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COURT OF APPEALS  
DIVISION II

No. 37731-4  
STATE OF WASHINGTON COURT OF APPEALS  
DIVISION TWO

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STATE OF WASHINGTON  
BY SW  
DEPUTY

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MARK A. LAVERGNE,

Appellant,

and

TERESA GRIMSELY,

Respondent.

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On Appeal from Thurston County Superior Court  
Honorable Paula Casey

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Amended Appellant's Opening Brief

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**ORIGINAL**

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## **A. Assignments of Error**

1. There is no substantial evidence supporting Finding of Fact No. 4: “By the other account this was apparently just the best bed or the only bed or just the way it was done by these parties in raising their children, with neither wanting to stray too far from the children.”
2. There is no substantial evidence supporting Finding of Fact No. 7: “The facts have not been well developed, in my opinion, despite the evidentiary hearing.”
3. There is no substantial evidence supporting Finding of Fact No. 13: “Ms. Grimsley’s testimony was basically that she welcomed Mr. LaVergne into the house so that the children wouldn’t leave her home half the time to go to his house.”
4. There is no substantial evidence supporting Finding of Fact No. 15: “Since I don’t have any information except some testimony from Mr. LaVergne that these parties were pursuing a relationship together, and even he did not give any concrete examples, of how this relationship was being pursued together except his testimony disputed that the parties had dinner together at restaurants only occasionally. I don’t know if the parties ever ate dinner together in their

own home or what they did.”

5. The trial court erred in concluding Conclusion of Law No. 2:  
“Merely living together is insufficient to prove reconciliation. Instead, a couple must intend to resume the marital relationship and hold themselves out as a married couple in order to prove reconciliation. Mr. LaVergne did not meet his burden of proving that reconciliation occurred.”
6. The trial erred when it concluded Conclusion of Law No. 5:  
“The parties lived in one house for their mutual convenience and to accomplish the parenting plan. No one really testified that these two people held themselves out as a couple after September 2004 and there was three years of time for someone to make those observations.”
7. The trial erred when it concluded Conclusion of Law No. 6:  
“I’m satisfied that the critical and most financially significant parts of the Property Settlement Agreement were, in fact, carried out after September 2004.”
8. The trial erred when it concluded Conclusion of Law No. 7:  
“Despite sharing the Fairview Home, the parties did not reconcile with the intention of resuming and preserving their marriage nor did they intend to deviate from nor set aside

the Property Settlement Agreement of September 2004.”

9. The trial erred when it concluded Conclusion of Law No. 10:

“The CR 2A Property Settlement Agreement will not be set aside.”

10. The trial erred when it concluded Conclusion of Law No. 11:

“The CR 2A Property Settlement Agreement will be enforced as of September 21, 2004.”

#### **Issues Pertaining to Assignments of Error**

1. Whether the trial court erroneously concluded that Mark LaVergne [Mark] and Teresa Grimsley [Teresa] did not intend to reconcile and abrogate their CR2A Agreement when they engaged in sexual relations, cohabitated for 33-months, slept in the same bed, mutually cared for their children, regularly had dinner together with their children at home, spent time as a couple with friends, traveled together with their children, continued to commingle their assets and debts, treated property allocated in the CR2A Agreement as mutually-owned, continued discussing financial investments, allowed Mark to retained ownership of A+ Septic contrary to the Agreement, continued to permit A+ Septic to pay Mark’s bills, and failed to follow-through with a majority of the CR2A Agreement’s provisions.

2. Whether the Parties' earnings and accumulations that were not disposed of by the CR2A Agreement, and their earnings and accumulations accumulated during the 33-month period after they signed the CR2A Agreement where they remained married and resumed living together were community property.

3. Whether the trial court erred when it failed to characterize as community or distribute the parties' earnings and accumulations they received while married during their 33-month cohabitation period after they signed the CR2A Agreement.

4. Whether this Court should remand this case with instructions to distribute the assets not transferred under the CR2A Agreement or which were earned or accumulated during the 33 months the parties cohabitated while married after they signed the CR2A Agreement.

## **B. Statement of Facts<sup>1</sup>**

### **1. Procedural Facts**

In November 2003, Teresa Grimsley [Teresa] filed a petition to dissolve her marriage to Mark LaVergne [Mark].<sup>2</sup> On September 24, 2004, Mark and Teresa signed a CR2A Agreement [“The CR2A

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<sup>1</sup> Verbatim Report of Proceedings dated January 28, 2008 is 1RP; the VRP dated January 28-29, 2008 is 2RP; and the VRP dated January 29, 2008 is 3RP.

<sup>2</sup> CP 929-33.

Agreement”], dividing some property between them that they owned; determining parenting issues; and determining maintenance and child support.<sup>3</sup> After signing the CR2A Agreement, Mark and Teresa stayed at a Ramada Inn and had sexual intercourse.<sup>4</sup> The next day, Mark moved back into their marital home with his and Teresa's children and Teresa, Mark and the children lived together for the next 33 months.<sup>5</sup>

The CR2A Agreement charged Teresa with drafting and presenting final orders to the trial court.<sup>6</sup> Teresa, however, did not draft proposed final orders and the Petition was dismissed.<sup>7</sup> Teresa got the dismissal vacated on July 2, 2007 without notice to Mark<sup>8</sup> and filed a Motion to Enforce the CR2A Agreement.<sup>9</sup>

On January 28-29, 2008, the trial court held an evidentiary hearing to determine whether to enforce or set aside the CR 2A Agreement.<sup>10</sup> Ultimately, the trial court enforced the CR 2A Agreement.<sup>11</sup>

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<sup>3</sup> Exhibit 1, CR2A Agreement.

<sup>4</sup> 1RP 111; 2RP 387.

<sup>5</sup> 1RP 109-110; 2RP 392-93.

<sup>6</sup> Exhibit 1, The CR2A Agreement, IV, E, ¶ 4.

<sup>7</sup> CP 939.

<sup>8</sup> CP 940.

<sup>9</sup> CP 941-42.

<sup>10</sup> See 1RP, 2RP, and 3RP.

<sup>11</sup> CP 941-42.

On April 29, 2008, the trial court issued final orders in this case: Decree of Dissolution, Findings of Fact and Conclusions of Law, Child Support Order, and a Final Parenting Plan.<sup>12</sup>

Mark timely appealed the Order Enforcing CR2A/Property Settlement Agreement and each of the final orders.<sup>13</sup>

## **2. Substantive Facts**

Mark and Teresa were married on October 1, 1994.<sup>14</sup> In many ways, they had a typical marital relationship. They dined out frequently together, went to movies together, and traveled together.<sup>15</sup> During their marriage they were fortunate to have founded and built a successful multi-million dollar business, A+ Septic and Plumbing [A+ Septic].<sup>16</sup> Mark started this business on December 27, 1993 and was the sole shareholder.<sup>17</sup> By 2004, the Company was grossing \$5.8 Million annually.<sup>18</sup>

Unconventionally, Mark and Teresa took turns managing A+ Septic.<sup>19</sup> At times, Mark would manage the Company and Teresa

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<sup>12</sup> CP 962-66; CP 980-89; CP 990-94; and CP 967-79.

<sup>13</sup> CP 952-61; CP 995-1038.

<sup>14</sup> CP 991, Finding of Fact ¶ 2.4.

<sup>15</sup> 3RP 463.

<sup>16</sup> Exhibit 8 (Articles of Incorporation for MAL, Inc. dba A+ Plumbing and Septic).

<sup>17</sup> *Id.*

<sup>18</sup> Exhibit 16 (MAL, Inc. Tax Return for 2004).

<sup>19</sup> 1RP 114.

would take a break and visa-versa.<sup>20</sup> Even when Mark or Teresa took a break from managing A+ Septic, they would still receive a substantial monthly distribution from the A+ Septic.<sup>21</sup>

A+ Septic also managed and paid Mark's and Teresa's personal bills.<sup>22</sup> At the end of the year, A+ Septic would treat these payments as ordinary income distribution to either Mark or Teresa, depending on who charged that particular personal expense. Mark or Teresa would then pay the tax attributable to this income.<sup>23</sup>

Building a business together proved a constant source of marital strain.<sup>24</sup> Mark described their working relationship as "contentious."<sup>25</sup> Teresa's many extra marital affairs did nothing to shore up their marital relationship.<sup>26</sup>

In 1997, the couple separated for about a year.<sup>27</sup> They subsequently reconciled in 1999 and renewed their vows.<sup>28</sup>

On January 6, 2003, Teresa gave birth to twins: Aaron and Landon.<sup>29</sup> Aaron had health complications that required extensive

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<sup>20</sup> 1RP 124.

<sup>21</sup> 1RP 125; 3RP 454-55.

<sup>22</sup> 2RP 341-42.

<sup>23</sup> 2RP 342.

<sup>24</sup> 1RP 124.

<sup>25</sup> 1RP 124.

<sup>26</sup> 2RP 222.

<sup>27</sup> CP 1045.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

treatment and extended hospital stays.<sup>30</sup> Eventually, Aaron was able to return home, but his condition required constant supervision and, for his first two years, he had to be fed through a tube directly into his stomach.<sup>31</sup>

In November 2003, Teresa filed a Petition for Dissolution of Marriage.<sup>32</sup> Mark believed Teresa was having an affair and was using methamphetamine.<sup>33</sup> Mark also alleged Teresa was improperly siphoning money from A+ Septic so he filed a Temporary Restraining Order.<sup>34</sup> The presiding court issued an Order prohibiting Teresa from having anything to do with A+ Septic.<sup>35</sup>

In December 2003, the trial court issued temporary orders that directed Mark and Teresa to split time living at the Fairview Avenue House to facilitate Aaron's care.<sup>36</sup> Teresa resided at the Fairview Avenue House from Monday 3pm until Friday at 9am. Mark resided at the Fairview Avenue House from Friday at 9am until Monday at 3pm.<sup>37</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> 2RP 227-28.

<sup>32</sup> CP 929-33.

<sup>33</sup> 1RP 115.

<sup>34</sup> 1RP 114; Exhibit 27.

<sup>35</sup> 1RP 114; Exhibit 27.

<sup>36</sup> CP 937, page 3, ¶ 11.

<sup>37</sup> CP 937, page 3, ¶ 11; 1RP 107; CP 1043.

The divorce proceedings were contentious, engendered hard feelings between the parties, and generated over \$200,000 in legal fees.<sup>38</sup> At the time, there was no indication that the parties would reunite or live together in the same house ever again.

As part of the initial dissolution process, a Guardian Ad Litem [GAL] submitted a report to the trial court.<sup>39</sup> The GAL observed “sensitive, attuned parenting” from both Mark and Teresa and stated the “boys showed affection to both parents.”<sup>40</sup> The GAL recommended one-week-on and one-week-off placement for Landon and Aaron with each parent establishing a separate residence.<sup>41</sup> The GAL also recommended Teresa see a therapist to deal with her “judgment with respect to lifestyle issues.”<sup>42</sup>

Teresa and Mark did not live together in the same house at the same time from December 2003 through September 2004.<sup>43</sup>

On September 21, 2004, the parties attended mediation with Commissioner Harry Slusher and deliberated for 11 hours.<sup>44</sup> The

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<sup>38</sup> 1RP 113.

<sup>39</sup> CP 1041-1053.

<sup>40</sup> CP 1047.

<sup>41</sup> CP 1052-53; 1RP 171-72.

<sup>42</sup> CP 1053.

<sup>43</sup> 1RP 107, 109;

<sup>44</sup> 2RP 245.

mediation culminated in their reaching and signing the CR2A Agreement. The CR2A Agreement provided:

- (a) "Household type" personal property would be divided between the parties by agreement.<sup>45</sup>
- (b) Mark would keep the Dodge truck, power parachute, Trendwest timeshare and ½ the couple's tools.<sup>46</sup>
- (c) Teresa would keep the Chevrolet car, Kubota lawnmower, 2 Seadoo water crafts, the Honda car, and ½ the tools.<sup>47</sup>
- (d) One joint bank account at West Coast Bank (Account No. 7205) would be closed and split 50/50 and the other West Coast Bank account (Account No. 7106) would be turned over to Mark in its entirety.<sup>48</sup>
- (e) Mark would resign from all positions he held at A+ Septic on October 1, 2004.<sup>49</sup>
- (f) A+ Septic's credit card would remain A+ Septic's property.<sup>50</sup>

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<sup>45</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment page 1, ¶ 3. The CR2A Agreement also stated the Parks Weaver would resolve any disputes between the parties over the division of personal property.

<sup>46</sup> Exhibit 1, The CR2A Agreement, IV, E, page 1, ¶ 3(a).

<sup>47</sup> Exhibit 1, The CR2A Agreement, IV, E, page 1, ¶ 3(b).

<sup>48</sup> Exhibit 1, The CR2A Agreement, IV, E, page 2, ¶ 6. This provision was clarified by a ruling by Commissioner Slusher, see Exhibit 1, Decision of Harry R. Slusher dated November 26, 2004.

<sup>49</sup> Exhibit 1, The CR2A Agreement, IV, E, page 3, ¶ 7.

<sup>50</sup> Exhibit 1, The CR2A Agreement, IV, E, page 3, ¶ 5.

(g) Teresa would indemnify Mark and hold Mark harmless from all past, present, and future liabilities associated with A+ Septic.<sup>51</sup>

(h) Mark would receive the following real property: Chambers Street, Seventh Avenue, Second Avenue and Pacific Avenue.<sup>52</sup>

(i) Mark would receive all investment accounts.<sup>53</sup>

(j) Teresa would keep the Fairview Avenue House and would solely own A+ Septic.<sup>54</sup>

(k) Teresa would exclusively control A+ Septic on October 1, 2004.<sup>55</sup>

(l) Teresa would pay Mark \$2,000,000; a \$750,000 initial payment being due on October 15, 2004.<sup>56</sup> The balance was due in monthly installments amortized over 9 years at 6% interest. A+ Septic would also pay Mark one-half A+ Septic's net annual profit over \$500,000.<sup>57</sup>

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<sup>51</sup> *Id.* Exhibit 1, The CR2A Agreement, IV, E, page 3, ¶ 7.

<sup>52</sup> Exhibit 1, IV, The CR2A Agreement, E, page 4, ¶ 8.

<sup>53</sup> Exhibit 1, IV, The CR2A Agreement, E, page 5, ¶ 12.

<sup>54</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (a).

<sup>55</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (e).

<sup>56</sup> This amount presupposed \$1.1 Million in the bank. If this amount was not in the bank, then the amount paid was to be reduced by the difference. See footnote to Exhibit 1, IV, E, Attachment A, (c).

<sup>57</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (c).

(m) A+ Septic would pay Mark a salary of \$10,000 a month from October through December 2004.<sup>58</sup>

(n) Teresa would secure her and A+ Septic's obligations to Mark by granting him a deed of trust on the Fairview Home and a UCC security interest on all A+ Septic's equipment.<sup>59</sup>

(o) A+ Septic would enter into a new lease with Mark at market rates and pay Mark one year rent for its continued ability to use and possess the Pacific Avenue Property.<sup>60</sup>

Mark and Teresa signed the CR2A Agreement on September 21, 2004.<sup>61</sup> The CR2A Agreement specifically charged Teresa with preparing the final paperwork embodying the CR2A Agreement,<sup>62</sup> and formally presenting the final orders.<sup>63</sup>

After mediation and after signing the CR2A Agreement, the parties reconciled. To be sure, that night, after they signed the CR2A Agreement, Mark and Teresa went to the Ramada Inn and had sexual relations.<sup>64</sup> Mark testified that they agreed not to follow-

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<sup>58</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, ¶ (f).

<sup>59</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, ¶ (d); 1RP 192.

<sup>60</sup> Exhibit 1, The CR2A Agreement, IV, E, page 4, ¶ 8.

<sup>61</sup> Exhibit 1, page 3 (Signature blocks).

<sup>62</sup> The final paper work included the Dissolution Decree, Parenting Plan, Child Support Order, and Findings of Fact and Conclusions of Law.

<sup>63</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment page 1, ¶ 4.

<sup>64</sup> 1RP 111; 2RP 387.

through with the CR2A Agreement and agreed to not divorce.<sup>65</sup>

The next day, Mark and Teresa began living together again in the Fairview Avenue House and they continuously lived there with their children for 33 months.<sup>66</sup> They even resumed sleeping together in the same bed.<sup>67</sup>

Though the CR2A Agreement charged Teresa with drafting the final orders in this case, Teresa did nothing to complete the divorce during this 33-month period.<sup>68</sup> The case was noted up twice for presentation of orders, but Teresa failed to follow-through both times.<sup>69</sup> Teresa said she did not follow-through the first time because she had a meeting with the Attorney General.<sup>70</sup> She could not even remember the reason she did not follow-through the second time the case was set for presentation.<sup>71</sup>

During the 33-months Mark and Teresa lived together after they signed the CR2A Agreement, they acted as a married couple: they slept in the same bed,<sup>72</sup> they ate dinner regularly with their

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<sup>65</sup> 1RP 112; 2RP 264-65 (Mark testified it was at the Ramada Inn that the couple agreed not to enforce the CR2A Agreement and not to get divorced).

<sup>66</sup> 1RP 109-110; Need a cite from Teresa's testimony.

<sup>67</sup> Even Teresa admitted she slept in the same bedroom as Mark 60-70 percent of the time he lived at the Fairview Avenue House. 2RP 391.

<sup>68</sup> 2RP 386.

<sup>69</sup> 2RP 386-87.

<sup>70</sup> 2RP 387.

<sup>71</sup> *Id.*

<sup>72</sup> 2RP 391; CP 945, Finding of Fact No. 4.

children,<sup>73</sup> they discussed investments with each other,<sup>74</sup> they went out to dinner as a couple,<sup>75</sup> they went to events together,<sup>76</sup> they did activities with their children,<sup>77</sup> and they traveled together.<sup>78</sup>

Teresa paid the Fairview Avenue House mortgage from West Coast Bank Account No. 7205 while Mark landscaped the Fairview Avenue House property and helped pay for the groceries.<sup>79</sup>

In some ways, Mark and Teresa may have acted consistent with the CR2A Agreement: (1) A+ Septic paid Mark a lump sum payment of \$602,000.00;<sup>80</sup> (2) Mark received \$10,000.00 a month from October 2004 through December 2004;<sup>81</sup> (3) Mark retained the following real property: Chambers Street,<sup>82</sup> 2<sup>nd</sup> Avenue,<sup>83</sup> Pacific Avenue<sup>84</sup> and 7<sup>th</sup> Avenue;<sup>85</sup> (4) A+ Septic save Mark a monthly check of \$16,837.65 from November 1, 2004 through July 2007.<sup>86</sup>

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<sup>73</sup> 3RP 414.

<sup>74</sup> 3RP 451

<sup>75</sup> 1RP 10.

<sup>76</sup> 1RP 9-10.

<sup>77</sup> 1RP 9.

<sup>78</sup> 3RP 476.

<sup>79</sup> 2RP 327-28; 3RP 471.

<sup>80</sup> 1RP 117; 2RP 252.

<sup>81</sup> 2RP 259.

<sup>82</sup> There was no testimony or evidence showing Mark owned the Chambers Street property after the parties signed the Agreement.

<sup>83</sup> 1RP 175-76.

<sup>84</sup> 1RP 139.

<sup>85</sup> There was no testimony or evidence showing the 7<sup>th</sup> Avenue property belonged to Mark after the parties signed the Agreement.

<sup>86</sup> 1RP 124, 3RP 440. Teresa claims she originally handed Mark his check monthly, but Mark stopped cashing his checks, so Teresa claimed she deposited

In many other ways, however, Mark and Teresa acted contrary to the CR2A Agreement:

(1) Mark never conveyed the Fairview Avenue House to Teresa and she never asked him to convey the Fairview Avenue House to her;<sup>87</sup>

(2) Mark never resigned from A+ Septic and never transferred his interest in A+ Septic to Teresa;<sup>88</sup>

(3) Teresa never transferred the investment accounts to Mark;<sup>89</sup>

(4) One of the Edward Jones Investment Accounts, an Individual retirement account, in Mark's name, continued to be funded by both Teresa and A+ Septic during the 33-months Mark and Teresa cohabitated;<sup>90</sup>

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the checks directly into Mark's account. 3RP 440. See Exhibit 20, Photocopies of checks Mark received from A+ Septic from November 1, 2004 – July 1, 2007.

<sup>87</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (a); 2RP 251, 384-85; 3RP 452, 356.

<sup>88</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (a); 2RP 255-57. According to the Articles of Incorporation filed with the State and the sole stock certificate for A+ Septic, Mark remains the sole shareholder of the Company. See Exhibit 8; 2RP 310. 1RP 116; 2RP 249; 3RP 428 (Teresa admitted Mark did not transfer the stock); 3RP 484.

<sup>89</sup> Exhibit 1, The CR2A Agreement, IV, E, page 5, ¶12; 2RP 250; 3RP 466, 468; Exhibit 1, The CR2A Agreement, IV, E, page 5, ¶ 12.

<sup>90</sup> Exhibit 24; 1RP 33-38 (Marvin Kopp's testimony RE Mark's IRA that Teresa and A+ Septic continued to fund).

(5) Neither Teresa nor A+ Septic ever entered into a new lease with Mark for A+ Septic's continued use of the Pacific Avenue Property.<sup>91</sup>

(6) Mark never received the entire balance from West Coast Bank account No. 7106 or one-half the balance from West Coast Bank Account No. 7205.<sup>92</sup> Instead of closing these accounts, Mark and Teresa sent a letter to West Coast Bank instructing West Coast Bank to keep these "joint" accounts open.<sup>93</sup> Moreover, Teresa kept using these accounts as if they belonged to her.<sup>94</sup> Just prior to re-starting this litigation, she emptied both accounts and did not distribute any funds to Mark.<sup>95</sup>

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<sup>91</sup> 1RP 138, 140-42; 2RP 249; 3RP 477. See Exhibit 12A (Appraisal of Pacific Avenue Property by Prime Locations).

<sup>92</sup> This was resolved in Harry R. Slusher's November 26, 2004 ruling where he concluded: (1) Teresa was to pay Mark half the balance of the account into which the "rents" were being deposited for the Pacific Avenue property; and (2) pay Mark the remaining balance of the account where no rent had been deposited. Exhibit 1, Commissioner Slusher's Ruling, ¶ 5, (a) and (b). 1RP 149-50.

<sup>93</sup> 1RP 159, Exhibit 42; 2RP 249-50, 397-98 (Teresa admitted the West Coast Accounts were never closed and split as they should have been); 3RP 406-07 (Teresa admitted she signed the letter to West Coasts Bank instructing the bank to keep accounts 7106 and 7205 open); and 3RP 411-12 (Teresa admitted the Agreement required these accounts to be closed, but the couple purposefully kept them open).

<sup>94</sup> Exhibit 48 (Account No. 7106 checks) and Exhibit 49 (Account No. 7205 checks).

<sup>95</sup> 3RP 410 (Teresa admitted she closed Account No. 7106), 471 (Teresa admitted she closed Account No. 7205).

(7) Teresa never gave Mark a deed of trust on the Fairview Avenue House or a UCC security interest on all of A+ Septic's equipment.<sup>96</sup>

(8) The couple never divided the household, personal property; rather, they both continued to use it while they lived together.<sup>97</sup>

(9) Mark did not vacate the Fairview Avenue House by November 1, 2004.<sup>98</sup>

(10) A+ Septic did not pay Mark \$750,000 as an initial payment if the Company had reserves of \$1.1 Million in the bank.<sup>99</sup> A+ Septic admittedly had \$1.1 Million in reserves in the bank.<sup>100</sup> A+ Septic, however, only paid Mark a \$602,000 down payment.<sup>101</sup>

(11) Teresa failed to make the initial installment payment to Mark on October 15, 2004 as required by the Agreement.<sup>102</sup>

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<sup>96</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (d); 1RP 192; 2RP 254.

<sup>97</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment, page 1, ¶3; 1RP 195-96. Parks Weaver was supposed to settle disputes regarding the division of personal property, but he was never contacted and is now dead. 1RP 196. See *a/so*, 2RP 396.

<sup>98</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, ¶ (h); 1RP 109-110.

<sup>99</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (c).

<sup>100</sup> 3RP 460-61.

<sup>101</sup> 3RP 459-61.

<sup>102</sup> Exhibit 20 begins with check dated November 1, 2004 even though Exhibit 1, IV, E, Attachment A, (c) stated first installment should be paid on October 15, 2004.

(12) Mark continued to use A+ Septic's corporate credit card.<sup>103</sup>

(13) A+ Septic deposited at least one of Mark's \$16,378.65 installment payments into the joint account (Account No. 7205).<sup>104</sup>

(14) Teresa failed to pay Mark at least 3 of the \$16,378.65 installment payments.<sup>105</sup>

Mark and Teresa also continued to commingle their assets as they did prior to filing for dissolution. According to the CR2A Agreement, Mark was to receive West Coast Bank Account No. 7106 with a balance of \$42,382.41; and one-half of West Coast Bank Account No. 7205 with a balance of \$7,228.80.<sup>106</sup> Pursuant to the CR2A Agreement, these accounts were to be closed.<sup>107</sup> Mark and Teresa kept these joint accounts open and Teresa treated these accounts as if they were her own.<sup>108</sup> She deposited

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<sup>103</sup> 2RP 302-03.

<sup>104</sup> 2RP 217 (Mark testified one check was wrongly deposited into Teresa's account). Exhibit 20.

<sup>105</sup> 2RP 353 (Louchren testified Mark did not receive 3 checks); Exhibit 20 shows three checks did not clear bank and A+ Septic did not send a check on October 15, 2004 when required by the Agreement.

<sup>106</sup> 1RP 154, 156.

<sup>107</sup> 1RP 147, Exhibit 1, The CR2A Agreement, IV, E, page 2, ¶6; Exhibit 1, Commissioner Slusher's Ruling, page 2-3 (Regarding West Coast Bank Accounts).

<sup>108</sup> Exhibit 42, Letter from Mark and Teresa instructing West Coast Bank to keep Accounts No. 7106 and 7205 open; 2RP 397 (These two accounts are joint accounts).

A+ Septic's monthly rent check for the Pacific Avenue Property into this account and spent freely on herself from this account.<sup>109</sup>

Teresa also used West Coast Bank account 7205 as if it continued to belong to her. She deposited approximately \$231,500 into this account during the 33-months the couple lived together.<sup>110</sup> She also wrote hundreds of checks from these accounts.<sup>111</sup> In fact, she paid the Fairview Avenue House mortgage from this account.<sup>112</sup> She further admitted she used these accounts in the same way she had always used them before she signed the CR2A Agreement.<sup>113</sup>

Moreover, despite Mark being the only person listed on the A+ Septic credit card account and the fact that Mark never formally authorized Teresa to use his A+ Septic credit card,<sup>114</sup> Teresa used Mark's credit card as though it was her primary credit card.<sup>115</sup>

Furthermore, Mark and Teresa treated property allocated in the CR2A Agreement as mutually-owned. Despite Mark being given

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<sup>109</sup> 2RP 294; Exhibit 48 (Account No. 7106 checks).

<sup>110</sup> 3RP 471.

<sup>111</sup> Teresa said she did not write many personal checks to these accounts, but a quick scan of Exhibits 48 and 49 show she wrote about 98 checks to the 7106 account; and 376 checks to the 7205 account during the 33 months. See Exhibits 48 and 49.

<sup>112</sup> 3RP 471; Exhibit 7.

<sup>113</sup> 3RP 356-57.

<sup>114</sup> 1RP 188-89.

<sup>115</sup> 3RP 428.

the Pacific Avenue Property in the Agreement, Teresa acted as if she and Mark still owned it jointly. She created and signed a new lease for a coffee stand, Johnie's Coffee, that began operating on this property.<sup>116</sup> Teresa admitted she was treating the Pacific Avenue Property as if she owned it.<sup>117</sup> Teresa testified that the coffee stand operator, Johnie Vosse, wrote several checks directly to her.<sup>118</sup> She said she never deposited these checks into Mark's account; instead, she either deposited them into her personal account or into the joint West Coast Bank account.<sup>119</sup> Moreover, she also exchanged the coffee stand rent for free coffee for A+ Septic's employees.<sup>120</sup> Finally, A+ Septic paid the property taxes on the Pacific Avenue Property.<sup>121</sup>

Teresa also treated the Second Avenue Property as though it were mutually owned. Teresa entered into a verbal rental agreement with Ricky Senn for his use of the Second Avenue Property.<sup>122</sup> Teresa also told Mr. Senn when and how to pay his

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<sup>116</sup> 3RP 446-47. Even though A+ Septic did not have a written lease with Mark, and therefore was only a month-to-month tenant, Teresa signed a 5-year lease with Johnie's Coffee with an option that permitted the coffee company to add another 5-years. 3RP 446-47.

<sup>117</sup> *Id.*

<sup>118</sup> 3RP 449.

<sup>119</sup> 3RP 450.

<sup>120</sup> 1RP 49; 3RP 449-50.

<sup>121</sup> 3RP 430-31.

<sup>122</sup> 1RP 175-76

rent.<sup>123</sup> Mr. Senn made payments occasionally to Mark and occasionally to Teresa.<sup>124</sup> A+ Septic also continued to make the utility payments for the Second Avenue Property and occasionally paid the property taxes.<sup>125</sup>

Finally, the Trendwest timeshare property remained in both Mark's and Teresa's names<sup>126</sup> and the quarterly fees were sometimes paid by Mark, sometimes paid by A+ Septic,<sup>127</sup> and sometimes paid from the joint account.<sup>128</sup>

Additionally, A+ Septic continued to treat Mark as it had treated him prior to the couple signing the CR2A Agreement. It continued to pay Mark's personal bills for 33-months and never asked him to reimburse it for these payments.<sup>129</sup>

## **C. Argument**

### **1. Standards of review.**

The proceeding below was an evidentiary hearing before the trial court. The trial court made both findings of fact and conclusions of law. An appellate court reverses a trial court's

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<sup>123</sup> 1RP 61, 63-64, 72-73.

<sup>124</sup> 1RP 63-64.

<sup>125</sup> 1RP 177-78.

<sup>126</sup> 1RP 180; Exhibit 57 (Trendwest Timeshare Invoice sent to Mark and Teresa LaVergne).

<sup>127</sup> 2RP 327; 3RP 452.

<sup>128</sup> 1RP 179; 2RP 327.

<sup>129</sup> 1RP 119; 2RP 302.

findings if they are not supported by substantial evidence in the record.<sup>130</sup> Conclusions of law are reviewed *de novo*.<sup>131</sup>

A conclusion of law is defined as the conclusions that follow, through the process of legal reasoning, when the law as applied to the facts as found by the court.<sup>132</sup> Findings of fact that appear in the conclusions of law, and visa-versa, are mislabeled and will be analyzed under the substantial evidence standard.<sup>133</sup> Findings of fact that have legal ramifications are conclusions of law and are reviewed *de novo*.<sup>134</sup>

**2. Washington cases have never analyzed when and under what circumstances a couple reconciles and thereby abrogates a separation contract or property settlement agreement.**

This is a case of first impression in Washington. No appellate court has articulated a standard to determine, first, whether a couple reconciled or, secondly, whether a couple's reconciliation abrogates their prior separation or property settlement agreement. This court should, therefore, establish the standard future courts will use when determining these issues.

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<sup>130</sup> *Miles v. Miles*, 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005).

<sup>131</sup> *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

<sup>132</sup> *State v. Niedergang*, 43 Wn. App. 656, 658, 719 P.2d 576 (1986) ("If the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.").

<sup>133</sup> *Winans v. Ross*, 35 Wn. App. 238, 240 n. 1, 666 P.2d 908 (1983); *Miles* at 70.

<sup>134</sup> *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980),

This is a factually unique case with no analogue in any jurisdiction. Here, the couple had sexual relations immediately after they signed the CR2A Agreement, then resumed cohabitating with one another and their children for 33 months and, in doing so, also resumed sleeping in the same bed. Mark and Teresa also followed few provisions in the CR2A Agreement and did not follow many other provisions in the CR2A Agreement. They did not pursue finalizing their divorce for over 33 months. There is no case containing all these factors. These factors are, however, discussed individually. This brief will discuss these factors and show that all these factors combined can only lead to a conclusion the parties reconciled. These complexities will be addressed below in light of legal principles from other jurisdictions.

The closest Washington case discussing reconciliation is *Burch v. Rice*.<sup>135</sup> In *Burch*, a woman acquired a restaurant prior to marriage.<sup>136</sup> During the marriage, the husband contributed labor toward the restaurant's improvement.<sup>137</sup> The parties executed an agreement that divided their property: the wife was granted the restaurant and the husband waived all right to alimony, suit money,

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<sup>135</sup> 37 Wn.2d 185, 222 P.2d 847 (1950).

<sup>136</sup> *Burch v. Rice*, 37 Wn.2d 185, 222 P.2d 847 (1950).

<sup>137</sup> *Id.* at 186-87.

and attorney fees.<sup>138</sup> A short time later, they reconciled.<sup>139</sup>

Reconciliation lasted for six months.<sup>140</sup> The wife obtained a divorce decree a short time later; the decree did not distribute the restaurant.<sup>141</sup>

Two years after the divorce, the wife purchased the property upon which the restaurant operated. She improved it. Ten years later, she sold the restaurant for a large profit. The husband brought suit claiming a half ownership interest in the restaurant.<sup>142</sup> He argued their Property Settlement agreement had been abrogated by their reconciliation.<sup>143</sup>

The *Burch* court stated there was no evidence that the parties intended to change or terminate the property settlement agreement because they, "neither by acts nor words indicated any intention of changing their property agreement."<sup>144</sup> Therefore, the property settlement agreement was enforceable by the wife.<sup>145</sup> The court

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<sup>138</sup> *Id.* at 187.

<sup>139</sup> *Id.* at 189.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 192.

<sup>145</sup> *Id.*

also determined the husband was barred by laches from asserting his claim.<sup>146</sup>

*Burch* provides limited help in deciding the complex issues in this case. The *Burch* court states the intent of the parties governs whether a couple reconciled,<sup>147</sup> but provides no further guidance.

**3. This Court should engage in a three-step analysis. First, whether the parties reconciled; second, whether reconciliation abrogated the CR2A Agreement; and, third, the legal effect reconciliation and abrogation have on the parties' agreement.**

Courts in other jurisdictions, typically, answer three questions when addressing whether a couple's reconciliation abrogates a prior property settlement agreement:

- (1) Did the couple reconcile?
- (2) Did the couple's reconciliation abrogate the parties' property agreement?
- (3) If the agreement has been abrogated, have all the provisions in the agreement been abrogated?

The arguments that follow will articulate the legal principles courts have applied in answering these questions. Second, it will identify the facts that support or undermine a conclusion that Mark and Teresa reconciled and thereby abrogated their CR2A

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 192.

Agreement. Third, it will apply the identified facts to the articulated legal principles. Having done these three things, it will, therefore, show Mark and Teresa reconciled; that their reconciliation legally abrogated their CR2A Agreement; and finally, that only the executory provisions in the CR2A Agreement were abrogated. This conclusion will be buttressed by the fact that Mark and Teresa, as a cohabitating married couple, continued to acquire and accumulate community property during the 33-month period they remained married and resumed cohabiting after they signed the CR2A Agreement.

**4. The parties' intent is fundamental in determining whether they have reconciled.**

Courts declare the parties' intent conclusively determines whether a couple has reconciled.<sup>148</sup> While Washington courts have not defined what constitutes reconciliation, other courts have gone on to define reconciliation as the intent to live together anew as husband and wife by establishing a marital home.<sup>149</sup> Other courts also stated, reconciliation is a state of mind to be determined from

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<sup>148</sup> *Burch v. Rice*, 37 Wn.2d at 192; *Dubin v. Dubin*, 174 Misc 952, 955, 22 NYS2d 246 (1940).

<sup>149</sup> *Jacobsen v. Jacobsen*, 41 Va. App. 582, 591, 586 S.E.2d 896 (2003).

all the evidence, including all reasonable inferences.<sup>150</sup>

While reconciliation seems to be a fact intensive inquiry, it is essential the trial court understand the law when it concludes whether a party reconciled or not. Here, the trial court never evinced a thorough understanding of the law governing reconciliation. Its conclusion the parties did not reconcile was in error.

- 5. If there are factors suggesting the parties may have reconciled, then courts should characterize the parties' agreement as either a separation agreement or a property settlement agreement in order to determine the correct law to apply to the facts when concluding whether a reconciliation abrogated parties' prior agreement.**

Once a court has concluded there are facts suggesting a couple reconciled, then the court must determine what is legally required to abrogate a couple's prior agreement and apply the facts suggesting reconciliation to the law and determine the legal effect attributable to the parties' actions.

The first step in determining the correct law to apply to the parties' actions is to characterize the parties' agreement as a separation agreement or a property settlement agreement. Courts apply different standards to property settlement and separation

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<sup>150</sup> *Drew v. Drew*, 250 Mass. 41, 45, 144 N. E. 763 (1924); *Nemer v. Nemer*, 117 Cal. App.2d 35, 38, 254 P2d 661 (1953).

agreements.<sup>151</sup> A separation agreement addresses the fact that husband and wife are living separately, provides support for the wife, and determines custody of the children.<sup>152</sup> A separation agreement is entirely executory dealing with future payments for the wife's support.<sup>153</sup>

Because a separation agreement is executory in its entirety, the majority of courts find it is completely abrogated when husband and wife reconcile and begin cohabitating anew.<sup>154</sup> This is because the consideration for a separation agreement is typically the couple continuing to live apart.<sup>155</sup> Reconciliation and cohabitation alone, therefore, wipes out the consideration and abrogates the agreement.<sup>156</sup>

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<sup>151</sup> Reconciliation as affecting separation agreement of decree, 35 ALR2d 707, § 2.

<sup>152</sup> *Id.*; A mere separation agreement does not constitute, nor is it intended to be, a full and final determination of the separate property rights of the parties. *Commonwealth ex rel. Di Valerio v. Di Valerio*, 169 Pa. Super. 477, 479-80, 82 A.2d 687 (1951).

<sup>153</sup> Reconciliation as affecting separation agreement of decree, 35 ALR2d 707, § 2.

<sup>154</sup> E.g., *In re Estate of Archibald*, 644 S.E.2d 264, 278 (N. C. 2007) (A separation agreement between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation). A minority of courts have held that cohabitation and reconciliation do not automatically abrogate a separation agreement. These courts state that a determination of reconciliation depends on whether the couple intended to reconcile by looking at conduct and surrounding circumstances. See e.g., *Ross v. Ross*, 103 Kan. 232, 233, 173 P.2d 291 (1918); *In Re Winter's Estate*, 164 Kan. 615, 619, 192 P.2d 186 (1948); and *In Re Ray's Estate*, 304 Pa. 421, 428 (1931).

<sup>155</sup> *Campbell v. Campbell*, 234 N. C. 188, 190, 66 S.E.2d 672 (1951).

<sup>156</sup> *Id.*

A pure property settlement agreement, on the other hand, makes a full and final determination of the rights of the parties in and with respect to their property<sup>157</sup> and may also contain some executory provisions.<sup>158</sup> For example, the agreement may charge the husband or wife with signing over a quit claim deed for land after the agreement has been signed.<sup>159</sup>

Courts hold property settlement agreements to a higher standard than separation agreements when determining whether a couple's reconciliation abrogated the agreement. The majority rule is that reconciliation and resumption of cohabitation will not alone abrogate a property settlement agreement.<sup>160</sup> A property settlement agreement is a final and binding contract that can only be voided by mutual agreement.<sup>161</sup> The intention of the spouses may be shown by acts and conduct and the surrounding circumstances.<sup>162</sup>

Here, the trial court erred because it never characterized the

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<sup>157</sup> Reconciliation as affecting separation agreement of decree, 35 ALR2d 707, §2.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See e.g., *Smith v. Smith*, 71 Ariz. 315, 227 P2d 214 (1951); *In Re Ray's Estate*, 304 Pa. 421, 430, 156 A 64 (1931);

<sup>161</sup> See e.g., *Morgan v. Morgan*, 106 Cal. App.2d 189, 234 P2d 782 (1951) (stating that the matter depends upon "the mutual intentions and understanding of the parties"); Reconciliation as affection settlement or decree, 35 ALR2d 707, § 5(a) (See case annotations).

<sup>162</sup> *Smith v. Smith*, 71 Ariz. at 319; *Morgan v. Morgan*, 106 Cal. App.2d at 192.

CR2A Agreement as either a separation agreement or a property settlement agreement. A trial court abuses its discretion when it decides a case on untenable grounds.<sup>163</sup> Since the trial court never characterized the CR2A Agreement, it never articulated or applied the correct legal standard to be applied to the facts in this case. As will be shown, the CR2A Agreement was a separation agreement. The trial court, therefore, abused its discretion in not applying the correct legal standard to separation agreements when it concluded the parties' reconciliation was not a reconciliation that abrogated the CR2A Agreement.

**6. The CR2A Agreement, in this case, is properly characterized as a separation agreement.**

Applying these principles related to separation agreements and property settlement agreements, it is clear the CR2A Agreement is a separation agreement. Here, the parties were separated and lived separate and apart when they signed the CR2A Agreement.<sup>164</sup> The CR2A Agreement acknowledged their intent to continue living separate and apart by awarding Teresa sole ownership and exclusive use and occupancy of the Fairview Avenue House.<sup>165</sup> It

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<sup>163</sup> *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

<sup>164</sup> 1RP 107-09 (Mark testified that he did not live in the Fairview House from December 2003 through September 21, 2004).

<sup>165</sup> Exhibit 1, CR2A Agreement, IV, E, Attachment A, (a).

also addressed the parenting arrangement regarding the children.<sup>166</sup> It provided neither parent needed to pay maintenance or child support.<sup>167</sup> All the provisions were executory,<sup>168</sup> since it contemplated the parties would subsequently make future payments, execute deeds of trust and UCC-1 financing statements, and divide property.<sup>169</sup>

Since the CR2A Agreement acknowledged Teresa's and Mark's continued and permanent separation; addressed parenting arrangements, maintenance and child support; and was entirely executory, it was a separation agreement and the parties' resuming sexual relations and moving in with one another abrogated the consideration for the CR2A Agreement as well as the executory

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<sup>166</sup> Exhibit 1, CR2A Agreement, IV, E, page 6, ¶ 13.

<sup>167</sup> *Id.* at page 3, ¶ 6.

<sup>168</sup> This is consistent with Black's Dictionary, which defines "executory" as: "To be performed at a future time; yet to be completed." Black's Law Dictionary (8th ed. 2004), executory.

<sup>169</sup> These are the executory provisions in the Agreement that were to be performed by the parties signed the agreement on September 21, 2004: Mark was to transfer all interest in A+ Septic to Teresa; Mark was to resign all positions with the corporation; Mark was retain ownership of 4 properties; A+ Septic was to pay Mark rent at market rates for use of the Pacific Avenue Property; Teresa was to transfer all investment accounts to Mark; Mark was to give the corporate credit card back to A+ Septic; Parenting plan decisions were to be presented with the final orders; Mark was to quit claim the Fairview House to Teresa; Teresa was to create a Deed of Trust on the Fairview House and a UCC security interest on A+ Septic's equipment to secure her debt to Mark; Mark was to received \$10,000 a month for three months; A+ Septic was to pay Mark \$2,000,000 over nine years; A+ Septic was to pay Mark a down payment of \$750,000 on October 15, 2004; and A+ Septic was to pay Mark the difference in monthly installments amortized over 9 years.

provisions in the CR2A Agreement.<sup>170</sup>

**7. Even if the CR2A Agreement was characterized as a property settlement agreement, the parties abrogated it through conduct.**

Parties to a property settlement agreement may rescind the agreement according to general contract rules.<sup>171</sup> The conduct of the parties can be sufficient to support rescission.<sup>172</sup> Specifically, Washington courts have determined that despite a spousal agreement having been put into written form, in compliance with a governing statute, the couple may rescind that same agreement through conduct via an implied contract.<sup>173</sup> This standard is consistent with how the majority of courts determine whether a couple has abrogated a property settlement agreement: a mutual intent to abrogate the agreement.<sup>174</sup>

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<sup>170</sup> Reconciliation as affecting separation agreement or decree, 35 ALR2d 707 (1954), § 3 (See numerous cases supporting the proposition that reconciliation and cohabitation abrogate a separation agreement).

<sup>171</sup> *Higgins v. Stafford*, 123 Wn.2d 160, 165, 866 P.2d 31, 34 (1994).

*In re Marriage of Fox*, 58 Wn. App. 935, 939, 795 P.2d 1170, 1173 (1990).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* (rescission of prenuptial agreement that was in writing in compliance with governing statute); see also *Implied Contract*, 25 Wash. Prac., Contract Law And Practice § 1:9.

<sup>174</sup> *Burch* at 192; See e.g., *Morgan v. Morgan*, 106 Cal. App.2d 189, 192, 234 P.2d 782 (1951) (stating that the matter depends upon "the mutual intentions and understanding of the parties"); Reconciliation as affecting settlement or decree, 35 ALR2d 707, § 5(a) (See case annotations). See also Reconciliation of the Parties, 19 Wash. Prac., Fam. And Community Prop. L. § 19.22 (2008).

## **8. The evidence in this case shows Teresa and Mark legally reconciled and abrogated their CR2A Agreement.**

The discussion in this section will identify the facts that courts in other jurisdictions have relied upon in concluding a couple intended to reconcile and/or abrogate their agreement and explain how these facts conclusively show Mark's and Teresa's facts/actions they engaged in after they signed the CR2A Agreement abrogated their prior CR2A Agreement. The facts in this case that compel a conclusion the parties intended to reconcile and abrogate the CR2A Agreement are: (1) cohabitation, (2) sexual relations, (3) commingling assets, (4) treating of assets awarded in the agreement to one party as mutually-owned, (5) not seeking a divorce, (6) holding themselves out as a married couple, (7) setting-up a marital home, (8) failing to enforce the agreement's provisions.

While isolated sexual intercourse, or even casual sexual relations, will, generally, be insufficient to impact the provisions of an agreement,<sup>175</sup> sexual relations coupled with other facts (i.e., resuming cohabitation) is often sufficient to demonstrate intent to

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<sup>175</sup> *Love v. Mewborn*, 79 N.C. App. 465, 467-68, 339 S.E.2d 487(1986)(A single instance of sexual relations during a twenty-four hour reconciliation period was held not to void alimony payments agreed to in a "separation agreement and property settlement."); *Edwardson v. Edwardson*, 229 Mich. 66, 67-68, 201 NW 223 (1924) (Casual acts of sexual intercourse insufficient to support a conclusion agreement abrogated).

abrogate a property settlement agreement.<sup>176</sup>

Here, Mark and Teresa not only engaged in sexual intercourse on the night they signed the CR2A Agreement,<sup>177</sup> but they also resumed living together after living 10 months apart. Courts have uniformly viewed cohabitation as material evidence of reconciliation and intent to abrogate an agreement.<sup>178</sup> Here, prolonged cohabitation, coupled with their sexual relations required the trial court to conclude that Mark and Teresa reconciled with an intent to abrogate the CR2A Agreement.

Mark and Teresa did not only cohabit and have sexual relations, but they also re-established a marital home. Resuming a marital home is determinative evidence a couple intended to reconcile and abrogate their prior agreement.<sup>179</sup> Here, Mark and Teresa did not only sleep in the same bed for 33-months, but they

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<sup>176</sup> See *Nemer v. Nemer*, 117 Cal. App.2d 35, 38, 254 P.2d 661 (1953) (wherein the court said that the mere fact that the parties indulged in intercourse is not a controlling circumstance, but additional facts can support a conclusion agreement abrogated); see also, *Nacht v. Nacht*, 167 Cal.App.2d 254, 261, 334 P.2d 275 (1959) (Isolated acts of intercourse do not necessarily establish a reconciliation).

<sup>177</sup> 2RP 387; 1RP 111.

<sup>178</sup> See e. g., *Sylvester v Sylvester*, 137 So 2d 716, 719-20 (1962). Note, some courts have held mere cohabitation, alone, does not necessitate a conclusion that parties intended to reconcile and abrogate their prior agreement. *Thompson v. Thompson*, 294 A.D.2d 943, 943, 741 N.Y.S.2d 641 (App. Div. 4th Dep't 2002) (Mere cohabitation alone will not abrogate a separation agreement); See also *Roberts v. Pace*, 193 Va. 156, 159, 67 S.E.2d 844, 846 (1951).

<sup>179</sup> See e.g., *Heskett v. Heskett*, 245 S.W.3d 222, 227 (Ky. Ct. App. 2008); *Yeich v. Yeich*, 11 Va. App. 509, 513-14, 399 S.E.2d 170 (1990).

also continued to care for their children and continued to share meals with their children on a regular basis at the Fairview Avenue House.<sup>180</sup> Mark and Teresa's sleeping in the same bed is quintessential evidence they intended to reconcile and abrogate their CR2A Agreement. Even the trial court found they had ample means, a large house and could have easily slept in different rooms.<sup>181</sup> Both Mark and Teresa remained on the title to the Fairview Avenue House despite the CR2A Agreement.<sup>182</sup> Mark and Teresa shared expenses and Mark did the landscaping.<sup>183</sup> Moreover, they continued to commingle their funds.<sup>184</sup>

Furthermore, a friend of the family, Yvonne Schultz, testified that she spent time with Mark and Teresa at the Fairview Avenue House. She testified she spent holidays at the Fairview Avenue

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<sup>180</sup> CP 945, Finding of Fact No. 4; 1RP 21-23; 2RP 221-22; 3RP 390-92.

<sup>181</sup> CP 945, Finding of Fact No. 5. This is an unchallenged finding and is, therefore, a verity on appeal. See *Zunino v. Rajewski*, 140 Wn. App. 215, 220, 165 P.3d 57 (2007).

<sup>182</sup> 3RP 452.

<sup>183</sup> 1RP 158; 2RP 327-28.

<sup>184</sup> The 9/21/08 Agreement (and the subsequent Commissioner Slusher decision) Teresa was directed to close West Coast Bank accounts 7106 and 7205 and disperse half of the funds in 7106 to Mark and all of the funds in 7205 to Mark. 9/21/08 Agreement, IV, E, page 2, ¶ 6; Commissioner Slusher's Order, page 2-3. These accounts were never closed. 2RP 397-98. She, however, continued to write checks out of these accounts. 3RP 442. Teresa admitted she did not close these accounts and continued to write checks and deposit funds into them. 3RP 442-46 (Teresa admitted she ran \$250,000 through account 7205). She further admitted that Mark and she sent a joint letter to West Coast Bank to keep both accounts open. 3RP 406-07.

House<sup>185</sup> and talked with Mark and Teresa about their relationship.<sup>186</sup> She even saw Mark and Teresa in bed with their children.<sup>187</sup> She opined that she saw no difference between the way Mark and Teresa acted after they signed the CR2A Agreement and the way they acted before they separated.<sup>188</sup> Finally, the undisputed evidence was that Mark and Teresa continued to hold themselves out as a couple: they went out to dinner together, went to events together, traveled together with the children, and discussed investments together.<sup>189</sup> Plainly, the evidence demonstrates that Mark and Teresa renewed their family home and held themselves out as a married couple. This conclusively shows that they reconciled, and, therefore, intended to abrogate the CR2A Agreement.<sup>190</sup>

Courts have also determined that failure to follow-through with an anticipated divorce is evidence of intent to reconcile and

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<sup>185</sup> 1RP 18-19, 22.

<sup>186</sup> 1RP 38.

<sup>187</sup> 1RP 21-22.

<sup>188</sup> 1RP 29.

<sup>189</sup> Mark testified extensively how he and Teresa renewed going to dinner and event outside the home. Ms. Schultz testified she had gone with Teresa and Mark out to dinner, to a Christmas Bazaar, to a casino, and trick-or-treating. 1RP 9-12. When asked about these things, Teresa did not deny that Mark was present and only stated: "I don't recall." 2RP 388; 3RP 478. In support of the statement that Mark and Teresa continued to discuss investments, see 1RP 118; 123; 2RP 287; 3RP 451 (Teresa admitted she discussed Trapline Meadows and Rockharbor Investments with Mark and told him to "Be careful.").

<sup>190</sup> See e.g., *In Re Landon's Estate*, 149 Misc. 832, 833, 269 NYS 275 (1933).

abrogate a prior agreement.<sup>191</sup> Here, the CR2A Agreement charged Teresa with presenting final orders to finalize the couple's divorce.<sup>192</sup> Teresa, however, failed to follow-through despite the fact that a final presentation of orders was scheduled twice.<sup>193</sup> In fact, the trial court dismissed the case due to her failure to follow through and present final papers.<sup>194</sup> Here, the divorce becoming final was a straight-forward matter. The CR2A Agreement had resolved the property, support and parenting issues.<sup>195</sup> Even so, Teresa took no action for 33-months. This clearly shows the couple reconciled and intended to abrogate the CR2A Agreement.

Courts have also determined that a couple's failure to follow-through with a prior agreement's evidences the couple's intent to reconcile and abrogate their prior agreement.<sup>196</sup> Here, Mark and

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<sup>191</sup> *Zullo v Zullo*, 317 So 2d 453, 453-54 (1975) (Husband's release and quitclaim deed to purchase money mortgage and note, executed as part of property settlement in contemplation of divorce was invalid and husband remained joint owner of property where divorce was not obtained and parties reconciled.).

<sup>192</sup> Exhibit 1, CR2A Agreement, IV, E, page 1, ¶ 4.

<sup>193</sup> 2RP 386-87.

<sup>194</sup> CP 939.

<sup>195</sup> See Exhibit 1, CR2A Agreement dated September 21, 2004.

<sup>196</sup> *In Re Wolfe's Estate*, 48 Cal 2d 570, 575-76, 311 P2d 476 (1957).

(Reconciliation abrogated property settlement, where agreed payments were never made and husband continued to hold property which had been transferred to wife); 2RP 310 (no stock shares issued to anyone else); See also, *Hall v Hall*, 328 SW2d 541, 543 (1959) (Where car which wife was to take under property settlement agreement remained licensed in name of husband, who paid taxes after reconciliation, furniture she was to receive was never moved from home, and cash was contributed by wife to purchase of business, there was abrogation).

Teresa may have done some things that may have been consistent with the CR2A Agreement, but they failed to follow through with many other provisions in the CR2A Agreement. Specifically, Teresa did not prepare final paperwork and present final documents to finalize the divorce.<sup>197</sup> Mark did not vacate the Fairview Avenue House on October 1, 2004.<sup>198</sup> Teresa failed to make the first monthly payment to Mark on October 15, 2004.<sup>199</sup> Teresa paid Mark a lower lump sum payment than required by the CR2A Agreement.<sup>200</sup> Mark did not transfer his A+ Septic shares to Teresa.<sup>201</sup> Mark remained co-owner of the Fairview Avenue House.<sup>202</sup> Teresa neither signed nor delivered a deed of trust on the Fairview House or a UCC-1 financing statement on A+ Septic's

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<sup>197</sup> Exhibit 1, The CR2A Agreement, IV, E, page 2, ¶ 4; 2RP 386-87.

<sup>198</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (h); 1RP 109-110.

<sup>199</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (c); 1RP 130 (Mark testified he received his first payment on November 1, 2004); Exhibit 23 (showing no check payment for \$16,037.65 made on October 15, 2004).

<sup>200</sup> The CR2A Agreement required A+ Septic to make a \$750,000 payment to Mark if the Company had \$1.1 Million in the bank. Teresa testified the Company had \$1.1 Million in the bank, but still paid Mark almost \$150,000 less than required. 3RP 461.

<sup>201</sup> 1RP 115-16 (Mark testified Teresa did not ask him to transfer stock, because they decided not to follow the CR2A Agreement); 2RP 247 (Mark admitted he was supposed to transfer stock to Teresa); Exhibit 8 Articles of Incorporation of Mal, Inc. and Bylaws of the Company, See attached Stock Subscription Agreement (Lists Mark as sole shareholder with 500 shares).

<sup>202</sup> Exhibit 1, CR2A Agreement, IV, E, Attachment A (a) ("Wife keeps house..."); 2RP 251 (Mark said he was supposed to quitclaim the Fairview House to Teresa, but she did not ask him to do it); 3RP 452 (Teresa admitted Fairview House remained in both names at time of hearing).

equipment.<sup>203</sup> The couple did not divide \$100,000 in personal property.<sup>204</sup> Teresa did not pay Mark rent at market values for A+ Septic's use of the Pacific Avenue Property.<sup>205</sup> Teresa did not transfer any investment account to Mark.<sup>206</sup> Teresa did not close the West Coast Bank accounts and disperse funds to Mark.<sup>207</sup> Indeed, Mark and Teresa jointly sent a letter to West Coast Bank instructing it to keep the accounts open and active.<sup>208</sup> Mark did not return the corporate credit card back to A+ Septic as required by the Agreement and used it for his own personal purposes.<sup>209</sup> Mark did not resign his positions with A+ Septic.<sup>210</sup> The couple did not implement the agreed parenting plan provisions in the Agreement.<sup>211</sup>

Courts have also found that intent to abrogate a prior agreement should be inferred when the couple economically commingled their

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<sup>203</sup> Exhibit 1, The CR2A Agreement, IV, E, Attachment A, (d).

<sup>204</sup> Exhibit 1, The CR2A Agreement, IV, E, page 1, ¶ 3; 3RP 479-80 (Teresa admitted they did not transfer personal property during 33-months).

<sup>205</sup> Exhibit 1, CR2A Agreement, IV, E, page 4, ¶ 8 (small underline scribble on right of page); 3RP 477; 1RP 138.

<sup>206</sup> Exhibit 1, CR2A Agreement, IV, E, page 5, ¶ 12; 2RP 250.

<sup>207</sup> Exhibit 1, CR2A Agreement, IV, E, page 2, ¶ 6; Commissioner Slusher's Ruling, page 2-3; 2RP 397-98 (Teresa admitted West Coast Accounts never closed).

<sup>208</sup> 3RP 406-07, 11; Exhibit 42 (Joint letter instructing West Coast Bank to leave accounts 7106 and 7205 open).

<sup>209</sup> Exhibit 1, CR2A Agreement, IV, E, page 3, ¶ 5; 2RP 302-03; 3RP 428 (Teresa admitted she never had Mark's corporate credit card changed to make her the holder).

<sup>210</sup> 2RP 249 (Mark did not signed a letter of resignation during the 33-months).

<sup>211</sup> Exhibit 1, CR2A Agreement, IV, E, page 6, ¶ 13.

assets after signing the agreement.<sup>212</sup> Here, Teresa continued to deposit hundreds of thousands of dollars into and write checks from the West Coast accounts (7106 and 7205), which were either entirely or partially allocated to Mark under the CR2A Agreement.<sup>213</sup> Account 7106 contained the money that belonged to Mark under the CR2A Agreement and each month a \$3,000 monthly rent payment from A+ Septic was deposited into the account.<sup>214</sup> Even so, Teresa continued to write checks from and make deposits into this account.<sup>215</sup> Furthermore, Account 7205 contained funds belonging to Mark under the CR 2A Agreement, but Teresa ran hundreds of thousands of dollars in to, and out of, this joint account during the 33-months the couple cohabitated as a family.<sup>216</sup> Moreover, Teresa used a credit card in Mark's name as one of her main credit cards and made hundreds of thousands of dollars in charges during this 33-month period.<sup>217</sup> Teresa plainly treated the West Coast Bank accounts and the credit card in Mark's

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<sup>212</sup> *Glassen v. Glassen*, 13 P.3d 719, 724 (Alaska, 2000) (reconciliation abrogated agreement where couple continued to act as a economic unit).

<sup>213</sup> Exhibit 6 (Account No. 7205) and Exhibit 7 (Account No. 7106); Exhibit 46 (Checks written from Account No. 7106); Exhibit 49 (Checks written from Account No. 7205).

<sup>214</sup> Exhibit 48; 3RP 443.1RP 141-42.

<sup>215</sup> Exhibit 48.

<sup>216</sup> Exhibit 49.

<sup>217</sup> 3RP 429-30 (Teresa admitted using Mark's credit card as one of her main credit cards during the 33-months).

name as if they were mutually-owned. Finally, the couple made joint purchases (Audie's truck and a jet ski) from the West Coast Bank accounts.<sup>218</sup>

In addition to commingling funds, the couple continued to treat property allocated in the CR2A Agreement as mutually-owned.<sup>219</sup> In addition to treating the West Coast Bank accounts and Mark's credit card as mutually-owned, Teresa treated the Pacific Avenue Property (allocated to Mark in the CR2A Agreement) as mutually-owned<sup>220</sup> when she negotiated a 5-year contract with Johnie's Coffee<sup>221</sup> and Teresa received all payments from the coffee company even though Mark owned the Pacific Avenue Property.<sup>222</sup> Furthermore, Teresa treated the Second Avenue Property as mutually-owned when she negotiated an oral tenancy and received rent checks from the tenant,<sup>223</sup> instructed when the tenant could pay less rent,<sup>224</sup> and when he did not need to pay.<sup>225</sup> The couple

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<sup>218</sup> 3RP 452-53 (Teresa admitted these purchases made through the a joint account).

<sup>219</sup> *In Re Wolfe's Estate*, 48 Cal. 2d 570, 573-74, 311 P2d 476 (1957) (Court held property settlement agreement abrogated when couple reconciled and treated property as mutually owned).

<sup>220</sup> 3RP 446-47 (Teresa admitted she treated the Pacific Avenue Property as her own when she made the deal with Johnie's Coffee).

<sup>221</sup> 3RP 446

<sup>222</sup> 3RP 449-50.

<sup>223</sup> 1RP 63-64.

<sup>224</sup> 1RP 67-68.

<sup>225</sup> 1RP 72.

also continued to treat the Mexico Trendwest timeshare as mutually-owned when they spent a vacation there with the children<sup>226</sup> and both Teresa and Mark paid the quarterly dues.<sup>227</sup>

Finally, there was additional miscellaneous evidence that Mark and Teresa reconciled and intended to abrogate the CR2A Agreement. *First*, A+ Septic continued to pay Mark's bills during the 33-months, just as it had done prior to couple signing the CR2A Agreement (including utilities on the Second Avenue property).<sup>228</sup> *Second*, A+ Septic did not ask Mark to reimburse it for these expenses during the 33-months. *Finally*, Mark remained the beneficiary on Teresa's individual retirement account.<sup>229</sup>

Having had sexual relations; resumed cohabitation and sleeping in the same bed for 33 months; failed to finalize the dissolution; failed to follow through with many provisions in the CR2A Agreement; commingled assets and earnings after signing the CR2A Agreement; and having acted inconsistent with the CR2A

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<sup>226</sup> 2RP 389 (Teresa admitted that Mark and her went to Mexico with the children and stayed at the Trendwest time share.).

<sup>227</sup> 1RP 179; 2RP 389; 3RP 452, 476.

<sup>228</sup> Exhibit 104 (Mark's distribution accounts after Agreement signed); 2RP 361 (Teresa told Ms. Louchren to pay 2<sup>nd</sup> Avenue utilities); 3RP 414; 430 (Teresa admitted she paid for Mark's 2<sup>nd</sup> Avenue property utilities); 3RP 456. A+ Septic continued to treat the bills it paid for Mark as a future distribution he would have to pay. 2RP 360 (Louchren testified that the account was called a different name, but still treated as a distribution account for Mark).

<sup>229</sup> Exhibit 24; 1RP 34-35.

Agreement's existence, the only logical inference is that the parties reconciled with intent to abrogate the CR2A Agreement.

The trial court erred in concluding the parties did not reconcile or abrogate their CR2A Agreement. The trial court's error is clear in its findings of fact and conclusions of law. There, it did not adequately take all the moving parts in this case into consideration. Many key facts that were previously discussed were never addressed or considered by the trial court. In fact, the trial court even wrote: "The facts have not been well developed in my opinion, despite our evidentiary hearing."<sup>230</sup> This is clear error that requires reversal. After all, what can be more compelling to show reconciliation sufficient to abrogate a divorcing couple's prior agreement than their having sex, moving back in with one another and their children, sleeping in the same bed for the next 3 years, commingling assets, and not finalizing the divorce?

**9. The unexecuted portions of the CR2A Agreement should be abrogated.**

After having properly determined the parties reconciled and abrogated their CR2A Agreement, this Court should then instruct the trial court to abrogate only the unexecuted or executory

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<sup>230</sup> CP 946, Finding of Fact No. 7.

provisions in the CR2A Agreement. Courts will not reverse executed portions of a property settlement agreement.<sup>231</sup> However, the unexecuted portions of the agreement are abrogated when the parties so intend. Here, Mark and Teresa intended to abrogate the CR2A Agreement, therefore, this Court should abrogate those provisions not enforced before Teresa re-opened this case.<sup>232</sup> However, those provisions already executed cannot now be undone.<sup>233</sup>

**10. The trial court erred in not characterizing or distributing the parties' earnings and accumulations they received after the CR2A Agreement was signed.**

Statutorily, property accumulated by a married couple is community unless it is properly characterized as separate.<sup>234</sup>

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<sup>231</sup> *Brazina v. Brazina*, 233 N.J. Super. 145, 150, 558 A.2d 69 (1989); *In re Marriage of Reeser* 635 P.2d 930, 932 (Colorado, 1981); *Cox v. Cox*, 659 659 So.2d 1051, 1054 (Florida 1995); *Acre v. Koenig*, 89 Idaho 342, 347, 404 P.2d 621 (1965); *Yeich v. Yeich*, 11 Va. App. at 513 (court held that an agreement that allocated all of the couple's property and stated no maintenance either way was subject to the rule that executory provisions of an agreement are abrogated upon reconciliation).

<sup>232</sup> The unexecuted provisions are the following: Mark did not transfer ownership of A+ Septic to Teresa; Teresa did not make an initial payment to Mark on October 15, 2004; Teresa did not take complete possession of the house; Teresa did not transfer all investment funds to Mark; Teresa did not pay Mark market rates for Pacific Avenue rent; Mark did not resign his positions with A+ Septic; Teresa did not execute a Deed of Trust on the Fairview House nor a UCC security interest on A+ Septic's equipment; Mark did not return the corporate credit card; Teresa did not close and disperse the funds in West Coast Bank Accounts 7106 and 7205; and Mark and Teresa did not divide personal property.

<sup>233</sup> The executed provisions are: A+ Septic paid Mark three months of salary; A+ Septic paid Mark a balloon payment of \$16,837.65; A+ Septic paid Mark a \$602,000 lump sum payment; and transferred the required real estate to him.

<sup>234</sup> RCW 26.16.030;

Separate property is statutorily defined as property acquired by gift, inheritance or earnings and accumulations received when the parties live "separate and apart."<sup>235</sup> Here, Mark and Teresa were legally married and lived together for 33 months after they signed the CR2A Agreement. Since they were married and cohabitating, they were not living "separate and apart." All their earnings and accumulations during this 33 month period were, therefore, Community Property. The trial court did not characterize or distribute this property in the final orders. The trial court's failure to characterize or distribute the assets and liabilities was error.<sup>236</sup>

**11. The trial court posited numerous erroneous findings of fact.**

The trial court's findings of fact were filled with inaccuracies. First, the trial court found that Teresa testified that Mark and she slept in the same bed because this was how they had always done

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<sup>235</sup> RCW 26.16.010; RCW 26.16.030; 26.16.140 (the only exception that property accumulated by a married couple is separation under this statutory provision).

<sup>236</sup> This accumulation of community property underscores the reason the trial court in this case had to make a finding that the CR2A Agreement was abrogated by the parties' reconciliation. As shown above, all the parties' earnings and accumulations were community. These earnings and accumulations had to be characterized and allocated by the court. *Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997); RCW 26.09.080. The CR2A could not have distributed these earnings and accumulations, because they were earned and accumulated after the CR2A was signed. Here, the trial court's Findings of Fact and Conclusions of Law merely incorporated the CR2A Agreement. As such, they failed to characterize or allocate the parties' subsequent earning or accumulations. The trial court erred in characterizing or allocating these earnings and accumulations that accrued subsequent to the CR2A Agreement.

it, it was the only bed, and they did not want to stray too far from the children.<sup>237</sup> Teresa did not testify regarding any of these facts.

Second, the court found that Teresa testified that she welcomed Mark into her house so that the children would not leave her home half the time to go to his house.<sup>238</sup> There is no support for this finding in Teresa's testimony. Her lone testimony is that she allowed Mark to stay at the Fairview House because he was depressed.<sup>239</sup>

Third, the trial court wrote that its only evidence that Mark and Teresa were pursuing a relationship was from Mark's disputed testimony that the couple had a few dinners together. The court then stated: "I don't know if the parties ever ate dinner together in their own home or what they did."<sup>240</sup> This finding neglected Yvonne Schultz's undisputed testimony where she said she spent time with the couple both in their home, at a casino, and at a restaurant.<sup>241</sup> She further testified that they went to a Christmas Bazaar and trick-or-treating together.<sup>242</sup> Finally, Teresa testified that her children

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<sup>237</sup> CP 945, Finding of Fact No. 4.

<sup>238</sup> CP 947, Finding of Fact No. 13.

<sup>239</sup> 2RP 293.

<sup>240</sup> CP 947, Finding of Fact No. 15.

<sup>241</sup> 1RP 9-12.

<sup>242</sup> 1RP 9.

loved having dinner with Mark and her at the Fairview House.<sup>243</sup>

Fourth, the court stated Mark and Teresa lived in one house for their mutual convenience and to accomplish the parenting plan. The court added no one testified that they held themselves out as a couple after 2004.<sup>244</sup> The court was mistaken; both Mark and Yvonne Schultz testified that Mark and Teresa held themselves out as husband and wife. There was no contravening testimony.

Fifth, the trial court was mistaken when it stated: "I'm satisfied that the critical and most financially significant parts of the Property Settlement Agreement were, in fact, carried out after September 2004."<sup>245</sup> This finding is clearly not supported by substantial evidence because the trial court ignored the numerous CR2A Agreement provisions that were not implemented: Mark did not transfer his ownership interest in A+ Septic to Teresa; Mark did not resign all positions with the corporation; A+ Septic did not pay Mark one year of rent at market rates for continued use of the Pacific Avenue Property; Teresa did not transfer all investment accounts to Mark; Mark did not return the corporate credit card to A+ Septic and continued to use it; parenting plan decisions were not implemented;

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<sup>243</sup> 3RP 414.

<sup>244</sup> CP 945, Conclusion of Law No. 5.

<sup>245</sup> CP 945-46, Conclusion of Law No. 6.

Mark did not quit claim the Fairview Avenue House to Teresa;  
Teresa did not grant Mark a deed of trust on the Fairview Avenue  
House or a UCC-1 security interest on A+ Septic's equipment to  
secure her debt to Mark; A+ Septic did not fully pay Mark the  
\$750,000 down payment on October 15, 2004.

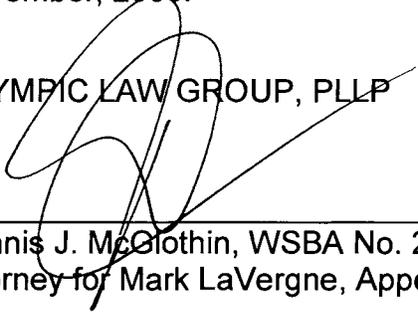
### **C. Conclusion**

Contrary to the trial court's decision, Mark and Teresa legally  
reconciled and abrogated the CR2A Agreement. Consequently,  
this Court should reverse the trial court's March 18, 2008 Order  
Enforcing CR2A/Property Settlement Agreement as well as the  
April 29, 2008 Final Orders embodying the CR2A Agreement. This

Court should also remand this matter with instructions to  
dismiss the dissolution action or try the matter without regard to the  
unexecuted CR2A Agreement provisions and distribute all the  
property either party owned at the time they began living separate  
and apart.

Dated the 3<sup>rd</sup> day of November, 2008.

OLYMPIC LAW GROUP, PLLP



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Dennis J. McGlothlin, WSBA No. 28177  
Attorney for Mark LaVergne, Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON, DIVISION II

MARK A. LaVERGNE,  
  
Appellant,  
  
and  
  
TERESA R. GRIMSLEY-  
LaVERGNE,  
  
Respondent.

No. 37731-4  
Lower Court Case  
No. 03-3-01421-5  
  
DECLARATION OF  
SERVICE

I RYAN M. BON, hereby declare as follows:

1. I am employed by the law firm of Olympic Law Group, P.L.L.P., a citizen of the State of Washington, over the age of 18 years, not a party to this action, and competent to testify herein.
2. On November 3, 2008, I caused the following documents:
  - A. [Corrected] Appellant's Opening Brief;
  - B. Motion to Amend Appellant's Opening Brief;
  - C. Amended Appellant's Opening Brief; and
  - B. Declaration of Service;

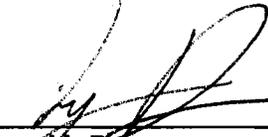
to be served on the attorneys at the following addresses:

**ORIGINAL**

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MORGAN HILL, P.C.  
2102 Carriage Drive SW  
Building C  
Olympia, WA 98502

- REGULAR MAIL
- VIA FACSIMILE
- VIA EMAIL
- VIA OVERNIGHT DELIVERY

I certify under penalty of perjury under the laws of the State of  
Washington, that the foregoing is true and correct.

  
\_\_\_\_\_  
Ryan M. Bon  
Legal Assistant