

No. 49874-0

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON, DIVISION II

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**In re the Marriage of:**

RICHARD L. YOUNG

Respondent,

vs.

DONNA D. YOUNG,

Appellant.

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BRIEF OF RESPONDENT

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## INTRODUCTION

After a long-term marriage, the trial court divided the parties' assets 50/50, leaving each party with about \$650,000. Since most of the assets before the court were businesses and real estate Richard Young intended to sell, much of Donna Young's award is an equalizing judgment Richard will pay over three years. In the meantime, the court ordered Richard to pay Donna maintenance until he is 68 and Donna is 67.

The asset valuations are amply supported by Richard's testimony that the trial court found credible and persuasive. Richard ran the parties' real estate and development businesses for years, so was very familiar with the value of their assets. The court found his testimony credible, and Donna offered no alternative valuations. This Court will not reweigh evidence or revisit credibility determinations.

The maintenance award too is amply supported by the evidence, particularly Richard's testimony that he needs and plans to cut back work significantly. The parties' businesses had run in the red for years, and Richard was making only \$3,000 a month by trial. Awarding Donna \$2,500-\$4,500 a month is well within the court's broad discretion. This Court should deny Donna fees and affirm.

## RESTATEMENT OF THE ISSUES

1. Should this Court affirm the property valuations, amply supported by Richard Young's testimony, which the trial court found credible and persuasive?

2. Should this Court affirm the maintenance award requiring Richard to pay roughly half his net income until he is 68, particularly in light of his testimony that he cannot continue working in such a high-stress job, and plans to cut back?

## RESTATEMENT OF THE CASE

Appellant Donna Young challenges the trial court's maintenance award and valuation of four of the parties' assets. BA 17-29. Richard Young addresses the facts relevant to these discrete issues in the argument section. Richard provides the following relevant background.<sup>1</sup>

Richard filed for dissolution in July 2014, after the parties' 42-year marriage.<sup>2</sup> CP 1-3, 114. The parties have two adult children. 6/29/16 RP 250; CP 117. Donna has not worked outside the parties' home in the last 20 years, and before that worked outside the home

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<sup>1</sup> This brief uses first names to avoid confusion. No disrespect is intended.

<sup>2</sup> Since Donna points out that Richard began living with his "intimate companion" upon filing for dissolution, it bears mentioning that Washington has been a no-fault state since 1973. BA 4-5; **Washburn v. Washburn**, 101 Wn.2d 168, 677 P.2d 152 (1984).

“on and off during hard times just doing minor retail.” 6/29/16 RP 250. Richard managed the parties’ two construction and real estate development businesses, C.C. Land Development, LLC and Cedarlake Company, Inc. 6/29/16 RP 23-24. In addition to these two businesses, the parties’ assets are: Carty Road, the marital home; the Bend condo and Pronghorn, a condominium and adjoined bare lot; Timbers, a 40% interest in a commercial office building held by C.C. Land; and Padden Parkway, an undeveloped commercial property held by C.C. Land. CP 25-26.

**A. The court found Richard’s testimony valuing the parties’ assets credible and persuasive.**

This matter’s procedural history is relevant only insofar as Donna complains that Richard provided the valuations of the parties’ assets. BA 8-12. Donna had ample opportunity to provide her own valuations, but never did so. Over a year after Richard filed for dissolution, the trial court held a hearing on Richard’s motion to set a trial date. 8/27/15 RP 1. When Donna raised issues with the asset valuations, Richard countered that Donna should have had her valuations completed months prior. *Id.* at 7-9. The court ordered the parties to confer regarding dates to complete trial no later than February, giving Donna another five months to obtain valuations. *Id.*

at 11. In October, the trial court struck the trial date, directing the court administrator to look for a trial date in April, giving Donna two more months. 10/29/15 RP 7. The court also granted Donna's motion to compel production by November 30, 2015. *Id.* at 12-13. Notably, Richard did not oppose the motion, stating that they had been compiling documents, but the process was "very arduous and slow in coming." *Id.* at 4. The parties started trial on June 29, 2016, six more months later. Thus, Donna had almost two years to obtain valuations, including a six-month period after discovery was complete.

In June 2016, shortly before trial, the parties entered a stipulation setting forth "facts related to properties of and/or related to the marital estate." CP 25-26. As Richard explained at trial, the stipulation set forth "uncontested facts," but did not include all of the encumbrances on the parties' assets. *Id.*; *Infra*, Argument § B. Also discussed in more detail below is Richard's testimony that the parties' business holdings had recently and considerably declined. 6/29/16 RP 35-38, 218-19; 287-88.

When testimony concluded, the court commented that it found "sincere" Richard's testimony that the parties' financial situation was more "desperate" than Donna believed:

[T]here's going to be some -- some controversy about just how desperate Mr. Young's financial situation is. I know that the wife is going to argue that it's not as bad as he painted the picture. But I was convinced that, while we're -- we're going to have a quarrel about how bad it is, that right now he is -- he is in a very complex state of debt and holdings. And that certain things are going to have to be done quickly. And a couple of things are even emergent. And that no matter what else is said, that he is being sincere about the facts on the ground.

6/29/16 RP 310-11. Before the court entered final orders, Donna moved to reopen testimony to offer evidence that Padden Parkway was being listed for sale for an amount greater than that set forth in the parties' stipulation of undisputed facts and the value testified to at trial. 8/25/16 RP 4-6. The court agreed to take additional evidence. *Id.* at 13. Donna does not contest the trial court's valuation of Padden Parkway. BA 26-29.

Following the additional testimony, the court gave an oral ruling, specifically finding Richard's testimony credible (9/30/16 RP 493):

I found his testimony credible. I know that there's some issues with respect to values and everything else. But I didn't get the sense, as I've listened to the husband over the last several times, that he's -- that he's padding numbers, being disingenuous about numbers at all.

**B. The court divided the assets 50/50, ordering Richard to pay an equalizing judgment in three installments over three years.**

The trial court laid out the statutory factors, noting in particular the duration of the parties' marriage and the law tasking trial courts with "roughly" equalizing the parties' post-dissolution financial circumstances after a long-term marriage:

I have to make a just and equitable distribution of the property pursuant to the statute. I have to look at the nature and extent of the community property, the nature and extent of the separate property, duration of the marriage, and the economic circumstances of each spouse. This is long-term marriage. . . . The ***Rockwell*** court and many other cases state that in dissolving a long-term marriage of 25 years or more, the trial court must put the parties in roughly equal financial positions for the rest of their lives. So, there are consequences to being married that long and then getting a divorce. . . . And 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.

*Id.* at 491-92. Donna takes out of context the comments about the duration of the marriage, suggesting that the court diminished her contributions to the community. BA 15-16. The point is simply that the "consequences" of a long-term marriage – roughly equalizing post-dissolution economic circumstances – are more onerous when only one party produced income, leaving less to distribute. 9/30/16 RP 492.

The court noted the difficult task of “put[ting] a precise number” on illiquid assets that could not be sold immediately. *Id.* at 493. Illiquidity also created a “tension” in reaching a just and equitable distribution of assets in that Richard needed time to sell assets to generate cash, but Donna nonetheless had the right to be cashed out in a reasonable timeframe (*id.* at 494):

The bottom line is that I have to resolve all these money issues with the tension being between the husband’s illiquidity versus the wife’s right to have her money in a reasonable -- with reasonable speed.

The court also saw the need to fully divorce the parties without leaving them tied by shared assets. *Id.* at 492. The risk that some assets could turn out better than expected was offset by the fact that Richard was working “his butt off,” and assuming “enormous risks” that the values “will not go [his] way.” 9/30/16 RP 493-94.

The court awarded Donna the Bend condo she was living in and the related Pronghorn lot, valued at \$215,550 total. *Id.* at 495; CP 122. The court declined to account for the \$70,000 loan from Richard’s father encumbering those properties, accepting that the loan exists, but noting that it “looks askance at, and with some suspicion, at interfamilial loans.” 9/30/16 RP 495; Ex. 5. The court awarded the debt to Richard as his separate property, ruling that “the

husband is just going to have to make his peace with his dad on that in some way.” 9/30/16 RP 495; CP 116.

The court awarded Richard Carty Road and the parties’ businesses and their holdings, valued at \$1,086,800. 9/30/16 RP 495; CP 122, 133-135. To accomplish a 50/50 distribution of assets, the court awarded Donna a \$435,625 equalizing judgment. 9/30/16 RP 495; CP 121, 128-30. Additionally, the court ordered Richard to pay a lien, attorney fees, and a prior judgment on temporary orders, totaling nearly \$55,000. CP 121, 123-24.

Recognizing that Richard had to liquidate assets to pay the equalizing judgment, the court ordered three installments over a three-year term, occurring January 1, 2017, 2018, and 2019. 9/30/16 RP 495-96; CP 129. Interest would begin accruing if a payment was 15-days late, and increased from 3% to 12% as the payment became more past-due. CP 129-30.

**C. The court ordered Richard to pay maintenance until he is 68-years old.**

The court also ordered Richard to pay \$4,500 each month maintenance for 42 months, ending when Donna will be 67 and Richard 68. 9/30/16 RP 497; CP 131. Although the maintenance term is set, Richard can reduce the monthly amount by paying the

equalizing judgment, beginning January 2017.<sup>3</sup> 9/30/16 RP 498; CP 131-32.

## ARGUMENT

### A. Standards of review.

The trial court's broad discretion in distributing assets and awarding maintenance will not be overturned absent a manifest abuse of discretion. *Marriage of Wright*, 78 Wn. App. 230, 237, 896 P.2d 735 (1995); *Marriage of Stachofsky*, 90 Wn. App. 135, 148, 951 P. 2d 346 (1998). The value of the assets before the court for distribution are factual questions. See *Marriage of Crosetto*, 82 Wn. App. 545, 553, 918 P.2d 954 (1996). This Court will not reverse findings of fact supported by substantial evidence. *Crosetto*, 82 Wn. App. at 553. "Substantial evidence" is not uncontroverted evidence – it "is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted." *Marriage of Katare*, 175 Wn.2d 23, 35, 283 P. 3d 546 (2012) (citing *King Cnty. v. Cent. Puget Snd. Grth. Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000)). Simply stated, "[i]f a trial court's finding is within the range of the credible evidence, we defer." *Marriage of Rockwell*, 141 Wn. App. 235, 248,

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<sup>3</sup> This is addressed fully below. *Supra*, Argument § C 1.

170 P.3d 572 (2007); *rev. denied*, 163 Wn.2d 1055, 187 P. 3d 752 (2008) (citing ***Marriage of Sedlock***, 69 Wn. App. 484, 491, 849 P. 2d 1243 (1993)).

A trial court's maintenance award is presumptively valid if the trial court has considered the statutory factors. ***Marriage of Zahm***, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). The only limitation on amount and duration of maintenance is that it must be just. ***Marriage of Valente***, 179 Wn. App. 817, 821, 320 P.3d 115 (2014).

Also pertinent here is that this Court will not re-weigh the evidence or review credibility determinations. ***Bale v. Allison***, 173 Wn. App. 435, 458, 294 P.3d 789 (2013) ("We do not reweigh or rebalance competing testimony and inferences even if we may have resolved the factual dispute differently"); ***Morse v. Antonellis***, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) ("credibility determinations are solely for the trier of fact"). Trial courts have wide latitude in determining the weight to give the evidence. ***Sedlock***, 69 Wn. App. at 491. A court may reject evidence "in whole or in part in accordance with its views as to the persuasive character of that evidence." ***Brewer v. Copeland***, 86 Wn.2d 58, 74, 542 P.2d 445 (1975). Appellate courts defer to the trial court's determination regarding the

weight given to conflicting testimony. ***State v. Monaghan***, 166 Wn. App. 521, 534, 270 P.3d 616 (2012), *as amended*.

Since this Court defers to the trial court's factual findings, a party challenging them cannot rely on "contrary evidence and testimony that was rejected by the trial court." ***Bale***, 173 Wn. App. at 458. Stated another way:

The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact. ...

***Quinn v. Cherry Lane Auto Plaza, Inc.***, 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

**B. The property valuations are amply supported by Richard's testimony, which the court found credible and persuasive.**

Richard testified at length about the value of the parties' assets, a topic he is particularly well versed in given that his business is buying, developing, and selling real property. The trial court found Richard credible, and his testimony persuasive. This Court should defer to these determinations and affirm.

Donna begins her argument on the asset distribution by claiming that the court "ignored" the parties' future earning potential. BA 26. That is simply incorrect. The court was well aware that Donna

had not worked outside the home in 20 years. 9/30/16 RP 492. The court was also well aware that Richard had been the sole-income provider, but that his income had dropped significantly and that he was struggling under the tremendous stress of his job, and looking to cut back. 6/29/16 RP 288, 310-11; 9/30/16 RP 493. Indeed the court noted that it could not “imagine” the stress of Richard’s job and that Richard was quickly facing a decision as to whether he would continue working as a developer. *Id.*

**1. Richard’s testimony amply supports the finding that Cedarlake has no value.**

The parties’ stipulation of facts provides that Cedarlake had a value of \$114,000, consistent with the Markee valuation. 6/29/16 RP 19; Ex. 2 at 4. Based on Richard’s testimony, the court valued Cedarlake at \$0. CP 118. Donna argues that since Richard used borrowed funds to pay off a Cedarlake debt after the valuation, the trial court erroneously failed to increase Cedarlake’s value. BA 27. Donna ignores Richard’s testimony, which the trial court found credible and persuasive. 6/29/30 RP 288, 310-11; 9/30/16 RP 493.

Richard testified at some length that Cedarlake’s business had slowed dramatically before trial. 6/29/16 RP 34-38, 218-19. During trial, Cedarlake was a plaintiff in an unrelated litigation for

wrongful termination of a construction contract. *Id.* at 31-32. Defendant, Mutual LLC, filed a counterclaim that exceeded Cedarlake's claim, also filing suit against the bonding companies who withdrew their bonds from Cedarlake.<sup>4</sup> *Id.* at 34-35. Cedarlake did not have the money to reinstate the bonds, and could not "obtain a bond of any kind from anywhere." *Id.* at 35, 38. It cannot do business without a bond. *Id.* at 35.

Cedarlake had significant losses in 2014, and 2015. *Id.* at 288. It had finished its last project just before trial. *Id.* at 218-19. It had no new projects, work was slow, and leases were not getting signed. *Id.* at 219. It was "in the red." *Id.* at 286-87. Richard was downsizing Cedarlake's office space to reduce the rent. *Id.* at 219. In short, this substantial evidence amply supports the trial court's valuation.

Donna also incorrectly argues that Cedarlake's "projected income stream" also mandates increasing Cedarlake's value. BA 27. The Markee valuation accounted for income streams and projected income streams. Ex. 2. It would be double-counting to use the same protected income streams to increase Cedarlake's value. BA 27.

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<sup>4</sup> Donna's speculation that this counterclaim explains the trial court's decision is a red herring. BA 27. Again, the lawsuit made it impossible to do business, and Cedarlake ran in the red for years. 6/29/30 RP 34-38, 218-19, 288.

In sum, Richard's testimony that Cedarlake had struggled for years amply support's the trial court's finding that it has no value.

**2. Richard's testimony amply supports the valuation of Carty Road.**

Donna's sole argument on the value of Carty Road is that "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." BA 27-28. Donna summarizes Cara Phillips', the parties' daughter's, testimony as follows: "the proceeds of the line of credit secured by the residence went into Cedarlake, and ... Cedarlake pays the interest on the loan." BA 27-28 (citing 6/29/16 RP 280-82). In short, Donna asks this Court to be persuaded by Phillips' testimony, when the trial court was persuaded by Richard's contrary testimony. This the Court cannot do. **Bale**, 173 Wn. App. at 458.

Richard testified unequivocally that he did not use any of the Carty Road credit line to "go into" Cedarlake. *Id.* at 125-26. He explained that there are two different credit lines at issue, one secured by Cedarlake for \$234,760, and one secured by Carty Road for \$238,392. 6/29/16 RP 121, 126-27. He used the Precision loan to pay off the Cedarlake credit line. 6/29/16 RP 126-27. Again, he

directly contradicted Phillips' assertion that the Carty Road credit line "went into" Cedarlake. BA 27-28.

Further, Phillips' assertion is not nearly as clear as Donna claims. *Compare* BA 27-28 with 6/29/16 RP 280-82. Phillips testified that sometime in 2007 or 2008, the Carty Road credit line was distributed in roughly equal amounts to three different entities, including to Cedarlake. 6/29/16 RP 280-82. She was not Cedarlake's bookkeeper at the time. *Id.* at 282.

Again, it is the trial court's province to determine the weight to be given to conflicting testimony. **Copeland**, 86 Wn.2d at 74. Here, the court expressly found Richard's testimony credible and persuasive. 6/29/16 RP 310-11; 9/30/16 RP 493. This Court cannot reweigh the evidence. **Bale**, 173 Wn. App. at 458; **Monaghan**, 166 Wn. App. at 534.

Finally, Richard's testimony more than supports the court's ruling that Carty Road's value is \$149,000. CP 133. The parties' stipulation of uncontested facts provides that Carty Road has a gross value of \$1,166,680, and debts and sales costs of \$995,474, totaling \$171,206 net value. CP 25. Richard testified, however, that Carty Road was encumbered by another \$39,548.30 from interest on the mortgage. 6/29/16 RP 122, 166. Accounting for that debt, Carty

Road's value is nearly \$20,000 less than the court found. CP 133. And Richard also testified that he intended to sell Carty Road immediately, in part to avoid foreclosure, and hoped to make \$50,000. 6/29/16 RP 108, 121-22. In short, the court's valuation is well within the range of the evidence.

**3. Richard's testimony amply supports the valuation of Timbers.**

The parties' stipulation of uncontested facts results in a net value for Timbers of \$601,050.71. CP 25. The trial court reduced that figure to \$410,000 to account for a 28% capital gains tax and a 3.8% "Obamacare" tax due upon sale. BA 9 (citing 6/29/16 RP 59; CP 235) (\$601,050 - \$191,613 = \$409,437). Donna's sole argument on Timbers is that "taxes can only be calculated based on income specific to the year of sale and may be avoided altogether via IRC §1031." BA 28-29.

Richard testified that although a buyer had considered Timbers for a §1031 exchange, they decided on another building. 6/29/16 RP 56. There is nothing else in the record about a §1031 exchange.

As to the taxes, Timbers had been listed for sale for over six months at trial. *Id.* at 55. The parties agreed to the gross value –

\$6,300,000 – based on the last offer, and calculated commissions, closing costs and excise taxes using the agreed gross value. CP 25. It is well within the range of the evidence for the trial court to use the same gross value to calculate capital gains and “Obamacare” taxes.

**4. Richard’s testimony amply supports the valuation of the Bend condo.**

Donna’s sole complaint on the value of the Bend condo is that the court did not reduce the value in the parties’ stipulation of uncontested facts by costs associated with selling the property. BA 29. There would be no reason to do so, where there was no indication Donna intended to sell. 6/29/16 RP 248. By contrast, Richard unequivocally testified that he planned to sell Carty Road immediately, and Padden and Timbers had already been listed for sale before trial. 6/29/16 RP 55, 108-09, 184.

Further, Donna failed to preserve this alleged error. The parties’ stipulation of uncontested facts does not include closing costs and fees for the Bend condo, and Donna did not testify to this point at trial. CP 26. A trial court cannot err by failing to do something it was not asked to do.

Any error would be *di minimus* in any event. Applying a 5% commission and 3% closing costs to the agreed \$130,000 value

assigned to the Bend condo, the value would be reduced by \$10,400. The trial court reduced the parties' agreed, combined, values for Pronghorn and Bend by \$7,800, a difference of only \$2,600.<sup>5</sup> Donna is entitled to an award that is fair, not one that is mathematically perfect. *Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145 (1975) ("The key to an equitable distribution of property is not mathematical preciseness, but fairness").

This *di minimus* difference is more than offset by the trial court's refusal to account for the \$70,000 loan from Richard's father encumbering the properties, accepting the loan's existence, but noting that it "looks askance at, and with some suspicion, at interfamilial loans." 9/30/16 RP 495; Ex. 5. The court awarded the debt to Richard as his separate property, ruling that "the husband is just going to have to make his peace with his dad on that in some way." 9/30/16 RP 495; CP 116.<sup>6</sup>

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<sup>5</sup> To avoid confusion, it bears noting that the trial court transposed the values for Pronghorn and Bend. The trial court awarded Donna \$202,000 in real property - Pronghorn, valued at \$130,000 and Bend, valued at \$72,000. CP 133. The parties agreed Bend, not Pronghorn, has a value of \$130,000. CP 26. As to Pronghorn, the net agreed value is \$79,800 (\$90,000 gross value - \$4,500 commissions, \$2,700 closing costs, and \$3,000 transfer fee). CP 26. The trial court valued Pronghorn at \$72,000, \$7,800 less than the total stipulated value. *Compare Id. with* CP 133.

<sup>6</sup> Richard addresses the equalizing judgment in the maintenance argument, where Donna focuses her arguments on the interplay between the two.

In sum, the trial court found credible and persuasive Richard's testimony that amply supports the property valuations. This Court should affirm.

**C. The maintenance award is well within the court's broad discretion.**

The trial court awarded Donna maintenance until she is 67 and Richard is 68, in an amount just slightly less than Donna requested. The term is plainly justified by Richard's testimony that his income is down and that he is in the process of cutting back work, which has grown too stressful. Both the amount and duration are within the range of Donna's request, and well within the trial court's broad discretion.

**1. The maintenance award does not allow Richard to avoid paying the equalizing judgment.**

Donna seems to misunderstand the relationship between the maintenance award and the installment payments on the equalizing judgment, arguing that the structure of the maintenance award allows Richard to "plausibly avoid paying Donna any of the judgment entered by the court." BA 25. That simply is not the case.

The court ordered Richard to pay the equalizing judgment in three \$145,208 installments, on January 1, 2017, 2018, and 2019. 9/30/16 RP 495-96; CP 129. The reason for the installment payments

is that Richard “does not have the ability to pay that tomorrow. [He] may and will have the ability to pay it over time.” 9/30/16 RP 495-96.

If a payment was more than 15-days late, interest would accrue at 3%, up to the six-month past due mark. *Id.* at 496; CP 128-29. Interest would then increase to 6% until the nine-month past due mark, at which point interest would increase to 12%. *Id.* The remaining installment payments would follow the same rules. 9/30/16 RP 497. The purpose was to incentivize Richard to pay Donna the equalizing judgment installments on time. *Id.* at 496.

The court ordered Richard to pay maintenance for 42 months beginning January 1, 2017. 9/30/16 RP 496. Donna had been receiving \$5,500 per month temporary maintenance since October 2015. 10/29/15 RP 23. Post-trial maintenance began at \$4,500 per month starting immediately after trial, and ran until the first installment payment on the equalizing judgment, due on January 1, 2017. 9/30/16 RP 497.

If Richard did not make the January 1, 2017 payment on the equalizing judgment, then maintenance would continue to run at the rate of \$4,500 per month. *Id.* If Richard made the first installment payment, then maintenance would reduce to \$3,500 a month. *Id.* at 498. Assuming Richard made the next two installment payments in

January 2018 and 2019, maintenance payments would again decrease by \$1,000 each year. *Id.*

Donna had proposed a similar step-down to incentivize Richard to pay the equalizing judgment as installments came due. CP 41. The court explained (9/30/16 RP 498):

[T]he only way the maintenance goes down is if those payments are made timely. That was a proposition set forth, I think, by the wife at some point, or some version thereof.

Donna does not explain how the structure of this maintenance award could allow Richard to avoid paying the equalizing judgment. BA 25. It does not. Although Richard can reduce the maintenance amount by timely paying the equalizing judgment, he cannot reduce the judgment by timely paying maintenance. Paying maintenance has zero effect on the obligation to pay the equalizing judgment.

Equally lacking support is Donna's assertion that "there is every reason for concern that Donna's judgment is illusory, making the maintenance award even more Draconian." BA 25-26. The judgment is not "illusory" simply because it is not secured by a lien. BA 17, 21, 26.

Donna repeatedly complains that since the equalizing judgment is not secured by a lien, Richard may or may not pay it. *Id.* Donna ignores that any judgment is enforceable through the

contempt process. 12/1/16 RP 16. She also ignores the dual incentives the court built into the equalizing judgment, increasing interest for non-payment, and decreasing maintenance for payment. *Id.* Further, Donna acknowledged before the trial court that without a lien in the judgment, she “already has a legal right to file a lien for any money judgment she’s awarded.” *Id.*

The trial court nonetheless gave Donna the opportunity to suggest language on this point, and she failed to do so. 12/1/16 RP 15-21. Although the court’s oral ruling did not address a lien, Donna included in her proposed final orders a lien on all property, real or personal, awarded to Richard. 12/1/16 RP 15. Richard opposed a lien on the property because it would hinder his ability to buy and sell – the nature of his business. *Id.* at 15-16. Donna countered that her intent was to lien only profits from any sale, not the properties themselves. *Id.* at 18-19. The trial court ordered the parties to work together before the next hearing to come up with language satisfying them both. *Id.* at 19-20. There is no indication in the record that the topic ever came up again.

In short, paying maintenance has no effect on Richard’s obligation to pay the equalizing judgment. *Id.* If necessary, Donna

has multiple methods to secure or enforce that judgment. It is Donna's argument that is "illusory."

**2. The maintenance award is well within the confines of Donna's maintenance request.**

Donna asked for \$5,000 per month maintenance, Richard proposed \$3,500, and the court awarded \$4,500 per month. CP 41, 54, 131. Donna proposed that maintenance "should decrease by \$1000 per month when Husband pays the first half of the equalizing judgment owed to Wife in full and should decrease by an additional \$1000 per month when Husband pays the second half of the equalizing judgment owed to Wife in full." CP 41. Her reasoning was that these reductions "will create an incentive for Husband to pay the equalizing judgment owed to Wife as quickly as possible and will create a reduction in maintenance at times that Wife receives funds that she can utilize to pay her expenses." *Id.* The trial court agreed, but reduced maintenance based on payments of one-third of the equalizing judgment rather than half. CP 129.

Donna also proposed that "[m]aintenance should be modifiable to \$0.00 per month once Husband has paid all money judgments owed to Wife in full and Husband has retired." CP 41. Rather than force the parties into a future modification proceeding,

the court accepted Richard's testimony that he planned to cut back, terminating maintenance when Richard is 68. 9/30/16 RP 498.

In short, the maintenance amount is just slightly less than Donna asked for, and more than Richard proposed. The term will most likely coincide with Richard's retirement, after he has paid the full equalizing judgment. The trial court was well within its discretion to accept Richard's testimony, rather than force the parties' back into court for a modification. This Court should affirm.

**3. Donna's request for "lifetime" maintenance was (and is) far overreaching.**

Donna argues that the trial court erred in declining her request for "lifetime maintenance." BA 17-26. She acknowledges that lifetime maintenance is "generally disfavored," but argues it was appropriate here because she cannot "contribute significantly ... to her own livelihood." BA 18 (quoting *Marriage of Valente*, 179 Wn. App. 817, 822, 320 P.3d 115, 117 (2014)). Donna is well and able-bodied. If she chooses to work, she may need some training, but that is not a basis for lifetime maintenance. This Court should affirm.

Donna finds herself in the situation many divorced people find themselves in when they have not worked outside the home during the marriage: they must live off the asset award and maintenance, or

obtain retraining and education to find work. This is not comparable to the lifetime maintenance cases Donna relies on. BA 18-19, 21-23.

In ***Marriage of Bulicek***, the parties divorced after a long-term marriage, at a time when husband's income was nearly three times wife's income from employment and disability. 59 Wn. App. 630, 631, 800 P.2d 394 (1990). In addition to her limited job skills and experience, wife had numerous health problems. ***Bulicek***, 56 Wn. App. at 631, 634. The trial court awarded wife, then 46, maintenance until husband, then 52, retired. 56 Wn. App. at 631-32. Husband was eligible to retire at any time. *Id.* The appellate court affirmed, rejecting husband's argument that maintenance should last only a year or two, noting that husband was "free to retire when he wishes." *Id.* at 634.

In short, ***Bulicek*** is not a lifetime maintenance case. Rather, maintenance would end when husband retired and he was eligible for retirement at any time. *Id.* at 631-32.

In ***Marriage of Tower***, the trial court awarded wife "permanent" maintenance following a 19-year marriage, starting at \$100 per month and increasing to \$700 per month as the children were emancipated. 55 Wn. App. 697, 699, 780 P.2d 863 (1989). The appellate Court affirmed, where the husband received 63% of the

property before the court, and where wife had multiple sclerosis that substantially limited her activities. **Tower**, 55 Wn. App. at 701-02.

**Tower** too is inapposite. There, the court held that the lifetime maintenance award was necessary to balance “[s]uch a disproportionate community property award in favor of the only spouse with any significant earning capacity.” *Id.* at 701. Richard did not receive a disproportionate property award, and Donna does not have a disabling disease.

In **Marriage of Nicholson**, the parties divorced after an 18-year marriage, at which time husband, age 50, made \$1,116 per month, while wife, age 49, made \$187, though her position would be terminated shortly after trial. 17 Wn. App. 110, 112, 116, 561 P.2d 1116 (1977). The parties divided their liquid assets roughly equally before trial, and the court awarded wife about two-thirds of the remaining assets. **Nicholson**, 17 Wn. App. at 112-13. The trial court ordered husband to pay wife \$175 per month child support and \$400 per month maintenance for ten years. 17 Wn. App. at 113. The appellate court affirmed. *Id.* at 121.

Donna’s reliance on **Nicholson** is misplaced. BA 23. There, wife who was “essentially unskilled,” received a ten-year maintenance award, not lifetime maintenance. When the award

expired, both parties would be 59 and 60, such that husband would not be forced to work into retirement age to pay maintenance. **Nicholson** simply does not support Donna's lifetime maintenance argument.

In **Marriage of Morrow**, the appellate court upheld a lifetime maintenance award, where wife was unable to work due to a vision problem, and husband had converted large amounts of community property for his separate use. 53 Wn. App. 579, 586-88, 770 P.2d 197 (1989). The court held that husband's conversions had provided him a significant financial advantage and that wife's "physical disability warrants a higher award than would otherwise be appropriate." **Morrow**, 53 Wn. App. 579, 586-88.

Again, Donna does not have a "disability" effecting her ability to work. Nor did Richard convert community property for his separate use. **Morrow** is inapposite.

**Marriage of Stacy**, one of the few cases Donna actually discusses, is also inapposite. BA 24 (citing 68 Wn.2d 573, 577, 414 P.2d 791 (1966)). There, the parties divorced after a long-term marriage, and the court awarded wife custody of the three minor children. **Stacy**, 68 Wn.2d at 573-74. Husband, age 43, made \$1,000 per month, and wife, age 41, did not work, but the trial court found

she was “an able bodied woman” who could provide for her “own living.” 68 Wn.2d at 574. The court awarded wife 60% of the community property, and her separate property, worth nearly as much, as well as \$300 per month child support, and \$100 per month maintenance for five years. *Id.* The appellate court adjusted the property distribution to leave wife about 75% of the community assets, and increased maintenance to \$200 per month. *Id.* at 577.

**Stacey** is easily distinguishable, most readily because the maintenance term was five-years, not “lifetime.” Even after the appellate court’s adjustment, wife’s maintenance was only 20% of husband’s income. With child support, she still had less than half of husband’s income, and child support for two of the three children would discontinue one year and two years after trial. Further, the five-year maintenance term ended when both spouses were in their mid-to-late forties – not when they were retirement age.

Finally, Donna relies on the general proposition that after a long-term marriage, trial courts are tasked with roughly equalizing the parties’ post-dissolution economic circumstances. BA 22-23. The trial court did exactly that, dividing the assets 50/50 and awarding Donna maintenance until she is 67 and Richard is 68. CP 116, 131-38. It is well within the court’s broad discretion to end the

maintenance term when Richard is 68, particularly in light of his testimony that he plans to cut back his work significantly. *Supra*, Argument § C 4.

**4. The maintenance award is well within the court's broad discretion and the court's findings provide no basis for reversal.**

Donna principally argues that she "cannot provide for herself," while Richard "has an ongoing career as a real estate owner and developer, with monthly income of at least \$14,000-17,000." BA 20. It is unclear how Donna derives her income figure, but it is inaccurate in any event. A loan application from November 2015 listed Richard's gross income as \$17,000, but Richard does not know where that figure came from. 6/29/16 RP 203; Ex. 48. The April 2015 Markee valuation for Cedarlake provides that Owner's Compensation was \$132,000 (\$11,000 a month) in 2014, and was expected to increase. Ex. 2 at 22. Richard explained, however, that although his annual income had consistently exceeded \$120,000 in 2011-2013, it dropped "significantly" to \$87,940 in 2014. 6/29/16 RP 27, 290-91.

The businesses were in a "downhill slide" due to the economy and market conditions. *Id.* at 28-29. By the time of trial, the businesses were "pretty stagnant." *Id.* at 29-30. Richard's income

was down to about \$3,000 per month in the six-to-eight months before trial. 6/29/16 RP 31.

It is similarly inaccurate to state that Richard has an “ongoing career.” BA 20. The trial court accepted Richard’s testimony that he would be immediately selling off business assets. 6/29/16 RP 310-11; 9/30/16 RP 493. Richard can no longer handle the significant stress of running the businesses and was in the process of cutting back. 6/29/16 RP 288.

It is also inaccurate that Donna “cannot provide for herself.” BA 20. Again, Donna is healthy and able-bodied. She has nearly four years to find employment if she chooses. 6/29/16 RP 288; 9/30/16 RP 498. The upshot of Donna’s argument is that Richard would have to work indefinitely so that she does not have to. That is untenable.

There simply is no reason to reverse for the entry of additional findings. BA 19-20. In awarding maintenance, the trial court must consider the factors enumerated in RCW 26.09.090(1). However, RCW 26.09.090 does not require “the trial court to make specific factual findings on each of the factors listed in RCW 26.09.090(1). The statute merely requires the court to consider the listed factors.” *Marriage of Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004).

Donna's claim that "there is no reason in the record to believe the court considered the factors" is belied by her concession that the court acknowledged the statutory factors at the outset of its oral ruling. BA 16, 19. Indeed, the court noted that Donna had set forth this "black letter law" in her trial brief. 9/30/16 RP 491.

The trial court's written findings and oral ruling demonstrate that it considered the statutory factors. As to factor (a), Donna's need for maintenance, the court was well aware that Donna would receive half the parties' property, totaling \$651,175, that she had not worked during the marriage, and that she needed immediate access to cash. 9/30/16 RP 494, 497-98; CP 134-37. As Donna points out, Richard did not contest that Donna needed maintenance. BA 21.

As to factor (b), time for education and training, the court was well aware of Donna's position that she could not obtain meaningful employment, so needed lifetime maintenance. CP 41-43. The court addressed that Donna had not worked during the marriage. 9/30/16 RP 492. It did not, and could not, specifically address time for education and retraining, where Donna did not address the point, instead taking the position that she could not work. CP 41-43.

As to factor (c), the standard of living established during the marriage, the court noted that the parties had amassed assets

sufficient to afford two homes. CP 116. As to factor (d), Donna concedes that the court considered the duration of their marriage. BA 20-21; 9/30/16 RP 491. As to factor (e), the court entered a written finding on the parties' ages, also noting that Richard would be paying maintenance until he is 68. 9/30/16 RP 498; CP 116.

Finally, the court was acutely aware of factor (f), Richard's ability to pay, finding credible Richard's testimony that the parties' assets were in far worse financial shape than Donna believed. 6/29/16 RP 310-11; 9/30/16 RP 492-93. The trial court also considered that Richard was in the process of deciding whether to continue on as a developer, noting also that it could not "imagine" the stress of Richard's job. *Id.* This was amply supported by Richard's testimony that he was at "retirement age," and wanted to dial back, that carrying Cedarlake had become too stressful to continue, and that he wanted to sell everything and put the proceeds into passive investments. 6/29/16 RP 288.

In sum, the maintenance award is not only well within the trial court's broad discretion, it is well within the range of Donna's maintenance proposal. This Court should affirm.

**D. This Court should deny Donna's request for attorney fees.**

This Court should deny Donna's request for fees under RCW 26.09.140 and RAP 18.1. In deciding whether to award attorney fees, this Court considers the merit of the issues on appeal and the parties' financial resources, balancing Donna's financial need against Richard's ability to pay. *Marriage of Kim*, 179 Wn. App. 232, 256, 317 P.3d 555 (2014) (citing *Marriage of C.M.C.*, 87 Wn. App. 84, 89, 940 P.2d 669 (1997)). Richard is currently paying Donna maintenance every month, in addition to trying to pay the equalizing judgment and meeting his own needs. Donna has not established financial need, and Richard certainly does not have ability to pay.

**CONCLUSION**

The trial court found credible and persuasive Richard's testimony that amply supports the property valuations. The maintenance award is within the range of Donna's request and well within the trial court's broad discretion. This Court should affirm.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of October 2017.

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A handwritten signature in black ink, appearing to read 'Shelby R. Frost Lemmel', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I certify that I caused to be emailed, a copy of the foregoing **BRIEF OF RESPONDENT**, postage prepaid, via U.S. mail on the 23<sup>rd</sup> day of October 2017, to the following counsel of record at the following addresses:

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