

77890-6

NO. 31892-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT
04/09/10
PIERCE
STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

ANGELA K. McCAUSLAND,

Respondent,

and

ROBERT G. McCAUSLAND,

Appellant.

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

BRIEF OF APPELLANT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542

By: Valerie Villacin
WSBA No. 34515

Attorneys for Appellant

1109 First Avenue, Suite 500
Seattle, WA 98101-2988
(206) 624-0974

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	1
III.	ISSUES RELATED TO ASSIGNMENTS OF ERROR	5
IV.	STATEMENT OF THE CASE	6
	A. Background.	6
	B. 1998 Reconciliation Agreement.	7
	C. 2000 Separation Agreement.	9
	D. Revision Of 2000 Agreement.	11
	E. 2002 Appeal.	13
	F. 2003 Remand.	14
V.	ARGUMENT	18
	A. The Trial Court Failed To Follow This Court's Mandate.	18
	1. This Court Held That The \$5,500 Monthly Combined 'Support' Payment Provision Was An Unenforceable Component Of The Agreement. The Trial Court Ignored This Mandate When It Found These Payments To Be Enforceable "Contractual Obligations."	18
	2. This Court Held That The Trial Court Improperly Characterized Child Support And Spousal Maintenance Payments As "Property Division." The Trial Court Ignored This Mandate And Once Again Treated The Monthly Payments As A Non-Modifiable Property Distribution.	19

3.	This Court Held That The \$16 Million Payment Provision Was Unenforceable. The Trial Court Ignored This Mandate When It Required Robert To Pay Certain Expenses That Were Conditioned On This Unenforceable Provision.	21
4.	The Trial Court Having Determined That Maintenance Terminated, Under The Court's Mandate Robert Is Entitled To Repayment Of That Portion Of The Monthly Payments That Are Not Properly Characterized As Child Support.	23
B.	The Trial Court Erred In Calculating The Child Support Obligation.	24
1.	The Trial Court Erred By Setting Child Support Beyond The Maximum Advisory Amount.	25
2.	The Trial Court Erred In Ordering The Father To Be Solely Responsible For Extraordinary Health Care Expenses For The Children.	28
VI.	CONCLUSION	29

STATEMENT OF AUTHORITIES

CASES

Biggs v. Vail, 124 Wn.2d 193, 876 P.2d
448 (1994) 20

Marriage of Brown, 8 Wn. App. 528, 507 P.2d
157 (1973) 24

Custody of R., 88 Wn. App. 746, 947 P.2d
745 (1998) 29

Marriage of Daubert/Johnson, __ Wn. App. __,
99 P. 3d 401 (2004) 26-28

Ethredge v. Diamond Drill Cont. Co., 200 Wash.
273, 93 P.2d 324 (1939) 18

**Harp v. American Surety Company of New
York**, 50 Wn.2d 365, 311 P.2d 988 (1957) 18, 20

Marriage of Mason, 40 Wn. App. 450, 698 P.2d
1104, *rev. denied*, 104 Wn.2d 1017 (1985) 23, 24

Marriage of Mason, 48 Wn. App. 688, 740 P.2d
356 (1987) 30

Marriage of McCausland, 112 Wn. App. 1029,
2002 WL 1399120 (Wash. App. Div. 2) passim

Marriage of Metler, 32 Wash. 494, 73 P. 535
(1903) 24

Marriage of Rusch, __ Wn. App. __, 98 P.3d
1216 (2004) 26

Marriage of Scanlon/Witrak, 109 Wn. App. 167,
34 P.3d 877 (2001), *rev. denied*, 147 Wn.2d
1026 (2002) 28

STATUTES

RCW 26.09.140 12

RCW 26.19 13, 29

RCW 26.19.020 25-26

RCW 26.19.065 25, 26

RCW 26.19.080 6, 28

RULES AND REGULATIONS

CR 11 20

RAP 12.8 29

I. INTRODUCTION

This is the second appeal from a ruling by Pierce County Superior Court Judge Frederick W. Fleming arising from the interpretation and enforcement of a separation agreement entered into by the parties a year before their marriage was dissolved in April 2001. The trial court's ruling on remand attempts to maintain its prior decision, which this court reversed. For the same reasons this court reversed the trial court's order in 2002, this court should once again reverse the trial court's order on remand from this court. This court should remand to a different judge and provide specific directions to the trial court to fashion a ruling that maintains the integrity of this court's earlier decision.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Granting Motion for Continuation of Monthly Payments and Expenses, entered August 23, 2002.

2. The trial court erred in entering Finding of Fact 2, that the March 23, 2000 Spousal Agreement "is a valid and binding contract between the parties." (CP 492)

3. The trial court erred in entering Finding of Fact 3, that the agreement was "fair and reasonable at the time of execution."
(CP 492)

4. The trial court erred in entering Finding of Fact 5, that the "extrapolation method shall be used" in determining child support.
(CP 492)

5. The trial court erred in entering Finding of Fact 6, that the husband has a "contractually required payment of \$5,500 per month" and awarding a portion of that amount to the wife as "property division." (CP 493)

6. The trial court erred in entering Finding of Fact 7:

The Respondent's contractual obligation to pay the Petitioner \$5,500.00 per month shall survive termination and/or modification of the Respondent's child support obligation. In the event that the Respondent's child support obligation is terminated, and/or modified, then the difference between the contractually required sum of \$5,500.00 per month and the amount of his then current child support obligation shall be payable to the Petitioner as property distribution.

(CP 493-94)

7. The trial court erred in entering Finding of Fact 8:

Respondent's obligation to pay to Petitioner \$5,500.00 per month shall not terminate upon the remarriage of the Petitioner, nor upon the death or remarriage of the Respondent. Upon the death of Respondent, said obligation should be a charge against his estate.

(CP 494)

8. The trial court erred in entering Finding of Fact 9:

The court finds that the lack of provision for maintenance is dependant [sic] upon the actual distributions and payments for the division of marital property as herein provided and that the wife will necessarily depend upon the receipt of said assets and payments in order to maintain a proper standard of living, that the failure to receive said assets and payments will seriously impair said standard and that the provisions for support and maintenance would have been significantly higher but for the reliance of the wife upon the receipt of said assets and payments. Accordingly, the husband shall acknowledge that in the event of any bankruptcy or insolvency proceedings, said distribution and payments should properly be recognized as nondischargeable obligations and should survive any such proceedings in order to carry out the intentions and agreement of the parties herein and he shall not take a contrary position. Notwithstanding the foregoing, the parties acknowledge that all of the payments and distributions under the decree should constitute an equitable division and distribution of marital property and are not intended to be treated as taxable income to the wife or to the husband and are being made hereunder as a nontaxable event.

(CP 494-95)

9. The trial court erred in entering Finding of Fact 11:

The Court finds that pursuant to the terms of the Spousal Agreement the Respondent should be required to pay 100% of all unreimbursed medical, dental and orthodontic expenses for the parties' minor children. The Respondent should also be required to provide medical and dental insurance coverage for the children and to pay 100% of the premium.

(CP 495)

10. The trial court erred in entering Finding of Fact 12, that the husband "shall pay 100% of all major items of repair and reasonable maintenance on Petitioner's current residence... so long as Petitioner continues to own said residence." (CP 495-96)

11. The trial court erred in entering Finding of Fact 13, that "Petitioner has incurred expenses since this matter was last before the Court that should have been paid by Respondent pursuant to the terms of the Spousal Agreement." (CP 496)

12. The trial court erred in entering Finding of Fact 19, that the husband is solely responsible for the children's orthodontic expenses. (CP 497)

13. The trial court erred in entering Finding of Fact 26, that the wife "has a need for [attorney fees] and that Robert McCausland has the ability to pay." (CP 500)

14. The trial court erred in entering Finding of Fact 27A, that: "The payments to wife commencing with the Spousal Agreement in March 2000 are property division in part and child support in part and not spousal maintenance." (CP 501)

The trial court's Findings of Fact and Conclusions of Law (CP 491-503) are Appendix A.

15. The trial court erred in entering its Amended Decree of Dissolution. (CP 516-20)

16. The trial court erred in entering its Order of Child Support (CP 504-15), and in extrapolating child support based on its finding that "The children participate in dance and sports activities, which are significant expenses. The children have the expectation of support at the level of their father's significant historical income." (CP 506)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred by ignoring the mandate of this court and reinstating its prior ruling, which this court reversed in the first appeal?

2. Whether the trial court erred by relying upon certain provisions of the 2000 agreement that are directly associated to provisions of the agreement that this court held were unenforceable?

3. Whether the trial court erred by extrapolating child support to nearly twice the advisory amount when its only finding in support of extrapolation is that the children participate in dance and sports activities and that the father has significant historical income?

4. Whether the trial court erred by ordering the father to pay 100% of the children's extraordinary health care expenses in spite

of the language of RCW 26.19.080, which provides that such expenses must be shared in proportion to the parties' income?

IV. STATEMENT OF THE CASE

This Statement of the Case is adopted largely from this court's unpublished decision, ***Marriage of McCausland***, 112 Wn. App. 1029, 2002 WL 1399120 (Wash. App. Div. 2), which is reproduced as Appendix B.

A. Background.

Robert and Angela McCausland married on May 26, 1988. The parties have two children: MM, born June 20, 1991, and DM, born December 28, 1994. Angela is trained as a teacher. ***McCausland***, 2002 WL 1399120 at *1. She has an undergraduate degree and is one year away from obtaining her masters degree. (RP 79) Angela stopped working outside the home in 1995. Although she resumed teaching full-time sometime after the couple separated, ***McCausland***, 2002 WL 1399120 at *1, Angela has since voluntarily elected to work part-time as a substitute teacher. (RP 131-32) Robert is a businessman who owned a mortgage lending company, which he sold to start an internet company in the late 1990s. ***McCausland***, 2002 WL 1399120 at *1. The internet company is now bankrupt and Robert

is an employee of another mortgage lending company in which he has no ownership interest. (RP 167-68, 209)

B. 1998 Reconciliation Agreement.

Angela and Robert first separated in September 1997, after nine years of marriage. Angela filed for dissolution. The parties attempted reconciliation in January 1998. They entered into a 'Reconciliation Agreement' (1998 Agreement), which dismissed the dissolution petition and provided that Robert would move back into the family home, that each party would exercise good faith in reconciling, and that if a dissolution petition was filed again, there would be a particular division of assets, maintenance payments, and child support. *McCausland*, 2002 WL 1399120 at *1.

Late in 1998, the parties separated again. They have lived apart ever since. *McCausland*, 2002 WL 1399120 at *1. After the second separation, Robert sold the mortgage business, leaving him responsible for promissory notes totaling \$495,000. (CP 5) The parties' 1999 tax return reflects a net \$3,800,000 loss largely as a result of the sale of the mortgage business. (CP 243, 248) After Robert sold the mortgage business, he started an internet company. The company grew quickly and was expected to go public in April 2000. *McCausland*, 2002 WL 1399120 at *1.

On May 5, 1999, Angela again filed a petition for dissolution, claiming that the 1998 Agreement had not been executed in good faith, was unfair, and had not been acted upon. Ignoring the 1998 Agreement's provision requiring Robert to pay \$2,756 monthly support (\$1,222 spousal maintenance and \$1,534 child support), Angela filed a motion for temporary spousal maintenance of \$4,000 per month and child support of \$6,000 per month and asked the court to award her \$5,000 for an expert to determine the worth of Robert's business interests. **McCausland**, 2002 WL 1399120 at *1.

Robert relied on the 1998 Agreement as a defense to Angela's motion for temporary support and maintenance. **McCausland**, 2002 WL 1399120 at *1. Without expressly addressing the 1998 Agreement's validity, the family court commissioner noted that Angela's expenses "seem inflated," but went on to note: "I do have to say that some of my decision is affected by the fact I think the agreement that he had her sign was offensive by its very nature. The fact that it was called a Reconciliation Agreement, I think, puts it into a new category. And that she was probably under undue pressure and that does create certain problems in my mind. And so his credibility in my mind is a little bit in question." The commissioner granted Angela temporary family support of \$7,100 per month, and

ordered Robert to pay \$5,000 in attorney fees and \$5,000 for a professional to determine the true financial status of his business.

McCausland, 2002 WL 1399120 at *1-2.

Robert moved for revision. On June 25, 1999, Judge Frederick W. Fleming, in his first ruling in this case, revised the commissioner's earlier ruling, gave counsel three months "to find out what the real income is," and reduced Robert's temporary family support payments to \$5,500 per month. **McCausland**, 2002 WL 1399120 at *2. Though the order does not explain its reasoning, the court's oral ruling indicates that, rather than deciding the issues de novo, Judge Fleming struck a compromise between the monthly amount provided in the 1998 Agreement and the temporary family support amount previously ordered by the commissioner. In setting the combined monthly support at \$5,500, Judge Fleming stated: "Fair thing to do is, since you're arguing about it, I'm just going to split the difference, \$5,500." **McCausland**, 2002 WL 1399120 at *2.

C. 2000 Separation Agreement.

As Robert's internet company prepared for its IPO, Angela threatened to "bring the company down" if she were not given monetary compensation. (RP 162) Angela could prevent the IPO by not signing a lock-up agreement as required by Bear Stearns, the firm

leading the IPO. (RP 162-65) Robert had to reach an agreement with Angela quickly or put at risk the IPO, along with the investments of several friends and family. (RP 162)

On March 23, 2000, Angela and Robert entered into a revised 'Spousal Agreement' (2000 Agreement), which expressly superceded the 1998 Agreement. *McCausland*, 2002 WL 1399120 at *2. As part of the agreement, Angela agreed to sign the lock-up agreement on which the IPO depended. (RP 164-65) The 2000 Agreement reiterated the 1998 Agreement's property division, with one addition: Robert agreed to pay Angela the \$16 million that she demanded as her share of the budding internet company's expected future value, in four annual installments between August 2000 through August 2003. *McCausland*, 2002 WL 1399120 at *2.

The 2000 Agreement also contained a 'Parenting and Support Issues' section, revised from the 1998 Agreement. *McCausland*, 2002 WL 1399120 at *2. This provision was directly associated with the \$16 million payment, as the new language provided that until the first \$4 million was paid in August 2000, Robert would continue to make \$5,500 monthly payments for the care and maintenance of Angela, their children, and the family home. (CP 70-71); *McCausland*, 2002 WL 1399120 at *2. While the first installment

payment of \$4 million was pending, Robert also was required to pay items of repair and maintenance costing over \$250 for the house in which Angela resided. (CP 70) Thereafter, with the exception of medical and dental insurance expenses and orthodontic expenses, Angela was to pay all expenses for the care and maintenance of the family home, herself, and the children. (CP 70)

By the fall of 2000, the IPO for Roberts' internet company had failed, and the company had declared bankruptcy. **McCausland**, 2002 WL 1399120 at *2. Robert was unemployed and collecting unemployment compensation of \$600 to \$800 per week. (RP 168, 224) Robert filed a motion to terminate maintenance and to modify child support payments to an amount based on an average income level imputed by statute. Though the 2000 Agreement did not expressly prohibit modification of maintenance or child support, a pro tempore commissioner ruled that the maintenance or child support obligation could not be modified so long as the 2000 Agreement was not unfair at the time it was entered, and ordered the \$5,500 payments continued. **McCausland**, 2002 WL 1399120 at *2.

D. Revision Of 2000 Agreement.

Robert moved for revision of the commissioner's ruling continuing the \$5,500 monthly payments. The parties were once

again before Judge Fleming. Judge Fleming agreed that there had been a change of circumstances, but denied Robert's motion on the grounds that the maintenance and child support payments were not modifiable under the 2000 Agreement:

An agreement is an agreement is an agreement. And whether it uses the magical words modifiable or not modifiable, I think the commissioner was correct, and I'm going to deny the motion to revise.

McCausland, 2002 WL 1399120 at *3.

As both counsel and the court at the close of the revision hearing were discussing what issues remained for trial, Judge Fleming opined that the 2000 Agreement's enforceability was "simply a legal issue." **McCausland**, 2002 WL 1399120 at *3. Judge Fleming then deleted from the 2000 Agreement the \$16 million payment to Angela, but upheld the monthly \$5,500 payments, characterizing them as "property division" for the maintenance of Angela and her children. Judge Fleming ruled that Robert's monthly payment obligation survived his death, but reserved the issue of whether the payments would survive Angela's death. **McCausland**, 2002 WL 1399120 at *3. Judge Fleming awarded Angela attorney fees on the grounds both that Angela was enforcing the 2000 Agreement, and that fees were also justifiable under RCW 26.09.140.

E. 2002 Appeal.

Robert appealed to this court, arguing that Judge Fleming improperly characterized the monthly child support and maintenance payment of \$5,500 to Angela as "property division." This court agreed, and reversed. *McCausland*, 2002 WL 1399120 at *1.

This court noted that two major components of the 2000 agreement were unenforceable – the \$5,500 monthly combined "support" payments, and the \$16 million award. *McCausland*, 2002 WL 1399120 at *5. This court noted that in awarding the monthly \$5,500 payment as "property division," Judge Fleming ignored the extensive property division separately effected by the other provisions of the 2000 agreement. *McCausland*, 2002 WL 1399120 at *4, fn. 6.

This court remanded to the trial court, directing the trial court to:

[S]egregate the combined monthly child support and maintenance payments; to set child support according to the requirements of RCW 26.19, including specifying any appropriate deviations and the justification therefore; and to adjust the property distribution as necessitated by the reconsideration of the combined monthly payments.

McCausland, 2002 WL 1399120 at *1. This court also reversed the trial court's award of attorney fees to Angela, and held that neither

party was entitled to an attorney fee award under the 2000 agreement. *McCausland*, 2002 WL 1399120 at *4.

F. 2003 Remand.

After this court released its opinion, Robert sought to reduce the \$5,500 monthly payments, which this court had determined to be part child support and part spousal maintenance, asking the trial court to establish his child support obligation pending the trial court's ruling on remand. (CP 580) The trial court rejected Robert's request, ignored this court's determination that the monthly payments were not property division, and ordered that Robert continue to pay Angela "property payments" in the monthly amount of \$5,500 pending retrial. (CP 603-04)

The parties were once again before Judge Fleming for a trial on remand from this court on October 22, 2003. Both parties submitted trial briefs that agreed that this court's mandate to the trial court was to "adjust the \$5,500 per month payments to classify them as child support and maintenance rather than property." (CP 187, 351- 52)

Robert urged the court to set child support based on his 2001 income of \$75,000 and imputing income to Angela to \$40,000, based on her training and experience. (CP 361) Robert also sought a

residential credit for the amount of time the children spend in his home. (CP 361-62) Robert urged the court to terminate spousal maintenance to Angela because she had no need for maintenance based on her earning ability and the property already awarded to her. (CP 365-66)

Angela urged the court to maintain the \$5,500 per month "support" payment. Angela argued that Judge Fleming should allocate this amount between spousal maintenance and child support. (CP 187) Angela asked the court to extrapolate child support based on Robert's historical income. (CP 374)

Judge Fleming ignored this court's mandate. The trial court refused to designate any part of the \$5,500 as spousal maintenance, finding that any maintenance obligation had been terminated as of the date of the agreement. (RP 306; Finding of Fact (FF) 27A, CP 501) The trial court declared that the agreement, including the specific provision for a \$5,500 monthly payment that this court found unenforceable, was binding:

You know, very simply, that contract, I thought, was binding. And I still think, regardless what the appellate court has said, that, you know, that's it, that she gets that \$5,500. And they said I need to reconsider it and segregate and so on, but then whatever fruits, she's made her bed and she's going to lie in it now. She gets \$5,500.

(RP 9)

Judge Fleming went on to declare that while he would designate a portion of the monthly payment as child support, he would not designate any of the monthly payment as spousal maintenance:

I might as well tell you, I'm not going to award any more maintenance now. I think that has its legal constraints and so on, but I believe that the \$5,500 is hers and that's what she rolled the dice to get when they entered into the agreement, and plus the other property that she got. And the difference between the child support and the \$5,500 remaining will be property. And you can tell [the appellate court] that I'm wrong in that regard.

(RP 301) Judge Fleming apportioned \$2,842 of the \$5,500 as child support. But he also ordered that if child support was modified, the "property distribution" would be increased in order to ensure that Angela continued to receive \$5,500 per month until she died:

If [Robert's] child support obligation is modified in any way (increased, reduced, or terminated), the property distribution set out herein shall be modified such that Petitioner Angela McCausland shall continue to receive the sum of \$5,500 per month from [Robert], in accordance with the Spousal Agreement and Decree of Dissolution.

The obligation of [Robert] to pay [Angela] \$5,500 per month shall terminate only upon the death of Petitioner Angela K. McCausland.

(CP 501, Conclusions of Law (CL) 3, 4)

Angela raised new issues at trial, beyond this court's mandate. Angela sought to be awarded the tax refund from the parties' 1997

and 1998 tax returns resulting from the losses associated with Robert selling the mortgage business and the bankruptcy of the internet company. (CP 189-90) Judge Fleming enforced this provision of the 2000 Agreement and awarded the tax refund to Robert. (CP 499, FF 23, 24)

Angela also sought reimbursement of over \$6,000 for "major repairs and maintenance" to the home, and 100% of orthodontic expenses. (CP 188-89) Under the 2000 Agreement, Robert was required to pay all "major repairs and maintenance" over \$250 until the first installment of the \$16 million award to Angela. (CP 70) Because Robert would never be able to pay the first installment, Angela argued that he was required to pay for all major repairs on her home forever. Judge Fleming agreed. (CP 497, FF 17, CP 518)

Likewise, the 2000 Agreement provided that Robert pay 100% of the children's orthodontic expenses until the first installment payment of \$4 million to Angela. (CP 70) But because the first installment payment would not occur, Angela argued that Robert should be responsible for 100% of the children's orthodontic expenses. Judge Fleming not only agreed, but went a step further by ordering that Robert pay 100% of all extraordinary medical and dental expenses for the children. (CP 497, FF 17, 18, 19, CP 549)

Judge Fleming denied Angela's request for attorney fees. (CP 503, CL 11) Both parties timely appealed.

V. ARGUMENT

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

The mandate of this court is binding on the trial court. "It must be strictly followed and carried into effect according to its true intent and meaning as determined by the directions given by this court." *Ethredge v. Diamond Drill Cont. Co.*, 200 Wash. 273, 276, 93 P.2d 324 (1939); *see also Harp v. American Surety Company of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957). The trial court disregarded the mandate of this court, and the trial court's ruling is a thinly veiled attempt to reinforce its prior ruling that this court previously reversed.

1. **This Court Held That The \$5,500 Monthly Combined 'Support' Payment Provision Was An Unenforceable Component Of The Agreement. The Trial Court Ignored This Mandate When It Found These Payments To Be Enforceable "Contractual Obligations."** (Assignments Of Error 2, 5, 6)

The trial court on remand completely ignored this court's holding that the \$5,500 monthly combined 'support' payments was an unenforceable component of the 2000 Agreement. *McCausland*, 2002 WL 1399120 at *5. The trial court instead found that the 2000 Agreement is "a valid and binding contract between the parties" (CP

492, FF 2), and that the \$5,500 monthly combined support payment was a "contractually required payment" and a "contractual obligation" to Angela. (CP 493-94, FF 6, 7) By treating the monthly payment of \$5,500 as a "contractual obligation," the trial court once again upheld its prior ruling treating the \$5,500 monthly payment as an obligation of Robert that could withstand modification, the emancipation of the children, Angela's remarriage, and Robert's death.

2. This Court Held That The Trial Court Improperly Characterized Child Support And Spousal Maintenance Payments As "Property Division." The Trial Court Ignored This Mandate And Once Again Treated The Monthly Payments As A Non-Modifiable Property Distribution. (Assignments Of Error 7, 8, 14)

This court also held in the first appeal that the trial court improperly characterized Robert's child support and maintenance as property division. *McCausland*, 2002 WL 1399120 at *1. This court held that the trial court erred because it failed to establish a separate child support amount and instead "apparently lumped child support together with spousal maintenance, [and] characterized the combined monthly payments as property division." *McCausland*, 2002 WL 1399120 at *4. This court directed the trial court on remand "to reconsider and to segregate the combined monthly child support and maintenance payments." *McCausland*, 2002 WL 1399120 at *1.

Although the trial court was given discretion to determine how much child support and spousal maintenance should be awarded and whether spousal maintenance should continue, there was no discretion given to the trial court otherwise with regard to these monthly payments. See **Harp v. American Surety Company of New York**, 50 Wn.2d 365, 369, 311 P.2d 988 (trial court must follow specific direction of the appellate court and only exercise its discretion when directed). The trial court was without discretion to once again treat the monthly support obligation as a non-modifiable property division, yet it did precisely that on remand.

It is presumptively unreasonable and an abuse of discretion for a trial court to reinstate its previous decision once it is reversed by the appellate court. See **Biggs v. Vail**, 124 Wn.2d 193, 202, fn.3, 876 P.2d 448 (1994) (on second appeal and remand for reconsideration of CR 11 sanctions the Court "caution[ed] the trial court that reimposition of its previous sanction, regardless of its findings, would be presumptively unreasonable and an abuse of discretion."). Despite apportioning a certain amount of the \$5,500 as child support, the trial court fashioned the order in such a way to reinstate its earlier ruling and court thus erred by failing to follow this court's mandate.

3. This Court Held That The \$16 Million Payment Provision Was Unenforceable. The Trial Court Ignored This Mandate When It Required Robert To Pay Certain Expenses That Were Conditioned On This Unenforceable Provision. (Assignment of Error 9, 10, 11, 12)

The "Parenting and Support Issues" provision of the 2000 Agreement relied upon by the trial court also is unenforceable pursuant to this court's mandate. *McCausland*, 2002 WL 1399120 at *5 (the \$5,500 monthly "support" payments and the \$16 million for the non-realized IP stock are unenforceable components of the 2000 Agreement). The trial court erred by ordering Robert to continue to pay for all "major repairs and reasonable maintenance" on Angela's residence for as long as she continues to own the residence (CP 495-96, FF 12) and by ordering Robert to pay 100% of all orthodontic expenses for the children (CP 495, FF 11) because the trial court relied on the "Parenting and Support Issues" provision of the Agreement in making these rulings. This provision directly relates to the \$16 million payment and \$5,500 monthly combined support payments to Angela that this court held unenforceable. *McCausland*, 2002 WL 1399120 at *5.

The 2000 agreement contemplated that Robert pay for any major repairs to Angela's home pending the first \$4 million payment.

(CP 70) But this court held that the \$16 million payment was unenforceable. It would be absurd to assume that as a result Robert would be required to pay for all major expenses on Angela's home indefinitely because the \$4 million payment would never occur, yet this is exactly what the trial court ordered in this case. Robert was required to pay almost \$5,000 in repairs and maintenance – including carpet cleaning, window cleaning, deck repair, and installation of a French drain – (CP 497) and saddled with the prospects of additional maintenance and repairs to real property that he does not own and in which he has not resided for over six years.

Likewise, Robert's responsibility for 100% of the orthodontic expenses assumed that after Angela received the first \$4 million payment, she alone would be responsible for all other expenses of the children. But because the \$4 million payment will never materialize, under the trial court's order Robert remains exclusively and perpetually responsible for the maintenance and support of Angela and the children. This court held that the \$16 million provision was unenforceable. The trial court ignored this court's mandate by reinstating the portion of the 2000 agreement which provided that Robert would be required to pay certain expenses pending the payment of the unenforceable provision.

4. The Trial Court Having Determined That Maintenance Terminated, Under The Court's Mandate Robert Is Entitled To Repayment Of That Portion Of The Monthly Payments That Are Not Properly Characterized As Child Support.
(Assignment of Error 1, 14)

Robert has paid \$5,500 per month to Angela since remand. Of that amount, this court's mandate directed that certain portions be determined as child support. The trial court incorrectly found that the balance was property, holding that Robert's maintenance obligation to Angela had in fact been terminated by the 2002 agreement: "It was a property settlement. . . . [M]aintenance terminated as of the date of the agreement then." (RP 305-06); see also CP 501, FF 27A ("The payments to wife commencing with the spousal agreement in March 2000 are property division in part and child support in part and not spousal maintenance."). Because this court determined that the payment was not property and because the trial court found that spousal maintenance terminated as of the 2000 agreement, on remand Robert was entitled to repayment of that portion of the monthly payments that cannot properly be characterized as child support. (See Arg. § B.1, *infra*)

The court lost jurisdiction to reinstate a maintenance award once the maintenance obligation terminated. ***Marriage of Mason***, 40 Wn. App. 450, 457, 698 P.2d 1104, *review denied*, 104 Wn.2d 1017

(1985); see also *Marriage of Brown*, 8 Wn. App. 528, 530, 507 P.2d 157 (1973). In *Mason*, after the appellate court held that the husband's spousal maintenance obligation terminated upon the wife's remarriage, the wife sought to modify maintenance in order to have the maintenance continued. The *Mason* court held that once final payment has been made pursuant to a maintenance provision, the court could not reinstate that obligation "under the auspices of a modification." 40 Wn. App. at 457. See also *Marriage of Metler*, 32 Wash. 494, 498, 73 P. 535 (1903) (if the court is without power to vacate the decree of divorce, any subsequent order for maintenance is void). The trial court having determined that maintenance terminated, under the court's mandate Robert is entitled to repayment of that portion of the monthly payments that are not properly characterized as child support.

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

The trial court erred in calculating Robert's child support obligation both by extrapolating from the child support schedule and by making Robert responsible for 100% of extraordinary health expenses.

1. The Trial Court Erred By Setting Child Support Beyond The Maximum Advisory Amount.
(Assignment of Error 4, 16)

The parties have one child over the age of 12 and one child under the age of 12. The advisory amount for both parents' obligation for both children would be \$1,713. RCW 26.19.020. The trial court found the parties had combined monthly net income of \$14,523 and, by extrapolation, set support at an amount far greater than the advisory range: \$1,814.22 for MM (age 13) and \$1,482.53 for DM (age 9), for a total of \$3,296.75 for both children. (CP 510) Based on each party's proportionate share of support, .862 for Robert and .138 for Angela (CP 511), Robert's transfer payment was set at \$2,842. (CP 511)

Robert's transfer payment is nearly twice the advisory amount. In cases where combined net income exceeds \$7,000, RCW 26.19.065(3) and RCW 26.19.020 provide that the court may either award support within the advisory range for incomes between \$5,000 and \$7,000 or may order support in a greater amount upon written findings of fact. The advisory amount for combined income of \$5,000 for a two-child family is \$574 for children under 12 and \$708 for children 12 and over. RCW 26.19.020. The advisory amount for combined income of \$7,000 for a two-child family is \$767 for children

under 12 and \$946 for children 12. RCW 26.19.020. Awards exceeding this advisory range must be supported by findings of fact. RCW 26.19.065(3) (the court may exceed the advisory amount of support set for combined monthly net incomes of seven thousand dollars upon written findings of fact); *accord* RCW 26.19.020.

The trial court was required to enter findings to explain why the amount of support is both necessary and reasonable. The cursory findings here are not sufficient to support the trial court's award. ***Marriage of Rusch***, __ Wn. App. ____, 98 P.3d 1216 (2004); ***Marriage of Daubert/Johnson***, __ Wn. App. __, 99 P. 3d 401 (2004). In ***Daubert***, the trial court made the following findings to support its award of extrapolated child support: "1. The father has sufficient wealth and resources that the amount ordered will not work a hardship on him. 2. The children need the additional amount to have a standard of living commensurate with that of the father's. 3. The children will benefit by the opportunities available to them from additional funds." ***Daubert***, 99 P.3d at 407. The ***Daubert*** court held that these findings were not adequate to support additional child support beyond the economic table amount. 99 P.3d at 407.

Here, the trial court's findings to support its award are even more inadequate. The child support order states: "The children

participate in dance and sports activities, which are significant expenses. The children have the expectation of support at the level of their father's significant historical income." (CP 506) The only extraordinary expenses of the children to which the mother testified were dance classes for \$220 per month and other expenses relating to costumes and sports uniforms of \$600 per month. (RP 89) No receipts were produced to verify these expenses. These findings cannot support an award of child support nearly twice the advisory amount.

The father's historical income also is not a sufficient basis to award child support beyond the advisory amount. *Daubert*, 99 P.3d at 407 ("The mere ability of either or both of the parents to pay more, whether based on consideration of income, resources or standard of living, is not enough to justify ordering more support.") "The test is the necessity for and reasonableness of the amount considering the totality of the circumstances." *Daubert*, 99 P.3d at 407. In light of the greater award of property to the mother (CP 370-371), notwithstanding the monthly "property" payment, the trial court erred in ordering child support in excess of the maximum presumptive amount in the absence of any findings supporting such an award.

2. The Trial Court Erred In Ordering The Father To Be Solely Responsible For Extraordinary Health Care Expenses For The Children. (Assignment of Error 9)

The trial court also ordered that Robert pay 100% of all extraordinary medical and dental expenses for the children. (CP 495, FF 11, CP 549) The trial court erred in not ordering Angela to pay her proportionate share of the children's extraordinary health care expenses.

Extraordinary health care expenses shall be shared by the parents in the same proportion as the basic child support obligation. RCW 26.19.080(2). Like long-distance transportation and post-secondary education expenses, the trial court has no discretion to divide extraordinary health care expense in a proportion different than the basic child support obligation RCW 26.19.080(2), (3); see ***Marriage of Scanlon/Witrak***, 109 Wn. App. 167, 177-79, 34 P.3d 877 (2001), *rev. denied*, 147 Wn.2d 1026 (2002) (no discretion in apportioning long-distance transportation expenses); ***Marriage of Daubert/Johnson***, ___ Wn. App. ___, 99 P.3d 401, 411 (2004) ("post secondary support must be apportioned according to the net income of the parents"). The trial court erred in ordering Robert to be solely responsible for the children's health care expenses, including orthodontia expenses.

VI. CONCLUSION

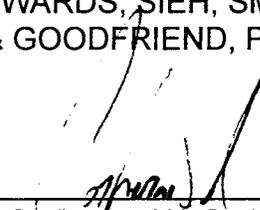
This court should reverse and remand to a different judge with specific directions. Given the history of this case, the court's mandate should provide specific directions to the trial court on remand. The information in the current record is sufficient to allow the trial court to act after direction from this court. In light of Judge Fleming's insistence in reinstating the \$5,500 "support" payment as property division despite this court's mandate, remand should be to a different judge to promote the appearance of fairness. *Custody of R.*, 88 Wn. App. 746, 763, 947 P.2d 745 (1998). Issuing such a mandate would save the resources of the parties and the trial court.

First, this court should direct the trial court to determine the child support obligation based on the statutory factors set forth in RCW 26.19, without extrapolation, and order both parties to pay their proportional share of extraordinary expenses. Second, this court should direct the trial court to order restitution to Robert for amounts overpaid as property division, maintenance, or repair. See RAP 12.8 (if a party has satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders to restore to the party any property taken from party, or in appropriate circumstances provide restitution); *Marriage of Mason*, 48 Wn. App. 688, 692-93, 740 P.2d

356 (1987) (awarding restitution of attorney fees paid by husband from the wife's attorney following reversal of award). This court should direct the trial court to order the parties to cooperate in amending the previous years' tax returns to reflect the deductibility to Robert of any payments to Angela that are *not* reimbursed. Finally, because neither party can be considered the "prevailing party" in enforcement of the 2000 Agreement, both parties should be responsible for their own attorney fees.

December 8, 2004

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin,
WSBA No. 34515

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 8, 2004, I arranged for service of the foregoing Brief of Appellant to the court and the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Barbara Henderson Edward M. Lane Smith Alling Lane 1102 Broadway Plaza, #403 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Jeffrey A. Robinson Attorney at Law 4700 Pt. Fosdick Prof. Bldg., Suite 301 Gig Harbor, WA 98335	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 8th day of December, 2004.


Tara D. Friesen



Honorable Frederick W. Fleming

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

In Re the Marriage of:

ANGELA K. McCAUSLAND,
Petitioner,
and
ROBERT G. McCAUSLAND,
Respondent.

No. 99-3-01357-2

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER having come before the Court for trial commencing October 21, 2003, upon remand from the Washington State Court of Appeals, Division II; this Court having reviewed the unpublished opinion of the Court of Appeals in Cause No. 27386-1-II; having heard the testimony of Petitioner, Angela K. McCausland; Frank Ault, CPA; and Respondent, Robert G. McCausland; having reviewed the Declaration of Edward M. Lane Re: Attorneys Fees, and the files and records herein and the exhibits admitted at trial, NOW, THEREFORE, the Court hereby enters the following FINDINGS OF FACT:

1. The mandate from the Washington State Court of Appeal, Division II, Case No. 27386-1-II, requires this Court to reconsider and to segregate the \$5,500.00 a month payment previously awarded to Petitioner to provide monthly child support in accordance

1 with RCW 26.19, including specifying any appropriate deviations and the justification
2 therefor; and to adjust the property distribution as necessitated by the reconsideration of the
3 monthly payment. The remand further provides that this Court should reconsider the
4 attorney's fee award previously made to Petitioner and to establish a factual basis for any fee
5 award.

6 2. This Court finds that the Spousal Agreement (Exhibit 8), dated March 23,
7 2000, between Robert G. McCausland and Angela K. McCausland, is a valid and binding
8 contract between the parties. The Court further finds that the Spousal Agreement executed on
9 March 23, 2000 between the parties was entered into for the purpose of resolving any present
10 or future property disputes between the parties.

11 3. The Court further finds that the Spousal Agreement was a comprehensive
12 settlement agreement entered into by both parties with the advice and approval of competent
13 counsel. The agreement was fair and reasonable at the time of execution.

14 4. Paragraph No. 21 of the Spousal Agreement provides specifically for parenting
15 and support issues and provides that the husband shall pay reasonable support of \$5,500.00
16 per month to be used by the wife for the care and maintenance of herself, her children and
17 minor maintenance of the family home.

18 5. The Court of Appeals ordered that a portion of said \$5,500.00 per month shall
19 be established as child support pursuant to RCW 26.19. In establishing and calculating the
20 amount of child support, the Court finds as follows:

21 a. The father's gross monthly income is \$13,333.00;

1 b. No federal income tax shall be deducted from father's gross monthly
2 income to determine his net monthly income due to his claimed losses on the parties 1999
3 Federal Income Tax Return offsetting his income tax liability for the years 1997 and 1998 and
4 twenty years in the future in accordance with Federal Income Tax Code §172;

5 c. The mother is underemployed and the Court should impute her income
6 at \$2,000.00 per month. The Court finds that rental income shall not be added to the amount
7 imputed to her, since mother's actual earned income, together with actual rental income
8 received, is less than the amount that the Court finds should be imputed to her;

9 d. The extrapolation method shall be used; and

10 e. The father is not entitled to a deviation based upon a residential
11 schedule credit, since the parties are following the parenting plan and a residential schedule
12 credit was not contemplated at the time of entry of the parenting plan.

13
14 Based upon the foregoing, the Court finds that the father's child support obligations shall be
15 set at \$2,842.00 per month, \$1,278.00 for Delaney, age 8, and \$1,564.00 for Madison, age 12.

16 6. The Court finds that the difference between Respondent's contractually
17 required payment of \$5,500.00 per month and his child support obligation of \$2,842.00 per
18 month is currently \$2,658.00 per month. This amount shall be awarded to the wife as
19 property division, and the property division is accordingly adjusted as necessitated by this
20 Court's reconsideration of the combined monthly payment.

21 7. The Respondent's contractual obligation to pay the Petitioner \$5,500.00 per
22 month shall survive termination and/or modification of the Respondent's child support
23

1 obligation. In the event that the Respondent's child support obligation is terminated, and/or
 2 modified, then the difference between the contractually required sum of \$5,500.00 per month
 3 and the amount of his then current child support obligation shall be payable to the Petitioner
 4 as property distribution. For example, if the Respondent's child support obligation were to be
 5 reduced to \$1,500.00 per month, then the property distribution to the Petitioner would
 6 increase to \$4,000.00 per month, resulting in a net obligation of Respondent of \$5,500.00 per
 7 month.

8 8. Respondent's obligation to pay to Petitioner \$5,500.00 per month shall not
 9 terminate upon the remarriage of the Petitioner, nor upon the death or remarriage of the
 10 Respondent. Upon the death of Respondent, said obligation should be a charge against his
 11 estate.

12 9. The court finds that the lack of provision for maintenance is dependant upon
 13 the actual distributions and payments for the division of marital property as herein provided
 14 and that the wife will necessarily depend upon the receipt of said assets and payments in order
 15 to maintain a proper standard of living, that the failure to receive said assets and payments
 16 will seriously impair said standard and that the provisions for support and maintenance would
 17 have been significantly higher but for the reliance of the wife upon the receipt of said assets
 18 and payments. Accordingly, the husband shall acknowledge that in the event of any
 19 bankruptcy or insolvency proceedings, said distribution and payments should properly be
 20 recognized as nondischargeable obligations and should survive any such proceedings in order
 21 to carry out the intentions and agreement of the parties herein and he shall not take a contrary
 22 position. Norwithstanding the foregoing, the parties acknowledge that all of the payments and
 23

1 distributions under the decree should constitute an equitable division and distribution of
 2 marital property and are not intended to be treated as taxable income to the wife or to the
 3 husband and are being made hereunder as a nontaxable event.

4 10. In the Findings of Fact and Conclusions of Law previously entered by this
 5 Court on October 20, 2001, the Court determined that the sum of \$16,000,000 required to be
 6 paid to Petitioner by Respondent was eliminated from the Spousal Agreement, and therefore,
 7 unenforceable. The Court further finds that the provision of the Spousal Agreement
 8 (contained in paragraph 23 at lines 15 - 18), which provides for the accrual of interest on said
 9 \$16,000,000.00 sum is also unenforceable and shall be of no further force and effect. These
 10 provisions are severable and the remaining provisions of the contract are enforceable in
 11 accordance with its terms.

12 11. The Court finds that pursuant to the terms of the Spousal Agreement the
 13 Respondent should be required to pay 100% of all unreimbursed medical, dental and
 14 orthodontic expenses for the parties' minor children. The Respondent should also be required
 15 to provide medical and dental insurance coverage for the children and to pay 100% of the
 16 premium.

17 12. The Court finds that pursuant to the terms of the Spousal Agreement
 18 Respondent shall pay 100% of all major items of repair and reasonable maintenance on
 19 Petitioner's current residence located at 2521 - 208th Avenue East, Sumner, Washington, so
 20 long as Petitioner continues to own said residence. Pursuant to the Spousal Agreement, major
 21 items of repair and reasonable maintenance are defined as those that exceed \$250.00 on any
 22 repair and/or maintenance item. The Court further finds that those repair and maintenance
 23

1 items need to be reasonable and that Petitioner shall communicate the necessity for and cost
2 of said future repairs and home maintenance to Respondent prior to incurring said obligation.

3 13. The Court finds that pursuant to the Spousal Agreement the Respondent is
4 responsible for paying all the notes, deeds of trust and encumbrances placed upon the
5 Petitioner's residence, commonly known as 2521 - 208th Avenue East, Sumner, Washington,
6 by the Respondent or the parties together, and to indemnify and hold Petitioner harmless
7 therefrom.

8 14. The Court finds that the current mortgage on the property with Countrywide
9 Home Loans has a current principal balance as of October 17, 2003, of \$80,993.40, as shown
10 on Exhibit 28. Respondent shall be required to pay said obligation pursuant to its terms.

11 15. The Court finds that pursuant to the Spousal Agreement the Petitioner is
12 required to pay the real estate taxes and homeowners insurance on the family home. Real
13 estate taxes and homeowners insurance are included in the monthly mortgage payment to
14 Countrywide Home Loans.

15 16. The Decree of Dissolution previously entered on April 20, 2001, provides that
16 taxes and insurance on the family home paid by Respondent on behalf of Petitioner have been
17 fully credited to Respondent through the month of April 2001 (Decree of Dissolution at
18 paragraph 3.13). Commencing with the month of May 2001 through the month of trial in
19 October 2002, Respondent withheld \$700.00 per month from the \$5,500.00 per month
20 payable to Petitioner, representing payment of taxes and insurance paid by Respondent on
21 behalf of Petitioner for the family home. Respondent shall be entitled to continue to deduct
22
23

1 the actual amounts he pays to the mortgage company for the real estate taxes and insurance on
2 Petitioner's home from the \$5,500.00 per month payable to her.

3 17. Petitioner has incurred expenses since this matter was last before the Court that
4 should have been paid by Respondent pursuant to the terms of the Spousal Agreement. These
5 consist of the following:

Description	Exhibit	Amount
Orthodontic	12	\$275.00
Deck Repair	14	3,009.71
French Drain	15	692.23
Medical insurance premiums for the children from October 2001 through October 2002	16	1,472.16
Window Cleaning	17	675.00
Carpet	18	335.00
TOTAL		\$6,459.10

6
7
8
9
10
11 *which have been paid by*
12 ~~Judgment should be entered against Respondent in favor of Petitioner for \$6,459.10.~~ *(SR)*

13 18. Petitioner incurred a medical bill for Madison at Good Samaritan Hospital for
14 her treatment on July 12, 2001, in the amount of \$2,662.59 (Exhibit 13). Interest and finance
15 charges may have accrued on that amount. Respondent should be required to immediately
16 pay the entire balance owing to Good Samaritan Hospital for services on behalf of Madison
17 on July 12, 2001.

18 19. Petitioner has paid \$275.00 to Heather A.M. Woloshyn, DMD, MSD, for
19 orthodontic work for Delaney. In addition, Respondent should be required to pay the balance
20 due and owing for Delaney's orthodontia expense, which at this time, is \$2,550.00 (Exhibit
21 12). Said amount should be paid directly to Auburn Orthodontic Associates. This amount
22 includes a required down payment of \$1,200.00, which shall be paid immediately by
23 Respondent to enable Delaney to commence orthodontic treatment.

1 20. Respondent caused to be filed an amended individual U.S. tax return for tax
2 year 1997 (Exhibit 5). Respondent also caused to be filed an amended U.S. Federal Income
3 Tax Return for tax year 1998 (Exhibit 6). In both 1997 and 1998, the parties filed joint
4 federal U.S. income tax returns (Exhibits 3 and 24). The amended U.S. individual income tax
5 returns for said years were required to be signed by both parties. This Court finds that
6 Petitioner did not sign the amended U.S. individual income tax returns for tax years 1997 and
7 1998. This Court further finds that Petitioner received no notice and had no knowledge of the
8 filing of said amended U.S. individual income tax returns and that Respondent forged
9 Petitioner's signature thereto without her knowledge or consent.

10 21. The parties were issued a refund from the U.S. Internal Revenue Service, based
11 on Petitioner's forged signature on the amended joint tax return filed by the Respondent,
12 representing the entire tax paid during marriage for tax year 1997 in the principal amount of
13 \$70,052.00 (Exhibit 5). In tax year 1997, the parties filed a joint U.S. Federal Income Tax
14 Return (Exhibit 3). The Internal Revenue Service paid interest on the refund in the amount of
15 \$16,698.89, for a total refund of \$86,750.89.

16 22. The parties received a refund from the U.S. Internal Revenue Service, based on
17 a second forged Petitioner's signature on an amended joint tax return filed by the Respondent,
18 for the total tax paid during marriage by the parties for tax year 1998 in the amount of
19 \$249,316.00 (Exhibit 6). In tax year 1998 the parties filed a joint U.S. Federal Income Tax
20 Return (Exhibit 24). The IRS paid interest on said refund in the amount of \$59,550.76, for a
21 total of \$309,366.79, as of the time of trial.

1 23. Paragraph No. 6 of the Spousal Agreement provides:

2 Should any joint tax return of the parties be audited, Husband shall
3 be responsible for any additional tax due, and shall be entitled to
4 any refund due, provided, however, that should any additional
5 taxes, interest, or penalty be due to the misrepresentations or
6 negligence or either party, that party shall be fully responsible for
7 any additional tax, interest or penalties and shall indemnify and
8 hold the other harmless therefrom. For the year 1999 Husband and
9 Wife shall report to the IRS all income for that year in a form most
10 beneficial to the parties. If a joint return is selected and filed,
11 Husband shall be responsible for the payment of all income taxes,
12 and shall be entitled to all refunds. If a separate income tax return
13 is filed by Husband and Wife, Husband shall be responsible for
14 any and all taxes due on returns of both Husband and Wife and
15 shall hold Wife harmless from any and all liability in either method
16 used.

17 All income from any source earned or received by Husband for the
18 year 2000 and all years beyond shall be his separate property and
19 shall be taxable to him. All income from any source earned or
20 received by Wife for the year 2000 and all years beyond shall be
21 taxable to Wife. Each shall be entitled to their respective refunds
22 and each shall hold the other harmless for any liability thereon for
23 their separate returns.

24. Based upon paragraph 6 of the Spousal Agreement, the Court finds, that in
25 spite of the forgery and the fact that the joint tax refunds were for years during which the
26 parties were married to one another and joint tax returns were filed for those years,
27 Respondent should be awarded all right, title and interest in and to the IRS refunds for tax
28 years 1997 and 1998, plus all interest accrued thereon through the date of trial in the total
29 amount of \$396,072.68.

30 25. The Petitioner has requested an award of attorney's fees based upon her need
31 for the award of the same and the Respondent's ability to pay. As of the time of trial,
32
33

1 Respondent had incurred attorney's fees and costs in excess of \$34,000.00. Paragraph 23 of
 2 the Spousal Agreement provides:

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

5 26. The unpublished opinion of the Court of Appeals in Cause No. 27386-1-II
 6 states:

7 Neither party was successful in 'enforcing' the terms of the 2000
 8 agreement at trial. Rather, Robert successfully voided his \$16
 9 million transfer to Angela, and Angela successfully convinced the
 10 trial court to characterize Robert's monthly \$5,500 payment
 obligation as 'property division' in lieu of \$16 million. Thus,
 neither party was entitled to an attorney fee award under the 2000
 agreement.

11 This court finds that attorney's fees should not be awarded to Angela McCausland but found
 12 that she had a need for that sum and that Robert McCausland has the ability to pay.

13 27. Petitioner and Respondent filed a joint U.S. individual income tax return for
 14 tax year 1999. That tax return establishes a net operating loss of \$-3,804,840.00 allocable to
 15 the parties' interests in Washington Mortgage Services and Free I Networks, Inc. (Exhibit 2).
 16 This net operating loss was carried back to tax years 1997 and 1998, by the forged signatures
 17 of Petitioner on the amended tax returns filed by the Respondent, resulting in a refund of the
 18 total taxes paid on the joint federal income tax returns filed for tax years 1997 and 1998. In
 19 addition, the net operating loss can be carried forward for 20 years or until the loss is sooner
 20 fully claimed, pursuant to Internal Revenue Code § 172, as agreed by the parties and their
 21 accountants.
 22
 23

(27A) THE PAYMENTS TO WIFE COMMENCING WITH THE SPOUSAL AGREEMENT IN MARCH 2000 ARE PROPERTY DIVISION IN PART AND CHILD SUPPORT IN PART AND NOT SPOUSAL MAINTENANCE.

28. This Court finds that pursuant to paragraph 6 of the Spousal Agreement, the net operating loss carry forward for future tax years should not be divided between the parties but should be awarded to Respondent Robert McCausland.

From the foregoing Findings of Fact the Court now makes the following CONCLUSIONS OF LAW.

1. An Order of Child Support shall be entered herein presently setting Respondent's child support obligation at \$2,842.00 per month, \$1,564.00 for Madison, age 12, and \$1,278.00 for Delaney, age 8.

2. Petitioner is hereby awarded \$2,618.00 per month payable by Respondent as and for property distribution. The property distribution provisions of the Decree of Dissolution entered on April 20, 2001, are hereby modified accordingly.

3. If Respondent's child support obligation is modified in any way (increased, reduced or terminated), the property distribution set out herein shall also be modified such that Petitioner Angela McCausland shall continue to receive the sum of \$5,500.00 per month from Respondent, in accordance with the Spousal Agreement and Decree of Dissolution. The property distribution portion thereof shall be the difference between Respondent's then current child support obligation and the sum of \$5,500.00 per month. The property distribution between the parties shall be adjusted accordingly as of the effective date of the modification, increase, reduction and/or termination of Respondent's child support obligation.

4. The obligation of Respondent to pay Petitioner \$5,500.00 per month shall terminate only upon the death of Petitioner Angela K. McCausland. It shall not terminate

1 upon the remarriage of either party or upon the death of Respondent Robert G. McCausland.
 2 Upon the death of Respondent, said obligation shall be a charge against his estate.

3 5. A judgment is hereby entered against Robert G. McCausland and in favor of
 4 Angela K. McCausland in the sum of \$6,459.10.

5 6. Respondent Robert G. McCausland is hereby awarded, as his sole and separate
 6 property, the refunds from the Internal Revenue Service for tax years 1997 and 1998,
 7 including interest thereon, in the total amount of \$396,072.68. The judgment awarded to
 8 Petitioner herein in the sum of \$6,459.10, shall be deducted from the \$396,072.68 awarded to
 9 Respondent, prior to the distribution of said funds to him.

10 7. Respondent Robert G. McCausland is awarded the net operating loss carry
 11 forward from the parties' 1999 joint federal income tax return.

12 8. The Respondent shall pay the home mortgage payment on the residential real
 13 property previously awarded to Petitioner, in accordance with the Spousal Agreement, dated
 14 March 23, 2000, and the Decree of Dissolution, entered on April 20, 2001, and commonly
 15 known as 2521 - 208th Avenue East, Sumner, Washington, and further described in the
 16 Spousal Agreement and Decree of Dissolution. Petitioner shall be responsible for payment of
 17 real estate taxes and homeowners insurance on said property.

18 9. Respondent shall pay 100% of all medical insurance expenses for the parties'
 19 two (2) minor children. Respondent shall pay 100% of medical expenses not covered by
 20 insurance and 100% of dental and orthodontic expenses incurred on behalf of the parties' two
 21 (2) minor children.
 22
 23

10. Respondent shall pay 100% of all repairs and reasonable maintenance on the residential real property awarded to Petitioner, for the duration that she owns said property, provided that the repair and/or reasonable expense exceeds the sum of \$250.00. Those repairs shall be reasonable and shall be paid by Respondent within 30 days of his receipt of an invoice for said repair or maintenance.

11. Each party shall be required to pay his or her own attorneys' fees and costs incurred herein.

12. The Decree of Dissolution entered April 20, 2001, is ratified and approved, as modified herein.

13. SEE FINDING OF FACT 27(A)
DONE IN OPEN COURT this 2ND day of JUNE, 2003.

Frederick W. Fleming
JUDGE FREDERICK W. FLEMING

Presented by:

Barbara A. Henderson
BARBARA A. HENDERSON, WSBA #16175
Attorneys for Petitioner

Jeffrey A. Robinson
JEFFREY A. ROBINSON, WSBA #8294
Attorney for Respondent

FILED
DEPT. 7
IN OPEN COURT
JUN - 2 2004
Pierce County Clerk
By *[Signature]*
DEPUTY

Westlaw Attached Printing Summary Report for VILLACIN,VALERIE 4700745

Date/Time of Request:	Wednesday, December 08, 2004 10:01:00 Central
Client Identifier:	MCCAUSLAND
Database:	WA-CS
Citation Text:	Not Reported in P.3d
Lines:	322
Documents:	1
Images:	0

(C) 2004. Copyright is not claimed as to any part of the original work prepared by a U.S. government officer or employee as part of that person's official duties. All rights reserved. No part of a Westlaw transmission may be copied, downloaded, stored in a retrieval system, further transmitted or otherwise reproduced, stored, disseminated, transferred or used, in any form or by any means, except as permitted in the Westlaw Subscriber Agreement, the Additional Terms Governing Internet Access to Westlaw or by West's prior written agreement. Each reproduction of any part of a Westlaw transmission must contain notice of West's copyright as follows: "Copr. (C) 2004 West, a Thomson business. No claim to orig. U.S. govt. works." Registered in U.S. Patent and Trademark Office and used herein under license: KeyCite, Westlaw and WIN. WIN Natural Language is protected by U.S. Patent Nos. 5,265,065, 5,418,948 and 5,488,725.

Westlaw.

Not Reported in P.3d
 112 Wash.App. 1029, 2002 WL 1399120 (Wash.App. Div. 2)
 (Cite as: 2002 WL 1399120 (Wash.App. Div. 2))

Page 1

H

NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division 2.

MARRIAGE of Angela K. McCausland,
 Respondent.

v.

Robert G. McCausland, Appellant.

No. 27386-1-II.

June 28, 2002.

Appeal from Superior Court of Pierce County;
 Hon. Frederick W. Fleming.

Catherine W. Smith, Brendan P. Finucane,
 Edwards Sieh Smith & Goodfriend, Seattle, WA,
 for Appellant.

Edward M. Lane, Smith Alling Lane P.S. Tacoma,
 WA, for Respondent.

UNPUBLISHED OPINION

HUNT, C.J.

*1 Robert McCausland appeals a trial court's dissolution decree based on allegedly erroneous findings of fact and conclusions of law. He argues that the trial court improperly characterized as 'property division' his monthly child support and maintenance payments to his former wife, Angela McCausland.

We agree, reverse, and remand to the trial court to reconsider and to segregate the combined monthly child support and maintenance payments; to set child support according to the requirements of RCW 26.19, including specifying any appropriate deviations and the justification therefore; and to

adjust the property distribution as necessitated by the reconsideration of the combined monthly payments. We also remand for reconsideration of the attorney fee award to Angela and to establish a factual basis for any fee award.

FACTS

Robert and Angela McCausland [FN1] married on May 26, 1988. They have two young children. [FN2] Angela is a teacher who stopped working outside the home in 1995, but resumed a teaching assistant position sometime after the couple separated. Robert is a businessman who owned a mortgage lending company, which he later sold to start an internet company.

FN1. We refer to the parties by their first names for clarity; we intend no disrespect.

FN2. *Madison*, born June 20, 1991, and *Delaney*, born December 28, 1994.

I. 1998 Reconciliation Agreement

Angela and Robert first separated in September 1997. Angela filed for dissolution. The parties attempted reconciliation. In January 1998, they entered into a 'Reconciliation Agreement,' (the 1998 Agreement) which dismissed the dissolution petition. Robert's attorney drafted the 1998 Agreement. Provision ten of the 1998 Agreement stated that (1) each party was represented and advised by a lawyer of his or her choice, and (2) Angela executed the 1998 Agreement despite her attorney's advice that it was unfair to her. The 1998 Agreement provided that Robert would move back into the home, that each party would exercise good faith in reconciling, and that if a dissolution petition was filed again, there would be a particular division of assets, maintenance payments, and child support.

Late in 1998, the parties separated again; they have lived apart ever since. During this time, Robert left the mortgage business and started an internet company. The company grew quickly and was

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

Not Reported in P.3d
 112 Wash.App. 1029, 2002 WL 1399120 (Wash.App. Div. 2)
 (Cite as: 2002 WL 1399120 (Wash.App. Div. 2))

Page 2

expected to go public in April 2000.

On May 5, 1999, Angela again filed a petition for dissolution, declaring that the 1998 'reconciliation' Agreement had not been executed in good faith, was unfair, and had not been acted upon. Angela ignored the 1998 Agreement's provision requiring Robert to pay \$2,756 monthly (\$1,222 spousal maintenance and \$1,534 child support). Instead, she filed a motion for temporary spousal maintenance of \$4,000 per month and child support of \$6,000 per month, and asked the court to award her \$5,000 as fees for an expert to determine the worth of Robert's business interests. Robert presented the 1998 Agreement as a defense to Angela's motion for temporary support and maintenance.

Without expressly addressing the 1998 Agreement's validity, the family court commissioner noted that Angela's expenses 'seem inflated,' but went on to note:

*2 I do have to say that some of my decision is affected by the fact I think the agreement that he had her sign was offensive by its very nature. The fact that it was call{ed} a Reconciliation Agreement, I think, puts it into a new category. And that she was probably under undue pressure and that does create certain problems in my mind. And so his credibility in my mind is a little bit in question.

Report of Proceedings (RP) (5/26/99) at 23-24. The commissioner then granted Angela temporary family support of \$7,100 per month, and ordered Robert to pay \$5,000 in attorney fees and \$5,000 for a professional to determine the true financial status of his business.

Robert moved for judicial revision. On June 25, 1999, a superior court judge revised the commissioner's earlier ruling, gave counsel three months 'to find out what the real income is,' and reduced Robert's temporary family support payments to \$5,500 per month. Though the trial court's order does not explain its reasoning, its oral ruling indicates that, rather than deciding the issues de novo, the trial court struck a compromise between the monthly amount provided in the 1998 Agreement and the temporary family support amount previously ordered by the commissioner. [FN3] In setting the combined monthly support at \$5,500, the trial court stated: '{F}air thing to do is,

since you're arguing about it, I'm just going to split the difference, \$5,500.' RP (6/25/99) at 16, 19.

FN3. The trial court disregarded the 1998 Agreement for purposes of temporary maintenance stating, 'That settlement agreement issue, I can't decide that on a summary judgment motion.' RP (6/25/99) at 13. We cannot determine from the record on appeal when this summary judgment motion was filed.

II. 2000 Separation Agreement

On March 23, 2000, Angela and Robert entered into a revised 'Spousal Agreement' (the 2000 Agreement), which expressly superceded the 1998 Agreement. The 2000 Agreement reiterated the 1998 Agreement's property division, with one addition: Robert also agreed to pay Angela the \$16 million that she demanded as her share of his budding internet company's expected future value, in four installments, [FN4] beginning in August 2000.

FN4. The payments were due annually each August, in the amount of \$4 million each.

The 2000 Agreement also contained a 'Parenting and Support Issues' section, revised from the 1998 Agreement: [FN5] The new language provided that until the \$16 million was paid in full, Robert would continue to make the \$5,500 monthly payments for care and maintenance of Angela, her children, and the family home. The 2000 Agreement further provided that the parties would dismiss the pending dissolution action. But Angela did not do so. On June 2, 2000, Robert filed a Response and Counter-Petition.

FN5. The 1998 Agreement's provision required Robert to pay \$2,756 monthly (\$1,222 spousal maintenance and \$1,534 child support). But Angela contested that amount and the commissioner revised it to \$7,100 monthly. Robert moved for judicial revision and the court again revised the amount to \$5,500 monthly. Thereafter, the 2000 Agreement used the \$5,500 monthly amount.

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

Not Reported in P.3d
 112 Wash.App. 1029, 2002 WL 1399120 (Wash.App. Div. 2)
 (Cite as: 2002 WL 1399120 (Wash.App. Div. 2))

Page 3

In the fall of 2000, the IPO for Roberts' internet company failed, and the company declared bankruptcy. Shortly thereafter, Robert filed a motion to terminate maintenance and to modify child support payments as provided in the 2000 Agreement, to an amount which, in the absence of any actual income for him, would be based on an average income level imputed by statute. Though the 2000 Agreement did not expressly prohibit modification of maintenance or child support, a pro tempore commissioner ruled that he could not modify this maintenance or child support so long as the 2000 Agreement was not unfair at the time it was entered. Thus, the commissioner declined to modify the support payments, and he awarded attorney fees to Angela.

III. Revision of 2000 Agreement

*3 Robert moved for revision. The superior court agreed that there had been a change of circumstances, but it denied Robert's motion on grounds that the maintenance and child support payments were not modifiable under the 2000 Agreement:

An agreement is an agreement is an agreement. And whether it uses the magical words modifiable or not modifiable, I think the commissioner was correct, and I'm going to deny the motion to revise.

RP (3/26/01) at 33.

As both counsel and the court were discussing what issues remained for trial, at the close of the revision hearing, the trial court opined that the 2000 Agreement's enforceability was 'simply a legal issue.' Nevertheless, the trial court allowed Robert to lay a foundation to make a record for appeal.

At the April 19, 2001 trial on the remaining issues, Robert argued that several contract defenses supported his position that the 2000 Agreement was either invalid or unenforceable. The trial court summarily denied all his claims without hearing any evidence and adopted Angela's position that if the contract was fair at its inception, then it must be enforced without regard to traditional contract defenses. The trial court refused to hear any evidence on Robert's theories, allowing only an 'offer of proof.'

The trial court then deleted from the 2000 Agreement Robert's \$16 million payment to Angela. But it upheld the monthly \$5,500 payments, characterizing them as a property division for the maintenance of Angela and her children. The court ruled that Robert's monthly payment obligation survived his death, but it reserved the issue of whether the payments would survive Angela's death.

The court entered the dissolution decree and awarded Angela attorney fees on the grounds that (1) Angela was enforcing the 2000 Agreement, and (2) fees were also justifiable under RCW 26.09.140 because Angela needed the fees and Robert had the ability to pay. Attributing Angela's entire attorney fee obligation to enforcement of the agreement, the court set the attorney fee award at \$13,000 and entered that amount as a judgment against Robert. Robert appeals.

ANALYSIS

I. Separation Agreements

We review a trial court's decision to enforce a settlement agreement under the abuse of discretion standard. *Morris v. Maks*, 69 Wn.App. 865, 868, 850 P.2d 1357, review denied, 122 Wn.2d 1020 (1993). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992).

RCW 26.09.070(3) governs separation agreements as follows:

If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage, for a decree of legal separation, or for a declaration of invalidity of their marriage, the contract, except for those terms providing for a parenting plan for their children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, that the separation contract was unfair at the time of its execution. Child support may be included in the separation contract and shall be reviewed in the

Not Reported in P.3d
 112 Wash.App. 1029, 2002 WL 1399120 (Wash.App. Div. 2)
 (Cite as: 2002 WL 1399120 (Wash.App. Div. 2))

Page 4

subsequent proceeding for compliance with RCW 26.19.020.

*4 Under this statute, separation agreement provisions concerning child support are not binding on the court. *In re Marriage of Thier*, 67 Wn.App. 940, 944, 841 P.2d 794 (1992), review denied, 121 Wn.2d 1021 (1993).

II. Child Support

Independent of the parents' separation agreement, the Legislature expressly requires the court to address and to determine child support: A trial court must set child support based on the statutory child support schedule or a justified deviation therefrom. RCW 26.09.100(2) (citing chapter 26.19 RCW). *In re Marriage of Ayyad*, 110 Wn.App. 462, 38 P.3d 1033 (2002). The trial court first determines each parent's income, RCW 26.19.071(1), considering each parent's monthly gross income from all sources, including but not limited to salaries, wages, deferred compensation, contract-related benefits, dividends, interest, capital gains, and bonuses. RCW 26.19.071(3).

But here, although the trial court acknowledged, 'We don't even have a child support order in here,' referencing the 2000 Agreement, the trial court did not independently establish a separate child support amount. Instead, it apparently lumped child support together with spousal maintenance, characterized the combined \$5,500 monthly payments as property division, and said that these payments would be 'as support for wife and children.' [FN6] Instead of basing the monthly payments either on the statutory tables or by justifying a deviation from the child support schedule, the trial court commented, 'I think we're better off leaving it like it is, and it'll be interesting.' RP (4/19/01) at 162.

FN6. On appeal, the parties disagree as to the intent of the \$5,500 payments provided in their 2000 Spousal Agreement. Robert argues that these payments, described as 'support' in the superior court's revision ruling and as 'family maintenance' in the commissioner's ruling, were an unsegregated combination of spousal maintenance and child support. He alleges he intended that these payments fulfill his obligations under the family support

statute, RCW 26.16.205, until such time as he paid Angela the full \$16 million, which would then obviate her need for any further support for her or her children. Angela simply asserts that the trial court accorded the only reasonable meaning to the monthly payments.

The parties agree that until the first payment of Four Million Dollars and 00/100 (\$4,000,000) is made, Husband shall provide to Wife a reasonable support of Five Thousand Five Hundred Dollars and 00/100 (\$5,500) per month to be used by her for the care and maintenance of herself, her children, and minor maintenance of the family home....

On or after ... the payment of Four Million Dollars ... with the exception of medical and dental insurance expenses and orthodontic expenses for the children to be paid by Husband, Wife shall pay and provide all expenses for the care and maintenance of the family home, herself and for the children, and Husband shall thereupon be relieved of any such obligation 23.

. If Husband should fail to make payments required herein, Husband shall be required to continue to pay Five Thousand, Five Hundred and 00/100 (\$5,500.00) per month until payments are made to Wife as herein provided. Clerk's Papers (CP) at 615-17. But contrary to both provisions, the trial court decided that the \$5,500 payments shall be payable as property division for the support of wife and children, thereby ignoring the extensive property division separately effected by provisions one through six of the 2000 Agreement.

III. Attorney Fees

The parties' 2000 Agreement provided, 'In the event of an action to enforce the terms of this Agreement by either party, the successful party shall be entitled to his or her reasonable attorney's {sic9b} fees and costs associated with such action.' Clerk's papers (CP) at 617.

A. Trial

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

Not Reported in P.3d
 112 Wash.App. 1029, 2002 WL 1399120 (Wash.App. Div. 2)
 (Cite as: 2002 WL 1399120 (Wash.App. Div. 2))

Page 5

Neither party was successful in 'enforcing' the terms of the 2000 Agreement at trial. Rather, Robert successfully voided his \$16 million transfer to Angela, and Angela successfully convinced the trial court to characterize Robert's monthly \$5,500 payment obligation as 'property division,' in lieu of the \$16 million. Thus, neither party was entitled to an attorney fee award under the 2000 Agreement.

RCW 26.09.140, however, allows a trial court to award reasonable attorney fees after considering the financial resources of both parties. Using its discretion, the court balances the requesting party's need for a fee award against the other party's ability to pay. *Leslie v. Verhey*, 90 Wn.App. 796, 805, 954 P.2d 330 (1998). If the court makes an award, it must state on the record the method it used to calculate it. *In re Marriage of Knight*, 75 Wn.App. 721, 729, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995).

Here, the trial court awarded attorney fees to Angela based on her financial need. The trial court's findings of fact included,

2.14 FEES AND COSTS.

*5 The wife has the need for payment of fees and costs and other spouse has ability to pay these fees and costs. The wife has incurred reasonable attorney's {sic} fees and costs in the amount of \$13,000 in enforcing the Spousal Agreement in accordance with its terms.

CP at 570. But the trial court did not explain how it calculated the attorney fee award.

Because (1) two major components of the 2000 Agreement are unenforceable (the \$5,500 monthly combined 'support' payments and the \$16 million for the non-realized IPO stock); and (2) the trial court awarded attorney fees at trial based on this Agreement, which provides for attorney fees only for successful enforcement of the Agreement, we remand to the trial court for reconsideration of an attorney fee award under the statute, based on the relative financial resources of the parties, which it has already considered. If on remand the trial court awards attorney fees under the statute, then it must state on the record the method it used to calculate such award. *Knight*, 75 Wn.App. at 729. [FN7]

FN7. In calculating a reasonable amount

of fees, the trial court should consider the following three factors: (1) the factual and legal questions involved; (2) the amount of time necessary for preparation and presentation of the case; and (3) the value and character of the property involved. *In re Marriage of Foley*, 84 Wn.App. 839, 846-47, 930 P.2d 929 (1997); *Knight*, 75 Wn.App. at 730. A party challenging the award has the burden to prove that the trial court abused its discretion by making a decision that is clearly untenable or manifestly unreasonable. *In re Marriage of Mattson*, 95 Wn.App. 592, 604, 976 P.2d 157 (1999). If on remand the trial court persists in awarding attorney fees to Angela, it must explain its consideration of the above factors and its method of calculation on the record.

B. Appeal

As provided in the 2000 Agreement, each party shall bear his or her own attorney fees and costs on appeal. Therefore, we award no attorney fees on appeal.

We reverse and remand to the trial court to reconsider and to segregate monthly child support, spousal maintenance, and any property distribution adjustments flowing therefrom. The trial court must set child support according to the requirements of RCW 26 .19, specifying any appropriate deviations and the justification therefore. The trial court shall also reconsider its award of attorney fees at trial, as set forth above.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: ARMSTRONG, and
 QUINN-BRINTNALL, JJ.

The 2000 Agreement included the following, conflicting provisions:

21. Parenting and Support Issues.

23. Validity.

Not Reported in P.3d
112 Wash.App. 1029, 2002 WL 1399120 (Wash.App. Div. 2)
(Cite as: 2002 WL 1399120 (Wash.App. Div. 2))

Page 6

112 Wash.App. 1029, 2002 WL 1399120
(Wash.App. Div. 2)

END OF DOCUMENT

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

