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DIVISION II

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COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION TWO

THURSTON COUNTY SUPERIOR COURT NO. 03-3-01421-5

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MARK A. LAVERGNE,  
Appellant,

and

TERESA GRIMSLEY,  
Respondent.

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RESPONDENT'S BRIEF

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**ORIGINAL**

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## I. INTRODUCTION

Appellant Mark LaVergne (“Mark”) seeks to reverse a ruling by the trial court that the property settlement agreement (“PSA”) he entered into with his wife, Teresa Grimsley (“Teresa”), on September 21, 2004 — after 11 hours of negotiations that involved counsel on both sides and a private mediator — is binding and should be enforced. The agreement provided, among other things, that Teresa would receive the couple’s successful business and the family home, and Mark would receive as consideration a payment of \$2 million paid out over 9 years.

Mark, however, contends that he and Teresa reconciled the very same night the agreement was signed and made an oral reconciliation agreement, the terms of which included his informal withdrawal from the operations of the business. To support his claim, Mark points to sexual relations that occurred between the parties that night, a resumption of cohabitation for the ensuing 33 months, and the failure to enforce every provision of the PSA. Teresa, meanwhile, testified that she never intended to reconcile with Mark, never intended to abrogate the PSA, and that she permitted Mark to remain in the family home because he was depressed and to facilitate the care of their twin boys, one of whom had a severe

health condition that required protracted drip feeding through a stomach tube.

The trial court concluded that the parties lived in one house “for mutual convenience,” never intending to resume the marital relationship and never holding themselves out as a married couple. As such, there was no reconciliation, and there was no intent “to deviate from nor set aside the Property Settlement Agreement of September 2004.” The court’s factual determinations were supported by substantial evidence and the legal conclusions were consistent with Washington law. The agreement was properly enforced and the final dissolution orders, entered on April 29, 2008, properly reflected that settlement.

Mark also challenges several August 22, 2008 rulings by the court intended to reconcile the various accounts connected with enforcement of the PSA. The rulings challenged, however, were either ones Mark specifically asked for, or failed to object to when evidence and argument were presented by opposing counsel at a two-day evidentiary hearing to enforce the decree and final orders. Now, Mark seeks to overturn the unfavorable rulings as improper modifications of the property division. In fact, the court’s rulings on August 22, 2008, contained in the Second

Amended Findings of Fact and Conclusions of Law Supporting Judgment Enforcing Decree, were appropriate *enforcement* of the PSA and should not be disturbed.

## II. STATEMENT OF FACTS

Mark and Teresa married on October 1, 1994.<sup>1</sup> During their marriage, they founded a successful business, A+ Plumbing and Septic (“A+”).<sup>2</sup> The parties took turns managing A+.<sup>3</sup> During the marriage, some of Mark and Teresa’s personal expenses were paid through company accounts.<sup>4</sup> At the end of the year, A+ treated these payments as distributions, and the parties would pay the applicable tax on the income.<sup>5</sup> Each party also received monthly distributions from A+, regardless of whether they were actively managing the company at the time or not.<sup>6</sup>

The marriage was a strained one, and in 1997 the couple separated for about a year.<sup>7</sup> They reconciled in 1999, which included a renewal of their wedding vows.<sup>8</sup> In January 2003, Teresa gave birth to twin boys,

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<sup>1</sup>CP 991.

<sup>2</sup>The parties operated this business through the “S” corporation MAL, Inc. 2RP 366.

<sup>3</sup>1RP 114.

<sup>4</sup>2RP 341-42.

<sup>5</sup>2RP 342.

<sup>6</sup>1RP 125; 3RP 454-55.

<sup>7</sup>CP 1044-44.

<sup>8</sup>CP 1044.

Aaron and Landon.<sup>9</sup> Aaron had health complications that required extensive treatment and extended hospital stays.<sup>10</sup> Eventually, Aaron was able to return home, but his condition required constant supervision and, for the first two years, he had to be fed through a tube directly into his stomach.<sup>11</sup>

On November 21, 2003, Teresa filed for divorce.<sup>12</sup> In December, the court issued temporary orders that provided for the parties to split time at their Fairview Avenue home in order to facilitate Aaron's care.<sup>13</sup> Teresa resided at the home from Monday at 3pm to Friday at 9am; Mark resided there from Friday at 9am until Monday at 3pm.<sup>14</sup> This schedule was followed by the parties from December 2003 to September 2004.<sup>15</sup> Mark never established a separate residence; during the time he was court-ordered not to be at the home, he resided with his parents.<sup>16</sup>

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<sup>9</sup>Id.

<sup>10</sup>Id.

<sup>11</sup>2RP 226-27.

<sup>12</sup>CP 929-33.

<sup>13</sup>CP 934-38.

<sup>14</sup>CP 936.

<sup>15</sup>1RP 109. Hereinafter, "RP" will refer to the three-volume Verbatim Report of Proceedings from the January 28-29, 2008 evidentiary hearing regarding the enforcement of the PSA. The transcripts of the subsequent proceedings, designated in Mark's Amended Supplemental Statement of Arrangements dated March 3, 2009, will be designated "RP (date of proceeding)."

<sup>16</sup>1RP 108.

The divorce proceedings in 2004 were contentious and expensive.<sup>17</sup> On September 21, 2004, the parties attended mediation with attorneys and Commissioner Harry Slusher and hammered out and signed a comprehensive property settlement agreement (the “PSA”) after 11 hours of negotiation pursuant to Civil Rule 2A.<sup>18</sup> The PSA covered all of the major assets of the parties.<sup>19</sup> The agreement provided for the following:

a. Business. Teresa receives the business and corporation; Teresa to take control and Mark to resign on October 1, 2004. Mark receives in exchange \$2,000,000.<sup>20</sup> The down payment on this amount was to be \$750,000, due October 15, 2004, if the corporation had at least \$1.1 million in the bank. If not, the down payment would be reduced by the difference. The remainder would be paid over 9 years in equal monthly installments with 6% interest, and through payment of half the annual net profit each year over \$500,000 as added principal payment. Mark would get a deed of trust on the Fairview home and a security interest on

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<sup>17</sup>1RP 113.

<sup>18</sup>2RP 245-46; Ex 1; CP 25-33. The document was titled “CR2A Stipulation and Agreement.” CP 25.

<sup>19</sup>CP 1133.

<sup>20</sup>Motion To Determine Trial Court’s Jurisdiction To Enforce CR2A Agreement, Appendix B (filed in the Court of Appeals August 2008). Slusher’s Nov. 26, 2004 arbitration ruling makes clear that this payment was intended as a *quid pro quo* for the business and family home.

corporate equipment to secure the debt. Mark would also receive a \$10,000/month salary through December 2004. The corporate credit card was to stay with Teresa and the corporation.<sup>21</sup>

b. Real Property. Mark receives real property on Chambers Street, Seventh Avenue, Second Avenue, and Pacific Avenue. Teresa receives the family home on Fairview Avenue. Mark is to vacate the family home by November 1, 2004. Teresa would lease the Pacific Avenue property, where A+ did business, for one year at market rate.<sup>22</sup>

c. Bank Accounts. One West Coast bank account would be closed and divided evenly (account ending 205), and Mark would receive the other West Coast account (ending 106).<sup>23</sup> Mark gets all investment accounts, listed out as MetLife, Edward Jones, and Ben Potter.<sup>24</sup>

d. Personal Property. Mark keeps Dodge truck, power parachute, Trendwest timeshare, and ½ the tools. Teresa keeps a Chevrolet, leased Honda, Kubota lawnmower, jet skis, and ½ the tools. Household items

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<sup>21</sup>Ex 1; CP 25-33.

<sup>22</sup>Id.

<sup>23</sup>Motion To Determine Trial Court's Jurisdiction To Enforce CR2A Agreement, Appendix B (filed in the Court of Appeals August 2008). This provision was clarified in Commissioner Slusher's November 26, 2004 arbitration ruling.

<sup>24</sup>Ex 1.

would be divided by agreement.<sup>25</sup>

e. Parenting Plan/Support. The current residential schedule was agreed to be observed, with no child support or maintenance going either way. But the parties were to evenly divide daycare, nanny expenses, uninsured medical expenses, and agreed-upon extra-curricular costs.<sup>26</sup>

In addition to these substantive provisions, the agreement contained language reflecting that it was “a full and complete agreement between the parties and is enforceable in court.”<sup>27</sup> The agreement is referred to in the hand-written text as “PSA.”<sup>28</sup> The agreement charged Teresa with preparing the final paperwork embodying the PSA and presenting the final orders in court.<sup>29</sup>

Later that night, after signing the agreement, the parties got a room at the Ramada Inn and had sexual relations.<sup>30</sup> At 5am, Teresa received a call and learned that her step-father had suffered a stroke. She went straight from the Ramada Inn to the hospital. Mark claims the couple

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<sup>25</sup>Id.

<sup>26</sup>Ex 1.

<sup>27</sup>Id.

<sup>28</sup>Id. (page 1 of hand-written attachment).

<sup>29</sup>Id.

<sup>30</sup>1RP 111; 2RP 387.

decided that night not to follow the agreement.<sup>31</sup> Teresa denies any such conversation.<sup>32</sup>

When Teresa got back to the Fairview home, Mark was extremely depressed.<sup>33</sup> He told Teresa he would look for his own place, as he had until November 1, 2004 to move out, but he continued to be depressed and it never happened.<sup>34</sup> Teresa did not force him to leave on November 1.<sup>35</sup> She did not feel comfortable “throwing him out” because of his depression and because of the children.<sup>36</sup> Teresa felt that Mark was in fact looking for a place of his own.<sup>37</sup>

In the weeks immediately following the signing of the PSA, however, the major provisions of the PSA were executed. A down payment of \$602,000 was made to Mark in accordance with the formula contained in the PSA.<sup>38</sup> Mark received his salary through December 2004

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<sup>31</sup>1RP 112; 2RP 264-65.

<sup>32</sup>2RP 392-93; CP 173; *see also*, 2RP 386; 3RP 477-78.

<sup>33</sup>2RP 393.

<sup>34</sup>*Id.*

<sup>35</sup>3RP 440-41.

<sup>36</sup>1RP 20; 3RP 441; 2RP 393; CP 173.

<sup>37</sup>1RP 20; 2RP 393.

<sup>38</sup>1RP 130; 1RP 117; 2RP 252. Mark’s brief is inaccurate when it asserts that “A+ Septic admittedly had \$1.1 Million in reserves in the bank.” (Appellant’s Opening Brief, p. 17.) The trial testimony cited by Mark establishes that A+ had around \$911,000 in the bank, and thus the down payment made to Mark followed the PSA formula closely. 3RP 460-61.

as the PSA provided.<sup>39</sup> Mark relinquished to Teresa total control of the business; he made no material decisions and attended virtually no company meetings.<sup>40</sup> Monthly payments in accordance with the amortization schedule — of \$16,837.65 — were made between November 2004 and July 2007.<sup>41</sup> Teresa’s lawyer prepared the final documents — including a UCC Security Agreement and Financing Statement and formal resignation of Mark’s MAL, Inc. position and stock — and forwarded them to Mark’s counsel.<sup>42</sup> Additional clarifications regarding the agreement went back to Commissioner Slusher for resolution, as the agreement provided, resulting in his November 26, 2004 written ruling.<sup>43</sup> A+ began separating the parties’ personal expenses and presenting Mark with periodic accountings of his separate personal expenditures.<sup>44</sup> The parties’ personal financial affairs were also separated by their accountant, and, in 2005, separate tax returns were prepared for tax year 2004.<sup>45</sup> Mark retained the real estate awarded to him in the PSA.<sup>46</sup> Mark was held

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<sup>39</sup>2RP 259.

<sup>40</sup>3RP 483-84; 2RP 351-52, 354; 3RP 428; 1RP 124.

<sup>41</sup>1RP 124; 3RP 440; Ex 20; CP 86-125.

<sup>42</sup>1RP 117; 2RP 248, 251; 3RP 476.

<sup>43</sup>1RP 117; Motion To Determine Trial Court’s Jurisdiction To Enforce CR2A Agreement, Appendix B (filed in the Court of Appeals August 2008).

<sup>44</sup>2RP 343-46; 3RP 414-15; 3RP 426-27; CP 1140.

<sup>45</sup>2RP 366, 369.

<sup>46</sup>1RP 175-76; 1RP 139; Amended Appellant’s Opening Brief, p. 14.

harmless from all corporate debt.<sup>47</sup> The vehicles were divided as provided for in the PSA.<sup>48</sup> Mark had two appraisals conducted to set a rental value on the Pacific Avenue property.<sup>49</sup>

At the same time, certain aspects of the agreement were not carried out. The Fairview home was never formally conveyed to Teresa.<sup>50</sup> Mark's stock in MAL, Inc. was never transferred.<sup>51</sup> The investment accounts were not transferred right away.<sup>52</sup> A+ did not enter into a lease for the Pacific Avenue property.<sup>53</sup> The West Coast bank accounts were not closed and continued to be used by Teresa.<sup>54</sup> The security interests on the debt owed Mark may not have been signed by Mark.<sup>55</sup> The parties did not divide the household items.<sup>56</sup>

Mark contended that these PSA items were not completed because

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<sup>47</sup>2RP 251-52.

<sup>48</sup>1RP 195; 2RP 304.

<sup>49</sup>1RP 140; 2RP 249.

<sup>50</sup>2RP 251, 384-85; 3RP 452.

<sup>51</sup>3RP 428.

<sup>52</sup>2RP 250; 3RP 466-68.

<sup>53</sup>1RP 138, 140; 2RP 249.

<sup>54</sup>2RP 249-50; 2RP 157.

<sup>55</sup>1RP 192; 2RP 254. At the August 21, 2008 trial, Teresa's counsel indicated that the UCC interests had actually been done "long ago," and that Mark "just didn't know [he] had it." 1RP 19 (Aug. 21-22, 2008). Thus, it may be that this was done during the 33 months after September 21, 2004.

<sup>56</sup>1RP 196; 2RP 396.

the parties had reconciled.<sup>57</sup> Teresa testified that she always believed the PSA was binding, and believed it had been mostly carried out.<sup>58</sup> Some of the more minor aspects of the agreement, for example, Teresa was actually not aware had not been executed.<sup>59</sup>

Mark also suggested that post-PSA behavior of Teresa with regard to certain property awarded to Mark demonstrated an intent to abrogate the PSA. First, Teresa negotiated a sub-lease for a coffee stand operating on the Pacific Avenue property where A+ did business.<sup>60</sup> Some checks were written directly to Teresa.<sup>61</sup> Teresa also routinely exchanged the coffee stand rent for free coffee for A+ employees.<sup>62</sup> The PSA was silent as to the coffee stand rents or rights to sublease.<sup>63</sup> The coffee stand, however, had existed prior to the PSA, and although it was not operating at the time the PSA was signed, negotiations with A+ had been ongoing regarding a new lease, and renovations were underway with the expectation of a future

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<sup>57</sup>See, e.g., 1RP 136, 138; 2RP 210, 317.

<sup>58</sup>2RP 385-86

<sup>59</sup>3RP 408-09, 411, 469-70 (West Coast accounts); 3RP 432 (investment accounts); 3RP 438 (account beneficiaries).

<sup>60</sup>3RP 446-47.

<sup>61</sup>3RP 449.

<sup>62</sup>1RP 49; 3RP 449-50.

<sup>63</sup>Ex 1.

coffee stand.<sup>64</sup>

Second, Teresa mentioned an A+ employee, Ricky Lee Senn, to Mark as a potential renter of the Second Avenue property.<sup>65</sup> Senn rented the property from December 2005 through August 2007.<sup>66</sup> The rent was set at \$800/month.<sup>67</sup> Senn made payments occasionally to Mark and occasionally to Teresa.<sup>68</sup> When Senn complained to Teresa about repairs that weren't being done by Mark, she suggested that if he reduced his rent to \$650/month it might make Mark show up and do some repairs.<sup>69</sup> Senn then reduced his rent to \$650/month, and did not make payments at all in certain months.<sup>70</sup> Mark accepted the \$650/month rent payments.<sup>71</sup>

Beginning in early 2004 and extending into the middle of 2006, Teresa was in a dating and sexual relationship with Dr. Peter Klein that was known to Mark both before and after September 21, 2004.<sup>72</sup> During this time, Dr. Klein regularly came to the Fairview home, and attended

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<sup>64</sup>See, CP 1549.

<sup>65</sup>1RP 62-63, 175.

<sup>66</sup>1RP 60-61.

<sup>67</sup>1RP 63-64.

<sup>68</sup>Id.

<sup>69</sup>1RP 66.

<sup>70</sup>1RP 64-65, 73.

<sup>71</sup>1RP 75.

<sup>72</sup>3RP 474-75; 1RP 90.

family and company functions with Teresa.<sup>73</sup> Teresa and Dr. Klein traveled together often, taking trips to such places as New York, Portland, Seattle, and the Tri-Cities to visit Teresa's family.<sup>74</sup> Mark was present at times when Dr. Klein came to the Fairview home, often sequestered in a room in the house.<sup>75</sup> Sometime thereafter, Teresa began a sexual relationship with Johnnie Perez.<sup>76</sup>

Also during this time, Teresa was being treated for a bladder condition that required frequent surgical intervention.<sup>77</sup> On four occasions between 2004 and 2006, Dr. Klein took Teresa to the hospital for her frequent (every 2-3 months) bladder surgeries.<sup>78</sup> Mark never attended any of these many surgeries or took care of Teresa when she arrived home.<sup>79</sup> When asked whether Mark seemed to have any visible concern about Teresa when she would come home from the hospital or even ask her how she was, Teresa answered: "No. I think he's come in and asked me if I needed a drink of water one time, but no."<sup>80</sup>

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<sup>73</sup>1RP 97-98, 100.

<sup>74</sup>1RP 97.

<sup>75</sup>1RP 96-97.

<sup>76</sup>3RP 475.

<sup>77</sup>3RP 475.

<sup>78</sup>1RP 98.

<sup>79</sup>1RP 99; 3RP 475-76.

<sup>80</sup>3RP 476.

Although the parties cohabited for 33 months after September 2004, part of the time sharing a king-size bed with the children,<sup>81</sup> there was very little evidence that the parties spent much time together. Similarly, there was no evidence that in all those months the parties ever held themselves out as husband and wife, or that the parties ever announced to anyone that they had reconciled.<sup>82</sup> Yvonne Schultz testified that she was with them one time at a casino, one time for dinner at El Sarape, an Easter dinner, and a couple of holiday events with the kids, such as trick or treating and a Christmas bazaar.<sup>83</sup> The activities she described all involved the young children.<sup>84</sup> At the same time, however, Schultz testified that during a Thanksgiving event at which she was present, Mark spent the entire evening gambling in another room and did not participate in the family activities.<sup>85</sup> She testified that Teresa confided in her that she let Mark stay in the home because she feared for her son Aaron's health if he went to Mark's residence half time.<sup>86</sup> She also

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<sup>81</sup>3RP 390.

<sup>82</sup>See, e.g., 3RP 477; 1 RP 20, 27.

<sup>83</sup>1RP 9-11, 18-19.

<sup>84</sup>Id.

<sup>85</sup>1RP 25.

<sup>86</sup>1RP 26-27.

testified, however, that she saw no affection between the two<sup>87</sup> and that Teresa told her she was allowing Mark to stay because of the kids.<sup>88</sup> There was no evidence of any trips or vacations together.<sup>89</sup> Alan Scott, Teresa's stepfather who assisted the parties with the children and spent significant time at the family home, testified that he saw no affection or any signs of reconciliation between Mark and Teresa after September 2004, which was different from their behavior prior to the divorce.<sup>90</sup> Mark admitted that instances in which Teresa was in the family home during the purported reconciliation were "rare."<sup>91</sup>

Finally, in June 2007, Teresa revived the divorce proceeding.<sup>92</sup> She felt it was time since the kids were old enough and Aaron's feeding tube was out.<sup>93</sup> Because she and Mark essentially never spoke, and the kids were now old enough to talk and understand the situation, Teresa felt like it was time the kids were around "a happy, healthy, normal

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<sup>87</sup>1RP 24.

<sup>88</sup>1RP 20.

<sup>89</sup>There was testimony about a trip to Mexico where Teresa joined Mark, the kids, and Brittany Schultz (Yvonne's teenage daughter) for the last two days, but Teresa testified that the purpose of her short trip was so she could "fly back with the kids." 3RP 476.

<sup>90</sup>2RP 231-32.

<sup>91</sup>CP 309.

<sup>92</sup>CP 22, 940; 3RP 485.

<sup>93</sup>3RP 485.

relationship.”<sup>94</sup> A motion was filed to enforce the PSA.<sup>95</sup> On January 28-29, 2008, following a commissioner’s ruling enforcing the PSA, an evidentiary hearing was held pursuant to a motion for revision on whether reconciliation had occurred and whether the parties had abrogated the PSA.<sup>96</sup>

In an oral ruling on February 7, 2008 and a written order on March 18, 2008, the court ruled that the PSA was fully enforceable.<sup>97</sup> The PSA and the court’s order enforcing it provided for binding arbitration for “any disputes in the drafting of final documents.”<sup>98</sup> The parties submitted several issues to arbitration prior to entry of orders and the arbitrator issued a written ruling dated April 9, 2008.<sup>99</sup> On April 29, 2008, the court issued a Decree of Dissolution, Findings of Fact and Conclusions of Law, Child Support Order, and a Final Parenting Plan.<sup>100</sup> These orders were largely simple, “bare-bones” orders since the PSA contained all the major terms of the settlement and was incorporated — along with the Parenting

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<sup>94</sup>Id.

<sup>95</sup>CP 941-42.

<sup>96</sup>1RP 1-200; 2RP 201-400; 3RP 401-533.

<sup>97</sup>CP 943-49.

<sup>98</sup>CP 27, 844.

<sup>99</sup>CP 1710-12.

<sup>100</sup>CP 962-66, 980-89, 990-94, 967-79.

Plan and Child Support Order<sup>101</sup> — in the final Decree.<sup>102</sup> As to back support, the child support order said “N/A” and made the health expenses division “effective May 2008.”<sup>103</sup> Mark appealed all of these orders.<sup>104</sup>

On August 21-22, 2008, the court held a further evidentiary hearing to enforce the decree and reconcile the various accounts in the wake of the court’s prior rulings.<sup>105</sup> Teresa objected to the continued hearing, suggesting that the trial court may lack jurisdiction because of Mark’s pending appeal.<sup>106</sup> Mark, however, moved the appellate court for an order to clarify the jurisdictional issue.<sup>107</sup> The trial court indicated that it had bifurcated the trial to decide the enforceability of the PSA prior to reconciling the various accounts if enforced, and the parties signed an agreed order to this effect on August 5, 2009.<sup>108</sup> On August 18, 2008, the Court of Appeals upheld the trial court’s jurisdiction to hold an evidentiary hearing and enforce the settlement agreement and any other provision of the court’s final orders, but ruled that if the trial court decided the decree

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<sup>101</sup>CP 1000.

<sup>102</sup>CP 998.

<sup>103</sup>CP 860-61.

<sup>104</sup>CP 952-61; CP 995-1038.

<sup>105</sup>CP 1641.

<sup>106</sup>Id; RP (Aug. 5, 2008) 3-4.

<sup>107</sup>CP 1658.

<sup>108</sup>CP 1641; RP (Aug. 5, 2008) 9-11.

should be modified, the prevailing party must comply with RAP 7.2(e).<sup>109</sup>

In advance of the evidentiary hearing, Mark filed (1) a Motion To Enforce CR2a and Other Relief, and (2) an Evidentiary Hearing Brief, in which he set forth the issues he wanted addressed at the August 21-22, 2008 hearing and asked for the court to grant various relief in connection with the enforcement of the PSA and decree.<sup>110</sup> Specifically, among other things, Mark asked the court to award (1) rent for the coffee stand on Pacific Avenue, (2) “all monies due and owing ... on the Second Avenue property since 9/04 ...”, and (3) to “remove Respondent as a signatory and liable party on all credit cards, whether personal or business.”<sup>111</sup> During trial, Mark presented evidence and argument on each of these issues.<sup>112</sup> Additionally, Mark never objected to evidence presented by Teresa regarding boat lift insurance proceeds, corporate credit card charges,<sup>113</sup> 2004 tax preparation fees, Second Avenue utility bills, and charges on the

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<sup>109</sup>CP 1658.

<sup>110</sup>CP 1056-57; CP 1059-65.

<sup>111</sup>CP 1057, 1064.

<sup>112</sup>IRP (Aug. 21-22, 2008) 165-66 (coffee stand rents); 166-68 (2<sup>nd</sup> Ave); 2RP (Aug. 21-22, 2008) 215-20, 325-26 (coffee stand); 221-23, 326-27 (2<sup>nd</sup> Ave); 224-26, 327-28 (corporate credit cards).

<sup>113</sup>Mark also presented his own testimony and argument on this topic. 2RP (Aug. 21-22, 2008) 226, 328.

A+ accounts as beyond the scope of PSA enforcement.<sup>114</sup> Mark's objections regarding evidence beyond the scope of PSA enforcement was limited to cell phone charges.<sup>115</sup>

On August 22, 2008, at the conclusion of the evidentiary hearing, the court made a series of rulings reconciling the various accounts and obligations flowing from the PSA as incorporated in the final decree.<sup>116</sup> First, the court set the rental value for the Pacific Avenue property beginning October 2004 at \$3900/month.<sup>117</sup> The court based that ruling on a finding that Mark's expert witness, Dale Carlson, was not credible based on use of the wrong square footage and use of poor comparables.<sup>118</sup> Second, the court denied an award to Mark of rent from the Second Avenue property, finding that the "parties were rather casual in their rental of this property ... [f]or periods of time there was no rent received ... the Court does not know when the rent was received or who received it."<sup>119</sup> Third, the court awarded Teresa \$12,337 in property taxes paid by her after

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<sup>114</sup>1RP (Aug. 21-22, 2008) 22-24 (boat lift); 24-26 (corporate credit card charges); 36 (2004 tax return); 39-40 (2<sup>nd</sup> Ave. utility payments); 46-47 (charges on A+ accounts); 2RP (Aug. 21-22, 2008) 230-34 (corporate credit card charges); 329 (boat lift); 331 (2004 tax return).

<sup>115</sup>1RP (Aug. 21-22, 2008) 30.

<sup>116</sup>CP 1500-27.

<sup>117</sup>CP 1619.

<sup>118</sup>CP 1504-05; CP 1618-19.

<sup>119</sup>CP 1624, 1512.

September 21, 2004 on two properties awarded to Mark under the PSA.<sup>120</sup>

Fourth, the court awarded Teresa \$19,598 for Mark's proportionate share of the children's health insurance expenses.<sup>121</sup> Fifth, the court ordered reimbursement to Teresa for daycare expenses in the amount of \$37,308.66.<sup>122</sup> Sixth, the court ordered Mark to pay Teresa \$4654.02 for insurance proceeds received from a boat lift that the court ruled was a fixture of the Fairview home and thus owing to Teresa who was awarded that property.<sup>123</sup> Seventh, the court ordered Mark to pay for preparation of his 2004 tax return, which was paid by Teresa.<sup>124</sup> Eighth, Mark had to reimburse Teresa for charges made to the A+ credit card and corporate accounts.<sup>125</sup> Ninth, Mark had to reimburse utility bills paid by Teresa for the Second Avenue property he was awarded in the PSA.<sup>126</sup>

After the hearing, Mark filed a motion opposing the reconciliation findings and requesting reconsideration.<sup>127</sup> Following oral argument on the various pending post-trial motions, the Court entered the Second Amended Findings of Fact and Conclusions of Law Supporting Judgment

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<sup>120</sup>CP 1621.

<sup>121</sup>CP 1622.

<sup>122</sup>CP 1621-22, 1628.

<sup>123</sup>CP 1510, 1628.

<sup>124</sup>CP 1512.

<sup>125</sup>CP 1510-11.

<sup>126</sup>CP 1513, 1629.

<sup>127</sup>CP 1106-1539.

Enforcing Decree on October 28, 2008 and denied the motion for reconsideration.<sup>128</sup> On January 20, 2009, the court entered a Judgment on Findings of Fact and Conclusions of Law, and Mark appealed both of these orders.<sup>129</sup>

### III. STANDARDS OF REVIEW

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). “So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.” *Burrill v. Burrill*, 113 Wash. App. 863, 868, 56 P.3d 993 (2002). This is because credibility determinations are not subject to review. *Id.*

True conclusions of law are reviewed *de novo*. *Stokes v. Polley*, 145 Wn.2d 341, 346, 37 P.3d 1211 (2001). Conclusions of law are

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<sup>128</sup>CP 1631.

<sup>129</sup>CP 1632; CP 1615-33.

conclusions that follow, through legal reasoning, when the law is applied to the facts as found by the court. *State v. Niedergang*, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986). Findings of fact mislabeled as conclusions of law will be subject to substantial evidence standard. *See, Robblee v. Robblee*, 68 Wn. App. 69, 74 n.1, 841 P.2d 1249 (Div. I 1992). Whether a married couple reconciled and whether they intended to abrogate a property settlement agreement are *factual* issues.<sup>130</sup>

“Inadequate written findings may be supplemented by the trial court’s oral decision or statements in the record.” *In re Marriage of Monaghan*, 78 Wn. App. 918, 925, 899 P.2d 841 (Div. II 1995). A trial court’s findings of fact in a divorce action are entitled to great weight, particularly where “the determination of fact is largely dependent on the relative credibility of witnesses who present conflicting testimony.” *Murray v. Murray*, 38 Wn.2d 269, 271, 229 P.2d 309 (1951). A ruling on a motion for reconsideration is within the discretion of the trial court and

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<sup>130</sup>*See, e.g., Nemer v. Nemer*, 254 P.2d 661, 663 (Cal. App. 2 Div. 1953) (“Whether the evidence showed a mutual intention to effect a reconciliation and unite in mending the matrimonial yoke is a question of fact for the determination of the trial court.”); *Tablada v. Tablada*, 590 So. 2d 1537, 1358-59 (La. App. 5 Cir. 1991) (“Reconciliation is an issue of fact, the resolution of which is determined by the trial judge after a careful examination of the facts”); *accord*, 27A C.J.S. Divorce § 334 (“It is [] a question of fact for the trial judge as to ... whether there was a mutual intent to effect a reconciliation”). As to intent to abrogate as a question of fact, *see, e.g., Henderson v. Winkler*, 454 So. 2d 1358, 1361 (Ala. 1984); *Hausmann v. Wittemann*, 132 N.W.2d 537, 538 (Wis. 1965); *Johnston v. Johnston*, 499 A.2d 1074, 1077 (Pa. Super. 1985); *Morgan v. Morgan*, 234 P.2d 782, 784 (Cal. App. 2 Dist. 1951).

is reversible only for a manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (Div. I 1990).

#### IV. ARGUMENT

A. Mark and Teresa Did Not Reconcile After Signing the CR2a Agreement.

Mark's primary argument on appeal is predicated on the assertion that Mark and Teresa reconciled on the day they signed the PSA after an 11-hour mediation. In this case, however, the court ruled that no reconciliation occurred, and this finding was supported by substantial evidence.

A *mutual intention* to become reconciled is fundamental to a determination as to whether reconciliation has occurred. *Camp v. Camp*, 331 S.E.2d 163, 166 (N.C. App. 1985) (where "evidence is conflicting ... issue of the parties' mutual intent is essential element in determining whether the parties were reconciled ..."); *see also, e.g., Whitlow v. Durst*, 127 P.2d 530, 532 (Cal. 1942); *Brazina v. Brazina*, 558 A.2d 69, 71-72 (N.J. Super. 1989). Further, "reconciliation should not be deemed to have occurred until the parties have successfully completed the exploratory stage of a reconciliation and have agreed upon a *true and genuine* reconciliation, that is to say, when the parties have resolved their major matrimonial differences and agree to *permanently* resume their former

relationship as husband and wife.” *Id.* at 71 (emphasis added); *accord, In re Donnelly’s Estate*, 155 N.Y.S.2d 922, 925 (N.Y. Sur. 1956) (reconciliation requires intent that it shall be permanent). *Jacobsen*, a case cited by Appellant, contains a thoughtful discussion of what constitutes reconciliation: “Reconciliation means more than simply cohabitation or the observance of civility; it comprehends a fresh start and genuine effort by both parties.” *Jacobsen v. Jacobsen*, 586 S.E.2d 896, 899 (Va. App. 2003), *citing, Black’s Law Dictionary* 1272 (6th ed.1990).<sup>131</sup>

Extended cohabitation in the absence of intent does not establish reconciliation. *See, e.g., Guriel v. Guriel*, 55 A.D.3d 540, 541, 865 N.Y.S.2d 611, 612 (N.Y.A.D. 2 Dept. 2008) (“parties’ cohabitation for eight months following the execution of the [combined separation and property settlement] agreement did not raise an issue of fact regarding an intention to reconcile and abandon the agreement”). Further, “[t]he party seeking to avoid an agreement based on a defense of reconciliation has the burden of proving that the reconciliation was genuine.” *Jacobsen*, 586 S.E.2d at 900. Whether evidence shows a mutual intention to effect a

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<sup>131</sup>*Burch v. Rice*, 37 Wn.2d 185, 222 P.2d 847 (1950), the leading case in Washington discussing the issues involved in this appeal, does not discuss principles of what constitutes reconciliation. In *Burch*, it was apparently undisputed that the parties had a true reconciliation for 6 months after executing a property settlement agreement. *Burch* does, however, discuss the legal effect of that reconciliation, and as such will be discussed in detail in section IV.B.2, *infra*, of this brief.

reconciliation is a question of fact for the trial court. *See*, note 130, *supra*.

In this case there was substantial evidence supporting the trial court's finding that no reconciliation occurred. Most directly, Teresa testified that the "reconciliation agreement" alleged by Mark never occurred and that she never had any intent to reconcile with him.<sup>132</sup> After the pressure and anger between the parties had subsided somewhat after signing the PSA, Teresa felt sorry for Mark because he was so depressed and did not feel that she could "throw him out."<sup>133</sup> He had promised to try and find a place to live and move out.<sup>134</sup> Additionally, Teresa worried about Aaron's health problems and how Mark (and Aaron) would handle Aaron's treatment regimen if on his own.<sup>135</sup> Teresa's explanation for why she allowed Mark to continue to live in the home was consistent with statements she had made to various other witnesses, statements not doubted by their recipients.<sup>136</sup>

A number of corroborating facts supported Teresa's testimony. First, Teresa's ongoing sexual affair with Dr. Peter Klein demonstrates a lack of intent to reconcile. Given that reconciliation requires genuine *mutual* intent, evidence of an ongoing affair is material to the question of

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<sup>132</sup>2RP 392-93; 3RP 477-78.

<sup>133</sup>2RP 393; see also, 1RP 20.

<sup>134</sup>*Id.*

<sup>135</sup>RP 26-27; 3RP 441.

<sup>136</sup>1RP 20, 27 (Yvonne Schultz); 2RP 224-25 (Alan Scott).

reconciliation. *Williams v. Williams*, 297 N.W. 294, 296 (Iowa 1941); *Beale v. Avery*, 178 N.E. 543, 543 (Mass. 1931). Second, despite 33 months of claimed reconciliation, Mark presented very little evidence that demonstrated marital-like activities or anything indicating that the parties held themselves out as husband and wife after September 2004.<sup>137</sup> Third, Teresa's frequent surgeries during the period of alleged reconciliation were never attended by Mark.<sup>138</sup> The evidence in this regard was uncontradicted. Perhaps more than anything else, Mark's conspicuous absence during these surgeries demonstrates that the cohabitation after September was just that — and only that — and not, as Mark claims, a genuine reconciliation.

In addition, the parties' business activities after signing the PSA indirectly shed light on the question of reconciliation. Although some aspects of the PSA were not carried out, the most significant aspects were,<sup>139</sup> and there was no other explanation for this than that the parties had not reconciled. Mark received his \$30,000 in salary payments at the end of 2004, \$602,000 lump sum payment, and nearly all of the amortized

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<sup>137</sup>CP 832; CP 1141 (The court summarized: "No one else testified that they saw these two people together anywhere after September 2004, at community activities with the children, at restaurants, at holiday celebrations, at the company offices, at movies, at preschool, at the hospital, anywhere.")

<sup>138</sup>RP 475-76.

<sup>139</sup>CP 1146 (The court ruled: "I'm satisfied that the critical and most financially significant parts of the Property Settlement Agreement were, in fact, carried out after September 2004.")

payments of \$16,837.65 due under the contract. Mark stayed completely out of the business after October 1, 2004, and A+ began keeping Mark's expenses separate from Teresa's. The parties' tax returns were prepared and filed separately after 2004, and Mark initiated an arbitration after September 2004 to deal with a few extra issues that were not fully resolved by the PSA. Teresa's lawyer prepared the documents implementing the PSA.

There is simply no possible way to explain all of these various actions by the parties if, as Mark claims, the parties agreed to reconcile and agreed not to follow the PSA on the night of September 21, 2004. While it is easy for Mark to list out details here and there that were not executed, he failed to offer any plausible testimony that would harmonize his account of reconciliation with the parties' business activities after September 2004. Put another way, it is easier to understand why certain details were not carried out even though the parties had not reconciled (Teresa's account) than to understand why so many of the major aspects of the PSA *were* carried out if the parties *had* reconciled (Mark's account). Mark's only argument or explanation at trial about why he received monthly payments in the *exact amount* of the PSA payoff schedule if there was a reconciliation agreement — essentially, “well, the parties

always got paid money from the company, so what's the difference”<sup>140</sup> — strains credulity. As such, this Court should find that the factual findings of the trial court rest on substantial evidence.

Finally, it is pertinent to the question of reconciliation to highlight that the trial court viewed the renewed cohabitation after September 2004 in the context of the parties' prior court order involving the residence; this context was specifically discussed by the court in its February 7, 2008 oral ruling enforcing the PSA.<sup>141</sup> During the year preceding September 21, 2004, the parties had been separated but sharing the family home pursuant to a December 2003 temporary order in the pending dissolution. That unusual order — which was based on the medical needs of their young son — provided for equal residential time with the children *in the family home*.<sup>142</sup> Thus, Mark spent half the week in the family home with the children and Teresa spent half the week there. Both parties, then, in the months prior to the PSA, resided in the family home without cohabitation. Mark thus never established a separate residence, and stayed with his parents during Teresa's part of the week with the kids. The PSA maintained the shared residential time between the parties. The prior residential arrangement is relevant in that it helped the court understand

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<sup>140</sup>1RP 125-26 (Mark's testimony); 3RP 493 (argument of counsel).

<sup>141</sup>CP 1142.

<sup>142</sup>CP 936.

Teresa's reluctance to "throw Mark out" and why subsequent cohabitation did not have the same evidentiary significance with respect to the parties' intent regarding reconciliation as it might have in a different case. It supported Teresa's testimony that the post-PSA cohabitation was largely "to accomplish the parenting plan,"<sup>143</sup> and that she permitted Mark to remain so that the children would not leave her home half the time to go to Mark's home.<sup>144</sup>

For all of these reasons, the trial court's factual determination that no reconciliation occurred is based on substantial evidence and supported the conclusion of law that the PSA was enforceable.

B. Even If There Was a Reconciliation, There Was No Intent To Abrogate CR2A Agreement.

1. *Different approaches to the effect of reconciliation*

If we assume the parties in fact reconciled, the court must determine the legal effect, if any, of the reconciliation. The rules regarding whether and under what circumstances a reconciliation will affect a post-marital contract vary from state to state. Indeed, jurisprudence regarding whether a reconciliation will abrogate a separation contract or property settlement agreement has been described as "muddled,"<sup>145</sup> the legal issues

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<sup>143</sup>CP 833.

<sup>144</sup>CP 1143, 1146.

<sup>145</sup>*Cox v. Cox*, 659 So. 2d 1051, 1053 (Fla. 1995).

as “difficult,”<sup>146</sup> and “considerable uncertainty and conflict of authority” has arisen.<sup>147</sup> As such, multiple lines of cases have evolved articulating different analytical frameworks:

The case law from other jurisdictions [regarding whether reconciliation will abrogate a settlement agreement] is divergent. One line of cases holds that the intention of the parties determines what consequences the resumption of cohabitation will have. Other cases hold that reconciliation voids a separation agreement but not a property settlement. Still others hold that reconciliation abrogates the executory portions of the separation agreement but does not affect those portions which have been executed.

*Yeich v. Yeich*, 11 Va.App. 509, 511, 399 S.E.2d 170, 171 (Va. App.1990).<sup>148</sup> Even that survey of the law is overly-simplistic in that some courts employ a hybrid between these approaches. *See, e.g., In re Marriage of Reeser*, 635 P.2d 930, 932 (Co. App 1981) (executed provisions are presumed valid and binding, executory provisions are presumed abrogated, but presumptions can be overcome with evidence of intent). This variance across different states seems to be the result of two factors: (1) imprecision regarding courts’ use of the terms “separation

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<sup>146</sup>*Cox v. Cox*, 638 So.2d 586, 588 (Fla. App. 1 Dist. 1994), *citing*, Homer H. Clark, Jr., *The Law of Domestic Relations* § 19.7, at 438 (2d ed. 1987).

<sup>147</sup>M.L. Cross, Annotation, *Reconciliation As Affecting Separation Agreement Or Decree*, 35 A.L.R.2d 707 § 4 (2008, originally published in 1954).

<sup>148</sup>*Citing*, 2 H. Clark, *The Law of Domestic Relations in the United States* II-438-39 (1987); Annotation, *Reconciliation as Affecting Separation Agreement or Decree*, 35 A.L.R.2d 707 (1954). It is important to note that after the *Yeich* decision — cited by appellant for the proposition that executory (spousal support) provisions of a separation agreement are abrogated following a resumption of the marital relationship — the Virginia Legislature passed a law requiring that any abrogation of such an agreement be in writing. *See, Smith v. Smith*, 449 S.E.2d 506, 507 n.1 (Va. App. 1994) .

contract” and “property settlement agreement”; and (2) competing policy concerns, each explained below.

A pure “separation contract” deals only with the immediate practicalities of a separation: providing for child and spousal support, and setting out custody/visitation of children. *See, Acre v. Koenig*, 404 P.2d 621, 623 (Idaho 1965). Separation contracts are wholly executory as to future support, and the continued separation is the consideration for the ongoing and future support.<sup>149</sup> It is fairly obvious, then, that in the context of a pure separation contract, a reconciliation demonstrates an intent to abrogate the agreement — child custody is no longer an issue, and support is unnecessary. *See, e.g., Wareham by Trout v. Wareham*, 716 A.2d 674, 677 (Pa. Super. 1998).

A property settlement agreement, in contrast, is substantially different. Property settlement agreements attempt to make a full and final settlement of the parties’ *property* rights. *Acre*, 404 P.2d at 624. They may be fully executed at time of signing, or may leave many executory provisions, such as payments over time or future transfers of property.<sup>150</sup> The provisions usually have separate consideration without any regard to a continued separation. *Id.* In this context, “[t]he subsequent reconciliation

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<sup>149</sup>Cross, *supra* note 147, at §§ 3, 6[a].

<sup>150</sup>Cross, *supra* note 147, at § 6[a].

*of the parties does not abrogate such a [property settlement] agreement.”*  
*Wareham*, 716 A.2d at 677 (emphasis in original); *see also, e.g., Acre*, 404 P.2d at 624 (because agreement was a property settlement agreement and not a separation contract, “agreement is not affected by [reconciliation and cohabitation] unless the parties agree that the settlement be terminated”). As summarized in the relevant A.L.R. annotation cited by Mark, “[t]he preferred view is that a reconciliation and resumption of cohabitation do not alone abrogate a true property settlement.”<sup>151</sup>

Many post-marital agreements, however, are not “pure” separation contracts or property settlement agreements but a combination of the two. But because courts are often not precise in their characterization of the type of agreement at issue, legal principles get muddled. For example, a court may take a principle that makes sense in the case of a separation contract — all executory provisions (for future support) are abrogated by reconciliation — and improperly apply it to a property settlement agreement, or an agreement that has property settlements aspects. *See, e.g., Simpson v. Weatherman*, 227 S.W.2d 148, 150 (Ark. 1950).<sup>152</sup> But

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<sup>151</sup>Cross, *supra* note 147, at §4. Because a property settlement agreement does not involve ongoing support, “there is no failure of consideration when the parties resume cohabitation, and [reconciliation] is not inconsistent with the continued existence of the settlement of property rights.” *Id.* at § 6[a].

<sup>152</sup>*Simpson* stated the rule under California law. But the commentary in the A.L.R. annotation cited by both parties in this case observes: “This California rule originates in a failure to distinguish between separation agreements and pure property settlements ....” Cross, *supra*

where a separation agreement and a property settlement agreement are contained in one instrument, property settlement provisions usually stand independently, even if separation provisions are abrogated by reconciliation.<sup>153</sup>

In this case, contrary to Mark's assertion, the PSA is, without question, primarily a property settlement agreement. The "agreement covered ... all the major assets" of the parties.<sup>154</sup> Also contrary to Mark's contention, the court did repeatedly characterize the agreement as a "property settlement agreement,"<sup>155</sup> consistently reminding counsel to refer to the agreement as a "property settlement agreement,"<sup>156</sup> plus labeling it so in various orders.<sup>157</sup> Moreover, the text of the PSA refers to itself as "PSA."<sup>158</sup> Regardless, there is no legal error in a court failing to characterize an agreement as a separation or property settlement agreement, and Mark has offered no authority for such a rule. In most cases, as explained above, the post-marital agreement is a combination of the two, and thus black-and-white characterization, as suggested by Mark,

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note 147, at § 6[a].

<sup>153</sup>Cross, *supra* note 147, at §4.

<sup>154</sup>CP 1133; CP 26; *see discussion, Acre v. Koenig*, 404 P.2d 621, 623 (Idaho 1965).

<sup>155</sup>CP 1131-33, 1135.

<sup>156</sup>See, e.g., 1RP 112.

<sup>157</sup>See, e.g., CP 1641.

<sup>158</sup>CP 28.

is of limited use.<sup>159</sup> Because the agreement in this case is primarily a property settlement agreement rather than a pure separation contract, reconciliation should not automatically abrogate the PSA.<sup>160</sup>

A second explanation for courts' conflicting analyses of the effect of reconciliation on a post-marital agreement is competing policy concerns. A majority of courts, for example, focus on the sanctity of contract negotiations. In such states — of which Washington appears to be one — the focus is on the intent of the parties and whether the parties actually *intended* their reconciliation to abrogate a previous property settlement agreement.<sup>161</sup> Other courts put their emphasis on the preservation of marriage, and hold that any executory provisions of a separation or property settlement contract are rescinded upon reconciliation, believing that such a policy helps encourage the reconciliation.<sup>162</sup> Finally, some courts' primary concern is discouraging litigation and assisting overworked courts, and these courts believe that *any* judicial review of ante-nuptial agreements is to be exercised

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<sup>159</sup>Cross, *supra* note 147, at §2: “[T]he parties often make it difficult for the courts to determine whether they are confronted with a separation agreement, a property settlement, or an inseparable mixture of both, because they cast everything indiscriminately into one instrument.”

<sup>160</sup>See, Section IV.B.2, *infra*.

<sup>161</sup>*Burch v. Rice*, 37 Wn. 2d 185, 190, 222 P.2d 847 (1950); *Morgan v. Morgan*, 234 P.2d 782, 784 (Cal. App. 2 Dist. 1951).

<sup>162</sup>See, e.g., *Brazina v. Brazina*, 558 A.2d 69, 71 (N.J. Super. 1989) (“[t]he primary purpose of the court is to preserve the marriage”).

sparingly.<sup>163</sup>

2. *Washington approach* — which is the preferable approach — is to look at parties intent, and, in the absence of clear intent to abrogate, to uphold property settlement provisions even where executory

Washington's clearest authority on this question is *Burch v. Rice*, 37 Wn.2d 185, 222 P.2d 847 (1950). *Burch* spoke directly to the question of whether complete reconciliation — the fact of which was uncontested in that case — necessarily abrogates a property settlement agreement, and held that it does not. *Burch* indicated that the intention of the parties — not their mere reconciliation — would govern whether the property settlement agreement would be enforceable: “Here, Mr. and Mrs. Burch lived together but a few months [six] after their reconciliation and neither by acts or words indicated any intention of changing their property agreement.” *Id.* at 192. *Burch* did not distinguish between separation contracts and property settlement agreements (the contract at issue was a pure property settlement agreement), and it did not distinguish between executed and executory contract provisions in holding that the intention of the parties governs the enforceability of a property settlement agreement.

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<sup>163</sup>*Strangolagalli v. Strangolagalli*, 295 A.D.2d 338, 338, 742 N.Y.S.2d 914, 915 (N.Y. A.D. 2 Dept. 2002) (“Judicial review of separation agreements is to be exercised sparingly, with a goal of encouraging parties to settle their differences on their own.”); *Guriel v. Guriel*, 55 A.D.3d 540, 541, 865 N.Y.S.2d 611, 612 (N.Y.A.D. 2 Dept. 2008) (court reluctance includes attacks on a separation or property settlement contract on the basis of reconciliation).

*Burch* adopts a pure intent-of-the-parties analysis, and presumes that a property settlement agreement is enforceable, even after reconciliation, absent an intent to change and/or abrogate the agreement.<sup>164</sup> *Id.*

In this case, the parties agree that the intent of the parties governs whether a post-marital agreement is abrogated, regardless of whether the parties reconciled.<sup>165</sup> This approach, utilized by the Washington Supreme Court in *Burch* — intent of the parties without reference to executed or executory provisions — is consistent with a line of cases from other jurisdictions. *Acre v. Koenig*, 404 P.2d 621, 624 (Idaho 1965); *see also*, *e.g.*, *Matter of Estate of Morrell*, 687 P.2d 1319, 1322 (Colo. App. 1984) (“In determining whether a reconciliation has terminated a property settlement agreement, the trier of fact must ascertain from the evidence whether the parties intended to revoke the agreement upon reconciliation.”); *Wood v. Wood*, 309 A.2d 103, 107 (D.C. 1973) (“it is well-settled generally, that subsequent cohabitation has the effect of avoiding [a valid property] settlement only if an intention to that effect is manifested by the participants”). It is also consistent with commentary in

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<sup>164</sup>As clarified in the ALR annotation on this issue: “the broad statement that the question whether the settlement survives a reconciliation depends upon the intention of the parties may sometimes be misleading. The true rule concerning the effect of intention seems to be that the settlement survives a reconciliation unless the court can find an intention that it shall not survive.” Cross, *supra* note 147, at § 5[a]. It seems to be exactly this approach that has been adopted by the Washington Supreme Court in *Burch*.

<sup>165</sup>See, Appellant’s Amended Opening Brief, p. 29.

the comprehensive ALR annotation on the issue: “There is no sound reason for the holding [of some jurisdictions] that the question whether certain clauses in a property settlement survive a reconciliation depends upon whether the provisions are executed or executory.”<sup>166</sup> Indeed, the “true rule” — embodied by the Washington Supreme Court’s approach in *Burch* — “... seems to be that the settlement survives a reconciliation unless court can find an intention that it shall not survive.”<sup>167</sup>

3. *Principles of contract law support the enforcement of the PSA.*

One pertinent portion of the property settlement agreement in *Burch* was quoted in the opinion in full:

It is understood between the parties hereto that this is a full and complete settlement of all property rights between the parties hereto and in the event that either party hereto shall institute an action for divorce or separate maintenance against the other party hereto, that neither party hereto shall claim or demand any suit, money, alimony, or attorneys fees in such action for divorce and separate maintenance. It is further understood and agreed between the parties hereto that any property hereafter acquired by either party shall be the sole and separate property of the party so acquiring it, free and clear of any claim of the other party hereto.<sup>168</sup>

The PSA in this proceeding states the following:

The following is a full and complete settlement stipulation and

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<sup>166</sup>Cross, *supra* note 147, at § 6[a]. Elsewhere, the ALR commentary states: “A true property settlement, according to the better view, is not affected by a reconciliation and resumption of cohabitation.” *Id.* at § 1.

<sup>167</sup>*Id.* at § 5[a], *citing, inter alia, Burch.*

<sup>168</sup>*Burch*, 37 Wn.2d at 188-89.

agreement of the parties pursuant to CR2A. Except as specified herein, each party shall retain any and all assets acquired by that party subsequent to separation. Except as specified herein, each party shall pay any and all obligations incurred by that party subsequent to separation. Unless otherwise specified herein, each party shall pay any and all obligation due on any assets received by that party. Each party agrees and stipulates this is a full and complete agreement between the parties, is enforceable in court. Each party understands that even though final documents yet need to be prepared this Stipulation and Agreement is effective and binding upon execution and enforceable in court.<sup>169</sup>

This language in the PSA is therefore strikingly similar to the language approved and enforced in *Burch*. The intent of the parties in this agreement was to avoid a trial by settling their property division after advice of counsel and 11 hours of mediation. A liberal construction is given to written contracts “in order that they may be given effect and carry out the intention reflected therein.” *In re Garrity’s Estate*, 22 Wn.2d 391, 398, 156 P.2d 217 (1945).

At bottom, a property settlement agreement is a contract. It is enforceable pursuant to the terms of contract law. Language relating to the enforceability of contracts, their binding effect, and the agreement of the parties that the PSA is enforceable is contained in the agreement itself, as shown above. The language quoted above suggests that the parties intended from the outset that the agreement would survive a reconciliation.

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<sup>169</sup>CP 26.

Moreover, to the extent Mark argues that reconciliation would automatically require the court to negate the terms of the PSA, it is in direct conflict with the holding in *Burch*. Moreover, Mark failed to make an adequate evidentiary showing regarding reconciliation, and he presented no evidence that the parties by conduct or otherwise intended to negate the PSA.

Beyond the ordinary principles of contract law that apply in this case, the PSA was executed pursuant to Civil Rule 2A (“CR2A”), which relates to litigation stipulations. CR2A provides that:

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

CR2A is intended to avoid disputes about whether or not parties or counsel have reached a final agreement and “to give *certainty* and *finality* to settlements and compromises, if they are made.” *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954)(discussing predecessor to CR2A) (emphasis added). Enforceability of a CR2A agreement is determined by reference to the substantive law of contracts. *In re Marriage of Ferree*, 71 Wash App. 35, 39, 856 P.2d 706 (Div. II 1993). Where the basic requirements of CR2A are met — an agreement between

parties or attorneys pursuant to a proceeding and in writing or on the record — the agreement is binding on its signatories. *Patterson v. Taylor*, 93 Wash. App. 579, 589, 969 P.2d 1106 (Div. I 1999). If there is no dispute as to the existence of the stipulation or its material terms, CR2A cannot be used as a shield to protect a litigant that has remorse or second thoughts about the agreement. *Lavigne v. Green*, 106 Wash. App. 12, 19, 23 P.3d 515 (Div. III 2001). In this case, there is no dispute about the existence of the PSA or its material terms. The agreement was signed by the parties and their attorneys. As such, the parties were entitled to rely on its enforceability.

Mark's argument, regardless of whether the parties reconciled, must be that the conduct of the parties amounted to a rescission of the contract. However, rescission can only occur when there is mutual consent to rescind a contract or demand to rescind by one side with acquiescence by the other, a material breach by one party with claim of rescission by the other or other such circumstances. *Woodruff v. McClellan*, 95 Wn.2d 394, 397, 622 P.2d 1268 (1980). There is certainly no mutual consent to rescind the contract in this instance — no demand to do so by Mark nor any acquiescence to do so by Teresa. There has been no material breach by one party and in fact Teresa has complied with the primary provisions of the contract, as argued in detail in the next

subsection.

The court may look beyond the words of the parties to the objective conduct of the parties, which will require the court to make a finding that for rescission to have been effected, both of the parties must have consented to the rescission by their objective conduct. *Modern Builders, Inc. Of Tacoma v. Manke*, 27 Wn. App. 86, 92, 615 P.2d 1332 (Div. II 1980). “Uncommunicated, subjective intent by one party to abandon is not sufficient to release the obligations.” *Id.* The objective conduct of the parties in this case includes but is not limited to Mark’s complete withdrawal from running the business and payments well over \$1,000,000 that he happily accepted.

Finally, also under contract law principles, when one party performs under a contract and the other party accepts the performance without objection, it is assumed that such performance was the performance contemplated by the contract. *Evans v. Laurin*, 70 Wn.2d 72, 76, 422 P.2d 319 (1966). The objective conduct of the parties in this case falls squarely within the holding in *Evans*. Teresa performed under the contract and such performance was accepted by Mark. An objective evaluation of Teresa’s conduct and Mark’s acceptance of it supports the position that not only did the parties not reconcile but that Teresa was actively going forward with the PSA.

4. *The parties' conduct does not reflect an intent to abrogate the PSA in this case.*

Even assuming, *arguendo*, the parties' did intend to reconcile in September 2004, they may or may not have intended to abrogate the PSA. *See, Burch*, 37 Wn. 2d at 191 (parties reconcile but court enforces property settlement agreement).<sup>170</sup> In this case, there is no evidence of an intent to abrogate. To the contrary, the evidence established that the most significant portions of the PSA were carried out by the parties during the months *following* the signing of the PSA. This supported the trial court's conclusion that "the critical and most financially significant parts of the Property Settlement Agreement were, in fact, carried out after September 2004."<sup>171</sup>

There is no direct evidence in the record whatsoever of an intent to abrogate the PSA other than Mark's self-serving testimony that he and Teresa had decided, later that night, "to basically not follow it."<sup>172</sup> Teresa, on the other hand, testified that she never intended to abrogate the PSA.<sup>173</sup> Mark's argument relies on circumstantial evidence regarding various ways in which the parties did not follow the less-significant portions of the PSA.

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<sup>170</sup>See also, CP 803.

<sup>171</sup>CP 833.

<sup>172</sup>1RP 112.

<sup>173</sup>2RP 392-93; see also, 2RP 386; 3RP 477-78.

But the court's factual findings regarding abrogation were supported by substantial evidence.

There would be no reason whatsoever for the most significant provisions of the PSA to have been executed if, as Mark contends, the parties agreed to abrogate the agreement in September 2004. The provisions that were not executed — primarily the transfer of investment accounts, the transfer of stock, signing UCC financing statements, division of the West Coast bank accounts, and the Pacific Avenue lease — were minor when compared to the provisions that were carried out in these parties' substantial community estate.<sup>174</sup> Moreover, Mark's testimony regarding abrogation was simply not credible. Despite receiving massive amounts of money, and monthly payments exactly in accordance with the agreed amortization schedule, Mark testified he still did not think the parties were following the agreement.<sup>175</sup> In light of the foregoing, there was substantial support for the trial court's conclusion that "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."<sup>176</sup>

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<sup>174</sup>See discussion, *supra*, pp. 8-10.

<sup>175</sup>IRP 125-26.

<sup>176</sup>CP 833.

C. If the PSA Was Abrogated, Partially-Executed Provisions Must Also Be Abrogated.

If, *arguendo*, the court found reconciliation and an intent to abrogate the PSA in this case, the court would have to un-do the *entire* complicated web of partially-executed provisions. It could not, as urged by Mark, simply “abrogate those provisions not enforced before Teresa re-opened this case.”<sup>177</sup> This is because the most significant provisions of the PSA were partially executed. The case law cited by Mark on this point discuss simple, completely-executed or completely-executory provisions. The cases do not discuss a scenario where, as in this case, one side has performed its part of a given property settlement provision, but the other side has not. In effect, to rescind all but the executed aspects of the PSA as of July 2007 in this case would create a massive, unjustified windfall for Mark.

“A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand while he shirks its disadvantages on the other, unless the two parts of the contract are so severable from each other as to form two independent contracts.” *Lucas v. Andros*, 185 W. 383, 386, 55 P.2d 330 (1936). In the context of marital agreements: “A party cannot, as a rule, rescind or repudiate the

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<sup>177</sup>Appellant’s Amended Opening Brief, p. 44.

unfavorable parts of a contract and claim the benefit of the residue. The theory underlying the rule is that retention of only the benefits amounts to unjust enrichment and binds the parties to a contract which they did not contemplate.” 19 Wash. Prac. § 17.14 (2008-09), *quoting*, 17A Am. Jur. 2d, Contracts sect. 548 (1991). Rescission, as an equitable remedy, will not be granted where “granting the relief sought by the [litigant] would result in his gratuitously obtaining the benefit of the [opposing party]’s performance.” *Burton v. Dunn*, 55 Wn.2d 368, 372, 347 P.2d 1065 (1960).

Partial rescission of a contract is only permitted where the contract is a divisible one and the ground of rescission relates merely to a severable part thereof. *Id.*; *accord*, *Soboda v. Nolf & Co.*, 91 W. 446, 157 P. 1100 (1916). If one party has performed part of a contract through payment but not received the consideration attributable to that payment, the party may recover: “When a consideration is divisible, and the price can be apportioned, then, if a distinct divisible portion of the consideration fails, the price paid for such portion can be recovered back.” *Id.*, *quoting*, Wharton on Contracts, § 748.

The foregoing principles apply in this case if the court rules that the parties intended to abrogate the PSA. It is clear that one particular exchange — business and home to Teresa for \$2 million and 3 months’

salary to Mark — was bargained for as an indivisible provision because of the arbitrator’s November 26, 2004 ruling clarifying the PSA, incorporated as part of the PSA, which spells it out in detail:

9. Promissory Note —

- (a) A central element of the negotiations which resulted in the parties’ CR2A agreement was ‘who would receive all interest in the Corporation?’ and ‘how much would the other receive in return?’.
- (b) *The parties agreed that Ms. Grimsley-LaVergne would be awarded the family home and all interest in the Corporation. The question then was ‘what was/is Mr. LaVergne to receive in return?’.*
- (c) *The parties then negotiated that Mr. LaVergne is receive [sic] \$2 mil. (plus 3 mos. at \$10,000/mo) most of which be paid over time with a negotiated rate of interest on the declining balance; and that this obligation owing to him will be secured by both a Deed of Trust on the family home and a UCC filing on all equipment of the Corporation.*<sup>178</sup>

Thus, *this* provision at the very least should be viewed as indivisible (it could be argued that the *entire* PSA is indivisible, but the result is the same). Meanwhile, Teresa made payments well in excess of \$1 million to Mark pursuant to this provision, and she was supposed to receive in return the business and the Fairview home. As of July 2007, she had received neither the title to the home nor the company stock. If the PSA is rescinded, Mark must return all of the payments made to him under the

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<sup>178</sup>Motion To Determine Trial Court’s Jurisdiction To Enforce CR2A Agreement, Appendix B (emphasis added) (filed in the Court of Appeals August 2008).

PSA,<sup>179</sup> because this indivisible provision has not been fully executed.

Failure to do so would constitute unjust enrichment at Teresa's expense.

D. In August 2008, the Trial Court Enforced, Not Modified, the Existing Dissolution Decree.

Several sections of Mark's supplemental brief seem to make the same argument: the trial court's August 22, 2008 rulings modified rather than enforced the April 29, 2008 final orders, or divided assets not in existence at the time of the final decree. This argument fails for several distinct reasons: (1) the court bifurcated the evidentiary hearing and specifically reserved reconciliation of corresponding accounts for the August 2008 trial; (2) Mark waived his right to argue that the trial court went beyond enforcement of the decree in that he made no objection to any of the evidence or argument presented by Teresa on those issues, and on some of them, presented his own pleadings, evidence, and argument asking for the very rulings about which he now complains; and, in any case, (3) the rulings were proper enforcement, not modification, of the decree and PSA.

1. *The trial was still pending in August 2008 and thus the court's August 22 reconciliation rulings were not a modification of the property division.*

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<sup>179</sup>And this would be nearly impossible given that Mark squandered the bulk of the money he received under the PSA in a series of ill-advised, unmonitored investments. 2RP 271-89.

Mark's arguments regarding improper modification of the property division by the court on August 22, 2008 hinge on the premise that true, unambiguous final orders, conclusive of all pending issues, were entered on April 29, 2008. The record, however, contains several clear statements by the court about the status of the case and, by implication, those April 29, 2008 orders.

At an August 5, 2008 hearing where the parties argued about whether the August 21-22, 2008 evidentiary hearing was needed since final orders had seemingly been entered, the court stated that the August 21-22 hearing was "not an enforcement of the decree" but "a completion of the trial to figure out what the terms of the property settlement, whether they've been carried out."<sup>180</sup> Mark's counsel then questioned how that could be true since the court entered the Decree on April 29, and the court replied that "reconciliation is a rather minor issue ... more money owing or less money owing but it's not going to mean titles don't transfer."<sup>181</sup> The court further stated that "because we bifurcated the trial it would have been my expectation that the appeal would not be timely until the end of the trial ... I thought we were in the middle of the trial and we just had the

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<sup>180</sup>RP (Aug. 5, 2008) 11.

<sup>181</sup>Id.

first half of it and we have the second half of it to go.”<sup>182</sup>

In a thorough explanation of the status of the case as of early August 2008, the court explained:

[O]n my own motion I decided to bifurcate the trial to have the first part of the trial about whether the property settlement agreement was enforceable and then the second part of the trial I think I indicated I think we knew we weren’t going to be dealing with the actual numbers at the trial, but the second part of the trial was to be about the reconciliation to how we were going to enforce this in light of payments made or whatever happened in the interim. And so it’s my belief that the further evidentiary hearing that we scheduled for August was just the second half of the first hearing which we already had. And the reason we didn’t hear it all at once is I didn’t want to hear all of the specific numbers if I was going to determine the property settlement agreement was not enforceable.<sup>183</sup>

The court mentions several more times in that hearing the need to “complete the trial” or “finish the trial.”<sup>184</sup> Moreover, in the written order entered at the conclusion of that hearing, approved by both parties, the court states that it “bifurcated the case re enforcement of CR2A and reconciliation of amounts & obligations owed under the CR2A.”<sup>185</sup>

As the court explained on August 5, 2008, the April 29, 2008 orders were to deal with basic asset and debt division, title transfers, etc., following the enforcement of the PSA. They were not intended to be a

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<sup>182</sup>Id. at 10.

<sup>183</sup>Id. at 9.

<sup>184</sup>Id. at 10, 12.

<sup>185</sup>CP 1641.

comprehensive final accounting of the money owed between the parties, which was substantial in this case because of the lengthy delay between the execution of the PSA and the divorce trial. Those issues were reserved for the second half of the trial, held August 21-22, 2008. In effect, the property division had not been completed, in the sense of every ancillary detail being clarified.

Moreover, the April 29, 2008 Decree explicitly incorporated the PSA, child support order, and parenting plan.<sup>186</sup> Thus, to the extent the April 29 orders contain provisions inconsistent with provisions in the PSA — for example, as to whether the parties agreed to split post-PSA/pre-Decree daycare and medical expenses 50/50 or not — an ambiguity existed that the court had the power to clarify.<sup>187</sup>

As such, the court's various accounting and reconciliation rulings from August 22, 2008 were not a modification of the April 29, 2008 orders but a supplement to them. None of the August 22 rulings complained about by Mark reversed an asset award contained in the Decree. Rather, the rulings merely reconciled the various monies owing *directly from* the asset awards embodied in the April 29 orders. This portion of Mark's appeal should be denied.

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<sup>186</sup>CP 998, 1000.

<sup>187</sup>See, *Kostelecky v. Kostelecky*, 537 N.W.2d 531, 553 (N.D. 1995).

2. *Mark Waived His Right To Contest Whether the Court Could Properly Make Its August 22, 2008 Rulings*

Several of the rulings challenged in Mark's Supplemental Brief as outside the parameters of decree enforcement were *specifically requested by him*. Indeed, it was Mark, not Teresa, that pushed for a subsequent evidentiary hearing (held August 21-22, 2008) to address the various accounts and obligations flowing from the court's enforcement of the PSA.<sup>188</sup> In his motion and brief filed in advance of the hearing "to enforce" the decree,<sup>189</sup> Mark requested that the court rule on, among other things: (1) monies owing for the coffee stand rental;<sup>190</sup> (2) monies owing for the Second Avenue property;<sup>191</sup> and (3) money owing on a utility debt against Mark for property awarded to Teresa.<sup>192</sup> He cannot now claim that the court improperly modified the property division by making the very rulings he asked it to make *to enforce* the Decree. "A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." *Henry v. Russell*, 19 Wash. App. 409, 415, 576 P.2d 908 (Div. II 1978), *quoting*,

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<sup>188</sup>RP (Aug. 5, 2008) 7.

<sup>189</sup>The title of Mark's August 15, 2008 motion was "Motion *To Enforce* CR2A and Other Relief." CP 1056 (emphasis added).

<sup>190</sup>CP 1057; CP 1064.

<sup>191</sup>CP 1057; CP 1064.

<sup>192</sup>CP 1057.

*Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954) (applied in a dissolution case). Here, Mark voluntarily waived any objection to the court's reconciliation of accounts flowing from the PSA property awards when he asked for the court to do it.

Further, in the context of a post-decree modification, there is authority that the parties may consent to a modification. *See, In re Marriage of Taylor*, 548 N.E.2d 106, 107-08 (Ill. App. 1989); *Kleinsmith v. Northwest Bank and Trust Co.*, 477 N.W.2d 388, 390 (Iowa 1991). Here, even if we assume certain aspects of the court's August 22 rulings were indeed modifications rather than enforcement of the property division, Mark clearly relinquished his right to claim such by specifically asking for and presenting evidence on some of those very rulings. For example, Mark complains that the court awarded Teresa post-PSA utility payments on property awarded to Mark under the PSA, but he specifically asked the court to award *him* relief from utility payments owed on property awarded to Teresa under the PSA. Implicitly, then, Mark acknowledged that such a ruling was an enforcement — not modification — of the property division.

In an even clearer example, Mark argues that the awarding of coffee stand rents is an example of an asset or liability not discussed in the

Decree that effectively modified the Decree.<sup>193</sup> Yet Mark specifically requested the court to make this ruling to award the coffee stand rents. As such, he has waived the right to claim the court improperly modified the Decree.

3. *Court merely enforced Decree and did not modify the property division*

The court had the power to enforce its property division order.<sup>194</sup> “The court is not only permitted, but indeed required, to enforce its original decree in later actions.” Brett R. Turner, *The Limits of Finality: Reopening Property Division Orders in Post-Judgment Proceedings*, 9 Divorce Litig. 145 at 148 (August 1997). Where the court is considering changed facts, the “task of the court in such a situation is to construe the order — to determine how the original court would have interpreted the existing order if it had known of the future change. Where the court stays within this limit, it can enforce and apply the prior order without modifying it.” *Id.*

In enforcing a property distribution, a court must have latitude to resolve ancillary issues with the respect to the divided property. *See, Burrill v. Burrill*, 113 Wash. App. 863, 874, 56 P.3d 993 (2002); *see also*,

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<sup>193</sup>Supplemental Brief, p. 13, 17.

<sup>194</sup>CP 1658.

*e.g.*, *Volk v. Volk*, 435 N.W.2d 690 (N.D. 1989) (where property awarded to wife has substantial tax arrears, proper to reopen judgment so that husband could be ordered to pay the taxes). Resolution of such issues constitutes enforcement, not modification, of a property division. *Burrill*, 113 Wash. App. at 874. Particular deference should be afforded a trial court's clarification or amendment when it clarifies its *own* prior decree. *Kostelecky v. Kostelecky*, 537 N.W.2d 531, 553 (N.D. 1995) ("Because the original decree did not specify how the distributions were to be structured or who would be liable for the resulting taxes, the decree was ambiguous and clarification was appropriate.").

In *Burrill*, the court awarded the family home to the husband, which had been previously occupied by the wife. 113 Wash. App. at 874. When he moved into the home, the wife had taken appliances, fixtures, and left the house in a state of filth. *Id.* at 868. Though the case was on appeal, the trial court ruled — pursuant to the husband's "postdissolution motion to enforce the decree of dissolution" — that (1) the award of the home included the appliances; (2) the award of the home implied that it be left in a habitable condition; and (3) an award of post-decree damages because of the problems with the home upon transfer was "an enforcement of the decree" over which the court had jurisdiction. *Id.* at 874. Thus, even though the damages awarded in *Burrill* related to "assets and debts

that were not in existence at the time the Dissolution Decree was entered” — one of Mark’s mantras in his appellate brief<sup>195</sup> — the Court of Appeals upheld the rulings as enforcement, not modification, of the dissolution decree. The obvious reason is because the supplemental rulings were connected to and flowed directly from the previous asset award of the court.

In this case, after issuing its ruling enforcing the PSA, the court stated “if it is appropriate that the dissolution court enforce the property settlement agreement or determine the extent to which it has been already completed or remains to be completed, then it come[s] back to me as the judge ....”<sup>196</sup> After entering the decree on April 29, 2008, the court was indeed asked to reconcile the various accounts connected with its prior order, in August 2008. The major items complained about by Mark in his appeal concern direct interpretation and/or enforcement of the court’s property division from its April 29, 2008 orders. None of the issues addressed at the August 21-22, 2008 hearing involve any assets or money that was considered owed prior to September 21, 2004. The trial court was simply reconciling any and all monetary claims that either party had against the other between the date of the PSA and the date of the hearing.

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<sup>195</sup>See, e.g., Supplemental Brief, pp. i, 3, 13-14.

<sup>196</sup>CP 1151.

This reconciliation of monies over a three and one-half year period of time had nothing to do with the modifying the PSA but merely enforcement and interpretation thereof.

For example, the boat lift was attached to the Fairview property and was ruled a fixture by the court.<sup>197</sup> In awarding that property to Teresa pursuant to the PSA, the court necessarily had the authority to order that insurance proceeds for damage to the boat lift received by Mark after the signing of the PSA be returned to Teresa. That ruling flowed directly from the prior award of the Fairview home to Teresa. *See, Burrill*, 113 Wash. App. at 874. Similarly, because the court awarded the Pacific Avenue property and the business, it had to make a ruling regarding the coffee stand rents that were inextricably connected to those awards. The Second Avenue property was awarded to Mark pursuant to the PSA, so ordering a return of post-PSA utility payments made by Teresa was proper enforcement of that award. Likewise, allocating the post-PSA charges to A+'s account and the A+ credit card by Mark fall squarely within the enforcement power of the court, since those items were specifically addressed in the PSA. Finally, Mark objects to the court requiring him to pay for his own 2004 tax preparation, a direct incident of the enforcement

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<sup>197</sup>2RP (Aug. 21-22, 2008) 355.

of the PSA as of September 21, 2004. That ruling was enforcement of its prior order and did not improperly modify the property division in any regard whatsoever. *See, id.*

Mark has taken the position that virtually every PSA enforcement ruling from August 22, 2008 that did not go in his favor was an improper modification of the property division. Yet he cannot cite a single instance where the court reversed a prior property award or changed such an award in any *substantive* fashion. Each of the court's rulings flowed directly from the prior property awards and the PSA, and simply reconciled the complicated web of accounts that had been created by the parties' delay in finalizing the divorce. These rulings, therefore, were appropriate and should not be disturbed.

E. The Pacific Avenue Rental Value Was Based On Substantial Evidence.

The PSA provided that Teresa, who was awarded the business, was to pay Mark market-rate rent on the Pacific Avenue property, awarded to Mark, where A+ had conducted its business. Mark has appealed the court's determination that the market-rate rental value for the property during the applicable time period is \$3900/month. Each party presented expert testimony regarding the rental value. The court's ruling focused on defects in Mark's expert's testimony. Mark's argument on appeal,

however, focuses exclusively on defects it believes the court ignored in Teresa's expert's testimony. Yet even if all of Mark's contentions regarding Teresa's expert, Mr. Wilmovsky, were true, they do not establish a lack of basis for the rent or establish that Mark's expert, Mr. Carlson, provided a more substantial basis on which to base rental value. Mark makes three specific objections to Wilmovsky's testimony: (1) he did not measure the property; (2) he failed to account for shop additions; and (3) he used poor comparables.<sup>198</sup> None of these contentions have merit.

Mark's first objection to Mr. Wilmovsky's testimony is that he did not measure the property as he claimed. His only evidence for this assertion is photographs that he argues establish that Mr. Wilmovsky's sketches are not accurate. This argument fails for two reasons. First, the photographs filed by Mark do not establish the alleged inaccuracy in Mr. Wilmovsky's drawings.<sup>199</sup> Second, even if they did, any inadvertent mistake in a written sketch does not directly lead to the conclusion that "Mr. Wilmovsky did not measure the property," as contended by Mark.<sup>200</sup> Mr. Wilmovsky repeated several times that he *did* measure the property.<sup>201</sup> The relevant information from his analysis is not the shape of the

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<sup>198</sup>Supplemental Brief, pp. 18-19.

<sup>199</sup>CP 1490-93.

<sup>200</sup>Appellant's Supplemental Brief, p. 18.

<sup>201</sup>1RP (Aug. 21-22, 2008) 141, 155, 156; CP 1458-59, 1473, 1474.

buildings, but their square footage. Mark submitted nothing from which the court could conclude that Mr. Wilmovsky based his opinion on inaccurate numbers. Moreover, it is undisputed that Mr. Carlson, Mark's expert, did *not* measure the property.<sup>202</sup> Instead, Mr. Carlson relied on measurements from a prior analysis done by someone else at an earlier time, then did his own mysterious calculations to arrive at altogether different values that he could provide no explanation for at trial.<sup>203</sup>

Next, Mark contends that “Mr. Wilmovsky neglected to include the shop additions,” and “failed to account for this addition” at trial.<sup>204</sup> Mark's counsel, however, *never* made clear at trial — despite multiple attempts to do so — what addition he was even referring to in questioning Mr. Wilmovsky.<sup>205</sup> After this muddled cross-examination, Mr. Wilmovsky, in response to the court's clarifying questions, made clear that he measured the entire property in February 2008.<sup>206</sup>

Finally, Mark takes issue with the comparables used in Mr. Wilmovsky's analysis. Both experts agreed that the Pacific Avenue property was fairly unique and that there were not perfect local

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<sup>202</sup>1RP (Aug. 21-22, 2008) 92.

<sup>203</sup>1RP (Aug. 21-22, 2008) 112-115.

<sup>204</sup>Appellant's Supplemental Brief, pp. 18-19.

<sup>205</sup>1RP (Aug. 21-22, 2008) 155-57; CP 1472-74.

<sup>206</sup>1RP (Aug. 21-22, 2008) 156-57; CP 1474.

comparables.<sup>207</sup> Two of the three comparables used by Mr. Wilmovsky, for example, were smaller parcels but with larger buildings.<sup>208</sup> Mr. Carlson's comparables, on the other hand, were all either warehouse-only or office-only — he did not include *any* mixed-use properties in his analysis.<sup>209</sup> Mr. Wilmovsky explained why the three properties he used were the best comparables available.<sup>210</sup> Further, Mr. Wilmovsky effectively described the process by which comparables with different variables can be used to get an accurate dollar/sq. ft. for a different property.<sup>211</sup> Whether or not a property is currently available for lease — another of Mark's criticisms — is not critical to the market-rate rental analysis if the property has been recently leased.<sup>212</sup> The court recognized imperfections in Mr. Wilmovsky's comparables,<sup>213</sup> but based its ruling on the fact that Mr. Carlson's comparables were flawed in a more fundamental way: "Mr. Carlson's comparables were either office space only or warehouse space only ... I think those are quite different than the combined use of office and warehouse space that Mr. Wilmovsky used in

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<sup>207</sup>1RP (Aug. 21-22, 2008) 136, 145.

<sup>208</sup>1RP (Aug. 21-22, 2008) 99, 129, 132.

<sup>209</sup>1RP (Aug. 21-22, 2008) 145.

<sup>210</sup>1RP (Aug. 21-22, 2008) 151.

<sup>211</sup>1RP (Aug. 21-22, 2008) 145-46.

<sup>212</sup>1RP (Aug. 21-22, 2008) 154.

<sup>213</sup>2RP (Aug. 21-22, 2008) 349-50.

his estimates.”<sup>214</sup> As such, the court’s conclusion that Mr. Wilmovsky’s comparables were more persuasive than Mr. Carlson’s was based on substantial evidence.

Mark’s argument ignores the deficiencies in his own expert’s opinion. The court’s factual findings are based largely on the credibility of the testifying witnesses. In this case, the court ruled that “... Mr. Carlson’s opinion with respect to the lease value of the land is not valuable.”<sup>215</sup> The court pointed to, among other things, Mr. Carlson’s inability to explain at trial the discrepancies in his area calculations.<sup>216</sup> Where issues of fact are reviewed to determine whether they are supported by substantial evidence, the review is deferential and entails acceptance of the fact-finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *Callecod v. Washington State Patrol*, 84 Wash App. 663, 676 n.9, 929 P.2d 510 (Div. I 1997). Here, Mr. Wilmovsky had 17 years of experience as a certified commercial real estate appraiser;<sup>217</sup> Mr. Carlson was not certified and had worked in the area of commercial property for only 18 months.<sup>218</sup> Clearly, the court’s ruling regarding the Pacific Avenue rental value was supported by

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<sup>214</sup>2RP (Aug. 21-22, 2008) 350.

<sup>215</sup>2RP (Aug. 21-22, 2008) 349.

<sup>216</sup>Id.

<sup>217</sup>1RP (Aug. 21-22, 2008) 139.

<sup>218</sup>1RP (Aug. 21-22, 2008) 89, 104, 118.

substantial evidence.

F. The Court's Rulings Reconciling Accounts In Accordance With Its Property Distribution Were Proper.

1. *The Court's ruling regarding Second Avenue rental income was proper.*

Mark contends he is owed \$13,600 in rent for the Second Avenue Property rented to Ricky Lee Senn from December 2005 through August 2007. Mark's argument on this point, however, is mistaken on at least two grounds.

The court ruled that Mark "failed to meet his burden" regarding what rent amounts Teresa may have received and whether those amounts "were ever distributed for the benefit of [Mark]."<sup>219</sup> Indeed, at trial, there was no evidence establishing the number, or amount, of rent payments made by Senn. The original rent of \$800 was only paid "in the beginning."<sup>220</sup> Mark's brief fails to acknowledge that the trial evidence established that there were periods time when Senn did not pay *any* rent.<sup>221</sup> A court may not base an monetary award on speculation. *Larson v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677 (1964). Without knowing how many months Senn did not pay rent, or whether any of the rent given to Teresa was distributed to Mark, the court would have been

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<sup>219</sup>CP 1629, 1138.

<sup>220</sup>1RP 64.

<sup>221</sup>1RP 68.

engaging in speculation about any monetary award. The court acted appropriately in refusing to make an adjustment in Mark's favor for these rents.

Moreover, Mark is inaccurate in asserting that "Teresa arbitrarily decided to reduce the rent" to \$650. In fact, Senn's testimony was that he decided to reduce the rent based on a suggestion by Teresa that withholding rent might get Mark to make needed repairs.<sup>222</sup> The decision, then, was not arbitrary but was based on Mark's failure to make requested repairs.<sup>223</sup> Senn also testified that he discussed the rent reduction with Mark and Mark agreed to it.<sup>224</sup> Nonetheless, because Mark failed to prove the rental amounts owing, if any, the court's ruling was proper.

## 2. *Property taxes*

The court ruled that "Respondent [Mark] had the responsibility to pay for real estate taxes on the property he was awarded under the Decree."<sup>225</sup> This obligation included tax on "permanent fixtures on the real estate."<sup>226</sup> Accordingly, the court ordered Mark to pay Teresa \$12,337 in taxes she paid on the Pacific Avenue property and the Second Avenue

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<sup>222</sup>1RP 65-66.

<sup>223</sup>1RP 64, 66.

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

<sup>225</sup>CP 1627.

<sup>226</sup>Id.

property after the PSA was signed and before the Decree was entered.<sup>227</sup>

This ruling was supported by the evidence.

Mark contends that a hand-written note, allegedly by Teresa's attorney, on a check record establishes that the \$12,337 are for personal property taxes on Pacific Avenue.<sup>228</sup> Yet the check indicated on that exhibit is for \$2198.45, and thus only represents one of the five payments included in the \$12,337 awarded by the court.<sup>229</sup> Moreover, there is no indication whose writing is on that record, and whether the author of the note had personal knowledge of the source of the tax.<sup>230</sup>

Mark also argues that a county tax summary establishes that the disputed payments were for personal, not real, property. This evidence, however, fails to establish whether any of the taxes assessed by Thurston County were in fact for permanent fixtures. If so, they were properly awarded to Teresa. Moreover, Teresa provided testimony regarding the real property taxes she paid; this testimony supported the trial court's ruling.<sup>231</sup> Just pointing to a document that says something different than a witness's testimony does not establish an abuse of discretion by the trial court; no class of evidence is entitled *per se* to greater weight than any

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<sup>227</sup>Id.

<sup>228</sup>Supplemental Brief, p. 22; CP 1419.

<sup>229</sup>These amounts are summarized at CP 1420.

<sup>230</sup>1RP (Aug. 21-22, 2008) 67, 72.

<sup>231</sup>1RP (Aug. 21-22, 2008) 67-73.

other at trial. *Calhoun, Denny & Ewing v. Whitcomb*, 90 W. 128, 135, 155 P. 759 (1916).

Finally, the court's ruling included a proviso that, "If the Court is incorrect that these [tax] payments [of \$12,337] are for the real estate or permanent fixtures on the real estate, then there should be an adjustment made so that Respondent only pays Petitioner for the real estate and permanent fixtures taxes on the Pacific Avenue and Second Avenue Properties."<sup>232</sup> Thus, this ruling recognized and accounted for the conflict in the evidence and was self-correcting. The ruling was thus not in error even if Mark is correct about the nature of the taxes. Mark's remedy, if the parties cannot resolve the dispute, is to bring a motion to enforce the ruling according to its terms. It is not a proper issue for appeal because the court's qualified ruling — to award Teresa whatever real property/fixture taxes she paid on properties awarded to Mark — was supported by the evidence.

### 3. *Health expenses.*

The PSA provided that daycare expenses, nanny expenses, and uninsured medical expenses were to be divided 50/50. In the arbitration decision dated April 9, 2008, Commissioner Slusher ruled that "medical

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<sup>232</sup>CP 1551-52.

insurance premiums” were also within the contemplation of the parties and fell within the parameters of the “uninsured medical expenses” provision of the PSA.<sup>233</sup> As such, these insurance premiums were also to be divided 50/50. The court, in enforcing the PSA and its Decree on August 22, 2008, properly assessed the total amount of these daycare and health expenses and divided them 50/50, as provided by the PSA.

Mark argues that the April 29, 2008 child support order — entered between the two phases of the trial and which provided that back child support was “N/A” and that other medical expenses would be divided “effective May 2008” — precluded the court’s August 22, 2008 reconciliation of back amounts owed. That order, however, cannot be viewed in isolation from the procedural posture of the case when it was signed, and the Decree into which it was incorporated. The court had bifurcated the trial and intended to hear testimony later in the summer regarding amounts owed by both parties prior to July 2007, in the wake of the enforcement of the PSA.<sup>234</sup> The April 29, 2008 order merely reflected the parties’ agreement that no support would be owed going forward — it was not a final ruling on the pre-July 2007 reconciliation before any

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<sup>233</sup>CP 1711. Teresa does not understand Mark’s statement in his brief that “the children’s medical insurance and uncovered medical payments[] were not issues before Mr. Slusher for binding arbitration.” Supplemental Brief, p. 23.

<sup>234</sup>RP (Aug. 5, 2008) 9.

evidence was even heard, as apparently contended by Mark. To the extent that paragraph 3.20 of the plain-vanilla Order of Child Support purported to constitute such a court ruling on the issue of what amounts were owed for daycare and health expenses prior to April 29, 2008, it was in conflict with both the PSA and the April 9, 2008 arbitration decision.

Even if this language had the effect Mark wishes to ascribe to it in this appeal, it was obviously an “error[] ... arising from oversight or admission” and, as such, could be corrected by the court at any time. Civil Rule 60(a); *In re: Marriage of Getz*, 57 Wash. App. 602, 604, 789 P.2d 331 (Div. I 1990). Such errors may be corrected by the court without implicating an inappropriate modification. Because the ruling did not change a decision being reviewed by the appellate court — which was only whether or not the PSA should be enforced due to reconciliation — it was a proper correction by the trial court.

Further, Mark never raised any objection at the August 21-22, 2008 trial that daycare and health expenses could not be allocated because the April 29, 2008 order of child support precluded it. The sole argument Mark made at trial was that since he was available to care for the children, nanny expenses were not necessary or reasonable.<sup>235</sup> Thus, Mark waived

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<sup>235</sup>2RP (Aug. 21-22, 2008) 323-24.

any argument for appeal that the trial court did not have the authority to award daycare and health expenses. Rule of Appellate Procedure (“RAP”) 2.5(a).

Finally, Mark makes the argument that the medical and daycare reimbursements were required to be arbitrated by Commissioner Slusher.<sup>236</sup> This is a bizarre argument in light of the myriad issues related to the PSA that were litigated by both parties in the August 21-22, 2008 continuation of trial. Mark offers no explanation as to why this particular issue, and not all of the others, would require arbitration prior to court consideration. Further, Commissioner Slusher’s April 9, 2008 arbitration decision states “It appears there is now agreement that Judge Casey will address the referenced personal property concerns.”<sup>237</sup> Moreover, this is another example of an objection never raised to the trial court that should not be considered in this appeal. RAP 2.5(a).

G. Teresa Should Be Awarded Her Attorney’s Fees In This Appeal Pursuant To RCW 26.09.140.

RCW 26.09.140 governs the availability of attorney’s fees in a dissolution matter, including appeal. Pursuant to that statute, the “appellate court may, in its discretion, order a party to pay for the cost to

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<sup>236</sup>Supplemental Brief, p. 24.

<sup>237</sup>CP 1710-11.

the other party of maintaining the appeal and attorney's fees in addition to statutory costs." RCW 26.09.140. In doing so, the court will consider "the arguable merit of the issues on appeal and the financial resources of the respective parties." *Johnson v. Johnson*, 107 Wash. App. 500, 505, 27 P.3d 654 (Div. II 2001) (citation omitted).

In this case, the bulk of Mark's appeal (his entire 48-page Opening Brief) and the most significant issue to the outcome of the litigation concerns whether the parties reconciled and intended to rescind the PSA. Given that these are factual issues that will not be disturbed on appeal where they are supported by substantial evidence (*see, Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959)), this portion of the appeal is frivolous in light of the overwhelming evidence supporting the trial court's rulings. Thus, even setting aside the relatively minor financial issues argued in Mark's supplemental brief, Teresa is entitled to recover her attorney's fees on this basis alone.

Further, the astronomical costs of litigation in this case have put a financial strain on Teresa. Whereas Mark was awarded a fixed sum of money at a time that the economy was strong and the parties' business was growing, recent economic troubles have taken their toll on the business. Mark has received large, fixed monthly payments during the recession while Teresa's income has been affected significantly by the economy. At

the same time, Mark has continued to litigate after numerous settlement attempts by Teresa to put an end to this case. Teresa will file a supporting Affidavit of Financial Need pursuant to RAP 18.1(c).

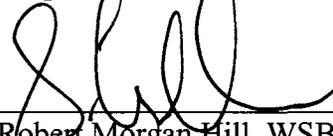
#### V. CONCLUSION

The trial court's decision that Mark and Teresa did not reconcile, and, additionally, did not intend to abrogate the PSA, is supported by substantial evidence and should not be disturbed.

Additionally, the court's various rulings reconciling accounts flow directly from its ability to enforce the decree and final orders. The court's ruling on the rental value of the Pacific Avenue property was supported by substantial evidence and should be upheld. Finally, Teresa should be awarded her reasonable attorney's fees in this matter, for the reasons set forth above.

DATED this 27<sup>th</sup> day of August, 2009.

Respectfully submitted,



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DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

MARK LaVERGNE,

Appellant,

vs.

TERESA GRIMSLEY,

Respondent.

NO. 37731-4

Thurston County Superior Court  
Cause No. 03 3 01421 5

DECLARATION OF SERVICE

I, Jean A. Archer, hereby declare under penalty of perjury of laws of the State of Washington, that on August 27, 2009, I caused a true and correct copy of the Respondent's Brief to be mailed via U.S. Postal Service, postage prepaid thereon to:

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Dated this 27<sup>th</sup> day of August, 2009.



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