

No. 63304-0

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

In re the Marriage of:

DALLENE N. BRACKEN,

Respondent,

And

JOHN L. BRACKEN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE SUZANNE BARNETT

---

BRIEF OF RESPONDENT

---

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 DEC 31 PM 3:42

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

WECHSLER BECKER, LLP

By: Catherine W. Smith  
WSBA No. 9542  
Valerie A. Villacin  
WSBA No. 34515

By: Mary H. Wechsler  
WSBA No. 9447

1109 First Avenue, Suite 500  
Seattle, WA 98101  
(206) 624-0974

701 Fifth Avenue, Suite 4550  
Seattle, WA 98104  
(206) 624-4900

Attorneys for Respondent

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	RESTATEMENT OF ISSUES.....	2
III.	RESTATEMENT OF FACTS .....	3
	A. The Parties Were Married Twenty Years And Have Three Children. ....	3
	B. The Husband Is The Grandson Of The Inventor Of Blistex And Receives Substantial Royalty Income. ....	3
	C. The Parties Executed A Prenuptial Agreement Two Days Before Their Wedding. The Husband Failed To Disclose The Extent Of His Separate Property To The Wife And She Felt Pressured To Sign The Agreement. ....	6
	D. In The Event Of Divorce, The Prenuptial Agreement Prohibited An Award Of Any Of The Husband's Separate Property To The Wife; Required That Community Property Be Divided Equally; And Prohibited Any Contribution To The Wife's Attorney Fees.....	9
	E. The Family's Lifestyle Was Funded By The Husband's Royalty Income. At The End Of The Parties' 20-Year Marriage, Community Property Comprised Only 17% Of The Entire Marital Estate. ....	11

F.	The Trial Court Awarded The Wife Nearly All Of The Community Assets, Made The Husband Responsible For Nearly All Of The Community Debt, But Otherwise Awarded The Husband All Of His Separate Property, Leaving Him With 66% Of The Marital Estate.....	15
G.	In Light Of The Disparity In The Parties' Economic Circumstances After A 20-Year Marriage, The Trial Court Awarded The Wife Spousal Maintenance.....	18
H.	Given The Husband's Much Larger Separate Estate And The Children's Substantial Trust Funds, The Trial Court Ordered The Husband To Pay Any Uncovered Education Expenses.....	19
IV.	ARGUMENT.....	20
A.	Summary Of Argument.....	20
B.	The Trial Court's Award Of 34% Of The Marital Estate To The Wife, Including Nearly All The Community Property, After A 20-Year Marriage Was Not An Abuse Of Discretion.....	21
1.	The Trial Court Properly Considered The Nature And Extent Of Both The Community Property And Separate Property.....	22
2.	The Trial Court's Valuation Of The Husband's Separate Property Was Supported By Substantial Evidence.....	24

3.	The Trial Court Has Discretion To Award One Party's Separate Property To The Other In Order To Make A Just And Equitable Division. ....	25
4.	The Trial Court Properly Considered The Parties' Economic Circumstances At The Time The Property Division Becomes Effective. ....	27
5.	The Trial Court Properly Considered The Duration Of The Marriage. ....	29
C.	The Trial Court's Award Of Spousal Maintenance Was Well Within Its Discretion, As It Properly Considered The Factors Of RCW 26.09.090. ....	31
1.	The Trial Court's Spousal Maintenance Was Within The Trial Court's Discretion In Light Of The Disparate Property Division In Favor Of The Husband And His Significantly Greater Income. ....	32
2.	The Trial Court's Spousal Maintenance Award Leaves The Husband With More Than Twice The Income Of The Wife Even After His Obligations To The Wife Are Paid. ....	33

3.	There Is No Formula For Spousal Maintenance. The Trial Court Here Made A Proper Spousal Maintenance Award Based On These Parties, Their Property, And Their Specific Circumstances. ....	36
4.	That The Husband Will Use Separate Income To Meet His Maintenance Obligation Is Simply A Matter Of Fact, And Not Evidence That The Trial Court Abused Its Discretion. ....	37
D.	The Trial Court Properly Held That The Prenuptial Agreement That Was Signed By The Wife Two Days Before The Parties' Wedding Was Both Substantively And Procedurally Unfair. ....	39
1.	The Prenuptial Agreement Was Substantively Unfair. ....	40
2.	The Marital Agreement Was Procedurally Unfair. ....	45
E.	The Trial Court Properly Entered A Confession of Judgment Against The Husband. ....	47
F.	This Court Should Award Attorney Fees To The Wife Based On Her Need And The Husband's Ability To Pay. ....	49
V.	CONCLUSION .....	50

## TABLE OF AUTHORITIES

### CASES

<b><i>Coggle v. Snow</i></b> , 56 Wn. App. 499, 784 P.2d 554 (1990) .....	23
<b><i>Friedlander v. Friedlander</i></b> , 80 Wn.2d 293, 494 P.2d 208 (1972) .....	45
<b><i>Hamlin v. Merlino</i></b> , 44 Wn.2d 851, 272 P.2d 125 (1954) .....	43
<b><i>Leslie v. Verhey</i></b> , 90 Wn. App. 796, 807, 954 P.2d 330 (1998), <i>rev. denied</i> , 137 Wn.2d 1003 (1999) .....	50
<b><i>Marriage of Bernard</i></b> , 165 Wn.2d 895, 204 P.3d 907 (2009) .....	40, 44
<b><i>Marriage of Bulicek</i></b> , 59 Wn. App. 630, 800 P.2d 394 (1990) .....	38
<b><i>Marriage of Burke</i></b> , 96 Wn. App. 474, 980 P.2d 265 (1999) .....	43
<b><i>Marriage of Burrill</i></b> , 113 Wn. App. 863, 868, 56 P.3d 993 (2002), <i>rev. denied</i> , 149 Wn.2d 1007 (2003) .....	47
<b><i>Marriage of Cohn</i></b> , 18 Wn. App. 502, 569 P.2d 79 (1977) .....	40
<b><i>Marriage of Crosetto</i></b> , 82 Wn. App. 545, 918 P.2d 954 (1996) .....	33
<b><i>Marriage of Dewberry/George</i></b> , 115 Wn. App. 351, 358, 62 P.3d 525, <i>rev. denied</i> , 150 Wn.2d 1006 (2003) .....	23
<b><i>Marriage of Estes</i></b> , 84 Wn. App. 586, 929 P.2d 500 (1997) .....	31, 33
<b><i>Marriage of Fiorito</i></b> , 112 Wn. App. 657, 50 P.3d 298 (2002) .....	23
<b><i>Marriage of Foran</i></b> , 67 Wn. App. 242, 834 P.2d 1081 (1992) .....	44, 45

<b>Marriage of Hadley</b> , 88 Wn.2d 649, 565 P.2d 790 (1977) .....	36
<b>Marriage of Irwin</b> , 64 Wn. App. 38, 48, 822 P.2d 797, rev. denied, 119 Wn.2d 1009 (1992) .....	26, 27
<b>Marriage of Konzen</b> , 103 Wn.2d 470, 693 P.2d 97 cert. denied, 473 U.S. 906 (1985) .....	22, 27
<b>Marriage of Luckey</b> , 73 Wn. App. 201, 868 P.2d 189 (1994).....	31, 36
<b>Marriage of Mathews</b> , 70 Wn. App. 116, 121, 853 P.2d 462, rev. denied, 122 Wn.2d 1021 (1993). .....	21, 22, 27
<b>Marriage of Matson</b> , 107 Wn.2d 479, 730 P.2d 668 (1986).....	39, 40, 44, 46
<b>Marriage of Morrow</b> , 53 Wn. App. 579, 770 P.2d 197 (1989).....	32, 37
<b>Marriage of Rich</b> , 80 Wn. App. 252 , 907 P.2d 1234, rev. denied, 129 Wn.2d 1030 (1996) .....	25, 46
<b>Marriage of Rideout</b> , 150 Wn.2d 337, 77 P.3d 1174 (2003).....	35
<b>Marriage of Rink</b> , 18 Wn. App. 549, 571 P.2d 210 (1977).....	33
<b>Marriage of Rockwell</b> , 141 Wn. App. 235, 243, 170 P.3d 572, 576 (2007), rev. denied, 163 Wn.2d 1055 (2008).....	30
<b>Marriage of Sheffer</b> , 60 Wn. App. 51, 802 P.2d 817 (1990).....	37
<b>Marriage of Soriano</b> , 31 Wn. App 432, 643 P.2d 450 (1982).....	24
<b>Marriage of Tower</b> , 55 Wn. App. 697, 689-99, 701, 780 P.2d 863 (1989), rev. denied, 114 Wn.2d 1002 (1990).....	37

<b><i>Marriage of Washburn</i></b> , 101 Wn.2d 168, 677 P.2d 152 (1984).....	32
<b><i>Marriage of White</i></b> , 105 Wn. App. 545, 20 P.3d 481 (2001).....	42
<b><i>Marriage of Young</i></b> , 26 Wn. App. 843, 615 P.2d 508 (1980).....	48
<b><i>Marriage of Zahm</i></b> , 91 Wn. App. 78, 955 P.2d 412, <i>aff'd</i> <i>by</i> , 138 Wn.2d 213 (1999).....	27
<b><i>Ramsdell v. Ramsdell</i></b> , 47 Wash. 444, 92 P.278 (1907).....	27
<b><i>Rehak v. Rehak</i></b> , 1 Wn. App. 963, 465 P.2d 687 (1970) .....	23

#### STATUTES

RCW 26.09.080.....	1, 21, 22, 26, 28, 29, 41, 42, 43
RCW 26.09.090.....	31, 32, 36
RCW 26.09.140.....	42, 49, 50

#### RULES AND REGULATIONS

RAP 18.1.....	50
---------------	----

## I. INTRODUCTION

The husband's appeal of a property division that leaves him with twice the assets and income of the wife after two decades of marriage is based entirely on his incorrect and unsupported claim that "Washington statutes and common law . . . go to considerable length to protect separate property." (App. Br. 29) Instead, RCW 26.09.080 gives trial courts the specific authority to distribute the separate property of one spouse to the other in order to insure a just and equitable distribution. Here, the trial court awarded the wife 34% of the marital estate, comprised almost entirely of the community property home where she lives with the parties' youngest child. Requiring the husband to use his significant passive income to pay off the mortgage on the family home was not a manifest abuse of discretion, especially when he was awarded all of his separate property, from which he enjoys income of over \$668,000 a year. The trial court's spousal maintenance award was also just under these circumstances, and served to equitably narrow the gap between the parties' economic circumstances. This court should affirm and award the wife attorney fees for having to respond to this appeal.

## II. RESTATEMENT OF ISSUES

1. After a 20-year marriage, during which the parties acquired limited community property and lived almost entirely off the husband's separate property income, the trial court awarded the husband 66% of the entire marital estate, including all his separate property. Did the trial court abuse its discretion in awarding the wife nearly all of the community assets and leaving the husband responsible for nearly all of the community debt, resulting in a net award to the wife of 34% of the marital estate?

2. As a result of the trial court's property distribution, the husband retained all of his separate estate, which provides him with annual income of \$668,000. The wife was awarded half the assets of the husband, none of which will provide her with any significant income. Did the trial court abuse its discretion by awarding the wife maintenance to lessen the disparity between the parties' economic circumstances?

3. Did the trial court err in honoring the "spirit" but declining to enforce as written the parties' prenuptial agreement because it required the wife to waive all of the statutory and common law protections otherwise afforded to her on dissolution and because

the husband had failed to disclose the nature and extent of his assets and expectancies before having the wife sign the agreement two days before their marriage?

4. Should this court award attorney fees to the wife based on her need and the husband's ability to pay?

### **III. RESTATEMENT OF FACTS**

#### **A. The Parties Were Married Twenty Years And Have Three Children.**

Respondent Dallene Bracken, now age 46, and appellant John Bracken, now age 50, met in 1985 and married on October 16, 1987 in Arizona. (RP 7-8, 497-98; CP 4) The parties have three sons, born in December 1988, March 1991, and January 1995. (RP 20, 25, 41) The parties separated on August 23, 2007 when Dallene filed a summons and petition for legal separation, later converted to a petition for dissolution on John's request. (CP 3, 11, 13, 14; RP 34) The marriage was dissolved on January 27, 2009, after a 6-day trial before King County Superior Court Judge Suzanne Barnett. (CP 539, 542)

#### **B. The Husband Is The Grandson Of The Inventor Of Blistex And Receives Substantial Royalty Income.**

John is the grandson of Louis D. Bracken, the inventor of Blistex. (RP 453-54) Blistex, Inc. pays royalties to Louis D.

Bracken's heirs based on a percentage of sales of the product; the Blistex licensing agreement originally entered into in 1947 continues today with only minor modifications. (RP 456-57) When John's father, Louis D. Bracken's only child, died in 1984, an estate plan was created to manage the royalties, and Blistex Bracken Limited Liability Company ("BLLC") was formed in 1985 to receive the royalties from Blistex, Inc. (RP 458-59, 461-62, Ex. 164)

Initially, a marital trust created for John's mother held an 81% interest in BLLC. (RP 466) The remaining 19% in BLLC was equally divided among John and his two sisters, each sibling received a 6.33% interest in BLLC. (RP 466) In 1998, through a combination gift/sale transaction, John's mother created a generation skipping trust (GST) for each sibling, each funded with a 20.33% interest in BLLC. (RP 466-67)

BLLC receives royalties from Blistex, Inc. once a month, and then distributes the income to the mother's marital trust, the siblings' trusts, and to the siblings individually based on their percentage interests. (RP 468-69) After BLLC pays royalties into the siblings' trusts, a payment of \$7,600 from each trust is paid to the mother's marital trust. (RP 468, 594, 613)

John's mother died on September 24, 2006. (RP 520) John and his sisters each inherited an equal interest in the mother's estate, including the 20% interest in BBLLC held in her marital trust. (RP 470) After their mother died, the siblings agreed to each create a new GST for the benefit of the siblings' children, funded by the siblings' interest in the mother's estate plus their individually held 6.33%. (RP 470-71, 594-96) The new GSTs would each hold a 13% interest in BBLLC, leaving each sibling with control over a one-third interest in BBLLC. (RP 470-72)

At trial, the Bracken sisters had already received their interests from the mother's marital trust because they had established their new GSTs. (See RP 474-75, 607) John had not yet established his GST, and had not yet received his interest from the mother's estate. (RP 607) At the time of trial in 2008, John held a 26.66% interest in BBLLC, 20.33% in his generation skipping trust and 6.33% individually (see CP 484), and could expect to receive an additional 6.67% from his mother's estate. (RP 470)

**C. The Parties Executed A Prenuptial Agreement Two Days Before Their Wedding. The Husband Failed To Disclose The Extent Of His Separate Property To The Wife And She Felt Pressured To Sign The Agreement.**

The parties became engaged in May 1987 while living in Arizona; Dallene was then age 23 and John age 27. (RP 8; CP 3) Dallene, a high school graduate, was working at a credit union earning between \$20,000 and \$30,000. (RP 9) John was earning between \$50,000 and \$60,000 in commercial real estate at Coldwell Banker. (RP 494) While the parties were dating, Dallene knew that John was an heir of the inventor of Blistex through “rumors,” but she did not have any specific information about his wealth. (RP 202-03, 206, 393, 398) As the trial court noted: “the husband was educated and financially sophisticated; wife was uneducated and naïve.” (CP 522)

John did not mention his desire for a prenuptial agreement when he proposed marriage to Dallene in May 1987. (RP 496) At the time of the parties’ engagement, John’s father’s probate was still open, and although the estate plan was in place, John had not yet received his interest in BBLLC. (RP 458-62, 500-01) John did, however, have other separate property inherited from his grandparents, including two trusts, a partnership, and equity in his

home, all of which totaled over \$1.8 million. (RP 501-03) While Dallene knew that John had an inheritance, she had “no clue” about the details. (RP 393, 398) There was no evidence that Dallene had any separate property of her own.

The parties scheduled their wedding for October 16, 1987. (RP 15-16) At the end of August 1987, John’s godfather, Paul Cressman, assigned an associate at Short, Cressman, & Burgess to draft a prenuptial agreement. (RP 582) According to John, in early September 1987, he told Dallene that he wanted “to keep [his family assets] separate” after they married. (RP 497) He suggested to Dallene that she use an Arizona attorney who in the past had provided DUI services to both Dallene and John to review the prenuptial agreement, which would be governed by Washington law. (RP 500, 503-04, Ex. 26) John hired and paid for Dallene’s attorney. (RP 504) Mr. Cressman could not recall when he provided the Arizona attorney with the first draft of the prenuptial agreement, but there was evidence that the Arizona attorney responded to a draft of the agreement on October 7, 1987 – nine days before the wedding. (RP 583)

A week later, on October 14, 1987, the parties signed the prenuptial agreement, two days before their wedding. (RP 16-17; Ex. 26) According to Dallene, the prenuptial agreement was “sprung” on her at the last minute, right before the wedding. (RP 9-10) Dallene was “very upset” by the prenuptial agreement, felt “distrusted,” and found the agreement “overwhelming” and “scary.” (RP 10-11) Dallene testified that she met with the Arizona attorney hired by John only twice: first to go over the agreement, and the second time to sign it. (RP 11) Dallene testified that she felt that she had no choice but to sign the agreement because wedding guests were already in town and John told her that he would not marry her if she did not sign the agreement. (RP 10, 17)

Although the agreement stated that there had been full disclosure of each party’s separate property, Dallene did not know the amount or extent of John’s separate property, nor did the agreement include a list of the parties’ assets. (RP 215, 588) Dallene denied being told anything about John’s separate assets before she signed the prenuptial agreement. (RP 215, 393, 398) John’s attorney testified that he was not involved in the disclosure of John’s assets, and that he “advised” John to disclose his assets

with Dallene. (RP 588) John testified that the parties never discussed the prenuptial agreement themselves, because all negotiations were exclusively through the attorneys. (RP 504-05)

The trial court found that Dallene “signed the [agreement] without full disclosure of the nature and extent of [John’s] family assets and expectancies.” (CP 493)

**D. In The Event Of Divorce, The Prenuptial Agreement Prohibited An Award Of Any Of The Husband’s Separate Property To The Wife; Required That Community Property Be Divided Equally; And Prohibited Any Contribution To The Wife’s Attorney Fees.**

Dallene had no separate property of her own. The agreement served only to protect John and his separate property interests, and required Dallene to waive significant statutory and common law protections in the event of divorce. The prenuptial agreement prevented Dallene from pursuing any interest in John’s separate estate (Ex. 26, ¶ 6(a)); required that any community property be divided “as equally as possible” (Ex. 26, ¶ 6(d)); and prohibited an award of attorney fees. (Ex. 26, ¶ 6(b))

Among the provisions touted as beneficial to Dallene, the prenuptial agreement provided that John’s separate property home, in which he had equity of \$40,000, would become a community

asset. However, the agreement also provided that in the event of sale, death, or divorce, John would be reimbursed for his original contribution (Ex. 26, ¶ 13) and that all future family residences would be treated the same. In other words, any family home purchased with John's separate property would be considered community property, but on sale, divorce, or death, John's separate property contribution would be reimbursed.

The prenuptial agreement also provided that in the event that John worked "more than 10% of [his] normal working day, yearly, on the management and control of a separate property asset, then the yearly appreciation above 10% of said separate property asset shall be credited to the community." (Ex. 26, ¶ 2) However, as the trial court noted, because John's separate property assets were largely "passive," and Dallene had no knowledge of the nature of John's separate property, Dallene "could not have known at the time she signed [the agreement] that [John] could support the family in luxury without working to earn any community property and without expending significant effort on separate property resources." (CP 492-93)

The trial court found that “given the overwhelming disparity in the treatment of the parties under the [agreement] and its effects, the court cannot and does not find that it provides fairly and reasonably for both parties.” (CP 493) The trial court expressed concern that “[John]’s situation and choices leave [John], at the end of this 20-year marriage, able to live securely in luxury. Under the [agreement], [Dallene], on the other hand, could end the marriage in much the same condition in which she entered it, *i.e.* with an interest in the (not insubstantial) equity in their home, but without career prospects to achieve or maintain anything close to the family’s former lifestyle.” (CP 492)

**E. The Family’s Lifestyle Was Funded By The Husband’s Royalty Income. At The End Of The Parties’ 20-Year Marriage, Community Property Comprised Only 17% Of The Entire Marital Estate.**

The parties moved to Seattle in March 1988; Dallene stopped working when the parties’ first child was born and did not work outside the home for most of the marriage. (RP 20, 478) The family lived in an “elaborate” 7,600-square foot home with a library, billiard room, swimming pool, garden room, and basketball court. (RP 38) The parties were members of several private clubs and

took several vacations a year. (RP 39) Their three children attended private school. (RP 38)

John worked in a variety of positions during the marriage: in real estate, as a sales representative for Wilson Sporting Goods, and as an organizer for a charity with his friend, professional golfer Fred Couples. These jobs provided the community with income ranging between \$40,000 and \$60,000 annually. (RP 478-82) After 2001, John had no outside employment, and instead became the “managing partner” for BBLLC, for which he was paid between \$40,000 and \$56,200 annually. (RP 482, 520) There was considerable evidence that there was very little to do in managing BBLLC, and that John made an effort not to work more than 10% of a normal work day – the limit that would have triggered the accumulation of community property under the 1987 prenuptial agreement. (RP 520-21, 599)

Despite the parties’ limited community income, the family lived lavishly off the income from BBLLC. By the time of trial, John’s gross annual income was \$668,004. (CP 506) In 2007, John received \$578,655.43 from his 26.66% interest in BBLLC. (RP 513, 519) From that amount, he paid \$101,706 as “debt

service” to his mother. (RP 515, 517-18) The trial court found that in light of his mother’s death and John’s interest in his mother’s estate, however, “[p]resumably, he will be able to make his own decisions regarding cancellation, satisfaction, forgiveness, or continued payment of that note upon distribution of his mother’s estate.” (CP 494)

Although at trial John complained bitterly that the parties lived beyond their means (RP 560-62), Dallene testified that John never conveyed this concern to her during the marriage. (RP 28) Dallene was never privy to any of the parties’ finances, so it was unclear to her how things were paid. (RP 26) John always assured her that “we had enough money,” “don’t worry,” and “everything is fine.” (RP 26, 27) When Dallene questioned John about their lack of savings and retirement accounts, John told her “we don’t need a savings account. I have that all taken care of.” (RP 27)

In 2005, Dallene started a decorating business, Bracken Design, which was successful for a period but ultimately lost its momentum after the parties’ separation, largely because many of Dallene’s clients had been John’s friends. (RP 290, 357, 386-87) Dallene was concerned that she would be unable to secure new

clientele due to her lack of formal training and experience in interior design (RP 390), and the trial court found that Dallene's lack of formal education and certification in design would limit her ability in the future to procure new clients who were not connected to the parties during their marriage. The court found "whether [Dallene] pursues further education in the design field, or otherwise, her earning potential is limited. Without the family connections and word of mouth referrals, [Dallene]'s business is unlikely to soar to the heights she has known. Though her business might not be as bad as it was for 2008, without her credentials, it is not likely ever to be as good as it was in 2006 and 2007." (CP 495) The trial court found that the wife's annual income was \$38,736. (CP 506)

By the time of trial, the parties' net community estate was \$1,186,000, almost entirely comprised of the net equity in a smaller home purchased after the parties separated and the net proceeds from the sale of the 7,600-square foot family "show" residence. (See CP 484-86) The trial court noted that John "contributed little in the way of earnings and did not acquire, build, or contribute any community savings to the marital estate." (CP 492) The trial court expressed concern that because the "husband's separate property

supported the family, [ ] there is comparatively little community property at issue – less than \$2 million in net value.” (CP 493)

John’s separate estate was significantly greater. By the time of trial, John’s separate estate was valued at \$5,716,400, not including the \$2 to \$4 million that he would inherit from his mother’s estate once her probate closed. (CP 484-86, 491)

**F. The Trial Court Awarded The Wife Nearly All Of The Community Assets, Made The Husband Responsible For Nearly All Of The Community Debt, But Otherwise Awarded The Husband All Of His Separate Property, Leaving Him With 66% Of The Marital Estate.**

The trial court found the 1987 prenuptial agreement to be both substantively and procedurally unfair. (CP 492-93) Nevertheless, the trial court stated its “intent to honor as nearly as possible the spirit of the [agreement] as it relates to the Bracken LLC royalty assets.” (CP 493) The court stated: “notwithstanding its invalidation of the prenuptial agreement, the court made every effort to maintain the integrity of the Bracken family interests and to leave those in the hands of husband. Preserving those assets for husband requires reasonable, fair, and equitable treatment of wife after almost 20 years of marriage.” (CP 522)

The trial court recognized that the husband's separate property, specifically his interest in BBLLC, "have maintained or increased in value over the last decade," and that it was expected to "increase in value indefinitely." (CP 493) Meanwhile, "the wife's prospects are starkly different. She cannot afford to own and maintain the home she is in. She cannot contribute to the children's educational expenses. Without a degree and apprenticeship, she cannot continue to work as a designer; at best, she might continue to work in the field as a salaried or commissioned designer. Her education and experience qualify her for clerical or, perhaps, middle management employment outside the field." (CP 493)

The trial court awarded to Dallene the most significant community asset – the home where she was residing with the parties' youngest son, with a value of \$2,000,000 and a mortgage obligation of \$950,000. (CP 494) The trial court awarded the residence "free and clear," and imposed the mortgage obligation on John. (CP 494) The court gave John the option "to pay the existing obligation in a lump-sum payoff or according to the existing amortization schedule." (CP 494)

The trial awarded other community assets to the wife totaling \$457,900, and ordered her to pay community obligations totaling \$115,000. The husband was awarded the remaining community assets totaling \$105,800, and ordered to pay community obligations totaling \$312,700. The husband was also awarded all of his separate property, valued at \$5,716,400. (See CP 484-86)

Excluding the \$2 to \$4 million inheritance that he would receive at the close of probate of his mother's estate, the trial court awarded the husband 66%, and the wife 34%, of the marital estate:

<b>Community Property:</b>	<b>Net Value</b>	<b>Dallene</b>	<b>John</b>
Yertle Residence	\$1,050,000	\$2,000,000	(\$ 950,000)
NW Mutual Insurance	\$ 30,600		\$ 30,600
Household Furnishings	\$ 114,000	\$ 74,000	\$ 40,000
Keswick Proceeds/ Pre-Distribution	\$ 307,500	\$ 307,500	
CP Accounts	\$ 111,600	\$ 69,000	\$ 35,200
Mercedes	(\$ 1,700)	(\$ 1,700)	
CP Debts	(\$ 426,000)	(\$ 113,300)	(\$ 312,700)
<b>Separate Property:</b>			
John Bracken GST	\$4,258,800		\$4,258,800
LLC Units - 6.33%	\$1,326,500		\$1,326,500
Husband's Accounts	\$ 131,100		\$ 131,100
Wife's Accounts	\$ 8,600	\$ 8,600	
<b>Total</b>	<b>\$6,903,600</b>	<b>\$2,344,100</b>	<b>\$4,559,500</b>

(CP 484-86, 519)

**G. In Light Of The Disparity In The Parties' Economic Circumstances After A 20-Year Marriage, The Trial Court Awarded The Wife Spousal Maintenance.**

The trial court acknowledged that its "primary concern" in determining "whether, in what amount, and for what duration to award spousal maintenance is the economic circumstances in which the parties find themselves after a marital dissolution." (CP 494) The trial court recognized that "without maintenance, the disparity between the lifestyles of Husband and Wife would be stark. Husband's assets and the income from those holdings assure him continued comfort and plenty, whether or not he chooses to work. Husband's life with his children can continue essentially unchanged. Wife, without maintenance, would enjoy a lifestyle grossly different for that of Husband, sufficiently different for the children to observe and feel the disparity." (CP 495)

The trial court acknowledged that the wife's decorating business proved to be successful for a couple of years, but believed that unless the "wife pursues further education in the design field, or otherwise, her earning potential is limited.." (CP 495) The trial court noted that if the wife "chooses to work outside the design field, her education and experience confine her to

clerical, entry-level employment with limited opportunity for advancement. In either instance, her future is much less sure and financially secure than that of Husband.” (CP 495)

The trial court awarded monthly spousal maintenance of \$10,000 per month through August 2017. (CP 481) Thereafter, the wife was awarded additional spousal maintenance of \$5,000 per month for an additional ten years, through August 2027. (CP 481)

Upon entry of the decree, the husband will have monthly net income of \$24,458.60 after spousal maintenance (\$10,000) and the wife’s mortgage (\$6,000) is paid, while the wife will have monthly net income of \$10,029.48. (See CP 500)

**H. Given The Husband’s Much Larger Separate Estate And The Children’s Substantial Trust Funds, The Trial Court Ordered The Husband To Pay Any Uncovered Education Expenses.**

At trial, the parties’ children were ages 20, 17, and 13. Each child had a Uniform Gift to Minors (UGM) account, funded by John’s mother, ranging in value from \$190,000 to \$400,000. (RP 411, 440, 441; CP 502-03) The oldest son was attending the University of Arizona in Tuscon. (RP 40) The second son was in his final year of high school at a therapeutic boarding school in Montana. (RP 629) The youngest son was in the eighth grade at

Villa Academy. (RP 41-42) The trial court ordered John to make a transfer payment of \$2,000 for the younger two sons. (CP 501) While the 17-year-old attends boarding school, however, John would not be required to make a transfer payment for that child. (CP 501) The trial court ordered the husband to pay for the children's private school and post-secondary support not funded by their UGM accounts. (CP 502-03) The husband does not challenge the trial court's child support order. (App. Br. 20)

#### **IV. ARGUMENT**

##### **A. Summary Of Argument.**

The husband challenges the trial court's property distribution and spousal maintenance award after a six-day trial in which the trial court heard extensive testimony regarding the nature and character of the assets owned and acquired by the parties before and during the marriage; the lifestyle they led during the marriage; and the prospects for each at the conclusion of their twenty-year marriage. The husband does not seriously allege any legal error by the trial court. Despite leaving this marriage with twice the assets and income of the wife and his separate property relatively intact, the husband nevertheless challenges these wholly fact-based, discretionary decisions based on his skewed notion of "what is fair."

Contrary to his arguments on appeal, the trial court properly considered the husband's silver spoon in addressing all of the relevant statutory factors and crafting a well-thought-out property distribution and spousal maintenance award. The trial court also properly found a hasty prenuptial agreement that required the wife, then age 23, uninformed as to "the amount, character, and value of [the husband's] separate estate," "naïve and uneducated," to waive every statutory or common law legal protection otherwise afforded to her, to be substantively and procedurally unfair. (CP 492-93, 522) The trial court's decisions here were well within its discretion and supported by substantial evidence. This court should affirm and award the wife her fees on appeal.

**B. The Trial Court's Award Of 34% Of The Marital Estate To The Wife, Including Nearly All The Community Property, After A 20-Year Marriage Was Not An Abuse Of Discretion.**

At the end of two decades of marriage, the trial court divided the marital estate, both separate and community property, in a manner that was just and equitable after consideration of all relevant factors, under RCW 26.09.080. The court's paramount concern is the economic condition of the parties upon entry of the dissolution decree. *Marriage of Mathews*, 70 Wn. App. 116, 121,

853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993). In light of the husband's significant separate estate, the trial court's award to the wife of 34% of the marital estate, including the majority of the community assets, was not an abuse of discretion.

**1. The Trial Court Properly Considered The Nature And Extent Of Both The Community Property And Separate Property.**

The husband would have this court focus solely on the parties' community property, as evidenced by his chart of the property at pages 21-22 of his brief reflecting only the trial court's distribution of the *community* property. Contrary to the husband's claim (App. Br. 27, 29), however, the trial court properly considered the nature and extent of *both* the community property and the separate property as required by RCW 26.09.080 (1), (2).

While the husband claims that he was left with negative (\$1,156,900) in community property (App. Br. 22), this ignores the bottom line – he was awarded \$4,559,500 in assets, compared to the \$2,344,100 awarded to the wife. “This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors.” ***Marriage of Konzen***, 103 Wn.2d 470, 478, 693 P.2d 97,

*cert. denied*, 473 U.S. 906 (1985). Our courts have regularly upheld such awards of the majority of the community property, and in some circumstances some of the other spouse's significant separate property, to the economically disadvantaged spouse. See e.g. **Marriage of Dewberry/George**, 115 Wn. App. 351, 358, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003) (affirming award to husband of "the bulk of the parties' community property, plus \$300,000 cash from [wife]'s separate accounts" when wife had significant separate property); **Marriage of Fiorito**, 112 Wn. App. 657, 659-60, 668-69, 50 P.3d 298, 305 (2002) (affirming award to wife of "most of the community property" and at least one separate property asset of husband, who had significant separate property); **Rehak v. Rehak**, 1 Wn. App. 963, 465 P.2d 687 (1970) (affirming award of 75% of the community property to wife when husband had significant separate property), *disapproved on other grounds by Coggle v. Snow*, 56 Wn. App. 499, 506, 784 P.2d 554 (1990).

The trial court was well aware that the community property comprised only a small portion of the entire marital estate, compared to the husband's extensive separate property (83% of the estate, as the husband repeatedly states throughout his brief:

App. Br. 1, 4, 21, 28). By awarding the wife the majority of the community assets, while leaving the husband responsible for the majority of the community debt, the trial court made a “just and equitable distribution” in light of the significant separate property awarded to the husband. Even doing so, the husband is still left with twice the assets of the wife after a 20-year marriage.

**2. The Trial Court’s Valuation Of The Husband’s Separate Property Was Supported By Substantial Evidence.**

The trial court did not err in its valuation of the husband’s separate property interests in BBLLC. (App. Br. 30-32) A trial court does not abuse its discretion by assigning values to property within the scope of the evidence. See *Marriage of Soriano*, 31 Wn. App 432, 435, 643 P.2d 450 (1982). Here, the trial court’s valuation was based on evidence presented by the wife’s expert witness, Kevin Grambush. (CP 484, RP 278, Ex. 18)

The husband complains Grambush’s valuation was improper because he “calculated the value of a single ‘unit’ of ownership interest in Blistex Bracken and multiplied that unit value” by the number of units in the husband 20.33% interest in his generating skipping trust and the 6.33% interest that the husband owns

individually. (App. Br. 30-31) But this is exactly the same method used by the husband's expert, Bob Duffy. Duffy valued a one percent interest in BLLC and multiplied that one percent interest by both the husband's individual 6.33% interest and his GST's 20.33% interest. (RP 757-58) The husband fails to show why this method was improper.

The trial court's valuation of the husband's interest was supported by substantial evidence. That the trial court found the wife's expert's valuation more credible than the husband's expert's valuation was not an abuse of discretion. The role of the appellate court is not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses. *Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030, 1031 (1996). And, even if the trial court had adopted Duffy's valuation of BLLC, the husband would have still been awarded much more of the marital estate than the wife.

**3. The Trial Court Has Discretion To Award One Party's Separate Property To The Other In Order To Make A Just And Equitable Division.**

The husband complains that because of the community obligations imposed on him, the trial court in effect awarded the

wife a portion of his separate property. (App. Br. 29-30) But the fact that the husband will be required to use his separate income to pay community obligations is not a manifest abuse of discretion. The trial court has discretion to award separate property of one spouse to the other under RCW 26.09.080 if doing so will effect a just and equitable distribution. **Marriage of Irwin**, 64 Wn. App. 38, 48, 822 P.2d 797, *rev. denied*, 119 Wn.2d 1009 (1992) (“The status of property as community or separate is not controlling. Rather, the trial court must ensure that the final division of property is ‘fair, just, and equitable under all the circumstances’”).

The husband’s argument is premised on the claim that “Washington statutes and common law . . . go to considerable length to protect separate property.” (App. Br. 29) However, any “protection” afforded separate property is far outweighed by the principles of equity and fairness that govern the distribution of the marital estate. In **Irwin**, for instance, this court rejected appellant’s claim that she was “entitled to all of her separate property and at least half of the community property, noting that “this contention does not find support in the case law. . . the standard is a ‘just and equitable’ distribution.” **Irwin**, 64 Wn. App. at 48. Instead, it was

“within the trial court’s discretion to determine that the fairest distribution was an approximately equal division of all property, whether separate or community.” *Irwin*, 64 Wn. App. at 49. See also *Marriage of Konzen*, 103 Wn.2d at 478 (affirming award to wife of an additional 30% of husband’s separate property, in addition to her award of community property); *Marriage of Zahm*, 91 Wn. App. 78, 86, 955 P.2d 412, *aff’d by*, 138 Wn.2d 213 (1999) (holding that even if a certain bank account was entirely separate property, the trial court properly divided the account “to reach a just and equitable distribution”); *Ramsdell v. Ramsdell*, 47 Wash. 444, 445-46, 92 P.278 (1907) (affirming property division that awarded all of husband’s separate property to wife).

**4. The Trial Court Properly Considered The Parties’ Economic Circumstances At The Time The Property Division Becomes Effective.**

The court’s paramount concern is the economic condition of the parties upon entry of the dissolution decree. *Marriage of Mathews*, 70 Wn. App. at 121. The trial court recognized that compared to the husband’s significant separate property estate, which will continue to increase steadily in value, “the wife’s prospects are starkly different.” (CP 493) The trial court properly

considered the parties' economic circumstances at the time the division of property was to become effective in distributing the marital estate. RCW 26.09.080(4).

The husband complains that the trial court "artificially fashioned its award to keep Dallene in a home that it acknowledged that she cannot afford to own or maintain. . . and ordered John to buy it for her." (App. Br. 32) But the trial court found that "given the disparity between the parties' prospects and the fact that the children will, for almost another decade, rely upon parental residential and educational support, the court is awarding the 'Yertle' residence to the Wife, free and clear of the mortgage obligation." (CP 494)

The wife and son had moved into their current home after the parties separated, and the wife testified that it would be harder on him if he had to move yet again. (RP 52) It would not have been in the youngest son's best interests to move, as there had already been so many changes in the last year. (RP 52) Further, the wife ran her design business out of the home, and was likely to lose clients if she had to move again. (RP 53) Awarding this home to the wife was well within the trial court's discretion, especially since

she is the primary residential parent for the parties' youngest son. See RCW 26.09.080(4) (trial court must consider "the desirability of awarding the family home or right to live therein for reasonable period to a spouse [ ] with whom the children reside the majority of the time.")

**5. The Trial Court Properly Considered The Duration Of The Marriage.**

Finally, the trial court properly considered the duration of the parties' marriage in making a just and equitable of the property in this 20-year marriage. RCW 26.09.080(3). The trial court recognized that "according to current statistics, the median length of a marriage that ends in divorce is just under eight years. A marriage of nearly twenty years duration is longer than more than half of the marriages in this country. The categories espoused by former Judge Winsor in 1982 are no longer reasonable. This is a long-term marriage." (CP 495)

The husband's argument that after two decades of marriage, and raising three sons together, the trial court should be less concerned with the wife's economic circumstances compared to the husband's because she failed to stick out the marriage for an additional five years, is offensive. There is nothing magic about 25

years of marriage that warrants less consideration for the wife's economic prospects.

In any event, regardless of the trial court's finding that this was a "long term marriage," the trial court did not treat it as one. In ***Marriage of Rockwell***, 141 Wn. App. 235, 243, 170 P.3d 572, 576 (2007), *rev. denied*, 163 Wn.2d 1055 (2008) (App. Br. 32), this court stated that in "a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives." Here, however, the trial did not in fact place the parties in "roughly equal financial positions for the rest of their lives." While the trial court clearly made an effort to lessen the disparity between the parties' economic circumstances, the husband will still have double the assets of the wife, providing him with net annual income of over \$363,000 even after paying the wife's maintenance and mortgage. Under these circumstances, the trial court's property award was well within its discretion.

**C. The Trial Court's Award Of Spousal Maintenance Was Well Within Its Discretion, As It Properly Considered The Factors Of RCW 26.09.090.**

Under the circumstances of this case, where the wife will have half the assets of the husband after a 20-year marriage, the trial court's maintenance award was proper. An award of spousal maintenance is discretionary, and will not be disturbed on appeal absent a showing that the trial court abused its discretion. ***Marriage of Luckey***, 73 Wn. App. 201, 209-210, 868 P.2d 189 (1994). The trial court's discretion in awarding maintenance is "wide;" the only limitation on the amount and duration of maintenance is that, in light of the relevant factors under RCW 26.09.090, the award must be "just." ***Luckey***, 73 Wn. App. at 209. "The standard of living of the parties during the marriage and the parties' post dissolution economic condition are paramount concerns when considering maintenance and property awards in dissolution actions." ***Marriage of Estes***, 84 Wn. App. 586, 593, 929 P.2d 500 (1997) (*citations omitted*).

**1. The Trial Court's Spousal Maintenance Was Within The Trial Court's Discretion In Light Of The Disparate Property Division In Favor Of The Husband And His Significantly Greater Income.**

Spousal maintenance is not only intended “to allow the spouse receiving maintenance sufficient time to obtain re-education and retraining” (App. Br. 35), but is a “flexible tool by which the parties’ standard of living may be equalized for an appropriate period of time.” *Marriage of Washburn*, 101 Wn.2d 168, 178-79, 677 P.2d 152 (1984). When, as here, “so many assets’ were beyond the reach of distribution” because they were the husband’s separate property, a significant long-term maintenance award is appropriate. See *Marriage of Morrow*, 53 Wn. App. 579, 583, 770 P.2d 197 (1989) (affirming award of lifetime maintenance).

Because of the trial court’s desire to “honor” the husband’s separate property, the wife was awarded half the assets of the husband. It was within the trial court’s “wide” discretion to then award the wife sufficient spousal maintenance to lessen the gap between the parties at the end of their 20-year marriage. Under RCW 26.09.090, “the trial court is not only permitted to consider the division of property when determining maintenance, but it is required to do so. Likewise, the trial court, when dividing the

property, may take into account the amount of maintenance it intends to grant.” **Marriage of Rink**, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977); see also **Marriage of Estes**, 84 Wn. App. at 593 (trial court should consider maintenance in light of the property awarded to each spouse); **Marriage of Crosetto**, 82 Wn. App. 545, 559, 918 P.2d 954 (1996) (“The trial court was entitled to consider the property division in its determination of maintenance, and to consider maintenance in its property division.”).

**2. The Trial Court’s Spousal Maintenance Award Leaves The Husband With More Than Twice The Income Of The Wife Even After His Obligations To The Wife Are Paid.**

While the trial court’s spousal maintenance award lessens the disparity between the parties, it still leaves the husband with significantly greater income. The husband still has nearly 2.5 times the income of the wife after paying spousal maintenance and the wife’s monthly mortgage:

	<u>Dallene</u>	<u>John</u>
Net Income <sup>1</sup>	\$10,029.48	\$30,458.60
Dallene’s Mortgage		(\$6,000.00)
Available income	\$10,029.48	\$24,458.60

---

<sup>1</sup> After payment and receipt of spousal maintenance, as set out in the unchallenged child support order. (CP 500)

The husband claims that his monthly income will be less because of his "debt" to his mother when she was still alive. (App. Br. 24) But the mother is now deceased. While the husband and his siblings continue to pay their individual obligations to the mother's estate, the estate is being distributed to them. (See RP 612-15) The trial court acknowledged that income from the husband's trust is "earmarked to pay the promissory note to his mother's estate" but also recognized that "presumably [the husband] will be able to make his own decision regarding the cancellation, satisfaction, forgiveness, or continued payment of that note upon distribution of his mother's estate." (CP 494)

While the husband asserts the trial court "is simply incorrect," because he testified that he had "no control over the GST debt payments," (App. Br. 34) in fact his testimony was that the debt payment was "automatic." (RP 594) The husband did not testify that he would have no control over the debt now that his mother has passed and he is a beneficiary of the estate to which his payments are made. Based on the evidence presented, the trial court could reasonably infer that the husband could exercise some control to forgive the debt, since he will in any event be the

beneficiary of these payments. ***Marriage of Rideout***, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003) (“trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence”).

The husband also claims that his income is further reduced by his obligation to pay tuition for the parties’ children. (See App. Br. 24). But the trial court noted that the children’s significant UGM accounts and trust funds could be used to defray these expenses, or to pay them entirely. (See CP 502-03, 523) While the husband testified that he preferred not to use those monies to pay the children’s education (RP 451), he also testified that there were no limitations on the trust accounts preventing their use for educational purposes. (RP 749)

Further, the trial court recognized the husband had access to his GST to provide him with additional funds. The trial court had “reviewed trust documents relating to the family generation skipping trusts. Based on that review, the court formed an opinion about Husband’s ability to invade and utilize those trust funds, both principal and interest. The court understands husband’s unwillingness to invade the trust assets. The court also

understands his legal ability to do so at any time.” (CP 523) The trial court also knew that the husband will imminently receive an inheritance from his mother’s estate of between \$2 million to \$4 million as another “source of support.” (CP 491, 494)

**3. There Is No Formula For Spousal Maintenance. The Trial Court Here Made A Proper Spousal Maintenance Award Based On These Parties, Their Property, And Their Specific Circumstances.**

The husband attempts to compare the spousal maintenance award in this case to other published cases affirming maintenance awards to claim that the trial court’s award here is “unparalleled.” (App. Br. 35-38) There is no magic formula for an appropriate award of maintenance. Nor should there be, as this would undermine the trial court’s “wide” discretion under RCW 26.09.090 to make a “just” maintenance award. *Luckey*, 73 Wn. App. at 209.

A trial court’s discretion in spousal maintenance awards is evident in the cases cited by the husband in his brief. Unless the trial court fails to properly consider the parties’ economic circumstances at the end of the marriage, the only thing these cases prove is that its decision will be affirmed. See, e.g., *Marriage of Hadley*, 88 Wn.2d 649, 657-58, 565 P.2d 790 (1977) (App. Br. 36) (affirming trial court’s use of a maintenance as a

substitute for wife's interest in community property awarded to husband); ***Marriage of Morrow***, 53 Wn. App. at 581 (App. Br. 36) (affirming lifetime maintenance award after 23-year marriage); ***Marriage of Tower***, 55 Wn. App. 697, 689-99, 701, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990) (App. Br. 36) (affirming award of permanent maintenance after 19-year marriage); *and see* ***Marriage of Sheffer***, 60 Wn. App. 51, 54, 802 P.2d 817 (1990) (App. Br. 37) (increasing maintenance award when trial court failed to adequately consider parties' economic circumstances and holding that maintenance should be utilized as a "flexible tool to more nearly equalize the post-dissolution standard of living of the parties, where the marriage is long term and the superior earning capacity of one spouse is one of the few assets of the community").

**4. That The Husband Will Use Separate Income To Meet His Maintenance Obligation Is Simply A Matter Of Fact, And Not Evidence That The Trial Court Abused Its Discretion.**

The husband asserts that the trial court's maintenance award improperly functions as a "perpetual lien" on his future income, which he claims is disfavored. (App. Br. 37) But as this court has noted, while there is valid policy for "disentangling divorcing spouses and setting each on a road to self-sufficiency,

neither our current statutory language dealing with dissolution nor the known, postdissolution realities mandate a blind adherence” to the “perpetual lien” notion argued by the husband in this case. ***Marriage of Bulicek***, 59 Wn. App. 630, 634, 800 P.2d 394 (1990).

The husband’s complaint that the trial court’s award of maintenance to the wife in effect acts as an award of his separate property is also meritless. The husband made this same complaint to the trial court, which properly rejected it because: “it is a fact that after dissolution, no spouse has any source from which to provide spousal maintenance other than separate property. If Husband does not want to use the principle and income from his family-based assets, which supported the family throughout the marriage, to pay spousal maintenance, he can return to the work force and use earned income to pay the maintenance.” (CP 522)

Here, the economic reality is that because the trial court awarded the husband all of his separate property, the wife was left with half the assets of the husband, largely in the form of her non-income producing home with the parties’ youngest child. The trial court properly acknowledged that “without maintenance, the disparity between the lifestyles of the husband and wife would

stark.” (CP 495) The wife would lead a lifestyle “grossly different” from that of the husband’s lifestyle, which provides him with “continued comfort and plenty.” (CP 495) Under these circumstances, the trial court’s spousal maintenance award was within its discretion.

**D. The Trial Court Properly Held That The Prenuptial Agreement That Was Signed By The Wife Two Days Before The Parties’ Wedding Was Both Substantively And Procedurally Unfair.**

While the trial court exercised its discretion to narrow the gap between the parties’ financial circumstances after their nearly 20-year marriage, the husband seeks to put the Grand Canyon between them by asking this court to hold that the prenuptial agreement was valid and enforceable. If the agreement were enforced, it would, after twenty years of marriage, leave the wife with less than 9% of the marital estate, no spousal maintenance, and no means to pay her attorney fees. The trial court properly held that the prenuptial agreement was not enforceable.

In determining whether a prenuptial agreement is enforceable, the court first determines whether the agreement provides a fair and reasonable provision for the party resisting enforcement of the agreement. ***Marriage of Matson***, 107 Wn.2d

479, 482, 730 P.2d 668 (1986). If the agreement makes “fair and reasonable provision” for the party resisting enforcement of the agreement, the inquiry ends and the agreement is enforced. **Matson**, 107 Wn.2d at 482. If not, the agreement is analyzed for procedural fairness: “The tests are: (1) whether full disclosure has been made . . . of the amount, character, and value of the property involved,” and (2) whether the agreement was entered into fully and voluntarily on independent advice and with knowledge by the spouse of her rights.” **Matson**, 107 Wn.2d at 483; **Marriage of Cohn**, 18 Wn. App. 502, 506, 569 P.2d 79 (1977).

Here, the trial court properly concluded that the parties’ prenuptial agreement was both substantively and procedurally unfair. Because the trial court’s factual determinations on these factors are supported by substantial evidence, this court must affirm. **Marriage of Bernard**, 165 Wn.2d 895, 906, ¶ 25, 204 P.3d 907 (2009).

**1. The Prenuptial Agreement Was Substantively Unfair.**

The husband’s statement that the parties’ prenuptial agreement is substantively fair because it “simply adopts Washington’s law on the preservation of separation property” (App.

Br. 40) is remarkable not just in its audacity, but also its utter lack of basis in law or fact. RCW 26.09.080, the statute that governs property distribution on dissolution, does not “preserve” separate property. Instead, the statute specifically makes separate property available to ensure a “just and equitable” distribution:

The court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, *either community or separate*, as shall appear just and equitable after considering all relevant factors.

RCW 26.09.080 (emphasis added). The parties’ prenuptial agreement is not consistent with Washington law, nor was the agreement fair, because it required the wife, the economically disadvantaged party, to waive legal protections otherwise afforded to her under Washington law:

First, the agreement specifically would have prohibited the court from “tak[ing] into account” the separate property of either party when dividing the parties’ assets. (Ex. 26, ¶ 6(c)) While the character of property is not “controlling” in a property division, the trial court is still required to consider the character of property in dividing the parties’ property. RCW 26.09.080(2) (when dividing assets, the trial court is required to consider, among several other

factors “the nature and extent of the separate property”).

Second, the agreement prohibited the trial court from awarding one spouse the other spouse’s separate property. (Ex. 26, ¶ 6(a)) But RCW 26.09.080 specifically gives the trial court with the authority to award separate property to the other spouse. RCW 26.09.080 (the court shall dispose of property, “either community or separate”). Contrary to the agreement’s provisions, trial courts are not required to “award separate property to its owner.” **Marriage of White**, 105 Wn. App. 545, 549, 20 P.3d 481 (2001).

Third, the agreement required that community property be divided as “equally as possible.” (Ex. 26, ¶ 6(d)) RCW 26.09.080 does not require an “equal” division of community property. **White**, 105 Wn. App. at 549. Instead, it requires a “just and equitable” distribution of the property, “community or separate.” RCW 26.09.080.

Finally, the agreement prohibited the court from awarding attorney fees to the wife regardless of her need and the husband’s ability to pay. (Ex. 26, ¶ 6(b)) RCW 26.09.140 authorizes the trial court to award attorney fees to one spouse based on their need comparative to the other spouse’s ability to pay. See **Marriage of**

**Burke**, 96 Wn. App. 474, 479-80, 980 P.2d 265 (1999) (prenuptial agreement barring award of fees on parenting issues violative of public policy; parenting was at issue in this case until a few days before trial).

Even if, as the husband asserts, the prenuptial agreement did not prevent the “creation of community property” (App. Br. 45), it was still substantively unfair at the time of execution. Further, the evidence in this case was that the husband had in fact taken steps under the agreement to avoid creating community property, limiting his community employment and relying on his significant passive separate income to prevent the creation of community property. See **Hamlin v. Merlino**, 44 Wn.2d 851, 866, 272 P.2d 125 (1954) (marital agreement unfair because it gave husband power to secure for himself property that would otherwise have become part of community estate).

Our courts have not hesitated to invalidate prenuptial agreements such as this one that limit one spouse’s ability to claim an interest in the other spouse’s separate estate upon dissolution or death, and limit the trial court’s discretion to make a just and equitable distribution under RCW 26.09.080. See e.g., **Marriage of**

**Bernard**, 165 Wn.2d at 905, ¶ 23 (prenuptial agreement that “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 statutory claims on [the husband]’s separate property” was substantively unfair); **Marriage of Foran**, 67 Wn. App. 242, 250, 257, 834 P.2d 1081 (1992) (prenuptial agreement that caused wife to waive any claim against husband’s separate estate in the event of divorce, and all of her statutory rights as a surviving spouse if husband predeceased her, “was patently unreasonable”); **Marriage of Matson**, 107 Wn.2d at 486 (prenuptial agreement that “acted to bar [the wife] from making any claim against or seeking any rights in [the husband]’s separate property” was substantively unfair).

That the prenuptial agreement was grossly disproportionate in favor of the party seeking enforcement is at least as evident here as in these cases. **Bernard**, 165 Wn.2d at 898, ¶ 2 (wife’s net worth was \$8,000; husband’s net worth was \$25 million when parties executed prenuptial agreement); **Matson**, 107 Wn.2d at 481 (wife had her personal effects while husband’s net worth when the agreement was executed was \$330,000, and \$830,000 at the time

of trial); **Foran**, 67 Wn. App. at 246 (wife's net worth was \$8,200; husband's was \$1,198,500 when parties executed prenuptial agreement). Here, the wife had no separate property and the husband had over \$1.8 million plus a significant imminent expectancy in his father's estate when they signed the agreement; his separate estate tripled in value by the time of trial. The marital agreements in each of these cases, including this one, were unenforceable because they allowed the husband to increase his disproportionately large separate estate at the expense of the community, and because they prevented the wife from seeking an equitable distribution if the marriage was dissolved.

## **2. The Marital Agreement Was Procedurally Unfair.**

Because the prenuptial agreement failed the test of economic fairness, the court was required to "zealously and scrupulously' examine the circumstances leading up to its execution, with an eye to procedural fairness." **Marriage of Foran**, 67 Wn. App. at 251. The burden of proving procedural fairness is on the spouse seeking enforcement of the agreement. **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.

While the trial court found that the wife signed the agreement “voluntarily,” it found that she did not sign it with “full disclosure of the nature and extent of Husband’s family assets and expectancies.” (CP 493) Accordingly, the trial court found that the “wife could not have known at the time she signed the [agreement] that the husband could support the family in luxury without working to earn any community property and without expending significant effort.” (CP 493)

The trial court simply did not believe that John disclosed the extent of his separate property, and found Dallene’s testimony of the lack of disclosure (RP 215, 393, 398) more credible. The role of the appellate court is “not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses.” **Marriage of Rich**, 80 Wn. App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030, 1031 (1996). Accordingly, this court must

affirm, because substantial evidence supports the trial court's findings. ***Marriage of Burrill***, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003) ("an appellate court will uphold a finding of fact if substantial evidence exists in the record to support it"). Because the prenuptial agreement was neither substantively nor procedurally fair, the trial court properly invalidated the agreement.

**E. The Trial Court Properly Entered A Confession of Judgment Against The Husband.**

The husband's challenge to the trial court's entry of a confession of judgment is meritless. First, his attorney consented to the entry of an order requiring him to sign a confession of judgment in the event of default, in lieu of immediate entry of a judgment for his obligation on the wife's home. (RP 884-85) Second, the confession of judgment was not in fact entered, as it would only be entered if the husband defaults on his obligation. (See CP 429-33)

The wife had originally sought entry of a judgment against the husband to ensure his compliance with the trial court's order obligating him to pay her mortgage payment. But the trial court was persuaded by the husband's attorney's concerns regarding the

“problems” with a judgment. The husband’s trial attorney conceded that a confession of judgment would be a “workable remedy”:

Wahrenberger: Let me tell you what I think some of the problems are with having a judgment here....

Court: I already know what that is. That is why I am saying an acknowledged confession of judgment which is not filed and is not of record unless and until he defaults on his obligation to her...

Wahrenberger: [I]f he defaults on a payment to Ms. Bracken, then I think the confession of judgment would be a workable idea as a remedy.

(RP 885-86)

The order requiring the husband sign a confession of judgment was appropriate especially because, contrary to the husband’s claim on appeal, the wife may be limited in pursuing contempt against the husband if he defaults on his obligation. If the order requiring him to pay the mortgage obligation was considered “property” as opposed to a “support” obligation, this would prevent the wife from pursuing contempt. See *Marriage of Young*, 26 Wn. App. 843, 846, 615 P.2d 508 (1980) (vacating a contempt finding against the husband for his failure to make payments to the wife “in lieu of any interest in her husband’s military pension” because it was property and not support).

Further, contrary to the husband's claim on appeal, he had "notice and opportunity to be heard" before the order regarding the confession of judgment was entered. In its order entered on April 24, 2009, the trial court noted that the issue had already been raised and addressed before the order was entered and the husband was not prejudiced by its entry:

Respondent was not prejudiced by the court's grant of petitioner's motion for confession of judgment without the court specifically seeking a written response. The issues was raised and addressed on 1-28-09. Further, the court had voluminous material before it in the dueling motions for reconsideration and needed no further edification on the extent of the beating of any dead horse in this case.

(CP 527) The trial court did not abuse its discretion in entering the order requiring the husband to sign a confession of judgment if he defaulted on his obligation.

**F. This Court Should Award Attorney Fees To The Wife Based On Her Need And The Husband's Ability To Pay.**

After a nearly 20-year marriage, the wife has less than half the assets and income of the husband. This court should award attorney fees to the wife based on her need and his ability to pay. RCW 26.09.140. This court has discretion to award attorney fees after considering the relative resources of the parties and the merits

of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). The wife will comply with RAP 18.1(c).

#### V. CONCLUSION

The trial court's property distribution and spousal maintenance award were well within its discretion, and the trial court properly invalidated the prenuptial agreement. This court should affirm.

Dated this 30th day of December, 2009.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: \_\_\_\_\_

— Catherine W. Smith  
WSBA No. 9542  
Valerie A. Villacin  
WSBA No. 34515

WECHSLER BECKER, LLP

By: \_\_\_\_\_

— Mary H. Wechsler  
WSBA No. 9447

Attorneys for Respondent

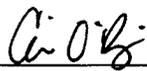
**DECLARATION OF SERVICE**

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

That on December 31st, 2009, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input checked="" type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Gail N. Wahrenberger Stokes Lawrence, P.S. 800 Fifth Avenue, Suite 4000 Seattle, WA 98104-3179	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mr. Charles Wiggins Wiggins & Masters, P.L.L.C. 241 Madison Avenue N Bainbridge Island, WA 98110-1811	<input checked="" type="checkbox"/> E-Mail <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Ms. Mary H. Wechsler Wechsler Becker, LLP 701 Fifth Avenue, Suite 4550 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

**DATED** at Seattle, Washington this 31st day of December, 2009.

  
\_\_\_\_\_  
Carrie O'Brien

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 DEC 31 PM 3:42