

NO. 63304-0-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION

In re the Marriage of:

DALLENE N. BRACKEN,

Respondent,

and

JOHN L. BRACKEN,

Appellant.

BRIEF OF APPELLANT

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins, WSBA 6948
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorney for Appellant

FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2009 OCT 22 AM 10:57

TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR	2
ISSUES RELATED TO ASSIGNMENTS OF ERROR	4
STATEMENT OF THE CASE	5
A. Background.	5
B. John’s grandfather created Blistex lip ointment.	5
C. John obtained most of his separate property, all of which is tied to Blistex Bracken, after the parties married.	6
D. The parties entered into a prenuptial agreement to preserve John’s separate property for future generations of Bracken descendants.....	10
E. John earned an income for all but two years of the marriage, even when he spent much of his work day on charitable endeavors.....	11
F. Dallene worked before the parties married, and began working again in 2001.....	12
G. The parties lived far beyond their means during the marriage, exhausting most of John’s separate property, exhausting community income, diminishing the value of their community property house, and incurring significant debt.	13
1. The parties spent the vast majority of their community income during the marriage, and refinanced their home three times to support their lifestyle.	13
2. The parties also spent the vast majority of John’s separate property assets and income.	14
3. The parties accumulated \$300,000 in debt to subsidize their lifestyle.	15

4.	John had to borrow funds to pay for Brady's therapeutic boarding school.....	16
H.	Procedural history.....	17
1.	John converted Dallene's legal separation petition into a dissolution petition when the parties' efforts to mend their relationship were unsuccessful.	17
2.	The trial court invalidated the prenuptial agreement, and ordered John to pay (1) \$1.8 million in maintenance over 20 years; (2) Dallene's \$950,000 mortgage; (3) child support; and (4) \$9,700 per month for the children's educational and related expenses.	19
3.	The net effect of the court's award is that Dallene received 60% of the total assets, community and separate, even though 83% of the net assets are John's separate property.....	21
4.	The court granted in part Dallene's motions for reconsideration, and denied John's motion.	25
	ARGUMENT.....	25
A.	Standards of review.	25
B.	The property distribution is unfair and inequitable where: the trial court gave Dallene almost all community property and gave John almost all community debt, which John can only pay with future income from his inheritance; the trial court also awarded Dallene \$1.8 million in maintenance, which John can only pay with future income from his inheritance; with the result that Dallene will receive 60% of all property, both community and John's separate inheritance.....	26

1.	The trial court must base any property division on consideration of the statutory factors.....	26
2.	The trial court failed to consider the nature and extent of community property in making the award.	27
3.	The trial court failed to consider the nature and extent of separate property, awarding Dallene the equivalent of 48% of John's separate property.....	29
4.	The asset distribution is further skewed because the trial court over-valued John's separate property.....	30
5.	The trial court incorrectly considered the duration of the marriage, erroneously distributing assets as if this were a long-term marriage, when it is a mid-range marriage.....	32
6.	The trial court erroneously applied the fourth statutory factor, the economic circumstances of the parties when the decree becomes effective.....	32
C.	The maintenance award is too long and too high.	33
1.	The trial court grossly overestimated John's ability to pay maintenance – RCW 26.09.090(1)(f).	33
2.	The trial court incorrectly treated the parties' marriage as a long-term marriage – RCW 26.09.090(1)(d).	35
3.	The 20-year, \$1.8 million maintenance award is unparalleled in Washington case law.	35

D.	The prenuptial agreement is enforceable because Dallene had full and fair disclosure of John's financial worth at the time of marriage.....	39
1.	Standard of review of the enforceability of the prenuptial agreement.....	39
2.	The prenuptial agreement is enforceable because it made a fair provision for Dallene when the parties married.....	40
3.	The prenuptial agreement is enforceable because Dallene knowingly signed it under counsel's advice (as the court found) and had full disclosure of John's assets when the parties married.....	45
4.	Since the prenuptial agreement is enforceable, the trial court erroneously awarded Dallene the equivalent of 48.1% of John's separate property.	47
E.	The trial court erred in ordering John to sign a Confession of Judgment for the mortgage obligation.	48
	CONCLUSION	50

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Estate of Crawford,</i> 107 Wn.2d 493, 730 P.2d 675 (1986)	47
<i>Mansour v. King County,</i> 131 Wn. App. 255, 128 P.3d 1241 (2006).....	49
<i>Marriage of Bernard,</i> 165 Wn.2d 895, 204 P.3d 907 (2009)	39, 40, 42, 46
<i>Marriage of Chumbley,</i> 150 Wn.2d 1, 74 P.3d 129 (2003)	44
<i>Marriage of Hadley,</i> 88 Wn.2d 649, 565 P.2d 790 (1977)	35, 36, 37
<i>Marriage of Littlefield,</i> 133 Wn.2d 39, 940 P.2d 1362 (1997)	26, 33, 34, 35
<i>Marriage of Mansour,</i> 126 Wn. App. 1, 106 P.3d 768 (2004).....	26, 27
<i>Marriage of Matson,</i> 107 Wn.2d 479, 730 P.2d 668 (1986)	39, 40
<i>Marriage of McCausland,</i> 159 Wn.2d 607, 152 P.3d 1013 (2007)	20
<i>Marriage of Morrow,</i> 53 Wn. App. 579, 770 P.2d 197 (1989).....	36, 37
<i>Marriage of Rockwell,</i> 141 Wn. App. 235, 170 P.3d 572 (2007), <i>rev. denied</i> , 163 Wn.2d 1005 (2008)	25, 27, 32
<i>Marriage of Sheffer,</i> 60 Wn. App. 51, 802 P.2d 817 (1990).....	37, 38

<i>Marriage of Shui,</i> 132 Wn. App. 568, 125 P.3d 180 (2005), <i>rev. denied,</i> 158 Wn.2d 1017 (2006)	29
<i>Marriage of Tower,</i> 55 Wn. App. 697, 780 P.2d 863 (1989), <i>rev. denied,</i> 114 Wn.2d 1002 (1990)	36, 37
<i>Marriage of Zier,</i> 136 Wn. App. 40, 47, 147 P.3d 624 (2006), <i>rev.</i> <i>denied,</i> 162 Wn.2d 1008 (2007).....	42
<i>Pederson v. Potter,</i> 103 Wn. App. 62, 11 P.3d 833 (2000), <i>rev. denied,</i> 143 Wn.2d 1006 (2001)	48, 49

STATUTES

RCW 26.09.080.....	27, 28
RCW 26.09.080(2)	29
RCW 26.09.080(3)	32
RCW 26.09.090(1)(b)	35
RCW 26.09.090(1)(d)	35
RCW 26.09.090(1)(e)	37
RCW 26.09.090(1)(f)	33

OTHER AUTHORITIES

Robert W. Winsor, <i>Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions</i> , WASHINGTON STATE BAR NEWS, 14-19 (Jan. 1982)	35
<i>Webster's Third New International Dictionary</i> p. 483 (1993).....	27

INTRODUCTION

Three percentages show that the property distribution in this dissolution was unfair and inequitable:

- ◆ 83% of the assets are undisputedly John Bracken's separate property passed down through generations of Brackens.
- ◆ The court awarded Dallene Bracken the equivalent of 60% of the total assets (community plus John's separate property): \$1,392,900 in community assets (more than the net community assets); \$1.8 million in maintenance (over 20 years); and a \$950,000 mortgage allocated to John.
- ◆ The award to Dallene amounts to more than all of the community property and 48.1% of John's separate property.

The court attempted to preserve for Dallene a standard of living the parties could not sustain during the marriage, and certainly cannot sustain now. The court acknowledged that Dallene could not afford to own her house, so the court ordered John to buy it for Dallene *and* to pay her maintenance. John cannot afford Dallene's house either. And the \$1.8 million maintenance award is beyond reason, where the parties were married for 19 years, Dallene is healthy and gainfully employed, and Dallene received twice the value of the community property.

The trial court's erroneous failure to enforce the parties' prenuptial agreement led to its asset distribution and maintenance errors. This Court should reverse and remand for a fair and equitable distribution of assets and a maintenance revision.

ASSIGNMENTS OF ERROR

The trial court's findings of fact are, for the most part, supported by substantial evidence. The following findings, however, are erroneous:

1. The court erred in "finding" that Dallene did not have full disclosure of John's assets when the parties married. CP 209.¹

2. The court erred in finding that the prenuptial agreement disallows separate property gifts to the community. CP 208.

3. The court erred in its interpretation of the prenuptial agreement. CP 208-09.

The more significant problem is in the trial court's award:

4. The trial court erred in concluding that John should pay Dallene maintenance of \$10,000 each month for 10 years, and \$5,000 each month for 10 more years. CP 215, FF 2.12; CP 217, CL 3.8.

5. The court erred in ignoring John's \$8,475 per month debt obligation when calculating maintenance. CP 210.

¹ The trial court filed a detailed memorandum decision concurrently with its findings of fact and conclusions of law, incorporating the memorandum decision. CP 204-13, 214-18 (attached as Appendices A and B).

6. The trial court erred in ordering that John should pay maintenance from his separate property. CP 211.

7. The trial court erred in entering a decree effectuating its 20-year, \$1.8 million maintenance award. CP 197.

8. The court erred in treating the 19-year marriage as a long-term marriage for purposes of determining maintenance. CP 211.

9. The trial court erred in ordering that maintenance will continue if Dallene remarries. CP 197.

10. The trial court erred in ordering John to pay Dallene's 30-year, \$950,000 mortgage. CP 198, 210.

11. The trial court erred in refusing to enforce the prenuptial agreement. CP 209; CP 217, CL 3.8.

12. The trial court erred in denying John's motion for reconsideration. CP 526-27.

13. The court erred in granting Dallene's motion for reconsideration. CP 519-20.

14. The court erred in ordering John to sign a Confession of Judgment. CP 512-16.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err in awarding Dallene the equivalent of 60% of the total assets, where (1) 83% of the assets are John's separate property; and (2) the award to Dallene includes more than 100% of the net community property and the equivalent of an additional 48.1% of John's separate property?

2. Separate property issues aside, is the \$1.8 million maintenance award too high, and the 20-year maintenance term too long, where the parties were married for less than 20 years?

3. Is the prenuptial agreement enforceable where (a) it made a fair provision for Dallene, where the agreement allowed for the accumulation of community property and required John to immediately gift 10% of his separate assets to Dallene; or (b) Dallene had full disclosure of John's separate assets, where John disclosed the separate property he had when the parties married and disclosed what he then knew about a possible inheritance from his father, and where Dallene's only testimony on the point is that John did not give her an asset list?

4. Did the trial court err in requiring John to execute a Confession of Judgment for the \$950,000 mortgage obligation,

where the order is sufficient to obligate John to pay the mortgage, and is sufficient to give Dallene a remedy if he fails to do so?

STATEMENT OF THE CASE

A. Background.

The parties, John and Dallene Bracken, married in October 1987. RP 8. Dallene became pregnant, and their first son, Jim, was born in December 1988. RP 20; CP 184. The parties had two more sons, Brady and Landon. CP 184.

Jim, who was 20-years-old when the trial court ruled, attends the University of Arizona in Tucson. RP 40; CP 184. Brady, who was 17, was attending a therapeutic boarding school for teens struggling with substance abuse. RP 40-41, 619. The parties anticipate that Brady will complete the program in December 2009. RP 41; CP 212. The parties' youngest son, Landon, who was 14, resides primarily with Dallene, per an agreed parenting plan. CP 184, 212.

B. John's grandfather created Blistex lip ointment.

John's grandfather, L.D. Bracken, was the pharmacist who developed the original "Blistex" lip ointment in the late 1930s or early 1940s. RP 453-54. At the request of many doctors, L.D. developed a lip ointment cold-sore remedy, eventually packaging it

in metal tubes, and selling it through a traveling salesman, Charles Arch.² *Id.* Bracken and Arch agreed that Arch would manufacture and sell the product and pay L.D. royalties. RP 456.

John's father, Jim Bracken, also attended pharmacy school, and then began medical school to pursue his true passion of becoming a doctor. RP 455. But when L.D. Bracken passed away, Jim Bracken left medical school and returned to Seattle to take over his father's pharmacy. RP 55. Jim Bracken developed the "stick" type of Blistex and licensed the rights to the formula to Arch, under the same terms Arch had with L.D. Bracken. RP 455.

C. John obtained most of his separate property, all of which is tied to Blistex Bracken, after the parties married.

John's father died in November 1984, about three years before the parties married. RP 8, 458. A few months later, a limited partnership was created to hold his interests in Blistex Bracken.³ RP 462; Ex 165 tab 16. Jim Bracken's will provided for the creation of two trusts: (1) a marital trust for John's mother Sharon, and (2) a "family" trust for John and his two sisters, to be

² The record misspells Charles' last name as "Arc."

³ The L.P. was subsequently converted to a limited liability company in 2007. RP 462. The brief refers to these different entities as "Blistex Bracken."

funded with assets held in the L.P. *Id.* Sharon Bracken, the sole personal representative of Jim Bracken's estate, decided which L.P. assets would fund the marital trust and which L.P. assets would fund the family trust. Ex 165 tab 16. Sharon elected to fund the marital trust with 81% of Jim's royalty rights in the Blistex product, putting the remaining royalty rights in the family trust. RP 464-66; CP 207; Exs 144, 164.

John had no ownership interest in Blistex Bracken or any assets from his father's estate when the parties married. RP 501; CP 207. John anticipated that he would receive an interest in Blistex Bracken in the future from his father's estate, but he did not know the value of the expectancy or the form it would take. RP 500-01. Rather, his father's estate was still open, and his potential inheritance was still undecided, when the parties married. *Id.*

John's most significant assets when the parties married were interest in two trusts that had been set up by his grandmother, valued at \$1,323,000. RP 510-11; Ex 130. John had a \$250,000 interest in "Quinton," a family partnership his father created in the early 1970s. RP 501, 503. John also used his separate funds to purchase a small interest in the limited partnership "Recorp," which

held raw land in New Mexico. RP 503, 695. Finally, John had about \$40,000 equity in his home. RP 503.

It was not until 1998 – 11 years after the parties married – that John received a distribution from his father’s estate when Sharon Bracken distributed a 6.33% interest to John (and his two sisters) from the Bracken family trust. CP 207; Exs 144, 164. That same year, Sharon Bracken created a generation skipping trust (“GST”) for John and his three boys, and two more GSTs for his two sisters and their respective children. RP 467. Sharon funded the GSTs with interests in Blistex Bracken from her marital trust. RP 467-69, 594. Each GST also purchased additional interests in Blistex Bracken from Sharon’s marital trust, and is obligated to pay \$7,600⁴ every month until 2013 to fulfill its obligation. *Id.*; Ex 148. In total, each GST holds 20.33% of the Blistex Bracken interest. *Id.*

Sharon also made cash gifts to everyone in John’s family during the marriage. RP 554. Sharon’s gifts to the parties’ children

⁴ John actually pays \$8,475.50 per month. RP 467-69. The additional monthly amount repays Jim’s account and Brady’s account for contributions they made to the down payment for the GST purchase. *Id.* John’s mother intended that the boys would contribute to the purchase. RP 467-68. The GST pays \$101,706 annually, or \$8,475.50 each month, to fulfill his obligation to purchase part of the GST interest. RP 467-69, 516-18. As discussed below, these are fixed obligations. *Id.* John has no control over this debt payment. RP 594; *infra*, Argument § C.

were placed in Uniform Gift to Minor Act accounts for the boys. RP 620-21. Sharon gifted Dallene \$10,000 in 1994, and each year from 1997 through 2001, and \$11,000 each year from 2002 through 2005, totaling \$104,000. RP 555-59. Other than two checks which went to the parties' extensive remodel of their "Keswick" home and other substantial family expenses (RP 558-59), John had no input and no knowledge of what Dallene did with Sharon's gifts. RP 560.

Sharon passed away in September 2006. RP 469. Sharon's estate was still open during trial. RP 600-01. Given ongoing tax disputes, it was "really hard" to predict how much John and his sisters would actually inherit. RP 608-09. John estimated, without dispute, that he would inherit \$2,368,000. RP 701-02.

In keeping with his parent's wishes, John has always intended to take the interests in Blistex Bracken that he inherited from his parents and put them into a GST for his children and grandchildren. RP 473, 745-46. He hopes to accomplish that in much the same way as Sharon did for her children and grandchildren. RP 746.

Finally, in 1998, John obtained a separate property interest in CCP Partners, LLC, which holds real property in suburban Denver. RP 697. CCP Partners has virtually no value. RP 698.

The partnership had concluded by trial, and John estimated he might receive \$2,000-to-\$3,000. *Id.*

D. The parties entered into a prenuptial agreement to preserve John's separate property for future generations of Bracken descendants.

Dallene knew about John's family's involvement in Blistex even before the parties started dating. RP 202, 500. The parties were engaged in May 1987. RP 496. Later that summer John told Dallene that he needed to keep his Blistex assets separate, and by September, he specifically told Dallene that he needed a prenuptial agreement. RP 496-98. John "felt a great sense of responsibility" to preserve what his grandfather and father had built (RP 498-99):

I explained to her that I felt a great sense of responsibility to be a good steward of what my grandfather and father had started with Blistex and their involvement going way back into the 1930s, and that I had a real responsibility to the rest of my family members, and that I promised my father that I would keep that separate.

John retained Paul Cressman, his godfather and a trusted family advisor. RP 497. Dallene retained Tom Abrams, who had previously represented John and Dallene in separate unrelated matters. RP 500, 503-04. John paid Dallene's fees. RP 504.⁵

⁵ The prenuptial agreement is discussed in more detail in the argument section. *Supra*, Argument Section D.

E. John earned an income for all but two years of the marriage, even when he spent much of his work day on charitable endeavors.

The court found that John earned income working in the private sector, but devoted much of his time and energy to charitable endeavors. CP 206. John worked as a real estate agent for Coldwell Banker before the parties married and when they first moved to Seattle, earning about \$50,000 annually. RP 477-79. After the parties moved to Seattle, John took a job as a golf sales representative for Wilson Sporting Goods in 1991. RP 479-80.

John worked for Wilson for a little over two years when a friend turned golf professional, Fred Couples, asked John to help him explore starting a charity golf tournament in Seattle to benefit cancer research. RP 480-81. John ran the tournament from 1994 through 2000, earning about \$40,000 annually. RP 481-82. The tournament raised \$1 million for cancer research. *Id.*

The last tournament was in August 2000, but John continued working into 2001, paying vendors and distributing funds to charitable organizations. RP 482. Over the next two years, John spent most of his time on charitable work before taking over as the managing partner for Blistex Bracken in 2003. RP 482-83, 520. As Blistex Bracken's manager, John initially earned \$40,000 annually.

RP 520. His compensation had increased to \$56,200 by 2006 when Sharon passed away. *Id.*

F. Dallene worked before the parties married, and began working again in 2001.

When the parties married, Dallene was working as a consultant for the Arizona State Association Credit Union League.

RP 9. She stopped working in 1988, when the parties' first child was born. RP 20.

Dallene began working in the interior design field in summer 2000. RP 35-36. After apprenticing with designer Lamar Efaw for about four years, Dallene went out on her own in 2005. *Id.* The trial court found that Dallene's design company, Bracken Design, was "wildly successful." CP 206. Dallene's net income averaged \$11,000 per month, \$130,000 per year, in 2006 and 2007. RP 533-34, 765-66. Her income declined in 2008 while the divorce and trial were ongoing. CP 207, 211. Although the parties disputed the cause of Dallene's decrease in income, the court found that without more education, Dallene is unlikely to match her 2006 and 2007 income. CP 207, 211.

G. The parties lived far beyond their means during the marriage, exhausting most of John's separate property, exhausting community income, diminishing the value of their community property house, and incurring significant debt.

1. The parties spent the vast majority of their community income during the marriage, and refinanced their home three times to support their lifestyle.

The parties lived beyond their means during the marriage.

RP 561. They spent their employment income (RP 527, 809-10; CP 201) and repeatedly refinanced their home to support their lifestyle. RP 564. They exhausted John's trusts from his grandmother, valued at over \$1.3 million when they married, and they incurred over \$300,000 in debt. CP 206, 207; RP 510-11.

John paid community expenses from Washington Mutual account #7171, which he funded with his community property income and with separate funds transferred into #7171 from the separate accounts in which his Blistex Bracken income was deposited.⁶ RP 527-28. Account #7171, which the court concluded was "mixed" community and separate property, had only \$11,300 in it when the parties divorced. CP 201. John placed those funds in the account after the parties separated. RP 698-99.

⁶In fact, the parties virtually depleted John's separate property accounts. *Infra*, Statement of the Case § G 3.

Dallene used her income to decorate and furnish the house. RP 809. By trial, there was just \$3,000 remaining in her “Bracken Design” community property account. CP 201.

The parties also refinanced their home three times to subsidize their lifestyle. RP 564. They took out a couple hundred thousand dollars on the first two refinances, and took out about \$170,000 on the third refinance. *Id.*

2. The parties also spent the vast majority of John’s separate property assets and income.

The trial court found that John supported the parties’ lifestyle with his separate property income and with the \$1.3 million in trust funds from his grandmother, the bulk of the separate property he had before the parties married. CP 206, 207; RP 510-11. The parties spent about \$1 million of the trust funds on two major remodels of the Keswick home. RP 563. They spent the remainder on basic living expenses. RP 564. In addition to John’s trusts, the parties also depleted the funds John received in 2000 from his interest in the Quinton partnership.⁷ RP 566.

The parties also all but exhausted John’s Blistex Bracken income. John had two Goldman Sachs accounts into which his

⁷ Valued at \$250,000 when the parties married. RP 501, 503.

Blistex Bracken income was automatically deposited. RP 528. The first Goldman Sachs account held the funds from the GST John's mother set up. RP 528. That account netted about \$339,556.62 annually. RP 467-69, 518. The second Goldman Sachs account received about \$137,392.69 each year from the interest John received from the Bracken family trust in 1998. RP 519.

John testified that he "frequently" transferred separate funds from his Goldman Sachs accounts into the account used to pay community expenses. RP 528. These accounts only had \$44,500 left when the parties divorced. CP 201.

3. The parties accumulated \$300,000 in debt to subsidize their lifestyle.

The trial court also found that the parties incurred over \$300,000 in debt to subsidize their lifestyle. CP 206. The parties exhausted a \$250,000 credit line to pay for community expenses. RP 571. Some of the large expenses paid from the credit line include a \$13,371 VISA bill both parties incurred (much of which went to college costs for the parties' oldest son), nearly \$40,000 to paint their house, \$27,207 in taxes, \$20,000 for construction on the home, and an \$8,600 mortgage payment. RP 571-73; Ex 139.

The parties also spent another \$62,700 on community expenses from a different credit line. RP 567-68; Ex 140. John

had to borrow from the children's accounts to pay off the \$62,700 debt, due at the year's end. RP 568-69. John explained, however, that the kids' accounts were not supposed to be used for community expenses. RP 568-69. He reimbursed their accounts in about three weeks. RP 569.

4. John had to borrow funds to pay for Brady's therapeutic boarding school.

The trial court found that John had to borrow to pay for Brady's substance abuse treatment at Second Nature Wilderness Program, which cost \$58,000. CP 212; RP 619, 622-23. The parties knew the program's significant costs when they elected to enroll Brady, but did not discuss how they would pay for it. RP 620. They were simply focused on getting Brady help. *Id.* When it came time to pay for Brady's treatment, John proposed that they use proceeds from the Keswick sale, but Dallene refused, taking the position that Brady's account should be used to pay for his treatment. RP 621-22. Brady's account was established using annual gifts from Sharon Bracken, just like the gifts Sharon gave to Dallene (*id.*), which Dallene had spent as she chose. RP 560.

There was no time to argue and John would not allow payment to be a stumbling block to getting Brady help. RP 621-22. He estimated the immediate cost for Brady's treatment, and took

out a \$50,000 loan from his sister Carol Clemency to pay for Brady's program. RP 621-22; Ex 126. John figured the parties would "argue . . . later" about how to pay for Brady's care. RP 622.

Once the immediacy of the situation abated and John had time to get things in order, he took out a bank loan to repay Carol. RP 622-23; Ex 126. In total, John has spent \$55,300 for Brady's program and \$3,015 for the educational consultant's travel fee, totaling \$58,315. RP 624.

After Brady completed the wilderness program, he enrolled in the Montana Academy, a therapeutic boarding school. RP 628-29. John paid the first two-months enrollment – \$17,000 – up front, and subsequently paid \$6,800 per month. RP 629. The program lasts 18 months, so the parties anticipated that Brady would complete his senior year of high school at the Montana Academy, and then complete the program at a nearby community college. *Id.*

H. Procedural history.

- 1. John converted Dallene's legal separation petition into a dissolution petition when the parties' efforts to mend their relationship were unsuccessful.**

Dallene filed for legal separation on August 23, 2007. CP 2; RP 218, Ex 114. John was "really surprised" – he did not know Dallene wanted a separation until she served him after the parties

had dinner downtown. RP 548. Dallene told John that she wanted to work on their relationship, but needed time apart. *Id.*

John moved out of the parties' home on September 10, renting a small home nearby. RP 549. By then, Dallene had filed a motion for an order requiring John to buy her a new house. RP 551. The Purchase and Sale Agreement on the "Yertle" house, a \$2 million home the parties ultimately purchased for Dallene, specifically provides that the home will not be used as evidence of the "appropriate post marital standard of living." Ex 133. The parties worked on their relationship, but eventually converted the action to a petition for dissolution. CP 11.

After the parties' six-day trial, ending on August 27, 2008 (RP 1, 836), the trial court issued a draft memorandum decision on December 4, 2008, along with proposed findings, dissolution decree and child-support order. CP 91. After much written argument and two presentation hearings (RP 855, 857-58; CP 91-183), the trial court filed a final memorandum decision and final findings on January 28, 2009. CP 204-213, 214-18.

2. **The trial court invalidated the prenuptial agreement, and ordered John to pay (1) \$1.8 million in maintenance over 20 years; (2) Dallene's \$950,000 mortgage; (3) child support; and (4) \$9,700 per month for the children's educational and related expenses.**

The court found that Dallene "agreed in principle with segregation and protection of [John's] separate property acquired prior to the marriage" (CP 205), but invalidated the prenuptial agreement. CP 209. The court awarded Dallene the home, but ordered John to pay Dallene's \$950,000 mortgage. CP 210. The trial court also ordered John to pay \$1.8 million in maintenance over 20 years: \$10,000 each month for 10 years, and \$5,000 each month for 10 more years. CP 197. Maintenance will not terminate if Dallene remarries, but will be reduced by 50% and will terminate five years after re-marriage. *Id.*

John also pays \$1,000 support each month for Landon⁸, which is above the standard calculation. CP 186. John must purchase health insurance for all three children and pays 75% of their extraordinary healthcare expenses. CP 188-89. Although

⁸ The trial court also ordered John to pay \$1,000 per month child support for Brady upon his return home from boarding school, so long as Brady is in school full time or is not working more than 15 hours per week. CP 187. In either case, the court ordered that support will terminate at the end of 2009, the year in which Brady turned 18. *Id.* Brady will return home in mid-December 2009 and begin college in January 2010. As such, John should not owe any support for Brady.

there are not findings sufficient to support the child support award above the standard calculation, John does not appeal from the child support award. ***Marriage of McCausland***, 159 Wn.2d 607, 610-11, 152 P.3d 1013 (2007).

In addition to child support, John must continue paying 100% of Landon and Brady's private schooling expenses, including all tuition and school-related costs, such as uniforms, books, fees, lunches, school sports trips, and hotels. CP 187-88, 212. John must also pay for 100% of the children's activities, including uniforms and equipment. CP 188.

John must also pay the children's post-secondary education expenses, including tuition, room, board, fees, books, medical insurance, and uninsured medical, if he does not use the trusts or UGMA⁹ funds to do so. CP 187-88. The court found that John has historically paid Jim's college expenses. CP 212.

John actually agreed to pay these expenses, totaling \$9,716 per month, from his separate property. (\$1,833 per month for Jim's college tuition, RP 442, \$6,800 per month for Brady's treatment/schooling, RP 629, and \$1,083 per month for Landon's

⁹ The two minor children still have the UGMAs funded by annual gifts from Sharon Bracken. RP 620-21. Jim converted his UGMA into a trust when he turned 18. RP 746-47.

private school, RP 445). John thinks that the community should share the children's educational expenses, but Dallene thinks that the children's accounts (funded with gifts from Sharon Bracken) should pay for their educations. CP 212. John wants to preserve the children's accounts to provide them with a nest-egg, such as a down-payment on a home. RP 451. His parents paid for his schooling, and he hopes to do the same for his kids. RP 450-51.

3. The net effect of the court's award is that Dallene received 60% of the total assets, community and separate, even though 83% of the net assets are John's separate property.

The court awarded Dallene the equivalent of 198% of the community property, and awarded John negative 98% of the community property (CP 200-02, attached as Appendix C):

Community Asset/Debt	FMV	To Dallene	To John
Yertle Residence	\$2,000,000 (\$950,000)	\$1,050,000	
NW Mutual Ins	\$30,600		\$30,600
Keswick proceeds	\$282,500	\$282,500	
Keswick proceeds pre-distribution	\$25,000	\$25,000	
WA Trust 7171 [mixed community and separate]	\$11,300	\$11,300	
WAMU 7232	\$7,400		\$7,400
WAMU 4581 (Bracken Design)	\$3,000	\$3,000	
Box Elder Credit Union	\$2,100	\$2,100	

Community Asset/Debt	FMV	To Dallene	To John
Dain Rauscher	\$87,800	\$60,000	\$27,800
Household furnishings	\$114,000	\$74,000	\$40,000
WA Trust line of credit 0445	(\$62,700)		(\$62,700)
WA Trust line of credit 5243	(\$50,000)		(\$50,000)
WA Trust line of credit 9356	(\$251,000)	(\$51,000)	(\$200,000)
Mercedes	\$34,800 (\$36,500)	(\$1,700)	
Visa 9444	(\$13,800)	(\$13,800)	
Nieman-Marcus	(\$800)	(\$800)	
MasterCard 5695	(\$2,300)	(\$2,300)	
WAMU line of credit for Bracken Design	(\$45,400)	(\$45,400)	
Total community assets	\$2,563,700	\$2,457,900	\$105,800
Total community debts	(\$1,377,700)	(\$1,065,000)	(\$312,700)
Community Property Before Transfer	\$1,186,000	\$1,392,900	(\$206,900)
Mortgage Transfer ¹⁰ Payment		\$950,000	(\$950,000)
Total after Transfer Payment		\$2,342,900	(\$1,156,900)
Award as a Percent of Community Property		198%	(98%)

¹⁰ The chart accounts for the mortgage payment as a transfer payment from John to Dallene because the trial court ruled that the value of the house distributed to Dallene is the fair market value, rather than the net value, where John must pay the entire \$950,00 mortgage obligation.

Although the asset distribution awards Dallene the net value of the Yertle house, \$2 million, the distribution leaves John with no community assets from which to pay the \$950,000 mortgage allocated to John. CP 200-02. John will have to pay the mortgage from his separate property income from his interests in Blistex Bracken. *Id.* The mortgage payment is the equivalent of 16.6% of the stated value of John's separate property. *Id.* (The stated total value of John's separate property was \$5,716,400,¹¹ CP 200-07). Dallene's \$1.8 million maintenance package is the equivalent of another 31.5% of the stated value of John's separate property. CP 201-02. Together, the maintenance and mortgage payments total nearly half of the stated value of John's separate property:

	Value	% of John's separate property
Maintenance Package	\$1,800,000	31.5%
Mortgage payments	\$950,000	16.6%
Total	\$2,750,000	48.1%

Adding together the \$1.8 million in maintenance, the \$950,000 mortgage payments, and Dallene's net property award of

¹¹ This figure includes the full value of the GST, which John does not own, and of which John is only one of the four present beneficiaries. *Supra*, Argument § B. As discussed below, this asset does not belong entirely to John.

\$1,392,900, Dallene will ultimately receive \$4,142,900, or 60% of the total assets (\$1,186,000 net community property + \$5,716,400 separate property = \$6,902,400). Eighty-three percent of the total assets are John's separate property.

The court's award leaves John with far less income than Dallene each month. John's monthly income, almost all of which comes from the Blistex Bracken assets that he inherited from his mother and father, is \$30,292¹² after paying taxes and maintenance. CP 185. After paying the mortgage on Dallene's house, all child-related expenses, and his own rent, John is left with \$1,483.10, while Dallene has \$11,029.48:

	Dallene	John
Net Income ¹³	\$10,029.48	\$30,458.60
Debt on GST	0	(\$8,475.50)
Tuition	0	(\$9,500)
Child support	\$1,000	(\$1,000)
John's rent	0	(\$4,000)
Dallene's mortgage	0	(\$6,000)
Monthly net	\$11,029.48	\$1,483.10

¹² This figure is derived from the following: \$55,667 - \$10,000 (maintenance) = \$45,667 - \$15,375 (taxes and FICA) = \$30,292. The court found that John's monthly income net of taxes and maintenance was slightly higher – \$30,458.60. CP 185.

¹³ These figures are net of taxes and maintenance. CP 185 (child support order).

CP 185. This leaves Dallene with over \$9,500 per month more than John. *Id.* And this does not account for the fact that John must provide health insurance for all three boys, and must repay another \$206,900 in community debt. CP 188-89, 200-02.

The court did not award attorney fees. CP 213.

4. The court granted in part Dallene's motions for reconsideration, and denied John's motion.

On reconsideration, the court granted Dallene's motion, ordered John to sign a Confession of Judgment for the \$950,000 mortgage obligation (CP 429-30, 450), and ordered Dallene not to file, record, or execute the Confession unless John defaults on the mortgage. CP 429-33. The court denied John's motion for reconsideration. CP 524-25. John timely appealed. CP 470-523.

ARGUMENT

A. Standards of review.

This court reviews the trial court's findings for substantial evidence. ***Marriage of Rockwell***, 141 Wn. App. 235, 242, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1005 (2008). Substantial evidence is "evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." ***Rockwell***, 141 Wn. App. at 242.

The Court reviews the property distribution and the maintenance award for an abuse of discretion. ***Marriage of Mansour***, 126 Wn. App. 1, 13-14, 106 P.3d 768 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. ***Marriage of Littlefield***, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). The decision is manifestly unreasonable “if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” ***Littlefield***, 133 Wn.2d at 47. It is based on untenable grounds if the record does not support the findings. 133 Wn.2d at 47. It is based on untenable reasons if it is based on an incorrect legal standard or the facts do not satisfy the correct standard. *Id.*

B. The property distribution is unfair and inequitable where: the trial court gave Dallene almost all community property and gave John almost all community debt, which John can only pay with future income from his inheritance; the trial court also awarded Dallene \$1.8 million in maintenance, which John can only pay with future income from his inheritance; with the result that Dallene will receive 60% of all property, both community and John’s separate inheritance.

1. The trial court must base any property division on consideration of the statutory factors.

The court must make a “just and equitable” property distribution, based on the following factors: (1) the nature and extent of the community property, (2) the nature and extent of the

separate property, (3) the duration of the marriage, and (4) the each spouse's economic circumstances when the distribution of assets is to become effective. *Mansour*, 126 Wn. App. at 15; RCW 26.09.080.¹⁴ The court is more likely to make a disproportionate award of community property where there is a long term marriage – which this Court recently stated is 25 years or more – or where one spouse is older, semi-retired, or in ill health, and the other is employable. *Rockwell*, 141 Wn. App. at 243.

2. The trial court failed to consider the nature and extent of community property in making the award.

RCW 26.09.080 requires the court to make a just and equitable property division “after considering all relevant factors including, but not limited to: (1) the nature and extent of the community property” The primary definition of “consider” is “to reflect on : think about with a degree of care or caution” *Webster's Third New International Dictionary* p. 483 (1993).

The trial court failed to “consider” the nature and extent of the community property. The net value of the parties' community property was \$1,186,000. *Supra*, Statement of the Case § H.3. The trial court did not seem to realize the total value, stating only

¹⁴ All relevant statutes are attached.

that “less than \$2 million (net of debt) in community assets were acquired.” CP 156. The chart of property appended to the dissolution decree combines community and separate property without any totals of either. CP 200-02.

The trial court never seemed to realize that she was awarding Dallene almost twice the value of the community property and that she burdened John with a net property award of minus 98% of the community property. Nor did the trial court seem to apprehend that between the property award and the maintenance award, she was awarding to Dallene 60% of the total estate, both community and separate property.

One might expect to see a 60/40 asset distribution in a long-term marriage in which the vast majority of the parties’ assets were community. But this is a mid-range marriage (*infra* Argument § B 5), and only 17% of the parties’ total assets were community property. *Id.* The trial court effectively ignored the amount of community property available for distribution, contrary to RCW 26.09.080.

3. The trial court failed to consider the nature and extent of separate property, awarding Dallene the equivalent of 48% of John's separate property.

A court must consider the “nature and extent” of separate property when distributing the parties’ assets. RCW 26.09.080(2). The court awarded Dallene the equivalent of 48% of John’s separate property. *Supra*, Statement of the Case § H 3. This award is inconsistent with Washington statutes and common law, which go to considerable length to protect separate property. The right to separate property is as “sacred” as the right to community property. ***Marriage of Shui***, 132 Wn. App. 568, 584, 125 P.3d 180 (2005), *rev. denied*, 158 Wn.2d 1017 (2006).

The separate property at issue here is the result of the Bracken family’s careful stewardship of the Blistex Bracken interests, coming into existence decades ago as a result of L.D Bracken’s creation. RP 498, 594. This is not the type of separate property that typically exists after a dissolution – post-dissolution employment income and community assets that are divided and become each recipient spouse’s separate property.

Inherited family property is at the heart of the division between community and separate property. The goal of keeping an inheritance separate is not just to protect the heir, it is to preserve

the family wealth for future generations. That is exactly what the Bracken family has done for three generations through careful estate planning and generation skipping trusts. The trial court's property division has made Dallene a Bracken family heir when she is no longer a family member. The court did so at the expense of the parties' children by requiring John to invade the GST, shifting funds that should be preserved for the children, to Dallene.

In short, awarding Dallene the equivalent of 48% of John's separate property (plus community property) treats his separate property as if it were community property. This erroneously fails to consider the nature and extent of separate property.

4. The asset distribution is further skewed because the trial court over-valued John's separate property.

The court compounded its distribution error by grossly overstating the value of the GST, which accounts for 74% of the stated value of John's separate property. The court awarded John the GST, valuing the asset at \$4,258,800. CP 200. The court adopted expert Kevin Grambush's valuation, which calculated the value of a single "unit" of ownership interest in Blistex Bracken, and multiplied that unit value times the number of units in the 20.33% GST interest. *Id.*; RP 277-78; Ex 20. Grambush used the same

unit value in calculating the value of the 6.33% interest John holds outright. Ex 20; RP 277-78, 845. In applying the same unit value to both calculations, Grambush failed to account for the fact that John does not own the GST and is not the sole beneficiary, both points that Grambush acknowledged. RP 846, 850-51. This error artificially inflated John's property distribution.

- Grambush also erroneously believed that as trustee of the GST John "had control over" the GST, and is "free to do whatever he wants" with the GST "with minor restrictions." RP 850, 851. That contradicts the express terms of the GST document. *Compare Id. with Ex 165 tab 25.* John does not have exclusive control over the GST – Robert Blais has been the special trustee of John's GST since its inception. Ex 165 tab 25.

The asset distribution is also misleading in two respects. First, the value of the Blistex Bracken assets awarded to John is based entirely on their royalty income. CP 200; Ex 20. But there is no guarantee that John will continue to receive the same Blistex Bracken income. Royalties dipped between 2006 and 2007, and the management predicted a 2008 decrease. RP 760, 848.

Second, John will have to pay the \$1.8 million maintenance award and the \$950,000 mortgage debt from his Blistex Bracken

income, seriously reducing the potential net amount that John might receive. These amounts essentially act as transfer payments of John's separate property to Dallene.

5. The trial court incorrectly considered the duration of the marriage, erroneously distributing assets as if this were a long-term marriage, when it is a mid-range marriage.

The trial court erroneously applied the third statutory factor, the duration of the marriage. RCW 26.09.080(3). The court ruled that this 19-year marriage is long-term "by today's standards" (CP 211), contrary to this Court's recent reminder that a long-term marriage is a marriage of 25 years, or more. *Rockwell*, 141 Wn. App. at 243. While a disproportionate award of *community* property is "more likely" in a long-term marriage, there is no basis for awarding Dallene the equivalent of 60% of the *total* assets, including 48.1% of John's separate property, in this mid-range marriage. *Rockwell*, 141 Wn. App. at 243.

6. The trial court erroneously applied the fourth statutory factor, the economic circumstances of the parties when the decree becomes effective.

The trial court artificially fashioned its award to keep Dallene in a home that it acknowledged she cannot "afford to own or maintain." CP 209. Since Dallene cannot afford to own her house, the court ordered John to buy it for her, and since she cannot afford

to maintain it, the court ordered John to pay Dallene \$1.8 million in maintenance over 20 years. CP 197, 200-02. The award is doubly erroneous where the parties agreed that the home would not be used as evidence of the “appropriate post marital standard of living.” Ex 133. Neither party can afford Dallene’s house.

In sum, awarding Dallene the equivalent of 60% of the total assets is simply outside the range of acceptable choices, where 83% of the assets are John’s separate property. *Littlefield*, 133 Wn.2d at 47. This Court should reverse and remand for a just and equitable property distribution.

C. The maintenance award is too long and too high.

1. The trial court grossly overestimated John’s ability to pay maintenance – RCW 26.09.090(1)(f).

The maintenance award is too high, where it leaves Dallene with 7.4 times more net monthly income than John. *Supra*, Statement of the Case § H 3. Maintenance should balance a gross disparity in the post-dissolution standard of living, not create one. This Court should reverse.

The trial court grossly overestimated John’s ability to pay maintenance (RCW 26.09.090(1)(f)), when it failed to account for the \$8,475.50 per month John’s GST pays to fulfill his obligation to purchase part of the GST interest. *Compare* Statement of the Case

§ H 3 with CP 185. These monthly debt payments are automatically deducted from John's GST account when the Blistex Bracken income is automatically deposited into his GST account. RP 468-69. John has no control over the debt payment. RP 594.

The trial court ruled, however, that John will "presumably" be able to forgive the debt when he receives his inheritance, since the bulk of the debt payment is to John's mother's estate:

Presumably, [John] will be able to make his own decisions regarding cancellation, satisfaction, forgiveness, or continued payment of that note upon distribution of his mother's estate.

CP 210. But the only testimony on the point is John's statement that he has no control over the GST debt payments. RP 594. The trial court is simply incorrect. The court's refusal to deduct these debt obligations from John's monthly net income is based on untenable grounds, where there is simply no evidence to support the trial court's finding. *Littlefield*, 133 Wn.2d at 47.

When John's monthly GST payment is taken into account, John is left with only \$1,483.10¹⁵ each month, after paying Dallene \$10,000 maintenance and after paying her \$6,000 per month

¹⁵ This number does not account for \$206,900 in community debt assigned to John. *Supra*, Statement of the Case § H 3.

mortgage. *Supra*, Statement of the Case § H 3. Dallene is left with \$11,029.48 per month, 7.4 times more than John. *Id.* Maintenance should not create such a gross inequity. This is “outside the range of acceptable choices.” ***Littlefield***, 133 Wn.2d at 46.

2. The trial court incorrectly treated the parties’ marriage as a long-term marriage – RCW 26.09.090(1)(d).

The trial court erroneously ruled that the parties’ marriage was long-term. *Supra*, Argument § B 4. Typically, the goal of maintenance in mid-range marriage is to allow the spouse receiving maintenance sufficient time to obtain re-education and retraining. Robert W. Winsor, *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, WASHINGTON STATE BAR NEWS, 14-19 (Jan. 1982); RCW 26.09.090(1)(b). Dallene does not need 20 years – longer than the marriage – to obtain re-education.

3. The 20-year, \$1.8 million maintenance award is unparalleled in Washington case law.

When a maintenance award exceeds ten years, it is usually because the husband received the lion’s share of the assets – usually community property – and the wife cannot work due to a disability. In ***Marriage of Hadley***, for example, the parties had been married for about 12 years when the trial court awarded the wife \$545,000 in community property, and \$480,000 in maintenance,

payable in \$4,000 monthly payments for a 10-year term. **Marriage of Hadley**, 88 Wn.2d 649, 651-52, 565 P.2d 790 (1977). The wife's total award, property and maintenance, was about half of the community property, and only 6% of the parties' total assets (\$9.4 million). **Hadley**, 88 Wn.2d at 653, 674 (*dissent*). The wife had multiple sclerosis, which left her "totally disabled, requiring full-time nursing care and other medical attention." *Id.* at 652. The Supreme Court affirmed. *Id.* at 659.

In **Marriage of Morrow** this Court affirmed the trial court's \$2,200 per month lifetime maintenance award in a 23-year marriage, where the husband had converted large amounts of community property for his separate use and the wife was unable to work due to a vision problem that periodically rendered her temporarily blind. **Marriage of Morrow**, 53 Wn. App. 579, 581, 586-88, 770 P.2d 197 (1989). In **Marriage of Tower**, this Court affirmed a permanent maintenance award in a 19-year marriage, where the wife had multiple sclerosis that substantially limited her activities and the husband received 63% of the property, which was all community. **Marriage of Tower**, 55 Wn. App. 697, 698-99, 701, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990).

None of these cases are comparable – Dallene is in good health and is capable of working. RCW 26.09.090(1)(e); RP 238, 258. In fact, Dallene out-earned John almost two-fold in 2006 and 2007. Compare RP 765-66, with CP 211. Additionally, this case is unlike *Tower*, where all of the property was community, and is unlike *Morrow*, where the husband converted community property. *Tower*, 55 Wn. App. at 698-99; *Morrow*, 53 Wn. App. at 587-88.

Hadley is at least comparable in that the husband's separate property outstripped the community property. But in *Hadley*, the husband's maintenance obligation was far less than his community property award. *Hadley*, 88 Wn.2d at 652. The wife in *Hadley* received the equivalent of about half of the community property, and no separate property. *Id.* Dallene received the equivalent of 198% of the community property plus 31.5% of John's separate property in maintenance. *Supra*, Statement of the Case § H 3.

The usual rationale for awarding maintenance is not present in this case. Maintenance is not a matter of right and it is not intended to function as a "perpetual lien on the other spouse's future income." *Marriage of Sheffer*, 60 Wn. App. 51, 54, 802 P.2d 817 (1990). The point of maintenance is typically to balance the post-dissolution standard of living that results when (1) the

economically disadvantaged spouse, usually the wife, has given up a career to support the community, so has a limited earning capacity; and (2) the husband pursued a career that produced the assets being divided, and has a far superior earning capacity. See, **Sheffer**, 60 Wn. App. at 54. That is not what happened here. John does not have a superior earning capacity, and his career did not produce the parties' assets, community or separate.

Consider John's employment income. The trial court found that John earns about \$60,000 annually for managing Blistex Bracken. CP 211. John's expert Bob Duffy estimated that John could earn about \$50,000 annually in real estate. RP 281-82. Although Grambush estimated that John could earn \$100,000 annually as a real estate broker, Grambush was unaware that John does not have a broker's license and has never worked as a broker. RP 303. Thus, the most maintenance could be based on is an income of \$110,000 – assuming John could work in real estate *and* manage Blistex Bracken, or maybe \$160,000 per year – assuming Grambush's estimate has any validity given its faulty premise. Using John's employment income would no doubt dramatically reduce the maintenance award.

In sum, even if it would not have to be paid from John's separate property, the maintenance award is simply beyond the range of acceptable choices. This Court should reverse.

D. The prenuptial agreement is enforceable because Dallene had full and fair disclosure of John's financial worth at the time of marriage.

1. Standard of review of the enforceability of the prenuptial agreement.

Prenuptial agreements are subject to a two-prong test to determine enforceability. *Marriage of Bernard*, 165 Wn.2d 895, 902, 204 P.3d 907 (2009) (citing *Marriage of Matson*, 107 Wn.2d 479, 482-83, 730 P.2d 668 (1986)). Under the first prong of the "*Matson* test," the court determines whether the agreement is "substantively fair" – that is whether it makes reasonable provision for the spouse not seeking to enforce it. *Matson*, 107 Wn.2d at 482. If the trial court finds that an agreement is substantively fair, "the analysis ends;" the agreement is enforceable. *Id.* Substantive fairness is a question of law, reviewed *de novo*, unless factual disputes must be resolved to interpret the prenuptial agreement's meaning. *Bernard*, 165 Wn.2d at 902.

If the agreement fails the *Matson* test's first prong, then the court will turn to the second prong – procedural fairness – which asks: (1) whether the spouses made a full disclosure of the amount,

character, and value of the property involved and (2) whether the agreement was freely entered into on independent advice from counsel with full knowledge by both spouses of their rights. **Bernard**, 165 Wn.2d at 902-03. If the court determines the second prong is satisfied, the agreement is valid and binding. 165 Wn.2d at 903.

The court's analysis under the second prong of the **Matson** test involves mixed questions of "policy and fact." *Id.* As such, this Court's review is *de novo*, but is "undertaken in light of the trial court's resolution of the facts." *Id.* This Court will uphold findings that are supported by substantial evidence. *Id.*

2. The prenuptial agreement is enforceable because it made a fair provision for Dallene when the parties married.

The prenuptial agreement gives Dallene 10% of John's separate property by will, and creates a community interest in his separate property house. Ex 26 ¶¶ 5, 13. The agreement also defines the method by which the parties will calculate the community's interest in any increase in John's separate property resulting from his community labor. Ex 26 ¶ 2. Otherwise, the agreement simply adopts Washington's law on the preservation of separate property. John's generous gifts of separate property

made a fair provision for Dallene when the parties executed the prenuptial agreement. This Court should reverse.

The attorneys, not the parties, negotiated the prenuptial agreement, beginning about two months before the wedding. RP 505; CP 209. Paul Cressman presented the first draft of the agreement to Dallene's attorney at least two to three weeks before the wedding. RP 509. Dallene reviewed it with her attorney and negotiated changes to John's draft. RP 506-07, 509. Specifically, Dallene obtained a provision that would allow her to acquire an interest in John's separate property if John spent more than 10% of his work week improving the separate property. RP 505-07; Ex 26 ¶ 2. Dallene also obtained a provision for an interest in John's separate property home. RP 505-07; Ex 26 ¶ 13.

The agreement also requires John to immediately bequeath 10% of his separate property to Dallene. RP 507; Ex 26 ¶ 5. John executed a will to that end before the wedding. RP 507.

Finally, the agreement provides that both parties entered the agreement "freely and voluntarily and with full opportunity to ascertain his or her rights," and that Dallene was advised to obtain independent counsel to represent her in the execution of the prenuptial agreement. RP 508; Ex 26 ¶ 7. Dallene also

acknowledged that John had “fully disclosed the nature and extent of his . . . separate property,” and waived her right to challenge the prenuptial agreement on that ground. Ex 26 ¶ 11. Dallene’s attorney signed a certificate indicating that Dallene was “fully knowledgeable” of John’s separate property, understood her legal rights, and signed the agreement voluntarily. Ex 26.

The trial court applied an incorrect legal standard, determining the prenuptial agreement’s substantive fairness as of the time of enforcement, not the time of execution. CP 208-09. Our Supreme Court recently rejected an invitation to focus on the time of enforcement, holding “We adhere 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.’” **Bernard**, 165 Wn.2d at 904 (quoting **Marriage of Zier**, 136 Wn. App. 40, 47, 147 P.3d 624 (2006), *rev. denied*, 162 Wn.2d 1008 (2007)).

The trial court’s substantive unfairness determination also turned on an incorrect interpretation of prenuptial agreement paragraph 4, which provides that separate property contributions to the community, or separate property used to obtain community credit, shall remain separate property:

Each party agrees that any contribution to the community from the separate estate of either party shall be considered separate property, and that any separate property used to secure credit for the community shall remain separate property. In the event the parties separate or the marriage is terminated by dissolution or the death of either party, the separate estate making such contribution, or securing such credit, shall be entitled to reimbursement, without interest against the community, and any reimbursement right shall be secured by a noninterest bearing lien in the benefitted community property or separate property of the other party. .

Ex 26 ¶ 4; CP 208. The trial court interpreted paragraph 4 to “essentially disallow[] gifts to the community from either party.” CP 208. That, the court held, was an attempt to deny Dallene “any possible future stake in the community property.” CP 208.

But paragraph 4 simply attempts to preserve the separate property character of separate funds contributed to a community asset, such as real property. Ex 26 ¶ 4. In fact, paragraph 4 provides that the reimbursement right will be secured by a lien “on the benefitted community property.” *Id.* This plainly anticipates a separate property contribution to an asset that will still exist in the event of a dissolution.

Paragraph 4 is consistent with a long-line of controlling authority, holding that separate funds combined with community funds to purchase real property retain their separate character.

Marriage of Chumbley, 150 Wn.2d 1, 8, 74 P.3d 129 (2003). The ***Chumbley*** Court applied the same rule to separate funds used to purchase community stock options, where the party contributing the separate funds did not intend to make a loan or gift to the community. ***Chumbley***, 150 Wn.2d at 8-9. The Court held that applying the “mortgage rule” to stock options gives “effect to the long-standing principle that the character of separate property continues through transitions where it can be traced and identified.” 150 Wn.2d at 9.

John’s performance is consistent with this interpretation, using separate property to buy a home and then reimbursing himself upon the sale of the home. RP 636. And John has never asserted a lien to recover the value of his separate property contributions to the community, as the court’s interpretation would allow. The parties depleted over \$1.5 million in John’s separate property assets (his grandmother’s trusts and Quinton) and also spent almost all of the separate property income John received during the marriage. *Supra*, Statement of the Case § G. These were “gifts to the community,” which the court erroneously found paragraph 4 “disallows.” CP 208.

Finally, the court's interpretation is inconsistent with testimony from John and his then attorney, Paul Cressman. RP 505, 584. Although Dallene claimed that a prior draft of the prenuptial agreement attempted to deny her community property (RP 205), she never claimed that the prenuptial agreement does so (nor did she produce the draft to which she referred).

In short, the prenuptial agreement was substantively fair when executed, where it allows for the creation of community property and requires John to gift 10% of his separate property to Dallene. This Court should reverse.

3. The prenuptial agreement is enforceable because Dallene knowingly signed it under counsel's advice (as the court found) and had full disclosure of John's assets when the parties married.

John's separate property before the marriage included (1) the two trusts from his grandmother; (2) his interest in Quinton; (3) his interest in Recorp; and (4) the equity in his home. *Supra*, Statement of the Case, § C. John told Dallene about the trusts from his grandmother, explaining that they consisted of stocks and bonds, and even showing Dallene trust statements documenting the \$1,323,000 balance. RP 501-02. John told Dallene about his interests in Quinton and Recorp, explaining that his Quinton interest, comprised of stocks and real property, was worth about

\$250,000 and that he had put \$40,000 into Recorp in 1986 and made an additional payment in 1987. RP 501-03. John told Dallene that he wanted to keep the \$40,000 of equity in his home. *Id.*

John also told Dallene about a future inheritance from his father, although he did not own the interest when the parties married. RP 500-01. John could not tell Dallene how much the future inheritance was worth or what form it would take because the estate was still open and he did not know. *Id.* John did not have any Blistex Bracken interest when the parties married, and did not obtain any until 1998 – 11 years later. *Id.*; CP 207.

Dallene does not contradict John's testimony regarding his disclosures. RP 16. Her only testimony on the point is that she never saw a list of John's assets. *Id.* But the law does not specifically require an asset list. ***Bernard***, 165 Wn.2d at 902-03.

Moreover, the trial court found that Dallene knowingly and intelligently signed the prenuptial agreement (CP 209), which provides that John had "fully disclosed the nature and extent of his . . . separate property," and waives Dallene's right to challenge the prenuptial agreement on that ground. Ex 26 ¶ 11. Dallene's attorney also certified that Dallene had full disclosure. Ex 26.

The fiduciary duty applicable when parties execute a prenuptial agreement is a two-way street. *Estate of Crawford*, 107 Wn.2d 493, 497, 730 P.2d 675 (1986). Dallene had the opportunity to ask questions or tell John that she wanted more information. If Dallene had originally told John that she needed more financial information, he could have tried to provide it. John should not now pay for Dallene's lack of due diligence.

4. Since the prenuptial agreement is enforceable, the trial court erroneously awarded Dallene the equivalent of 48.1% of John's separate property.

Since the prenuptial agreement is enforceable, the trial court plainly erred in awarding Dallene 48.1% of John's separate property by way of the \$950,000 mortgage and \$1.8 million in maintenance. Dallene waived any claim to John's separate property. Ex 26 ¶ 1. John cannot pay \$16,000 per month (\$10,000 maintenance and \$6,000 mortgage) without invading his separate property. The award circumvents Dallene's waiver. *Id.*

The only way to calculate a reasonable payment to Dallene (whether maintenance or mortgage) is to compare the parties' respective earning capacities. The court found that Dallene's gross income without maintenance is \$38,736 per year. CP 191. John's gross employment income is \$56,200 per year. RP 520. Though

the court could possibly impute a higher income to John, the income disparity between John and Dallene does not support the maintenance and mortgage payment awards to Dallene.

E. The trial court erred in ordering John to sign a Confession of Judgment for the mortgage obligation.

The Confession of Judgment is invalid on its face, where John did not consent to it, and deprives John of his due process rights. It is also duplicative and unnecessary, since Dallene has other remedies if John defaults. This Court should reverse.

At Dallene's request, the trial court ordered John to sign a Confession of Judgment on his obligation to pay Dallene's mortgage. CP 431-33. The Confession is conditioned on John defaulting on the mortgage, as defined under the terms of the mortgage loan agreement (CP 432) and provides that the amount of the judgment "shall be" the principal balance. CP 431.

The Confession is invalid on its face because John did not consent to it. CP 442-45. "A confession of judgment requires the consent of both parties to the judgment." *Pederson v. Potter*, 103 Wn. App. 62, 68, 11 P.3d 833 (2000), *rev. denied*, 143 Wn.2d 1006 (2001). This Court should reverse.

The Confession is also unnecessary and duplicative, and deprives John of due process. The dissolution decree orders John to pay Dallene's mortgage directly to the mortgage company. CP 198. Dallene has a number of available remedies if John fails to comply with the decree, including a show cause motion, a contempt motion, and other supplemental proceedings to enforce the decree. In any of these proceedings, John would have notice and the opportunity to be heard, which are, of course, the most "elementary and fundamental" due process requirements. ***Mansour v. King County***, 131 Wn. App. 255, 270 n.42, 128 P.3d 1241 (2006). But a court may enter a confession of judgment without notice and a hearing. ***Pederson***, 103 Wn. App. at 67-68.

The Confession further illustrates the problem with ordering John to pay Dallene's mortgage in the first place. The mortgage is a lien on John's future income from his separate property Blistex Bracken assets. This Court should reverse.

CONCLUSION

The trial court erred in awarding Dallene twice the value of the community property, including allocating Dallene's \$950,000 mortgage to John. This Court should reverse and remand for a fair and equitable asset distribution. The trial court erred in ordering John to pay Dallene \$1.8 million in maintenance for 20 years, the equivalent of 31.5% of John's separate property. The Court should reverse and remand for a reduction or elimination of maintenance.

The trial court erred in refusing to enforce the prenuptial agreement. This Court should hold that the agreement is enforceable and reverse and remand with instructions not to invade John's separate property. Finally, the trial court erred in requiring John to sign a Confession of Judgment to which he did not consent. This Court should hold that the Confession of Judgment is void and order the trial court to strike it.

RESPECTFULLY SUBMITTED this 21 day of October, 2009.

WIGGINS & MASTERS, P.L.L.C.



Charles K. Wiggins, WSBA 6948
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 21st day of October 2009, to the following counsel of record at the following addresses:

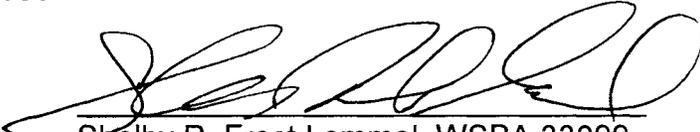
Co-counsel for Appellant

Gail Wahrenberger
Stokes Lawrence, P.S.
800 5th Ave Ste 4000
Seattle, WA 98104-3180

Counsel for Respondent

Catherine W. Smith
Law Offices of Edwards, Sieh,
Smith & Goodfriend, P.S.
500 Watermark Tower
1109 First Avenue
Seattle, WA 98101-2988

Mary H. Wechsler
Wechsler Becker, LLP
701 5th Ave Ste 4550
Seattle, WA 98104-7088


Shelby R. Frost Lemmel, WSBA 33099

RCW § 26.09.080. Disposition of property and liabilities -- Factors

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

HISTORY: 2008 c 6 § 1011; 1989 c 375 § 5; 1973 1st ex.s. c 157 § 8.

RCW § 26.09.090. Maintenance orders for either spouse or either domestic partner --
Factors

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

HISTORY: 2008 c 6 § 1012; 1989 c 375 § 6; 1973 1st ex.s. c 157 § 9.

FILED
KING COUNTY, WASHINGTON
JAN 28 2009
SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

In Re the Marriage of:

DARLENE N. BRACKEN,

Petitioner,

and

JOHN L. BRACKEN,

Respondent.

CAUSE NO. 07-3-05848-0 SEA

MEMORANDUM OPINION

MEMORANDUM OPINION

ORIGINAL

Appendix A

MEMORANDUM OPINION

Marriage of Bracken

07-3005848-0 SEA

I. Background

The parties to this action are before the court for dissolution of a 19 year, 10 month marriage. They were married on October 16, 1987, in Phoenix, Arizona. They separated on August 27, 2007. Wife filed a petition for legal separation on August 27, 2007. Husband responded on October 29, 2007, and filed an amended response on February 2, 2008, and requested conversion of the petition to one for dissolution of the marriage.

The parties reached agreement with regard to the terms of their parenting plan. The court signed the final parenting plan on July 31, 2008, the first day of trial. The issues for resolution by trial included disposition of property, spousal maintenance, and child support.

The court heard evidence and argument of counsel over almost six, non-consecutive trial days. Each party presented expert and lay witnesses. Based on trial, the court made findings of fact and conclusions of law and signed the decree of dissolution.

This memorandum opinion is an elucidation of the facts of the case and the court's analysis of those facts and applicable law.

II. Facts

A. Prenuptial Agreement

The parties signed a prenuptial agreement (PNA) dated October 14, 1987. At trial, Wife testified that she had signed the PNA with advice of counsel, but without adequate time to consider its contents. Wife testified that she agreed in principle with segregation and protection of Husband's separate property acquired prior to the marriage, but that she was unaware of the nature and extent of his family holdings.

The PNA provides that each party maintain his or her separate property free of any claims by the other spouse, *except* that after the date of marriage any accretion in value in the residential real property Husband owned in Phoenix before marriage would be considered community property and would be invested in a subsequent residence/s for the couple and their immediate family.

The PNA further provides that, if either party spends more than 10% of his or her "working day" managing a separate property asset, then any yearly appreciation above 10% shall be credited to the community.

Wife asks this court to invalidate the PNA. Husband asks this court to uphold the PNA and interpret it in such a way to deny Wife any separate property, including payment of maintenance from separate property assets. Husband also claims that he has not devoted more than 10% of his energies to management of his separate property interests and that, as a result, no part of that interest can be re-characterized as community property.

Memorandum Opinion
Marriage of Bracken
Page 1

ORIGINAL

B. Roles of Parties During Marriage

These parties remained married for almost 20 years. They bore and reared three sons. Both parents participated in the raising of the children, but Wife was the primary care giver. She did not work outside the home until approximately eight years ago, after all the boys were enrolled full time in school. She began as a part-time, unpaid assistant to a licensed designer and ended by forming her own design business.

During this marriage, Husband supported the family handsomely. The parties lived in capacious homes with luxurious amenities. The children attended private schools, enjoyed expensive camps, and played Select sports. The family travelled widely and often on adventurous and active vacation trips.

Husband supported the couple's lavish lifestyle with income derived from his separate property interests and from assets left to him by his grandparents. The parties also incurred over 300,000 in debt. Husband had some earned income from positions in the private sector, but he devoted his time and energies primarily to work he enjoyed, regardless of the level of compensation, and to charities. Beginning in 2003, Husband took the lead as managing partner of the family limited partnership, the entity that held the royalty rights and received the royalty income from Blistex sales. In 2007, the family reorganized the holding entity as a limited liability company. Husband is the managing member of the LLC. For his part-time management work, the members of the family LLC pay him a salary approximately equal to what he earned in the private sector for full time work at the outset of this marriage. The Blistex holdings, well-managed by the Bracken family for three generations, provide substantial returns to Husband, apart from his management pay.

Husband testified that he spends approximately eight to ten hours per week managing the family holding company. Husband did not controvert Wife's testimony that he maintains a daily routine of rising and leaving the house by 6:00 a.m. for a daily meeting and a workout, and that he returns home each day between 5:30 and 6:00 p.m. Given this schedule, Husband is occupied with avocations and charities and management of the LLP for, at best, a 45-hour work week. If he spends eight hours per week on the family business, that is 17% of his work effort. If he spends ten hours per week on the family business, that is 22% of his work effort.

In 2000, Wife began working part-time as an assistant to a well-known interior designer. Wife showed a talent for design and, in 2005, decided to offer design services under her own business name¹. Bracken Design was wildly successful in a very short period of time. The success of Bracken Design can be attributed not only to Wife's acknowledged talent, but also to the social circumstances in which the couple found themselves. They lived in a 7,600 square-foot home that served as a living showroom for Wife's work. They entertained often, offering her even greater visibility in the community that would prove to be her clients.

Wife has design talent, but no design training or credentials. Her social circumstances have changed since the couple separated, in that she lives in a significantly smaller (though by no means, small) home. The opportunities to entertain and showcase her work are significantly

¹ Wife has no formal design training. She is not certified or qualified to become a member of ASID, the design professionals' organization. She cannot market herself or her business as a legitimate design business. According to the testimony of her mentor, she is a "decorator," not an interior designer.

lessened by her current circumstances. In addition, the turmoil of the separation and subsequent dissolution proceedings has undoubtedly contributed to the precipitous decline in her design business revenues.

C. Property Description

Husband and his two adult sisters are the grandchildren of L.D. Bracken, a local pharmacist and the inventor of Blistex lip balm. In 1947, L.D. Bracken licensed the Blistex formula and trademark to Blistex, Inc., the lip balm's manufacturer since that time. The Bracken family maintained royalty rights. Husband received some of the benefit of the family wealth in the form of a generation-skipping trust established by his grandparents. Husband also received a gift outright of approximately \$1.5 million from his grandfather. Husband testified that he has depleted completely those inherited funds during the term of this marriage supporting the family's lifestyle.

Husband's father, Jim Bracken, passed away in 1984. His children, and beneficiaries, established a limited partnership to hold and manage income from the limited partnership. In 1998, Husband received a 6.33% limited partnership interest outright. Jim Bracken assigned the bulk of his Blistex interests to a marital trust for the benefit of his wife, Sharon, Husband's mother.

In 1998, the marital trust established a generation-skipping trust for each of Jim Bracken's children. The marital trust funded the generation-skipping trusts by gift and sale. Husband's generation-skipping trust currently contains interests totaling 20.33% of the royalty asset. The sale of interests to the generation-skipping trusts was accomplished by each buyer executing a promissory note to the seller, the marital trust. The generation-skipping trusts use royalties that flow from ownership interests to make note payments to the marital trust.

Sharon Bracken died in 2006. Her estate bequeaths interests to generation-skipping trusts for all of her grandchildren, including the children of this marriage. Husband is a beneficiary of his mother's estate. Probate of the Sharon Bracken estate is ongoing, but evidence at trial suggests that Husband is likely to receive as his share an inheritance in the approximate amount of two- to four-million dollars. The estate is not closed as it is engaged in protracted litigation regarding taxation issues.

Husband assumed the role of managing partner of his family limited partnership in October 2003. In June 2007, the partnership was converted to a limited liability company based in Reno, Nevada. Husband continued as managing member of the LLC. From and after the time when he assumed management, Husband earned a salary from the family business. His initial salary was \$40,000 per year. In 2007, the LLC paid Husband \$56,200 as a management fee. His duties include serving on the board of Blistex, Inc., managing the cash flow from the royalties, and "auditing" the manufacturing and sales records to assure the accuracy of the royalty remittances from Blistex, Inc. to the LLC.

Trial exhibit 164 is a graphic depiction of the interrelated interests of the Bracken family in the current LLC. Access to and management of these interests available to Husband is at the heart of the issues remaining in this case.

III Analysis

Memorandum Opinion
Marriage of Bracken
Page 3

A. Validity of the Prenuptial Agreement

Prenuptial agreements are legal under Washington law. If a pre-nuptial agreement merely serves to keep the parties' separate property separate during the marriage, then it does not alter the legal rights of either spouse. Such an agreement, likewise, does not alter the court's authority to deal with all the property (separate and community) held by the parties in order to effect a fair and equitable distribution at dissolution. See *Marriage of Matson*, 107 Wash.2d 479, 482 (1986). If the agreement alters or purports to alter the legal rights of the spouses to a fair and equitable distribution, however, the court must further analyze and determine the validity and effect of the agreement. *Id.*

If the agreement purports to waive the partners' respective rights to an equitable distribution of property and liabilities, the court must first determine if the agreement makes a fair and reasonable provision for the party not seeking enforcement. If it does, the analysis ends. *Id.* If the PNA does not provide fairly and reasonably for both parties, then the court must decide: *i)* whether the agreement was made after full and fair disclosure of the character and value of the property involved, and *ii)* whether the parties entered into the agreement voluntarily and on independent advice of counsel. *Id.* at 482-83.

The PNA in this case begins by keeping the parties' separate property separate. This PNA goes on, however, to alter the legal rights of the parties to future acquisition of community property. Except for the equity in the Phoenix residence owned by Husband at the date of marriage, and such equity as the couples' future residence/s might accrue, the agreement attempts to deny Wife any possible future stake in the community's property. The agreement provides that if either party uses separate property funds to collateralize a community obligation, the collateral is to remain separate property and shall be reimbursed first out of any proceeds of the acquired community property. This provision alone is not unreasonable. The PNA goes on to declare, however, that if either party makes a separate property "contribution" to the community, then that "contribution" is to retain its separate character and be returned to the contributor. The PNA allows gifts from one party to the other, but essentially disallows gifts to the community from either party.

The PNA provides acquisition of a community interest in separate property, if either party devotes more than 10% of his or her work day, annualized, to management of separate property assets. When the parties married, Husband was employed by a third party and was not actively involved in management of his family assets. He continued employment in the private sector until 2000. His activities outside the home, heavily weighted to charitable works, were the source of a small portion of his support for the family and its lifestyle. Husband contributed little in the way of earnings and did not acquire, build, or contribute any community savings to the marital estate. The parties' main community property asset at the time of dissolution consists of equity in a residence occupied by Wife.

Because Husband's assets are predominantly passive assets, he has spent only up to 20% of his work life on managing those assets. Those assets have remained fairly stable in value over time, resulting in little, if any appreciable interest that could be characterized under the PNA as community property. Husband's situation and choices leave Husband, at the end of this 20-year marriage, able to live securely in luxury. Under the PNA, Wife, on the other hand, could end the marriage in much the same condition in which she entered it, *i.e.*, with an interest in the (not insubstantial) equity in their home, but without career prospects to achieve or maintain anything close to the family's former lifestyle.

Memorandum Opinion
Marriage of Bracken
Page 4

Wife asks this court to invalidate the PNA signed by these parties. Given the overwhelming disparity in the treatment of the parties under this PNA and its effects, the court cannot and does not find that it provides fairly and reasonably for both parties. The questions before the court become, therefore, whether the agreement was made after full disclosure of the amount, character, and value of the property involved, and whether the agreement was signed voluntarily on advice of independent counsel.

Regarding the second prong, Wife protested that the PNA was "sprung" on her on the eve of the wedding. In fact, she had counsel working for her for approximately two months prior to the signing of the PNA and the wedding. While the circumstances of execution of the agreement were not ideal, Wife signed it voluntarily. Her testimony on this issue was not persuasive.

The evidence at trial established, however, that notwithstanding the representations to the contrary in the PNA itself, Wife never saw or had full disclosure of the amount, character, or value of Husband's assets and prospects. Husband's attorney testified that he "assumed" Husband had made full disclosure. Wife's attorney certified that she had had full disclosure, without ever having seen any asset list, as required by the terms of the PNA.

This court finds that Wife signed the PNA without full disclosure of the nature and extent of Husband's family assets and expectancies. Wife could not have known at the time she signed the PNA that Husband could support the family in luxury without working to earn any community property and without expending significant effort on separate property resources.

B. Property Distribution

In this case, the parties' PNA contained a provision describing certain alleged waivers of claims against one another in the event of dissolution. The PNA provided that the parties' community property be divided as equally as possible. As Husband's separate property supported the family, however, there is comparatively little community property at issue—less than \$2 million in net value.

Because of the careful stewardship of family assets, Husband and the children of this couple are well situated for their lives and the lives of generations to come. Tax records in evidence indicate that the Bracken royalty assets have maintained or increased in value over the last decade. Both parties' experts opined that the value of Husband's interests would continue a modest increase in value indefinitely.

Wife's prospects are starkly different. She cannot afford to own and maintain the home she is in. She cannot contribute to the children's educational expenses. Without a degree and apprenticeship, she cannot continue to work as a designer; at best, she might continue to work in the field as a salaried or commissioned designer. Her education and experience qualify her for clerical or, perhaps, middle management employment outside the design field.

The property distribution table attached to the Decree details the allocation of properties and funds. It was the court's intent to honor as nearly as possible the spirit of the PNA as it relates to the Bracken LLC royalty assets. Preservation of those assets will enable Husband to fund a generation-skipping trust for his children with his own LLC interests and those each child inherited from his mother's estate. It will also enable him to manage the LLC assets in his own generation-skipping trust.

Memorandum Opinion
Marriage of Bracken
Page 5

Husband's wealth extends beyond the LLC interests, however. He derives income from the LLC, some of which is earmarked to pay the promissory note to his mother's estate. Presumably, he will be able to make his own decisions regarding cancellation, satisfaction, forgiveness, or continued payment of that note upon distribution of his mother's estate. He also has an expected inheritance from his mother as a source of support. Further, if need be, Husband has marketable skills and can work outside the family business if he so chooses.

Given the disparity between the parties' prospects and the fact that the children will, for almost another decade, rely upon parental residential and educational support, the court is awarding the "Yertle" residence to Wife, free and clear of the mortgage obligation. Husband may choose to pay the existing obligation in a lump-sum payoff or according to the existing amortization schedule. As probate of his mother's estate may not settle for another year or more, Husband is not obligated to make a lump sum transfer immediately, or at all. Husband is required, however, to keep the mortgage current if he chooses to maintain the amortization schedule.

If Wife opts to sell the Yertle residence, she is required to apply sale proceeds first to payment of the mortgage loan balance, if any, to other liens or encumbrances, and to costs of sale. She will then be free to use net sale proceeds at her discretion. If Wife pays any mortgage balance on sale of the residence, Husband is obligated to repay Wife for the amount she paid to clear title of that mortgage lien. Husband shall repay Wife on the same terms as the mortgage in existence at the time of sale, or at such other terms as the parties may agree, *provided*, that the terms are no less favorable to Wife.

C. Spousal Maintenance

The PNA in this case, even if valid and enforceable, did not address directly the issue of spousal maintenance. The primary concern of a trial court in determining whether, in what amount, and for what duration to award spousal maintenance is the economic circumstances in which the parties find themselves after a marital dissolution.

Wife seeks spousal maintenance as follows:

\$21,500 per month for two years
\$19,000 per month for three years
\$15,000 per month for five years
\$10,000 per month for five years.

Wife's request assumed she would be paying the mortgage on the residence. She asserts that she is considering pursuing a design certificate or degree. In either case, she will be obligated to complete an apprenticeship² following her course work. Only then will she be entitled to represent herself as credentialed designer.

Husband argues against the requested award of spousal maintenance on three grounds. He first argues that Wife is unlikely to pursue or obtain a design degree when her business generated over \$500,000 in annual gross revenues in 2006 and 2007.

² According to the testimony, if wife pursues a two-year curriculum, she will be required to do a four-year apprenticeship. If she obtains a four-year degree, her apprenticeship will be two years.

Second, Husband argues that this 20-year marriage is at best a "mid-term" marriage and that maintenance should be limited.

Husband finally argues that, even if an award of maintenance were proper, the PNA gives Wife no interest in his separate property. By his analysis, inasmuch as he has. He contends that he would have limited funds to pay maintenance as he has only his earnings as manager of the LLC. The benefits he derives from ownership of his separate property remain his separate property under the PNA. Husband asserts that under the PNA, Wife is precluded from receiving spousal maintenance from his separate property sources..

Whether Wife pursues further education in the design field, or otherwise, her earning potential is limited. Without the family connections and word of mouth referrals, Wife's business is unlikely to soar to the heights she has known. Though her business might not be as bad as it was for 2008, without her credentials, it is not likely ever to be as good as it was in 2006 and 2007.

Husband's reliance on the marriage construct proffered by former Judge Winsor in 1982 is misplaced. According to current statistics, the median length of a marriage that ends in divorce is just under eight years. A marriage of nearly 20 years' duration is longer than more than half of the marriages in this country. The categories espoused by former judge Winsor in 1982 are no longer reasonable. This is a long-term marriage.

Finally, Husband claims to have no source of funds other than his separate property. Evidence at trial established, however, that he earns nearly \$60,000 per year from his effort as managing member of the family LLC. His earnings are neither a beneficial interest in the family holdings nor an inheritance. His earnings are generated by his effort. While those earnings are characterized as separate property after the date of separation, they are not *sui generis* with the separate property interests covered by the PNA. For the reasons stated above, even if Husband did not work for a salary, Wife is entitled to spousal maintenance. That maintenance can be paid from Husband's separate property interests notwithstanding the PNA.

Maintenance should be ordered in this case because, without maintenance, the disparity between the lifestyles of Husband and Wife would be stark. Husband's assets and the income from those holdings assure him of continued comfort and plenty, whether or not he chooses to work. Husband's life with his children can continue essentially unchanged. Wife, without maintenance, would enjoy a lifestyle grossly different from that of Husband, sufficiently different for the children to observe and feel the disparity.

Wife's employment prospects are limited. Without the necessary design credentials, Wife might gamble on continued word-of-mouth referrals to Bracken Design, but she could not advertise herself as a trained or certificated designer. She might find employment as a consultant with a furniture or department store at entry-level wages. If she chooses to work outside the design field, her education and experience confine her to clerical, entry-level employment with limited opportunity for advancement. In either instance, her future is much less sure and financially secure than that of Husband.

D. Child Support

Husband's mother made consistent financial gifts to her children, their spouses, and her grandchildren. The grandchildren's funds were protected in a Uniform Gifts to Minors (UGM)

Memorandum Opinion
Marriage of Bracken
Page 7

trust account for each of these parties' sons. Their sons are also in line for beneficial interests in the Bracken LLC.

One of the parties' three sons is over 18 and in college. He received and invested his UGM trust funds in an irrevocable trust. The parties intend to continue to support this son with post-secondary educational assistance.

The parties' second son is in a therapeutic boarding school. Husband is currently funding the cost of this therapy through borrowing. The parties are hopeful that he will complete high school in August 2009 and go on to college. This prognosis is not, however, certain. The youngest son is in middle school and the parties are following an agreed parenting plan. All the children have consistently attended private schools.

The two younger sons have UGM funds and expectancies in the family assets. Husband will counsel them to invest and preserve those assets, as has the oldest son. If either or both of the two younger sons pursue post-secondary education, the parties intend to offer support.

The parties do not agree on the nature, level, or source of educational support for any of the sons. Wife believes the sons' UGM trust accounts should fund their education. Husband insists that those funds are not and never were intended for education. He contends that each son should invest his fund for future generations and that the parents should pay their education expenses.

At trial, Husband testified that he intends to continue educational support at pre-dissolution levels for all three sons, providing Wife contributes a *pro rata* share. For all of the reasons set forth to justify payment of spousal maintenance, Wife is unable to fund any portion of the children's educational expenses. Unless the parties make a joint decision to change the secondary school circumstances of their two younger children, Husband will pay for their private secondary school.

Husband is required to pay child support to Wife. The court will, however, recognize Husband's contributions for secondary school tuition, books, and mandatory fees as a credit against child support that might be otherwise payable. The transfer payment amount further deviates from the standard calculation because Husband is providing Wife with a residence and is paying for the children's post-secondary education. Child support will continue until the end of the calendar year in which the youngest son reaches 18 or the end of the calendar year in which he completes his secondary education, whichever is later.

The parties are not ordered to provide post-secondary financial educational support to any of the children. They may do so voluntarily in whatever ways and means they might have. Their children are not disqualified by wealth from seeking merit scholarships or part time employment to pay some of their own expenses. Each son has resources of his own to defray his educational costs.

E. Attorneys' Fees

Both parties have incurred significant attorneys' fees and litigation expenses. Each party was well represented by reputable, experienced, and talented counsel. Husband did not seek payment of attorneys' fees, though he did claim that Wife was intransigent in withholding

Memorandum Opinion
Marriage of Bracken
Page 8

information concerning her design business. Wife seeks payment of attorneys' fees based upon her need and Husband's ability to pay.

The court will not shift fees to either party. Wife's inability to respond to discovery regarding her design business was not volitional. It took forensic analysis to determine what the assets and liabilities of that business were. Further, after a fair and equitable property division in this case, Wife will have the wherewithal to pay her own attorneys' fees, and Husband will not be in any better position to pay those than Wife. Husband will be able to pay only his own attorneys' fee.

IV. Conclusion

On this date, the court will sign Findings of Fact and Conclusions of Law, a Decree of Dissolution, and an Order for Child Support. The court has detailed the specifics of the property distribution on a document labeled "Exhibit A" to the decree.

Dated: 1-27-09
Steganne M. Bracken,
Judge

Memorandum Opinion
Marriage of Bracken
Page 9

**Superior Court of Washington
For King County**

In re the Marriage of:

DALLENE BRACKEN,

Petitioner,

and

JOHN BRACKEN,

Respondent.

No. 06-3-05184-3 SEA

**Findings of Fact and
Conclusions of Law
(FNFL)**

I. Basis for Findings

The court presided at trial in this matter. The following people attended:

- Petitioner.
- Petitioner's Lawyer.
- Respondent.
- Respondent's Lawyer.
- Other: Witnesses for both sides

II. Findings of Fact

2.1 Residency of Petitioner Wife

Wife is a resident of the state of Washington.

2.2 Notice to the Respondent

Husband appeared and responded to the petition.

2.3 Basis of Personal Jurisdiction Over the Respondent

The court has personal jurisdiction over Husband because he resides presently in Washington. The parties lived in Washington during their marriage and both parties continue to reside in this state.

2.4 Date and Place of Marriage

The parties were married on October 16, 1987, at Phoenix, Arizona.

Findings of Fact and Concl of Law (FNFL) – Page 1 of 5

WPF DR 04.0300 (6/2006) – CR 52; RCW 26.09.030; .070(3)

2.5 Status of the Parties

Husband and Wife separated on August 24, 2007.

2.6 Status of Marriage

The marriage is irretrievably broken and at least 90 days have elapsed since Wife filed the petition and served Husband.

2.7 Separation Contract or Prenuptial Agreement

The parties signed a prenuptial agreement dated October 14, 1987. The facts surrounding the execution of the prenuptial agreement are more fully outlined in this court's memorandum opinion, filed concurrently herewith. The court should interpret the prenuptial agreement and apply Washington law to its operation and to determine its validity and effect.

2.8 Community Property

The parties have real or personal community property as set forth in Exhibit A to the Decree. This exhibit is incorporated by reference as part of these findings.

2.9 Separate Property

The parties have separate property as set forth in Exhibit A to the Decree. This exhibit is incorporated by reference as part of these findings.

2.10 Community Liabilities

The parties have incurred community liabilities as set forth in Exhibit A to the Decree. This exhibit is incorporated by reference as part of these findings.

2.11 Separate Liabilities

Husband has incurred separate liabilities as set forth in Exhibit A to the Decree. This exhibit is incorporated by reference as part of these findings.

Wife has incurred separate liabilities as set forth in Exhibit A to the Decree. This exhibit is incorporated by reference as part of these findings.

2.12 Maintenance

As detailed more fully in the court's memorandum opinion, the court should award maintenance to Wife.

2.13 Continuing Restraining Order

Does not apply.

2.14 Protection Order

Does not apply.

2.15 Fees and Costs

Attorney fees are not awarded to either party. The court's reasoning is more fully set forth in the memorandum opinion filed concurrently herewith.

Husband's contention that Wife was obstructionist in preparing the matter for trial is not well taken. Wife's business records, which were at the heart of much of the pre-trial conflict, were a shambles. Contrary to Husband's apparent beliefs, Wife did not intentionally "cook" the books with any malevolent or dishonest intent. Wife has a high school education, no business training, and no knowledge of corporate or tax laws and requirements. Once Wife hired a bookkeeper, the two rarely consulted. Wife was unaware of the consequences of her inattention to the corporate form and the separate nature of her personal accounts and the accounts of her business. Her bookkeeper asked Wife not to use the business checking account for personal expenses, but not *vice versa*. Wife failed to grasp the import of her inattention to accounting.

2.16 Pregnancy

The wife is not pregnant.

2.17 Dependant Children

The children listed below are dependent upon either or both spouses.

Name of Child	Age	Mother's Name	Father's Name
Jim Bracken	20	Dallene Bracken	John Bracken
Brady Bracken	17	Dallene Bracken	John Bracken
Landon Bracken	14	Dallene Bracken	John Bracken

2.18 Jurisdiction Over the Children

This court has jurisdiction over the children. Washington is the home state of the children because the children lived in Washington with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of this proceeding and any absences from Washington have been only temporary. The children have no home state elsewhere.

2.19 Parenting Plan

The parenting plan signed by the court on July 31, 2008, is approved and incorporated as part of these findings. This parenting plan is the result of an agreement of the parties.

The parties' middle son, Brady, is currently out of the home at boarding school. All family members anticipate his return, perhaps as early as the end of the 2008-09 academic year. Brady's camp and boarding school expenses are significant, but both parents anticipate that he will return home having completed high school in August 2009. They are hopeful that he will then attend college. Whenever he is not enrolled full time and in residence at a school or college, the parents anticipate that he will share time with both parents.

2.20 Child Support

There are children in need of support and child support should be set pursuant to the Washington State Child Support Schedule, with a deviation as noted in the Order of Child Support. The Order of Child Support signed by the court on this date and the child support worksheet, which has been approved by the court, are incorporated by reference in these findings.

The parties' oldest son, Jim, is a university student. Although he has aged out of child support proper, and has personal resources, Husband has committed to continue to offer support to Jim

and his other sons through college to encourage them to manage, preserve, and nurture their resources and inheritances for future generations of the Bracken family.

2.21 Other

Because of the complexity of the financial circumstances of these parties, the court prepared and filed a memorandum opinion more fully detailing its findings and analysis in this case. The findings of the memorandum opinion are incorporated herein by reference.

III. Conclusions of Law

Based on its findings, the court makes the following conclusions of law.

3.1 Jurisdiction

The court has jurisdiction to enter a decree in this matter.

3.2 Granting a Decree

The court should grant the parties a decree of dissolution.

3.3 Pregnancy

Does not apply.

3.4 Disposition

The court should determine the marital status of the parties, make provision for a parenting plan for any minor children of the marriage, make provision for the support of any minor child of the marriage entitled to support, consider or approve provision for maintenance of either spouse, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing restraining orders, and make provision for the change of name of any party. The distribution of property and liabilities as set forth in the decree is fair and equitable.

3.5 Continuing Restraining Order

Does not apply.

3.6 Protection Order

Does not apply.

3.7 Attorney Fees and Costs

Neither party is required to pay attorneys' fees or litigation expenses of the other.

3.8 Other

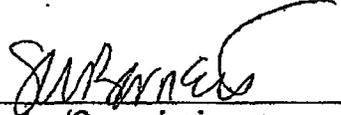
Based on the reasoning set forth in the memorandum opinion and the substantive and procedural problems with the prenuptial agreement, the court concludes that the prenuptial agreement is unenforceable.

Wife is entitled to spousal maintenance in the amount of \$10,000 per month for a period of ten years and \$5,000 per month for a period of ten years. The first ten-year term begins as of September 2007. Spousal maintenance shall terminate upon the death of Wife, but shall continue at the rate of 50% of the original amount for a period of five years after the date of remarriage of

Findings of Fact and Concl of Law (FNFL) – Page 4 of 5
WPF DR 04.0300 (6/2006) – CR 52; RCW 26.09.030; .070(3)

Wife. Husband shall obtain and maintain a policy of insurance on his life naming Wife as beneficiary, with a death benefit amount equal to the present value of the declining balance of the original spousal maintenance.

Dated: 1-27-09



Judge/Commissioner

Approved:
Mary D. [unclear] 9447
attorney for Plaintiff

Judge [unclear] #19427
ATTY FOR RESPONDENT

EXHIBIT A
to Dissolution Decree

Bracken Dissolution
07-3-05848-0 SEA

Property Description	Char	FMV	Lien/s	Net Value	To Wife	To Husband
ASSETS						
<u>Real Property</u>						
Residence ("Yertle") ¹	CP	\$ 2,000,000.00	\$ 950,000.00	\$ 1,050,000.00	\$ 2,000,000.00	
<u>Intangible Property</u>						
Bracken Design	CP	\$ -			100%	
<u>Blistex Bracken Interests</u>						
John Bracken GST - 20.33% LLC	H-SP	\$ 4,258,800.00				100%
LLC Units - 6.33%	H-SP	\$ 1,326,500.00				100%
<u>Other</u>						
Sharon Bracken Estate (1/3) ²	H-SP	\$ unknown				100%
NW Mutual Insur	CP	\$ 30,600.00				100%
Recorp	H-SP	\$ 86,600.00				100%
CCP	H-SP	\$ -				100%
Alanna Condon	H-SP	\$ -				100%

¹ The "Yertle" residence is awarded to Wife; the mortgage obligation is allocated to Husband. The value of the asset distributed to Wife is, therefore, the FMV rather than the net value.

² The Sharon Bracken probate estate is not closed and is engaged in protracted litigation. The value of Husband's share is estimated between \$2 million and \$3 million.

Club Memberships	CP	\$ -			Tennis club	All others
Husky football tickets	CP	\$ -				100%
Husky basketball tickets	CP	\$ -				100%
Airline reward miles	CP	\$ -			50%	50%
<u>Cash/Securities Accounts</u>						
WA Trust 5592 (Keswick proceeds)	CP	\$ 282,500.00			\$ 282,500.00	
Keswick proceeds pre-distr.	CP	\$ 25,000.00		\$ 25,000.00	\$ 25,000.00	
WA Trust 3019	son	\$ -				
WA Trust 7171	mixed	\$ 11,300.00			\$ 11,300.00	
WA Trust 3504	son	\$ -				
Goldman 2715	H-SP	\$ 13,400.00				\$ 13,400.00
Goldman 2186	H-SP	\$ 31,100.00				\$ 31,100.00
WaMu 8132	W-SP	\$ 1,200.00			\$ 1,200.00	
WaMu 7232	CP	\$ 7,400.00				\$ 7,400.00
WaMu 4581 (Bracken Des.)	CP	\$ 3,000.00			\$ 3,000.00	
Box Elder Credit Union	CP	\$ 2,100.00			\$ 2,100.00	
Dain Rauscher 1228 ³	CP	\$ 87,800.00			\$ 60,000.00	\$ 27,800.00
<u>Personalty</u>						
Mercedes	CP	\$ 34,800.00	\$ (36,500.00)		\$ (1,700.00)	
Lexus	son					
Toyota LandCruiser	son					
HH furnishings ⁴	CP	\$ 114,000.00			\$ 74,000.00	\$ 40,000.00

³ The actual allocation shall be in the same percentages as noted, with the understanding that the balance of this account has declined due to market forces.

⁴ Each party has "claimed" household furnishings and personal property items from the Keswick residence. The balance of property is in storage. Husband testified that he wants a few more items from storage. He is awarded all of the items in storage and may dispose of them as he sees fit.

LIABILITIES						
WA Trust LOC 0445	CP	\$ (62,700.00)				\$ (62,700.00)
WA Trust LOC 5243	CP	\$ (50,000.00)				\$ (50,000.00)
WA Trust LOC 9356	CP	\$ (251,000.00)			\$ (51,000.00)	\$ (200,000.00)
Visa 9444	CP	\$ (13,800.00)			100%	
Nieman-Marcus	CP	\$ (800.00)			100%	
Gas card 1779	CP	\$ -			100%	
MasterCard 5695	CP	\$ (2,300.00)			100%	
Blistex Visa 3975	H-SP	\$ -				100%
WaMu LOC (Bracken Design)	CP	\$ (45,400.00)			\$ (45,400.00)	
"Vertle" Mortgage	CP	\$ (950,000.00)				\$ (950,000.00)