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COURT OF APPEALS
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STATE OF WASHINGTON

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NO. 31892-0-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Marriage of

ANGELA KARON McCAUSLAND,
Respondent/Cross-Appellant

vs.

ROBERT GLENN McCAUSLAND,
Appellant/Cross-Respondent

RESPONDENT/CROSS-APPELLANT'S
PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Angela McCausland asks this court to accept review of the published Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Angela¹ seeks review of the following parts of the decision of Division II of the Court of Appeals in *In re Marriage of McCausland*, 118 P.3d 944 (2005) (hereinafter referred to as *McCausland II*):²

(1) That part of the decision reversing the trial court's determination on remand that a March 2000 Spousal Agreement (2000 Agreement) between the parties is enforceable with the exception of a \$16 million payment to Angela that the trial court "deleted" from the Agreement; A-3, A-13.

(2) That part of the decision vacating the property division in the Agreement; A-3,

(3) That part of the decision vacating the trial court's determination on remand that the \$5,500 monthly support payment to Angela in the Agreement is enforceable, that \$2,842 of that amount should be characterized as child support, and that the remainder of the monthly support payment should be characterized as a "property" payment. A-13,

(4) That part of the decision reversing the trial court's determination that Robert's obligation under the Agreement to pay for home maintenance and repairs, and to pay for 100 percent of the

¹ For purposes of clarity, the Petitioner is referred to herein as Angela, and the Respondent Robert McCausland is referred to as Robert. No disrespect is intended.

² An earlier appeal in this matter, *In re Marriage of McCausland*, 2002 Wash. App. LEXIS 1499, will be referred to as *McCausland I*.

children's orthodontia and extraordinary medical expenses was enforceable; A-10 to A-11,

(5) That part of the decision refusing to consider whether the trial court on remand erred in denying her attorney fees under the terms of the Agreement, holding that the trial court did not err in denying Angela attorneys fees based upon RCW 26.09.140, and holding that Angela is not entitled to attorneys fees on her cross appeal; A-11 to A-12,

(6) That part of the decision refusing to consider Angela's argument that the trial court erred in awarding Robert 100% of a \$396,000 tax refund from joints returns filed in 1997 and 1998, plus 20 years of future deductions. A-12,

(7) That part of the decision remanding the matter to a different trial judge. A-3, A-13.

A copy of the decision is in the Appendix at pages A-1 to A-13. The decision has been published at 118 P.3d 944 (2005). A copy of the order denying petitioner's motion for reconsideration is in the Appendix at pages A-14 to A-15. A copy of *McCausland I* is in the Appendix at pages A-16 to A-21. A copy of the 2000 Spousal Agreement is in the Appendix at pages A-22 to A-43. A copy of the trial court's factual findings and conclusions of law on remand is in the Appendix at A-44 to A-56.

III. ISSUES PRESENTED FOR REVIEW

(1) Did the Court of Appeals err when it reversed the trial court's determination that the \$16 million property payment provision in the 2000 Agreement was severable from the remaining terms of the Agreement and the remaining terms were enforceable, particularly where a severability clause in the Agreement states that any provision deemed to be invalid or unenforceable is severable from the remainder of the Agreement and "shall not cause the invalidity or unenforceability of the remainder of the Agreement"? See A-35.

(2) Did the Court of Appeals err when it determined that a \$5,500 combined monthly support payment under the Agreement is unenforceable³ where nothing in the law, public policy, or reason prohibits a spouse from voluntarily and formally obligating himself or herself to do *more* than the law requires in providing spousal support or child support, where there was no finding by the trial court that the Agreement was unfair at the time of execution, and the parties expressly warranted that the Agreement was fair and equitable at the time of execution? *See* A-34.

(3) Did the Court of Appeals err when it determined that Robert's contractual obligation under the Agreement to pay for maintenance and repair expenses to the family home and 100 percent of the children's orthodontia and extraordinary medical and dental expenses is unenforceable?

(4) Did the Court of Appeals err when it refused to consider whether the trial court erred when it denied Angela her attorneys fees based on the Agreement, where, *on remand*, Angela specifically sought to enforce the Agreement *and prevailed* with respect to the \$5,500 per month contractual obligation, and with respect to Robert's contractual obligation to pay for all home maintenance and repairs and 100 % of the children's orthodontia and extraordinary medical expenses?;

(5) Did the Court of Appeals err when it found that the trial court did not err in denying Angela's attorneys fees based upon RCW 26.09.140 even though the trial court found on remand that Robert had the ability to pay Angela's attorney fees and Angela had a need for him to pay them? *See* A-53.

(6) Did the Court of Appeals abuse its discretion when it refused to consider whether the trial court erred by awarding Robert 100% of the \$396,000 tax refund from the parties 1997 and 1998 returns plus 20 years of future deductions? *See* A-53 to A-55.

³ Although the Court of Appeals states in *McCausland II* that it determined in *McCausland I* that the \$5,500 monthly payment was unenforceable, the earlier decision on this point is ambiguous at best. *See McCausland I*, 2002 Wn. App. LEXIS 1499, at p. 1-2. A fair and reasonable reading of the earlier decision is that the trial court was required to "segregate the combined monthly child support and maintenance payments" and to set child support according to the requirements of RCW 26.19.020, but not that the \$5,500 contractual *amount* itself was unenforceable.

(7) Did the Court of Appeals abuse its discretion when it remanded the matter to a different trial judge, where no bias, prejudice, or appearance of unfairness has been shown.⁴ *See* A-3, A-13.

IV. STATEMENT OF THE CASE

Angela and Robert separated in 1997 and Angela filed for dissolution. In January 1998, they entered into a Reconciliation Agreement and dismissed the dissolution petition. The 1998 Agreement provided for a particular division of assets, maintenance payments, and child support in the event a dissolution petition was filed again. A-17.

In late 1998, the parties separated again. Angela again filed a dissolution petition declaring that the 1998 Agreement had not been executed in good faith and was unfair. Angela sought temporary spousal maintenance and child support. Robert presented the 1998 Agreement as a defense to Angela's motion. A-17 to A-18.

Although the court commissioner did not expressly address the validity of the 1998 Agreement, the commissioner stated that he/she thought the Agreement was "offensive by its very nature". RP (5-26-99) at 23-24, A-18. The commissioner ignored the support provision in the 1998 Agreement and granted Angela temporary support of \$7,100 per month. A-18.

⁴ *See In re Marriage of Muhammad*, 153 Wn.2d 795, 808, 108 P.3d 779 (2005) (Alexander, C.J., concurring in part dissenting in part).

Robert moved for judicial revision. A superior court judge revised the commissioner's ruling and reduced Robert's temporary family support payments to \$5,500 per month. Although the trial court's order did not explain its reasoning, the oral ruling indicates that the trial court struck a compromise between the monthly amount provided in the 1998 Agreement and the temporary family support ordered by the commissioner. A-18.

On March 23, 2000, Angela and Robert entered into a revised "Spousal Agreement" (the 2000 Agreement) which expressly superseded the 1998 Agreement. The 2000 Agreement reiterated the 1998 Agreement's property division,⁵ with one addition. Robert also agreed to pay Angela the \$16 million that she demanded as her share of his internet company's expected future value,⁶ in four annual installments of \$4 million each. *See* A-22 to A-43.

The 2000 Agreement contained a "Parenting and Support Issues" section, revised from the 1998 Agreement, which had provided for a combined monthly support payment of \$2,756. A-18. The new language

⁵ The parties had a substantial amount of property, including the proceeds in a mortgage services company that had recently been sold, substantial stock interests in an internet company incorporated by Robert, the family home in Sumner; the proceeds from the sale of two investment properties; a real estate contract on a single family residence, a fractional interest in a condominium, automobiles, boats and boating equipment, jewelry, artwork, furniture and furnishings, retirement accounts, bank accounts and life insurance policies. *See* Appendix at A-22 to A-43.

⁶The internet company had grown quickly and was expected to go public in April 2000.

provided that until the \$16 million was paid in full, Robert would continue to make \$5,500 monthly payments for care and maintenance of Angela, their children, and the family home. A-18. The 2000 Agreement contains the following additional provisions that are pertinent here:

12. Finality. The parties agree that this arrangement with respect to their property rights and obligations, whether or not approved by the Court shall constitute a full and complete settlement of all of their property rights and obligations, and neither party will claim, assert, or demand of or against the other party any relief different than is embodied in this Agreement, and will not assert a demand that is inconsistent or contrary to the terms embodied herein. In the event a Dissolution of Marriage or Legal Separation action is pursued by either, the other agrees to speedily cooperate to implement the terms of this Agreement.

...

14. Fairness of the Agreement. The parties have discussed this Agreement between themselves and their advisors. Both parties are aware that this Agreement constitutes a legal contract, binding upon them and upon third parties, including their heirs, executors, and assigns. The parties have satisfied themselves that this Agreement is fair. . . .

...

17. Severability. In the event any of the provisions of this Agreement are deemed to be invalid or unenforceable, the same shall be deemed severable from the remainder of the Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement. If such provision shall be deemed invalid due to its scope or breadth, such provision shall be deemed valid to the extent of the scope of breath permitted by law.

...

23. Validity. Wife shall not challenge the validity of this Agreement, and further warrants that she

will make no additional claim upon Robert McCausland in the future for anything further from him by way of property awarded or spousal maintenance. Wife specifically waives any such claim in return for the award of the properties set forth above. Wife shall not take any action or make any claim contrary to the terms of this agreement, except actions to enforce the terms of this Agreement, or filing for dissolution of marriage or legal separation. Any claim or action by Husband against Wife shall not relieve Husband of any financial obligation to Wife except as provided for herein.

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 fees and costs associated with such action. *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. . . .*

See A-33 to A-35, A-38 (emphasis added). The 2000 Agreement also contains an integration clause and a warranty by the parties that the "Agreement is fair and equitable at the time of execution. . ." A-34.

In the fall of 2000, the IPO for Robert's internet company failed, and the company declared bankruptcy. A-18. Robert filed a motion to terminate maintenance and to modify child support payments. A commissioner ruled that he could not modify the maintenance or child support so long as the 2000 Agreement was not unfair at the time it was entered. A-18. Robert moved for revision. The superior court agreed there had been a change of circumstances but denied Robert's motion on

the grounds that the maintenance and child support payment were not modifiable under the 2000 Agreement. A-18.

The trial court “deleted” from the 2000 Agreement Robert’s \$16 million payment to Angela but “upheld” the \$5,500 monthly support payment obligation characterizing the payment as a “property division for the maintenance of Angela and her children.” A-19. The superior court awarded Angela attorney fees on the grounds that she was enforcing the 2000 Agreement and because, pursuant to RCW 26.09.140, Angela needed the fees and Robert had the obligation to pay. A-19.

Robert appealed the decision to the Court of Appeals and argued that the trial court improperly characterized as “property division” his monthly child support and maintenance payments to Angela. A-4. The Court of Appeals agreed and reversed and remanded to the trial court to “reconsider and to segregate the combined monthly support and maintenance payments; to set child support according to the requirements of RCW 26.19.020, 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.” A-4. The Court of Appeals concluded that neither party was entitled to an attorney fee award under the 2000 Agreement and remanded for

reconsideration of the attorney fee award to Angela based upon RCW 26.09.140.⁷ A-4.

On remand, Robert urged the trial court to set child support based upon his 2001 income and to impute \$40,000 income to Angela; he also sought to terminate his spousal maintenance obligation. A-4. Angela urged the trial court to uphold the \$5,500 support payment, to divide the \$5,500 payment between child support and spousal maintenance, and to extrapolate the proper amount of child support based on Robert's historical income. She raised three new issues including a request that, pursuant to the 2000 Agreement, Robert reimburse her for \$6,000 of "major maintenance" to the family home, and for 100 percent of the children's orthodontia expenses, and a request that the court award her a portion of the \$396,000 tax refund from the parties' 1997 and 1998 tax returns. She also sought attorneys fees. A-4.

The trial court recited its previous finding that the \$16 million payment to Angela in the 2000 agreement was severable from the remainder of the Agreement and unenforceable. A-48. The trial court determined that the remainder of the Agreement was a valid and binding contract between the parties. A-45. The trial court awarded Angela extrapolated child support of \$2,842 per month, and awarded the

⁷ Angela petitioned for review of *McCausland I*, but review was denied.

difference between the amount of child support and the \$5,500 contractual monthly payment as a new “property” division. A-46.

Based upon the 2000 Agreement, the trial court ordered Robert to reimburse Angela for repairs and maintenance to the family home and ordered Robert to pay 100 percent of the children’s orthodontia expenses. A-48, A-55. The trial court awarded Robert the tax refunds from the parties’ 1997 and 1998 tax returns and the loss carry forward from the 1999 tax return. A-55. The trial court determined that Robert had the ability to pay Angela’s attorney fees and Angela had a need for him to pay the, but concluded that the Court of Appeals’ prior opinion precluded awarding fees to Angela. A-53.

On the second appeal, the Court of Appeals reversed the trial court’s determination that the 2000 Agreement is enforceable with the exception of the \$16 million payment to Angela. A-3, A-13. It vacated the property division in the 2000 Agreement. A-3. It held that the \$5,500 monthly support payment in the 2000 Agreement was unenforceable. It reversed the trial court’s determination that Robert’s obligation under the 2000 Agreement to pay for major repair and home maintenance and his obligation to pay for 100 percent of the children’s orthodontia and extraordinary medical expenses was enforceable. A-10 to A-11.

Despite the provisions in the 2000 Agreement pertaining to Finality (Paragraph 12), the Fairness of the Agreement (Paragraph 14), the Severability of the Agreement (Paragraph 17) and the Validity of the Agreement (Paragraph 23), the Court of Appeals concluded as follows:

When the IPO earnings failed to materialize, all portions of the 2000 Agreement tied to those profits became unenforceable and the parties' anticipated economic circumstances changed in a manner that the trial court was bound to consider.

McCausland II, 118 P.3d at 952. Thus, the Court of Appeals reversed and vacated the property division. *McCausland II*, 118 P.3d at 947.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review of the decision of the Court of Appeals in this matter because (1) the decision involves an issue of substantial public interest pursuant to RAP 13.4(b)(4), (2) the decision conflicts with the plain language of RCW 26.09.070(3) regarding separation contracts; and (3) the decision conflicts with Supreme Court and Court of Appeals precedent. *See* (RAP 13.4(b)(1) and (2). Such precedent discusses RCW 26.09.070(3) and establishes that a separation contract is binding upon the courts unless the contract was unfair at the time of execution. *See, e.g., In re Marriage of Little*, 96 Wn.2d 183, 192, 634 P.2d 498 (1981); *Nelson v. Collier*, 85 Wn.2d 602, 609-610, 537 P.2d 765 (1975); *In re Marriage of Glass*, 67 Wn. App. 378, 390, 835 P.2d

1054 (1992) (Division I) ; *In re Marriage of Shaffer*, 47 Wn. App. 189, 193, 733 P.2d 1013 (1987) (Division II); *In re Marriage of Yearout*, 41 Wn. App. 897, 901, 707 P.2d 1367 (1985) (Division II).

Here, there was no finding by the trial court that the 2000 Agreement was unfair at the time of execution, and thus the trial court was bound to enforce the property division, and to review the support provision of the Agreement for compliance with RCW 26.19.020. Because the child support complied with RCW 26.19.020, the court was bound to enforce the 2000 Agreement and failed to follow Supreme Court precedent by refusing to do so, particularly where the parties specifically included in the Agreement the provisions regarding Finality, Severability, Fairness, and Validity. A-33 to A-34, A-38.

A. There is a Substantial Public Interest in Upholding the Enforceability of Separation Contracts

Pursuant to the public policy supporting the 1973 Dissolution Act, amicable agreements between separating spouses regarding the resolution of property, maintenance, and child support questions are preferable to an adversarial resolution of these issues. *See In re Marriage of Little*, 96 Wn.2d 183, 192, 634 P.2d 498 (1981). The adversarial resolution of these issues often has a detrimental impact upon the children who are frequently involved, which is also a concern of substantial public interest.

Pursuant to RCW 26.09.070(3) separations contracts are *binding* on the parties unless the trial court finds it “unfair” at the time of execution. *Little*, 96 Wn.2d at 193. Our present law gives wide latitude to marital partners to independently dispose of their property by contract, free from court supervision. *Nelson*, 85 Wn.2d at 610. This law is undermined by the decision of the Court of Appeals.

The Court of Appeals decision completely disregards the parties’ express intent in amicably resolving the division of their property and in resolving the child support and maintenance that Robert would pay to Angela. Angela does not dispute that the \$16 million payment to her under the Agreement cannot be enforced because of the bankruptcy of the internet company. Nonetheless, pursuant to the Finality, Severability, Fairness, and Validity terms in the 2000 Agreement, the remaining terms of the 2000 Agreement should have been enforced, including the \$5,500 monthly support provision, and the provision that Robert pay for major maintenance and repairs to the family home and for 100% of the children’s orthodontia and extraordinary medical expenses.

The parties expressly contemplated that if Robert did not make the four annual payments of four million dollars each, he would be required to continue to make the \$5,500 monthly payments. A-38. Where there was no finding by the trial court of unfairness at the time of execution, *see* A-

45, and the parties expressly agreed that the terms of the Agreement were fair, *see* A-34, the Court of Appeals erred by vacating their property division and the provision for family support.

The decision of the Court of Appeal vitally affects a substantial public interest. This decision will discourage separating spouses from amicably resolving their property division and child support and maintenance issues, if such contracts are subject to invalidation by the court without any finding of unfairness, or non-compliance with RCW 26.19.020. This will undoubtedly result in more adversarial litigation in the family law area. Such adversarial litigation will unnecessarily tie up the court system and increase the disruption to the lives of the parties and the children who are frequently involved.

B. The Court of Appeals Decision Conflicts with RCW 26.09.070(3)

Pursuant to RCW 26.090.070(3),

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 degree 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 subsequent proceeding for compliance with RCW 26.19.020.

RCW 26.09.070(3) (emphasis added). Despite the plain language of the statute binding the trial court to enforce the 2000 Agreement, the Court of Appeals disregarded both the plain language of the statute and the express terms of the Agreement when it vacated the property division and the support provision.

The Court of Appeals considered whether the contract was “severable or entire” in light of the factual unenforceability of the \$16 million payment provision. The Court of Appeals correctly recognized that *this* is an issue of the parties’ intent and that such intent should be determined by “objective manifestations.” *McCausland II*, 118 P.2d at 951. But, the court completely failed to consider the objective manifestations of intent that were clearly spelled out within the four corners of the 2000 Agreement.

The parties intended that the Agreement would be the *final* agreement between them, whether or not approved by the court (paragraph 12) A-33. This expressly stated intent of finality, precludes any intent to modify. The parties believed that the Agreement was *fair* and intended it to be *binding* upon them (paragraph 14) A-34. They intended it to be

severable in the event any provision was found to be unenforceable (paragraph 17). A-35. They intended it to be *valid*. A-38. And, they specifically contemplated and intend that the \$5,500 support payments would continue even if Robert did not pay the four payments of four million dollars each (paragraph 23). A-38. Their intent could not have been more clearly manifested.

Instead of considering the parties' objective manifestations of intent, the Court of Appeals considered the changed economic circumstances *after* the contract was executed and then apparently speculated that the parties would not have agreed to the terms in the Agreement if they had known of these circumstances in advance. This is not a proper role for the Court, where both parties were represented by counsel and knowingly and voluntarily entered into the 2000 Agreement. In doing so, they each took risks that their economic circumstances might change *after* the execution of the Agreement. Because the Court of Appeals' decision conflicts with the plain language of RCW 26.09.070(3) and the public policy supporting the enforceability of separation contracts, the Supreme Court should accept review.

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C. **The Court of Appeals Decision Conflicts with Supreme Court and Court of Appeals Precedent**

In the case of *In re Marriage of Little*, the supreme court recognized that the Dissolution Act of 1973 effected an important change in the role of the court in approving separation agreements. Under the prior law, such an agreement was to be adopted only if its terms were deemed fair and equitable by the judge. *In re Marriage of Little*, 96 Wn.2d at 192-193. Under the current law, “amicable agreements are preferred to adversarial resolution of property and maintenance questions, as well as those of child custody and support, and the separation contract is binding upon the court unless it finds that the contract was unfair at the time of its execution.” *Little*, 96 Wn.2d at 193 (citing RCW 26.09.070(3)); *see also Nelson v. Collier*, 85 Wn.2d at 610 (RCW 26.09.070(3) gives wide latitude to marital partners to independently dispose of their property by contract free from court supervision); *In re Marriage of Shaffer*, 47 Wn. App. at 193 (because of the right of marital partners to divide their property as they see fit, the old rule allowing the court to disregard the property division made by the parties is no longer appropriate).

As stated by Division II in the *Schaffer* case,

[T]he only question for a trial court reviewing a separation agreement is was the agreement unfair when it was executed? If the agreement is not unfair, the parties will be held to have waived their right to have

the court determinate a “just and equitable” division of the property.

47 Wn. App. at 194; *see also In re Marriage of Glass*, 67 Wn. App. at 390 (a separation contract that limits the court’s power to modify an agreed maintenance award is to be enforced).

Both *McCausland* decisions properly acknowledge that the trial court is not bound by the parties’ agreements with regard to child support. *McCausland II*, 118 P.3d at 954; *McCausland I* at 11. The *McCausland I* decision correctly directed the trial court on remand to determine support according to the requirement of RCW 26.19.020, including specifying any appropriate deviations and the justifications therefore. *See McCausland I*, at p. 1-2. But, the fact that the trial court must independently determine child support according to the statutory requirements, “does not compel the trial court to reject the parties’ agreement.” *McCausland II*, 118 P.3d at 955 (citing *Pippins v. Jankelson*, 110 Wn.2d 475, 479, 754 P.2d 105 (1988)).

Once a trial court determines that the parties have provided for child support in a separation contract in an amount that satisfies the statutory requirements, it does not have the discretion to ignore the parties’ Agreement to provide more support than the law requires. RCW 26.09.070(3); *Little*, 96 Wn. 2d at 193-194; *see also In re Marriage of*

Mahalingam, 21 Wn. App. 228, 234-35, 584 P.2d 971 (1978)(enforcing an escalation clause in a provision on child support contained in a separation agreement) *see also Untersteiner v. Untersteiner*, 32 Wn. App. 859, 864, 650, P.2d 256 (1982) (“[n]othing in the law, public policy, or reason prohibits a former spouse from *voluntarily* and formally obligating himself or herself to do more than the law requires in providing support for a former spouse”).⁸

Here, the trial court on remand properly set child support according to Chapter 26.19.020 specifying its reason for extrapolating from the child support schedule. A-45 to A-46. Because the parties’ Agreement provided for combined spousal maintenance and child support in the amount of \$5,500 per month, and the trial court properly set child support at \$2842 per month, it did not have discretion to invalidate the *combined* support provision absent a finding that the 2000 Agreement was unfair when executed, or that the parties did not intend for the Finality, Severability and Validity provisions to apply. Here there were no such findings.

The fact that there was a change in economic circumstances *after* the execution of the 2000 Agreement was not a proper grounds for the Court of Appeals to ignore these express provisions in the 2000

⁸ *See also Kinne v. Kinne*, 82 Wn.2d 360, 363, 510 P.2d 814 (1973).

Agreement. If it were, the well-established public policy supporting the enforcement of separation contract would be seriously undermined. Parties to a separation contract necessarily take a risk that there may be a change in their economic circumstances. They are free to provide in the contract for a modification in the event their economic circumstances changes. Here, Robert and Angela specifically chose not to provide for a modification of their Agreement by including the Finality, Severability, and Validity provisions in their 2000 Agreement. Thus, the Court of Appeals erred by vacating the property division and by finding that the 2000 Agreement was not enforceable.

VI. CONCLUSION

Based on the foregoing, the Petitioner Angela McCausland respectfully requests that this court accept review of the decision of the Court of Appeals. Review should be accepted because this decision involves an issues of substantial public importance, because the decision conflicts with RCW 26.09.070(3), and prior precedent as discussed herein. The issues related to the \$5,500 monthly support payment, the enforceability of the property division, the tax refund and tax deduction, attorneys fees, and the remand to a different trial judge should all be reviewed in order to provide complete relief to the parties.

05 OCT 31 PM 4:32

DATED this 31st day of October, 2005.

STATE OF WASHINGTON

SMITH, ALLING, LANE, P.S.

BY

DEPUTY



EDWARD M. LANE, WSB #02972

Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing document was served on:

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On October 31, 2005 by placing it in an envelope, addressed as indicated, then sealed it and deposited it with sufficient postage fully prepaid thereon in a receptacle of the United States Postal Service within Pierce County, Washington, before the hour of midnight.

Signed at Tacoma, Washington on October 31, 2005.



EDWARD M. LANE

FILED
COURT OF APPEALS
DIVISION II

NO. 31892-0-II

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STATE OF WASHINGTON

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Marriage of

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APPENDIX TO RESPONDENT/CROSS-APPELLANT'S
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In re the Marriage of ANGELA KARON McCAUSLAND, Respondent/Cross-Appellant v. ROBERT GLENN McCAUSLAND, Appellant/Cross-Respondent.

No. 31892-0-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

118 P.3d 944; 2005 Wash. App. LEXIS 2174

August 30, 2005, Filed

PRIOR HISTORY: [**1] Superior Court of Pierce County. Superior Court Docket No. 99-3-01357-2. Date Filed In Superior Court: June 24, 2004. Superior Court Judge Signing: Frederick Fleming. *In re Marriage of McCausland, 112 Wn. App. 1029, 2002 Wash. App. LEXIS 2343 (2002)*

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant former husband appealed the judgment of the Superior Court of Pierce County (Washington) that entered orders related to, inter alia, child support and property division in his divorce from respondent former wife. The wife cross-appealed.

OVERVIEW: The father argued, inter alia, that the trial court erred by ordering him to pay 100 percent of all the extraordinary medical and dental expenses, including orthodontics, for the children. Findings had to support any requirement that a parent bear the full cost of any extraordinary expense, or all of the medical, dental or orthodontic expenses, including insurance costs. The court of appeals found that the trial court relied on one parent's current and historical income and the children's participation in activities without proof of the specific claimed expenses, and it did not enter findings on or include the cost of medical insurance premiums, orthodontic expenses, uncovered medical and dental expenses, extraordinary expenses and any other special needs in the child support worksheets, schedule, or order. As a result, the record was insufficient to determine whether the expenses were necessary and reasonable, what the total amount of support was or should be, or the proper allocation of support between the parents.

OUTCOME: The property division was reversed and vacated. The order requiring the husband to pay the wife's house maintenance was vacated. The case was

remanded to a different judge for determination of child support and maintenance, if any, and to determine whether equity required a recharacterization nunc pro tunc of any portion of the undifferentiated maintenance.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Remands & Remittitur
Civil Procedure > Trials > Judicial Discretion

[HN1] It is a well settled principle that an appellate court's mandate is "binding" on the superior court and must be strictly followed. The superior court may exercise discretion where an appellate court directs it to "consider" an issue, although in so doing, it must adhere to the appellate court's instructions, if any.

Civil Procedure > Appeals > Standards of Review > Standards Generally
Contracts Law > Contract Interpretation > Interpretation Generally
Contracts Law > Contract Interpretation > Parol Evidence Rule

[HN2] Generally an appellate court gives words in a written agreement their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. To determine the parties' intent in a written agreement, the appellate court employs the context rule. Under the context rule, extrinsic evidence is admissible to aid in ascertaining the parties' intent where the evidence gives meaning to words used in the contract. Thus, the appellate court determines the parties' intent by viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, subsequent acts and conduct of the parties, the reasonableness of the respective interpretations advanced by the parties, and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing.

Civil Procedure > Appeals > Standards of Review > Standards Generally

Contracts Law > Contract Interpretation > Interpretation Generally

Contracts Law > Contract Interpretation > Parol Evidence Rule

[HN3] Extrinsic evidence may be used whether or not the contract language is ambiguous. However, extrinsic evidence may not be used: (1) to establish a party's unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or modify the written word. A contract may be either severable or entire, depending upon the parties' intent. When determining the parties' intent, an appellate court does not concern itself with unexpressed subjective intent, only objective manifestations of intent. Generally, a contract is entire, rather than severable, when by its terms, nature and purpose, it contemplates and intends that each and all of its parts are interdependent and common to one another and to the consideration. In other words, a contract is entire, rather than severable, when the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.

Family Law > Child Support > Obligations

[HN4] In setting child support, a trial court first determines the couple's combined net incomes. It uses that figure to calculate the basic child support obligation, according to the child support economic table set forth in *Wash. Rev. Code § 26.19.020*. The trial court then allocates the basic support obligation between the parents based on each parent's share of the combined monthly net income. *Wash. Rev. Code § 26.19.080(1)*. This is the standard calculation. *Wash. Rev. Code § 26.19.011(8)*.

Family Law > Child Support > Obligations

[HN5] See *Wash. Rev. Code § 26.19.065*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Family Law > Child Support > Obligations

[HN6] An appellate court reviews a trial court's child support order for abuse of discretion. A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, including an erroneous view of the law. The trial court's entry of general, rather than specific, findings does not automatically require vacation of the trial court's order if evidence in the record supports it.

Family Law > Child Support > Obligations

[HN7] A trial court is not bound by parties' agreements with regard to child support. The trial court must first independently determine child support according to the statutory requirements. But that does not compel the trial court to reject the parties' agreements. It merely allows the trial court to specify its reasons for deviating from the standard calculation.

Family Law > Child Support > Obligations

[HN8] Extraordinary medical expenses are not included in the standard calculation. *Wash. Rev. Code § 26.19.080(2)*. The trial court must normally apportion the responsibility for these expenses to parents in the same proportion as the basic child support obligation.

Family Law > Child Support > Obligations

Family Law > Divorce, Dissolution & Spousal Support > Obligations

[HN9] Child support may be included in the separation contract and shall be reviewed in the subsequent proceeding for compliance with *Wash. Rev. Code § 26.19.020*. Under this statute, separation agreement provisions concerning child support are not binding on the court. Parties are also permitted to agree to provide more spousal support than they would otherwise be obligated to pay for maintenance.

Family Law > Divorce, Dissolution & Spousal Support > Obligations

[HN10] The trial court has the discretion to set child support based on the overall financial circumstances and resources of the parties, their standard of living during the marriage, and special needs of the children. The trial court may also exceed advisory amounts where the combined income of the parties is over \$ 7,000 and the award does not amount to more than 45 percent of the paying parent's net income. *Wash. Rev. Code § 26.19.065(1)*.

Family Law > Child Support > Obligations

[HN11] In the context of a child support obligation, parties are not required to submit receipts for all claimed expenses or to justify extrapolation when combined net incomes exceed \$ 7,000. But when a parent is ordered to pay particular expenses for the children, the record must include what those costs are generally, and the court must consider each parent's ability to share those expenses in light of their economic circumstances and in light of their total child support obligation. *Wash. Rev. Code § § 26.19.065(1), 26.19.075, 26.10.001*.

Family Law > Divorce, Dissolution & Spousal Support > Costs & Attorney Fees

[HN12] Under *Wash. Rev. Code § 26.09.140*, a trial court may award reasonable attorney fees after considering the financial resources of both parties. Using its dis-

cretion, the court balances the requesting party's need for a fee award against the other party's ability to pay.

Evidence > Procedural Considerations > Burdens of Proof

Family Law > Divorce, Dissolution & Spousal Support > Costs & Attorney Fees

[HN13] In calculating a reasonable amount of attorney's fees in a dissolution of marriage action, 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. 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.

Civil Procedure > Appeals > Briefs

Civil Procedure > Appeals > Records on Appeal

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN14] Wash. R. App. P. 10.3(a)(4) requires each party's brief to contain a fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement. In addition, the parties' argument must contain citations to legal authority and references to relevant parts of the record. Rule 10.3 (a)(5). Further, appellants must make a separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. Unchallenged findings of fact are verities on appeal.

Civil Procedure > Costs & Attorney Fees > Attorney Fees

[HN15] See *Wash. Rev. Code* § 4.84.330.

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FOR APPELLANT: Catherine Wright Smith, Edwards Sieh Smith & Goodfriend PS, Seattle, WA; Valerie A Villacin, Edwards Sieh Smith & Goodfriend PS, Seattle, WA; Jeffrey Alan Robinson, Attorney at Law, Gig Harbor, WA.

JUDGES: Written By: Van Deren, A.C.J. Concurred In By: Bridgewater, J., Hunt, J.

OPINIONBY: Van Deren

OPINION: [*947] VAN DEREN, A.C.J. - This is the second appeal arising from the interpretation and enforcement of a March 2000 spousal agreement (2000 Agreement) between Robert and Angela McCausland. The parties' final separation occurred in 1998, and their marriage was dissolved in October 2001. In the first appeal, we determined that the 2000 Agreement provisions for a \$ 16 million cash payment and a \$ 5,500 monthly payment from Robert to Angela n1 were unenforceable. We reversed and remanded to the trial court to "reconsider and to segregate monthly child support, spousal maintenance, and any property [**2] distribution adjustments flowing therefrom." *In Re Marriage of McCausland*, noted at 112 Wn. App. 1029, 2002 WL 1399120, at *5 (unpublished). We also directed the trial court to set child support according to the requirements of chapter 26.19 RCW, including specifying any deviations and their justification. Finally, we directed the trial court to reconsider its award of attorney fees to Angela at trial.

n1 We refer to the parties by first name for clarity and mean no disrespect.

Robert appeals the trial court's decision on remand. He argues that the trial court erroneously (1) calculated child support; (2) awarded monthly payments to Angela as a property division until her death; and (3) enforced other support provisions of the 2000 Agreement without regard for need or ability to pay. Robert also ascribes error to the trial court's finding of fact that Angela had a need for attorney fees and that he had an ability to pay, but he agrees with its conclusion that Angela should not be awarded such [**3] fees.

Angela cross-appeals, arguing that the trial court improperly (1) allocated tax refunds from tax years 1997 and 1998; (2) allocated tax deductions 20 years hence to Robert; and (3) erred in declining to award her attorney fees.

We reverse and vacate the property division. We remand to a different judge for determination of child support and maintenance, if any, and to determine whether equity requires a recharacterization *nunc pro tunc* of any portion of the undifferentiated support Robert paid to Angela. We also vacate the order requiring Robert to pay Angela's house maintenance and repair expenses and remand for determination of any reimbursement Angela owes to Robert for expenses he has paid since our earlier remand.

FACTS

Robert and Angela married on May 26, 1988. They have two children. They divorced in October 2001. n2 We need not repeat the background facts we set forth in our previous opinion. *McCausland*, 2002 WL 1399120, at *1. Rather, we highlight only the facts pertinent to the issues in this appeal from the trial court's actions on remand.

n2 The record does not contain the October 2001 findings of fact, conclusions of law, decree of dissolution, or parenting plan. Although there was a temporary order of support or family maintenance, "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.'" *In Re Marriage of McCausland*, noted at 112 Wn. App. 1029, 2002 WL 1399120, at *4 (unpublished). No child support order or worksheets were filed at the time of dissolution.

[**4]

I. PRIOR APPEAL

In his prior appeal, Robert argued that the trial court improperly characterized his monthly \$ 5,500 support payment to Angela as a "property division." *McCausland*, 2002 WL 1399120, at * 3. We agreed, holding that the provisions in the 2000 Agreement for \$ 5,500 "combined monthly support" payments and a \$ 16 million cash payment to Angela for the anticipated, [*948] but non-realized, IPO n3 stock sale were "unenforceable." *McCausland*, 2002 WL 1399120, at **2, 3. We remanded to the trial court:

[T]o 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.

McCausland, 2002 WL 1399120, at *1.

n3 "IPO" is a common acronym for Initial Public Offering. Black's Law Dictionary, 8th ed., at 1114, defines an IPO as "A company's first public sale of stock."

[**5]

We also determined that under the terms of the 2000 Agreement, only a party who successfully enforced the Agreement was entitled to attorney fees, and we directed the trial court to reconsider whether it should have awarded attorney fees to Angela under *RCW 26.09.140* "based on the relative financial resources of the parties" since neither party had successfully enforced the 2000 Agreement at trial. *McCausland*, 2002 WL 1399120, at *5. We further required that, "[i]f on remand the trial court persists in awarding attorney fees to Angela," it must "state on the record the method it used to calculate such award." *McCausland*, 2002 WL 1399120, at *5, n.7.

II. REMAND

At the 2003 remand hearing, Robert urged the trial court (1) to set child support based on his 2001 income of \$ 75,000; (2) to impute \$ 40,000 income to Angela based on her training and experience as a teacher; (3) to grant him a residential credit for the time the children spent with him in order to reduce his child support transfer payment to Angela accordingly; and (4) to terminate his spousal maintenance obligation to Angela.

Angela urged the trial court [**6] (1) to reinstate its original \$ 5,500 per month "support" payment; (2) to divide the \$ 5,500 payment between child support and spousal maintenance; and (3) to extrapolate the proper amount of child support based on Robert's historical income. In addition, Angela raised three new issues. She asked the trial court (1) to award her a portion of the tax refund from the parties' 1997 and 1998 tax returns; (2) to order Robert to reimburse her \$ 6,000 for "major maintenance" to the family home; and (3) to require Robert to reimburse her for 100 percent of the children's orthodontia expenses. Clerk's Papers (CP) at 189. Finally, Angela sought attorney fees.

A. Property Provisions

The trial court recited its findings of fact and conclusions of law entered on October 20, 2001, that the parties' anticipated \$ 16 million property division to Angela from the bankrupt corporation was unenforceable. It also found that Robert's maintenance obligation to Angela terminated when the parties executed the 2000 Agreement. It further determined that the remainder of the 2000 Agreement was severable from the \$ 16 million payment provision and was therefore enforceable, despite our holding that the \$ [**7] 5,500 monthly com-

bined support was independently unenforceable. *McCausland*, 2002 WL 1399120, at *5.

Based on its determination of severability of the 2000 Agreement's provisions, the trial court awarded the difference between the amount of monthly child support it ordered and \$ 5,500 to Angela as a new "property" division. n4 CP at 493. The trial court further ordered that (1) the "property" payment did not terminate on Robert's death so that the payment of \$ 5,500 a month would be a claim on his estate; (2) the payment of \$ 5,500 a month was for the rest of Angela's [*949] life, regardless of a reduction in child support or Angela's remarriage; (3) the payment was not dischargeable in bankruptcy; and (4) the payment was not taxable to Angela or deductible by Robert.

n4 The trial court did not explain how this related to or affected the prior distribution of property that divided all of their community and separate property. In that distribution, Angela received property with a net value of \$ 500,000 to \$ 700,000, and Robert received a net property division of close to \$ 0. Nor did the trial court place a present value on a lifetime of non-taxable property payments to a 43 year-old woman. Angela was born in July, 1961.

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B. Child Support Calculation

In calculating child support, the trial court (1) imputed \$ 2,000 a month income to Angela based on her unreported rental income and her voluntary unemployment; (2) determined that Robert's monthly net income was \$ 12,523; and (3) awarded Angela extrapolated child support of \$ 2,842 a month for the two children. The trial court explained that it set the award in excess of the statutory amount because:

The father's income alone is greater than \$ 7,000 per month. 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 at 506. The trial court did not award Robert a residential credit to offset his child support payments. n5

n5 The Parenting Plan is not part of the record on appeal and we do not review whether Robert was entitled to an adjustment for residential time with the children. The trial court may consider this on remand.

[**9]

C. Tax Refunds, Loss Carry Forwards, Home Maintenance, and Medical/Dental Expenses

With regard to the new issues Angela raised on remand, the trial court: (1) awarded Robert the tax refunds from the parties' 1997 and 1998 returns and the loss carry forward from the 1999 tax return; (2) ordered Robert to reimburse Angela for repairs and maintenance to the family home, finding that under the terms of the 2000 Agreement, he was responsible for such costs for the rest of Angela's life; and (3) ordered Robert to pay 100 percent of the children's orthodontia expenses and all other extraordinary medical and dental expenses for the children.

D. Attorney Fees

The trial court determined that Robert had the ability to pay Angela's attorney fees and that Angela had a need for him to pay them, but that our prior opinion precluded the trial court from awarding fees to Angela.

ANALYSIS

I. SUPERIOR COURT AUTHORITY ON REMAND

Robert argues that our previous decision limited the superior court's scope of authority on remand. Agreeing with Robert in principle, Angela argues that, nonetheless, we left the superior court some discretion on remand.

[HN1] It is a well settled principle that our [**10] mandate is "binding" on the superior court and "must be strictly followed." *Harp v. American Sur. Co. of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957); *State ex. rel. Smith v. Superior Court for Cowlitz County*, 71 Wash. 354, 357, 128 P. 648 (1912). The Supreme Court, however, has distinguished between what the superior court on remand is "obligated to do without the exercise of any discretion, and the area within which it *could* exercise its discretion." *Harp*, 50 Wn.2d at 369 (emphasis added); see also *State ex. rel. City of Seattle v. Superior Court of Washington for King County*, 1 Wn.2d 630, 633, 96 P.2d 596 (1939). The superior court may exercise discretion where an appellate court directs it to "consider" an issue, although in so doing, it must adhere to the appellate court's instructions, if any. *Smith*, 71 Wash. at 357.

Here, we determined that the \$ 16 million cash payment from Robert to Angela in the 2000 Agreement and the \$ 5,500 monthly payments to Angela were unenforceable. *McCausland*, 2002 WL 1399120, at *5. We remanded to the superior court with instructions [**11] to "reconsider" (1) child support and maintenance according to the requirements of *chapter 26.19 RCW*; (2) the parties' property distribution to the extent "necessitated by the reconsideration of the combined monthly payments;" and (3) [*950] attorney fees, including "establish[ing] a factual basis for any fee award." *McCausland*, 2002 WL 1399120, at *1.

As the Supreme Court contemplated in *Harp*, we note that our use of the term "reconsider" in our previous opinion was intended to indicate that the superior court would wield some discretionary power in the act of "reconsidering," but that it must also formulate its decision within the limitations of our specific instructions on remand. *Harp*, 50 Wn.2d at 369. In other words, the remand did not open all other possible dissolution-related issues nor could the trial court ignore our specific holdings and directions on remand.

Angela argued on remand that the trial court should segregate the \$ 5,500 monthly payments into maintenance and child support. Robert argued that the trial court should award child support, but no maintenance. The trial court determined that Robert's maintenance obligation terminated [**12] upon execution of the 2000 Agreement. It then (1) classified part of the \$ 5,500 monthly payment as child support and part as "property;" (2) ordered that if child support were modified or terminated, that the "property" portion of the award would increase commensurately; and (3) ordered that the new "property" payment continue for the rest of Angela's life. CP at 494.

But we previously held that the \$ 5,500 monthly payment was unenforceable. *McCausland*, 2002 WL 1399120, at *5. Therefore, it was not severable from the rest of the 2000 Agreement and it did not survive as a contract obligation following the failure of the internet company IPO in 2000. Any fair reading of the 2000 Agreement shows that the temporary undifferentiated support payments from Robert to Angela were inextricably tied to the success of the proposed internet company. All of the economic concessions Robert made in the 2000 Agreement clearly anticipated that he would be a multi-millionaire, able to afford all the expenses for his family, including paying off Angela's house, carrying its expenses, and paying for all the children's medical, dental, and orthodontic expenses.

Under these circumstances, the trial court [**13] could not properly designate a portion of the \$ 5,500 monthly payments as a new property distribution on re-

mand. This is true, especially in light of the prior distribution of all of the parties' assets and liabilities in the 2001 Decree.

We directed the trial court to segregate any monthly payments into child support and maintenance. n6 Nothing in the parties' 2000 Agreement or in our remand order contemplated that the trial court would allocate a portion of the unenforceable \$ 5,500 monthly payment as property distribution; nor did the parties ask the trial court to so allocate it. *McCausland*, 2002 WL 1399120, at *1. Therefore, we vacate that portion of the \$ 5,500 monthly payment the trial court improperly characterized as a property distribution.

n6 Our intent in specifying a reconsideration of the property distribution adjustments was to remind the trial court to consider the other payments Robert was making, i.e., the mortgage on the family home, costs of repairs and maintenance on the house, taxes and insurance, all of which are taken into consideration when considering the need for maintenance and the allocation of extraordinary expenses for the children.

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II. PROVISIONS IN THE 2000 AGREEMENT

On remand, the trial court ruled that the \$ 16 million payment that we held was unenforceable was severable from the remainder of the 2000 Agreement. Then it ruled that, in addition to the \$ 5,500 monthly payment, the portions covering home repair and the children's medical, dental, and orthodontic expenses remained intact as contract obligations. We address whether these portions of the 2000 Agreement were severable and whether these provisions need to be addressed on further remand.

A. Standard of Review

[HN2] Generally we give words in a written agreement their "ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Hearst Communs., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262, No. 75400-4, 2005 WL 1528859, *5 (Wash. Jun. 30, 2005). To determine the parties' [*951] intent in a written agreement, we employ the context rule, as articulated in *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990); see also *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351, 103 P.3d 773 (2004).

Under the context rule, extrinsic evidence is admissible to aid in ascertaining [**15] the parties' intent "where the evidence gives meaning to words used in the contract." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695,

974 P.2d 836 (1999) (citing *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992)) ("extrinsic evidence illuminates what was written, not what was intended to be written.").

Thus, we determine the parties' intent by:

viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, subsequent acts and conduct of the parties, the reasonableness of the respective interpretations advanced by the parties, and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing.

Adler, 153 Wn.2d at 351.

[HN3] Extrinsic evidence may be used whether or not the contract language is ambiguous. *Hudesman*, 115 Wn.2d at 669. However, extrinsic evidence may not be used "(1) to establish a party's unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, [**16] or modify the written word." *W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 495, 7 P.3d 861 (2000) (citing *Hollis*, 137 Wn.2d at 695-96).

A contract may be either severable or entire, depending upon the parties' intent. *State v. Plaggemeier*, 93 Wn. App. 472, 482, 969 P.2d 519 (1999). When determining the parties' intent, we "do not concern ourselves with unexpressed subjective intent, only objective manifestations of intent." *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003).

Generally, a contract is "entire," rather than severable, when "by its terms, nature and purpose, it contemplates and intends that each and all of its parts are interdependent and common to one another and to the consideration." *Saletic v. Stammes*, 51 Wn.2d 696, 699, 321 P.2d 547 (1958) (citation omitted). In other words, a contract is "entire," rather than severable, when "the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out." *Saletic*, 51 Wn.2d at 699 (quoting [**17] *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 298, 62 S. Ct. 581, 86 L. Ed. 855 (1942)).

B. Home Maintenance and Repair Expenses

Robert argues that on remand the trial court erred (1) in selectively enforcing portions of paragraph 21 of the 2000 Agreement that recited the contemplated \$ 16 million payment to Angela and the temporary support provisions; and (2) in ordering him to pay for all "major repairs and reasonable maintenance" on Angela's residence for as long as she continues to own it. Br. of Appellant at 21. He further argues that when we previously held that the \$ 5,500 monthly "support" payments and the \$ 16 million transfer payment were unenforceable, we thereby invalidated the entire support section of the 2000 Agreement. Br. of Appellant at 21. Angela argues that we previously held that only the \$ 16 million was "factually unpayable" and that the other provisions of the 2000 Agreement remain valid and enforceable. Br. of Resp't at 18. We agree with Robert. We expressly ruled that both the \$ 16 million payment and the \$ 5,500 payments were unenforceable. *McCausland*, 2002 1399120, at *5.

The linchpin of the financial arrangements between [**18] Robert and Angela in the 2000 Agreement was his anticipated receipt of internet company profits from the IPO. See CP at 70. Robert's obligation to pay Angela \$ 16 million from the internet profits, to pay temporary support at the rate of \$ 5,500 monthly, and to pay for home maintenance [*952] and repairs are contained in the same paragraph of the 2000 Agreement.

We held that the 2000 Agreement provision requiring Robert to pay Angela \$ 16 million was unenforceable because his company filed for bankruptcy and neither Robert nor his company ever realized the contemplated profits. Those lost profits were never an asset before the court for distribution, nor were they available for the trial court's consideration in setting support obligations. When the IPO earnings failed to materialize, all portions of the 2000 Agreement tied to those profits became unenforceable and the parties' anticipated economic circumstances changed in a manner that the trial court was bound to consider. Accordingly, we now expressly hold that the provisions regarding Robert's obligation to pay for Angela's home maintenance and repairs are also unenforceable.

III. CHILD SUPPORT OBLIGATION

Robert also argues that [**19] the trial court erred in awarding child support in excess of the maximum statutorily recommended amount, and in failing to make sufficient findings to support such an award. Angela counters that the trial court's findings are sufficient to support its child support award. Angela urges that our ruling in *Marriage of Clarke*, 112 Wn. App. 370, 48 P.3d 1032 (2002), should control.

Robert distinguishes the facts here from *Clarke*, where the parent paying support was obligated to pay only 33 percent of his income. n7 He contends that (1)

Angela's interpretation of *Clarke* is overbroad; (2) the record here does not provide the same amount of support for a higher award as did the record in *Clarke* because Angela has failed to provide receipts for the extraordinary costs she claims; and (3) if he is required to pay Angela \$ 5,500 per month, we should view his entire \$ 5,500 monthly payment as child support, n8 such that 44 percent of his income is tied to child support.

n7 The party challenging the child support award in *Clarke* was obliged to spend only 30 percent of his income on child support. *In re Marriage of Clarke*, 112 Wn. App. 370, 379, 48 P.3d 1032 (2002). We held in *Clarke* that where the parties' combined income is over \$ 7,000, the trial court may award a child support obligation in excess of statutory guidelines, so long as it does not amount to more than 45 percent of a parent's income. 112 Wn. App. at 379.

[**20]

n8 Robert acknowledges that trial court la-beled only \$ 2,842 of the \$ 5,500 monthly payment as child support. Because we have already held that the \$ 5,500 monthly payment is unen-forceable, we do not address this issue.

A. Legislative Scheme

The Legislature created the child support schedule "to ensure that every child support award satisfies the child's basic needs and provides additional financial support commensurate with the parents' income, resources, and standard of living" in a manner that will "equitably apportion the child support obligation between both parents." *Clarke*, 112 Wn. App. at 377-78.

[HN4] In setting child support, a trial court first determines the "couple's combined net incomes." *In re Paternity of Hewitt*, 98 Wn. App. 85, 88, 988 P.2d 496 (1999). It uses that figure to calculate the "basic child support obligation, according to the "child support economic table set forth in *RCW 26.19.020*. *Hewitt*, 98 Wn. App. at 88. The trial court then allocates the basic support obligation between the parents [**21] "based on each parent's share of the combined monthly net income." *RCW 26.19.080(1)*. This is the "[s]tandard calculation." *RCW 26.19.011(8)*.

RCW 26.19.065 provides standards for the upper limits of child support ordered by the court:

(1) [HN5] **Limit at forty-five percent of a parent's net income.** Neither parent's total child support obligation may exceed forty-five percent of net income except for good cause shown. Good cause includes but is not limited to possession of substantial wealth, children with day care expenses, special medical need, educational need, psychological need, and larger families.

....

[*953] (3) **Income above five thousand and seven thousand dollars.** The economic table is presumptive for combined monthly net incomes up to and including five thousand dollars. When combined monthly net income exceeds five thousand dollars, support shall not be set at an amount lower than the presumptive amount of support set for combined monthly net incomes of five thousand dollars unless the court finds a reason to deviate below that amount. The economic table is advisory but not presumptive [**22] for combined monthly net incomes that exceed five thousand dollars. When combined monthly net income exceeds seven thousand dollars, the court may set support at an advisory amount of support set for combined monthly net incomes between five thousand and seven thousand dollars or the court may exceed the advisory amount of support set for combined monthly net incomes of seven thousand dollars upon written findings of fact.

At issue here is whether the child support order, the worksheets, and the trial court's written findings of fact supporting the extrapolated child support are sufficient under *RCW 26.19.065 (3)*, to allow us to meaningfully review the child support obligations of the parents.

B. Standard of Review

[HN6] We review the trial court's child support order for abuse of discretion. *In re Marriage of Fiorito*, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, including an erroneous view of the law. *Fiorito*, 112 Wn. App. at 663-64.

The trial court's entry of general, rather than specific, findings does not automatically [**23] require

vacation of the trial court's order if evidence in the record supports it. *In re Marriage of Griffin*, 114 Wn.2d 772, 777, 791 P.2d 519 (1990) (where the record supported the court's general finding, there was sufficient support for its award of child support in excess of the advisory amount); see also *In re Marriage of Crosetto*, 82 Wn. App. 545, 560, 918 P.2d 954 (1996) ("[T]he lack of a trial court's specific findings is not fatal, and in the absence of a finding on a particular issue, an appellate court may look to the oral opinion to determine the trial court's basis for the deviation.").

C. Extrapolation

Robert urges us to adopt the standards articulated in *Marriage of Daubert & Johnson*, 124 Wn. App. 483, 495, 496, 99 P.3d 401 (2004), in which Division One recently disagreed with our holding in *Clarke*. *Daubert* held that child support awards exceeding the statutory advisory amount are not deviations from the scheduled amounts because support based on combined incomes in excess of \$ 7,000 a month are not on the schedule, but support calculated above the statutory advisory amount must be supported by more than [**24] cursory findings. 124 Wn. App. at 495, 496.

Division One held that (1) the trial court's findings must specifically explain "why the amount of support ordered is both necessary and reasonable," *Daubert*, 124 Wn. App. at 495; (2) the trial court's determination of necessity for extrapolated child support should include factors such as "the special medical, educational and financial needs of the children," *Daubert*, 124 Wn. App. at 496 (citing *In re Marriage of Rusch*, 124 Wn. App. 226, 98 P.3d 1216 (2004)); (3) the factors relevant to the trial court's determination of the reasonableness of child support include, but are not limited to, the "parents' income, resources and standard of living," *Daubert*, 124 Wn. App. at 496 (citations omitted); and (4) "The mere ability of either or both parents to pay more, whether based on consideration of income, resources or standard of living, is not enough to justify ordering more support." *Daubert*, 124 Wn. App. at 498 (citing an earlier Division One opinion, *In re Marriage of Scanlon & Witrak*, 109 Wn. App. 167, 179-80, 34 P.3d 877 (2001) [**25] ("[I]t contravenes legislative intent to increase the child support obligation of an obligor parent of moderate means simply because the obligee parent is affluent.")).

[*954] We have previously held that where the parents' combined monthly income exceeds \$ 7,000, the trial court has express statutory authority to extrapolate a child support award amount higher than that advised in the support schedule under *RCW 26.19.020*. *Clarke*, 112 Wn. App. at 379 (holding that where the combined income of the parents was over \$ 8,500, and the father's total obligation constituted only 30 percent of his in-

come, the trial court did not abuse its discretion in awarding more than the statutory advisory amount.).

Here, the trial court found that Robert's net monthly income was \$ 12,523. n9 The court imputed an income of \$ 2,000 per month to Angela. Thus, the parents' combined monthly net income was \$ 14,523. Using the extrapolation method, n10 the trial court ordered combined child support in the amount of \$ 3,296 per month, \$ 1,814.22 for the 13-year old daughter and \$ 1,482.53 for the nine-year old son. Based on the parties' proportionate share of support, [**26] n11 the trial court ordered Robert to pay \$ 2,842 child support per month -- \$ 1,278.00 for the nine-year-old and \$ 1,564 for the 13-year-old. n12

n9 The trial court did not deduct federal income tax because of Robert's "claimed losses on the parties 1999 federal income tax return offsetting his income liability for the years 1997 and 1998 and 20 years in the future in accordance with Federal Income Tax Code § 172." CP at 493.

n10 Under this method, the trial court recited its consideration of Robert's historical income.

n11 The parties' proportionate shares were set at .862 for Robert and .138 for Angela.

n12 The statutory advisory amount of child support for parents with a combined income of \$ 7,000 or more with two children is \$ 767 for children under 12 and \$ 946 for children over 12. *RCW 26.19.020*. Under these guidelines, the total monthly child support award here would have been \$ 1,713. Robert's share would have been about \$ 1,477.

The trial court made the [**27] following written finding to support its extrapolated award:

The father's income alone is greater than \$ 7,000.00 per month. The children participate in dance and sports activities, which are significant expenses. [n13] The children have the expectation of support at the level of their father's significant historical income.

CP at 506.

n13 Angela testified that the children have extra expenses of \$ 224 per month for dance classes and \$ 600 per month for costumes and sports uniforms, though no receipts are on record.

In addition to the extrapolated support, the trial court ordered Robert to pay the medical insurance premiums and 100 percent of the orthodontic expenses, as well as all medical and dental expenses not covered by insurance, for both children. No itemizations of these costs appears in the child support worksheets or child support order, nor are these costs delineated in the court's findings or oral ruling.

D. Extraordinary Health, Dental, and Orthodontic Expenses

Robert also [**28] argues that the trial court erred in ordering him to pay 100 percent of all the extraordinary medical and dental expenses, including orthodontics, for the children. He cites *RCW 26.19.080(2)* for the proposition that the trial court was required to split the expense between the parties in the same basic proportion as the child support obligation.

Angela agrees that normally *RCW 26.19.080(2)* would prevent the trial court from requiring one parent to pay all extraordinary medical expenses. But she argues that because Robert agreed to pay the children's extraordinary health expenses under the 2000 Agreement, he should continue to pay them as the trial court ordered.

Robert does not contest Angela's interpretation of the 2000 Agreement. But he argues that (1) the trial court was not bound by their separation agreement concerning child support; and (2) instead, the trial court must independently determine child support according to the statutory requirements in *chapter 26.19 RCW*.

We agree with Robert that [HN7] the trial court is not bound by parties' agreements with regard to child support. *Pippins v. Jankelson*, 110 Wn.2d 475, 478, 754 P.2d 105 (1988). [**29] We also agree that the trial [**955] court must first independently determine child support according to the statutory requirements. But that does not compel the trial court to reject the parties' agreements. It merely allows the trial court to specify its reasons for deviating from the standard calculation. *Pippins*, 110 Wn.2d at 479.

[HN8] Extraordinary medical expenses n14 are not included in the standard calculation. *RCW 26.19.080(2)*. The trial court must normally apportion the responsibility for these expenses to parents in the "same proportion as the basic child support obligation." *RCW 26.19.080(2)*.

n14 *RCW 26.19.080(2)* defines extraordinary medical expenses as monthly health care expenses which exceed five percent of the basic support obligation.

As we noted in our prior ruling in this case:

[HN9] Child support may be included in the separation contract and shall be reviewed in the subsequent proceeding for compliance [**30] with *RCW 26.19.020*. Under this statute, separation agreement provisions concerning child support are not binding on the court.

McCausland, at **3-4 (citing *In re Marriage of Thier*, 67 Wn. App. 940, 944, 841 P.2d 794 (1992)) (holding "[w]e find no error in the court's refusal to enforce the terms of any agreement pertaining to custody").

We also permit parties to agree to provide more spousal support than they would otherwise be obligated to pay for maintenance. *Untersteiner v. Untersteiner*, 32 Wn. App. 859, 864, 650 P.2d 256 (1982) ("Nothing in law, public policy or reason prohibits a former spouse from voluntarily and formally obligating himself or herself to do more than the law requires in providing support for a former spouse.") (emphasis added). Robert has not cited, nor have we found, any case suggesting the same is not true for child support. On the contrary, courts have enforced provisions in separation agreements that appeared to benefit the children but which the court would not normally have awarded. See e.g., *In re Marriage of Mahalingam*, 21 Wn. App. 228, 234-35, 584 P.2d 971 (1978) [**31] (enforcing an escalation clause in a provision on child support contained in a separation agreement.).

Therefore, we find no merit in Robert's assertion that the trial court is bound to comply with the restrictions in *RCW 26.19.080(2)* when determining which party should bear the cost of extraordinary medical and dental expenses.

Here, we have held that the parties' economic situation was changed in a way that compelled the trial court to reject the economic provisions of the 2000 Agreement. Therefore, the trial court must consider all of the parties' circumstances before making a decision about how to apportion the children's extraordinary medical, dental, and orthodontic expenses. On remand, the trial court is directed (1) to determine the standard child support calculation, any extraordinary expenses, the cost of medical, dental, and orthodontic insurance and care; and then (2)

to allocate these according to *chapter 26.19 RCW*, keeping in mind that it may allocate the expenses in a manner different from each parent's percentage of the combined total net income. The record should contain a calculation of the total child support obligation in light of [**32] *RCW 26.19.065(1)*, which limits the total obligation to forty-five percent of a parent's net income.

Findings must support any requirement that a parent bear the full cost of any extraordinary expense, or all of the medical, dental or orthodontic expenses, including insurance costs. As Robert does not contest that he agreed to cover these expenses under the 2000 Agreement, the trial court may decide whether it is appropriate to allocate 100 percent of these expenses to him.

We reject Robert's invitation to adopt the strictures of Division One in *Daubert*. [HN10] The trial court has the discretion to set child support based on the overall financial circumstances and resources of the parties, their standard of living during the marriage, and special needs of the children. The trial court may also exceed advisory amounts where the combined income of the parties is over \$ 7,000 and the award does not [*956] amount to more than 45 percent of the paying parent's net income. *RCW 26.19.065(1)*; *Clarke*, 112 Wn. App at 379.

But here, the trial court relied on one parent's current and historical income and the children's participation [**33] in activities without proof of the specific claimed expenses; and it did not enter findings on or include the cost of medical insurance premiums, orthodontic expenses, uncovered medical and dental expenses, extraordinary expenses and any other special needs in the child support worksheets, schedule, or order. As a result, the record is insufficient for us to determine whether the expenses are necessary and reasonable, what the total amount of support is or should be, or the proper allocation of support between the parents.

[HN11] We do not require the parties to submit receipts for all claimed expenses or to justify extrapolation when combined net incomes exceed \$ 7,000. But when a parent is ordered to pay particular expenses for the children, the record must include what those costs are generally, and the court must consider each parent's ability to share those expenses in light of their economic circumstances and in light of their total child support obligation. *RCW 26.19.065(1)*; *RCW 26.19.075*; *RCW 26.19.001*; see *Daubert*, 124 Wn. App. at 495.

IV. ATTORNEY FEES

Angela argues that the trial court erred in denying [**34] her attorney fees under the terms of the 2000 Agreement, and thus violated our mandate.

Robert argues that we (1) did not mandate that the trial court award Angela attorney fees; (2) found that

Angela was not entitled to attorney fees under the parties' 2000 Agreement; and (3) merely instructed that if the trial court decided to award fees on remand under *RCW 26.09.140*, it must state the method used to calculate the fees under the factors set forth in *In re Marriage of Knight*, 75 Wn. App. 721, 730, 880 P.2d 71 (1994). Therefore, Robert argues, the trial court had discretion not to award fees and properly exercised it.

We held that as "[n]either party was successful in 'enforcing' the terms of the 2000 Agreement at trial . . . [t]hus neither party was entitled to an attorney fee award under the 2000 Agreement." *McCausland*, 2002 WL 1399120, at *4. But we noted that [HN12] under *RCW 26.09.140*, a trial court may "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 [**35] other party's ability to pay. *McCausland*, 2002 WL 1399120, at *4 (citation omitted). Observing that "[h]ere, the trial court awarded attorney fees to Angela based on her financial need," we remanded "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." *McCausland*, 2002 WL 1399120, at **4-5 (citation omitted). We also listed the factors the trial court was to consider in making its determination. n15

n15 Specifically we said:

[HN13] 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); [*In re Marriage of Knight*, 75 Wn. App. 721, 730, 880 P.2d 71 (1994)]. 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.

McCausland, 2002 WL 1399120, at *5, n.7.

[**36]

Angela's argument that the trial court should have awarded her fees under the 2000 Agreement has no merit. We decided this issue in our prior opinion, and the trial court was bound by it. We do not reconsider it now.

[*957] We also agree with Robert that we did not require the trial court to award Angela fees under *RCW 26.09.140*; we required only that the trial court reconsider the issue in light of enumerated factors. Thus, the trial court had discretion not to award fees to Angela under *RCW 26.09.140*. Angela does not explain why the trial court's determination was in error, except to say that she believed we required the trial court to award her fees. As this argument fails, we find the trial court did not err in denying Angela attorney fees.

V. TAX REFUNDS

Angela argues that the trial court erred in awarding Robert 100 percent of the \$ 396,000 tax refund from the parties' joint tax returns filed in 1997 and 1998, plus 20 years of future deductions, because the issue was not covered by the 2000 Agreement. n16

n16 The trial court essentially found that since Robert bears the risk in the event of an audit, he should enjoy any gains, whether arising from an audit or any other source.

[**37]

Robert argues that the trial court did not err in finding that the 2000 Agreement awarded "all right, title, and interest in and to the IRS refunds" to Robert. CP at 499. He urges that because Angela did not challenge the trial court's finding of fact, it is a verity on appeal. Robert also argues that Angela's argument should fail because she did not set forth a fair statement of facts relevant to the issue she presents for review, required under RAP 10.3(a)(4); nor did she challenge whether substantial evidence supported the trial court's ruling.

Angela responds that the 2000 Agreement applies only to an audit, and not, as here, to a spouse's amended

filing. Angela also argues that the trial court's finding of fact on this subject was an error of law and, therefore, is appealable "without the assignment of error to the factual finding upon which this error is based." n17 Reply to Resp't Cross Appeal at 2. Angela further argues that the 2000 Agreement awards Robert tax refunds for only 1999, not earlier. Angela urges us to determine that the trial court should have considered its award of the tax refunds when it made its decision on attorney fees using the *Knight* factors. 75 Wn. App. at 732. [**38]

n17 She does not state what this error of law was.

[HN14] RAP 10.3 (a)(4) requires each party's brief to contain "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement." In addition, the parties' argument must contain "citations to legal authority and references to relevant parts of the record." RAP 10.3 (a)(5). Further, appellants must make a:

separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

RAP 10.3 (g). Unchallenged findings of fact are "verities on appeal." *Knight*, 75 Wn. App. at 732.

Here, Angela did not assign error to the trial court's finding of fact on this matter, set forth facts relevant to [**39] this issue in her statement of the case, or cite a single legal authority for her position in her brief or reply brief. For these reasons, we do not to review her claim. n18

n18 But we may exercise our discretion to review the issue despite "one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure." *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). Here, Angela provides no support for her claim, making it beyond the scope of reasonable, informed appellate review.

VI. ATTORNEY FEES ON CROSS-APPEAL

Robert argues that he should be awarded attorney fees for responding to Angela's cross-appeal because he is enforcing the terms of the 2000 Agreement relating to attorney fees and the tax refund. In addition, Robert argues he should receive attorney fees under *RCW 4.84.330*. Angela argues that she, not Robert, is entitled to attorney [*958] fees for her cross appeal under the 2000 Agreement and under *RCW 26.09.140* [**40].

The 2000 Agreement states:

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 fees and costs associated with such action.

CP at 72.

RCW 4.84.330 provides:

[HN15] [W]here such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Though Robert prevailed on the issue of whether the trial court erred in denying an award of attorney fees to Angela, this was not an enforcement of the 2000 Agreement, as we specifically remanded only for determination of whether fees should be awarded on the basis of *RCW 26.09.140*. Under both the 2000 Agreement and *RCW 4.84.330*, only where a party prevails in an enforcement action are they entitled to an award of attorney fees.

We previously [**41] held that neither party substantially prevailed on the terms of the 2000 Agreement, and neither was entitled to attorney fees under the agreement. *McCausland*, 2002 WL 1399120, at * 4. As a result, Robert is not entitled to fees on this appeal under the 2000 Agreement or under *RCW 4.84.330*. Nor do we award attorney fees to Angela, as she was not a prevailing party under either the 2000 Agreement or *RCW 26.09.140*.

We reverse and remand to a different judge for further proceedings in accord with the following:

Because we vacate the child support order and the property division, on remand the trial court shall determine the appropriate amount of support from the date of the prior remand. In so doing, the trial court shall calculate child support and extraordinary expenses, including medical, dental and orthodontic expenses, according to *chapter 26.19 RCW*, and shall state the basis for its finding of extraordinary expenses and its allocation of those expenses between the parents. n19 The trial court shall also determine whether a deviation or extrapolation above the standard calculation is appropriate and the parties' [**42] relative needs for, and abilities to pay, maintenance. The trial court shall disregard the economic and support provisions of paragraph 21 of the 2000 Agreement in its entirety.

n19 The trial court does have the discretion to allocate the expenses to one parent if supported by appropriate findings.

The trial court shall determine whether Robert's undifferentiated support payments to Angela from 1998 to the present, including the \$ 5,500 monthly payment and the house maintenance and repair expenses, as well as any additional payments for expenses for the children, are divisible between maintenance and child support *nunc pro tunc*. We vacate Robert's obligation to pay for major repairs and reasonable maintenance on Angela's residence and direct the trial court to enter appropriate orders for reimbursement to Robert for expenses he has paid since our earlier remand. The trial court may also consider whether Robert is entitled to reimbursement or restitution from Angela for payments in excess of appropriate child [**43] support and maintenance, if any, since our earlier remand.

Finally, if it is determined that any of the payments or any portion of such payments Robert made to Angela were deductible under the IRS Code, the trial court shall require the parties to cooperate in amending any previous years' tax returns to reflect such deductibility. *See Kean v. C.I.R.*, 407 F.3d 186 (3rd Cir. 2005).

Van Deren, A.C.J.

We concur:

Bridgewater, J.

Hunt, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE MARRIAGE OF:
ANGELA MCCAUSLAND,

Respondent/Cross-Appellant,

v.

ROBERT G. MCCAUSLAND,

Appellant/Cross-Respondent.

No. 31892-0-II

ORDER DENYING MOTION TO
RECONSIDER

FILED
COURT OF APPEALS
DIVISION II
05 SEP 30 PM 12:41
STATE OF WASHINGTON
BY [Signature]

RESPONDENT moves for reconsideration of the court's decision terminating review, filed August 30, 2005. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Van Deren, Bridgewater, Hunt

DATED this 30th day of September, 2005.

FOR THE COURT:

Van Deren A.C.J.
ACTING CHIEF JUDGE

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In re the Marriage of ANGELA K. McCausland, Respondent, and ROBERT G.
McCausland, Appellant.

No. 27386-1-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2002 Wash. App. LEXIS 1499

June 28, 2002, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

PRIOR HISTORY: Appeal from Superior Court of Pierce County. Docket No: 99-3-01357-2. Date filed: 04/20/2001. Judge signing: Hon. Frederick W. Fleming. *In re Marriage of McCausland, 112 Wn. App. 1029, 2002 Wash. App. LEXIS 2343 (2002)*

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant husband challenged the dissolution decree entered by the Superior Court of Pierce County (Washington) and argued it improperly characterized as property division his monthly child support and maintenance payments to appellee wife.

OVERVIEW: The parties entered into a separation agreement in March 2000. The 2000 agreement provided that the husband would continue to make \$ 5,500 monthly payments for care and maintenance of the wife, her children and the family home, and the husband also agreed to pay the wife \$ 16 million that she demanded as her share of his budding Internet company's expected future value. In the fall of 2000, the husband's Internet company declared bankruptcy. The trial court deleted from the 2000 agreement the husband's \$ 16 million payment to the wife, but upheld the monthly \$ 5,500 payments, characterizing them as a property division for the maintenance of the wife and her children. The appellate court found that the trial court failed to independently establish a separate child support amount, or base the monthly payments either on the statutory tables or justify a deviation from the child support schedule. Fur-

thermore, since neither party was successful in enforcing the terms of the 2000 agreement, neither party was entitled to an attorney fee award under the 2000 agreement.

OUTCOME: The dissolution decree was reversed and remanded, and the wife's attorney fee award was remanded for reconsideration.

LexisNexis(R) Headnotes

Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN1] The appellate court reviews a trial court's decision to enforce a settlement agreement under the abuse of discretion standard.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN2] An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds or reasons.

Family Law > Marital Duties & Rights > Separation & Postnuptial Agreements

[HN3] See *Wash. Rev. Code* § 26.09.070(3).

Family Law > Marital Duties & Rights > Separation & Postnuptial Agreements

Family Law > Child Support > Obligations

[HN4] Under *Wash. Rev. Code* § 26.09.070, separation agreement provisions concerning child support are not binding on the court.

Family Law > Marital Duties & Rights > Separation & Postnuptial Agreements

Family Law > Child Support > Obligations

[HN5] Independent of a separation agreement, the legislature expressly requires the court to address and to de-

termine child support: a trial court must set child support based on the statutory child support schedule or a justified deviation therefrom. *Wash. Rev. Code* § 26.09.100(2). The trial court first determines each parent's income, *Wash. Rev. Code* § 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. *Wash. Rev. Code* § 26.19.071(3).

Civil Procedure > Costs & Attorney Fees > Attorney Fees

[HN6] *Wash. Rev. Code* § 26.09.140 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. If the court makes an award, it must state on the record the method it used to calculate it.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Costs & Attorney Fees > Reasonable Fee Amount

[HN7] 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. 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.

COUNSEL: For Appellant(s): Catherine W. Smith, Edwards Sieh Smith and Goodfriend, Seattle, WA, Brendan P. Finucane, Edwards Sieh Smith & Goodfriend, Seattle, WA.

For Respondent(s): Edward M. Lane, Smith Alling Lane P.S., Tacoma, WA.

JUDGES: Authored by J. Robin Hunt. Concurring: David H. Armstrong, Quinn-Brintnall, J.

OPINIONBY: J. Robin Hunt

OPINION:

HUNT, C.J. -- 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 [*2] 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 n1 married on May 26, 1988. They have two young children. n2 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.

n1 We refer to the parties by their first names for clarity; we intend no disrespect.

n2 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 [*3] 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 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] \$ 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:

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 [*5] 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. n3 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.*

n3 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.

[*6]

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, n4 beginning in August 2000.

n4 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: n5 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 [*7] and Counter-Petition.

n5 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.

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. [*8] Thus, the commissioner declined to modify the support payments, and he awarded attorney fees to Angela.

III. REVISION OF 2000 AGREEMENT

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 [*9] 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

[HN1] We review a trial court's decision to enforce a settlement [*10] 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, 863 P.2d

1353 (1993). [HN2] 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:

[HN3] 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 [*11] and shall be reviewed in the subsequent proceeding for compliance with *RCW 26.19.020*.

[HN4] 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, 854 P.2d 41 (1993).

II. CHILD SUPPORT

[HN5] 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 [*12] 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." n6 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.*

n6 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 2000 Agreement included the following, conflicting provisions:

21. Parenting and Support Issues. 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. Validity. . . .

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.

[*13]

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 [sic] fees and costs associated with such action." Clerk's papers (CP) at 617.

A. TRIAL

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, [HN6] 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), [*14] review denied, 126 Wn.2d 1011, 892 P.2d 1089 (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.

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 [*15] on the record the method it used to calculate such award. *Knight*, 75 Wn. App. at 729. n7

n7 [HN7] 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 [*16] 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 therefor. 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.

Hunt, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

In re the Marriage of:

No. 99-3-01357-2

ANGELA K. McCAUSLAND,

SPOUSAL AGREEMENT

Petitioner,

and

ROBERT G. McCAUSLAND,

Respondent.

THIS AGREEMENT is made this 23 day of MARCH, 2000, between Robert G. McCausland (hereinafter "Husband") and Angela K. McCausland (hereinafter "Wife"); and Husband and Wife hereby enter into this Spousal Agreement for the purpose of resolving any present or future property disputes between the parties, and to convey, one to the other, property interests as set forth below as their individual sole and separate property, and Husband and Wife agree as follows:

1. During the course of their marriage, Husband and Wife acquired an interest in a company called Washington Mortgage Services, Inc., d/b/a/ Home Mortgage USA. That business has recently been sold by Husband to a third party, and the parties no longer retain an interest in said business.

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2. Husband incorporated Freei Networks, Inc., a Washington corporation, d/b/a/ Freei.net in which the Husband is fully employed and has acquired substantial stock interests in said business. Wife claims an interest therein, which Husband disputes.

3. Husband originally purchased and later quit claimed a community interest to Wife in the home in which she lives located at 2521 – 208th Avenue E., Sumner, Washington 98390, for which there is a mortgage in the approximate amount of \$80,000 payable at approximately \$1,500 per month, upon which both parties are signors.

4. Husband and Wife have sold their interest in two investment properties: (a) single family residence located at 33411 SW 23rd Avenue, Federal Way, Washington 98023, and (b) duplex located at 31826 and 31828 – 118th Place S.E., Auburn, Washington. These were previously given as his separate property to Husband in their prior Reconciliation Agreement. The sum of \$112,818.73 (proceeds from these sales as of January 25, 2000) is presently held in a trust account at Columbia State Bank under the control of Edward M. Lane, being account no. 7000182225. Husband and Wife have additionally acquired interests in other residential rental properties, automobiles, boats, personal property, furniture, furnishings, jewelry and artwork, together with bank accounts in the names of each of them.

NOW, THEREFORE, in consideration of the mutual promises, agreements and covenants contained herein, and in consideration of the desires of the parties to

1 resolve the issues concerning the ownership of assets as between Husband and Wife,
2 the parties agree as follows:

3 1. Award to Wife – Sixteen Million Dollars. Wife shall be awarded as her
4 sole and separate property, as property division and not as spousal maintenance, the
5 sum of Sixteen Million Dollars and 00/100 (\$16,000,000) payable in U.S. funds in four
6 (4) annual installments, commencing August 2000, and payable in increments of Four
7 Million Dollars and 00/100 (\$4,000,000) each in August 2000, August 2001, August
8 2002, and August 2003. No interest is to be given, unless payment is in default.

9 Eight Hundred Thousand shares of stock in the corporation of Freei Networks,
10 Inc., d/b/a Freei.net (a Washington corporation) shall be deposited into an escrow
11 account at Sound Trust Company or another mutually agreeable Escrow Company.
12 The stock shall be held by the escrow agent as security to the Wife for the sixteen
13 million dollar payments to her provided for herein. The escrow agent shall be directed
14 to release the shares to Husband after the last Four Million Dollar payment made to
15 Wife. Husband shall retain all voting rights in any stock. If the stock goes public, the
16 securities held by the escrow agent ^{shall} ~~may~~ be converted to the public issuance to insure
17 the security on said stock remains in effect, valid and enforceable. Upon full payment
18 of the sums above provided, Husband shall receive said remaining pledged stock,
19 together with any and all proceeds, and shall assume any and all liabilities therewith
20 and hold Wife harmless therefrom.

Wife shall first sign the "Lock Up Agreement" as requested by Husband in connection with a possible public offering or otherwise. It shall be in the form

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1 designated by his counsel, and approved by her counsel. If it is not approved, no
2 funds are to be paid to Wife until a satisfactory Lock Up Agreement is signed by her

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3 2. Washington Mortgage Services, Inc., d/b/a/ Home Mortgage USA.
4 Husband shall be entitled to all interest of the parties in the stock or corporation of the
5 business known as Washington Mortgage Services, Inc. (a Washington corporation)
6 d/b/a/ Home Mortgage USA, together with any and all sale proceeds, and shall
7 assume any and all liabilities associated therewith, and hold Wife harmless therefrom.

8 3. Freei Networks, Inc. d/b/a/ Freei.net. Husband shall be entitled to all
9 interest of the parties in the stock or corporation of the business known as Freei
10 Networks, Inc. d/b/a/ Freei.net (a Washington corporation), together with any and all
11 proceeds, subject to the security interest provided to Wife herein, and shall assume
12 any and all liabilities associated therewith, and hold Wife harmless therefrom.

13 4. Additional Award to Wife. In addition to the above, Wife shall be
14 awarded as her sole and separate property, as property division and not as spousal
15 maintenance, the following assets:

16 A. Family residence located at 2521 – 208th Avenue East, Sumner,
17 Washington 98390, legally described as follows:

18 Lot 44, TAPPS ISLAND DIVISION NO. 1, according to
19 Plat thereof recorded in Volume 48 of Plats, Page 10
20 through 34, inclusive, records of Pierce County,
Washington, more commonly known as 2521 – 208th
Avenue East, Sumner, Washington 98390.

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Husband shall be responsible for paying all the notes on deeds of trust placed upon the property by the parties together, or any encumbrances placed upon the property by Husband, and to indemnify and hold Wife harmless therefrom;

Husband shall execute to Wife a Quit Claim Deed for the property located at 2521 – 208th Avenue East, Sumner, Washington granting to Wife title free and clear of encumbrances and subject to his payment of promissory notes, secured by deeds of trust, or any other encumbrance on said property, as of the date of this Agreement. If Wife determines to dispose of the home and acquire a new home, Husband shall immediately pay off the notes on deeds of trust and all other encumbrances on said property incurred prior to the date of this Agreement. If Husband and Wife choose to jointly invest in a new home, title to the new home shall reflect the dollar investment of each (i.e., it will be held jointly in proportion to the dollar investment by each). Wife, at her option, may purchase the Husband's interest in said property at a value determined by an appraiser selected by Wife. Husband shall provide and pay for any and all security systems in the present, and future home, and shall immediately install and pay for a security alarm system for the present home;

B. Any vehicle which has been provided for Wife's sole use and convenience now, or purchased by the parties in the future. If title is held in a corporate name, it shall be transferred to Wife to effectuate this Agreement. The 1997 Sea Doo jet ski, 1996 Kawasaki jet ski and Trailer;

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C. Wife's retirement accounts from her employment, including employment as a teacher; or such other retirement benefits to which she is now entitled or in the future acquires;

D. All household goods, furniture and furnishings, artwork, and jewelry, now held or hereinafter purchased by Wife, or both parties for Wife's primary residence, except those items the parties mutually agree may be given to Husband as well as any such items subsequently purchased by Husband;

E. Any and all bank accounts in Wife's name alone and \$75,000 from the Trust account funds held by her attorney;

F. Any and all life insurance policies insuring the life of Wife not specifically referred to herein;

G. All insurance policies insuring any assets awarded to Wife or belonging to Wife;

H. Any and all insurance in the name of Wife not specifically referred to herein relating to medical, hospitalization, and dental care; and

I. Any and all rights and benefits derived as a result of Wife's past or present employment, union affiliation, United States or other citizenship and/or residency within a state, all of which include but are not limited to: Various forms of insurance, rights to Social Security payments, Medicare and Medicaid payments, retirement benefits, profit sharing benefits, contributed savings benefits, stock options benefits, sick leave benefits, educational benefits and grants, and all other legislated, contractual and/or donated benefits, whether vested or non-vested, and/or directly or

1 indirectly derived through the activity of Wife. Husband shall provide to Wife and
2 children medical and dental insurance expense coverage and also orthodontic
3 expense coverage for the children as long as they are eligible according to their
4 insurance provider.

5 5. Additional Award to Husband. In addition to the above, Husband
6 shall be awarded as his sole and separate property as property division the following
7 real and personal property, free and clear of any right, titles or interest of Wife therein:

8 A. Real estate contract on single family residence located at 3414 -
9 200th Street, Seattle, Washington, subject to any indebtedness thereon. See Exhibit
10 "A" for legal description attached hereto and incorporated herein by reference;

11 B. Proceeds from the sale of a single family residence located at
12 33411 - SW 23rd Avenue, Federal Way, Washington 98023, subject to any
13 indebtedness thereon. See Exhibit "B" for legal description attached hereto and
14 incorporated herein by reference, subject to \$75,000 awarded to Wife;

15 C. Proceeds from the sale of a duplex located at 31826 and 31828 -
16 118th Place S.E., Auburn, Washington subject to any indebtedness thereon. See
17 Exhibit "C" for legal description attached hereto and incorporated herein by reference,
18 subject to \$75,000 awarded to Wife;

19 D. Any and all boating equipment and boats, subject to any
20 indebtedness thereon;

E. Any vehicle or motor home which has been provided to Husband
for his sole use and convenience, subject to any indebtedness thereon;

1 F. All interest in the business of Washington Mortgage Services,
2 Inc., (A Washington corporation) d/b/a Home Mortgage USA, together with all of its
3 obligations and assets;

4 G. All interest in the business known as Freei Networks, Inc. d/b/a
5 Freei.net (a Washington corporation), together with all of its obligations and assets,
6 subject to the security interest to Wife herein;

7 H. Any and all bank accounts in Husband's name alone;

8 I. Any and all furnishings agreed to be awarded to Husband along
9 with his own personal clothing and property, jewelry, and such items as he may
10 hereinafter purchase.

11 J. Husband's 401(K) Plan worth about Twenty Thousand Dollars
12 and 00/100 (\$20,000);

13 K. Any and all life insurance policies insuring the life of Husband not
14 specifically referred to herein;

15 L. All insurance policies insuring any assets awarded to Husband
16 herein or belonging to Husband;

17 M. Any and all insurance in the name of Husband not specifically
18 referred to herein relating to medical, hospitalization, and dental care; and

19 N. Any and all rights and benefits derived as a result of Husband's
20 past or present employment, union affiliation, United States or other citizenship and/or
residence within a state, all of which include, but are not limited to: various forms of
insurance, rights to Social Security payments, unemployment compensation

1 payments, disability payments, Medicare and Medicaid payments, retirement benefits,
2 profit sharing benefits, contributed savings benefits, stock options benefits, sick leave
3 benefits, educational benefits and grants, and all other legislated, contractual and/or
4 donated benefits, whether vested or non-vested, and/or directly or indirectly derived
5 through the activity of Husband.

6 O. Husband's fractional interest in a condominium in Whistler,
7 Canada.

8 P. All sums in the trust accounts of Edward M. Lane, which relate to
9 assets sold which were given to Husband in the parties' prior Reconciliation
10 Agreement, less the \$75,000 previously awarded to Wife heretofore in this Agreement.

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

1 All income from any source earned or received by Husband for the year 2000
2 and all years beyond, shall be his separate property and shall be taxable to him. All
3 income from any source earned or received by Wife for the year 2000 and all years
4 beyond shall be taxable to Wife. Each shall be entitled to their respective refunds and
5 each shall hold the other harmless for any liability thereon for their separate returns.

6 7. Attorney's Fees and Costs. Each party shall bear his or her respective
7 attorney's fee incurred in connection with this Agreement and other legal expenses
8 and costs incurred in the previous dissolution action.

9 8. Obligations. Both parties represent and warrant that there are no
10 community obligations except those which are mentioned in this Agreement. It is
11 agreed that from and after the date of this Agreement, unless otherwise specifically
12 mentioned herein, each party shall pay and be responsible for any and all
13 indebtedness incurred by Husband or Wife and hold the other party harmless from any
14 payment thereon, and indemnify the other party should Husband or Wife be required
15 to pay on any obligation incurred subsequent to this date.

16 A. Husband's Obligations. Husband shall pay and hold Wife
17 harmless from any payments thereon, and indemnify Wife if she should be required to
18 pay on the following debts, whether separate or community:

19 (1) Notes, mortgages, or deeds of trust or obligations
20 incurring liens on the principal family residence located at 2521 - 208th Avenue East,
Sumner, Washington 98390, and real estate taxes to date;

1 (2) Notes, mortgage, or deeds of trust or obligations incurring
2 liens on the single family residence located at 3414 – 200th Street, Seattle,
3 Washington;

4 (3) Notes, mortgage, or deeds of trust or obligations incurring
5 liens on the single family residence located at 11 "F" Street NW, Auburn, Washington;

6 (4) Any and all debts related to Washington Mortgage
7 Services, Inc., d/b/a Home Mortgage USA or Freei Networks, Inc., d/b/a Freei.net;

8 (5) Any all debts or credit cards in Husband's name alone;
9 and

10 (6) Real estate taxes due on properties awarded to Husband,
11 and on Wife's home for taxes due April 30, 2000.

12 B. Wife's Obligations. Wife shall pay and hold Husband harmless
13 from any payments thereon and indemnify Husband should he be required to pay on
14 the following debts:

15 (1) Real estate taxes and insurance on property awarded to
16 Wife on or after the date of this Agreement; and

17 (2) Any and all debts or credit cards in Wife's name alone.

18 9. Effective After Death. Should the death of either party to this Agreement
19 occur following execution of this Agreement, the distribution of property agreed upon,
20 allocation of debts agreed upon, and other obligations agreed upon, shall nonetheless
be valid and shall be enforceable against the estate of either party insofar as

1 applicable law permits. A will executed by either party subsequent to this Agreement
2 is still effective according to its terms, but shall not affect the terms of this Agreement.

3 10. Execution of Necessary Documents. Both parties agree to execute all
4 documents and papers necessary to effectuate this Agreement and to sign the same
5 promptly.

6 11. Legal Descriptions. In the event that any legal descriptions are not
7 attached to this Agreement at the time the Agreement is executed, or if the legal
8 description is incorrect, each of the parties expressly authorize the attachment of
9 exhibits with legal descriptions, if any, and to correct any incorrect descriptions which
10 may now or later be attached, subject to the approval of both parties or their attorneys,
11 which approval shall not be unreasonably withheld.

12 12. Finality. The parties agree that this arrangement with respect to
13 their property rights and obligations, whether or not approved by the Court, shall
14 constitute a full and complete settlement of all of their property rights and obligations,
15 and neither party will claim, assert, or demand of or against the other party any relief
16 different than is embodied in this Agreement, and will not assert a demand that is
17 inconsistent or contrary to the terms embodied herein. In the event a Dissolution of
18 Marriage or Legal Separation action is pursued by either, the other agrees to speedily
19 cooperate to implement the terms of this Agreement.

20 13. No Inducements. It is understood and agreed that no inducements or
promises of any kind or nature have been made or extended from either of the parties
to the other which has induced the execution of this Agreement, and the same

SPOUSAL AGREEMENT - 12.

MCGAVICK
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A Professional Services

1102 Broadway, Suite 500 • Tacu

Telephone (253) 627-1181 • 1

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1 embodies in its entirety the Agreement between the parties relative to the disposition
2 of their property rights and the community obligations, and there is no other agreement
3 existing between the parties with reference to such property rights and community
4 obligations.

5 14. Fairness of the Agreement. The parties have discussed this Agreement
6 between themselves and their advisors. Both parties are aware that this Agreement
7 constitutes a legal contract, binding upon them and upon third parties, including their
8 heirs, executors, and assigns. The parties have satisfied themselves that this
9 Agreement is fair. Each party warrants to the other that they are unaware of any
10 indebtedness or claims by third parties against the community for any additional
11 community or separate assets, except as set forth herein.

12 15. Warranty. The parties warrant that this Agreement is fair and
13 equitable at the time of execution and no claim shall be made in regard to any future
14 investments or financial interests of the other party.

15 16. Integration. This Agreement sets forth the entire agreement between
16 the parties with regard to the subject matter hereof. All agreements, covenants,
17 representations, and warranties, express or implied, oral and written, of the parties
18 with regard to the subject matter thereof are contained herein. No other agreements,
19 covenants, representations or warranties, express or implied, oral or written, have
20 been made by either party to the other with respect to the subject matter of this
Agreement. All prior and contemporaneous conversations, negotiations, possible and
alleged agreements and representations, covenants and warranties with respect to the

1 subject matter hereof, are waived, merged herein, and superseded hereby. This is an
2 integrated agreement. Each party agrees to keep the terms of this Agreement
3 confidential to themselves and their advisors. They shall not reveal the details to
4 anyone else and they shall cooperate in seeking to have any court files sealed.

5 17. Severability. In the event any of the provisions of this Agreement are
6 deemed to be invalid or unenforceable, the same shall be deemed severable from the
7 remainder of this Agreement and shall not cause the invalidity or unenforceability of
8 the remainder of this Agreement. If such provision shall be deemed invalid due to its
9 scope or breadth, such provision shall be deemed valid to the extent of the scope or
10 breadth permitted by law.

11 18. Captions. Titles or captions contained herein are inserted as a
12 matter of convenience and for reference and in no way define, limit, extend, or
13 describe the scope of this Agreement or any provision hereof.

14 19. Interpretation. No provision of this Agreement is to be interpreted for or
15 against any party because that party or the party's legal representative drafted the
16 provision. Rather, the language in all parts of this Agreement shall be in all cases
17 construed as a whole according to its fair meaning and not strictly construed for nor
18 against either party.

19 20. Treatment of Income Tax. Each party shall be responsible for any
20 income tax obligation resulting from the distribution of the property awarded to them in
this Agreement.

1 21. Parenting and Support Issues. The parties agree that until the first
2 payment of Four Million Dollars and 00/100 (\$4,000,000) is made, Husband shall
3 provide to Wife a reasonable support of Five Thousand Five Hundred Dollars and
4 00/100 (\$5,500) per month to be used by her for the care and maintenance of herself,
5 her children, and minor maintenance of the family home. If there are major items of
6 repair and reasonable maintenance required on the home prior to the payment of Four
7 Million Dollars and 00/100 (\$4,000,000), Husband shall pay for the same.

8 On or after August 2000, upon the payment of Four Million Dollars and 00/100
9 (\$4,000,000), with the exception of medical and dental insurance expenses and
10 orthodontic expenses for the children to be paid by Husband, Wife shall pay and
11 provide all expenses for the care and maintenance of the family home, herself and for
12 the children, and Husband shall thereupon be relieved of any such obligation until
13 August 2001.

14 Upon the payment of the second sum of Four Million Dollars and 00/100
15 (\$4,000,000), with the exception of medical and dental insurance expenses and
16 orthodontic expenses for the children to be paid by Husband, Wife shall undertake as
17 above the costs and maintenance of the family home, of herself and the children, until
18 August 2002.

19 Upon the payment of the third sum of Four Million Dollars and 00/100
20 (\$4,000,000), with the exception of medical and dental insurance expenses and
orthodontic expenses for the children to be paid by Husband, Wife will undertake as

1 above the costs and maintenance of the family home, of herself and the children, until
2 August 2003.

3 Upon the final payment of Four Million Dollars and 00/100 (\$4,000,000) to Wife,
4 with the exception of the medical and dental insurance expenses and orthodontic
5 expenses for the children to be paid by Husband, Wife shall thereafter permanently
6 provide for the costs and maintenance of the family home, of herself and the support
7 of the children, except their education and the children's reasonable expenses through
8 college as the parties shall determine. College expenses shall be borne by the parties
9 in such proportion as the parties shall thereon mutually agree, or if no agreement, they
10 shall be paid one half by each parent.

11 Minor items of repair and maintenance above provided shall not exceed Two
12 Hundred and Fifty Dollars (\$250) on any repair and maintenance item. All other
13 repairs shall be considered major under the terms of this paragraph.

14 22. Dissolution Action. The action for dissolution presently pending shall be
15 dismissed, and both parties shall pay their own attorney's fees and costs incurred
16 therein. If an action for dissolution is commenced, either by Husband or Wife, this
17 Agreement shall be incorporated in full in any subsequent Decree of Dissolution. Wife
18 shall be designated as the person having residential care of the children, Madison
19 McCausland, age 8-1/2 (Birthdate: 6/20/91) and Delaney McCausland, age 5,
20 (Birthdate: 12/28/94), subject to reasonable visitation/residential provisions for the
Husband. Joint decision making shall be required for such issues as education,
religion, non-emergency medical care, driver's license, military service or marriage

1 under the age of 18. Child support obligations shall be established in accordance with
2 law. Any and all attorney's fees associated with the dissolution action shall be paid by
3 the party incurring the same.

4 23. Validity. Wife shall not challenge the validity of this Agreement,
5 and further warrants that she will make no additional claim upon Robert McCausland in
6 the future for anything further from him by way of property award or spousal
7 maintenance. Wife specifically waives any such claim in return for the award of
8 properties set forth above. Wife shall not take any action or make any claim contrary
9 to the terms of this agreement, except actions to enforce the terms of this Agreement,
10 or filing for dissolution of marriage or legal separation. Any claim or action by
11 Husband against Wife shall not relieve Husband of any financial obligation to Wife
12 except as provided for herein.

13 In the event of an action to enforce the terms of this Agreement by either party,
14 the successful party shall be entitled to his or her reasonable attorney's fees and costs
15 associated with such action. If Husband should fail to make payments required herein,
16 Husband shall be required to continue to pay Five Thousand, Five Hundred and
17 00/100 (\$5,500.00) per month until payments are made to Wife as herein provided. In
18 the event of default by Husband in payments provided, Wife shall be entitled to
19 interest at twelve percent (12%) per annum after due date, and reasonable attorney's
20 fees and costs incurred by Wife in any action to collect said sums.

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ATTORNEY'S CERTIFICATION

The undersigned hereby certifies that he is an attorney at law, duly licensed and admitted to practice in the State of Washington; that the undersigned has been employed by ROBERT G. McCausland, identified as Husband in the foregoing Agreement; that the undersigned has advised and consulted with the Husband in connection with his property and support rights and has fully explained to him the legal effect of the foregoing Agreement, and the effect that it has upon any property or support rights he would otherwise obtain as a matter of law; that the Husband and the undersigned have received answers to all of their inquiries concerning the property of the Wife; that the Husband, after being fully advised by the undersigned, acknowledged to the undersigned that he fully understood the legal effect of the foregoing Agreement, and would execute the same freely and voluntarily.

DATED this 20th day of March, 2000.

By Gregory H. Pratt
GREGORY H. PRATT, WSBA No. 3123
Attorney for Robert G. McCausland, Husband

CERTIFICATION OF ATTORNEY

The undersigned hereby certifies that he is an attorney at law, duly licensed and admitted to practice in the State of Washington; that the undersigned has been employed by ANGELA K. McCausland, identified as the Wife in the foregoing Agreement; that the undersigned has advised and consulted with the Wife in connection with her property and support rights and has fully explained to her the legal effect of the foregoing Agreement, and the effect that it has upon any property or support rights she would otherwise obtain as a matter of law; that the Wife and the undersigned have received answers to all of their inquiries concerning the property of the Husband; that the Wife, after being fully advised by the undersigned, acknowledged to the undersigned that she fully understood the legal effect of the foregoing Agreement, and would execute the same freely and voluntarily.

DATED this 24th day of March, 2000.

By Edward M. Lane
Edward M. Lane, WSBA No. 2972
Attorney for Angela K. McCausland, Wife

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EXHIBIT "A"
TO
SPOUSAL AGREEMENT

Legal Description for property located at:
3414 S. 200th St., Des Moines, WA 98198-5738

That portion of Government Lot 4, Section 3, Township 22 North, Range 4 East, W.M., in King County, Washington, described as follows:

Commencing at an iron pipe marking the West quarter corner of said Section 3; Thence North 3° 19' 38" West 30.01 Feet; Thence North 88° 00' 51" East, along the North margin of County Road, 36 feet North of and parallel with the East and West centerline of said Section 3, 600.81 feet to the true point of beginning; Thence continuing North 88° 00' 51" East 100 feet; Thence North 1° 46' 45" West 250 feet; Thence West 100 feet to a point which is North 1° 46' 45" West of the true point of beginning; Thence South 1° 46' 45" East 250 feet to the true point of beginning; Except the East 05 feet of the South 125 Feet thereof;

(Also known as portion of Tract 143, Angle Lake Shore Acres No. 3, According to the unrecorded Plat thereof.)

Situate in the County of King State of Washington.



EXHIBIT "B"
TO
SPOUSAL AGREEMENT

Legal Description for property located at:
33411 SW 23rd Ave., Federal Way, WA 98023-2807

Lot 39, Westway, According to the Plat thereof, Recorded in Volume 90 of Plats, Pages 13 through 15, inclusive, in King County, Washington.

SUBJECT TO:

Easement provision contained in said plat, restriction contained in said plat, covenants, conditions, restriction, easement and liability for assessments recorded under Recording No. 6529604 and amended under Recording No. 6668027, Agreement and the terms and conditions Recorded under Recording No. 6468689 and modified under Recording No. 8401170853, and the right of the public to make necessary slopes for cuts or fills.

EXHIBIT "C"
TO
SPOUSAL AGREEMENT

Legal Description for property located at:
31826 and 31828 – 118th P. SE, Auburn, WA 98002

Lots 90 and 91, LEA HILL VILLAGE DIVISION NO. 1, according to the plat thereof
recorded in Volume 87 of Plats, pages 39 through 41, in King County, Washington.



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

FINDINGS OF FACT AND CONCLUSIONS OF LAW -

Page 1

Smith Alling Lane

A Professional Services Corporation Attorneys at Law

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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
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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. Notwithstanding the foregoing, the parties acknowledge that all of the payments and
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FINDINGS OF FACT AND CONCLUSIONS OF LAW -

Page 4

*Smith
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 Lane*

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 Attorneys at Law*

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 Facsimile: (253)

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
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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
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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

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

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 \$249,816.00 (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.
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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,
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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.
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3186 6/25/2004 LA

(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.

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

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

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

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

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

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

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Attorney for Respondent

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