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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON  
NO: 365093-III

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BENJAMIN JONES

*Petitioner*

v.

LISA JONES

*Respondent/Appellant*

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APPELLANT'S REPLY BRIEF

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## REPLY ARGUMENT

I. ASSIGNMENT OF ERROR NUMBER ONE: IN ADDRESSING THE TRIAL COURT'S GROSSLY DISPROPORTIONATE PROPERTY AWARD IN FAVOR OF THE FINALLY ADVANTAGED SPOUSE, THE HUSBAND FAILS TO PROVIDE ANY SUPPORT FOR HIS THEORY THAT SIGNIFICANT DEBTS SHOULD BE IGNORED

A court also abuses its discretion any time the decree results in a “patent disparity in the parties’ economic circumstances.” *In re Marriage of Rockwell*, 141 Wn. App. 235, 243 (2007). While the husband attempts to “re-characterize” the award of debt in his argument, it does not change the fact that Mr. Jones received **94.8%** of the net property award and was ordered to pay only one year of rather insignificant spousal maintenance. CP 57-63; CP 64-69; CP 97-110 (Exhibit A); RP 801, lines 7-12. Specifically, Mr. Jones was awarded \$169,011.00 in property while Ms. McCrea-Jones was awarded \$209,781.00. CP 105-115, Exhibit A; CP 57-63; CP 64-69. Mr. Jones received only \$10,346.00 of the parties’ community debt, while Ms. McCrea-Jones received \$201,181.00. CP 105-115, Exhibit A; CP 57-63; CP 64-69. The resulting net awards of the parties were \$158,665.00 to Mr. Jones and \$8,600.00 to Ms. McCrea-Jones. CP 105-115, Exhibit A; CP 57-63; CP 64-69.

Mr. Jones argues that this Court should disregard the student loan debt awarded to the Appellant Lisa Jones. This argument fails for several reasons. First, the trial court found the debt to community. CP 57-63, Findings of Fact, Page 5, section 11(3).

Second, no Washington case supports disregarding a community debt in the division of property, whether it is a student loan or otherwise. Accordingly, Mr. Jones points this Court to no case that would support this theory. He is asking this Court to set a very dangerous precedent in ignoring a community debt. This is not some type of phantom debt “in name only” that does not need to be re-paid. This is a very real debt, with very real payments that Ms. Jones must make. In fact, this is not a debt that cannot be discharged even in bankruptcy. These mandatory monthly payments imperil Ms. Jones’, and the child’s, ability to meet expenses especially considering the lack of assets awarded to the wife.

Similarly, despite Mr. Jones’ efforts to justify the result, no Washington case has ever upheld such a disproportionate award in favor of the financially advantaged spouse. Despite his efforts to rationalize the result of the case cited by Appellant in her opening brief, *Matter of Marriage of Kaplan*, 4 Wn. App. 2d 466, 476 (2018), this case does not support Mr. Jones’ theory in any way, shape, or form. It is true that Washington courts have long held that property need not be divided

equally. *Kaplan*, 4 Wn. App. 2d at 476. “The longer the marriage, the more likely a court will make a disproportionate distribution of the community property.” *Rockwell*, 141 Wn. App. at 243. Disproportionate property awards are often utilized in mid to long-term marriages. *Kaplan*, 4 Wn. App. 2d at 477. However, these findings in Kaplan and Rockwell were made in favor of the financially disadvantaged spouse. As noted in the Appellant’s opening brief, the facts of Kaplan are very similar to the facts of this case.

However, case law support for the Appellant’s position goes far beyond the Kaplan case and the other cases cited in the opening brief. 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).

By no means is the wife arguing on appeal that the decision was erroneous simply because it was not equal. In a 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).

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.

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.

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 failure to divide the \$8,200.00 pension acquired during the relationship and 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 husband earns substantially more than the wife, parties are similarly situated, and the husband received approximately **\$150,000.00 more in net assets than the wife?**

Importantly, Division III recently decided the case of Marriage of Tulleners, Docket Number 35641-8, File Date 12/5/2019. In Tulleners, this Court made the same discussions relative to a disproportionate award

of community property. Absolutely nothing in the Tulleners decision would support a grossly disproportionate award of community property to the *financially advantaged* spouse.

The third error made by Mr. Jones is his claim that the student loan debt should somehow be offset against the value of Ms. Jones' degree. This claim by Mr. Jones ignores the fact that much of the student loan debt went to pay personal/household expenses rather than tuition-related charges. In fact, the wife's testimony indicated that the husband encouraged her to take the full amount of loans because it was "cheap money". See RP 594, lines 5-16. She testified that these matters were handled by her husband. Page 594, line 11. She further testified that these student loans were used, in part, to make house repairs and to pay other community expenses. Another very important omission by Mr. Jones is that while the wife is saddled with her community student loans, the husband's community student loans were paid off during the marriage. See RP 593, line 10 through page 594, line 2.

It was entirely appropriate for the trial court to find the student loan debts to be community. The husband significantly benefitted from these loans during marriage. It would be completely inequitable and inappropriate to adopt the husband's request that these student loan debts be ignored or simply offset against the value of the degree.

Even if we were to ascribe some unknown value to Ms. Jones' degree, the argument by Mr. Jones that this would offset the student loans/gross imbalance of debt awarded to Ms Jones, still fails. It fails because there is still a grave imbalance of income between the parties. It is undisputed that Mr. Jones is a pilot with Alaska Airlines. RP 602. He is also a pilot with the Air National Guard. RP 112. His employment and future earnings will only increase as time passes. See Exhibit R118 which shows the salary increases for a Alaska Airlines First Officer. The pay rate for the first year of employment (the husband's rank at time of trial) is \$90 per hour with 75 hours minimum guaranteed. At year 2, the first officer pay jumps to \$126.00 per hour. It increases every year after that up to a maximum of \$174 per hour with 12 years of service. As is, the year after the parties separated, Mr. Jones salary reached its highest figure to date, making \$124,837.00 in 2017. RP 381, lines 10-15.

Even if Mr. Jones never received another raise, his \$124,837.00 income is still substantially higher than Ms. Jones' *best possible day* when it comes to annual income. Ms. McCrea-Jones prior employment as a counselor provided a peak income of \$31,371.00 per year. RP 549, lines 3-18. Even if Ms. McCrea-Jones can re-learn the material necessary to pass the licensing exam to become a clinical psychologist, her expected entry level salary at full time will be around \$60,000.00. RP 570, lines 9-

15. In his brief, the husband argues that Ms. Jones could earn between \$67,000.00 to \$93,000.00 annually. See Response Brief, Page 21, second paragraph with citations to the record.

Even if the husband were 100% correct in his salary assumptions, the Ms. Jones would still be earning substantially less than Mr. Jones, assuming *arguendo* that Mr. Jones never received a raise again as a pilot (which of course will not occur). Once again, under any possible set of circumstances, Ms. Jones is the financially disadvantaged spouse. Under this case law, there is no possible justification for awarding the financially advantaged spouse, Mr. Jones, the vast majority of the net assets.

Finally, Mr. Jones glosses over the serious issues with the children in arguing that Ms. Jones could have advanced more quickly in her degree and employment pursuits. While she was able to obtain a professional degree during the course of the marriage, the vast majority of her time and efforts were entirely devoted to the children of the marriage. RP 509.

Mr. Jones discusses the children but omits the very lengthy record (cited in the Appellant's brief) that the children suffered from severe behavioral issues. Tara and Lonnce each suffered from severe abuse, exposure to domestic violence, and fetal alcohol syndrome which resulted in significant special needs and each required extensive attention and care. RP 500, line 19 to RP 501, line 14; See also RP 504, line 21. The children

suffered from attachment issues, anxiety, and were developmentally delayed. Lonnece's issues were more severe and she was non-verbal even though she was a toddler and she had rage issues resulting in her hurting herself or others. Over time, violence escalated from head-banging to confrontations requiring police involvement. See RP 502, lines 14-19 through RP 513. There were violent outbursts. RP 508-09. See also RP 514 lines 12-18. Lonnece ran away from home on multiple occasions and was assaulted at times. RP 516, line 16 to RP 518 Line 25.

Although Ms. Jones' doctoral program is meant to be completed in 5 years, because of these myriad of issues with the children, Ms. McCrea-Jones took 9 years to earn her degree. RP 528, lines 9-15.

In 2008 while the parties were still living in Oregon, they were again contacted and asked to adopt a third child, Grace, who was born to the same biological mother as Tara and Lonnece. RP 531, lines 5-10. Although Ms. McCrea-Jones was already experiencing difficulty attending school and caring for the children, the parties decided to adopt Grace. RP 532. At the time of her adoption, Grace was 9 ½ months old and like her sisters, suffered from significant special needs including generalized anxiety disorder, ADD, mild depression, and issues relating to Fetal Alcohol Syndrome. RP 535-36. The adoption of Grace further contributed to the delay in Ms. McCrea-Jones completing her doctorate. RP 533.

Because of Mr. Jones' military commitments, Ms. McCrea-Jones had to continue delaying the completion of her dissertation to tend to the children. RP 530-31. Ms. McCrea-Jones was ultimately able to complete her degree in 2013 and since that time, has been extraordinarily limited in her ability to obtain licensure and pursue a career in psychology because of the need to care for the children's special needs. Following the completion of her doctorate, Ms. McCrea-Jones continued to devote significant time and efforts to the children. She worked as a lecturer at Whitworth University in 2014-2015 and made a salary of \$27,000. RP 548. (Claims by Mr. Jones that his wife portrayed herself as a exclusively stay-at-home parent are entirely misplaced. Her employment history was set forth in her Appellant Brief and in the trial record. Her claim was that her ability to complete a degree and become gainfully employed were significantly impacted by her responsibilities to the children.)

The end result is that even if all of Mr. Jones' assertions were adopted by this Court in a light most favorable to him, Ms. Jones at best would be capable of earning \$97,000.00 per year. This would still be substantially less than Mr. Jones. The reality of this case is far different than this "most favorable light" assertion. Under any possible set of circumstances, there is absolutely no justification for a disproportionate award in the favor of Mr. Jones. This Court should remand with very clear

instructions to the trial court that the net asset award must either be equal of a disproportionate award in favor of the wife, Ms. Jones. That is the only possible result allowed by the statute and case law.

II. ASSIGNMENT OF ERROR NUMBER TWO: THE COURT ERRED BY FAILING TO ORDER SIGNIFICANT MAINTENANCE TO THE WIFE ESPECIALLY IN LIGHT OF THE PROPERTY DIVISION.

Mr. Jones correctly argues that the trial court has broad discretion in awarding maintenance. The Appellant has already admitted such in her opening brief, citing to *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27 (1999). However, Mr. Jones' argument ignores the subtleties of the Appellant's presentation: The lack of maintenance cannot possibly be justified given the highly inappropriate disproportionate property award in favor of Mr. Jones.

Again, while almost all disproportionate divisions of property are made in favor of the financially disadvantaged spouse, Washington courts have recognized that long-term maintenance can be used as a tool to equalize or justify a disproportionate award which would otherwise appear improper on its face. *In re Marriage of Sheffer*, 60 Wn. App. 51, 56 (1990); *see also In re Marriage of Tower*, 55 Wn. App. 697, 701 (1989). However, in the absence of a balancing award of maintenance, the

disproportionate division of property in favor of the financially advantaged spouse is always an abuse of discretion. *Sheffer*, 60 Wn. App. at 56. In upholding the division and maintenance award, the court specifically held “the disproportionate division of property in favor of the only spouse with any significant earning capacity would be an abuse of discretion if it were not balanced by long-term maintenance.” *Tower* at 700 (underlining added). The Court went on to note that “the net result of the entire decree, including maintenance and child support provisions, is that the parties will probably have approximately equal monthly disposable incomes.” *Id.* at 701.

Unlike the trial court in *Tower*, both the disproportionate division of property and the minimal award of maintenance in this case amount to an abuse of discretion. While the exact numbers and calculations are set forth in the Appellant’s opening brief and will not be re-stated here, the parties’ incomes are so disparate (even in a light most favorable to Mr. Jones) that the trial court failed to make a reasonable award in either its property award or maintenance award. While in isolation the trial court could have the discretion to make a minimal maintenance award as occurred here, this maintenance award cannot stand in light of the property award that occurred.

III. ASSIGNMENT OF ERROR NUMBER THREE: THE COURT ERRED IN ITS DETERMINATION OF ASSET VALUES, AND ERRED IN ITS CHARACTERIZATION OF ASSETS, RESULTING IN AN EVEN MORE DISPROPORTIONATE PROPERTY AWARD IN FAVOR OF THE FINANCIALLY ADVANTAGED SPOUSE.

**Assigned Property Error #1**

As with his discussion of maintenance above, Mr. Jones is glossing over the subtleties of the presentation made by his former wife. Ms. Jones is not arguing that the trial court lacked the authority/discretion to charge the wife with a \$40,000.00 pre-distribution, representing \$5,000.00 held in STCU checking #6075 and \$35,000 held in STCU money market #6083. The wife concedes that the trial court had this authority, but that is not the point she is trying to make.

The wife did not receive any award of attorney fees during the temporary order process. RP 589, line 15; RP 316, line 3. She paid \$24,315.00 in attorney fees through trial, with \$1,800.00 still owing at the time of trial. RP 589, lines 5-12; Exhibit R121, financial declaration at page 7. She paid these attorney fees from the \$40,000.00 that was contained in the two STCU accounts, #6075 and #6083. See generally, RP 588, line 25 through RP 589, line 25. She asked the Court to not charge this to her as a property distribution but instead to award it to her as

an attorney fee award. RP 589 lines 23-25. The wife indicated that if the Court awarded her the entire \$40,000.00, she would not request an additional award of attorney fees for trial attorney fees which would be additional to the attorney fees already incurred and set forth in the financial declaration. See the exchange with the trial court at RP 590, lines 1-21.

What Ms. Jones is asking this Court to really consider here is the *overall* totality of the circumstances. The trial court granted a grossly disproportionate award of property to Mr. Jones, ordered nominal maintenance to the wife, ordered no attorney fees to the wife despite a very clear disparity in earnings. Not only did the trial court deny this request, the trial court granted absolutely nothing in attorney fees to Ms. McCrea-Jones. Either this property award should be reversed, or full attorney fees should be awarded pursuant to assignment of error IV.

#### **Assigned Property Error #2**

Ms. McCrea-Jones bought another vehicle, 2017 Chrysler Pacifica on March 26, 2018, long after separation. The trial court first erred by finding that this Chrysler Pacifica and the underlying loan was community property given that it was purchased by the wife long after separation. CP 57-63, findings page 4, section 9.48 and page 5 section 11.4. The

character of property as community or separate is determined as of the date of acquisition. In re Estate of Borghi, 167 Wn.2d 480, 484 (2009).

In his response brief, the husband argues that the trial court could correctly conclude that the vehicle was community because the \$3,000.00 down payment came from the \$40,000.00 discussed under assignment of error #1, above. See also generally RP 313 line 7. The husband is wrong, because at best, there would be a \$3,000.00 community right of reimbursement due the community. The Pacifica is separate property.

However this argument by Mr. Jones glosses over what is really at issue and ignores the subtleties that the trial court double-dipped Ms. Jones. Since Ms. Jones was already charged with the \$40,000.00, she cannot be charged another \$3,000.00 when this down payment sum was taken directly from said \$40,000.00 that she was already charged for. The error is obvious, yet Mr. Jones will not concede it. While it does not change the result, because a double-dipping is never permissible, this error is further compounded by the trial court's assumption that the \$3,000.00 down payment came from the \$40,000.00 contained in the STCU accounts which also contained the wife's child support, maintenance, and Alaska adoption subsidy/foster care payment. See Exhibit R110.

### **Assigned Property Error #3**

Again, Mr. Jones mischaracterizes the argument made by his former wife. The trial court charged wife for her USAA Savings using date of separation value and it was entitled to do so. The parties separated on November 13, 2016. RP 399, line 19-21. CP 1-9. As can be seen at Exhibit P19 the date of separation value was \$4,075.30 increasing to \$4,075.81 with interest. See Exhibit P19, also CP 57-63, findings, page 4, section 9.55.

Mr. Jones conveniently ignores that the trial court used a completely different standard when it came to the valuation of his account. Even though these were both bank accounts, the trial court employed an entirely different standard, charging the husband only \$1,303.00 for his Numerica account. CP 57-63, findings, page 4, section 9.54. As can be seen from the trial exhibit R109, the husband had \$4,814.00 value shown on the Numerica statement. The husband paid \$3,500.00 of this to his divorce attorney Randall Danskin. By utilizing a \$1,303.00 value rather than the \$4,814.00 in the account, the trial court literally made an attorney fee award to the husband. The husband must be charged the \$4,814.00 that was initially in the account so that the same date of separation standard is used. To use two distinct valuation standards is an abuse of discretion.

IV. ASSIGNMENT OF ERROR NUMBER FOUR: THE COURT ERRED BY DENYING MS. MCCREA-JONES' REQUEST FOR ATTORNEY FEES.

Despite the efforts of Mr. Jones to justify the lack of any award of attorney fees, the trial court abused its discretion when considering the disproportionate share of property awarded to Mr. Jones, the rather nominal maintenance award to Ms. McCrea-Jones, the fact that Ms. Jones was charged as a property distribution with the \$40,000.00 she used to pay her attorney fees, and the disparity of earnings at the end of a 20 year marriage. Across the board financially, the trial court delivered an extraordinarily harsh result to Ms. Jones. It is not justifiable under the law. Mr. Jones should have been ordered to pay Ms. McCrea-Jones' attorney fees and this Court is asked to direct that this occur on remand.

V. ASSIGNMENT OF ERROR NUMBER FIVE: THE COURT ERRED BY ORDERING THE RESPONDENT TO REFINANCE THE FORMER FAMILY HOME WITHIN ONE YEAR.

In isolation, Mr. Jones is correct in arguing that the trial court could order the refinance of the family home. In his brief, he points to Ms. Jones' testimony that she would be willing to do so and argues that this

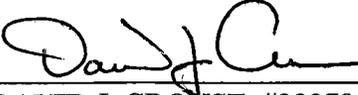
refinance was stipulated to. This argument is nonsense.

Ms. Jones' asked the trial court for a reasonable property award, reasonable maintenance, and for attorney fees. If a reasonable award was made as she requested, then she would have been able to refinance the home. However, she was left with maintenance that soon expired. She was unemployed. She received an almost net zero property award with very substantial debt. No bank in existence would loan on this set of facts. Accordingly, under this unique set of facts, the trial court's refinance order was an abuse of discretion.

VI. REQUEST FOR ATTORNEY FEES

The Appellant again requests the Court for an award of attorney fees pursuant to RCW 26.09.140 and in accordance with RAP 18.1

Respectfully Submitted:

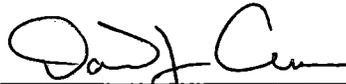
By:   
\_\_\_\_\_  
DAVID J. CROUSE, #22978  
Attorney for Respondent/Appellant

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 7<sup>th</sup> day of January, 2020, he served a copy of the Appellant's Reply Brief to the persons hereinafter named at the places of address stated below which is the last known address.

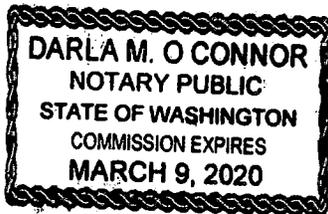
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\_\_\_\_\_  
DAVID J. CROUSE, #22978

SUBSCRIBED AND SWORN to before me this 7 day of January 2020  
2020.



Darla M. O'Connor  
NOTARY PUBLIC in and for the State of  
Washington, residing in Spokane.  
My Commission Expires: 3/9/2020