IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In the Matter of the Marriage of CAROLE HOFFMAN, Respondent, and ALAN LOWELL HOFFMAN, Appellant.	No. 66193-1-I DIVISION ONE UNPUBLISHED OPINION FILED: May 14, 2012

Leach, C.J. — In this marriage dissolution proceeding, Alan Hoffman appeals the trial court's property distribution. Specifically, he argues that the court disregarded the parties' prenuptial agreement, mischaracterized the Redmond, Washington, home as community property, and erroneously awarded Carole Hoffman 50 percent of that home's value. He also appeals the award of reimbursement to Carole[1] for the increase in value to his separate property produced by improvements made during marriage and the award of attorney fees. Carole cross appeals the court's enforcement of the prenuptial agreement and denial of maintenance. Finding no error, we affirm.

Background

Alan and Carole Hoffman were married on August 5, 2000. About a month

[1] We refer to the parties by their first names for clarity. We intend no disrespect.

before the wedding, Alan recommended they execute a prenuptial agreement to protect their separate assets.[2] Then they traveled to Europe for a work-related conference and vacation. While abroad, they did not discuss the prenuptial agreement. After they returned, Carole met with Margaret Langlie, an attorney Alan recommended to her, and gave Langlie a copy of the draft agreement. Langlie was scheduled to leave town on vacation soon after, but she reviewed the agreement and proposed several changes that Alan's attorney incorporated into the final draft the parties signed.

The agreement provided that in the event of a divorce, each party would receive all that party's separate property and the other party would neither assert nor accept any interest in it. Each party also agreed not to assert or accept "any payment for support or other maintenance." They also agreed that all of both parties' personal service earnings would be community property, except that Carole could use up to a lifetime maximum of $75,000 of her earnings to pay her existing debts and accumulate a separate property account. The agreement also required Alan to make the maximum allowable contributions to a Roth IRA (individual retirement account), which would be community property with Carole as the beneficiary and to be awarded to Carole in the event of a divorce.

Carole filed for dissolution in 2009. After a six-day trial, the trial court determined that the prenuptial agreement was valid and enforceable. The parties hotly contested the characterization of the couple's three residences—the primary residence

[2] Both Alan and Carole had children from previous marriages and came into the relationship with the expectation of significant separate assets—Alan as the beneficiary of his family trusts and Carole through an anticipated financial award in a lawsuit against her former investment advisor.

in Redmond (Trilogy), a vacation home in Sun Valley, Idaho (Lane Ranch), and Alan's house in Woodinville, Washington, which the parties sold in 2006. The court characterized Trilogy as community property and the other homes as Alan's separate property. It awarded Carole $75,000 as reimbursement for the increase in the value of the Woodinville home attributable to postmarriage improvements made to prepare it for sale. Carole also received 60 percent of the community portion of Alan's TIAA-CREF retirement account, as well as Alan's Roth IRA and a spousal IRA he had set up. The court valued Carole's award at $568,000. The court denied Carole's request for maintenance, but it did award her $70,000 in attorney fees.

Alan claims that the court erred by characterizing the Trilogy residence as community property and awarding Carole 50 percent of its stipulated value. He also maintains the prenuptial agreement prevents Carole from receiving any of the increase in value of the Woodinville home, maintenance, or attorney fees. In a cross appeal, Carole alleges that the court erred by finding the prenuptial agreement was valid and enforceable and by refusing to award her maintenance. Specifically, she argues that the agreement is substantively and procedurally unfair and that Alan invalidated the agreement by not honoring its terms throughout the marriage. She also requests an award of attorney fees on appeal.

Standard of Review

Absent a factual dispute, we review the substantive fairness of a prenuptial agreement de novo.[3] Procedural fairness presents mixed questions of legal policy and

[3] In re Marriage of Foran, 67 Wn. App. 242, 251 n.7, 834 P.2d 1081 (1992) (citing Berg v. Hudesman, 115 Wn.2d 657, 668, 801 P.2d 222 (1990)).

fact.[4] Accordingly, we review procedural fairness as a question of law, but viewed in the light of the trial court's undisputed findings of fact or those supported by substantial evidence.[5] Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true.[6] While the trial court's property award will be reversed only on a showing of manifest abuse of discretion,[7] the characterization of property as community or separate is a question of law that we review de novo.[8]

Analysis

We begin by addressing Carole's challenge to the prenuptial agreement's validity. She argues that the court erred by enforcing the agreement. Courts employ a two-pronged analysis for determining the validity of a prenuptial agreement.[9] First, the court decides whether the agreement makes fair and reasonable provision for the party not seeking enforcement of the agreement.[10] If it does, the analysis is at an end, and the court will enforce the agreement.[11] If the agreement does not make fair and reasonable provision for the opposing spouse, then the court must determine "'(1) whether full disclosure has been made by [the parties] of the amount, character and value of the property involved, and (2) whether the agreement was entered into fully

[4] Foran, 67 Wn. App. at 251.
[5] Foran, 67 Wn. App. at 251.
[6] Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).
[7] In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999); In re Marriage of Fiorito, 112 Wn. App. 657, 667-68, 50 P.3d 298 (2002).
[8] In re Marriage of Skarbek, 100 Wn. App. 444, 447, 997 P.2d 447 (2000).
[9] In re Marriage of Matson, 107 Wn.2d 479, 482, 730 P.2d 668 (1986).
[10] Matson, 107 Wn.2d at 482.
[11] Matson, 107 Wn.2d at 482.

and voluntarily on independent advice and with full knowledge by [both spouses of their] rights.'"[12] Carole asks that we modify the test adopted by our Supreme Court to require that an agreement be both substantively and procedurally fair to be enforceable. We must follow the law as announced by our Supreme Court.

Carole argues that the agreement is substantively unfair because of the vast wealth disparity between the parties after trial. She relies heavily on the concurring opinion in In re Marriage of Matson[13] to argue that the agreement's substantive fairness should be determined as of the time of enforcement. But our Supreme Court recently rejected an invitation to alter its analysis to adopt this test, noting, "To do so would change the test from one of fairness to fortuity."[14] Thus, we evaluate the substantive fairness of a prenuptial agreement as of the time of execution.

An agreement disproportionate to the respective means of each party that also limits one spouse's accumulation of separate property while at the same time precluding any claim to the other spouse's separate property is substantively unfair.[15] That is not the case here. At the time Alan and Carole signed the agreement, they both expected significant separate property windfalls—Alan as the beneficiary of several multimillion-dollar family trusts, Carole from an anticipated $600,000 recovery from a pending lawsuit. The agreement protects all of these monies as each party's separate property. Further, the agreement allowed Carole to use $75,000 of her personal

[12] Matson, 107 Wn.2d at 483 (alterations in original) (quoting Whitney v. Seattle-First Nat'l Bank, 90 Wn.2d 105, 110, 579 P.2d 937 (1978)).

[13] 107 Wn.2d 479, 488-92, 730 P.2d 668 (1986) (Pearson, J., concurring).

[14] In re Marriage of Bernard, 165 Wn.2d 895, 904, 204 P.3d 907 (2009).

[15] Bernard, 165 Wn.2d at 905 (citing Matson, 107 Wn.2d at 486).

service earnings to create separate property, while all Alan's accumulated personal service earnings would become community property. And while the agreement protected Alan's premarriage retirement accounts, it also required him to fund a Roth IRA for Carole's benefit. With the benefit of hindsight, none of the provisions intended to protect Carole's interests have played out as well as she might have hoped at the time she signed the agreement—her lawsuit settled without a financial award, she chose not to work for most of the marriage and thus did not have earnings to build a separate property account, and due to legal restrictions on Roth IRA contributions, Alan could not continue funding this account. However, these subsequent developments do not alter the conclusion that the agreement itself did not disproportionately favor Alan at Carole's expense. Additionally, as reflected in the trial court's property distribution, the agreement allowed for the accumulation of substantial community property, primarily in the form of Alan's postmarriage retirement accumulations.

We find that the agreement was substantively fair, but even if it were not, it would still be enforceable based on procedural fairness. Procedural fairness depends on whether the parties have made full disclosure of the amount, character, and value of the property involved, and whether they entered the agreement voluntarily on independent advice and with full knowledge by both spouses of their rights.[16] Carole bases her procedural challenge upon the timing to the agreement and not upon the adequacy of Alan's disclosure. The undisputed trial testimony shows that Carole met with her own attorney to review the agreement more than a week before the wedding.

[16] Matson, 107 Wn.2d at 483 (quoting Whitney, 90 Wn.2d at 110).

Attorney Langlie suggested changes beneficial to Carole, and those changes were incorporated into the final draft. Carole entered the agreement voluntarily and knowingly, and we find that it was procedurally fair to both parties.[17]

Alternatively, Carole argues that the agreement is unenforceable because neither party followed its terms throughout the marriage. While she urged the trial court to invalidate the agreement for substantive and procedural unfairness, she never addressed the possibility that the parties' postmarriage conduct rendered the agreement unenforceable. This issue cannot be raised for the first time on appeal, and we decline to address it here.[18] Also, because we affirm the trial court's conclusion that the agreement was enforceable, we find no error in the court's denial of maintenance under the agreement's terms.

We next address Alan's challenges to the court's property distribution. Specifically Alan argues that the trial court erred by characterizing the Trilogy house as community property and awarding Carole 50 percent of its value, together with $75,000 in reimbursement for the community contribution to improvements that increased the value of the Woodinville home, and $70,000 in attorney fees. All property acquired during marriage is presumed to be community property.[19] The law favors characterizing property as community property "unless there is clearly no question of its

[17] Because we find the agreement both substantively and procedurally fair, we need not address Carole's request that we dispose of our Supreme Court's two-part analysis and craft a new rule that either substantive or procedural unfairness invalidates a prenuptial agreement.

[18] RAP 2.5.

[19] In re Marriage of Short, 125 Wn.2d 865, 870, 890 P.2d 12 (1995).

[separate] character."[20] A spouse may only overcome this heavy presumption with clear and convincing evidence of the property's separate character.[21]

Alan argues that substantial evidence exists to find the Trilogy home was his separate property. Even if that is the case, it misstates the question we must decide here—whether substantial evidence supported the trial court's characterization of the home as community property. We find that it did. We determine property's character as of the date it was acquired.[22] The Trilogy home was purchased during the marriage and is therefore presumptively community property. Further, the $65,000 earnest money deposit came from an account titled in Alan's name but where he regularly deposited his community wages and from which he paid community expenses.[23] Neither Alan's nor Carole's expert witnesses could trace the down payment back to Alan's separate property trust accounts. And despite an initial attempt to have Carole sign a quitclaim deed, Alan voluntarily titled the house in both their names. Based upon the totality of the circumstances, the trial court found that Alan intended to and did acquire the Trilogy property as community property.

Citing In re Estate of Borghi,[24] Alan correctly notes that no presumption arises from the names on a deed. However, the facts of Borghi distinguish that case from the one now before us. Years before she married, Jeanette Borghi purchased real estate

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[20] Brewer, 137 Wn.2d at 766-67.

[21] Kolmorgan v. Schaller, 51 Wn.2d 94, 98, 316 P.2d 111 (1957).

[22] In re Estate of Borghi, 167 Wn.2d 480, 484, 219 P.3d 932 (2009).

[23] The trial court did not characterize this account because at the time of trial, all funds in the account had already been depleted. However, it is clear from the record that separate and community funds were commingled here and used to pay community expenses.

[24] 167 Wn.2d 480, 488, 219 P.3d 932 (2009).

in her own name using her own funds.[25] Several months after she married, the grantor, in fulfillment of a real estate contract, delivered a special warranty deed naming "Robert G. & Jeanette L. Borghi, husband and wife" as grantees.[26] When Jeanette died without a will, her heirs disagreed whether the inclusion of Robert's name on this fulfillment deed changed the property from separate to community property.[27] The court held that including the husband's name on the deed did not create a presumption that Jeanette intended to gift her separate property to the marital community.[28] Here, because the trial court determined the character of the Trilogy property based upon the intent of the parties at the time of acquisition, looking to the totality of the circumstances at that time, Borghi does not apply. Although Alan presented evidence that he funded the remainder of the purchase price with his separate property trust funds, the trial court acted within its discretion when it found this insufficient to overcome the strong presumption that the house is community property, when considered with the other evidence of Alan's intent. Therefore, the record supports the trial court's characterization.

Alan also challenges the award of reimbursement for the improvements made during marriage to increase the value of the Woodinville home before it was sold. Alan argues that the prenuptial agreement provides that all proceeds from the sale of or increase in value to separate property shall be separate property. However, this provision addresses appreciation in value and does not address the circumstance

[25] Borghi, 167 Wn.2d at 482.
[26] Borghi, 167 Wn.2d at 482.
[27] Borghi, 167 Wn.2d at 482-83.
[28] Borghi, 167 Wn.2d at 488.

where a significant community contribution adds to the value of separate property.[29] Where there is direct and positive evidence that community labor led to an increase in value of a spouse's separate property, the marital community is entitled to reimbursement for that labor.[30] Carole presented evidence that she spent over 400 hours overseeing significant renovations to get the Woodinville house ready for sale, essentially acting as a general contractor. Alan does not dispute that these efforts added significant value to the Woodinville house. He only claims that the prenuptial agreement prohibited any reimbursement for this increase. The trial court properly interpreted the agreement and awarded Carole only reimbursement for value properly attributed to the community, maintaining all the proceeds of Alan's separate property contributions as his separate property.

Alan also argues that the court erred by awarding Carole attorney fees. Although he acknowledges that the prenuptial agreement does not expressly prohibit Carole from seeking attorney fees, he claims that this was implied in the agreement and that Carole's trial testimony that she believed the agreement prohibited a fee award established that it did. However, when interpreting a contract, "we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties."[31] The prenuptial agreement provides Carole shall not "assert any claim or accept any

[29] The agreement provides only that "Community Property shall not be invested towards or applied to improvements to either party's separate property."

[30] In re Marriage of Elam, 97 Wn.2d 811, 816-17, 650 P.2d 213 (1982).

[31] Hearst Comm'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

payment for support or other maintenance," but it does not prevent the court from making an equitable decision to award attorney fees. The record contains no evidence of mutual intent concerning this issue. Carole is unemployed, and two expert witnesses testified that she could need significant retraining and skills development to secure an administrative job paying somewhere between $10 and $15 per hour. We agree with the trial court that she has demonstrated need. Alan has significant assets through his family trusts and his personal investments and retirement accounts. He has the ability to pay. The court did not err by awarding Carole attorney fees. For the same reasons, we award her attorney fees on appeal conditioned upon her compliance with RAP 18.1.

Conclusion

Finding that substantial evidence supports the trial court's property distribution and award of fees, we affirm.

Leach, C.J.

WE CONCUR:

Dwyer, J.

Appelwick, J.