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No. 77890-6

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

ANGELA K. McCAUSLAND,

Petitioner,

and

ROBERT G. McCAUSLAND,

Respondent/Cross-Petitioner.

FILED
NOV 30 2005
CLERK OF SUPREME COURT
STATE OF WASHINGTON

ANSWER TO PETITION FOR REVIEW
(RAISING CONDITIONAL CROSS-PETITION)

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& GOODFRIEND, P.S.

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A. Identity Of Respondent/Cross-Petitioner.

Respondent/Cross-Petitioner Robert McCausland was the appellant in the Court of Appeals.

B. Restatement Of The Case.

1. Background.

Robert and Angela McCausland were married in 1988 and have children born in 1991 and 1994. Angela and Robert first separated in September 1997, after nine years of marriage. The parties reconciled but then separated again in late 1998. Robert thereafter started an internet company, which was expected to go public in April 2000.

On March 23, 2000, Angela and Robert entered into a property settlement in which Angela agreed to sign a lock-up agreement on which a planned IPO for Robert's internet company depended and Robert agreed to pay Angela \$16 million as her share of the internet company's expected future value. *McCausland*, 2002 WL 1399120 at *2. The agreement provided that until the first \$4 million was paid four months later, in August 2000, Robert would make the mortgage payments on the house awarded to Angela, pay \$5,500 for the support of Angela and their

children, and pay items of repair and maintenance for the house. (CP 70-71); *McCausland*, 2002 WL 1399120 at *2.

By the fall of 2000, the IPO for Robert's internet company had failed and the company had declared bankruptcy. *McCausland*, 2002 WL 1399120 at *2. Robert was unemployed and collecting unemployment compensation of \$600 to \$800 per week. (RP 168, 224) Robert filed a motion to terminate the \$5,500 monthly payment and asked the court to order child support at an amount based on the child support guidelines. The trial court denied Robert's motion on the grounds that the monthly payments were not modifiable: "An agreement is an agreement is an agreement." *McCausland*, 2002 WL 1399120 at *3. Although the trial court eliminated the \$16 million payment to Angela from the agreement, it ordered Robert or his estate to continue to make monthly \$5,500 payments at least until Angela's death, characterizing the payments as "property division" for the maintenance of Angela and their children.

2. The First Appeal.

Robert appealed, arguing that the trial court improperly characterized the \$5,500 monthly payment to Angela as "property

division." The Court of Appeals agreed, reversed, and remanded to the trial court, directing the trial court to:

[S]egregate the combined monthly child support and maintenance payments; to set child support according to the requirements of RCW 26.19, including specifying any appropriate deviations and the justification therefore; and to adjust the property distribution as necessitated by the reconsideration of the combined monthly payments.

McCausland, 2002 WL 1399120 at *1.

Angela petitioned for review from the Court of Appeals' unpublished decision, presenting an issue nearly identical to that set forth in her current petition for review:

Is a Settlement Agreement (Spousal Agreement) drawn in conformity with RCW 26.09.070 providing for family support via property division become (sic) binding upon the Court?

9/27/2002 Petition for Review. This Court denied review on April 29, 2003. 149 Wn.2d 1005.

3. Remand.

The parties were once again before the trial court on remand from the Court of Appeals on October 22, 2003. Both parties submitted trial briefs that agreed that the Court of Appeals' mandate to the trial court was to "adjust the \$5,500 per month payments to classify them as child support and maintenance rather

than property." (CP 187, 351-52) Nevertheless, the trial court declared once again that the agreement, including the specific provision for a \$5,500 monthly payment that the Court of Appeals had found unenforceable, was binding:

You know, very simply, that contract, I thought, was binding. And I still think, regardless what the appellate court has said, that, you know, that's it, that she gets that \$5,500. And they said I need to reconsider it and segregate and so on, but then whatever fruits, she's made her bed and she's going to lie in it now. She gets \$5,500.

(RP 9)

The trial court apportioned \$2,842 of the \$5,500 as child support and the characterized the remaining portion as "property." The court ordered that if Robert's child support was reduced or terminated, the "property distribution" would be increased, to ensure that Angela continued to receive \$5,500 per month until she died. (CP 501) The trial court set child support at an extrapolated amount, based on a finding that: "The children participate in dance and sports activities, which are significant expenses. The children have the expectation of support at the level of their father's significant historical income." (CP 506) The only extraordinary expenses of the children to which the mother testified were dance

classes for \$220 per month and other expenses for costumes and sports uniforms of \$600 per month. (RP 89)

4. The Second Appeal.

Both parties appealed. The Court of Appeals once again held that the \$5,500 monthly support payment provision of the agreement was unenforceable:

Any fair reading of the 2000 Agreement shows that the temporary undifferentiated support payments from Robert to Angela were inextricably tied to the success of the proposed internet company. All of the economic concessions Robert made in the 2000 Agreement clearly anticipated that he would be a multi-millionaire, able to afford all the expenses for his family including paying off Angela's house, carrying its expenses, and paying for all the children's medical, dental, and orthodontic expenses.

Marriage of McCausland, __ Wn. App. __, ¶20, 118 P.3d 944, 950 (2005). Division Two rejected Robert's request that the court adopt the standards for extrapolation set forth by Division One in ***Marriage of Daubert & Johnson***, 124 Wn. App. 483, 99 P.3d 401 (2004), which requires the trial court to enter specific findings to explain why the amount of support is both necessary and reasonable. The Court confirmed Division Two's continued adherence to the reasoning of ***Marriage of Clarke***, 112 Wn. App. 370, 382, 48 P.3d 1032 (2002), which held that while "specific

findings are preferred, the absence of such findings does not require vacation of the order." The Court of Appeals remanded to a different trial court judge to determine whether extrapolation of child support above the standard calculation is appropriate, the proper amount of support from the date of the prior remand, and whether Robert is entitled to reimbursement or restitution for payments in excess of reasonable child support and maintenance. ***McCausland***, ¶¶ 76, 77, 118 P.3d at 958.

Angela petitions for review. Robert in this answer cross-petitions for review of the appellate court's extrapolation analysis.

C. Argument Why Review Of The Issues Should Not Be Accepted.

1. This Court Should Disregard Those Issues Raised By The Petitioner That Are Not Argued In The Petition.

Angela's petition for review identifies seven issues (Petition at 2-4), but she provides argument for only three. (Petition at 11-20) For example, Angela takes issue with the Court of Appeals ruling regarding attorney fees, the tax refund, and the remand to a different judge (Petition at 3-4; Issues 4, 5, 6, 7), but fails to address the Court of Appeals decision relating to these provisions and provides no argument as to why review should be granted for

this issue. Angela has abandoned those issues for which she fails to present argument and this Court should not consider those arguments. RAP 13.4(e); RAP 10.3(a)(5); see *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004) (appellant's failure to argue an assignment of error waives the argument).

2. This Court Should Not Accept Review Of The Court Of Appeals' Decision Because It Conforms To Well-Settled Law.

This Court should not accept review of the issues for which Angela provides argument because the Court of Appeals' decision is premised on the unusual facts of this particular case, does not involve an issue of substantial public interest, and conforms to well-settled law. Angela's argument for review hinges on her assertion that the court has no discretion and is required to enforce a property settlement agreement under RCW 26.09.070 if it was "fair and equitable" as of the date of signing. But agreements concerning the status or disposition of the parties' community property are also subject to "the powers of the superior court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suits of either party," RCW 26.16.120, and general contract law applies in interpreting and enforcing property settlement agreements. *Marriage of*

Hammack, 114 Wn. App. 805, 60 P.3d 663, *rev. denied*, 149 Wn.2d 1033 (2003); *Marriage of Sievers*, 78 Wn. App. 287, 301, 897 P.2d 388 (1995); *Marriage of Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993). In this case, the Court of Appeals decision is supported by settled law that a party may be excused from performance of a contract where performance has been rendered impracticable due to extreme and unreasonable difficulty, expenses, injury or loss. *Metropolitan Park Dist. Of Tacoma v. Griffith*, 106 Wn.2d 425, 439, 723 P.2d 1093 (1986); *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 363-364, 705 P.2d 1195, 713 P.2d 1109 (1986).

The agreement at issue in this case relied on the parties' mutual expectation of a successful IPO of Robert's internet company. Angela concedes that the \$16 million payment under the agreement is not enforceable. (Petition 13) The Court of Appeals properly determined that Robert's obligation to pay \$5,500 per month to Angela and to pay for home maintenance and repair expenses were inextricably tied to the unenforceable \$16 million payment, and thus unenforceable:

When the IPO earnings failed to materialize, all portions of the 2000 Agreement tied to those profits became unenforceable and the parties' anticipated economic circumstances changed in a manner that the trial court was bound to consider.

McCausland, ¶¶ 31,32, 118 P.3d at 951-52.

Angela's petition for review raises no issues of substantial public interest, no conflicts of authority, and no significant questions of constitutional law. This Court should deny review.

D. Cross-Petition For Review.

Since August 2004, the intermediate appellate courts have issued five analytically inconsistent published decisions on when child support can and should be extrapolated from the guidelines because the parties' net monthly income exceeds \$7,000. **Marriage of Rusch**, 124 Wn. App. 226, 98 P.3d 1216 (Division One, August 23, 2004) (court must consider the standard of living of each parent and special medical, educational, or financial needs of the children before extrapolating; the court's findings must explain why additional support is necessary); **Marriage of Daubert & Johnson**, 124 Wn. App. 483, 99 P.3d 401 (Division One, October 25, 2004) (court could not make necessary findings to support extrapolation when the mother failed to provide evidence of children's *future* needs for additional expenditures); **State ex. rel.**

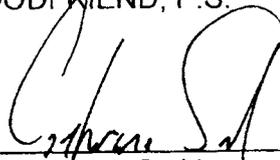
M.M.G. v. Graham, 123 Wn. App. 931, 99 P.3d 1248 (Division One, November 1, 2004), *reconsideration denied* (September 14, 2005), *petition for review pending* (Cause No. 77858-2, October 14, 2005) (encouraging the trial court on remand to reconsider its decision not to extrapolate, despite lack of evidence of additional expenditures); **Marriage of Marzetta**, ___ Wn. App. ___, 120 P.3d 75 (Division Three, April 21, 2005, *published with modifications* September 20, 2005) (affirming extrapolated support award based "on the parties' wealth" without discussion of necessary need findings); **Marriage of McCausland**, ___ Wn. App. ___, ¶ 57, 118 P.3d 944, 955 (Division Two, August 30, 2005) (expressly rejecting Division One's analysis in **Daubert**, relying on **Marriage of Clarke**, 112 Wn. App. 370, 48 P.3d 1032 (2002)). This Court should accept review of the cross-petition and provide needed guidance to practitioners and litigants on the calculation of child support in over-\$7000 cases. RAP 13.4(b)(2), RAP 13.4(b)(4).

E. Conclusion.

This Court should deny review. If this Court accepts review, it should also accept review of the cross-petition.

Dated this 30th day of November, 2005.

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

By: 
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TO E-MAIL

Attorneys for Respondent/
Cross-Petitioner

DECLARATION OF SERVICE

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

That on November 30, 2005, I arranged for service of the foregoing Answer to Petition for Review to the court and the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
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DATED at Seattle, Washington this 30th day of November, 2005.


Tara D. Friesen

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Attached in .pdf format is the Answer to Petition for Review in Marriage of McCausland, Cause No. 77890-6. The person filing this answer is Catherine W. Smith, WSBA No. 9542, e-mail address: cate@washingtonappeals.com

Tara Friesen

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