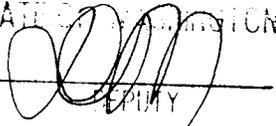


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DIVISION II

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STATE OF WASHINGTON
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NO. 31892-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

ANGELA K. McCAUSLAND,

Respondent/Cross-Appellant,

and

ROBERT G. McCAUSLAND,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
HONORABLE FREDERICK W. FLEMING

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. INTRODUCTION

The parties separated in 1998 after nine years of marriage. Seven years later, the parties are involved in a second appeal arising from the interpretation and enforcement of a separation agreement entered into by the parties a year before their marriage was dissolved in 2001 because the trial court's ruling on remand attempts to maintain its prior decision, which this court reversed. This court should once again reverse the trial court's order on remand, just as it reversed the trial court's order in 2002. This court should remand to a different judge and provide specific directions to the trial court to fashion a ruling that maintains the integrity of this court's earlier decision in order to finally provide the parties with resolution to their dissolution.

II. REPLY ARGUMENT

A. **The Trial Court Failed To Follow This Court's Mandate.**

During the previous appeal in this matter, decided in 2002, appellant Robert McCausland argued that the trial court improperly characterized his monthly child support and maintenance payments as "property." *McCausland*, 2002 WL 1399120 at *1. Robert argued that our courts have repeatedly held that periodic support payments, like the support payments in this case, are alimony or maintenance, as

opposed to property distribution. (See 9/21/2001 App. Br. at 30-31, citing **Duncan v. Duncan**, 25 Wn.2d 843, 844, 848-49, 172 P.2d 210 (1946)(rejecting the argument that payments labeled as “alimony” and “support” were intended as property distribution); see also **Berry v. Berry**, 50 Wn.2d 158, 161-162, 310 P.2d 223 (1957)(holding payments designated as support were not property settlement); **Marriage of Roth**, 72 Wn. App. 566, 571-73, 865 P.2d 43 (1994)(holding provision for “spousal maintenance” was not facially ambiguous and rejecting argument that payments were intended as property distribution))

This court agreed with Robert and held that the trial court erred by “apparently lump[ing] child support together with spousal maintenance” and characterizing this monthly payment as “property division” in order to uphold the parties’ 2000 Separation Agreement (the “2000 Agreement”) requiring such payments. **Marriage of McCausland**, 2002 WL 1399120 at *1, *4. This court held that this provision of the 2000 Agreement requiring Robert to pay \$5,500 monthly to the wife was unenforceable:

(T)wo major components of the 2000 Agreement are unenforceable, (the \$5,500 monthly combined ‘support’ payments and the \$16 million for the unrealized IPO stock).

McCausland, 2002 WL 1399120 at * 5.

This court noted that by treating the monthly payment as “property distribution,” the trial court improperly ignored the already extensive property distribution set forth by the other enforceable provisions of the 2000 Agreement:

But contrary to both provisions [the \$16 million and \$5,500 combined monthly ‘support’ payments provisions], the trial court decided that the \$5,500 payments shall be payable as property division for the support of wife and children, thereby ignoring the extensive property division separately effected by provisions one through six of the 2000 agreement.

McCausland, 2002 WL 1399120 at *4, fn 6. (See also CP 370-371)¹

This court then reversed the trial court’s order treating the \$5,500 monthly payment as “property distribution” and directed the trial court to reconsider the monthly support payment and segregate it as child

¹ Ignoring her own extensive property distribution, Angela makes the incorrect assertion that Robert was awarded \$900,000 in stock. (Resp. Br. at 19) In reality he was only awarded \$101,100, due to a lock-up agreement. (Compare RP 119 with RP 185-186) Pursuant to the property agreement, the wife was awarded the family residence free of encumbrance and valued between \$420,000 (tax assessed value)(RP 120) and \$725,000 (based on a certified market analysis by Robert, who is in the real estate and mortgage business)(RP 190), her retirement valued at \$5,000, the personal property in the residence valued at \$100,000, and cash of \$95,000. Robert was awarded his residence with an undisputed net value of \$27,000, his 401(k) of \$20,000, cash of \$35,000, stock of \$101,110, the tax refund of \$320,000, personal property of \$10,000, and the Whistler Timeshare of \$55,000. (CP 370-371) Robert was also ordered to pay debts of approximately \$496,000 plus the mortgage on the wife’s residence of \$85,000. (CP 371)

support and spousal maintenance by setting child support according to the requirements of RCW 26.19. **McCausland**, 2002 WL 1399120 at *1, *5.

Ignoring this court's mandate, the trial court on remand found that the \$5,500 monthly payment to the wife as set forth in the 2000 Agreement was enforceable and binding on the parties. (CP 492, Finding of Fact (FF)2; CP 493-494, FF 7) Under the guise of complying with this court's mandate, the trial court designated a portion of the \$5,500 monthly payment as "child support," but once again treated the remaining balance as "property distribution." (CP 493, FF 6) The trial court ordered that if child support is modified in the future, the "property distribution" would be increased in order to ensure that the wife continued to receive \$5,500 per month until she died. (CP 501, 502, Conclusion of Law (CL) 3, 4)

Asking this court to affirm the trial court's erroneous ruling, respondent Angela McCausland ignores this court's unambiguous holdings that the \$5,500 monthly payment mandated under the Agreement is unenforceable by dismissing them as "assertions" or "contentions" made by Robert, rather than as the clear direction from this court. (*Compare* App. Br. at 13 with Resp. Br. at 10; *see also* Resp. Br. at 18). But the trial court disregarded the mandate of this

court, and the trial court's ruling is a thinly veiled attempt to reinforce its earlier ruling that this court reversed. For the same reasons this court reversed the trial court's order in 2002, this court should once again reverse the trial court's order on remand from this court.

1. The Trial Court Had No Discretion To Uphold Its Prior Ruling And Enforce The \$5,500 Monthly Payment As A Contractual Obligation Binding On The Husband.

Contrary to Angela's assertions (Resp. Br. at 14, 16), the trial court had no discretion to once again treat the monthly payment under the 2000 Agreement as a non-modifiable contractual obligation. Yet it did precisely that on remand. Although the trial court was given discretion to determine how much child support and spousal maintenance should be awarded and whether spousal maintenance should continue, there was no discretion given to the trial court otherwise with regard to these monthly payments. See ***State v. Strauss***, 119 Wn.2d 401, 412-413, 832 P.2d 78 (1992) (the trial court is bound on remand by the appellate court decision and the trial court lacks authority to enter the same findings that the appellate court earlier invalidated); ***Harp v. American Surety Co.***, 50 Wn.2d 365, 368, 369, 311 P.2d 988 (1957)(the trial court must follow specific direction of the appellate court and only exercise its discretion when directed). The trial court had no discretion to reinforce its prior ruling

by holding that the \$5,500 monthly payment was a “contractual obligation” when this court held that the contractual provision was unenforceable and directed the trial court to only reconsider the monthly payment and segregate it as child support and spousal maintenance. *McCausland*, 2002 WL 1399120 at *1, *5.

Angela argues that “[a]t no time did this court hold that the monthly family support sum was unenforceable.” (Resp. Br. at 16) But the problem here is not that the trial court ordered the continuation of the \$5,500 monthly payments, but that it did so in such a way to reinstate its earlier ruling, which this court had reversed. By treating the monthly payment of \$5,500 as an enforceable “contractual obligation,” the trial court once again upheld its prior ruling treating the \$5,500 monthly payment as an obligation of Robert that could withstand modification, the emancipation of the children, Angela’s remarriage, and Robert’s death. (CP 493-494, FF 6, 7)

2. Because The Provision Relating To The \$16 Million Payment Was Unenforceable, The Trial Court Erred In Ordering The Husband To Pay Certain Expenses That Were Conditioned On This Unenforceable Provision.

The trial court also erred in ordering Robert to continue to pay for all “major repairs and reasonable maintenance” on Angela’s residence for as long as she continues to own the residence (CP 495-

496, FF 12; CP 503, CL 10) and by ordering Robert to pay 100% of all orthodontic expenses for the children (CP 495, FF 11; CP 502, CL 9) because the trial court relied on an unenforceable provision of the 2000 Agreement in making these rulings.

The provision requiring Robert to bear these expenses exclusively and indefinitely is directly related to the unenforceable \$16 million payment under the "Parenting and Support Issues" provision of the 2000 Agreement. (CP 70-71) Under the 2000 Agreement, Robert was required to pay for any major repairs to Angela's residence and for 100% of the children's orthodontic expenses pending the first of four payments on the \$16 million to Angela. (CP 70) As originally contemplated in the 2000 Agreement, the \$16 million payment to Angela was considered her "share of [the husband's] budding internet company's expected future value." **McCausland**, 2002 WL 1399120 at *2. But it is undisputed that this "budding internet company" failed to materialize because of bankruptcy, and no longer existed by the time of the parties' dissolution. **McCausland**, 2002 WL 1399120 at *2. Therefore, this court properly held that this provision relating to the non-realized IPO was unenforceable. **McCausland**, 2002 WL 1399120 at * 5.

Because this court held that the \$16 million payment was unenforceable, the first payment will never occur. It would be absurd to assume that Robert should now be required to pay for all major expenses on Angela's home indefinitely and for all of the children's orthodontic expenses exclusively when the underlying basis for this agreement is unenforceable.

The only argument made by Angela to support her position that Robert should continue to make these payments is her inaccurate assertion that the \$16 million payment and \$5,500 monthly combined support payments were enforceable provisions of the 2000 Agreement. (Resp. Br. at 18) Angela's position completely ignores this court's clear and unambiguous holding to the contrary:

(T)wo major components of the 2000 Agreement are **unenforceable**, (the \$5,500 monthly combined 'support' payments and the \$16 million for the unrealized IPO stock).

McCausland, 2002 WL 1399120 at * 5 (emphasis added). The trial court erred by requiring Robert to pay these expenses based on an unenforceable provision of the parties' 2000 Agreement.

3. Based On The Trial Court's Finding That Spousal Maintenance Terminated, When This Court Reverses The Trial Court's Award Of Any Portion Of The \$5,500 As Property Distribution, The Husband Should Be Reimbursed For All Payments Made To The Wife That Were Not Child Support.

Angela agrees that the trial court found that spousal maintenance terminated when the parties entered into the 2000 Agreement but misses the point as to why Robert should be reimbursed for payments made beyond child support. (Resp. Br. at 18-19; RP 305-306) Robert has continued to pay Angela \$5,500 per month since then and during the remand from this court. Because this court determined that the monthly payment was not property distribution but combined child support and spousal maintenance (*McCausland*, 2002 WL 1399120 at *4), and because the trial court found that spousal maintenance was terminated (RP 305-306; see also CP 501, FF 27A), Robert is entitled to recoup that portion of the \$5,500 monthly payments he has paid since remand that are not properly deemed child support. See RAP 12.8 (if a party has satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders to restore to the party any property taken from the party, or in appropriate circumstances provide restitution).

Furthermore, the trial court cannot on a second remand reinstate spousal maintenance when it found it was terminated in

2000. **Marriage of Mason**, 40 Wn. App. 450, 457, 698 P.2d 1104, review denied, 104 Wn.2d 1017 (1985) (the trial court could not reinstate a maintenance obligation once final payment has been made pursuant to a maintenance provision); see also **Marriage of Brown**, 8 Wn. App. 528, 530, 507 P.2d 157 (1973). Therefore, Robert should be reimbursed for all payments made to Angela since remand beyond the child support award.

B. The Trial Court Erred In Calculating The Child Support Obligation.

1. The Trial Court Erred In Setting Child Support At Nearly Double The Advisory Amount When The Award Is Not Supported By Adequate Findings Of Fact.

Pursuant to the economic table in RCW26.19.020, the parents' total obligation for support of both children would be \$1,713. (CP 515) Based on each party's proportionate share of income, .862 for Robert and .138 for Angela (CP 511, 515), Robert's transfer payment based on the advisory amount in the economic table would be \$1,476.60. Rather than set child support at the advisory amount, the trial court extrapolated beyond the economic table and set Robert's transfer payment at nearly twice the advisory amount, \$2,842 per month. (CP 506) But in reality, Robert's support obligation was actually set at \$5,500, nearly four times the advisory amount, because the balance

of the \$5,500 monthly payment beyond the amount that the trial court deemed child support is neither spousal maintenance (because it was terminated by the trial court) nor property (because this court held the monthly payment was not property).

The trial court erred by setting child support for the parties' two children at an amount far greater than the advisory range without sufficient findings to explain why the amount of support is both necessary and reasonable. (CP 510) **Marriage of Rusch**, __ Wn. App. ___, 98 P.3d 1216, 1219 (2004)(the court may only exceed the advisory amount of support upon written findings of fact which explains why additional support is necessary); **Marriage of Daubert/Johnson**, __ Wn. App. ___, 99 P.3d 401, 406 (2004)(if child support is set above the economic table, written findings must explain why the amount of support is reasonable and necessary).

The trial court's only finding to support its award is: "The father's income alone is greater than \$7,000 per month. 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) But Robert's historical income is not a basis to award child support beyond the advisory amount. **Daubert**, 99 P.3d at 407 ("The mere ability of either

or both of the parents to pay more, whether based on consideration of income, resources or standard of living, is not enough to justify more support"); see also **Marriage of Fiorito**, 112 Wn. App. 657, 665, 667, 50 P.3d 298 (2002)(rejecting mother's argument that the trial court must base its determination of child support solely on the high income of one of the parents).

Furthermore, the only extraordinary expenses related to "dance and sports" to which Angela testified were \$220 for dance classes and \$600 for "other expenses" including costumes and sports uniforms. (RP 89) Angela provided no receipts to verify these expenses. The expenses related to these activities alone are not sufficient to award child support that is two to four times the advisory amount. Because child support was set in an amount far greater than the advisory amount, the trial court was required to enter sufficient findings other than the additional costs of dance classes and costumes of \$820 to support its award. See **Marriage of Scanlon/Witrak**, 109 Wn. App. 167, 179, 34 P.3d 877, review denied, 147 Wn.2d 1026 (2002)(reversing award of extrapolated child support when not supported by evidence, mother's testimony that children's monthly clothing expenses were \$600 and that other unspecified child expenses were \$950 per month were "not exceptional"); see also

Daubert, 99 P.3d at 407 (“Parents are entitled to know what the additional support is supposed to cover”). This is especially true in this instance when Angela has no housing costs because Robert is obligated to pay the mortgage for her home beyond the \$5,500 the trial court already ordered he pay pursuant to the property distribution of the 2000 Agreement. (CP 66, CP 535, CL 8)

Ignoring contrary law, Angela holds steadfast to an overbroad interpretation of **Marriage of Clarke**, 112 Wn. App. 370, 48 P.3d 1032 (2002) to support her assertion that extrapolation of child support is warranted and that the trial court’s findings are sufficient to support an award beyond the standard calculation. (Resp. Br. at 21-22) In **Clarke**, this court affirmed the trial court’s award of additional child support to the mother even though the trial court’s findings were only “ cursory” and “more specific findings are preferred.” 112 Wn. App. at 381-382. But unlike the case here, the **Clarke** court found that the record was sufficient to support the court’s extrapolation. 112 Wn. App. at 381. Here, Angela’s undocumented testimony on the cost of the children’s dance classes and costumes and uniforms and the lack of supporting evidence is not sufficient to support the court’s extrapolation.

Angela also relies on language from **Clarke** citing RCW 26.19.065(1), for the proposition that if child support is less than 45% of the obligor's monthly net income, specific findings regarding the child's special medical, education or psychological needs are not necessary even if support is set above the economic table. (Resp. Br. at 22); 112 Wn. App. at 381. But in **Clarke**, the court relied in part on the fact that the child support award was less than 30% of the father's net income. 112 Wn. App. at 381. Here, the \$5,500 monthly payment is 44% of the father's net income. (See CP 505) This is a far greater percentage than the obligation of the father in **Clarke**.

Finally, the proposition that specific findings are not necessary when child support is less than 45% of the obligor parent's net income has recently been called into question:

Under the reasoning in **Clarke**, if a non-custodial parent's net monthly income was \$50,000 per month, then any level of support below 45 percent of that figure would not require specific findings. Extrapolation programs do not base calculations on economic data. Instead, they merely extend the numbers on the tables out to the appropriate income level and provide a child support number. Therefore, the figures provided by the extrapolation program are not based on the child's specific, articulable needs. They merely continue the economic table past the \$7,000 mark. Had the Legislature intended this result, the Legislature would not have capped the table at \$7,000.

Rusch, 98 P.3d at 1219; see also *Daubert*, 99 P.3d at 406; but see *State ex. rel. M.M.G. v. Graham*, 123 Wn. App. 931, 938-939, 942, 99 P.3d 1248 (2004)(citing *Clarke* favorably for the proposition that the statute expressly invites courts to extrapolate in cases of combined income over \$7,000, but also noting that such extrapolation requires specific findings). Under the circumstances of this case the trial court erred in awarding child support at an amount far greater than the advisory amount when there was no evidence that the children incurred expenses that warranted an award of support beyond the economic table and there were no findings that such support was necessary and reasonable.

2. Separation Agreement Provisions Concerning Child Support Are Not Binding And The Trial Court Erred In Requiring The Husband To Be Solely Responsible For The Extraordinary Expenses Of The Children.

The trial court erred in not ordering Angela to pay her proportionate share of the children's extraordinary health care expenses. Angela argues that the trial court was not bound by the statutory requirements to apportion extraordinary expenses in the same proportion as the basic child support obligation because this obligation arose from the parties' 2000 Agreement. (Resp. Br. at 23) But as this court held in the first appeal: "separation agreement

provisions concerning child support are not binding on the court,” (**McCausland**, 2002 WL 1399120 at *4 citing **Marriage of Thier**, 67 Wn. App. 940, 944, 841 P.2d 794 (1992), review denied, 121 Wn.2d 1021 (1993)), and “[i]ndependent of the parties’ separation agreement, the Legislature expressly requires the court to address and determine child support” pursuant to the statutory requirements set forth in RCW 26.19. **McCausland**, 2002 WL 1399120 at *4.

RCW 26.19.080(2) requires that extraordinary expenses be shared by the parents in the same proportion as the basic child support obligation. Absent findings to support a deviation from the statutory obligation to apportion extraordinary expenses to both parents, the trial court has no discretion to divide extraordinary expenses in a proportion different than the basic child support obligation. See **Marriage of Katare**, 2004 WL 3120849, _ P.3d _ (2004) (publication ordered 1/20/2005)(an exception to the rule requiring allocation of extraordinary expenses in the same proportion as the basic child support obligation is when the trial court makes findings to support a deviation); see also **Marriage of Scanlon/Witrak**, 109 Wn. App. 167, 181, 34 P.3d 877 (2001), rev. denied, 147 Wn.2d 1026 (2002) (no discretion in apportioning long-distance transportation expenses); **Marriage of Daubert/Johnson**,

99 P.3d 401 at 409-410 (2004) ("post secondary support must be apportioned according to the net income of the parents"). The trial court erred in ordering Robert to be solely responsible for the children's extraordinary health care expenses, including orthodontia expenses.

C. This Court Should Once Again Enforce The Attorney Fee Provision Of The 2000 Agreement And Deny The Wife Attorney Fees On Appeal.

Angela asks for attorney fees on appeal, stating without authority that she "should be awarded her attorney fees and costs incurred in this appeal in a sum to be specified." (Resp. Br. at 26) This court should deny her request for fees as it did in the first appeal by enforcing the attorney fee provision of the 2000 Agreement, which requires each party to bear his or her own attorney fees and costs. **McCausland**, 2002 WL 1399120 at *5.

This court should also deny Angela's request for attorney fees because she fails to devote a section to her brief for her request for attorney fees on appeal, fails to cite RAP 18.1, and her request is wholly unsupported by argument. **Marriage of Foley**, 84 Wn. App. 839, 847, 930 P.2d 929 (1997) (denying attorney fee request when no argument made as to why attorney fees should be awarded); **Edwards v. Edwards**, 83 Wn. App. 715, 725, fn. 5, 924 P.2d 44, 932

P.2d 171 (1997)(rejecting attorney fee request when respondent failed to cite RAP 18.1, make argument, and failed to devote section of brief to fee request). Finally, this court should deny Angela's request for attorney fees because under RCW 26.09.140 she does not have a financial need.

III. RESPONSE TO CROSS-APPEAL

A. Restatement of Issues.

1. Did the trial court abuse its discretion by enforcing the attorney fee provisions of the parties' 2000 Agreement, which requires that each party bear his or her own attorney fees and costs?

2. Did the trial court abuse its discretion by enforcing the provision of the parties' 2000 Agreement awarding the tax refunds to the husband, to which the wife never previously objected?

B. The Trial Court Properly Enforced The Attorney Fee Provisions Of The 2000 Agreement And Ordered Each Party To Be Responsible For His or Her Own Fees.

The parties' 2000 Agreement contained several provisions relating to each party's responsibility for attorney fees. The first provision required each party to be responsible for his or her own fees related to the 2000 Agreement and for fees related to the earlier dissolution action filed and dismissed by Angela:

Each party shall bear his or her respective attorney's fee incurred in connection with this Agreement and

other legal expenses and costs incurred in the previous dissolution action.

(CP 65) The second provision required each party to be responsible for his or her own attorney fees for any subsequent dissolution action filed:

If an action for dissolution is commenced..... Any and all attorney's fees associated with the dissolution action shall be paid by the party incurring the same.

(CP 71-72) The final provision required a party to pay the other party's fees and costs if the other party successfully enforced the 2000 Agreement in court:

In the event of an action to enforce the terms of this Agreement by either party, the successful party shall be entitled to his or her reasonable attorney's fees and costs associated with such action.

(CP 72)

This court upheld these provisions of the 2000 Agreement as enforceable components of the Agreement. See **McCausland**, 2002 WL 1399120 at *4-5. This court reversed the trial court's award of attorney fees to Angela, holding that because neither party was successful in "enforcing" the 2000 Agreement, neither party was entitled to an attorney fee award under the 2000 Agreement. **McCausland**, 2002 WL 1399120 at *4. This court also declined to award attorney fees to Angela on appeal by upholding the provision

of the Agreement providing that each party shall bear his or her own attorney fees and costs. **McCausland**, 2002 WL 1399120 at *5.

Angela argues that the trial court was mandated by this court to award attorney fees to her under RCW 26.09.140. (Resp. Br. at 24-25) But this court only noted that the trial court appeared to also base its award of attorney fees to Angela on her financial need. **McCausland**, 2002 WL 1399120 at *4. This court reversed the award of attorney fees under the 2000 Agreement but directed that if the trial court “persists” in awarding attorney fees to Angela on remand, it must do so under the factors set forth in **Marriage of Knight**, 75 Wn. App. 721, 730, 800 P.2d 71 (1994), *rev. denied*, 126 Wn.2d 1011 (1995). **McCausland**, 2002 WL 1399120 at *5, fn 7.

This court did not mandate that attorney fees be awarded on remand. Therefore, an award of fees pursuant to RCW 26.09.140 was discretionary and the trial court did not abuse its discretion by enforcing the 2000 Agreement by requiring Angela to bear her own attorney fees. In light of the disparate property award to Angela (CP 370-371), Angela did not have the financial need to have her attorney fees paid. This court should affirm the trial court’s denial of attorney fees to Angela.

C. Cross-Appellant's Failure To Set Forth Facts Relevant To The Issue She Presents For Review, Her Failure To Assign Error To The Trial Court's Finding Of Fact, And Her Failure To Argue And Cite Authority For Her Position That The Trial Court's Award Of The Tax Refund To The Husband Pursuant To The 2000 Agreement Was Error Preclude Review.

Angela assigns error to the trial court's award of the tax refund to the husband but fails to assign error to the trial court's finding of fact supporting this award. (Resp. Br. at 2) The trial court properly found that the parties' 2000 Agreement awarded "all right, title, and interest in and to the IRS refunds" to Robert. (CP 499, FF 23, 24) Because this finding of fact is not challenged, it should be accepted as a verity on appeal. *Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Furthermore, as cross-appellant, Angela was required to set forth a fair statement of the facts relevant to the issues she presents for review. RAP 10.3(a)(3). But Angela failed to set forth any facts regarding the tax refund in her Statement of the Case, nor does she allege that the trial court's finding is not supported by substantial evidence in the record. (See Resp. Br. at 3-12) There is in fact substantial evidence in the record to support the trial court's finding that the 2000 Agreement awarded any tax refund to Robert for any of the parties' past tax returns. Therefore this court should uphold the

trial court's finding. *Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003).

Angela incorrectly states that "the tax refund was not mentioned in the Spousal Agreement" (Resp. Br. at 26) and also incorrectly asserts that the award of a tax refund to Robert was "uncontemplated" by the parties. (Resp. Br. at 25) The 2000 Agreement, executed in March 2000, clearly states that Robert is liable for any additional tax due on any past joint tax returns of the parties, but also provides that Robert is entitled to any tax refunds due:

Should any joint tax return of the parties be audited, **Husband shall be responsible for any additional tax due, and shall be entitled to any refund due**, provided, however, that should any additional taxes, interest, or penalty be due to the misrepresentations or negligence of either party, that party shall be fully responsible for additional tax, interest or penalties and shall indemnify and hold the other harmless therefrom.

(CP 64)(emphasis added)

The 2000 Agreement further made the husband solely liable on any income taxes for 1999, but again entitled Robert to any refunds associated with the parties' joint tax return for 1999:

For the year 1999, Husband and Wife shall report to the IRS all income for that year in a form most beneficial to the parties. **If a joint return is selected and filed, Husband shall be responsible for the payment of all income taxes, and shall be entitled to all refunds.** If

a separate tax return is filed by Husband and Wife, Husband shall be responsible for any and all taxes due on returns of both Husband and Wife, and shall hold Wife harmless from any and all liability in either method use[d].”

(CP 64)(emphasis added)

The parties filed their 1999 taxes jointly, seven months after the 2000 Spousal Agreement was executed. (RP 53; CP 243-244) The net losses reflected in the parties' 1999 tax return was \$3,804,840. (RP 37-38; CP 243) These losses were generated by Washington Mortgage Services, Freel Networks, and some activity on rental properties. (RP 38; CP 247-248) These were all properties previously awarded to Robert as his separate property pursuant to the 2000 Agreement. (RP 37-38,50-52, 193; CP 62-63) Therefore, pursuant to the 2000 Agreement, Robert was entitled to any refunds resulting from the parties' joint 1999 tax return. (CP 64)

Pursuant to Internal Revenue Code § 172, a taxpayer may carry back losses two years and then carry forward the remaining loss for 20 years or until extinguished. (RP 39-40; CP 77) Robert did exactly that. Robert carried back the losses from the 1999 tax return to the two previous tax years – 1997 and 1998. (RP 39; CP 257-262) As a result of this “carry back,” Robert was refunded 100% of the \$70,052 in taxes paid in 1997 (RP 40; CP 262), and 100% of the

\$249,816 in taxes paid in 1998. (RP 42; CP 258) Pursuant to the 2000 Agreement, the trial court properly found that the unambiguous language awarded these tax refunds to Robert, “plus all interest accrued thereon through the date of trial in the amount of \$396,072.68”. (CP 499, FF 24)

Angela argues that she is entitled to “at least one-half of the refund amount and future tax deductions.” (Resp. Br. at 27) But she makes no argument as to why she is entitled to such an award in light of the unambiguous language of the 2000 Agreement, nor does she present any authority to support her position. Thus, this court should not even review this issue. *Sintra, Inc. v. Seattle*, 131 Wn.2d 640, 663, 935 P.2d 555 (1997) (refusing to review appellant’s assignment of error when appellant cites only trial testimony related to issue but fails to present authority and argument).

It appears that Angela’s only “argument” on appeal on this issue is her complaint that Robert forged her signature on the amended tax returns. But the trial court’s unchallenged finding states that the provision of the 2000 Agreement awarding the tax refunds to Robert stands “in spite of the forgery.” (CP 499, FF 24) This is because regardless of whether Angela signed the tax returns herself,

she had no right to any refunds resulting from the amended tax returns because of the 2000 Agreement.

Angela may argue that Robert did not amend the 1997 and 1998 tax returns until October 2002, and thus she was not aware of the tax refunds. But this argument has no merit, for Angela is charged with knowledge of the existing laws when the 1999 tax return was filed. See *Roon v. King County*, 24 Wn.2d 519, 527, 166 P.2d 165 (1946) (tax payer is charged with knowledge of tax law requiring a certificate of delinquency to be issued and realty sold to satisfy taxes not paid by tax payer). Thus, she is charged with knowing that Robert could carry back the 1999 losses to 1997 and 1998 to recoup the taxes paid and to carry it forward to future income.

This is especially true because Angela was represented by counsel who could have advised her of the possible tax treatment of the losses. If Angela wished to seek any right to utilize the tax loss of 1999 for her own benefit, she should have challenged the provision of the 2000 Agreement during the first trial and in the first appeal. The only provisions of the 2000 Agreement challenged in the first appeal were the \$16 million dollar payment to Angela and the \$5,500 monthly payment characterized as property. Although these provisions were held to be unenforceable by this court, pursuant to the 2000

Agreement those provisions were severable and the remainder of the agreement is valid and enforceable, including the provision awarding any tax refunds to Robert. (CP 69) This court should affirm the trial court's award of the tax refund to Robert.

D. Robert Is Entitled To Attorney Fees For Enforcing The 2000 Agreement In This Cross-Appeal.

Pursuant to the 2000 Agreement, Robert is entitled to attorney fees in responding to this cross-appeal because he is enforcing the terms of the agreement relating to attorney fees and the tax refund. (CP 72) RCW 4.84.330 requires the court to order reasonable attorney fees and costs to the prevailing party in a contract dispute, where the contract contains an attorney fee provision such as the one in this case. In these situations, the court has no discretion except to the amount of fees determined to be reasonable. Pursuant to the 2000 agreement, Robert is entitled to attorney fees for enforcing the agreement in this cross-appeal.

IV. CONCLUSION

The trial court's ruling on remand attempts to maintain its prior ruling holding the \$5,500 monthly payment as a non-modifiable contractual obligation binding on the husband. This court should remand to a different judge and provide directions to the trial court to fashion a ruling that maintains the integrity of this court's earlier

decision. As set out in the opening brief, this court should direct the trial court as follows:

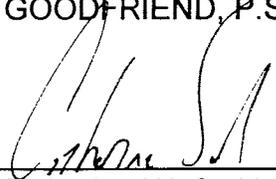
- The child support obligation should be determined based on the statutory factors set forth in RCW 26.19, without extrapolation, and both parties should pay their proportional share of extraordinary expenses.
- Any obligations previously ordered requiring Robert to pay for all “major repairs and reasonable maintenance” on Angela’s residence should be terminated.
- Restitution to Robert should be ordered for amounts overpaid in excess of an unextrapolated child support amount as property division, spousal maintenance, or repair.
- If necessary, the trial court should order the parties to cooperate in amending the previous years’ tax returns to reflect the deductibility to Robert of any payments to Angela that are *not* reimbursed.

Issuing such a mandate would save the resources of the parties and the trial court. The information in the current record is sufficient to allow the trial court to act after direction from this court. A specific mandate from this court to the trial court will provide the parties with final resolution to their dissolution and the property distribution.

On the wife's cross-appeal, this court should affirm the trial court's denial of attorney fees to the wife and the award of the tax refund to the husband. These were both enforceable provisions of the parties' 2000 Agreement, which the trial court properly upheld. The husband is entitled to his fees in responding to the cross-appeal under the 2000 Agreement.

February 15, 2005

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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 February 15, 2005, I arranged for service of the foregoing Reply Brief of Appellant/Cross-Respondent to the court and the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 15th day of February, 2005.


La Shona D. Artis

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