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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.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT'S BRIEF

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I. INTRODUCTION

The husband does not dispute that the wife has been diagnosed with multiple sclerosis and rheumatoid arthritis. Nor does he dispute that her professed fears for her future are sincere. But the wife is not a plaintiff in a tort action. She is not entitled to a half-million dollar “fund” for “what ifs” beyond what the trial court found was a just and equitable distribution of the parties’ significant community property.

The trial court was well aware of the wife’s medical condition, and with her condition in mind awarded the wife both a disproportionate share of the parties’ community property and substantial maintenance of \$10,000 per month for 85 months. The wife will have a six-figure annual income until she is age 62, on top of a \$3.7 million nest egg, including the parties’ waterfront home. The trial court did not err in refusing to award the wife a half-million dollars more on a bizarre theory that can only be justified on the basis that the husband was somehow responsible for the purely speculative potential consequences of the wife’s medical conditions.

The only error the trial court committed was in extending the wife's maintenance beyond the first 85 months to award her lifetime maintenance just to keep the option of maintenance "open" in the event circumstances change in the future. This court should vacate the extended maintenance award after the first 85 months of maintenance. In light of the substantial property awarded to each party, and the significant maintenance awarded to the wife, each party should be responsible for their own attorney fees.

II. REPLY TO RESTATEMENT OF FACTS

A. The Trial Court Rejected The Life Care Plan Prepared For The Wife As A "Very Worst Case Scenario," Which Is The Basis of the Cross-Appeal.

Nao has been diagnosed with multiple sclerosis (MS) and rheumatoid arthritis. (RP 247) Nao's MS has stabilized over the past few years, and with medication she has been "exacerbation free." (RP 253, 534) Her physician, Dr. Bowen, testified that Nao may "develop progressive disability" in the future, but the extent is "hard to predict." (RP 535)

Dr. Likosky, who examined Nao on Dan's behalf, testified that "the average person" with MS will experience a "change in function," rather than a "disabling disability," fifteen years after

initial diagnosis.¹ (RP 254-55) With the medications currently available, the “majority of people [who suffer from MS] will function relatively well for the next fifteen or twenty years” after their initial diagnosis. (RP 255) Dr. Likosky testified that “a small portion of people will have more than that level of disability [and] a very small portion of people will go on to a more malignant course of the illness in which they may have more substantial disability. But the average person doesn’t do that.” (RP 254-55) Dr. Bowen concurred, testifying that even though his patients tend to be the “bad cases,” only a small percentage require a wheel chair, and an even smaller percentage require a service dog. (RP 541-42)

Despite this evidence that with proper medication her diagnoses would have very little effect on her ability to function, Nao’s “vocational counselor and life care planner” Judith Parker prepared a “Life Care Plan” that purportedly set out the cost of Nao’s care for the rest of her life, assuming that she lived 29 more years. (Ex. 63 at 5, 52) The anticipated cost of the “Life Care Plan”

¹ At the time of trial, it had been six years since Nao was first diagnosed with MS. (RP 536)

was almost \$7.5 million.² (Ex. 63 at 52) Steve Kessler calculated the present value of the cost of the Plan, less what he estimated insurance would cover,³ as \$486,000. (RP 478)

Nao asked the court to award her this amount in addition to her requested property and spousal maintenance award (CP 199) even though Nao's doctor testified that in his more than thirty years of treating MS patients, he had never seen a "Life Care Plan" for one of his patients. (RP 542-43) Nao's cross-appeal is based on the trial court's failure to award her the claimed cost of her Life Care Plan. But the trial court declined to award any funds for the Life Care Plan because it found there was no "factual basis [] to prove that the wife is in need of all services detailed in the Life Care Plan at this time." (Finding of Fact (FF) 2.12, CP 88) Cross-Appellant's statement of facts, and indeed her entire brief, utterly fails to

² Ms. Parker testified that in calculating the cost of the Plan she gave no consideration to whether insurance would cover any of the medical costs. (Ex. 63 at 83-86) Instead, she based her figures on "private pay costs." (Ex. 63 at 84)

³ Kessler testified that he assumed that 15% of the Plan would not be covered by insurance. (RP 472) But he did not independently determine which individual items would be covered by insurance, and did not know which insurance plan Nao would use after the dissolution. (RP 478-79) Kessler testified that his choice of 15% was a "judgment" call on his part. (RP 477)

address the trial court's rejection of the underlying factual basis for her "Life Care Plan."

The trial court's rejection of the wife's tort-based "Life Care Plan" is wholly understandable, especially given its questionable components. In addition to the cost of visits with her physicians and prescription medication, most of which would admittedly be covered by insurance,⁴ the Plan included the cost for items that appeared only marginally related to Nao's medical care. For instance, the Plan included the cost for the next 29 years of a financial planner, an attorney, a yard maintenance worker, a housekeeper, a lifetime gym membership, and weekly personal training. (Ex. 56) The Plan also included the cost of two trips to Japan every year, at a cost of between \$13,000 and \$28,000 per year. (Ex. 56) Ms. Parker admitted that many of the items on the Plan were not necessarily recommended by Nao's doctors. Instead, they were based on her own recommendations that the doctors agreed to "sign off" on. (Ex. 63 at 126, 128)

⁴ As Nao points out in her brief, her medications alone account for 52% of the Life Care Plan. (Cross-Appeal Br. 16) But Nao also testified that she believed that her insurance would cover 80% of the cost of her prescriptions. (RP 437) Dr. Likosky testified that he believed that insurance would cover the full cost for her prescriptions. (RP 271)

The Plan also included the cost for “therapeutic modalities” that were in fact “lifestyle choices.” (RP 265) The Plan assumed that for the next 29 years, Nao would go to counseling every 2 weeks;⁵ both massage therapy and physical therapy 12 times a year;⁶ and acupuncture⁷ and “aquatic therapy”⁸ 6 times a year. The Plan also included the cost for monthly speech/language therapy, once Nao reaches age 60, to “maintain cognition levels as MS progresses.”⁹ (Ex. 56)

The Plan also included the cost of a wheel chair, a power scooter, a modified van for the scooter, and a service dog. (Ex. 56) The Plan included the cost of construction if Nao needed to “modify” her home to accommodate any future disability. (Ex. 56)

⁵ Nao testified that in 2011, she had gone to counseling 11 times. She only began going twice a month in the months leading to trial. (RP 331-32) Dr. Likosky testified that it is unlikely that someone would need to go to counseling every two weeks for the rest of her life, as it is usually only needed during “stressful” periods. (RP 264)

⁶ Nao testified that she stopped going to physical therapy because she preferred massage therapy. (RP 333)

⁷ Nao was not using acupuncture at the time of trial, because she “did not like it.” (RP 331) But Nao testified that she was open to trying it again, for “spasm treatment.” (RP 331)

⁸ Although she testified that she would “like to start swimming,” there was no evidence that Nao had ever used “aquatic therapy.” (RP 356)

⁹ Dr. Likosky testified that the inclusion of speech language therapy did not “make too much sense” because even if Nao’s cognitive abilities diminished, such therapy would be of little assistance. (RP 264)

The Plan included the cost of an electric hospital bed and “orthopedic equipment” based on the assumption that Nao might develop paralysis. (Ex. 56) Once Nao reaches age 63, in seven years, the Plan included the cost for 5-8 hour daily “attendant care” to assist her with shopping, meal preparation, personal care, errand services, and local transportation. (Ex. 56)

Dr. Likosky described the Plan as preparing for the “very worst-case scenario based on the thought that if everything went wrong this would be helpful in supporting that.” (RP 257) Less than 5% of MS patients will require the amount of care listed in the Plan. (RP 258)

B. Both Expert Witnesses Agreed That The Husband’s “Reasonable Replacement Compensation” Was \$400,000 And That Any Income Earned Above That Amount Was Considered In Valuing The Business Awarded To The Husband.

The parties operated a ship brokerage, Naodan Chartering, during the marriage. (RP 55, 58) Naodan Chartering pays Dan an annual salary of \$192,000, plus bonuses. (RP 60-62) Both experts who valued the company determined that Dan’s annual “reasonable replacement compensation” was \$400,000. (RP 167, 169)

While Nao states throughout her brief that Dan earns \$1 million annually (Cross-App. Br. 1, 12-13),¹⁰ any income he earns over his “reasonable replacement compensation” was considered when the business was valued and awarded as part of the marital estate. (RP 153, 167) The trial court found that the business was worth \$1.593 million, and awarded it to Dan. (FF 2.21, CP 89, 95) This value represented 60% of his 45% award of the community property.

As Nao acknowledges, the value of the business is largely intangible, as it was based on its future income stream, and the business “has little in the way of tangible assets.” (Cross-App. Br. 12) In other words, the majority of property awarded to Dan had no tangible value. Nao received her interest in the business when she was awarded nearly \$900,000 in other cash and assets awarded to her as part of her 55% award of the community property.

¹⁰ Naodan was “insane[ly]” profitable in the two years leading up to trial. (RP 62) Although the company historically had revenue of \$500,000 annually, in the two years before trial, the company earned \$2.1 million annually in gross revenue. (RP 65, 160) The “spike” in gross revenue was because Russia – China’s usual supplier – had imposed an export tax on its timber. (RP 66-67) To avoid the tax, China increased its import of timber from North America. (RP 66-67) Nevertheless, China recently started tightening credit, thus reducing its imports. (RP 68) As a result, the revenue for Naodan was down 30% at the time of trial from the year before. (RP 68) Dan did not believe that the income will maintain this level in the future. (RP 67; *see also* RP 166)

III. RESPONSE TO CROSS-APPEAL

A. The Trial Court Awarded The Wife Substantial Property And Maintenance To Meet Any Future Medical Needs. It Was Within The Trial Court's Discretion To Refuse To Fund A Life Care Plan That Was Not Factually Supported.

The trial court did not abuse its discretion in declining to award the wife an additional half million dollars, on top of the \$3.7 million that she received, to fund a "Life Care Plan," after it found 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) And the trial court properly awarded substantial maintenance of \$850,000 – the amount and duration that the husband does not challenge on appeal – to assist the wife with her future needs.

There is nothing in the record to support the wife's claim that the trial court evaluated the Life Care Plan for evidence proving "beyond a reasonable doubt" that the wife would need all of the services described. (Cross-App. Br. 40) However, there was certainly substantial evidence to support the trial court's finding that it was unlikely that the wife would need all or even most of the services described. (See Reply to Restatement of Facts § I.A) Ms. Parker, who prepared the Plan, acknowledged that the Plan was

“organic,” because “people change, disease processes change, and that drives further changes in the life care plans.” (Ex. 63 at 53) Dr. Likosky described the Plan as a “worst case scenario,” and testified that only 5% of patients who suffer MS will require the services described in the plan. (RP 257-58) Even the wife’s doctor testified that only a small percentage of his patients require a wheelchair or a service dog, as included in the Plan. (RP 251-52) Based on the wife’s testimony, the trial court could also conclude that she would not use all of the services – and certainly not in the frequency described in the Plan.¹¹

Further, it was well within its discretion for the trial court to refuse to award the wife additional monies for what were “lifestyle choices.” If the wife wants to travel (first class) to Japan twice a year, have weekly personal training sessions, monthly massages, employ yard and housekeeping services, retain a financial planner

¹¹ In her brief, the wife claims that “she is currently receiving all but 21 of the 63 services listed in the Life Care Plan.” (Cross-App. Br. 16) This is not true, and the citation to the record does not support that claim. Instead, the cited record states “of the 63 items, all but 21 start at her current age. Most of the costs anticipated 7 to 10 years from now [] may never be needed.” (CP 25) There was no evidence that Nao was currently using these services and in the frequency predicted by the Plan. For example, the wife denied going to acupuncture 6 times a year, there was no evidence that she was undergoing aquatic therapy, and even though the Plan presumed that she would go to counseling every two weeks, the wife testified that she only intended to continue going as “required” by her counselor. (RP 331, 332)

and attorney, and engage in “aquatic” therapy, those are services she should use either her property or maintenance award to support – not the basis for an “extra” slush fund. The trial court’s award of more property and substantial maintenance was more than adequate to assist the wife in meeting her medical needs in the future. The trial court did not abuse its discretion in declining to award the wife an additional “fund” for her proposed Life Care Plan.

B. Except For The Trial Court’s Decision To Extend The Duration Of Maintenance For The Wife’s Lifetime, The Maintenance Award Was Within The Trial Court’s Discretion.

Apparently acknowledging that lifetime maintenance was neither appropriate nor necessary, the wife claims in her appeal that the trial court should have awarded her the amount of maintenance that she requested at trial – \$20,000 per month for 12 years. (Cross-App. Br. 42; CP 198) But an award of spousal maintenance is a discretionary decision that will not be disturbed on appeal absent a showing that the trial court abused its discretion. *Marriage of Luckey*, 73 Wn. App. 201, 209-210, 868 P.2d 189 (1994). The trial court’s discretion in this area is “wide;” the only limitation on the amount and duration of maintenance is

that, in light of the relevant factors, the award must be “just.” *Luckey*, 73 Wn. App. at 209.

The wife complains that she was entitled to “substantial” maintenance, but she in fact received “substantial” maintenance – \$10,000 per month for 85 months, for a total of \$850,000 – the equivalent of a six-figure annual income until she reaches age 62. This amount is in addition to the nearly one year of maintenance that the wife received while the dissolution was pending, as well as the significant liquid assets she was awarded.

The wife cannot, as she does in both her response to the husband’s appeal and in her cross-appeal, ignore the property distribution under RCW 26.09.090(1)(a). (*See* Reply Argument § IV.B) In making its maintenance award, the trial court must consider the property awarded to each spouse. *Marriage of Estes*, 84 Wn. App. 586, 593, 929 P.2d 500 (1997). Therefore, the fact that she was awarded more property, and more liquid property compared to the husband, must be considered in determining whether the maintenance award here is just. *See Marriage of Wright*, 78 Wn. App. 230, 238, 896 P.2d 735 (1995) (a disproportionate award of assets “substantially improve[s] [the

wife]’s financial position,” and eliminates the need for additional maintenance) (*See* Reply Argument § III.B).

The premise for her claim that she should have been awarded more maintenance is her argument that the husband’s “business income” of \$83,000 per month warrants an award of maintenance of \$20,000, not \$10,000. (Cross-App. Br. 30) First, this high income was an anomaly due in part to recent trade with China that will decrease in the future – as evidenced by the fact that it was already going down by the time of trial. (RP 67-68, 166) Second, the wife’s claim ignores that both experts agreed that the husband’s monthly gross “reasonable compensation” was actually \$33,000 (\$400,000 annually). (RP 167, 169) In other words, the wife claims that not only was she entitled to 55% of the community property, but also two-thirds of the husband’s post-dissolution separate income.

Further, the larger income figure relied on by the wife is the income from the business beyond the husband’s reasonable compensation, which was the basis for the \$1.593 million value of the business awarded to him. The business represents 60% of his 45% award of the community property. The trial court cannot count those funds both as income for maintenance and as an asset

awarded to the husband in the property division, otherwise it would be “double dipping.” See *e.g. Marriage of Barnett*, 63 Wn. App. 385, 818 P.2d 1382 (1991) (See App. Br. 15-16). In other words, if the business income is considered for purposes of awarding maintenance, then the value of the business, which is premised on that income, cannot be considered in the property distribution.¹²

In fact, the maintenance award appropriately balances the parties’ economic circumstances for a reasonable period of time after their divorce. Maintenance awards that attempt to fully equalize the parties’ income for long periods of time, even following a long term marriage such as this, are generally disfavored. See *e.g. Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462, review denied, 122 Wn.2d 1021 (1993) (App. Br. 14); *Cleaver v. Cleaver*, 10 Wn. App. 14, 21, 516 P.2d 508 (1973) (App. Br. 14).

For 85 months, the wife will be receiving \$10,000 per month – close to one-third of the husband’s monthly “reasonable replacement compensation” – after already receiving 55% of the community property, including nearly 82% of the investment and retirement accounts. While the husband is paying maintenance, he

¹² If the business is removed from the property distribution, the wife was awarded 76% of the community property, plus lifetime maintenance.

will have to “catch up” to the wife’s property award, and save for his own retirement. Assuming this court vacates the “lifetime” portion of the maintenance award, as it should, the husband will be at or near retirement when maintenance terminates, and the wife will be eligible to receive social security benefits. In other words, the parties will not be in dissimilar circumstances.

This court should affirm the monthly maintenance award of \$10,000 for 85 months as within the trial court’s discretion under the circumstances of this case, but otherwise vacate the extended duration as requested in the husband’s appeal.

IV. REPLY IN SUPPORT OF APPEAL

A. The Trial Court Erred By Awarding Lifetime Maintenance Based On The “Conjectural Possibility Of A Future Change In Circumstances.”

“[I]t is not the policy of the law to place a permanent responsibility upon a divorced spouse to support a former wife.” *Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508 (1973). The trial court erred when it extended the duration of maintenance from 85 months to lifetime based solely on speculation that the wife’s needs might change in the future. *Marriage of Morgan*, 59 Wn.2d 639, 643, 369 P.2d 516 (1962) (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); *Marriage of Rouleau*, 36 Wn. App. 129, 672 P.2d 756 (1983) (reversing an award of maintenance that was based upon the “conjectural possibility of a future change in circumstances”).

The wife claims that the husband’s argument is “fatally flawed” because the increased duration of maintenance was not solely a “vehicle” for the wife to pursue additional maintenance in the speculative event that her medical condition deteriorates, but also that the trial court believed she required “additional maintenance” and an “additional amount of money.” (Cross-App. Br. 23, *citing* 7/27 RP 9, 22) But the wife admits that the basis for the trial court’s order reconsidering maintenance came about only after it was “advised that maintenance is modifiable only so long as it continues” and after it “expressed uncertainty about the law in this area.” (Cross-App. Br. 40-41) Further, the absurdity of trying to justify the \$100 a month in “additional money” the wife will receive as maintenance beginning 2029, as based on her anticipated needs, is apparent from the proposition itself.

The trial court in fact conceded that its reason for extending the duration of maintenance was to keep it “open so that if

something happens, then either party has the chance to come back and modify it.” (7/27 RP 9; *see also* 7/27 RP 26: “and I think the reason I reconsidered, was the need to have the ability for ongoing maintenance adjustment”) While it also stated that there were “other considerations” for the “additional maintenance,” it failed to articulate any reasons on the record other than more speculation. (7/27 RP 9, 22) For instance, the trial court reasoned that the “additional maintenance” it awarded after the first 85 months was because of its “concern about what insurance will cover,” and it did not know “whether or not the medical benefits that are available will be as generous as we think they are now. I have no way of knowing whether or not that will continue.” (7/27 RP 24, 26) But not knowing whether the medical insurance rules might change in seven years is not a basis to extend the duration of maintenance to lifetime maintenance, even if it is at a reduced amount, particularly when the amounts awarded are not grounded on any suggested anticipated need of the wife.

With regard to the amount of the extended maintenance, the trial court conceded it was being “arbitrary” when deciding whether to award the first portion of the extended maintenance at \$1,000 or \$100:

Regardless of - and if we change it to \$100 a month versus \$1,000 a month, that goal would still be - so let's - again and I - my problem here is that I - sound like I'm being somewhat arbitrary as far as just picking a number here. And I guess there's a reason for that because I guess I should never admit on the record that I'm being arbitrary. That probably wouldn't look good on appeal. But I am looking into the future, which is difficult to divine what the situation is going to be.

(7/27 RP 23) The wife claims that to the extent it was error for the trial court to reduce the extended maintenance of \$1,000 per month to \$100 per month after 10 years, the husband invited the error. (Cross-App. Br. 25) But the husband has never claimed that it was error for the trial court to reduce the amount of the extended maintenance from \$1,000 to \$100 when the wife turned age 72. Instead, he challenges the trial court's decision to extend the duration of the maintenance at all, which was based solely on speculation that the wife's needs might change.

Marriage of Rouleau, 36 Wn. App. 129, 672 P.2d 756 (1983) controls, and requires reversal. In *Rouleau*, this court reversed a maintenance award similar to the one here, as it was based on the trial court's rationale that "the door should be left open for the husband to apply for increased maintenance should circumstances change in the future." 36 Wn. App. at 130. This court held that the

trial court could not speculate on the husband's future needs in determining spousal maintenance. *Rouleau*, 36 Wn. App. at 132.

The wife tries to distinguish *Rouleau* because the husband there did not have a "present" need for maintenance and the wife here does. (Cross-App. Br. 27) But the husband does not dispute that the wife had a "present" need for maintenance – he does not challenge the trial court's award of maintenance of \$10,000 per month for the first 85 months. (See App. Br. 9) Instead, he challenges the trial court's decision to extend the duration of maintenance indefinitely, because it was not based on the wife's "present" need. Instead, it was based solely on speculation that her medical condition might deteriorate and insurance coverage might change. Under both *Rouleau* and *Morgan*, a maintenance award that is based on speculation of future changes is reversible error.

The wife argues that a "place holding" maintenance award should be affirmed when a future change of circumstances is likely. (Cross-App. Br. 28) First, there is no finding in this case that a change of circumstances is "likely" – indeed, the trial court's findings are contrary to such a claim. The trial court specifically rejected the wife's proposed findings that the wife's "condition will not improve and it is expected to decline" (CP 90) and that "it is

more probable than not that the wife's condition will deteriorate in the future." (CP 87) Second, spouses in a dissolution action are entitled 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) (App. Br. 12). When the "extended" maintenance starts, the husband will be age 61. He should not be left in limbo, wondering when or if the wife will seek increased maintenance, particularly when he will be nearing retirement. This is particularly true because he was awarded less than 20% of the parties' retirement accounts, and will have to shore up his own retirement at the same time he is paying substantial maintenance to the wife.

The trial court erred by improperly extending the duration of its maintenance award from eighty-five months to lifetime maintenance based solely on speculation that the wife's future needs might change. This court should reverse and vacate that portion of the maintenance award that extends beyond the 85 months originally awarded.

B. The Trial Court Erred In Awarding Lifetime Maintenance To The Wife When She Already Received A Greater Share Of The Community Property, Including The Vast Majority Of The Parties' Liquid Assets And Retirement.

In awarding maintenance, the trial court is required to also consider the “separate or community property apportioned” to the party seeking maintenance. RCW 26.09.090(1)(a). In this case, the trial court erred by failing to consider the fact that the wife received \$3.7 million in largely liquid assets, when it extended the duration of maintenance beyond the first 85 months that it originally awarded. Among the assets awarded to the wife were 81.7% of the parties’ retirement and investment accounts, worth nearly \$2.5 million, and nearly a half million dollars in separate property cash. (CP 95-96) *See Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797, *rev. denied*, 119 Wn.2d 1009 (1992) (trial court did not abuse its discretion in declining to award permanent maintenance to wife who was awarded \$2.6 million in assets, some of which were income producing). The cases relied on by the wife to claim that lifetime maintenance was “proper” because the wife has a “progressively debilitating disease” (App. Br. 35) do not support the lifetime maintenance award – particularly one that is admittedly a

“placeholder” – despite the significant assets and maintenance awarded in the portion of the award the husband does not contest:

In *Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990) (Cross-App. Br. 35-36), for instance, the appellate court affirmed an award of lifetime maintenance to a wife with multiple sclerosis. But there, unlike here, the husband was awarded significantly more assets than the wife. And the wife’s property award in *Tower*, unlike here, consisted only of a mortgaged residence and personal property; she received no cash, investments, or retirement.

In *Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989) (Cross-App. Br. 36), the appellate court affirmed an award of lifetime maintenance to a wife who suffered a condition that occasionally rendered her legally blind. But in *Morrow*, the husband’s misconduct had placed assets that could otherwise have been awarded to the wife beyond the reach of distribution. 53 Wn. App. at 584-89. Thus, while the wife in *Morgan* was awarded one-half of the community property valued at \$117,000, the court found the husband had a “beneficial interest” in assets valued between \$800,000 and \$950,000, in addition to his share of the community property. Here, all of the assets were available for distribution,

there were no allegations of misconduct by the husband, and the wife received more than one-half of the community property.

In *Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977) (Cross-App. Br. 36), the Supreme Court affirmed an award of maintenance for 10 years – not lifetime – to a wife, who had multiple sclerosis, and who at the time of the appeal was “totally disabled, requiring full-time nursing care and other medical attention.” The wife in *Hadley* had received \$545,000 in community property, and the husband received the remaining estate of nearly \$9 million. Obviously, *Hadley* does not support an award of lifetime maintenance here, where the wife was not totally disabled, and the husband received significantly less assets than the wife.

Finally, the wife claims that lifetime maintenance was justified because she will inevitably consume her assets in order to meet her daily needs. (Cross-App. Br. 37) But her argument ignores that she will receive \$850,000 in spousal maintenance, \$2.5 million in investment and retirement accounts, which will provide her with additional income, and that by the time the unchallenged maintenance award terminates, she will be eligible to receive a portion of the husband’s social security benefit. (RP 547)

Under these circumstances, the trial court erred in awarding lifetime maintenance to the wife.

C. The Wife Should Pay Her Own Attorney Fees On Appeal.

This court should deny the wife's request for attorney fees because she does not have the need for an award of fees under RCW 26.09.140. As the trial court found in an unchallenged finding, "the husband and wife have the ability to pay his or her own attorneys and costs incurred herein." (FF 2.15, CP 88) Nothing has changed and each party should bear their own attorney fees on appeal.

V. CONCLUSION

This court should vacate that portion of the maintenance award beyond the first 85 months originally awarded, because it was based solely on speculation that the wife's needs might change in the future. This court should otherwise affirm the trial court's other decisions, and order each party to bear their own fees and costs on appeal.

Dated this 3rd day of July, 2013.

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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 July 3, 2013, I arranged for service of the foregoing Reply Brief of Appellant/Cross-Respondent's Brief, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 3rd day of July, 2013.



Victoria K. Isaksen