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(Consolidated with Nos. 35292-7-III, 35499-7-III, and 35839-9-III)

WASHINGTON STATE COURT OF APPEALS, DIVISION III

LORI VAN DE GRAAF,

Respondent,

v.

ROD D. VAN DE GRAAF,

Appellant.

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT

Hon. Michael G. McCarthy

APPELLANT ROD D. VAN DE GRAAF'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY REPLY

This case cries out for reversal and remand to a different judge for a genuinely equitable property division and reasonable maintenance amount for a fixed duration. Try as she might, Respondent cannot get around the multiple clear errors that constitute abuse of discretion in the trial court rulings. Reversal is required because the trial court failed to exercise its discretion within the statutory and case law legal boundaries on the evidence before it.

First, it purported to divide and “award” as part of the marital property an insurance policy of over \$116,000 that was not owned by either spouse, a jurisdictional defect rendering the award void and, when that fact was called to its attention on reconsideration, the trial court refused to correct the error. That alone requires reversal.¹

Second, it based its permanent maintenance award on financial figures from 2012, despite the availability of current financial information for the obligated party, Appellant Rod Van de Graaf, which were provided at trial and, despite Rod’s motion to modify the unsupportable maintenance in 2017. The award fails the statutory requirement that the obligated party is able to pay the amount ordered as well as provide for his own needs. The \$6,000/month ordered consumes nearly 77% of Rod’s pre-tax

¹ *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002) (decree with third party property vacated); *Persinger v. Persinger*, 188 Wn. App. 606, 355 P.3d 291 (2015) (void judgments must be vacated).

monthly income of \$7,800 and, given the nature of the overall award and the unavailability of the insurance policy funds, the trial court left Rod bereft of liquid assets to supplement his monthly income.

Third, the trial court failed to take into account for maintenance the fluctuation in cattle prices which affect Rod's income and ability to pay, absent an award of sufficient liquid assets to supplement the fluctuations inherent in the cattle (or any other agricultural) business. Rather, the trial court unrealistically treated the cattle business as a steady-state income machine based on the earlier high cattle price years. Even if there is an arguable justification for that approach in determining the property division (which there is not), those figures cannot equitably be used in calculation of maintenance at the end of trial in fall, 2016, or in denying Rod's motion to modify in April, 2017.

Fourth, the trial court erred in characterizing the Ellensburg property as community when it was purchased by Rod and his brother in 1977, eight years before the marriage. RP 500. At most, there could be a small marital lien on that property, since its taxes and other payments were serviced with separate funding sources rather than community funds or labor. Nevertheless, the trial court ignored the pre-marriage purchase of the property and how it was financially maintained and added the entirety of its value into the community property "pot" which the trial court decided to divide

equally, while leaving both parties to retain all their separate property. This also requires vacation of the overall property division after a proper re-characterization of the Ellensburg property.

Finally, the trial court erred by including in its calculations that it believed Rod would soon inherit Van de Graaf Ranches (“VDGR”) from his parents, Dick and Maxine Van de Graaf, using that “mere expectancy” to drive both the property division and the amount and duration of the permanent maintenance award, which continues even if Respondent remarries. The court’s November 17, 2016, ruling incorporated into the final orders makes this plain:

Rod Van de Graaf is a very wealthy man, **who is about to become even wealthier**. He is the co-owner of the Midvale Cattle Company, the co-owner of K2R, LLC [sic], **and will soon be the co-owner of VDGR**. I can only estimate his accumulated wealth, which has to be close to 5 or 6 million dollars, if not more. [Rod] is easily able to support himself and his former spouse, without hardship to either.

CP 787-88 (emphasis added). It then expressly *added* that expected inheritance to Rod’s total gross income from Midvale “**for 2012**” when calculating maintenance, stating, “it is reasonable for the Court to conclude his income will increase **once his interest in Van de Graaf Ranches, is formalized**” such that his annual income would “translate[] to almost \$17,000 per month. CP 788 (emphasis added).

This is clear error requiring reversal because, as shown in the Opening Brief, there is no *evidence* supporting this determination of Rod’s monthly income at the end of trial or in April 2017. This runs

afoul of RCW 26.09.090(f) because the evidence of Rod's income and assets at the end of trial and in 2017 do not support that finding given 1) the decline in the cattle prices from historic highs; 2) the financially tenuous situation of Midvale Cattle Company in 2016 and 2017; and 3) use of a "mere expectancy" that Rod would inherit great wealth "soon" when no document or competent, admitted evidence sets forth any such right that he had or could act on.

It is particularly inequitable since Lori received virtually all the liquid assets from the marriage, is currently continuing to work as a part-time special education teacher in the Sunnyside School District and claims income of over \$21,000 per year, and stands to have her own inheritance from her parents, the owners of the jewelry store in Sunnyside, which the trial court refused to consider.

These errors then drove the erroneous post-trial rulings on contempt (how is a person supposed to make monthly payments based on an "expected" inheritance not received?); suit money (with over \$1 million in liquid assets Respondent claims an immediate need, yet her appellate briefing shows she is fully represented on appeal), and the "529 Account" for their fourth son's final year at WSU, where payment of college bills had never been an issue during the five year pendency of the divorce.

Any response arguments not addressed herein are answered by Rod's Opening Brief, and the Court is respectfully directed there.

II. REPLY ARGUMENT

A. The Trial Court Abused Its Discretion In Dividing The Marital Estate By Considering As Available To Rod Assets In Which He Had No Legal Interest – His Parents’ Business, Van de Graaf Ranches.

Fundamental to a marital property division is that the trial court is to make an equitable disposition “of the property and the liabilities of the parties, either community or separate,” RCW 26.09.080 (emphasis added). Nothing else is before the court in a dissolution. *See* OB at 33-36.

The statute governing division of marital assets, RCW 26.09.080, lists the factors a trial court is to consider when dividing marital assets and liabilities. Although the statutory factors are not exclusive, nothing in the statute suggests the court may consider acquisitions it finds are likely to occur in the future. Indeed, the plain language of the statute does not allow the court to divide assets based on speculation. The fourth statutory factor is “the economic circumstances of each spouse *at the time the property division is to become effective*[.]” RCW 26.09.080(4) (emphasis added). Lori would have this court rewrite the fourth factor to add the words “and might be in the future.” “[A] court must not add words where the legislature has chosen not to include them.” *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

To be sure, Washington courts have stated a few times that the trial court may consider anticipated future acquisitions. Lori

cites two of them. Response Brief (“RB”) at 26 (citing *Stacy v. Stacy*, 68 Wn.2d 573, 414 P.2d 791 (1966); *In re Marriage of Gillespie*, 89 Wn. App. 390, 948 P.2d 1338 (1997)). But in every such decision, that language was *dictum* and never adopted as a holding. And for good reason: no one, even a court, can reliably predict the future. Lori cites no precedent where the court actually divided or awarded “property” that was an anticipated, unvested future acquisition or inheritance. And Rod has found none.

The only form of “future” assets or income that may be considered is where the spouse’s interest in the future asset had already vested, so that it cannot be taken away, such as stock options and pension rights. *See, e.g., In re Marriage of Short*, 125 Wn.2d 865, 873-75, 890 P.2d 12 (1995) (adopting analysis for division of vested stock options). But the law always has been that a mere expectancy is not a property right subject to division in a divorce. *In re Marriage of Harrington*, 85 Wn. App. 613, 624, 935 P.2d 1357 (1997) (“For purposes of Washington dissolution actions, property... must be something to which there is a right. A mere expectancy is not a right and such is not property. WSBA, WASHINGTON FAMILY LAW DESKBOOK § 38.2 (1989).”). *See* OB at 33-36.

This basic principle has not been changed by the legislature or the courts to date, as confirmed by the FAMILY LAW DESKBOOK; and if it is not divisible property, neither can an expectancy be taken

into account in determining the amount or length of maintenance.²

There is no evidence that Rod had an actual interest, vested or otherwise, in his mother's trust or Van de Graaf Ranches at the time of dissolution. The court thus abused its discretion in considering, when dividing the marital estate, the speculative and unsupported "likelihood" that Rod will acquire that trust in the future, from which he could then inherit a share of his parents' business.

B. The Trial Court Abused Its Discretion In Setting The Amount And Duration Of Maintenance, In Refusing to Modify The Maintenance, And In Finding Rod In Contempt When He Could Not Pay The Maintenance.

1. The trial court abused its discretion in setting maintenance that Rod could not afford to pay and making it permanent, even if Lori remarries, when she continues to be able to work, was awarded ample property, and failed to take into account her own likely inheritance.

In addition to the basic equitable principles described at OB, 46-48,³ maintenance must be based on the parties' current circumstances at the time it is imposed. *In re Marriage of Mathews*,

² The most recent edition of the DESKBOOK (through the 2013 supplement) after discussing unvested stock options, states that "There is no right to an expectancy, such as a prospective inheritance, and thus an expectancy is not divisible "property," language from *Harrington*. WSBA, WASHINGTON FAMILY LAW DESKBOOK § 30.2 (2nd ed. 2004).

³ The trial court may consider the property division when determining maintenance and may consider maintenance in making an equitable division of the property, *In re Marriage of Rink*, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977), and the award must be just in light of all the relevant statutory factors, including the spouse's ability for self-support. *In re Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990).

70 Wn. App. 116, 123, 853 P.2d 462 (1993); *cf. In re Marriage of Scanlon & Witrak*, 109 Wn. App. 167, 178, 34 P.3d 877 (2001) (same re child support). And the statute expressly requires the trial court must take into account “[t]he ability of the spouse . . . from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse . . . seeking maintenance.” RCW 26.09.090(f).

This Court held it is reversible error to fail to consider, or to reasonably take into account, the ability of the obligated spouse to meet his own needs, or if the record does not show the obligated spouse has the ability to meet his needs and the obligations imposed by the trial court. *Matthews*, 70 Wn. App. at 123-125 (maintenance award reversed; trial court failed to accurately take into account obligor’s future income stream).⁴

It has long been, and still is “error to order maintenance in excess of the ability to pay.” Scott Horenstein, 20 WASHINGTON PRACTICE, FAMILY AND COMMUNITY PROPERTY LAW § 34:9.1 (2nd ed., 2015) (hereafter HORENSTEIN), citing *Bungay v. Bungay*, 179 Wash. 219, 223, 36 Pac. 1058 (1934) (holding it is error to consider the obligated spouse’s parent’s income or wealth in determining the spouse’s ability to pay maintenance). Mr. Horenstein explains that

⁴ *Matthews* has been followed by unpublished decisions to reverse where the obligated spouse had not significant personal property from which to satisfy the lifetime maintenance award and under the circumstances, it was unclear if the obligated spouse could support himself after making the maintenance payments.

This is not only a matter of fairness to the obligor spouse, but it is also a matter of judicial economy because if the decreed maintenance is not paid, the court will be burdened with repeated attempts to coerce the performance of an act that cannot be performed.

HORENSTEIN, *supra*, citing to the line of cases holding the “obligor cannot be held to be [in] contempt when there is a pecuniary inability to pay the maintenance” and noting that the “principle is similar to the equitable rule that a court will not enter an injunction which cannot be enforced.” *Id.*, at fn. 2.

This is not *ipse dixit* from Mr. Horenstein. The Supreme Court explained the practical and legal reasons for this salutary rule in the context of a divorce which left the obligated spouse in possession of a farm which provided the funds for child and spousal support, just as Rod here was left in possession of Midvale Cattle Company which provides him with his income from which he must support himself as well as pay maintenance:

It seems to us that, taking the most optimistic view with respect to income that may be derived from farm operations, the decree has imposed an obligation on appellant which he cannot possibly perform. For he has no other source of income. While, in these cases, it is the policy of the law to require fathers to adequately provide for their families, **it is not the policy of the law to impose upon them obligations which they cannot perform.** *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653 [1909]; *Bungay v. Bungay*, 179 Wash. 219, 36 P.2d 1058 [1934]. The interests of the family are much better served by an allowance that can and will be paid than one which will inevitably result, from time to time, in show

cause orders which must be dismissed upon showing of inability to pay. *Holcomb v. Holcomb*, *supra*.

Bowers v. Bowers, 192 Wash. 676, 678, 74 P.2d 229 (1937) (emphasis added).⁵

The imposition of \$6,000/month in maintenance in 2017 was an abuse of discretion under the tests stated in *In re Marriage of Littlefield*⁶ when the trial court had evidence Rod's income from Midvale was greatly reduced at the end of trial than it was in the earlier periods testified to, and thus based its determination not on current income, but outdated information and Rod's parents' assets.

Moreover, "When the wife has the ability to earn a living," as Lori does here from her teaching, "it is not the policy of the law of this state to give her a perpetual lien on her divorced husband's future income." *Morgan v. Morgan*, 59 Wn.2d 639, 642, 369 P.2d 516 (1962) (holding that a finding that the wife's health may deteriorate and render her incapable of supporting herself did not support maintenance award where she was presently capable).

⁵ *Bungay* and *Bowers* have been followed in unpublished decisions as recently as 2010; this principle was not changed by the 1973 Dissolution Act.

⁶ *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) states the test this way (emphasized numbers added):

A court's decision is manifestly unreasonable if it is [1] outside the range of acceptable choices, given the facts and the applicable legal standard; [2] it is based on untenable grounds if the factual findings are unsupported by the record; [or 3] it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

See also, In re Marriage of Chandola, 180 Wn.2d 632, 642, 653-56, 327 P.3d 644 (2014) (trial court's discretion is "cabined" by applicable statutory provisions, reversing for failure to meet statute's requirement designed to "prevent[] arbitrary imposition of the [trial] court's preferences.").

Similarly, any consideration of one spouse's future income or financial security must be balanced with a similar consideration of the other spouse's future income or financial security to be "fair, just and equitable" as the statute requires. *Matthews, supra*. That was not done here, despite the trial court's findings showing it should have. Though the trial court found that Lori has health problems, Lori herself testified they were in "remission" and under control, RP 246, a good thing, and the court found that Lori was able to and did work part time as a special-education teacher (CP 787), meaning she could generate at least some income, as the record reflects.⁷ No reason is given for the failure to take into account Lori's current abilities to work and to earn. This was error under *Matthews*.

Like its property division, the trial court's maintenance award was infected by its improper consideration of a possible future inheritance. CP 787. That is not a proper consideration because it does not reflect *current* circumstances. It is particularly improper to factor in against Rod here where the Court did *not* factor in Lori's likely inheritance from her elderly parents who owned the jewelry store in Sunnyside.

Lori argues that Rod nevertheless can presently afford to pay the \$6,000 per month in maintenance ordered, asserting that substantial evidence supports the trial court's finding that Rod's

⁷ See, e.g., CP 523-524 (detailing Lori's pay stubs at over \$29/hour for 91 hours in January, 2016, or gross earnings of over \$2600).

“expected income in the near term will be at least \$200,000 per year.” RB at 40 (citing CP 788). But Lori points to Rod’s supposed income from Midvale Cattle Company *in 2013, 2014, and 2015*—two, three, and four years *before* trial. *Id.* (citing Ex. 25). Worse, she overstates Rod’s reported income for those years. The test, as noted *supra*, is Rod’s *current* income when the obligation takes effect. RCW 26.09.090(f); *Marriage of Matthews*. Moreover, Lori’s figures necessarily rely on the trial court’s assumption of Rod’s future ownership of VDGR, not current income.

Lori purports to derive income for Rod from K-1 tax forms for reporting business income. Rod’s total gross income in 2013, 2014, and 2015 as reflected on the tax returns filed by Rod and Lori was (\$62,611), \$22,237, and \$35,465 respectively (his adjusted gross income was even less). Exs. 6.8, 6.9, 6.10. Further, the undisputed evidence was that Rod’s wages in 2016 and 2017 were less than \$100,000 per year. RP 522; Resp. Ex. 2.9; *see also* CP 535. To make matters worse, the equity distributions from Midvale Cattle Company that the family had relied on to cover expenses in past years stopped because of the company’s precarious financial situation, brought about by continuing losses due to depressed cattle prices. RP 763-64, 768. Those depressed prices are a factor over which Rod has no control. He is not falsely “impoverishing” himself to avoid payment – he simply doesn’t have the income.

Lori's remaining arguments about relative financial resources miss the point. Rod does not contend Lori is "bar[red] from receiving maintenance because she should be able to "match Rod's income" by working. RB at 41. The point is that a maintenance award must be fair to *both* parties. And absent the present means to pay, the trial court's maintenance award is unfair to Rod and inconsistent with the statute and longstanding case law.

The fact that the maintenance award is for life, and even if Lori remarries, makes it even more unfair. Substantial evidence did not support indefinite maintenance. Regardless of her ability to earn income, Lori received nearly \$2.8 million in the property division, mostly in cash, at age 56. CP 3, 763-64, 786. This massive asset award did not merely "weigh against" Lori's request for lifetime maintenance as the trial court found; it militated against that request.

The life-time provision, clearly based on Rod's presumed inheritance, is especially inequitable where the Court failed to take into account Lori's likely inheritance. The trial court's maintenance award was contrary to the evidence and an abuse of discretion.

- 2. The trial court abused its discretion by refusing to modify the maintenance based on financial market circumstances it did not anticipate and over which Rod had no control, such that the changed circumstances made the failure to modify the award unfair and untenable under the facts.**

The trial court further abused its discretion by adhering to its excessive maintenance award even after Rod updated his income and asset information after the decree was entered and requested modification. The maintenance award was based in part on three events the court found were imminent but did not, in fact, occur.

First, the trial court found that Rod’s income “in the near term”—including “salary *and distributions*”—would be at least \$200,000 per year. CP 788 (emphasis added). But Rod received no equity distributions from Midvale Cattle Company. Lori emphasizes that the trial court had already considered Rod’s trial testimony about the moratorium on Midvale equity distributions. But the trial court evidently concluded that the moratorium would be short lived, and thus included future “distributions” in Rod’s income. When Rod attested after entry of the decree that he had, *in fact*, received no further distributions (and confirmed that none could be expected for the foreseeable future), this was a changed circumstance relative to the trial court’s findings. CP 879, 887.

Second, the trial court found that Rod would “soon be the co-owner of Van de Graaf Ranches” because his mother supposedly would transfer to him a share of a trust, from which he could expect to inherit a share of his parents’ company. CP 887. But as Lori does not dispute, that had not occurred. Use of that unvested, speculative potential wealth thus did not reflect Rod’s *present* circumstances.

Third, the trial court purported to award Rod the Beneficial Life Insurance policy, with a cash-surrender value of \$116,000. CP 786. But that policy turned out not to be available for distribution because it was not owned by the parties, meaning that Rod ended up with far less cash available to pay expenses like maintenance than contemplated under the property division. *See* OB at 39-41; *infra*, § II.C.2. Lori’s asserts there was “no evidence the court considered this asset as a source to pay his maintenance obligation.” RB at 43. But this ignores that the court did purport to consider, as it must, Rod’s “ability...to meet his own needs.” CP 787. And Lori cannot dispute that had Rod actually received the cash value of the Beneficial Life policy, it would have comprised most—more than 75 percent—of the liquid assets awarded to Rod. CP 785, 786.

Given these changed circumstances that drastically affected Rod’s ability to pay maintenance while also providing for himself, the court abused its discretion in refusing to modify the maintenance payment accordingly. The maintenance award should be vacated and the matter remanded for re-calculation of a fair and equitable award based on Rod’s actual circumstances as of April, 2017, and Rod given credit for the excess payments made from that date forward. And when the market factors rebound, Lori can move to modify the then-appropriate maintenance accordingly. She is not prejudiced by a proper application of the law to the actual facts.

3. The trial court erred in finding Rod in contempt when he was unable to meet his maintenance obligation.

Lori acknowledges that if the maintenance award was unfair to Rod and he could not afford to pay it, then it was error to find him in contempt. RB at 44. The contempt finding should be vacated.

Contrary to Lori's assertion, Rod's ability to afford to pay the maintenance is not a simple matter of credibility determinations. *See* RB at 45. There is no genuine dispute that Rod has not received further Midvale equity distributions, a trust interest or inheritance, or the proceeds of the Beneficial Life policy—all of which the trial court predicted he would receive promptly after entry of the decree, and each of which were essential to his ability to pay the high amount maintenance under the court's orders. This Court should vacate the contempt orders because there is no basis in the record to find that Rod personally had the ability to pay.

C. The Property Award Must Be Vacated Because the Purported Award Of The Beneficial Life Policy To Rod Renders The Decree Void.

1. Rod did not invite error.

Lori's invited-error argument focuses on the wrong "error." The invited-error doctrine prohibits a party from taking knowing and voluntary actions to "set up" an error and then challenging that same error on appeal. *In re Thompson*, 141 Wn.2d 712, 723-24, 10 P.3d 380 (2000). "The doctrine was designed in part to prevent parties

from misleading trial courts and receiving a windfall by doing so.”
State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009).

The invited-error doctrine does not apply where the appellant gave the trial court an opportunity to correct the original error, and the trial court declined. *See State v. Studd*, 137 Wn.2d 533, 552-53, 973 P.2d 1049 (1999). For instance, in *Studd*, the Supreme Court held that the doctrine did not apply to defendants who proposed an ambiguous jury instruction given by the trial court, but also proposed a curative instruction, which the trial court rejected. *Id.*

To be sure, Rod did (mistakenly) ask the trial court to divide the Beneficial Life policy. RP 670-71. But his precise complaint on appeal is not that the trial court erroneously included the policy in the property division. After the decree was entered, Rod moved to vacate the decree and amend the property division to remove the Beneficial Life policy from the division and otherwise adjust the division to be equitable to **both** parties given the *parties'* assets before the Court, per RCW 26.09.080. The trial court refused; it is that refusal that Rod challenges on appeal. Rod cannot be found to have “set up” an error to exploit on appeal when he asked the trial court to correct that precise error. *See Studd*, 137 Wn.2d at 552-53. The invited-error doctrine does not apply.

2. The record establishes a third party owns the Beneficial Life policy, which the trial court purported to award to Rod. This renders the decree void.

Lori is wrong that Rod’s so-called “self-serving declaration” was the sole evidence before the trial court in connection with Rod’s CR 60 motion for relief, showing that the parties did not own the Beneficial Life policy. RB at 32. Lori’s own filings and testimony confirm that fact.⁸ Lori filed papers that established the policy was owned by a trust. They included two documents from Beneficial Life, both addressed to “Rod & Lori Van de Graaf LIT Dated January 1999” (where “LIT” stood for “Life Insurance Trust”). CP 1473, 1475. What is more, Lori’s own cover sheet filed with the documents, signed by her attorney, identified the documents as “Information Regarding the Beneficial Life Insurance Policy – Rod & Lori Van De Graaf *Trust*[.]” CP 1472 (emphasis added). Lori even testified that premium payments were made to the trust. RP 924-25.⁹

⁸ Rod’s post-trial efforts to access the policy by having the court clerk sign for the trustees, CP 1654-1660, were resisted by Lori on the basis it was non-marital property and the relief denied, CP 1748, keeping those funds from Rod.

⁹ Although two insurance policies insured Rod and Lori’s lives, only one was at issue in the property division. One policy was a term-life policy and thus had no cash-surrender value. RP 518-19; CP 483. The other policy was a universal or “whole life” policy from Beneficial Life Insurance Company. RP 518-19; CP 1473, 1475. The trial court found that the latter policy had a cash-surrender value of \$116,000 and purported to award that policy to Rod. CP 785, 770. As explained in the main text, that policy was owned by a trust.

Given this evidence, Lori’s claim on appeal that the insurance policy is not “indisputably” a non-marital asset is disingenuous. RB at 33. There can be no rational dispute that the policy was owned by neither Rod nor Lori and, thus, was not subject to division by the trial court. *See, e.g., In re Marriage of McKean*, 110 Wn. App. 191, 194-95, 38 P.3d 1053 (2002). This jurisdictional defect renders the judgment void. *Id.*; *Persinger v. Persinger*, 188 Wn. App. 606, 609, 355 P.3d 291 (2015).

Ignoring the voidness issue altogether, Lori argues that Rod is not entitled to relief because the policy’s true owner could have been discovered earlier with reasonable diligence. As she did below, Lori argues that if a mistake was made, Rod should have to live with it. *See* CP 897, 928-30. But there is no diligence requirement to obtain vacation of a void judgment. Diligence is required only in connection with a request for relief under CR 60(b)(3), based on “newly discovered evidence.” And a party may raise voidness at any time—including for the first time on appeal. *Timberland Bank v. Mesaros*, 1 Wn. App. 2d 602, 606, 406 P.3d 719 (2017); *Persinger*, 188 Wn. App. at 609; *cf.* CR 60(b)(5).¹⁰

¹⁰ Lori also ignores that Rod moved for relief under CR 60(b)(1), which authorizes relief in the event of “mistakes...in obtaining a judgment or order.” A mistake of fact by a party, leading to entry of the judgment, is a qualifying “mistake” under this rule. *See Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999) (reversing denial of motion to vacate, holding that a party’s “genuine misunderstanding” was a mistake under CR 60(b)(1)).

A trial court has no discretion; it must vacate a void judgment. *Mitchell v. Kitsap County*, 59 Wn. App. 177, 180-81, 797 P.2d 516 (1990). The remedy on appeal is to vacate and remand. *See Persinger*, 188 Wn. App. at 607. That needs to be done here.

3. The Beneficial Life policy was significant to the property division because it represented three-quarters of the liquid assets awarded Rod. But the void decree must be vacated regardless of the percentage of the marital estate affected.

Lori cites no authority that would allow a void decree to stand, merely because the value of the property the court lacked jurisdiction to award is small relative to the value of the entire marital estate. The sole case Lori cites on this point did not involve a void decree. *See In re Marriage of Pilant*, 42 Wn. App. 173, 180-81, 709 P.2d 1241 (1985). The problem in *Pilant* was that the trial court failed to state its rationale for giving a low value to the husband's vested future retirement benefits. *Id.* The appellate court held that "the erroneous valuation of one item in this particular case" did not require reversal. *Id.* That is a far cry from a void decree that purports to award a third party's property to one of the spouses.

Furthermore, although she disputes that part of the trial court's rationale for awarding the Beneficial Life policy to Rod was to give Rod some liquid assets (in the form of the policy's \$116,000 cash-surrender value), again, Lori cannot deny that the value of the policy comprised most of the liquid assets awarded to Rod. CP 785,

786. This fact meant that Rod's inability to cash in the policy caused a significant hardship, even if the policy's value comprised a relatively small percentage of the overall marital estate. That distinguishes this case from any case where a mistake in the award affected too small a percentage of the overall division to warrant appellate relief. Nor does she state why she fought so hard to keep that money from Rod when it had been awarded to him and she made no claim to it; it could only be a form of punishment or part of a financial squeeze. This Court has to vacate the decree.

D. The Trial Court Erred In Characterizing The Ellensburg Property As Community property.

Respondent cannot dispute the evidence that the Ellensburg property was bought by Rod and Rick in 1977, long before the marriage in 1985. RP 500. *See* OB at 18. And because that factual base cannot be attacked, Lori also cannot successfully challenge the arguments that characterization of the Ellensburg property was clear error, as set out at OB at 41-46.

This Court recently demonstrated in *Schwartz v. Schwartz*, 192 Wn. App. 180, 192, 368 P.3d 173 (2016), that it is error if the trial court fails to go through the apportionment analysis where there may be a community interest in what was, at the outset, separate property. As for the Ellensburg property, Rod stands by his argument detailed in the Opening Brief that it was separate property before the marriage, was maintained as such throughout the marriage

without the use of community resources or efforts, and at most there could be only a small community lien against it.¹¹

E. Post-Secondary Support Order And Transfer of 529 Account.

1. The trial court erred in failing to make factual findings to support its post-secondary support order.

Lori maintains that the trial court was not required to make findings to support its post-secondary support order, citing *In re Marriage of Morris*, 176 Wn. App. 893, 906, 309 P.3d 767 (2013). RB at 47. But *Morris* is different. In *Morris*, the appellant “did not dispute the appropriateness of postsecondary support under the statutory factors.” *Id.* at 908. Thus, findings on those factors would have been superfluous. *See id.* The sole contested issue was the appellant’s ability to pay the amount of support awarded, and that issue was “a matter of simple math.” *Id.* at 906, 908.

Here, in contrast, Rod disputes the appropriateness of postsecondary support under the statutory factors. Findings of fact are thus required to “demonstrate that the trial court properly exercised its discretion in making the award.” *Morris*, 176 Wn. App.

¹¹ The *Schwartz* analysis also needs to be applied to the family home on remand in order to designate any appropriate amount of community interest, since it was funded at the outset with Rod’s separate funds from his “cattle account” which began long before the marriage. *See, e.g.*, CP 633-636 (post-trial brief). On remand the trial court should be instructed to do a proper analysis of the characterization of the family home so that it is correctly apportioned between separate and community property.

at 906 (quoting *In re Marriage of McCausland*, 159 Wn.2d 607, 620, 152 P.3d 1013 (2007)).

The evidence showed that NVDG had more than sufficient funds available to pay for his final year of college. *See* OB at 51 and record cites therein. Lori asserts that some of those funds were “not intended as a college fund,” citing testimony by NVDG that his parents had said that his parents would pay his college expenses not covered by the 529 account. RB at 48; RP 407. Certainly, the trial court may consider any pertinent testimony. But there is no indication that the trial court, in exercising its discretion, considered NVDG’s needs in light of the resources available to him, as required by RCW 26.19.090(2). Vacation and remand is required.

2. The trial court erred in ordering Rod to pay funds from the 529 account directly to Nate Van de Graaf.

Lori asserts that the trial court did not award the 529 account to Rod, pointing to the language in the decree awarding Rod “[a]ny and all bank accounts in his name only” but denying him “access to any bank accounts in the names of [NVDG], or [DVDG].” RB at 48; CP 770. Lori is simply wrong: the 529 account was titled in Rod’s name alone. CP 1663, 1735, 1739. It was thus one of the accounts awarded to him. CP 770.

The trial court ordered Rod to pay the balance of the 529 account to Nate. CP 1829-30. The trial court lacked authority to

distribute Rod's funds to NVDG, a third party, for his unconditional use. *See In re Marriage of Soriano*, 445 Wn. App. 420, 421-22, 722 P.2d 132 (1986). Nor was there any legitimate reason to do so. No showing or finding was made that it was not "feasible" to order that the payments be made directly to the school under RCW 26.19.090(6). Moreover, though the court's order required NVDG to "make available" his academic records and grades as a "condition" of receiving postsecondary support, the court set no actual standards for receipt of support. The court thus distributed the 529 account funds to NVDG in advance, without conditions, contrary to the express terms of the statute. This Court should vacate and remand with instructions.

F. The Trial Court's Errors in Awarding Fees to Lori Must Be Reversed.

1. The trial fees must be vacated for lack of necessary findings and as contrary to the unchallenged finding that, given the property award, each party can pay their own fees.

Where, as here, there are no findings as to the appropriateness of the fee award or its amount, the award must be vacated. *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998), *overruled on other grounds*, 173 Wn.2d 643, 272 P.3d 802 (2012) (written findings and conclusions showing the trial court's basis for finding the amount of fees awarded was reasonable are required to sustain a fee award); *In re Marriage of Nelson*, 62 Wn. App. 515, 521, 814

P.2d 1208 (1991) (vacating award for lack of findings); *In re Marriage of Steadman*, 63 Wn. App. 523, 529-30, 821 P.2d 59 (1991) (reversing award for lack of findings).

The award of trial fees below must therefore be vacated for lack of the required findings. *Id.* Indeed, the only findings as to fees are in the trial court’s letter ruling, which found that both parties have sufficient resources to pay their own fees, CP 788 ¶ 4,¹² a finding that was confirmed (not abandoned) by incorporating the November 17 ruling into the final orders in February, 2017. Moreover, the prospect of Respondent having to follow the American Rule of paying for one’s own fees is the most likely “carrot” to curb excessive litigation in the future.

2. The trial court’s suit money award must be reversed and vacated because it applied a test that was untenable under the facts and inconsistent with the legal standard.

The trial court’s suit money award must be reversed because it applied a test that was untenable under the facts and inconsistent with the legal standard, and thus must be vacated. *See* OB at 58-59.

While RAP 7.2(d) recognizes that the trial court has discretion to order “suit money” in the form of the advancement of attorney fees for an appeal of a dissolution decree or modification of

¹² The trial court found: “. . . at the end of the day, both parties have sufficient wherewithal to pay their own costs and fees.” CP 788. Respondent chose to not cross-appeal this finding, so it is a verity on appeal.

a decree, the purpose of such an advance award is, and always has been, to make sure that the requesting spouse has the funds to proceed with the appeal *based on an immediate need*, one that is genuine.¹³ Thus, in *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360–61, 333 P.2d 936, 937 (1959), suit money was required because the requesting spouse had no control over the ample assets awarded her in dissolution due to the husband’s supersedeas bond, which stayed her access to the assets she was awarded. She needed the funds in order to bring her appeal.

In this case, Lori *received* over \$1 million in liquid assets in the spring of 2017 after entry of the final orders and denial of reconsideration. It was *Rod* who was stripped of liquid assets, or denied them such as the Beneficial Life policy cash. Despite this disparity in *her* favor, Lori nevertheless fought strenuously for suit money for appeal clearly as a tactic to put financial pressure on Rod. She showed no reticence or inability to obtain counsel for lack of funds, instead fighting to keep Rod from accessing any funds awarded to him including, inexplicably, the Beneficial Life policy.

¹³ The purpose of suit money is to afford an impecunious spouse his or her day in court, not to punish the other. *See Stibbs v. Stibbs*, 38 Wn.2d 565, 567, 231 P.2d 310, 311 (1951) (sole purpose of suit money is to “effectively afford wife her day in court”); *State ex rel. Hettrick v. Long*, 183 Wash. 309, 312, 48 P.2d 224, 225 (1935) (“the wife is entitled to attorney’s fees and suit money in order to prosecute or defend an action for divorce...such allowances are made for the very purpose of enabling her to prepare and prosecute, or else defend, the action.”); *State v. Superior Court of King Cty.*, 55 Wash. 347, 351, 104 P. 771, 773 (1909) (“Neither is the order imposed as a penalty . . . and must be sustained on equitable grounds, having reference to the relative situation of the parties.”)

Moreover, Lori engaged in this aggressive litigation when, unlike the wife in *Stringfellow*, the judgment had *not* been superseded by Rod, *and* when she had received substantial liquid assets, failing to show a genuine need for suit money.¹⁴ Having family help in such circumstances is not new in Washington, but those non-parties can and do draw limits, which do not redound to the divorced spouse, *see Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653 (1909) (divorced spouse not in contempt for failure to pay when family members, who had put up supersedeas bond, do not lend further funds).

The test for suit money is present need and ability to pay by the respective ex-spouses under *Stringfellow* and earlier cases. It is not to be used to punish. The test was not met here, requiring vacation of the suit money order and the associated contempt orders.

G. The Remand Should Be To A Different Judge To Preserve The Appearance Of Fairness.

Remanding a case to a different judge is a sensitive issue, as seen by the dissent in *In re Marriage of Mohammed*, 153 Wn.2d 795, 808-09, 108 P.3d 779 (2004) (Alexander, C.J., dissenting). *See*

¹⁴ Rod was able to have the judgment superseded in early 2018 only after Lori forced him into supplemental proceedings and his family agreed to arrange the bond required beyond the house, since he could not pay the \$1.4 million dollar judgment. *See* CP 2154 *et seq.*, supplemental clerk's papers including Rod's reply papers in support of supersedeas, the trial court order granting use of the family home as partial security and setting the additional supersedeas amount which included the amount of Lori's fees she requested for the appeal, and the supersedeas bonds that were filed on behalf of Rod.

OB, pp. 61-63. But at times it must be done to preserve the appearance of fairness, as in both *Mohammed*, 153 Wn.2d at 807-08, and in *Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012), precisely because marital property divisions present “the height of discretion.” *Tatham*, 170 Wn. App. at 105.

Justice Owen’s *Mohammed* opinion provides a useful guide for analyzing why it should be done here. She pointed out there, as Rod pointed out in the Opening Brief and herein, that “[a] number of aspects of the property division strongly indicate that the trial judge went beyond simply looking at the parties’ existing economic circumstances” (*Muhammed*, 153 Wn.2d at 804, emphasis added), in that case adding a jurisdictionally impermissible factor – fault – via the wife’s decision to obtain a protective order against the husband. *Id.* The opinion showed by the trial judge’s statements and orders how this was so. *See id.*, 153 Wn.2d at 805. Similarly here, the trial court’s written findings and later orders show it went beyond “the parties’ existing economic circumstances,” here adding in non-marital property of at least two major forms – Rod’s parents’ business, VDGR, as to which he had no ownership interest; and the Beneficial Life insurance policy, owned by a third party trust. These are basic jurisdictional errors akin to the fault-tinged decision by the trial court in *Muhammad*.

First, as noted herein and in the Opening Brief, the trial court’s written decision that was incorporated into the final orders clearly stated that his parents’ business “soon” would be co-owned by Rod (CP 787-88) – yet there is no evidence that Rod has any current or vested future interest in the business. The only evidence is that VDGR is owned by his parents and not Rod.¹⁵ Yet the trial court expressly took that non-marital property over which Rod had no vested interest or control into account in *both* the property division *and* the maintenance award. *Second*, the trial court refused to correct its “award” of the Beneficial Life policy to Rod, after the fact that it is non-marital property was brought to its attention on reconsideration. As in *Muhammed*, it appears the trial court here held it against Rod that his parents owned the cattle company and had not yet distributed it to him. It determined that the money from VDGR – from Rod’s parents – could and would pay for both the property division and permanent maintenance, an apparent reason why there was no “need” to fix the insurance policy problem when raised. Given the jurisdictional defects here as basic as using fault, the same reason to remand to a different judge applies as in *Muhammed* – the appearance of fairness demands it.

¹⁵ See OB at 15-17 and record cites therein. See also Rod’s post-trial briefing, CP 628-657 (post-trial brief) and CP 666-701 (supplemental post-trial Brief), *esp.* CP 630-31 & 642-646 (post-trial brief) detailing the ownership of the parents’ business and Rod’s lack of interest therein; and CP 666-681, 686-687 (supplemental brief) re the Maxine Trust, VDGR ownership, and VDGR stock.

H. Neither Party Should Be Awarded Fees On Appeal.

Lori's request for fees on appeal should be denied. The trial court was correct in its letter ruling that both parties have sufficient resources to pay their own fees, a finding not challenged by Respondent, who dropped her cross-appeal. The prospect of following the American Rule of paying for one's own fees is the most likely "carrot" to curb excessive litigation in the future.

III. CONCLUSION

Appellant Rod Van de Graaf asks the Court to reverse and vacate the trial court's rulings because of the legal errors and abuses of discretion that marred the proceeding. He asks the Court to remand to a different judge to determine both a reasonable amount of maintenance for a reasonable period of time, as well as a property division that is fair, just, and equitable based on the correct characterization of the property, particularly the Ellensburg property and the family home. He further asks that the Court deny Respondent's request for fees on appeal because she has ample resources to pay her own legal fees from the property division.

Respectfully submitted this 8th day of October, 2018.

CARNEY BADLEY SPELLMAN, P.S.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 8th day of October, 2018.


 Elizabeth C. Fuhrmann, PLS, Legal
 Assistant/Paralegal to Greg Miller

CARNEY BADLEY SPELLMAN

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