

No. 47937-1-II

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

In re the Marriage of:

VICTOR K. CHENG,

Appellant,

and

JULIA A. CHENG,

Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

For most of their 18-year relationship, the parties struggled financially while Victor Cheng worked little, if at all, and depleted community assets to pursue his professional goals. Near the end of the marriage, community efforts paid off with a rapidly growing business. Victor made nearly \$1 million the year he filed for divorce.

Julia Cheng worked early on in the marriage, but left work to raise three children and take care of the family. The disparity here is significant – Julia leaves the marriage jobless, with impressive degrees, but lacking job experience and current skills, while Victor leaves as an expert in his field with a multi-million dollar business.

Victor seeks to reduce child support, the equalizing judgment, and maintenance. But child support is based on lengthy declarations from both parties, detailing their extraordinary expenditures on the children, including private schools, expensive vacations, numerous activities and hobbies, and more. The equalizing judgment properly includes interest to protect Julia from inflation and to compensate her for the lost opportunity to use or invest the asset. And maintenance is properly based on Victor's real income, not his "reasonable compensation" – just 25% of his take-home pay. This Court should affirm these highly discretionary decisions.

STATEMENT OF THE CASE

The parties met while attending Stanford, and began living together in 1994, sharing Julia's dorm room and using Victor's as an office.¹ CP 729-30, FF 2.12 (1); J Cheng RP 29.² They married in November 1996, after living in a committed intimate relationship for two years. CP 3; CP 724, FF 2.4; CP 729, FF 2.12 (1). They have three daughters, 11 year-old A, 7 year-old C, and 5 year-old D. CP 780, 802. Victor petitioned for dissolution in August 2013. CP 3, 307, 724. After a 17-day trial, the court entered final orders in May 2015. CP 218-67, 723.

A. While both parties are highly educated, Victor has continued his education and training and become a highly successful entrepreneur, while Julia left her job to support Victor and raise a family.

1. Both parties found work after graduation, but Victor quit about two years later to attempt a startup.

The parties both graduated from Stanford in 1995, Victor with a Bachelor of Arts in economics and a Master of Arts in sociology, and Julia with an economics degree. V Cheng RP 4; J Cheng RP 38.

¹ This brief uses first names following that convention in the opening brief. No disrespect is intended.

² This brief uses the citation format adopted in the opening brief.

They married a year after graduating, when they were both 23-years old. J Cheng RP 38.

Victor, who excels at interviewing, received offers from at least seven major business management consulting firms, including his first choice, Bain and Company in San Francisco. J Cheng RP 36; V Cheng RP 677. Julia, who does not excel at interviewing, had only one offer at SCA Consulting in New York – not a “prestigious offer.” J Cheng RP 32, 35, 45, 823. Victor took a job at McKinsey and Company so both parties could work in New York City. *Id.* at 39-41.

Victor was in a “cohort” of only 100 business analysts McKinsey hired worldwide that year. *Id.* at 39-40. After about 18 months, Victor rose to the top 20% of his cohort, and was promoted. *Id.* at 40. Those promoted were on an automatic partnership track, while the remaining 80% were expected to leave. *Id.* at 40-41.

After a few months at SCA, Julia took a “better job” at First Manhattan Consulting Group, also in New York City. *Id.* at 33. But when Julia was passed up for promotion while the rest of her cohorts were promoted, she learned that she lacked basic skills her cohorts possessed. *Id.* at 37-38. Julia took time off work to attend classes at NYU in summer 1997, to gain the skills needed to place her on level with her cohorts. *Id.* at 45. She completed basic “101” type courses

in accounting and finance over the summer, and then immediately began looking for work again in the fall. *Id.* at 43.

Though Julia had not yet found work, Victor quit his job at McKinsey in December 1997. *Id.* at 46. Victor did not have a plan, but wanted to do something related to the internet, such as selling orchids online. *Id.* at 46, 49. Victor was not having problems at McKinsey – he was very close to one of the senior partners and was considered “a star.” *Id.* at 46.

Since both parties were unemployed, they moved in with Julia’s mom in Queens. *Id.* at 46-47. They had no savings. *Id.* at 48. They slept on the floor. *Id.* at 49.

Though Julia had a number of interviews, she received only one job offer, a position as a business analyst at Pepsi. *Id.* at 43, 45. While Victor took time to “figure out what he wanted to do,” Julia went back to work in March 1998. *Id.* at 43, 45, 49.

The parties moved into a low income apartment, trying to save money for Victor’s “startup.” *Id.* at 50. By May 2000, Victor’s two startup attempts had failed, and he took a job in Manhattan. *Id.* at 51.

2. The parties agreed that Julia would return to school and finish her education while they tried to start a family.

With Victor back at work, the parties agreed that it was the right time for Julia to “finish her education,” and she left Pepsi in May 2000 to attend Harvard Business School in the fall. *Id.* at 51-54. At trial, and on appeal, Victor spends considerable time pointing out that Julia has a Harvard MBA. BA 1, 9-13, 27, 36. Indeed, he has referred to Julia as his Harvard educated stay-at-home wife. J Cheng RP 55-56. Julia explained at trial that in Chinese culture, a bachelor’s degree is an incomplete education, akin to a high school diploma. *Id.* at 52-53. Julia did not have a life-long dream of attending Harvard as Victor suggests, but wanted to “finish” her education. *Id.* Selecting Harvard, the “highest . . . ranking” business degree available, was the “Chinese way.” *Id.* at 55. It also meant a lot to Victor’s family to have a second Harvard degree in the family, his brother’s being the first. *Id.* at 55-56.

The parties’ decision that Julia would go back to school was also motivated in large part by their desire to start a family. *Id.* at 51-55. Both wanting to be “young parents,” the parties had stopped using birth control right after graduating, but had not conceived. *Id.* at 39. They were “worried” that Julia was not pregnant already, and

she received a diagnosis that she was unlikely to get pregnant without reproductive assistance. *Id.* at 52-53.

Working long hours at Pepsi was not conducive to having a family. *Id.* at 52-53. But school had always been easy for Julia, so the parties thought attending Harvard would be less stressful than working, facilitating their efforts to start a family. *Id.* at 54. The parties did not talk much about whether Julia would use her MBA after having children. *Id.* Her “dream” was to look back on life able to say that she had been “a great mom” to “wonderful kids.” *Id.* at 52. Having an MBA was “insurance” that might allow her to obtain part-time work as the kids grew older. *Id.*

Victor continued working in New York City during Julia’s first year at Harvard, but found a job in Boston during her second year. *Id.* at 56-57. Julia graduated in 2002, but Harvard was more stressful than the parties had anticipated, and Julia did not conceive. *Id.* at 58. After graduation, the parties moved to San Francisco to facilitate Victor’s efforts to pursue a career in the tech industry. *Id.* at 59-60. Without stress from school or work, Julia quickly became pregnant. *Id.* at 60. A was born in September 2003. *Id.* at 66.

3. Victor left another job shortly after the parties' first child was born, and spent so much money pursuing his dream of being an entrepreneur that the parties had to sell their home.

Though Victor was still employed when A was born, he left his job within months. *Id.* at 60. Julia understood that Victor “quit,” while Victor maintains that he was “laid off.” *Compare id. with V Cheng RP 680.* Julia was “freaked out,” as she did not feel capable of supporting the family financially with a newborn at home. *J Cheng RP 61.* The parties were living on credit cards, with no money coming in and “lots” going out, particularly considering their “hefty mortgage.” *Id.* at 62. They were stressed and unhappy, fighting about Victor quitting without consulting Julia, or promising to get a job, but failing to make good. *Id.* at 63.

Julia decided that to keep peace in the family, she had to “take a leap of faith and trust” Victor to provide for the family financially. *Id.* It was then that Julia took charge of household expenditures on one credit card, leaving everything else to Victor. *Id.* at 63-64. From that point forward, Julia knew little about the household finances. *Id.* at 64-65.

For three years, Victor remained unemployed, pursuing his dream of becoming an entrepreneur. *Id.* at 66. Victor made a little

money selling grants online, but spent most of his time in workshops and training programs. *Id.* About three months after C was born in June 2007, Victor told Julia that they could no longer pay their mortgage. *Id.* at 66, 71.

Unbeknownst to Julia, Victor had taken \$250,000-300,000 out of the house to pay for his training. *Id.* at 65. The parties had to sell the house immediately – a “fire sale.” *Id.* at 66. They were lucky to clear their debts, and have a little cash left over. *Id.* at 66, 71.

4. Julia remained focused on the children, while the parties’ work and sacrifice finally paid off with a successful business, FFM, in 2009.

The parties rented a small two-bedroom cottage for their family of four. *Id.* at 71. As she had been since A was born, Julia remained 100% focused on the children. *Id.* at 67-69. In addition to caring for the kids, Julia cooked, cleaned and took care of the home. *Id.* Victor tried to come up with business ideas. *Id.*

C was a colicky baby with “really bad reflux.” *Id.* at 74-75. For 10 months, Julia slept upright holding C so that she would not aspirate in her sleep. *Id.* at 74-75, 80. After breastfeeding, she spent considerable time making food for the children, as they both had allergies, and C struggled to gain weight. *Id.* at 68, 80-81. Further complicating matters, A required significant therapeutic treatment

following a 2008 diagnosis that she has an exceptionally high IQ, but has dyslexia and sensory processing issues. *Id.* at 78, 81. The parties' third daughter, D, was born Christmas Day 2009, one month before her due date. *Id.* at 82, 83.

Earlier in 2009, Victor, with Julia's help, started Case Interview, a facet of Fast Forward Media ("FFM"), a consulting business Victor first started in 2002. *Id.* at 86; V Cheng RP 186-87. FFM worked with owners of fast growing small businesses, while Case Interview focused on new MBA and PhD graduates seeking employment in the management consulting industry Victor had previously worked in. V Cheng RP at 186-88.

FFM generated \$275,000 in revenue in 2009, and double that in its second year, 2010. *Id.* at 192. The parties moved to Bainbridge Island in 2010, where they would be able to afford to purchase a home. J Cheng RP 90, 93. FFM continued to grow rapidly, generating \$1.082 million in 2011. V Cheng RP 192. The parties purchased a Seattle-facing, waterfront home in 2012, after saving up for a down payment. J Cheng RP 94. FFM generated \$1.398 million in 2012, and \$1.545 million in 2013. V Cheng RP 192-93.

Since FFM is an S Corporation, the parties received both Victor's salary and pass through income. V Cheng RP 252. In 2013,

Victor's total income was \$926,495. *Id.*; Exs 36, 37, 43. Victor did not provide 2014 income at trial, but acknowledged deposition testimony that he expected it to be close to 2013. CP 725, FF 2.8.2.

B. As FFM really took off, the family's standard of living increased dramatically in the two years before the dissolution.

Victor says nothing about the family's standard of living during the marriage. This bears directly on his challenges to maintenance and child support.

Aside from the short time A attended a "high-end" charter school in California, the children have always attended private school. J Cheng RP 317-18, 319. The girls wore the "best brands" and always had a professional portrait each year. *Id.* at 271, 318. The parties spared no expense to help their kids find activities they were passionate about. *Id.* at 319-20.

The parties hired help for things like yard care, cleaning, meal preparation, and childcare. J Cheng RP 144-45, 255, 761-65. The family ate the best food available and frequently ate at restaurants. *Id.* at 316-17. They traveled considerably, for weeks, or even a month at a time. *Id.* at 318-19.

The family always lived in "high-end" homes after the children were born. *Id.* at 318. After purchasing their Bainbridge

Island home, the parties spent about \$400,000 remodeling it in 2013. *Id.* at 94, 832. The home is 3,500 square feet and sits on a half-acre of property with at least 100 feet of no-bank waterfront facing Seattle. *Id.* at 317.

C. Procedural History

Victor filed for dissolution on August 2, 2013. CP 7. He omits any discussion of the events immediately preceding his filing.

1. Victor filed for dissolution, using misrepresentations to obtain a restraining order and gain an advantage in the litigation.

In July 2013, the family stayed in Victor's parents' home in Encinitas, California, as the lease had expired on their Bainbridge rental and their remodel was incomplete. Julia Cheng RP 369-70. On July 25, C, who was then six, had a particularly emotional "tantrum" when Julia told her it was nap time. *Id.* at 372-80. C was screaming "at the top of her lungs," and moving around the bedroom kicking things. *Id.* at 374-76, 399. She attempted to hit and kick Julia, and spat on her. *Id.* at 374-76, 401. She knocked folded laundry onto the floor and spat on it. *Id.* at 407. She punched the wall so hard that she fell backward onto a padded bedrail. *Id.* at 399-400. C continued her fit. *Id.* at 400-03.

Julia did not want to give C a “timeout” alone, which Victor had previously objected to as child “abandonment.” *Id.* at 375. She sat on the floor with D, hoping to “wait [it] out.” *Id.* at 376. After C repeatedly attempted to punch and kick Julia, Julia placed a finger on C’s forehead to capture her eye-contact, stating that if C attacked her again, she would have to defend herself. *Id.* at 402-03, 404-05. C then calmed “pretty quickly,” crawled into Julia’s lap to snuggle, and was soon in bed asleep. *Id.* at 402-03.

Julia told Victor about C’s behavior that evening, and he seemed unconcerned. *Id.* at 414-16. Everything was “normal,” and C was affectionate with Julia, as usual. *Id.* But the next morning, while Julia was in the bedroom working, Victor took C and the other girls to the emergency room, alleging that C was injured. V Cheng RP 143; J Cheng RP 423-24, 26-28. When they returned, A and C told Julia that she had “slapped” C. J Cheng RP 425-26. Fearful that Victor was accusing her of child abuse, and believing she would be arrested, Julia stated that she wanted a divorce and prepared to leave the home. *Id.* at 429-31. She thought leaving was the best way to de-escalate the situation. *Id.* at 433-34.

The children became very upset, and Julia comforted them until they stopped crying. *Id.* at 434-35. Victor did nothing. *Id.* at 435-

36. Julia told Victor that it would be best for the children if she left while he took them out to dinner. *Id.* at 435. Victor just nodded. *Id.*

Julia went to a hotel that night, and left the next morning, July 26, for a pre-planned conference in Texas. *Id.* at 434, 436-37. Despite repeatedly claiming that Julia “disappeared,” Victor had planned the Texas trip for Julia, and confirmed that she was there. *Compare V Cheng RP 527-28, 529, 532 with J Cheng RP 434, 436-37, 444.* Julia Skyped with the kids and exchanged emails with Victor. *J Cheng RP 44.* But on the last night of her trip, Julia realized that Victor had changed bank account settings and cancelled their American Express Card, leaving Julia with only one card that was nearly maxed out. *Id.* at 446-47.

When Julia arrived back at the Encinitas home on August 1, she received a text from Victor as she was pulling into the driveway, telling her to check her email. *Id.* at 448. Victor told Julia – over email – that she was “barred” from entering the home. *Id.* Victor allowed Julia to see the kids the next day, August 2, but sent them with a “babysitter” to supervise the visit. *Id.* at 452. That day, Victor filed a petition for dissolution and a restraining order. *Id.* at 458.

Once the parties returned to Washington in early August, Julia was allowed supervised visits only, until December, 2013, when the

trial court ordered 50/50 parenting pending trial. *Id.* at 922-23. The parties went to trial in December 2014, and after 17 days of testimony, the court entered final orders in May 2015. CP 723.

The trial court found that Victor “made a gross error in judgment by getting a restraining order against [Julia] and unnecessarily subjecting the children to supervised visits for four months,” “demonstrat[ing] a reckless disregard” for the children’s feelings and emotional well-being. CP 747, F 2.19 (58), (59). The court’s findings detail at considerable length Victor’s efforts to falsely portray Julia as a child abuser so that he could obtain an advantage in the dissolution proceedings. CP 747-53, FF 2.19 (58)-(81). The court repeatedly found that Julia was credible as to this issue, while Victor was not. CP 748, FF 2.19 (64); 752, FF 2.19 (80); CP 755, FF 2.19 (91), (94), (95); CP 756, FF 2.19 (96).

After trial, the court awarded Julia \$145,489 attorney fees based on Victor’s intransigence and “bad faith” in making and persisting in “unsubstantiated and false allegations against [Julia] concerning her mental/emotional health and fitness as a parent.”

Supp. CP ____ at 2.³ Victor does not challenge – or even mention – this order. BA 2-6.

2. The trial court divided the assets 50/50.

The parties' marital estate was principally their home and FFM, with FFM the "bulk" of the estate. CP 771-72. Both parties presented expert business valuations based on the capitalization of excess earnings method. CP 726, FF 2.8.2.1; Long RP 48; Kessler RP 16-17. The trial court valued FFM at \$3.6 million, a compromise between the proposed values. CP 726, FF 2.8.2.1. Victor does not challenge the valuation or the distribution of assets. BA 2-4.

The court awarded Victor FFM. CP 771. Over Victor's objection, the court awarded Julia the home, in large part because the parties invested so heavily in the remodel that they would have to sell it at a loss. CP 725, FF 2.8.1. The court also found that the children would benefit from living in the home, particularly where they had moved around often. *Id.*

The court ordered Victor to pay Julia \$1,455,154, her 50% interest in FFM, less the equity in the house. CP 729, FF 2.8.5 &

³ Along with this brief, Julia files a Supplemental Designation of Clerk's Papers, designating the court's order on attorney fees and amended findings.

2.8.6. This equalizing payment was the only way to divide the marital estate equally, FFM and the house being the only significant assets. *Id.* The court ordered Victor to make monthly payment for 15 years, applying a 6% interest rate. *Id.*

3. The court awarded Julia maintenance for 3 years and 8 months, where she had been out of work for 14 years and needed retraining, and where the community investment in FFM began paying off shortly before Victor filed for divorce.

The trial court began by noting that the parties were married for 16 years and had cohabitated in a committed intimate relationship for two years before marriage. CP 729-30, FF 2.12 (1). Julia worked consistently for the first four years of the marriage, but has not worked since 2000. CP 730, FF 2.12 (5).⁴ In this regard, Julia stands in stark contrast to Victor, who benefited substantially from significant community investment in his career. *Compare id. with* CP 725, FF 2.8.2.

Victor caused significant stress in the marriage by quitting jobs to become an entrepreneur. CP 725, FF 2.8.2. The family struggled financially while Victor pursued various business ventures. *Id.* The

⁴ Though the court's finding on this point is somewhat unclear as to when Julia left her job at Pepsi, it is undisputed that she has not worked since May 2000. J Cheng RP 45.

community investment in Victor's career was so significant that they had to sell their home just after C was born. *Id.*

This community investment paid off shortly before the dissolution, when FFM took off. *Id.* Victor created a niche market and "is now a recognized expert in his field." *Id.* FFM grew rapidly in the years leading up to trial, providing income nearing \$1,000,000 in 2013. *Id.* Victor "acknowledged his deposition testimony that he expected 2014 profits to be about the same as 2013." *Id.* As FFM grew rapidly, the family's standard of living improved vastly. CP 730, FF 2.12 (2).

In short, Julia gave up her career to raise the children and support Victor while he pursued various business ventures that began paying off just a few years before the dissolution. CP 731, FF 2.12 (12), (13). Victor recognized as much, also acknowledging that Julia will never reach his level of financial success. *Id.* at (13). While the court found that Julia is "highly educated, intelligent, talented and creative," the court was also mindful that being a stay-at-home mother for 14 years placed significant limitations on Julia. CP 731, FF 2.8 (12).

The court took a compromise approach to maintenance, awarding Julia considerably less than she asked for (\$2.4 million,

paid at \$25,000 per month for 8 years) and more than Victor offered (\$240,000, paid at \$10,000 per month for 2 years). CP 730, FF 2.12 (3); CP 732, FF 2.12 (15). The maintenance award, totaling \$640,000, is to be paid over a three-year, eight-month term, as follows (CP 732, FF 2.12 (15)):

- ◆ \$20,000/month from May 1, 2015 to December 2015;
- ◆ \$15,000/month until December 2016;
- ◆ \$15,000/month until December 2017; and
- ◆ \$10,000/month until December 2018.

4. The court placed the children with Julia the majority of the time, and awarded support consistent with both parties' evidence of significant expenditures on the children.

Victor challenges the child support order, obligating him to pay \$5,000 a month and 72% of the children's extraordinary expenses. CP 783-86; BA 4. The court found that support above the standard calculation was warranted, in light of the family's standard of living during the marriage, including "frequent meals at expensive restaurants, an organic diet that is financially beyond the scope of the average household, and expensive vacations, clothing, education, lessons and activities." CP 759, FF 2.20. Julia "testified at length about the children's expenses, including private school tuition and special needs expenses for A[. (Exhibit 403)." *Id.* And "[b]oth

parents provided financial declarations indicating extraordinary expenditures on the children. (Exhibits 22 and 402).” *Id.*

While Victor does not challenge the parenting plan, it is relevant to child support. BA 7. The court placed the children with Julia nine of fourteen overnights, finding that Julia “took the greater responsibility for meeting the children’s daily needs,” and “maintained a more loving, stable, consistent and nurturing relationship with each of the children.” CP 741, FF 2.19 (33), (34); CP 803. Victor repeatedly acknowledged that Julia was the primary parent during the marriage. CP 741, FF 2.19 (32). Julia took care of everything from arranging schooling and summer activities and camps, to purchasing the children’s clothing, attending to special dietary needs (resulting from severe allergies), scheduling and attending all medical and therapeutic appointments, identifying and locating specialists to address A’s special needs, identifying “the children’s individual interests and talents to determine what extracurricular activities they would like,” and helping the children build friendships and community. CP 742-43, FF 2.19 (35)-(57).

The court entered numerous and detailed findings on parenting, including that the strength and nature of the children’s relationship with Julia is stronger than their relationship with Victor.

CP 733, FF 2.19 (4); CP 733-59, FF 2.19 (1)-(124). Before filing for divorce, Victor acknowledged his difficulties relating to the children. CP 738, FF 2.19 (20). In considerable email correspondence during the marriage, Victor admitted that he “yelled, lashed out in anger at the children and behaved like a ‘raging lunatic.’” CP 737, FF 2.19 (16), (19), (21). “When questioned about his admissions of rage toward the children,” Victor attempted to minimize the term “rage” under the “Pia-Mellody based therapy” he followed, which psychological evaluator Dr. Bruce Olson dismissed as a “non-acceptable, non-normative model.” CP 738, FF 2.19 (16), (18).

It was only after Victor filed for divorce that he alleged that it was Julia, not he, who struggled to control her “anger,” even misrepresenting the purpose of two workshops Julia attended as being focused on “anger and rage management.” CP 738-39, FF 2.19 (20), (21). That was false. *Id.* at (21). Victor “provided no evidence other than his own testimony about [Julia] raging at the children. No one but he had anything negative to say about [Julia].” *Id.* Indeed, despite “voluminous” emails to Julia “describing his own problems relating to the children,” Victor did not produce a single email addressing Julia’s supposed “parenting deficits.” *Id.*

Victor appeals.

ARGUMENT

A. Standard of review.

This Court reviews for an abuse of discretion the property distribution, maintenance award, and child support award. *In re Marriage of Wright*, 179 Wn. App. 257, 261, 319 P.3d 45 (2013), *rev denied*, 180 Wn.2d 1016 (2014); *In re Parentage of Fairbanks*, 142 Wn. 257, 261, 269, 319 P.3d 45 (2013), *rev denied*, 180 Wn. 2d 1016 (2014); *In re Parentage of Fairbanks*, 142 Wn. App. 950, 955, 176 P.3d 611 (2008). The trial court's discretion is broad, and this Court will affirm unless the "appellant demonstrates that the trial court manifestly abused its discretion." *Wright*, 179 Wn. App. at 261.

B. The trial court's maintenance award is well within its broad discretion. (BA 22-24)

1. The court did not impermissibly double dip by distributing FFM and awarding Julia maintenance based on Victor's actual income, where FFM's goodwill is not the equivalent of Victor's post-dissolution income.

Victor asserts that the trial court erred in distributing FFM *and* awarding maintenance, arguing that FFM's value is based in large part on its goodwill, such that basing maintenance on Victor's actual income impermissibly redistributes FFM's goodwill a second time. BA 22-27. This argument directly contradicts the great weight of authority in this State that goodwill "is not synonymous with the

spouse's expectation of future earnings." *In re Marriage of Lukens*, 16 Wn. App. 481, 486, 558 P.2d 279 (1976). In distributing FFM, the court divided its present value, not Victor's future income. This Court should affirm.

Victor does not challenge the trial court's lengthy and detailed findings establishing FFM's value. CP 725-28, 735-38, FF 2.82; BA 8.2-5. Based on those findings, the court correctly rejected Victor's double-dipping argument (CP 761, CL 3.4 (5)):

The husband's argument that the award of the business and the award of maintenance is double-dipping is unsupported. "In the case of goodwill, it has been held elsewhere that the valuation of an asset on the basis of its past earnings and the establishment of an award of maintenance or child support based upon those earnings is not double dipping. The basis of this holding is that goodwill is not synonymous with future earnings, *In re Marriage of Lukens*, 16 Wn. App. 481, 486-87, 558 P.2d 279 (1976), in that goodwill reflects the past and not necessarily the future earnings of the asset. *In re Marriage of Bookout*, 833 P.2d 800, 18 FLR 1129 (Colo. App.1991)." Kenneth W. Weber, 20 *Washington Practice, Family and Community Property Law*, § 34.9 (2009).

This conclusion is consistent with controlling precedent.

Professional goodwill is an intangible asset often defined as the "expectation of continued public patronage." *In re Marriage of Hall*, 103 Wn.2d 236, 238-39, 692 P.2d 175 (1984) (quoting *Lukens*, 16 Wn. App. at 483); *In re Marriage of Crosetto*, 82 Wn. App. 545, 553, 918 P.2d 954 (1996). As Justice Story stated it, goodwill is the

value a business derives not from its stock, assets, and funds, but from its ability to generate more business:

[goodwill is] a benefit or advantage “which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.”

Hall, 103 Wn. 2d at 239 (quoting **Lukens**, 16 Wn. App. at 483-84 (citing J. Crane and A. Bromberg, *Law of Partnership* § 84 (1968), quoting from J. Story, *Partnership* § 99 (3d ed. 1850)).

While goodwill typically supplements a business’s earning capacity, “[g]oodwill is not the earning capacity itself.” **Hall**, 103 Wn.2d at 241. Goodwill is a “distinct asset” of the business, “not just a *factor* contributing to the value or earning capacity” of the business. 103 Wn.2d at 241 (emphasis added) (citing Comment, *Professional Goodwill in Louisiana: An Analysis of its Classification, Valuation, and Partition*, 43 La. L. Rev. 119, 123 (1982); 38 Am. Jur. 2d Good Will § 8 at 916 (1968)). Our courts have illustrated the difference between goodwill and earning capacity as follows:

Discontinuance of the business or profession may greatly diminish the value of the goodwill but it does not destroy its existence. When a professional retires or dies, his earning

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capacity also either retires or dies. Nevertheless, the goodwill that once attached to his practice may continue in existence in the form of established patients or clients, referrals, trade name, location and associations which now attach to former partners or buyers of the practice. Comment, *Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 Tul. L. Rev. 313, 320 (1981). Reference to Judge Reed's example in **Lukens**, [*supra*] illustrates the difference in that a professional can transport all of his skill (earning capacity) to a new town, but patients or clients, reputation and referrals (goodwill) cannot always be transported.

Hall, 103 Wn.2d at 241. Washington courts have long considered professional goodwill a marital asset subject to distribution in a dissolution proceeding. *In re Marriage of Fleege*, 91 Wn.2d 324, 327, 588 P.2d 1136 (1979); *In re Marriage of Luckey*, 73 Wn. App. 201, 205, 868 P.2d 189 (1994); **Lukens**, 16 Wn. App. at 484-86.

Victor's answer to **Lukens** and its progeny is that "the trial court acknowledged the value of [FFM] was based on the 'projected income' of [FFM]." BA 26 (citing CP 726-27, FF 2.8.2.2) (emphasis Victor's). Victor argues that FFM's goodwill is equivalent to his future income because the goodwill is based, in part, on FFM's ability to generate "income in the future. *Id.* (citing Long I RP 14-15, 24-25, 51, 54-55). Thus, Victor argues that "maintenance based on that same future income stream" effectively awarded Julia "an interest in [Victor's] business twice." BA 24.

This argument is directly at odds with *Lukens*, *Hall*, and others, *supra*. Victor conflates cash flows with goodwill, ignoring that goodwill is not the equivalent of earning capacity. BA 24-27; *Hall*, 103 Wn.2d at 241; *Lukens*, 16 Wn. App. at 484-86.

And the maintenance award does not distribute Victor's future income "twice" because the property award does not distribute future income in the first place. In dividing the parties' assets, the court valued FFM so that it could award Victor FFM and award Julia an equalizing judgment. That distribution is not the equivalent of awarding Julia some portion of Victor's future income.

2. The court's award properly effectuates the distinct purposes of a property distribution and a maintenance award.

Victor's double-dipping argument elides the distinct purposes underlying a property distribution and a maintenance award. BA 24-27. The court's goal in dividing assets in a dissolution is to make a just and equitable distribution of marital property, in light of the nature and extent of the property, the duration of the marriage, and each spouse's economic circumstances at the time of distribution. RCW 26.09.080; *Wright*, 179 Wn. App. at 261. Maintenance, on the other hand, is not a distribution of assets, but "'a flexible tool' for equalizing the parties' standards of living for an 'appropriate period of time.'"

Wright, 179 Wn. App. at 269 (quoting *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984)); *In re Marriage of Williams*, 84 Wn. App. 263, 267-68, 927 P.2d 679 (1996), *rev. denied*, 131 Wn.2d 1025 (1997). In fashioning a maintenance award, the trial court must consider, among other things, the parties' post-dissolution financial resources and their ability or inability to meet their financial needs independently, the time necessary for the disadvantaged spouse to find employment, the duration of the marriage, and the would-be obligor spouse's ability to pay maintenance. RCW 26.09.090(1)(a)-(f); *In re Marriage of Williams*, 84 Wn. App. at 267-68. Amongst these many factors, "the need of one party and the ability of the other party to pay an award" is particularly important. *In re Marriage of Foley*, 84 Wn. App. 839, 845, 930 P.2d 929 (1997).

Thus, maintenance is based not on the parties' financial situations at the time of divorce, but on their abilities to maintain in the future the standard of living enjoyed during the marriage. *Washburn*, 101 Wn.2d 179. The only limitation on maintenance is that the award must be "just." 101 Wn.2d at 178; **Wright**, 179 Wn. App. at 269 (citing *In re Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990)).

Dividing FFM serves the purpose of a distribution of assets. Unable to award Julia assets to offset the award of FFM to Victor, the trial court valued FFM and awarded Julia an equalizing judgment. CP 729, FF 2.8.6. Since FFM was the only major asset other than the parties' home, awarding Julia an equalizing judgment for her share of FFM was the only way to achieve the 50/50 distribution the court found just and equitable. *Id.* Victor does not challenge the asset distribution. BA 3-5.

The maintenance award serves a different purpose. The maintenance award looks not at FFM's value or the parties' assets, but at their post-dissolution standards of living, with a goal of equalizing the parties' standards of living for an appropriate period. ***In re Marriage of Estes***, 84 Wn. App. 586, 593, 929 P.2d 500 (1997) (citing ***Washburn***, 101 Wn.2d at 179). This is particularly important where it was near the end of the marriage that Victor's income, and the family's standard of living, dramatically increased. CP 730, FF 2.13 (2).

The court considered that Victor's annual income is nearly \$1 million, while Julia will be lucky to earn \$100,000 a year – 90% less than Victor. CP 760-61, CL 3.4 (2). This is in large part because Julia's "career opportunities were devoted to boosting [Victor's]

career and business.” *Id.* While Julia will likely be able to support herself in the future, she was unemployed and in need of retraining when the divorce was finalized. CP 730, FF 2.12 (3); CP 731-32, FF 2.13 (14); CP 760, CL 3.4 (3). And Julia’s ability to support herself in the future does not preclude a maintenance award, but is only one factor to be considered. CP 760, CL 3.4(3) (citing ***Washburn***, 101 Wn.2d at 178-79).

In short, Victor’s argument that the trial court abused its discretion in considering FFM’s value *and* Victor’s actual income ignores the distinct purposes of distributing property and awarding maintenance.

3. The cases upon which Victor relies are inapposite.

Victor principally relies on ***In re Marriage of Barnett***, in which the trial court awarded the wife a \$100,000 lien against the parties’ salvage business and \$500 per month in lifetime maintenance. BA 22-23 (discussing 63 Wn. App. 385, 386-88, 818 P.2d 1382 (1991)). But the only proceeds from the business derived from the process of liquidating the business, selling off all existing scrap without acquiring more. 63 Wn. App. at 386-88. Thus, the appellate court held that the maintenance award was essentially a distribution of the

income from the liquidation of the business, improperly distributing the business a second time. *Id.* at 388.

But FFM is a going concern. Victor's \$80,000 monthly income is from operating FFM, not selling off its assets. ***Barnett*** is inapposite.

In re Marriage of Mathews is equally inapposite. BA 23 (citing 70 Wn. App. 116, 124-25, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993)). There, the trial court ordered the husband to pay \$1,400 maintenance – half his income – indefinitely, as well as tuition and health insurance premiums, leaving him about \$1,000 a month. ***Mathews***, 70 Wn. App. at 122-24. The indefinite maintenance award failed to account for the fact that upon retirement, husband would have to pay maintenance from disability or retirement accounts, despite the fact that the QDRO operated to transfer one-half of husband's disability or retirement to wife. 70 Wn. App. at 124-25. Thus, the appellate court reversed, holding that the trial court failed to consider husband's ability to pay maintenance, as well as other statutory factors. *Id.* at 123-24.

This matter is nothing like ***Mathews***, which does not even address double-dipping. The maintenance award in ***Mathews*** was

flawed because it was indefinite. *Id.* That is not an issue here, where the maintenance term is only three years, eight months. CP 732.

Victor's comparison to *In re Marriage of Valente* is equally unavailing. BA 24-25 (citing 179 Wn. App. 817, 320 P.3d 115 (2014)). Victor seeks bright-line rules, ignoring that the only limitation on maintenance is that the award is just. *Washburn*, 101 Wn. 2d at 178. Given the standard of living leading up to the divorce, Julia's need, and Victor's ability to pay, it is just to award Julia less than 30% of Victor's income, decreasing to less than 15%, over three years and eight months. But it would be grossly unjust to calculate maintenance based on only 25% of Victor's take-home income, as he proposes.

And *Valente* is inapposite in that the appellate court was not tasked with determining whether the business valuation *had* to carve out some portion of the husbands' income to avoid double dipping. There, the husband argued that the trial court double dipped where: (1) the business valuation was based on future income streams; (2) the asset distributed compensated the wife for her interest in those future income streams; and (3) maintenance was based on husband's future income. *Valente*, 179 Wn. App. at 828-29. The appellate court rejected that argument, holding that the business valuation "carved out" the husband's replacement income (the price

to replace husband with someone with his knowledge and experience) from the net income streams used for the valuation. 179 Wn. App. at 830. Determining that the trial court accomplished a just and equitable maintenance award in **Valente** does not mean the trial court failed to do so here.

4. The amount and duration of maintenance is well within the trial court's broad discretion.

Victor argues in the alternative that the maintenance award is "improper" even if it is not a double dip. BA 27-29. This Court should affirm the trial court's proper exercise of its broad discretion.

As discussed above, maintenance is a flexible tool used to achieve equity, and is limited only by the bounds of justice. **Washburn**, 101 Wn.2d at 178-79. Victor owns his own business, earning nearly \$1 million a year. CP 725, FF 2.8.2 His success is due in large part to Julia's sacrifice and support, and the community's investment in his education and training. *Id.*; CP 760, FF 3.4 (2).

It was only toward the end of the marriage that the community benefited from its substantial investment in Victor's endeavors. CP 725, FF 2.8.2. For years, Julia worked while Victor's startup attempts failed. CP 725, FF 2.8.2; CP 730, FF 2.12 (5); J Cheng RP 46-51. Years later, the parties lost their home while Victor depleted

community assets to educate himself in pursuit of his dream. CP 725, FF 2.8.2; J Cheng RP 66. Now an expert in his field, Victor earns nearly \$1 million a year. CP 725, FF 2.8.2.

In sharp contrast, Julia leaves an 18-year relationship with no job, and needing retraining to earn just one-tenth of Victor's income. CP 729-30, FF 2.12 (1); CP 730, FF 2.12 (3); CP 731, FF 2.1 (13); CP 731-32, FF 2.12 (14); CP 760, CL 3.4 (2). Julia's expert, Janice Reha, opined that Julia's skills are outdated and that she needs additional training and education to re-enter the workforce. CP 730, FF 2.12 (7); Reha RP 7-13, 36, 52-53. Just being out of the job market for 14 years "creates a big challenge and obstacle." *Id.* at 10-11. Julia missed out on the "Internet and social media onslaught," and is unfamiliar with current software applications. *Id.* at 8, 38-39. "In today's world," Julia's Harvard MBA cannot compensate for the fact that she lacks requisite skills, especially in the Seattle area where the populace is "overeducated." *Id.* at 10-11, 36.

Victor's vocational expert, William Skilling, opined that Julia could become gainfully employed within 90 days, earning between \$86,000 to \$115,000. CP 730, FF 2.12 (7); CP 731, FF 2.13 (10); Skilling RP 50. This was based in large part on Julia's Harvard MBA.

Id. at 36-37, 50. Skilling thought it minimally relevant that Julia's MBA was 14-years old or that she had never worked since obtaining it. *Id.*

Taking a compromise approach, the court found the Julia needs one-to-two years of retraining. CP 731-32, FF 2.12 (14). Although she is highly educated, Julia has not worked in 14 years and her skills are outdated. CP 731, FF 2.12 (12).

After carefully considering the relevant factors, the court awarded Julia maintenance for three years, eight months, totaling \$640,000. CP 732, FF 2.12(15). Victor earns as much in about eight months. The court was well within its broad discretion.

Victor's principal argument is that the maintenance award consumes all or most of his "reasonable compensation." BA 28. In other words, Victor argues that to determine whether the maintenance award is reasonable, this Court should ignore Victor's pass-through income – \$650,000 a year. *Id.* That is just another iteration of the double-dipping argument addressed above.

Victor's only other argument is the incorrect assertion that the trial court "acknowledged" that Julia would be self-supporting within a year. BA 27 (citing CP 729-32, FF 2.12). Again, the court found that Julia would need one-to-two years to obtain the retraining needed to find employment. CP 731, FF 2.12 (14). Only then would she qualify

for a job making \$80,000-to-\$100,000, nowhere near what it will cost to support herself and the three children near the standard of living enjoyed during the marriage. CP 731-32, FF 2.12 (13), (14).

In sum, Victor asks this Court to disregard the great weight of authority in this state that goodwill is not synonymous with future earnings. Doing so would work a gross inequity, allowing Victor to set aside \$60,000 for himself, paying maintenance based on only one-quarter of his take-home income. This Court should affirm.

C. Imposing interest on the equalizing judgment was well within the court's broad discretion. (BA 29-32).

Citing an inapposite case discussing prejudgment interest, Victor argues that trial courts should impose interest only where a party "retains money which he ought to pay to another." BA 29 (quoting *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775, 115 P.3d 349 (2005)). Since Victor lacks sufficient cash to pay Julia, he argues that the court abused its broad discretion in awarding interest on the equalizing judgment. BA 28-29. But trial courts have broad discretion to impose interest on equalizing judgments. *In re Marriage of Stenshoel*, 72 Wn. App. 800, 811-12, 866 P.2d 635 (1993). This Court should affirm.

Victor's argument is at odds with the nature of an equalizing judgment: one party receives the bulk of the assets and the community lacks sufficient cash to accomplish the overall property distribution the court finds just and equitable. Here, the community did not have sufficient cash the court could have distributed to Julia to offset the award of FFM to Victor. Hence, the equalizing judgment. Victor's argument amounts to one that the trial court could never impose interest in an equalizing judgment, where it will typically be the case that the obligor lacks to cash to pay the judgment up front, as opposed to over time.

Victor relies on *In re Marriage of Young*, in which the appellate court upheld the trial court's discretion not to impose interest on an equalizing payment unless the obligor defaulted. BA 30-31 (discussing 18 Wn. App. 462, 569 P.2d 70 (1977)). Pointing to a different result under different facts does not demonstrate an abuse of discretion.

Nor does the case law support Victor's suggestion that interest is proper only if he defaults. BA 30-31 (discussing *Young*, 18 Wn. App. at 465-66). Trial courts have discretion to impose interest to compel timely payment even if the obligor does not default. *Barnett*, 63 Wn. App. at 387. There, the appellate court upheld a

10% interest rate on the lien securing payment of one-half of the proceeds from liquidating the parties' business. 63 Wn. App. at 387. The **Barnett** court noted that interest makes the "property income productive." *Id.*

Victor ignores that the same is true here. Julia asked for 6% interest – half the statutory rate – because without it, she would effectively be loaning Victor money interest free. J. Cheng RP 571. Interest compensates Julia for the lost opportunity to invest and grow the money she was awarded, and the negative effects of inflation. *Id.* at 907-08; CP 413-14.

Victor argues in the alternative that the 6% is too high, since the court found that FFM's growth rate is only 3%. BA 31-32 (citing CP 727, FF 2.8.2.2). That is false. The court did not find that FFM's growth rate is 3% – a fact brought to Victor's attention in response to his motion for reconsideration. CP 412-13.

The trial court rejected Victor's expert (Steven Kessler's) growth-rate analysis, finding it inconsistent with FFM's historical growth and unsupported by the evidence. CP 727, FF 2.8.2.2. Expert Long estimated that FFM would have a 10% growth rate through 2015, a 5% growth rate in 2016, a 4% growth rate in 2017 and a 3% growth rate thereafter. *Id.* While the court found Long's estimate

“overly optimistic, but slightly more credible than Mr. Kessler’s predictions,” it did not select a growth rate. *Id.* Instead, the court found simply that FFM would “more likely than not, continue to enjoy significant growth in the near future.” CP 726, FF 2.8.2. Victor’s assertion that the court found that FFM’s growth rate is 3% in baseless. BA 31.

Finally, this Court should disregard Victor’s complaint that it is inequitable to use goodwill to value FFM. BA 30. Victor’s own expert valued FFM using goodwill. I Kessler RP 38-39. Victor waived any argument on this point.

Imposing interest on the equalizing payment was well within the trial court’s broad discretion. This Court should affirm.

D. The court properly exercised its broad discretion in declining to “credit” Victor for certain post-separation payments. (BA 32-35).

1. Judge Roof’s pretrial order did not limit Judge Olson’s broad discretion in crafting the final orders.

Victor argues that the trial court erroneously failed to give him a credit for using post-separation earnings to pay \$83,316 to the parties’ defined benefit retirement plan, and \$94,923 toward the parties’ 2013 tax debt. BA 32. Victor’s lead argument is that the trial court was bound by an *in limine* order requiring him to make these

payments, but stating that they “shall be a credit to him at the time of distribution.” *Id.* (quoting CP 16; Ex 17). He suggests that Julia should have contemporaneously objected. *Id.*

Victor omits that Judge Roof entered the order he relies on and that Judge Olson tried the case and entered the final orders Victor challenges. BA 32; CP 409-10. Judge Roof lacked the evidence that formed the basis of Judge Olson's decision on this issue. CP 408-10, 794-95. Victor's suggestion of waiver is baseless.

2. The court properly declined the credit Victor for FFM's pre-separation debt.

Victor argues that the court had to give him credit for paying the mandatory pension plan payment because he paid it with post-separation earnings in September 2014, more than a year after the parties separated. BA 32. He omits that FFM incurred the debt in 2013, before the parties separated. *Id.*; CP 794-95. This omission is glaring in light of the trial court's analysis on this point. CP 794-95.

The trial court explained that under 26 U.S.C. § 412, FFM – not Victor – is required to make the mandatory pension plan payments. CP 795. Indeed, FFM historically deducted mandatory pension plan payments as a business expense. CP 409; Exs 35, 37. Victor controlled FFM's profits, electing to wait until 2014 – after the

date of separation – to make the payment for the 2013 pension plan contribution. CP 724, 794-95. But his voluntary delay does not change the fact that the amount past due was a debt owed by FFM, “not a personal expense that can be credited to [Victor] as though he had paid a community liability.” *Id.* at 795.

Victor asserts that he and FFM are “one in the same – if the company pays a debt, the husband pays the debt.” BA 34. While that might be an admission of corporate disregard, it does not change the fact that the debt belongs to FFM under the statute. CP 794-95.

Victor also takes issue with the trial court’s conclusion that the parties’ experts accounted for the mandatory pension plan payment in valuing FFM, arguing that the valuations could not have accounted for the pension plan payment, where they were completed nine months before the pension plan payment was made. BA 33-34 (citing CP 795). Victor again ignores that FFM incurred this debt before the parties separated. CP 794-95.

And the community-property character of the pension plan does not mandate that the late payment into the plan was a “community debt.” BA 33. Here too, Victor ignores that the debt belonged to FFM. CP 794-95. Victor elected to postpone payment

until he solely owned FFM. *Id.* But that does not transform FFM's debts into a personal obligation. *Id.*

3. The court properly declined to award Victor a credit for paying income-tax debt post-separation.

Victor argues next that the trial court erroneously failed to give him a credit for paying \$94,923 in back taxes for 2013. BA 34-35. Victor's 2013 income was \$927,000, and his effective tax rate was 34%. *V Cheng RP 206; Ex 44.* Thus, the 2013 back taxes were approximately one-third of the total 2013 tax liability. *See Ex 44.*

The trial court's rationale for denying Victor a credit was that Julia could not be jointly responsible for the entire 2013 tax obligation, where the parties separated in July 2013, when Victor locked Julia out of the home and the parties' accounts. CP 410, 795. As such, Julia did not share in FFM's profits when it is most profitable, during the fourth quarter. *Id.* Since Victor failed to demonstrate the portion of the 2013 taxes for which Julia should be jointly responsible, he was not entitled to a credit. CP 795.

Victor argues that Julia did not challenge that the 2013 tax obligation was a community debt. BA 34. But when Victor raised this issue for the first time on reconsideration, Julia argued she should not be jointly responsible for the full amount of the 2013 taxes, where

the parties separated in July 2013, halfway through the year, before FFM was most profitable. CP 410-11.

Victor also takes issue with the trial court's conclusion that Julia did not benefit equally from FFM's fourth-quarter profits, asserting that he paid maintenance and all of the family's expenses during that time. BA 34-35. After locking Julia out and cutting off her access to funds, Victor paid Julia \$10,000 in temporary maintenance, 1/8th of his monthly income. CP 410; CP 760, CL 3.4 (2). The trial court simply recognized that Victor was not sharing equally with Julia. CP 795.

Finally, Victor claims that Julia was compensated for fourth-quarter profits in the asset distribution. BA 35. Distributing assets justly and equitably does not make up for Victor denying Julia access to sufficient funds while controlling FFM's revenues. Absent sufficient evidence, the trial court properly exercised its discretion.

E. The court properly calculated the parties' incomes for purposes of calculating child support. (BA 35-40)

1. The trial court properly declined to impute income to Julia, who has not worked in 14 years, and requires job training to be employable.

Victor argues that the trial court had to impute income to Julia, who, he claims, is "voluntarily unemployed." BA 35-36. He argues

that Julia “made little effort to find employment during the separation and stopped seeking employment completely in September 2014, three months before trial.” BA 36. Claiming that Julia has no “reasonable explanation about why she failed to hold a job,” he asserts that the court abused its discretion in declining to impute income. BA 36 (citing *Goodell v. Goodell*, 130 Wn. App. 381, 391, 122 P.3d 929 (2005)).

It should be no surprise that Julia, who left her career fourteen years ago to take care of Victor and the kids, cannot immediately find work during her divorce. While apparently lost on Victor, this was not lost on the trial court. CP 732, FF 2.12 (14).

And Victor completely overlooks the trial court’s finding that Julia needs one-to-two years of retraining. BA 36-37. Victor claims that the trial court “failed to give any reasons for its decision.” *Id.* The court’s reasons are obvious:

There was no testimony at trial about how long it would take for [Julia] to get the necessary software, social media and current business administration skills in order to refresh her out of date knowledge and skills. It seems to this court that she surely could obtain such re-training in a year or two at the most. Thus, she could obtain one of the jobs listed in [Victor’s expert’s] report earning at least \$80,000, and over \$100,000 after two years – which is commensurate with her educational background and experience.

CP 732, FF 2.12 (14). The court did not have to explain further when it denied Victor's request to impute additional income on reconsideration. CP 796.

And Victor mischaracterizes Julia's efforts to find work. BA 36. Julia began applying for jobs in June 2014. J Cheng RP 295-96. She applied at all levels, including for positions as an analyst, manager, and assistant manager. *Id.* at 296, 877. She applied for 52 jobs, and made 102 networking contacts to Harvard classmates, former coworkers, and friends. *Id.* at 297, 877-78; Ex 210.

Julia did not get a single interview. J Cheng RP 299. She could not get past her absence from the workforce and her lack of skills needed in the current marketplace. *Id.* at 296-98.

Victor complains that Julia's choice to be a stay-at-home mom does not justify the failure to impute income. BA 36-37. Julia was looking for a job and acknowledged that she would need to work. J Cheng RP at 296-97, 877-78. The issue is not a choice not to work, but the need for retraining. CP 732, FF 2.12 (14).

Finally, Victor's assertion that the court should have imputed \$6,666 a month ($\$80,000 / 12$) is far off base. BA 37. Again, the trial court found that Julia would need one-to-two years of retraining

before becoming employable. CP 732, FF 2.12 (14). There is no basis for imputing an income Julia cannot currently obtain.

2. The trial court correctly declined to treat interest on the equalizing judgment as income to Julia.

Although he concedes that the equalizing judgment is not treated as income to Julia for purposes of calculating child support, Victor argues that the court erroneously declined to include the interest on the equalizing judgment in calculating Julia's income. BA 38. Victor provides no support for his assertion other than the generic proposition that "interest" is included in income under RCW 26.19.071(3)(i). *Id.*

But property settlement payments are not income, as they represent property the recipient spouse already owns; *i.e.*, her share of the community property. ***Stenshoel***, 72 Wn. App. at 805-06. Where the equalizing payment is not income, there is no basis for treating interest on it as income. This is especially true when the purpose of the interest is effectively a substitute for having to wait 15 years to obtain the value of the asset she was awarded. That is, if Julia already had the money and invested it in the stock market, her gains would not be income until she cashed out her stock. ***In re***

Marriage of Ayyad, 110 Wn. App 462, 469, 38 P.3d 1033, *rev. denied*, 147 Wn.2d 1006 (2002).

Victor also argues that the court erred in declining to deduct the interest from his gross income, arguing that the court is required to deduct "normal business expenses." BA 38-39 (citing ***In re Marriage of Mull***, 61 Wn. App. 715, 722, 812 P. 2d 125 (1991); RCW 26.19.071(5)(b)). ***Mull*** plainly does not support Victor's claim. Victor is required to pay Julia as part of the court's just and equitable property distribution because there were not sufficient assets to divide. CP 729, FF 2.8.6. The fact that Victor received the business, so must balance the equities by paying Julia cash, does not transform an equalizing judgment into a business expense.

3. The court properly declined to reduce Victor's gross income by FFM's pension plan contribution.

Finally, Victor argues that the court erred in deducting mandatory pension plan payments from his gross income to calculate his net income for purposes of calculating child support. BA 39 (citing ***Mull***, 61 Wn. App. at 720-21; RCW 26.19.071(5)(c)). Again, FFM, not Victor, is obligated to pay into the pension plan. Victor continues to ignore this point. BA 39-40.

F. The court was well within its broad discretion in awarding child support above the standard calculation, while also ordering Victor to pay his proportionate share of the extraordinary expenses. (BA 41-44)

The trial court was well within its broad discretion in awarding support above the standard calculation, in light of the lifestyle the children enjoyed during the marriage, and the parents' ability to continue it moving forward. This Court should affirm.

The trial court has wide discretion to award child support above the advisory amount based on each parent's standard of living, and the children's special medical, educational, and financial needs. *In re Marriage of Krieger*, 147 Wn. App. 952, 961, 199 P3d 450 (2008); *In re Marriage of Daubert*, 124 Wn. App. 483, 490, 497. 99 P.3d 401 (2004), *overruled in part*, *In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). Appropriate bases for additional support include, but are not limited to, private school tuition, day care, tutoring, summer camps, computers, orthodontia, and "travel for extracurricular activities or cultural experiences." *Krieger*, 147 Wn. App. at 961; *Daubert*, 124 Wn. App. at 494, 497.

Well aware of this controlling law (CP 761-62), the trial court found that the children should receive support above the advisory

amount. CP 759, FF 2.20. The court relied on both parties' financial declarations, each "indicating extraordinary expenditures on the children." *Id.* (citing Exs 17, 22, and 402). Julia also "testified at length about the children's expenses, including private school tuition and special needs expenses for A[]." CP 759, FF 2.20 (citing Ex 403). In short, the lifestyle the children enjoyed during the marriage necessitated additional support (CP 759, FF 2.20):

The children have experienced a lifestyle that includes frequent meals at expensive restaurants, an organic diet that is financially beyond the scope of the average household, and expensive vacations, clothing, education, lessons and activities.

The evidence amply supports the child support award. As just one example of the children's lifestyle, A began horseback riding at age three, and (before the separation) Victor promised to lease her a horse, a \$1,000 monthly expense. J Cheng RP 319. The children took ballet, played soccer and tennis, and even tried archery. *Id.* at 19-20, 320, 561. They generally participated in one sport and one music activity per season. *Id.* at 320.

The children also enjoyed a number of hobbies, including ice skating, roller skating, pottery and many different arts and crafts. *Id.* at 19, 22-23, 194-95, 265-66, 561. They had family game nights and movie nights, and "humongous" birthday parties. *Id.* at 267. Julia

estimated it would cost her \$5,366 each month to continue providing the activities, hobbies, vacations, and such that the children enjoyed during the marriage. *Id.* at 264-67; Exs 402 at 4, 403.

The family ate the best food available, what Julia called a “beyond organic” diet. J Cheng RP 316-17. They also ate out three or more nights a week, Victor estimating that he spends over \$1,800 a month for meals eaten out and “cash purchases.” Ex 22 at 4. Julia conservatively estimated that it would cost \$2,685 a month to continue their eating habits in her household. Ex 402 at 4; J Cheng RP at 256-57.

Victor argues that the trial court erred in awarding support above the standard calculation based on extraordinary expenses divided proportionally between the parties. BA 42. Specifically, Victor claims that the trial court could not consider the following items in awarding additional support, since the parties proportionally share them: “work-related child care, educational expenses, including private school tuition, agreed extracurricular activities, and uninsured medical expenses, including counseling, vision, dental, and orthodontia.” BA 42. He claims that setting aside these extraordinary expenses, all that is left is clothing, food and vacations, which do not justify additional support. BA 42-43.

Victor ignores that Julia pays nearly \$7,500 for the house and utilities and that the court found that the children would benefit from remaining in the home they were accustomed to, particularly as they had moved often. CP 723, FF 2.8.1; Ex 402. In addition to “agreed activities,” Julia estimates spending \$800 a month just on the many hobbies and crafts the kids enjoyed during the marriage. Ex 403. And there are always miscellaneous expenses, such as replacing electronic devices (\$260/month), family portraits (\$96/month) and supplements (\$150/month), all of which are consistent with the family’s standard of living. Ex 403; J Cheng RP 269, 271.

Victor complains in a footnote that Julia projected expenses that she was not actually incurring. BA 43 n.5. Julia explained that the children had historically participated in these activities, and stopped only because they were too exhausted from the long commute to A’s old school in Seattle. J Cheng RP 265-68.

Finally, the trial court’s findings are plenty specific. BA 43-44. Nothing in *Daubert* suggests that the court is required to itemize and value every expense related to a child. Rather, the findings must demonstrate “only that the additional support [is] necessary and reasonable.” *Krieger*, 147 Wn. App. at 961. They do.

The findings are nothing like those in *Daubert*, awarding additional support just because the father could afford it. BA 44. Nor did the court only cite the family's "lifestyle" – it spelled out specific facets of the family's lifestyle that justify additional support. Compare *Id.* with CP 759, FF 2.20. Nothing more is required.

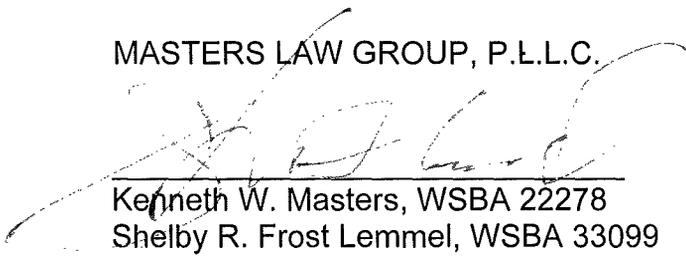
This Court should affirm the child support award.

CONCLUSION

After 17 days of testimony, the trial court entered 41 pages of findings, carefully detailing its highly discretionary decisions. The court's maintenance award allows Julia to find work after having been unemployed for 14 years, and to briefly approximate the standard of living she helped make possible. The child support award allows the children to continue living much like they did during the marriage. This Court should affirm these fair and just awards.

RESPECTFULLY SUBMITTED this 7th day of March, 2016.

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CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

I certify that I caused to be mailed, a copy of the foregoing BRIEF OF RESPONDENT postage prepaid, via U.S. mail on the 7th day of March, 2016, to the following counsel of record at the following addresses:

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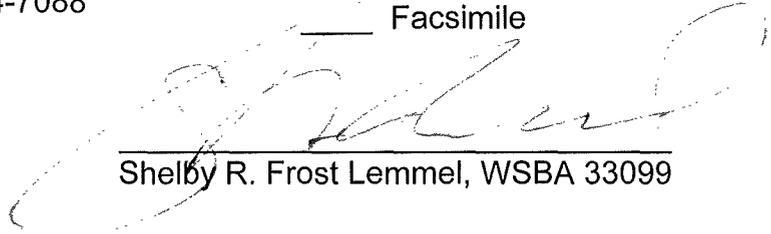
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RCW 26.09.080

Disposition of property and liabilities—Factors.

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

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

[2008 c 6 § 1011; 1989 c 375 § 5; 1973 1st ex.s. c 157 § 8.]

RCW 26.09.090

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

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

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

[2008 c 6 § 1012; 1989 c 375 § 6; 1973 1st ex.s. c 157 § 9.]

RCW 26.19.071

Standards for determination of income.

(1) **Consideration of all income.** All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for purposes of calculating the basic support obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.

(2) **Verification of income.** Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs.

(3) **Income sources included in gross monthly income.** Except as specifically excluded in subsection (4) of this section, monthly gross income shall include income from any source, including:

- (a) Salaries;
- (b) Wages;
- (c) Commissions;
- (d) Deferred compensation;
- (e) Overtime, except as excluded for income in subsection (4)(i) of this section;
- (f) Contract-related benefits;
- (g) Income from second jobs, except as excluded for income in subsection (4)(i) of this section;
- (h) Dividends;
- (i) Interest;
- (j) Trust income;
- (k) Severance pay;
- (l) Annuities;
- (m) Capital gains;
- (n) Pension retirement benefits;
- (o) Workers' compensation;
- (p) Unemployment benefits;
- (q) Maintenance actually received;
- (r) Bonuses;
- (s) Social security benefits;
- (t) Disability insurance benefits; and

(u) Income from self-employment, rent, royalties, contracts, proprietorship of a business, or joint ownership of a partnership or closely held corporation.

(4) **Income sources excluded from gross monthly income.** The following income and resources shall be disclosed but shall not be included in gross income:

- (a) Income of a new spouse or new domestic partner or income of other adults in the household;
- (b) Child support received from other relationships;
- (c) Gifts and prizes;
- (d) Temporary assistance for needy families;
- (e) Supplemental security income;

(f) Aged, blind, or disabled assistance benefits;

(g) Pregnant women assistance benefits;

(h) Food stamps; and

(i) Overtime or income from second jobs beyond forty hours per week averaged over a twelve-month period worked to provide for a current family's needs, to retire past relationship debts, or to retire child support debt, when the court finds the income will cease when the party has paid off his or her debts.

Receipt of income and resources from temporary assistance for needy families, supplemental security income, aged, blind, or disabled assistance benefits, and food stamps shall not be a reason to deviate from the standard calculation.

(5) **Determination of net income.** The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income:

(a) Federal and state income taxes;

(b) Federal insurance contributions act deductions;

(c) Mandatory pension plan payments;

(d) Mandatory union or professional dues;

(e) State industrial insurance premiums;

(f) Court-ordered maintenance to the extent actually paid;

(g) Up to five thousand dollars per year in voluntary retirement contributions actually made if the contributions show a pattern of contributions during the one-year period preceding the action establishing the child support order unless there is a determination that the contributions were made for the purpose of reducing child support; and

(h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about which there is disagreement.

Items deducted from gross income under this subsection shall not be a reason to deviate from the standard calculation.

(6) **Imputation of income.** The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

(a) Full-time earnings at the current rate of pay;

(b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;

(c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;

(d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;

(e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

[2011 1st sp.s. c 36 § 14; 2010 1st sp.s. c 8 § 14; 2009 c 84 § 3; 2008 c 6 § 1038; 1997 c 59 § 4; 1993 c 358 § 4; 1991 sp.s. c 28 § 5.]

26 USCS § 412

Minimum funding standards

(a) Requirement to meet minimum funding standard.

(1) In general. A plan to which this section applies shall satisfy the minimum funding standard applicable to the plan for any plan year.

(2) Minimum funding standard. For purposes of paragraph (1), a plan shall be treated as satisfying the minimum funding standard for a plan year if—

(A) in the case of a defined benefit plan which is not a multiemployer plan or a CSEC plan, the employer makes contributions to or under the plan for the plan year which, in the aggregate, are not less than the minimum required contribution determined under section 430 [26 USCS § 430] for the plan for the plan year,

(B) in the case of a money purchase plan which is not a multiemployer plan, the employer makes contributions to or under the plan for the plan year which are required under the terms of the plan,

(C) in the case of a multiemployer plan, the employers make contributions to or under the plan for any plan year which, in the aggregate, are sufficient to ensure that the plan does not have an accumulated funding deficiency under section 431 [26 USCS § 431] as of the end of the plan year, and

(D) in the case of a CSEC plan, the employers make contributions to or under the plan for any plan year which, in the aggregate, are sufficient to ensure that the plan does not have an accumulated funding deficiency under section 433 [26 USCS § 433] as of the end of the plan year.

(b) Liability for contributions.

(1) In general. Except as provided in paragraph (2), the amount of any contribution required by this section (including any required installments under paragraphs (3) and (4) of section 430(j) or section 433(f) [26 USCS § 430(j) or § 433(f)]) shall be paid by the employer responsible for making contributions to or under the plan.

(2) Joint and several liability where employer member of controlled group. If the employer referred to in paragraph (1) is a member of a controlled group, each member of such group shall be jointly and severally liable for payment of such contributions.

(3) Multiemployer plans in critical status. Paragraph (1) shall not apply in the case of a multiemployer plan for any plan year in which the plan is in critical status pursuant to section 432 [26 USCS § 432]. This paragraph shall only apply if the plan sponsor adopts a rehabilitation plan in accordance with section 432(e) [26 USCS § 432(e)] and complies with such rehabilitation plan (and any modifications of the plan).

(c) Variance from minimum funding standards.

(1) Waiver in case of business hardship.

(A) In general. If—

- (i) an employer is (or in the case of a multiemployer plan or a CSEC plan, 10 percent or more of the number of employers contributing to or under the plan are) unable to satisfy the minimum funding standard for a plan year without temporary substantial business hardship (substantial business hardship in the case of a multiemployer plan), and
- (ii) application of the standard would be adverse to the interests of plan participants in the aggregate,

the Secretary may, subject to subparagraph (C), waive the requirements of subsection (a) for such year with respect to all or any portion of the minimum funding standard. The Secretary shall not waive the minimum funding standard with respect to a plan for more than 3 of any 15 (5 of any 15 in the case of a multiemployer plan) consecutive plan years

(B) Effects of waiver. If a waiver is granted under subparagraph (A) for any plan year—

- (i) in the case of a defined benefit plan which is not a multiemployer plan or a CSEC plan, the minimum required contribution under section 430 [26 USCS § 430] for the plan year shall be reduced by the amount of the waived funding deficiency and such amount shall be amortized as required under section 430(e) [26 USCS § 430(e)],
- (ii) in the case of a multiemployer plan, the funding standard account shall be credited under section 431(b)(3)(C) [26 USCS § 431(b)(3)(C)] with the amount of the waived funding deficiency and such amount shall be amortized as required under section 431(b)(2)(C) [26 USCS § 431(b)(2)(C)], and
- (iii) in the case of a CSEC plan, the funding standard account shall be credited under section 433(b)(3)(C) [26 USCS § 433(b)(3)(C)] with the amount of the waived funding deficiency and such amount shall be amortized as required under section 433(b)(2)(C) [26 USCS § 433(b)(2)(C)].

(C) Waiver of amortized portion not allowed. The Secretary may not waive under subparagraph (A) any portion of the minimum funding standard under subsection (a) for a plan year which is attributable to any waived funding deficiency for any preceding plan year;

(2) Determination of business hardship. For purposes of this subsection, the factors taken into account in determining temporary substantial business hardship (substantial business hardship in the case of a multiemployer plan) shall include (but shall not be limited to) whether or not—

- (A) the employer is operating at an economic loss,
- (B) there is substantial unemployment or underemployment in the trade or business and in the industry concerned,
- (C) the sales and profits of the industry concerned are depressed or declining, and
- (D) it is reasonable to expect that the plan will be continued only if the waiver is granted.

(3) Waived funding deficiency. For purposes of this section and part III of this subchapter [26 USCS §§ 401 et seq.], the term "waived funding deficiency" means the portion of the minimum funding standard under subsection (a) (determined without regard to the waiver) for a plan year waived by the Secretary and not satisfied by employer contributions.

(4) Security for waivers for single-employer plans, consultations.

(A) Security may be required.

(i) In general. Except as provided in subparagraph (C), the Secretary may require an employer maintaining a defined benefit plan which is a single-employer plan (within the meaning of section 4001(a)(15) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1301(a)(15)]) to provide security to such plan as a condition for granting or modifying a waiver under paragraph (1) or for granting an extension under section 433(d) [26 USCS § 433(d)].

(ii) Special rules. Any security provided under clause (i) may be perfected and enforced only by the Pension Benefit Guaranty Corporation, or at the direction of the Corporation, by a contributing sponsor (within the meaning of section 4001(a)(13) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1301(a)(13)]), or a member of such sponsor's controlled group (within the meaning of section 4001(a)(14) of such Act [29 USCS § 1301(a)(14)]).

(B) Consultation with the pension benefit guaranty corporation. Except as provided in subparagraph (C), the Secretary shall, before granting or modifying a waiver under this subsection or an extension under [section] 433(d) [26 USCS § 433(d)] with respect to a plan described in subparagraph (A)(i)—

(i) provide the Pension Benefit Guaranty Corporation with—

(I) notice of the completed application for any waiver, modification, or extension and

(II) an opportunity to comment on such application within 30 days after receipt of such notice, and

(ii) consider—

(I) any comments of the Corporation under clause (i)(II), and
(II) any views of any employee organization (within the meaning of section 3(4) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(4)]) representing participants in the plan which are submitted in writing to the Secretary in connection with such application.

Information provided to the Corporation under this subparagraph shall be considered tax return information and subject to the safeguarding and reporting requirements of section 6103(p) [26 USCS § 6103(p)].

(C) Exception for certain waivers or extensions.

(i) In general. The preceding provisions of this paragraph shall not apply to any plan with respect to which the sum of—

(I) the aggregate unpaid minimum required contributions (within the meaning of section 4971(c)(4) [26 USCS § 4971(c)(4)]) for the plan year and all preceding plan years, or the accumulated funding deficiency under section 433 [26 USCS § 433], whichever is applicable,

(II) the present value of all waiver amortization installments determined for the plan year and succeeding plan years under section 430(e)(2) or 433(b)(2)(C) [26 USCS § 430(e)(2) or § 433(b)(2)(C)], whichever is applicable, and

(III) the total amounts not paid by reason of an extension in effect under section 433(d) [26 USCS § 433(d)],

is less than \$ 1,000,000.

(ii) Treatment of waivers or extensions for which applications are pending. The amount described in clause (i)(I) shall include any increase in such amount which would result if all applications for waivers or extensions with respect to of the minimum funding standard under this subsection which are pending with respect to such plan were denied.

(5) Special rules for single-employer plans.

(A) Application must be submitted before date 2 1/2 months after close of year. In the case of a defined benefit plan which is not a multiemployer plan, no waiver may be granted under this subsection with respect to any plan for any plan year unless an application therefor is submitted to the Secretary not later than the 15th day of the 3rd month beginning after the close of such plan year.

(B) Special rule if employer is member of controlled group. In the case of a defined benefit plan which is not a multiemployer plan, if an employer is a member of a controlled group, the temporary substantial business hardship requirements of paragraph (1) shall be treated as met only if such requirements are met—

(i) with respect to such employer, and

(ii) with respect to the controlled group of which such employer is a member (determined by treating all members of such group as a single employer).

The Secretary may provide that an analysis of a trade or business or industry of a member need not be conducted if the Secretary determines such analysis is not necessary because the taking into account of such member would not significantly affect the determination under this paragraph.

(6) Advance notice.

(A) In general. The Secretary shall, before granting a waiver under this subsection, require each applicant to provide evidence satisfactory to the Secretary that the applicant has provided notice of the filing of the application for such waiver to each affected party (as defined in section 4001(a)(21) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1301(a)(21)]). Such notice shall include a description of the

extent to which the plan is funded for benefits which are guaranteed under title IV of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1301 et seq.] and for benefit liabilities.

(B) Consideration of relevant information. The Secretary shall consider any relevant information provided by a person to whom notice was given under subparagraph (A).

(7) Restriction on plan amendments.

(A) In general. No amendment of a plan which increases the liabilities of the plan by reason of any increase in benefits, any change in the accrual of benefits, or any change in the rate at which benefits become nonforfeitable under the plan shall be adopted if a waiver under this subsection or an extension of time under section 431(d) or section 433(d) [26 USCS § 431(d) or § 433(d)] is in effect with respect to the plan, or if a plan amendment described in subsection (d)(2) which reduces the accrued benefit of any participant has been made at any time in the preceding 12 months (24 months in the case of a multiemployer plan). If a plan is amended in violation of the preceding sentence, any such waiver, or extension of time, shall not apply to any plan year ending on or after the date on which such amendment is adopted.

(B) Exception. Subparagraph (A) shall not apply to any plan amendment which—

- (i) the Secretary determines to be reasonable and which provides for only de minimis increases in the liabilities of the plan,
- (ii) only repeals an amendment described in subsection (d)(2), or
- (iii) is required as a condition of qualification under part I of subchapter D, of chapter 1 [26 USCS §§ 401 et seq.].

(d) Miscellaneous Rules.

(1) Change in method or year. If the funding method or a plan year for a plan is changed, the change shall take effect only if approved by the Secretary.

(2) Certain retroactive plan amendments. For purposes of this section, any amendment applying to a plan year which—

(A) is adopted after the close of such plan year but no later than 2 1/2 months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),

(B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances, shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment, or within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary

unless the Secretary determines that such amendment is necessary because of a temporary substantial business hardship (as determined under subsection (c)(2)) or a substantial business hardship (as so determined) in the case of a multiemployer plan or a CSEC plan and that a waiver under subsection (c) (or, in the case of a multiemployer plan, any extension of the amortization period under section 431(d) or section 433(d) [26 USCS § 431(d) or § 433(d)]) is unavailable or inadequate.

(3) Controlled group. For purposes of this section, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 [26 USCS § 414].

(e) Plans to which section applies.

(1) In general. Except as provided in paragraphs (2) and (4), this section applies to a plan if, for any plan year beginning on or after the effective date of this section for such plan under the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1001 et seq.]—

- (A) such plan included a trust which qualified (or was determined by the Secretary to have qualified) under section 401(a) [26 USCS § 401(a)], or
- (B) such plan satisfied (or was determined by the Secretary to have satisfied) the requirements of section 403(a) [26 USCS § 403(a)].

(2) Exceptions. This section shall not apply to—

- (A) any profit-sharing or stock bonus plan,
- (B) any insurance contract plan described in paragraph (3),
- (C) any governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]),
- (D) any church plan (within the meaning of section 414(e) [26 USCS § 414(e)]) with respect to which the election provided by section 410(d) [26 USCS § 410(d)] has not been made,
- (E) any plan which has not, at any time after September 2, 1974, provided for employer contributions, or
- (F) any plan established and maintained by a society, order, or association described in section 501(c)(8) or (9) [26 USCS § 501(c)(8) or (9)], if no part of the contributions to or under such plan are made by employers of participants in such plan.

No plan described in subparagraph (C), (D), or (F) shall be treated as a qualified plan for purposes of section 401(a) [26 USCS § 401(a)] unless such plan meets the requirements of section 401(a)(7) [26 USCS § 401(a)(7)] as in effect on September 1, 1974.

(3) Certain insurance contract plans. A plan is described in this paragraph if—

- (A) the plan is funded exclusively by the purchase of individual insurance contracts,
- (B) such contracts provide for level annual premium payments to be paid extending not later than the retirement age for each individual participating in the plan, and commencing with the date the individual became a participant in the plan (or, in the case of an increase in benefits, commencing at the time such increase becomes effective),

- (C) benefits provided by the plan are equal to the benefits provided under each contract at normal retirement age under the plan and are guaranteed by an insurance carrier (licensed under the laws of a State to do business with the plan) to the extent premiums have been paid,
- (D) premiums payable for the plan year, and all prior plan years, under such contracts have been paid before lapse or there is reinstatement of the policy,
- (E) no rights under such contracts have been subject to a security interest at any time during the plan year, and
- (F) no policy loans are outstanding at any time during the plan year.

A plan funded exclusively by the purchase of group insurance contracts which is determined under regulations prescribed by the Secretary to have the same characteristics as contracts described in the preceding sentence shall be treated as a plan described in this paragraph.

(4) Certain terminated multiemployer plans. This section applies with respect to a terminated multiemployer plan to which section 4021 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1321] applies until the last day of the plan year in which the plan terminates (within the meaning of section 4041A(a)(2) of such Act [29 USCS § 1341A(a)(2)]).

History:

(Added Sept. 2, 1974, P.L. 93-406, Title II, § 1013(a), 88 Stat. 914; Oct. 4, 1976, P.L. 94-455, Title XIX, §§ 1901(a)(63), 1906(b)(13)(A), 90 Stat. 1775, 1834; Sept. 26, 1980, P.L. 96-364, Title II, §§ 203, 208(c), 94 Stat. 1285, 1289; July 18, 1984, P.L. 98-369, Div A, Title IV, § 491(d)(25), 98 Stat. 850; April 7, 1986, P.L. 99-272, Title XI, §§ 11015(a)(2), (b)(2), 11016(c)(4), 100 Stat. 265, 267, 273; Dec. 22, 1987, P.L. 100-203, Title IX, §§ 9301(a), 9303(a), (d)(1), 9304(a)(1), (b)(1), (e)(1), 9305(b)(1), 9306(a)(1), (b)(1), (c)(1), (d)(1), (e)(1), 9307(a)(1), (b)(1), (e)(1), 101 Stat. 1330-331, 1330-333, 1330-342 to 1330-344, 1330-348, 1330-351, 1330-352, 1330-354 to 1330-357; Nov. 10, 1988, P.L. 100-647, Title II, § 2005(a)(2)(A), (d)(1), 102 Stat. 3610, 3612; Dec. 19, 1989, P.L. 101-239, Title VII, § 7881(a)(1)(A), (2)(A), (3)(A), (4)(A), (5)(A), (6)(A), (b)(1)(A), (2)(A), (3)(A), (4)(A), (6)(A), (c)(1), (d)(1)(A), 103 Stat. 2435-2439; Dec. 8, 1994, P.L. 103-465, Title VII, §§ 751(a)(1)-(9)(A), (10), 752(a), 753(a), 754(a), 768(a), 108 Stat. 5012-5019, 5021-5023, 5040; Aug. 5, 1997, P.L. 105-34, Title XV, § 1521(a), (c)(1), (3)(A), Title XVI, § 1604(b)(2)(A), 111 Stat. 1069, 1070, 1097; June 7, 2001, P.L. 107-16, Title VI, §§ 651(a), 661(a), 115 Stat. 129, 141; March 9, 2002, P.L. 107-147, Title IV, Subtitle A, § 405(a), Subtitle B, § 411(v)(1), 116 Stat. 42, 52; April 10, 2004, P.L. 108-218, Title I, §§ 101(b)(1)-(3), 102(b), 104(b), 118 Stat. 597, 601, 606; Dec. 21, 2005, P.L. 109-135, Title IV, Subtitle A, § 412(x)(1), 119 Stat. 2638; Aug. 17, 2006, P.L. 109-280, Title I, Subtitle B, § 111(a), Title II, Subtitle B, § 212(c), Title III, § 301(b), 120 Stat. 820, 917, 919; Dec. 23, 2008, P.L. 110-458, Title I, Subtitle A, §§ 101(a)(2), 102(b)(2)(H), 122 Stat. 5093, 5103.)
(As amended April 7, 2014, P.L. 113-97, Title II, § 202(c)(1), (2), 128 Stat. 1135.)

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