

NO. 66193-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Marriage of Hoffman

ALAN HOFFMAN,

Appellant/Cross Respondent,

v.

CAROLE HOFFMAN,

Respondent/Cross Appellant

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE  
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

The Honorable Carol Schapira, Judge

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APPELLANT'S/CROSS RESPONDENT'S REPLY BRIEF

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## **I. INTRODUCTION**

The reference to Tolstoy's quote on unhappy marriages is inappropriate and a sign of Carole Hoffman's attempt to raise the ire of the Court in this appeal. Commencing soon after the parties' marriage on August 5, 2000, as Dr. Hoffman testified at trial, Carole Hoffman began her attempt to invade Dr. Hoffman's separate estate, and expectancy of a separate estate once his mother passed away. As provided at trial through testimony of Carole Hoffman's former confidant, Barbara Miller, Carole Hoffman disclosed her plans to obtain from Dr. Hoffman as much financial resources as possible for her future. Barbara Miller also testified to Carole Hoffman's attempt to have Dr. Hoffman arrested after suddenly serving him with dissolution paperwork. Many of Carole Hoffman's claims are based on trust funds established for Dr. Hoffman's family in 2006, six (6) years after the parties were married, and two and one-half (2.5) years before she filed for dissolution. As Dr. Hoffman testified, anticipation of being able to invade the trust funds were the only reason she remained married to Dr. Hoffman for as long as she did. Carole Hoffman is now suffering from confiding in Barbara Miller all her deceits and infidelities.

At trial, Carole Hoffman admitted to surreptitiously commencing her copying of all Dr. Hoffman's financial documents and hiring a financial expert to attempt to establish commingling of Dr. Hoffman's separate estate once the trust funds were established. Most of Dr. Hoffman's separate estate, for which Carole Hoffman claims entitlement, is based on the trust funds established after his mother's death.

Noticeably absent from Carole Hoffman's Brief of Respondent/Cross Appellant is any reference to the testimony of her close friend at the time, Barbara Miller, who provided testimony as to Carole Hoffman's deceit, and acceleration thereof, after the family trusts were established, including Carole Hoffman's intent to force her name to be added to the Redmond "Trilogy" home deed. All of the Trilogy sales documents were signed by Dr. Hoffman alone preceding the purchase of the Trilogy home (including the purchase and sale agreement) evidencing his intent to keep the property as his separate property.

Also absent from Carole Hoffman's Brief of Respondent/Cross Appellant evidencing the substantive and procedural fairness of the prenuptial agreement is reference to the number of drafts of the prenuptial agreement exchanged between

attorneys prior to the execution of the prenuptial agreement, changes Carole Hoffman required therein, and the changes made pursuant to Carole Hoffman's requests.

## **II. ARGUMENT IN REPLY TO ARGUMENT TO APPEAL**

### **A. The Trial Court's Characterization of the Redmond "Trilogy" Home as Community Property and Award of Fifty Percent (50%) of Its Value to Petitioner was Improper.**

Assets acquired during marriage are presumptively community property. RCW 26.16.030. Separate property is property acquired "before marriage and that acquired by him or her afterwards by gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof." RCW 26.16.010. The characterization of property is determined on the date of acquisition. *In re Estate of Borghi*, 167 Wn.2d 480, 484 (2009). When property is characterized as separate, there is a presumption the property retains its separate property characterization. *Id.* at 484 (stating "a presumption arises that it remain[s] separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property"); *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 865 (1993) (providing "the character of [ ] separate property continues through

changes and transitions if it can be traced and identified”); *In re Marriage of Zahm*, 138 Wn.2d 213, 223 (1999) (stating “[p]roperty acquired during marriage has the same character as the funds used to purchase it”).

Regarding the nature, importance, and policy underlying separate property rights, the Washington State Supreme Court provides the following:

[t]he right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character *until some direct and positive evidence to the contrary is made to appear.*

*Borghi*, 167 Wn.2d at 484 (2009); *In re Marriage of Chumbley*, 150 Wn.2d 1, 6 (2003) (quoting *In re Dewey’s Estate*, 13 Wn.2d 220, 226-27 (1942)). Any increase in value to separate property presumptively retains its characterization as separate property. *Elam v. Elam*, 97 Wn.2d 811, 816 (1982). This presumption is rebutted with “direct and positive evidence that the increase is attributable to community funds or labors.” *Id.* A spouse is entitled to only the amount proven to be increased with community efforts. *Id.* at 816-17.

Carole Hoffman attempts to distinguish the precedent set by the Washington Supreme Court, *Borghi*, by asserting "the facts are entirely different than in *Borghi*." Res. Br. 23. In *Borghi*, the wife did purchase the real property at issue prior to marriage. *Borghi*, 167 Wn.2d at 482. However, the Supreme Court used the opportunity provided by the facts in *Borghi* to clear any confusion provided by the cases of *Hurd* and *Olivares*--the joint title gift presumption. *Borghi*, 167 Wn.2d at 486. Specifically, the Court of Appeals in *Hurd* provided as follows:

[w]e now hold that a spouse's use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation, permits a presumption that the purchase or transaction was intended as a gift to the community. We also hold that there must be clear and convincing proof to overcome such a presumption.

*Borghi*, 167 Wn.2d at 487 (quoting *In re Marriage of Hurd*, 69 Wn. App. 38, 51). In addition, the Court of Appeals in *Olivares* provided as follows:

When one spouse uses separate property to acquire an asset, but takes title to that asset in the name of the other spouse, under Washington law there is a rebuttable presumption of a gift to the spouse in whose name title is taken.

*Borghi*, 167 Wn.2d at 488 (quoting *In re Marriage of Olivares*, 69 Wn. App. 324, 336). The Supreme Court in *Borghi* reiterated the

touchstone separate property presumption—to change the character of separate property to community property, “the evidence must show the intent of the spouse owning the separate property to change its character.” *Id.* at 485.

Not only was there clear proof presented at trial that Dr. Hoffman, at sixty-five (65) years of age, did not intend to transmute his (actually the Hoffman Family Trust’s) separate funds to community property rather than retain them for his children, who are the eventual beneficiaries of the trusts, but there is evidence and testimony of deceit on Carole Hoffman’s part, with the compliance of her friend and real estate agent, Beverly Lanthorn, to get her name on the title. RP, August 18, 2010, p. 83; RP, August 19, 2010, p. 269-270; RP, August 23, 2010, p. 397-400; RP, August 24, 2010, p. 617-618; RP, August 25, 2010, p. 719-727; CP 158-165; Ex. 134; Ex. 140; Ex. 146.

Carole Hoffman asserts the Trilogy home was community property at the time of acquisition. Res. Br. 24. However, substantial evidence provided to the Trial Court clearly demonstrated Dr. Hoffman’s separate funds were used to purchase the Trilogy home. RP, August 19, 2010, p. 269-270. The earnest money of \$65,000 was paid from a \$100,000 transfer from Dr.

Hoffman's Smith Barney Account #5301. RP, August 19, 2010, p. 269. The Trial Court found the Smith Barney Account #5301 was Dr. Alan Hoffman's separate property. CP 158-165. The remainder of the payment owing on the Trilogy home of \$1,294,160 was paid from a \$1,300,000 transfer from the Hoffman Family trust funds. RP, August 19, 2010, p. 270.

In addition to the source of funds used to purchase the Trilogy home, but for Carole Hoffman's testimony the Trilogy home was to be a community asset, and the deed to the home, all other evidence presented to the Trial Court proved the Trilogy home was Dr. Hoffman's separate property--specifically, Dr. Hoffman was the only party to execute the contractual documents within the purchase and sale agreement, including the Residential Real Estate Purchase and Sale Agreement and Escrow Instructions, Record of Cash Receipt, Builder-Buyer's Agent Registration Form, Tax form W-9, Addendum A Buyer's Contingency, Addendum B Community Documents, Addendum C New Home Warranty, Addendum D Mold Disclosure, Receipt for Community Documents, Ratification of Agreement, Affiliated Business Arrangement Disclosure Statement, Addendum 1 #1 Optional Items, Addendum 5A Special/Miscellaneous Provisions, Option Selection Policy,

Request to Not Share your Information, Receipt for Law of Agency Booklet, Seller Disclosure Statement, Attachment to Real Property Transfer Disclosure Statement, Pre-Closing Process Acknowledgment, and Disclosure and Buyer Acknowledgement Regarding Sound Transmission. Ex. 134. The October 9, 2006 letter to Dr. Hoffman with enclosure of executed and accepted contract terms was addressed to Dr. Hoffman alone. RP, August 18, 2010 p. 83; Ex. 134. Furthermore, as evidenced by Carole Hoffman signing the Age Verification and Assumption of Risk documents, Carole Hoffman was present for the execution of the above-referenced contractual documents; however, she did not sign any of the documents. RP, August 23, 2010, p. 399; Ex. 134. In fact, Carole Hoffman originally testified she was in surgery when the documents were signed; however, Carole Hoffman was later proven to have not been in surgery on the day at issue when presented her signature on the Age Verification and Assumption of Risk documents. RP, August 18, 2010, p. 83; RP, August 23, 2010, p. 397-400; Ex. 134. Carole Hoffman's only defense to her claim of not being present at the purchase and sale signing, when presented the executed Age Verification document, was that it was undated and she must have signed it at a later date; when shown

the signed and dated Assumption of Risk document she tried to claim it was not her signature. RP, August 23, 2010, p. 399; Ex. 134.

Further evidence the Trilogy home was to be Dr. Hoffman's separate property was provided to the Trial Court via Dr. Hoffman's August 4, 2007 Will, drafted after the Trilogy home purchase, in which it provided the Trilogy home was purchased with separate funds. RP, August 24, 2010, p. 617-618; Ex. 140. Dr. Hoffman's intent was further spelled out in the prenuptial agreement, in which it provided Dr. Hoffman would provide in his Will for Carole Hoffman to remain in the parties' home, if Dr. Hoffman's death preceded Carole Hoffman's death, for her lifetime, with the eventual distribution of the home provided in his Will. Ex. 146. Barbara Miller, a former confidant of Carole Hoffman also testified to her knowledge of Carole Hoffman's intent to withhold informing Dr. Hoffman of the need for her to sign a quit claim deed, and of her intent not to sign the quit claim deed immediately before closing on the Trilogy home. RP, August 25, 2010, p. 719-727.

Although as argued by Carole Hoffman credibility determinations are the province of the Trial Court, Res. Br. 25-26, the Trial Court's disregard for the overwhelming evidence the

Trilogy home was a separate asset is manifest abuse of discretion warranting correction by the Court of Appeals. Carole Hoffman asserts, without reference to any evidence presented at trial the following:

[t]he husband, a veteran of two previous divorces, was likely aware that the prevailing law at the time was that property acquired in both parties' names during marriage with one spouse's separate property was presumed to be a gift to the community. ***Marriage of Hurd***, 69 Wn. App. 38, 51, 848 P.2d 185, *rev. denied*, 122 Wn.2d 1020 (1993), *overruled Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932, (2009). That likely was why he tried to get Ms. Hoffman to quitclaim the property to him the morning of the closing. (RP 576, 581)

Res. Br. 26 n.2. No evidence was presented to the Trial Court regarding Dr. Hoffman's intent based upon prevailing case law at the time of the Trilogy home purchase. Carole Hoffman's inclusion of this outside the record footnote evidences she is aware the Supreme Court in *Borghi* clearly overruled the *Hurd* joint gift presumption.

Carole Hoffman's testimony that Dr. Hoffman presented her, at the last minute, with the quit claim deed is an outright mischaracterization (or more likely a lie) of the event refuted by her actions with regard to the purchase and sale documents, Carole Hoffman's extensive experience as a real estate agent, her sharing

in the commission for the home purchase, and direct testimony of Barbara Miller. RP, August 18, 2010, p. 33-36; RP, August 18, 2010, p. 45; RP, August 18, 2010, p. 83; RP, August 19, 2010, p. 269-270; RP, August 23, 2010, p. 397-400; RP, August 23, 2010, p. 374-376; RP, August 24, 2010, p. 617-618; RP, August 25, 2010, p. 719-727; CP 158-165; Ex. 134; Ex. 140; Ex. 146. Carole Hoffman cites *Pleuss v. City of Seattle*, 8 Wn. App. 133 (1972), for the proposition that Alan's fear he would lose \$65,000 in earnest money if he did not sign the deed to Trilogy home with Carole Hoffman's name on the deed did not constitute duress. Res. Br. 26-27. It was not Dr. Hoffman's burden to establish legal duress, rather it was the substantial evidence taken as a whole that should persuade the Court to reverse the Trial Court's finding the Trilogy home was community property.

Beverly Lanthorn, a close friend of Carole Hoffman's, acted as real estate agent for both the purchase of the Trilogy home and the sale of Dr. Hoffman's Woodinville home. RP, August 23, 2010, p. 485-486. Although she was supposedly acting as an agent for Dr. Hoffman, she admitted to withholding knowledge from him of her agreement with Carole Hoffman to share her commission with Carole for the purchase of the Trilogy home. RP, August 23, 2010,

p. 497. Carole Hoffman testified that she and Dr. Hoffman were looking for a home together for some time, but Ms. Lanthorn testified that she and Carole looked for a home together for several months before informing Dr. Hoffman--this was coincidentally, right after the Hoffman Family Trusts were established. RP, August 18, 2010, p. 79-80; RP, August 23, 2010, p. 486-487; RP, August 23, 2010, p.495. Barbara Miller testified that Carole Hoffman told her that Ms. Lanthorn was aware of her plan to present Dr. Hoffman with the quit claim deed at the last moment, and that she would then refuse to sign it until the last moment. RP, August 25, 2010, p. 724-725.

As the Trilogy home was separate property at acquisition, and due to the premarital agreement's provision "[e]ach party shall be entitled to possession of his or her separate property," the Trial Court abused its discretion in finding the Trilogy home community property. Ex. 146. The Trilogy home should be characterized as separate property, and Dr. Hoffman should be awarded the entire value of the home.

**B. The Trial Court Erred in Awarding Petitioner \$75,000 for Increase in Value to the Woodinville Home.**

Dr. Hoffman did not challenge the Trial Court's award of \$5,500 awarded to Carole Hoffman for her personal physical efforts in preparing the Woodinville home for sale, as argued by Carole Hoffman. Res. Br. 28. Regarding alleged use of community property to assist in preparing the Woodinville home for sale, first, Carole Hoffman resided in the home without any contribution to the home. RP, August 23, 2010, p. 402. Carole Hoffman testified at trial she believed no amount should be considered a debit to her request for reimbursement from the home based on the fact she was able to live in a home rent-free and without any financial obligation owing on the home. RP, August 23, 2010, p. 402. In addition, all the financial outlay to renovate the home derived from Dr. Hoffman's separate funds. RP, August 24, 2010, p. 591. Further, upon receipt of the \$962,000 from the sale of the Woodinville home, Dr. Hoffman returned \$900,000 to the trust, but he retained \$62,000 to make up for the fix-up costs. RP, August 19, 2010, p.284.

In addition, per Section 6.3 of the premarital agreement, it provided "[u]pon sale of the residence Alan shall retain all proceeds

as separate property. Upon divorce, Alan shall retain the residence." Ex. 146. The prenuptial agreement further provided in Section 6.1 if the proceeds from sale of the Woodinville home were used to purchase another home, it would remain separate property. Ex. 146. As the improvements to the Woodinville home, made in anticipation of its sale after the Trilogy home was purchased, were made with either separate funds or the \$62,000 remaining after the net proceeds of the Woodinville home's sale were returned to the trust, if the Trial Court considered Section 3.1 of the prenuptial agreement in its analysis to award reimbursement to Carole Hoffman for the increase in value, there should have been no community lien as claimed by Carole Hoffman. Res. Br. 30-31. However, the Trial Court's order the prenuptial agreement was enforceable, and Section 6.3's clear directive Dr. Hoffman shall retain the proceeds from the sale of the Woodinville home, evidence the Trial Court's error in awarding Carole Hoffman \$75,000 for improvements to the residence. CP 158-165; Ex. 146.

**C. The Prenuptial Agreement Prohibits the Trial Court's Award of \$70,000 in Expert and Attorney's Fees.**

Carole Hoffman asserts Dr. Hoffman did not challenge that substantial evidence did not support the Trial Court's finding attorney and expert fees were appropriately ordered. Res. Br. 31. In fact, Dr. Hoffman did challenge substantial evidence did not support the Trial Court's finding attorney and expert fees were appropriate, as the document supporting the Trial Court's finding (the prenuptial agreement) did not permit Carole Hoffman to seek attorney and expert fees. Ex. 146.

Although not expressly provided in the prenuptial agreement, and as provided in Dr. Hoffman's initial briefing (App. Br. 40-41), a binding contract between parties requires a meeting of the minds as to the terms contained therein, even if implied. *Davis v. Niagra Mach. Co.*, 90 Wn.2d 342, 347 (1978) (quoting *Western Oil Refining Co. v. Underwood*, 83 Ind. App. 488, 491, 149 N.E. 85 (1925), "[a] true implied contract is an agreement of the parties arrived at from their acts and conduct viewed in the light of surrounding circumstances, and not from their words, either spoken or written. Like an express contract, it grows out of the intentions of the parties to the transaction, and there must be a meeting of

minds. Such a contract differs from an express contract only in the mode of proof"). In this case, although the prenuptial agreement did not specifically provide no attorney fees should be awarded, it is clear that was the intention of the parties, as Carole Hoffman, a party to the contract, testified that was her understanding of its terms. RP, August 23, 2010, p.400-401. Carole Hoffman's testimony at trial in conjunction with the prenuptial agreement she voluntarily executed require reversal of the Trial Court's decision to award Carole Hoffman attorney and expert fees, as the Trial Court did not properly apply the agreement to issue of attorney and expert fees. RP, August 23, 2010, p. 400-401; Ex. 146.

### **III. ARGUMENT IN RESPONSE TO CROSS-APPEAL**

Carole Hoffman alleges without substantiation that Dr. Hoffman continues to live "with \$16 million and a six-figure income in semi-retirement." Res. Br. 21. Dr. Hoffman at age sixty-nine and a half (69.5) is fully retired. His research laboratory was closed down, and he has no present earning power.

Dr. Hoffman's estate consists of the remainder of his TIAA/CREF retirement, after Carole Hoffman was awarded sixty percent (60%) of the community portion, the Trilogy home (after paying Carole Hoffman \$487,500 per the Trial Court's finding

Carole Hoffman be awarded fifty percent (50%) of the home's value), his IRA commenced prior to marriage, and a modest Smith Barney investment account. CP 173-180. The remainder of the alleged estate of Dr. Hoffman remains in family trust funds, for the eventual benefit of Dr. Hoffman's children, grandchildren, and future generations.

Per the Trial Court, Carole Hoffman leaves the marriage with \$487,500 for her share of the Trilogy home, \$75,000 for the increase in value to the Woodinville home (owned by Dr. Hoffman prior to marriage), \$5,500 for her labor in preparing the Woodinville home for sale, sixty-percent (60%) of the community portion (\$381,434 as of September 30, 2010) of Dr. Hoffman's TIAA/CREF retirement account (community portion included the two (2) years of cohabitation prior to marriage), the parties' 2008 federal income tax refund of \$8,256, community pre-distributions to Carole Hoffman in the amount of \$25,500, her Scottrade Account with a June 30, 2010 balance of \$47,578, her Smith Barney IRA with a May 30, 2010 balance of \$9,643, Dr. Hoffman's personal Roth IRA (awarded to Carole Hoffman per the terms of the prenuptial agreement she now attempts to invalidate), and her 2006 Lexus. Carole Hoffman also retained all commissions she secretly received from the sale of Dr.

Hoffman's Woodinville home, the purchase of the Trilogy home, and the purchase of the Sun Valley home, which she justified at trial through the provision of the prenuptial agreement providing she could retain \$75,000 of prospective income as her separate property.

**A. The Trial Court Properly Upheld the Prenuptial Agreement as Substantively and Procedurally Fair.**

Carole Hoffman asserts a test for prenuptial agreements, which is not based in Washington case law and the *Matson* test, as explained below, requiring the Court to analyze the enforcement of prenuptial agreements based upon being both substantively and procedurally fair. Res. Br. 44. Carole Hoffman further argues a substantively unfair prenuptial agreement, assuming determined as such, can on its own invalidate the agreement. Res. Br. 46. Carole Hoffman cites the case of *In re Marriage of Burke*, 96 Wn. App. 474 (1999), for this proposition. In *Burke*, the facts are distinguishable from the case at issue, as the parties were involved in a child custody determination in which both parties sought custody of their infant child. See *Burke*, 96. Wn. App. at 476. The Court held as follows:

[b]ut the waiver of rights under RCW 26.09.140, as it applies to parenting plan issues, is not binding upon the court because such waivers violate public policy. The state's interest in the welfare of children requires that the court have the discretion to make an award of attorney fees and costs so that a parent is not deprived of his or her day in court by reason of financial disadvantage.

*Burke*, 96 Wn. App. at 480. In this case, the parties had no children of the marriage, and thus, the prenuptial agreement did not effect a parties' right to provide for the welfare of children--the only issues at trial were division of property and debt, an attorney's fees request, and the validity of a prenuptial agreement which governed the issues.

Lastly, Carole Hoffman argues the fairness of the prenuptial agreement should be determined at the time of property and debt distribution, and the prenuptial agreement at issue prevented the accumulation of community property. Res. Br. 47. First, the substantive fairness of the agreement is to be determined at the time of enforcement, not thereafter. *In re Marriage of Bernard*, 165 Wn.2d 895, 902 (2009). Second, the prenuptial agreement, as further discussed below, was substantively fair at the time of execution.

In Washington, as a matter of public policy, courts generally favor freely and voluntarily executed prenuptial agreements because they are “conducive to marital tranquility and the avoidance of disputes about property in the future.” *Dewberry v. George*, 115 Wn. App. 351, 364 (2003)<sup>1</sup> (quoting *Friedlander v. Friedlander*, 90 Wn.2d 293, 301 (1972)). A prenuptial agreement is a contract between parties in a marriage. *Id.* Thus, when a court interprets a prenuptial agreement, principles of contract law apply. *Id.* The burden of proof regarding the enforcement of a prenuptial agreement is on the party requesting the agreement be enforced. *Friedlander*, 80 Wn.2d at 300.

Regarding whether to enforce a prenuptial agreement, Washington courts utilize the two (2) prong *Matson* test. *In re Marriage of Matson*, 107 Wn.2d 479, 482-83 (1986); *In re Marriage of Foran*, 67 Wn. App. 242, 249 (1992); *Bernard*, 165 Wn.2d at 902. First, the two (2) prong test requires a court to analyze the fairness of the agreement. *Matson*, 107 Wn.2d at 482. If the first prong is met, the analysis ends and the agreement may be enforced;

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<sup>1</sup> The husband in *Dewberry* argued Washington law prohibited prenuptial agreements because of their affect on community property law and the public policy underpinning community property law. *Id.* With regard to the husband's argument, the Court stated, “[t]his is not an accurate statement of Washington law.” *Id.* Further, the Court proclaimed Washington courts have long held that a husband and wife may contractually modify the status of their property.

however, if the first prong is not met, a court must determine the agreement contained full disclosure and was entered voluntarily on independent legal advice. *Id.* at 483. Therefore, assuming *arguendo* a court finds a prenuptial agreement lacks fairness, it still may validate a prenuptial agreement if the party not seeking enforcement of the agreement voluntarily executed the agreement based upon independent legal advice. *Id.*

Washington courts consider a wide range of factors in determining whether the execution of a prenuptial agreement is executed knowingly and voluntarily. These factors include, but are not limited to the following:

The bargaining positions of the parties, sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date are some of the factors involved in the circumstances surrounding the document signing.

*Id.* Other considerations include the identity of the person who prepared the agreement, the relative business experience of each spouse, the relative values of the parties' estates at the time the agreement is signed, the amount of time the parties had in which to review the agreement once drafted, whether or not both parties received a copy of the agreement, the amount of time between the

drafting of the agreement and the assertion of rights under the agreement, and the number and nature of instances in which the parties revisit or review the agreement. See *Hamlin v. Merlino*, 44 Wn.2d 851, 866 (1954); *In re Marriage of Crawford*, 107 Wn.2d 493, 497-98 (1986).

The other cases cited by Carole Hoffman in support of her argument the prenuptial agreement should not be enforced are factually distinguished from the case at issue.

In the Supreme Court case *In re Marriage of Bernard*, 165 Wn.2d 895 (2009), the husband's net worth was approximately \$25,000,000 million dollars, and the wife had a net worth of approximately \$8,000 at the time the parties married. *Id.* at 898. The husband began drafting the prenuptial agreement in January 2000, but kept it from the wife until June 20, 2000. *Id.* at 899. The wife met with her attorney on July 5, 2000; however, the wife's attorney received a different draft of the prenuptial agreement that was "substantially different" than the original draft of the agreement. *Id.* The wife's attorney testified at trial that he did not have sufficient time to fully review and process the substantially altered version of the draft of the agreement prior to the wedding scheduled three (3) days after the wife's attorney received the

altered draft. *Id.* Rather, the wife's attorney sent correspondence to the wife providing "five major areas of major concern." *Id.*

Specifically, the wife's attorney testified as follows:

[m]y job was [to] tell her don't sign the [prenuptial] agreement. She signed it. Now we're going to fix it. Well, okay. The agreement was that the-the agreement she made, we were going to limit it to certain items.

*Id.* at 900 n.2. Moreover, the husband testified at trial if the prenuptial agreement was not executed, he would have called off the wedding. *Id.* The wedding was set at the Seattle Tennis Club and included approximately two hundred (200) guests. *Id.* at 900. The day of the wedding, the parties executed a "side letter" providing there would be a renegotiation of the wife's attorney's concerns. *Id.* The terms of the "side letter" restricted the scope of any renegotiation. *Id.* at 901. As the trial court found the prenuptial agreement lacked substantive fairness, it turned to the issue of procedural fairness. *Id.* The trial court concluded the prenuptial agreement was procedurally unfair because the terms of the "side letter" restricted the scope of renegotiation. *Id.* at 913-914.

The Supreme Court in *Bernard* analyzed whether the "side letter" cured the substantive and procedural unfairness of the prenuptial agreement. *Id.* 903. In the Supreme Court's

determination the prenuptial agreement was neither substantively or procedurally fair, the Court reiterated the test for validity of prenuptial agreements is the two (2) prong *Matson* test. *Id.* at 904-905.

In the Court of Appeals case *In re Marriage of Foran*, 67 Wn. App. 242 (1992), the husband presented the prenuptial agreement to the wife on January 10, 1980, one (1) day prior to the parties' wedding trip to Las Vegas. *Id.* at 245. The wife executed the agreement on January 11, 1980. *Id.* The wife was unrepresented by an attorney in the process of reviewing and executing the prenuptial agreement. *Id.* The wife testified to three (3) major factors compelling her to sign the agreement: (1) pressure due to preparation for wedding trip, (2) pressure in the parties' trucking business, including a potential lawsuit, and (3) the husband's history of domestic violence. *Id.* at 246. The wife testified the husband told her she would be signing the agreement and "she knew she would be hit if she did not sign the paper." *Id.* Regarding the terms of the prenuptial agreement, it permitted the husband to wholly prohibit or substantially prohibit the establishment of community property. *Id.* The Court found the prenuptial agreement "patently unreasonable," due to the fact it prohibited the wife's

ability to have an interest in the husband's separate property trucking business. *Id.* at 255. If the contract were enforced, it provided "virtually no community property." *Id.* at 256.

In the Supreme Court case *In re Marriage of Matson*, 107 Wn.2d 479, the husband's "specific intent [was to] mak[e] certain everything obtained in the future would be separate and go to his sons." *Id.* at 480. This intent was never made apparent to the wife. *Id.* Regarding the review and execution of the prenuptial agreement, the week before the marriage, the parties' met with husband's attorney two (2) times. *Id.* The first meeting occurred four (4) days before the marriage and involved the parties discussing the purpose of prenuptial agreements. *Id.* Immediately prior to the wedding, the couple met again with the husband's attorney and executed the prenuptial agreement. *Id.* "The attorney did not advise [the wife] to seek independent counsel but did say to both parties, if '[y]ou want somebody else to look at this, fine.'" *Id.* at 481. In addition, the husband testified if the wife did not sign the prenuptial agreement, the wedding would have been delayed. *Id.* The Court found that due to the very brief period between initial disclosure of the prenuptial agreement to the wife and execution of

said agreement, the wife did not have a sufficient opportunity to waive her rights to the husband's property. *Id.* at 487.

In this case, the above-referenced cases are wholly distinguishable. First, Carole Hoffman elected to not have her attorney testify at trial. Thus, no evidence could be presented to the Trial Court regarding negotiation of the prenuptial agreement except for the testimony of the parties and Dr. Hoffman's attorney. Moreover, Carole Hoffman asserted attorney-client privilege regarding any communication between her attorney and herself as it pertained to the execution of the prenuptial agreement. RP, August 18, 2010, p.174-75. The only documentary evidence presented to the Trial Court regarding Carole Hoffman's understanding of, review of, and execution of, the prenuptial agreement came in the form of letter correspondence and drafts of the prenuptial agreement exchanged between counsel. Ex. 146; Ex. 147; Ex. 148; Ex. 149.

As to Carole Hoffman's argument the Trial Court "erred in entering a finding purporting to declare, without analysis, that the prenuptial agreement was substantively fair," (Res. Br. 35) "a trial court's decision may be sustained on any theory within the pleadings and the evidence, even if the trial court did not consider

it." *Foran*, 67 Wn. App. at 248. Moreover, a court must analyze the substantive fairness of the agreement "based on the circumstances surrounding the execution of the agreement," not to analyze the substantive fairness at the time of enforcement. *Bernard*, 165 Wn.2d at 904. The Court in *Bernard* provided to analyze the substantive fairness of the prenuptial agreement at the time of enforcement would "change the test from one of fairness to fortuity." *Id.*

In this case, regarding the substantive prong of the *Matson* analysis, the Court did analyze the substance of the prenuptial agreement at the time of execution as follows:

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

RP, August 26, 2010, p. 948.

At the time the prenuptial agreement was executed in 2000, Dr. Hoffman's mother was still alive and he had only one (1) trust,

originally established by his father in 1974. RP, August 24, 2010, p. 566-67; Ex. 146. The value of this trust was provided in the prenuptial agreement at \$800,000. Ex. 146. The Hoffman Family Trusts were not established until 2006, after his mother's death at the end of 2005. Ex. 139. To scrupulously provide full disclosure, Dr. Hoffman listed \$5,000,000 as an expectancy. Ex. 146. Thus, at the time the prenuptial agreement was executed, Dr. Hoffman's net worth was not \$8,000,000 (Res. Br. 36), it was approximately \$3,000,000. RP, August 24, 2010, p. 566-67; Ex. 146.

At the time the prenuptial agreement was executed, Carole Hoffman listed a settlement from a lawsuit against Piper-Jaffray, which she had been pursuing for several years, and fully anticipated to win--also an expectancy. RP, August 18, p. 200; Ex. 146. The prenuptial agreement further specified Carole Hoffman was entitled to retain the first \$75,000 of her earned income as separate property, to retain Dr. Hoffman's Roth IRA in event of dissolution, and to be provided the ability to remain in Dr. Hoffman's home for the remainder of her life if still married at the time of Dr. Hoffman's death--no such provisions were made for Dr. Hoffman. Ex. 146.

Regarding the procedural fairness of the prenuptial agreement, Carole Hoffman's second attack on the contract, she testified Dr. Hoffman and she commenced prenuptial agreement discussions in early July 2000. RP, August 18, 2010, p. 50. Carole Hoffman was represented throughout the drafting of the prenuptial agreement. RP, August 18, 2010, p. 54. Carole Hoffman met with Margaret Langlie on two (2) separate occasions in Ms. Langlie's office to discuss the terms of the premarital agreement and to execute the premarital agreement. RP, August 18, 2010, p. 57, 67. Carole Hoffman also testified she worked with Ms. Langlie via telephonic and facsimile communication. RP, August 18, 2010, p. 190-191. Regarding the premarital agreement's terms, Margaret Langlie drafted a letter on behalf of Carole Hoffman dated July 24, 2000 to Dr. Alan Hoffman's attorney, Hugh Judd, requesting changes to the draft prenuptial agreement. RP, August 18, 2010, p. 185-186; Ex. 147. Two (2) separate drafts of the premarital agreement were admitted into evidence at trial--one (1) dated July 27, 2000, and another draft dated August 1, 2000. RP, August 18, 2010, p. 186-188; Ex. 148; Ex. 149. Subsequent to the first draft of the premarital agreement, it was changed pursuant to Carole

Hoffman's request through counsel, Margaret Langlie. RP, August 24, 2010, p. 557.

Substantial evidence was presented at trial regarding Carole Hoffman's contract experience and general legal acumen. RP, August 18, 2010, p. 191. Carole Hoffman had substantial experience with contract-related work for her business, Eagle Satellite Incorporated. RP, August 18, 2010, p. 191. In this endeavor, Carole Hoffman negotiated leases and reviewed contracts with manufacturers. RP, August 18, 2010, p. 191-192. In addition, Carole Hoffman spent many years before, plus the first five (5) years of, the parties' marriage litigating *pro se* her Piper Jaffray lawsuit. RP, August 24, 2010, p. 545. Carole Hoffman's claim that Dr. Hoffman's vacation requirements were the reason she could not build up a separate estate, as allowed for in the pre-nuptial agreement, are self-serving, in opposition to her demand for an allowance in the prenuptial agreement for her to retain her work earnings as separate property, and in opposition to her previous work history. RP, August 24, 2010, p. 544-546. Carole Hoffman's attempt to portray herself, at age fifty-five (55), as an uninformed new bride (Res. Br. 1-3) was belied by and the fact she was married two (2) times previously in conjunction with her

business/legal acumen throughout her life. RP, August 18, 2010, p. 191-192; RP, August 24, 2010, p. 545.

Carole Hoffman asserts the Trial Court unfairly shifted the burden of enforcement of the prenuptial agreement to Carole Hoffman. Res. Br. 39-40. Carole Hoffman supports this argument with reference to the Trial Court stating there was no "duress."

Res. Br. 39-40. The Trial Court did not shift the burden to Carole Hoffman, rather the Trial Court provided the following:

[t]here are lots of reasons that couples would not discuss [a prenuptial agreement] much, but it doesn't mean it wasn't being thought about. This was Ms. Hoffman's third marriage, it was Dr. Hoffman's third marriage. He indicated he had a prenuptial, so perhaps he had been thinking about it lots of times, we don't know that, and again I don't know -- we don't have evidence, we don't have a writing that indicates it was talked about, but the court in no way finds that being presented 45 to 60 days before the actual marriage with needing to sign a prenuptial or meeting with your attorney having more than a week to look at a writing, thinking about a writing, ask for changes, have those changes made and signing a writing in any way constitutes duress *or is somehow procedurally improper*.

RP, August 26, 2010, p. 947 (emphasis added). While the Trial Court may have stated the word "duress," it did not shift the burden to Carole Hoffman, it analyzed the evidence before it, including Carole Hoffman being represented throughout the negotiations,

requesting changes to the prenuptial agreement, having the changes made to the prenuptial agreement, and freely and voluntarily executing the prenuptial agreement after representation and changes made to the prenuptial agreement. Substantial evidence was presented to the Trial Court to enforce the parties' prenuptial agreement.

**B. The Trial Court Properly Upheld the Prenuptial Agreement After Examining the Parties' Actions During Marriage Relative to the Terms of the Prenuptial Agreement.**

Carole Hoffman asserts the Trial Court should not have enforced the prenuptial agreement because the parties did not observe the agreement during marriage. Res. Br. 47-49. In *In re Marriage of Fox*, 58 Wn. App. 935 (1990), cited as authority by Carole Hoffman, the trial court found the wife transferred "all her separate funds during the marriage" to the parties' joint community checking account and the funds were spent on community assets. *Id.* at 936. The court also found the husband transferred his \$36,000 of inheritance into the parties' joint bank account. *Id.* at 937. The Court of Appeals engaged in a legal analysis of whether the parties rescinded the agreement. *Id.* at 938-939. Specifically, the Court of Appeals provided, "[t]he laws of contract respecting

rescission of antenuptial agreements, whether in writing or not, are applicable: an agreement to rescind *must* also be a valid contract, requiring assent of the parties." *Id.* at 939 (emphasis added).

Under the above-referenced facts, the Court of Appeals determined the parties' conduct evidenced an intent to disregard the agreement completely. *Id.* at 939-940.

Dr. Hoffman scrupulously followed the full intent of the prenuptial agreement--although, as Carole Hoffman claimed, his University of Washington paycheck was deposited in his separate account for the first six (6) years of their marriage, he immediately transferred all but that required to pay home real estate taxes and insurance to a Bank of America Account #0662, in their joint names, which Ms. Hoffman solely managed. RP, August 24, 2010, p. 561-566. Dr. Hoffman's deposit of his paychecks, and payment of the parties' expenses was jointly agreed upon, according to terms in the prenuptial agreement, and in concert with a financial advisor almost immediately after marriage. RP, August 24, 2010, p. 561-566. Carole Hoffman's allegation that Dr. Hoffman did not live up to the terms of the prenuptial agreement in not continuing to fund his Roth IRA to his maximum allowed ability is facetious--after he and his sister began taking trustee fees from their mother's

accounts, because Dr. Hoffman testified he could no longer fund the Roth IRA due to his tax return income exceeding the limit for which Roth IRA contributions could be made, and to be scrupulously fair to his wife, he began contributing an extra, unmatched, \$1,000 per month to his TIAA/CREF retirement account, of which Carole Hoffman was awarded sixty percent (60%) in the Decree of Dissolution; he also started a spousal IRA for her benefit, which she was awarded in its entirety in the Decree of Dissolution. RP, August 24, 2010, p. 568-569; CP 173-180.

**C. The Appellate Court Should Not Award Attorney's Fees to the Wife.**

Regarding Carole Hoffman's request for attorney fees and costs for this appeal, each party should be responsible for their own separate attorney's fees and costs in this matter.

**III. CONCLUSION**

The Supreme Court's intention that separate property is just as sacred as community property is clear. Moreover, the Court's decision that title alone does not determine ownership was made clear in the recent *Borghi* case. A person's intent to gift separate property to the community must be demonstrated by the party asserting the gift. Carole Hoffman did not produce substantial

evidence at trial to meet this burden. In contrast, the evidence at trial demonstrated deceit (and possibly fraud) on the part of Carole Hoffman in having her name on the title to the Trilogy house. The size of Dr. Hoffman's estate (although for the benefit of his children, grandchildren, and future generations) should not bear on the Court's legal determination as to the nature of his separate property. The Trial Court erred in this respect.

Dr. Hoffman's actual estate, not counting the trusts that are specified to go to his children and grandchildren, are the result of forty-seven (47) years of labor and careful saving, first in the army, then in a small start-up company that was eventually disbanded, and then teaching and researching at the University of Washington in a non-tenured position. The sum of Carole Hoffman's arguments revolve around the unfairness of the approximate \$900,000 she was awarded in the dissolution--which is more than Dr. Hoffman's entire take-home pay during their entire eight and one-half (8.5) year marriage. If the Court of Appeals does not reverse the Trial Court's decision as requested by Dr. Hoffman, it should not grant the relief requested by Carole Hoffman due to the parties' substantively and procedurally fair prenuptial agreement.

Dated: September 9, 2011

Respectfully submitted



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Alan Hoffman



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**COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON**

**In re the Marriage of:**

**NO. 66193-1-I**

**CAROLE HOFFMAN,**

**DECLARATION OF DELIVERY**

**Respondent/Cross Appellant,**

**And**

**ALAN LOWELL HOFFMAN,**

**Appellant/Cross Respondent.**

**Declaration of Delivery**

I, Lane Ronne, declare as follows:

I am the legal assistant to attorney Paul F. Eagle and J. Blake Hilty of Eagle Law Offices, PS. On the 9th day of September, 2011, I forwarded via ABC Legal Messenger Service to, Ted D. Billbe, attorney for Respondent/Cross Appellant, and to Catherine W. Smith, & Valerie A. Villacin, attorneys for Respondent/Cross Appellant, a copy of the Appellant's/Cross Respondent's Reply Brief and the Declaration of Delivery dated September 9, 2011 at the addresses listed below.

**DECLARATION OF DELIVERY**  
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

**DATED** this the 9th day of September, 2011 at Seattle, Washington.

EAGLE LAW OFFICES, PS



Lane Ronne, Legal Assistant

**DECLARATION OF DELIVERY**

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