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

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In Re the Marriage of:

ANGELA K. McCAUSLAND,

Petitioner/Respondent/Cross-Appellant

-and-

ROBERT G. McCAUSLAND,

Respondent/Appellant/Cross-Respondent

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**BRIEF OF RESPONDENT**

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## I. RESPONSE TO INTRODUCTION

This is the second appeal by Robert G. McCausland, Appellant, and the first cross-appeal by Angela K. McCausland, Respondent, from rulings by Pierce County Superior Court Judge Frederick W. Fleming, arising from his interpretation and enforcement of a Spousal Agreement dated March 23, 2000. Robert McCausland argues that the trial court improperly enforced the remand decision of this Court filed on June 28, 2002. Angela McCausland's cross appeals on the court's denial of attorney's fees and costs incurred by her after the court awarded to Robert McCausland the sum of \$396,000.00 unexpectedly received as IRS refunds for the years of the parties' marriage in 1997 and 1998 not contemplated in the Spousal Agreement.

Robert McCausland argues, even in the introduction, that the trial court failed to follow this Court's decision and that the Court should act again to reverse the trial court's order on remand from this Court.

Angela McCausland contends that the court did follow the Appellate Court's decision on remand but then awarded to Robert McCausland the sum of \$396,000.00 income tax refunds for 1997 and 1998 that were not contemplated at the time of the spousal agreement and then failed to take into consideration the need of Angela McCausland for

attorney's fees and costs and to consider the ability of Robert McCausland to pay.

The suggestion that this Court should remand this case to a different judge and to provide "specific directions to the trial court to fashion a ruling that maintains the integrity of this court's earlier decision" is insulting and misplaced. The trial court followed this Court's decision.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to award attorney's fees and costs to Angela McCausland in view of the spousal agreement and the extraordinary unexpected windfall in the form of IRS refunds totaling \$396,000.00 RP 22 and not contemplated within the Spousal Agreement.

2. The trial court erred in entering an order (CP 419-421) awarding the total IRS refund of \$396,000.00 RP 4-22 to Robert McCausland without dividing said refund with Angela McCausland.

3. The trial court erred in its order dated July 30, 2004, (CP 575-576) in denying an award of attorney's fees and costs to Angela McCausland as spelled out in the affidavits provided to the court (CP 424-426) and Memorandum in Support (CP 450-451 and 439-449), reflecting Angela McCausland's need and Robert McCausland's ability to pay.

4. The trial court erred in failing to award attorney's fees and costs after this Court remanded "for reconsideration of the attorney fee

award to Angela and to establish a factual basis for any fee award” and in following the language of this Court in Section 2.14 that sets out the precise method for determining and awarding fees and costs.

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred in failing to follow the mandate of this 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.

2. Whether this court erred in awarding \$396,000 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.

### **IV. STATEMENT OF THE CASE**

This is a second appeal limited to the Honorable Frederick Fleming’s decision on remand from this Court, *Marriage of McCausland*, 112 Wn. App. 1029 (2002).

The Appellant’s statement of the case, paragraphs A through D, allegedly “adopted largely from the Court’s unpublished decision,” is a factual recitation based partly on the decision and unnecessarily inserting the Appellant’s contentions not supported by the Appellate Court’s factual determinations. The Respondent therefore reviews the facts as found by this Appellate Court.

**A. Background.**

Robert and Angela McCausland married on May 26, 1988. They have two young children. 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.

**B. 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" (1998 Agreement) which dismissed the dissolution petition. Robert's attorney drafted the 1998 Agreement. Provision 10 of the 1998 Agreement stated that (1) each party was represented and advised by a lawyer of his or her choice, (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 separate and 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.

**C. 2000 Separation Agreement**

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 \$2,756.00 monthly (\$1,222.00 spousal maintenance and \$1,534.00 child support). Instead, Angela filed a motion for temporary spousal maintenance of \$4,000.00 per month and child support of \$6,000.00 per month, and asked the court to award her \$5,000.00 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 “seemed 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

(RP) (5/26/99) at 23-24. The Commissioner then granted Angela temporary family support of \$7,100.00 per month, and ordered Robert to pay \$5,000.00 in attorney's fees and \$5,000.00 for a professional to determine the true financial status of his business.

Robert moved for judicial revision. On June 25, 1999, a superior court judge revised the commissioner's earlier ruling, gave counsel three (3) months "to find out what the real income is" and reduced Robert 's temporary family support payments to \$5,500.00 per month. Although 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 previously ordered by the commissioner. In setting the combined monthly support at \$5,500.00, the trial court stated: "[F]air thing to do is, since you're arguing about it, I'm just going to split the difference, \$5,500.00." RP (6/25/99) at 16, 19.

**D. Spousal Agreement (2000 Agreement).**

On March 23, 2000, Angela and Robert entered into a revised “Spousal Agreement” (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 sixteen million dollars as her share of his budding internet company’s expected future value, in four (4) equal installments, beginning in August, 2000.

The 2000 Agreement also contained a “parenting and support issues” section, revised from the 1998 Agreement. The new language provided that until the \$16 million was paid in full, Robert would continue to make the \$5,500.00 monthly payments for care and maintenance of Angela, her children, and the family home. The 2000 Agreement further provided that the parties would dismiss the pending dissolution action. But Angela did not do so. On June 2, 2000, Robert filed a response and counter petition.

In the fall of 2000, the IPO for Robert’s 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. Although 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 as long as the 2000 Agreement was not unfair at the time it was entered. Thus, the commissioner declined to modify the support payments and he awarded attorney's fees to Angela.

Robert moved for revision. The superior court agreed that there had been a change of circumstance, 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 am 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's summarily denied all of his claims without hearing any evidence and adopted Angela's position that if the contract was fair at its inception, then it must be enforced without regard to judicial 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 \$5,500.00 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 trial court entered the dissolution decree and awarded Angela attorney's 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 trial court set the attorney fee award at \$13,000.00 and entered that amount as a judgment against Robert. Robert appealed.

**E. 2002 Appeal**

In response to Section E, 2002 Appeal, this Court in its unpublished opinion said as follows:

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 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 requirements of RCW 26.19, including specifying any appropriate deviations and the justification therefore; and to adjust the property distribution as necessitated by the reconsideration of the combined monthly payments. We also remand for reconsideration of the attorney fee award to Angela and to establish a factual basis for any fee award.

Robert made the assertion that "this Court noted that two major components of the 2000 agreement were unenforceable" and that the court erred in awarding the monthly payment as property division. He then went on to say, "Judge Fleming ignored the extensive property division separately effected by the other provisions of the 2000 agreement." Citing, *McCausland*, 2002 WL 1399120 at \*4, fn. 6. This Court did not do any such thing. Judge Fleming determined that as a result of Angela's

concession the sixteen-million-dollar award would not be factually possible (RP 3), and held that the agreed upon monthly payment of \$5,500.00 had been tied to the sixteen-million-dollar award was property division. In Appellant's words, "the trial court then deleted from the 2000 agreement Robert's \$16 million payment to Angela, but it upheld the monthly \$5,500.00 payments, characterizing them as a property division for the maintenance of Angela and her children."

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

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

That direction, though somewhat unclear, was accomplished by the trial court by specifying the portion of the \$5,500.00 monthly payment allocable to child support and adjusting the property distribution as necessitated by the reconsideration of the agreed upon monthly payment.

**F. 2003 Appeal.**

This Court did not reverse the trial court's award of attorney fees to Angela but recognized that RCW 26.09.140 "allows a trial court to award reasonable attorney fees after considering the financial resources of

both parties,” and remanded 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 this statute, then it must state on the record the method it used to calculate such award. *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995).” In footnote 7 the court stated:

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.

It is clear from the above language that this Court did not reverse but merely remanded the attorney fee issue to the trial court for reconsideration in view of the factors above cited.

## V. ARGUMENT

### A. The trial court followed this court’s mandate.

This Court in its unpublished opinion dated June 28, 2002, in Cause No. 27386-1-II, on page 11 held:

We reverse and remand to the trial court to reconsider and to segregate monthly child support, spousal maintenance, and any property distribution adjustments flowing therefrom. The trial court must set child support according to the requirements of RCW 26.19, specifying any appropriate deviations and the justification therefore. The trial court shall also reconsider its award of attorney's fees at trial, as set forth above.

The Appellant cited two cases for the proposition that the mandate of the appellate court is binding on the trial court.

It must be strictly followed and carried into effect according to the true intent and meaning as determined by the directions given by the court.

Citing, *Ethredge v. Diamond Drill Cont. Co.*, 200 Wash. 273, 276, 93 P.2d 324 (1939); the Appellant also cited *Harp v. American Surety Company of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957). The *Ethredge* case involved a construction contract issue and affirmed the actions of the trial court in saying:

The trial court in following the direction of this court was limited to hearing... . \_\_\_\_\_ competent, relevant and material evidence as may be offered by either party as to what was said and done at the time the agreement of March 20<sup>th</sup> was executed by the parties.

*Harp* was an action on a supersedes bond in a divorce action, the court commenting on page 369 said:

The distinction between what the superior court was obligated to do without the exercise of any discretion and the area within which it could exercise its discretion is clear. It is that exercise of discretion which is the distinguishing feature between this case and *Empson v. Fortune*, 102 Wash. 16, 172 Pac. 873

(1918)... . In that case, the supreme court left no discretion to the superior court; here the superior court was directed to exercise its discretion 'as to property division, alimony, and attorney's fees,' and when it did, it was, so far as the payments and attorney's fees were concerned, an entirely new judgment and subject to appeal on every issue where discretion had been exercised.

It is clear then that when the Court of Appeals ordered that the trial court "reconsider and to segregate monthly child support, spousal maintenance, and adding property distribution adjustments flowing therefrom," and directing the trial court to set "child support according to the requirements of RCW 26.19, specifying any appropriate deviations and the justifications therefore." Its mandate therefore directed the trial court to "reconsider" which essentially is to exercise discretion in following this Court's mandate. The trial court did just that.

- 1. The \$5,500.00 monthly combined family support payment provision was reconsidered and segregation was made as required.**

The Spousal Agreement executed on March 23, 2000 was analyzed on page 7 of this Court's decision. It upheld the terms specified in the Spousal Agreement under RCW 26.09.070(3), the statute governing separation agreements. The Court held that "under this statute, separation agreement provisions concerning child support are not binding on the court." Child support then became the issue and the court ordered that the family support of \$5,500.00 per month be segregated and child support

should be set based on the statutory child support schedule or a justified deviation therefrom following RCW 26.09.100(2). This Court cited Chapter 26.19 RCW and *In re Marriage of Ayyad*, 110 Wn. App. 462, 38 P.3rd 1033 (2002).

The Court then directed “that the trial court first determine 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).

The trial court found after testimony of both the parties and Angela’s CPA (both parties agreed with his analysis)(RP 210), that based on the \$12,523 (CP 546) net income per month (*See* RP 208-209) that Robert earns and the imputed amount of \$2,000 a month (CP 546) to Angela (RP 8), that \$2,842 per month is child support (CP 546) and the balance of the \$5,500, (\$2,648 per month) (CP 559) is property division. (RP 8 and CP 572-573) The trial court did precisely what the Court of Appeals ordered, segregated the \$5,500 per month and determined and ordered child support in accordance with RCW 26.19.

The sixteen-million-dollar provision in the Spousal Agreement was determined by the trial judge after hearing testimony concerning the bankruptcy of the FreeI Net internet organization and the waiver by Angela

of the enforcement of that provision to be factually unenforceable and so held. But in lieu thereof, Angela argued that the \$5,500 family support provision should be enforced. The trial court agreed, noting that Angela had taken a “bird in the hand rather than three dozen in the bush.” (RP 23) This court did not disagree but held that it was necessary to determine the amount of child support as required by statute and segregate the monthly family support to comply. At no time did this court hold that the monthly family support sum was unenforceable or in any way determine that the Spousal Agreement itself was unenforceable.

2. **The trial court followed the mandate, segregated the \$5,500 family maintenance provision, determined the amount of child support, reconsidered and allocated property division as required.**

The mandate of this Court directed the trial court to “reconsider and segregate monthly child support, spousal maintenance, and any property distribution adjustments flowing therefrom.” *McCausland*, 2002 WL 1399120 at 11.

Now the Appellant cites *Harp v. American Surety Company of New York, supra*, for the proposition that the trial court had no discretion with regard to the monthly payments. That is contrary to the holding of the *Harp* case and it is contrary to this Court’s directions to “reconsider” which is a mandate to exercise discretion. *Harp v. American Surety Company of*

*New York, supra.* The Spousal Agreement (CP 56-76) set forth the monthly payments agreed upon by the parties (CP 70-71) which this Court upheld subject only to the direction to establish child support in accordance with RCW 26.19. The trial court followed the mandate and direction of this Court. *Biggs v. Vail*, 124 Wn.2d 193, 202, *footnote 3*, 876 P.2d 448 (1994) is not authority for the proposition alleged by the Appellant. The *Biggs* case involved a CR 11 finding after a first appeal and the *Biggs* court, in reviewing the action of the trial court, made a second remand requiring the trial court to make “explicit findings as to which filings violated CR 11, if any, as well as such pleadings that constituted a violation...” without imposing any sanctions on the trial court. *Biggs v. Vail, supra* at 202. In the *McCausland* case, the trial court made comprehensive findings supporting the amended decree of dissolution (CP 570-574 and CP 557-569).

**3. The Appellant’s contention that this Court held that the \$16 million payment provision was unenforceable is misplaced.**

This Court commented in its decision, *McCausland*, 2002 WL 1399120 at 6:

The trial court then deleted from the 2000 Agreement, Robert’s \$16 million payment to Angela.

This was not in any way a holding by this Court that the \$16 million payment provision was “unenforceable.” The trial court recognized in the evidence produced by both parties that the \$16 million payment was factually unpayable but the provision for the payment of \$5,500 per month was enforceable under the terms of the contract. RP (6/2/04) at 11, 13 (CP 558) It is clear that the whole of the Appellant’s argument on these issues is based solely on the contention that this Court held that the \$16 million provision, the \$5,500 per month and other related provisions were “unenforceable.” That contention is inaccurate and the argument based upon that premise is misplaced.

**4. Contrary to the Appellant’s contention, there is not now nor since the trial judge’s ruling in 1999 any spousal maintenance. RP (6/25/99) at 16, 19. RP (6/25/99) 15, 16.**

The trial court has consistently held that the \$5,500 per month payment required by the Spousal Agreement was unsegregated family maintenance required to be paid by Robert to Angela and that sum did not include spousal maintenance to Angela. RP (6/2/04) at 15, 16. This Court determined that RCW 26.19 required the court to segregate the amount attributable to child support. The trial court did so based upon a \$13,333 gross monthly nontaxable income of Robert and an imputed net income of \$2,000 per month for Angela. RP (307). (CP 558-559).

The trial court determined that the balance over and above child support was property division in lieu of the \$16 million required to be paid in accordance with the Spousal Agreement. The trial court exercised its discretion granted to it by this Court directing the trial court to “reconsider.”

The trial court also awarded to Robert the additional sum of \$396,000 garnered as income tax refunds payable to both parties for tax years 1997 and 1998, during the marriage of the parties. The income tax refunds were obtained by Robert by forging Angela’s signature to the amended income tax returns submitted. (RP 216 Exhibits 3 & 4) (RP 219) This windfall was not specifically noted as property division in the Spousal Agreement. (CP 62-65) The trial court also noted, contrary to Appellant’s allegations, that Robert was awarded substantial, additional property in the Eden BioScience investment, valued at the time of the trial at \$45 per share times 20,000 shares or \$900,000 (RP 119).

The assertion by the Appellant that Angela should repay to Robert the amount not characterized as child support is unfounded. The trial court found that the portion of the \$5,500 per month payment above the amount of child support was property. RP (301). They have cited CP 501 at FF 27A which says, “The payments of wife commencing with the Spousal Agreement in March 2000 are property division in part and child

support in part and not spousal maintenance.” Those two citations support Angela’s contention. The argument that the amount attributable to spousal maintenance over the child support portion of the \$5,500 per month payment is unfounded because there has not been an amount determined to be spousal maintenance and the argument to the contrary is not supported by the evidence.

**B. The trial court did not err in calculating the child support obligation.**

Extrapolation was called for in view of the substantial income of Robert at \$13,333 nontaxable gross income per month and Angela’s imputed net income of \$2,000 per month.

**1. The trial court did not err by setting child support.**

The standard of review of a trial court’s decision setting child support is abuse of discretion. *In Re Marriage of Crosetto*, 82 Wn. App. 454, 560, 918 P.2d 954 (1996). In order to find abuse of discretion, the trial court’s decision must be manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 284 P.2d 775 (1971).

A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record... .

*In Re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Finally, the amount of child support rests in the sound discretion of the trial court. *In Re Marriage of Stern*, 57 Wn. App. 707, 717, 789 P.2d 807, *review denied*, 115 Wn.2d 1013 (1990).

RCW 26.19.020 specifically provides that when the parties' combined monthly net incomes exceed \$7,000.00, the court may exceed the advisory amount of support "upon written findings of fact". *See also* RCW 26.19.065(3). Here, Robert argues that the trial court's findings are insufficient to support its use of the extrapolation method for calculating his child support obligation. In support of that argument, Robert relies upon two recent decisions from Division I, *Marriage of Rusch*, \_\_\_\_ Wn. App. \_\_\_\_, 98 P.3d 1216 (2004) and *Marriage of Daubert/Johnson*, \_\_\_\_ Wn. App. \_\_\_\_, 99 P.3d 401 (2004). *Rusch* was decided on August 23, 2004, with publication ordered October 15, 2004, while *Daubert/Johnson* was decided on October 25, 2004, and amended on reconsideration December 16, 2004. Neither of these cases had even been decided by Division I on June 4, 2004, when the findings in this case were entered.

Instead, Angela relied upon (and continues to rely upon) *Marriage of Clarke*, 112 Wn. App. 370, 48 P.3d 1032 (Division II, 2002). In *Clarke*, the trial court's finding stated "good grounds exist to use the extrapolated amount" (*Clarke*, 112 Wn. App. at 381.) There, this court held that

although that finding was cursory “the remaining record is sufficient to support the court’s extrapolation”. *Id.* Washington courts have recognized that:

In establishing the child support schedule, the legislature intended 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. RCW 26.19.010; *In Re Marriage of Leslie*, 90 Wn. App 796, 803, 954 P.2d 330 (1989), *review denied*, 137 Wn.2d 1003, 972 P.2d 466 (1999). (Emphasis added).

*Marriage of Clarke*, 112 Wn. App. at 377.

Moreover, in *Leslie*, the court held that exceeding the maximum amount of support provided by the economic table is not a deviation. *Leslie*, 90 Wn. App. at 804; *Marriage Scanlon*, 109 Wn. App. 167, 176-77, 34 P.3d 877 (2001).

Here, the court’s order on support requires Robert to pay less than 23% of his net income to support his two children. Because the amount ordered is less than 45% of Robert’s monthly nontaxable net income of \$12,523.17 (CP 546), RCW 26.19.065(1) does not require the trial court to find that the children have special medical, educational or psychological needs. Instead, the court was entitled to consider the fact that Robert had demonstrated a consistent ability to produce a higher than average income, both throughout and following his marriage to Angela. By use of the

extrapolation method, the court awarded support commensurate with both the parents' income and standard of living.

Angela also presented evidence of expenses for the children, including dance and sports. As a teacher, Angela would be unable to earn sufficient income to provide the lifestyle that Robert afforded the children during the marriage and continues to be able to provide to them with the income to which he testified at the time of trial. As in *Clarke*, "the lack of a trial court's specific findings is not fatal" (*Clarke*, 112 Wn. App. at 382) since this court is to review the record as a whole in light of the purposes and limitations set forth in the statute.

**2. The trial court correctly ordered the father to be solely responsible for extraordinary healthcare expenses for the children.**

The trial court correctly ordered Robert to pay 100% of extraordinary medical and dental expenses for the children. (CP 495, FF 11, CP 549) Robert argues that the trial court had no discretion to divide extraordinary healthcare expense in a proportion different than the basic child support obligation. However, this argument ignores the unique and overriding fact that Robert entered into a contractual agreement to do so. (Spousal Agreement, CP 207-208)

Thus, the trial court was not called upon to exercise any discretion or to apportion these expenses pursuant to statute. Instead, the parties

entered into a contract which was fair at the time of execution and which the trial court enforced pursuant to its terms.

**C. The trial court erred in refusing to grant to Angela attorney's fees and costs.**

The trial court erred in refusing to grant to Angela her attorney's fees and costs under the terms of the Spousal Agreement or under the terms expressed in this Court's mandate 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).

This Court in *McCausland*, 2002 WL 1399120 at 9, commented that:

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

This Court remanded to the trial court for reconsideration of an attorney fee award under the statute. Footnote 7 described the method to be used in calculating a reasonable amount of fees. The trial court should consider the following three (3) 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.

These directions to the trial court were sufficient for the court to have reconsidered the attorney fee award and to consider in addition any additional award of fees and costs. Angela has been called upon to expend substantial sums of money on attorney fees and costs as shown in the Affidavit of Edward M. Lane, (CP 424-438) in the enforcement of the contractual terms agreed upon by the parties and the first and second appeals, with little or no assets from which to pay them. (RP 113-116) (CP 454-480)

The trial court ignored this request and refused to consider or reconsider Angela's request (RP 298), even though directed to do so by this Court and even after awarding to Robert the \$396,000, IRS refunds fraudulently obtained and un contemplated by the parties in their Agreement. (Exhibit 8, CP 56-76) The trial court further refused to require Robert, from said funds, to pay the balance of the \$81,000 due on the mortgage on the family home that would enable Angela to obtain

financing on said home to pay the substantial sums that are presently unpaid. The award gives Robert substantially more assets from which he would be able to pay attorney fees and costs awarded to her. The properties that have been awarded to Angela under the terms of the Decree of Dissolution and Agreement were not cash assets capable of paying the substantial expenses. This Court should order the trial court to determine the reasonableness of the attorney fees and costs requested and award Angela her fees and costs as requested. Angela should be awarded her attorney fees and costs incurred in this appeal in a sum to be specified.

**D. The trial court erred in awarding the tax refund of \$396,000, plus 20 years of tax deductions, to Robert and in failing to divide it with Angela.**

The tax refund was not mentioned in the Spousal Agreement (Exhibit 8, CP 56-76) and became a new issue for the trial court. The refunds were for the years 1997 (CP 39-41) and 1998 (CP 41-46) and were the return of funds paid to the IRS by the parties during their marriage. (RP 37-38) The refunds were obtained by Robert forging Angela's signature on the amended tax returns. (RP 95) (RP 192) The refund checks were issued to both parties. (RP 96-98) This additional award to Robert gave him substantial funds to pay for Angela's needed award of attorney's fees and costs. It also eliminated federal taxes worth millions of dollars on future income for 20 years. (RP 49)(RP 42)(Exhibit 7) This

court on remand should reverse this award and order the trial court to award Angela at least one half of the refund amount and future tax deductions. The alternative is to pay off the mortgage of \$81,000.00 on her home and allow her to refinance to pay her attorney's fees and costs incurred in these expensive proceedings.

## **VI. CONCLUSION**

Judge Frederick Fleming has in all ways attempted to enforce the terms of this Court's mandate. He has extensive knowledge and understanding of the case that would take another judge, many, many hours of review. This second appeal questioning the enforcement of the mandate by Judge Fleming only multiplies the complexity of this case. The mandate itself, although specific in some areas, is confusing. It was difficult for the judge and the parties to understand. This confusion is illustrated not only by the regular proceedings but also the briefs in this case where allegations are made by the Appellant that have not been supported by this Court's decision, all of which can be noted by this Court in its review.

Judge Fleming had been ordered to determine what portion of the agreed upon \$5,500 per month was attributable to child support. He has done that. The Appellant's even argue the basis upon which he made that determination even in spite of their counsel's agreement that the amount

was appropriate. The issuing of a new mandate to a new judge in accordance with the Appellant's position would only multiply the expense to the parties and the complexity of the case to a new trial judge. The suggestion that first this court should direct the trial court to change its method of calculation of child support and second, to order "restitution" to Robert for sums they claim were overpaid and then in adding an argument for restitution of attorney fees paid by the husband for the wife's attorney and for a reversal of the award (that has not previously been argued) are all fallacious arguments.

The suggestion that the Court should direct the trial court to order the amending of previous years tax returns to reflect the deductibility of Robert of any payments to Angela "that are not reimbursed" is once again not argued in the main portion of the Appellant's brief and is neither reasonable nor capable of accomplishing, particularly in view of Robert's fraudulent tax amendments that have obtained tax refunds for 1997 and 1998 based upon losses in 2000 and his future 20 years of millions of dollars of tax losses awarded to him obviating any future income tax charges.

Angela requests attorney fees on appeal for sums that have been required to respond to this Appellant's brief and that the Court further order that Judge Fleming, the trial judge, reconsider and order Angela

attorney fees and costs incurred in trial and in the numerous hearings associated therewith in enforcing the parties' Spousal Agreement or under the terms of RCW 26.09.140 and under the direction of *In re Marriage of Knight, supra*. The court should also order the division of the tax refunds and the future tax deductions for twenty (20) years.

DATED this 18<sup>th</sup> day of January, 2005.

SMITH ALLING LANE, P.S.

A handwritten signature in cursive script, appearing to read "Edward M. Lane", is written over a horizontal line.

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**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 18th day of January, 2005, I arranged for service and delivery of the foregoing Brief of Respondent via ABC Legal Messengers to the following:

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Dated this 18th day of January, 2005, at Tacoma, Washington.



ANN CHRISTIAN, Legal Assistant

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