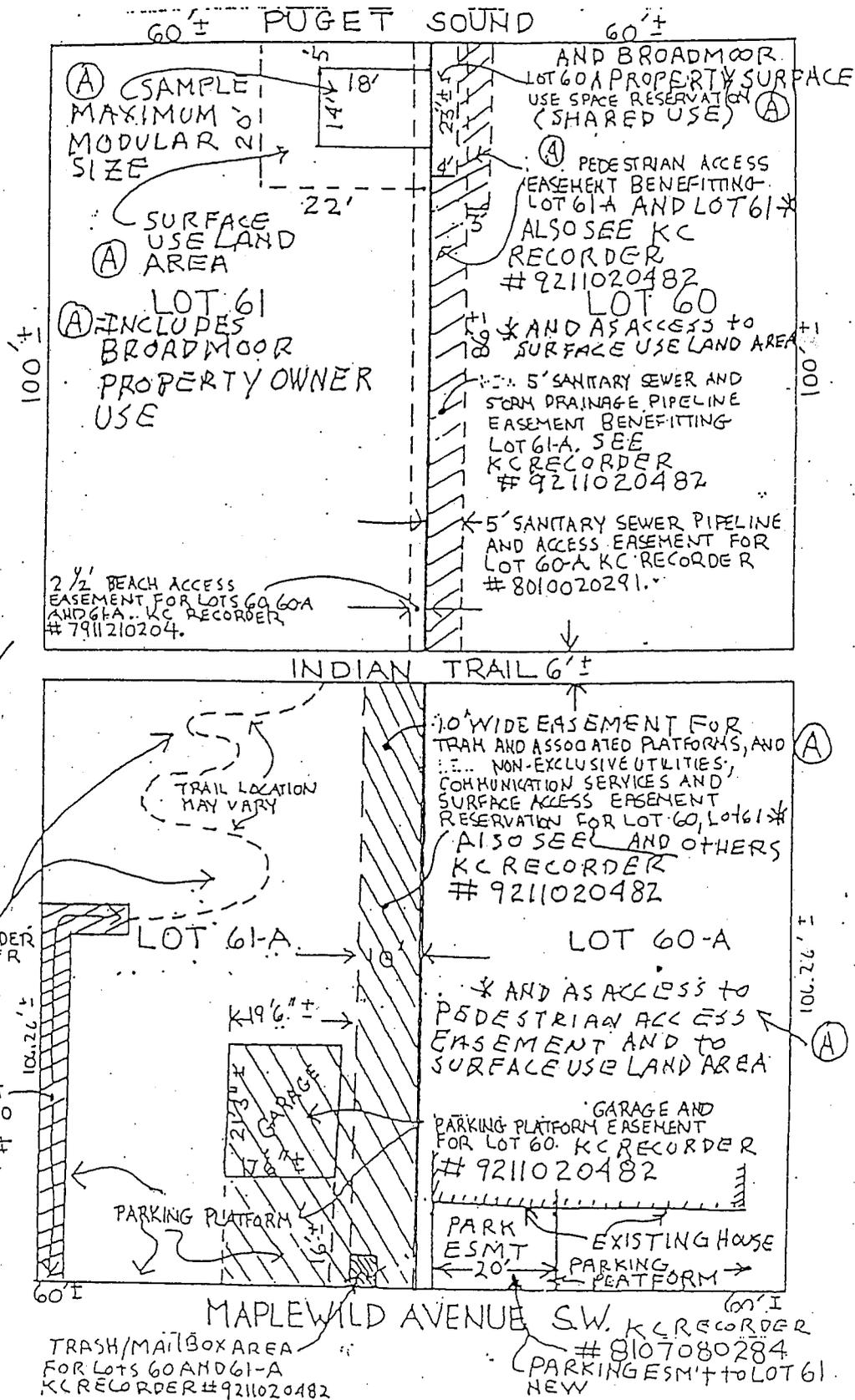
Situate in the County of King, State of Washington.

/ PAGE 1 of 2

AB

BERNARD BEACH/CABFINA SITE EASEMENT BENEFITS BERNARD BROADMOOR HOME SITE

SKETCH NOT TO SCALE.
 MAY 15, 2000 J.T.B.



ATL

SCHEDULE B
PRENUPTIAL AGREEMENT

(1)

Blaine J. Whitehead

Personal Financial Statement

6-30-00

Assets

Cash
(Bank of Am. Checking / Savings) 2,500

Auto - 97 Honda Accord 8,000

Furnishings, clothing, jewelry 40,000
30,000 Working items
5,000 fur coat
5,000 Personal jewelry

Total Assets \$ 50,500

Liabilities

Loan Payable to Thomas Brown (6,000)

Misc installment accounts (6,464)

Total Liabilities (12,464)

Net Assets 38,036

SS# 542-54-6548

DOB: 02/14/49

[Handwritten Signature]

Bank of America / USA m/c	2,500
Texas # 74-180-2080-1	465
Discord # 6011 0074 9200 1636	1,260
Discord / Transit # 6011 3005 8850 3001	463
First USA # 4417 1222 0848 4459	384
First USA / United # 4288 5230 1815 1957	372
	<u>6,464.00</u>

American State Insurance
 Life Insurance Policy 01-00627555
 no cash value
 \$100,000 payable upon death
 to Crystal Whitehead and
 Marcellus Whitehead

[Handwritten signature]