IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:		**No. 28147-7-III**
CELESTE CLARICE DAVAZ,	)	
Respondent,	)	**Division Three**
and	)	
CYRIL WILLIAM DAVAZ,	)	
Appellant.	)	**UNPUBLISHED OPINION**

Sweeney, J. — This appeal follows a dissolution action and an award of permanent maintenance to the wife. The husband appeals the award and contends, among other things, that the court failed to consider his reasonable living expenses before awarding maintenance. We have reviewed the record and cannot find where the court considered the husband's reasonable living expenses before awarding maintenance. We, therefore, reverse and remand for further proceedings.

FACTS

Cyril and Celeste Davaz[1] married in 1970, when they were 18 and 16 years old. Neither party finished high school. Ms. Davaz worked mostly as a homemaker. Mr. Davaz worked outside of the home. Mr. Davaz eventually retired from his job in 2005 because of health problems. The Davazes lived on Mr. Davaz's disability and social security income of $3,100 per month and individual retirement account (IRA) withdrawals of $2,000 per month since his retirement.

The Davazes separated in January 2008. They had two debts at the time, a motor home payment and a car lease. And they had some assets, including the motor home, the IRA, and other personal property.

The trial court awarded Mr. Davaz most of the community's personal property, including the motor home, the car, the bank accounts, and 45 percent of the IRA. The court also required that Mr. Davaz assume the community debt. It then awarded Ms. Davaz the community's remaining personal property and 55 percent of the IRA. The court found that Ms. Davaz had limited ability to meet her financial needs, that Mr. Davaz had $1,500 in disposable income from his social security and disability benefits after paying the community debts, and that the parties had been married for 38 years and

[1] Ms. Davaz has changed her name to Celeste C. Luffman. Clerk's Papers (CP) at 78. We, however, refer to her as Ms. Davaz in this appeal to be consistent with the trial court.

enjoyed a comfortable middle-class lifestyle. Based on these findings, the court awarded Ms. Davaz $750 per month in maintenance for life.

Mr. Davaz appeals the maintenance award as an abuse of discretion.

DISCUSSION

Mr. Davaz contends that the award of permanent maintenance is improper when the appropriate statutory factors are considered, that the award is based on a misunderstanding of his disposable income, that it is just plain unjust and that, therefore, the award amounts to an abuse of the judge's discretion. Ms. Davaz responds that the court considered the necessary statutory factors before making the award and, that when so considered, the award of permanent maintenance was well within the court's discretionary authority.

We review the court's award of maintenance for abuse of discretion. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). "An award of maintenance that is not based upon a fair consideration of the statutory factors constitutes an abuse of discretion." *In re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954 (1996).

A trial court's discretion to order maintenance is limited only by the requirement that the amount and duration of the award be just in light of the statutory factors. *In re*

Marriage of Washburn, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). The court must consider the parties' postdissolution financial resources; their abilities to meet their needs independently; the duration of the marriage; the standard of living established during the marriage; the parties' ages, health, and financial obligations; and the ability of one spouse to pay maintenance to the other. *In re Marriage of Williams*, 84 Wn. App. 263, 267-68, 927 P.2d 679 (1996); RCW 26.09.090(1). Ultimately, the court's main concern must be the parties' economic situations post-dissolution. *Id.* at 268.

Again, the trial court here ordered Mr. Davaz to pay maintenance for life. It the considered statutory factors:

> In determining the issue of maintenance the court has considered RCW 26.09.090. The court has considered the financial resources of Ms. Davaz, the party seeking maintenance and finds that she has extremely limited earning capacity, which is affected by her lack of education, lack of job skills, her age and her physical ailments. Ms. Davaz has a limited ability [to] meet her financial needs.
>
> The court has also considered the financial resources of Mr. Davaz, the party [from] whom maintenance is being sought. Mr. Davaz has social security benefits as well as disability benefits, which provide him at least $1,500 in disposable net income after paying the community debt.
>
> The court has considered that both parties were retired prior to their separation and neither party has sufficient health, is of sufficient age, or has the educational background to return to school and embark on a new career path. The lifestyle of the parties was comfortable and middle class and the duration of the marriage is nearly four decades and . . . is a significant consideration.

Clerk's Papers (CP) at 71. Mr. Davaz weighs these same factors and urges that proper consideration militates against a permanent

award of maintenance. But it is the trial court's prerogative and duty to weigh these factors, not ours. *Zahm*, 138 Wn.2d at 227; *In re Marriage of Brossman*, 32 Wn. App. 851, 854, 650 P.2d 246 (1982).

The trial court considered Ms. Davaz's ability to support herself and her financial resources, "including [the] separate or community property apportioned to . . . her." RCW 26.09.090(1)(a). It found that Ms. Davaz had a limited ability to support herself independently:

> The court has considered the financial resources of Ms. Davaz . . . and finds that she has extremely limited earning capacity, which is affected by her lack of education, lack of job skills, her age and her physical ailments. Ms. Davaz has a limited ability [to] meet her financial needs.

CP at 71.

Mr. Davaz notes that Ms. Davaz received more of the community property than he did and she has the ability to support herself. He argues that he is disabled and cannot work to support himself. Ms. Davaz received 62 percent of the community assets. The community had a net worth of $176,660. Ms. Davaz was awarded community property worth $110, 615 (55 percent of the IRA and a Kauai timeshare) and no debt. The court considered Ms. Davaz's financial resources. And that is all that RCW 26.09.090 requires. *In re Marriage of Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004).

Mr. Davaz argues that no maintenance should have been awarded because Ms. Davaz has no debt and can work. RCW

26.09.090(1)(a) does not require that the court make a finding on Ms. Davaz's debt load. The trial court was required to consider Ms. Davaz's "age, physical and emotional condition, and financial obligations." RCW 26.09.090(1)(e). It found that Ms. Davaz was retired, aging, and in poor health: "[B]oth parties were retired prior to their separation and neither party has sufficient health, is of sufficient age, or has the educational background to return to school and embark on a new career path." CP at 71. The court's findings also suggest an understanding that Ms. Davaz can work. *See* CP at 24. And the findings recognized that her ability to work is of little value because of her age, physical ailments, and lack of education and job skills. Ms. Davaz is a 55-year-old woman with carpal tunnel, back, shoulder, and hip pain, no high school diploma, and limited work experience. Report of Proceedings (RP) at 22, 116-29, 177-78, 281-82. This evidence supports the court's finding that Ms. Davaz has a limited ability to support herself independently. The court properly considered Ms. Davaz's financial resources and ability to support herself before awarding maintenance.

In a letter ruling, the court acknowledged that Ms. Davaz has no debt when it noted that Mr. Davaz assumed all the parties' debts. And, although Ms. Davaz has no debt, she does have living expenses that she cannot pay because she also has no income. *See* CP at 99-101 (Ms. Davaz's financial declaration); *see also* RP at 233 (Ms. Davaz

testified that her monthly expenses are $1,000 less than her declaration suggests). The court fairly considered this factor.

But the trial court also had to consider "[t]he ability of the spouse . . . from whom maintenance is sought to meet his . . . needs and financial obligations while meeting those of the spouse . . . seeking maintenance." RCW 26.09.090(1)(f). The court found that "Mr. Davaz has social security benefits as well as disability benefits, which provide him at least $1,500 in disposable net income after paying the community debt." CP at 71. The court's letter ruling says that Mr. Davaz's total monthly income is $3,100. And his total monthly debt is $1,579, leaving him $1,521 in discretionary income.

The court, however, apparently did not account for Mr. Davaz's needs, including his food, utility, transportation, health care, and personal expenses. Those expenses amount to approximately $1,800 per month. CP at 16-17; RP at 432. On this record, then, it appears Mr. Davaz does not have the ability to meet his needs *and* pay $750 per month in maintenance. A court abuses its discretion by ordering maintenance that a spouse is not able to pay. *Bungay v. Bungay*, 179 Wash. 219, 223-24, 36 P.2d 1058 (1934). The court here erred by ordering maintenance without properly considering Mr. Davaz's ability to pay. We, then, reverse the maintenance award and remand to the court for further findings on RCW 26.09.090(1)(f) and a maintenance award that reflects

consideration of this factor.

Mr. Davaz also challenges the duration of the maintenance award. The court ordered, "The obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." CP at 77.

Mr. Davaz contends that the court relied too heavily on the length of the parties' marriage when ordering him to pay maintenance permanently. A court must consider all the statutory factors when setting the duration of a maintenance order. RCW 26.09.090(1). But it may assign whatever weight it wants to each. *See Washburn,* 101 Wn.2d at 178 (discretion to order maintenance is limited *only* by requirement that its amount and duration be just in light of statutory factors). We cannot conclude that the court erred by finding that "the duration of the marriage is nearly four decades and has [sic] is a significant consideration." CP at 71.

Permanent maintenance awards are generally disfavored. *In re Marriage of Coyle*, 61 Wn. App. 653, 657, 811 P.2d 244 (1991). Nonetheless, the award of lifetime maintenance in a reasonable amount is proper "when it is clear the party seeking maintenance will not be able to contribute significantly to . . . her own livelihood." *In re Marriage of Mathews*, 70 Wn. App. 116, 124, 853 P.2d 462 (1993).

Ultimately, we cannot say the court abused its discretion by making any award

here permanent. Ms. Davaz may be physically able to work. But she is 55 years old, she has no high school diploma, and she has limited work experience in the last 40 years because she was primarily a homemaker throughout the marriage.

Attorney Fees

Ms. Davaz requests an award of attorney fees on a number of theories: RCW 26.09.140 (dissolution—attorney fees), *In re Marriage of Morrow*, 53 Wn. App. 579, 590-91, 770 P.2d 197 (1989) (intransigence), and RAP 18.9(a) (sanctions).

We may award attorney fees to either party in a maintenance action. RCW 26.09.140. We must consider the parties' relative need versus ability to pay. *In re Marriage of Shellenberger,* 80 Wn. App. 71, 87, 906 P.2d 968 (1995). Ms. Davaz's only income is monthly maintenance from Mr. Davaz. But the court also awarded her more than 60 percent of the parties' assets. And Mr. Davaz has a fixed income and received all of the parties' debts. "Awards have been found to be an abuse of discretion when the benefited spouse has received a majority of the parties' total assets, . . . and the other spouse already has an onerous financial burden." *Morrow*, 53 Wn. App. at 590. We therefore decline to award attorney fees under RCW 26.09.140.

Nor will we award attorney fees under RAP 18.9. RAP 18.9 authorizes us to impose sanctions in the form of attorney fees against a party whose appeal is frivolous.

In re Marriage of Greenlee, 65 Wn. App. 703, 710-11, 829 P.2d 1120 (1992). Mr. Davaz's appeal is not frivolous; it presents a debatable issue. Nor can we conclude that his appeal reflects any intransigence. We, then, do not award fees to either party.

We reverse and remand for further consideration.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.