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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

IN RE:

**JUDITH TULLENERS
Appellant**

V.

**ANDRE TULLENERS
Respondent**

NO. 356418-III

APPELLANT'S BRIEF

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WSBA #22978

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ASSIGNMENTS OF ERROR

- I. The trial court erred by manifestly abusing the discretion afforded to it in making a just and equitable property division in that there are no facts which would warrant a grossly disproportionate division of community property.
- II. The trial court erred by finding that the Petitioner's separate property portion of her pension was unvalued and the court's apparent expectation of a present value calculation is also in error.
- III. The trial court erred by factoring in hypothetical separate property values for the husband's pre-marital pension when the values were completely unknown, where nothing was traced by him, and where the court found these interests to be community under the commingling doctrine.
- IV. The trial court erred in its finding that the award of property and liabilities was fair and equitable.

STATEMENT OF THE CASE

The parties married on November 29, 1997. RP 20, line 20. The parties separated as of the dissolution filing date, May 5, 2016. RP 22, line 12. CP 1-5. This is a marriage of 18 ½ years in duration. At the time of trial, the husband was 72 years old and the wife was 71 years old, with both parties being retired. RP 23, RP 38. It was a second marriage for both parties. RP 21-22.

The husband and wife earned similar incomes during the marriage. The wife maxed out at approximately \$60,000.00 per year in her job as a teacher. RP 37, line 13. Over the course of re-employment following cancer treatment she earned \$25,000.00 per year, half-time, based on a \$50,000.00 per year annual salary. RP 168, line 21. The husband's best estimate of his highest income was "60-plus" (referring to \$60,000.00 per year). RP 39, line 15. The husband agreed that their incomes were historically similar. RP 39, line 20.

During the marriage, the wife developed breast cancer and took leave from her job as a teacher to seek treatment and recover. RP 36; RP 166; Her treatment required a double mastectomy, radiation and chemotherapy and she was very sick. RP 37, lines 16 to RP 38 line 1; .RP 166, line 25. Even when she returned to work, she could work only

part-time. RP 167, lines 9-16. The wife was also suffering from significant retinal deterioration. RP 6, line 19 through RP7, line 6; RP 38 line 7. She had 5 eye surgeries before being forced to retire from her job as a teacher. RP 167, line 18. Her retina detached and she had multiple cataract surgeries. RP 168, line 5. This retinal deterioration forced her to retire early from her work as a teacher. RP 38, line 7. RP 167, line 18; RP 168.

After her breast cancer treatment, her medical condition allowed the wife to return to half-time work only. RP 167-168. In approximately 2005, the wife retired from her work as a teacher as her retinal deterioration did not allow her to continue employment. She was forced to retire early. RP 168; RP 186. The husband did not testify to any significant medical concerns at the time of trial. (Post-trial/post-decree medical issues were further raised by the wife but they are not addressed herein as they were not considered by the trial court.)

The wife's income is \$1,100.00 per month from social security. RP 175, line 1; P43. She receives about \$250.00 per month in rental income. RP 174, line 18. Her state retirement pays \$900.00 per month. RP 174, line 23. She also takes a \$500.00 monthly draw from her retirement accounts. RP 178, line 19. See also Exhibits P36, P43, P44. The income is also re-summarized at page 2 of P44. She was receiving \$2,250.00 per month gross income at the time of trial.

The husband's social security income is \$1,697.00 per month. Exhibit R101, P42. He receives \$7,500.00 per year from Fidelity pension

#1, \$18,900.00 per year from Fidelity pension #2, and \$15,000.00 per year from his Metlife pension for an average gross monthly income of \$3,450.00.00. All of these calculations are contained in Respondent's Exhibit R102. Please note that page 1 of this exhibit is duplicative of page 4 (showing same figure for Fidelity pension #2). He was receiving \$5,147.00 per month in income at the time of trial. This is in the light most favorable to the husband as he submitted 2015 data for the 2017 trial. Exhibit R102. The wife provided current documentation. Exhibits P36, P43, P44.

The wife's mother passed away in 2003. RP 32; RP 156-RP 165. While the probate was delayed by the first estate attorney's significant health issues (RP 157-158), the wife ultimately received a ½ interest (with her brother) in real property on Idaho Rd. as well as approximately \$102,000.00 in investment funds. Upon receipt, the wife immediately invested her inheritance funds in a Reliastar/Voya investment, never adding to it and only taking some periodic draws during retirement. RP 156-RP 165. The wife provided an appropriate tracing of her claimed separate property interests at trial per the trial court's findings. CP 86-91, page 3-4.

The husband had some pre-marriage retirement interests, of which no value was ever provided at trial by documentary evidence and the husband could not even testify as to values. RP 88, lines 13-23. The wife testified that his retirement stocks primarily consisted of tech-type stock, and that the husband lost most of his retirement post-marriage during the

tech-bubble collapse. She testified that the husband reported to wife that he had lost all but \$40,000.00 of his investments. RP 197 lines 20 through RP 199. She testified that her husband was very upset and that she tried to console him. RP 199. She testified that she and her husband developed a plan to “build that account back up where he would continue to put the max amount that he was allowed to put into his 401k.” RP 199, lines 6-12. The husband, in fact, began to max his retirement accounts. RP 199, line 16.

The husband denied that this tech loss had occurred. RP 41-42. In the wife’s testimony she indicated that since she was working and earning a living that could support the household, the husband desired to place all of his discretionary community income in his retirement investments in order to rebuild his lost retirement. RP 200, lines 11-25. She testified that based on these substantial investments of discretionary income, the husband’s investment accounts increased substantially. RP 200 line 22 to RP201, line 21.

However, while the husband disputes these facts, he does not dispute that he was making extra contributions to his investment accounts during marriage. To the contrary, he directly testified to making these additional contributions. RP 41, line 16; RP 42, lines 6-15. He admitted to a “max contribution” to his Williams Investment Account (which later became the seed money for the various investments that were created and transferred over the years). RP 89, lines 12-24; RP 90, line 1.

The husband failed to answer his interrogatories for ten months. A motion to compel was litigated before Judge Clarke, with the court indicating that any documents not provided could not be utilized at trial. CP 15-20; CP 21-22; CP 23-30; CP 31. In response to Judge Clarke's order/sanctions the husband did answer interrogatories and provided some requests for production. The husband's answers and production utterly fails to provide any tracing of claimed separate property. RP 90 lines 315. RP 134 line 6 through RP 147 line 25. As the trial court correctly found, the husband failed to provide an appropriate tracing of claimed separate property at trial. CP 86-91. Not only was there no tracing, the trial court noted that there was "no evidence introduced" and "no documentation" of contributions made. CP 86-91 at pages 2-3. While there were both some form of community and separate property present in these accounts, "as they were disbursed out, there is no evidence of what funds went where". CP 86-91 at page 3. The trial court found that the accounts were commingled and thus community. CP 86-91 at page 3.

The trial court issued a written memorandum decision following trial on September 6, 2017. CP 86-91. Attached to its findings is an exhibit evidencing the values of all accounts as found by the trial court. There was a typo in this attached exhibit where the value of Mr. Tulleners Fidelity Retirement account was valued at \$409.00 rather than \$409,000.00. This was clarified at presentment to be \$409,000.00. RP 286-287.

Mr. Tulleners was accordingly awarded \$718,172.00 of community

property, \$20,000.00 of separate property, and 50% of the community portion of the wife's TRS III teacher's retirement pension. RP 287, CP 86-91; CP 101-107. Ms. Tulleners was awarded \$301,741.51 of community property with \$251,730.00 of separate property. RP 287, CP 86-91, CP 101-107. She was also awarded her 50% community share of her TRS III teacher's retirement pension as well as the separate property (pre-marital) portion of the same retirement. These calculations were net values (factored in debt). RP 287, line 22.

The wife assumed that this disparity had to result from the retirement "\$409.00" typo and thus filed a motion to clarify. CP 94-96. This was addressed with the court at presentment and in the decree. RP 285-295; CP 101-107. The Court chose to adopt the findings of fact and decree of dissolution presented by the Respondent. RP 285-295. The findings of fact and decree of dissolution were entered on September 28, 2017. CP 97-100, CP 101-107. This appeal was then filed on October 16, 2017. CP 108-120.

ARGUMENT

I. THE TRIAL COURT ERRED BY MANIFESTLY ABUSING THE DISCRETION AFFORDED TO IT IN MAKING A JUST AND EQUITABLE PROPERTY DIVISION IN THAT THERE ARE NO FACTS WHICH WOULD WARRANT A GROSSLY DISPROPORTIONATE DIVISION OF COMMUNITY PROPERTY IN FAVOR OF THE HUSBAND.

RCW 26.09.080 controls the disposition of property in a marital dissolution action and provides:

In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital 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; and,
- (4) The economic circumstances of each spouse 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 with whom the children reside the majority of the time.

Other factors that are generally considered in making a just and equitable division of property are: the party through whom the property was acquired; the age of the parties; health, physical condition, education, employment history, training and business or occupation experience, and future earning prospects; and the nature and value of the parties respective contributions to property. Friedlander v. Friedlander, 80 Wn.2d 293, 305 (1972); Baker v. Baker, 80 Wn.2d 736, 746 (1972).

The trial court should weigh all relevant factors within the context of the parties' circumstances to arrive at a just and equitable division of property. In re Marriage of Konzen, 103 Wn.2d 470, 478 (1985). The courts are directed to consider the merits of issues raised by the parties, factors affecting present and future needs and earning capacities, the kinds

of property to be distributed, and sources through which they were acquired. Fite v. Fite, 3 Wn. App. 726, 734 (1970). The key to an equitable division of property is fairness. In re Marriage of Matthews, 70 Wn.App. 116, 121 (1993) citing In re Marriage of Clark, 13 Wn.App. 805, 810 (1975), review denied 86 Wn.2d 1001 (1975). "The key to fairness is considering all the circumstances of the marriage, past and present, with an eye to the future needs of the persons involved. Fairness is decided by the exercise of wise and sound discretion, not by set or inflexible rules." Clark, 13 Wn.App. at 810.

The economic circumstance of each spouse upon dissolution has been labeled the "paramount concern" of the court in making property division. In re Marriage of Tower, 55 Wn. App. 697, 700 (1989); DeRuwe v. DeRuwe, 72 Wn.2d 404, 408 (1967). The future earnings prospects of the parties are also to be considered by the court in making a just and equitable division of property. Id. Said prospects have been described as a "substantial factor" in making a just and equitable disposition of the property. In re Marriage of Hall, 103 Wn.2d 236, 248 (1984).

In this case, as will be discussed below, the trial court made a very disproportionate split of community property in favor of the husband. All of the above factors will be analyzed in this brief to determine if there was any justifiable basis for the trial court to make such a disproportionate award. The need to determine whether any justifiable basis exists is appropriate given the status of the law, and the wife Judy Tulleners

admittedly faces a high burden. Wide discretion and latitude rests with the trial court in making the determination that a particular division meets the just and equitable standard. Davis v. Davis, 13 Wn.App. 812, 813 (1975).

The trial court has broad discretion in awarding property in a dissolution action, and will be reversed only upon showing a manifest abuse of discretion. The Court abuses its discretion if it is based on untenable grounds. Marriage of Harris 107 Wn.App. 597, 601 (2001). While the trial court has considerable discretion in making property divisions and will not be reversed on appeal absent showing of a manifest abuse, discretion exercised on untenable grounds constitutes manifest abuse. Marriage of Kraft, 61 Wn.App. 45, 50 (1991), review granted and affirmed, 119 Wn.2d 438 (1991).

By no means is the wife arguing on appeal that the decision was erroneous simply because it was not equal. In a decree of dissolution, the division of property must be equitable but need not be equal. Edwards v. Edwards, 74 Wn.2d 286, 287 (1968); Blood v. Blood, 69 Wn.2d 680, 682 (1966); Owens v. Owens, 61 Wn.2d 6, 8 (1962). An exact monetary division of community property is not essential to an equitable division. Fite v. Fite, 3 Wn.App. 726, 735 (1970), *review denied*, 78 Wn.2d 997 (1971).

However, as a general rule, a court should not award a disproportionate share of the community property to either spouse. Dickison v. Dickison, 65 Wn.2d 585, 587 (1965); Rehak v Rehak, 1

Wn.App. 963, 966 (1970). However, a disproportionate division may properly be made when justified by special considerations including “the parties’ necessities and financial abilities, their ages, health, education, and employment histories and the duration of the marriage.” In re Marriage of Dessauer, 97 Wn.2d 831, 839 (1982).

It should also be said that by no means is the wife claiming an abuse of discretion because the trial court considered her separate property. Indeed, such a consideration is expressly authorized by both the statute and case law. The case law is legion that Washington courts are expressly authorized to invade the separate property of a spouse, or consider the amount of separate property owned by a spouse, to effect an equitable division of community property. An approximately equal division of all property owned by the spouses may be appropriate in a given instance. See In re Marriage of Irwin, 64 Wn.App. 38, 49, *review denied*, 119 Wn.2d 1009 (1992), in which the post-trial value of the former wife’s separate property was held to offset a disproportionate award of community property by the trial court to the former husband. If necessity and fairness dictate, either spouse may be awarded part or all of the separate property of the other. Van Kleffens v. Van Kleffens, 150 Wash. 685, 689 (1929). It is not necessarily unfair for the court to ignore the true source of the property in division. In re Marriage of Pilant, 42 Wn.App. 173, 178 (1985). Specific characterization of property as separate or community is not required in a trial court’s findings. What is required is that the record

reflect that the trial court had the character of the property as separate or community in mind and that the final division is fair, just, and equitable under all the circumstances. In re Marriage of Dalthorp, 23 Wn. App. 904, 909 (1979). The character of the property, although significant in determining division, is only one of the many factors to be considered. Beam v. Beam, 18 Wn.App. 444, 454 (1977), *review denied*, 90 Wn.2d 1001 (1978); Eide v. Eide, 1 Wn.App. 440, 443 (1969); accord Marriage of Bepple, 37 Wn.App. 881, 884 (1984).

The wife takes no issue with the findings of the trial court and instead asserts that the findings were correct but for the “fair and equitable” determination and the trial court’s determination that the separate property portion of Ms. Tulleners’ pension was not valued. CP 86-9, page 3. It is the distribution of property following these findings, where the error lies.

Ms. Tulleners asserts that the disproportionate split of property ordered by the court is manifestly unreasonable even in consideration of the substantial equity afforded to a trial court as cited above. The trial court in its memorandum decision set forth a schedule of property awarded, along with the values of said property. CP 86-91. The same exhibit, evidencing values is attached to the decree of dissolution. CP 101-107. Mr. Tulleners was accordingly awarded \$718,172.00 of community property, \$20,000.00 of separate property, and 50% of the community portion of the wife’s TRS III teacher’s retirement pension. RP 287, CP 86-91; CP 101-107. Ms. Tulleners was awarded \$301,741.51 of community property

with \$251,730.00 of separate property. RP 287, CP 86-91, CP 101-107. She was also awarded her 50% community share of her TRS III teacher's retirement pension as well as the separate property (pre-marital) portion of the same retirement. These calculations were net values (factored in debt). RP 287, line 22.

As Mr. Tulleners received a net community property estate (after debts) of \$718,172.00 while Ms. Tulleners received a net community property estate consisting of \$301,741.51 of community property, this is a difference of \$416,430.49. This means that Mr. Tulleners received 70.4% and Ms. Tulleners received 29.6% of the \$1,197,794.00 net community estate.

As cited above, a trial court should consider the amount and nature of each party's separate estate. Ms. Tulleners was awarded \$251,730.00 of separate property while Mr. Tulleners was awarded \$20,000.00 of separate property. However, even when her separate estate is completely factored in, Mr. Tulleners received \$184,700.00 more in community property than Ms. Tulleners. In all due respect, this would have been Mr. Tulleners' *very best* day in trial because he would be in effect, sharing in 100% of Ms. Tulleners' inheritance. Yet, the trial court awarded Mr. Tulleners \$416,430.49 more in community property.

The question that must result from this gross disparity in property award is the following: "Is there some other reason, allowed by the statute and case law, that the trial court relied upon to make such a disparate

division?” In other words, is there a difference in the health, age, or earnings that would justify such a disparate division in favor of the husband? An analysis of the facts shows that there are none. In fact, the issue of health would mitigate in favor of a disparate award *in favor* of the wife.

In this case, the age of each spouse is similar, 72 and 71 respectively at the time of trial. The 18 ½ year marriage is of such a length that the court would not be analyzing the case as a short term marriage. The wife’s health at the time of trial was substantially worse than the husband’s. (Post-decree, the wife raised additional health issues that were not ultimately considered by the trial court. As such, they have not been addressed herein. The Respondent has supplemented the clerk’s papers. To the extent that he addresses these health issues in his response brief, such issues will be fully replied to in the Appellant’s reply brief.)

Both parties are retired and on fixed incomes, so the future earning capacities cannot be a factor. In fact, as demonstrated above, Ms. Tulleners monthly income was \$2,250.00 per month gross income at the time of trial. The husband’s monthly income was \$5,147.00 per month at the time of trial. If anything, the case law would require that the wife be ordered a disparate share of the property given the disparate nature of the earnings.

Separate property cannot be a factor because as discussed above, the husband received a grossly disproportionate award even when the wife’s

separate property is fully considered.

Certainly, disparate awards appear throughout case law. In the case of Rehak v. Rehak, 1 Wn. App. 963, 966 (1970) the court upheld an award of virtually all of the community property to the wife. The husband had a substantial separate estate and his annual earnings were twice those of the wife. Here, the award would still be grossly disparate in favor of the husband even when considering the entirety of the wife's separate earnings. In the instant case, both parties' retirement income would be similar (given their ability to draw from their retirement accounts). The Rehak case would thus provide no authority for the award by this trial court.

The courts regularly award more property to the spouse with a lower income earning capacity. In a frequently cited case, In re Marriage of Donovan, 25 Wn. App. 691, 699 (1980), the appellate court upheld the trial court's award of two-thirds of the net assets to the wife. The husband was an airline pilot earning a substantial salary while the wife had spent most of her time during the marriage taking care of the family's three children and caring for the family home. The wife's salary potential was less than a third of her husband's salary. Here, the husband has a similar retirement income and received substantially more property. Again, the Donovan case provides no support for this trial court's disparate award.

In Stacy v. Stacy, 68 Wn.2d 573, 577 (1966) the Supreme Court increased the trial court's award to the wife to approximately 75% of the net assets. The wife had not worked outside the home during the 22 year

marriage and there were still three children in her care. The husband's income was substantially more than the wife's prospective income. The facts supporting these disparate awards run *completely contrary* to the disparate award made in this case.

There is a Division III case that is on point with the instant case: In Marriage of Kraft, 61 Wn.App. 45 (1991), the wife was awarded a disproportionate share of the community property. The Division III court discussed the same "considerable discretion" standard that has been presented in this brief. Id. at 50. Once the Division III court properly accounted for disability benefits, the wife received \$163,150 of community property while the husband received \$73,550.00. Id. The court found this to be untenable. Id. In the instant case, the result is even more untenable, because the wife is retired and has no ability to make up the substantial loss of community property. She is in need of a fair division given her significant health concerns.

The Supreme Court has also addressed this issue in the case of Marriage of Muhammad, 153 Wn.2d 795 (2005). In Muhammad, the trial court awarded the husband a disproportionate share of the community property relying in large part on the fact that the wife obtained a protection order which cost the husband his job as a deputy sheriff. Id. at 804-806. The Court found that such a result was an untenable abuse of discretion. Undoubtedly, counsel for Mr. Tulleners will argue that the result in Muhammad was fact focused on the protection order consideration.

However, such an argument would completely miss the underlying nuance contained in the Supreme Court decision.

The parties' assets were divided equally except for the pensions, with the husband's being valued at \$38,400.00 and the wife's valued at \$7,625.00. Id. at 799. The court pointed out that the husband thus received \$8,800 more, and the wife \$8,800.00 less than a presumed 50/50 split of assets. Id. The Court also took great issue with the trial court's failure to divide the \$8,200.00 pension acquired during the meretricious relationship, with the trial court characterizing it as "minimal." Id. at 799-800.

The Muhammad court characterized the property division disparity as a "highly questionable division of the parties' assets and liabilities". Id. at 805. They also characterized the trial court's determination that \$8,200.00 was "minimal" as "inexplicable". Id. at 804. "There are very few people for whom half of \$8,200.00 is a "minimal" amount, and given the total assets and liabilities at issue in this dissolution proceeding, Gilbert and Muhammad are clearly not among them." Id. How much more does this analysis apply to the instant case where the marriage is of much longer duration, the parties are similarly situated, and if anything the wife had significantly greater health concerns through the time of trial. Both parties are retired and on fixed income, and the disparity amounts to **hundreds of thousands of dollars?**

This exact question was posed to the trial court by Appellant's counsel in the motion to clarify and at presentment. CP 94-96; RP 285-295. The trial court's answer to this dilemma is error. At RP 289, line 14, the trial court again indicated that the wife's separate property pension was not valued. (See also same finding at CP 86-91, page 3. The trial court found that because she was receiving 68% of her TERS III pension as a separate property asset, that this justified the substantial disparity in awards between the parties. RP 289-290. The trial court reiterated that it did not know the value of her TRS III separate property pension. RP 289, line 23. The trial court also found that a completely speculative, hypothetical value of the husband's pre-marital separate property retirement value was an appropriate consideration. RP 290-291. The trial court found that overall, it was equitable. RP 292. Again, all of these basis for the grossly disproportionate award are submitted by the Appellant to be error.

The separate property pension basis is error

The trial court clearly believed that the Appellant should have provided some kind of present value calculation of her separate property TRS III pension. This type of present value pension calculation was

expressly rejected by Division III in the afore-cited case of Marriage of Kraft, 61 Wn.App. 45 (1991). A present value calculation is speculative and is disfavored when a pension is in pay status. See Kraft at 50. Present value calculations, in which an expert estimates the remaining years of life pursuant to census calculations, and then applies a hypothetical (speculative) interest rate that is usually tied to a hypothetical interest rate, has uniformly been disfavored under Washington law. The trial court's request for such calculation is legal error, different than the manifest abuse of discretion standard applied to property division awards.

Here, Ms. Tulleners is in pay status. Contrary to the trial court's findings, her exact monthly payment is known. It has been calculated by the State of Washington, Department of Retirement Systems. This document was admitted as evidence at Exhibit P36. As can be seen at page two of this exhibit, the State calculated the community portion of the \$944.65 monthly benefit, which is \$306.20 per month. \$638.45 per month is the separate property portion. This separate property portion is thus \$7,661.40 per year.

Ms. Tulleners was 71 years old at the time. Assume for the sake of argument (employing the trial court's hypothetical) that Ms. Tulleners lived 10 additional years to bring her to census levels. This is a total award of

\$76,614.00. Let us assume that despite her cancer history and severe eye issues, she lives another 20 years, to age 91. This amounts to a \$153,228.00 award. Under any possible circumstances or hypothetical, this award does not come close to justifying a \$400,000.00+ disparate award of community property. This is a manifest abuse of discretion.

The trial court's consideration of the husband's hypothetical separate property is error.

In its written findings/memorandum opinion, the trial court found that Mr. Tulleners had completely failed to trace his claimed separate property retirement. CP 86-91, page 2. These findings were incorporated into the findings of fact and decree of dissolution. CP 97-100, CP 101-107. Mr. Tulleners failure to trace was absolute. He did not have a single document evidencing any value at the time of marriage. He traced absolutely nothing.

Yet, Judge Clarke clearly decided to provide him some award for this unproven, unknown value. The spouse asserting the separate character of an asset has the burden of proving by clear and satisfactory evidence, that separate property was the source of the asset. Marriage of Pearson-Maines, 70 Wn. App. 860 (1993). The commingling doctrine has been well established in Washington law. Separate funds often become

so commingled with community funds that it is impossible to trace them. Washington Community Property Deskbook, at 3-12. The comingling doctrine is simply a form of the basic presumption that an asset acquired during marriage is community property. See Harry M. Cross, The Community Property Law in Washington (Revised 1985), 61 Wash. L. Rev. 13, 56 (1986).

As a result, all of the commingled funds, and property acquired with the commingled funds, are deemed to be community property. Beam v. Beam 18 Wn.App. 444 (1978); See also In re Witt's Estate, 21 Wn.2d 112 (1944) for an identical holding. The trial court even recognized this. CP 86-91, page 3. Yet it engaged in speculation and hypothetical, negating the comingling doctrine and failing to apply the doctrine as required whereby the community property is equitably divided. In other words, the trial court completely disregarded the fair and equitable division of community property. This is a manifest abuse of discretion.

There is absolutely no justification for this type of award under any of the facts of this case. There is legal error in the request for a present value calculation. Further, this grossly disproportionate division of assets is a manifest abuse of discretion that is in desperate need of remedy by this Court.

CONCLUSION/REQUEST FOR RELIEF

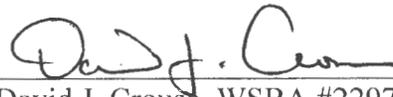
The trial court made a legal error in seeking a present value calculation where the wife was in pay status. The trial court manifestly abused its discretion in making a tremendously disproportionate division of property. The parties' ages were essentially the same and their retirement status was the same. The wife's health was inferior to the husband's at trial. The husband's monthly income was greater than the wife's income at the time of trial. There is nothing in the facts that would allow a trial court to make a substantially disproportionate distribution in favor of the husband.

The trial court engaged in speculation, clearly guessing what the husband's pre-marital retirement/investment interests might have been. This speculative (literally guessed) value was somehow applied to the property distribution. This is error.

The judgment of the trial court must be reversed on appeal. This Court already knows the value of all assets. This Court already knows the exact facts and circumstances of this case. No remand is necessary. Given the law, given the facts and circumstances, this Court is respectfully requested to enter an order requiring that the community property be divided equally between the parties. The Fidelity account was valued with

\$409,000.00 in it and has already been utilized to effectuate the equalization of assets to date. This account remains available pursuant to a stay order granted by the trial court. This Court is requested to make this additional equalization payment out of this same Fidelity account.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David J. Crouse", written over a horizontal line.

David J. Crouse, WSBA #22978
Attorney for Judith Tulleners, Appellant

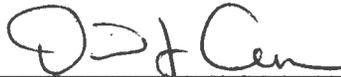
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion to be competent to serve papers.

That on the 15th day of June, 2018, he personally served a copy of the Appellant's brief to the persons hereinafter named at the places of address stated below which is the last known address.

ATTORNEY FOR RESPONDENT

Craig Mason
Mason Law
1707 W. Broadway Ave.
Spokane, WA 99201



DAVID J. CROUSE

SUBSCRIBED AND SWORN to before me this 15 day of June, 2018.





NOTARY PUBLIC in and for the State of Washington, residing in Spokane.
My Commission Expires: 8/29/20