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STATE OF WASHINGTON

No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Marriage of
THOMAS BERNARD,
Appellant/Respondent
and
GLORIA BERNARD,
Respondent/Petitioner

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COURT OF APPEALS
STATE OF WASHINGTON
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APPELLANT'S PETITION FOR REVIEW TO THE
WASHINGTON STATE SUPREME COURT

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TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF PETITIONER/CITATION TO COURT OF APPEALS' DECISION	1
II. INTRODUCTION	1
III. ISSUES PRESENTED FOR REVIEW	2
IV. STATEMENT OF THE CASE.....	5
V. ARGUMENT	9
A. Review By This Court Is Warranted Because The Court Of Appeals' Decision Conflicts With Existing Law	9
1. Substantial Credible Evidence Is Necessary To Support The Trial Court's Conclusion That The Prenuptial Agreement And Amendment Were Procedurally Unfair	9
2. The Evidence In This Case Is Not Credible And Sufficient To Persuade A Fair Minded Person That The Prenuptial Agreement And Subsequent Amendment, Taken Together, Were Procedurally Unfair And That The Husband Should Be Denied The Benefit Of What He Negotiated.....	10
a. The Court of Appeals recognized that the wife had an attorney but that he was incompetent.....	10
b. There is no evidence the husband knew Gehring was not competently performing his duties; the husband was entitled to rely on Gehring to competently perform his duties	12

c.	Even if the wife engaged an incompetent attorney, the husband cannot be punished for the wife's poor choice of counsel	13
B.	The Wife Breached Her Duty And Confidential Relationship With Her Husband By Negotiating The Marriage Agreement In Bad Faith	16
C.	The Court Disregarded The Second Prong of the <i>Matson/Foran</i> Test.....	18
D.	Review By This Court Is Warranted Because This Case Involves Issues Of Substantial Public Interest And Public Policy	19
VI.	CONCLUSION.....	22

TABLE OF AUTHORITIES

	<u>Pages</u>
Cases	
<i>Agronic Corp. of America v. DeBourgh</i> , 21 Wn.App. 459, 585 P.2d 821 (1978).....	9, 10
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 301, 494 P.2d 208 (1972).....	19
<i>In re Marriage of Bernard</i> , 137 Wn. App. 827, 155 P.3d 171 (2007).....	1, 9, 11, 12, 13, 21
<i>In re Marriage of Cohen</i> , 18 Wn.App. 502, 569 P.2d 79 (1977).....	3, 14, 15
<i>In re Marriage of Foran</i> , 67 Wn. App. 242, 834 P.2d 1081 (1992).....	3, 17, 18, 19
<i>In re Marriage of Hadley</i> , 88 Wn.2d 649, 565 P.2d 790 (1977).....	2, 13, 14, 15, 16
<i>In re Marriage of Horner</i> , 151 Wn.2d 884, 892, 93 P.3d 124 (2004).....	20
<i>In re Marriage of Matson</i> , 107 Wn.2d 482, 730 P.2d 688 (1986).....	3, 18, 19
<i>N. Fiorito Co. v. State</i> , 69 Wn.2d 616, 621, 419 P.2d 586 (1966).....	10
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	2, 13, 15
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 879, 73 P.3d 369 (2003).....	10
<i>ZeBarth v. Swedish Hospital Medical Center</i> , 81 Wn.2d 12, 499 P.2d 586 (1972).....	2, 10

Statutes

RCW 7.04.030.....	6
-------------------	---

Rules

RAP 13.4.....	2
RAP 13.4 (b).....	3

Other Authorities

Unif. Premarital Agreement Act, (1983) 19

Appendix

	<u>Pages</u>
I. April 9, 2007 Court of Appeals' Decision.....	A001-A008
II. May 15, 2007 Court of Appeals' Order Denying Motion for Reconsideration	A009

I. IDENTITY OF PETITIONER/CITATION TO COURT OF APPEALS' DECISION

Appellant J. Thomas Bernard asks this Court to accept review of the Court of Appeals' decision filed on April 9, 2007¹ and the Court of Appeals' subsequent Order Denying Appellant's Motion for Reconsideration, filed on May 15, 2007, which terminated review in this case. Copies of these decisions are in the Appendix to this Petition.

II. INTRODUCTION

This case turns on its head existing law governing the creation of marriage agreements.

Here, the wife and her attorney deceptively concluded during negotiations that the wife was not bound by a marriage agreement into which she subsequently entered. Those conclusions were not communicated to the husband or his attorney. On the contrary, the wife affirmed under oath that the agreement was legally entered into and her attorney certified the agreement met legal procedural requirements. The wife then accepted significant benefits under the agreement.

The Court of Appeals held the wife was not bound by her agreement in part because her attorney was not competent.

¹ See, *In re Marriage of Bernard*, 137 Wn. App. 827, 155 P.3d 171 (2007).

The husband should not be punished for his good faith entry into what he reasonably believed was a valid agreement. If the wife objects to the agreement she signed, her recourse should be against her attorney, not her husband.

III. ISSUES PRESENTED FOR REVIEW

A Petition for Review may be accepted if the decision of the Court of Appeals is in conflict with: (1) a decision of this Court; (2) another decision of the Court of Appeals or (3) involves an issue of substantial public interest.²

This case meets these criteria: the Court of Appeals' opinion in this case conflicts with, or calls into question, this Court's decisions in *ZeBarth v. Swedish Hospital Medical Center*, 81 Wn.2d 12, 499 P.2d 586 (a trial court's decision must be supported by substantial credible evidence); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) (Courts engage a strong presumption counsel's representation was effective); *In re Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977) (Court refused to penalize husband for his wife's failure to obtain competent legal counsel to advise her in the drafting of a series of property settlement agreements); *In re Marriage of Matson*, 107 Wn.2d 482, 730

² See, RAP 13.4 (b). Petitioner does not maintain there is a constitutional question in this case.

P.2d 688 (1986); and *In re Marriage of Foran*, 67 Wn. App. 242, 834 P.2d 1081 (1992) (regarding application of the “two prong” test for measuring the validity of marriage agreements).

The Court of Appeals’ decision is also in conflict with, or calls into question, *In re Marriage of Foran, supra*, and *In re Marriage of Cohn*, 18 Wn. App. 502, 569 P.2d 79 (1977) (it is unfair to penalize husband for wife’s failure to disclose her lack of understanding of their antenuptial and property settlement agreements).

Appellant also petitions this Court for review because this case involves substantial public interest issues about the formation, validity and enforceability of marriage agreements as to:

- The scope of a spouse’s fiduciary and good faith duties to the other spouse in negotiating post-marriage property agreements and whether the wife in this case violated her fiduciary duty to her husband when she negotiated a post-marriage agreement at the same time she and her attorney purposely withheld from the husband their belief that the wife lacked bargaining power in the negotiations and had identified “outs” if she later wanted to disclaim her agreements.

- The degree to which a husband should be penalized when, unknown to the husband, the wife's independent attorney fails to advise the wife accurately about her legal rights in connection with the negotiations of a marriage agreement.
- Whether the wife should be estopped from challenging her agreements after she accepts their benefits.
- The extent to which a husband should be able to justifiably rely on his wife's notarized acknowledgment that she voluntarily signed a post-marriage agreement, and the related certificate, signed by wife's attorney, that the attorney had fully advised the wife of her rights and the legal significance of the post-marriage agreement and that the wife acknowledged her complete understanding of the legal consequences and terms of that agreement.

IV. STATEMENT OF THE CASE

This was a short term marriage of about 54 months. The wife, who is highly educated, had virtually no assets when she married her multi-millionaire husband.³

After delaying for months to retain an attorney to represent her in the prenuptial agreement negotiations, the wife finally employed an attorney, Marshall Gehring, virtually on the eve of her wedding.⁴ By then, it was too late for Mr. Gehring to negotiate for his client or do little more than critique an existing draft agreement prepared by the husband's attorney. He provided his critique and objections in a letter to his client recommending that she not sign the agreement.⁵ She signed it anyway and married the next day.⁶

Because of the circumstances, the parties agreed the signed prenuptial agreement needed modification, especially to address—and resolve—Mr. Gehring's concerns.⁷ As a result, the parties signed a side agreement, or side letter, on the day of their wedding committing to amend the Prenuptial Agreement after they returned from their honeymoon.⁸

³ RP Vol. 129:11 to 30:4; Trial Exhibit 128.

⁴ RP Vol. I, 102:2 to 105:2; RP Vol. II, 49: 12-23.

⁵ RP Vol. I, 864:13.

⁶ RP Vol. I, 105:21.

⁷ RP Vol. I, 111:5-13; 112:2 to 113:22; Trial Exhibit 102.

⁸ RP Vol. I, 47:20-25, 68:18-25; RP Vol. II, 94:17 to 95:15; RP Vol. III, 17:6-14, *See also*, RP Vol. I, 106:3-11; Trial Exhibits 103 and 127.

After their return, the parties engaged in a series of negotiations that spanned about 14 months. During these negotiations, Mr. Gehring's pre-marriage objections to the Prenuptial Agreement were resolved. Mr. Gehring then advised his client to sign the Amendment—and she did so.⁹ In the attorney certificate signed as part of the Amendment, Mr. Gehring certified he had fully advised his client of her property rights and the legal significance of the Amendment and that his client acknowledged to him her complete understanding of the legal consequences and terms of the Amendment.¹⁰ At the same time, the wife's signature on the Amendment was acknowledged by a notary who attested that the wife acknowledged under-oath to the notary that she signed the Amendment as her free will and voluntary deed for the uses and purposes mentioned in the Amendment.¹¹

At trial, Mr. Gehring described his client as being “very crafty.”¹² Before signing the Amendment, the wife and Mr. Gehring secretly discussed their dissatisfaction with the Amendment's terms and her “outs” if she later wanted to try to get out of her agreements. They also maintained she could successfully renounce the agreements because she lacked “bargaining power” when she signed the Amendment.¹³

⁹ *Id.*

¹⁰ *Id.*

¹¹ RP Vol. I, 61:18 to 62:3; Trial Exhibit 104, page 5.

¹² RP Vol. VI, 2-3; RP Vol. I, 131:16-20

¹³ RP Vol. I, 119:17 to 121:25.

The husband knew nothing of this. Indeed, the opposite is expressed by the wife and her attorney in Trial Exhibits 104 and 132; RP Vol. V, 25:5-9. While the husband insisted he and his wife needed a nuptial agreement because of their hugely disparate wealth, he trusted his wife and believed she had negotiated and signed the Amendment in good faith, as did he.

After the Amendment was signed, the marriage continued, so too did the wife's employment by the husband's company. The husband followed the Amendment and showered gifts and other financial rewards on his wife and her children, all of which she accepted.¹⁴

On September 10, 2004, after about 50 months of marriage, the wife ended the marriage, started a divorce action and renounced her marriage Agreements.¹⁵

The trial court concluded that the husband did not trick or manipulate the wife into signing the agreements.¹⁶

On February 14, 2005, the husband moved to stay the divorce proceedings and proceed to arbitration under RCW 7.04.030.¹⁷ On March 2, the wife moved to determine the validity of the arbitration agreement.¹⁸ On

¹⁴ See, e.g., RP Vol. III, 21:12 to 25:1, 58:9-18.

¹⁵ CP 4-6.

¹⁶ RP Vol. VI, 2:12 to 3:16.

¹⁷ CP 49.

¹⁸ CP 194, 417, 568.

April 1, the wife moved for partial summary judgment.¹⁹ On April 29, 2005, Judge Helen Halpert granted partial summary judgment in favor of the wife declaring that the July 7, 2000 Prenuptial Agreement (singular), as a matter of law, did not make fair and reasonable provision for the wife.²⁰ The Court also rejected the husband's motion to arbitrate property issues as required by the Agreement and set for trial the issue of whether the marriage agreements were valid.²¹

Following a four day trial on the enforceability of the marriage agreements, the Court gave her oral decision on September 20, 2005. In it, she commented that this "was one of the most difficult decisions I've had to make in my 15 year career as a judge."²² She further stated this was difficult because the wife "very much contributed to the procedural defects... [and] and steadfastly resisted Tom's encouragement to find an independent attorney in a timely manner."²³ Notwithstanding these facts, the Trial Court found the wife had not voluntarily entered into her agreements.

¹⁹ CP 302.

²⁰ CP 1103. In so ruling, the Trial Court considered only the July 7, 2000 Agreement as this Order states, in part: "The court is satisfied that the agreement [singular], as a matter of law, does not make fair and reasonable provision for [the wife]." Clerk's Papers 1104. Therefore, she was entitled to partial summary judgment.

²¹ *Id.*

²² RP Vol. VI, 2:3-5.

²³ *Id.* at 10:3-9.

Subsequently in ruling against appellant's Motion for Reconsideration, the Trial Court also recognized it was "making new law" by not applying existing law to the resulting integrated Agreement.²⁴

The case was then set for a trial on property division issues and the husband timely appealed.

In an opinion dated, April 9, 2007 Division One of the Court of Appeals affirmed the trial court. Respondent now files this Petition for Review.

V. ARGUMENT

A. Review By This Court Is Warranted Because The Court Of Appeals' Decision Conflicts With Existing Law.

1. Substantial Credible Evidence Is Necessary To Support The Trial Court's Conclusion That The Prenuptial Agreement And Amendment Were Procedurally Unfair.

The Court of Appeals may not substitute its findings for that of the trial court if there is substantial evidence supporting the trial court's decision, "unless [the] findings of the trial court are clearly unsupported by the record."²⁵ *Agronic Corp. of America v. DeBourgh*, 21 Wn.App. 459, 585 P.2d 821 (1978). *Agronic* defines "substantial evidence" as "that

²⁴ RP Vol. VII, 10:5-10.

²⁵ Here, unlike the trial court, the Court of Appeals found Mr. Gehring incompetently represented Gloria and substituted its findings for the trial court because the trial court relied too much on the fact that Gloria was "represented" by Mr. Gehring. *In re Marriage of Bernard*, 137 Wn. App. at 837.

character of evidence which convinces an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *Id.* at 463.

“Substantial evidence” is defined as “a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

Substantial evidence must be “credible.” *ZeBarth v. Swedish Hospital Medical Center*, 81 Wn.2d 12, 18 499 P.2d (1972) (appeal from jury verdict); *N. Fiorito Co. v. State*, 69 Wn.2d 616, 621, 419 P.2d 586 (1966) (appeal from trial court findings).

- 2. The Evidence In This Case Is Not Credible And Sufficient To Persuade A Fair Minded Person That The Prenuptial Agreement And Subsequent Amendment, Taken Together, Were Procedurally Unfair And That The Husband Should Be Denied The Benefit Of What He Negotiated.**
 - a. The Court of Appeals recognized that the wife had an attorney but that he was incompetent.**

The Court of Appeals held that the wife did not have the benefit of independent counsel, the bargaining position of the parties were grossly imbalanced and the wife at no time had full knowledge of her legal

rights.²⁶ None of this was communicated to the husband before this litigation. Indeed, quite the opposite was communicated to the husband by the wife and Mr. Gehring.²⁷

While no one disputes the substantive and procedural deficiencies of the Prenuptial Agreement, these deficiencies were cured by the 14-month-later Amendment. During the related negotiations, the wife and her attorney led the husband (and his attorney) to reasonably believe that the wife had independent counsel to advise her about the Amendment. Any limitations on counsel's independence and performance were neither caused by, nor known by, the husband or his attorney.

The entire purpose for the Amendment negotiation process was to eliminate the prior substantive and procedural deficiencies and to create a marriage agreement that complied with the law. To this end, for example:

- The wife and her attorney had the benefit of about 14 months between the two Agreements to negotiate and raise their issues;
- Mr. Gehring's file establishes that the Prenuptial Agreement itself was "on the table" for amendment as to issues beyond the issues raised in the side letter, that he

²⁶ *In re Marriage of Bernard*, 137 Wn. App. at 386-87.

²⁷ *See, e.g.*, Trial Exhibits 104 and 132; RP Vol. V, 25:5-9.

negotiated for more than the side letter provided, and that the rest of the Agreement was open for negotiation;²⁸ and

- The wife and her attorney agreed to an Amendment they told the husband the wife voluntarily signed after being fully advised of her relevant rights.

In hindsight, the Court of Appeals determined that which the husband did not, and could not, know: it harshly criticized Mr. Gehring's competence because he did "not advise [the wife] accurately" about her rights; his assessment of the Prenuptial Agreement was "flawed" in several significant ways; and the wife's representation by counsel was, therefore, "inadequate;"²⁹

- b. There is no evidence the husband knew Gehring was not competently performing his duties; the husband was entitled to rely on Gehring to competently perform his duties.**

While the Court of Appeals may be correct in its assessment of Gehring's competence, there is no evidence that the husband was

²⁸ There is nothing in the side letter that limits further negotiations to only what is in the side letter. Moreover, the parties declined to follow the side letter as to, for example, the October 7, 2000 deadline. The fact that Mr. Gehring's own file refutes the Court of Appeal's conclusion that "Gehring's role was limited to commenting on unfair provisions [in the Prenuptial Agreement] and advising [the wife] whether or not to sign the document as written." *In re Marriage of Bernard*, 137 Wn. App. at 835. This conclusion is not clearly supported by the record and cannot be the basis that there was substantial credible evidence to support the conclusion that the Amendment negotiations were limited to the issues raised in the side letter.

²⁹ *In re marriage of Bernard*, 137 Wn. App. at 835-37.

responsible for it or even knew of it. Indeed, he was entitled to rely on the fact that the wife's attorney was competently advising her. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The Court of Appeals now penalizes the husband for his good faith and reasonable reliance on Mr. Gehring to properly assist the wife in negotiating and entering into a valid and enforceable marriage agreement.

c. Even if the wife engaged an incompetent attorney, the husband cannot be punished for the wife's poor choice of counsel.

The wife chose Mr. Gehring, not the husband.

In re Marriage of Hadley, 88 Wn.2d 649, 565 P.2d 790 (1977)

involved a series of property status agreements entered into after marriage. These agreements were motivated by Ms. Hadley's illness. In the process, Ms. Hadley engaged a lawyer to examine the agreements and advise her. Her attorney did not render legal advice to Ms. Hadley because he needed additional information which Ms. Hadley failed to give to him.

In upholding the enforceability of the agreements, this Court held that while Ms. Hadley's failure to provide the required information and obtain independent legal advice "may have been an unfortunate omission on her part, it is unfair to penalize Mr. Hadley for it."³⁰

³⁰ Moreover, as in *Hadley*, Tom Bernard's actions toward his wife were consistent with those required in a relationship of trust and confidence. *Hadley*, 88 Wn.2d at 655; VI RP 2-3.

Equally telling is the failure of the dissent in *Hadley* to convince the court that the agreements should be rejected “to achieve ‘just and equitable’ disposition of the property rights of the parties.” *Hadley*, 88 Wn.2d at 660. The majority also rejected the argument that Ms. Hadley’s failure to obtain a legal opinion about the agreements invalidated the agreements. It similarly rejected the dissent’s claims that the wife’s failure to obtain independent legal advice as to the agreements she signed did not vitiate the husband’s significant duty to disclose all material relevant facts. *Id.* at 671.

In re Marriage of Cohn, 18 Wn. App. 502, 569 P.2d 79 (1977) is another case where, as here, each party had access to legal counsel to advise her in negotiating prenuptial agreements. In *Cohn*, the wife argued she did not understand the provisions in the agreements. She also asserted they were not signed on independent legal advice with full knowledge of her rights and interests. The *Cohn* court cited to *Hadley* and held that if Ms. Cohn did not understand the provisions or effect of the agreements, there was “no evidence that she ever let her husband . . . know of her lack of knowledge [and] . . . it would be unfair to penalize Mr. Cohn for Ms. Cohn’s omission to request further information. *In re Marriage of Cohn*, 18 Wn. App. at 510.

Here too, there is no evidence the wife ever let the husband know of her concerns about bargaining power, her lack of knowledge or of her attorney's shortcomings. Neither she nor her attorney asked for further information from the husband or his attorney. Nor did they ask to clarify whether the 14 month negotiations could address issues not included in the side letter. Instead, the evidence is that the wife and Mr. Gehring purposefully concealed such concerns from the husband in order to trick and deceive him into continuing the benefits of the marriage.³¹

There is no evidence the husband or his attorney acted improperly in this matter.³² There is no evidence the husband knew of the defects in the wife's legal representation emphasized by the Court of Appeals.

The husband was entitled to rely on the fact that the wife's attorney was presumed to have acted competently. *State v. McFarland, supra*. Instead, contrary to the teaching of *Hadley* and *Cohn*, the Court of Appeals penalized the husband for the failures of the wife and her attorney.

³¹ See, e.g., Trial Exhibits 131 and 132 and the certification and notarized acknowledgement in Exhibit 104. Known to the wife and Mr. Gehring when they signed the Amendment, but unknown to the husband, was the fact that the "crafty" wife had lots of "outs" if she later wanted to reject the Agreements she had signed. See, e.g., RP Vol. I, 119:17 to 121:25, 131:16-20. Is it not a breach of the wife's duty to the husband—to enter into an agreement that perpetuates her beneficial marriage on terms she intentionally concealed from her husband?

³² VI RP 2-3.

B. The Wife Breached Her Duty And Confidential Relationship With Her Husband By Negotiating The Marriage Agreement In Bad Faith

The wife and Mr. Gehring actually discussed their belief that they lacked bargaining power in the 14-month negotiations that led up to the Amendment agreement. They discussed their dissatisfaction with the wife's negotiating options, that they wife had lots of "outs" if she later wanted out of the agreement and that she could get out of the agreement by getting a court to declare it unenforceable.³³

None of this was communicated to the husband, despite the fact that the parties occupied a fiduciary relationship of trust and the wife owed her husband the duty of good faith, candor and sincerity.³⁴

By this deception, the wife and Mr. Gehring have deprived the husband of the benefit of his bargain. They also made it impossible for him to address, before the amendment was signed, the bargaining power issue, the scope of negotiations in the 14-month negotiation period and all other issues that could have then resolved the substantive and procedural deficiencies the wife now asserts, and that the trial court and Court of Appeals have used, to declare the marriage agreements invalid and unenforceable.

³³ See, e.g., RP Vol. I, 119:17 to 121:25.

³⁴ *In re Marriage of Hadley*, 88 Wn.2d at 655.

It is fundamentally unfair, and it should be unlawful, for a spouse to maintain secret reservations about a marriage agreement, accept for a time the benefits of the resulting flawed agreement and then disclaim the agreement in order to claim more from the other spouse than the agreement allows.

If the wife objects to her agreement, her recourse should not be against her innocent spouse, but against the attorney who advised her. In this connection, attention is called to the important footnote 14 in *In re Marriage of Foran*, 67 Wn. App. 255. An attorney who advises a party in the negotiation of a marriage agreement accepts serious ethical, moral, economic and political responsibilities to both spouses. “A client is not well served by an unenforceable contract, marital tranquility is not achieved by a contract which is economically unfair or achieved by unfair means.”³⁵

The implications of this expression of public policy is especially important with regard to post-marriage agreements in the context of the duties of good faith, candor and sincerity each spouse owes to the other.

³⁵ *Id.* (as to a prenuptial agreement).

C. The Court Disregarded The Second Prong Of The *Matson/Foran* Test

Courts have looked to the settled law of the *Matson/Foran* “two prong test” in deciding the validity of a marriage agreement.

The validity of a prenuptial agreement is evaluated by means of a 2-prong analysis:

First, the court must decide whether the agreement provides a fair and reasonable provisions for the party not seeking enforcement of the agreement. If the court makes this finding, then the analysis ends and the agreement may be validated....

The second prong of this analysis involves two tests...

(1) whether full disclosure has been made by [the parties] of the amount, character and value of the property, and (2) whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights.³⁶

Here, the Court of Appeals declined to enforce a marriage agreement that was entered into pursuant to the second prong of the *Matson/Foran* test. Either the wife entered the agreement fully and voluntarily on independent advise with full knowledge of her rights as she testified under oath in the notarized agreement, and her attorney certified, or she lied under oath and deceived her husband into entering the agreement under false pretenses. In either event, it should not be the

³⁶ *In re Marriage of Foran*, 67 Wn. App. at 249.

husband who is punished by the Court's refusal to enforce the agreement.

Like the Trial Court, the Court of Appeals applied "new law" by either: (1) disregarding the *Matson/Foran* procedural corrections employed by the parties in the 14 months they negotiated the Amendment, or by (2) disregarding the wife's breach of duty of good faith toward her husband.

D. Review By This Court Is Warranted Because This Case Involves Issues Of Substantial Public Interest And Public Policy.

The public policy of this state favors marriage agreements that are freely and intelligently made because they are conducive to marital tranquility in the future and are, therefore, regarded with favor.³⁷ The public policy of this state should not enable parties who enter into marriage agreements through the door of deceit. State statutes reinforce the public policy that supports marriage agreements.³⁸ In addition, scores of court cases govern prenuptial and other marriage contracts. Even uniform laws have been proposed to govern the formation and

³⁷ See, e.g., *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972); *In re Marriage of Foran*, 67 Wn. App. at n.14, 255.

³⁸ See, e.g., RCW 26.16.050 authorizing married couples to convey a community interest in real estate to the separate property of the other; RCW 26.16.120 authorizing community property agreements; RCW 26.09.070 authorizing separate agreements between married spouses.

enforceability of premarital agreements.³⁹

When determining whether a case presents issues of continuing and substantial public interest this Court reviews:

(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. A fourth factor may also play a role: the level of genuine adverseness and the quality of advocacy of the issues. Lastly, the court may consider the likelihood that the issue will escape review because the facts of the controversy are short-lived.

In re Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124 (2004).

The issues in this case meet all of the above criteria. There are at least 68 Washington appellate cases, both published and unpublished, that discuss “pre-nuptial agreements” in one way or the other. At least 28 of these cases have been decided since January, 2000. This demonstrates there is a significant and genuine public interest in creating valid marriage agreements.⁴⁰

Because of the frequently complicated nature of the marriage agreement negotiation process, meaningful judicial guidance is required to assist the public in creating valid marriage agreements. Legal certainty about how parties can properly enter marriage agreements which are fair to all parties is an important and desirable public goal. It does society no

³⁹ Unif. Premarital Agreement Act, (1983). While gaining the approval of the American Bar Association, the Washington legislature failed to enact the Uniform Law in 1987.

⁴⁰ See also, footnotes 38 and 39, *supra*.

good to perpetuate uncertainty about what is required to achieve an enforceable marriage agreement. Without clear judicial guidance as to what factors are to be considered regarding, for example, the competence of counsel and the voluntariness of an agreement, the effect of a spouse's notarized acknowledgement, the effect of counsel's certification, etc., confusion regarding the legal standards will remain, especially now—in view of the holdings in the published opinion in *In re Marriage of Bernard*.

Is, as in this case, a husband to be punished when he negotiates a marriage agreement in good faith with his wife's attorney? Should the husband be penalized for the unknown incompetence of a licensed member of the Bar who is representing his wife in critical contract negotiations? Is a spouse's notarized acknowledgement meaningless? Should attorneys be permitted to sign certifications which they know will be relied upon by an adverse party when the attorney knows the terms of the certification are false? Can a spouse not rely on such acknowledgements and certifications? Should a spouse and her attorney be allowed to harbor secret reservations about the substance and negotiation procedure incident to a marriage contract because they may later be needed by the spouse if she wants to get "out" of her contract?

This Court of Appeals' decision, if allowed to stand, will have a

chilling effect on the formation of marriage agreements.

Guidance from this Court is needed to answer these questions and deal with the aberrational consequences of the lower courts' decisions in this case.

VI. CONCLUSION

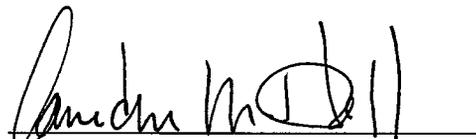
For the reasons set forth above, review of this case by this Court is warranted. The Court of Appeals' decision conflicts with existing law. The Court of Appeals' decision involves issues of substantial public interest, which if left unaddressed will have a chilling effect on the creation of marriage agreements. The Court of Appeals' decision should be reversed.

We respectfully request this Court grant our Petition to review the Court of Appeals decision.

DATED: June 14, 2007.

Respectfully submitted,

Camden Hall, PLLC

A handwritten signature in black ink, appearing to read "Camden M. Hall", written over a horizontal line.

Camden M. Hall, WSBA No. 146
Attorney for Appellant, J. Thomas Bernard

DECLARATION OF SERVICE

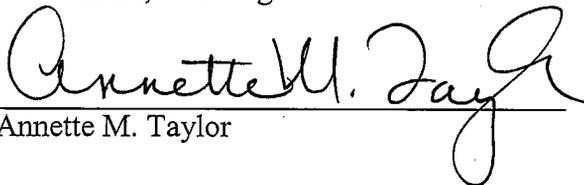
I declare under penalty of perjury under the laws of the state of Washington, that by the end of the day on June 14, 2007, I will have served, or had served, this Petition for Review to the Washington State Supreme Court and Declaration of Service upon the following individuals in the manner indicated below:

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DATED: June 14, 2007 at Seattle, Washington.


Annette M. Taylor

FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2007 JUN 14 PM 3:46

APPENDIX I

Westlaw.

155 P.3d 171

Page 1

137 Wash.App. 827, 155 P.3d 171
 (Cite as: 137 Wash.App. 827, 155 P.3d 171)

H

In re Marriage of Bernard
 Wash.App. Div. 1,2007.

In re the MARRIAGE OF Gloria BERNARD,
 Respondent,
 and J. Thomas Bernard, Appellant.
 No. 57296-2-I.

April 9, 2007.
 Reconsideration Denied May 15, 2007.

Background: Wife filed action against husband for divorce. The Superior Court, King County, Helen L. Halpert, J., declared prenuptial agreement unenforceable and failed to rule on husband's motion to compel arbitration, for arbitration. Husband appealed.

Holdings: The Court of Appeals, Baker, J., held that:

- (1) prenuptial agreement as amended by side letter was substantively unfair and unreasonable, and
- (2) prenuptial agreement was procedurally unfair.

Affirmed.

West Headnotes

[1] Alternative Dispute Resolution 25T ↪213(5)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and Contest

25Tk204 Remedies and Proceedings for Enforcement in General

25Tk213 Review

25Tk213(5) k. Scope and Standards of Review. Most Cited Cases

Standard of review of trial court's refusal to order arbitration, upon husband's motion under prenuptial

agreement to compel arbitration in divorce proceedings, was de novo; refusal to order arbitration was essentially a denial of the motion to compel arbitration.

[2] Divorce 134 ↪286(1)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k286 Review

134k286(1) k. Scope and Extent in General. Most Cited Cases

Divorce 134 ↪286(6.1)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k286 Review

134k286(6) Questions of Fact, Verdicts and Findings

134k286(6.1) k. In General. Most Cited Cases

Husband and Wife 205 ↪29(9)

205 Husband and Wife

205II Marriage Settlements

205k28 Requisites and Validity

205k29 Antenuptial Settlements

205k29(9) k. Validity of Settlement in General. Most Cited Cases

Evaluation of the substantive and procedural fairness of a prenuptial agreement involves mixed questions of legal policy and fact; it is treated as a question of law, to be viewed in light of the undisputed findings and the findings supported by substantial evidence.

[3] Alternative Dispute Resolution 25T ↪199

155 P.3d 171

Page 2

137 Wash.App. 827, 155 P.3d 171
(Cite as: 137 Wash.App. 827, 155 P.3d 171)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement,
and Contest
25Tk197 Matters to Be Determined by
Court

25Tk199 k. Existence and Validity of
Agreement. Most Cited Cases
Proper course for trial court in divorce proceedings
involving prenuptial agreement was to determine
whether arbitration clause in prenuptial agreement
was substantively or procedurally unconscionable;
Court then could deny arbitration and proceed with
other issues only if it concluded that arbitration
clause was improperly transacted.

[4] Alternative Dispute Resolution 25T ⇨213(5)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement,
and Contest
25Tk204 Remedies and Proceedings for
Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and Standards
of Review. Most Cited Cases

Husband and Wife 205 ⇨29(9)

205 Husband and Wife
205II Marriage Settlements
205k28 Requisites and Validity
205k29 Antenuptial Settlements
205k29(9) k. Validity of Settlement in
General. Most Cited Cases
Prenuptial agreements would be evaluated under a
two-pronged test, on review of denial of motion to
compel arbitration in divorce proceedings: first,
Court of Appeals has to decide whether agreement
made fair and reasonable provision for the party not
seeking enforcement; if yes, then the analysis ends
and the agreements are validated, but if not, the
second prong of the analysis involves two tests: (1)
whether full disclosure has been made of the
amount, character, and value of the property
involved, and (2) whether the agreements were
entered into fully and voluntarily on independent
advice and with full knowledge by both spouses of

their rights.

[5] Husband and Wife 205 ⇨29(9)

205 Husband and Wife
205II Marriage Settlements
205k28 Requisites and Validity
205k29 Antenuptial Settlements
205k29(9) k. Validity of Settlement in
General. Most Cited Cases
Prenuptial agreement as amended by side letter was
substantively unfair and unreasonable, where
agreement severely restricted creation of
community property, especially if death or
dissolution occurred within 10 years of marriage,
community property rights were completely
eliminated in short term, yet husband could enrich
his own separate property at expense of community,
there was no allowance for reimbursement of wife's
contribution or personal services to husband's
separate property, and there was no allowance for
maintenance, regardless of length of marriage.

[6] Husband and Wife 205 ⇨29(9)

205 Husband and Wife
205II Marriage Settlements
205k28 Requisites and Validity
205k29 Antenuptial Settlements
205k29(9) k. Validity of Settlement in
General. Most Cited Cases
Attorney hired by wife at time of drafting of
prenuptial agreements was not independent counsel,
so as to support a finding of procedural unfairness
in the drafting of the agreements, in divorce
proceedings brought by wife, although attorney was
not hired by husband; attorney's role was limited to
commenting on unfair provision and advising wife
whether or not to sign document as written, and
wife and attorney did not believe that entire
prenuptial agreement was open for negotiation
during amendment discussions.

[7] Husband and Wife 205 ⇨29(9)

205 Husband and Wife
205II Marriage Settlements
205k28 Requisites and Validity
205k29 Antenuptial Settlements

155 P.3d 171

Page 3

137 Wash.App. 827, 155 P.3d 171
(Cite as: 137 Wash.App. 827, 155 P.3d 171)

205k29(9) k. Validity of Settlement in General. Most Cited Cases

Wife never had full knowledge of her rights during discussions on prenuptial agreements, in support of a finding of procedural unfairness in the drafting of the agreements, in divorce proceedings brought by wife; wife's attorney did not explain community property or how agreement altered her rights under the law, his assessment that agreements were substantively fair in short term was flawed, and he told her that after time passed, agreement would become irrelevant and would be ignored by a court.

[8] Husband and Wife 205 ⇨29(9)

205 Husband and Wife

205II Marriage Settlements

205k28 Requisites and Validity

205k29 Antenuptial Settlements

205k29(9) k. Validity of Settlement in General. Most Cited Cases

Relative bargaining positions of husband and wife were grossly imbalanced, for purposes of negotiations regarding prenuptial agreements, in support of a finding of procedural unfairness in the drafting of the agreements, in divorce proceedings brought by wife; if wife refused to sign amendment to original agreement, she stood to lose her husband, her job of seven years, and her home, she had not arranged for financial aid for her children's education because husband had promised to assist them, and she had deposited half her annual salary into a community property account, half of which husband would retain if she left.

[9] Appeal and Error 30 ⇨842(2)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(2) k. Findings of Fact and Conclusions of Law. Most Cited Cases

A conclusion of law erroneously labeled as a finding of fact is nevertheless reviewed as a conclusion of law.

[10] Alternative Dispute Resolution 25T ⇨373

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk366 Appeal or Other Proceedings for Review

25Tk373 k. Record and Briefs. Most Cited Cases

Divorce 134 ⇨278.1

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k278.1 k. In General. Most Cited Cases

On appeal from trial court's order declaring prenuptial agreement unenforceable and denying husband's motion to compel arbitration in divorce proceedings, former husband failed to provide sufficient appellate argument to support his assignment of error to trial court's award of fees to wife, in advance, to cover cost of responding to appeal, and thus Court of Appeals would decline to review the issues, where husband did not brief the issue or cite any authority.

Camden Michael Hall, Camden Hall, PLLC, Seattle, WA, for Appellant.

Cynthia B. Whitaker, Melissa Mager, Law Offices of Cynthia B. Whitaker, Jerry Richard Kimball, Catherine Wright Smith, Edwards Sieh Smith & Goodfriend PS, Seattle, WA, for Respondent.

BAKER, J.

*829 ¶ 1 This is an appeal from the first half of a bifurcated dissolution trial. Husband Tom Bernard appeals the trial court's verdict that the prenuptial agreement and subsequent amendment are unenforceable.

I.

¶ 2 Tom Bernard hired Gloria Whitehead in 1994. Gloria worked for Tom's real estate development and management firm. In April 1999, they were

155 P.3d 171

Page 4

137 Wash.App. 827, 155 P.3d 171
 (Cite as: 137 Wash.App. 827, 155 P.3d 171)

engaged to be married. Both *830 had been married before, and both had adult children. The parties had an imbalance of assets: Tom's net worth at the time was approximately \$25 million, Gloria's was \$38,000.

¶ 3 When he proposed, Tom mentioned a prenuptial agreement. Gloria consented to sign an agreement, but Tom did not contact his attorney of 25 years right away because, "we weren't about to get married, you didn't need to negotiate a prenup unless the wedding is coming up." FN1 No action was taken to **173 draft an agreement until May 24, 2000, less than six weeks before the July 8 wedding date. His attorney, Richard Keefe, faxed Tom a checklist of items to be included in a prenuptial agreement. Tom lost the list and Keefe had to resend it on June 8. Tom asked Gloria to prepare his lengthy financial statement, so he could attach it to the agreement. She did so, and also completed her own financial statement. During this same period, Tom was urging Gloria to retain her own attorney. Gloria made efforts to do so, but could not find an attorney she was comfortable hiring. She also believed that she needed to have a draft agreement first.

FN1. Report of Proceedings (RP) (Sept. 8, 2005) at 29.

¶ 4 On June 20, 18 days before the wedding, Gloria received the first draft of the agreement, containing a number of blanks. With draft agreement in hand, Gloria stepped up her search for an attorney. During the same period, however, she was also preparing Tom's financial statement, moving out of her home and into Tom's, preparing for her daughter's graduation and trip to Mexico, finalizing the wedding plans, and working at Bernard Development Company. After many inquiries, Gloria was referred to attorney Marshall Gehring by a co-worker.

¶ 5 Gehring first received a draft copy of the agreement from Keefe on July 5, three days before the wedding. Keefe's cover letter to Gehring cautioned that Tom had not yet seen that version of the agreement. Gehring reviewed the document,

and on the day before the wedding he wrote a letter to Gloria and advised her not to sign it. He cited five *831 major concerns with the agreement; these were not the only problems he noted, but time was short. He also acknowledged that refusing to sign was probably not practical. Gehring did not tell Gloria that they could have waited until later to negotiate a more equitable agreement. Keefe and Tom quickly drafted a "side letter" in which both parties agreed to amend the prenuptial agreement with respect to the five issues raised in Gehring's advice letter.

¶ 6 Gloria signed both the prenuptial agreement and the side letter within 24 hours of the wedding. The side letter incorporated Gehring's suggestions, but Gloria signed it without first consulting Gehring. She said she signed the agreement because she felt she had no alternative. To refuse would mean canceling the wedding, she said, because the agreement was a test of her love and loyalty. She did not feel that the agreement was fair. Tom conceded that the first agreement needed to be amended.

¶ 7 In August 2001 an amendment was executed, based on the terms contained in the side letter. Although both parties were involved in the drafting process, Gloria believed that no terms of the agreement were open for discussion other than those mentioned in Gehring's letter. The amendment was a separate document, not a redraft of the original agreement. The side letter stated that if the parties failed to reach agreement on the amendment, the original agreement remained in full force and effect. Gloria signed the amendment because Gehring told her that having signed the prenuptial she was stuck with it, but at least the amendment was a "little bit better." FN2 The prenuptial agreement as amended still severely restricted Gloria's community property rights.

FN2. RP (Sept. 7, 2005) at 60.

¶ 8 Gloria filed for divorce in early 2005. Tom demanded arbitration based on the original agreement's arbitration clause. Gloria moved for summary judgment to have the entire prenuptial

137 Wash.App. 827, 155 P.3d 171
(Cite as: 137 Wash.App. 827, 155 P.3d 171)

agreement, including the arbitration clause, declared unenforceable. The trial court declared the *832 agreement substantively unfair as a matter of law and denied Tom's motion to compel arbitration. The first part of a bifurcated trial examined the procedural fairness of the agreement as amended. The judge decided that the adoption of the amendment was procedurally fair. However, because the side letter did not allow for renegotiation of the entire agreement, the amendment did not cure the procedural defects in the original agreement, so the agreements taken together were procedurally unfair. Nothing more was said specifically about Tom's request for arbitration. But it appears that all concerned assumed that if the agreement as a whole was unenforceable, then the arbitration clause was also ineffective. Tom appealed the verdict.

****174 II.**

[1][2] ¶ 9 The trial court's refusal to order arbitration is essentially denial of a motion to compel arbitration, which is reviewed de novo.^{FN3} Evaluation of the substantive and procedural fairness of a prenuptial agreement involves mixed questions of legal policy and fact. It is treated as a question of law, to be viewed in light of the undisputed findings and the findings supported by substantial evidence.^{FN4}

FN3. *Kruger Clinic v. Regence Blueshield*, 157 Wash.2d 290, 298, 138 P.3d 936 (2006). Denial of Tom's motion to stay pending arbitration was essentially denial of a motion to compel. The trial court somewhat erroneously characterized Tom's motion as a motion for summary judgment.

Either way, the standard of review is de novo.

FN4. *In re Marriage of Foran*, 67 Wash.App. 242, 251, 834 P.2d 1081 (1992).

III.

[3] ¶ 10 Instead of trying the validity of the agreement as a whole, the trial court should have first determined whether the arbitration clause, viewed independently, was substantively or procedurally unconscionable. This rule comes from *Pinkis v. Network Cinema Corp.*^{FN5} *Pinkis* held *833 that an arbitration clause contained within a larger agreement must be evaluated independently before the court deals with substantive issues concerning the contract.^{FN6} Judicial review of the matter is limited to whether the arbitration clause, viewed separately, is subject to traditional contract defenses such as fraud or unconscionability.^{FN7} The court may deny arbitration and proceed with other issues only if it concludes that the arbitration clause was improperly transacted.^{FN8}

FN5. 9 Wash.App. 337, 345, 512 P.2d 751 (1973).

FN6. *Pinkis*, 9 Wash.App. at 345, 512 P.2d 751. Although the arbitration agreement in *Pinkis* fell under the federal arbitration laws, the same rule applies when Washington's arbitration laws are at issue. See, *Keen v. IFG Leasing Co.*, 28 Wash.App. 167, 622 P.2d 861 (1980).

FN7. *Pinkis*, 9 Wash.App. at 345, 512 P.2d 751.

FN8. *Pinkis*, 9 Wash.App. at 345-46, 512 P.2d 751.

¶ 11 However, this case requires more than a rote application of the *Pinkis* rule. No court has yet determined the effect of *Pinkis* in the context of a prenuptial agreement. We apply a different standard of enforceability to prenuptial agreements, the *Foran*^{FN9} test. If the issue were properly before us, we would need to determine whether the *Foran* test, as opposed to traditional contract defenses, applies to an arbitration clause when that clause is seated within a prenuptial agreement.

FN9. *In re Marriage of Foran*, 67

155 P.3d 171

Page 6

137 Wash.App. 827, 155 P.3d 171
 (Cite as: 137 Wash.App. 827, 155 P.3d 171)

Wash.App. 242, 834 P.2d 1081 (1992).

¶ 12 But because the parties do not raise this issue, it is inappropriate for us to decide it.^{FN10} Although RAP 2.5(a) allows us to affirm on any sufficiently developed ground, the *Pinkis* issue was not even discussed, much less developed, in the trial court or on appeal. Even though the trial court erred, the issue is now the law of the case, and the trial court can refuse to consider it on remand.^{FN11}

FN10. RAP 2.5(a).

FN11. RAP 2.5(c)(1); *State v. Barberio*, 121 Wash.2d 48, 49-51, 846 P.2d 519 (1993).

[4] ¶ 13 We therefore turn to the briefed issue, whether the entire agreement as amended was substantively and procedurally fair. The agreements must be evaluated under *834 a two-pronged test, cited in *Foran*.^{FN12} first, we must decide whether they MAKE FAIR AND REASONABLE provision for the party not seeking enforcement. If we answer this question "yes," then the analysis ends and the agreements are validated. If not, the second prong of the analysis involves two tests: (1) whether full disclosure has been made of the amount, character, and value of the property involved, and (2) whether the agreements were entered into fully and voluntarily on independent advice and with full knowledge by both spouses of their rights.^{FN13}

FN12. *Foran*, 67 Wash.App. at 249, 834 P.2d 1081.

FN13. *Foran*, 67 Wash.App. at 249, 834 P.2d 1081.

¶ 14 Tom does not seriously dispute that the July 7, 2000 prenuptial agreement, standing alone, was both substantively and procedurally**175 defective.^{FN14} Instead, he argues that the amendment cured any procedural and substantive defects in the prenuptial.

FN14. Tom accuses Gloria of dragging her feet in obtaining an attorney. But Tom, who requested the prenuptial in the first place, also dragged his feet by waiting until May to draft an agreement. He makes no argument and cites no support for the proposition that Gloria's action or inaction excuses any other procedural unfairness.

Substantive Fairness

[5] ¶ 15 The trial court correctly determined that the agreement as amended is not substantively fair and reasonable. It fails the first prong of the *Foran* test.^{FN15} Even considering the amendment, the agreement still severely restricts the creation of community property, especially if death or dissolution occurs within ten years of marriage. Community property rights are completely eliminated in the short term, yet Tom can enrich his own separate property at the expense of the community. For example, Gloria's labor benefits Tom's separate property, but she cannot share in the increase in value to his business. Despite disallowing community property, the amended agreement also makes no provision for Gloria from Tom's *835 separate property regardless of how long the marriage lasts. There is no allowance for reimbursement of Gloria's contributions or personal services to Tom's separate property. There is no allowance for maintenance, again regardless of the length of the marriage. Even if the parties had stayed married for twenty years, Gloria could not be awarded their home after Tom's death. This kind of imbalance is what doomed a similar agreement in *Foran*.^{FN16}

FN15. In fact, it closely mirrors the unfair agreement at issue in *Foran*. *Foran*, 67 Wash.App. at 250, 834 P.2d 1081.

FN16. *Foran*, 67 Wash.App. at 250-51, 834 P.2d 1081.

Procedural Fairness

¶ 16 The trial court erred when it concluded that

155 P.3d 171

Page 7

137 Wash.App. 827, 155 P.3d 171
 (Cite as: 137 Wash.App. 827, 155 P.3d 171)

adoption of the amendment was procedurally fair. Both the original agreement and the amendment failed the second prong of *Foran*. Neither document was drafted with the benefit of independent counsel, the bargaining positions of the parties were grossly imbalanced, and at no time did Gloria have full knowledge of her legal rights.^{FN17}

FN17. *In re Marriage of Matson*, 107 Wash.2d 479, 484, 730 P.2d 668 (1986).

Independent Counsel

[6] ¶ 17 Although Gehring was “independent” in the sense that he was not hired by Tom, he did not fulfill the primary duty of independent counsel, “assisting the subservient party to negotiate an economically fair contract.”^{FN18} Upon receiving the draft agreement, Gehring's role was limited to commenting on unfair provisions and advising Gloria whether or not to sign the document as written. Although they did have the benefit of time during the amendment discussions, Gehring and Gloria did not believe that the entire prenuptial agreement was on the table. Gehring told Gloria that she had no option to reopen negotiations about the rest of the agreement.^{FN19} He said that after she signed the original agreement, however flawed, it *836 was not open for negotiation during discussions about the amendment.

FN18. *Foran*, 67 Wash.App. at 254, 834 P.2d 1081.

FN19. Tom claims that Gehring's file contains proposed edits to the agreement that belie his sworn testimony. But the test here is whether substantial evidence supports Gloria's position. *Foran*, 67 Wash.App. at 251, 834 P.2d 1081.

Full Knowledge of Rights

[7] ¶ 18 Gloria also never had full knowledge of her rights, because Gehring did not advise her accurately. He did not explain community property, or how the agreement altered Gloria's

rights under the law. Gehring's assessment that the prenuptial agreement was substantively fair in the short term was flawed. Gehring said that any appeal from binding arbitration would be a trial de novo, apparently in the erroneous belief that the mandatory arbitration rules would apply to a private agreement to arbitrate. He also told Gloria that even if she agreed to arbitrate,**176 she could avoid binding arbitration by applying to a court for relief.

¶ 19 Gehring told Gloria that after enough time had passed, the agreement would become irrelevant and could be ignored by a court. He testified that despite concerns with minor difficulties, Gloria was happy with the amendment. Gloria's trial counsel suggested that it is “hard to be knowingly happy with something that you don't understand.”^{FN20} Gehring replied, “Sometimes ignorance is bliss.”^{FN21} Because Gloria never had full knowledge of her rights, both the agreement and the amendment were procedurally unfair.

FN20. Clerk's Papers at 687.

FN21. Clerk's Papers at 688.

Relative Bargaining Positions

[8] ¶ 20 The parties' bargaining positions were grossly imbalanced. Gloria believed that she had no bargaining power regarding the amendment. If Gloria refused to sign the amendment, she stood to lose her husband, her job of seven years, and her home. She had not arranged for financial aid for her children's education because Tom had promised to assist them. Gloria had deposited half her annual salary into a community property account, half of *837 which Tom would retain if she left. Finally, the side letter made clear that if Gloria did not sign the amendment, then the original agreement would remain in force. Compared to Tom, Gloria's bargaining position was weak.

¶ 21 In addition, the amendment was nothing more than a codification of the provisions of the side letter, which Gloria signed the day of the wedding. It was not a renegotiation of the entire agreement.

155 P.3d 171

Page 8

137 Wash.App. 827, 155 P.3d 171
(Cite as: 137 Wash.App. 827, 155 P.3d 171)

Gehring and Gloria both testified that the amendment could only address those items listed in the side letter. In fact, the final amendment adopted the side letter almost entirely. Any procedural analysis of the amendment must take the circumstances of the side letter into account. Procedurally, the side letter was adopted in the same manner as the original agreement: finalized and signed within 24 hours of the wedding.

¶ 22 The trial court erred in concluding that the amendment passed the second prong of the *Foran* test. The judge relied too much on the fact that Gloria was represented, however inadequately, by counsel, and the fact that the amendment was not rushed. The other important criteria discussed above—the duty of independent counsel, bargaining positions of the parties, and full knowledge of legal rights—are missing from the analysis.

[9] ¶ 23 The agreement and amendment were procedurally unfair under *Foran*. Also, the amendment was based almost completely on the side letter, which was as rushed and procedurally flawed as the prenuptial agreement itself. The trial court erred when it concluded that the amendment was procedurally sound.^{FN22}

FN22. A conclusion of law erroneously labeled as a finding of fact is nevertheless reviewed as a conclusion of law. *City of Tacoma v. William Rogers Co.*, 148 Wash.2d 169, 192, 60 P.3d 79 (2002).

¶ 24 Tom contends that the trial court erred in refusing to uphold the amendment based on its conclusion that the amendment was procedurally fair. But a trial court's decision may be sustained on any theory within the *838 pleadings and the evidence.^{FN23} Because the amendment was procedurally flawed, the decision not to enforce the agreement as amended was proper.

FN23. *Foran*, 67 Wash.App. at 248, 834 P.2d 1081.

Attorney Fees

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[10] ¶ 25 The trial court, under *Stringfellow v. Stringfellow*,^{FN24} awarded fees in advance to Gloria, to cover the cost of responding to this appeal. Tom assigned error to this decision, and has not paid the fees to Gloria. But he has not briefed the issue, nor cited any authority to this court, so his challenge**177 to the fees will not be reviewed.^{FN25} The trial court's order regarding fees is affirmed.

FN24. 53 Wash.2d 359, 361, 333 P.2d 936 (1959) (trial court has authority to award “suit money on the appeal”), subsequent proceedings at 56 Wash.2d 957, 350 P.2d 1003 (1960).

FN25. *State v. Dennison*, 115 Wash.2d 609, 629, 801 P.2d 193 (1990).

¶ 26 AFFIRMED.

WE CONCUR: ELLINGTON and AGID, JJ.
Wash.App. Div. 1, 2007.
In re Marriage of Bernard
137 Wash.App. 827, 155 P.3d 171

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APPENDIX II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

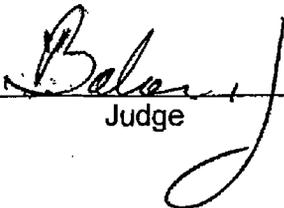
In re the Marriage of:)
)
GLORIA BERNARD,)
)
Respondent,)
)
and)
)
J. THOMAS BERNARD,)
)
Appellant.)
_____)

DIVISION ONE
No. 57296-2-1
**ORDER DENYING MOTION
FOR RECONSIDERATION**

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 15th day of May, 2007

FOR THE COURT:



Judge

FILED
COURT OF APPEALS FOR THE
STATE OF WASHINGTON
2007 MAY 15 PM 3:19