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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of:

TIMOTHY W. FITZGERALD,

Petitioner/Appellant,

vs.

THERESA L. FITZGERALD,

Respondent/Respondent.

REPLY BRIEF OF APPELLANT TIMOTHY W. FITZGERALD

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APPELLANT'S REPLY BRIEF

COMES NOW Appellant, Timothy W. Fitzgerald, by and through his counsel of record, and replies to the Brief of Respondent as follows.

I. INTRODUCTION

For the reasons outlined in the Appellant's Opening Brief, the Spokane County Superior Court erred, and thereby prejudiced the Appellant when it denied enforcement of *Appellant's Motion to Enforce the Stipulated Agreement*.

The central issue in this case is whether the parties executed a valid agreement regarding child support and maintenance. This is a simple matter of contract law and interpreting the circumstances leading up to the creation of the parties' "*Agreed Order Re: Child Support and Maintenance*." (Hereinafter, "*Agreed Order*").

Despite numerous factual and legal arguments demonstrating otherwise, the Respondent, Ms. Fitzgerald, contends that the parties did not have a "meeting of the minds." A "meeting of the minds" is deemed to have taken place when it is clear by the actions of the parties that they have assented to enter into a contractual relationship. 1-2 Matthew Bender, *Corbin on Contracts* § 2.9 (2015). In her Responsive Brief, Ms. Fitzgerald refers to the "*Agreed Order*" dated November 30, 2013 as a *counter-offer* to Mr. Fitzgerald's proposed "*Addendum to Decree of Dissolution and Order of Child Support*." Brief of Respondent 4-5 (Hereinafter, "*Addendum to*

Decree”). By recognizing that the “*Agreed Order*” was in fact a counter-offer, Ms. Fitzgerald has refuted her own contention that a meeting of the minds had not occurred.

A plain view of the facts indicate that after a series of correspondence between parties’ counsel regarding the terms of the agreement:

1. Appellant’s counsel, Mr. Peltram, sent Respondent’s counsel, Mr. Nolte, an offer on November 8, 2013;
2. Mr. Nolte responded in kind with a counter-offer on November 30, 2013; and
3. Mr. Fitzgerald accepted the terms of Mr. Nolte’s counter-offer by performing under the terms of the same for a period of thirteen months.
4. Ms. Fitzgerald assented to the terms by virtue of specific performance under the agreement for thirteen months.
5. Further, Mr. Peltram signed and returned the *Agreed Order* to counsel for Ms. Fitzgerald in a reasonable amount of time.

The parties entered into a valid stipulation akin to a CR 2A agreement. Mr. Fitzgerald concedes that based on his change in employment status, a new agreement should be created, but it does not change the fact that the court erred in denying the *Appellant’s Motion to Enforce the Stipulated Agreement*. Mr. Fitzgerald was unjustly punished by the trial court for following the terms of the offer that Ms. Fitzgerald counsel proposed to him.

As such, Mr. Fitzgerald respectfully asks this court to vacate the trial court's January 28, 2015 decision.

II. REPLY - ASSIGNMENTS OF ERROR

Assignment of Error 1. The trial court erred in denying enforcement of the party's "*Agreed Order*" and subsequently ordering Mr. Fitzgerald to pay \$25,250.00 in maintenance and child support because the parties reached a valid agreement.

III. REPLY - ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a valid agreement was formed when: (1) the Respondent's attorney drafted and sent the Appellant's attorney a written offer on the firm's pleading paper; and (2) the Appellant accepted the offer by performing under the Appellant's terms for thirteen months.

IV. STANDARD OF REVIEW

Whether a valid agreement exists in this particular circumstance is a question of contract law. Contract formation requires both legal and factual analysis of the underlying evidence. *State v. Horrace*, 144 Wn.2d 386, 392 (2001). In other words, review of contract formation issues are treated as mixed questions of fact and law and are thus reviewed de novo. *Id.*; see also, *In re Marriage of Foran*, 67 Wn. App. 242, 251 (1992).

V. REPLY – ARGUMENT

The trial court erred in failing to enforce the *Agreed Order*. A valid stipulated agreement akin to a CR 2A agreement was entered into when Mr. Nolte prepared the offer on his firm's pleading paper and both parties demonstrated their acceptance of the agreement by performing under the terms for thirteen months..

The policy behind enforcing stipulated agreements is to avoid endless disputes and to bring finality to compromises. *Eddleman v. McGhan*, 45 Wn. 2d 430 (1954); *Bryant Palmer Coking Coal Co.*, 67 Wn. App. 176, 179 (1992). The trial court's failure to enforce the *Agreed Order* that was carried out by both Mr. Fitzgerald and Ms. Fitzgerald circumvents the policy of stipulated agreements.

Stipulated CR 2A agreements are bound by basic contract principles. *Morris v. Maks*, 69 Wn. App. 865, 868 (1993); *Stottlemyre v. Reed*, 35 Wn. App. 169, 171 (1983). There must be an offer, acceptance, and consideration. *Id.*; RCW 62A.2-206. The seminal case in Washington jurisprudence regarding the interplay between CR 2A agreements and contract law is *Morris v. Maks*. 69 Wn. App. 865. In *Morris*, the court established a three factor test to determine whether correspondence between parties can amount to a valid CR 2A agreement. *Id.* Courts must consider whether:

- a. The subject matter has been agreed upon;
- b. The material terms are stated in the informal writing; and

- c. The parties intended a binding agreement prior to the time of signing and delivery of a formal contract.

Id. At 869.

The first *Morris* factor is not in dispute. The subject matter of the negotiations dealt entirely with maintenance and child support obligations. The second and third factors are in dispute.

1. **The material terms of the *Agreed Order* regard Mr. Fitzgerald's child support and maintenance obligations.**

The second *Morris* factor is disputed by Ms. Fitzgerald. While the parties disagree on certain factual issues surrounding the agreement, the material terms of the *Agreed Order* are uncontroverted as they are in writing. CP at 43; CP 218. A genuine dispute is one that is “over the existence or material terms of the agreement, as opposed to a dispute over its material terms.” *In re Marriage of Ferree*, 71 Wn. App. 12, 19 (2001). Material terms are substantive provisions that alter an agreement. *Morris*, 69 Wn. App. at 870. Stated plainly, a genuine dispute is *not* raised by one merely disputing the specifics of the terms, but a genuine dispute *is* raised by a party asserting that the terms never existed in the first place. In her brief, Ms. Fitzgerald contends that the terms of the agreement are in dispute. Brief of Respondent, 13. Ms. Fitzgerald disputes the material terms by asserting that the communications between the parties failed to culminate in an agreement. Brief of Respondent, 13. Ms. Fitzgerald does not challenge the existence of the terms, she merely states that the terms never culminated in an agreement.

This is not a genuine dispute of material terms as contemplated by *Morris*. Even if addressed under the *Morris* factors correctly, the terms of Mr. Fitzgerald's *Addendum to Decree* and Ms. Fitzgerald's *Agreed Order* concern the same material terms. CP 43; CP 173; CP 179. Mr. Fitzgerald, through Mr. Peltram, proposed a temporary suspension of maintenance and \$250.00 per child, per month in support (*Addendum to Decree*). CP 50. Ms. Fitzgerald, through Mr. Nolte, proposed a temporary suspension of maintenance and an undivided \$500.00 per month in child support (*Agreed Order*). CP. 55-56. Mr. Fitzgerald was amiable to these terms and began paying Ms. Fitzgerald an undivided \$500.00 per month in child support beginning on November 1, 2013. CP 55-56. He also suspended maintenance payments per the terms of the *Agreed Order*. CP 62. Thus, It is undisputed that the material terms of the agreement were set out during the parties' negotiations and the second *Morris* factor is satisfied even if challenged by Ms. Fitzgerald.

2. Mr. Fitzgerald accepted the terms of Ms. Fitzgerald's offer by performing in good faith for a thirteen month period.

The final *Morris* factor is a factual determination. Here, the issue before the court concerns acceptance. "Acceptance is an expression (communicated by word, sign, or writing to the person making the offer) of the intention to be bound by the offer's terms." *Veith v. Xterra Wetsuits, LLC*, 144 Wn. App. 362, 370 (2008) citing *Plouse v. Bud Clary of Yakima, Inc.*, 128 Wn. App. 644, 648 (2005). As with any contract, the court's role is to

ascertain the objectively manifested intention of the parties. *Berg v. Hudesman*, 115 Wn. 2d 657, 663, (1990); *Plumbing Shop v. Pitts*, 67 Wn. 2d 514, 517 (1965). Using the objective manifestation standard, courts impute to a person an intention corresponding to the reasonable meaning of their words or acts. *Id.* The parties' subjective intentions are irrelevant. *City of Everett v. Estate of Sumstad*, 95 Wn. 2d 853, 855 (1981).

In *Morris*, the court ruled that informal written correspondence between the parties' attorneys were sufficient to establish a CR 2A agreement. 69 Wn. App. at 869. Thomas Maks, through counsel, agreed to the terms of a settlement offer from the Phillip Morris and his attorney. *Id.* 867. After the parties agreed to the material terms of the deal, Maks' accountant informed him that the agreement would have a substantial affect upon his tax liability. *Id.* Maks terminated the negotiations. *Id.* The evidence presented at trial indicated that the subject matter of the agreement was uncontroverted, the material terms were stated in informal letters between counsel, and the parties' written statements evidenced an objective intent to be bound by the terms of the letters. *Id.* *Morris* demonstrates that courts are willing to subvert contract formalities when informal negotiations clearly establish the material terms with which parties agree to be bound.

In the Fall of 2013, the parties reached an agreement after several weeks of negotiations. CP 62. On November 8, 2013, following two phone conversations between parties' counsel, Mr. Peltram sent Mr. Nolte the *Addendum to Decree*. CP 43; CP 173. On November 30, 2013, Mr. Nolte

counter-offered with the *Agreed Order*. CP 43; CP 173. The *Agreed Order*, though unsigned, was sent on pleading paper from Mr. Nolte's office, Stamper Rubens P.S. CP 52-57. Based on the actions of the parties leading up to the counter-offer, and by delivering the *Agreed Order* on his firm's pleading paper, Mr. Nolte and Ms. Fitzgerald manifested an intent to deliver, and did deliver a binding agreement to Mr. Peltram and Mr. Fitzgerald. At that point, the only remaining step to create a binding agreement was for Mr. Fitzgerald to agree to the order, which he did, not only through complete performance under the agreement, but also through his counsel's signature on the document itself. A reasonable view of these negotiations clearly indicate that the parties manifested an intent to enter into an agreement.

VI. CONCLUSION

The Appellant, Timothy Fitzgerald, respectfully requests this Court to enforce the parties' *Agreed Order Re: Child Support and Maintenance* and overturn the trial court's decision awarding Theresa Fitzgerald's child support and maintenance in the amount of \$25,250.00.

Respectfully submitted on this 1st day of October, 2015.



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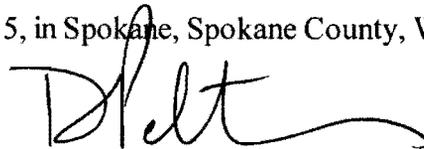
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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the state of Washington that on the 1st day of October, 2015, I caused a true and correct copy of the Reply Brief of Appellant Timothy W. Fitzgerald to be served on the following persons by first class mail, postage pre-paid, and bearing the following correct names and addresses of these addressees:

Attorney for Respondent:
Ms. Hailey L. Landrus
Attorney at Law
720 West Boone, Suite 200
Spokane, WA 99201

SIGNED this 1st day of October, 2015, in Spokane, Spokane County, Washington.



DANA A. PELTRAM