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Prenuptial Agreements in Washington: a Primer

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Prenuptial agreements, or the lack of them, have been very much in the news. From the speculation that Melania Trump refused to move from New York to Washington, D.C., until she renegotiated her prenup with then-President Elect Trump to the somewhat startling news that Bill and Melinda Gates did not have such an agreement, the topic has gotten much press.[1] A Google search undertaken on June 21, 2021, brought up over 3,000,000 hits for the query, "Do you need a prenuptial agreement?" Even before the recent spate of media attention, the number of prenuptial agreements was rising, perhaps as a result of the tendency of millennials to marry later than earlier generations did, after they have had the opportunity to accumulate more assets.[2] As a result, lawyers need at least a basic understanding of the law surrounding the creation and enforcement of prenuptial agreements.

In *In re Marriage of Bernard*, the Washington Supreme Court reaffirmed Washington's long-standing approach, requiring a two-prong analysis in determining whether a prenuptial agreement can be enforced.[3] First, is the agreement substantively fair to the party opposing its enforcement? "If the agreement makes fair and reasonable provisions for the spouse not seeking its enforcement, the analysis ends; the agreement is enforceable." And second, if the agreement is substantively unfair, was it nonetheless procedurally fair? If either prong is satisfied, the agreement is enforceable. The analysis of these two prongs tends to overlap, with courts requiring a greater level of procedural fairness when the agreement is "patently unreasonable."[4]

This two-prong analysis also controls where the parties were not legally married but had entered into a Committed Intimate Relationship.[5] The two-prong analysis is also applied when the agreement was entered into after marriage.[6]

The potential reach of a prenuptial agreement is very broad, including property division at dissolution, estate planning, maintenance and attorneys' fees. However, provisions in an agreement that purport to affect the rights of children are not enforceable.[7]

The fairness and enforceability of a prenuptial agreement is determined as of the date of execution. As noted by the court in *Bernard*, an analysis based on date of enforcement "would change the test from one of fairness to fortuity."[8] If a prenuptial agreement fails to meet the two-prong test, it is void, not voidable. Accordingly, it cannot be ratified by conduct: The fact that the parties conducted their affairs in compliance with the agreement does not render it enforceable.[9] In addition, the passing of time during a marriage does not support a laches defense to a postmortem challenge to a prenuptial agreement.[10]

The burden of proving the enforceability of a prenuptial contract is on the party seeking its enforcement.[11]

Separation contracts — contracts or agreements entered in contemplation of dissolution or separation — are authorized by section 26.09.070 of the Revised Code of Washington (RCW). Such an agreement is enforced unless "unfair at the time of its execution." A discussion of the enforceability of separation contracts is beyond the scope of this article.

Was the agreement substantively fair to the party objecting to its enforcement?

For substantive fairness, courts have considered several factors for determining whether an agreement fairly provides for the spouse not seeking enforcement, including: (1) the proportional benefit between the parties, (2) restrictions on the creation of community property, (3) prohibitions on the distribution of separate property upon dissolution, (4) the economic means of each spouse, (5) preclusion of common law and statutory rights to both community and separate property upon dissolution, (6) limitations on inheritance, (7) prohibitions on awards of maintenance, and (8) limitations on the accumulation of separate property.[12]

The overarching question is whether the agreement fairly provides for the objecting spouse. For example, an agreement that is "disproportionate to the respective means of each spouse, which also limits the accumulation of one spouse's separate property while precluding any claim to the other spouse's separate property, is substantively unfair."[13] An agreement that deems any contribution to a spouse's separate property, whether by way of labor or community financial resources, to be a "gift" to the owning party is also unreasonable.[14] As a general rule, the further an agreement deviates from the statutory provisions contained in Chapters 09 and 16 of Title 26 of the RCW, the more likely it will be to

present issues of substantive unfairness.

In contrast, where the parties are of relatively equal economic stature at the time of the execution of the agreement, with each capable of working, and where there is no waiver of the statutory right to a just and equitable distribution at dissolution, an agreement to treat all wages and accumulations therefrom as separate property is substantively fair and enforceable.[15]

Was the agreement executed in circumstances that demonstrate procedural fairness? As summarized by the court in *Kellar v. Estate of Kellar*,

> To determine whether a prenuptial agreement is procedurally fair, we consider (1) whether there was full disclosure by the parties of the amount, character, and value of the property, and (2) whether the agreement was entered into freely and voluntarily, upon independent advice, and with full knowledge by both spouses of their rights.[16]

Courts review the totality of the circumstances to decide whether the challenging spouse "was in a fair position to sign the agreement fairly and intelligently."[17]

Whitney v. Seattle-First National Bank is often cited for the proposition that independent counsel is not always required.[18] However, the agreement in *Whitney* was fair to the challenging spouse, who had sophisticated knowledge of her husband's assets. Research has disclosed no case where a substantively unfair agreement was upheld, absent the ability to consult with independent counsel. Certainly, if an agreement is "patently unreasonable," independent counsel is required.[19]

The independent counsel requirement means only that the challenging spouse had a meaningful opportunity to consult. Counsel must have been given the proposed agreement far enough before the wedding to review it fully and, if appropriate, to suggest changes.[20] However, the fact that independent counsel may have been ineffective does not invalidate the agreement but is a matter to be addressed in a malpractice action against counsel."[21]

In addition, a party acting under the pressure of an impending wedding, particularly when there is a belief that the wedding will be canceled if the agreement is not signed, is not acting voluntarily.[22]

Enforceability of oral agreements. A prenuptial agreement is an agreement "made upon consideration of marriage" and thus within the statute of frauds.[23] In *Dewberry v. George*, the court upheld an oral agreement to keep earnings and accumulation from those earnings separate, under the doctrine of "part performance," when the parties, throughout their marriage, acted consistent with such an agreement.[24]

Conclusion. A review of the caselaw gives an unduly pessimistic view of the enforceability of prenuptial agreements. Agreements with the hallmarks of fairness are unlikely to result in litigation. When the parties and their attorneys remember that the spouses owe each other "the highest fiduciary duty," pitfalls are likely to be avoided and the resulting contract will be enforceable.[25] ■

Hon. Helen L. Halpert (Ret.) retired from the King County Superior Court in 2018 after serving on that court for nearly 19 years. She currently is a mediator/arbitrator at JAMS, specializing in family law cases.

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[1] Mary Jordan, *The Art of Her Deal: The Untold Story of Melania Trump*.

[2] Press Release from the American Association of Matrimonial Lawyers (October 16, 2013), *https://www.prnewswire.com/news-releases/increase-of-prenuptial-agreements-reflects-improving-economy-and-real-estate-market-228034921.html; https://www.cnbc.com/2018/07/02/more-millennials-sign-prenups-before-marriage.html*.

[3] *In re Marriage of Bernard*, 165 Wn. 2d 895, 902 (2009). *Accord, In re Marriage of Matson*, 107 Wn. 2d 479, 482 (1986) ("If fair and fairly made, we have held prenuptial agreements between competent parties.").

[4] *In re Estate of Crawford*, 107 Wn. 2d 493, 497 (1986); *In re Marriage of Kaye*, 183 Wn. App. 1045 (unpublished, 2014).

[5] *In re the Parentage of G.W.-F. and A.W.-F., Children*, 170 Wn. App. 631 (2012).

[6] *In re Marriage of Cox*, 9 Wn. App.1017 (unpublished, 2019).

[7] *In re Marriage of Littlefield*, 133 Wn. 2d 39, 58 (1997); *In re Marriage of Burke*, 96 Wn. App. 474, 477-479 (1999).

[8] *Bernard*, 165 Wn. 2d at 904.

[9] *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 584 (2012).

[10] *In re Estate of Crawford*, 107 Wn. 2d 493, 501 (1986).

[11] *Bernard*, 165 Wn. 2d at 911.

[12] *Kaye* at *5 (internal citations omitted).

[13] *Bernard*, 165 Wn. 2d at 905.

[14] *In re Marriage of Foran*, 67 Wn. App. 242, 250 (1992).

[15] I*n re Marriage of Dewberry and George*, 115 Wn. App 358, 364 (2003).

[16] *Kellar*, 172 Wn. App. at 585 (internal citations omitted).

[17] *Mattson*, 107 Wn. 2d at 485.

[18] *Whitney v. Seattle-First National Bank*, 90 Wn. 2d 105, 111 (1978).

[19] *In re Estate of Crawford*, 107 Wn. 2d at 496.

[20] *Bernard*, 165 Wn. 2d at 905-907.

[21] *Kellar*, 172 Wn. App. at 589.

[22] *Matson*, 165 Wn. 2d at 484-486.

[23] RCW 19.36.010(3).

[24] *Dewberry*, 115 Wn. App. at 363.

[25] *Peter v. Skalman*, 27 Wn. App. 247, 251 (1980).