

No. 42660-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re Committed Intimate Relationship of:

JULIE RILEY,

Appellant

and

ROGER HORTON,

Respondent

12/11/11 - 7 AM '11
STATE OF WASHINGTON
BY _____
COURT OF APPEALS, DIVISION II
CLERK

**APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE PAULA CASEY**

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Horton hinges his response to this appeal on the argument that the parties' 2008 Agreement¹ cannot be enforced because it was "based on" the substantively and procedurally unfair Separate Property Agreement. A closer analysis of the cases Horton cites in support of this argument, however, shows that the Court must instead analyze the 2008 Agreement under the two pronged analysis of *Matson*,² *Foran*³ and *Bernard*.⁴

The undisputed testimony of both parties, the documentary evidence in the record, and the subsequent performance by the parties of their obligations under the 2008 Agreement all demonstrate the existence of that agreement and define its terms. Horton does not dispute that the 2008 Agreement was substantively fair. Therefore, this Court should enforce it.

¹ All capitalized terms used herein refer to the same items as set forth in Appellant's opening brief.

² *Marriage of Matson*, 107 Wn.2d 479, 730 P.2d 668 (1986).

³ *Marriage of Foran*, 67 Wn. App. 242, 834 P.2d 1081 (1992).

⁴ *Marriage of Bernard*, 165 Wn.2d 895, 204 P.3d 907 (2009).

II. ARGUMENT

A. The Court Should Enforce The 2008 Agreement Because Its Existence And Terms Were Established And it Was Substantively Fair.

Horton cites *Rathke v. Yakima Valley Grape Growers Ass'n*, 30 Wn.2d 486, 192 P.2d 349 (1948) in support of his argument that the 2008 Agreement is unenforceable because it was “based on” the unenforceable Separate Property Agreement. *Resp. Brief* at 12-13. In *Rathke*, the parties entered into two related contracts: one requiring Yakima Valley Grape Growers Association (“Growers”) to sell all of its grape juice output to Clarke-Donelson (the “Sales Agreement”) and another requiring Growers to purchase all its machinery and supplies to produce the grape juice from Rathke (the “Purchase Agreement”). 30 Wn.2d at 487. The Sales Agreement was determined not only to be unenforceable: it was found to be a *criminal violation* of the Robinson-Patman Act. 30 Wn.2d at 508. The *Rathke* court held that, where a Sales Agreement is found to be illegal and therefore void and unenforceable, the related Purchase Agreement could not be enforced. 30 Wn.2d at 509.

In this case, the Separate Property Agreement was not illegal: it was simply unfair to Riley. In contrast to the two agreements in *Rathke*, the two agreements here were not entered into contemporaneously but instead were separated by two years. The *Rathke* holding does not prevent

parties to a committed intimate relationship from reaching an enforceable agreement regarding the division of their property in a second agreement, provided that the second agreement withstands scrutiny under the two-pronged analysis of *Matson, Foran and Bernard*.

Moreover, contrary to Horton's claims, the 2008 Agreement was not "based on" the Separate Property Agreement at all. Rather, the parties largely ignored the provisions of the Separate Property Agreement when they negotiated the new 2008 Agreement. The numerous differences between the provisions of the Separate Property Agreement and the 2008 Agreement demonstrate that the parties entered a wholly new agreement, not merely an amendment to the Separate Property Agreement. Those differences include the following:

Option to Purchase. Paragraph XIII of the Separate Property Agreement gave both parties the option to purchase any of the jointly-held property, including the residence, for thirty days after the termination of the agreement when Riley vacated the residence. CP 14. The option was exercisable by written notice. No such notice was ever given by either party.

Appraisers. The Separate Property Agreement also included a detailed procedure for obtaining two separate appraisals, with the average of the two appraised values to be used as the purchase price in exercising the purchase option. CP 14. Horton obtained an appraisal on his own, but the parties did not use his appraisal, but instead reached an agreed valuation of \$750,000 for the residence.

Forced Sale of Residence. The Separate Property Agreement provided that, if neither party exercised his/her purchase option, the residence was to be listed for sale within 30 days of the parties' separation. CP 15. The residence was never listed for sale. Instead, Horton and Riley negotiated the 2008 Agreement, pursuant to which Horton paid Riley \$150,000 for her share of the equity in the residence, and Riley quit-claimed her interest in the residence to Horton.

Upon their separation, the parties were faced with the unpleasant prospect of jointly owning real and personal property under the terms of the Separate Property Agreement. CP 10. Rather than follow the detailed provisions in the Separate Property Agreement, the parties reached a new agreement to divide all of their property except for the disputed retirement accounts. According to Riley's testimony, which was never controverted by Horton, the parties began the process of dividing their assets by addressing the residence. RP 64, 266. Once they reached agreement regarding the house, they proceeded to divide the cars (RP 120) and bank accounts (RP 64). Horton testified that the parties agreed to value the home at \$750,000, RP 195-96, and further testified that Riley agreed with the home value. RP 197. Horton also testified that he prepared detailed lists of values of assets, including the furniture. RP 199.

However, once agreement had been reached regarding all other assets, Riley's uncontroverted testimony was that Horton then indicated that he was relying on the Separate Property Agreement with respect to the

retirement accounts. RP 64, 266. In short, the testimony of both parties, along with trial exhibits 2, 3, and 36 clearly demonstrate that the parties had a meeting of the minds to evenly divide all their non-retirement assets, while not reaching agreement with regard to the retirement accounts. Riley met her burden of proving the existence and terms of the 2008 Agreement. *See Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993).

The clear evidence of the existence and terms of the 2008 Agreement does not stop with the extensive testimony and documentary evidence in the record: the parties themselves provided further proof of the 2008 Agreement by *substantially performing their obligations* under that agreement. Performance of a separate property agreement is evidence of that agreement's existence. *See Marriage of DewBerry*, 115 Wn. App. 351, 359, 62 P.3d 525 (2003). Riley quitclaimed her interest in the residence to Horton. Ex. 2. Horton refinanced the home and used the proceeds in part to pay Riley \$150,000 for her share of the equity. CP 83. Horton further demonstrated his reliance on the 2008 Agreement by refinancing a second time, raising another \$40,000 - \$50,000. When asked how he used the proceeds of this second refinancing, Horton objected, and the trial court sustained the objection based on irrelevance. RP 260.

The undisputed evidence before the trial court was that the parties agreed to evenly divide their assets, while leaving the disposition of the retirement accounts for later resolution. Horton eagerly negotiated to resolve the division of the non-retirement assets, but once he had Riley's agreement he refused to discuss the retirement assets. RP 64, 266. Had the real estate market continued its pre-2008 trend of upward price movements, Horton no doubt would have insisted that he receive the benefit of his bargain.

Partial settlement agreements are commonplace in civil litigation. In the context of dividing marital property, RCW 26.09.070 provides in pertinent part as follows:⁵

RCW 26.09.070
Separation contracts.

(1) The parties to a marriage ..., in order to promote the amicable settlement of disputes attendant upon their separation may enter into a written separation contract providing for ...the disposition of *any property* owned by both or either of them....

...

(3) If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage ..., the contract... shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the

⁵ The property acquired during a committed intimate relationship is divided by applying the principles relating to division of marital assets by analogy. See *Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000); *Connell v. Francisco*, 127 Wn.2d 339, 349, 898 P.2d 831 (1995).

parties on their own motion or on request of the court, that the separation contract was unfair at the time of its execution. (emphasis added).

RCW 26.09.070 contemplates that the parties may reach a partial settlement as to “any property” owned by them, and expresses the legislature’s intent to “promote the amicable settlement of disputes attendant upon [the parties’] separation.” Here, the parties both testified as the terms of their 2008 Agreement and do not dispute that they agreed to an equal division of their non-retirement assets. Their negotiations contained numerous instances of give and take which differ from the terms of the Separate Property Agreement, such as the parties’ agreement to value the home at \$750,000 instead of relying on the appraisal procedures set forth in the Separate Property Agreement. Accordingly, consideration was exchanged, and there was a clear “meeting of the minds” with respect to all non-retirement property.

The substantive fairness of agreements such as the 2008 Agreement is determined as of the time of execution, not at the time of trial. *Bernard*, 165 Wn.2d at 904. “If [an agreement dividing assets] is not unfair, the parties will be held to have waived their right to have the court determine a ‘just and equitable’ division of the property.” *Marriage of Shaffer*, 47 Wn. App. 189, 194, 733 P.2d 1013 (1987). Both parties testified as to the terms of the 2008 Agreement, and both parties

admitted that they had reached an agreement as to the disposition of all their assets other than the retirement accounts. Under the holding of *Shaffer*, the trial court erred in ignoring the 2008 Agreement and proceeding to divide all of the parties' assets.

Horton cites *Bernard* for the proposition that “an amended prenuptial agreement could not be enforced when the underlying prenuptial agreement on which it was based was unenforceable due to substantive and procedural unfairness.” *Resp. Brief* at 12. According to Horton’s argument, because the amended agreement in *Bernard* was “based on” the original agreement which was unenforceable, the amended agreement was therefore unenforceable. *Id.* This is a complete misstatement of the holding in *Bernard*. In fact, the *Bernard* court analyzed the two agreements involved there in ***exactly the manner in which Riley asked the trial court and is asking this Court to analyze the agreements at issue here***: by applying the two-pronged analysis of *Matson*, *Foran* and *Bernard*.⁶

In *Bernard*, Thomas had a net worth of approximately \$25 million while his fiancé, Gloria, had a net worth of \$8,000. 165 Wn.2d at 898.

⁶ As noted by the *Bernard* court, the two-pronged analysis traces its roots back to cases predating *Matson*, including *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954); *Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972); *Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977). *Bernard*, 165 Wn.2d at 902.

Thomas informed Gloria that he would need her to sign a prenuptial agreement, but failed to provide her attorney with a copy of the proposed agreement until three days before the wedding. 165 Wn.2d at 898-99. Gloria signed the prenuptial agreement the day before the wedding and, on the day of the wedding, the parties signed a “side letter” agreeing to renegotiate five areas of concern that Gloria’s attorney had identified in the short time he had the prenuptial agreement. 165 Wn.2d at 900. The Supreme Court found both the original prenuptial agreement and the “side letter” were both substantively and procedurally unfair to Gloria, and declined to enforce either agreement on that basis. 165 Wn.2d at 907. So, by following the two-pronged analysis of *Matson* and *Foran*—not on the basis that the side letter was “based on” the original prenuptial agreement—the Bernard court found the “side letter” and the subsequently-negotiated amendment to the original prenuptial agreement unenforceable. *Id.*

The *Bernard* court made clear that where, as here, *any* agreement dividing the property from a marriage is before the court, the court must analyze that agreement under the two-pronged analysis of *Matson*, *Foran* and *Bernard*:

Turning to the agreement at issue, we apply the two-prong analysis to the prenuptial agreement as signed on the eve of marriage and subsequently amended 14 months later.

Thomas concedes the prenuptial agreement as originally executed on the eve of marriage was substantively and procedurally unfair; therefore, we must determine whether the later amendment cured the substantive or procedural deficiencies. 165 Wn.2d at 903-04.

...

The prenuptial agreement as amended ... made provisions for Gloria disproportionate to the means of Thomas, and limited Gloria's ability to accumulate her separate property while precluding her common law or statutory claims on Thomas's property. The agreement as amended is substantively unfair. It can be enforced only if it was executed fairly, the second prong of our analysis. 165 Wn.2d at 905.

...

[A] fair-minded person would be persuaded that the side letter did not give Gloria a right to amend the prenuptial agreement beyond the few matters specified in the "side letter." ... We hold the agreement, as amended, was procedurally unfair. 165 Wn.2d at 907.

Because the prenuptial agreement was both substantively and procedurally unfair, it is unenforceable. 165 Wn.2d at 907.

Here, Horton does not argue that the 2008 Agreement was substantively unfair to him: after all, it evenly divided the property it addressed, and Horton's income was nearly triple Riley's at the time. RP 33, 250, 264. The enforceability of contracts such as the one at issue is determined "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)). Because the 2008 Agreement was substantively fair to Horton at the time it was entered, the trial court

erred as a matter of law in not enforcing it, under the two-pronged analysis of *Matson, Foran and Bernard*.

B. Substantial Evidence Does Not Support The Trial Court's Award of All the Quasi-Community Interest in the Exeltech Account to Horton.

In order for this Court to uphold the trial court's award of all the Exeltech retirement account to Horton, substantial evidence must support the trial court's finding that none of the account had vested as of the parties' separation. See *Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). Horton correctly states the standard for determining whether "substantial evidence" exists: "evidence is 'substantial' if it exists in a sufficient quantum to persuade a fair minded person of the truth of the declared premise." *Resp. Brief* at 17 (citing *Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003)). The *only* evidence before the trial court supporting the notion that none of the Exeltech retirement account had vested as of the date of separation was Horton's testimony. *Resp. Brief* at 17. In light of the clear documentary evidence to the contrary set forth in trial exhibit 12 and in light of the fact that Horton made no attempt to explain why exhibit 12 was incorrect, Riley respectfully submits that no fair-minded person would believe that none of the Exeltech account had vested as of the April 2008

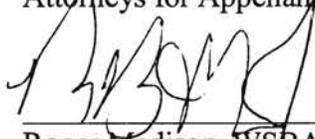
date of separation. Accordingly, she respectfully requests that this Court award her one-half, or \$2,388.01, from that account.⁷

III. CONCLUSION

The trial court erred as a matter of law when it refused to apply the two-pronged analysis of *Matson*, *Foran* and *Bernard* to the 2008 Agreement. Because its existence was established by documentary evidence, by the testimony of both parties and by their subsequent performance and because it was substantively fair, the 2008 Agreement should have been enforced. This Court should therefore reverse the trial court and enforce the 2008 Agreement. This Court should also award Riley 50% of the quasi-community interest in the Exeltech account, thus correcting the clear error made by the trial court in awarding all of that account to Horton.

Respectfully submitted this 3rd day of May, 2012.

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⁷ Horton characterizes the trial court's error as "de minimis." *Resp. Brief* at 18. Because of the relatively minor amount involved, Riley would not and did not base her appeal primarily on this error. However, she believes that the amount is worth dealing with, and respectfully requests that the error be corrected.

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:

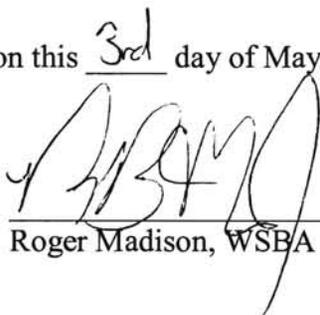
That on May 3, 2012, I arranged for service of the foregoing Brief of Appellant, to the court and counsel for the parties to this action as follows:

Office of Clerk
Washington Court of Appeals, Division II
950 Broadway, Suite 300
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Via U.S. mail, first class postage prepaid

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12 MAY -7 AM 10:57
STATE OF WASHINGTON
BY _____
DEPUTY

Dated at Olympia, Washington this 3rd day of May, 2012.



Roger Madison, WSBA 15338