No. 102553-0

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 84532-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

KRISTIN N. HARPER,

Respondent,

and

BENJAMIN STONER-DUNCAN,

Petitioner.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.
By: Valerie Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE CASES

STATUTES

RULES AND REGULATIONS

A. Identity of Petitioner.

Petitioner is Benjamin Stoner-Duncan, appellant in the Court of Appeals.

B. Court of Appeals Decision.

Petitioner seeks review of the Court of Appeals' August 21, 2023 decision (App. A: "Op _") affirming the trial court's decision confirming an arbitration award in a marriage dissolution action. Respondent Kristin Harper was awarded 81% of the actually divisible marital estate because the arbitrator valued and awarded to petitioner his medical degree/earning capacity as an asset and failed to account for petitioner's $171,000 obligation to respondent, which the arbitrator ordered him to pay to compensate respondent for petitioner's outstanding student loans, in the property division. The Court of Appeals denied petitioner's timely motion for reconsideration on October 12, 2023. (App. B)

C. Issues Presented for Review.

1. Does the Court of Appeals' holding that the arbitrator did not exceed her powers by valuing husband's medical degree/earning capacity and awarding it to him as an asset conflict with decisions from this Court and the Court of Appeals that professional degrees and future earning capacity cannot be treated as assets in a marriage dissolution action?

2. Does the Court of Appeals' holding that whether an arbitration award dividing the parties' marital estate should be vacated for a facial legal error "must be analyzed in light of whether it rendered the property distribution as a whole unjust and inequitable" conflict with decisions from this Court and the Court of Appeals that an error of law apparent on the face of an arbitration award is grounds for vacation, and forbidding reviewing courts from considering the merits of the arbitration decision?

D. Statement of the Case.

1. Having both earned post-graduate degrees during their 17-year relationship, the parties separated when they were 40.

Petitioner Benjamin Stoner-Duncan and respondent Kristin Harper were age 40 when Harper filed for dissolution of the parties' marriage on March 11, 2021. (*See* CP 1, 68-69) Prior to their marriage in June 2008, the parties were in a committed intimate relationship starting in December 2003. (CP 281) They have two children: a son born April 2004 (now an adult) and a daughter born May 2010. (CP 68)

Both parties obtained post-graduate degrees during their relationship. Harper earned her Master of Public Health ("MPH") in global epidemiology and a Doctorate ("PhD") in genetics and microbiology from Emory University in May 2008, after which she worked as a postdoc at Columbia University. (CP 69, 94) Stoner-Duncan completed his undergraduate degree by the end of

2004 (CP 70) and attended Columbia University for a fifth year of college in 2008, studying organic chemistry and physics. (*See* CP 71, 76-77)

In 2010, Stoner-Duncan began attending medical school at Columbia University. (CP 77, 97) Harper completed her postdoctoral research in 2013 and started a company, Harper Health and Science Communication LLC, where she still works as a freelance medical writer and editor; her clients include the Bill and Melinda Gates Foundation, Medscape, the World Health Organization, the National Institute of Health, and assorted academic groups. (*See* CP 80, 94, 118)

The parties moved to Washington after Stoner-Duncan graduated from medical school in 2014 for his four-year residency in emergency medicine at the University of Washington. (CP 72, 78) After completing his residency in 2018, Stoner-Duncan worked as an independent contractor at Northwest Hospital for the

remainder of that year, earning approximately $100,000. (CP 72) Starting in 2019, Stoner-Duncan became a salaried employee at Northwest Hospital. (CP 72) By 2020, Stoner-Duncan was earning approximately $312,000 annually (CP 123), while Harper's business earned $178,000 (CP 118), with annual compensation to her of $138,000. (CP 96)

2. The arbitrator sought to "reimburse" the community for its support of husband obtaining his medical degree.

On January 4, 2022, the parties agreed to submit their disputes to Cheryll Russell for binding arbitration under RCW ch. 7.04A. (CP 18-21) Ms. Russell ("the arbitrator") issued her arbitration decision on May 30, 2022. (CP 136) After Stoner-Duncan moved for reconsideration, the arbitrator issued an additional decision on August 12, 2022. (CP 196)

The arbitrator found "the community invested 10 years into [Stoner-Duncan] completing a fifth year before entering medical school, attending medical school, and

completing his residency including his lap year, but realized income of nearly 3 years from the time he completed his residency until the parties separated." (CP 123) The arbitrator stated the community should be reimbursed for its support of Stoner-Duncan's medical degree through both the property division and maintenance to Harper. (CP 123)

a. The arbitrator awarded wife maintenance, worth $390,000, for seventy-eight months.

The arbitrator found that an award of maintenance to Harper was a "reasonable and appropriate way to compensate her for the income she has foregone and the financial gain [Stoner-Duncan] will enjoy" as a result of the community's support of Stoner-Duncan's medical degree. (CP 103) The arbitrator awarded Harper monthly maintenance of $5,000 for 78 months, totaling $390,000, effectively equalizing the parties' incomes, as found by the arbitrator. (*See* CP 104, 139)

b. The arbitrator valued husband's medical degree/earning capacity at $472,000 and awarded it to him as an asset.

The arbitrator also stated her intent to compensate Harper through an award of property by valuing Stoner-Duncan's medical degree/earning capacity and including it as a community asset in the property division. (*See* CP 123-24, 166) The arbitrator valued Stoner-Duncan's medical degree/earning capacity at $472,000—the amount she believed Stoner-Duncan would earn in 2028, based on an assumption (not supported by the record) that Stoner-Duncan's annual income will increase by $20,000 every year. (*See* CP 166)

c. The arbitrator ordered husband to pay wife $171,000 to compensate her for a student loan that was rolled into the mortgage against the family home awarded to her.

The arbitrator valued the family home at $970,000, with a mortgage balance of $389,043. (CP 114, 197) The parties had refinanced the mortgage in 2020. (CP 81, 131)

At the time of the refinance, the parties rolled the $171,000 that they still owed on Stoner-Duncan's medical school loans into the mortgage, which "lowered the combined payments" for both the mortgage and student loan. (CP 75, 131)

The arbitrator awarded the house to Harper but reasoned that "due to the mortgage being refinanced in July 2020 so [Stoner-Duncan] could roll his medical school loans into the mortgage, . . . awarding the house to [Harper] results in her paying off [Stoner-Duncan]'s medical school loans of $171,000.00 while he keeps the long term benefit of his medical school education and license is neither just nor equitable." (CP 131) The arbitrator therefore made Stoner-Duncan responsible for this community debt and ordered him to pay $171,000 to Harper, plus 4% interest, on or before August 1, 2027. (CP 183)

d. The arbitration decision resulted in husband being awarded only 19% of the marital estate, the value of which was less than his maintenance obligation.

The arbitrator attached a "Property Division Spreadsheet" to her arbitration award, which purportedly reflected a "'just and equitable' distribution of all separate and community property and liabilities in this marriage dissolution proceeding." (*See* CP 193, 197-98) Among the assets included in the spreadsheet was Stoner-Duncan's "professional degree" valued at $472,000. (CP 197) Omitted from the spreadsheet was the arbitrator's allocation to Stoner-Duncan of the obligation to pay the $171,000 debt rolled into the mortgage against the house awarded to Harper. (*See* CP 197)

By including Stoner-Duncan's medical degree in the property awarded to him and excluding the $171,000 obligation owed by him to Harper, the arbitrator's decision appeared to be a nearly equal division of the marital estate:

	Harper	Stoner-Duncan
House	$970,000	
Mortgage (inc. $171,000 student loan)	($389,043)	
Holmes Island (SP)		$14,500
Medical degree		$472,000
Harper Health	$41,000	
Bank accounts	$31,126	$59,993
Investment accounts	$24,786	$63,223
Retirement accounts	$221,352	$284,658
Total	**$899,221**	**$894,374**
	50.1%	49.9%

(CP 197-98) But 53% of Stoner-Duncan's purported half of the marital estate consisted of the value of his medical degree. If the medical degree is removed from the calculation and Stoner-Duncan's obligation to pay $171,000 to Harper is included, the property division leaves Harper with over four times more assets than Stoner-Duncan:

	Harper	Stoner-Duncan
House	$970,000	
Mortgage (inc. $171,000 student loan)	($389,043)	
Holmes Island (SP)		$14,500
~~**Medical degree**~~		~~**$472,000**~~
Harper Health	$41,000	
Bank accounts	$31,126	$59,993
Investment accounts	$24,786	$63,223
Retirement accounts	$221,352	$284,658
Judgment	**$171,000**	**($171,000)**
Total	**$1,070,221**	**$251,374**
	81%	19%

3. The Court of Appeals affirmed the trial court's order denying husband's motion to vacate or modify the arbitration award.

On September 8, 2022, King County Superior Court Judge Sean O'Donnell ("the trial court") denied Stoner-Duncan's motion to vacate or modify the arbitration award. (CP 253-55) On November 7, 2022, the trial court entered final orders consistent with the arbitration award. (CP 279, 297) The final divorce order and findings appended the spreadsheet that had been attached to the arbitration

award that was filed on reconsideration. (*Compare* CP 197-98 ***with*** CP 287-88, 306-07)

Stoner-Duncan appealed the trial court's order confirming the arbitration award arguing that the arbitration award, which leaves him with a property award worth $251,374 (19% of the marital estate) and a $390,000, 78-month maintenance obligation after a 17-year relationship (13 years married), was based on a "legal error" and/or "mathematical miscalculation" warranting vacation or modification under RCW 7.04A.230 or RCW 7.04A.240. Stoner-Duncan argued that under this Court's decision in *Marriage of Hall*, 103 Wn.2d 236, 247-48, 692 P.2d 175 (1984), the arbitrator exceeded her powers by valuing his degree/earning capacity and treating it as an asset in the property division and that the omission of his obligation to pay the $171,000 student loan community debt in the property division spreadsheet artificially inflated his share of the marital estate.

Division One affirmed the arbitrator's decision, holding that "the arbitrator acted within their powers when considering Stoner-Duncan's degree." (Op. 16) Division One recognized that including Stoner-Duncan's degree/earning capacity as an asset, and omitting his obligation to pay $171,000 to Harper, from the spreadsheet did not provide a "complete view of the parties assets and liabilities at the end of the dissolution process," but held "the asserted error must be analyzed in light of whether it rendered the property distribution as a whole unjust and inequitable." (Op. 20) Because Division One determined that "the arbitrator's decision as a whole is just and equitable. We find neither mathematical error nor an error of law." (Op. 21)

Despite not specifically requesting an award of attorney fees under RCW 7.04A.250, Division One awarded Harper attorney fees on appeal. (Op. 21-22) Stoner-Duncan moved for reconsideration, asking Division

One to exercise its discretion to deny attorney fees to Harper under the statute. Division One denied reconsideration. (App. B)

E. Reasons for Granting Review.

1. Division One's decision holding that the arbitrator did "not exceed their statutory powers" by assigning a monetary value to husband's degree/ earning capacity and awarding it to him conflicts with decisions from this Court and the Court of Appeals.

Division One's decision that the arbitrator "acted within their powers" by assigning a value to husband's degree/earning capacity and awarding it to him as an asset conflicts with decisions from this Court and published decisions from the Court of Appeals holding that neither professional degrees nor future earning capacity may be treated as an asset in dividing the marital estate, warranting review under RAP 13.4(b)(1) and (2). *See Marriage of Hall*, 103 Wn.2d 236, 247-48, 692 P.2d 175 (1984); *Marriage of Leland*, 69 Wn. App. 57, 72, 847 P.2d

518, *rev. denied*, 121 Wn.2d 1033 (1993); *Fernau v. Fernau*, 39 Wn. App. 695, 707, 694 P.2d 1092 (1984); *Marriage of Anglin*, 52 Wn. App. 317, 320, 759 P.2d 1224 (1988); *Marriage of Rockwell*, 141 Wn. App. 235, 248, ¶23, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008); *see also Brewer v. Brewer*, 137 Wn.2d 756, 774, 976 P.2d 102 (1999) (concurrence).

This Court first addressed treatment of professional degrees and future earning capacity in *Washburn v. Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984), where it held that when "a person supports a spouse through professional school in the mutual expectation of future financial benefit to the community, but the marriage ends before that benefit can be realized, that circumstance is a 'relevant factor' which must be considered in making a fair and equitable division of property and liabilities pursuant to RCW 26.09.080, or a just award of maintenance pursuant to RCW 26.09.090." However, this Court

specifically declined to address "the somewhat metaphysical question of whether a professional degree is 'property'" that should be valued and divided. 101 Wn.2d at 176. In fact, the single justice who dissented in *Washburn* did so precisely because of the majority's refusal to characterize a professional degree "as a marital asset," the value of which is to be "measured by the increased earning capacity inherent in the particular education and as such is subject to a just and equitable distribution." 101 Wn.2d at 184 (Justice Rosellini dissenting).

Ten months later, in *Hall,* this Court chose to address the "the somewhat metaphysical question of whether a professional degree is 'property'" that it avoided in *Washburn* by holding that a spouse's future earning capacity, like a professional degree, is not an asset that can be valued and used to offset an award of other assets. 103 Wn.2d at 247-48. This Court noted that while "treatment of future earning capacity as a distinct marital asset has

been advocated" in other jurisdictions, our courts have "declined to treat it as such." 103 Wn.2d at 247. Thus, while this Court recognized that future earning capacity is a "substantial factor" to be considered by the trial court in making a just and equitable distribution of property, this Court refused "to find that future earning potential" of the wife (who like husband here was a salaried physician) "is an asset which can be used to offset goodwill" of the husband, who was a one-third partner in a cardiology clinic. 103 Wn.2d at 248.

Within a week of this Court's decision in *Hall,* the Court of Appeals issued its own decision rejecting a wife's contention that her husband's "degree should be disposed of as if it were property, analogous to a home, business, or pension" in ***Fernau,*** 39 Wn. App. at 707. The Court held that the trial court properly compensated the wife for the community's support to the husband in obtaining his medical degree by awarding her maintenance for a

maximum of two years so she could "obtain an equal educational opportunity with the financial support" of the husband. 39 Wn. App. at 707.

Since this Court's decision in *Hall,* our courts have consistently held that "[e]arning capacity is not a divisible asset, although it is a factor to be considered when dividing the community and separate property in a dissolution proceeding." *Leland,* 69 Wn. App. at 72; *see Anglin,* 52 Wn. App. at 320 ("Future earning potential, although a factor to be considered by the trial court in determining a just and equitable division of property, is not an asset to be divided between the spouses"); *Brewer,* 137 Wn.2d at 774 (concurrence) ("Future, post-dissolution earnings ... are not 'assets' which are before the court for disposition in a dissolution action"). The Court in *Rockwell*, for instance, specifically held that this Court's decision in *Hall* "forbids treating earning capacity as a present asset, placing it

among other community assets, and dividing it as property." 141 Wn. App. at 248, ¶23.

In affirming the order confirming the arbitration award, Division One reasoned that the arbitrator merely considered husband's degree/earning capacity as a "factor" in dividing the property, as allowed by *Hall*. (Op. 17) However, the arbitrator did more than consider husband's degree/earning capacity as a "factor" - she expressly valued it and awarded it to him as an asset.

The face of the arbitrator's original award states, "the issue presented is not whether [husband]'s medical degree has value but what value should be assigned to it." (CP 123) "[T]his Arbitrator FINDS it is just and equitable to assign a value of $542,500 to [husband]'s degree…" (CP 124, emphasis in original) While the arbitrator reduced the value of husband's degree/earning capacity on reconsideration, she reiterated her intent to treat it as an asset, by asserting that she "FINDS there is a basis to

consider [husband]'s earning capacity and to assign a value…" (CP 166) The arbitrator "FINDS it is just and equitable to reconsider the value allocated to his medical degree and license in the May 30, 2022 Arbitration Decision and to lower the value to $472,000.00." (CP 166, emphasis in original)

Division One nevertheless reasoned that "assign[ing] a monetary value to the degree" was merely a "heuristic" used by the arbitrator "to equitably weigh property distribution to Harper by accounting for Stoner-Duncan's future earning potential." (Op. 16) Division One stated that the arbitration award's spreadsheet, which identified and valued husband's "professional degree" as an asset and placed it on husband's side of the ledger (CP 197), was merely "used to illustrate the arbitrator's thought process." (Op. 20)

The spreadsheet was more than the "arbitrator's thought process." The arbitrator described the spreadsheet

as identifying "all property, both community and separate," subject to "division between the parties" (CP 131) and the allocation therein as a "'just and equitable' distribution of all separate and community property and liabilities in this marriage dissolution proceeding" and directed the spreadsheet "be incorporated into the Decree and the Findings and Conclusions." (CP 193) In incorporating the spreadsheet, the Decree lists "Husband's professional degree and license" among the "personal property" awarded to husband (CP 300) and the Findings and Conclusions refers to the spreadsheet in identifying the parties' property and debts. (CP 281-82, 287-96) The spreadsheet thus reflected not "the arbitrator's thought process," but her actual intent to award husband's degree/earning capacity to him, which was then "used to offset" property awarded to wife, which *Hall* forbids. 103 Wn.2d at 248; *Rockwell,* 141 Wn. App. at 248, ¶23.

In *Marriage of Zahm*, 138 Wn.2d 213, 978 P.2d 498 (1999), for instance, this Court addressed social security benefits, which like earning capacity and professional degrees, is not an asset "subject to division in a marital property distribution case" 138 Wn.2d at 219, but a "factor" that can be considered when evaluating "the economic circumstances of the spouses" in making a just and equitable division of assets. 138 Wn.2d at 223. This Court in ***Zahm*** held the trial court erred in characterizing the social security benefits as community property but deemed the error harmless because the trial court did "not impermissibly calculate a specific formal valuation of petitioner's social security benefits and award respondent a precise property offset based on that valuation but, rather, merely considered those benefits when determining the parties' relative economic circumstances at dissolution." 138 Wn.2d at 222.

The arbitrator here committed the error of law that the trial court in *Zahm* avoided. The arbitrator did not merely consider husband's degree/earning capacity as a factor in making a just and equitable division of the marital estate; she "impermissibly calculate[d] a specific formal valuation" of his degree/earning capacity and then awarded wife "a precise property offset based on that valuation." *See Zahm,* 138 Wn.2d at 222. (*See* CP 197)

This Court should grant review and reaffirm that professional degrees and future earning capacity cannot be treated as assets in dividing a marital estate upon the parties' divorce.

2. Division One's holding that the asserted facial legal error in an arbitration award must render "the property distribution as a whole unjust and inequitable" before it should be vacated also conflicts with decisions from this Court and the Court of Appeals.

Division One's decision holding that the asserted error of law on the face of an arbitration award dividing a

marital estate "must be analyzed in light of whether it rendered the property distribution as a whole unjust and inequitable" before a court may vacate the arbitration award (Op. 20) conflicts with decisions from this Court and the Court of Appeals holding that facial legal error warrants vacating an arbitration award and forbids courts from considering the merits of the case, warranting review under RAP 13.4(b)(1) and (2). *See Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, ¶16, 236 P.3d 182 (2010); *Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998); *Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg*, 101 Wn. App. 119, 124, 4 P.3d 844 (2000), *rev. denied*, 142 Wn.2d 1025 (2001); *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 497, 32 P.3d 289 (2001); *Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990); *Agnew v. Lacey Co-Ply,* 33 Wn. App. 283, 287-88, 654 P.2d 712 (1982), *rev. denied*, 99 Wn.2d 1006 (1983).

"Facial legal error," regardless of the merits of the resulting decision, is grounds for vacating an arbitration award because it "constitutes an instance in which arbitrators 'exceed their powers,' thus permitting vacation of the award." *See Broom,* 169 Wn.2d at 237, ¶11 (citing *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995)). An arbitrator exceeds their powers if the "face" of the arbitration award shows the arbitrator's "adoption of an erroneous rule of law or mistake in applying the law . . ." *Boyd,* 127 Wn.2d at 263 (quoted source omitted).

The facial legal error standard for vacating arbitration awards is less restrictive than the standard applied, for instance, in California, where "arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision." *See Morrell v. Wedbush Morgan Sec. Inc.*, 143 Wn. App. 473, 483, ¶23, 178 P.3d 387 (2008) (noting that "Washington courts are not quite as restricted in evaluating arbitration awards").

In fact, this Court refused to "overturn years of precedent approving of facial legal error as a ground for overturning arbitral award" in *Broom* by rejecting petitioner's request for it to adopt a more restrictive standard for reviewing arbitration awards. *See* 169 Wn.2d at 238-39, ¶15.

This Court upheld the facial legal error standard in *Broom,* holding that when "judicial review is limited to the face of the award, the purposes of arbitration are furthered while obvious legal error is avoided." 169 Wn.2d at 239, ¶16. Accordingly, this Court affirmed the trial court's order vacating an arbitration award that dismissed respondents' claims against petitioner as time-barred because arbitrations are not "actions" for purposes of applying statutes of limitation. *Broom,* 169 Wn.2d at 244, ¶¶26, 27. Because the basis for the arbitrators' dismissal of respondents' claims was apparent on the "face" of the award, this Court held that the "arbitrators exceeded their powers by applying statutes of limitations inapplicable to

arbitral proceedings," which was a "valid ground" for the trial court to vacate the arbitration award. 169 Wn.2d at 245, ¶¶29, 30.

Likewise, there was a "valid ground" for vacating the arbitration award here because the arbitrator exceeded her powers by treating husband's degree/earning capacity as an asset in dividing the marital estate, in violation of *Hall*. Division One erred by disregarding this error based on its own determination that "the arbitrator's decision as a whole is just and equitable." (Op. 21)

While Division One stated it was "not determining whether we agree with the arbitrator's decision or would have arrived at the same decision" (Op. 20, fn. 6), that is exactly what it did. Notwithstanding the apparent errors on the face of the arbitration award, Division One upheld it because it agreed with the arbitrator's decision, which it described as "considered, thoughtful and thorough," considering "the parties' 20-year relationship, and the

opportunities Harper forwent to support" husband.[1] (Op. 20-21)

In doing so, Division One entered "forbidden territory for a court" reviewing an arbitration award by considering the "merits of the controversy" that was before the arbitrator. *Morrell,* 143 Wn. App. at 486, ¶29. If the purpose of the facial legal error standard is so "obvious legal error is avoided," a reviewing court should not confirm an arbitration award where a legal error is apparent on its face by looking "to the merits of the case" to decide that the arbitration award is still sound notwithstanding the legal error. *See Broom,* 169 Wn.2d at 239, ¶16. Instead, if there is an apparent legal error on the face of the award the reviewing court must vacate the arbitration award without regard to the merits of the decision. *See, e.g., Lindon,* 57 Wn. App. at 816 (reversing

[1] The parties did not in fact have a "20-year relationship;" the parties were married for 13 of the 17 years they resided together. (*See* CP 281)

order confirming arbitration award when arbitrator made an "error of law" in declining to enforce a contract modification for lack of consideration); *see also Norberg,* 101 Wn. App. at 127-28.

In *Norberg*, for instance, the Court considered an arbitration award that included a specific amount of damages for decedent's loss of probable future inheritance in a survival action. The Court affirmed the trial court's order vacating the arbitration award because a decedent's estate cannot recover damages in a survival action for decedent's loss of a prospective inheritance and by "making such an award, the arbitrators exceeded their powers." 101 Wn. App. at 127-28. The Court noted, however, that the arbitration award might have been confirmed had the arbitrators "submerged the lost inheritance issue by stating the damages as a lump sum award." 101 Wn. App. at 124. Instead, by itemizing the damages in two distinct categories - lost earnings and lost inheritance - the

arbitration award had "an issue of law apparent on the face of the award, making it a proper subject of a motion to vacate." 101 Wn. App. at 125.

Here, the arbitration award had "an issue of law apparent on the face of the award" - the arbitrator's erroneous treatment of husband's degree/earning capacity as an asset. (CP 123-24, 166, 197) Division One could not ignore that error by independently deciding that "the arbitrator's decision as a whole is just and equitable." (Op. 21) In doing so, Division One undermined the purpose of the facial legal error standard – to avoid obvious legal error. *See Broom,* 169 Wn.2d at 239, ¶16.

This is contrary to what the Court did in *Tolson,* where it sought to avoid an "obvious legal error" by reversing an order confirming an arbitration award when it could "be read in at least two ways" - one of which was "erroneous." 108 Wn. App. at 498. To avoid obvious legal

error, the Court remanded so the arbitrator could clarify its decision. 108 Wn. App. at 499.

Regardless, Division One could not ignore "any fault in the spreadsheet" in including husband's degree/earning capacity and excluding his obligation to pay wife $171,000 when husband was clearly prejudiced by the error. (*See* Op. 20) After a 13-year marriage, husband is left with only 19% of the marital estate, consisting largely of retirement assets that are not available to him without incurring a penalty, and a maintenance obligation of $390,000 that exceeds the amount awarded to him in property by more than one-third. This skewed award is wholly a result of errors of law that are apparent on the face of the arbitration award that cannot merely be chalked up as "reflective of the difference in Stoner-Duncan's future earning capacity as compared to Harper's," as held by Division One. (Op. 20)

In *Marriage of Muhammad*, 153 Wn.2d 795, 108 P.3d 779 (2005), for instance, this Court reversed a

property division that left wife with only 16% of the retirement accrued by the parties when the decision appeared to be based on the trial court considering marital misconduct by the wife. This Court held the "large disparity between the value of the parties' pensions" awarded to the parties "strongly indicate that the trial court went beyond simply looking to the parties' existing economic circumstances, but instead weighed" wife's alleged misconduct "against her." 153 Wn.2d at 804, ¶13. Because "consideration of marital misconduct is explicitly prohibited in RCW 26.09.080," this Court held the "highly questionable division of the parties' assets and liabilities" was "based on untenable grounds or untenable reasons," requiring reversal. 153 Wn.2d at 805-06, ¶¶14, 16; *see also* *Urbana v. Urbana*, 147 Wn. App. 1, 15, ¶30, 195 P.3d 959 (2008) (80/20 property division suggests trial court improperly considered marital misconduct in dividing the property).

Here, the hugely disparate property award and maintenance obligation suggests that it was based entirely on the errors made by the arbitrator that Division One ignored by considering the merits of the arbitrator's decision and deciding on its own whether it was "just and equitable." This Court should grant review to clarify that a court reviewing an arbitration award cannot ignore a facial legal error based on its own consideration of the merits of the arbitrator's decision.

F. Conclusion.

This Court should accept review to reaffirm that professional degrees and future earning capacity cannot be treated as assets in a marriage dissolution action and clarify that a court cannot ignore a legal error apparent on the face of the arbitration award based on the court's own consideration of the merits of the arbitrator's decision.

If review is denied this Court should exercise its discretion and deny respondent attorney fees for

answering this petition.[2] As reflected in the financial declarations filed in the Court of Appeals, in addition to being awarded four times the assets as petitioner, respondent now has greater monthly net income than petitioner, and petitioner does not have the ability to pay her attorney fees.

I certify that this petition is in 14-point Georgia font and contains 4,972 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 13th day of November, 2023.

SMITH GOODFRIEND, P.S.

By: */s/ Valerie A. Villacin*
Valerie A. Villacin
WSBA No. 34515
Attorneys for Petitioner

---

[2] An award of attorney fees to a respondent answering a petition for review is within this Court's discretion. RAP 18.1(j). An award of attorney fees under RCW 7.04A.250(3) is also discretionary. *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn. App.2d 594, 625-26, ¶8, 439 P.3d 662, *rev. denied*, 193 Wn.2d 1033 (2019).

DECLARATION OF SERVICE

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

That on November 13, 2023, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-File
Wolfgang R. Anderson Anderson, Fields, McIlwain & Eubanks Inc., P.S. 207 E Edgar St Seattle WA 98102-3108 anthony@a-f-m-law.com	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail
Sharon J. Blackford Sharon Blackford PLLC 600 Stewart St Ste 400 Seattle, WA 98101-1217 sharon@washingtonappellatelaw.com	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail

DATED at Seattle, Washington this 13th day of November, 2023.

/s/ Victoria K. Vigoren
Victoria K. Vigoren

FILED
8/21/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of: KRISTIN HARPER, Respondent, v. BENJAMIN STONER-DUNCAN, Appellant.	No. 84532-2-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Kristin Harper and Benjamin Stoner-Duncan have been together for nearly two decades and have two children. In 2010, when Stoner-Duncan was in medical school, the couple decided that Harper would forego her academic career to be the children's primary caretaker and the family's primary breadwinner until Stoner-Duncan finished his residency and began working as an emergency physician in Seattle in 2019. Harper petitioned for dissolution in 2021 and the parties agreed to resolve the matter by arbitration. The arbitrator awarded the parties' house and maintenance to Harper, along with a $171,000 judgment to offset Stoner-Duncan's remaining medical school loans, which had been rolled into the home's mortgage.

Stoner-Duncan, appealing the trial court's refusal to vacate or modify the arbitrator's decision, asserts that the arbitrator committed an error of law by assigning a value to Stoner-Duncan's medical degree when distributing property. He also asserts that they erred when awarding the house to Harper. And he

contends that they exceeded their powers in giving most of the couple's assets to Harper. We disagree and affirm.

FACTS

Kristin Harper and Benjamin Stoner-Duncan[1] met in 2000, began cohabitating in 2003 and married in 2008. They have two children: a son, born in 2004, and a daughter, born in 2010. Over the course of their relationship, both parties pursued and received advanced degrees. Harper received a Master of Public Health in global epidemiology and a Ph.D. in genetics and microbiology from Emory University in 2008 and worked at Columbia University as a post doctoral (postdoc) scholar. Stoner-Duncan entered Columbia Medical School in 2010 and began his residency in 2014.

Harper's education was paid for by fellowships from the National Science Foundation and the Howard Hughes Medical Institute, which included stipends the couple used to support themselves. During this period—which was before Stoner-Duncan began medical school—Stoner-Duncan worked a variety of jobs, including as a lab technician, a busboy, an artist, a bartender, a stagehand, and running his own business, Ben's Bikes. When the couple moved to New York so that Harper could pursue her postdoc research, Stoner-Duncan sold his business and began to contemplate medical school. Because he needed additional

[1] Briefing on appeal and the record below both refer to the parties by their first names, as is customary in family law matters because individuals often share family names. Because Harper and Stoner-Duncan do not share a name, however, we will not follow suit.

pre-med requirements before applying, Stoner-Duncan attended Columbia for a year, with tuition paid by his grandfather.

The couple's daughter was born around the time Stoner-Duncan was accepted to Columbia Medical School. The next year, their son was diagnosed with Asperger's syndrome and began attending therapy five times a week. Faced with suddenly increased family demands, the couple concluded that one of them would have to give up their career prospects to become a primary caregiver, at least for a time. Because of Stoner-Duncan's considerably higher potential earnings—Harper estimated her income as a professor would at most reach $260,000—they decided that Harper would stop pursuing an academic career.

In 2013, knowing that their residence would be determined by the location of Stoner-Duncan's medical residency and reluctant to commit to any specific employer, Harper began a freelance writing business, Harper Health and Science Communication. The couple moved to Seattle for Stoner-Duncan's residency at the University of Washington. They purchased a house for $535,000 using a $230,000 gift from Stoner-Duncan's mother as a down payment.

The residency period put significant strain on their relationship, with Stoner-Duncan working 80-100 hours a week. During the residency, Stoner-Duncan made roughly $55,000 annually and Kristin worked 20 hours a week at her business.

Stoner-Duncan completed his residency in 2018 and is now an emergency room doctor at Northwest Hospital in Seattle. As of the arbitration of this case,

his gross monthly income was $27,703. Harper's was $10,025. Her work has been featured in a number of publications, including the New York Times, BBC, and Howard Hughes Medical Institute, and her clients have included the Bill and Melinda Gates Foundation, Medscape, the World Health Organization, and the National Institute of Health. In 2020, the couple refinanced their house to roll Stoner-Duncan's remaining $171,000 student loans into their mortgage.

Harper petitioned for dissolution of the marriage in March 2021. The parties stipulated to proceed by arbitration rather than in superior court. The arbitrator issued their decision in May 2022. They issued parenting plan and child support orders that are not at issue in this appeal. They also ordered maintenance payments from Stoner-Duncan to Harper at $5,000 per month for 78 months. The arbitrator based this award on the 10 years of support Harper provided to Stoner-Duncan as he pursued his current position as an emergency room doctor, as well as her sacrifice of her own academic career and earning potential. Taking into account Stoner-Duncan's future earning potential, the arbitrator awarded Harper the house and ordered Stoner-Duncan to pay a judgment to Harper of $171,000 to compensate for the medical school loans that are now part of the mortgage. In a somewhat unusual move, when determining the distribution of the parties' property, the arbitrator valued Stoner-Duncan's medical degree and license at roughly half a million dollars and used this value in determining the appropriate distribution of assets.

Much of the equitable reasoning behind the arbitrator's decision appears to be reflected by this table, which lays out the parties' respective contributions to their marital community:

YEAR	[Harper]	[Harper]	[Stoner-Duncan]	Stoner-Duncan]
2002	$0	Undergrad	$1,312	
2003	$0	Undergrad	$102	
2004	$26k-30k	Grad School	$5,824	
2005	$26k-30k	Grad School	$5,241	
2006	$26k-30k	Grad School	$11,763	
2007	$26k-30k	Grad School	$5,432	
2008	$23,878	Grad School	$0	
2009	$77,616	Post Doc	$17,013	
2010	$66,112	Post Doc	$22,704	Med Sch
2011	$37,985		$0	Med Sch
2012	$44,356		$0	Med Sch
2013	$29,385		$0	Med Sch
2014	$11,914		$24,598	Residency
2015	$96,555		$51,301	Residency
2016	$97,482		$55,072	Residency
2017	$93,800		$60,329	Residency
2018	$94,800		$77,543	Indep K'tr
2019	$97,600		$237,079	
2020	$116,000		$311,558	[2]

In short, Harper served as the couple's primary source of income throughout their relationship, including when she was in school. The marriage ended only shortly after the community began to realize the financial benefits of Stoner-Duncan's degree.

Harper moved for reconsideration, which the arbitrator denied as to most of the issues raised, though they did grant Stoner-Duncan some partial relief, including reducing the valuation of his medical degree from $542,400 to

[2] Minor edits have been made to this table to alter formatting and remove citations to exhibits reviewed by the arbitrator when assembling it.

$470,000. Stoner-Duncan moved the superior court to modify, correct, or vacate the arbitration. This request was denied, and the court awarded fees to Harper.

Stoner-Duncan appeals.

ANALYSIS

Standard of Review

Appellate review of property divisions and other orders coming out of the arbitrated dissolution of a marriage is strictly limited by the courts' interests in carving out a space for finality in arbitration. Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). Arbitration is governed by the Washington uniform arbitration act, chapter 7.04A RCW. Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 236, 236 P.3d 182 (2010).

RCW 7.04A.240 and RCW 7.04A.230 lay out, respectively, the scope of a trial court's ability to modify and vacate arbitration awards, and therefore the scope of appellate review of the trial court's orders. As relevant here, modification is required where "[t]here was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award." RCW 7.04A.240(1)(a). Vacation is required where, among other possibilities, there was evident partiality on the part of the arbitrator, misconduct by the arbitrator that prejudiced the rights of a party, or the "arbitrator exceeded the arbitrator's powers." RCW 7.04.230(1)(b)(i), (1)(b)(iii), (1)(d).

An error of law on the face of the award demonstrates that an arbitrator has exceeded their powers under RCW 7.04A.230(1)(d). Broom, 169 Wn.2d

at 237. Such error may be shown either through "adoption of an erroneous rule or mistake in applying the law." Lindon Commodities, Inc. v. Bambino Bean Co., Inc., 57 Wn. App. 813, 816, 790 P.2d 228 (1990). But the evidence before the arbitrator will not be considered. Lindon Commodities, 57 Wn. App. at 816. "Judicial review of an arbitration award, therefore, does not include a review of the merits of the case." Davidson, 135 Wn.2d at 119.

The $230,000 Gift

We first address Stoner-Duncan's contention that the arbitrator committed an error of law in the characterization of the $230,000 gift that his mother made while the couple was purchasing their house. He asserts that the arbitrator erred by treating the gift as community rather than separate property, and therefore committed a downstream error by awarding the couple's house to Harper. The arbitrator's characterizations are supported by their factual findings. And the arbitrator's ultimate distribution of the house is not dependent on the characterization of either the house or the gift as separate or community property, but rather on their determination as to the equitable distribution of the communities' assets and liabilities given all the circumstances. We correspondingly reject this argument.

Washington is a community property state. Chapter 26.16 RCW. Property acquired by either spouse during a marriage is typically owned and managed by both partners equally. RCW 26.16.030. Property acquired before the marriage is and remains separate, as is any property acquired after the marriage but gained by "gift, bequest, devise, descent, or inheritance."

RCW 26.16.010. Notably, RCW 26.09.080 permits property's distribution at the end of a marriage regardless of whether it is separate or community, though it does direct the trial court to consider the nature of the property when distributing assets.

A gift of property acquired during a marriage is presumed to be community property. In re Smith's Estate, 73 Wn.2d 629, 631, 440 P.2d 179 (1968). This presumption can be rebutted by clear and convincing evidence of intent by the donor to make the gift to one spouse specifically, rather than to the community. Matter of Marriage of Olivares, 69 Wn. App. 324, 331, 848 P.2d 1281 (1993).

A trial court's characterization of property as either community or separate is a mixed question of law and fact. Matter of Marriage of Watanabe, 199 Wn.2d 342, 348-49, 506 P.3d 630 (2022). Factual findings—reviewable when made by a trial court, but not typically when made by an arbitrator—are reviewed for substantial evidence. Watanabe, 199 Wn.2d at 348-49. Where factual findings are not challenged or are supported—as here—our review is limited to whether those findings support the characterization of property as a matter of law, and review is de novo. Watanabe, 199 Wn.2d at 348-49.

In this case, Stoner-Duncan's mother gifted $230,000 toward the down payment used to purchase the couple's house. The gift letter itself named only Stoner-Duncan as a recipient. Stoner-Duncan relied on this fact to argue that the gift was meant for him along, increasing his stake in the house itself. The arbitrator disagreed. The gift was made as a part of the process of securing a mortgage and title to the house, title was in both Stoner-Duncan and Harper's

names, and the gift letter itself was required by the lender as a condition of the mortgage. Harper testified that Stoner-Duncan's mother represented the gift as meant for both of them. And Harper used some of her separate property to purchase the house and mortgage payments were made from community funds. The arbitrator therefore found that Stoner-Duncan had not demonstrated that the gift was intended for him as separate property, regardless of its nominal assignment to him alone. Additionally, when refinancing the mortgage, title remained in both the parties' names. The arbitrator found as a result that no evidence supported the notion that the house itself was intended to be anything other than community property.

As findings of fact going to intent, and with intent determinative of the legal character of property, this panel is not in a position to decide that either the house or the gift of $230,000 are anything other than community property. This is because our review is limited to errors of law or mathematical miscalculations, and Stoner-Duncan's challenge goes instead to the merits of the arbitrator's decision. We see no error of law or mathematical miscalculation here.

Additionally, though RCW 26.09.080 requires consideration of the separate or communal nature of property before it is divided, property of either nature may be distributed to either spouse if it is just and equitable to do so. Regardless of the nature of the property, then, the arbitrator did not error.

Division of Property and Maintenance Award

We now address Stoner-Duncan's challenges to a number of the arbitrator's decisions in deciding how to divide the couple's property and whether

to award maintenance. He raises two primary concerns in this context. He asserts, first, that the arbitrator erred in assigning a value to his professional degree. He then asserts that the arbitrator did not properly account for the $171,000 judgment against him. He characterizes these as errors of law or evident mathematical miscalculations that led to an inequitable distribution of property and an inequitable maintenance award.

We disagree. The arbitrator's division of property and award of maintenance both took into account a range of equitable factors. Their treatment of Stoner-Duncan's professional degree assigned it a monetary value as an aid to provide understanding of their thought process about the property division. More broadly, the distribution of assets and liabilities and award of maintenance do not constitute an error of law. Despite Stoner-Duncan's attempt to paint the arbitrator's responsibility as *equally* distributing assets, their duty was instead to create an *equitable* distribution.

1. Principles of Property Division and Maintenance

A brief overview of the dissolution process's treatment of property distribution and maintenance is useful. Asset distribution at the end of a marriage is guided by RCW 26.09.080, which, although statutory, retains many of the equitable characteristics that courts have traditionally applied. The statute directs the dividing tribunal to, "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 the relevant factors." RCW 26.09.080. It lists four non-exclusive factors to consider:

> (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.

RCW 26.09.080.

A tribunal's powers when seeking to place the parties on just and equitable footing are not limited to distribution of property held by the parties at the time of their dissolution. Tribunals may also award maintenance, ongoing monetary support from one former spouse to another. RCW 26.09.090(1). Maintenance is awarded "in such amounts and for such periods of time as the court deems just" and, like property distribution, is made without consideration of misconduct. RCW 26.09.090(1). The statute again lists a number of non-exclusive factors for the tribunal to consider when awarding maintenance:

> (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.

RCW 26.09.090(1).

The tribunal's powers are plainly broad. And both maintenance and property distribution are guided principally by concerns about equity and justice in light of the parties' circumstances. Fundamentally, "[a]n equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties." Matter of Marriage of Crosetto, 82 Wn. App. 545, 556, 918 P.2d 954 (1996).

Of particular concern to Stoner-Duncan is the arbitrator's treatment of his professional degree, to which they assigned a monetary value of roughly half a million dollars when dividing property, and then considered when awarding Harper a maintenance award.

Washington's treatment of professional degrees in cases like the present one is best described in the seminal decision on the subject, Washburn v. Washburn:

> When a person supports a spouse through professional school in the mutual expectation of future financial benefit to the community, but the marriage ends before that benefit can be realized, that circumstance is a "relevant factor" which must be considered in making a fair and equitable division of property and liabilities pursuant to RCW 26.09.080, or a just award of maintenance pursuant to RCW 26.09.090. A professional degree confers high earning potential upon the holder. The student spouse should not walk away with this valuable advantage without compensating the person who helped him or her obtain it.

101 Wn.2d 168, 178, 677 P.2d 152 (1984). The tribunal "may compensate a

spouse who has assisted the student spouse in obtaining his or her professional degree . . . through property division, maintenance, *or a combination of these*." Fernau v. Fernau, 39 Wn. App. 695, 707, 694 P.2d 1092 (1984) (emphasis added).

Washburn lists a number of factors for tribunals to consider while distributing assets and awarding maintenance based on one spouse's support for the other during professional school: (1) the amount of community funds expended for educational costs, though not living expenses that would have been incurred regardless; (2) the amount the community would have earned had the student spouse not been pursuing professional school; (3) any education or career opportunities foregone by the supporting spouse; (4) the future earnings of each spouse. 101 Wn.2d at 179-80. These first two standards consider the past conditions of the marriage, while the third and fourth allow adjustment of any corresponding award to account for future circumstances as well. Washburn, 101 Wn.2d at 180-81. Where maintenance is concerned, Washburn emphasizes that it "is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." 101 Wn.2d at 179.

2. The Arbitrator's Awards

The arbitrator in this case considered Stoner-Duncan's professional degree and license both in distributing assets and in awarding maintenance, as Washburn allows. The basic distribution of the assets was simple and, in the arbitrator's calculation, reflected an equitable split between the Stoner-Duncan

and Harper accounting for Stoner-Duncan's degree. Harper was awarded the couple's Ballard house, valued at $970,000 but encumbered by a $389,043 mortgage, leaving an actual value of $580,957. She also received her business, Harper Health and Science Communications, LLC, valued at $41,000, $31,126 of the couple's bank accounts, $24,786 of their investment accounts, and $221,352 of their retirement accounts. These assets total $899,221.

Stoner-Duncan, meanwhile, received $59,993 of the bank accounts, $63,223 of their investment accounts, and $284,658 of their retirement accounts.[3] He also retained his share of ownership of an island in Canada, valued at $14,500. And the arbitrator gave a value of $472,000 to his medical degree and license to determine how they arrived at an equitable split of the parties' assets and liabilities. In making this determination the arbitrator considered two components: (1) the money spent in obtaining the degree, and (2) the lifetime earnings that would not be realized by the community.[4] This provided an illustrative value of $894,374 to Stoner-Duncan's assets. The couple's personal property was divided more or less evenly.

Stoner-Duncan was also ordered to pay a judgment of $171,000 to Harper. This accounted for his outstanding medical education debt, which the

---

[3] As Stoner-Duncan points out, the arbitrator's property division sheet contains a scrivener's error. It awards Stoner-Duncan a Fidelity account valued at $52,564.08 as well as a Vanguard 401k valued at $57,525.69, but erroneously counts both accounts as worth $52.564 in the column totaling the valuation of his assets. The correct total is $284,658.

[4] The arbitrator initially valued the degree at $542,500, 10 percent of an expert witness's valuation of his future earnings. On reconsideration, it lowered this amount slightly to the $472,000 figure.

couple had rolled into their mortgage several years earlier and which, as a result, Harper would otherwise have been responsible for paying off.

In addition to the property division, the arbitrator awarded Harper maintenance of $5,000 a month for 78 months—a total of $390,000. The arbitrator found that Harper "set aside her career and her professional and financial advancement to support through . . . 4 years of medical school, through 4 years of his residency, through a lap year, and while he established his current position as an ER doctor." The arbitrator viewed maintenance as "a reasonable and appropriate way to compensate her for the income she has foregone and the financial gain Stoner-Duncan will enjoy."

The arbitrator's decision may also have been informed by testimony that Harper is going blind. Harper asserted that she is losing her eyesight and might become blind because of a hereditary disease. Stoner-Duncan presented Harper's condition as less severe, limited to "droopy eyelids and dry eyes," and not one that would significantly affect her ability to work or live. The arbitrator did not make a finding on this factual dispute, but did state in passing that Harper "is slowly going blind, which [Stoner-Duncan] verified."

Much of the dispute in this case arise out of the arbitrator's use of a property division spreadsheet. Stoner-Duncan's degree was included on the spreadsheet as an asset he possessed, valued at $472,000. The $171,000 judgment against him however, was excluded from the spreadsheet. The result is that the spreadsheet creates the appearance of an equal property distribution, with each spouse awarded roughly half of their total shared assets.

3. Valuation of the Degree

Stoner-Duncan contends, first, that the arbitrator's decision to assign a monetary value to his degree and include it in the property division spreadsheet was error, saying that "a spouse's earning capacity or future earning potential, like a professional degree, is not an asset that can be valued and used to offset an award of other assets." We conclude that the arbitrator acted within their powers when considering Stoner-Duncan's degree.

Washburn is clear that a professional degree or license may be a "relevant factor" in distributing property. 101 Wn.2d at 178. In this case, the heuristic used by the tribunal was to assign a monetary value to the degree to equitably weigh property distribution to Harper by accounting for Stoner-Duncan's future earning potential. That value was then included in the property division spreadsheet as an asset on Stoner-Duncan's side of the ledger. This is unusual, and does not conform to the usual practices when making a property division spreadsheet. These spreadsheets typically tally assets and liabilities understood as financial items that are fungible, transferable, and either monetary or easily reducible to a monetary value. Professional degrees and licenses are not typically included as assets on these spreadsheets. By including the degree's value on the spreadsheet, the arbitrator included an atypical asset to demonstrate the financial parity they determined in the asset distribution.

Though the arbitrator's approach was unusual, their property distribution, understood holistically, nevertheless did not exceed their statutory powers. Instead, by assigning Stoner-Duncan's degree a monetary value, they quantified

how a just and equitable distribution was accomplished without an entirely *equal* distribution. An entirely equal distribution would have ignored the resulting inequity caused by Stoner-Duncan's professional prospects and earning potential in comparison to Harper's.

Stoner-Duncan cites to case law when attempting to rebuff this, but these citations are unhelpful to him. Washburn, it is true, declined "to address at this time the somewhat metaphysical question of whether a professional degree is 'property.' " 101 Wn.2d at 176. It is "property" in its more usual sense that is included on property division spreadsheets, a practice that accords with the tribunal's statutory mandate to distribute separate and community *property* held by the spouses. See RCW 26.09.080 (requiring "disposition of the property and liabilities of the parties"). But as already discussed, Washburn went on to allow consideration of a degree in property distribution, leaving it to the tribunal to determine the method to do so. And In re Marriage of Hall, which Stoner-Duncan also cites, explicitly says that "we have emphasized future earning capacity as a factor to be considered in property distribution in the context of professional degrees." 103 Wn.2d 236, 247, 692 P.2d 175 (1984). We conclude that Stoner-Duncan's critique of the way in which the arbitrator used his degree to demonstrate a just and equitable property distribution does not, on its own, establish that the arbitrator exceeded their authority.

4. The Distribution and Maintenance Were Not Inequitable

Stoner-Duncan next contends that the arbitrator erred by considering his degree in three places: distribution of property, the award of maintenance, and

the separate $171,000 judgment. He asserts that this counts his degree against him three times; a mathematical error and an error of law. He points out that the division of assets, when his professional degree is removed from consideration and the judgment is accounted for, awards Harper roughly 80 percent of the couple's existing assets. He treats this as a distribution so lopsided that it constitutes an error of law. We disagree.

Washburn and its progeny cases are clear that a professional degree may be considered not only when distributing property but simultaneously elsewhere. The question is whether the final distribution and maintenance are, examined as a whole, equitable.[5] There is good reason for this. A dissolution may come at a time when all the costs of a degree have already been borne by a community, but the benefits of that degree have not yet accrued or are only beginning to accrue. Where this happens, one party may reap the benefits of the other's sacrifices, while the other spouse is left having permanently forgone opportunities. Asset distribution alone can, as a result, be insufficient to address the inequities caused by the community's dissolution, because the community will not have had the time to accumulate sufficient assets to address the inequity. In these circumstances, distribution of assets may be weighted toward non-

[5] Stoner-Duncan also asserts that there is an internal conflict in the arbitrator's decision by saying that this unequal distribution conflicted with their stated intent. But the pages of the arbitrator's decisions to which he cites do not support the inference he encourages us to make that the arbitrator sought to *equally* distribute the community's assets. Instead, those portions of the arbitrator's decisions repeatedly reference the creation of "just and equitable" distribution and affirm the arbitrator's belief that the distribution in this case matches that standard.

professional spouse, but that spouse may *also* receive maintenance and other benefits to account for the sacrifices they made in support of the spouse whose earning capacity is now higher.

That is precisely the situation here. The arbitrator's unchallenged (and unchallengeable) findings of fact demonstrate that Harper, for over a decade, supported Stoner-Duncan as he applied to medical school, attended medical school, went through residency, and established his career. She did so at a cost to her own career, and with the assumption that she and their family as a whole would be able to benefit from his higher earning capacity. This dissolution came only shortly after the community began to see the benefits of Stoner-Duncan's degree. And the degree's value was not doubly or triply counted, since the arbitrator's valuation of the degree during asset distribution only considered less than 10 percent of its total value as measured in future earnings. Similarly, the arbitrator's award of a separate $171,000 judgment was also not error. This award reflected Stoner-Duncan's remaining medical school debt, now incorporated into the mortgage for which Harper is responsible. Distributing that debt to Stoner-Duncan is does not mean that the arbitrator counted his degree against him more than once.

Stoner-Duncan also attacks the arbitrator's treatment of the $171,000 judgment by saying that they should have placed it on the property distribution spreadsheet. It's absence from that document, he asserts, makes it appear that the distribution of property was wholly equal while ignoring a significant liability on his side. Certainly, including the $171,000 judgment on the spreadsheet

would allow for a more complete view of the parties assets and liabilities at the end of the dissolution process. But the spreadsheet is only one part of the arbitrator's final order, and the treatment of the $171,000 medical school debt and the reasoning behind the distribution and maintenance decisions is thoroughly explained elsewhere in their decision. Our concern is whether the arbitrator committed an error of law and exceeded their statutory authority. Once again, the asserted error must be analyzed in light of whether it rendered the property distribution as a whole unjust and inequitable. Where, as here, the spreadsheet was used to illustrate the arbitrator's thought process as a supplement to the nearly 100 other pages of analysis and background they had provided, this exclusion is not an error of law.[6]

The arbitrator's decision fully and completely addressed the couple's assets and liabilities. It is considered, thoughtful, and thorough. As a result of this, any fault in the spreadsheet, despite the spreadsheet's lack of total fidelity to the reasoning behind the arbitrator's decision, is not fatal to the decision as a whole. Nor is the arbitrator's treatment of Stoner-Duncan's degree erroneous. The value the arbitrator assigned to it at various places in the decision—$472,000 during asset distribution, the maintenance award of $390,000, and $171,000 payment of his medical debt—is reflective of the difference in Stoner-Duncan's future earning capacity as compared to Harper's. Considering the

[6] We emphasize that our review is not de novo. We are not determining whether we agree with the arbitrator's decision or would have arrived at the same decision. Our review is very narrow: whether the arbitrator committed an error of law or a mathematical miscalculation.

parties' 20-year relationship, and the opportunities Harper forwent to support him, the arbitrator's decision as a whole is just and equitable. We find neither mathematical error nor an error of law.

Attorney Fees Below

Stoner-Duncan contests the trial court's award of fees to Harper.

RCW 7.04A.250 permits the award of fees and costs to the prevailing party on motions to confirm, vacate, modify, or correct an arbitration award. The trial court below, rejecting Stoner-Duncan's challenge to the arbitrator's decision, awarded Harper attorney fees as the prevailing party.

Stoner-Duncan now asks this court to reverse that award. His request, however, is premised on us agreeing with his arguments that the arbitrator exceeded their powers. Since we do not, we affirm the fee award.

Attorney Fees on Appeal

Both sides request fees on appeal. We may rely on applicable law to grant party's reasonable attorney fees and costs on review. RAP 18.1(a). We may therefore award fees to the party who prevails on appeal under RCW 7.04A.250. We award fees to Harper.

Stoner-Duncan contends that Harper did not adequately brief this issue, nitpicking her citations to authority and mischaracterizing her request. He latches onto her use of the word "frivolous" and her assertion that his arguments on appeal are not "meritorious" to characterize her request for fees as one made because his arguments were frivolous. He then argues that she did not cite to relevant authority to make this request. See Faulkner v. Racquetwood Vill.

Condo. Ass'n, 106 Wn. App. 483, 487, 23 P.3d 1135 (2001) (failure to cite applicable law supporting grant of attorney fees supported denial).

But Harper's request for fees comes directly after her discussion of RCW 7.04A.250, which supports her request as the prevailing party. Her citation to the appellate rules is, admittedly, to RAP 18.*2*(c), rather than to RAP 18.*1*. But this is a clear scrivener's error; RAP 18.2, concerning voluntary withdrawal of review, has no subparts, and RAP 18.1(c) concerns affidavits of need submitted to support fee awards. We reject Stoner-Duncan's attempt to read all meaning out of Harper's request and award her fees.[7]

We affirm.

Smith, C.J.

WE CONCUR:

Díaz, J.

Mann, J.

[7] Both parties have filed affidavits of financial need and argue about whether this is necessary and appropriate at this step. We disregard these affidavits. Where financial need is relevant to an attorney fee award, affidavits can be considered. RAP 18.1(c). Here, because an award is to the prevailing party, they are superfluous.

FILED
10/12/2023
Court of Appeals
Division I
State of Washington

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

In the Matter of the Marriage of: KRISTIN HARPER, Respondent, v. BENJAMIN STONER-DUNCAN, Appellant.	No. 84532-2-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Benjamin Stoner-Duncan moved for reconsideration of the opinion filed on August 21, 2023. Respondent Kristen Harper has filed an answer. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Smith, C.J.
Judge

SMITH GOODFRIEND, PS

November 13, 2023 - 12:41 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84532-2
Appellate Court Case Title:	In re the Marriage of: Kristin N. Harper, Res. and Benjamin Stoner-Duncan, App.

The following documents have been uploaded:

- 845322_Petition_for_Review_20231113124114D1593874_5783.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 2023 11 13 Petiton for Review.pdf

A copy of the uploaded files will be sent to:

- anthony@a-f-m-law.com
- cate@washingtonappeals.com
- sharon@washingtonappellatelaw.com
- sharonblackford@gmail.com

Comments:

Sender Name: Victoria Vigoren - Email: victoria@washingtonappeals.com
Filing on Behalf of: Valerie A Villacin - Email: valerie@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20231113124114D1593874