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NO. 73239-1-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of:

TIMOTHY W. FITZGERALD,

Petitioner/Appellant,

vs.

THERESA L. FITZGERALD,

Respondent/Respondent.

BRIEF OF APPELLANT TIMOTHY W. FITZGERALD

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A. ASSIGNMENTS OF ERROR

1. The Superior Court of Spokane County, state of Washington, erred in entering its oral decision on January 28, 2015 in Cause No. 12-3-02173-1, wherein the Court denied the "motion to enforce stipulated agreement" of the appellant, Timothy W. Fitzgerald. [RP 2-8, 11; CP 42-62, 64-67, 255].

2. The Superior Court of Spokane County, state of Washington, erred in entering its oral decision on January 28, 2015 in Cause No. 12-3-02173-1, wherein the Court in turn granted, in part, the relief for support payments requested by Respondent in terms of her motion to show cause. [RP 2-8, 11; CP 42-62, 64-67, 255].

3. The Superior Court of Spokane County, state of Washington, erred in entering paragraphs A and B of the "I. Judgment Summary" as set forth in its "Order on Show Cause re: Contempt/Judgment" filed on January 28, 2015 in Cause No. 12-3-02173-1, which provides that Respondent Theresa Fitzgerald is the "judgment creditor" and that Appellant Timothy Fitzgerald is the "judgment debtor." [CP 256].

4. Furthermore, the Superior Court of Spokane County, state of Washington, erred in entering paragraph C of the "I. Judgment Summary" as set forth in its "Order on Show Cause re: Contempt/Judgment" filed on January 28, 2015 in Cause No. 12-3-02173-1, which provides, in pertinent part, for a "[p]rincipal judgment amount . . . [of] . . . back child support" in the sum of "\$25,250." [CP 256].

5. The Superior Court of Spokane County, state of Washington, also erred in entering paragraph 2.6 "Back Child Support . . . Maintenance" of its "II. Findings and Conclusions" as set forth in its "Order on Show Cause re: Contempt/Judgment" filed on January 28, 2015 in Cause No. 12-3-02173-1, which provides, in pertinent part, that Timothy Fitzgerald failed to pay the other party the sum of \$16,750 for child support . . . for the period from 10/10/2013 through 1/28/2015." [CP 258].

6. Additionally, the Superior Court of Spokane County, state of Washington, erred in entering said paragraph 2.6 "Back Child Support . . . Maintenance" of its "II. Findings and Conclusions" as set forth in its "Order on Show Cause re: Contempt/Judgment" filed on January 28, 2015 in Cause No. 12-3-02173-1, which provides, in pertinent part, that "Timothy Fitzgerald failed to pay the other party the sum of \$8,500 for maintenance . . . for the period from 10/1/2013, and 05/01/2014 through 1/28/2015." [CP 258].

7. The Superior Court of Spokane County, state of Washington, erred in entering paragraph 3.4 "Judgment for Past Child Support" of its "II. Findings and Conclusions" as set forth in its "Order on Show Cause re: Contempt/Judgment" filed on January 28, 2015 in Cause No. 12-3-02173-1, which provides, in pertinent part, that "Theresa Fitzgerald shall have judgment against Timothy Fitzgerald in the amount of \$16,750 for unpaid child support arrearages . . . for the period from 10/10/2013 through 1/28/2015." [CP 260].

8. The Superior Court of Spokane County, state of Washington, erred in entering paragraph 3.7 "Judgment for Past Maintenance" of its "II. Findings and Conclusions" as set forth in its "Order on Show Cause re: Contempt/Judgment" filed on January 28, 2015 in Cause No. 12-3-02173-1, which provides, in pertinent part, that "Maintenance for Nov. 13 through April 2014 is suspended but is added to the back end of the obligation." [CP 261].

9. Finally, the Superior Court of Spokane County, state of Washington, erred in entering its February, 19, 2015 "Order Denying Petitioner's Motion to Enforce a Stipulated Agreement" in Cause No. 12-3-02173-1. [CP 264].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, under the authority of Rule 2A of the Washington Civil Rules for Superior Court [CR], and RCW 2.44.010, the Superior Court of Spokane County, state of Washington, should have dismissed Respondent's motion for contempt while, at the same time, the Court should have enforced the parties' stipulated agreement regarding the payment of maintenance and child support, insofar as (a) Respondent's counsel of record drafted and provided an unsigned copy of said agreed order to Petitioner's counsel, (b) both parties relied upon, followed, and carried out the terms of this unsigned agreement for well over the period of a year, and (c) the Respondent, Theresa Fitzgerald, then chose to unilaterally disavow the parties' stipulated

agreement and to bring said contempt action against Petitioner, Timothy Fitzgerald, after the terms of the agreement had taken affect were carried out? [Assignments of Error Nos. 1 through 8].

2. Whether, in addition to being required to apply the provisions of CR 2A and RCW 2.44.010 in this case, the Superior Court of Spokane County, state of Washington, should have at the very least denied Respondent's motion for contempt against the Petitioner, and Appellant herein, and upheld the parties' stipulated agreement on the alternative, equitable grounds of equitable estoppel and laches in light of the facts and circumstances of this case? [Assignments of Error Nos. 1 through 8].

3. Whether, in turn, the Superior Court of Spokane County, state of Washington, should have imposed monetary terms and sanctions, including an award of a reasonable attorney and other costs, against Respondent's counsel and in favor of Petitioner, as is authorized under Rule 11 of the Washington Superior Court Civil Rules [CR], when Respondent's counsel refused to acknowledge the parties' course of dealings and the enforceability of the agreement order which he drafted and sent to Petitioner's counsel? [Assignments of Error Nos. 1 through 8].

C. STATEMENT OF THE CASE

This matter concerns the parties' course of dealings, mutual assent, understanding and agreement over a period of thirteen [13] months regarding the stipulated suspension of child support and maintenance payments and the

underlying, corresponding December 2013 agreed order to this effect which Respondent's attorney of record prepared and provided to Petitioner's counsel, and the Appellant herein, Timothy Fitzgerald. Unless otherwise indicated, the following facts and circumstances are based upon the "II. Declaration" contained in Petitioner's "Motion to Enforce Stipulated Agreement and Declaration of Counsel in support thereof," dated January 10, 2015, and accompanying exhibits, filed with the Superior Court of Spokane County, state of Washington, on January 12, 2015 in Cause No. 12-3-02173-1. [CP 42-61].

1. Factual Background. On October 7, 2013, Petitioner's counsel, Martin A. Peltram, notified Respondent's attorney by letter that he represented the Petitioner, and Appellant herein, Timothy Fitzgerald, in this matter concerning maintenance and other support obligations. [CP 42-43, 45-46]. In this same correspondence, Attorney Peltram outlined Mr. Fitzgerald's proposal to resolve such financial matters without the need of any formal or prolonged judicial proceedings. [CP 42-43, 45-46].

As a brief background, and as reflected in the Superior Court's file under Cause No. 12-3-02173-1, the parties entered a stipulated Decree of Dissolution on June 21, 2013. [CP 43]. At that time, Mr. Fitzgerald was an active member of the United States armed forces but, as was anticipated by both parties at that time, he would be separating from the military by the end of the year. [Id.]. In fact, Mr. Fitzgerald did separate from the armed forces on September 30, 2013. [Id.].

The Decree of Dissolution provides that the provision for spousal maintenance is modifiable as of the date of Petitioner's separation from the military. [CP 27-40, 43]. This provision anticipated the fact that following the Petitioner's retirement from military service, the Respondent, Theresa Fitzgerald, would be sharing in a portion of her husband's military pension benefits. [Id.]. Again, both parties were fully aware of this fact. [Id.].

On October 17, 2013, counsel for Respondent sent Petitioner's attorney a letter acknowledging Attorney Peltram's representation and responding to part of the settlement proposal outlined in the latter's October 7th correspondence. [CP 43, 47-48].

Thereafter, on October 24, 2013, Respondent was provided with information regarding the subject military pension benefits. [CP 43]. Counsel for both parties spoke by telephone on October 30 and 31, 2013, wherein the resolution of the subject issue of spousal maintenance was discussed. [Id.]. On November 8, 2013, Respondent's counsel was faxed a letter and proposed order based upon counsels' putative settlement agreement. [CP 43, 49-51].

In response to Petitioner's proposed order, Respondent's counsel sent Petitioner's attorney his own agreed order regarding child support and maintenance, which was dated December, 2013. Suffice it to say, the parties began following this order since the month prior thereto. [CP 43, 52-57].

For reasons unknown, the matter lay dormant for some time. [CP 43]. Nevertheless, both parties strictly abided by the agreement drafted by Ms. Fitzgerald's attorney dated December 2013. [Id.]. However, for no explained reason, on May 7, 2014, Respondent's attorney sent a letter directly to Mr. Fitzgerald requesting that he provide certain information, notwithstanding him then being represented by counsel. [CP 43, 58]. Attorney Peltram responded to this letter on May 13, 2014, but Respondent's counsel never replied, and the matter once again continued to set idly with both parties still following Respondent's December 2013 stipulated order. [CP 43, 59].

Finally, on August 22, 2014, Respondent's attorney was provided a signed copy of the December 13th order prepared by Petitioner's attorney, asking him to enter the same and provide counsel with a conformed copy. [CP 43, 52-57]. No response was forthcoming. [CP 43].

On October 6, 2014, Petitioner's attorney began leaving telephone messages with Ms. Fitzgerald's counsel's office, asking about the status of the order, with no response. [CP 43]. Consequently, on December 11, 2014, a letter to the same effect was sent to Respondent's counsel. Again, no response was received. [CP 43, 59].

On January 6, 2015, a one-hundred and eight [108] page fax was received by Petitioner's counsel from Ms. Fitzgerald's attorney, along with a two [2] page letter wherein it is alleged that Mr. Fitzgerald "is delinquent in maintenance and child support payments" and proposing entirely new orders from that previously provided on December 13, 2013, and which had been

faithfully and silently followed by both parties in this matter for some thirteen [13] consecutive and uninterrupted months. [CP 44, 60-61].

2. Procedural History. On January 12, 2015, Petitioner, and Appellant herein, Timothy Fitzgerald, filed in Superior Court of Spokane County, state of Washington, under Cause No. 12-03-02173-1, a motion and supporting documentation seeking enforcement of the parties' previously identified course of dealing, representing their mutual understanding and agreement regarding the stipulated suspension of child support and maintenance payments as outlined above in Part C.(1). [CP 42-61] In response, Respondent, Theresa Fitzgerald, filed on January 13, 2015, a "motion for order to show cause re: contempt (maintenance and child support) and request for other relief adjusting child support and providing annual retirement account statement," along with accompanying documents [CP 64-67, 68-76, 77-81, 82-87, 88-161] for which a "show cause order" was thereafter entered by the Superior Court on January 15, 2015. [CP 163-65].

These combined matters were preassigned to the Honorable Patrick A. Monasmith, Judge of the Superior Court, and heard on January 28, 2015. [CP 162]. On that date, the Court denied Mr. Fitzgerald's motion to enforce the parties' stipulated agreement on the basis that, at best, the arrangement between the parties was only a "tacit acknowledgement" and that such was not the same as a "mutuality of obligation." [RP 43-44]. In short, the Court found no agreement concerning suspension of either child support or spousal maintenance. [RP 44]. However, equity required in this instance that "those

maintenance payments accruing between November of 2013 and April of 2014 . . . [should] . . . not be part of the judgment for past due support, but rather added to the back end of the 60-month obligation." [RP 44].

With regard to child support arrearages, the Superior Court entered "judgment . . . for \$25,250.00" against Mr. Fitzgerald and in favor of his ex-spouse. [RP 45]. In turn, the Court reserved the request for attorney fees until the time of entry of any modified order of child support. [RP 46].

After the January 28th hearing, an order on show cause and to this effect was entered by the Court. [CP 255, 256-63]. On February 24, 2015, an order denying Mr. Fitzgerald's motion to enforce agreement was formally entered. [CP 264-65]. This appeal follows after the timely filing of a notice of appeal by Mr. Fitzgerald on February 26, 2015. [CP 266-77].

D. STANDARD OF REVIEW

The resulting issues framed in Part B above concerning the Superior Court's erroneous decisions encompass the following standards of review insofar as this appeal entails a combination of (1) issues of fact, (2) mixed issues of law and fact, (3) issues of law, and (4) issues concerning the abuse of discretion by the trial court. Errors of fact are reviewed in terms of whether there is substantial evidence in the underlying record to support the same. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 103 (1959). Substantial evidence, involving a ruling on modification of maintenance, only exists when there is evidence of a sufficient quantum to

persuade a fair-minded person of the truth of the declared premise set forth in a finding of fact. In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001); see also, Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986); Olmstead v. Department of Health, 61 Wn.App. 888, 893, 812 P.2d 527 (1986); Green Thumb, Inc. v. Tiegs, 45 Wn.App. 672, 676, 726 P.2d 1024 (1980). Hence, mere speculation, conjecture, and supposition as to the operative facts and circumstances presented support a factual determination by the Superior Court. Id.

In contract, mixed questions of law and fact are considered both in terms of a quantitative determination of substantial evidence as to the latter and, as to the legal aspects of such issue, are reviewed de novo. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001). In essence, such issue is considered both in terms of a quantitative determination of substantial evidence as well as to the legal aspects entailed. Id.; see also, In re Marriage of Foran, 67 Wn.App. 242, 251, 834 P.2d 1081 (1992); Horrace, at 392. In other words, review is treated as a mixed question of fact and law and, thus, reviewed de novo. Id. However, even if the findings of the Superior Court can be said to be supported by substantial evidence, the issue remains whether such factual determinations support the Court's application of governing law, as well as the Court's ultimate decision and judgment. See, Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas &

Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984). If they do not, then reversal is fully warranted and proper. Id.

Finally, in terms of any aspect of review associated with exercise of discretion by the trial court, the governing standard is a manifest abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The trial court may be deemed to have so abused its discretion when the court acted on untenable grounds or for untenable reasons, or has erroneously interpreted, applied, or ignored the governing law. Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990); State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995). In other words, a factual determination which is not based upon substantial evidence, or misapplication of the law, constitutes an abuse of discretion warranting reversal on appeal. Id.; see also, In re Spreen, at 346.

As discussed below, and as outlined in the above stated assignments of error, there cannot be any question under the facts and circumstances of this case that the Superior Court's factual determinations are not supported by substantial evidence, nor are the Court's conclusions of law well-founded or supported by the governing law of this case. By the same measure, the Court's decisions in this case constitute nothing short of a manifest abuse of discretion insofar as the Court acted on untenable grounds and has, without question, erroneously interpreted, applied, or ignored the governing law.

E. ARGUMENT

As outlined above, the Appellant, Timothy Fitzgerald, maintains the Superior Court of Spokane County, state of Washington, committed errors as outlined in his assignments of error of Part A and, therefore, said challenged decisions of the Court should now be reversed on this appeal. RAP 12.2. Specifically, Mr. Fitzgerald argues:

1. The Superior Court of Spokane County, state of Washington, should have enforced the agreed order re: child support and maintenance, dated November 30, 2013, insofar as it was an enforceable agreement as contemplated under CR 2A and the corresponding provisions of RCW 2.44.010. [Issue no. 1].

The provisions of Rule 2A of the Washington Civil Rules for Superior Courts [CR] and RCW 2.44.010 govern the enforcement of settlement agreements in the context of litigation or legal actions. Morris v. Maks, 69 Wn.App. 865, 868, 850 P.2d 1357, review denied, 122 Wn.2d 1020 (1993). The underlying policy behind these provisions is to avoid endless disputes over the existence and terms of settlement agreements, and to bring finality to such compromises. Eddleman v. McGhan, 45 Wn.2d 430, 275 P.2d 729 (1954); Bryant Palmer Coking Coal Co., 67 Wn.App. 176, 179, 834 P.2d 662 (1992). CR 2A applies to an agreement when (a) the agreement is made by parties or their attorneys "in respect to the proceedings in a cause" and (b) "the purport" of the agreement is controverted. Eddleman, at 432; Bryant, at 179.

In this case, the settlement agreement was in writing, but was never signed by the either Respondent, Theresa Fitzgerald, or her attorney. Hence, the first question posed is whether CR 2A applies, and if so, has the subject "agreed order re: child support and maintenance," dated December 2013 [hereinafter referred to as "agreement," "settlement agreement" or "agreed order"], been controverted or disputed.

It is clear the first element associated with the application of CR 2A is present insofar as there was a documented settlement agreement prepared for settlement purposes by Respondent's trial counsel on behalf of his client, Ms. Fitzgerald. The issue is thus whether the Respondent can genuinely dispute the purport and finality of the agreement. See, Lavigne v. Green, 106 Wn.App. 12, 19, 23 P.3d 515 (2001).

In this context, a genuine dispute is one that is "over the existence or material terms of the agreement," as opposed to a dispute over its material terms. In re Marriage of Ferree, 71 Wn.App. 35, 40, 856 P.2d 706 (1993). Once the material terms are agreed upon, a party's remorse or second thoughts over the bargain are insufficient to raise any genuine dispute over the agreement. Lavigne, at 19. Here, the Appellant, Timothy Fitzgerald, demonstrated the lack of any possible, genuine dispute over the existence of the settlement agreement or its material terms with respect to the declaration of counsel and the exhibits thereto. [CP 42-61, 240-46]. See, Ferree, at 41.

Once again, the agreed order dated December 2013 was drafted by Respondent's counsel on her behalf after a series of negotiations between the parties in connection with the parties' earlier stipulated Decree of Dissolution entered on June 21, 2013, wherein the parties contemplated a change in support obligations following Mr. Fitzgerald's retirement from the military. [CP 27-40]. In this vein, the agreed order prepared by Respondent's counsel provided that the parties would suspend support and maintenance payments until further order of the Superior Court. [CP 52-57]. Per this agreement, the Petitioner, and Appellant herein, did not send Respondent support or maintenance from the day the agreed order was transmitted by her attorney to Mr. Fitzgerald's attorney. [CP 42-44]. Furthermore, the agreement was followed and carried out mutually by the parties without controversy for the next thirteen [13] month period. [Id.]. It is clear from the actions and course of conduct of the parties that the material terms of the agreed order were considered final and binding. [Id.].

If the purport of the agreed order had been remained unresolved and in dispute, it stands to logic and reason that the Respondent, Ms. Fitzgerald, would have raised the issue long before she did. Consequently, she is now bound by the stipulation reached by her counsel of record under the authority of CR 2A and RCW 2.44.010. In re Marriage of Ferree, supra; see also, 15A K. Tegland & D. Ende, "Washington Handbook on Civil Procedure," Wash.Prac., § 7.15, a 144-45 (West 2010).

Given the passage of time, it can only be surmised that for some unknown reason Ms. Fitzgerald later became disenchanted with the parties' bargained-for agreement. Such disingenuous conduct should not be countenance by the courts of Washington. Lavigne, at 19. Otherwise, the purpose behind CR 2A and RCW 2.44.010 to bring finality to disputes and claims will be totally frustrated. Id. In sum, CR 2A cannot be used as a shield to protect a litigant who has remorse or second thoughts over the bargain, as Respondent seeming now has. Id.

2. Under the doctrine of equitable estoppel, the Respondent is likewise precluded from challenging the enforceability of the subject agreement, as well as foreclosed from bringing her motion for contempt against the Appellant. [Issue no. 2].

The record is patently clear and beyond any rational dispute that since December 2013 the parties faithfully abided by the precise terms of the written agreed order prepared by Ms. Fitzgerald's attorney. Accordingly, Respondent was barred under the doctrine of equitable estoppel from abandoning said agreement as she has attempted to do and as the Superior Court erroneously allowed her to do.

Suffice it to say, when entering its oral decision, the Superior Court was considered the equities involved in this matter. [RP 2-5]. However, Mr. Fitzgerald maintains that the Court did not go far enough in this regard.

Equitable estoppel, or estoppel in pais, permits a court to hold a party to a representation which that party has made through words or actions, when inequitable consequences will otherwise result to another party who has justifiably and in good faith relied upon such representation by the party to

be held responsible therefore. Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975). The doctrine can be invoked when three [3] conditions or elements are shown, by clear, cogent and convicting evidence: (a) an admission, statement or act that is inconsistent with a subsequent assertion by the party responsible for the same, (b) action or forbearance thereon by another in reasonable reliance on the admission, statement or act, and (c) an injury or damage will result to the replying party if the admission, statement or act were repudiated by the party responsible for the same. Colonial Imp., Inc. v. Carlton NW, Inc., 121 Wn.2d 726, 734, 736, 853 P.2d 913 (1993); Procter v. Huntington, 146 Wn.App. 836, 845, 192 P.3d 958 (2008); see also, Sorenson v. Pyeatt, 158 Wn.2d 523, 539, 146 P.3d 1172 (2006).

Clearly, Mr. Fitzgerald relied upon and followed the terms of the agreement since it was drafted and presented to him by Respondent's attorney some thirteen [13] months prior to Ms. Fitzgerald's repudiation of said agreement. Without question, when bringing her motion for contempt against her former spouse, Mr. Fitzgerald, she was attempting to subvert the parties' prior and bargained-for agreement in a manner entirely at odds with the terms and representations of that agreement. By the same measure, the Appellant herein without question reasonably and justifiably relied upon Ms. Fitzgerald's actions and conduct when first creating the terms of the subject contract and then remaining silent for an extended period of time before

revisiting this matter and baldly claiming that Mr. Fitzgerald was in arrears and subject to a motion for contempt regarding the same.

Once again, Appellant carried out his side of the bargain in good faith and on the reasonable assumption that the agreed order prepared by Respondent's counsel effectuated and simplified the division of maintenance obligations once his military pension benefits commenced. Suffice it to say, Mr. Fitzgerald will unjustifiably be forced to pay a considerable sum in the thousands of dollars unless this reviewing court now intervenes in this matter and reverses the Superior Court as allowed under RAP 12.2.

3. Also, under the doctrine of laches, the Respondent was likewise barred from challenging the enforceability of the subject, stipulated agreement, as well as foreclosed from bringing her motion for contempt against the Appellant. [Issue no. 2].

Once again, even if it could be said the subject agreement was not otherwise legally enforceable under the authority of Rule 2A of the Washington Civil Rules for Superior Courts [CR] and RCW 2.44.010 the equitable doctrine of laches bars the Respondent, Theresa Fitzgerald, from challenging said agreement as well as bringing her motion for contempt against her former spouse, Timothy Fitzgerald.

The principal purpose behind the doctrine of laches is to allow the court to prevent injustice and hardship which otherwise would be suffered by the defending party, if the plaintiff or complaining party was allowed to proceed on a stale claim. See, Johnson v. Schultz, 137 Wash. 584, 243 P. 644 (1926). In other words, the doctrine is a creature of equity and grounded upon the same principles as equitable estoppel. Laches may be asserted at

any time prior to the running of the statute of limitations where the defending party has altered his position, or otherwise would be injured, because of the delay by the other side in litigating that party's rights or claims. Rutter v. Rutter's Est., 59 Wn.2d 781, 785, 370 P.2d 862 (1962).

The elements of laches are: (a) knowledge or reasonable opportunity for discovery of the cause of action by the plaintiff, (b) an unreasonable and inexcusable delay in commencing the action, and (c) damage and injury to the defendant resulting from the unreasonableness and inexcusable nature of the delay. Automobile United Trades Organization v. State, 175 Wn.2d 537, 542, 286 P.3d 377 (2012); State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 241, 88 P.3d 375 (2004); Lopp v. Peninsula Sch. Dist. No. 401, 90 Wn.2d 754, 585 P.2d 801 (1978); In re K.R.P., 160 Wn.App. 215, 247 P.3d 491 (2011); Kelso Educ. Ass'n v. Kelso Sch. Dist. No. 453, 48 Wn.App.743, 740 P.2d 889 (1987). Suffice it to say, the most important of these factors in establishing laches is the latter. Crodle v. Dodge, 99 Wash. 121, 992 P. 1019 (1917). Otherwise, the initial two [2] criteria are of no consequence when standing alone. Id.

In In re Sanborn, 55 Wn.App. 124, 777 P.2d 4 (1989), the plaintiff brought an action to recover arrearages for past due spousal maintenance from her former husband. However, the wife did not bring this action until twenty-eight [28] months after the commencement of the delinquency in payments which remained well within the ten [10] year statute of limitations governing enforcement of judgments. Sanborn, at 128. Ultimately, the court

of appeals determined that the doctrine of laches in that instance was inapplicable because the husband could not show prejudice, two wit: the third prong of laches, resulting from the wife's delay in bringing suit. Id.

In comparison, the result here is different from the facts in Sanborn. Here, as Mr. Fitzgerald explained to the Superior Court, there is no question he suffered damage from his former wife's delay in failing to bring the issue at hand to fruition in a timely manner. Simply put, Mr. Fitzgerald would have surely negotiated a different agreement to account for his change in income status if he had been made aware of the putative accrual of maintenance and child support payment, or he would have filed a formal modification action regarding the same. Mr. Fitzgerald saw no need to do so in light of his ex-wife taking no further action following the December 2013 agreed order until now. Thus, it is clear that the three [3] prong elements of laches are present in this case, and the Superior Court erred in deciding otherwise. Id.

4. In turn, the Superior Court should have imposed monetary terms and sanctions including an award of reasonable attorney fees and other costs, against Respondent's counsel and in favor of Petitioner, as is authorized under Rule 11 of the Washington Superior Court Civil Rules [CR], when Respondent's counsel refused to acknowledge the parties' course of dealings and the enforceability of the agreement order which he drafted and sent to Petitioner's counsel. [Issue no. 3].

Based upon the forgoing arguments and legal analysis which clearly demonstrate Respondent's disingenuousness in terms of her denying and attempting to unfairly, and without just cause, circumvent the parties' stipulated agreement, mutual understanding, and course of dealings, the

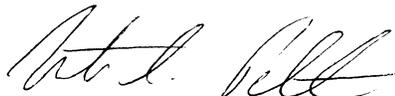
Superior Court should have imposed terms and sanctions against Ms. Fitzgerald, as was requested by the Appellant, and as is duly authorized and mandated under CR 11.

F. CONCLUSION

Based upon the foregoing points and authorities, the Appellant, Timothy Fitzgerald, respectfully requests that, in accordance with the authority of this Court under RAP 12.2, the challenged decisions of the Superior Court of Spokane County, state of Washington, be reversed on this appeal and, further, this matter be remanded to the Superior Court for additional proceedings, with specific direction and instruction to said Court, that the subject stipulated agreement is to be fully enforced and, further, that appropriate CR 11 sanctions be imposed against the Respondent, Theresa Fitzgerald, in terms of an award of fees and costs, including a reasonable attorney fee, insofar as the Appellant was unduly forced to proceed this matter before the trial court. Justice and equity require nothing less in terms of bringing finality to this matter.

DATED this 15 day of June, 2015.

Respectfully submitted:



MARTIN A. PELTRAM, WSBA# 23681
Attorney for Appellant Timothy Fitzgerald

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

TIMOTHY W. FITZGERALD,

Petitioner/Appellant,

v.

THERESA L. FITZGERALD,

Respondent/Respondent.

No. 73239-1-1

CERTIFICATE OF MAILING

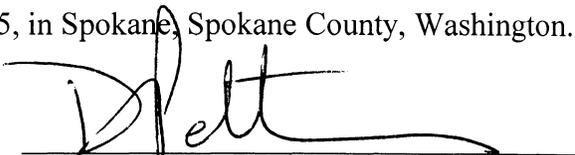
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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 JUN 18 AM 11:30

I certify under penalty of perjury under the laws of the state of Washington that on the 16th day of June, 2015, I caused a true and correct copy of the Brief of Appellant Timothy W. Fitzgerald to be served on the following persons by first class mail, postage pre-paid, and bearing the following correct names and addresses of these addressees:

Attorney for Respondent:

Ms. Hailey L. Landrus
Attorney at Law
720 West Boone, Suite 200
Spokane, WA 99201

SIGNED this 16th day of June, 2015, in Spokane, Spokane County, Washington.


DANA A. PELTRAM