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DEPUTY

IN THE FAMILY DIVISION
IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

ANDREW FURER,

Plaintiff,

vs.

Case No. DV04-01626

ELOISA FURER,

Defendant.

Dept. No. 11

ORDER AFTER TRIAL

This is a divorce action that has been bifurcated for trial. Trial was held for 8 days on April 10-12 and May 1-5, 2006. The court has considered the pleadings and other relevant documents filed in this case, the testimony of the witnesses, the admitted exhibits and the argument of counsel. In accordance therewith the court finds and concludes as follows:

ISSUES TO BE DECIDED

The Order after Early Case Management Conference, filed December 3, 2005, describes the issues to be decided at this stage of the trial as:

- 1) The validity of the parties' postnuptial agreement;
- 2) The validity of the parties' marital settlement agreement; and,

1 6. When an attorney enters into a business relationship with a client which is, by its
2 terms, potentially advantageous to the lawyer, the court will closely scrutinize such a
3 transaction. *Williams*, at 108 Nev. at 471, 836 P.2d at 618.

4 7. "Under our case law, when an attorney deals with a client for the former's
5 benefit, the attorney must demonstrate by a higher standard of clear and satisfactory
6 evidence that the transaction was fundamentally fair and free of professional
7 overreaching." *Williams*, 108 Nev. at 472, 836 P.2d at 618.

8 8. "As a general proposition, lawyer-client agreements are necessarily subject to
9 greater scrutiny and stricter rules than transactions occurring between parties on an equal
10 footing." *Williams*, 108 Nev. at 472, 836 P.2d at 618.

11 9. Public policy dictates that:

12 When an attorney bargains with his client in a business transaction in a
13 manner which is advantageous to himself, and if the transaction is later
14 called into question, the court will subject it to close scrutiny. In such a
15 case, the attorney has the burden of showing that the transaction "was in all
16 respects fairly and equitably conducted; that he fully and faithfully
17 discharged all his duties to his client, not only by refraining from any
18 misrepresentation or concealment of any material fact, but by active
19 diligence to see that his client was fully informed of the nature and effect of
20 the transaction proposed and of his own rights and interests in the subject
21 matter involved, and by seeing to it that his client either has independent
22 advice in the matter or else receives from the attorney such advice as the
23 latter would have been expected to give had the transaction been one
24 between his client and a stranger." *Williams*, 108 Nev. at 472-73, 836 P.2d at
25 618-619 (quoting *Goldman v. Kane*, 329 N.E.2d 770, 773 (Mass. App. Ct 1975)).

26 10. "There is a great temptation for an attorney to temper his or her loyalty to a
27 client where the attorney's own financial interests are involved...In any transaction in
28 which an attorney is charged with obtaining a business advantage from a client, there is a

1 presumption of impropriety which may be overcome only by clear and satisfactory
2 evidence that the transaction was fundamentally fair, free of professional overreaching,
3 and fully disclosed. *Discipline of Singer*, 109 Nev. 1117, 1120-21, 865 P.2d 315, 317 (1993).

4 11. A fiduciary relationship also arises from the existence of the marriage itself.
5 *Williams*, 108 Nev. at 472, 836 P.2d at 618.

6 12. In *Applebaum v. Applebaum*, 93 Nev. 382, 384-85, 566 P.2d 85, 87 (1997) the court
7 stated in dictum that once a spouse announces an intention to seek a divorce, the other
8 spouse is on notice that their interests are adverse. In *Williams*, the court clarified that,
9 "The issue of whether a confidential relationship survives the announcement of an
10 intention to seek a divorce necessarily depends on the circumstances of each case."
11 *Williams*, 108 Nev. at 472 n.4, 836 P.2d at 618 n.4.

12 13. "Because of the presumed fiduciary relationship existing between parties who
13 are engaged to be married, a presumption of fraud exists where a premarital agreement
14 greatly disfavors one of the parties." *Sogg v. Nevada State Bank*, 108 Nev. 308, 312, 832 P.2d
15 781, 784 (1992).

16 14. This presumption may be overcome by a showing that the party
17 claiming disadvantage was not in fact disadvantaged. Factors to consider
18 include whether the disadvantaged party (1) had ample opportunity to
19 obtain the advice of an independent attorney, (2) was not coerced into
20 making a rash decision by the circumstances under which the agreement
21 was signed, (3) had substantial business experience and business acumen,
22 and (4) was aware of the financial resources of the other party and
23 understood the rights that were being forfeited. *Sogg*, 108 Nev. at 312, 832
24 P.2d at 784.

25 15. A marital settlement agreement can be set aside if a party thereto made a
26 false representation with knowledge or belief that the representation was
27 false or without sufficient basis for making the representation, the
28 representing party intended to induce the other party to act or refrain from

1 acting on the representation, and the other party justifiably relied on the
2 representation and was damaged thereby. *Blanchard v. Blanchard*, 108 Nev.
3 908, 910-11, 839 P.2d 1320, 1322 (1992).

4 16. Husbands and wives may enter into contracts between themselves, subject to
5 the general rules which control the actions of persons occupying relations of confidence
6 and trust toward each other. NRS 123.070.

7 17. The facts recited in a written instrument between parties are
8 conclusively presumed to be true. NRS 47.240(2).

9 18. ...the trial court in no instance is bound by the written agreement of the
10 parties to a divorce action. It may or it may not adopt, according to its
11 judgment, wisdom, and discretion, such written agreement if it deems the
12 same to satisfactorily care for the interests of the respective parties to the
13 action and the minor children, if any. It is not bound to do so, however, and
14 may, in its discretion, cast aside and refuse to adopt any such agreement
15 which the parties might have, with the utmost good faith, entered into. The
16 mere fact that the trial court does occasionally, and perhaps in most
17 instances, adopt as a part of its findings and decree an agreement which the
18 respective parties might have entered into settling and adjusting their
19 property rights and differences, and even payments of alimony, does not, of
20 itself, signify that it cannot, if it so desires, adopt its own. *Lewis v. Lewis*, 53
21 Nev. 398, 411, 2 P.2d 131, 136 (1931).

22 19. "Except as otherwise provided in NRS 125.155 [which addresses pension and
23 retirement benefits] and unless the action is contrary to a premarital agreement between
24 the parties which is enforceable pursuant to chapter 123A of NRS:

25 1. In granting a divorce, the court:

26 (b) Shall, to the extent practicable, make an equal disposition of the
27 community property of the parties, except that the court may make an unequal
28 disposition of the community property in such proportions as it deems just if

1 the court finds a compelling reason to do so and sets forth in writing the reasons
2 for making the unequal disposition. NRS 125.150(1)(b).

3 20. "If a party's manifestation of assent is induced by an improper threat by the
4 other party that leaves the victim no reasonable alternative, the contract is voidable by the
5 victim" Restatement (Second) of Contracts § 175(1) (1981).

6 21. The policy in favor of free access to the judicial system militates against
7 the characterization as improper of threats to commence civil process, even
8 if the claim on which the process is based eventually proves to be without
9 foundation. Nevertheless, if the threat is shown to have been in bad faith, it
10 is improper. Bad faith may be shown by proving that the person making the
11 threat did not believe there was a reasonable basis for the threatened
12 process, that he knew the threat would involve a misuse of process or that
13 he realized the demand he made was exorbitant. Restatement (Second) of
14 Contracts § 176 cmt. d (1981).

15 22. The threat of commencing a civil action may be improper. However, it does not
16 usually amount to duress because the victim can assert his right in the threatened action
17 and this is ordinarily a reasonable alternative to succumbing to the threat. Restatement
18 (Second) of Contracts § 175 cmt. b (1981).

19 23. Mutual mistake occurs when both parties, at the time of contracting, share
20 misconceptions about vital facts upon which they base their bargain. Mutual mistake is a
21 basis for equitable rescission of a contract. *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753
22 (1997).

23 24. Rescission is an equitable remedy which totally abrogates a contract and which
24 seeks to place the parties in the position they occupied prior to executing the contract.
25 *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 854 P.2d 860 (1993).

26 25. Generally, both procedural and substantive unconscionability must be present
27 in order for a court to exercise its discretion to refuse to enforce a contract as
28 unconscionable. Procedural unconscionability exists when a party lacks a meaningful

1 opportunity to agree to the contract terms either because of unequal bargaining power, as
2 in an adhesion contract, or because the contract and its effects are not readily
3 ascertainable upon review of the contract. Substantive unconscionability focuses on the
4 one-sidedness of the contract terms. *Horton v. Green*, 120 Nev. 549, 96 P.3d 1159 (2004).

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7 FINDINGS OF FACT

8 1. The plaintiff, Andrew Furer, and the defendant, Eloisa Furer, were married on
9 June 28, 1981. The Furers have one child together, Alexander Eric Furer, born November
10 14, 1984.

11 2. Following the first few years of marriage, the Furers argued frequently. From
12 early in the marriage the parties contemplated and discussed divorce on several occasions.

13 3. Neither party had assets of significance to this case at the time of marriage.
14 During marriage assets with a present value of approximately \$80 million were
15 accumulated through employment, business opportunity and investment.

16 4. Mrs. Furer was born September 5, 1941 and is now 65 years old. Mrs. Furer was
17 born in the Philippines. She has a 1963 bachelor's degree in education, with a major in
18 English, from the Divine Word University of Tacloban, located in Tacloban City in the
19 Philippines. She also completed two travel, hotel and restaurant management courses in
20 the Philippines, one in 1969 and one in 1971. She understands and communicates in
21 English without difficulty.

22 5. Mrs. Furer served for 3 years as the supervisory head of housekeeping for a
23 Hilton hotel in Ethiopia. She substituted for short periods for employees with time-off
24 from similar positions at Hilton hotels in Switzerland and France. She held similar
25 managerial housekeeping roles at the L' Hermitage hotel in Beverly Hills, Cedar Sinai
26 Medical Center and the Madison Hotel in Washington D.C.

27 6. The court finds Mrs. Furer to be very intelligent, well educated, and broadly
28 experienced.

1 7. Mrs. Furer has had no employment for income since she became pregnant in
2 early 1984. She was a stay-at-home mother for the parties' child, Alexander.

3 8. Mr. Furer was born February 21, 1953 and is now 53 years old. Mr. Furer was
4 born in the United States. In 1974, Mr. Furer graduated cum laude from Harvard College
5 with an undergraduate degree in economics. While a student at the college he became a
6 member of the Phi Beta Kappa Society. In 1977, Mr. Furer received a JD, magna cum laude,
7 from Harvard Law School. He was an editor of the Harvard Law Review. He took and
8 passed the California Bar Examination in 1977.

9 9. Mr. Furer planned to retire by age 40. He clerked for a judge at the U.S. Tax
10 Court in Washington, D.C. for two years. He then joined a tax firm in Los Angeles where
11 he worked for about 2 years. He then returned to Washington, D.C. where he was
12 employed by the U.S. Department of Treasury, first as an attorney advisor and finally as
13 associate tax legislative counsel.

14 10. In 1984, Mr. Furer joined a Wall Street investment bank, Salomon Brothers, in
15 New York City as an investment banker involved in developing new mortgage based
16 products to allow savings and loans to raise money.

17 11. From 1987 to 1993 Mr. Furer was a managing partner of Castine Partners, an
18 entity pursuing investment opportunities for the Robert Bass Group.

19 12. One of the investment opportunities pursued by Castine Partners was the
20 purchase from the U.S. government of America Savings & Loan, the largest, failed savings
21 and loan in the United States. As a limited partner in Castine Partners, Mr. Furer had an
22 opportunity to invest about \$3-4 million of personal funds in the business opportunity.
23 Mr. Furer had available about \$1 million earned during the marriage. Robert Bass loaned
24 him the balance. The deal took about a year. Mr. Furer was a principal in the negotiation.
25 At the time of the purchase, Mr. Furer worked in New York City and lived with his wife
26 and child in New Jersey.

27

28

1 13. In 1993, Mr. Furer entered into semi-retirement and moved with his wife and
2 child to Switzerland. He continued to serve as a consultant to Castine Partners and served
3 on the board of directors of certain corporations.

4 14. In 1996, while the Furer's lived in Switzerland, Washington Mutual purchased
5 Castine Partners' interest in American Savings & Loan. In consideration of the sale, Mr.
6 Furer received, in his name alone, about 890,000 shares of Washington Mutual which had
7 a value at that time of about \$15 per share. Since that time, the value of the stock has
8 approximately tripled. The current value of the stock is more than \$50 million, making it
9 the most valuable marital asset.

10 15. The court finds Mr. Furer to be very intelligent, well educated and broadly
11 experienced.

12 16. Mr. Furer allowed his license to practice law in California become inactive at
13 some time during the 1980's. He reactivated his license in 1996 and then allowed it to
14 become inactive again. Mr. Furer testified that he has been fully retired since 2003.

15 17. In 1996 or 1997 the Furer family left Switzerland and returned to the United
16 States. They considered several states as the location for their home, each with favorable
17 tax climates, as decided by Mr. Furer. They decided finally to live at Incline Village,
18 Nevada. Before moving to Nevada, Mr. Furer knew that Nevada is a community property
19 state.

20 18. Mr. Furer monitored and managed the financial assets accumulated during
21 marriage. In recent years he frequently used a computer for a couple of hours a day to
22 examine the investments. Occasionally he showed a summary to Mrs. Furer.

23 19. When monies were received by the Furer's from any source (for wages, bonuses,
24 dividends, etc.) Mr. Furer would deposit the monies into an account in his name alone, or
25 into a joint account, as Mr. Furer decided. Dividends from the Washington Mutual Stock
26 went into an account in Mr. Furer's name. Mrs. Furer was aware of this fact from the time
27 the stock was acquired in 1996.

28

1 20. The court has considered conflicting evidence about Mrs. Furer's role in relation
2 to the family finances, including attorney Sandra Unsworth's testimony the Mrs. Furer
3 claimed involvement in major financial decisions. Mrs. Furer had a credit card and
4 received a \$2,000 monthly gambling allowance from Mr. Furer. Mr. Furer testified that he
5 believed Mrs. Furer did not know the parties' tax basis in their largest single asset, the
6 Washington Mutual stock. Mrs. Furer regularly signed, without review, tax and real estate
7 documents prepared by Mr. Furer. The court finds that Mrs. Furer was not meaningfully
8 involved with the monitoring or management of the assets acquired during marriage.

9 21. At some time during the latter part of the 1990's, Mr. Furer made a donation to
10 Harvard University of nearly \$5 million. A professorship in economics was created and
11 was named for Andrew Furer. A scholarship for Filipino students was also created and
12 was named for the Furer family. Mrs. Furer asked Mr. Furer why she was not
13 memorialized in the name of either of the gifts. Mr. Furer explained in response that Mrs.
14 Furer had not attended Harvard. Mr. Furer believed the gift was from his separate
15 property.

16 22. In 2002, at a time when the parties were living in Nevada, the parties engaged in
17 estate planning with attorney Don Ross of the law firm Woodburn and Wedge. The
18 parties met with Mr. Ross for about 2 hours on May 20, 2002. The community vs. separate
19 property nature of the parties' assets was discussed. The use of a postnuptial agreement
20 to conclusively establish the community vs. separate property nature of the parties'
21 property was considered.

22 23. Mrs. Furer asked during the estate planning what her property rights were. Mr.
23 Furer stated during the estate planning that most of the marital assets were his separate
24 property. Mr. Furer testified that his belief was based upon his understanding that assets
25 titled in his name alone were his separate property. There was discussion during the
26 estate planning process that Mrs. Furer's share of the marital assets was \$15 million.
27
28

1 24. As a result of the May 20, 2002 meeting, attorney Ross drafted an intervivos
2 trust that identified both Mr. and Mrs. Furer as trustors and trustees. The trust was to be
3 funded with all of the assets of the parties, including the Washington Mutual stock.

4 25. On May 23, 2002, attorney Ross had an extended telephone conversation with
5 Mr. Furer. Mrs. Furer did not participate in that conversation. As a result of that
6 conversation, attorney Ross modified the estate planning documents to exclude the
7 Washington Mutual stock from the intervivos trust that identified both of the Furer's as
8 trustees. As a further result of the conversation, attorney Ross drafted a separate trust for
9 the Washington Mutual stock that identified Mr. Furer as the sole trustor and trustee.

10 26. On May 24, 2002, Mr. and Mrs. Furer met with attorney Ross to review and
11 execute final documents. Both the Furer's joint trust and Mr. Furer's separate trust were
12 signed at that meeting.

13 27. Mr. Furer testified that two trusts were used to implement a decision that Mr.
14 and Mrs. Furer made together to preserve the status quo that certain marital assets were
15 held in Mr. Furer's name alone. Mr. Furer asserted that he had Mrs. Furer's consent
16 because she did not object. The evidence shows that Mrs. Furer was uncertain of her
17 rights and that Mr. Furer claimed sole ownership of the Washington Mutual stock.

18 28. Mr. Furer testified that he learned nothing about community property law
19 during the estate planning other than the fact that the concept of community property
20 exists. Based upon the facts that Mrs. Furer knew Nevada was a community property
21 state before he moved here, that Mrs. Furer asked about her property rights during the
22 estate planning, that Mr. Furer asserted a claim that he had separate property ownership
23 of any asset titled in his name alone, and that attorney Ross discussed with the Furer's the
24 community vs. separate property nature of the parties' assets, the court does not find this
25 testimony to be credible.

26 29. In 2003, Mrs. Furer was the recipient of an honor she had long coveted. She was
27 named Hermana Mayor of Manila in the Philippines. This honor involved a public
28 ceremony in the Philippines where Mrs. Furer might share the stage with former First

1 Lady Imelda Marcos and others. This honor obligated Mrs. Furer to make a contribution to
2 the Catholic Church.

3 30. Mr. Furer believed the contribution would be hundreds of dollars. When Mrs.
4 Furer told him that the contribution would be in the range of \$5,000 to \$10,000, Mr. Furer
5 told Mrs. Furer that she did not have any money of her own and that all of the assets
6 accumulated during the marriage belonged to him alone. Mr. Furer accused Mrs. Furer of
7 stealing his money. He threatened to publicly accuse Mrs. Furer of stealing his money at
8 the ceremony marking the honor, about 4 months later. He made the statements on more
9 than one occasion. Although he did not publicly accuse her of stealing, he did not retract
10 his claims or his threat.

11 31. In January 2004, the parties were again discussing divorce, in part because of the
12 above-described situation involving the Hermana Mayor award. At this point Mr. and
13 Mrs. Furer had not engaged in sexual relation in more than a decade. Mr. Furer stated that
14 he did not want to divorce. He stated that he loved his wife. He was also concerned with
15 losing the taxes benefits available through the unlimited marital deduction and stepped-
16 up basis.

17 32. During January 2004, Mr. Furer approached attorney Shawn Meador to prepare
18 a property agreement between the parties. In January 2004 Attorney Meador prepared a
19 draft marital settlement agreement based upon instructions from Mr. Furer. That draft
20 agreement provided that Mrs. Furer would receive, upon divorce, \$15 million of the
21 approximately \$80 million of marital assets.

22 33. At some time after it was decided, Mr. Furer learned of the decision in *Wendt v.*
23 *Wendt*, 757 A.2d 1255 (Conn. App. Ct. 2000) by reading about it in the Wall Street Journal
24 or New York Times. The *Wendt* case involved distribution of a \$100 million marital estate
25 under principles of equitable distribution. The decision approved a division upon divorce
26 whereby the stay-at-home wife received approximately \$20 million and the businessman
27 husband more that \$80 million following the parties' 31 year marriage.

28

1 34. In March of 2004, while the Furer's were discussing divorce, Mr. Furer went on
2 to the Internet and located a website which included an article discussing the *Wendt*
3 decision. At trial Mr. Furer testified that he searched the Internet because he was
4 interested in the possibility of whether New Jersey law might have something to say about
5 what would happen if the parties divorced. He downloaded the *Wendt* article and gave a
6 copy to Mrs. Furer. Thereafter, he discussed the article with Mrs. Furer many times.

7 35. Mr. Furer testified that when he gave the *Wendt* article to Mrs. Furer and
8 subsequently discussed it with her he did not attempt to influence Mrs. Furer's thinking
9 about the law regarding distribution of marital assets to be applied in this case. He
10 testified that he did not tell her that the law discussed in the article might apply to their
11 divorce. He testified that he told her only that the article might have some significance in
12 relation to the parties' situation. Mr. Furer also testified that at the time he gave the *Wendt*
13 article to Mrs. Furer that he had no knowledge of community property law generally or of
14 Nevada property distribution law. Based upon the fact that Mrs. Furer made contradictory
15 representations to Attorney Unsworth prior to the signing of the postnuptial agreement,
16 and the fact that the outcome of the *Wendt* case was consistent with the position Mr. Furer
17 wanted Mrs. Furer to accept in accordance with his January, 2004 draft of a marital
18 settlement agreement, the court finds that this testimony from Mr. Furer is not credible.

19 36. Mrs. Furer testified at trial, and the court finds, that her husband told her that
20 an unequal division of marital assets, as occurred in *Wendt*, was appropriate in the Furer
21 divorce because much of the marital estate was earned while the parties lived in New
22 Jersey. She testified, and the court finds, that Mr. Furer told her that \$15 million of the
23 approximately \$80 million of marital assets was a fair payment to her and all she was
24 entitled to because of *Wendt*.

25 37. Mrs. Furer contacted several lawyers in an effort to select one to represent her.
26 In March 2004 Mrs. Furer hired attorney Sandra Unsworth for help with the proposed
27 marital settlement agreement that had been prepared for Mr. Furer by attorney Shawn
28 Meador during January 2004. Mrs. Furer imposed restrictions on the representation. Mrs.

1 Furer told attorney Unsworth that most of the financial and legal issues were already
2 resolved. She explained that her husband was a Harvard educated lawyer and a
3 phenomenal business success whom she trusted completely. Mrs. Furer told attorney
4 Unsworth that Mrs. Furer's attorney husband had advised her that New Jersey law
5 governed the marital assets and that in conformance with the *Wendt* decision she was
6 entitled to only a minor portion of the marital assets upon divorce. Mrs. Furer told
7 attorney Unsworth that did not want to incur unnecessary attorney fees in questioning Mr.
8 Furer's advice.

9 38. On March 4, 2004 Attorney Meador faxed to attorney Unsworth the draft marital
10 settlement agreement that attorney Meador prepared in January 2004. Although the draft
11 document was prepared as a marital settlement agreement, the parties and their counsel
12 agree that in March 2004 the parties intended to have a postnuptial agreement in an
13 attempt to mend their marriage.

14 39. Attorney Unsworth advised Mrs. Furer to hire a New Jersey lawyer to assess the
15 implications of the *Wendt* decision and New Jersey law in relation to the distribution of
16 marital assets in the event of a divorce by the Furers.

17 40. Mrs. Furer testified, and the court finds, that she was advised by Mr. Furer that
18 she would be wasting money to hire a New Jersey lawyer because he was providing
19 proper advice that the *Wendt* decision is applicable to their divorce.

20 41. On or about March 15, 2004 Mrs. Furer faxed to attorney Unsworth a list of
21 marital assets which had been dictated to by Mr. Furer to Mrs. Furer. There is no
22 evidence that this list was inaccurate or incomplete. Attorney Unsworth wanted to see
23 supporting documents. She spoke with Mrs. Furer and attorney Meador about obtaining
24 additional information. Mrs. Furer told attorney Unsworth that the list came from Mr.
25 Furer, that she trusted Mr. Furer's representation that the list was accurate, and that
26 further documentation should not be pursued. At Mrs. Furer's direction, attorney
27 Unsworth did not seek from Mr. Furer's counsel any financial documents, any appraisals
28 or any other information from which could be determined the value of any asset or the

1 community vs. separate property nature of any asset. Attorney Unsworth decided not to
2 seek materials from attorney Meador because Mrs. Furer was relying upon Mr. Furer's
3 representation that all assets were disclosed and that Mrs. Furer was entitled under New
4 Jersey law to only a minor share of the marital estate.

5 42. Mr. Furer's counsel, Shawn Meador, testified that it was unusual in his
6 experience that Mrs. Furer's counsel sought no financial documents. He thought the lack
7 of information requests to be even more unusual in this case because of the large amount
8 of money involved.

9 43. During negotiation of the postnuptial agreement the parties continued to reside
10 together. Sometimes Mrs. Furer would ask Mr. Furer about the meaning of language in
11 drafts of the agreement. Mr. Furer acknowledged that he would sometimes discuss with
12 her what some of the provisions were as he negotiated terms directly with her.

13 44. Shawn Meador, Mr. Furer's attorney, testified, and the court finds, that the
14 Furer's spoke together about the terms of the proposed postnuptial agreement and what
15 they were willing to do and not willing to do. Mr. Furer provided attorney Meador with
16 updates of the status of the Furer's talks. Based upon these updates, attorney Meador then
17 re-drafted the agreement and sent the drafts to Mr. Furer for further consideration
18 between Mr. and Mrs. Furer. It was attorney Meador's understanding from Mr. Furer that
19 Meador was not to send drafts to attorney Unsworth until he was informed by Mr. Furer
20 that Mrs. Furer approved them going to her lawyer.

21 45. Sandra Unsworth, Mrs. Furer's attorney, testified similarly that Mrs. Furer
22 dissuaded direct contact between the lawyers, that Mrs. Furer negotiated directly with Mr.
23 Furer, and that changes to the proposed agreement were communicated by Mr. Furer to
24 his attorney.

25 46. Mr. Furer was present with Mrs. Furer during some of the telephone calls Mrs.
26 Furer had with attorney Unsworth. Attorney Unsworth was concerned about Mr. Furer's
27 presence during these calls and spoke with attorney Meador about the problem.

28

1 47. Although Mrs. Furer negotiated some relatively minor, mostly non-monetary
2 terms of the postnuptial agreement, including 5 years of health insurance, automobile
3 insurance and the division of some personal property, there was no negotiation on the
4 division of the bulk of the wealth of the parties. Mrs. Furer accepted without significant
5 negotiation the division of the marital wealth which Mr. Furer told her was appropriate.

6 48. On the night prior to the signing of the postnuptial agreement, Mr. and Mrs.
7 Furer read it together and Mr. Furer explained to Mrs. Furer what was in the draft. She
8 testified that her husband told her to ignore the language of the postnuptial agreement,
9 that it was worded in a particular manner to make it legal.

10 49. On May 5, 2004 Mr. and Mrs. Furer signed the postnuptial agreement which is
11 at issue in this litigation.

12 50. Attorney Unsworth met with Mrs. Furer for 1 hour, or less, from the time
13 representation began on March 4, 2004 until the day the postnuptial agreement was signed
14 on May 5, 2004. Mrs. Furer's attorney bill for all services related to the postnuptial
15 agreement, including 3 hours on the day of signing, involved 12.12 hours of legal services.

16 51. Attorney Unsworth testified that Mrs. Furer would not have signed the
17 postnuptial agreement but for her trust in Mr. Furer's representations. The court so finds.

18 52. Mr. Furer's calculations show that under the May 5, 2004 postnuptial agreement
19 Mrs. Furer would receive \$16,747,469 of the \$71,640,217 post-tax value of the assets
20 accumulated during marriage.

21 53. Based upon the above described evidence the court makes findings of fact that
22 Mr. Furer gave legal advice to Mrs. Furer concerning the postnuptial agreement, that Mrs.
23 Furer relied upon that advice to her detriment, and that an attorney-client relationship
24 existed between Mr. and Mrs. Furer.

25 54. The parties' postnuptial agreement of May 5, 2005 provides, at page 25,
26 Paragraph I, as follows:

27 The parties agree that if either party elects to seek a decree of
28 separate maintenance, legal separation or divorce, this Agreement shall, at

1 the request of the (sic) either party, be submitted to the Court for approval
2 and, if approved, may be incorporated in any judgment or decree of
3 separate maintenance, legal separation or divorce rendered by the court
4 having jurisdiction of any such proceedings between the parties.... Without
5 waiving or limiting the foregoing, notwithstanding any submission or
6 approval by the court and the incorporation in any legal order of decree,
7 this Agreement shall not be merged into such order of decree but shall
8 survive as an independent contractual obligation.

9 55. Prior to Mrs. Furer's execution of the postnuptial agreement, attorney Unsworth
10 advised Mrs. Furer that this provision meant that the court could refuse to approve the
11 postnuptial agreement if the court believed it to be unconscionable or fundamentally
12 unfair of one of the parties.

13 56. The court finds that Mr. Furer engaged in a pattern of conduct over years that
14 convinced Mrs. Furer that she was not entitled, as a matter of law, to receive upon divorce
15 half of the assets acquired during marriage. This conduct included acquiring significant
16 marital assets in his name alone, maintaining significant marital assets in his name alone,
17 assigning additions to marital assets between joint or separately held accounts as he
18 determined, telling Mrs. Furer that he alone owned the assets held in his name alone,
19 accusing Mrs. Furer of stealing marital assets that she hoped to give to charity, engaging in
20 estate planning which gave the prestige of Woodburn and Wedge to the manner in which
21 the marital assets were divided between the parties, drafting during January 2004 a
22 marital settlement agreement which offered Mrs. Furer only \$15 million of the parties' \$80
23 million in assets, telling Mrs. Furer such a division of assets was fair, giving Mrs. Furer
24 legal advice by way of the *Wendt* article which reinforced the legitimacy of a grossly
25 uneven division of marital property upon divorce, and agreeing to and encouraging the
26 uneven distribution described in the postnuptial agreement.

27 57. At the time Mr. Furer made the gift to Harvard he told Mrs. Furer that the gift
28 was from his separate property. At the time of the parties' estate planning during 2002,

1 Mr. Furer stated in Mrs. Furer's presence that all property in his name alone belonged to
2 him alone. When Mrs. Furer was named Hermana Mayor, Mr. Furer told her that she had
3 no money of her own, that all of the assets accumulated during marriage belonged to him
4 alone, and that she was stealing from him. At the time Mr. Furer gave Mrs. Furer the
5 *Wendt* article, and thereafter, he told her that she was entitled upon divorce to a minor
6 portion of the marital assets. Mrs. Furer has proven by clear and convincing evidence that
7 Mr. Furer made these statements without sufficient basis; that Mr. Furer intended to
8 induce Mrs. Furer to believe that a majority of the marital assets were his and to cause her
9 to refrain from asserting claim to those assets; that because of Mr. Furer's position as an
10 attorney and successful businessman, Mrs. Furer justifiably relied upon the statements;
11 and that Mrs. Furer was damaged because of her reliance by her entry into an unfair
12 postnuptial agreement. Mr. Furer's representations played a material and substantial part
13 in leading Mrs. Furer to sign the postnuptial agreement.

14 58. During May and June of 2004 the parties' became more hostile and they decided
15 upon divorce. Mr. Furer dated and Mrs. Furer was outraged. They stopped living
16 together. On June 30, 2004 Mrs. Furer obtained a temporary protection order against
17 domestic violence against Mr. Furer. On that same day, Mr. Furer was arrested for an
18 alleged act of domestic violence against Mrs. Furer.

19 59. Through their respective counsel they negotiated a Marital Settlement
20 Agreement which reaffirmed the May 5, 2004 postnuptial agreement but also, notably,
21 gave Mrs. Furer an additional \$9 million of marital assets.

22 60. After her signing of the postnuptial agreement on May 5, 2004 and before her
23 signing of the Marital Settlement Agreement, Mrs. Furer met with Kenneth L. Fortney,
24 CPA, concerning the proposed property distribution she would receive in the event of
25 divorce.

26 61. On July 2, 2004, Mr. Furer filed a complaint for divorce in case number DV04-
27 01560. The complaint asked the court to approve, confirm, adopt and incorporate the
28 postnuptial agreement of May 5, 2004.

1 62. Also on July 2, 2004 Mrs. Furer signed the Marital Settlement Agreement. Mrs.
2 Furer testified that she signed the marital settlement agreement it gave her several million
3 more dollars of value from the marital estate than did the postnuptial agreement and
4 because Mr. Furer threatened to litigate the enforceability of he postnuptial agreement if
5 she refused to sign the Marital Settlement Agreement. He told her the litigation could take
6 years.

7 63. On July 7, 2004 Mrs. Furer substituted attorney Bonnie Mahan as her counsel in
8 stead of attorney Sandra Unsworth. Mrs. Furer told attorney Mahan that the Marital
9 Settlement Agreement was resolved. At Mrs. Furer's direction, Attorney Mahan involved
10 herself in no investigation, research or negotiation.

11 64. Mrs. Furer re-signed the Marital Settlement Agreement on July 8, 2004. The
12 document she signed is identical to the agreement she signed on July 2, 2004 except that
13 the July 8, 2004 version identifies Bonnie Mahan as her attorney. The Marital Settlement
14 Agreement was executed by Mr. Furer on July 9, 2004. The Marital Settlement Agreement
15 is dated July 9, 2004.

16 65. On July 9, 2004 the parties signed a stipulation asking the court to withdraw and
17 dismiss the complaint in case number DV04-01560. The court issued its order granting the
18 requested relief on August 3, 2004.

19 66. Mr. Furer's calculations show that under the July 9, 2004 Marital Settlement
20 Agreement Mrs. Furer would receive \$22,893,871 of the \$71,418,413 post-tax value of the
21 assets accumulated during marriage. Mr. Furer assured the court that these numbers are
22 correct within a tolerance of 1/10th of 1%.

23 67. On July 12, 2004 Mr. Furer filed and submitted in case number DV04-01626 the
24 parties' Joint Petition for Divorce which asked the court to approve, adopt, ratify and
25 confirm the Marital Settlement Agreement dated July 9, 2004.

26 68. Thereafter, Attorney Mahan asked that Mr. Furer sign a warranty that he had
27 made full disclosure of the marital assets prior to the execution of the Marital Settlement
28 Agreement.

1 divorce, of property earned during marriage. Mrs. Furer would not have signed the
2 postnuptial agreement but for her trust in, and detrimental reliance upon, Mr. Furer's legal
3 advice. The court finds that an attorney-client relationship existed between attorney Furer
4 and Mrs. Furer during the negotiation of the postnuptial agreement and that the
5 postnuptial agreement is a product of that attorney client relationship. The agreement is
6 advantageous to Mr. Furer and disadvantageous to Mrs. Furer

7 2. Mr. Furer has not shown by clear and satisfactory evidence, or by a
8 preponderance of the evidence, that the postnuptial agreement was in all respects fairly
9 and equitably entered, that he was actively diligent to see that his client was fully
10 informed of the nature and effect of the postnuptial agreement, and that the postnuptial
11 agreement was free of professional overreaching. Mr. Furer failed to demonstrate that Mrs.
12 Furer completely understood that she was entitled to more of the marital assets than the
13 postnuptial agreement offered to her. The postnuptial agreement is, accordingly,
14 voidable.

15 3. Mr. Furer owed a fiduciary obligation to Mrs. Furer based upon their marital
16 relationship. That duty was breached in relation to the postnuptial agreement by Mr.
17 Furer's pattern of conduct which convinced Mrs. Furer that she was not entitled, as a
18 matter of law, to receive upon divorce half of the assets acquired during marriage. The
19 postnuptial agreement is, accordingly, voidable.

20 4. Mrs. Furer argues that a presumption of fraud exists in relation to the postnuptial
21 agreement because it greatly disfavors Mrs. Furer. Mr. Furer argues that the contract does
22 not greatly disfavor Mrs. Furer and, if it does, the presumption of fraud has been rebutted.
23 Each party asks the court to apply the analysis used by the court in *Sogg v. Nevada State*
24 *Bank*, 108 Nev. 308, 832 P.2d 781 (1992).

25 5. The first question to be addressed under a *Sogg* analysis is whether the
26 postnuptial agreement greatly disfavors Mrs. Furer and thereby raises a presumption of
27 fraud. *Sogg*, 108 Nev. 308, 832 P.2d 781. The *Sogg* court found that "Because, in the instant
28 case, the premarital agreement signed by Vicky left her with no resources or means of

1 support in the event of divorce, and because Vicky probably would have received more
2 under the community property laws of Nevada were it not for the premarital agreement,
3 there is a presumption that the agreement was fraudulent." *Id.* at 312, 832 P.2d at 784.

4 6. Mr. Furer argues that Mrs. Furer cannot be "greatly disfavored" so long as she is
5 left with resources and a means of support. According to Mr. Furer's calculation the May
6 5, 2004 postnuptial agreement gives to Mrs. Furer \$16,747,469 of the parties' after tax
7 \$71,640,217 of investment assets. Clearly, the postnuptial agreement provides Mrs. Furer
8 with resources and support. Sufficiency of support is, however, only one of the two basis
9 described in *Sogg* for determining that a marital contract greatly disfavors a spouse. The
10 other basis is whether the disfavored spouse would have received more under the
11 community property laws of Nevada were it not for the agreement. Mrs. Furer may be
12 entitled to receive an additional \$19 million, after tax, under Nevada's community
13 property laws then she would receive under the postnuptial agreement. Accordingly, the
14 court concludes that the postnuptial agreement greatly disfavors Mrs. Furer and that a
15 presumption of fraud arises under *Sogg*.

16 7. *Sogg* provides that if a presumption of fraud exists, it can be rebutted by a
17 showing that Mrs. Furer 1) had an ample opportunity to consult an attorney, 2) was not
18 coerced, 3) possessed substantial business acumen, and 4) understood the financial
19 resources of the parties and the rights being forfeited under the agreement. See also, *Fick v.*
20 *Fick*, 109 Nev. 458, 851 P.2d 445 (1993).

21 8. The parties presented conflicting evidence about whether Mrs. Furer had ample
22 opportunity to obtain advice of an independent attorney regarding the postnuptial
23 agreement. As above described, the court finds that Mr. Furer engaged in a pattern of
24 conduct over years that convinced Mrs. Furer that, as a matter of law, she was not entitled
25 to receive upon divorce half of the assets accumulated during marriage. This influence
26 was not absolved by the limited legal representation obtained by Mrs. Furer. Mr. Furer's
27 over reaching continued during attorney Unsworth's representation. His overreaching
28 was so pervasive that Mrs. Furer was unwilling to believe that the legal advice he gave

1 was incorrect. Mr. Furer and his counsel knew of the limited role played by Mrs. Furer's
2 counsel. The court finds that in these circumstances created by Mr. Furer, Mrs. Furer did
3 not have an opportunity to receive and act upon independent legal advice.

4 9. The parties offered different characterizations of Mrs. Furer's business experience
5 and business acumen. Although Mrs. Furer has experience in supervising the
6 housekeeping services of several upper class hotels, all of that experience was more than
7 20 years ago. She has not been employment since she became pregnant with the parties'
8 son in 1984. She has relied exclusively upon her husband's money management skills
9 during her marriage. Mr. Furer did not trust her ability to make a \$5,000 - \$10,000
10 decision. He acknowledged that she is unaware of the tax basis in the largest marital asset.
11 She has no experience in negotiating multi million dollar contracts. The court concludes
12 that Mrs. Furer does possess substantial business acumen although it is not commensurate
13 with that possessed by Mr. Furer. Nor was it sufficient to resist her husband's
14 overreaching conduct that convinced her she was entitled to only a minor portion of the
15 marital estate.

16 10. The parties also presented differing testimony about whether Mrs. Furer was
17 aware of the financial resources of the other party and understood the rights that that she
18 was forfeiting under the postnuptial and marital settlement agreements. The court is
19 convinced by the testimony of Eloisa Furer, attorney Sandra Unsworth, attorney Bonnie
20 Mahan, and the totality of the circumstances of this case that Mrs. Furer entered into the
21 postnuptial agreement based upon the belief, instilled by her husband, that she was
22 entitled to only a minor portion of the marital estate as a matter of law. Accordingly, the
23 court makes a finding of fact that Mrs. Furer did not understand what rights she was
24 forfeiting when she entered into the agreement.

25 11. The court concludes that the presumption of fraud, which exists in this case
26 under a Sogg analysis, has not been overcome. Accordingly, the postnuptial agreement is
27 voidable.

28

1 12. Based upon the above described findings of fact, the court concludes that the
2 postnuptial agreement is voidable because of misrepresentation. *Blanchard v. Blanchard*,
3 108 Nev. 908, 839 P.2d 1320 (1992).

4 13. For the reasons stated above, and to the extent of the court's power under the
5 language of the postnuptial agreement and the above identified case and statutory law, the
6 court declines to approve the postnuptial agreement and declares it to be void.

7 14. Mr. Furer argues that the recitals of the postnuptial agreement must be
8 conclusively presumed to be correct under NRS 47.240(2). Because the court has
9 determined that the postnuptial agreement is void, its recitals are void.

10
11 Is the Furer's marital settlement agreement valid?

12 1. Following the execution of the postnuptial agreement on May 5, 2004 and before
13 the execution of the Marital Settlement Agreement on July 9, 2004 the relationship between
14 the parties changed. They determined to divorce. They stopped living together. Mrs.
15 Furer obtained a temporary protection order against domestic violence which alleged that
16 Mr. Furer was the perpetrator. Mr. Furer was arrested for alleged domestic violence
17 against Mrs. Furer. In these circumstances, the court finds that the fiduciary relationship
18 between the parties based upon their marriage was ended. *Applebaum v. Applebaum*, 93
19 Nev. 382, 384-85, 566 P.2d 85, 87 (1997); *Williams v. Waldron*, 108 Nev. 466, 472 n.4, 836 P.2d
20 614, 618 n. 4 (1992).

21 2. During this period Mrs. Furer's reliance upon Mr. Furer for legal advice also
22 changed. The parties relied more upon their attorney's for negotiation. The amount of
23 distribution Mrs. Furer is entitled to receive under the Marital Settlement Agreement
24 shows that she no longer felt constrained by the *Wendt* decision or the other aspects of Mr.
25 Furer's long course of conduct which had previously convinced her that she was entitled
26 to only about \$15 million from the marital estate. A preponderance of the evidence does
27 not show that Mrs. Furer relied upon Mr. Furer's advice in relation to the Marital
28 Settlement Agreement. The court finds that the attorney-client relationship between Mr.

1 and Mrs. Furer was effectively severed and is not a basis upon which to invalidate the
2 Marital Settlement Agreement.

3 3. According to Mr. Furer's calculation the July 9, 2004 Marital Settlement
4 Agreement gives to Mrs. Furer only \$22,893,871 of the parties' after tax \$71,418,413 of
5 investment assets. Applying the analysis described in *Sogg*, the court concludes that the
6 Marital Settlement Agreement greatly disfavors Mrs. Furer and that a presumption of
7 fraud is warranted.

8 4. The court now turns to the factors described in *Sogg* by which a presumption of
9 fraud can be rebutted. As described above, the court finds that Mrs. Furer was freed from
10 the overreaching influences of Mr. Furer on the two occasions she executed the Marital
11 Settlement Agreement. She had an ample opportunity to have the advice of an
12 independent legal counsel.

13 5. The evidence shows that Mrs. Furer signed the marital settlement agreement
14 twice, each time represented by different counsel, because the offer was attractive to her
15 and because Mr. Furer threatened her with years of litigation over the validity of the
16 postnuptial agreement if she did not sign. A threat of litigation is not duress or coercion
17 unless the threat is improper and the victim has no reasonable alternative. Restatement
18 (Second) of Contracts, Sections 175 and 176 (1981). The evidence does not show the
19 absence of a reasonable alternative to succumbing to the threat. Asserting her rights in the
20 threatened litigation appears to have been a reasonable alternative available to Mrs.
21 Furer's instead of signing of the Marital Settlement Agreement.

22 6. Mrs. Furer possessed substantial business acumen and experience, sufficient to
23 allow her to enter into a binding contract after her husband's undue influence was
24 eliminated.

25 7. The court finds that Mrs. Furer knew the financial resources of the parties and,
26 with her husband's undue influence removed; there was no impediment to her
27 understanding the rights she was forfeiting under the Marital Settlement Agreement.
28

1 8. Based upon these considerations, the court concludes under *Sogg* that the
2 presumption of fraud has been rebutted.

3 9. Absent a showing of overreaching or oppressive behavior court should not
4 deviate from the terms of a voluntary marital settlement agreement to relieve one of the
5 parties from the apparent hardship of an improvident bargain. *McCutcheon v. Tracey*, 928
6 So.2d 364 (Fla. App. 3 Dist., 2006) see also, *In Re Marriage of Pierce*, 206 Or. App. 699, 138
7 P.3d 889 (2006); *Galloway v. Galloway*, 47 Va. App. 83, 622 S.E. 2d 267 (2005); *Duffy v. Duffy*,
8 881 A.2d 630 (D.C., 2005).

9 10. The absence of overreaching or oppressive behavior, together with the rebuttal
10 of the presumption of fraud under *Sogg*, are a compelling reasons to uphold the validity of
11 the Marital Settlement Agreement, even though that contract makes an unequal
12 disposition of assets acquired during marriage.

13
14 Has Mrs. Furer materially breached the terms of the Marital Settlement Agreement such
15 that Mr. Furer may rescind the Marital Settlement Agreement and enforce the postnuptial
16 agreement?

17 Because of other rulings in this order, the question of whether Mrs. Furer materially
18 breached the terms of the Marital Settlement Agreement such that Mr. Furer may rescind
19 the Marital Settlement Agreement and enforce the postnuptial agreement need not be
20 reached.

21
22 Miscellaneous

23 1. Mrs. Furer has not proven by a preponderance of the evidence the existence of
24 the elements of either mutual mistake or unconscionability.

25 2. Attorney Meador's undisclosed simultaneous representation of Mr. Furer and
26 Attorney Unsworth does not affect the validity of the postnuptial and Marital Settlement
27 Agreements

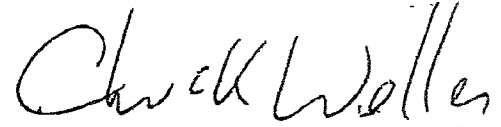
JUDGMENT

1
2 1. Based upon the above identified findings of fact and conclusions of law it is the
3 judgment of this court that the parties' May 5, 2004 postnuptial agreement is invalid. The
4 parties' July 9, 2004 Marital Settlement Agreement, including its restatement of terms from
5 the postnuptial agreement, is valid.

6 2. Discovery relating to the next phase of this bifurcated proceeding may
7 commence.

8 **IT IS SO ORDERED.**

9 Dated: November 14, 2006.

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12 District Court Judge
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