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No. 73239-1-I

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

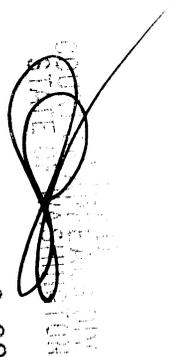
In re the Marriage of:

TIMOTHY W. FITZGERALD,  
Appellant,

and

THERESA L. FITZGERALD,  
Respondent.

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APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
Honorable Patrick Monasmith, Judge

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BRIEF OF RESPONDENT

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ORIGINAL

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**A. ISSUES RELATING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Did the trial court properly deny Mr. Fitzgerald's Motion to Enforce Stipulated Agreement where the alleged agreement was not signed by Ms. Fitzgerald or her attorney and the parties did not agree on the terms of child support and maintenance?
2. Did the trial court properly exercise its discretion by refusing to bar Ms. Fitzgerald's motion for contempt for laches where Ms. Fitzgerald's motion was filed within the statute of limitations and Mr. Fitzgerald offered no evidence of prejudice?
3. Did the trial court properly exercise its discretion by declining to equitably estop Ms. Fitzgerald's motion for contempt where the parties' modification negotiations did not end in agreement and where Mr. Fitzgerald offered no evidence of injury?
4. Did the trial court properly exercise its discretion by denying Mr. Fitzgerald's request for CR 11 sanctions where Ms. Fitzgerald's motion was based on undisputed facts and warranted by the law and her motion was successful?
5. Should the Court grant Ms. Fitzgerald attorney fees and costs under RCW 26.09.140 where she has demonstrated need and Mr. Fitzgerald has the ability to pay?

**B. STATEMENT OF THE CASE**

After nearly 24 years of marriage, Timothy and Theresa Fitzgerald divorced on June 21, 2013. Clerk's Papers (CP) 17. Mr. Fitzgerald had been in the military throughout the parties' marriage. CP 71. Ms. Fitzgerald had been a stay-at-home wife and mother, raising the parties'

four children while Mr. Fitzgerald was frequently deployed abroad for months at a time. CP 71.

Final agreed orders awarded Mr. Fitzgerald the family home (and the expenses associated with it), 61% of his military retirement pay, his Roth IRA, half of the funds on deposit in four bank accounts, two vehicles, an ATV, and miscellaneous personal property. CP 32-33, 35. Ms. Fitzgerald was awarded a vacant lot (and the mortgage against it), a timeshare (and the annual maintenance expenses associated with it), 39% of Mr. Fitzgerald's military retirement pay, the three remaining IRAs, the remaining funds on deposit in five bank accounts, a suburban, and a few personal property items. CP 33-34, 36.

In addition to the division of property and liabilities, Mr. Fitzgerald agreed to pay Ms. Fitzgerald \$1,000 maintenance per month for 60 months. CP 37. Maintenance would terminate upon Ms. Fitzgerald's death or remarriage and was modifiable as soon as Mr. Fitzgerald retired from the military in September 2013:

The husband shall pay the wife \$1,000 per month for sixty (60) months beginning June 1, 2013. If the wife remarries during the sixty (60) months period, maintenance shall be terminated. It is also noted that the future maintenance is terminated upon the death of the wife. In the event the husband dies prior to sixty (60) months of spousal maintenance, the number of months remaining of maintenance shall be designated to the wife from his life

insurance policy. The balance of the life insurance policy shall be distributed to his children as beneficiaries. Maintenance shall be modifiable as soon as the end of September 2013 when the husband retires from the military. Should the wife and/or the husband obtain new employment or other financial changes the issues of maintenance can be readdressed during the sixty (60) months as this maintenance is modifiable. Maintenance shall be deductible and declarable according to the IRS.

CP at 37.

Mr. Fitzgerald was ordered to pay child support of \$2,000 per month (\$1,000 for each of the parties' two minor children). CP 8. The Final Order of Child Support also provided that Mr. Fitzgerald could ask the court to modify his child support obligation when he separated from the military in September 2013:

It is anticipated that the father will soon be retired from the military as of September 2013. As a result of that, his only income will be his portion of the retirement which is anticipated at approximately \$4,750 gross income per month. At the same time the respondent/mother shall receive her portion of the retirement, which then shall give her income of approximately \$3,070 per month. Based on those calculations, either party by appropriate motion and notice to the family law department of Superior Court may request a recalculation of child support.

CP at 15 (Paragraph 3.23).

At the end of September 2013, Mr. Fitzgerald retired from the military, was unemployed, and (through counsel) contacted Ms. Fitzgerald to discuss modifying his maintenance and child support obligations. CP

178. He proposed paying \$1,500 total in child support and maintenance for October 2013, terminating maintenance effective November 2013, and decreasing his ongoing child support transfer payment to \$127.65 per month beginning November 2013. CP 179, 186.

Ms. Fitzgerald agreed to accept the October 2013 payment of \$1,500 because Mr. Fitzgerald had no employment and would not begin receiving his military retirement until November 2013; however, she rejected Mr. Fitzgerald's proposal regarding his ongoing child support obligation. CP 179. She proposed that Mr. Fitzgerald's ongoing child support obligation be decreased to \$794.66 per month beginning November 2013. CP 198.

Mr. Fitzgerald would not agree to pay child support of \$794.66 per month and offered to pay \$500 per month. CP 179. On November 8, 2013, he sent Ms. Fitzgerald a proposed "*Addendum to Decree of Dissolution and Order of Child Support*" that terminated his maintenance obligation and reduced his child support obligation for two children to \$250 per month per child effective November 1, 2013. CP 179, 209-10.

Beginning November 2013, Mr. Fitzgerald began following his proposal and unilaterally stopped paying maintenance and began paying child support of \$500 per month. CP 167.

Ms. Fitzgerald counter-offered on November 30, 2013, with an unsigned, proposed “*Agreed Order Re: Child Support and Maintenance*” that temporarily suspended maintenance “until the first month the Petitioner obtains employment” and reduced child support for the parties’ two minor children to an undivided \$500 per month. CP at 218; CP 180, 219-20. Ms. Fitzgerald’s proposed order further required Mr. Fitzgerald to notify her within seven days of obtaining employment. CP 220. Mr. Fitzgerald did not respond to Ms. Fitzgerald’s November 30 proposal. CP 180.

In April 2014, Mr. Fitzgerald was appointed Spokane County Superior Court Clerk. CP 180. He neither notified Ms. Fitzgerald of his new employment nor resumed maintenance payments, and he continued to pay no maintenance and \$500 monthly child support. CP 167. Ms. Fitzgerald learned of Mr. Fitzgerald’s new employment from the parties’ children. *Id.* On May 7, 2014, she requested information from Mr. Fitzgerald about his new employment. CP 180, 223.

Mr. Fitzgerald acknowledged his new employment on May 13 and indicated that the parties needed to exchange current financial information to recalculate child support for the parties’ son because their daughter was soon graduating from high school. CP 180, 225. He also requested the

income of Ms. Fitzgerald's partner if Ms. Fitzgerald was going to pursue spousal maintenance. CP 180, 225.

Beginning June 2014, Mr. Fitzgerald unilaterally lowered his child support payment to \$250 per month. CP 168.

On August 22, 2014, Mr. Fitzgerald's attorney signed and returned Ms. Fitzgerald's November 30, 2013, proposed "*Agreed Order Re: Child Support and Maintenance*" to Ms. Fitzgerald's attorney and offered to "resume discussion about finalizing [the] matter" even though his job future as Clerk of the Court was uncertain because he had to run for election in the fall of 2014. CP at 227.

Mr. Fitzgerald won the November election and notified Ms. Fitzgerald in December 2014 that child support could be calculated according to the parties' respective incomes because his job future and income were certain for the next four years. CP 181.

On January 6, 2015, Ms. Fitzgerald sent Mr. Fitzgerald proof of her income and expenses, notified Mr. Fitzgerald that he was delinquent on his maintenance and child support obligations, asked Mr. Fitzgerald to bring those obligations current, and proposed that his child support obligation for the parties' remaining minor child be adjusted to \$1,373.78 per month. CP 181.

Mr. Fitzgerald responded by moving to enforce the proposed “*Agreed Order Re: Child Support and Maintenance*” as a stipulated agreement pursuant to CR 2A and RCW 2.44.010. CP 42-61, 240-45.

Ms. Fitzgerald opposed Mr. Fitzgerald’s motion, arguing that the parties never had a meeting of the minds on the proposed “*Agreed Order Re: Child Support and Maintenance.*” CP 250. She argued that Mr. Fitzgerald’s actions showed there was no meeting of the minds. Report of Proceedings (1RP) (Jan. 28, 2015) (Counsels’ Oral Argument) 20. For instance, Mr. Fitzgerald began paying child support of \$250 per child before the proposed “*Agreed Order Re: Child Support and Maintenance,*” which set child support at an undivided \$500, was even drafted. CP 167, 179-80. Moreover, Mr. Fitzgerald did not notify Ms. Fitzgerald within seven days of becoming re-employed, he did not resume maintenance payments upon his re-employment or upon signing the proposed order, and he unilaterally reduced his child support payments to \$250 per month in June 2014. CP 168.

Ms. Fitzgerald moved for contempt, requesting a judgment for back maintenance and back child support. CP 64-7. She requested a judgment of \$16,750 for delinquent child support from October 2013

through January 2014, and \$14,500 for unpaid maintenance from October 2013 through January 2014. CP 64-7.

Mr. Fitzgerald asked the court apply the doctrines laches and equitable estoppel to bar Ms. Fitzgerald's motion. CP 42-61, 240-45. He also moved for CR 11 sanctions against Ms. Fitzgerald's attorney. CP 245-46. Ms. Fitzgerald further argued that equitable estoppel did not apply because it was not reasonable for Mr. Fitzgerald to have relied on the unsigned "*Agreed Order Re: Child Support and Maintenance*" when the June 2013 Final Order of Child Support was still effective and obligated him to pay child support of \$1,000 per month. CP 251-52; 1RP 20-21. And she argued that laches did not apply because she timely sought to enforce Mr. Fitzgerald's court ordered obligations and because Mr. Fitzgerald could not show detrimental reliance, i.e., that he would be damaged by doing what he had been legally ordered to do. CP 250-53; 1RP 21.

The trial court questioned whether Mr. Fitzgerald's equitable defenses were supported by evidence of detrimental reliance. 1RP 12, 21. Mr. Fitzgerald offered no evidence but claimed he had detrimentally relied because he would have negotiated a different agreement or filed a motion

to modify child support and maintenance had he known back maintenance and child support payments were accruing. 1RP 12; CP 244.

After oral argument on the parties' respective motions, the trial court found the parties did not have an agreement to modify maintenance or child support, nor did they have the power to modify child support by agreement, and denied Mr. Fitzgerald's Motion to Enforce a Stipulated Agreement. CP 268; Report of Proceedings (2RP) (Jan. 28, 2015) (Oral Ruling) 6.

It further found that, while Mr. Fitzgerald was not in willful contempt, he owed \$16,750 in back child support and \$8,500 in back maintenance. 2RP 6. As a matter of equity, the trial court suspended the \$7,000 of maintenance owed between November 2013 and April 2014, adding it to the end of Mr. Fitzgerald's 60-month maintenance obligation. 2RP 6; CP 275. The trial court entered an Order on Show Cause, which included a judgment against Mr. Fitzgerald in the amount of \$25,250 for back maintenance and child support. CP 270. Mr. Fitzgerald appealed both orders entered by the trial court. CP 266-77.

## C. ARGUMENT

### 1. Mr. Fitzgerald's Motion to Enforce a Settlement Agreement was properly denied where the alleged agreement was not signed by Ms. Fitzgerald or her attorney and child support, maintenance, and notice terms were disputed.

The trial court correctly denied Mr. Fitzgerald's Order Denying Petitioner's Motion to Enforce a Stipulated Agreement. This Court reviews de novo an order denying a motion to enforce a settlement agreement supported by declaration: "When a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed, the trial court proceeds as if considering a motion for summary judgment." *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (2000).

"Principles of contract law control the formation of a settlement agreement." *Pietz v. Indermuehle*, 89 Wn. App. 503, 519, 949 P.2d 449 (1998) (citing *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993)). The agreement is subject to judicial interpretation in light of its language and the circumstances surrounding its making. *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983).

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, 801 P.2d 222 (1990). The parties' subjective intentions are irrelevant. *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981).

A contract does not exist unless the parties have agreed upon the terms of a contract and their intention is clear. *Pietz*, 89 Wn. App. at 519. In other words, a contract requires a meeting of the minds on the essential terms. *Evans & Son, Inc., v. City of Yakima*, 136 Wn. App. 471, 477, 149 P.3d 691 (2006). This requires a consideration of whether (1) the subject matter has been agreed upon, (2) all of the terms are stated in writing, and (3) the parties intended a binding agreement prior to the time the contract was made. *Morris*, 69 Wn. App. at 869.

When the purport of a claimed settlement agreement is disputed<sup>1</sup>, the agreement will not be enforced pursuant to CR 2A and RCW 2.44.010 unless the agreement is assented to in open court on the record or in writing and signed by the attorney denying the agreement's existence:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the

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<sup>1</sup> The purport of an agreement is disputed when its material terms are disputed. *In re Marriage of Ferree*, 71 Wn. App. 35, 40, 856 P.2d 706 (1993).

record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

CR 2A;

An attorney and counselor has authority:

(1) To bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney[.]

RCW 2.44.010(1). While settlements are to be encouraged and the purpose of the rule and statute is to give certainty and finality to settlements if they are made, negotiations that do not culminate in an agreement are not binding upon the parties. *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954). Where it is disputed that the parties' negotiations resulted in an agreement, noncompliance with CR 2A and RCW 2.44.010 precludes enforcement of the so-called agreement. *Id*; *Ferree*, 71 Wn. App. at 40.

“[T]he party moving to enforce a settlement agreement carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement.” *Brinkerhoff*, 99 Wn. App. at 696. Thus,

because Mr. Fitzgerald is the party who moved to enforce the proposed Agreed Order re Child Support and Maintenance as an agreement, Mr. Fitzgerald has the burden of showing that there is no material dispute regarding the order's terms or existence. The evidence is considered in the light most favorable to the non-moving party, Ms. Fitzgerald. *Id.* at 697. Mr. Fitzgerald failed to meet his burden.

The terms of the alleged agreement - the November 30, 2013, proposed Agreed Order re Child Support and Maintenance - were disputed. The November 30 proposed order was nothing more than a communication in a series of negotiations between the parties over 13 months that failed to culminate in an agreement.

This series of negotiations show Ms. Fitzgerald proposed suspending Mr. Fitzgerald's maintenance obligation temporarily until the first month that Mr. Fitzgerald became reemployed and proposed requiring Mr. Fitzgerald to notify her within seven days of his reemployment. CP 218.

Mr. Fitzgerald, on the other hand, wanted to permanently terminate his maintenance obligation. CP 167, 209. Although not supported by the Decree, it has been Mr. Fitzgerald's position all along that his maintenance obligation should terminate when Ms. Fitzgerald began receiving her share

of military retirement pay. However, the parties entered into an agreed Decree in June 2013 that provided for 60 months of \$1,000 monthly maintenance payments with full knowledge that Mr. Fitzgerald would be retiring from the military in September 2013 and with full knowledge that Ms. Fitzgerald would begin receiving a portion of his retirement pay shortly after his retirement. Maintenance was made modifiable in light of the fact that Mr. Fitzgerald's income would change upon his retirement from the military.

Although Mr. Fitzgerald now claims he intended to temporarily suspend maintenance consistent with the November 30 proposed order, his objective actions show he considered maintenance to be permanently terminated consistent with his November 8, 2013, proposed Addendum to Decree of Dissolution and Order of Child Support. CP 209-10. Mr. Fitzgerald stopped paying maintenance beginning November 1, 2013, which was before the November 30 proposed order existed. He did not notify Ms. Fitzgerald when he became re-employed in April 2015. He did not respond to the November 30 proposed order until after he became re-employed. He did not voluntarily resume paying maintenance after his re-employment or after his attorney signed the November 30 proposed order in August 2014. CP 167. He did not begin paying maintenance again

until he was court-ordered to do so. The evidence of the parties' negotiations and Mr. Fitzgerald's objective actions show the parties did not have a meeting of the minds on maintenance.

The evidence further shows the parties did not agree on an undivided child support obligation of \$500 per month as set forth in the November 30 proposed order. Mr. Fitzgerald initially proposed modifying child support to \$127.65 per month. CP 179. Ms. Fitzgerald proposed reducing Mr. Fitzgerald's child support obligation to \$794.66 with a credit for medical premiums once Mr. Fitzgerald provided proof of premium payments. CP 179.

Mr. Fitzgerald rejected Ms. Fitzgerald's proposal, offered to pay \$250 per child, and began paying \$500 per month for the parties' two minor children at the beginning of November 2013. CP 179. At the end of November 2013, Ms. Fitzgerald rejected Mr. Fitzgerald's offer and proposed that he pay an undivided child support obligation of \$500. CP 180.

Mr. Fitzgerald did not respond until May 2014, after his re-employment, and stated that the parties needed to exchange financial information and recalculate child support. CP 180. He then began paying \$250 per month in child support unilaterally when the parties' daughter

graduated from high school. CP 167. And he continued to pay \$250 per month after his attorney signed the November 30 proposed order that indicated a \$500 child support payment in August 2014. In January 2015, Ms. Fitzgerald proposed that Mr. Fitzgerald pay \$1,373.78 per month based on the parties' current incomes. CP 181.

Like maintenance, the objective evidence of the parties' negotiations and Mr. Fitzgerald's objective actions show the parties never had a meeting of the minds on the modification of child support.

Because the parties genuinely dispute the terms modifying Mr. Fitzgerald's maintenance and child support obligations, no agreement exists. And, because it is disputed that the parties' negotiations resulted in an agreement, the alleged settlement agreement had to be either signed by Ms. Fitzgerald or her attorney or entered on the court record or in the court minutes to be enforceable under CR 2A or RCW 2.44.010. It is undisputed that neither Ms. Fitzgerald nor her attorney signed the November 30, 2013, proposed order. It is further undisputed that the order was not entered on the court record or into the court minutes.

The parties had no meeting of the minds on the essential terms of the modification of Mr. Fitzgerald's maintenance and child support obligations. And noncompliance with CR 2A and RCW 2.44.010

precludes enforcement of the proposed Agreed Order re Child Support and Maintenance. *Eddleman*, 45 Wn.2d at 432; *Ferree*, 71 Wn. App. at 40. Thus, the trial court did not err, and this Court should affirm the trial court's Order Denying Petitioner's Motion to Enforce Stipulated Agreement.

**2. The trial court properly declined to apply the doctrine of laches to Ms. Fitzgerald's motion for contempt where Mr. Fitzgerald produced no evidence of prejudice.**

The trial court did not abuse its discretion by refusing to apply the doctrine of laches. Mr. Fitzgerald argues Ms. Fitzgerald's motion for contempt should have been barred by laches. He also contends for the first time on appeal that laches should have barred Ms. Fitzgerald from challenging Mr. Fitzgerald's Motion to Enforce a Stipulated Agreement. *See* CP 243-45. Mr. Fitzgerald may not raise this new issue for the first time on appeal, and this Court should disregard it. RAP 2.5(a). He failed to establish laches in any event. The application of laches is reviewed for abuse of discretion. *In re Marriage of Watkins*, 42 Wn. App. 371, 375, 710 P.2d 819 (1985).

To establish laches, Mr. Fitzgerald had to show: (1) inexcusable delay, and (2) prejudice to Mr. Fitzgerald from such delay. *Automotive*

*United Trades Organization v. State*, 175 Wn.2d 537, 542, 286 P.3d 377 (2012).

Ms. Fitzgerald's motion for contempt for unpaid child support and maintenance was not inexcusably delayed as a matter of law. The applicable statute of limitation is 10 years. RCW 6.17.020.

In *In re Marriage of Sanborn*, the court held that laches did not apply and awarded the former wife a judgment for back maintenance plus interest and attorney fees even though the claim was asserted after 28 months of non-payment. 55 Wn. App. 124, 128, 777 P.2d 4 (1989). Ms. Fitzgerald asserted her claim for back maintenance and back child support after only 13 months. Within that 13 months, she had attempted to negotiate an agreed modification of maintenance and child support in light of Mr. Fitzgerald's employment changes. And approximately seven months of the delay was due, at least in part, to the fact that Mr. Fitzgerald's future income was uncertain because he had to stand for election. After Mr. Fitzgerald won the election and his financial future was certain, negotiations ended unsuccessfully and Ms. Fitzgerald promptly took court action. Like in *Sanborn*, laches should not apply here because Ms. Fitzgerald's claim was timely.

Even if the delay was inexcusable, Mr. Fitzgerald failed to prove he suffered prejudice as a result of the delay. *Id.* at 128. Reasonable inferences from the trial court's oral ruling show the trial court found no prejudice to Mr. Fitzgerald as a result of the delay.

During oral argument, the trial court considered Mr. Fitzgerald's equitable claims by questioning whether Mr. Fitzgerald had been prejudiced by Ms. Fitzgerald's delay in moving for contempt. He offered no evidence that he took on additional financial obligations that he would not have taken had he anticipated paying unpaid maintenance and child support. Instead, Mr. Fitzgerald claimed he would have filed for modification had he known back support was accruing. He also claimed he was prejudiced because he would have to pay over \$30,000 in back maintenance and child support.

In fact, Mr. Fitzgerald continues to argue on appeal that he "will unjustifiably be forced to pay a considerable sum in the thousands of dollars unless this reviewing court now intervenes in this matter." Br. of Appellant at 17. But Mr. Fitzgerald cannot prove prejudice by showing he must do now what he had been legally obligated to do under the Final Order of Child Support and Decree of Dissolution entered in this matter. *Sanborn*, 55 Wn. App. at 128. Mr. Fitzgerald could have moved to modify

child support and maintenance at any time after September 2013. He did not.

The lack of evidence of prejudice supports the trial court's refusal to apply the doctrine of laches to Ms. Fitzgerald's claims. The trial court properly exercised its discretion.

**3. The trial court properly refused to apply the doctrine of equitable estoppel where the trial court found the parties did not have an agreement and Mr. Fitzgerald produced no evidence of injury.**

The trial court also properly exercised its discretion by refusing to equitably estop Ms. Fitzgerald from moving for contempt. Mr. Fitzgerald concedes the trial court considered his equitable claims but contends the trial court did not go far enough in considering his equitable estoppel defense. He further contends that Ms. Fitzgerald should be equitably estopped from challenging Mr. Fitzgerald's Motion to Enforce a Stipulated Agreement and from moving for contempt.

First, Mr. Fitzgerald did not ask the trial court to equitably estop Ms. Fitzgerald from challenging his Motion to Enforce a Stipulated Agreement. CP 243. He cannot now request such relief for the first time on appeal. RAP 2.5(a). This Court should disregard the request.

Second, the trial court asked Mr. Fitzgerald if he had any questions or needed the court to clarify its decision. 2RP at 8, 12. Mr. Fitzgerald never asked the trial court to clarify or elaborate on its decision regarding equitable estoppel. 2RP at 8, 12. The invited error doctrine prohibits a party from setting up an error at the trial court level and then complaining of it on appeal. *In re Marriage of Morris*, 176 Wn. App. 893, 900, 309 P.3d 767 (2013). Because Mr. Fitzgerald did not ask the trial court to further consider his equitable estoppel defense, he cannot now claim that the trial court did not “go far enough” in considering it.

Whether the trial court properly refused to apply equitable estoppel is reviewed for abuse of discretion. *Coy v. Raabe*, 77 Wn.2d 322, 326, 462 P.2d 214 (1969); *Watkins*, 42 Wn. App. at 375. This Court does not reweigh evidence as Mr. Fitzgerald’s argument implies. *In re of Marriage of McNaught*, 72343-0-I, 2015 WL 4885752, at \*7 (Wash. Ct. App. Aug. 17, 2015).

To prove equitable estoppel, Mr. Fitzgerald had to show: (1) Ms. Fitzgerald asserted a statement or acted inconsistent with a claim afterward asserted; (2) Mr. Fitzgerald acted on the faith of that statement or act; and (3) Mr. Fitzgerald would be injured if Ms. Fitzgerald were allowed to contradict or repudiate the statement or act. *Hunter v. Hunter*, 52 Wn.

App. 265, 271, 758 P.2d 1019 (1988). “Equitable estoppel is not favored, and the party who asserts it must prove every element with clear, cogent, and convincing evidence.” *Sanborn*, 55 Wn. App. at 129.

Reasonable inferences from the trial court’s oral findings demonstrate Mr. Fitzgerald did not establish that Ms. Fitzgerald asserted a statement or acted inconsistent with a claim afterward asserted. Mr. Fitzgerald’s argument on equitable estoppel is based primarily on the false premise that the parties had an agreement. The trial court found the parties’ negotiations did not culminate into an agreement. 2RP 5, 6. The evidence in the record supports that finding. The alleged agreement was not signed by Ms. Fitzgerald or her attorney. 2RP 2-3; CP 57, 221. There was no indication the alleged agreement was binding. 2RP 3; CP 215, 166-68. Instead, “everything that happened was a moving target.” 2RP 4-5; CP 178-239. And Ms. Fitzgerald’s delay in moving for contempt was not an expression of mutuality. 2RP 5. Moreover, the trial court further found that the parties did not have the authority to simply modify child support by agreement absent court approval because the parties receive child support as trustees. 2RP 6.

In addition, Mr. Fitzgerald produced no evidence of injury that would justify the application of equitable estoppel. As with laches, he

offered no evidence that he had taken on some financial obligation that he would not have taken had he known he would be required to pay child support and maintenance.

The trial court properly exercised its discretion by declining to apply the doctrine of equitable estoppel.

**4. The trial court properly denied Mr. Fitzgerald's request for CR 11 sanctions where Ms. Fitzgerald prevailed on her motion.**

The trial court properly exercised its discretion by denying Mr. Fitzgerald's request for CR 11 sanctions against Ms. Fitzgerald's attorney. Mr. Fitzgerald contends on appeal the trial court should have imposed CR 11 sanctions against Ms. Fitzgerald and her counsel. He asked the trial court for CR 11 sanctions against only Ms. Fitzgerald's counsel. Thus, he cannot seek CR 11 sanctions against Ms. Fitzgerald for the first time on appeal. RAP 2.5(a).

“[D]ecisions either denying or granting sanctions ... are generally reviewed for abuse of discretion.” *Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

The trial court properly denied CR 11 sanctions because Ms. Fitzgerald prevailed against Mr. Fitzgerald's Motion to Enforce a Stipulated Agreement and on her motion for contempt. The purpose of

CR 11 is to deter baseless filings and curb abuses of the judicial system. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004). A filing is baseless if it is not well grounded in fact, or not warranted by existing law. *Skimming*, 119 Wn. App. at 754, 82 P.3d 707. The burden was on Mr. Fitzgerald, the moving party, to justify his request for sanctions. *Biggs*, 124 Wn.2d at 202, 876 P.2d 448. Because CR 11 sanctions have a potential chilling effect, sanctions should be imposed only when it is patently clear that a claim has absolutely no chance of success. *Skimming*, 119 Wn. App. at 755.

Here, Ms. Fitzgerald's motion was based on the undisputed facts that, although he was court-ordered and had the ability to do so, Mr. Fitzgerald was not paying maintenance or child support consistent with those orders. Ms. Fitzgerald's motion was not only well-grounded in fact and warranted by existing law but it also succeeded insofar as the trial court granted the back maintenance and back child support she requested and entered a judgment of \$25,250 in favor of Ms. Fitzgerald. Because the trial court's Order on Show Cause is sound, the trial court properly exercised its discretion by denying Mr. Fitzgerald's request for CR 11 sanctions.

**5. Ms. Fitzgerald should be awarded attorney fees and costs on appeal pursuant to RCW 26.09.140.**

Ms. Fitzgerald requests attorney fees and costs on appeal. This Court may award attorney fees if authorized by applicable law. RAP 18.1.

RCW 26.09.140 provides for attorney fees and costs on appeal: “Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys’ fees in addition to statutory costs. The court may order that the attorneys’ fees be paid directly to the attorney who may enforce the order in his or her name.”

Consistent with RAP 18.1(c), Ms. Fitzgerald has timely filed a Financial Declaration simultaneously with this brief so that the Court can consider her resources. Ms. Fitzgerald’s Financial Declaration shows that her basic expenses exceed her income (especially when considering her \$500 monthly payments for attorney fees) even though she receives \$2,765 in retirement pay and her sole income of \$1,000 monthly maintenance. Her only other resource is approximately \$14,000 of investments. She should not be required to deplete her only investments to defend against this action.

Moreover, although the trial court entered a judgment of \$25,250 in Ms. Fitzgerald’s favor, the majority of that judgment (\$16,750) was for

unpaid child support, which belongs to the children, not Ms. Fitzgerald. Only \$8,500 was for unpaid maintenance. And, as of the date of this brief, the trial court has not yet decided Ms. Fitzgerald's request for attorney fees and costs at the trial court level.

The fees and costs incurred by Ms. Fitzgerald to defend against Mr. Fitzgerald's action to date have far exceeded \$8,500. She has need, and Mr. Fitzgerald has the ability to pay. Ms. Fitzgerald, therefore, respectfully requests that this Court order Mr. Fitzgerald to pay for the cost to Ms. Fitzgerald of maintaining and defending this appeal and reasonable attorneys' fees in addition to statutory costs.

**D. CONCLUSION**

For the reasons stated above, Ms. Fitzgerald asks this Court to affirm the trial court's Order Denying Petitioner's Motion to Enforce a Stipulated Agreement dated February 19, 2015, and Order on Show Cause dated January 23, 2015, and to award her attorney fees and costs pursuant to RCW 26.09.140.

Respectfully submitted on September 17, 2015.

STAMPER RUBENS, P.S.

By:   
Hailey L. Landrus, WSBA #39432  
Attorney for Respondent

PROOF OF SERVICE (RAP 18.5(b))

I, Laurel Vitale, do hereby certify under penalty of perjury that on September 17, 2015, I caused to be delivered by messenger, a true and correct copy of the Brief of Respondent:

Mr. Martin A. Peltram  
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Spokane, WA 99201

A handwritten signature in black ink that reads "Laurel Vitale". The signature is written in a cursive style and is positioned above a horizontal line.

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