

original

No. 35635-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

GORDON FRIEND RENNIE,

Respondent,

and

CYNTHIA ANN RENNIE,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BY DEPUTY [Signature]

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE CHRISTINE A. POMEROY

BRIEF OF APPELLANT

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Table of Contents

I. Introduction.....	1
II. Assignments of Error.....	1
III. Issues.....	2
IV. Statement of Facts.....	2
A. Cindy works and attends graduate school in West Virginia.....	3
B. The couple starts their home and family in Washington State.....	3
C. Cindy raises their three children while Gordon advances in his career.....	4
D. Cindy briefly works as a vocational rehabilitation counselor.....	5
E. Cindy searches for full-time work to support herself.....	6
F. Cindy is no longer able to work as a cardiopulmonary technologist.....	8
G. Cindy wants to work again as a vocational rehabilitation counselor.....	9
I. Gordon applies pressure on Cindy.....	11
J. The dissolution trial in October 2006.....	12
1. Assets and debts.....	12
2. Earnings and expenses.....	12
3. Maintenance.....	14

K. The trial court’s rulings.....	18
1. Division of property and debts.....	18
2. Maintenance award.....	19
V. Argument.....	21
A. The maintenance award was inequitable in light of the post-dissolution economic situations of the parties.....	21
1. The maintenance award was improperly based on the unsupported ruling that Cindy was “underemployed”.....	22
a. A conclusion of law was mischaracterized as a finding of fact.....	23
b. Cindy was not “underemployed”.....	24
2. The maintenance award left Cindy economically disadvantaged compared to Gordon.....	24
B. Attorney fees.....	30
VI. Conclusion.....	31

Table of Authorities

Cases

<u>Keever & Associates, Inc. v. Randall</u> , 129 Wn. App. 733, 738, 119 P.3d 926 (2005).....	23
<u>Marriage of Sheffer</u> , 60 Wn. App. 51, 53, 802 P.2d 817 (1990).....	21, 25, 26
<u>Marriage of Washburn</u> , 101 Wn.2d 168, 179, 677 P.2d 152 (1984)	26, 27
<u>Para-Medical Leasing, Inc. v. Hangen</u> , 48 Wn. App. 389, 398, 739 P.2d 717 (1987).....	23

Statutes

RCW 26.09.090.....	21, 22
RCW 26.09.140..	30

I. Introduction

After a 25 year marriage, the trial court awarded the wife eight years of progressively decreasing amounts of maintenance, forcing her to live off of her share of the marital assets, while the husband, a physician, enjoys a substantial income and a comfortable standard of living, which he attained because the wife forfeited her career to care for their three daughters and their home.

This court should reverse the trial court's maintenance award and remand for an award in the amount and duration requested by the wife or that is equitable in light of the post-dissolution economic situations of the parties. This court also should award attorney fees to the wife.

II. Assignments of Error

1. The trial court erred in ruling, in the findings of fact, that Cindy was "underemployed." CP 56, Findings of fact 2.12.

2. The trial court erred in ruling, in the conclusions of law, that maintenance should be ordered based on the factors set forth in the findings of fact. CP 59, Conclusions of law 3.8.

3. The trial court erred in ruling, in the decree, as to the amount and the duration of the maintenance award. CP 50, Decree of dissolution 3.7.

4. The trial court erred in entering the findings of fact and conclusions of law. CP 53-59.

5. The trial court erred in entering the decree of dissolution. CP 42-52.

III. Issues

Issue one: Was the maintenance award improperly based on the unsupported ruling that Cindy was “underemployed”?

Issue two: Is the maintenance award inequitable in light of the post-dissolution economic situations of Cindy and Gordon?

Issue three: Should Cindy be awarded attorney fees on appeal?

IV. Statement of Facts

Cindy and Gordon met in 1980 when Gordon was in a medical residency at the University of Washington. RP 20, 54. Cindy already had a degree from a community college. RP 20, 107. She had been working for ten years as a cardiopulmonary technologist at a Veterans Administration Hospital and at a United States Public Service Health Hospital. RP 107-108. At the time, she was working while studying for her undergraduate degree. RP 54, RP 107, 110. She and Gordon were earning about the same amount of money. RP 54.

The couple was married in January 1981. RP 20, 54-55.

Thinking he would have better career opportunities in West Virginia, Gordon moved there alone, leaving Cindy to complete her studies in Seattle. RP 55, 110. Several months later, she earned her bachelor's degree in psychology and followed Gordon. RP 22, 55.

A. Cindy works and attends graduate school in West Virginia.

The couple stayed in West Virginia for three years, both working to support themselves. RP 55. Cindy worked part-time as a substitute church musician and as an assistant to a doctor who was updating his records of unread echocardiograms. RP 111. She also studied for a master's degree in vocational rehabilitation counseling. RP 22, 55, 112.

B. The couple starts their home and family Washington State.

In 1984, Cindy earned her master's degree and they moved back to Washington State. RP 22, 56, 112. Cindy, pregnant at the time, took a part-time job as a vocational rehabilitation counselor. RP 56, 112. Gordon got a job as a physician at Group Health Cooperative in Olympia, where he continues to work to this day. RP 56.

That spring, the couple bought a waterfront home in Olympia. RP 145, 209, 210, 214. As down payment, they used

\$9,000 that Cindy had taken from her pre-marriage retirement account, as well as \$11,000 from a loan from Gordon's father, which they later repaid. RP 109, 145.

C. Cindy raises their three children while Gordon advances in his career.

After she gave birth to their first child, a daughter, in August 1984, Cindy took a brief break and then returned to work part-time. RP 22, 112. She again became pregnant, and, struggling to juggle work and child care, stopped working. RP 112. She had her second daughter in 1986 and her third in 1988. RP 112-113.

Cindy cared for the girls and kept house, while maintaining an influential leadership role in music in a number of churches. RP 22-23, 116. She was involved with the girls, who were very active in sports and music programs. RP 23. She was a troop leader in Girl Scouts and a swimming instructor at the YMCA. RP 23.

In 1990, Cindy began working part-time as a church musician. RP 59-60, 113. She continued this work throughout the 1990s, earning some extra money at various part-time jobs. RP 113.

During these years, Gordon worked long hours at his job. RP 116-117. He came home between 5:30 and 6:00 p.m., but

would get calls on most evenings and had to return to work. RP 116-117.

D. Cindy briefly works as a vocational rehabilitation counselor.

In 1999, Gordon was arrested for domestic violence against Cindy. RP 113. He accepted a plea agreement and entered domestic violence counseling. RP 113-114, CP 14. As a result of a restraining order against Gordon, Cindy stayed in their home with the girls. RP 113-114.

Concerned about the stability of her marriage, Cindy sought to enter the field that she left 15 years earlier. In November 1999, she found a temporary part-time job as a vocational rehabilitation counselor at Department of Health and Human Service's Division of Vocational Rehabilitation. RP 113, 115. Normally, the program only employed counselors who had passed a state certification examination. RP 157-159. Even though Cindy's certification had lapsed, she was able to get the position because the agency was in a provisional period during which it was upgrading the certification process. RP 159-160. While working, she continued to care for the children. She took them to school in the morning, went to work, then picked them up and took them to their activities. RP 113.

Meanwhile, Gordon said that he was planning to file for divorce if Cindy did not have the restraining order lifted. RP 114. Cindy asked the court to dismiss the order and Gordon moved back into the family home. RP 114-115.

In early 2001, Cindy was interviewing for another position at the division. RP 114-115. Around that time, she and Gordon were attending a marriage workshop when Gordon had a stroke. RP 26, 60, 114, 115. He was hospitalized for about three weeks. RP 26, 114. Cindy stopped trying to get the new job. RP 114-115. She brought Gordon back to the family home and cared for him. RP 60,114-115.

Gordon recovered at home for about six months. RP 116. Working part-time for the next six months, he gradually phased back into his job. RP 116. His income was not affected by his convalescence, as he had disability coverage. RP 116.

During this time and into 2004, Cindy had several part-time jobs, performing music at churches. RP 115-116, 118-119. She also stayed very involved with her daughters' activities. RP 119. The oldest daughter was in college and the other two were involved in school activities, such as cheerleading and swimming. RP 119.

E. Cindy searches for full-time work to support herself.

In August 2004, Cindy was arrested for an alleged domestic violence incident. RP 27. As a result of the charge—which was later dismissed, a restraining order was entered against her, so she had to leave the family home. CP 14, RP 56. Gordon remained in the home with their youngest daughter, who was 17 and finishing her last year of high school. RP 98, 100-101. Although devastated by the charge, Cindy was unwilling to file for dissolution, because she believed that marriage “is a lifelong commitment and that resolution is always possible.” RP 140.

With only her work as a musician, Cindy was earning only \$400 a month. RP 58, 98, 129. She now had to support herself, paying rent and other expenses. RP 129-132. She began a concerted effort to make more money. RP 120. She put out many job applications and got on the state register for as many positions as she thought she could qualify for. RP 120. She looked for all kinds of additional work, even doing seasonal work for a home business that made gift items. RP 120.

Six months later, in February 2005, she found a job where she could use some of her skills and experience. She was hired as an outreach coordinator at a community resource agency in its

homeless resource advocacy program. RP 120. She earned \$11 per hour for 20 hours of work each week. RP 120.

F. Cindy is no longer able to work as a cardiopulmonary technologist.

Cindy tried to get a job in the field that she had worked in over 20 years ago—cardiopulmonary technology—but she learned that the field had become very specialized. RP 109-110. She completed applications, submitted her resume on internet sites for cardiopulmonary technology and related positions, and went to interviews, but she was told that her technical skills were not up to date. RP 110, 150.

Worse, she was no longer certified to work as a cardiopulmonary technologist. RP 150-151. She job-shadowed technologists at a clinic. RP 151. The techs told her that she would have to go back to school in order to work in the field again. RP 151. In all, she would need to complete four years of education to become certifiable as a sonographer. RP 151.

Even if she did the coursework, she probably would have been physically unable to do the demanding job. She had physical limitations, such as a weakness in her hand due to arthritis, which

would make it difficult to hold the large and heavy transducers for the entire 45 minute to one hour long examinations. RP 151-152.

G. Cindy wants to work again as a vocational rehabilitation counselor.

Cindy wanted to work again as a vocational rehabilitation counselor, believing that she had the best opportunities in that field. RP 150, 155. But as her certification had lapsed years before, she would not qualify for any job as a vocational rehabilitation counselor until she passed the certification examination. RP 150, 157-159. To obtain her certification, Cindy would have to study full time for at least one year to complete the required coursework of six online classes. RP 179.

Needing immediate income, she still tried to find work as a vocational counselor. She sent out her resume (RP 149, Exhibit 18), submitted applications for several positions (RP 149, Exhibit 19), and networked with people in the field (RP 149-150).

H. Cindy works with a vocational counselor.

In January 2006, Cindy met with a vocational counselor, Janice Reha. RP 152, 162-163. Over the next nine months, they met seven times, during which time Ms. Reha performed an intensive career assessment on Cindy, assisted her in her effort to

find employment, and prepared a vocational report on her behalf. RP 162-163, 175-176, Exhibit 21.

Ms. Reha noted, in her report, that Cindy faced significant obstacles in re-entering the job market, including her sporadic and interrupted career history, her age, her lack of a state certification as a vocational rehabilitation counselor, and the limited openings in her competitive field. Exhibit 21, page 4 and 11. She further noted that Cindy “has been recovering from loss of self-esteem and self-confidence resulting from her marriage.” Exhibit 21, page 5. She recommended that Cindy cut back on her 40+ hour work schedule, complete the classes required to obtain recertification, and find part-time work in her field, supplemented by long range maintenance. Exhibit 21, page 10.

During the months that she consulted with the vocational counselor, Cindy was working at the community resource agency, as well as at several other part-time jobs as a musician. RP 164-165. She continued to apply for positions as a vocational rehabilitation counselor, including one that was suggested by Gordon’s attorney in April 2006. RP 164-165, Exhibit 19. She applied many times for every position and program that she could think of. RP 160-161. She applied again for a job at Division of

Vocational Rehabilitation but learned, in the months before trial, that the program had a freeze on hiring. RP 160.

I. Gordon applies pressure on Cindy.

Meanwhile, Gordon was taking legal steps to apply tremendous emotional and financial pressure on Cindy. In June 2005, he filed a petition for dissolution of the marriage. CP 4-9, RP 58-59, 98. He asked that Cindy be restrained from the family home and from having residential time with her youngest daughter. RP 98-100.

He also asked that Cindy receive no maintenance, at a time when he was earning about \$14,000 a month. CP 6, RP 61-64, Exhibits 1, 3, 4, 5, 6. After he was ordered to pay temporary maintenance, he obtained an order of child support, requiring Cindy to pay him \$430 a month for their youngest daughter. CP 14, RP 100-101. He deducted the amount from the monthly maintenance payments that he made to her. RP 101.

In September 2005, their youngest daughter moved into the home of her boyfriend's family. RP 101. Gordon continued to deduct the amount for child support each month, while contributing nothing to the boyfriend's family. RP 101-102. Finally, in January 2006, Cindy obtained an order forcing Gordon to reimburse her for

the four months of unnecessary support that she paid. CP 15, RP 102.

J. The dissolution trial in October 2006.

1. Assets and debts.

At the time of trial, in October 2006, Gordon and Cindy had assets worth around \$1,900,000. CP 35-37, 39-41, Exhibits 8, 11-13. The assets included the family home, individual retirement accounts for each of them, Gordon's 401(k) retirement plan, a college fund for the girls, Gordon's rental home, and a timeshare condominium, among other things. RP 29, 46-48, 53, 90-99, 143, 207, 214, Exhibits 11-12. They had debts of around \$95,000, consisting of a mortgage on the home, credit card debt, and unpaid federal income taxes. RP 30, 32, 65-66.

2. Earnings and expenses.

Gordon was 54 years old. CP 28. He was earning about \$16,000 a month or about \$190,000 a year. RP 61-64, 194-195, Exhibits 6, 32. He also received about \$800 a month in rent from a property that he inherited. RP 64-65, 80.

His monthly net income was about \$11,500. Exhibit 32. His monthly expenses totaled about \$8,400, consisting of \$3,200 in maintenance payments, \$2,000 for mortgage and taxes on the

family home, and about \$750 for the girls, among other things. RP 52-53, 70, Exhibit 4. He no longer paid on the credit card debt. And he no longer paid out of his income for the daughter who left for college. RP 71-72. He paid for the girls' college expenses out of their college fund. RP 32-37, 147. After these expenses, he had about \$3,100 remaining each month.

Gordon was in good health, despite his stroke five years earlier, and he did not plan on retiring soon. RP 40-41. He would be eligible for about \$1,500 a month in social security benefits if he retired in eight years at age 62. Exhibit 2. He had term life and medical insurance through his employer. RP 95-96.

Cindy was almost 58 years old. RP 107. She was earning a total of about \$2,100 a month, working several part-time jobs. RP 121-124, Exhibits 17, 38. She had become a case manager at the agency, earning \$12.50 an hour, still working 20 hours a week. RP 121, 123, Exhibit 38. She had one job as a church musician that paid \$400 a month for about 10 hours of work each week, as well as another, similar job that paid about \$350 a month. RP 121-122. She also made about \$175 a month as an accompanist for a ballet. RP 122.

As she was receiving \$3,200 a month in maintenance, her total gross monthly income was about \$5,200. Her monthly net equaled her monthly expenses. Both were around \$5,000. RP 135-137, Exhibit 17. Her expenses included the cost of medical insurance after the dissolution and out of pocket payments for domestic violence victim counseling. RP 134-135. They did not include payments on the credit card debt that would be eliminated in the dissolution. CP 48-49. After the dissolution, she would have to pay for COBRA, as she received regular treatment for hypothyroidism and saw a psychiatrist for an adjustment disorder. RP 134-135.

She had not contributed significantly to social security. Her only lengthy period of work occurred before the marriage, and, as an employee of the federal government, she participated in a retirement plan that was outside of the social security system. RP 108. She had removed the funds from the plan to use as the down payment on the family home. RP 109. As a spouse, she would be entitled to claim the amount of half of Gordon's benefits when he turned 62. RP 235, Exhibit 39.

3. Maintenance.

A great deal of the two day trial focused on whether Cindy should receive maintenance. Gordon strongly opposed maintenance. He testified that Cindy would not need it because she would receive a greater fraction of the community assets. RP 29-30. He also testified that she was able to work full-time. RP 30.

Cindy asked for maintenance of \$3,200 a month until Gordon received social security benefits, then decreasing to \$500 a month for life. CP 24, 26. She testified that she wanted to work full-time as a vocational rehabilitation counselor, and recounted her extensive efforts to find appropriate work. RP 109-110, 121-124, 150-152, 155, 157-160, 164-166, Exhibits 18-19.

Cindy, in response to questioning by the court, said that she had applied with many programs for the state, including Juvenile Rehabilitation. RP 160-161. She told the court that she was not currently on the state employment register because personnel told her it had just been revised and she should wait a month before reapplying. RP 161.

On cross examination, counsel for Gordon, in an effort to depict Cindy as a person who shirked work, made her read the

vocational counselor's recommendation that she "obtain long-range maintenance, to support part-time employment". RP 165.

The vocational counselor, Janice Reha, testified on Cindy's behalf. RP 174-193. Ms. Reha described Cindy as "a very bright woman" with a master's degree in vocational rehabilitation counseling but without the certification necessary to qualify for positions in the field. RP 176. She opined that Cindy could not work as a cardiopulmonary technologist, as all of her skills are outdated, or as a musician, as no full time positions were available. RP 183.

Ms. Reha said that Cindy faced obstacles in getting a job as a vocational rehabilitation counselor, even if she had her certification. She said that positions in vocational rehabilitation with the government "are very hard to come by" so most of these professionals "end up becoming self-employed or working as contractors." RP 177. She said the competition for these jobs was keen and the employers were looking for two years of recent work experience in the field. RP 178. She also said that Cindy's age would be a barrier to employment, because she would be competing with young, new graduates and companies were less

inclined to hire older people. RP 180. She said that she and Cindy searched for state jobs and found only sporadic openings. RP 178.

Ms. Reha spoke of the problem of studying—and getting stuck in—a specialized field in vocational rehabilitation. RP 177-178. She said that Cindy’s specialization was “working with people who have disabilities; usually physical but emotional as well.” RP 177-178.

Ms. Reha suggested that Cindy work part-time while doing her classes for certification, as “she’s too strung out with too many different jobs right now”. RP 179-180. She said that Cindy should find a part time job in her area of specialization and develop a track record. RP 180, 185. But she doubted that Cindy could do it right away, given her involvement in the divorce and her need to search for a place to live. RP 179.

The court appeared convinced that Cindy was shirking work in order to live off of maintenance, as Gordon’s attorney had implied. Disagreeing, Ms. Reha testified that Cindy had done everything that she could do to find employment over the prior year and a half (RP 184):

THE COURT: I guess what I’m saying is when I see the recommendations, “Career goals: To work part time, to obtain maintenance to supplement,” there was never, “I want

to get a job, and I want to be self-sufficient.” You didn’t see this in Cindy, did you?

THE WITNESS: I certainly did. This woman is working four to five different, individual jobs. I work a lot – I mean, I’ve done this for 30 years. I’ve worked a lot with older women, and I’ve seen a lot of them. I see very few who are putting out the effort Cindy does.

RP 182-183.

K. The trial court’s rulings.

1. Division of property and debts.

The court basically divided the parties’ community property 45/55 in favor of Cindy. The family home was to be sold for \$700,000 if they could not agree on a price, and the proceeds were to be split 45/55 in favor of Cindy, after paying closing costs, the mortgage, the credit card balances, income taxes, and attorney fees. CP 43-44, 46-49, 51, RP 274-275, 281, Exhibit 17. At that price, Gordon would receive about \$228,000 and Cindy about \$307,225 from the net proceeds of the home. Gordon was awarded his inherited rental home, worth \$160,000. CP 44-45, RP 64-65, 80, 274. Cindy was awarded the timeshare, worth between \$10,000 and \$30,000. CP 47, RP 53, 143. In total, Gordon received about \$388,000 and Cindy about \$327,225 in presently available assets, not including vehicles and personal property.

The court set out specific formulae for dividing the IRAs and Gordon's retirement plan. Gordon would receive about \$106,000 and Cindy about \$162,000 in present dollars in his IRA, according to the formula. CP 45, 47, RP 276. She received her entire IRA, valued at about \$27,000. CP 47, RP 276. The present value of the parties' portions of Gordon's retirement plan cannot be accurately determined based on the record. Splitting the amount in the plan 40/60 on the closest date in the record to the date of separation—about \$607,000—Gordon would receive about \$242,000 and Cindy about \$364,000. Exhibit 25. Gordon contributed about \$1,000 each month to the plan, according to his wage statement. Exhibit 32. With 25 months from the date of separation to trial, he would receive an additional \$25,000. The accumulations to August 2006 were about \$94,000, excluding the contributions. Exhibit 11. After the appropriate split, Gordon would receive roughly \$305,000 and Cindy \$420,000 in present dollars from his retirement plan.

2. Maintenance award.

The trial court, in the findings of fact, considered the required statutory factors, but also decided that Cindy was "underemployed":

This is a long-term marriage. Prior to and during the marriage, the wife obtained an AA, BA, and a Masters in

Vocational Counseling. She was employed prior to the marriage and during the first part of the marriage.

During most of the marriage, the wife was a stay-at-home parent for the three children, such that there are significant obstacles to re-entering the workforce.

At the time of the trial, the wife was age 57 years 11 months.

On the date of trial, the wife was earning approximately \$2,100 per month gross income working four jobs.

The husband was employed was a physician earning approximately \$190,000 per year.

The family had a significant standard of living during the marriage.

A career counselor testified that the wife was unable to return to her prior technical profession of cardiopulmonary technologist and, most likely, would be only able to find part-time work as a vocational rehabilitation counselor. This would be after approximately one year of re-education/training.

The husband suffered a stroke several years ago. He was 54 years, 9 months at the time of trial.

Neither party has any medical problem preventing him or her from being employed full-time at this time.

The wife has minimal social security benefits in her own right based on her earning record. She will be eligible to collect up to one-half of the social security benefits available to the husband, but cannot collect until both have reached age 62. She must remain unmarried.

The wife is currently underemployed.

CP 55-56.

The court, in the decree, awarded her just eight years of progressively decreasing amounts of maintenance, despite its awareness of the post-dissolution disparity in incomes between the parties (RP 273):

\$3,200 per month for twelve (12) months commencing November 2006, then \$2,000 per month for twenty-four (24) months, then \$1,000 per month for sixty (60) months.

CP 50.

Gordon was not ordered to pay Cindy's medical insurance after the date of entry of the decree. CP 50.

V. Argument

A. The maintenance award was inequitable in light of the post-dissolution economic situations of the parties.

The trial court should have awarded an increased amount of maintenance for a longer duration because of the post-dissolution disparity in Gordon and Cindy's economic situations.

The award of maintenance is within the discretion of the trial court. In re Marriage of Sheffer, 60 Wn. App. 51, 53, 802 P.2d 817 (1990). A trial court abuses its discretion when it makes a decision based on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion. Sheffer, 60 Wn. App. at 53 (citations omitted). But where the disparity in earning power and

potential is great, the appellate court “must closely examine the maintenance award to see whether it is equitable in light of the post-dissolution economic situations of the parties.” Sheffer, 60 Wn. App. at 56.

The trial court is required by statute to reach a just result in awarding maintenance after considering all relevant factors. RCW 26.09.090. These factors include, but are not limited to, the following:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

RCW 26.09.090.

1. The maintenance award was improperly based on the unsupported ruling that Cindy was “underemployed.”

The trial court, considering the relevant factors, entered findings, supported by substantial evidence in the record, that reflect that at the time of trial Cindy was unable to meet her needs independently and that she needed additional time to acquire the education to enable her to find appropriate employment. But, deciding that Cindy was “underemployed”, the court awarded her maintenance of inadequate amount and duration.

a. A conclusion of law was mischaracterized as a finding of fact.

The finding that Cindy was “underemployed” is actually a conclusion of law. A finding of fact is a determination from the evidence of the case propounded by one party and denied by another. Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App. 389, 398, 739 P.2d 717 (1987)(citation omitted). If a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law. Para-Medical Leasing, 48 Wn. App. at 389 (citations omitted).

The legal implication of “underemployment” is that Cindy voluntarily chose to earn less than she is capable of earning in

order to avoid supporting herself independently, so she should receive less maintenance. The ruling that Cindy was “underemployed” was not determined from evidence presented at trial. The appellate court reviews erroneously labeled findings of fact that are conclusions of law de novo. Keever & Associates, Inc. v. Randall, 129 Wn. App. 733, 738, 119 P.3d 926 (2005).

b. Cindy was not “underemployed.”

A review of the record as a whole does not support the court’s decision that Cindy was “underemployed.” The only evidence offered by Gordon in support of his contention that Cindy was shirking work in order to live off of maintenance was the vocational counselor’s recommendation that Cindy “obtain long-range maintenance, to support part-time employment”. But the counselor based her recommendation on her research into the realistic obstacles that Cindy faced in getting hired as an entry level vocational rehabilitation counselor, even after she became certified, given her work history, her age, the few openings in her field, as well as her lack of self-esteem and confidence. The evidence presented a trial overwhelmingly shows that Cindy worked hard at several jobs to make ends meet, while trying to get hired as a vocational rehabilitation counselor.

2. The maintenance award left Cindy economically disadvantaged compared to Gordon.

Based on its decision that Cindy was “underemployed”, the court knowingly crafted an inequitable maintenance award that left Cindy economically disadvantaged compared to Gordon.

In a series of maintenance cases from our state, spanning several decades, the courts have focused on the importance of the parties’ post-dissolution economic status. These cases “have also emphasized that the economic condition in which a dissolution decree leaves the parties is a paramount concern in determining issues of property division and maintenance.” Sheffer, 60 Wn. App. at 55 (emphasis added).

The facts of the present case are remarkably similar to those in Sheffer. In that case, Beverly and Alfred Sheffer were married for 30 years. Beverly worked as a secretary, but quit her job to stay home and raise their four children. Over 10 years later, in 1972, she returned to work part-time when their youngest daughter started kindergarten. For the next eight years, she worked either part-time or full-time, quitting when she had health problems and needed to transport her daughter to school. Six years later, in 1986, Beverly returned to work as an automobile license clerk,

earning a monthly net income of \$844, without health benefits. By that time, Alfred had worked for Boeing for over 30 years, earning a monthly net income over \$4,900.

The trial court divided their roughly \$106,000 in community assets 60/40 in favor of Beverly. Beverly was awarded the family home, with an equity of \$66,000. Alfred's award included a \$12,000 lien on the home, payable with interest within three years. Beverly also was awarded \$1,200 a month in maintenance for 36 months and 50 percent of Alfred's vested retirement. Sheffer, 60 Wn. App. at 52-53.

Beverly appealed the maintenance award, pointing out the post-dissolution disparity in economic situations between Alfred and herself. The appellate court examined a series of prior cases in which a wife sacrificed her education and career so that the husband could advance in his career. In one of these cases, In re Marriage of Washburn, 101 Wn.2d 168, 179, 677 P.2d 152 (1984), our Supreme Court said that maintenance "is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time."

The court analyzed the parties' relative economic situations both during and after the payment of maintenance and concluded that the wife was left economically disadvantaged as compared to the husband. Reversing, the court held that the standard of living of the parties during marriage and the parties' post-dissolution economic condition "are paramount concerns when considering maintenance and property awards in dissolution actions." Sheffer, 60 Wn. App. at 57.

The court explained its holding, saying that the community benefited economically as a result of the parties' efforts, so maintenance "should be utilized in this case as a flexible tool to more nearly equalize the post-dissolution standard of living of the parties":

The economic reality is that this community has substantially benefited from Alfred's career, which in turn was facilitated by Beverly's caring for the home and family while forfeiting her own economic opportunities. When Beverly did return to fulltime/part-time work as her youngest child reached school age, Alfred disapproved. Beverly later left her job for health reasons and to provide transportation for their daughter. Through her efforts, Beverly provided the services needed by the community to function as a family. She did so at a sacrifice of her economic opportunities in the market place. That trade-off, clearly agreed to by Alfred, now leaves Beverly economically disadvantaged as compared to Alfred.

Sheffer, 60 Wn. App. at 57.

The court should come to the same conclusion in the present case. Gordon was able to devote himself entirely to his career, resulting in a substantial income and standard of living, because Cindy raised their girls while forfeiting her own career. Although she obtained her master's degree in the field, she only worked briefly as a vocational rehabilitation counselor in 1984 and in 1999-2001. By the time they separated in 2004, Cindy, then 56 years old, lacked the required certification to work in her field and needed to return to school for a year to obtain it. At the same time, she could not earn an income sufficient to pay her expenses.

Assuming that Cindy began the year of classes for certification in November 2006 while working part-time as a case manager, she would have a monthly gross income of about \$4,300, consisting of about \$1,100 in wages and \$3,200 in maintenance. Her expenses will be about \$5,000 a month, as well as a total of about \$7,700 for the classes. Exhibit 21, page 11. After 12 months, she would have debts of \$16,100.

Assuming further that she passes the certification examination and immediately gets work as a vocational rehabilitation counselor, Cindy would earn a monthly salary of about \$2,500 and receive \$2,000 in maintenance for a monthly

gross income of \$4,500. Exhibit 21, page 11. For the next 24 months, she would incur a debt of \$6,000 each year.

Three years later, at age 61, Cindy would begin receiving \$1,000 a month in maintenance for the next sixty months. Her gross monthly income would drop to \$3,500 and her monthly debts would rise to \$1,500 or \$18,000 a year. Her total debt for the eight year period during which she receives maintenance would be about \$118,100, so she will be forced to spend a good deal of the house proceeds to cover her basic expenses.

Cindy will be 66 when she stops receiving maintenance. She will be entitled to about \$750 a month in social security benefits, but she will need to continue to work as she will be going into debt in the amount of \$1,750 each month.

Gordon will earn at least \$16,800 a month, including his wages and rent payments from his inherited property. After his monthly expenses of \$5,200, he will be left with \$11,600 a month, excluding maintenance payments. In the first year of maintenance payments, he will have \$8,400 a month remaining. For the next two years, he will have \$9,600 remaining. For the final five years, he will have \$10,600 remaining. Obviously, he will not have to

touch the house proceeds. He can reinvest them in another property, and live comfortably off of his monthly earnings.

When Gordon retires, he will receive each month \$1,500 in social security benefits, \$800 in rent, as well as payments from his retirement plan. His retirement nest egg will have remained intact, growing in value due to his regular contributions and interest.

The trial court, noting in its oral ruling that it “looked at the disparity of the income” and that Gordon “will make substantially more income than her for his lifetime”, awarded Cindy a relatively low amount of maintenance for just eight years. Cindy received a larger share of the assets, but she will be forced to live off of them. Gordon will not. He will leave behind a 25 year marriage with a very comfortable income and a significant amount of growing assets for his retirement.

Accordingly, in light of the duration of the marriage and the standard of living during the marriage, as well as Cindy’s inability to support herself independently and Gordon’s ability to pay, the award of maintenance was unjust. The court should use maintenance here as a flexible tool to more nearly equalize Cindy and Gordon’s post-dissolution standard of living.

B. Attorney fees.

Cindy also asks for an award of attorney fees on appeal under RCW 26.09.140. In deciding whether to award attorney fees and costs, the court considers the need and ability of the parties. Although the family home was ordered to be sold, this has not been accomplished, so the parties do not have the proceeds from the sale. Cindy has the need: She is struggling to earn the income necessary to pay her basic expenses. Gordon has the ability to pay: He has a monthly net income of about \$11,800. Considering the disparity in income between Cindy and Gordon, the court should award attorney fees and costs of the appeal to Cindy.

VI. Conclusion

The court should reverse the maintenance award and direct the trial court to award maintenance of \$3,500 a month until Gordon begins receiving social security benefits, decreasing to \$500 for life after that point, as Cindy requested at trial. In the alternative, the court should reverse and remand this case for a maintenance award that is equitable in light of the post-dissolution economic situations of the parties.

The court also should award Cindy the attorney fees and costs incurred in maintaining her appeal.

Dated this 18th day of June 2007.

LAW OFFICES OF
JANICE M. SUTTER

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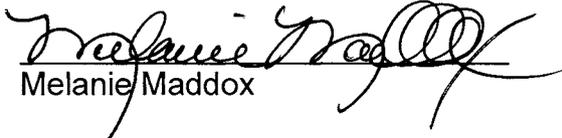
Declaration of Service

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

That on June 18, 2007, I arranged for service of the foregoing Brief of Appellant, to the court and the parties to this action as follows:

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DATED at Seattle, Washington this 18th day of June, 2007.


 Melanie Maddox

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