

No. 49874-0-II

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

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In re the Marriage of

RICHARD L. YOUNG  
Respondent

and

DONNA D. YOUNG  
Appellant

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAMANIA COUNTY

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AMENDED OPENING BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to consider all the statutory factors, including all “relevant factors,” when awarding maintenance and by failing to enter findings on the relevant factors.

2. The trial court erred when it awarded maintenance in an amount and for a duration inadequate to serve the purposes of our law, specifically, an award that is just and equitable.

3. The trial court erred when it ordered maintenance to terminate based on the presumption the husband would pay the judgments ordered, leaving the wife with no means of support if the husband does not pay the judgments.

4. The trial court erred by valuing at zero the husband’s ongoing business, both productive of substantial monthly income, including one that had been valued by agreement of the parties at \$114,000, and by valuing other properties without regard to material facts.

5. The trial court erred by deducting from the value of the properties speculative taxes and post-separation loans that did not benefit the community.

6. The trial court erred by entering the following findings of fact and conclusions of law:

Finding #8 (Finding and Conclusions about a Marriage):

The division of real property described in the final order is fair (just and equitable). CP 115

Finding #9 (Finding and Conclusions about a Marriage):

“The division of community personal property described in the final order is fair (just and equitable). CP 115.

Finding #11 (Finding and Conclusions about a Marriage):

“The division of community debt described in the final order is fair (just and equitable).” CP 115

Finding #13 (Finding and Conclusions about a Marriage):

“Spousal support should be ordered because the court has considered the factors enumerated in RCW 26.09.090.” CP 116

Finding # 6, Appendix A (Final Divorce Decree), awarding judgment to Donna Young in the amount of \$435,625. CP 123, 129.

Finding #7, Appendix C (Final Divorce Decree), awarding to Petitioner: Carty Road property valued at \$149,000; Padden Parkway property valued at \$500,000; The Timbers at Van Mall valued at \$410,000. CP 123, 133.

Finding #8, Appendix D (Final Divorce Decree), awarding to Petitioner Cedarlake Company valued at \$0. CP 123, 134.

Finding #13, Appendix B (Final Divorce Decree) regarding spousal support. CP 124, 131-132.

7. The trial court should award the wife her fees on appeal.

*Issues Pertaining to Assignments of Error*

1. When awarding maintenance, must the court consider all relevant factors, including the parties' potential for future earnings and the parties' respective future circumstances, and must the court enter findings addressing all the relevant factors?

2. In Washington, is homemaker's contribution to the family discounted for being non-remunerative?

3. Where a spouse lacks the ability to contribute significantly to her own livelihood, having spent 43 years performing the family's domestic labor, is an award of lifetime maintenance, secured by a life insurance policy, consistent with Washington law and policy?

4. Must the court also consider the parties' future earning potential in order to make a just and equitable property distribution?

5. Must property valuations be based on evidence, not speculation, and otherwise be free of arithmetical error?

6. Should the wife be awarded her fees on appeal based on the disparate financial circumstances of the parties?

## II. STATEMENT OF THE CASE

Donna and Richard Young were married for 42 years and had been together since Donna was 16 years old. 5RP 25, 260. Donna raised their two children and did not work outside the home after the children were born; she has no marketable skills. 5RP 250; CP 178. Richard worked in construction and real estate development, managing the parties' two businesses, C.C. Land Development, LLC ("CC Land"), which buys and sells various properties, and Cedarlake Company, Inc. ("Cedarlake"), which develops properties, with a focus on tenant improvements. See Ex. 1 (career profile). Throughout the marriage, the parties used Cedarlake to pay a number of personal expenses (medical, auto, cell phones, etc.). CP 179. In addition to these two businesses, the parties' assets consisted of several properties, described below. Instead of saving for retirement, they planned to rely on their businesses and properties for their retirement. 5RP 235.

The parties separated in June 2014, when Richard asked Donna to move out of the marital home, which sits on 26.58 acres in Ridgefield, Washington, with a market value over \$1million. CP 178; CP 25. Donna moved into a small condo the couple owns in Bend, Oregon, with a market value of \$130,000. CP 178; CP 25. Richard filed for dissolution in July 2014, moved his intimate companion into the marital residence with him,

where they continue to reside, and stopped paying the mortgage, despite a temporary order requiring him to do so. CP 1-3; 5RP 106, 217, 241; CP 7-8.<sup>1</sup> (Richard’s intimate companion owns a construction business very similar to Cedarlake, which he helped her start around the time his license was suspended. 5RP 216-17. Richard said he would be doing some estimating and looking at projects for the company, which is called Onyx Contracting and which Richard described as a “100 % woman-owned business.” 5RP 216-217.)

At the time of separation, the parties’ assets consisted of the following properties: (1) the marital home in Ridgefield, Washington (“Carty Road residence”), a single family home sitting on 26.58 acres; (2) a condominium in Bend, Oregon (“Bend condo”); (3) an undeveloped lot in Bend, Oregon (“Pronghorn lot”); (4) a 40% interest in The Timbers at Van Mall (“The Timbers”), a commercial office building located on Vancouver Mall Loop in Clark County, Washington, which produces rental income from 15-20 leased spaces; (5) Padden Parkway Business Development Project (“Padden Parkway”), an undeveloped commercial property in Clark County, Washington; and Cedarlake Company, the construction business. CP 25-26.

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<sup>1</sup> The court issued its oral ruling in October 2015, but the order was not entered until January 2016. The order obligates Richard to “pay all expenses related to the parties’ Ridgewood residence (Carty Road).” CP 8.

Shortly before he filed for dissolution, Richard declared the parties' net worth to be \$8,774,073. CP 179, 182 (6/5/2014 financing application with West Coast Bank). After separation, Cedarlake and the Timbers continued to generate income. See 5RP 284-85 (testimony about Cedarlake current job lists, employees); Ex. 2 at 22 (Cedarlake valuation shows owner compensation of \$132,000 in 2014 and projected an increase); 5RP 132-33 (\$30,000 Timbers dividend for 2015). In 2015, Richard reported a gross monthly income of \$17,000, consistent with historical earnings. 5RP 203; see also Ex. 2 at 22 (Cedarlake valuation showing that he consistently received between \$122,000 and \$132,000 in owners' compensation from 2011 through 2014).

In April 2015, Richard had a valuation of Cedarlake performed, which concluded it was worth \$114,000. Ex. 2. The valuation reflected consideration of a lawsuit brought by Cedarlake post-separation for wrongful termination of contract, seeking damages of \$190,000, and included debt from a sizable loan (\$235,000). Ex. 2 at 19, 5RP 32, 126-128.

In September 2015, Richard received a \$30,000 dividend from The Timbers, though he did not split it with Donna. 5RP 132-33, 152; Ex. 19. Instead, he claimed he used it to pay bills of CC Land and Cedarlake. 5RP 133. Also in 2015, Richard received a tax refund from the parties' 2014

joint return, but Donna never saw any of it. 5RP 238, 148-51; Ex. 27.

Donna sought and was granted temporary maintenance of \$5500/month. 3RP 23; CP 7. Richard was sporadic and delinquent in making the maintenance payments and owed over \$36,000 in back support at the time of trial. CP 33, 109; Ex. 62.

In November 2015, Richard took out a loan from Precision Capital for \$2,695,000 against Padden Parkway, which he used as a line of credit (“Precision LOC”). 5RP 140-42; Ex. 15. The bank advanced the funds in two installments, with the interest rate increasing with the second installment. Ex. 15. He claimed the first installment of \$1.8 million was being used to develop Padden Parkway, 5RP 94-96, though he actually funneled some of those funds back into Cedarlake, 5RP 139, 142-43.

Donna did not sign off on the loan and did not agree to this refinancing of Padden Parkway; Richard refused to provide all documents relating to the loan application and she was concerned that this encumbrance was wasting their estate. CP 180. In January 2016, the court issued a temporary order preventing the parties from further encumbering any property and requiring Richard to provide notice to Donna of receipt of any portion of the Precision LOC funds and a monthly accounting of the use of the proceeds, including use of the funds by CC Land or other entity for completion of the Padden project, toward Richard’s salary, and to

service any debt. CP 7-8. The court also compelled Richard to comply with discovery requests. CP 60-61.

In June 2016, shortly before trial, the parties entered into a stipulation to “facts related to properties of and/or related to the marital estate.” CP 25-26. The stipulation included the costs of selling the properties (closing costs, realtor commission, excise tax) for all the properties except for the Bend condo. CP 25-26. The stipulation did not include the Precision LOC debt on the Padden Parkway property nor did it reflect the Cedarlake or CC Land debts that were paid off post valuation with Precision LOC funds. The total value reflected in the stipulation is \$3,185,575.83 (See Appendix: Spreadsheet), less than half the net worth of \$8,774,073 Richard declared two years earlier, just before filing for dissolution. CP 179, 182 (6/5/2014 financing application with West Coast Bank).

Two weeks after the stipulation, the parties proceeded to trial, where Richard argued the stipulated values should be further reduced, further driving down the net worth of the estate. He testified that he owed \$1.1 – 1.2 million on the Precision LOC that should be deducted from the Padden Parkway value. 5RP 99. He testified there were additional taxes associated with the sale of Padden Parkway that must also be deducted from the stipulated property values (e.g., capital gains tax, health care act

tax). 5RP 99. He argued that accounting for these additional reductions, the value of Padden Parkway was now only a little over \$500,000, as compared to \$2,089,519.12 in the stipulation. CP 236. However, he also acknowledged that the current listing for Padden Parkway was \$4.9 million, a million more than the stipulated listing value of \$3.85 million. 5RP 67-68, 184-185; Ex. 45. He explained that this increase in listing value was due to costs of improvements (traffic light, widening of roads) plus realtor's fees and excise tax (i.e., these costs of sale go up because he would be selling for more). 5RP 191-192. Basically, Richard argued he would sell the "improved" property for more but make less on the sale.

Richard argued similar reasons to reduce the value of The Timbers (the mall property) from the stipulated figure of \$601,050.71 to \$410,000 to account for capital gains and health care act taxes. 5RP 59; CP 235. However, these reductions would occur only upon sale of the properties (Timbers or Padden) and the amounts could not be known until sale because they are affected by the seller's tax year-specific income. CP 35 (Donna requesting award of Timbers, with its income stream and her assuming any tax consequences of sale); CP 264-265. In other words, without a sale pending, these reductions were entirely speculative. Moreover, even if the property sold, these taxes would be avoided if the seller engaged in a "1031 exchange" (see IRC § 1031(a)(1), as Richard

conceded. 5RP 215 (Richard's testimony acknowledging that whoever owns Padden and Timbers could invest in other properties and not pay tax); 5RP 367 (Richard testifies that proceeds from sale of individual lots would be eligible for "1031 exchange").

Richard likewise argued the stipulated value of the Carty Road house should be reduced by \$40,000 for interest on mortgage payments he had not made. 5RP 164. However, the marital residence value was already reduced by the value of the Columbia Bank Line of Credit (\$238,392.00), on which Cedarlake paid the interest, according to the daughter, who had been the bookkeeper and office manager. 5RP 282. She also testified the Columbia LOC proceeds went into Cedarlake, though Richard disputed that. 5RP 125-126, 280-281; Ex. 2 at 19.

Richard also argued at trial the business should be further devalued because of a counterclaim to the Cedarlake wrongful termination lawsuit. 5RP 34-35. Richard claimed the reduction should be \$225,000, wiping out all its value, though he conceded the counterclaim did not identify a figure; he came up with one by claiming it was something they were "hearing" at a recent deposition. 5RP 34-35, 294; CP 237. By contrast, the lawsuit claim for \$190,000 is reduced in the valuation schedule (Income Approach Summary) to an "Expected Lawsuit Settlement" value of \$63,333. Ex. 2 at Schedule 8. Yet Richard argued the full \$225,000,

the number they were “hearing,” should be deducted. Moreover, in response to the court’s questioning, Richard admitted he had insurance to cover legal fees to defend against the counterclaim, limiting his exposure. 5RP 293-94.

Richard also claimed that the business was currently “in the red.” 5RP 287. However, the parties’ daughter, who had worked as Cedarlake’s bookkeeper and office manager, contradicted this testimony. She testified she examined Cedarlake’s books a week or so before trial, and that everything seemed “on par” with when she left the year before, as far as current job lists, payroll, etc., and that the company actually had more employees than when she left. 5RP 285. Donna also testified that even when business slowed pre-separation, they still had the same lifestyle, taking trips and never missing any of their payments. 2RP 250-51. Cedarlake was the main source of the parties’ income and the entity through which many of their expenses were paid. CP 179. Additionally, according to the Cedarlake valuation, the owners’ compensation was projected to exceed \$132,000 annually. Ex. 2 at 22. In other words, the business was expected to continue to provide a substantial income stream, along with the “income” of paying various expenses of the owners.

Moreover, the evidence showed Cedarlake’s value had actually increased after the 2015 valuation, because some of the Precision LOC

funds went into Cedarlake, reducing its debts. 5RP 139, 142-43; RP 126 (\$234,760 to pay off line of credit); 5RP 146, 158-60 (\$130,000 and \$8,000 going back into Cedarlake). That is, Richard wanted to reduce the Padden property value by an amount he poured into Cedarlake, but without reflecting the added value to Cedarlake. He testified only and repeatedly in terms of subtraction, despite the valuation, its projection of higher compensation, and the daughter's testimony about the business thriving.

At the conclusion of the testimony, the trial court indicated it would rule on August 25, after a planned vacation, and the parties were to submit written closing arguments. 5RP 169-70, 296. However, on August 25, Donna moved to reopen based on new evidence that the Padden Parkway property was being listed for \$2 million more than the stipulated value of \$3,850,000 and \$1 million more than the listing price of \$4.9 testified to at trial; she asked the court to hear additional evidence on the value of that property. CP 61-93; 6RP 4-6. The court agreed and heard two more days of testimony on the value of Padden Parkway.

Tony Reser, the realtor handling the listing, testified the increase in listing price accounted for improvements which enabled them to sell the property lot by lot at a higher price than selling the entire undeveloped property, suggesting a greater profit. However, Richard then testified

about additional costs that should be deducted from the value of Padden Parkway, such as an additional interest payment of \$117,406 on a promissory note (“the Castry note”) that was not included in the stipulation, 5RP 434-35; property tax of \$42,000, 5RP 391; capital gains tax, 5RP 393; management fees (paid to Richard, see 5RP 232, over which Donna has “no control”), and an increase in realtor fees, 5RP 463-64. See Ex. 1 from September 2016 trial (“Profitability chart” of Padden Parkway Richard submitted). When the court asked him what he thought the property was now worth, Richard testified that it “would be nice” if he could get \$300,000 for it, despite the substantially higher listing price and the improvements made to the property purportedly with the funds from the Precision LOC, about which the realtor testified. 5RP 472.

Donna vigorously contested these additional reductions. CP 260-268 (objections to closing argument). In particular, she objected to reducing the value of Padden by the entire amount of the Precision LOC; if anything, the only deductions should be for those funds used to benefit the community. CP 48-49.

By the end of the second phase of trial, the court largely relied on the stipulation, but altered in ways that overwhelmingly favored Richard. The court found the assets totaled approximately \$1.25 million – one-third the stipulated value and one-eighth Richard’s 2014 declared net worth –

after significantly reducing the value of Timbers and Padden, both of which the court awarded to Richard. Cedarlake, which started out with a stipulated value of \$114,000, was reduced to zero value, CP 134, despite undisputed evidence at trial showing that it had actually gained over \$371,000 in value post valuation and its ongoing income stream. Padden Parkway was reduced from the net stipulated value of \$1.3 million to \$500,000, CP 135, apparently for the Precision LOC, but despite the \$1 million increase in listing value. The Timbers was reduced from the net stipulated value of \$601,000 to \$410,000, apparently based on the speculative taxes to which Richard testified. CP 134. The Carty Road house was also reduced from the net stipulated value of \$179,000 to \$149,000, perhaps reflecting the outstanding mortgage interest Richard had failed to pay. CP 133.

The court awarded all of these assets to Richard, leaving Donna with the condo and the Pronghorn lot, the values of which remained substantially the same as the stipulated values (a total of \$202,000). CP 122, 133-35.<sup>2</sup> She was awarded an equalizing payment of \$435,625, to be paid in three installments over the next four years. CP 129-132. The court did not order the sale of any of the properties, as Donna requested, but instead provided an incentive for Richard to sell them by ordering that he

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<sup>2</sup> The condo was the only property not reduced by costs of sale. CP 25-26.

pay \$4500 in monthly maintenance until April 2020, with payments decreasing “if and/or when” Richard makes payments against the equalizing judgment. CP 131-132. If Richard makes 40 months of payments, maintenance ends whether or not he has paid the judgment, though the court notes in its findings that “the amount and duration of maintenance relies on [the] presumption” that Richard will pay the judgment in a timely fashion. CP 116.

The court said little in explanation of the maintenance award. Donna requested permanent maintenance given the long marriage, her age of 63, and her lack of marketable skills, CP 17, 41; 5RP 250; CP 178-179, meaning she had no prospect to generate adequate income. Richard did not dispute her need for maintenance. He had agreed to temporary maintenance, conceding his ability to pay it. CP 2. Rather, he diminished Donna’s contribution to the marriage, arguing her “substantive contribution as a homemaker ended decades ago” when the children were grown. CP 232. Donna strongly disagreed the family’s success was the result of Richard’s efforts alone. 5RP 260 (not a “one man show”). As she observed, over the many years of the relationship, their fortunes rose and fell together. 5RP 260, 250 (reflecting on “hard times” shared).

The court endorsed Richard’s reasoning to a degree, noting, “the parties are about to suffer the consequences of a long-term marriage where

particularly one party did most of the work and the other party stayed home most of the time.” 5RP 492. As to the factors pertinent to maintenance, the court entered findings based on the 43 year marriage, the parties’ ages (him 64, her 63), the court’s presumption that Richard will pay the judgment “in a timely fashion,” and on the parties’ “standard of living during the marriage given that both parties have their own houses and so forth.” CP 116. Neither in the written findings nor in its oral ruling did the court makes findings about the parties’ respective incomes/earning capacities or other statutory factors, see 5RP 497 (acknowledging statutory factors, but making no findings); CP 116.

Donna timely appealed. CP 142.

### III. ARGUMENT

#### A. INTRODUCTION AND THE STANDARD OF REVIEW.

In this case, the court’s orders leave the parties to this long-term marriage in starkly different circumstances. Though noting the wife’s position as a long-time homemaker, and noting there are consequences to structuring a marriage in this manner, the court’s orders mean only the wife will bear those consequences. This is the effect, even if not the court’s intention. The wife has no income-producing prospects, little in the way of assets, time-limited maintenance, and a judgment the husband may or may not pay. By contrast, the husband has a 26-acre residential

property and two businesses, which richly supported the family during the marriage. He also has a live-in companion with her own business. In short, these two people face dramatically different futures, a result at odds with our law and policy.

This Court reviews for an abuse of discretion a trial court's decision distributing marital assets and awarding or denying maintenance. *In re Marriage of Washburn*, 101 Wn. 2d 168, 179, 677 P.2d 152 (1984). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; or it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Littlefield*, 133 Wn.2d at 46-47.

**B. THE TRIAL COURT ERRED IN AWARDING INADEQUATE MAINTENANCE AND FAILING TO CONDUCT THE PROPER STATUTORY ANALYSIS.**

Donna requested lifetime maintenance. CP 41-45. The court awarded her 40 months of maintenance, in diminishing amounts if Richard pays the judgment as ordered. CP 128-132. Whether or not he does,

maintenance ends after 40 payments, at which time Donna will be approximately 66 years old.

A trial court has the authority to award maintenance "in such amounts and for such periods of time as the court deems just." RCW 26.09.090(1). Thus, 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." *Washburn*, 101 Wn. 2d at 179. In particular, Washington law makes the future economic circumstances of the parties the paramount concern. *In re Marriage of Bulicek*, 59 Wn. App. 630, 635, 800 P.2d 394 (1990).

Though generally disfavored, "a lifetime maintenance award in a reasonable amount is proper 'when it is clear the party seeking maintenance will not be able to contribute significantly to ... her own livelihood.'" *In re Marriage of Valente*, 179 Wn. App. 817, 822, 320 P.3d 115, 117 (2014) (internal citation omitted). A long line of Washington cases establishes the principle that circumstances may require a continuing obligation. *In re Marriage of Coyle*, 61 Wn. App. 653, 657, 811 P.2d 244 (1991); *In re Marriage of Sheffer*, 60 Wn. App. 51, 56-58, 802 P.2d 817 (1990); *In re Marriage of Bulicek*, 59 Wn. App. 630, 633-34, 800 P.2d 394 (1990); *In re Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002 (1990); *In re Marriage of*

*Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989). In short, there are certain circumstances where a lifetime award of maintenance may be the “just” result. *Washburn*, 101 Wn.2d at 178.

To determine whether to award maintenance and in what amount and for what duration, the court must consider the statutory factors, which includes a requirement the court consider all “relevant factors.” RCW 26.09.090.<sup>3</sup> Yet here the court failed to do so. It considered some factors, more or less in passing, but failed utterly to consider all relevant factors, most crucially, the parties’ disparate earning potential. This failure alone – to consider on the record and make adequate findings on the mandatory factors – requires reversal. Not only can this Court not review the trial court’s findings, because they are inadequate, there is no reason in the record to believe the court considered the factors as the law requires. *See State ex rel. J.V.G. v. Van Guilder*, 137 Wn. App. 417, 424, 154 P.3d 243 (2007) (requirement that court consider relevant facts enforced by requirement that court state reasons for denying a request for deviation from child support). Certainly, it makes no sense to ignore in the maintenance analysis the game-changing difference in the parties’ abilities to generate income. Trial courts can and do get this process wrong. *See, e.g., In re Marriage of Spreen*, 107 Wn. App. 341, 349, 28 P.3d 769

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<sup>3</sup> The statute is in the appendix.

(2001) (court's maintenance analysis process "flawed" resulting in arbitrary limit on maintenance). Here, too, a flawed process led to a flawed result, one that leaves Donna with a reduced lifestyle, in contrast to Richard, and a future of economic insecurity, one crisis away from poverty.

These facts are undisputed. Both parties are in their sixties, but one has no marketable skills or work history, working sporadically and outside the family business, as well as performing all the domestic labor for over 40 years. 5RP 250; CP 178-179. The other has an ongoing career as a real estate owner and developer, with monthly income of at least \$14,000-17,000 (Cedarlake and Timbers), not including the goods and services flowing to him as business expenses. See CP 179; Ex. 2 at 37 (health insurance, travel, entertainment listed in valuation schedule); Ex. 2 at 22 (owner compensation from Cedarlake upwards of \$132,000 and projected to increase). His income and this shadow income foretell a prosperous future while Donna faces a far different future, one not only more modest but fundamentally insecure. She cannot provide for herself. RCW 26.09.090(1)(b). She and Richard achieved a very comfortable standard of living, yet only one of them will continue to enjoy that. RCW 26.09.090(1)(c). Their marriage was long. RCW 26.09.090(1)(d). Indeed the court acknowledged that this was the longest marriage he has ever seen

in a divorce case. 5RP 491. Richard has good future earnings potential. RCW 26.09.090(1)(f). Simply, this is a case where “it is clear the party seeking maintenance will not be able to contribute significantly to his or her own livelihood.” *In re Marriage of Mathews*, 70 Wn. App. 116, 124, 853 P.2d 462 (1993). To the extent Rich’s ability to pay lifetime maintenance may change, when and if he retires, Donna noted he has the ability to modify at that time. CP 41. Richard did not dispute his ability to pay maintenance or Donna’s need for maintenance. (The court expressly found need/ability as to attorney fees. CP 116.) Finally, the judgment awarded offers Donna minimal comfort. Though the maintenance award encourages Richard to pay the judgment, the maintenance ends whether or not he does, leaving Donna in the position of having to enforce the judgment, against her former very financially savvy ex-husband.

This result does not make sense. Indeed, when compared to the reported cases on maintenance, this case most resembles those where the court awarded substantial and, often, permanent maintenance and those where the appellate court reversed for inadequate awards.

As a first and general principle, it bears noting that maintenance is strongly favored where, as here, the marriage is long; one spouse has been a “breadwinner” and the other a “homemaker;” and the parties have

disparate earning potentials, leading to a stark difference in the standard of living they will be able to maintain post-dissolution. Our law, unlike Richard and, apparently, the trial court, does not discount the contribution made by a homemaking/stay-at-home parent. *See, e.g., Morrow*, 53 Wn. App. at 587-588 (recognizing sacrifice of wife in becoming homemaker, “forfeit[ing] economic opportunities while her husband capitalized on them”).

Thus, this Court has repeatedly upheld maintenance awards that roughly equalized the parties’ income streams. *See, e.g., In re Marriage of Williams*, 84 Wn. App. 263, 269, 927 P.2d 679 (1996) (reducing husband’s to \$2,300 and raising wife’s to \$1,900); *In re Marriage of Vander Veen*, 62 Wn. App. 861, 815 P.2d 843 (1991) (maintenance award upheld after 17 year marriage where the wife had not worked for 13 years outside the family farm and would need to go to school to obtain suitable employment); *Bulicek*, 59 Wn. App. at 634 (maintenance appropriate where husband’s income was nearly three times the wife’s). Pertinently, the court in *Bulicek* noted as “the reality”:

... that [the wife] does not live on income close to the income that supported the couple's standard of living during marriage and will likely never achieve the post-dissolution economic level of [the husband, who] will be in a position to support a lifestyle more comparable to the lifestyle enjoyed by the couple during marriage than will [the wife], given their relative earning powers.

59 Wn. App. at 633-35. This exactly describes the Youngs' circumstances as well. As this Court in *Bulicek* observed, the proper focus of the court's analysis is "the post-dissolution relative economic positions of the parties." *Id.*, at 635. *See, also, In re Marriage of Marzetta*, 129 Wn. App. 607, 624, 120 P.3d 75 (2005) (after 13 year marriage, wife awarded 20 years of maintenance, based among other things, on limited future earning ability); *In re Marriage of Nicholson*, 17 Wn. App. 110, 116-117, 561 P.2d 1116 (1977) (award to 49 year old wife of maintenance for ten years where wife had few job skills or experience and husband earned good salary and had good earning potential).

Indeed, this Court has reversed trial court decisions that fail to focus properly on the reality of the parties' economic futures. For example, this Court reversed as inadequate an award of maintenance to the wife where she received 60% of the parties' assets but where, after a 30 year marriage, the parties faced very different economic futures. *In re Marriage of Sheffer*, 60 Wn. App. 51, 802 P.2d 817 (1990). Here, Donna received much less in the property distribution, especially when accounting for all the value that disappeared from the assets after Richard claimed a net worth of over \$8 million just before filing for dissolution. This Court admonished that where "the disparity in earning power and potential is great, this court must closely examine the maintenance award

to see whether it is equitable in light of the post-dissolution economic situations of the parties." 60 Wn. App. at 56.

Also on similar facts and reasoning, our Supreme Court reversed as inequitable and doubled an award of maintenance of \$100 monthly for five years (in 1966) where the 41 year old wife had no work experience, had stayed home during the 22 year marriage to care for the children, and the husband earned \$1000 a month, and despite that the wife received 75% of the net assets. *Stacy v. Stacy*, 68 Wn.2d 573, 577, 414 P.2d 791 (1966). Again, and importantly, the court focused on the relative earning potential of the parties and how that affected their economic futures. *Id.*, at 576. Here, for 43 years, Donna contributed to the family by performing the domestic labor essential to every family. This is not a contribution Washington law permits the court to ignore, anymore than Washington law permits the court to ignore the different futures these parties face.

That is, with the proper focus in mind, courts properly award maintenance to construct similar economic futures for parties separating after long-term marriages. Here, the court did not even consider the parties' income potential before consigning Donna to future of economic insecurity. It simply failed to consider the future economic circumstances of the parties and to seek to equalize those circumstances. This is one of those cases where "the disparity in earning power and potential is great,"

and, where, accordingly, “this 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. Donna is entitled to enjoy a standard of living comparable to Rich’s, at least for as long as he continues to earn 100% more income than she does. Under the facts and circumstances of this case, the court’s award is unjust because it is inadequate.

Equally troubling, as previously alluded to, the court constructed its asset distribution and maintenance award in such a way that Richard can plausibly avoid paying Donna any of the judgment entered by the court. If he makes the full maintenance payment of \$4500 monthly for the 40 months ordered, he will have paid \$180,000.00, less than half the judgment he owes Donna. He gets the use of her money and the potential to insulate himself against judgment, for example, by transferring ownership to another person or entity. (Richard acknowledged his role in starting and operating his intimate companion’s new business, Onyx Contracting.) Richard made obvious his business knowledge and skills, apparently confounding the trial court in respect of the numerous transactions between and among the various assets. The court’s order presumes he will pay, conditioning the amount and duration of maintenance on that presumption. CP 116. Yet, there is every reason for

concern that Donna's judgment is illusory, making the maintenance award even more Draconian. What Donna needs is a truly "just" result, lifetime maintenance secured by a life insurance policy.

Because the court did not consider the factors required by Washington law, with a result inconsistent with our law, its order on maintenance should be reversed and the cause remanded for entry of lifetime maintenance at a level adequate to equalize the parties' financial circumstances, including by a means Richard cannot evade.

C. THE TRIAL COURT ERRED IN ITS VALUATION OF CERTAIN PROPERTIES AND IN ITS DISTRIBUTION.

Donna's financial circumstances are worsened by the court's valuation and distribution errors, arriving at a conclusion neither just nor equitable. RCW 26.09.080. Here, again, "[f]uture earning potential 'is a substantial factor to be considered by the trial court in making a just and equitable property distribution.'" *In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P.3d 572, 579 (2007) (internal citations omitted). Yet, here, again, the court ignores the parties' future earning potential.

These errors will be addressed in respect of each of the properties concerned.

1) Cedarlake Company

This real estate construction and development company has been the parties' main economic engine. It has paid salaries to them both and

many of their expenses. CP 179); Ex. 2 at 22. A professional valuation in 2015 concluded it was worth \$114,000.00. Subsequently, one of the debts reflected in that valuation was paid (via the Precision LOC), see Ex. 2 at 17, 5RP 126, but the court did not increase the company value accordingly. Rather, inexplicably, the court valued the company at zero, perhaps adopting Richard's testimony about a counter-claim despite that there is not even a dollar amount yet for that claim and it has not been litigated. See 5RP 34-35. The court did not, and could not, make a finding on this speculative event. *See Donaldson v. Greenwood*, 40 Wn.2d 238, 252-253, 242 P.2d 1038 (1952) (cannot make finding out of "thin air"). Even if evidence supported some reasonable reduction for this counter-claim, the evidence definitely reflects an increase in value due to the loan repayment from the Precision LOC, not to mention the projected income stream from the company. The court's discretion "does not extend not extend to completely overlooking factors material to the determination." *In re Marriage of Landauer*, 95 Wn. App. 579, 975 P.2d 577 (1999). These facts are material to determining the value of this long-time business – a value more than zero.

## 2) Carty Road

The court's valuation and distribution of Carty Road also raises concerns, given the daughter's testimony that the proceeds of the line of

credit secured by the residence went into Cedarlake, and that Cedarlake pays the interest on the loan. 5RP 280-82. The family business frequently borrowed against one property to purchase or develop another. But in light of the daughter's testimony and the use of Precision LOC funds to pay off Cedarlake debt, it is unclear whether Carty Road's value should be reduced by the Columbia Bank Line of Credit. Faced with this shell game, Donna proposed selling the marital residence, rather than awarding it to Richard at a value steeply reduced by the LOC and costs of sale. As it stands, her small condo and his 26-acre estate are valued as virtual equivalents (\$130,000 and \$149,000, respectively). CP 116 (finding "the standard of living during the marriage and given that both parties have their own houses and so forth"). Here, the "so forth" does not add up.

### 3) Timbers

The parties agreed two weeks before trial that Timbers was worth \$601,050, which included reductions for costs of sale though no sale is required or likely (this being a nicely productive commercial rental property). CP 25-26. Richard then testified to \$191,613 more in reductions arising from taxes that he might have to pay if the property sold. Even if there is a sale, taxes can only be calculated based on income specific to the year of sale and may be avoided altogether via IRC §1031.

This is nothing more than a windfall to Richard based on a number he pulls out of thin air.

4) Bend Condo

Every single property is discounted by the same costs of sale --- with the exception of the property awarded to Donna for her to live. This just doesn't make sense. The court deemed it relevant that each party had a residence (CP 116), but the value of Richard's is reduced by speculative costs of sale and Donna's is not. Again, this disparity makes no sense, is not explained, and contributes to the injustice of the court's result.

5) Conclusion

Combined, the maintenance order and the property distribution fail to do what Washington law requires, to leave these parties on similar footing. There is no reason for the disparate result reached here and the court gave none, and, rather, failed to consider the most important factors under Washington law. Either by changes to the property valuation and distribution or to maintenance or to both, the court must consider how its ultimate decision leaves these two parties as they face their separate futures.

#### D. MOTION FOR ATTORNEY FEES

Donna requests her fees on the authority of RAP 18.1 and RCW 26.09.140, given her need and the ability of Richard to pay her fees, as the trial court likewise recognized. CP 116. The statute provides that:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

This statute has as its purpose "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage." 20 Kenneth W. Weber, Wash. Prac., *Family and Community Property Law* § 40.2, at 510 (1997). It is hard to dispute that a party with vastly inferior resources "is at a distinct and unfair disadvantage in proceedings" in family law litigation. *King v. King*, 162 Wn.2d 378, 417, 174 P.3d 659 (2007) (Madsen, J., dissenting). Donna is disadvantaged in this litigation, precisely because of the difference in the parties' incomes and in the assets they received (i.e., half of hers being in a judgment against Richard). This is the kind of disparity the statute seeks to redress. Accordingly, Donna requests her fees.

#### IV. CONCLUSION

For the foregoing reasons, Donna asks this Court to vacate the maintenance and property distributions portions of the decree and to remand for the trial court to consider all the evidence as to valuation and to consider the mandatory factors relevant and necessary to analysis of the maintenance and property distribution issues. Donna also requests her fees.

Respectfully submitted this 24th day of July 2017.

/s Patricia Novotny, WSBA #13604

/s Nancy Zaragoza, WSBA #23281

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ASSETS		
REAL PROPERTY	STIPULATION	Court Valued
2307 NW Cary Road Residence	\$ 1,166,680.00	
5% Commission at time of sale:	\$ (58,334.00)	
3% closing costs	\$ (35,000.00)	
Less: Homes Mortgage Nationstar *6327	\$ (663,748.00)	
Less: Columbia Bank LOC	\$ (238,392.00)	
	<b>\$ 171,206.00</b>	<b>\$149,000.00</b>
65765 Pronghorn Estate Drive (Lot 24)	\$ 90,000.00	
Commission 5%	\$ (4,500.00)	
Closing Costs 3%	\$ (2,700.00)	
Pronghorn Transfer Fee	\$ (3,000.00)	
	<b>\$ 79,800.00</b>	<b>\$72,000.00</b>
18575 SW Century Drive, Bend In at Seventh Mt. Condo (Units 1013-1015)	<b>\$ 130,000.00</b>	<b>\$130,000.00</b>
Cedarlake Company, Inc. -- 10,000 shares	<b>\$ 114,000.00</b>	<b>\$0.00</b>
CC Land Development, LLC (Timbers)	\$ 2,520,000.00	
commission 5%	\$ (126,000.00)	
closing costs and exciste tax 3%	\$ (75,600.00)	
stancorp mortgage	\$ (1,529,747.00)	
T.I. Loan Balance	\$ (137,259.00)	
Prepayment penalty	\$ (50,343.29)	
	<b>\$ 601,050.71</b>	<b>\$410,000.00</b>
CC Land Development, LLC (Padden)	\$ 3,850,000.00	
commission 4%	\$ (154,000.00)	
closing costs and exciste tax 3%	\$ (115,500.00)	
casty mortgage	\$ (1,331,600.00)	
Platfoot Note	\$ (159,380.88)	
	<b>\$ 2,089,519.12</b>	<b>\$500,000.00</b>
CC Land (Business)		<b>\$0.00</b>
<b>TOTAL BUSINESS INTERESTS</b>	<b>\$ 3,185,575.83</b>	<b>\$1,261,000.00</b>

**In re Marriage of Young**

**No. 49874-0-II**

**APPENDIX OF PERTINENT STATUTORY PROVISIONS**

**RCW 26.09.080**

**Disposition of property and liabilities—Factors.**

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

**RCW 26.09.090**

**Maintenance orders for either spouse or either domestic partner—Factors.**

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her 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 or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage or domestic partnership;

- (d) The duration of the marriage or domestic partnership;
- (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
- (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

**ZARAGOZA NOVOTNY PLLC**

**September 07, 2017 - 1:39 PM**

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**Appellate Court Case Title:** In re the Marriage of: Richard L. Young, Respondent v. Donna D. Young, Appellant  
**Superior Court Case Number:** 14-3-00036-2

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