

No. 74726-6

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Division I
State of Washington

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

EDMUND MICHAEL VONALLMEN,

Appellant,

and

JACQUELYNE LERAE VONALLMEN,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JUDITH H. RAMSEYER

BRIEF OF RESPONDENT

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I. INTRODUCTION

The husband appeals the trial court's award of approximately 60% of the community estate to the wife following a long-term marriage. The husband has worked at Microsoft for 25 years, earning a base salary of \$215,000 and, historically, an annual bonus and stock grants. The wife has not worked outside the home since 2000, has been the primary homemaker, and has an annual earning capacity of \$32,000. In making its award, the trial court noted that the disproportionate property distribution was fair and equitable in light of all of the circumstances of the marriage, and would obviate the need for permanent and substantial maintenance into the future. The trial court did not abuse its discretion.

The husband also appeals the trial court's maintenance award to the wife of \$8,500 for 48 months, \$6,500 for 36 months, and \$5,000 for a final 24 months, arguing that the trial court erred in including his annual bonus in determining his ability to pay despite his own expert taking it into account when calculating his income in various maintenance scenarios. The husband contends that he will not be able to financially "catch up" to the wife while paying maintenance, but the award lasts only until the husband reaches age 62, and decreases over time. The trial court clearly considered all of

the factors set forth in RCW 26.09.090, including the husband's overall financial circumstances, not just his income.

The trial court's maintenance order and property distribution ensure that the parties will be in roughly equal positions for the rest of their lives. This Court should affirm and award the wife her fees on appeal.

II. RESTATEMENT OF FACTS

A. The parties were married for 22 years and have two teenage children.

Respondent Jacquelyne "Jacki" VonAllmen, age 53, and appellant Edmund VonAllmen, age 54, were married for 22 years. (CP 1-2) After they met in California in February 1988, Jacki quit her job and moved to Kentucky to live with Edmund in November 1989. (RP 454-55) After becoming engaged in February 1991, they married on March 28, 1992. (RP 89, 455-56; Finding of Fact (FF) 2.4, CP 62) The parties separated on August 25, 2014, and Edmund filed a petition for dissolution in King County Superior Court in November 2014. (RP 96-97; FF 2.5, CP 62)

The parties have a son, now age 19, and daughter, now age 15. (RP 90; FF 2.17, CP 63; CP 142) An agreed final parenting plan for the daughter and a final order of child support for both children were entered on December 28, 2015. (CP 72-80, 161-69) The trial court

denied Edmund's motion for reconsideration of the tax rates applied to the child support calculation on January 29, 2016. (CP 155-57) The parties will adjust the child support order this fall when the son begins college. (CP 157) Edmund does not challenge the final parenting plan or the child support order on appeal.

B. The husband has worked at Microsoft for the past 25 years, while the wife has been the homemaker.

Edmund received a job offer from Microsoft in 1991 after a three-month internship with the company. (RP 123, 456) Edmund and Jacki moved to Washington together for Edmund's job in September 1991. (RP 123, 456) Edmund has worked at Microsoft in various positions for 25 years. (RP 123-24; FF 2.21.2, CP 64)

Edmund's income from Microsoft consists of a \$215,000 salary, an annual bonus, and stock grants that fully vest over five years. (RP 44, 46, 48) Every year, Edmund has received an annual bonus in September, which was approximately \$60,000 in 2014 and \$50,000 in 2015. (RP 254, 46-47, 178, 181) The stock grants are awarded annually at the end of August, and fully vest over five years. (RP 48-49) Edmund must be an employee of Microsoft when the stocks vest in order to exercise them. (RP 49) It has been his practice to sell the stocks shortly after they vest and utilize the proceeds. (RP 246) Just prior to trial, Edmund sold stocks that vested in August 2015 for

\$198,051. (RP 367, 220) In addition to these annual stock grants, Microsoft also has an Employee Stock Purchase Plan (“ESPP”), “which allows him to purchase Microsoft stock at a discount from money withheld from his paycheck.” (RP 221; FF 2.21.11, CP 66)

Jacki has a B.A. in Psychology and a minor in Business and worked in several positions involving data entry/office assistance in the 1990s. (RP 457, 91; FF 2.21.3, CP 64) She has not worked outside the home since 2000, and she has “been primarily a homemaker and currently spends an inordinate amount of time driving her children to their activities.” (RP 105, 459; FF 2.21.3, CP 64) Both parties’ experts agreed that without additional training, Jacki is able to earn approximately \$31,000 to \$32,000 a year. (RP 58; FF 2.21.3, CP 64-65; Exs. 44, 112)

C. The parties have substantial assets, which the trial court split 60/40 in favor of the wife.

The trial court divided the “community assets 40% to Petitioner and 60% to Respondent,” finding this division “fair and equitable under the totality of the circumstances.” (Conclusion of Law (CL) 3.8.2, CP 68)¹

¹ The values assigned to the parties’ assets and liabilities are taken from “Exhibit A” to the trial court’s findings. (CP 183-85) The trial court made clear that “[v]alues on Exhibit A represent ratios, and may not reflect actual values on the date assets and debts are divided.” (CL 3.8.2, CP 68)

The parties agreed that the family home is community property valued at \$1,040,000. (FF 2.21.7, CP 65) In July 2014, the credit cards were maxed out and Edmund began “shutting things down,” leaving Jacki in a “very scary situation” because she “didn’t know what was happening” or “what was going to happen.” (RP 479) Jacki withdrew \$100,000 on a home equity line of credit (“HELOC”) because she thought it was the “safe thing to do” “to protect against the uncertainty of her financial status.” (RP 478-79; FF 2.21.7, CP 65) The trial court found the HELOC to be a community debt because Jacki “had no access to separate resources and was wholly dependent on community resources for her support and attorney fees during separation,” and split the debt equally between the parties. (RP 104-05; FF 2.21.7, CP 65) The trial court awarded the net value of the family home, \$940,548, to Jacki. (CP 183; FF 2.21.7, CP 65)

The parties have a Fidelity 401(k) account worth approximately \$1,177,324 as of October 16, 2015. (RP 341; Ex. 7) At trial, Edmund claimed that \$17,114 of that amount should be characterized as separate property stemming from his contributions, his employer’s contributions, and dividends that all occurred post-separation. (RP 341; CP 24; Ex. 7) The trial court found that the

parties “generally agree on the characterization of . . . retirement accounts,” which, by Edmund’s own calculations, would have been 98.5% community and 1.47% separate. (FF 2.21.11, CP 66; Ex. 31) The trial court awarded 42% of the Fidelity 401(k)’s December 31, 2015 value to Edmund and 58% to Jacki “to approximate the 40/60% division of community assets.”² (CL 3.8.2, CP 68; CP 187-88)

The parties primarily agreed with the distribution of the vehicles: Edmund received a Porsche valued at \$190,000 as separate property, and Jacki received a Lexus valued at \$42,244, as well as a \$50,000 loan on the car, as her separate property. (CP 184, 187-89; FF 2.21.13, CP 66) The trial court evenly split the couples’ Freestone investment accounts worth approximately \$3.2 million at the time of trial. (RP 282; FF 2.21.9, CP 65; CP 183) The trial court awarded \$27,198 from the ESPP account to Edmund as separate property, and gave each party \$6,320 from that account as community property. (CP 183, 187-88)

At the time of the trial, there were 8,238 unvested shares of Microsoft stock. (RP 247, 268) The trial court adopted Edmund’s

² A scrivener’s error lists the Fidelity 401(k) division as “44/58%” in the trial court’s findings. (CL 3.8.2, CP 68) But in the Decree of Dissolution, the trial court clearly awards “42% of 12/31/2015 value of his Fidelity 401K” to Edmund (CP 187) and “58% of the husband’s Fidelity 401K” to Jacki. (CP 188)

expert's characterization of the stocks, as there was both a community and separate property aspect to them, but split all unvested stock awarded prior to the date of separation evenly. (FF 2.21.10, CP 66; CP 183, 187-88) The trial court valued the unvested stock at \$407,539. (CP 183)

The total amount of liabilities was \$175,612. (CP 184) In addition to the \$50,000 car loan and half of the HELOC loan, Jacki assumed an additional \$19,684 of the liabilities as separate property. (CP 184) Edmund assumed half of the HELOC loan and \$789 as community liabilities, and \$5,685 as separate liability. (CP 184) The trial court added these figures up to \$6,456,582 in total assets less \$175,612 in total liabilities for a net value of \$6,330,972 for all assets. (CP 184) Of that amount, \$5,736,487 comprised the community estate. (CP 184) The trial court awarded the husband \$2,252,383, or 39.26%, of the community estate, and \$415,282 in separate property. (CP 184) The wife's award was \$3,434,103, or 59.86%, of the community, and \$179,203 in separate property. (CP 184)

D. The trial court awarded the wife maintenance on a decreasing scale for nine years.

Although the trial court divided assets disproportionately in favor of Jacki "to reduce the need for extensive spousal maintenance into the future," it still found that "[s]ome spousal maintenance is

warranted . . . to account for the length of the marriage, the disparate earning ability of each party, and to help [her] transition to maintaining her own financial stability.” (FF 2.12, CP 63) To that end, the trial court awarded Jacki maintenance for nine years, beginning on January 1, 2016. (CL 3.8.1, CP 68) Edmund must pay Jacki \$8,500 per month for 48 months, then \$6,500 per month for 36 months, and finally \$5,000 per month for 24 months. (CL 3.8.1, CP 68) The trial court determined Edmund’s ability to pay based on his average annual income of \$262,235, which included his salary and the average of his 2014 and 2015 bonuses. (FF 2.21.2, CP 64)

The trial court denied Edmund’s motion for reconsideration on the property distribution and maintenance order. (CP 98-100, 113-14) Edmund appeals.

III. ARGUMENT

A. **The trial court’s property distribution put the parties in roughly equal positions for the rest of their lives.**

The trial court was well within its discretion to award 60% of the community estate to the wife, more than twice the amount of separate property to the husband than the wife, and nine years of maintenance after a 26-year relationship. “As with maintenance, the trial court’s paramount concern when distributing property in a dissolution is the economic condition in which the decree leaves the

parties.” *Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.2d 679 (1996), *rev. denied*, 131 Wn.2d 1025 (1997). “A trial court is not required to place the parties in precisely equal financial positions at the moment of dissolution.” *Marriage of Wright*, 179 Wn. App. 257, 262, ¶ 7, 319 P.3d 45 (2013), *rev. denied*, 180 Wn.2d 1016 (2014). Rather, where the spouses were in a long-term marriage, “the court’s objective is to place the parties in roughly equal financial positions for the rest of their lives.” *Wright*, 179 Wn. App. at 262, ¶ 7.

To that end, the trial court must take into account “all of the circumstances of the marriage, past and present, with an eye to the future needs of the persons involved.” *Marriage of Nicholson*, 17 Wn. App. 110, 118, 561 P.2d 1116 (1977) (quoting *Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145, *rev. denied*, 86 Wn.2d 1001 (1975)); *Marriage of Hall*, 103 Wn.2d 236, 248, 692 P.2d 175 (1984) (future earning potential “a substantial factor to be considered by the trial court in making a just and equitable property distribution”). Reviewing courts are “reluctant to encroach upon this discretion by providing a precise formula prescribing the amount of property to be distributed or maintenance to be awarded to the supporting spouse.” *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984); *Marriage of Rockwell*, 141 Wn. App. 235, 243, 248, ¶¶ 12, 22, 170

P.3d 572 (2007) (“[T]he court is not required to divide community property equally”; “[i]f a trial court’s finding is within the range of the credible evidence, we defer.”), *rev. denied*, 163 Wn.2d 1055 (2008).

The trial court’s decree is fair and equitable in light of all of the circumstances of the marriage. The trial court awarded the wife, who has a significantly lower earning capacity than the husband, roughly 60% of the community estate. (CP 184; CL 3.8.2, CP 68) The husband, whose salary is eight times the wife’s imputed income, received the remaining 40% of the estate. (CP 184; FF 2.21.2, CP 64) The husband also received a greater separate property award of \$415,282 compared to the wife’s \$179,203. (CP 184) In making this distribution, the trial court ensured that the parties will be in roughly equal positions for the rest of their lives.

Indeed, Edmund has already begun to “recover financial parity” with Jacki. (App. Br. 46) Edmund is entitled to all of his stock grants awarded as of August 2015, 10% of which vested in both February and August 2016. (CP 187; Ex. 31) Edmund is entitled to all of his 401(k) funds from January 1, 2016 onward, as well as the stocks purchased and funds withheld from his pay through the ESPP since the date of separation. (CP 187) Meanwhile, even if Jacki finds

employment, it is highly unlikely that she will be able to amass anywhere near the retirement that Edmund will before they each reach retirement age. Edmund is clearly not prevented from “begin[ning] to equalize” his financial position with Jacki’s (App. Br. 47), as he has already begun to do so. In addition, Edmund has a significantly higher earning potential than Jacki, and will be entitled to twice as much Social Security as her once he retires. (RP 279)

Even if Edmund voluntarily retires from Microsoft early, he will still be able to pay maintenance and “catch up” to Jacki’s financial position over the rest of their lives. (App. Br. 41) Microsoft incentivizes employees aged 55 or older who have been with the company for 15 consecutive years to voluntarily retire early by allowing all unvested stock grants to automatically vest at their present value on that day. (RP 445-46) Edmund admits that “strategically managing his departure from Microsoft” by retiring would result in him “maximizing his unvested stock grants.” (App. Br. 42) If he is confident that he can maximize his unvested stock grants, he would undoubtedly remain in a superior financial situation to Jacki and would still have the ability to pay maintenance going forward. This is especially true considering that the payments will begin to decrease on January 1, 2020, when he is just 57. (CP 1;

CL 3.8.1, CP 68) Regardless of whether or not Edmund takes a lower paying job elsewhere (App. Br. 42), he still has a substantially higher earning capacity than Jacki. Edmund is not now, nor will be, in a disparate financial situation for the rest of his life.

B. The trial court did not mischaracterize any property.

1. The trial court properly characterized and awarded 50% of the future value of the unvested stocks to each party.

a. The trial court made clear that the unvested stock grants are characterized as property, not income. (Response to App. Br. 48)

Remand is not necessary to “determine the tax status of the payment of any vesting stock to Ms. VonAllmen.” (App. Br. 48) As Edmund himself concedes (App. Br. 48), the trial court clearly stated that it “characterize[d] the stock and remaining proceeds generated by sale of the stock as property, not as Petitioner’s annual income,” and reiterated this post-trial. (FF 2.21.10, CP 66; CP 192-92) The trial court also specifically addressed the tax rates to apply in the Decree of Dissolution, which states that the unvested stock award to Jacki is “subject to the same terms and conditions as apply to petitioner, unless respondent is able to exercise the stock using her own tax withholding rate if different at the time from petitioner’s.” (CP 188)

b. The trial court was well within its discretion to award the wife half of the unvested stocks. (Response to App. Br. 20-23, 46-47)

The trial court properly “adopt[ed] the characterization of [the unvested stock options] as community and separate as provided by Petitioner’s financial expert,” using the formula set forth by our Supreme Court in *Marriage of Short*, 125 Wn.2d 865, 890 P.2d 12 (1995). (FF 2.21.10, CP 66) (emphasis added) In *Short*, the Court adopted a “time rule” to determine when unvested employee stock options are acquired for purposes of characterizing the property. The “time rule” is a “formula for allocating stock options according to the employment services performed prior to and after the date the parties were ‘living separate and apart.’” *Short*, 125 Wn.2d at 872. Where the stock options are intended as compensation for future employment services, the rule is “applied only to the first stock option to vest” after the separation date. *Short*, 125 Wn.2d at 874.

Edmund’s financial expert, Neil Beaton, followed this exact formula in calculating the separate and community aspects of the unvested stock awards, based on the August 25, 2014 separation date. (Ex. 31) Mr. Beaton characterized all of the stocks that vested after the first post-separation vesting date as Edmund’s separate property. (Ex. 31) The trial court did not “mischaracterize” the

second stock grant that vested post-separation; it explicitly agreed with and adopted Mr. Beaton's analysis that characterized it as separate property. (FF 2.21.10, CP 66)

However, just because the trial court characterized the \$198,051 as Edmund's separate property does not mean that the trial court abused its discretion by awarding 50% of those funds to Jacki. "A trial court in dissolution proceedings has broad discretion to make a just and equitable distribution of property." *Wright*, 179 Wn. App. at 261, ¶ 5. "The court may distribute *all* property, whether categorized as community or separate." *Wright*, 179 Wn. App. at 261, ¶ 5 (emphasis added); *see also Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 ("The character of the property is a relevant factor which must be considered, but is not controlling."), *cert. denied*, 473 U.S. 906 (1985); *Marriage of Larson and Calhoun*, 178 Wn. App. 133, 135, ¶ 1, 313 P.3d 1228 (2013) (holding that the trial court's authority to award a spouse's separate property to the other spouse is not limited to "circumstances where a spouse cannot be amply provided for from community property alone"), *rev. denied*, 180 Wn.2d 1011 (2014).

The trial court intentionally, and properly, awarded Jacki 50% of all unvested stock that Microsoft awarded Edmund prior to

separation in order to “equalize income over time as well as the vagaries of the stock market.” (FF 2.21.10, CP 66) In Edmund’s motion for reconsideration, he requested the trial court’s order “be clarified” as to whether the court intended to award Jacki half of the unvested stock that it characterized as his separate property. (CP 100) The trial court reiterated in its order denying reconsideration that it had “awarded 50% of all Microsoft stock awarded to Petitioner before the date of separation to Respondent, *even though* under the law unvested stock earned during marriage is characterized as separate or community depending on when it vests.” (CP 192-93) (emphasis added) The trial court clearly recognized that “[a]ll property, community and separate, is before the Court for equitable distribution.” (CP 193) *See Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002), *rev. denied*, 148 Wn.2d 1023 (2003); *Marriage of Zier*, 136 Wn. App. 40, 46, ¶ 15, 147 P.3d 624 (2006) (“[A]lthough a court may characterize one or another asset as separate versus community, all property before the court is capable of division to reach a just and equitable result.”), *rev. denied*, 162 Wn.2d 1008 (2007). The trial court did not abuse its discretion.

- c. It is irrelevant that the trial court entered a projected value for the unvested stock grants because each party is entitled to 50% of any value at which the stocks vest.**
(Response to App. Br. 48-49)

The trial court's decision to recite a \$407,539 projected value for the unvested future stock grants awarded prior to separation is irrelevant, because it clearly awarded 50% of whatever value those shares vest at to each party. The trial court placed a value on the unvested Microsoft stock because it had an obligation to know the value of the parties' assets and liabilities in making an equitable property distribution. See RCW 26.09.080 (trial court must consider "nature and extent" of property in making its disposition). But the trial court expressly stated that "[v]alues on Exhibit A represent ratios, and may not reflect actual values on the date assets and debts are divided. *To the extent there is a discrepancy between specific findings and allocations made in the paragraphs herein and on Exhibit A, the written allocation made herein prevails.*" (CL 3.8.2, CP 68) (emphasis added)

The written allocation clearly states that "all unvested Microsoft stock awarded to Petitioner before the date of separation shall be sold within a reasonable time of vesting . . . and net proceeds shared equally by the parties." (FF 2.21.10, CP 66) The trial court

awarded the unvested stock as separate property in Exhibit A. (CP 183) Thus, if the stock grants vest at a different rate than the trial court estimated, the parties' separate property awards will each be reduced or increased *equally*, while their respective community property awards will not be affected at all. (CL 3.8.2, CP 68)

2. The trial court did not err in characterizing the Fidelity 401(k) as community property.
(Response to App. Br. 25-26)

The trial court properly adopted the parties' characterization of the Fidelity 401(k) account and awarded 42% to Edmund and 58% to Jacki, regardless of any minimal separate property component that might exist. (FF 2.21.12, CP 66; CP 184) *See Konzen*, 103 Wn.2d at 478 ("character of the property . . . is not controlling"); *Marriage of Gillespie*, 89 Wn. App. 390, 400, 948 P.2d 1338 (1997) ("Where there is any uncertainty in tracing an asset to a separate property source, the law resolves the uncertainty in favor of a finding of community character."). Even if this Court finds that the trial court failed to properly characterize the 401(k), "mischaracterization of property is not grounds for setting aside a trial court's property distribution if it is fair and equitable." *Gillespie*, 89 Wn. App. at 399. Edmund's own expert characterized the Fidelity 401(k) as 1.47% separate property and 98.5% community property at trial. (Ex. 31)

Complaining about \$17,114 – a mere 0.27% of the parties’ total assets – is not grounds for vacating the trial court’s otherwise fair property decree.

C. None of the alleged mathematical errors in the trial court’s spreadsheet affect the equitable nature of the trial court’s property distribution. (Response to App. Br. 23-28)

Many of the “mathematical” errors that Edmund cites to are not mathematical errors at all, but rather reflect his general unhappiness with the trial court’s property distribution. (See App. Br. 19) Regardless, no mathematical error harms the equitable nature of the overall property distribution. “The key to an equitable distribution of property is not mathematical preciseness, but fairness.” *Clark*, 13 Wn. App. at 810. “Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.” *Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990).

Edmund is correct that the trial court did not subtract the \$50,000 car loan from the total community, despite having included it in when calculating the parties’ total debts and liabilities. (App. Br. 25) In Exhibit A, the total asset figure of \$6,456,582 should be reduced by the parties’ total liabilities of \$175,612 to get an accurate

total asset figure of \$6,280,970. After subtracting each party's separate property, the correct community estate total is \$5,686,485, not \$5,736,487. (CP 184) Thus, reducing the community property total actually *increases* Edmund's percentage of the community, and is by no means reason for remand.

In addition, even if the trial court awarded Jacki the gross value of the house, and included each party's half of the HELOC debt in their liabilities, the property distribution would still be fair and equitable. The trial court awarded the wife the family home, which is valued at \$1,040,000. (CP 183) The HELOC on the house still had a balance of \$99,452 at the time of trial, which the trial court found to be a community debt. (FF 2.21.7, CP 65; CP 192) In Exhibit A, the trial court allocated the net value of the house, \$940,548, as part of Jacki's community award, and did not subtract half of the HELOC debt (\$49,726) from either party's community award. (CP 183)

In his motion for reconsideration, Edmund argued that the trial court's findings were inconsistent with Exhibit A as to whether the HELOC was a community obligation to be paid by the parties or Jacki's debt alone. (CP 99) The trial court clarified that "[t]he balance of the HELOC is a community debt," and ordered each party to pay 50% directly to the lender. (CP 113)

Edmund now argues for the first time on appeal that it was “an abuse of discretion to count the HELOC a second time by lowering the value of the home by the HELOC amount.” (App. Br. 24) Had the trial court used the gross value of the family home and reduced each side’s award by \$49,726, Edmund’s community property award would be \$2,202,657, or 38.73% of the community estate. Jacki’s would be \$3,483,829, or 61.27%. Although this would make Jacki’s percentage of the community slightly above the court’s intended 60/40 allocation, such a property distribution is equitable in light of “all of the circumstances of the marriage.” *Clark*, 13 Wn. App. at 810.

In *Marriage of Donovan*, 25 Wn. App. 691, 612 P.2d 387 (1980), this Court affirmed a much more disparate distribution as being well within the trial court’s discretion. In *Donovan*, “the wife’s award [was] valued at close to twice that of the husband’s award” following a 14-year marriage. 25 Wn. App. at 696. This Court found that the husband earned a “substantial salary” that was “reasonably secure.” *Donovan*, 25 Wn. App. at 696. The wife, on the other hand, was “not prepared, without additional training, for entry into the labor market,” and, “[e]ven after training, the wife’s salary potential [would] undoubtedly be less than a third of her husband’s present

salary.” *Donovan*, 25 Wn. App. at 696-97. This Court therefore found that although “[a]t first blush it may appear that the division is inequitable,” “the scales of equity [we]re balanced by the circumstances of the parties.” *Donovan*, 25 Wn. App. at 696.

The trial court’s disparate community property award here, given the totality of the circumstances, is even more compelling than *Donovan*. First, this marriage lasted for 22 years, not 14. Second, the award here was not nearly as disproportionate. Jacki was awarded only 61% of the community estate, based on values in Exhibit A that the trial court itself cautioned “represent ratios, and may not reflect actual values on the date assets and debts are divided.” (CL 3.8.2, CP 68) Jacki was not awarded twice the amount of community property as Edmund, as was the case in *Donovan*. In addition, the husband in *Donovan* had three times the earning capacity of the wife; here, Edmund’s salary is \$262,235 compared to Jacki’s imputed income of approximately \$32,000 – eight times that of what Jacki could make. (FF 2.21.2, CP 64; FF 2.21.3, CP 64-65; CP 163) The property distribution was clearly equitable in light of the circumstances of the parties.

D. The trial court properly considered the factors set forth in RCW 26.09.090 in finding maintenance necessary. (Response to App. Br. 29-41)

The trial court's award of nine years of maintenance in decreasing amounts was well within the trial court's discretion. Under RCW 26.09.090, a trial court has broad discretion in awarding maintenance. *Washburn*, 101 Wn.2d at 179. RCW 26.09.090 lists six non-exhaustive factors for the trial court to consider, but "places emphasis on the justness of an award, not its method of calculation." *Washburn*, 101 Wn.2d at 182. "[F]inancial need is not a prerequisite to a maintenance award"; "[m]aintenance is 'a flexible tool' for equalizing the parties' standards of living for an 'appropriate period of time.'" *Wright*, 179 Wn. App. at 269, ¶¶ 22-23 (quoted source omitted). "The only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be 'just.'" *Wright*, 179 Wn. App. at 269, ¶ 23.

The trial court found that "[s]ome spousal maintenance is warranted . . . to account for the length of the marriage, the disparate earning ability of each party, and to help [the wife] transition to maintaining her own financial stability." (FF 2.12, CP 63) Edmund contends that the "court's maintenance award is an abuse of discretion because it does not evince a fair consideration of RCW

26.09.090(1)(f), [his] ability to meet his financial obligations.” (App. Br. 30) But in determining spousal maintenance, the trial court considered *all* of the factors set forth in RCW 26.09.090, and expressly stated that it had “taken into account the financial circumstances of the parties,” including Edmund’s “ability to meet his financial obligations after dissolution.” (CL 3.8.1, CP 68)

The reasonableness of the maintenance award itself evidences the trial court’s proper consideration of all of the factors in RCW 26.09.090. The maintenance is not permanent; it ends in nine years, when Edmund reaches the retirement age of 62. (CL 3.8.1, CP 68) Furthermore, during that time, the amount *decreases* by a total of \$3,500 a month. (CL 3.8.1, CP 68) Considering Edmund’s tremendous earning capacity of \$262,235 compared to Jacki’s \$32,000, the maintenance award is clearly just in light of all of the circumstances, and will equalize the parties’ standard of living going forward. *Wright*, 179 Wn. App. at 269, ¶ 23.

1. The trial court properly included Edmund’s bonus in determining his ability to pay.

The maintenance order does not require Edmund to “advance 1/12 of his expected bonus” every month and leave him with a “shortfall” in his living expenses. (App. Br. 31) The trial court properly factored in Edmund’s annual bonus when determining his

ability to pay maintenance.³ Indeed, even his own financial expert took into account his 2015 bonus amount when calculating his income. (Ex. 44; RP 50-51) Edmund received his 2015 bonus in September, as he does every year. (RP 254) Maintenance began on January 1, 2016. (CL 3.8.1, CP 68) Edmund is not “advancing” money he has not yet received to Jacki, but rather budgeting the amount of his bonus for the duration of the following year.

Edmund misplaces his reliance on *Bungay v. Bungay*, 179 Wash. 219, 36 P.2d 1058 (1934), to contend that the maintenance order is an abuse of discretion because it is “impossible of performance.” (App. Br. 32) In *Bungay*, the Court noted that the courts must look to the “appellant’s earning power as the measure of his duty to provide,” and found that the husband had *no* other means of income to pay maintenance. 179 Wash. at 223. Here, the husband has substantial earning power – in 2014, he earned approximately \$513,000, while both parties’ experts agreed that the wife’s earning potential is approximately \$32,000. (RP 76, 58; FF 2.21.3, CP 64-

³ While RCW 26.09.090 gives the trial court wide latitude in what factors to consider in awarding maintenance, RCW 26.19.071 expressly requires the court to consider “*all* income and resources of each parent,” including bonuses, when determining child support obligations. RCW 26.19.071(1), (3) (emphasis added). A trial court does not abuse its discretion by then using that same amount to calculate both child support and ability to pay spousal maintenance, as the court did here. (FF 2.21.2, CP 64)

65; Exs. 44, 112) It is not “impossible” for Edmund to pay his maintenance. Edmund has ample resources – namely his salary and bonus – from which to pay maintenance. In addition, the maintenance *decreases* over time. In four years, when both children are in college and the maintenance is reduced to \$6,500, Edmund should have enough to meet his claimed monthly expenses on his \$215,000 salary alone, without even taking the bonus into consideration. (App. Br. 31-32)

Edmund’s reliance on *Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993), is also misplaced because there the trial court ordered the husband to pay the wife lifetime maintenance. After the husband retired and lost his only source of income, he would be required to pay the wife half of his retirement that he was awarded as part of the property distribution for the rest of his life. *Mathews*, 70 Wn. App. at 124-25. Under such circumstances, the maintenance award did “not evidence a fair consideration of the statutory factors and therefore constitutes an abuse of discretion.” *Mathews*, 70 Wn. App. at 123.

Unlike in *Mathews*, the trial court here did fairly consider the statutory factors, and only awarded maintenance during the time the husband was expected to work. In addition, the maintenance order

here is temporary and decreases over that time period. Even *if* Edmund “does not have the [base] monthly income to pay the ordered maintenance” (App. Br. 33), he does have the resources to pay the maintenance and still “meet his . . . needs and financial obligations” – all that is required under RCW 26.09.090. This is a far cry from an indefinite maintenance order that would have Edmund depleting half of his income and retirement funds indefinitely.

2. The maintenance award does not constitute “impermissible double-dipping.”

That Edmund might need to use savings to pay maintenance if he does not get a bonus is not “impermissible double-dipping.” (App. Br. 34) Edmund erroneously contends that this case is like *Marriage of Barnett*, 63 Wn. App. 385, 818 P.2d 1382 (1991), where the “appellate court found that the maintenance award was essentially a distribution of assets” where the husband was selling off existing scrap at the parties’ scrap business and not acquiring more. (App. Br. 34)

In *Barnett*, the husband was awarded the parties’ salvage business, valued at \$200,000. The trial court awarded the wife a \$100,000 lien against the business, which it directed the husband to make all reasonable efforts to sell. In an effort to incentivize the

husband to sell the business, the court imposed 10% interest on the lien commencing one year after the date of the decree of dissolution. The trial court also awarded a \$500 monthly maintenance to the wife for the remainder of her life. *Barnett*, 63 Wn. App. at 386. On appeal, the Court limited the \$500 monthly maintenance award to the “1 year before interest begins on the offsetting obligation of \$100,000.” *Barnett*, 63 Wn. App. at 388-89. The Court found that the “record indicates the maintenance award was an attempt to distribute [the wife's] share of the business as realized through the future sale of salvage.” *Barnett*, 63 Wn. App. at 388. But because the wife already had a \$100,000 lien for her one-half of the value of the salvage business, the same property was distributed twice. *Barnett*, 63 Wn. App. at 388.

Barnett is inapposite. First, the parties here did not have a business and the wife was not awarded a lien on any of the property distributed to the husband. Second, Edmund is able to use his income, not his assets, to pay the monthly maintenance. Even if he did need to dip into his savings or use some of his assets to cover his maintenance in the absence of a bonus, that is not the kind of impermissible “double-dipping” *Barnett* contemplated.

In *Barnett*, the husband was depleting assets that were not being replenished – unlike a savings or investment account, which continues to grow and generate income in the form of dividends. In addition, the assets that the husband in *Barnett* was depleting were the same assets in which the wife already had a 50% interest. Here, Edmund has his own savings, investment, and retirement accounts going forward – all of which, from here on out, are his separate property and in which Jacki has no lien or interest. She is not being awarded the same property twice should Edmund have to use some of those funds in an emergency to pay his maintenance. The maintenance award is thus not “essentially a distribution of assets because Mr. VonAllmen must use assets already awarded to him to satisfy his maintenance obligation.” (App. Br. 35)

The trial court did not abuse its discretion in granting Jacki maintenance after taking into account all of the factors set forth in RCW 26.09.090. (CL 3.8.1, CP 68)

3. The maintenance award is not “unnecessary.”

The maintenance award is not “unnecessary” merely because the property division favors Jacki. (App. Br. 38) “[F]inancial need is not a prerequisite to a maintenance award.” *Wright*, 179 Wn. App. at 269, ¶ 22. “[T]he trial court has discretion to award both an

unequal property division and maintenance in favor of the same spouse.” *Wright*, 179 Wn. App. at 269, ¶ 24.

Edmund cites *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007), for the proposition that “maintenance is not needed due to the disproportionate property award to the wife.” (App. Br. 39) But *Rockwell* did not even address a maintenance award under RCW 26.09.090. *Rockwell* only concerned the trial court’s property distribution under RCW 26.09.080, which this Court affirmed. 141 Wn. App. at 255, ¶ 39. Neither party assigned error to the trial court’s decision regarding maintenance. Indeed, nowhere in the opinion did it state whether or not the trial court had awarded, declined, or even considered a maintenance order. All that *Rockwell* supports is the proposition that where the trial court considers the age, disparate earning capacities, and employment histories of spouses, an unequal 60/40 division of community property is well within its discretion. 141 Wn. App. at 248-49, ¶¶ 23-24.

Edmund’s reliance on *Marriage of Wright*, 78 Wn. App. 230, 896 P.2d 735 (1995), is similarly misplaced. (App. Br. 40) In *Wright*, the trial court denied the wife’s request for spousal maintenance, concluding that she did not meet the criteria of RCW 26.09.090. 78 Wn. App. at 238. On appeal, the Court reviewed the trial court’s

findings and property distribution as a whole and held that it “cannot say that the trial court’s decision regarding maintenance was error.” *Wright*, 78 Wn. App. at 238. In so holding, the Court properly deferred to the trial court’s discretion, finding that its decision was not based “on untenable grounds or for untenable reasons.” *Wright*, 78 Wn. App. at 237.

Unlike in *Wright*, where the trial court expressly found that the wife did not satisfy the statutory factors allowing maintenance, the trial court here concluded the exact opposite and explicitly found that Jacki *did* satisfy the RCW 26.09.090 factors. (FF 2.12, CP 63; CL 3.8.1, CP 68) Sufficient evidence of the parties’ ages, earning capacities, financial circumstances, and the standard of living in the marriage supported the trial court’s finding that maintenance was warranted.

This case is also not analogous to *Marriage of Irwin*, 64 Wn. App. 38, 822 P.2d 797, *rev. denied*, 119 Wn.2d 1009 (1992). (App. Br. 40) In *Irwin*, the trial court awarded the wife short-term maintenance of \$12,000 for seven months, totalling \$84,000. 64 Wn. App. at 44. The property decree required the husband to make cash payments to the wife in the coming years, with “the purpose of the payments being to equalize the property

distributions.” *Irwin*, 64 Wn. App. at 43-44. “[T]he trial court recognized that [the wife] could not be left for any length of time with no cash, and ordered that \$12,000 per month in maintenance should be paid until the equalization payments fell due.” *Irwin*, 64 Wn. App. at 55. On appeal, this Court *affirmed* the trial court’s maintenance award, as it should do here.

Finally, the trial court in *Marriage of Crosetto*, 82 Wn. App. 545, 558-59, 918 P.2d 954 (1996) (App. Br. 40) concluded that the wife was in need of spousal maintenance, but declined to make such an award. Instead, the trial court granted her an unequal share of the community estate and relieved her of her child support obligation. On appeal, the Court found no abuse of discretion because “the trial court considered the relevant factors regarding maintenance and property division.” *Crosetto*, 82 Wn. App. at 559. Here, the trial court also considered the relevant factors under both RCW 26.09.090 and .080 in awarding maintenance and dividing the property, thus not abusing its discretion.

4. The maintenance order does not violate the husband’s due process rights.

The maintenance order does not violate Edmund’s due process rights because he can seek to modify the order under RCW 26.09.170. Edmund contends that due process is violated because

“he must advance funds he has not yet been awarded to Ms. VonAllmen and, should those funds not be awarded to him, he is absolutely barred from applying to court for relief” under RCW 26.09.170. (App. Br. 37-38) But he is not “absolutely barred” from seeking relief from the court. He may move for modification of the maintenance order if he fails to get his bonus and can demonstrate to the trial court that there was a “substantial change of circumstances.” RCW 26.09.170(1).

Edmund points to no authority from this jurisdiction or any other that prohibiting retroactive modification of a maintenance order is a violation of due process. (See App. Br. 37) Indeed, it has long been the law of this state that retroactive modification is impermissible. See *Marriage of Drlik*, 121 Wn. App. 269, 279, 87 P.3d 1192 (2004); *Bowman v. Bowman*, 77 Wn.2d 174, 177, 459 P.2d 787 (1969); *Pace v. Pace*, 67 Wn.2d 640, 641, 409 P.2d 172 (1965). “At most the court can only modify maintenance . . . as of the date of the filing of the modification petition.” *Drlik*, 121 Wn. App. at 279 (quoted source omitted).

State ex rel. Lloyd v. Superior Court of King County, 55 Wash. 347, 104 Pac. 771 (1909) does not hold otherwise. (App. Br. 35-36) The issue in *Lloyd* was whether or not a marriage even existed; if it

did not or the court was uncertain whether one did, a maintenance award would be a violation of due process. 55 Wash. at 349-50. *Lloyd* is wholly inapplicable when, as here, there is no question that the parties were married. The trial court properly awarded maintenance under RCW 26.09.090. That order does not violate Edmund's due process rights, as he can seek relief from the court under RCW 26.09.170 should his circumstances substantially change.

E. This Court should award attorney fees to the wife.

This Court should award Jacki her attorney fees on appeal based on her need and Edmund's ability to pay. RCW 26.09.140; RAP 18.1(a); *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998) (awarding attorney fees to the wife "[g]iven the disparity in income and assets between the two" parties, and the husband's ability to pay), *rev. denied*, 137 Wn.2d 1003 (1999). On appeal, Edmund complains only of discretionary, fact-based decisions that were supported by substantial evidence. While it is true that Jacki was awarded property and maintenance, she should not be required to use those awards to defend trial court's decisions that were wholly within its discretion. Edmund's income is eight times that of Jacki's. (FF 2.21.2, CP 64; FF 2.21.3, CP 64-65) Because Edmund

has the ability to pay attorney fees to Jacki, who has the need lest she be forced to use her property and maintenance awards to defend the trial court's decree on appeal, this Court should award Jacki attorney fees.

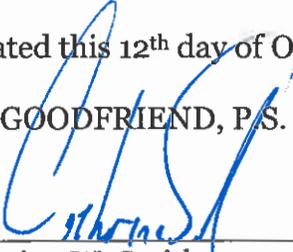
IV. CONCLUSION

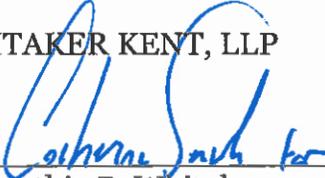
This Court should affirm and award respondent her fees on appeal.

Dated this 12th day of October, 2016.

SMITH GOODFRIEND, P/S.

WHITAKER KENT, LLP

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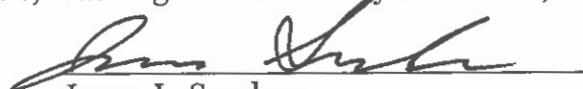
DECLARATION OF SERVICE

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

That on October 12, 2016, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
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DATED at Seattle, Washington this 12th day of October, 2016.


Jenna L. Sanders