

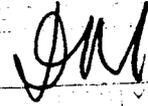
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STATE OF WASHINGTON

BY



31892-0-II

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

In Re the Marriage of:

ANGELA K. McCAUSLAND,

Petitioner/Respondent/Cross-Appellant

-and-

ROBERT G. McCAUSLAND,

Respondent/Appellant/Cross-Respondent

REPLY TO RESPONSE TO CROSS APPEAL

Edward M. Lane, Esq., WSBA #2972
Barbara A. Henderson, Esq., WSBA #16175
SMITH ALLING LANE, P.S.
Attorneys for Respondent
1102 Broadway Plaza, Suite 403
Tacoma, WA 98402
(253) 627-1091

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A. Statement of Issues.

Cross Appellant, Angela McCausland, reincorporates her assignments of error and issues related to assignments of error and her statement of the case on pages 2 – 12 of the Brief of Respondent.

B. The trial court erred in failing to follow the mandate of the court in determining the character and amount of attorney's fees and costs to be awarded to Angela McCausland in enforcing the Spousal Agreement or applying RCW 26.09.140 in view of Angela's need and Robert's ability to pay.

This court in McCausland 2002 in its mandate contained in its unpublished opinion, dated June 28, 2002, as set forth in Angela's responsive brief on pages 24 and 25, granted the trial court authority to award fees under RCW 26.09.140, or as designated under *In Re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994), *review denied*, 126 Wn. 2d 1011 (1995). The argument to the contrary fails to understand this court's decision and its mandate. This court should directly mandate the award of attorney's fees and costs.

C. The trial court erred in awarding \$396,000.00 in tax refunds for taxes paid by the community in 1997 and 1998 and granting 20 years of tax deductions, all not called for in the Spousal Agreement, without dividing it with Angela or considering it for an award of attorney's fees and costs to Angela.

Robert points out that this Cross Appellant did not assign error to the trial court's Findings of Fact and as such is a factual verity. *Marriage*

of Brewer, 137 Wn.2d 756, 976 P.2d 102 (1999). Angela points out that this finding of fact is based on an error of law and is certainly appealable without the assignment of error to the factual finding upon which this error is based. The Findings of Fact relating to this subject (CP 564-565) describes in detail the court's findings with respect to the subject. The trial court's finding (CP 564-565) in pertinent part is as follows:

...that in spite of the forgery and the fact that the joint tax refunds were for years during which the parties were married to one another and joint tax returns were filed for those years, Respondent should be awarded all right, title and interest in and to the IRS refunds for tax years 1997 and 1998, plus all interest accrued thereon...in the total amount of \$396,072.68.

(CP 565, Paragraph 24).

Paragraph 6 of the Spousal Agreement upon which the trial court's conclusion is based states as follows:

Income tax liability. Should any joint tax return of the parties be audited, husband should be responsible for any additional tax due, and shall be entitled to any refund due, provided, however, that should any additional taxes, interest or penalty be due to the misrepresentation or negligence of either party, that party shall be fully responsible for any additional tax, interest or penalties and shall indemnify and hold the other harmless therefrom. For the year 1999, husband and wife shall report to the IRS all income for that year in a form most beneficial to the parties. If a joint return is selected and filed, husband shall be responsible for the payment of all income taxes, and shall be entitled to all refunds...

(CP 64).

The issue then before this court is solely whether paragraph 6 on page 9 of the Spousal Agreement (CP 56-76) does in fact establish the award of that sum of money to Robert. The trial court opined that in spite of the forgery and the fact that the joint tax returns were for years in which the parties were married and that it was done without notice to Angela and was not truly an audit as spelled out in paragraph 6 of the Spousal Agreement (CP 64), that sum should be awarded to Robert. It is clear that an audit is an independent action by the Internal Revenue Service in reviewing a tax return filed by parties in which errors are claimed. Here, it is undisputed that there was no audit of any past income tax returns. There was an amendment to the tax returns of 1997 and 1998 initiated solely by Robert, without notice to Angela, by forging her signature. There was no audit that would trigger the language of paragraph 6 of the Spousal Agreement.

The other subject specified in the Spousal Agreement is the income tax returns to be filed for 1999. The Agreement provides that "if a joint return is selected and filed, husband shall be responsible for the payment of all income taxes and shall be entitled to all refunds." This latter reference relates solely to the 1999 return. The facts as set forth by the Court in its Findings of Fact spell out the differences. A 1999 tax return

was filed jointly by the parties, signed by both as shown in Clerk's Paper 243-255. The 1999 refund of \$11,103.00 (CP 243) was requested and paid to Robert. The amended returns for 1997 and 1998 were not contemplated in the Spousal Agreement language or by the parties (CP 258-262). The refunds for those years, therefore, should have been and must be considered by this Court as having not been covered by the terms of the Spousal Agreement and not contemplated by the parties at the time of the execution of the agreement. Robert, in this case, somehow conjures up unwritten language in the Spousal Agreement and creates a theory that since the parties both signed a joint return in 1999 to get an \$11,103.00 refund that Angela and her lawyers are bound to know that he could forge Angela's signature and amend the 1997 and 1998 joint tax returns, giving him a \$396,000.00 refund. That concept stretches the language of the Spousal Agreement, Angela's knowledge of the fact that he had done so, the tax laws and the anticipation of that act by both her and her lawyers. As stated many times by the trial judge, "An agreement is an agreement is an agreement." The written agreement cannot be extended beyond its terms to warrant Robert's actions or the arguments of his counsel in response thereto. The 1997 and 1998 income tax refunds are property of the parties and should have been divided. If not divided, then at the very least the refund should certainly have been considered in the award of

attorney's fees under the requirements set forth in the *Knight* case. *In Re Marriage of Knight*, 75 Wn. App. 21, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995). The fact that Robert was awarded over \$396,000.00 in cash gave him the ability to pay Angela's attorney's fees.

D. Angela is entitled to attorney's fees under the provisions of the Spousal Agreement, RCW 26.09.140, and the *In Re Marriage of Knight*, *infra.*, factors.

Appellant contends that Robert is entitled to attorney's fees for enforcing the 2000 Agreement in this Cross-Appeal. Obtaining \$396,000.00 (by forgery) and by means neither spelled out in the Spousal Agreement nor contemplated by the parties at the time entitles him to attorney's fees? Not so. The findings of Judge Fleming, the trial judge, set forth the facts surrounding Robert's fraudulent conduct and certainly the ultimate result should not in any way be interpreted as his attempt to enforce the terms of the Spousal Agreement. On the other hand, Angela has in every way possible attempted to enforce the Spousal Agreement in spite of Robert's challenges to the Agreement. This appeal and the previous one are both attempts on his part to challenge the Agreement and the trial court's attempt to enforce the terms thereof. Angela has been called upon to expend considerable money in defending against Robert's charges in both this and the former appeal. The substantial award to Robert as a result of his fraudulent amendment of the tax returns for 1997

and 1998 should be considered in an award of attorney's fees to Angela in accordance with *McCausland* 1. Angela has enforced the terms of the agreement (CP 72). Angela is entitled to fees and costs under RCW 26.09.140 and the *Knight* factors.

CONCLUSION

In relating solely to the response to the cross appeal by Angela and this reply, Angela concludes as follows:

1. The court should determine that Robert's fraudulent amendment of the 1997 and 1998 federal income tax returns in October of 2002 resulting in \$396,000.00 in income tax refunds created a marital asset that should be divided equally between Robert and Angela. The Spousal Agreement did not, by its terms, mention or contemplate upon such an act or provide for the distribution of the results thereof. This amendment was not contemplated by the parties or their lawyers at the time the instrument was entered into. The trigger word "audit" did not occur to award Robert the income tax refunds for those years and the court, therefore, should hold as a matter of law that the \$396,000.00 tax refunds for the years 1997 and 1998 were community property and should have been divided and awarded to the parties equally.

2. The matter of attorney's fees has been discussed above and it is clear that the statute and the terms of the *Knight* case direct this court

to award Angela attorney's fees and costs, both incurred prior to and during this appeal, in a sum now totaling approximately \$65,000.00, for the costs and expenses of the trial work after the execution of the Spousal Agreement, through all the processes since then, the first and second appeal, and the interim hearings on remand.

RESPECTFULLY SUBMITTED this 15th day of March, 2005.

SMITH ALLING LANE, P.S.



EDWARD M. LANE, WSBA #2972
BARBARA A. HENDERSON, WSBA #16175
Attorneys for Respondent
1102 Broadway Plaza, Suite 403
Tacoma, WA 98402
(253) 627-1091

CERTIFICATE OF SERVICE

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

That on the 15th day of March, 2005, I arranged for service and delivery of the foregoing Reply to Response to Cross Appeal via ABC Legal Messengers to the following:

Catherine W. Smith, Esq.
Valerie Villacin, Esq.
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98104

Jeffrey A. Robinson, Esq.
Attorney at Law
4700 Pt. Fosdick Prof. Bldg., Suite 301
Gig Harbor, WA 98335

Dated this 15th day of March, 2005, at Tacoma, Washington.


ANN CHRISTIAN, Legal Assistant

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