

74659-6

FILED  
August 22, 2016  
Court of Appeals  
Division I  
State of Washington

74659-6

NO. 74659-6-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

DAVID ROWE,

Petitioner/Appellant,

v.

LONNIE ROSENWALD,

Respondent.

---

**BRIEF OF RESPONDENT**

---

MASTERS LAW GROUP, P.L.L.C.  
Kenneth W. Masters, WSBA 22278  
Shelby R. Frost Lemmel, WSBA 33099  
241 Madison Ave. North  
Bainbridge Island, WA 98110  
(206) 780-5033

Attorney for Respondent

## TABLE OF CONTENTS

INTRODUCTION .....	1
RESTATEMENT OF ISSUES .....	2
STATEMENT OF THE CASE .....	3
A.    Both desiring to keep their incomes separate, the parties entered into a Property Agreement in October 2009, after lengthy negotiations and advice from counsel. ....	3
B.    The Agreement allowed both parties to preserve the fruits of their labor for their own benefit. ....	8
C.    Although Rowe insists that the parties subsequently married, he acknowledges that they had no marriage license or certificate and no “legal marriage.” .....	12
D.    The parties ended their relationship in June 2013.....	13
E.    The trial court granted summary judgment, ruling that the parties’ Property Agreement is enforceable as a matter of law.....	14
ARGUMENT .....	15
A.    Standard of review. ....	15
B.    The Property Agreement is substantively and procedurally fair, so is enforceable under <i>Matson</i> and its predecessors and progeny. ....	16
1.    The Property Agreement is substantively fair, so was properly enforced. BA 19-24. ....	18
2.    The Property Agreement is procedurally fair, so was properly enforced even if substantively unfair. BA 24-27.....	23
C.    Rowe’s remaining arguments are meritless. ....	29

1.	The trial court correctly struck the trial date, where there was no need to determine whether the parties were married since the Agreement is enforceable. BA 9-11.....	29
2.	The trial court did not address the distribution of assets that might hypothetically have occurred absent the Property Agreement, and this Court should decline to reach this issue. BA 12-14.....	35
3.	This Court should decline to adopt a substantive unconscionability test. BA 15-19. .....	37
D.	The trial court correctly awarded Rosenwald attorney fees under the fee provision in the Property Agreement and this Court should award Rosenwald fees on appeal. BA 29-31.....	40
CONCLUSION.....		42

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<b><i>Connell v. Francisco</i></b> , 127 Wn.2d 339, 898 P.2d 831 (1995).....	33, 35, 36
<b><i>DewBerry v. George</i></b> , 115 Wn. App. 351, 62 P.3d 525 (2003) .....	18, 20
<b><i>In re Domestic P'ship of Walsh</i></b> , 183 Wn. App. 830, 335 P.3d 984 (2014) .....	32
<b><i>Elam v. Elam</i></b> , 97 Wn.2d 811, 650 P.2d 213 (1982).....	36
<b><i>In re Estate of Crawford</i></b> , 107 Wn.2d 493, 730 P.2d 675 (1986).....	16
<b><i>Friedlander v. Friedlander</i></b> , 80 Wn.2d 293, 494 P.2d 208 (1972).....	16
<b><i>Gorden v. Lloyd Ward &amp; Associates, P.C.</i></b> , 180 Wn. App. 552, 323 P.3d 1074 (2014) .....	39
<b><i>Hamlin v. Merlino</i></b> , 44 Wn.2d 851, 272 P.2d 125 (1954).....	16, 18
<b><i>Keller v. Estate of Keller</i></b> , 172 Wn. App. 562, 291 P.3d 906 (2012) .....	15, 16, 18, 25
<b><i>In re Marriage of Bernard</i></b> , 165 Wn. 2d 895, 204 P.3d 907 (2009).....	<i>passim</i>
<b><i>In re Marriage of Foran</i></b> , 67 Wn. App. 242, 834 P.2d 1081 (1992) .....	<i>passim</i>
<b><i>In re Marriage of Hadley</i></b> , 88 Wn.2d 649, 565 P.2d 790 (1977).....	16

<b><i>In re Marriage of Lindsey,</i></b> 101 Wn.2d 299, 678 P.2d 328 (1984).....	33
<b><i>In re Marriage of Matson,</i></b> 107 Wn.2d 479, 730 P.2d 668 (1986).....	<i>passim</i>
<b><i>In re Marriage of Pennington,</i></b> 142 Wn.2d 592, 14 P.3d 764 (2000).....	33
<b><i>In re Marriage of Valente,</i></b> 179 Wn. App. 817 320 P.3d 115 (2014) .....	26, 30, 38
<b><i>In re Marriage of Zier,</i></b> 136 Wn. App. 40, 147 P.3d 624 (2006) .....	23, 38
<b><i>McDonald v. White,</i></b> 46 Wash. 334, 89 P. 891 (1907).....	31
<b><i>In re McLaughlin’s Estate,</i></b> 4 Wash. 570, 30 P. 651 (1892).....	31
<b><i>Meton v. Indus. Ins. Dep’t,</i></b> 104 Wash. 652, 177 P. 696 (1919).....	32
<b><i>Oliver v. Fowler,</i></b> 161 Wn.2d 655 (2007).....	<i>passim</i>
<b><i>In re Parentage of G.W.-F.,</i></b> 170 Wn. App. 631, 285 P.3d 208 (2012) .....	16, 18, 20, 33
<b><i>In re Parentage of J.M.K.,</i></b> 155 Wn.2d 374, 119 P.3d 840 (2005).....	40, 41
<b><i>QFC v. Mary Jewell T, L.L.C.,</i></b> 134 Wn. App. 814, 142 P.3d 206 (2006) .....	41, 42
<b><i>Appeal of the Reading Fire Ins. and Trust Co.,</i></b> 113 Pa. 204, 6 A. 60 (1886) .....	31
<b><i>Reeves v. McClain,</i></b> 56 Wn. App. 301, 783 P.2d 606 (1989) .....	42

<b><i>Retail Clerks Health &amp; Welfare Trust Funds v. Shopland Supermarket,</i></b> 96 Wn.2d 939, 640 P.2d 1051 (1982).....	26, 27
<b><i>Soltero v. Wimer,</i></b> 159 Wn.2d 428, 150 P.3d 552 (2007).....	33, 34, 38
<b><i>Summerville v. Summerville,</i></b> 31 Wash. 411, 72 P. 84 (1903).....	31, 32
<b><i>Walters v. A.A.A. Waterproofing, Inc.,</i></b> 151 Wn. App. 316, 211 P.3d 454 (2009) .....	38
<b><i>Weatherall v. Weatherall,</i></b> 56 Wash. 344, 105 P. 822 (1909).....	31
<b>Statutes</b>	
RCW 4.84.330 .....	41
RCW 26.04.010(1).....	32
<b>Other Authorities</b>	
CR 56(c) .....	16
RAP 18.1 .....	41

## **INTRODUCTION**

When David Rowe and Lonnie Rosenwald began cohabitating, both were in their fifties, had been divorced, and had children from their prior marriages. Both had established successful careers yielding six-figure incomes. Both wanted to preserve the fruits of their labor for their own benefit.

The parties mutually agreed to enter into a Property Agreement to keep their incomes separate. Both had independent advice from counsel, and both negotiated revisions to the drafts that exchanged hands over a period of months. The parties executed the Agreement in October 2009, Rowe over his counsel's advice.

The Agreement is substantively and procedurally fair. The Agreement allowed two established professionals to maintain the fruits of their labor for their own benefit and to create community property, while also making provisions for Rowe who earned less than Rosenwald. The parties entered the agreement knowingly, with advice from independent counsel, and without time constraints.

The Agreement is not substantively "unconscionable," and this Court should reject Rowe's proposed new test in any event, where it directly contradicts Supreme Court precedent spanning more than 50 years. This Court should affirm.

## RESTATEMENT OF ISSUES

1. Where the parties were both educated professionals with six-figure incomes who mutually desired to preserve the fruits of their labor for their own benefit, and where the Property Agreement allowed them to do so while also making provisions for Rowe whose income was lower, is the Agreement substantively fair as a matter of law?

2. Where the parties executed the Property Agreement after lengthy negotiations, with full financial disclosure, and under the advice of independent counsel, is the Agreement procedurally fair as a matter of law?

3. Since the Property Agreement controls the distribution of assets, did the trial court properly enter judgment without determining whether the parties were married?

4. Should this Court decline to adopt a new test for the enforceability of property agreements that conflicts with the two-prong *Matson* test used for nearly 60 years?

5. Did the trial court correctly award Rosenwald fees as the prevailing party under the attorney fee provision in the Agreement, and should this Court award Rosenwald fees on appeal?

### **STATEMENT OF THE CASE**

**A. Both desiring to keep their incomes separate, the parties entered into a Property Agreement in October 2009, after lengthy negotiations and advice from counsel.**

After dating for about two years, Appellant David Rowe and Respondent Lonnie Rosenwald began cohabitating in Rosenwald's Mercer Island home in January or February 2009. CP 178, 267. Both parties were in their early to mid-50s, both were divorced, and both had children from prior marriages. *Id.* Rosenwald's oldest daughter moved out in 2009, and her youngest daughter lived primarily with Rosenwald and Rowe. CP 512. Rowe had three children, two young adults, and one teenager who visited on Wednesdays and every other weekend. *Id.*

The parties began discussing a property agreement in April 2009. CP 229, 282, 284. They agreed that their respective incomes should remain separate throughout their relationship. CP 594. Rowe wanted to use his separate income to pay down debt, save for retirement and support his sons. *Id.*

Rosenwald informed her lawyer that although the parties were “engaged,” they “may or may not get married.” CP 284. She asked for a “co-hab agreement that could be converted to a pre-nup without really changing the terms.” *Id.*

Rosenwald initially believed that her attorney could represent both parties, but her attorney corrected that misunderstanding. CP 282-84. Rosenwald quickly shared that information with Rowe, telling him that she could direct her attorney to draft something for him to review with independent counsel, or that he could initiate the drafting process with counsel. CP 282. A few days later, Rowe responded affectionately:

Hi Love, Sounds fine. How would you advise me to find an appropriate attorney? Xoxoxoxoxox.

*Id.* (paragraphing omitted). Later in May, Rosenwald provided Rowe with a copy of a draft property agreement that her attorney had prepared. CP 179. At Rosenwald’s request, Rowe took the draft agreement to Wolfgang R. Anderson, who had handled his divorce two years earlier. CP 179, 189, 230. Anderson and Rowe’s trial and appellate counsel are law partners.

Rowe first met with Anderson to discuss the draft agreement on June 9, 2009. CP 179, 196. That day, Anderson wrote a letter to

Rosenwald's attorney, stating that he had advised Rowe not to sign the draft agreement. CP 109-110. The letter provided that Rowe and Anderson had an attorney/client relationship, that Anderson had "made . . . clear" his "advice" that Rowe not sign the proposed agreement, and that Rowe agreed with Anderson's advice (*id.*):

Please be advised that David Rowe consulted with me regarding the property agreement that you forwarded to him. I reviewed the same and have advised my client it is an agreement that is essentially signing him up into bondage. . . . I advised David that he should not sign the agreement and he agrees with me after I advised him. I fail to see how somebody can maintain a wedding vow that would say "I'll take care of you for better or worse" without omitting the words 'better' and inserting the words 'screwing you for worse'. . . . I fail to see how your client can even legitimately propose this agreement. I think I've made my advice to my client clear.

During the ensuing months, the parties negotiated the terms of the draft agreement. CP 179, 193, 196, 594-97. Anderson reviewed proposed changes on August 6, 2009, and held a "Conference regarding Property Settlement Agreement" on the 11<sup>th</sup>. CP 196. Rowe proposed revisions to the draft agreement. CP 179. Rowe acknowledges that the parties specifically negotiated many of the draft agreement's provisions, exchanging blackline drafts. CP 594-97.

Concluding that they needed more time to arrive at a final agreement, the parties entered into a Temporary Cohabitation

Agreement on August 13, 2009. CP 179, 192. The Temporary Agreement provides that the parties had been negotiating “in good faith” and that neither would be disadvantaged by any additional time that passed prior to the execution of a final agreement. CP 179, 192. They agreed that in the interim, their “living situation should be considered the same as prior to living together.” CP 192.

Rowe and Anderson reviewed and conferred about the final Agreement on October 21, 2009. CP 196. The Agreement is dated October 22, 2009, and Rosenwald signed it that day under notary seal. CP 267, 274. Rowe signed on November 21, 2009, also under notary seal. CP 275. The parties initialed each page. CP 267-74.

The Agreement’s recitals do not refer to a marriage, but provide that the parties have “joined their lives and families together in an intimate, committed relationship and life partnership.” CP 267.

The stated purposes of the Agreement are:

- ◆ To “disclose and define” as separate property: (1) the assets and debts each party owned prior to their relationship and (2) each party’s “respective incomes from employment and business”;
- ◆ To avoid “combining or comingling such property,” except as provided in the Agreement;
- ◆ To protect the separate property each party owned or subsequently acquired; and

- ◆ To protect each party from the other's separate debts, obligations, and liabilities.

CP 267. The parties entered into the Agreement understanding that they were waiving the legal remedies they might otherwise be entitled to absent a property agreement. CP 267, 274.

The Agreement expressly provides that it was "entered into without any undue influence, fraud, coercion, or misrepresentation . . ." CP 273 ¶ 17. Paragraph 18 includes each parties' acknowledgment that he or she had been given full financial disclosure and had not sought further disclosure. CP 273. Each also acknowledged that the Agreement is fair and equitable, that they were waiving rights they might have but for the Agreement, and that they entered into the Agreement voluntarily (CP 274, ¶ 23):

Each party acknowledges that he or she has read this entire Agreement, and it is fair and equitable and that it is being entered into voluntarily. The parties acknowledge that they might have property rights under the law of "committed intimate relationship" in accordance with *Oliver v. Fowler*, 161 Wn.2d 655 (2007) and similar cases due to their cohabitation. But for this Agreement, those property rights might entitle Lonnie or David to an equitable distribution of a portion of the other party's separate property upon their separation or death of the parties if their separate property would have been community property had they been married during their committed intimate relationship. Lonnie and David understand that they are waiving any claim they might otherwise have to any of the other party's separate property or income, and acknowledge that such waiver is fair.

Paragraph 19 provides that each party had independent advice from counsel he or she selected. CP 273. Both attorneys signed the certification providing that they had fully advised the parties of their legal rights, that each fully understood the legal effect of the Agreement, and that each executed it “freely and voluntarily”:

THE UNDERSIGNED hereby certifies that he is an attorney at law, duly licensed and admitted to practice in the State of Washington; that the undersigned has been employed by David Rowe, one of the parties to the foregoing Property Agreement; that the undersigned has advised and consulted with him in connection with his property and support rights and has fully explained to him the legal effect of the foregoing Agreement and the effect that it has upon property or support rights that he would otherwise obtain as a matter of law; that David Rowe, after being fully advised by the undersigned, acknowledged to the undersigned that he fully understood the legal effect of the foregoing Property Agreement and would execute the same freely and voluntarily.

CP 276.

Attorney Anderson advised Rowe not to sign the Agreement, but Rowe did so anyway. CP 231. Rowe states that attorney Anderson was so “incensed” that he insisted that they both sign in red pen “as a symbol of protest.” *Id.*

**B. The Agreement allowed both parties to preserve the fruits of their labor for their own benefit.**

Under the Property Agreement, each party retains separate property brought into the relationship and any after-acquired

separate property, along with any income from separate property, and any increase in value. CP 268. Each is responsible for separate debt. CP 268-69. Each agreed that their respective income, including that from stock options, retirement plans and the like, would be characterized as separate property. CP 269.

Rowe states that he was unemployed when he signed the final Agreement in October 2009, omitting that his unemployment was brief and that he earned \$78,000 that year. BA 4; CP 178, 509, 576, 586. When the parties began cohabitating, Rowe was earning about \$100,000 a year as a project manager on large software projects. CP 178. Following his brief period of unemployment, Rowe earned \$116,965 in 2010, \$116,798 in 2011, and \$122,232 in 2012. CP 576-80. He also came into the relationship with a real-property interest worth \$50,000 to \$300,000, and a retirement account with a \$70,000 estimated balance. CP 564, 567.

The parties, who lived in Rosenwald's Mercer Island home, specifically agreed that the home would remain Rosenwald's separate property and that she would pay, from her separate property, the mortgage, property taxes, insurance, improvements, and major repairs, defined as those "not due to wear and tear." CP 269. The parties agreed to the same for Rosenwald's vacation home

on Whidbey Island, save for the fact that it did not have a mortgage. CP 180, 269.

Rosenwald's Mercer Island home was a two-story, four-bedroom family home with a patio and yard. CP 180. She sold the home for nearly \$1 million in 2014. *Id.* Rosenwald's Whidbey Island home was a two-story, four-bedroom waterfront vacation property that she built with her former husband in 2001. *Id.* The Whidbey home was worth about \$700,000. *Id.*<sup>1</sup>

During the parties' cohabitation, Rosenwald paid the mortgage, taxes, and insurance on the Mercer Island home, as well as the taxes and insurance on the Whidbey Island home, totaling about \$2,700 per month. *Id.* Rowe agreed to pay Rosenwald \$730 per month as a "rental-type payment" to live in the Mercer Island home and to use the Whidbey home. CP 180, 269, 596. Rowe acknowledges that the parties specifically negotiated that amount. CP 596-97. The Property Agreement provides that this payment "shall not entitle [Rowe] to any ownership interest whatsoever in either of [Rosenwald's] Real Properties." CP 269-70 ¶ 4 b.

---

<sup>1</sup> Rosenwald no longer owns the Whidbey home.

Before moving in with Rosenwald, Rowe had been paying \$1,200 a month to rent a two-bedroom apartment. CP 512. He could not have rented an apartment on Mercer Island for \$730 a month, much less a four-bedroom house. CP 180. He acknowledged living more comfortably in Rosenwald's home. CP 581-582.

Rowe also agreed to pay half of the "utilities, routine maintenance, and repairs due to wear and tear" for both homes. CP 269 ¶ 4 a. Here too, the Agreement expressly provides that this payment "shall not" entitle Rowe to any ownership interest in Rosenwald's homes. CP 269-70 ¶¶ a & b. Here too, the parties specifically discussed this provision. CP 597.

In accord with the Property Agreement, the parties established a joint bank account for the purpose of sharing the costs of living and household expenses, including housecleaning, groceries, joint restaurant meals, and a beach club membership. CP 180, 270. The parties agreed to contribute the same amount into the account, and the Agreement allowed the parties to gift additional separate property into the joint account. CP 270.

The Agreement also permitted the parties to open additional joint accounts to create a community estate. CP 270, 597. The parties opened a joint account used for vacations and entertainment.

CP 181, 574. Rosenwald contributed \$500 per month, four-times as much as Rowe. *Id.*

Since the parties would be living in Rosenwald's home and Rowe did not own a home of his own, the Agreement provided that Rosenwald would give Rowe funds from her separate property to help with the cost of transitioning to a new home if the parties' relationship terminated. CP 271 ¶ 9. Specifically, Rosenwald agreed to pay Rowe \$15,000 if the relationship ended within five years, and \$30,000 if it ended after more than five years. *Id.* The Agreement also included a provision allowing Rowe to continue residing in Rosenwald's home if she predeceased him, as well as cash payments to cover household or moving expenses. *Id.*

**C. Although Rowe insists that the parties subsequently married, he acknowledges that they had no marriage license or certificate and no "legal marriage."**

On July 9, 2011, about 20-to-21 months after entering into the Property Agreement, the parties hosted a party to celebrate their relationship with family and friends. CP 182. While Rosenwald denies that the parties married, Rowe insists that they did. *Compare* CP 182 *with* BA 4, 9-10. As addressed below, however, this disagreement is immaterial, where the Property Agreement controls the distribution of assets regardless of whether the parties were

married, in a CIR, or just cohabitating. But since Rowe spends an inordinate amount of time claiming the parties were married, Rosenwald briefly provides the following response. BA 4, 9-10.

Rowe acknowledges that they did not have a marriage license, certificate, or “legal marriage”:

Q. Did you get a marriage license?

A. No.

Q. Did you get a marriage certificate?

A. No.

Q. Were you legally married?

A. We did not have a formal certificate. That’s correct.

...

Q. It’s not a legal marriage?

A. Correct.

CP 574-75, 579. Rowe also acknowledged that before the celebration of their relationship, Rosenwald told Rowe’s ex-wife and children that the parties were not getting married. CP 563. The parties never filed income taxes as a married couple. CP 579-80.

**D. The parties ended their relationship in June 2013.**

The parties terminated their relationship on June 13, 2013. CP 182. Rowe moved out, temporarily staying in Rosenwald’s Whidbey

Island residence. *Id.* On September 5, 2013, Rosenwald gave Rowe a “Memorandum of Termination of Relationship,” offering to pay Rowe \$15,000 from her separate funds under Paragraph 9 of the Property Agreement. *Id.* Rowe refused to sign the memorandum. *Id.*

**E. The trial court granted summary judgment, ruling that the parties’ Property Agreement is enforceable as a matter of law.**

Rowe filed a petition for legal separation in February 2015, seeking a disposition of assets, maintenance and attorney fees. CP 1-4. In November 2015, Rosenwald moved for summary judgment that the Property Agreement was valid and enforceable as a matter of law. CP 157-77. In early December, Rowe answered Rosenwald’s summary judgment motion and filed a countermotion for declaratory relief, asking the Court to rule that the Property Agreement was invalid and unenforceable. CP 424-35, 436-37. Two days later, Rowe filed a motion for declaratory relief asking “Whether there are any material issues of fact or law that would prevent the court from determining whether the parties were in fact married,” along with a memorandum addressing “marital status.” CP 438-49, 499-501. Rosenwald replied to her summary judgment motion on December 14, 2015. CP 502-07.

On December 21, the trial court granted Rosenwald's motion for summary judgment, ruling that the Property Agreement was enforceable as a matter of law. CP 696-700. The court also awarded Rosenwald attorney fees under the Agreement's fee provision. *Id.*

After Rowe continued to file pleadings as if the parties were preparing for trial, Rosenwald moved to strike the trial date and for entry of judgment on December 30, 2015. CP 707-11. Rowe moved for reconsideration of the order granting summary judgment the next day. CP 730-47. Following Rowe's response and Rosenwald's reply on the motion for entry of judgment, the Court entered a judgment, struck the trial date, and denied Rowe's motion for reconsideration. CP 888-90. The judgment provides that the parties divided all joint assets after their June 2013 separation and that no joint assets or debts remained to be divided. CP 889. The order also provides that the summary judgment order "fully adjudicated all pending claims." *Id.* Rowe appealed.

## **ARGUMENT**

### **A. Standard of review.**

This Court reviews summary judgment orders *de novo*, taking all facts and reasonable inferences in the light most favorable to the nonmoving party. *Keller v. Estate of Keller*, 172 Wn. App. 562, 573-

74, 291 P.3d 906 (2012). Summary judgment is proper “when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Keller*, 172 Wn. App. at 573 (citing CR 56(c)).

**B. The Property Agreement is substantively and procedurally fair, so is enforceable under *Matson* and its predecessors and progeny.**

When asked to determine the enforceability of a property agreement, Washington courts apply a two-prong analysis first expressly adopted in *In re Marriage of Matson*, 107 Wn.2d 479, 482-83, 730 P.2d 668 (1986). *In re Marriage of Bernard*, 165 Wn. 2d 895, 902, 204 P.3d 907 (2009) (citing *Matson*, *supra*; *In re Estate of Crawford*, 107 Wn.2d 493, 496, 730 P.2d 675 (1986); *In re Marriage of Hadley*, 88 Wn.2d 649, 654, 565 P.2d 790 (1977); *Friedlander v. Friedlander*, 80 Wn.2d 293, 300-303, 494 P.2d 208 (1972); *Hamlin v. Merlino*, 44 Wn.2d 851, 864-67, 272 P.2d 125 (1954)); *In re Parentage of G.W.-F.*, 170 Wn. App. 631, 644-67, 285 P.3d 208 (2012); *Keller*, 172 Wn. App. at 585-90. The party seeking enforcement bears the burden of proof. *Bernard*, 165 Wn. 2d at 902 (citing *Friedlander*, 80 Wn.2d at 300) .

Under the first prong of the *Matson* analysis, the court determines whether the agreement is “substantively fair,” that is,

whether it makes a fair and reasonable provision for the party seeking to avoid enforcement. **Bernard**, 165 Wn. 2d at 902 (citing **Matson**, 107 Wn.2d at 482). If the agreement is substantively fair, “the analysis ends; the agreement is enforceable.” **Bernard**, 165 Wn. 2d at 902. Substantive fairness is “entirely a question of law” absent factual disputes regarding the meaning of the contract. **Bernard**, 165 Wn. 2d at 902 (citing *In re Marriage of Foran*, 67 Wn. App. 242, 251 n.7, 834 P.2d 1081 (1992)).

If the agreement is substantively unfair, then the court proceeds to the second prong of the **Matson** analysis, asking whether the agreement is “procedurally fair.” **Bernard**, 165 Wn. 2d at 902. Under the second prong, the court asks: (1) whether the parties fully disclosed “the amount, character, and value of the property involved”; and (2) whether the parties entered the agreement freely, on independent advice from counsel, with full knowledge of their rights. **Bernard**, 165 Wn. 2d at 902 (citing **Matson**, 107 Wn.2d at 483). If the agreement is procedurally fair, it is enforced, and “an otherwise unfair distribution of property is valid and binding.” **Matson**, 107 Wn.2d at 482.

In reaffirming **Matson** in the 2009 **Bernard** decision, our Supreme Court stated that the two-prong **Matson** analysis “has

characterized [the Court's] analysis for over 50 years." **Bernard**, 165 Wn. 2d at 903 (citing **Hamlin**, 44 Wn.2d 851). **Matson** remains the controlling law. **G.W.-F.**, 170 Wn. App. at 644-67; **Keller**, 172 Wn. App. at 585-90.

**1. The Property Agreement is substantively fair, so was properly enforced. BA 19-24.**

As this Court has recently and repeatedly held, "[t]here is nothing unfair about two well-educated working professionals agreeing to preserve the fruits of their labor for their individual benefit." **DewBerry v. George**, 115 Wn. App. 351, 365, 62 P.3d 525 (2003); **G.W.-F.**, 170 Wn. App. at 645 (quoting **DewBerry**, *supra*). The parties' Property Agreement does just that, so it is substantively fair. This Court should affirm.

The Property Agreement gives both parties the same rights with respect to their property. CP 268-69. Both parties retain the separate property brought into the CIR and any separate property acquired during the CIR. CP 268 ¶ 1. Both were responsible for their separate debt. CP 268-69 ¶ 2. Both retained the fruits of their labor. CP 269 ¶ 3.

The Agreement also allowed the parties to accumulate community-like property. CP 270 ¶ 6. Although the Agreement does not expressly address spousal maintenance, the parties

acknowledged that they were entering a CIR, in which maintenance is unavailable. CP 267, 274 ¶ 23. And the parties acknowledged that they were waiving property rights that might be available to them absent the Property Agreement. CP 267, 274 ¶ 23.

The parties were similarly situated coming into the CIR – and the Agreement. Both were in their early-to-mid 50s. CP 178. Both were divorced with children they intended to support. CP 178, 267. Both were educated professionals many years into their successful careers. CP 178, 576-80. Both wanted to keep their respective incomes separate. CP 594.

While Rowe was briefly unemployed in 2009, he still earned nearly \$80,000 that year, also earning between \$112,000 and \$122,000 in surrounding years. CP 576-80. Rosenwald earned more than Rowe, but she also contributed more under the Property Agreement. Rosenwald spent about \$2,700 on the mortgage, taxes and insurance for both of her homes, while Rowe paid a \$730 “rental-type” payment for the use and enjoyment of both homes. CP 180, 269 ¶4b. Rosenwald contributed four-times as much as Rowe to the joint account used to fund vacations and entertainment. CP 180, 270 ¶ 6, 574. And since Rowe did not own a home, the Agreement provided that Rosenwald would provide Rowe with funds to assist in

transitioning to a new home if the relationship ended, as well as additional sums to help with household or moving expenses if Rosenwald predeceased Rowe. CP 271 ¶¶ 9 & 10. Again, the parties acknowledged that the Agreement was “fair and equitable.” CP 274 ¶ 23.

Much like the parties in this Court’s recent **G.W.-F.** decision, both Rowe and Rosenwald were educated professionals with significant earning potential. 170 Wn. App. at 645. Both were allowed to use separate income to accumulate separate property. *Id.* Unlike the **G.W.-F.** parties, however, Rosenwald contributed much more to the shared household expenses. *Id.* As in **G.W.-F.**, “[t]here is nothing unfair about two well-educated working professionals agreeing to preserve the fruits of their labor for their individual benefit.” *Id.* at 646 (quoting **DewBerry**, 115 Wn. App. at 365). The Property Agreement is substantively fair, so was properly enforced as a matter of law.

Rowe’s arguments to the contrary are unavailing. Rowe acknowledges that the Agreement made a provision for Rowe upon termination of relationship, but argues that \$15,000 was not “reasonable.” BA 21-22. That sum would allow Rowe to rent an apartment on Mercer Island for 9-to-12 months. CP 513, 569. And that is not the only provision for Rowe. Unlike the disadvantaged

spouse in **Bernard**, Rowe had the right to cash sums under the Agreement in the event that Rosenwald predeceased him. *Compare* CP 271-72 ¶ 10 *with* 165 Wn.2d at 904. And unlike the disadvantage spouses in **Matson**, **Foran** and **Bernard**, Rowe retained the separate property bought into the relationship, with an estimated value of \$120,000 to \$370,000. *Compare* CP 268 ¶ 1 b; CP 564, 567 *with* **Matson**, 107 Wn.2d at 481; **Foran**, 67 Wn. App. at 246; **Bernard**, 165 Wn.2d at 898.

But most importantly, Rowe is nothing like the parties seeking to avoid enforcement in **Matson**, **Foran** and **Bernard**, where he is an educated professional who earned a six-figure income, even earning over \$80,000 the year he was briefly unemployed. CP 576-80. Again, Rowe wanted to keep the parties' respective incomes separate so that he could pay off debt, save for retirement, and provide for his three children. CP 594. During the parties' cohabitation, Rowe was able to pay off over \$40,000 in separate debt, gift \$20,000 – to – \$25,000 to his children, and accumulate between \$20,000 – to – \$25,000 in his separate account. CP 569-73, 583. While the Property Agreement may not have played out as well for Rowe as he might have hoped when he signed it, that does not alter the Agreement's substantive fairness.

Rowe's comparison to **Foran** is inapt. BA 20-22. There, the wife quit her job to work fulltime for husband's company before the marriage. **Foran**, 67 Wn. App. at 245. She drew little salary during the marriage, though her labor enriched the husband's separate-property company. 67 Wn. App. at 246. She also put "a great deal of time, labor and effort into developing" real property that was also the husband's separate property under the Agreement. *Id.* at 247. In short, the prenuptial agreement was set up to enrich the husband only. *Id.* That is not the case here. Rowe did not work to enrich Rosenwald's separate property. The Agreement allowed him to keep the fruits of his labor for his own benefit.

Rowe next argues that whether the Agreement is substantively fair is "determined by looking at their relative circumstances at the time of trial." BA 22. That is incorrect. Our Supreme Court expressly rejected that approach in **Bernard**, refusing to "alter [the **Matson**] analysis and evaluate substantive fairness at the time of enforcement, as opposed to at the time of execution, of an agreement." **Bernard**, 165 Wn.2d at 904. The Court could not have been more clear, stating, "We refuse. To do so would change the test from one of fairness to fortuity." *Id.* The Court reiterated its adherence to the "settled rule that '[t]he validity of

prenuptial agreements in this state is based on the circumstances surrounding the execution of the agreement.” *Id.* (quoting ***In re Marriage of Zier***, 136 Wn. App. 40, 47, 147 P.3d 624 (2006) (citing ***Matson***, 107 Wn.2d at 484). Thus, the issue is whether the Agreement was substantively fair to Rowe when the parties entered it in 2009, not whether it turned out as he had hoped years later. *Id.*

The Property Agreement was substantively fair, where it allowed both parties to preserve the fruits of their labor, while also making provisions for Rowe, who earned less than Rosenwald. This Court should affirm.

**2. The Property Agreement is procedurally fair, so was properly enforced even if substantively unfair. BA 24-27.**

As discussed above, a substantively unfair agreement will be enforced if procedurally fair. ***Matson***, 107 Wn.2d at 482. Where Rowe had counsel, full knowledge of his rights, and full disclosure of Rosenwald’s assets, this Court should affirm. See, ***Bernard***, 165 Wn. 2d at 902 (citing ***Matson***, 107 Wn.2d at 483).

Under the second ***Matson*** prong, this Court considers the circumstances surrounding entry into the Agreement, specifically whether the parties fully disclosed “the amount, character, and value” of their property, and whether they “entered the agreement freely, on

independent advice from counsel, with full knowledge of their rights.”  
*Id.* The circumstances surrounding entry of the Agreement were plainly fair as to both parties. This Court should affirm.

After the parties discussed a property agreement for about a month, Rosenwald gave Rowe a draft agreement in May 2009. CP 179, 229, 282. While leaving open the possibility of marrying in the future, it is undisputed that there was no immediate plan to marry. There was, for example, no date, or even a discussion of a date, much less a wedding just weeks or days later. See *e.g.*, ***Bernard***, 165 Wn.2d at 899 (wife first saw the draft agreement 18 days before the wedding); ***Foran***, 67 Wn. App. at 245 (seven days before the wedding); ***Matson***, 107 Wn.2d at 480 (four days before the wedding). The parties held a celebration nearly two years later. CP 182. Timing plainly is not an issue here.

Nor is full disclosure an issue. ***Bernard***, 165 Wn. 2d at 902. Both parties listed their assets, debts, and income in attachments to the Property Agreement. CP 277-80. The Agreement also includes each party’s acknowledgement that “he or she has been given a full and adequate disclosure of the assets, estate, current earnings, expectancies, and obligations of the other party, and neither party seeks further disclosure.” CP 273 ¶ 18. That is “strong evidence that

disclosure was made.” **Keller**, 172 Wn. App. at 586. Rowe does not contend otherwise.

Rowe also had independent advice of counsel and full knowledge of his legal rights. **Bernard**, 165 Wn. 2d at 902. At Rosenwald’s request, Rowe obtained independent counsel – his attorney from his divorce – to review the draft agreement. CP 179, 189, 230. After counsel advised Rowe not to sign the draft agreement, negotiations ensued. CP 109-110, 179, 193-225, 238-65, 594-97. Rowe acknowledged specifically negotiating many provisions in the Agreement. CP 594-97. When the parties entered a final agreement five months after the first draft agreement circulated, Rowe again conferred with counsel, who again advised him not to enter the Agreement. CP 193, 196, 231. Rowe did so anyway. CP 231. The Agreement provides that both parties “had independent advice of counsel,” and Rowe’s attorney signed the attorney certification. CP 273 ¶ 19, 276 ¶ B.<sup>2</sup>

Rowe does not contest the above. BA 24-27. Rather, his argument is that he did not enter into the Property Agreement

---

<sup>2</sup> Rowe incorrectly asserts that there is a material question of fact as to whether Rosenwald told Rowe to discontinue working with counsel. BA 28. Rosenwald denies as much. CP 510. But this disagreement is immaterial. Rowe actually had counsel.

“voluntarily,” as he was under economic and psychological duress and coercion. *Id.* But Rowe does not cite a single case addressing duress or coercion as a contract defense, much less in the context of a property agreement. BA 24-25. The cases Rowe cites address only the summary judgment standard. *Id.* This Court should disregard this argument that is entirely unsupported by any relevant authority. ***In re Marriage of Valente***, 179 Wn. App. 817, 832 n. 54 320 P.3d 115 (2014).

In any event, Rowe’s claimed “duress” is inadequate to invalidate his assent to the parties’ Property Agreement. Rowe must establish duress or coercion with “evidence that the duress resulted from [Rosenwald’s] wrongful or oppressive conduct.” ***Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket***, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). It is insufficient that Rowe may have been reluctant to sign the Property Agreement, or faced “financial embarrassment.” ***Retail Clerks***, 96 Wn.2d at 944. It is insufficient that Rowe may have “entered into [the Agreement] under stress or pecuniary necessity.” 96 Wn.2d at 944. Rowe must show that he was “deprived of his free will.” *Id.* at 944-45.

Rowe’s entire claim of duress or coercion is that Rosenwald threatened to end their relationship if Rowe did not sign the Property

Agreement, which, Rowe claims, would have left him “homeless.” BA 26. Accepting that assertion as true, it is insufficient to establish duress or coercion. No “wrongful or oppressive conduct” caused Rowe’s duress, where Rosenwald has every right to require a property agreement to protect her assets and income. ***Retail Clerks***, 96 Wn.2d at 944. It is irrelevant that Rowe may have faced “financial embarrassment” if he had refused to sign the Agreement, or even that he signed it out of “pecuniary necessity” as he seems to suggest. 96 Wn.2d at 944. Rowe simply has not met his burden.

Rowe’s specific arguments on this point are equally unavailing. Rowe argues that “Attorney Anderson was not permitted to negotiate on [Rowe’s] behalf,” where he did not receive a reply letter from Rosenwald’s attorney. BA 25. Rosenwald’s attorney did not directly address Anderson’s letter comparing the draft property agreement to “bondage,” insinuating the Rosenwald was attempting to “screw[]” Rowe, and questioning whether the draft agreement was even a “legitimate” proposal. CP 110-11. But it is beyond dispute that the parties negotiated for months after that letter was sent and that Rowe again conferred with Anderson before signing the final Agreement. CP 179, 193-225, 231, 238-65, 594-97. Again, Anderson signed the attorney certification in the final Agreement. CP 276 ¶ B.

Rowe's reliance on **Foran** is misplaced. BA 25 (citing **Foran**, 67 Wn. App at 254). There, as in **Matson**, the disadvantaged spouse declined to seek independent counsel. **Foran**, 67 Wn. App at 254 (citing **Matson**, 107 Wn.2d at 481). Rowe had an attorney.

Rowe's reliance on **Bernard** is equally misplaced. BA 26 (citing **Bernard**, 165 Wn.2d at 901). There, the economically disadvantaged spouse received the first draft agreement just 18 days before the parties' wedding. 165 Wn.2d at 901. Just a few days before the wedding, she received a revised draft agreement that was substantively different than the prior version. *Id.* at 901. At that juncture, it was too late to meaningfully negotiate or obtain full advice *Id.* The wife "was faced with the choice of the humiliation of calling off a wedding or signing a substantively unfair document." *Id.*

**Bernard** is plainly inapposite. The parties entered the Agreement 20-to-21 months before their July 2011 celebration, and six months before planning it. CP 182, 291-95, 299, 302. Rowe could not have "face[d] the humiliation of calling off" a party that was not being planned when he signed the Agreement. **Bernard**, 165 Wn.2d at 901.

Finally, the factual disputes Rowe identifies are not material. BA 27-29. Accepting as true that Rosenwald said she would end their

relationship if an agreement was not reached, she had every right to do so. BA 28. And accepting that Rowe would have been “homeless” if he had not signed the Agreement, Rosenwald was not obligated to provide Rowe with a home. *Id.* If accepted, Rowe’s argument would effectively prevent an economically advantaged spouse from protecting her assets. That is the purpose of a property agreement.

In short, Rowe is an educated adult who had time, full disclosure, and the advice of counsel. Under those circumstances, he cannot avoid enforcement of the parties’ Property Agreement simply because it might have been financially difficult for him if he had declined to sign it.

**C. Rowe’s remaining arguments are meritless.**

**1. The trial court correctly struck the trial date, where there was no need to determine whether the parties were married since the Agreement is enforceable. BA 9-11.**

Rowe argues that the trial court erred in entering judgment without first determining whether the parties were married. BA 9-11. But since the Property Agreement, not the parties’ relationship status, governs their property rights, whether they were married is irrelevant. This Court should affirm.

Rowe’s principal argument on this point is that if the parties were married, as opposed to in a CIR, then Rosenwald’s separate

property would have come before the trial court for distribution and Rowe would be entitled to maintenance (after a 4-year relationship). BA 9. But whether married or in a CIR, the parties' rights upon termination of their relationship are governed by their Property Agreement. Indeed, the Agreement expressly provides that if the relationship terminates, then the parties "shall be bound by the terms of this Agreement and seek no other recourse from any court." CP 271 ¶ 9. There was no reason for the trial court to resolve this irrelevant issue, and the Agreement precludes it in any event.

Rowe's remaining arguments on this point are insufficient for this Court's review and at odds with decades of Washington law. Rowe argues in a single sentence, without elaboration or citation to authority, that the trial court "was aware of Washington case law that has recognized couples as being legally married even though no marriage license had been obtained." BA 9 (citing CP 499). This Court need not consider this unsupported assertion. *Valente*, 179 Wn. App. at 832 n. 54.

In any event, the cases Rowe cited to the trial court are inapposite and inconsistent with modern law. CP 499. Before the trial court, Rowe relied on a body of law from 1892 to 1909, holding generally that "[i]f a ceremony of marriage appears in evidence," after

which the parties hold themselves out as married, the law may presume that a valid marriage occurred. CP 499 (quoting ***Summerville v. Summerville***, 31 Wash. 411, 416, 72 P. 84 (1903); (citing ***In re McLaughlin's Estate***, 4 Wash. 570, 585, 30 P. 651 (1892); ***McDonald v. White***, 46 Wash. 334, 337-38, 89 P. 891 (1907); ***Weatherall v. Weatherall***, 56 Wash. 344, 349-50, 105 P. 822 (1909). That presumption could be rebutted by evidence that the parties did not intend to be married, but were living in a "illicit" relationship:

"[C]ohabitation and reputation alone are not marriage. They are merely circumstances from which a marriage may sometimes be presumed. It is a presumption, however, that may be rebutted by other facts and circumstances. When the relation between a man and a woman living together is illicit in its commencement, it is presumed so to continue until a changed relation is proved. Without proof of subsequent actual marriage, it will not be presumed from continued cohabitation and reputation of a relation between them, which was of illicit origin."

***McLaughlin***, 4 Wash. at 586 (quoting ***Appeal of the Reading Fire Ins. and Trust Co.***, 113 Pa. 204, 208, 6 A. 60 (1886)). In short, these cases provided a rebuttable presumption that a marriage is lawful, absent legal documentation, when there is strong evidence that the parties had a wedding, intended to be legally married, and then held themselves out as such.

In **Summerville**, for example, a 36-year-old man and 16-year-old girl agreed to marry and had a ceremony performed by a man the girl believed to be a clergyman. 31 Wash. 413. The pair then lived together, had a child, and held themselves out as husband and wife. *Id.* at 413-14. The husband denied that the marriage existed after throwing the wife and child out of his home. *Id.* at 412. In order to award the wife “alimony,” the court presumed that a marriage had occurred. *Id.* at 413-14.

Of the many distinguishing factors between **Summerville** and this matter, the most critical is Rowe’s acknowledgment that the parties’ celebration did not create a “legal marriage” and that there was no marriage license or certificate. CP 575, 579. These parties were not married. RCW 26.04.010(1); **Meton v. Indus. Ins. Dep’t**, 104 Wash. 652, 655, 177 P. 696 (1919) (requiring a solemnized civil contract for a marriage to be valid). No reading of the cases Rowe cited below changes that.

And in any event, Washington law has changed a bit in the past 125 years. For decades, Washington courts have recognized CIRs, previously meretricious relationships, in which the parties cohabit in a “marital-like” relationship, knowing they are not lawfully married. **In re Domestic P’ship of Walsh**, 183 Wn. App. 830, 845,

335 P.3d 984 (2014); **Connell v. Francisco**, 127 Wn.2d 339, 346, 898 P.2d 831 (1995) (citing **In re Marriage of Lindsey**, 101 Wn.2d 299, 304, 678 P.2d 328 (1984)). CIRs are “[w]holly unrelated to . . . marriage.” **In re Marriage of Pennington**, 142 Wn.2d 592, 599-600, 14 P.3d 764, 769 (2000); **Connell**, 127 Wn.2d at 349; **G.W-F**, 170 Wn. App. at 637. As this Court recently stated it, a CIR “is not a marriage.” **G.W-F**, 170 Wn. App. at 637.

This distinction between marriage and cohabitation is significant. “[T]he laws involving the distribution of marital property do not directly apply to the division of property following a [CIR].” **G.W-F**, 170 Wn. App. at 637 (quoting **Connell**, 127 Wn.2d at 349). In a CIR, the court will divide only those assets acquired during the CIR, analogous to community property acquired during a marriage. **Connell**, 127 Wn.2d 349-51. If there is no “community-like” property, then there is nothing to divide. **Soltero v. Wimer**, 159 Wn.2d 428, 434, 150 P.3d 552 (2007).

Rowe ignores this entire body of law. BA 9-10. He argues that the parties were “married” because they “set out formal wedding invitations . . . announcing their wedding ceremony,” had a sign on location referring to a “wedding,” exchanged “wedding rings and vows,” and referred to the event as a “wedding.” *Id.* In fact, the

invitations referred to a “union,” not a wedding, and the sign was created by the caterer without input from the parties. CP 458, 511. The parties at times used “marriage” or “wedding” for ease of reference. CP 511. But their terminology is immaterial in any event, where Rowe acknowledges that the parties had no marriage license, no marriage certificate, and no “legal marriage.” CP 574-75, 579.

Using the words “wedding” or “marriage” does not transform a CIR into a marriage. BA 9-11. If adopted, Rowe’s argument would radically change Washington law, effectively ending the CIR doctrine in many cases.

Rowe also suggests, again without argument, that the trial court erroneously dismissed the case without first resolving whether Rosenwald was required to pay Rowe \$15,000 or \$30,000 under the Agreement. BA 11. There was no reason for the trial court to address this issue, where Rowe was entitled to \$15,000 under the Agreement’s plain language. CP 271.

The Agreement provides that Rosenwald would pay Rowe \$15,000 if the parties’ relationship ended “with five (5) years from the date of this Agreement,” or \$30,000 if it ended more than five years from the date of the Agreement. *Id.* The Agreement is dated October 22, 2009, Rosenwald signed it on October 22 and Rowe signed it on

November 21. CP 267, 274-75. Rowe acknowledges that the parties separated in June 2013. CP 18, 575. Thus, the relationship ended within five years of the date of the Agreement, using October 22 or November 21. There was no need for more litigation to resolve this issue.

In short, the trial court did not err in entering judgment without addressing questions conclusively resolved by the summary judgment order enforcing the Property Agreement. This Court should affirm.

**2. The trial court did not address the distribution of assets that might hypothetically have occurred absent the Property Agreement, and this Court should decline to reach this issue. BA 12-14.**

Rowe argues that “[i]n the absence of an agreement to the contrary,” the trial court applies a presumption that property acquired during the CIR is “owned by both parties.” BA 12 (quoting *Connell*, 127 Wn.2d at 351). He then goes on to list improvements he supposedly made to Rosenwald’s homes, such as selecting paint color or supervising the installation of a new dishwasher. BA 12-14.<sup>3</sup>

---

<sup>3</sup> It bears noting that despite repeatedly stating that he “purchased” items for Rosenwald’s homes, Rowe admits that Rosenwald “possibly or probably” paid for all major repairs to her homes. *Compare* BA 12-14 with CP 76-77.

His point is apparently that if the Property Agreement was not enforceable, then he might have some interest in Rosenwald's homes based on his "contribution." BA 14 (citing *Elam v. Elam*, 97 Wn.2d 811, 816-17, 650 P.2d 213 (1982)).

Since there is "an agreement to the contrary," the trial court did not reach the distribution of assets Rowe might be entitled to "[i]n the absence of an agreement."<sup>4</sup> BA 12 (quoting *Connell*, 127 Wn.2d at 351). There is nothing for this Court to review.

Moreover, the Property Agreement plainly provides that Rowe did not gain some interest in Rosenwald's separate property through the "contributions" he alleges. BA 12-14; CP 268-69. The Agreement provides that the parties will each retain their separate property and that neither shall gain an interest in the other's separate property, including any "appreciation arising from it" by virtue of their relationship "or for any other reason." CP 268 ¶ 1. The Agreement specifically identifies Rosenwald's homes as her separate property, providing that Rowe's payment of one-half of the utilities, routine maintenance and minor repairs, and his \$730 per month "rental type

---

<sup>4</sup> Similarly, whether Rosenwald's stock was acquired for past or future services is irrelevant. BA 29. Her stock is her separate property under the Agreement. CP 269 ¶ 3.

payment,” shall not entitle him “to any ownership interest whatsoever in either of [Rosenwald’s] Real Properties.” CP 269-70 ¶ 4.

In short, the trial court had no reason to speculate as to how it might have distributed assets in the absence of a Property Agreement. This Court cannot review an issue that the trial court never decided.

**3. This Court should decline to adopt a substantive unconscionability test. BA 15-19.**

Rowe asks this Court to create new law, under which a property agreement would be void if substantively unconscionable when enforced, regardless of whether it is procedurally fair. BA 15-19. That approach directly conflicts with *Matson*’s teaching that fairness is determined at the time of execution, not enforcement, and would eliminate the second *Matson* prong, procedural fairness. In short, Rowe would have this Court upend nearly 60 years of controlling precedent. This Court should decline to do so.

Rowe acknowledges that “[t]here is no case law in the State of Washington that directly holds that the principals that govern the unconscionability of a provision of contracts apply to those executed by prospective spouses or cohabitants.” BA 16. Rowe’s entire argument on this point is that property agreements are contracts and “ordinary contract defenses to enforcement include

unconscionability.” *Id.* (quoting **Walters v. A.A.A. Waterproofing, Inc.**, 151 Wn. App. 316, 321, 211 P.3d 454 (2009)). Rowe does not further address unconscionability as a contract defense, or address why this Court should create new law in direct conflict with **Matson**, its predecessors, and its progeny. BA 16. Here too, this Court need not consider this inadequate argument. **Valente**, 179 Wn. App. at 832 n. 54.

This Court should reject Rowe’s request to create new law that would turn **Matson** on its head. Rowe’s proposed test would require our courts to determine substantive unconscionability at the time of enforcement. BA 18-19. Rowe continues to ignore that **Matson** forbids that practice.

As discussed above, the **Bernard** Court made abundantly clear that the “settled rule” in Washington is that substantive fairness is determined “based on the circumstances surrounding the execution of the agreement.” **Bernard**, 165 Wn.2d at 904 (quoting **In re Marriage of Zier**, 136 Wn. App. 40, 47, 147 P.3d 624 (2006) (citing **Matson**, 107 Wn.2d at 484)). The Court flatly refused to alter **Matson** and examine substantive fairness from the point of enforcement, holding that “[t]o do so would change the test from one of fairness to fortuity.” **Bernard**, 165 Wn.2d at 904. **Bernard** and

**Matson** are controlling on this point, yet Rowe does not even address them. BA 15-19.

Rowe's proposed test is at odds with **Matson** in another fundamental way. For nearly 60 years, our Court has consistently employed a two-prong inquiry, under which procedural fairness cures substantive deficiencies. **Bernard**, 165 Wn. 2d at 902; **Matson**, 107 Wn.2d at 482. Rowe provides no reason to do away with the procedural fairness prong entirely. There is none.

In any event, the parties' Property Agreement is not unconscionable, that is, overly harsh, shocking to the conscious or exceedingly calloused. BA 18 (citing **Gorden v. Lloyd Ward & Associates, P.C.**, 180 Wn. App. 552, 564-65, 323 P.3d 1074 (2014) (declining to enforce a client services agreement based on its venue and mandatory arbitration clauses). Although unclear, Rowe's sole argument on this point seems to be that the Agreement is substantively unconscionable because it precludes maintenance. BA 17-18. There is nothing "shocking" about two educated adults with six figure incomes agreeing that one will not pay the other maintenance in the event that their cohabitation ends.

But Rowe also overlooks that he would not be entitled to maintenance absent the Agreement. The parties are not married and

there is no basis for providing maintenance following the termination of a CIR. Rowe's theory is essentially that the Agreement is unconscionable because it eliminated a right Rowe never had. That is meritless.

In short, the parties agreed to preserve the fruits of their labor for their own benefit. The Agreement is not substantively unconscionable because it did not play out for Rowe as well as he had hoped.

**D. The trial court correctly awarded Rosenwald attorney fees under the fee provision in the Property Agreement and this Court should award Rosenwald fees on appeal. BA 29-31.**

Rowe does not dispute that the Property Agreement includes a valid and enforceable attorney fee provision. BA 29; CP 273 ¶21. If this Court affirms the ruling on summary judgment, then it should also affirm the fee award.

Fee awards are within the trial court's broad discretion. *In re Parentage of J.M.K.*, 155 Wn.2d 374, 395, 119 P.3d 840 (2005). Rowe challenges lead counsel's hourly rate and seems to assert that the fee request was insufficient. BA 30-31. Neither point is well taken.

Rosenwald's lead counsel is a named partner at Lasher, Holzapfel, Sperry & Ebberson, PLLC, where she has practiced family

law since being admitted to the Washington bar in 1976. CP 556, 713. She is a fellow of the American Academy of Matrimonial Lawyers. CP 556-57, 713. Her Martindale-Hubbell rating has been AV preeminent – the highest rating given – for nearly 20 years, and she is listed on the Martindale-Hubbell register of Preeminent Women Lawyers. *Id.* Other professional recognitions include *Best Lawyers in America*, *Washington Law and Politics Super Lawyer*, and Top 50 Women Lawyers in the State. *Id.* Her \$525 hourly rate is comparable to that of her peers. *Id.*

It is unclear why Rowe claims the fee request was insufficient. BA 30-31. Counsel detailed the work she performed, as well as that performed by others in her firm who worked on the case under her supervision. CP 557-59, 712-14. She provided detailed billing records summarizing all work performed and costs incurred. CP 602-20. Nothing more is required.

This Court should award Rosenwald fees on appeal. RAP 18.1. It is well recognized that our courts will award attorney fees where, as here, an enforceable contract provides for fees. ***QFC v. Mary Jewell T, L.L.C.***, 134 Wn. App. 814, 818, 142 P.3d 206 (2006) (citing RCW 4.84.330). “A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal.”

**QFC**, 134 Wn. App. at 818 (quoting **Reeves v. McClain**, 56 Wn. App. 301, 311, 783 P.2d 606 (1989)). Thus, this Court should award Rosenwald fees under the Property Agreement. CP 273 ¶21.

### **CONCLUSION**

The trial court's summary judgment order is correct under well-settled law. This Court should affirm and award Rosenwald fees.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of August, 2016.

MASTERS LAW GROUP, P.L.L.C.

s/ Shelby R. Frost Lemmel

---

Shelby R. Frost Lemmel, WSBA 33099  
241 Madison Avenue North  
Bainbridge Island, WA 98110  
(206) 780-5033

**CERTIFICATE OF SERVICE BY MAIL**

I certify that I caused to be emailed or mailed a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail, on the 22nd day of August, 2016, to the following counsel of record at the following addresses:

Co-counsel for Respondent

Linda Kelley Ebberson  
Lasher Holzapfel Sperry &  
Ebberson, PLLC  
601 Union Street, Suite 2600  
Seattle, WA 98101-4000

U.S. Mail  
 E-Mail  
 Facsimile

Counsel for Appellant

H. Michael Finesilver  
Attorney at Law  
207 East Edgar Street  
Seattle, WA 98102-3108

U.S. Mail  
 E-Mail  
 Facsimile

s/ Shelby R. Frost Lemmel

\_\_\_\_\_  
Shelby R. Frost Lemmel, WSBA 33099