

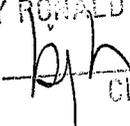
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SUPREME COURT
STATE OF WASHINGTON

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NO. 80348-0

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON


CLERK

In re the Marriage of:

GLORIA BERNARD,

Respondents,

v.

J. THOMAS BERNARD,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

This appeal fundamentally asks whether prenuptial agreements are still “favored” – or even possible – in Washington. Where, as here, two parties contemplate a second marriage later in life and one of them has substantial separate property, the “favored” party ought to be able to vouchsafe his or her property to a child by a deceased former spouse via a prenuptial agreement. But when examined under the marital-dissolution microscope, this inevitably will seem “unfair” to the “disfavored” second spouse.

Thus, asking whether a prenuptial agreement is “fair” to the second spouse is unsound in principle and unworkable in fact. Similarly improper is asking not just whether a prospective spouse had independent counsel, but also whether her counsel provided “competent” advice. Such counsel must be independent, so one betrothed cannot know precisely what advice the other is receiving, much less judge its efficacy.

Here, the prospective spouse had full knowledge of her fiancé’s property and independent counsel, so the Court should enforce the prenuptial agreement. *A fortiori*, the postnuptial agreement signed on advice of counsel much later must be binding. The Court should reverse and remand for arbitration.

RELEVANT FACTS

The parties' briefs and the appellate opinion discuss the facts at length. But a few facts are particularly salient to the arguments in this supplemental brief. They bear emphasis here.

A. Thomas came into the marriage a 57-year-old recently bereaved and very wealthy widower, while Gloria came in a 50+ divorcée with \$8,000 and two college-aged children.

Thomas was 57 years old when he married Gloria on July 8, 2000.¹ RP 9/8am 10; CP 3. He previously had been married to Jackie Bernard for 29 years. CP 10. Jackie supported Thomas in his very successful business ventures, working from home. RP 9/7 152-53. Jackie and Thomas had one son, Jamie. RP 9/6 38-39. Jackie died of cancer in April 1998. CP 200. Jamie and a niece are Thomas's only surviving blood relatives. RP 9/7 179.

Gloria was over 50 years old when she married Thomas. CP 3-4. She was a divorcée with two college-age children. RP 9/6 95; RP 9/12 20. She held a BS from the University of Oregon and an MBA from City University. RP 9/6 29. She worked for over 20 years in property development and management, was conversant

¹ First names are used for clarity and convenience only.

with business law, had worked with attorneys, and held a broker's license. RP 9/6 30-32; RP 9/7 15, 165.

Gloria began working as Thomas' assistant at Bernard Development Company in March 1994. CP 1814 (F/F 1). She gradually worked up to handling many complex matters. RP 9/6 37-38. She became vice president of Bernard Development in 1998, making \$60,000 per year. RP 9/7 155-56; RP 9/12 21.

B. Thomas asked Gloria to marry him about one year after his wife of 29 years died of cancer, and within five minutes they had agreed to have a prenuptial agreement in order to protect Thomas' son by his first marriage.

Thomas and Gloria began dating about six months after Jackie died. RP 9/7 156. She hesitated at first because she feared that dating her boss might jeopardize her lucrative job. RP 9/12 11. Thomas assured Gloria that he would continue to pay her salary until she found another job if it did not work out. *Id.* Thomas proposed in April 1999, about a year after Jackie died. RP 9/7 156.

When Thomas asked Gloria to marry him, within five minutes they had agreed to have a prenuptial agreement to protect Jamie:

Q: And in the engagement proposal or discussion was the issue of a prenuptial agreement raised?

...

A: [Gloria]: It was a very short, generic type of a conversation. He said something very similar to, "I'm

going to have to have a prenuptial because of the estate that Jackie and I set up for Jamie,” and I said, “That’s fine, I understand.”

A: [Gloria]: . . . I’m not really sure, but I believe I might [also] have said something to the effect, [“]I know that you have certain assets set aside for Jamie and I wouldn’t ever try to take those away. That makes sense that you need to have something so those always stay there for Jamie[”]

RP 9/6 38-39; *see also* RP 9/7 156 (Thomas sought a prenuptial agreement within five minutes of proposing); CP 1814 (F/F 4).

To begin work on the prenuptial agreement, Thomas called his long-time business attorney, Richard E. Keefe, in late January 2000. RP 9/7 85. Keefe provided extensive materials explaining prenuptials, which Thomas and Gloria read over. *Id.*; RP 9/7 180; Ex 112, pp. 392-425. In May 2000, Keefe prepared a detailed checklist with 13 points. RP 9/7 96; Ex 140.² Keefe specifically noted that he hoped to have a draft within a week (¶ 9) and that by then – “or sooner if Gloria desires” – she should have counsel (¶ 11). Ex 140. In a postscript, Keefe included the names of three experienced counsel for Gloria: Rita Bender (Skellenger Bender); Bill Kinzel (Kinzel, Allen); and Tom Hamerlink (Hamerlink & Besk). *Id.* Keefe also noted that the parties should sign the agreement “at

² A copy of Keefe’s checklist (Ex 140) is Appendix A to this brief.

least several weeks before the happy day.” *Id.*, ¶ 13. Thomas gave Gloria a copy of this document. RP 9/7 167.

At trial, however, Gloria claimed she never saw the checklist. RP 9/12 31. Thomas said Gloria refused to hire the independent counsel suggested by Keefe. RP 9/8am 36-37. The trial court found that Thomas “repeatedly informed wife that she needed to find independent counsel” CP 1814 (F/F 6).

C. Gloria delayed until three days before the wedding in obtaining independent counsel, who identified five broad concerns and told her not to sign the agreement.

It is uncontested that Thomas urged Gloria to seek counsel when she wished. The trial court found that Gloria “took no action to find an attorney for several months, in part because she believed that she needed a draft agreement to bring to an attorney.” CP 1814 (F/F 7). Gloria received a draft on June 20, 2000 (*id.*, F/F 8) but did not start looking for an attorney until the end of June. RP 9/6 67. She did not speak with him until July 5, three days before the wedding. RP 9/6 81; CP 1815 (F/F 11). The trial court found that this was too late for Gloria to receive adequate advice. CP 1816 (F/F 22). It also found that Gloria “contributed to the procedural defects.” CP 1815 (F/F 24).

Gloria's attorney, Marshall Gerhing, "made every effort to advise wife of the problems of the proposed agreement" CP 1816 (F/F 22). Gerhing testified that he fully advised Gloria about what was wrong with the agreement, but she did not seem very interested and told him to just take care of it. RP 9/7 36. His letter to her identifies five broad areas as problems. Ex 102.³ Gloria acknowledged that she understood this letter and the agreement well enough to know that Gehring advised her not to sign it and that she did not like it, but she signed it anyway. RP 9/6 46-47.

Specifically, Gehring's letter to Gloria identified several "provisions in the agreement that are unfavorable to you and which I recommend be changed." Ex 102 at 1. He made no financial analysis (*id.*) but Gloria has never argued that she had anything less than full knowledge of Thomas' financial affairs and assets. See, e.g., RP 9/7 157, 177-78. He told her that the agreement was fair for a short-term marriage (with a few exceptions discussed below and resolved in the subsequent amendment), but needed "some improvement" for the long term. Ex 102, at 1.

³ A copy of Gerhing's July 7, 2000 letter is Appendix B to this brief.

For the short term, Gehring's "few exceptions" were (a) restrictions on use of community property, which the amendment removed; (b) requirements that all of the wife's salary go into the community property account, which the amendment cut in half; and (c) provisions that the husband may use community funds to pay for life insurance benefiting his son, which the amendment changed. *Compare Ex 102 with Ex 104 (amendment)*.⁴

Gehring told Gloria that – if their marriage was long-term – then the agreement was not "fair" for five reasons: (a) Gloria's health and welfare needs must be accommodated if the marriage goes long-term or if Thomas should die first; (b) she should not waive her right to spousal support or maintenance; (c) she should be able to spend her community funds any way she wished; (d) Thomas should pay for his life insurance benefiting his son out of his separate funds; and (e) community debts should be community obligations, not separate obligations. Ex 102. Gehring gave Gloria concrete examples. *Id.* at 1-3. He told her not to sign the agreement unless these problems were fixed and, if that was not

⁴ Ex 104 is Appendix D to this brief.

practicable, then she should obtain an agreement to renegotiate these very broad issues after the wedding. *Id.* at 3.

D. The parties agreed to and did renegotiate counsel's broad concerns over a year after the wedding, and Gloria again signed the agreement with full understanding, freely and voluntarily.

The parties signed a "side agreement" on their wedding day, resolving two of Gerhing's concerns, and preserving the others for further negotiation. Ex 103.⁵ The parties resolved Gehring's major concerns about protecting Gloria's long-term health and welfare and spousal maintenance by adding an additional \$800,000 (\$80,000 per year on parties' the sixth through tenth anniversaries and \$400,000 at death) to what Gloria would already receive under the prenuptial agreement, which included \$100,000 cash, the continued use of Thomas' home for a year, her accumulated assets, the benefits of the marriage (including having all her living expenses paid and her children's college paid for, as discussed below), and half of the remaining community property accounts. *Id.*

Although the side agreement had a negotiation deadline of October 7, 2000, the trial court found that the deadline "was abandoned." CP 1816 (F/F 29). Ultimately, the parties agreed to

⁵ Ex 103 is Appendix C to this brief.

amend the prenuptial on August 28, 2001. App. D, Ex 104. The amendment recognizes that since Thomas will expend "considerable time and energy" managing and overseeing his separate property that will not be accountable to the community, he will (a) provide and maintain the family residence and living expenses from his separate property (including such things as food, utilities, telephone, bedding, towels, plants "and the like"); (b) fund all household and joint living accounts; and (c) make additional provisions for Gloria in the event of divorce or his death. *Id.* at 2-3. Gloria would place half of her yearly salary, and Thomas would place at least \$100,000 per year, into the community account, and each spouse would have an unlimited right to use half of the community account at will. *Id.* at 3.

Gloria signed the amendment, acknowledging it as "her free and voluntary act." *Id.* at 5. Gehring also certified that he had consulted with Gloria, that he had "fully advised her," and that Gloria had "acknowledged her full and complete understanding of the legal consequences and of the terms and provisions of" the amendment. *Id.* at 6.

E. Gloria received very substantial benefits during the marriage, but left after only four years and found a new job paying nearly \$85,000 a year.

During the four-year marriage, Thomas paid for her two children's college educations, including \$75,000 in living expenses and a summer trip for all to Cambridge (where her daughter spent a summer semester). RP 9/8am, 22-24, 56. Thomas spent more than \$225,000 to pay for their college. *Id.* He wrote "gift" on every check for their college. *Id.* at 56.

The parties traveled to California, Hawaii, Thailand, France and Portugal. RP 9/8am 23-24, 56-58. At the end, Gloria encouraged Thomas and his son Jamie to travel to Italy, telling Jamie that she thought Thomas had Alzheimers, so this could be their last trip together. RP 9/8am 64. While Thomas and Jamie were away, Gloria moved out, later filing for divorce. *Id.*

About a month before this, and despite Thomas' generosity, Gloria obtained a salary increase to \$80,000 a year. RP 9/12 19. Even after she left him, Thomas agreed to an order continuing her salary (at \$6,666 per month) through June 2005. CP 24-25. Gloria obtained an extension of this order through January 2006. CP 1116, 1285. She then obtained a job in February 2006, which pays her close to \$85,000 per year. CP 2209.

ARGUMENT

Prenuptial agreements should be “favored” in Washington. See *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972). But prenuptial litigation has become a morass of excuses and dodges designed to renege on valid agreements.⁶ This Court should end such needless, oppressive litigation.

A. The “fairness” prong is unsound in principle, unworkable in fact, and unfair in result.

The law currently first inquires whether a prenuptial agreement makes a substantively fair provision for the “disfavored” spouse. See, e.g., *In re Marriage of Matson*, 107 Wn.2d 479, 482, 730 P.2d 688 (1986). But if the parties just want a substantively fair disposition of their assets upon dissolution, they do not need a prenuptial agreement: Under Washington law, parties may agree to, or a dissolution court will make, a “just and equitable” (a/k/a “fair”) disposition of their assets in light of all relevant circumstances. See, e.g., RCW 26.09.080. The “fairness” prong is unnecessary. This Court should abandon it.

⁶ See generally, e.g., *Bernard v. Bernard*, 137 Wn. App. 827, 155 P.3d 171 (2007), rev. granted, 163 Wn.2d 1011 (2008); *In re Marriage of DewBerry*, 115 Wn. App. 351, 62 P.3d 525, rev. denied, 150 Wn.2d 1006 (2003); *In re Marriage of Foran*, 67 Wn. App. 242, 834 P.2d 1081 (1992).

The “fairness” prong is also unsound and unworkable. Almost inevitably, a competently drafted prenuptial agreement will seem substantively unfair to the “disfavored” spouse because its only purpose is to preserve the property for someone else (e.g., a child from an earlier marriage). In light of the growing number of second marriages, late in life, involving substantial separate assets, inquiring whether an agreement makes a substantively fair provision for the “disfavored” spouse simply leads the court astray.

Indeed, it may lead to unjustly prejudging the second prong of the *Matson* test, procedural fairness. That is, any “substantively unfair” determination plainly implies either that the “disfavored” spouse lacked knowledge or (as argued here) that her independent counsel was “incompetent.” The “unfairness” determination thus overshadows the impartiality of the proceedings. The substantive “fairness” prong is harmful and should be abandoned.

The Court should ensure procedural fairness in contracting, not substantive fairness. See, e.g., *Matson*, 107 Wn.2d at 484 (“the relationship between the two parties . . . requires a procedural fairness. . . .”). This Court should disavow the “Substantive Fairness” prong adopted in *Bernard*, 137 Wn. App. at 834, excepting only the most egregious allegations, such as patent

fraud, physical threats or violence, and other illegal coercions. In short, only standard contract defenses should apply when assessing the substantive fairness of a prenuptial agreement.⁷ Courts do not “protect” intelligent adults from their own agreements.

This is consistent with the position taken in the ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 7.05 (ALI 2002). This rule provides that courts should not inquire whether enforcement will “work a substantial injustice” unless (a) a fixed number of years has passed (which the Comments suggest is always longer than a short-term marriage); (b) the parties had a child; or (c) some other substantial change in circumstances has arisen that the parties probably did not anticipate. *Id.*, ¶ (2)(a) – (c). The courts should not use “substantive fairness” to invalidate parties’ voluntary agreements.

⁷ See, e.g., *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket*, 96 Wn.2d 939, 944-45, 640 P.2d 1051 (1982) (“Generally, circumstances must demonstrate a person was deprived of his free will at the time he entered into the challenged agreement in order to sustain a claim of duress”); *Pedersen v. Bibioff*, 64 Wn. App. 710, 722-23, 828 P.2d 1113 (1992) (“Fraud in the inducement . . . is fraud which induces the transaction by misrepresentation of motivating factors such as value, usefulness, age or other characteristic of the property or item in question”); RESTATEMENT (SECOND) OF CONTRACTS §§ 164 (“If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient”) & 175 (duress).

B. In any event, the agreement is fair in the short term – which is just how long the wife stayed in the marriage.

Generally speaking, a “just and equitable” distribution following a short-term marriage should, to the extent possible, return the parties to the same positions they were in at marriage. See, e.g., Robert W. Winsor, *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, WS Bar News, 14 (Jan. 1982).⁸ Here, the wife came into the marriage with \$8,000 and her engagement ring, but sought a divorce only four years later.

The amended agreement leaves her in a better position: she would take the enormous benefits she received during the marriage (such as her brand new \$70,000 BMW and her children’s fully-paid college education), plus half of the community property account (into which the husband agreed to and did place \$100,000 a year). This omits the hundreds of thousands of dollars in maintenance and attorneys’ fees she has obtained by challenging the agreement, claiming that she did not mean what she promised. While the record is not clear regarding the precise magnitude of her haul, it is clear that she takes out much more than she brought in.

⁸ Several appellate opinions affirm awards based on this rule of thumb, but they are all unpublished. Moreover, appeals from this type of a property division are predictably rare.

That is why her independent counsel told her, on the day before her wedding, that the prenuptial is fair in the short term:

Generally speaking, near term refers to the first several years of the marriage; long term refers to a time period eight or more years after the marriage. In my opinion, the Agreement . . . (with the few exceptions noted below) is fair and equitable insofar as the near term is concerned.

Ex 102 (Gehring's July 7, 2000 letter). As noted above, Gehring's "few exceptions" were resolved in the subsequent amendment. App. D, Ex 104. Thus, on its face the amended agreement is more than fair under the circumstances of this case.

The wife's apparent response to the obvious fairness of the agreement under these circumstances is to focus on what might have happened if the parties had remained married for 20 years. That is water under the bridge: she left. The prenuptial agreement is fair for a four-year marriage. The postnuptial agreement is more than fair. The Court should reverse and remand for arbitration.

C. Dissolution courts should not be in the business of determining whether legal advice was "competent."

Washington prenuptial law now also apparently inquires whether a "disfavored" spouse had "competent" independent legal counsel. See *Foran*, 67 Wn. App. 255-56 & n.16; *Bernard*, 137 Wn. App. at 835-36. But the law generally does not accept lawyer

"incompetence" as an excuse for reneging on a legal agreement.⁹ The lurid spectacle of appellate counsel openly criticizing her client's prior counsel is bad enough. The appellate court's repeating such remarks is worse (137 Wn. App. at 835-36) – particularly where, as here, counsel had no representation at trial and no opportunity to defend himself.

But worst of all is the patent unfairness of requiring anyone to accurately divine that his fiancée's counsel is "incompetent," on pain of a court later setting aside an agreement designed to protect his child's future. *Matson* and its companion case both required "independent counsel" in these circumstances, not competent counsel. *Matson*, 107 Wn.2d at 483-84; *In re Estate of Crawford*, 107 Wn.2d 493, 497, 730 P.2d 675 (1986).

Indeed, our courts have wisely rejected the injustice of penalizing one spouse for the other's failure to timely obtain independent counsel despite repeated advice and ample time to do so. *In re Marriage of Hadley*, 88 Wn.2d 649, 655, 565 P.2d 790

⁹ See generally, *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 734-36, 987 P.2d 634 (1999) (attorney concession binding absent fraud or overreaching); *In re Estate of Harford*, 86 Wn. App. 259, 265, 936 P.2d 48 (1997) (attorney incompetence not grounds to set aside judgment affirming settlement), *rev. denied*, 135 Wn.2d 1011 (1998).

(1977); *In re Marriage of Cohn*, 18 Wn. App. 502, 510, 569 P.2d 79 (1977). This Court should reaffirm the sound principle that where, as here, the so-called “advantaged” party encourages the other party to obtain counsel (and offers to pay for it) and independent advice is tardily obtained, the “advantaged” party may not be penalized, even where the advice is alleged to be less than perfect.¹⁰

The origin of *Foran*’s “competent counsel” requirement is unclear – no authority supports it. But *Foran*’s language may provide a clue: in discussing counsel’s “duties,” the opinion repeatedly refers to “subservient” and “dominant” parties. 67 Wn. App. at 254. An imbalance of wealth does not make one betrothed “subservient” to the other. It is simply archaic to suggest that just because Thomas had more assets than Gloria, she somehow lost her will and could not think for herself, even with advice of independent counsel.

Foran’s archaic language is like a thumbprint on the scales of justice. This Court should overrule *Foran*. At the very least, the Court should reject its faulty, harmful legal analysis.

¹⁰ Tom Bernard does not concede that Gerhing gave less than competent advice. Rather, the point here is that *Foran* is faulty in principle.

CONCLUSION

When, as here, courts spend their time listening to "expert testimony" about how childhood problems of a competent adult with a Master's degree allegedly affected an agreement she signed on advice of counsel, the law has lost its way. When, as here, courts set aside valid agreements preventing a spouse who brought \$8,000 into the marriage from taking millions as she exits only four years later, the law has lost its way. When, as here, a dissolution appeal centers on whether a party's independent legal advice was "competent," the law has lost its way. And when, as here, a court invalidates a *postnuptial* agreement signed on advice of counsel with full knowledge of assets over a year after the wedding – thus avoiding an arbitration clause – justice is truly lost.

The Court should reverse and remand for arbitration.

DATED this 5th day of May 2008.

Wiggins & Masters, P.L.L.C.



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TO E-MAIL**

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing SUPPLEMENTAL BRIEF of PETITIONER postage prepaid, via U.S. mail on the 5th day of May, 2008, to the following counsel of record at the following addresses:.

Co-counsel for Petitioner

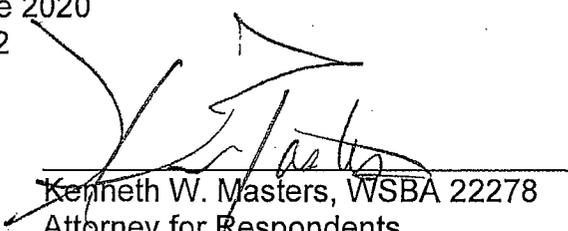
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APPENDICES

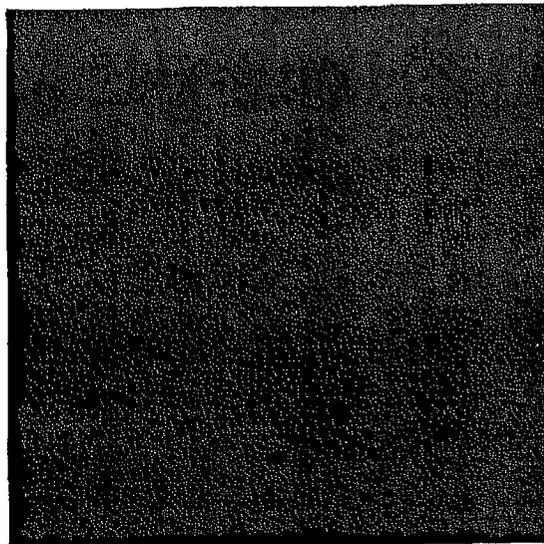
Appendix A: Ex 140	Prenuptial Checklist
Appendix B: Ex 102	July 7, 2000 Letter from Gehring to Gloria Re: Prenuptial Agreement.
Appendix C: Ex 103	Side Letter
Appendix D: Ex 104	First Amendment to Prenuptial Agreement (without exhibits)

FOSTER PEPPER & SHEFELMAN PLLC
ATTORNEYS AT LAW



Memorandum

To: Tom Bernard
From: Richard E. Keefe
Date: May 24, 2000
Subject: Checklist for Pre-Nuptial Agreement
Client Matter No.: 923-1000
Client Name: Bernard, J. Thomas/General Matters



In order to draft the agreement we need the following information:

1. Full name, address, date of birth and social security number for each of you.
2. A detailed personal financial statement for each of you including with specificity, a description of all assets and liabilities as well as an estimated fair market value of each (a "rule of reason" should apply to personal clothing, furnishings and the like — that is I wouldn't worry about those things unless they are family heirlooms, valuable jewelry, photographic equipment or something of that nature).
3. All real estate assets should be identified with specificity including legal descriptions.
4. Interests in commercial real estate need to be dealt with carefully, specifying the nature of the partnership or other interest held and so forth.
5. Please don't forget assets such as insurance policies, IRA's, 401(k)'s, bank accounts and so forth.
6. Please provide a statement of each party's approximate income in 1999 and the anticipated amount for this year.
7. Please identify any retirement rights or interests not otherwise covered above. The new community should open checking, savings and other appropriate accounts, and of course must have working capital. Probably the best way to deal with this is to be sure that each

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party is paid a proper wage from each entity for which it works — as all such compensation for efforts are considered community property. This is probably the area which will require the most careful thinking and documentation in your situation.

8. Another area to be dealt with is the mortgage, tax, insurance and maintenance payments on the community home. Presumably you will elect to live in one of the existing houses and preserve the separate property character thereof. If this be so, then we need to determine the estimated mortgage, tax, insurance and maintenance payments and provide a fair mechanism for funding those with the owner's separate property.

9. I will provide a draft agreement for your review next week, which will propose solutions to the major issues and contemplates attaching schedules prepared by you of the various property interests and so forth.

10. We should then discuss the proposed agreement, make such changes as you deem appropriate and create a "working draft."

11. **At that stage — or sooner if Gloria desires — she should make an appointment with an attorney of her choosing to: review the agreement; be certain she understands the issues; and that she is treated fairly.**

12. Thereafter it is up to you whether suggested changes or negotiations are handled between the two of you or through attorneys.

13. However the matter is handled, the final document should be prepared and executed at least several weeks before the happy day.

REK:chn

P.S. Three capable attorneys for this work are:

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Skellenger Bender
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101-2605
Phone (206) 623-6501
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Bill Kinzel
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MARSHALL F. GEHRINO
ATTORNEY AT LAW
25425 - 194TH AVENUE S.E. (1375)
KENT, WASHINGTON 98031

REGISTERED ATTORNEY
U.S. PATENT & TRADEMARK OFFICE

July 7, 2000

(31-44) VOICE
679-9495 FAX
Area Code 253

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

*Wed
July 5*

Re: Prenuptial Agreement

Dear Ms. Whitehead:

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

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

The following are my concerns with the proposed Prenuptial Agreement:

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

Gloria L. Whitehead
Page -2-

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

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

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

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

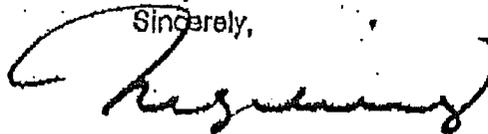
Gloria L. Whitehead
Page -3-

funds for support of your children (paragraph c above). In my opinion, you should reject this paragraph as written and insist that life insurance policies for the benefit of his children be paid for from this separate property funds.

e. Paragraphs (ii) and (iii) refer to obligations of the parties. In (ii), you agree that Mr. Bernard will not be liable for any debts or liabilities that you incur after your marriage; and in (iii), you agree that he will not be responsible for any credit card charges that you make. Community property expenditures are not distinguished. *Under these paragraphs, anything you buy will be your own personal obligation, whether or not it is food for you and him, clothes, medical care, or anything else.* This is contrary to community property law, which you are waiving. In my opinion, you should reject these two paragraphs or insist that their wording be changed to exempt obligations resulting from reasonable and proper community expenditures of any type.

The above five items represent my major concerns with the proposed Prenuptial Agreement. In my opinion, the proposed Agreement will not be a fair and equitable arrangement until those five items are further addressed. I have agreed to work with Mr. Keefe on these items, and some other minor concerns I have, if that is your desire. While my advice to you is that you not sign the Agreement until the above concerns are addressed, I know that is probably not practical from your viewpoint and that of Mr. Bernard given your wedding tomorrow. I would hope that, as an alternative, Mr. Bernard and Mr. Keefe would agree, by a written instrument of some sort, to negotiate these areas of concern as soon as practical after your marriage.

Sincerely,



Marshall F. Gehring

cc: Richard E. Keefe
Attorney at Law

July 7, 2000

Gloria L. Whitehead
1421 Shenandoah Drive East
Seattle WA 98112

Re: Prenuptial Agreement

Dear Gloria:

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

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

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

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

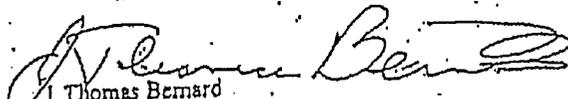
Finally, we agree that:

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

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

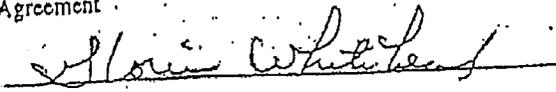
Please sign and return the enclosed copy of this letter to confirm our agreement.

Sincerely,


J. Thomas Bernard

Enclosure/ Signed Prenuptial Agreement

Agreed and Accepted:



Date:

July 8, 2000

Exhibit B

Appendix C

FIRST AMENDMENT TO PRENUPTIAL AGREEMENT

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

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

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

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

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

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

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

will
~~will~~ *JTB* *WJB*

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

WJB *JTB* *WJB*

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

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

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

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

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

"7. Joint Bank Accounts.

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

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

Appendix D

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Insert the following new subparagraph (iv):

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

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

Dated as of August 28, 2001.

Alvin B. Bland
Wife

Alvin B. Bland
Husband

STATE OF WASHINGTON)

COUNTY OF KING)

ss.

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

Dated this 28 day of August, 2001.



Karen Peterson
(Signature of Notary)

KAREN PETERSON
(Legibly Print or Stamp Name of Notary)

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

My appointment expires 7-14-2004

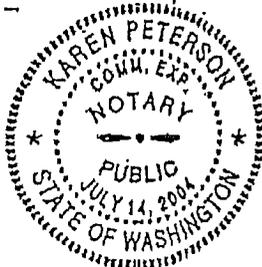
STATE OF WASHINGTON)

COUNTY OF KING)

ss.

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

Dated this 28 day of August, 2001.



Karen Peterson
(Signature of Notary)

KAREN PETERSON
(Legibly Print or Stamp Name of Notary)

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

My appointment expires 7-14-2004

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

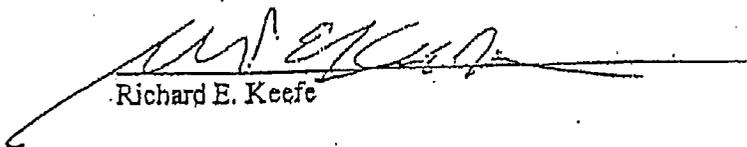
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CERTIFICATION OF ATTORNEYS

BY RONALD R. CARPENTER

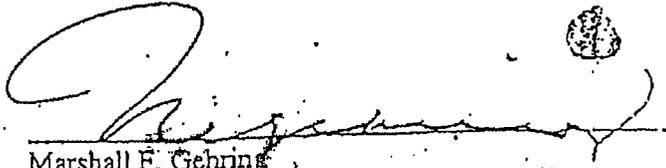
I, Richard E. Keefe, hereby certify that I am a duly licensed attorney, admitted to practice law in the state of Washington; that I have consulted with J. Thomas Bernard, who is a party to the foregoing First Amendment to Prenuptial Agreement dated July 7, 2001, which Prenuptial Agreement was made in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

DATED: August 28, 2001.


Richard E. Keefe

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

DATED: 8/17, 2001.


Marshall F. Gehring

FILED AS ATTACHMENT
TO E-MAIL

Appendix D