No. 1025530

THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

KRISTIN N. HARPER,

Respondent,

and

BENJAMIN STONER-DUNCAN,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

DECISIONS OF THE WASHINGTON SUPREME COURT

DECISIONS OF THE WASHINGTON COURT OF APPEALS

WASHINGTON STATE STATUTES

WASHINGTON STATE COURT RULES

I. INTRODUCTION

Stoner-Duncan presents no legitimate basis for this Court's review. As this Court has emphasized, appellate review of property divisions and other orders coming out of the arbitrated dissolution of a marriage is strictly limited by the courts' interests in carving out a space for finality in arbitration. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). This Court strongly discourages appeals of arbitration awards. "Encouraging parties voluntarily to submit their disputes to arbitration is an increasingly important objective in our ever more litigious society. This objective would be frustrated if a trial court were permitted to conduct a trial *de novo* when it reviews an arbitration award. Arbitration is attractive because it is a more expeditious and final alternative to litigation." *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995). [Emphasis added.]

Stoner-Duncan's petition is based in part on a fictitious portrayal of the property disposition wherein he has allegedly received only 19% of the community property; a portrayal which has been rejected by the arbitrator, superior court, and Court of Appeals.

His central complaint concerns the arbitrator's treatment of his future earnings. Stoner-Duncan claims that the arbitrator improperly valued his future earnings and divided them on the property spreadsheet. Yet the arbitrator did not award the actual value of Stoner-Duncan's future earnings; as the Court of Appeals noted, the expert valued his future earnings at over $5 million. Slip Op. at 14. Instead, the arbitrator exercised their discretion to award Harper less than 10% of the actual value of Stoner-Duncan's future earnings as an heuristic to "equitably weigh property distribution to Harper by accounting for Stoner-Duncan's future earning potential." Slip Op. at 16.

Because a tribunal "may compensate a spouse who has assisted the student spouse in obtaining his or her professional degree … through property division, maintenance, or a combination of these[]" the arbitrator's use of an heuristic to illustrate their thinking regarding the degree of compensation due Harper for helping Stoner-Duncan obtain his degree was entirely appropriate. *Fernau v. Fernau*, 39 Wn. App. 695, 707, 694 P.2d 1092 (1984); *Washburn v. Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). This Court should deny review.

II. CORRECTIONS TO STATEMENT OF THE CASE

Stoner-Duncan claims that the "arbitration decision resulted in husband being awarded only 19% of the marital estate" Petition at 9-12, 31. This is erroneous. First, Stoner-Duncan's portrayal of his award is premised upon decisions the arbitrator did not make. Second, his portrayal is premised upon there being no expression of

the huge benefit of the medical degree that Harper supported him to obtain (Slip Op. at 5). Petition at 11.

Third, his "19%" portrayal includes the judgment of $171,000 for Stoner-Duncan's outstanding medical school debt which the arbitrator specifically declined to place on the spreadsheet. Slip Op. at 11. The Court of Appeals recognized that had the arbitrator placed the $171,000 on the spreadsheet, Harper would have been responsible for paying it off since it had been rolled into the mortgage for the home Harper was awarded. Slip Op. at 13-14.

Finally, Stoner-Duncan has not contested the arbitrator's treatment of his $171,000 in outstanding medical debt in his petition for review. He nonetheless assumes that somehow it will be inserted into the spreadsheet as an asset to Harper. This is not reasonable.

Stoner-Duncan's portrayal of his award as "19%" of the marital estate is unrealistic, counterfactual, and has

been rejected by the arbitrator, trial court, and Court of Appeals. This Court should give it no credence.

The Court of Appeals did not, as Stoner-Duncan claims, "ignore a legal error apparent on the face of an arbitration award based on the court's own consideration of the merits of the arbitrator's decision." Petition at 33. Instead, the Court of Appeals relied upon the very limited nature of appellate review of arbitrated property divisions in dissolutions (Slip Op. at 6), the dividing tribunal's broad authority to dispose of the property and liabilities of the parties so as to place them on a just and equitable footing (Slip Op. at 10-11, 13), this Court's directive in *Washburn* to consider a spouse's future financial benefit from professional school the other spouse supported them through (Slip Op. at 12-13), Harper's encroaching blindness (Slip Op. at 15), the arbitrator's stated intent to create a "just and equitable distribution" and the arbitrator's repeated belief stated on the face of the award

that the distribution in this case accomplishes that standard (Slip Op. at 18).

Stoner-Duncan confuses the Court of Appeals' consideration of the face of the arbitrator's nearly 100-page award (about which Stoner-Duncan argued in detail to the Court of Appeals in 24 pages of factual recitation) with the prohibition against conducting a trial *de novo* about the arbitration or reviewing the merits of the case. *Morrell v. Wedbush Morgan Sec. Inc.*, 143 Wn. App. 473, 481, 178 P.3d 387, 391 (2008). Stoner-Duncan's portrayal of the Court of Appeals' decision as one which "ignore[s] a legal error apparent on the face of an arbitration award based on the court's own consideration of the merits of the arbitrator's decision" (petition at 33) is incorrect. The Court of Appeals carefully addressed Stoner-Duncan's contention that the award was error, but it simply did not agree with him. Further, Stoner-Duncan appears to criticize the Court of Appeals for reviewing the almost

100- page face of the award, yet this is what the law permits our courts to do. *Cummings v. Budget Tank Removal & Envtl. Servs., LLC*, 163 Wn. App. 379, 388, 260 P.3d 220, 223 (2011).

Stoner-Duncan's final factual misrepresentation lies in his claim that he is simply unable to pay Harper's attorney fees for answering his petition. Because Stoner-Duncan has raised the same unsuccessful arguments over and over, he has been made to pay Harper attorney fees by the arbitrator, the trial court, and the Court of Appeals. He has continued to pay his own attorneys to bring these repeated unsuccessful claims, as well as paying Harper's attorney fees, and none of these financial obligations has deterred Stoner-Duncan from continuing to engage Harper in fruitless litigation. Stoner-Duncan's gross monthly income is $27,703 while Harper's is $10,025. Slip. Op. at 3-4. Even accounting for the $5,000/monthly maintenance Stoner-Duncan is currently paying Harper,

his income still significantly exceeds hers and it is obvious that he can pay her attorney fees for answering this petition.

III. ARGUMENTS AGAINST REVIEW

1. The Court of Appeals' decision does not conflict with any decision of this Court or any other division of the Court of Appeals. The cases upon which Stoner-Duncan relies to establish grounds for acceptance of review do not avail him. He overgeneralizes holdings, ignores strongly worded holdings favoring Harper, and relies upon inapposite cases concerning social security benefits, loss of probable future inheritance, and disability insurance benefits. This case does not satisfy the criteria for acceptance of review.

Stoner-Duncan asserts that *Hall* bars any enumeration of the value of a spouse's future earning capacity due to a professional degree. Petition at 16-17. This overstates the holding of *Hall*. Summing up its

reasoning, *Hall* emphasized the limited nature of its holding:

> Once again we emphasize the importance of consideration of future earning potential. We decline to find that future earning potential is an asset which can be used to offset goodwill. [Emphasis added.] Instead, we hold that it is a substantial factor to be considered by the trial court in making a just and equitable property distribution. On remand, the trial court should articulate its reasoning in taking into account this substantial factor.

Marriage of Hall, 103 Wn.2d 236, 248, 692 P.2d 175 (1984). While Stoner-Duncan characterizes *Hall* as forbidding the use of future earning capacity as an asset used to offset the award of other assets, *Hall* only disapproves of its use to offset goodwill, not all assets, as Stoner-Duncan argues. 103 Wn.2d at 248.

Stoner-Duncan complains that the arbitrator articulated their reasoning for taking into account the substantial factor of future earning capacity, as *Hall* directs be done. Petition at 23. The arbitrator did not specifically use it to offset goodwill, which *Hall* prohibits.

Stoner-Duncan's position appears to be that his future earning capacity should not be considered or balanced in any way, using neither property nor maintenance. *See* Petition at 32. While he criticizes the arbitrator's handling of his substantial future earning capacity, he does not suggest in what equitable way his future earnings should be considered. Instead, he has consistently argued that no value should be placed on his medical education and the future earnings flowing from that education. CP 160. Stoner-Duncan does not establish a conflict with any Washington case, nor does he suggest a reasonable way to harmonize the cases he cites to reach an outcome that takes into account the substantial factor of future earning capacity, as *Hall* requires.

Stoner-Duncan relies upon *Marriage of Leland*, 69 Wn. App. 57, 72, 847 P.2d 518, *rev. denied*, 121 Wn.2d 1033 (1993) for the general principle that "[e]arning capacity is not a divisible asset, although it is a factor to be

considered when dividing the community and separate property in a dissolution proceeding." Petition at 18. [*citing Hall* at Wn.2d 236, 247-48.] Yet *Leland* goes on to note that "[a]n able bodied spouse leaves a dissolved marriage with his or her earning capacity intact, and his or her former spouse has no property interest in that earning capacity." *Leland*, 69 Wn. App. at 72. The Arbitrator acknowledged this language in *Leland,* finding they nevertheless have the power to consider Stoner-Duncan's earning capacity as an asset. CP 166.

Stoner-Duncan's interpretation of *Leland* fails to harmonize with the arbitrator's power and responsibility to do equity when one spouse has sacrificed their earning capacity to put a student spouse through school, as explained by our Supreme Court in *Washburn v. Washburn*, 101 Wn.2d 168, 677 P.2d 152 (1984). Further, *Leland* is inapposite. *Leland* did not concern a student spouse; in *Leland*, the question is "whether a disability

insurance policy is properly treated in the same manner as a term life insurance policy for purposes of characterizing the ownership of the policy proceeds." 69 Wn. App at 72.

Leland did not take the hard line Stoner-Duncan suggests. Rather than hewing to a rigid rule that earning capacity is not a divisible asset, the *Leland* court arrived at an "equitable result" that post-age 65 disability payments, while they are "designed to protect against the risk of loss of the insured's future earning capacity," (*Id.* at 72) can be characterized in the nature of a pension in which the marital community retains an interest. *Id.* at 73.

In so doing, *Leland* took into account many equitable factors, including the tax status of the amount at issue, the time frame in which the husband's post-dissolution obligations will be completed, the duration of child support, the wife's ability to acquire retirement

benefits, and the parties' respective future earning capacities. *Id*. at 75. No hard line rule limits the court's or Arbitrator's ability to do equity in cases like the one at bar. Rather, *Leland* follows Washington caselaw and policy by prioritizing the trial court/arbitrator's obligation to do equity in the unique circumstances of each case rather than blindly follow inflexible dogma, just as the Arbitrator did in this case. The Arbitrator correctly fashioned an equitable result given the facts of the instant case and the trial court correctly confirmed the Arbitrator's decision.

Stoner-Duncan gives short shrift to the policy set forth by our Supreme Court in *Washburn* that the supporting spouse should be compensated "through a division of property and liabilities" and/or a just award of maintenance. *Washburn*, 101 Wn.2d at 178:

> When one spouse supports the other through professional school in the mutual expectation that the community will enjoy the financial benefit flowing from the resulting professional

> degree, but the marriage is dissolved before that benefit can be realized, should the supporting spouse be compensated? Our answer is yes. The contribution of the supporting spouse to the attainment of a professional degree by the student spouse is a factor to be considered in dividing property and liabilities pursuant to RCW 26.09.080, or in awarding maintenance pursuant to RCW 26.09.090. The *Washburn* court failed to consider Mrs. Washburn's contribution to her husband's education in any respect. We thus reverse and remand for consideration the appropriate compensation due Mrs. Washburn.

Id. at 170. *Washburn* held it was error for the trial court to "decline[] to characterize Mr. Washburn's degree as property, and refuse[] to admit expert testimony which would have established the value of the degree through comparison of Mr. Washburn's earning potentials with and without it." *Id.* at 161.

Because the student spouse leaves the marriage with "the degree and the increased earning potential that it represents, while the supporting spouse has only a dissolution decree" *Id.* at 173-74, "that circumstance is a

'relevant factor' which must be considered in making a fair and equitable division of property and liabilities pursuant to RCW 26.09.080, or a just award of maintenance pursuant to RCW 26.09.090. A professional degree confers high earning potential upon the holder. The student spouse should not walk away with this valuable advantage without compensating the person who helped him or her obtain it." *Id.* at 178. [Emphasis added.]

Washburn consistently emphasizes the broad discretionary powers of the trial court, noting "[w]e are reluctant to encroach upon this discretion by providing a precise formula prescribing the amount of property to be distributed… to the supporting spouse." *Id.* at 179. [Emphasis added.]

Washburn directs trial courts to consider a long list of factors when "determining the proper amount of compensation for the supporting spouse…" including the amount of community property expended for educational

costs, the amount the community would have earned had the efforts of the student spouse not been directed toward their studies, any educational or career opportunities which the supporting spouse gave up in order to support the student spouse, or move to where the student spouse wished to attend school, the future earning prospects of each spouse, including the earning potential of the student spouse with the professional degree. *Id.* at 179-80. [Emphasis added.] The arbitrator properly and carefully considered these factors.

Stoner-Duncan's reliance on *Fernau v. Fernau*, 39 Wn. App. 695, 707, 694 P.2d 1092 (1984) is similarly misplaced. While Stoner-Duncan cites *Fernau* for the proposition that the Arbitrator lacks authority to award a professional degree or earning capacity as a tangible asset (Petition at 17), *Fernau* actually says something very different. The *Fernau* wife argued on appeal that the trial court is required to explicitly determine the value of the

student spouse's medical degree, training, and increased earning capacity, and to award a portion of that amount to the supporting spouse with provisions for payment, disposing of it as if it were property analogous to a home, business, or pension. *Id*. at 708.

Understandably, the Court of Appeals declined to impose such a requirement on the trial court, holding only that the trial court must compensate the supporting spouse through the variety of options described in *Washburn*: "property division, maintenance, or a combination of both." *Fernau*, 39 Wn. App. at 707; *Washburn*, 101 Wn.2d 183-84.

While the Arbitrator found that Mr. Kessler projected that from 2021 through 2045 when Stoner-Duncan turns 65, the community would lose a total of $5,425,000.00 of Stoner-Duncan's earnings, the Arbitrator found no caselaw supporting the award of such earnings. CP 122. The arbitrator thus did not award the

valuation of Stoner-Duncan's future earnings in the spreadsheet.

Noting that the community invested 10 years into Stoner-Duncan completing a fifth year before entering medical school, attending medical school, and completing his residency while only realizing income of 2-3 years before separation, the Arbitrator determined that the equitable amount to assign to Stoner-Duncan's degree/future earnings is 10% of Mr. Kessler's estimate, or $542,500.00. CP 123. On reconsideration, the Arbitrator lowered that value to $472,000.00. CP 166. Thus the arbitrator did not value Stoner-Duncan's future earnings and place that value on the spreadsheet; the arbitrator used a highly discounted figure as a heuristic for fair compensation to Harper for all she had sacrificed over many years and the academic career she gave up to obtain Stoner-Duncan's medical degree.

While Stoner-Duncan argues that *In re Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572, 578-79 (2007) supports his hard-line approach to consideration of future earnings, it does not. Petition at 18-19. *Rockwell* affirmed the trial court's consideration of the husband's future earning capacity of $70,000/year for several years until retirement when formulating the overall property award. 170 P.3d 579.

Stoner-Duncan's reliance upon a concurrence to claim that *Brewer v. Brewer*, 137 Wn.2d 756, 976 P.2d 102 (1999) stands for the broad proposition that future, post-dissolution earnings are not assets which are before the court for disposition in a dissolution action is misplaced. The *Brewer* court said: "[t]he question presented in this case is whether monthly payments to a permanently disabled spouse under a private disability insurance policy after dissolution of a marriage constitutes separate property and not community

property, even though the policy was acquired during the marriage and premiums were waived by the issuing companies." 137 Wn.2d at 758. This bears little or no relationship to the instant case. In *Brewer*, this Court held that the arbitrator is free to allocate a disability payment however it believes is equitable. *Id*. at 768. The *Brewer* court's consistent emphasis is on the arbitrator's ability to do equity. *Id*. at 769. *Brewer* does not support review.

Stoner-Duncan relies heavily on *Marriage of Zahm*, 138 Wn.2d 213, 978 P.2d 498 (1999) (Petition 22-23), yet *Zahm* is inapposite and does not support review. *Zahm* says that Social Security benefits are not assets subject to division, just a factor for consideration, because federal law doesn't allow them to be divided: 42 U.S.C. § 407(a) of the Social Security Act (Act) and 42 U.S.C.A. § 659(i)(3)(B)(ii). *Zahm* does permit a trial court to consider a party's social security benefits when

determining the parties' relative economic circumstances at dissolution, under RCW 26.09.080. 978 P.2d at 503. *Zahm* does not support review.

Stoner-Duncan characterizes *Broom v. Morgan Stanley DW Ins.,* 169 Wn.2d 231, 236 P.3d 182 (2010) as standing for the hard line that facial legal error, regardless of the merits of the resulting decision, is grounds for vacating an arbitration award because it constitutes an instance in which arbitrators exceed their powers. Petition at 25-6, 30. Yet Stoner-Duncan flatly misstates the language of *Broom* – nowhere does *Broom* say "regardless of the merits of the resulting decision." Stoner-Duncan's reliance on *Broom* is misplaced and does not support review.

Similarly, Stoner-Duncan's reliance upon *Federated Services v. Estate of Norberg*, 101 Wn.App.119, 126, 4 P.3d 844 (2000) (Petition at 29-30) does not avail him. While *Norberg* concerns a vacated arbitration award, the

Norberg court resorted to an extended discussion of the nature of survival actions going back to common law; its holding is solidly grounded within this legal context. 4 P.3d 847-849. This bears no resemblance to the case at bar and does not support review.

Contrary to Stoner-Duncan's skewed interpretations of *Washburn, Hall*, *Fernau*, and the other cases upon which he relies, the path our appellate courts have carefully marked out on this issue is that while the trial court or Arbitrator is not required to explicitly determine the value of future earnings and to award some portion of that amount to the supporting spouse as an heuristic for the consideration *Hall* and *Washburn* require be given to future earnings, the trial court or Arbitrator may do so if in their discretion equity requires it be done. The Arbitrator was well within their discretion to use a heuristic to value and allocate a small amount of the actual value of Stoner-Duncan's medical degree and

earning capacity, and the trial court properly refused to vacate the award on this basis.

2. The Court of Appeals correctly considered the face of the award in arriving at its holding. Stoner-Duncan argues that this Court should grant review based upon a selective reading of the almost 100 pages of arbitration award comprising the "face" of the award. His claim that this Court should ignore those portions of the face of the award that explain the arbitrator's reasoning is without logic or basis in the law.

Stoner-Duncan's reliance upon *Morrell* to support his argument that the Court may not look at the entire face of the arbitration award does not avail him. In his petition, Stoner-Duncan discusses several cases in which the face of the award, including the equitable factors and circumstances set forth on the face of the award, were appropriately considered in fashioning a holding. The Court of Appeals did not err in so doing.

According to Stoner-Duncan, *Morrell* stands for the simple proposition that arbitrators exceed their powers when they assign an erroneous reason for their decision. Petition at 25, 28. But the appellate court in *Morrell* rejected the claim that the arbitrator had exceeded their powers because they assigned an erroneous reason for their decision. 178 P.3d 394. The takeaway from *Morrell* is that the "arbitrator's decision should be the end of dispute, not the beginning" at 178 P.3d 391.

The arbitrator here acted well within their powers, and the trial court correctly confirmed the carefully crafted award. This Court should deny review.

3. This Court should award Harper attorney fees for having to respond to this Petition. This Court may award Harper attorney fees for answering an unsuccessful petition for review. RAP 18.1(j); *Mainline Rock & Ballast, Inc., v. Barnes, Inc.*, 8 Wn. App.2d 594, 625-26, 439 P.3d 662, *rev. den.*, 193 Wn.2d 1033 (2019).

Stoner-Duncan has the ability to pay Harper's attorney fees based upon Stoner-Duncan's gross monthly income of $27,703. Harper's gross monthly income is $10,025. Slip. Op. at 3-4. Even accounting for the $5,000/monthly maintenance Stoner-Duncan is currently paying Harper, his income still significantly exceeds hers and it is obvious that he can pay her attorney fees for answering this petition.

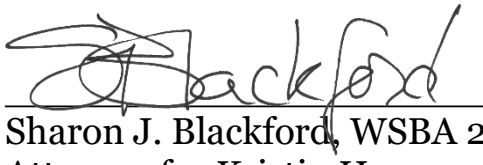
IV. CONCLUSION

This Court should decline Stoner-Duncan's petition for review because the Court of Appeals opinion upholding the arbitrator's and trial court's decisions conforms with Washington law and does not contradict any Washington case.

I certify that this pleading is in 14 point Georgia font and contains 3,709 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

DATED this 13th day of December, 2023.

Respectfully submitted:



Sharon J. Blackford, WSBA 25331
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CERTIFICATION OF SERVICE

I, Peter Chadwick, certify that on the 13th day of December, 2023, I caused a true and correct copy of **Answer to Petition For Review** to be served on:

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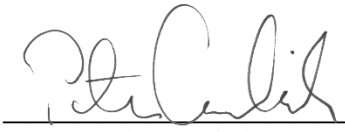
VIA the Court of Appeals eService portal.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Shoreline, Washington, this 13th day of December, 2023.



Peter Chadwick, Legal Assistant
to Sharon Blackford

SHARON BLACKFORD PLLC

December 13, 2023 - 2:35 PM

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