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SEP 28 2019

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 BRIEF

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### ASSIGNMENTS OF ERROR

- I. The Court erred by ordering a grossly disproportionate property award in favor of the financially advantaged spouse.
  
- II. The Court erred by failing to order significant maintenance to the wife despite the existence of a 20-year marriage and a significant disparity in income between the parties.
  
- III. 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. Specifically, the court erred by charging the wife with a \$40,000.00 pre-distribution for STCU funds used to pay attorney fees (or in the alternative not awarding her attorney fees) , finding the wife's 2017 Chrysler Pacifica and loan to be community and awarding the equity as community, charging the wife her \$3,000 down payment as community while still charging the wife for the full \$40,000.00 STCU account where the husband alleges the funds came from, and by using an incorrect valuation for the husband's Numerica bank account.
  
- IV. The Court erred by denying Ms. McCrea-Jones' request for attorney fees at trial after she documented her substantial need and Mr. Jones' ability to pay.

V. The Court erred by ordering Ms. McCrea-Jones to refinance the former family home within one year.

## STATEMENT OF THE CASE

Mr. Jones and Ms. McCrea-Jones met during college at the University of Alaska in 1993 and married on May 17, 1996. RP 491, lines 2-23. The parties separated on November 13, 2016. RP 399, line 19-21. During the 20 ½ year marriage, Mr. Jones became a Lieutenant Colonel with the Air National Guard and made a significant salary. RP 602, line 14-18. In 2018, following the separation of the parties, Mr. Jones accepted a position as a pilot with Alaska Airlines, where he is expected to earn his highest salary to date. RP 112, lines 5-11. Ms. McCrea-Jones made a minimal salary during the marriage and took on the primary role of caring for the parties three daughters, Tara, Lonnece, and Grace, all of whom have special needs. RP 611-12.

In the early years of their marriage, the parties expressed an interest in adopting foster children. RP 494, lines 13-25. After being contacted by the State of Alaska in 1998, the parties adopted Tara and Lonnece, who are biological sisters. RP 497, lines 1-11; RP 502, 1-8. At the time of the adoption, Tara was 2 years old and Lonnece was 3 years old. RP 45, lines 19-21. Tara and Lonnece 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.

Around of the time of the adoption of Tara and Lonnece, Mr. Jones completed his education and began his career as a pilot in the Alaska Air National Guard. RP 507, lines 3-13. Mr. Jones' career as a military pilot resulted in him being away from the home for extended periods of time. RP 611, lines 22-25 - 612, lines 1-10. As Mr. Jones was advancing his career, the primary parenting responsibilities, including handling the issues with the children's special needs, to include the violent outbursts, typically fell on Ms. McCrea-Jones. RP 508-09. See also RP 514 lines 12-18. Ms. McCrea-Jones' college graduation (bachelor's degree) was delayed by over a year behind her husband college graduation due to her role as the primary care provider for the children. RP 497, lines 17-20.

After Ms. McCrea-Jones graduated from college, she worked as a chemical dependency counselor while continuing to care for the children. RP 498-99. She earned approximately \$31,371.00 per year. RP 549, lines 3-18. In 2003, the parties began discussing Ms. McCrea-Jones' career aspirations and her interest in pursuing a doctoral degree in psychology.

RP 50, lines 2-5. Ms. McCrea-Jones was admitted to a doctoral program at George Fox University in 2003 and the parties moved to Oregon with the children. RP 528, lines 1-3.

Tara and Lonnece continued to experience significant behavioral and emotional issues, making it difficult for Ms. McCrea-Jones to attend a doctorate level program and care for the children. Lonnece ran away from home on multiple occasions and was assaulted at times. RP 516, line 16 to RP 518 Line 25. At times, Mr. Jones was out of country and Ms. McCrea-Jones had to deal with Lonnece's running away herself. RP 270 line 21 to RP 271 line 9. Although the 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.

In 2010, Ms. McCrea-Jones completed the classroom requirements of the doctoral program and while she still needed to defend her dissertation, the parties' moved to Spokane. RP 55. The children, particularly Lonneece, were experiencing significant difficulties in Oregon. RP 56. The parties hoped that a move to Spokane would create a healthy environment for the children while also giving Mr. Jones the ability to continue working for the Air National Guard. RP 56.

While the move to Spokane was intended to benefit the situation of the parties, it exacerbated the issues with the children. RP 524-25; RP 530. 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. Around this time, the parties were again contacted by the State of Alaska for an adoption of another special needs child. RP 550. The

child, Ashara, was the biological sister of Tara, Lonnece, and Grace. RP 550. Like her sisters, Ashara was significantly delayed, underweight, and with fetal alcohol syndrome. RP 561 line 18 to RP 562, line 22. At age 6 (time of trial), she was still not potty trained. RP 562, line 12.

Initially, the parties began taking steps together to adopt Ashara, going so far as to fly to Alaska to meet her. RP 552-53; RP 555, lines 4-14. Suddenly, before the separation of the parties, Mr. Jones notified Ms. McCrea-Jones that he was no longer willing to pursue adoption. RP 556, lines 6-11. Ms. McCrea-Jones continued with the adoption. RP 560. Ashara's adoption has further impeded Ms. McCrea-Jones' ability to obtain licensure start her career as a psychologist. RP 560.

The parties separated in November 2016 and since that time, Mr. Jones has continued to advance his career while Ms. McCrea-Jones cares for their special needs children. Mr. Jones salary reached an all time high in 2017, making over \$124,000. RP 381. This income allowed Mr. Jones to make significant contributions to his retirement that year, even while under a temporary order requiring him to pay spousal maintenance and child support. RP 328-329. Mr. Jones has now accepted a First Officer position with Alaska Airlines in February 2018 and at the time of trial, was expected to make his highest salary to date. RP 112; RP 433, lines 7-20. Mr. Jones' salary is expected to steadily increase each year. *Id.*

Due to her commitments raising four special needs children, Ms. McCrea-Jones has not been able to obtain licensure as a psychologist and begin her career. As an entry level psychologist, she is expected to make around \$60,000 per year. RP 570. Her highest yearly earnings to date were as a counselor in Alaska where she made under \$32,000. RP 549.

Trial in this case was held in August 2018. Following trial, the court awarded \$169,011.00 in property to Mr. Jones and \$209,781.00 to Ms. McCrea-Jones. CP 57-63; CP 64-69. See also CP 97-110 which at Exhibit A provides a joint trial management report showing the court's ruling and all calculations. Ms. McCrea-Jones was ordered to pay \$201,181.00 of the parties' community debt while Mr. Jones received \$10,346.00 of the debt. CP 57-63; CP 64-69; CP 97-110. The resulting net property awards were \$158,665.00 to Mr. Jones and \$8,600.00 to Ms. McCrea-Jones. CP 57-63; CP 64-69; CP 97-110. The trial court ordered Mr. Jones to pay one year of spousal maintenance at \$1,700.00 per month and denied Ms. McCrea-Jones' request for attorney fees. CP 64-69. The trial court awarded Ms. McCrea-Jones the family home, but ordered that it be refinanced within one year. CP 64-69.

## ARGUMENT

- I. THE COURT ABUSED ITS DISCRETION BY ORDERING A GROSSLY DISPROPORTIONATE PROPERTY AWARD IN FAVOR OF THE FINALLY ADVANTAGED SPOUSE AND FAILED TO BALANCE THE AWARD BY ORDERING SIGNIFICANT MAINTENANCE DESPITE THE EXISTENCE OF A 20 YEAR MARRIAGE.

A property division made during a divorce proceeding may be reversed on appeal if the trial court abused its discretion. If the distribution of property is based on untenable reasons or grounds, the trial court has abused its discretion. *In re Marriage of Larson*, 178 Wn. Ap. 133, 188 (2013). 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).

Although the division of property is discretionary, the court’s distribution is governed directly by statute. RCW 26.09.080 requires that all property distributions be just and equitable. RCW 26.09.080. In making its determination, the Court must consider the “(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 the property is to

become effective.” *Id.*; see also *Matter of Marriage of Kaplan*, 4 Wn. App. 2d 466, 476 (2018). The court may also consider factors such as the parties’ employment history, necessities and financial abilities, and prospects for future earnings. *Urbana v. Urbana*, 147 Wn. App. 1, 11, (2008). While no single factor is determinative, the economic circumstances of each spouse upon dissolution are of “paramount concern.” *Id.* (citing *In re Matter of Marriage of Olivares*, 69 Wn. App. 324, 330 (1993)).

***A. Disproportionate Property Awards Are Proper When Granted In Favor Of The Financially Disadvantaged Spouse.***

In analyzing a trial court’s division of property, Washington courts have long held that property need not be divided equally. *Kaplan*, 4 Wn. App. 2d at 476. In fact, “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. Notably however, while disproportionate awards are common, the spouse receiving the greater share of property is always the financially disadvantaged spouse, not the financially *advantaged* spouse. See also *In re Marriage of Davison*, 112 Wn. App. 251, 258 (2002); *Donovan v. Donovan*, 25 Wn. App. 691, 696 (1980); *Urbana*, 147 Wn. App. at 8.

The Division 1 Court of Appeals recently analyzed the validity of disproportionate property awards in the 2018 case, *Marriage of Kaplan*. The parties in *Kaplan* had been married for 25 years. 4 Wn. App. at 471. The husband earned a substantial salary of over \$200,000 per year while the wife, who had a college degree, left her employment to care for the children of the marriage. *Id.* at 471-72. The trial court ordered the wife to receive 55% of the \$5.2 million estate and a 6-year maintenance award of \$10,000 per month. *Id.* at 473. The Division 1 Court of Appeals upheld both the disproportionate property award and the maintenance order, finding that both were just and equitable given the economic realities of the parties and the length of the marriage. *Id.* at 478-79.

A disproportionate award was similarly upheld in *Marriage of Davison*, where a husband who received 25 percent of the community property following trial appealed, arguing that the distribution was inequitable. 112 Wn. App. at 258. In upholding the award, the Division 3 Court of Appeals noted that an equal division of property is not required. Rather, the distribution need only be equitable. *Id.* at 259. Based on the circumstances of the parties and division of separate property, the award in favor of the financially disadvantaged spouse was appropriate. *Id.*

Similarly, in *Urbana*, the Division 2 Court of Appeals considered the equity of a property distribution which awarded 20 percent of the

community property to the husband and 80 percent of the community property to the wife. *Urbana*, 147 Wn. App. at 8. While the case was ultimately remanded due to the trial court's improper consideration of marital misconduct and failure to make findings supporting its disproportionate distribution, the appellate court specifically highlighted that a fair and equitable division of property does not equate to 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." *Id.* at 11.

In *Donovan*, Division 1 considered facts quite analogous to the case at hand and rendered a decision which reveals the abuse of discretion which occurred at the trial court this case. The parties in *Donovan* were married for 14 years and during the course of the marriage, had three children together. *Donovan*, 25 Wn. App. at 696. The husband worked as an airline pilot while the wife spent the majority of her efforts devoted to caring for the children and maintaining the family home. *Id.* at 693.

After trial, the court awarded \$166,575 in property to the wife and \$177,479 to the husband. However, the husband was ordered to pay \$94,625 of the community debt and the wife was ordered to pay only \$1,974. *Id.* As a result, the husband's net award was \$82,954 and the wife's net award was \$164,601. *Id.* On appeal, the husband argued that

the disproportionate property award in favor of the wife was not equitable, as the value of the wife's award was nearly double his. *Id.* Importantly, in upholding the disproportionate distribution, the court aptly stated:

At first blush it may appear that the division is inequitable, the wife's award being valued at close to twice that of the husband's award. However, the scales of equity are balanced by the circumstances of the parties. This marriage lasted 14 years during which time three children were born. The husband is a commercial airline pilot and earns a substantial salary. His future, in this regard, is reasonably secure. The wife, on the other hand, is not prepared, without additional training, for entry into the labor market. Even as she trains for future employment she will have to arrange for childcare of her youngest child, who was 7 years old at the time of trial. The two older children are young teenagers who require parental supervision, if not mother's care.

*Id.* at 696–97. In addition to this disproportionate property award, the wife was also awarded 24 months of maintenance. Both the division of property and maintenance award were upheld on appeal.

The unpublished case of *Mount v. Mount*, similarly illustrates the abuse of discretion that occurred in the case at hand. In *Mount*, the Division 2 Court of Appeals considered a disproportionate division of property that awarded 75% of the marital property to the wife and 25% to the husband. *See Mount v. Mount*, 2014 WL 48002 at \*1. The parties were married for 22 years and at the time of the divorce, the wife made approximately \$3,894 per month and the husband made \$7,634 per month.

*Id.* To equalize the positions of the parties, the court not only awarded a disproportionate share of property to the wife, but ordered the husband to pay \$1,500 per month in maintenance, \$7,000 in his wife’s attorney fees, and the entirety of his wife’s student loans. *Id.* Although the award heavily favored the wife, the Court of Appeals upheld the entire award, reasoning that the difference in the parties’ salaries and the length of the marriage supported the significant disproportion. *Id.* at \*3-6.

Well reasoned cases such as *Kaplan*, *Donovan*, and *Mount* stand in stark contrast to the distribution made by the trial court in this case. Because the economic circumstances of each spouse at the end of the dissolution is the “paramount concern” of the court, the disproportionate award made in each of the aforementioned cases was made in favor of the financially *disadvantaged* spouse. By awarding the spouse in a financially inferior position more marital assets, courts can more easily reach the “just and equitable” result required by RCW 26.09.080.

In this case, despite Mr. Jones significantly higher earning capacity and the fact that the parties were married for over 20 years, 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. Importantly however, 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. No Washington case has ever upheld such a disproportionate award in favor of the financially advantaged spouse. Very frankly, it is apparent that the trial court forgot to subtract the liabilities to arrive at net asset figures before completing its award and distribution.

Like the husband in *Donovan*, 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 are "reasonably secure" and will only increase as time passes. *Donovan*, 25 Wn. App. at 696; see also 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. Mr. Jones' salary at Alaska Airlines will steadily increase each year and in 2019, Mr. Jones anticipates making the most he ever has. RP 433, lines 7-20. Ms. McCrea-Jones is similar to the wives in *Donovan*, *Kaplan*, and *Mount*. 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. Ms. McCrea-Jones last employment was as a counselor, where at her peak, she earned \$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 entry level salary at full time will be around \$60,000.00. RP 570, lines 9-15.

In addition to the disparity between the earnings of Mr. Jones and Ms. McCrea-Jones, the parties have three children together, just like the parties in *Donovan*. Although two of the children have now reached the age of majority, all three suffer from a variety of disabilities and severe limitations. RP 500-01; RP 503-04; RP 506; RP 535-36; RP 561-62. The youngest child is only 11 years old and will continue to require substantial care from Ms. McCrea-Jones. RP 418, lines 7-8; RP 535-36. During the marriage, Mr. Jones military commitments often took him away from the home for extended periods of time. RP 507, line 18 - RP 508, line 13. As a result, the primary parenting responsibilities fell onto Ms. McCrea-

Jones. RP 508, 515. Ms. McCrea-Jones' college graduation was delayed by over one year due to the needs of the children and her professional degree, which takes 5 years to finish, took over 9 years to complete as she struggled to balance schooling and parenting special needs children. RP 49, lines 12-20; RP 527, line 25 - RP 528.

To make matters even more complicated, prior to separation, Mr. Jones and Ms. McCrea-Jones planned to adopt another child, Ashara, the biological sister of Grace, Tara, and Lonnece. RP 555, lines 4-17. Like Grace, Ashara is developmentally disabled and suffers from numerous limitations. RP 561-62. At its inception, Mr. Jones was agreeable to the adoption. However, shortly before the separation, Mr. Jones chose to no longer be a part of the adoption. RP 556, lines 6-11. Ms. McCrea-Jones followed through with the adoption, which has resulted in additional responsibilities and requirements which have further impeded her ability to obtain licensure and full-time employment in her chosen field. RP 560.

Despite the gross disparity between the earnings of Mr. Jones and Ms. McCrea-Jones, the time and efforts required of Ms. McCrea-Jones given the child's needs and limitations, and the adoption of Ashara, Mr. Jones received 94.85% of the total net property award, leaving a completely unjustifiable disparity between the parties' economic circumstances. This is a manifest abuse of discretion and should not be

upheld on appeal. *See Rockwell*, 141 Wn. App. at 243. The trial court should be reversed with instructions to grant a disproportionate share of the net assets to the financially disadvantaged spouse, Ms. McCrea-Jones.

II. THE COURT ERRED BY FAILING TO ORDER SIGNIFICANT MAINTENANCE TO THE WIFE DESPITE THE EXISTENCE OF A 20-YEAR MARRIAGE AND A SIGNIFICANT DISPARITY IN INCOME.

Generally, the decision to award maintenance is a discretionary decision resting with the trial court. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27 (1999). It is an abuse of discretion for the trial court to fail to base a maintenance award upon a fair consideration of the statutory factors under RCW 26.09.090. *In re Marriage of Mathews*, 70 Wn. App. 116, 123 (1993). The factors the court must consider in determining maintenance are: (1) the post-dissolution financial resources of the parties; (2) their abilities to independently meet their needs; (3) the time necessary for the party seeking maintenance to find employment; (4) duration of the marriage; (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; (6) and the ability of the spouse from whom maintenance is sought to meet his needs and financial obligations. RCW 26.09.090; See also *Marriage of Mazetta*, 129 Wn. App. 607, 624 (2005).

While the statutory tests for maintenance and property division are different, there is no requirement that the determination of maintenance be isolated from the property division made by the court. In fact, “a careful reading of RCW 26.09.090 reveals that the trial court is not only permitted to consider the division of property when determining maintenance, but it is required to do so. *See In re Marriage of Rink*, 18 Wn. App. 549, 552-553 (1977) (“The trial court, when dividing the property may likewise take into account the amount of maintenance it intends to grant.”).

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 *Tower*, the Division 1 Court of Appeals upheld a disproportionate distribution of property in favor of the financially advantaged spouse. *Tower*, 55 Wn. App. at 701. Specifically, the husband was awarded 63% of the marital property while the wife received

37%. *Id.* at 700-01. The wife had an insignificant earning capacity and several health issues. *Id.* at 698-99. Importantly however, while the wife was awarded less of the martial property, she received lifetime spousal maintenance. *Id.* at 699. (Emphasis added.) 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.” *Id.* 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. In other words, the trial court failed to make a reasonable award in either its property award or maintenance award. Further, as will be seen below, the trial court even refused to grant any award of attorney fees and re-characterized funds that the wife received in temporary orders and which she used to pay attorney fees, as a property award to her. The inequity of the overall award is rather startling.

The statutory factors of RCW 26.09.090 clearly favor a significant award of maintenance, especially considering the 20 year marriage of the

parties, the fact that the wife forsake or significantly delayed her employment and education to care for the very high needs of her special-needs children, and the substantial disparity in the income of the parties that existed at the time of trial. Mr. Jones post-dissolution financial situation is remarkably superior to that of Ms. McCrea-Jones. While Ms. McCrea-Jones will continue to struggle balancing the time and effort needed to care for two special needs children with the time necessary to obtain licensure or begin working at an entry level position, Mr. Jones will be advancing his career with Alaska Airlines. RP 112, Exhibit R118.

Given his guaranteed increasing income, Mr. Jones has an absolute ability to meet his monthly needs and Ms. McCrea-Jones does not. Ms. McCrea-Jones is now saddled with significant debts and an obligation to refinance the home awarded to her (discussed more fully below) by September 2019. CP 69-74. The statutory factors weigh heavily in favor of a significant maintenance award.

Crucially, while the trial court did order spousal maintenance, the one year award that was granted was not equitable in its own right, much less a balance to the disproportionate division of property. The trial court ordered Mr. Jones to pay \$1,700.00 in monthly maintenance until September 2019 (one year after trial). RP 801, lines 7-12; RP 803, lines 22-23; CP 71. The maintenance award amounts to a total of \$20,400.00.

The insignificance of the award is remarkable considering the gross disparity of the property and debt division. Under *Tower*, the trial court's decision amounts to an abuse of discretion and should not be upheld.

The \$1,700.00 maintenance award is a substantial reduction from the ordered amounts under temporary orders. CP 10-11. Not only was the husband ordered to pay temporary maintenance of \$1,800.00 per month, he was also ordered to pay the home mortgage payment CP 10-11; R597 line 2. The mortgage payment is \$1,657.00 per month. Exhibit R121, Financial declaration page 3, section 7A. He also paid the wife's health insurance which the wife must now pay post-divorce. RP 587 line 8. The cost of health insurance to the wife will be \$606.00 per month, post-decree. Exhibit R121, Financial declaration page 5, section 7E.

In sum, the wife's obligation increased by \$2,263.00 from temporary orders due to the home mortgage and the health insurance costs assigned to her. Her maintenance of \$1,700.00 ordered by the trial court does not even meet this increase. Her need per her financial declaration is \$9,282.00 per month (Exhibit R121, Financial declaration page 1), less her \$1,100.00 foster care/adoption subsidy from the State of Alaska (Exhibit R121, Financial declaration page 2, section 4) and \$972.52 child support ordered by the court (CP 50-56) for an actual need of \$7,209.48 per month.

Contrast the husband's situation. His maintenance reduced \$100.00 per month from \$1,800 per month to \$1,700.00 per month. CP 10-11, CP 64-69. His obligation for the \$1,657.00 home mortgage was terminated. CP 64-69. His financial situation improved by \$1,757.00 per month.

The husband's ability to pay increased maintenance is easily demonstrated. Under temporary orders he was ordered to pay the spousal maintenance of \$1,800.00 per month and the home mortgage of \$1,657.00 per month. At the same time, he was still able to make substantial payments to his Thrift Savings Plan. The husband's Thrift Savings Plan was entirely voluntary. RP 318, line 9. After separation and while paying maintenance, the husband contributed \$10,897.76 to his Thrift Savings Plan Civilian. RP 322 line 1. He contributed another \$4,944.20 to his Thrift Savings Plan Uniformed. RP 327, line 8. The total voluntary contribution during temporary orders was \$15,841.96.

The husband's income was at its highest level ever at the time of trial. His income will be increasing given the guaranteed increases provided by Alaska Airlines. Exhibit R118. When it is considered that he was able to voluntarily contribute \$15,841.96 to his Thrift Savings Plan while meeting his maintenance obligation, paying the home mortgage, and paying the wife's health insurance, the minimal maintenance ordered by

the trial court is not equitable. This is especially true given the grossly disproportionate property division in favor of the husband. On remand, this Court is asked to direct the trial court to order no less than 5 years maintenance at an amount no less than what was paid by the husband in temporary orders, \$3,457.00 per month.

III. THE TRIAL 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**

At page 12 of the Joint Management report, the husband requested that the wife be charged 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. See also RP 588, line 19 referencing the husband's request for the \$40,000.00 charge to the wife. The exhibit showing both the \$5,000.00 deposit and the \$35,000.00 deposit is Exhibit R110, page on of exhibit. The wife's accounting of use of these funds is at Exhibit R111.

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. 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, below.

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

Ms. McCrea-Jones' car was wrecked in January 2018 and was totaled by the insurance company. RP 309, lines 7-12. The insurance company mailed a check to the husband for \$8,000.00 representing the insurance proceeds of the wife's totaled vehicle, and he kept the check. RP 309 lines 15-25.

The wife bought another vehicle, 2017 Chrysler Pacifica on March 26, 2018, long after separation. Exhibit R104; RP 310, line 23 through RP 311, line 8. She paid a \$3,000.00 down payment at the time of purchase. Exhibit R104, RP 311, lines 21-25. She took out a loan for the remainder of the balance due. Exhibit R104, R105. During the time of purchase, the wife was receiving child support and maintenance from the husband and receiving an adoption subsidy from the State of Alaska. RP 312, line 22 through 313 line 4.

Husband asserted that she paid this \$3,000.00 down payment from the \$40,000.00. RP 313 line 7. However, if true, husband would be “double dipping” by asking for both the \$3,000.00 down payment and the \$40,000.00 award. RP 313 lines 9-24. Husband admitted that this proposal would be double dipping. RP 313 line 25.

The trial court erred by finding that this Chrysler Pacifica and the underlying loan was community property as it was purchased by the wife long after separation. CP 57-63, findings page 4, section 9.48 and page 5 section 11.4. In reaching this equitable goal, the trial court must first characterize the property as either community or separate. In re Marriage of Olivares, 69 Wn. App. 324, 329 (1993). 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). As this vehicle was

acquired after the date of separation, it is definitively separate property. It is clear error and the wife's \$5,551.00 equity in the vehicle was her separate property, not community property as charged by the trial court. For value of the vehicle see CP 57-63, findings, page 4, section 9,48. For value of the car loan, see CP 57-63, findings, page 5, section 11.4.

The trial court further erred by finding that the \$3,000.00 down payment came from the \$40,000.00 contained in the STCU accounts. See Exhibit R110. This bank account also contained the wife's child support, maintenance, and Alaska adoption subsidy/foster care payment. There was no way to trace the \$3,000.00 down payment to the \$40,000.00 originally placed in this account.

More importantly, the trial court erred by finding the Chrysler Pacifica to be community *and* by charging her with the full \$40,000.00 received from the STCU account. See CP 57-63, page 4, section 9.49 and 9.50. If the \$3,000.00 down payment was paid from the \$40,000.00 as claimed by the husband, the trial court "double dipped" the wife by charging her for both. At most, the trial court could only charge the wife for \$37,000.00 received (assuming that no attorney fee credit is provided). Again, see CP 57-63, findings, page 4, section 9.49 and 9.50. This should be corrected on appeal.

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

The trial court charged wife for her USAA Savings using date of separation value. 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.

Yet, 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. This is completely inappropriate and is clear error. The husband should be charged the \$4,814.00 that was initially in the account.

IV. THE COURT ERRED BY DENYING MS. MCCREA-JONES' REQUEST FOR ATTORNEY FEES AFTER SHE DOCUMENTED HER NEED AND MR. JONES ABILITY TO PAY.

RCW 26.09.140 governs cost and attorney fee awards in domestic relations proceedings. The statute provides that “[t]he court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney’s fees or other professional fees in connection therewith...” *Id.* Whether or not an award is proper is discretionary, but the award “must be based upon the financial need of the wife and the ability of the husband to pay.” *Cleaver v. Cleaver*, 10 Wn. App. 14, 22 (1973). While neither party is entitled to “free litigation”, when one party has a need, and the other party has an ability to pay, an award of attorney fees is appropriate. *Id.*; *see also Coons v. Coons*, 6 Wn. App. 123, 126 (1971).

“Need” is determined as of the outset of the case, and not necessarily as of the time of trial. Washington Family Law Deskbook, section 3.3(1), page 3-9. The wife, for example, may receive a substantial property and maintenance award in the final decree, but she may also be entitled to attorney fees if the husband has the ability to pay and from the outset she did not have access to the resources necessary to finance her litigation, or if she was forced to invade her property to finance the litigation but the husband was able to finance his out of current income.

*Id.* at 3-9. -10; *see also Friedlander v. Friedlaner*, 58 Wn.2d 288 (1961) (situation must be viewed as it existed at the time the action was commenced); *In re Marriage of Morrow*, 53 Wn. App. 579, 590 (1989) (“A spouse's receipt of substantial property or maintenance does not preclude the spouse from also receiving an award of attorney fees and costs when the other spouse remains in a much better position to pay.”).

Importantly, need “does not necessary mean destitution or poverty but it does mean an absence of funds and a lack of ability to get them without extreme hardship.” *Coons*, 6 Wn. App. at 126. For example, in *Knies v. Knies*, a husband appealed the trial court’s decision to award his ex-wife \$4,500 in attorney fees. 96 Wn. App. 243, 254 (1999). Although the wife had a secure job, an IRA, \$12,000 in cash, and \$160,000 in equity in her home, the court nevertheless awarded fees in her favor. *Id.* This ruling was upheld by the Division 1 Court of Appeals, finding that because Mr. Knies had more assets and an ability to pay, the award was proper.

Likewise, in *Mattson v. Mattson*, 95 Wn. App. 592, 605 (1999), the Division 2 Court of Appeals upheld an award of attorney fees following trial. The court found that because the husband’s resources substantially exceeded the wife’s and because the wife had documented her need and

provided an accounting of the fees owed to her counsel, the trial court properly exercised its discretion in granting an award. *See id.*

Most notably, in the unpublished case of *Mount v. Mount* discussed in Section I, above, the Division 2 Court of Appeals upheld a trial court's decision which awarded 75% of the community property to the wife, required the husband to pay \$1,500 in maintenance until he retired, required him to pay \$12,452 of his wife's student loans, and required him to pay \$7,000 of his wife's attorney fees. *Mount*, 2014 WL 48002 at \*1. What is most noteworthy about *Mount* is that while the award significantly favored the wife, the husband's monthly income was \$7,634 and the wife's was \$3,894. *Id.* The income gap between the parties in the instant case is even larger. Nevertheless, the court in *Mount* found it proper to not only award a disproportionate share of property and maintenance, but to award attorney fees. *Id.* at \*5-6. In doing so, the court reasoned that based on their relative incomes and separate property, the wife had a need and the husband had an ability to pay. *Id.* at \*6.

In the case at hand, Ms. McCrea-Jones clearly demonstrated at trial that she did not have an income or any separate funds from which to finance the action. RP 589-90; RP 664-65. While Ms. McCrea-Jones obtained a professional degree during the marriage, she was unable to complete requisite testing or begin working as a licensed psychologist due

to continuing needs involving the parties' severely disabled children. RP 543-44.

As discussed at section III, assigned property error #1, Ms. McCrea-Jones was only able to pay for her attorney fees prior to trial by utilizing the \$40,000.00 funds in the parties' joint account at separation. RP 589, lines 13-22. These funds, although already spent, were awarded to Ms. McCrea-Jones as an asset following trial. CP 71; CP 107. As a result, in the entirety of this action, she has received absolutely no award of attorney fees.

Currently, Ms. McCrea-Jones sole sources of income are adoption support she receives from the State of Alaska, spousal maintenance (which ends in September 2019), and child support. This limited income does not provide Ms. McCrea-Jones even enough to meet the basic needs of herself and the children each month. Ms. McCrea-Jones has no ability to pay for the litigation. At the time of trial, the wife had approximately \$100.00 in her bank account. RP 591, line 24.

Mr. Jones, on the other hand, has an absolute ability to pay Ms. McCrea-Jones' attorney fees. Mr. Jones' current income is more than sufficient to meet his financial obligations and pay his attorney fees. RP 382, lines 5-8; RP 684. As a pilot at Alaska Airlines and in the Air National Guard, Mr. Jones' monthly income will only continue to increase

on a yearly basis. RP 384, lines 11-4; RP 431-32, Exhibit R118. In addition, Mr. Jones was awarded only \$10,346 of the community debt, which further increases the disparity between his monthly income and monthly expenses. CP 114.

In denying Ms. McCrea-Jones request for attorney fees, the trial court abused its discretion. RP 804, lines 7-12. This is especially true when considering the disproportionate share of property awarded to Mr. Jones and the insignificant temporary maintenance award to Ms. McCrea-Jones. The economic circumstances of the parties following the trial court's decision are drastically different, despite the fact that the parties had a 20 year marriage. Mr. Jones should have been ordered to pay Ms. McCrea-Jones attorney fees.

V. THE COURT ERRED BY ORDERING THE RESPONDENT TO REFINANCE THE FORMER FAMILY HOME WITHIN ONE YEAR.

In its property distribution, the trial court in this case awarded the parties' Spokane home to Ms. McCrea-Jones, which had an estimated equity of approximately \$24,270. RP 798, lines 21 - RP 799, line 1.

Importantly however, the Court also required that Ms. McCrea-Jones refinance the home by September 2019 (one year) or sell it if she was unable to obtain refinancing. RP 799, lines 4-9; CP 70.

If the trial court's disproportionate division of property had been made *in favor of* Ms. McCrea-Jones as the financially disadvantaged spouse, had sufficient maintenance had been ordered, and had reasonable attorney fees been ordered, a requirement to refinance the home would arguably have been reasonable. However, by dividing property in the manner that it did, awarding the vast majority debt to Ms. McCrea-Jones, and ordering that a refinance be completed within one year, the trial court imposed a requirement that could not possibly be met.

Given the substantial debt assigned to Ms. McCrea-Jones in the decree, she received only 5.15% of the net property award. Other than this insignificant award, Ms. McCrea-Jones has no other liquid assets to assist in obtaining refinancing. Furthermore, by denying Ms. McCrea-Jones request for attorney fees, the martial property awarded to her which could have otherwise assisted in refinancing the home was utilized to cover litigation costs incurred before, during, and after trial. Given the grossly disproportionate division of property in favor of Mr. Jones, the trial court failed to afford Ms. McCrea-Jones a legitimate opportunity to obtain refinancing. Her income/debt ratio alone would disqualify her from any

refinance. Even the husband acknowledged during trial it would be impossible for the wife to refinance the home “at this point”. RP 295 , line 9. The requirement imposed by the trial court amounts to an abuse of discretion and should not be upheld.

Aside from the impossible economics of the situation, the sale of the home is inappropriate under the circumstances. The sale of the home would be traumatic to Grace and Ashara. RP 584, line 7. Ms. McCrea-Jones testified that the sale would devastate Grace because of her need for stability given her special needs and her attachment to the home. RP 584, lines 8-20. Concerns for Grace include an increase in her depression, increase in anxiety and an escalation of her ADD symptoms. RP 584, lines 23-25.

Very importantly, if the home were sold, the sale would result in a net loss to the parties of \$1,200.00 See RP 298, lines 12-18 (husband’s testimony). However, this estimate does not include the repairs that would need to be made to the property to get it ready for sale. RP 587 line 18 through RP 588 line 16. The wife does not have the funds for these repairs. RP 588, line 18. The loss to the wife would be likely greater than the \$1,200.00 amount asserted by the husband.

Then husband’s desire for a refinance is based on his concern that the wife’s payment of the loan exposes the husband to a credit risk. RP

295, line 23. The husband also would get back his VA loan ability. RP 299, line 22.

It is critical to note that wife will lose the assigned \$24,000.00 equity in the home and end up with this \$1,200.00 loss if a sale is required. RP 298 lines 12-18. The end result is rather than having been awarded 5.15% of the net assets, Ms. McCrea-Jones would actually be awarded a negative percentage with Mr. Jones receiving over 100% of the net estate. This is beyond a draconian result. There is no good cause shown to order the sale of the home under the circumstances of this case.

#### VI. REQUEST FOR ATTORNEY FEES

The Appellant requests the Court for an award of attorney fees pursuant to RCW 26.09.140 and in accordance with RAP 18.1. RCW 26.09.140 provides “[u]pon any appeal, the appellate court may, in its discretion, or a party to pay for the cost to the other party of maintaining the appeal and attorneys’ fees in addition to statutory costs.” As detailed above, the order of the trial court placed the parties in grossly disparate financial circumstances, with Mr. Jones being placed in the highly advantageous position. This is contrary to Washington law and wholly inequitable. Mr. Jones has a steadily increasing salary and continued ability to pay attorney fees. Ms. McCrea-Jones has a substantial need for

attorney fees. Although attorney fees were not granted at trial, this Court has the authority under RCW 26.09.140 to award attorney fees on appeal. Ms. McCrea-Jones request for attorney fees should be granted.

## VII. CONCLUSION

Due to the gross disparity between the earnings of Mr. Jones and Ms. McCrea-Jones, the length of the marriage, Ms. McCrea-Jones role as the primary caregiver to three special needs children, the trial court should have awarded a disproportionate share of the net property to Ms. McCrea-Jones. Instead, the trial court awarded 94.85% of the net property to Mr. Jones, the financially advantaged spouse. The trial court also erred in its determination of characterization and valuation of certain properties, making the award even more inequitable. This is a manifest abuse of discretion.

Ms. McCrea-Jones demonstrated a clear need for maintenance. Ms. Jones had the ability to pay maintenance. The trial court's award of maintenance is wholly insufficient under the facts of this case. No less than five years of maintenance should be ordered at an amount to meet the wife's need.

Furthermore, despite Mr. Jones' ability to pay attorney fees and Ms. McCrea-Jones' demonstrated need, the trial court abused its discretion

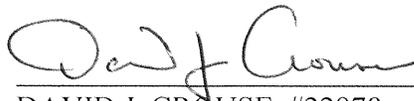
by failing to award attorney fees. By ordering that the \$40,000.00 used by the wife to pay her attorney fees be charged to her as a property distribution, absolutely no fees were awarded to the wife at any time during the case. A substantial attorney fee award should be ordered, equal to the \$40,000.00 the wife utilized from the bank funds that were made available to her. Similarly, she should not be charged with this \$40,000.00 in attorney fees as a property distribution., This would require further adjustments to the property distribution that was before the trial court.

Finally, the trial court abused its discretion by requiring Ms. McCrea-Jones to refinance the former family home within one year without affording her the economic means to do so. This will result in the displacement of high needs territory. The only advantage to husband is that his credit rating might improve and he would regain his VA eligibility. A sale would ensure that the wife received less than 0% of the community net assets.

This Court is asked to be very precise in its remand. Across the board, the trial court made rulings against the wife that in many respects are not remotely supportable by the law. A 5.15% of net asset award to the wife is unseen in any Washington case law. The fact that minimal maintenance was awarded and no attorney fees were awarded resulted in a truly draconian decree. Without a strict and clear remand, the wife has no

confidence that these injustices will be truly corrected.

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 23<sup>rd</sup> day of September, 2019, he 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.

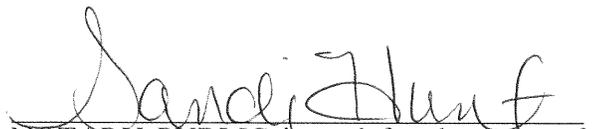
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DAVID J. CROUSE, #22978

SUBSCRIBED AND SWORN to before me this 23 day of September 2019.



NOTARY PUBLIC in and for the State of  
Washington, residing in Spokane.  
My Commission Expires: 3-19-2020