

2013 FEB 21 PM 1:22

No. 69242-9

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

In re the Marriage of:

DANIEL VALENTE,

Appellant/Cross-Respondent,

vs.

FUKIKO VALENTE,

Respondent/Cross-Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE CHRIS WASHINGTON

---

BRIEF OF APPELLANT/CROSS-RESPONDENT

---

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith  
WSBA No. 9542  
Valerie A. Villacin  
WSBA No. 34515

By: Jeffrey L. Barth  
WSBA No. 9017

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

121 Lake St. S., Suite 101  
Kirkland, WA 98033-0925  
(425) 822-6564

Attorneys for Appellant/Cross-Respondent

**TABLE OF CONTENTS**

I. ASSIGNMENT OF ERRORS .....1

II. STATEMENT OF ISSUES .....1

III. STATEMENT OF FACTS ..... 2

IV. ARGUMENT ..... 9

    A. As A Matter Of Law, The Trial Court Erred In Awarding Lifetime Maintenance To The Wife As A “Vehicle” For Future Modifications In The Event That Her Physical Condition Declined. .... 9

        1. The Duration Of Maintenance Cannot Be Based On The “Conjectural Possibility Of A Future Change In Circumstances.” ..... 9

        2. An Award Of Lifetime Maintenance Solely As A “Vehicle” For The Wife To Seek Future Modification Deprives The Husband Of His Right To Have His Obligations Under The Decree Settled At The Time The Decree Is Entered.....12

    B. An Award Of Lifetime Maintenance Was Not Warranted Under The Facts Of This Case When The Wife Already Received Nearly All Of The Parties’ Retirement Accounts, And The Husband’s Award Consisted Largely Of The Community Business.....13

V. CONCLUSION .....19

## TABLE OF AUTHORITIES

### CASES

<i>Cleaver v. Cleaver</i> , 10 Wn. App. 14, 516 P.2d 508 (1973).....	13-14
<i>Marriage of Barnett</i> , 63 Wn. App. 385, 818 P.2d 1382 (1991).....	16
<i>Marriage of Mathews</i> , 70 Wn. App. 116, 853 P.2d 462, <i>rev. denied</i> , 122 Wn.2d 1021 (1993).....	14-15
<i>Marriage of Morgan</i> , 59 Wn.2d 639, 369 P.2d 516 (1962).....	9-11, 13
<i>Marriage of Morrow</i> , 53 Wn. App. 579, 770 P.2d 197 (1989).....	17
<i>Marriage of Rouleau</i> , 36 Wn. App. 129, 672 P.2d 756 (1983).....	9-11
<i>Marriage of Tower</i> , 55 Wn. App. 697, 780 P.2d 863 (1989), <i>rev. denied</i> , 114 Wn.2d 1002 (1990).....	17-18
<i>Marriage of Williams</i> , 84 Wn. App. 263, 927 P.2d 679 (1996), <i>rev. denied</i> , 131 Wn.2d 1025 (1997).....	15
<i>Shaffer v. Shaffer</i> , 43 Wn.2d 629, 262 P.2d 763 (1953).....	12-13

### STATUTES

RCW 26.09.090 .....	13, 14
---------------------	--------

## **I. ASSIGNMENT OF ERRORS**

1. The trial court erred in awarding the wife permanent lifetime maintenance as set forth in its Decree of Dissolution. (CP 100)

2. The trial court erred in finding that the wife “may incur future medical expenses and have future rehabilitation costs due to her medical conditions” as a basis for its award of permanent lifetime maintenance to the wife. (Finding of Fact (FF) 2.12, CP 87-88)

## **II. STATEMENT OF ISSUES**

1. Did the trial court err in awarding lifetime maintenance to the wife as a “vehicle” for her to seek additional maintenance in the event her physical condition deteriorates when at the time of trial her condition was “stable” and whether her condition would deteriorate in the future was purely speculative?

2. Did the trial court err in imposing an obligation on the husband to pay lifetime maintenance to the wife when any maintenance paid after he retires will necessarily come from retirement assets awarded to him in the decree or acquired after the marriage was dissolved?

### III. STATEMENT OF FACTS

Appellant Daniel Valente, age 54 (DOB 1/16/1959), was born and raised in New York. (RP 53; CP 1) Respondent Fukiko (“Nao”) Valente, age 55 (DOB 5/28/1957), was born and raised in Kagoshima, Japan. (RP 53; CP 1) The parties were married on July 23, 1985, in Tokyo, Japan. (Finding of Fact (FF) 2.4, CP 86; RP 51) They have two adult children: a daughter, age 26, who attends graduate school at Columbia University in New York, and a son, age 24, who recently graduated from Washington State University. (RP 51-52)

The parties owned and operated a ship brokerage, Naodan Chartering. (RP 55, 58) Dan primarily ran the business; Nao had limited involvement. (RP 55-56) Naodan Chartering pays Dan an annual salary of \$192,000, plus bonuses. (RP 60-62) Both experts charged with valuing the company determined that Dan’s annual “reasonable replacement compensation” was \$400,000. (RP 167, 169)

In 2005, Nao was diagnosed with Multiple Sclerosis (MS). (RP 320-21) This diagnosis was confirmed as “relapsing/remitting MS” in 2008. (RP 321, 341-42) Nao also has rheumatoid arthritis.

(RP 532) Both MS and rheumatoid arthritis are chronic diseases that are not curable. (RP 287)

Nao treats her MS and rheumatoid arthritis with prescription medication and exercise. (RP 321, 327-28, 534) Nao's current physician, Dr. James Bowen, described MS as an "unpredictable" disease, in which a patient may become progressively disabled over time. (RP 534-35) But Dr. Bowen also testified that "in recent years [Nao's] MS has been relatively stable." (RP 534-35) Dr. William Likosky, who examined Nao for trial on behalf of Dan, testified that MS is not necessarily progressive, and that "most people with MS fortunately do well." (RP 255, 287) Nao's most recent MRI did not show any new MS activity, she was trending toward improvement, and she is overall functioning well. (RP 253) Nao is not disabled by her MS, and she can walk without a cane, walk her dog around the neighborhood, and drive herself around. (Ex. 18)

On April 19, 2011, approximately six months after Dan moved out of the family residence, he filed a petition to dissolve the parties' marriage. (CP 1-4) On April 16, 2012, the parties appeared before King County Superior Court Judge Chris Washington for a

four-day trial. The disputed issues at trial were property distribution and spousal maintenance.

For nearly a year before trial, Dan paid monthly spousal maintenance of \$6,000 to Nao under a temporary order. (*See* RP 36, 139-40; Supp. CP \_\_\_, Sub no. 8) At trial, Dan proposed that he continue to pay Nao monthly spousal maintenance of \$6,000 for an additional eight years. (RP 139-40, 225) Dan also proposed that the community estate, valued at \$5.9 million, be divided equally. (RP 118; CP 95) Dan proposed that he be awarded the community business at \$1.6 million, leaving Nao with more of the liquid assets from which she could earn additional income to support herself. (RP 119-20)

Nao asked the court to award her spousal maintenance of \$20,000 a month for 12 years, and 55% of the parties' community property. (RP 48) Nao also presented a "Life Care Plan," which purportedly represented a prediction of future costs as a result of her medical conditions. (RP 535-36; FF 2.12, CP 88) Nao claimed that her "life care" costs would total nearly \$7.5 million, with a present value \$468,531. (RP 407, 471; FF 2.12, CP 88) Nao asked the trial court to order Dan to make a payment of \$486,531 to her

for her “Life Care Plan,” in addition to her requested community property and spousal maintenance awards. (RP 49, 407)

The trial court issued its oral ruling May 25, 2012. (5/25 RP 2) The trial court stated that a “significant factor” in its decision was the “likelihood of [the wife’s] physical condition declining” in the future. (5/25 RP 3) The trial court divided the community property 55/45 in favor of Nao. (5/25 RP 6) Each party was awarded the home where they were residing. (CP 95) Nao received over \$3.288 million in community property, including 81.7% of the parties’ retirement and investment accounts, worth over \$2.477 million. (5/25 RP 6; CP 95) Dan received \$2.633 million in community property. Sixty percent of his community property award consisted of the community property business, valued at \$1.593 million – a value based largely on the “future income stream of the business” rather than its tangible assets. (CP 95; RP 153) Dan’s 18.3% share of the parties’ retirement and investment accounts was worth \$554,915 – less than a quarter of the amount awarded Nao. (CP 95) Each party was also awarded their separate property – \$612,793 to Dan and \$484,233 to Nao. (5/25 RP 13; CP 96)

The trial court rejected the wife's request for an additional \$486,531 for her "Life Care Plan," finding that a "factual basis was not presented to prove that the wife is in need of all services detailed in the Life Care Plan at this time." (FF 2.12, CP 88; *see also* 5/25 RP 8: "the medical testimony in this case does not support the Court's ability to take that life care plan as something that's necessary at this time.") The trial court stated that there "was not sufficient evidence at this time for me to award money or require payments to be made as result of [the wife's condition], this is an unknown, and I certainly hope that the condition does not progress." (5/25 RP 18)

In its oral ruling, the trial court awarded the wife monthly spousal maintenance of \$10,000 until the wife turns age 62, in seven years and one month (85 months). (5/25 RP 7) The trial court stated that the amount of maintenance was a "reasonable amount of money, combined with the division of the property, as it is to allow [the wife] to continue to live her life in a way that she has come to enjoy living her life during the course of the marriage." (5/25 RP 9) The trial court noted that "down the road" the wife "could move to a smaller structure" that would reduce expenses if

work needed to be done to her present residence to accommodate any future access issues. (5/25 RP 9-10)

The trial court also stated that its maintenance award was not “intended [ ] to preclude a future consideration or revision of maintenance [ ] based on a sufficient deterioration in [the wife’s] physical condition” during the duration of the maintenance award. (5/25 RP 8) Finally, the trial court stated that when determining the husband’s ability to pay maintenance, it considered that the business awarded to the husband is an “ongoing interest that will provide significant income to the petitioner” “albeit with some uncertainty” in light of recent changes impacting its profitability. (See 5/25 RP 7)

The wife moved for reconsideration before final orders were entered. (CP 12) The wife asked the court to extend the duration of maintenance from seven years and one month to twelve years, to coincide with when the husband will begin to draw Social Security. (CP 12) On July 3, 2012, the trial court in a conference call indicated its intent to extend the duration of maintenance not just to twelve years, as requested by the wife, but to make the award of maintenance permanent. (CP 32-33) The trial court indicated that once the wife turns age 62, in seven years and one month,

maintenance would reduce from \$10,000 to \$1,000 until the death of either party. (CP 32-33) On the husband's motion for reconsideration, the trial court then ordered that monthly maintenance be further reduced from \$1,000 to \$100 when the husband turns age 72. (7/27 RP 26)

The trial court stated that it chose to extend the length of maintenance to use it as a "vehicle" to allow the wife to modify maintenance in the event her physical condition deteriorated in the future. (*See* 7/27 RP 3-4, 9, 23) The trial court acknowledged that based on the evidence presented, it did not know "whether or not the medical condition is going to deteriorate, and if so, at what rate." (7/27 RP 21) But the trial court stated that "in the unfortunate event that the medical condition does deteriorate, the reason I'm doing this in the first place is to allow the parties, you know, to come back in to court and revisit the maintenance in its entirety versus simply depending on how much per month I've added." (7/27 RP 24)

The husband appeals. (CP 82) The wife has cross-appealed. (CP 108)

#### IV. ARGUMENT

**A. As A Matter Of Law, The Trial Court Erred In Awarding Lifetime Maintenance To The Wife As A “Vehicle” For Future Modifications In The Event That Her Physical Condition Declined.**

**1. The Duration Of Maintenance Cannot Be Based On The “Conjectural Possibility Of A Future Change In Circumstances.”**

On appeal, the husband does not challenge the trial court’s original decision to award monthly maintenance to the wife of \$10,000 for 85 months – a total of \$850,000 in maintenance payments. Instead, the husband challenges the trial court’s legal error on reconsideration to extend the duration of maintenance as a “vehicle” for the wife to pursue additional maintenance in the speculative event that her medical condition deteriorates. A finding of necessity, upon which an award of maintenance depends, cannot be based upon the conjectural possibility of a future change in circumstances. *Marriage of Morgan*, 59 Wn.2d 639, 643, 369 P.2d 516 (1962); *Marriage of Rouleau*, 36 Wn. App. 129, 672 P.2d 756 (1983). Thus, the trial court erred as a matter of law by extending maintenance from its original award to lifetime maintenance based solely on speculation that the wife’s physical condition might deteriorate in the future.

In *Rouleau*, the Court of Appeals reversed a maintenance award nearly identical to the one here. There, the trial court awarded the husband, who had suffered an aneurysm, maintenance of \$1 annually until the husband's death or remarriage, on the grounds that "the door should be left open for the husband to apply for increased maintenance should circumstances change in the future." *Rouleau*, 36 Wn. App. at 130. The trial court found that the husband has "a most serious physical and emotional problem ... and I believe that that—while it does not create a financial need at this moment it creates an underlying need which may become a financial need should the—should something occur in the future." *Rouleau*, 36 Wn. App. at 130. This court reversed, holding that absent testimony that the husband would in fact need assistance, the trial court could not speculate on his future needs in determining spousal maintenance. *Rouleau*, 36 Wn. App. at 132; *see also Morgan*, 59 Wn.2d at 643 (reversing an award of lifetime maintenance intended to "provide security for [the wife] and to protect her from possible incapacity to earn a livelihood *in the future*" as solely speculative) (emphasis in original).

The trial court's decision extending the duration of maintenance is contrary to both *Rouleau* and *Morgan*, as it is based

entirely on speculation that the wife's medical situation might deteriorate. As the trial court acknowledged, it could not "divine what the [wife's] situation is going to be." (7/27 RP 23) While the wife and her physician presented evidence that her physical condition would deteriorate in the future requiring additional support in the form of payment for her "Life Care Plan," the trial court rejected this testimony. The trial court found that there was not a "sufficient factual basis" "at this time" that the wife's condition would deteriorate or that she would have a need for additional support in that event. (5/25 RP 8) In other words, the trial court did not find that the wife's current needs required an award of lifetime maintenance. In fact, the wife never requested lifetime maintenance. Instead, she "only" sought twelve years of maintenance – until the husband turns age 65.

The trial court erred by improperly extending the duration of its maintenance award from seven years and one month (as it originally ruled) to lifetime maintenance solely as a "vehicle to allow maintenance to be adjusted." (7/27/12 RP 9) Under *Rouleau* and *Morgan*, this court should reverse and vacate that portion of the maintenance award that extends beyond the seven years and one month originally awarded.

**2. An Award Of Lifetime Maintenance Solely As A “Vehicle” For The Wife To Seek Future Modification Deprives The Husband Of His Right To Have His Obligations Under The Decree Settled At The Time The Decree Is Entered.**

Parties have a “right to have their respective interests in their property after they are divorced, definitely and finally determined in the decree which divorces them.” *Shaffer v. Shaffer*, 43 Wn.2d 629, 631, 262 P.2d 763 (1953). The trial court’s award of lifetime maintenance for the purpose of allowing the wife to seek modification in the future leaves the husband’s obligations under the decree unsettled, as he has no idea when or if the wife will seek modification or how much more he may be required to pay in the future. This was error.

As the trial court acknowledged, in a sense it was “punting” its decision on spousal maintenance down the road to another judge to decide:

I don’t know how long people are going to live. I don’t know how long or whether or not the medical condition is going to deteriorate, and if so, at what rate. And my thought was at any time appropriate, this could be revisited by another judge and allow that judge to make a decision based on those new decisions.

(7/27 RP 21) This was not a proper performance of the trial court’s

statutory duty to resolve the disputes presented to it at trial. Instead, the trial court left open the prospect of – and in fact, encouraged – further litigation between the parties, contrary to *Shaffer*, 43 Wn.2d at 630-31 (parties should not be left with the prospect of future litigation due to inadequacies in the decree of dissolution). The trial court’s award of lifetime maintenance solely as a “vehicle” for future litigation between the parties based on speculation that the wife’s condition *might* deteriorate was improper under the law and must be reversed.

**B. An Award Of Lifetime Maintenance Was Not Warranted Under The Facts Of This Case When The Wife Already Received Nearly All Of The Parties’ Retirement Accounts, And The Husband’s Award Consisted Largely Of The Community Business.**

In light of the property awarded the wife - \$3.7 million – an award of lifetime maintenance was error. RCW 26.09.090(1)(a) (before awarding maintenance, court must consider “separate or community property apportioned” to the party seeking maintenance). Maintenance is not a matter of right and courts may not grant a perpetual lien on the future earnings of a maintenance obligor. *Marriage of Morgan*, 59 Wn.2d 639, 642, 369 P.2d 516 (1962). Lifetime maintenance is generally disfavored. *Cleaver v. Cleaver*, 10 Wn. App. 14, 21, 516 P.2d 508 (1973). Given that post-

decree earnings are separate property, maintenance awards that attempt to fully equalize the parties' income for long periods of time cannot be justified. *See Cleaver*, 10 Wn. App. at 21 (reversing award of permanent maintenance and limiting maintenance to seven years when youngest child is emancipated where wife received slightly more than half the property after a 20 year marriage); *see also Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993).

In *Mathews*, the appellate court reversed an award of lifetime spousal maintenance in part because it required the husband to pay maintenance after he retired. Requiring the husband to pay maintenance from his retirement income in effect would cause him to distribute property to the wife that he was previously awarded in the dissolution and was "clear error." *Mathews*, 70 Wn. App. at 124-125.

Here, the trial court's order also obligates the husband to continue to pay maintenance after he retires without any finding that he will have the ability to pay maintenance. RCW 26.09.090(1)(f) (court must consider ability of spouse from whom maintenance is sought to meet his own needs). Once the husband retires, his income from the community business awarded to him

will be zero. The husband must then live off any post-decree assets or the limited retirement awarded to him (he received 18.3% of the parties' retirement accounts), which he will necessarily have to "share" with the wife by paying spousal maintenance. This was "clear error." See *Mathews*, 70 Wn. App. at 124-25; see also *Marriage of Williams*, 84 Wn. App. 263, 268-69, 927 P.2d 679 (1996) (affirming an award of maintenance until the husband retires when the husband could have retired prior to the dissolution - in which case the wife would have received her share of the retirement benefits and there would be no need for maintenance), *rev. denied*, 131 Wn.2d 1025 (1997).

The maintenance award here was particularly egregious since the most significant asset awarded to the husband was the community business, the value of which was largely based on its "future income stream," which will necessarily end upon the husband's retirement. In making its award of spousal maintenance, the trial court stated that it considered the fact that the business awarded to the husband will continue to provide him with "significant income." (FF 2.12, CP 88; 5/25 RP 7) But the "significant income" that the husband may earn was the basis for the \$1.593 million value of the business awarded to him – an asset

that represented 60% of his 45% award of the community property. The wife was already “paid” her interest in the business with nearly \$900,000 in other cash and assets awarded to her as part of her 55% award of the community property. To count those funds both as income for maintenance and as an asset awarded to the husband in the property division is “double dipping.” *See e.g. Marriage of Barnett*, 63 Wn. App. 385, 818 P.2d 1382 (1991).

In *Barnett*, the parties’ major asset was a salvage business. The trial court awarded the wife a \$100,000 lien for half of the value of the salvage business, plus lifetime spousal maintenance. The husband appealed the maintenance award, asserting that it was based on speculation that he would earn substantial income from the business that was awarded to him. The *Barnett* court reversed because the maintenance award was an attempt to distribute the wife’s share of the business as realized through future income of the business:

That distribution had, however, already been effected by the \$100,000 lien to [the wife] for one half of the value of the salvage business. In effect, the same property was distributed twice. This was error.

*Barnett*, 63 Wn. App. at 388.

Likewise, the maintenance award here was error because it attempts to distribute the future income stream from the community business to the wife twice. The trial court already compensated the wife for her interest in the future income stream when it awarded her other assets equal to 55% of the value of the business. By awarding her spousal maintenance based on that same future income stream, the trial court in effect distributed her interest in the business twice.

Case law supporting an award of “permanent maintenance” is inapplicable and does not support the award of maintenance in this case. *Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989); *Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990). In *Morrow*, the appellate court affirmed an award of lifetime maintenance to the wife after a 24-year marriage, based on evidence that the wife supported the husband through college and professional school, that she suffered a condition that occasionally rendered her legally blind, and that the husband’s misconduct had placed assets that could otherwise have been distributed equally to the wife beyond the reach of distribution. 53 Wn. App. at 584-89. Here, to the contrary, the husband had already completed his education before the parties

married, the trial court acknowledged that the wife's present health concerns did not warrant an award of permanent maintenance, all of the parties' assets were available for distribution, and the wife was awarded more than one-half of those assets.

In *Tower*, the appellate court affirmed an award of lifetime maintenance to a wife with multiple sclerosis. But the husband in *Tower*, who was ordered to pay spousal maintenance, was also awarded the majority of the community property - unlike the husband here, who was awarded only 45% of the community property. In affirming the property distribution, the appellate court noted that "such a disproportionate community property award in favor of the only spouse with any significant earning capacity would be an abuse of discretion were it not balanced by long term maintenance." *Tower*, 55 Wn. App. at 701.

The trial court erred in awarding lifetime maintenance to the wife here when the trial court did not find that the wife, based on her current condition, had the need for lifetime maintenance, and when its lifetime maintenance award would necessarily be paid from either the assets awarded to the husband in the decree or from his retirement accounts acquired post-dissolution.

**V. CONCLUSION**

This court should reverse the trial court's award of maintenance as it was not based on the evidence presented at trial, but on speculation of the wife's future needs. The court should limit the duration of maintenance to seven years and one month.

Dated this 20th day of February, 2013.

SMITH GOODFRIEND, P.S.

By: 

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

By: 

Jeffrey L. Barth  
WSBA No. 9017

Attorneys for Appellant/Cross-Respondent

**DECLARATION OF SERVICE**

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

That on February 20, 2013, I arranged for service of the foregoing Brief of Appellant/Cross-Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Jeffrey L. Barth Attorney at Law 121 Lake St. S., Ste 101 Kirkland, WA 98033-9025	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Kathleen L. Sanders 4122 Factoria Blvd. S.E., Suite 303 Bellevue, WA 98006	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Patricia Novotny Attorney at Law 3418 NE 65th St., Ste A Seattle, WA 98115	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 20th day of February, 2013.

  
\_\_\_\_\_  
Victoria K. Isaksen