

No. 66193-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

In re the Marriage of:

CAROLE HOFFMAN,

Respondent/Cross-Appellant,

and

ALAN LOWELL HOFFMAN,

Appellant/Cross-Respondent.

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE CAROLE SCHAPIRA

REPLY BRIEF OF CROSS-APPELLANT

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## I. REPLY ARGUMENT

### A. A Substantively Unfair Prenuptial Agreement Should Never Be Enforceable.

The husband concedes that “when a court interprets a prenuptial agreement, principles of contract law apply.” (Cross-Resp. Br. 20) Accordingly, a prenuptial agreement should be invalidated if it is found to be substantively unfair. In ***Adler v. Fred Lind Manor***, 153 Wn.2d 331, 103 P.2d 773 (2004), for instance, the Supreme Court considered an arbitration clause in an employment contract. The Court in ***Adler*** held that substantive unconscionability alone would make the challenged provisions of the agreement unenforceable. 153 Wn.2d at 347. Thus, unlike the principles applied to prenuptial agreements, which may allow enforcement of an agreement entered into with sufficient procedural safeguards even if it is substantively unfair, the trial court’s decision in this case must be reversed as a matter of general contract law if the agreement is substantively unfair.

A rule requiring substantive and procedural fairness before a prenuptial agreement will be enforced is consistent with the Dissolution Act, which only authorizes enforcement of an agreement between spouses “providing for . . . maintenance [and]

the disposition of any property owned by both or either of them” that was not “unfair at the time of its execution,” “considering the economic circumstances of the parties and any other relevant evidence.” RCW 26.09.070(1), (3). RCW 26.09.070 thus focuses on the fairness of the agreement given the parties’ economic circumstances when the agreement is reached, *and* at the time of its enforcement.

It is also in accord with RCW 26.09.080, which requires the trial court to consider the “economic circumstances of each spouse [ ] at the time the division of property is to become effective.” RCW 26.09.080(4); *see also Marriage of Matson*, 107 Wn.2d 479, 490, 730 P.2d 668 (1986) (Pearson, J. concurring). Under the Dissolution Act, a marital agreement between spouses that does not make a fair and reasonable provision for both parties based on current circumstances should not be enforced, regardless of any procedural niceties at the time of the agreement’s execution.

This court should take this opportunity to hold that a prenuptial agreement is only enforceable if the party seeking to enforce the agreement can show that it is both substantively and procedurally fair, and that a substantively unfair prenuptial

agreement cannot be saved by procedural fairness. This rule was proposed to the Supreme Court in *Marriage of Bernard*, 165 Wn.2d 895, 204 P.3d 907 (2009). The Court declined to entertain analysis of the proposed rule because “the prenuptial agreement at issue is both substantively and procedurally unfair, and the application of a different analysis would not alter the outcome here.” 165 Wn.2d at 903, ¶ 17. While the agreement in this case is also substantively and procedurally unfair, this court should hold that the trial court erred in avoiding any analysis of the substantive fairness prong in order to validate the agreement based solely on a determination of procedural fairness.

**B. A Prenuptial Agreement That Requires The Economically Disadvantaged Party To Waive Her Statutory Rights To Spousal Maintenance And The Husband’s Separate Property, While Limiting The Accumulation Of Community Property, Is Substantively Unfair.**

Whether a prenuptial agreement is substantively fair, in that it “makes a fair and reasonable provision for the spouse not seeking its enforcement,” is “entirely a question of law.” *Marriage of Bernard*, 165 Wn.2d at 902, ¶ 14. A prenuptial agreement such as the one at issue here that requires the economically disadvantaged party to waive statutory rights to spousal

maintenance and any interest in the other party's separate property, and that encourages the preservation and growth of the richer spouse's separate property while limiting the accumulation of community and separate property by the poorer spouse, is substantively unfair as a matter of law. This is the clear holding of these three cases, all discussed in cross-appellant's opening brief:

- ***Marriage of Bernard***, 165 Wn.2d 895, 905, ¶ 23, 204 P.3d 907 (2009) (prenuptial agreement was substantively unfair as a matter of law because it “overall made provisions for [the wife] disproportionate to the means of [the husband], and limited [the wife]’s ability to accumulate her separate property while precluding her common law or statutory claims on [the husband]’s property.”) (Cross-Appeal Br. 37);

- ***Marriage of Matson***, 107 Wn.2d 479, 486, 730 P.2d 668 (1986) (prenuptial agreement was substantively unfair because it “acted to bar [the wife] from making any claim against or seeking any rights in [the husband’s] separate property” and denied the wife “any of her common law and statutory rights for a just and equitable distribution of property.”) (Cross-Appeal Br. 37-38);

- **Marriage of Foran**, 67 Wn. App. 242, 249-50, 834 P.2d 1081 (1992) (prenuptial agreement was substantively unfair as a matter of law because it required the wife to waive any claim against the husband's separate estate, in the event of divorce, and all of her statutory rights as a surviving spouse if the husband predeceased her) (Cross-Appeal Br. 38).

As with the prenuptial agreements in **Bernard, Matson**, and **Foran**, the agreement in this case is substantively unfair as a matter of law. Here, the wife had net tangible assets of \$3,270 and the husband had a net worth of \$8 million when they married. (RP 58-61; Exhibit 146, Ex. A, B) The prenuptial agreement preserved and encouraged the increase of the husband's separate estate, limited the wife's ability to accumulate any separate property to a "lifetime maximum of \$75,000 of her personal service earnings [from which] to pay off her existing debts and accumulate a separate property account," eliminated the wife's statutory right to seek spousal maintenance or any portion of the husband's separate property, and limited the accumulation of community property. (Exhibit 146) According to the husband, the agreement

also required the wife to waive her statutory right to need-based attorney fees on dissolution. (See Cross-Resp. Br. 15-16)

The husband wrongly characterizes substantive fairness as an issue of fact, claiming that the trial court “analyze[d]” the substantive fairness of the agreement. (Cross-Resp. Br. 27) The only citation to the record that the husband provides for his claim is the court’s oral ruling. The trial court did not in fact address substantive fairness, limiting its discussion to whether there was full disclosure of assets prior to execution of the agreement:

Substantively, the parties entered into this relationship. They each set out the assets. There’s no question that the giant gorilla throughout this case has been these very substantial Trusts that were created by Dr. Hoffman’s parents, some of which came into full fruition with the passing of Dr. Hoffman’s mother. He indicated in his list, I think, an estimate of the various asset, including these Trusts, and she indicated in her assets as relatively minor set of assets in hand and a big expectancy, certainly I think over \$600,000 of her assets were hoped-for outcome from Piper Jaffray.

(Cross-Resp. Br. 27, *quoting* RP 948)

The husband then argues that “a trial court’s decision may be sustained on any theory within the pleadings and evidence, even if the trial court did not consider it” (Cross-Resp. Br. 26-27), but fails to explain what “theory” supports the trial court’s

determination that the prenuptial agreement was substantively fair. Nowhere in its oral or written ruling does the trial court's explain why an agreement such as the one here could be substantively fair, when other similar agreements have been struck down. **Bernard**, 165 Wn.2d at 905, ¶ 23; **Matson**, 107 Wn.2d at 486; **Foran**, 67 Wn. App. at 249-50.

In reality, as did the trial court, the husband skips entirely over the substantive fairness prong to argue that because the agreement was purportedly procedurally fair, the agreement should be enforced. (See Cross-Resp. Br. 28-32) But the current test for enforceability of a prenuptial agreement requires that the trial court *first* determine "whether the agreement is substantively fair, specifically whether it makes reasonable provision for the spouse not seeking to enforce it." **Bernard**, 165 Wn.2d at 902, ¶ 14.

The trial court's failure to fully address the substantive fairness of the agreement was error. Even had the trial court provided any analysis to support its conclusion that the agreement was substantively fair, such a determination was reversible legal error because the agreement failed to make a fair and reasonable provision for the wife, limited her statutory and common law rights

to maintenance and a share of the husband's separate property, and limited her ability to accumulate her own separate property and community property. As in *Bernard, Matson*, and *Foran*, the agreement in this case was substantively unfair. It could only be enforced if, after the trial court "zealously and scrupulously" examined the circumstances leading up to the agreement's execution, it found the agreement procedurally fair. *Foran*, 67 Wn. App. at 251.

**C. The Husband Did Not Prove That A Prenuptial Agreement Presented To The Wife Less Than Three Weeks Before The Wedding, Leaving Her With Limited Ability To Verify His Financial Disclosure And To Negotiate A Favorable Agreement, Was Procedurally Fair.**

Whether a prenuptial agreement is procedurally fair is a "mixed issue[ ] of policy and fact, and accordingly review is de novo but undertaken in light of the trial court's resolution of the facts." *Marriage of Bernard*, 165 Wn.2d at 903, ¶ 16. In this case, it is undisputed the prenuptial agreement was provided to the wife less than three weeks before the parties' planned wedding. (RP 51, 53) The wife's attorney, to whom she was referred by the husband, was leaving town three days before the parties' wedding, leaving the wife even less time to confirm the husband's financial disclosure

and negotiate a fair agreement. (RP 66-67, 177-78) The trial court concluded the prenuptial agreement procedurally fair only by improperly shifting the burden from the husband to the wife to prove that the prenuptial agreement was procedurally unfair. (See Finding of Fact (FF) 2.7, CP 159) The trial court erred as a matter of law in enforcing the prenuptial agreement because it used the wrong legal test in concluding that the agreement was procedurally fair.

The trial court placed the burden on the wife to prove that she signed the prenuptial agreement under “duress” to prove that the agreement was procedurally unfair. The trial court found “there was no evidence presented demonstrating the agreement was signed under duress despite Ms. Hoffman’s argument she did not have enough time to understand the agreement.” (FF 2.7, CP 159) This is not the test in Washington. The burden of proving procedural fairness is on the spouse seeking enforcement of the agreement – in this case, the husband. ***Friedlander v. Friedlander***, 80 Wn.2d 293, 300, 494 P.2d 208 (1972).

The two-part test for procedural fairness requires the court to *first* examine whether full disclosure was made of the amount, character and value of the property involved, and *second* to

determine whether the agreement “was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights.” **Marriage of Matson**, 107 Wn.2d at 483, 485-86 (prenuptial agreement was procedurally unfair because the wife was given insufficient time to enter into an agreement knowingly and voluntarily). Although the trial court found that the prenuptial agreement was entered into “voluntarily” by the wife, it made no other findings whether there was full disclosure of the character and value of the property involved or whether the wife had “full knowledge” of her rights.

Given the absence of these essential findings, the husband failed to meet his burden of proof for procedural fairness. “The absence of a finding on an issue is presumptively a negative finding against the person with the burden of proof.” **George v. Helliard**, 62 Wn. App. 378, 383-84, 814 P.2d 238 (1991) (quoting **Taplett v. Khela**, 60 Wn. App. 751, 759, 807 P.2d 885 (1991)). Even were the burden on the wife to prove procedural unfairness, the proper test is a significantly lower standard than the “duress” test used by the trial court. (See Cross-App. Br. 39-40); see e.g. **Marriage of Foran**, 67 Wn. App. at 257, fn. 17 (even though wife was not

“coerced” to sign agreement, the prenuptial agreement was procedurally unfair because there was insufficient evidence that the wife understood the legal consequences of the agreement).

The husband argues that the agreement was procedurally fair because the wife was “represented throughout the negotiations, requesting changes to the prenuptial agreement.” (Cross-Resp. Br. 31-32) But the legal representation alone does not make an agreement procedurally fair. For example, the Supreme Court invalidated a prenuptial agreement as not procedurally fair even though the wife was represented by counsel, “an attorney experienced in prenuptial negotiations,” who negotiated a limited number of more favorable terms for the wife in *Bernard*, 165 Wn.2d at 899-900, ¶¶ 4-5, 8.

The Court recognized that the wife had received the agreement so soon before the wedding that “there was not enough time for [the wife] or her attorney to adequately review the prenuptial agreement” in *Bernard*, 165 Wn.2d at 906, ¶ 25. The wife here received the first draft 18 days before the wedding – the same time frame as in *Bernard*. Although the wife, as in *Bernard*, was also able to meet with an attorney, she had only nine working

days to review the agreement with the attorney and respond. (RP 66-68) The wife abandoned the idea of trying to pursue any financial information from the husband because she did not think there was enough time to verify it before the wedding. (RP 178-79)

While the husband argues that the trial court did not improperly shift the burden to the wife to prove that the agreement was procedurally unfair, he also inconsistently claims it is the wife's "fault" that the trial court found the agreement procedurally fair because she did not have the attorney who represented her testify at trial. (Cross-Resp. Br. 26) The husband asserts that "the only documentary evidence presented to the Trial Court regarding Carole Hoffman's understanding of, review of, and execution of, the prenuptial agreement came in the form of letter correspondence and draft of the prenuptial agreement exchanged between counsel." (Cross-Resp. Br. 26) But it was not up to the wife to prove that the agreement was procedurally unfair. Instead, the burden was on the husband to prove that the agreement was entered into fairly with significant time for the wife to consider the agreement and enter into the agreement voluntarily and with full knowledge of his assets, and her rights.

The husband also claims that the wife's purported "contract experience and general legal acumen," and the fact that she was married twice before, supports the trial court's determination that the agreement was procedurally fair. (Cross-Resp. Br. 30-31) But the wife testified that although she had been married twice before, she had never dealt with a prenuptial agreement. (RP 54) There was also no evidence that the wife's previous work experience in "negotiat[ing] leases and review[ing] contracts with manufacturers" (Cross-Resp. Br. 30) gave her any insight into negotiating a fair prenuptial agreement. See **Bernard**, 165 Wn.2d at 898, ¶ 2 (prenuptial agreement procedurally unfair even though wife "held undergraduate and master's degrees in business administration"); **Matson**, 107 Wn.2d at 486 (prenuptial agreement procedurally unfair even though wife "previously worked as a secretary in a Yakima law firm and had more access to counsel than someone without that experience").

The husband failed to meet *his* burden to prove that the agreement was entered into by the wife knowingly and voluntarily. The trial court erred in enforcing the prenuptial agreement because

it used the wrong legal test in finding that the agreement was procedurally fair, placing the burden the wife to prove duress.

**D. The Parties' Failure To Observe The Agreement During The Marriage Invalidated The Prenuptial Agreement.**

"The burden is upon the spouse seeking to enforce [a prenuptial agreement] to show it has been strictly observed in good faith." *Marriage of Fox*, 58 Wn. App. 935, 938, 795 P.2d 1170 (1990). When there is evidence that the parties did not mutually observe an agreement, "the court is not bound to enforce it." *Fox*, 58 Wn. App. at 938.

Here, the husband did not meet his burden to show the agreement was "strictly observed." Indeed, he does not deny that he did not follow the *terms* of the agreement, but claims that he followed the "full intent" of the agreement. (Cross-Resp. Br. 33) That he now provides excuses for his failure to follow the terms of the agreement during the marriage does not change the fact it was not "strictly observed" during the marriage. *Fox*, 58 Wn. App. at 938. Because the husband failed to observe the prenuptial agreement, the trial court should have found that it was abandoned and refused to enforce it.

**E. This Court Should Award Attorney Fees To The Wife.**

The husband leaves the marriage with over \$16 million and continued employment income of \$8,000 a month (even though he is semi-retired). Meanwhile the wife, who at age 65 has no employment prospects and minimal separate property, receives 5% of the marital estate. The wife has the need for attorney fees and the husband has the ability to pay. This court should award attorney fees to the wife under RCW 26.09.140.

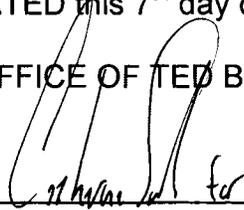
**II. CONCLUSION**

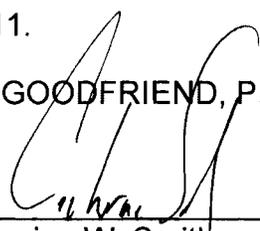
The prenuptial agreement upon which the trial court based its property division was substantively and procedurally unfair as a matter of law. This court should reverse the trial court's decree enforcing the parties' prenuptial agreement and remand for a fair and equitable distribution of the marital estate under RCW 26.09.080 and an award of spousal maintenance under RCW 26.09.090. This court should also award attorney fees to the wife on appeal pursuant to RCW 26.09.140.

DATED this 7<sup>th</sup> day of November, 2011.

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**DECLARATION OF SERVICE**

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

That on November 8, 2011, I arranged for service of the foregoing Reply Brief of Cross-Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 8th day of November, 2011.

  
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