

No. 62611-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

DAVID VAN ZILE,

Respondent,

and

VICTORIA VAN ZILE,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAMES DOERTY

BRIEF OF RESPONDENT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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COURT OF APPEALS
STATE OF WASHINGTON

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I. RESTATEMENT OF ISSUES

1. By agreement, the wife was awarded a disproportionate share of the community estate. The assets awarded to the wife were liquid and could be reinvested to produce income. The husband was awarded fewer, largely illiquid assets. The husband provided full support to the wife for the year after their separation until shortly before trial. Prior to trial, the parties also agreed that the husband would be entirely responsible for the children's private school tuition, college savings, health care insurance, and auto insurance. Did the trial court abuse its discretion in awarding maintenance to the wife for five years after the decree was entered, making the last four years of maintenance contingent on the husband earning sufficient income to meet his obligations to the children and his own living expenses?

2. The parties entered into a CR2A stipulation regarding child support, agreeing that the husband would make a monthly transfer payment of \$1,000 to the mother for the parties' dependent children. Did the trial court abuse its discretion by entering the parties' agreed child support order when neither party asked the court to change or review the provisions of the order?

II. RESTATEMENT OF FACTS

A. Background.

Respondent David Van Zile, age 53, and appellant Victoria (Vicki) Van Zile, age 46, were married on August 29, 1987 and separated on March 26, 2007. (4/23 RP 4; CP 83) The parties have four children: daughter Blake, age 20 (DOB 1/31/1989), son Keegan, age 19 (DOB 1/24/1990), son Rourke, age 16 (DOB 4/5/1993), and son Jack, age 12 (DOB 7/28/1997). (4/23 RP 4-5, 149, 150, 152) At the time of trial, Blake was attending a private college in Pennsylvania, which was being paid in part from college savings funded by the parents. (4/23 RP 5, 19) The parties' sons were living primarily with Vicki in the family residence pursuant to an agreed parenting plan. (4/23 RP 6, 7-8, 4/24 RP 2; CP 65; Exhibit 1) David lived in a condominium in Kirkland that the parties purchased jointly during separation. (4/23 RP 6, 37-38, 109)

The parties executed a CR 2A Stipulation on parenting, child support, and property distribution. (Exhibit 2) The parties agreed that David would pay \$1,000 per month in child support for the three youngest children, and agreed that the transfer payment would remain the same even after the older child graduated from high school in June 2008. (Exhibit 2; 4/23 RP 9) The parties

agreed that neither parent would be responsible for post-secondary support for the children, but that David would be required to fund a college savings account for the two youngest children in the amount of \$300 per month per child until they graduated from high school. (Exhibit 2; 4/23 RP 12) David also agreed to be entirely responsible for the two youngest children's private school tuition, health insurance for all four children, and auto insurance for one child. (Exhibit 2; 4/23 RP 11, 12-13) The parties agreed to a disproportionate division of property (54/46) in Vicki's favor. (Exhibit 2; 4/23 RP 14) The only issue at trial was spousal maintenance.

B. The Husband Worked In The Financial Sector. The Wife, Who Worked For The First Six Years Of The Marriage, Was A Stay-At-Home Parent.

1. Historically, The Husband Earned Significant Income, But Due To The Downturn In The Economy There Was Reasonable Concern That His Future Earning Capacity Would Be Reduced.

By the time the parties married in 1987, David had already finished graduate school and had been a financial advisor with Merrill Lynch for four years. (4/23 RP 50) After the parties married, the parties relocated to Chicago, where David briefly worked on the Chicago Board of Options Exchange. (4/23 RP 50) In 1988, the

parties returned to the Seattle area, where David worked in institutional equity sales, a field that he remains in today. (4/23 RP 51) At the time of trial on April 23, 2008, David was working for Oppenheimer & Company, which had recently acquired David's former employer, Canadian Imperial Bank of Commerce (CIBC). (4/23 RP 51-52)

David's annual base salary was \$150,000, plus the opportunity for bonuses. (4/23 RP 53, 55) David's bonuses are based on the overall profitability of the company as well as the revenues that David individually generates. (4/23 RP 57) In the four years before trial, David earned between \$398,350 and \$458,412 annually with CIBC. (4/23 RP 65-66; Exhibit 9-12) Typically, one-half to two-thirds of David's earnings were based on bonus income. (4/23 RP 67) Bonuses, if any, are paid in a lump sum in the month of December. (4/23 RP 67)

David testified that the recent acquisition of CIBC and the current state of the economy would negatively affect his future income, specifically his bonuses. (4/23 RP 69, 72) David testified to a "clash of cultures" between his former employer and the firm that acquired it. (4/23 RP 69) While Oppenheimer runs a "high volume, low cost business model," CIBC "spent a lot more

overhead for research, staff, ability to generate product.” (4/23 RP 71) Oppenheimer laid off eight percent of its work force, including twenty percent of its research analysts, a month before trial. (4/23 RP 71) David testified that losing research analysts would negatively affect his bonus, because the “primary driver” of his revenue was the research product. (4/23 RP 72) Even without the reduction in research product, David was already on track to generate less than 50% of the revenues that he had generated the year before. (4/23 RP 65; Exhibit 25) Further, if Oppenheimer loses money, it will likely reduce its sales force, to which David belongs, because “right now the merged company has more sales people than it needs.” (4/23 RP 78)

The trial court found that “[t]here is a reasonable basis for concern as to the husband's ability to maintain the level of earnings he generated over the last 10 years.” (*unchallenged portion of Finding of Fact (FF) 2.12(vi), CP 85*) The trial court noted that “[t]he financial industry is struggling with well-documented problems that affect the husband’s earning capacity. His employer is now under new management with a new culture, which casts further doubt on the husband’s future earning capacity.” (*unchallenged portion of FF 2.12(vi), CP 85*)

2. The Wife Is Well-Educated And Had A Significant Work History Before Staying Home To Raise The Children.

Vicki, age 46, graduated from the University of Washington in 1984 with a Bachelor's degree in kinesiology – the study of human movement and motion. (4/23 RP 87-88, 143) When they were first married, Vicki had been working for Boeing for two years. (4/23 RP 143-44) When the parties moved to Chicago, Vicki worked in a mechanical testing lab. (4/23 RP 146) After the parties returned to the Seattle area in 1988, Vicki was re-hired by Boeing to work on a project for their short-range attack missiles, providing human factors communication with the Air Force. (4/23 RP 149) Vicki did well at Boeing and consistently received raises and good reviews from her supervisors. (4/24 RP 26, 28) Vicki earned approximately \$29,000 in 1988, one-third more than she was earning when she had left Boeing one year earlier. (4/23 RP 146, 151)

After the parties' second child was born in 1990, Vicki reduced her employment at Boeing to part-time, working in flight deck research. (4/23 RP 150) Working three days a week, Vicki earned between \$22,000 and \$25,000. (4/23 RP 150)

When the parties' third child was born in 1993, Vicki stopped working outside the home. (4/23 RP 153)

Between the parties' separation in March 2007 and trial in April 2008, Vicki made no significant effort to seek employment. (4/24 RP 30) Vicki told David that she did not intend to work for a year or two after separation, but Vicki did not explain, and David did not understand, why she would not pursue some form of paid employment. (4/23 RP 89-90)

At trial, Vicki testified that she thought of returning to school to obtain a teacher's certificate so that she could become a physical education teacher. (4/23 RP 167-68, 169) Vicki testified that it would cost between \$12,000 and \$13,000 to obtain her certificate and that she would likely earn a starting salary of approximately \$35,000. (4/23 RP 173, 175) Vicki acknowledged that this was about the same salary she had earned fifteen years earlier at Boeing. (See 4/24 RP 29) While Vicki testified that she considered returning to Boeing (4/23 RP 167-68), she made no effort to contact Boeing regarding possible employment. (4/24 RP 28)

The trial court expressed concern that Vicki had "not pursued developing skills that would allow her to increase her earning capacity in order to maintain a \$12,000 per month lifestyle"

that she claimed she had. (*unchallenged portion of* FF 2.12(ii), CP 84) The trial court found that Vicki's "stated plans of returning to school to pursue a K-8 teaching certificate would actually develop skills that would earn the same or less than she could earn based on her current education and work experience. There is no significant financial benefit to the wife from the educational plan she described at trial." (FF 2.12(ii), CP 84) Based on Vicki's testimony that she had previously earned between \$22,000 and \$25,000 working only three days per week (4/23 RP 150), the trial court found that Vicki could "earn \$40,000 per year from employment based on her prior education and experience." (FF 2.12(i), CP 84)

C. Procedural History.

David moved out of the family residence in March 2007 (4/23 RP 155) and filed a petition for dissolution on May 7, 2007. (CP 3) No temporary orders were entered relating to child support or spousal maintenance. (4/24 RP 10) Instead, David continued to directly pay the mortgage on the family residence and the children's private school tuition, and funded a joint checking account from which Vicki paid the household expenses and children's expenses. (4/23 RP 90, 4/24 RP 11-12)

In September 2007, David and Vicki jointly purchased a condominium in Kirkland in which David could reside for \$785,000, with a five percent down payment. (4/23 RP 37-38, 109) The parties took out two mortgages totaling \$745,750 to purchase the condominium. (4/23 RP 39) The monthly mortgage payment was \$5,500. (4/23 RP 39) In addition, David paid condominium dues of \$450 per month. (4/24 RP 18)

By the time of trial, the value of the condominium had likely decreased in value by eight percent, in line with other real properties in the Kirkland and King County area due to market conditions. (4/23 RP 41) David testified that he could not sell the condominium except at a loss. (4/23 RP 41, 42-43)

The parties participated in mediation on March 6, 2008. (4/23 RP 119) They reached an agreement on all issues except spousal maintenance. (Exhibit 2; 4/23 RP 13)

1. The Parties Agreed To A Disproportionate Division Of Property That Favored The Wife.

The parties' community estate was valued at over \$2 million. (See Exhibit 2; 4/23 RP 20-21) The parties agreed to disproportionately divide the property in favor of Vicki on a 54/46 basis. (Exhibit 2; 4/23 RP 14) The parties agreed to sell the family

residence and to award Vicki enough proceeds from the sale to ensure an overall 54/46 division of property. (4/23 RP 20-21)

The home was listed for sale two weeks before trial at a price of \$810,000, but David believed that it would likely only sell for \$770,000. (4/23 RP 21-22) If sold at that price, the parties would receive proceeds of \$643,500 after costs of sale and the \$88,000 mortgage were paid. (4/24 RP 22-23) To effectuate a 54/46 division, Vicki would receive cash of \$618,760 from the proceeds, giving her a total of \$1,212,474 in assets. (4/23 RP 26-27) David would receive \$1,032,849 in assets. (4/23 RP 26)

Among the assets awarded to Vicki was real property in Wenatchee valued at \$500,000. (Exhibit 2; 4/23 RP 27) David believed that property was undervalued, in part because it was appraised during the winter and it is summer recreation property. (4/23 RP 28-29) There is no debt on the Wenatchee property, and David testified that if it were sold today Vicki would net "at least" \$500,000. (4/23 RP 30) If Vicki sold this property and invested the proceeds, she could get a return of eight percent or \$40,000 annually. (4/23 RP 31-32) In addition to the Wenatchee property, Vicki received over \$40,000 in cash and her retirement account, valued at \$34,442. (See Exhibit 2)

David received approximately \$1,000,000 in community property, but the assets awarded to him were less desirable than those awarded to Vicki. The most significant asset awarded to David was his retirement account of approximately \$562,000, to which he had no access except with an early withdrawal penalty. (Exhibit 2; 4/23 RP 44-45) David also received the community's interest in a CIBC equity fund of nearly \$200,000. (Exhibit 2; 4/23 RP 45) The fund is a "co-invest partnership," which cannot be sold and generates no income. (4/23 RP 45, 46-47) David received the Kirkland condo and its accompanying debt, which was valued at \$44,000 even though he owed more on it than it was valued, and he would be unable to sell it except at a loss. (4/23 RP 42-43; Exhibit 2) David received a joint investment account with Schwab valued at approximately \$100,000, but the majority of that account was in "penny stocks" that have little liquidity. (4/23 RP 34-35; Exhibit 2) At the time of trial, the Schwab account had fallen to \$76,000 due to market fluctuations. (4/23 RP 35)

The trial court found that the parties' property settlement left Vicki "in a better financial position than [David] in terms of the parties' assets and liabilities, not only in terms of the percentage-wise division of the assets, but also from the standpoint of liquidity."

(FF 2.12(i), CP 84) The trial court also found that Vicki was in a “far better position in terms of her ability to liquidate the assets that were awarded to her in order to raise cash.” (FF 2.12(i), CP 84) The trial court further recognized that Vicki “leaves the marriage with no financial obligations other than her own living expenses.” (FF 2.12(v), CP 85)

The trial court noted that Vicki was “awarded two parcels of real estate (the family residence and the Wenatchee recreational property) which, when sold, should net approximately \$1,200,000 for the wife.” (FF 2.12(i), CP 84) The trial court recognized that in light of the parties’ divorce, the Wenatchee recreational property awarded to Vicki is now a “\$500,000 luxury the parties cannot afford after the divorce. The wife will probably have to liquidate this property in order to generate money to invest in income producing assets.” (FF 2.12(iii), CP 84)

If Vicki sold the Wenatchee property, combined the proceeds with her share of the proceeds from the sale of the family residence, and “spent \$400,000 of that amount to purchase a house for herself, she would have \$800,000 remaining to invest in income producing assets. It is reasonable to expect that she would

generate an annual income of \$40,000-\$45,000 based on that level of investment.” (FF 2.12(i), CP 84)

2. The Parties Agreed That The Husband Would Bear The Lion’s Share Of The Children’s Support, Including Total Responsibility For The Children’s Private School Tuition And College Savings.

David agreed to pay child support of \$1,000 per month for the parties’ dependent children even after the older child graduated from high school three months after the agreement was entered. (Exhibit 2; 4/23 RP 9) In addition, David agreed to fund a college savings account for the two youngest children by paying an additional \$300 per month per child until each child graduates from high school. (Exhibit 2; 4/23 RP 12) David also agreed to pay 100% of private school tuition for the two youngest children, a total of approximately \$18,000 to \$19,000 per year. (Exhibit 2; 4/23 RP 10) Finally, David agreed to pay 100% of auto insurance for one child and health insurance for all four children. (Exhibit 2; 4/23 RP 11-12, 13) Excluding the cost of auto and health insurance, the father thus had undertaken fixed expenses for the children of approximately \$3,200 per month, or nearly \$40,000 annually.

The trial court recognized that during the marriage, “a large percentage of [the party’s] income went toward the kids for private

school tuition, activities, and college savings.” (*unchallenged portion of FF 2.12(iii), CP 84*) Thus, while “the family [] prospered, [they] did not lead an opulent, extravagant, or sumptuous lifestyle.” (*unchallenged portion of FF 2.12(iii), CP 84*) The trial court found that “[u]nder the parties’ agreement on child support, [David] has agreed to carry almost the entire burden of these expenses on his own moving forward, which is clearly a benefit to both parents, and which is consistent with choices they made during the marriage.” (*unchallenged portion of FF 2.12(vi), CP 85*) Thus, the trial court acknowledged that “a substantial part of the husband's expenses are related to his child support and college funding obligations.” (*unchallenged portion of FF 2.12(vi), CP 85*)

While David agreed to undertake these obligations at mediation, at trial he expressed concern that he would be unable to meet these obligations and his own living expenses, estimated at approximately \$11,000 per month, unless he grossed at least \$280,000 annually. (4/23 RP 91) Vicki did not challenge this testimony, and the trial court agreed that David “must earn \$280,000 per year in order to meet his own needs and [fixed] financial obligations, including his substantial obligations toward

private school tuition, college funding, and child support.” (FF 2.12(vi), CP 85)

3. The Trial Court Awarded Spousal Maintenance To The Wife That Guaranteed Maintenance The First Year, And Based The Following Four Years On The Husband Earning A Minimum Income.

The parties appeared before King County Superior Court Judge Jim Doerty on the issue of spousal maintenance only. After a two-day trial, the trial court found that an award of spousal maintenance to the wife was warranted. While the trial court acknowledged that the wife “has a need for maintenance of \$45,000 per year” (*unchallenged portion of FF 2.12(i), CP 84*), it also acknowledged that the husband “has the ability to pay *only* if he earns more than \$280,000 per year.” (FF 2.12(vi), CP 85, *emphasis added*)

The trial court found that the wife’s need for maintenance is “greatest in the first year because she is currently not employed and needs some time to liquidate property that can be re-invested in income producing assets.” (FF 2.12(i), CP 84) The trial court awarded the wife maintenance of \$3,750 per month (\$45,000 annually) for the first year, regardless whether the husband earns enough to meet his own expenses. (CP 91) Thereafter for the

following four years, the wife's maintenance is predicated on the husband earning at least \$280,000 a year based on the husband's unchallenged testimony that he needed to earn at least that amount to meet his own obligations, including those to the children. (CP 91)

The trial court ordered that if the husband earns less than \$280,000, the wife will receive no maintenance. (CP 91) If the husband earns between \$280,000 and \$325,000, the wife will "receive maintenance equal to 100% of his income in excess of \$280,000." (CP 91) If the husband earns over \$325,000, the wife will receive maintenance of \$45,000. (CP 91) The husband's income will be based on his prior year's earnings. (CP 91) Maintenance, if any, will be paid in one lump sum payment on April 1 of the current year. (CP 91)

The trial court adopted the parties' agreed parenting plan, child support order, and property settlement agreement. (CP 83, 86-87) The trial court denied the wife's motion for reconsideration. (CP 106) The wife appeals the maintenance award and the agreed order of child support. (CP 81)

III. ARGUMENT

A. The Trial Court's Award Of Spousal Maintenance Was Well Within Its Discretion, As It Properly Considered The Factors Of RCW 26.09.090.

An award of spousal maintenance is a discretionary decision that will not be disturbed on appeal absent a showing that the trial court abused its discretion. *Marriage of Luckey*, 73 Wn. App. 201, 209-210, 868 P.2d 189 (1994). The trial court's discretion in this area is "wide," the only limitation on the amount and duration of maintenance is that, in light of the relevant factors, the award must be "just." *Luckey*, 73 Wn. App. at 209.

The court must consider the following factors in determining an award of maintenance under RCW 26.09.090:

- (1) 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 needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party (RCW 26.09.090(1)(a));
- (2) 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 (RCW 26.09.090(1)(b));

- (3) The standard of living established during the marriage or domestic partnership (RCW 26.09.090(1)(c);
- (4) The duration of the marriage or domestic partnership (RCW 26.09.090(1)(d);
- (5) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance (RCW 26.09.090(1)(e); and
- (6) 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 (RCW 26.09.090(1)(f).

Here, the trial court considered the factors of RCW 26.09.090 and made extensive findings of fact to support its decision. While the wife challenges several of those findings, they are supported by substantial evidence. “Substantial evidence” is evidence that is sufficient “to persuade a fair-minded, rational person of the truth of that determination.” ***Marriage of Hulscher***, 143 Wn. App. 708, 714, ¶ 9, 180 P.3d 199 (2008). The trial court’s award of maintenance to the wife was well within its discretion, and was “just” in light of the relevant statutory factors:

Factor 1: The Wife Received Significant Assets That She Can Invest To Meet Her Reasonable Needs In Addition To The Maintenance That She Was Awarded.

In making its maintenance award, the trial court considered the financial resources of the wife, including the fact that she was awarded \$1.2 million in assets, most of which were liquid. (FF 2.12(i), CP 84); RCW 26.09.090(1)(a). Contrary to the wife's assertion, the trial court did not order that the wife "sell her assets and live off the proceeds." (App. Br. 17, 27) Instead, the trial court properly recognized that because of both the disproportionate award of assets to the wife and the nature of those assets, the wife could reinvest those assets to produce income, which could yield her a 5% to 8% return, to assist her in meeting her needs independent of her maintenance award. (FF 2.12(i), CP 84; 4/23 RP 126)

"The purpose of spousal maintenance is to support a spouse, typically the wife, until she is able to earn her own living or otherwise become self-supporting." ***Marriage of Irwin***, 64 Wn. App. 38, 55, 822 P.2d 797, *rev. denied*, 119 Wn.2d 1009 (1992). When, as here, the wife is awarded significant property, some of which is income producing, the need to award spousal maintenance while she trains for a career is eliminated. ***Irwin***, 64

Wn. App. at 56; *see also Marriage of Crosetto*, 82 Wn. App. 545, 558-59, 918 P.2d 954 (1996) (a disproportionate award of property may be in lieu of an award of spousal maintenance); *see also Marriage of Wright*, 78 Wn. App. 230, 238, 896 P.2d 735 (1995) (“unequal distribution of property also obviated the need for any spousal maintenance as it substantially improved [wife]’s financial position”).

The wife complains that the trial court’s decision forces the wife to “downsize” from the home where she and the children reside by requiring her to sell the home. (App. Br. 21-22) But the trial court did not order the wife to sell the home. The parties agreed *before* trial to sell the home, and to award the wife the majority of the proceeds. (Exhibit 2) The wife cannot challenge that agreed sale now.

The trial court did note that it might no longer be feasible for the wife to continue to own recreation property in Wenatchee after the dissolution: the “Wenatchee recreational property is now a \$500,000 luxury the parties cannot afford after the divorce.” (FF 2.12(iii), CP 84) Whether the wife sells the property is entirely within her control. But even if selling the Wenatchee property somehow acts as a reduction in her “standard of living,” the wife is

not entitled “to maintain her former standard of living as a matter of right.” **Cleaver v. Cleaver**, 10 Wn. App. 14, 20, 516 P.2d 508 (1973).

Factor 2: The Wife Has The Current Ability To Be Employed Without The Need For Further Education Or Training.

Within its discretion as the fact-finder, the trial court determined that the wife already had sufficient skills and education to “find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances,” without the need for further training. (FF 2.12(ii), CP 84); RCW 26.09.090(1)(b); **Wright**, 78 Wn. App. at 234 (denying an award of maintenance to wife who already had sufficient training and education to provide for herself).

The wife has a degree from the University of Washington and significant experience in the workforce. (4/23 RP 87-88, 143-46, 149-52) The trial court found that the wife’s “stated plans of returning to school to pursue a K-8 teaching certificate” would provide “no significant financial benefit,” as she already had the ability to earn “\$40,000 per year from employment based on her prior education and experience.” (FF 2.12(i), (ii), CP 84) Nevertheless, the trial court acknowledged that the wife’s “need for maintenance is greatest in the first year” as she needs time to

obtain employment and “re-invest her assets in income-producing assets” (FF 2.12(i), CP 84)

The trial court crafted its award to guarantee that the wife received \$45,000 in spousal maintenance for the first year after divorce regardless of the earnings of the husband. (CP 91) Thereafter, the maintenance award is dependent on the husband's earnings and his ability to pay maintenance. (CP 91) This was not an abuse of discretion.

Factor 3: The Parties Led A Modest Lifestyle That Focused Largely On The Children.

The wife does not challenge the trial court's finding that the parties led a modest lifestyle, and that during the marriage, “a large percentage of their income” was used towards the “children's private school tuition, activities, and college savings.” (FF 2.12(iii), CP 84) In her motion for reconsideration, the wife presented an “offer of proof” that one of the children was no longer attending private school and asserted that the husband's expenses were now reduced. (CP 78) However, the trial court was free to reject this offer in light of the extensive testimony that all four children had historically attended private school, with the exception of one child who had briefly attended public school before returning to private

school. (4/23 RP 10, 156-58) Based on this evidence the trial court could infer that the child's absence from private school was only temporary, which in fact was the case here. ***Magnuson v. Magnuson***, 141 Wn. App. 347, 351, ¶ 9, 170 P.3d 65, 67 (2007), *rev. denied*, 163 Wn.2d 1050 (2008) (trial court acts within its fact-finding discretion when drawing inferences from the given evidence).

The trial court's maintenance award was not intended to allow the husband "to protect his assets and affluent lifestyle." (App. Br. 17) Instead, it was intended to ensure that the husband, who was entirely responsible for the children's private school tuition and college savings, had sufficient income available to continue to support the children in the manner that the parties agreed. This was not an abuse of discretion.

Factor 4: The Trial Court Considered The Length Of The Marriage In Its Maintenance Award.

The trial court acknowledged the length of the parties' marriage in its maintenance award. RCW 26.09.090(1)(d). Notably, the wife does not challenge the amount or duration of the trial court's award of maintenance, only that it is not "guaranteed" except for the first year. But the trial court recognized that by the

time of trial, the husband had already supported the wife for thirteen months, during a time when the wife made no effort to prepare for her future or to limit her spending. (FF 2.12(ii), CP 84, FF 2.12(iv), CP 85) See **Marriage of Turner**, 75 Wn.2d 33, 35, 448 P.2d 941 (1968) (in a modification action, wife's unwillingness to improve her circumstances since divorce by seeking employment or training mitigates against continuing maintenance at the same level as awarded at the time of divorce).

A "long-term" marriage does not mandate an award of "long-term" maintenance, or any maintenance at all. For example, in **Irwin**, the court affirmed an award of spousal maintenance for seven months after a twenty-seven year marriage, at which point certain property would be awarded to the wife. 64 Wn. App. at 56. In **Suther v. Suther**, 28 Wn. App. 838, 841, 627 P.2d 110, *rev. denied*, 95 Wn.2d 1029 (1981), the court affirmed an award of maintenance for five years after a twenty-two year marriage when the wife had not finished high school and needed six months to recover emotionally from the divorce.

After a nineteen-year marriage, the wife was awarded a disproportionate share of the property and was "guaranteed" two years of maintenance, including the support that she received

during the parties' separation. The trial court did not abuse its discretion in also providing for maintenance to the wife for an additional four years if, based on the husband's earnings, he has the ability to pay.

Factor 5: The Maintenance Award Properly Reflects The Wife's Age and Physical Condition and Financial Obligations.

The trial court's maintenance award, which guaranteed maintenance to the wife for the first year after the divorce to provide her with adequate time to obtain employment, was appropriate under the circumstances. The wife was forty-six years old and there was no evidence that she was either physically or emotionally incapable of immediately seeking employment. The wife had been an active volunteer in the children's schools, coaching soccer and volleyball, and performing office tasks. (4/23 RP 158-59)

This case is unlike *Marriage of Sheffer*, 60 Wn. App. 51, 802 P.2d 817 (1990) relied on by the wife throughout her brief. There, after a thirty-year marriage, the wife, who was earning only \$844 per month, had "a variety of health problems and spends over \$200 per month on required medications." *Sheffer*, 60 Wn. App. at 52. This court expressed concern that the trial court's award of maintenance of \$1,200 per month for three years did not take into

consideration the “parties’ postdissolution economic condition.” *Sheffer*, 60 Wn. App. at 57. This court expressed particular concern because at the exact time that maintenance ended, the wife was also required to pay off the husband’s lien against the family residence awarded to the wife, which would likely result in the wife having to sell the home, considerably increasing her housing costs. *Sheffer*, 60 Wn. App. at 57.

Here, the wife was in good health, unlike the wife in *Sheffer*. Further, the wife in this case has no financial obligations to the husband. In fact, the trial court recognized that the parties’ agreed child support order relieved the wife of financial obligations for the children, including private school tuition and college savings for which she would otherwise be obligated. (FF 2.12(vi), CP 85) Accordingly, the trial court properly found that the wife “leaves the marriage with no financial obligations other than her own living expenses.” (FF 2.12(v), CP 85)

Factor 6: In Light Of The Obligations Placed On The Husband Under The Parties’ CR2A Agreement, The Trial Court Properly Found That The Husband Only Had The Ability To Pay Maintenance If He Made A Certain Amount Of Income.

The wife’s entire appeal is premised on what she believes she “needs” or is “entitled” to. But in making a maintenance award,

the trial court must consider not only one party's need for maintenance but also the other party's ability to pay maintenance. RCW 26.09.090(1)(f). **Marriage of Foley**, 84 Wn. App. 839, 846, 930 P.2d 929 (1997) (spousal maintenance to the husband was not warranted when wife lacked the ability to pay a maintenance award given her living expenses and debt obligations); see also **Irwin**, 64 Wn. App. at 55 (whether alimony should be awarded must be based on the need of the receiving spouse and the ability of the paying spouse to pay). Here, the husband simply does not have the ability to pay maintenance to the wife if he cannot first meet his own expenses, including those obligations he has undertaken for the parties' children.

The trial court acknowledged that "a substantial part of the husband's expenses are related to his child support and college funding obligations." (FF 2.12(vi), CP 85) Based on the testimony of the husband, which the trial court accepted and the wife did not challenge, it found that "the husband must earn \$280,000 per year in order to meet his own needs and fix the financial obligations, including his substantial obligations toward private school tuition, college funding, and child support." (FF 2.12(vi), CP 85) Accordingly, the trial court properly found that "the husband has the

ability to pay maintenance only if he earns more than \$280,000 per year.” (FF 2.12(vi), CP 85)

Unlike the wife, the husband has no potential liquid assets to assist him with his living expenses if his obligations exceed his income. As the trial court recognized, the wife could, but was not required to, sell the Wenatchee property and reinvest the proceeds to produce income to assist her with her expenses. (FF 2.12(i), CP 84) But the husband has no similar ability. If he liquidated the most valuable asset awarded to him, his 401(k) plan, the husband would not only have to pay taxes on the withdrawal but he would also have to bear significant penalties – negatively impacting the value of this asset by at least 40%. (4/23 RP 44-45) The wife claims that the husband could sell his condo, but this would not be helpful because it would be sold at a loss, and the husband would still be required to repay the outstanding loan obligation to the bank. (App. Br. 22-23) While it might superficially improve the husband’s cash flow, he would still need to find a new home.

The trial court carefully considered the statutory factors in making its maintenance award to the wife. Its decision was well within its discretion and should be affirmed.

B. The Wife Failed To Preserve Her Challenge To The Child Support Order.

For the first time on appeal, the wife complains of the transfer payment in the parties' agreed child support order. The wife cannot in this appeal complain that the trial court abused its discretion by approving a child support order that was agreed to as part of a CR2A stipulation when she never raised this issue below. While it is true that the trial court is not bound by parties' agreements with regard to child support, the trial court must at least be notified that a party to an agreement wants the court to exercise its discretion to review the agreement.

At the presentation hearing on September 26, 2008, wife's counsel did not object to entry of a child support with a transfer payment of \$1,000, nor did he object to the inclusion of the husband's payment of private school tuition as part of the worksheets. Instead, his only comment regarding child support was regarding the parties' incomes:

And the transfer payment's agreed. What we need is numbers to put in the worksheet because that drives some other things in the support order, primarily the allocation of extraordinary health care expenses.

(9/26 RP 14)

Absent any indication in the record that appellant advanced this particular claim in any substantive fashion at trial, it cannot be considered on appeal. ***Marriage of Studebaker***, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); *see also* RAP 2.5(a); ***Lindblad v. Boeing Co.***, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court level). The purpose of this rule is to afford the trial court an opportunity to correct alleged errors, thereby avoiding unnecessary appeals and retrials. ***Demelash v. Ross Stores, Inc.***, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001).

In any event, the transfer payment of \$1,000 for the parties' two youngest children was proper. The standard calculation for support for the children is \$1,429 (\$790 for Rourke and \$639 for Jack). (See CP 30) The father's proportionate share (67.3%) of that obligation is \$962. The trial court did not abuse its discretion in adopting the parties' agreement on child support.

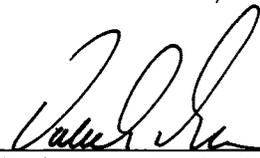
IV. CONCLUSION

The trial court's maintenance award was well within its discretion, taking into consideration the circumstances of the parties, including their pre-trial agreements, and the relevant

statutory factors. Further, the trial court's adoption of the parties' pre-trial agreement on child support was also within its discretion. This court should affirm.

Dated this 24th day of July, 2009.

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DECLARATION OF SERVICE

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

That on July 24, 2009, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 24th day of July, 2009.



Carrie O'Brien

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