

6/24/12

6/24/12

No. 69242-9-1

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

---

---

In re the Marriage of  
  
DANIEL VALENTE  
Appellant/Cross-Respondent

and

FUKIKO VALENTE  
Respondent/Cross-Appellant

---

---

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

---

---

REPLY BRIEF OF CROSS-APPELLANT

---

---

PATRICIA NOVOTNY  
Attorney for Respondent/Cross-Appellant  
3418 NE 65th Street, Suite A  
Seattle, WA 98115  
(206) 525-0711

RECEIVED  
JUN 27 12 PM 11:47  
COURT OF APPEALS  
DIVISION ONE

TABLE OF CONTENTS

I. STATEMENT OF ISSUES IN REPLY ..... 1

II. ARGUMENT IN REPLY ..... 2

    A. THE WIFE IS DISABLED BY TWO INCURABLE AND  
        PROGRESSIVE DISEASES..... 2

    B. THE TRIAL COURT’S MAJOR CONCERN WAS  
        PROVIDING FOR NAO IN LIGHT OF HER POOR HEALTH.  
        ..... 2

    C. THE TRIAL COURT DID NOT UNDERSTAND  
        WASHINGTON LAW ON MAINTENANCE. .... 4

    D. THE TRIAL COURT’S MAINTENANCE AWARD WAS  
        INADEQUATE IN AMOUNT AND INADEQUATE AND  
        ARBITRARY IN DURATION. .... 11

    E. THE COURT ALSO DID NOT UNDERSTAND ITS  
        DISCRETION AS TO THE LIFE CARE PLAN. .... 15

III. CONCLUSION ..... 18

## TABLE OF AUTHORITIES

### **Washington Cases**

<i>Cleaver v. Cleaver</i> , 10 Wn. App. 14, 516 P.2d 508 (1973).....	10
<i>In re Custody of C.C.M.</i> , 149 Wn. App. 184, 202 P.3d 971 (2009). .....	17
<i>In re Marriage of Barnett</i> , 63 Wn. App. 385, 818 P.2d 1382 (1991).	9
<i>In re Marriage of Estes</i> , 84 Wn. App. 586, 929 P.2d 500 (1997). .....	8, 9
<i>In re Marriage of Mathews</i> , 70 Wn. App. 116, 853 P.2d 462 (1993). .....	10
<i>In re Marriage of Rockwell</i> , 141 Wn. App. 235, 170 P.3d 572, (2007) .....	5, 6, 10, 11
<i>In re Marriage of Sheffer</i> , 60 Wn. App. 51, 802 P.2d 817 (1990) .....	6, 7
<i>In re Marriage of Spreen</i> , 107 Wn. App. 341, 28 P.3d 769 (2001) .... .....	11, 12, 13, 14
<i>In re Marriage of Wright</i> , 78 Wn. App. 230, 896 P.2d 735 (1995)....	8
<i>Stacy v. Stacy</i> , 68 Wn.2d 573, 577, 414 P.2d 791 (1966). ....	6, 7

### **Statutes, Rules, & Other Authorities**

RCW 26.09.090 .....	5
RCW 26.09.090(1)(f).....	9

## I. STATEMENT OF ISSUES IN REPLY

1. The trial court did not believe, and the evidence did not support, that Nao's diseases "have very little effect on her ability to function," as the husband claims. Br. Cross-Respondent, at 3.

2. The trial court intended to provide the wife, a 56-year-old homemaker with two incurable and progressive diseases, with peace of mind.

3. Yet, the maintenance awarded is inadequate under Washington law.

4. To determine whether a maintenance award is just, the relevant comparison is between the circumstances of the spouses, and here the differences are stark.

5. In a long marriage, the trial court's objective is to leave the spouses in roughly equal financial situations, which did not happen here.

6. A trial court must understand the proper legal test to apply it.

7. The trial court's choice of maintenance amount and duration was arbitrary.

8. Nao did not have to prove her future needs with certainty, but by a preponderance of the evidence, which she did.

## II. ARGUMENT IN REPLY

### A. THE WIFE IS DISABLED BY TWO INCURABLE AND PROGRESSIVE DISEASES.

Dan has denied and minimized Nao's medical condition from the start, going even so far as to delay necessary treatments for two years. RP 321-324; Exhibit 63, at 75-79 (medical records confirming delay). Nao suffered at least four attacks in the brain and neck during that time. RP 324-326. Now Dan cherry picks from his medical expert's testimony and concludes that Nao's diseases "have very little effect on her ability to function,..." Br. Cross-Respondent, at 3. This characterization is both wrong and cruel. See Br. Respondent/Cross-Appellant, at 6-10. And the trial court did not buy it.

### B. THE TRIAL COURT'S MAJOR CONCERN WAS PROVIDING FOR NAO IN LIGHT OF HER POOR HEALTH.

Nao has two rare and incurable diseases, which means she is in a doubly-rare category. RP 532. One disease aggravates the symptoms of the other and the other limits the treatments she can receive. RP 532-533. They render her unable to work, cause ongoing pain and depression, and affect her ability simply to move in the world. RP 30, 304, 324-348, 534-544. The trial court understood this and, even though vexed by a kind of philosophical

uncertainty and inexperience, also understood “the likelihood of her physical condition declining, ...” RP (05/25/12) 3.

This concern was paramount in the court’s analysis. The court wanted Nao to have “peace of mind ...” for her lifetime. RP (05/25/12) at 3, 8, 19. When the court awarded her less maintenance than she requested, the court assured her “that this is not an end to help if it’s needed financially in terms of the medical condition.” RP (05/25/12) at 19. In declining to fund the Life Care Plan, the court hastened to assure Nao that its ruling did not “preclude a future consideration or revision of maintenance ... based on a sufficient deterioration in Ms. Valente’s physical condition, and I want to make that clear for the record.” RP (05/25/12) 8; RP (05/25/12) 9 (“I want it clear on the record that I am in no way precluding the return to the Court to ask for the maintenance amount to be adjusted.”). The court told Nao the maintenance amount was “not permanent,” but could be “overcome by a significant change, ...” RP (05/25/12) 8-9. The court emphasized “my decision should not be considered to preclude the possibility of a maintenance adjustment.” RP (05/25/12) 17. The court further explained that “I want it clear on the record that I am in no way indicating that the respondent should not be able to come in

and request an adjustment in maintenance as a result of her physical or any other legal reason.” RP (05/25/12) 18. In an effort to protect that potential, the court struck from the written findings most of the evidence regarding Nao’s conditions, after seeking assurances from counsel about the effect of doing so. RP (07/27/12) 3-4.

In short, it is clear the court had *the will* to provide for the wife, in respect of her diseases and any future worsening of her condition. But the court had trouble finding *the way* to do so, hindered by acknowledged inexperience in the relevant law. See, e.g., RP (07/27/12) 3 (“there’s a means by which a request to change maintenance can be requested simply because there’s ongoing maintenance; isn’t that correct?”); 8-9 (“and this is not my specialty in terms of my field of practice before becoming a judge”); 19 (“I’m – this is a new area for me”). The court’s inexperience, combined with Dan’s relentless opposition to a fair award to Nao, led the court to make two erroneous rulings, despite its intention to provide Nao with “peace of mind.”

**C. THE TRIAL COURT DID NOT UNDERSTAND WASHINGTON LAW ON MAINTENANCE.**

Dan argues in defense of the inadequate maintenance award that the trial court’s discretion is “wide.” Br. Cross-

Respondent, at 11. If only the trial court had understood this. As mentioned previously, the trial court repeatedly confessed its inexperience in the area and asked for help from counsel, receiving widely divergent instruction from each. Most particularly, what the trial court misunderstood is that “[i]n a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives.” *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572, (2007) (internal citation omitted). That did not happen here.

Uncontrovertibly, substantial long-term or lifetime maintenance is permitted in a 25-year marriage where one spouse has no prospect for earning a livelihood and is disabled by two incurable and progressive diseases, and where the community enjoys substantial wealth, and where the working spouse has more than a decade of high-earning potential ahead of him. RCW 26.09.090; Br. Respondent/Cross-Appellant, at 31- 36 (cases cited therein). That is, Nao's maintenance request at trial closely follows the script of the statute and these many precedents. Dan had at least twelve more years before retirement. During that time he could pay Nao the \$20,000 in monthly maintenance she requested and still take home over \$41,000. Exhibit 56 (2012 cash flow

analysis). Not only is this outcome permitted under Washington law, given the circumstances here, where every single statutory factor militates in favor of a generous maintenance award, something on the order of Nao's request is required. *Rockwell, supra*. The trial court did not understand this standard and did not apply it.

Nor does this analysis change simply because the wife received slightly more of the community property, as Dan claims. Br. Cross-Respondent, at 12. In the first place, Nao received only 4% more of the combined community and separate property. CP 95-96 (husband receives \$128,060 more in separate property). In other words, Nao received approximately \$525,000 more in the distribution of over \$7 million in total assets. Because of the parties' wealth, it sounds like a lot of money, but the required comparison is between them. *In re Marriage of Sheffer*, 60 Wn. App. 51, 54, 802 P.2d 817 (1990), *citing Stacy v. Stacy*, 68 Wn.2d 573, 577, 414 P.2d 791 (1966). In the two years before trial, Dan earned \$1.2 million and \$1.3 million. CP 88. He persuaded the court to adopt a smaller number looking ahead, i.e., \$1 million. CP 88-89. Based on that smaller number, Dan's net take home every month would be over \$41,000 if he was paying Nao \$20,000

in maintenance. Exhibit 56 (column 1). Under the lower maintenance ordered, he takes home about \$50,000 a month. His monthly expenses are \$7,000. Exhibit 13. That leaves him with over \$40,000 every month. At the end of a year, he will have an extra \$480,000. In six years, when he will be about \$3 million ahead, maintenance will terminate and Dan will be an additional \$120,000 richer every year.

In sum, taken in context, the award to Nao is only barely disproportionate and in no way closes the widening gap between the parties. That is what maintenance is for.

As case law makes clear, a disproportionate award is a factor in, but not a substitute for, the maintenance analysis. See, e.g., *Stacy v. Stacy, supra* (reversed inadequate maintenance award despite 75% property distribution to needy spouse); *Marriage of Sheffer, supra* (reversed inadequate maintenance award despite 60% property distribution to needy spouse). With Dan's future earnings, it will take him just over a year to "recoup" the slight advantage Nao received in the property distribution. Then he will outpace her at warp speed.

Nor do the cases Dan cites help him here. Br. Cross-Respondent, at 12-13. In one case, the trial court declined to

award maintenance to the wife because she failed to satisfy the statutory criteria of RCW 26.09.090. *In re Marriage of Wright*, 78 Wn. App. 230, 238, 896 P.2d 735 (1995). Here, Nao satisfies all the statutory criteria for maintenance, and dramatically so. The appellate court affirmed in *Wright*, noting further in *dicta* that the wife received 60% of the property distribution. *Id.* There the disproportionate award may have contributed to the wife's failure to satisfy the statutory maintenance criteria, but those facts bear no resemblance to this case. Here, during the long marriage, Nao performed all the domestic labor, including rearing the children, allowing the husband to build the family business. She has no marketable skills and is, in any case, disabled. Given Nao's particularly heightened needs, the slightly disproportionate award of property simply does not eliminate the need for additional maintenance. *Wright* does not say otherwise and the trial court never found otherwise.

Another of the cases Dan cites seems to lend support to Nao's argument, not his. Br. Cross-Respondent, at 12, citing *In re Marriage of Estes*, 84 Wn. App. 586, 593-594, 929 P.2d 500 (1997). In *Estes*, the trial court denied maintenance in lieu of a slightly disproportionate property division where the parties had

sharply disparate earning capacities. The appellate court reversed because the award left the wife with income “not sufficient to meet her monthly expenses, even when her earnings are supplemented with income from property awarded to her.” *Id.*, at 594. Here, as in *Estes*, and for the same reason, remand is appropriate.

Nor does the maintenance award (the inadequate one or the one Nao requested) amount to double-dipping, as Dan argues, relying on *In re Marriage of Barnett*, 63 Wn. App. 385, 818 P.2d 1382 (1991). Br. Cross-Respondent, at 14; see, also, Br. Cross-Respondent, at 8. The peculiar facts of *Barnett* simply do not apply here. There the trial court used maintenance as a means to distribute a marital asset that was to be sold, thereby eliminating the income stream. That is not happening here. Dan was awarded the “insane[ly]” profitable business and is predicted to continue his high earnings. RP 62; CP 88-89. Here, unlike in *Barnett*, the maintenance, awarded at a proper level, is a means of curing the disparity in the parties’ economic circumstances, without which the court cannot accomplish the statutory mandate. When Dan argues the court should not consider his future earnings potential he is completely sideways with Washington law. RCW 26.09.090(1)(f).

Nor is Dan fairly describing Washington law when he says our law disfavors maintenance awards “that attempt to fully equalize the parties’ income for long periods of time,…” Br. Cross-Respondent, at 14. As noted above, Washington law favors such awards, identifying as the court’s objective in a long term marriage “to place the parties in roughly equal financial positions for the rest of their lives.” *Marriage of Rockwell*, 141 Wn. App. at 243 (internal citation omitted). Because Dan simply misstates the law here, the authorities he cites do not help him. In one case, the appellate court reversed a maintenance award of indefinite duration because there was no finding the wife would be unable to work in the future. *In re Marriage of Mathews*, 70 Wn. App. 116, 124, 853 P.2d 462 (1993). That is not the problem here, where the wife is permanently disabled. RP 544; Exhibit 63, at 46, 55-57. Even if she was not, she has no marketable skills, speaks English haltingly, and spent the entire marriage performing the family’s domestic labor. In short, *Mathews* is an inapt comparison, a characterization which applies, for the same reason, to *Cleaver v. Cleaver*, 10 Wn. App. 14, 516 P.2d 508 (1973), where the wife was younger, not disabled, and had marketable skills. Br. Cross-Respondent, at 14.

The case law does not help Dan precisely because Washington law not only favors, but requires the kind of award Nao sought here, one that would have left her with about a third of Dan's income until he reached retirement age. This is not even "roughly equal," as described in *Rockwell*. But it is a lot closer, and it is where the court would have gone using the correct legal standard.

**D. THE TRIAL COURT'S MAINTENANCE AWARD WAS INADEQUATE IN AMOUNT AND INADEQUATE AND ARBITRARY IN DURATION.**

This case most resembles *In re Marriage of Spreen*, 107 Wn. App. 341, 28 P.3d 769 (2001), where the trial court arbitrarily picked a duration for maintenance. Here, as in *Spreen*, the trial court seemed to pick a number out of a hat, ordering the \$10,000 maintenance to end at Nao's age 62. RP (05/25/12) 7-8. Both age and amount are arbitrary and at odds with the court's stated goals. The court said it chose the amount of \$10,000 (not \$20,000, as Nao requested, or \$6,000 as Dan suggested) "to allow Ms. Valente to continue to live her life in a way that she has come to enjoy living her life during the course of the marriage." RP (05/25/12) 9. But the court does not say why she needs so much less than Dan or less than she has lived on, a troubling omission when her health suggests she needs as much or more. Indeed, the court suggests

she might have to sell her house (RP 05/25/12 9-10), without ever explaining why she should not receive an income stream more “roughly equal” to Dan’s so that she can stay in the home, with its accommodations, which took two years for her to find. RP 402-404. Again, the court seemed to have *the will* to do what Washington law dictates, but cannot seem to find *the way*.

The choice of duration is especially arbitrary and the court does not explain why Nao’s need for support will change dramatically at her age 62, when the court orders maintenance reduced from \$10,000 to \$1,000 monthly. Certainly, there is no reason to expect Nao will need less at age 62, particularly when the medical evidence pointed to progressive debilitation, and even the court feared her needs will only increase. Nor will Dan’s ability to pay change. He will only be 60 and he makes no challenge to the finding he will continue his high earnings to at least age 65. RP 50, 294.

As to the next step down, from \$1,000 to \$100, the court admits it picked Nao’s age 72 arbitrarily. RP (07/27/12) 22-23. As *Spreen* instructs, these arbitrary decisions constitute an abuse of discretion. In *Spreen*, the appellate court faulted the trial court for setting a duration for maintenance untethered to the facts and

circumstances of the case. In particular, in *Spreen*, the evidence showed the wife would not become self-supporting for up to two years, yet the court limited maintenance to one year. 107 Wn. App. at 348-349. Here, the situation is even more dramatic, since Nao is never going to be employable. The court's choices as to the duration of maintenance are simply untenable.

When the court asked if there was a reason to set a certain date for complete termination of maintenance, Dan responded that the award was "a yoke around his neck" and proposed a cutoff date, "whether it's 65 or 66 or 67." RP (07/27/12) 20. Dan's feeling burdened by the needs of his spouse of 25 years is not an adequate reason to terminate maintenance. Nao requested 12 years of maintenance because that is when she could obtain the full benefit of Dan's social security. RP 410-415. In his testimony, Dan argued for eight years of maintenance claiming that Nao could then rely on social security. RP 225. We do not know that the court accepted this testimony, but if it did, that would be error, as *Spreen* also makes clear.

In the first place, the parties offered different views of what would be available to Nao in terms of social security, with Dan offering an incorrect and rosy view and Nao offering a view

consistent with federal law. RP 226-227, 234, 410-416, 547, 557; CP 12-13, 17-23.<sup>1</sup> When the \$10,000 maintenance terminates, and Nao is 62, she would be eligible only for an approximate third of Dan's benefit; she would be eligible for half only when he reaches full retirement age. RP 415-416, CP 17. Nao testified her own benefit would be only \$400-500, depending on whether she began taking it at age 62 or 65. RP 415-416; Exhibit 64. No one disputed this figure or offered figures on what she would receive if she began taking Dan's benefit at his age 62 or full retirement age. In *Spreen*, this lack of evidence proved fatal to the trial court's decision to rely on benefits instead of maintenance.

Moreover, the use of social security in the maintenance analysis is problematic, if that is what the trial court was doing, as *Spreen*, and the cases it cites, makes clear. Since we do not even know the court considered the testimony regarding social security, we cannot know whether it properly used that testimony.

---

<sup>1</sup> See, also, *Social Security: The Official Website of the U.S. Social Security Administration* (last visited November 3, 2013).

[http://ssa-custhelp.ssa.gov/app/answers/detail/a\\_id/299/~/qualifying-for-divorced-spouse-benefits](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/299/~/qualifying-for-divorced-spouse-benefits)

[http://ssa-custhelp.ssa.gov/app/answers/detail/a\\_id/367/related/1](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/367/related/1)

The maintenance award was arbitrarily chosen, in amount and especially in duration. It was also, in both respects, inadequate under Washington law.

E. THE COURT ALSO DID NOT UNDERSTAND ITS DISCRETION AS TO THE LIFE CARE PLAN.

The husband mischaracterizes the wife's challenge to the court's ruling on the Life Care Plan. Br. Cross-Respondent, at 9. Nao simply does not argue the trial court could not, in the exercise of its discretion, decline to fund the Life Care Plan. Rather, her point is that the trial court did not properly exercise its discretion, one way or another, because the trial court set too high a bar for the burden of proof. Put another way, what the trial court failed to understand is that the evidence was sufficient to fund the Life Care Plan.

The court found that "a factual basis was not presented to prove that the wife is in need of all the services detailed in the Life Care Plan *at this time.*" CP 88 (emphasis added). This is not so much a finding as a restatement of what the Life Care Plan is: a *plan* for the future. Though Nao presently is using or has used many of the services in the Life Care Plan (doctors visits, screening and other lab tests, medications, acupuncture, counseling, wheelchair, massage, in-home elevator, etc.), her future need for

additional services is based on the expert opinions of her doctors and the life care planner. Essentially, the court faulted the Life Care Plan because it attempted to forecast Nao's future needs, based upon her present ones. That is, the court thought the Life Care Plan had to be based upon complete certainty.

For example, the court began its oral ruling by declaring: "I'm dealing with an unknown here, ..." RP (05/25/12) 8. The court worried it did not know for certain what "in fact will occur,..." RP (05/25/12) 9. "I don't know how long people are going to live. I don't know how long – whether or not the medical condition is going to deteriorate, and if so, at what rate." RP (07/27/12) 21. The court described its difficulty in "trying to look into the future to see what's going to happen." RP (07/27/12) 21.

In a different context, the court was more comfortable making a prediction, "albeit with some uncertainty." RP (05/25/12) 7. Regarding Dan's future earnings, the court observed: "there is no guarantee as to how things are going to go, but by looking back at the averaging of how things have gone, it certainly seems that there is – this is an ongoing interest that will provide significant income to the petitioner in the particular case." RP (05/25/12) 7.

It is a mystery why the court did not apply this same measure to the evidence of the likely trajectory of Nao's medical condition, though the explanation may lie in Dan's relentless attack upon the plan. Certainly, it is not that the prediction lacked evidence. Nao's medical history is as predictive as the historical success of the family's business. Exhibit 60; RP 320-349, 532-545. Both Nao's main doctors, specialists in their fields and familiar with her particular dual-disease circumstances, had no trouble concurring in the Life Care Plan. Exhibit 56. They declared "[t]he medical and rehabilitation recommendations contained in the attached life care plan necessary and appropriate for Nao Valente." CP 209. This evidence satisfies a preponderance standard, which is at the low end of the proof spectrum. *In re Custody of C.C.M.*, 149 Wn. App. 184, 202, 202 P.3d 971 (2009). Despite what the trial court thought, certainty is not required. *Id.*

This case should be remanded with instructions for the trial court to apply the preponderance standard to the evidence of Nao's health and future needs and to reconsider the Life Care Plan in light of that evidence.

### III. CONCLUSION

The trial court repeatedly and properly made clear its concern for the wife's future, her medical condition and her peace of mind. Given the wealth of this community, those concerns could and should be fully protected. The wife should not have to return to court for another round of stressful litigation, not when Washington law entitles her to peace of mind now. The court's failure to accomplish the goals of maintenance arose from its misunderstanding of the proper legal standards and its own authority. This amounts to an abuse of discretion and justifies remand for entry of orders increasing the amount and duration of maintenance. The court should also reconsider whether the Life Care Plan, in substantial part, *likely* represented the wife's future medical and related needs, as the wife's doctors thought, which is a legally adequate foundation for an award to fund it. Finally, the wife requests her fees on appeal, given the huge disparity in the parties' financial circumstances.

Dated this 4th day of November 2013.

RESPECTFULLY SUBMITTED,



---

PATRICIA NOVOTNY #13604  
Attorney for Respondent/Cross-Appellant