

FILED
Court of Appeals
Division III
State of Washington
1/2/2018 4:02 PM

No. 35133-5-III
(Consolidated with Nos. 35292-7-III, and 354997-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 OPENING BRIEF

Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30512

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Rod D. Van De Graaf

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES | vi |
| I. INTRODUCTION | 1 |
| II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL..... | 5 |
| A. Assignments of Error – Property Division..... | 5 |
| B. Issues on Appeal – Property Division..... | 9 |
| III. STATEMENT OF THE CASE | 11 |
| A. Overview Facts..... | 11 |
| 1. Background and Family Home..... | 11 |
| 2. Midvale Cattle Company..... | 12 |
| 3. Validity of Promissory Notes Executed by Rod and Lori. | 14 |
| 4. Claimed Expectancy of an Interest in Stock of VDGR, Inc. | 15 |
| 5. K2R Properties..... | 17 |
| 6. Ellensburg Property. | 18 |
| 7. Rod’s Ability to Work and Income. | 18 |
| 8. Lori’s Ability to Work and Income. | 19 |
| B. Trial Proceedings and Final Orders..... | 20 |
| C. Post-Trial Proceedings. | 26 |
| 1. Contempt proceedings – April, May and July, 2017. | 26 |
| 2. Suit money request. | 29 |
| IV. ARGUMENT | 30 |
| A. Standard of Review and Basic Principles of Property Division..... | 30 |

| | | |
|----|---|----|
| B. | The Overall Property Division and Maintenance Award Were Inequitable and Failed the Test of RCW 26.09.080. They Were Dramatically Skewed By Adding Rod’s <u>Parents’</u> Assets To Rod’s Assets And Thus Placing Rod In An Impossible Financial Position In Which He Has Been Unable To Pay Court-Ordered Payments Maintenance Or The Property Division Judgment, Or Fees From Either His Income Or The Assets He Was Left With, Forcing Rod To Borrow Money To Make Sufficient Payments To Avoid Or Purge Contempt..... | 32 |
| 1. | Basic principles of property division..... | 32 |
| 2. | The trial court erroneously included the assets of Rod’s parents in its property division when the receipt of such assets at some time in the future, if at all, is nothing but a mere expectancy which is not “vested” and is not certain, unlike pension rights, disability rights, or stock option rights. The trial court broke a fundamental rule of marital law which is that only the property of the parties is before the court for distribution, not the property of third parties. The trial court exceeded its jurisdiction by including third party assets as what Rod was deemed to own and have available for purposes of both property division and maintenance. | 33 |
| C. | The Property Division Must Be Vacated Because The “Award” To Rod Of The Beneficial Life Insurance Policy Is Void As Beyond The Court’s Jurisdiction And Authority Because The Policy Was Not Owned By Either Rod Or Lori..... | 39 |
| D. | The Trial Court Committed Clear Error By Characterizing The Ellensburg Property As Community When It was Purchased Nearly Ten Years Before The Marriage On A Real Estate Contract. Rod Is Entitled By RCW 26.16.010 To Keep His Pre-Marital Separate Property And Also The “Rents, Issues, And Profits Thereof”. At Most, Lori Could Have Sought A Community Lien Based On Uncompensated Labor During The Marriage, Which She Did Not Seek Nor Prove. | 41 |

| | | |
|----|--|----|
| 1. | The Ellensburg property was separate property and Lori failed to establish a right to a community lien under <i>Marriage of Elam</i> for any increase in its value during the marriage attributable to uncompensated toil of Rod. | 41 |
| 2. | The award of the Ellensburg property to Lori must be vacated as contrary to the trial court’s distribution scheme which left each party with their separate property and because it improperly put her in business with her former husband after an acrimonious divorce. ... | 44 |
| E. | The Maintenance Award Was Untenable. | 46 |
| F. | The Trial Court’s <i>Sua Sponte</i> Post-Secondary Support Order For The Emancipated Son With His Own Assets Far Beyond The Requirements For His Senior Year At WSU Must Be Vacated. | 49 |
| G. | The Award of \$58,000 in Attorney’s Fees on Reconsideration Was Error for Failing to Meet the Legal Requirements for a Fee Award. | 52 |
| H. | The contempt orders of must be vacated because the trial court erroneously failed to give effect to the reduced income to Rod caused by the steep decrease in cattle prices, over which Rod had no control, and the fact the property award left Rod with no assets to pay maintenance other than his substantially reduced income, and the court refused to modify the maintenance order to be in accord with Rod’s actual income. | 54 |
| I. | The Trial Court’s Refusal to Modify Maintenance Was Contrary to the Undisputed Facts and Must Be Vacated. | 58 |
| J. | The Post-Trial Orders for Suit Money and the Sua Sponte Transfer of Marital Property to One of the Children for Post-Secondary Support Must Be Vacated. | 58 |
| 1. | The award of suit money was erroneous for failing to meet the legal standard and for disregarding the facts and circumstances. | 58 |

| | | |
|-----|--|----|
| 2. | The transfer of the “529 Account” funds directly to NVDG under the authority of the post-secondary support order must be vacated because it is inconsistent with the post-secondary support statute..... | 60 |
| K. | The Case Should Be Remanded to a Different Judge..... | 61 |
| V. | CONCLUSION | 63 |
| VI. | Appendices | 65 |

APPENDICES

Page(s)

| | | |
|--------------------|---|------------|
| Appendix A: | Challenged Findings of Fact from Final Orders entered 2/17/17 (CP 760, 766), as amended 2/27/17 (CP 783-788)..... | A-1 to A-8 |
| Appendix B: | Challenged Findings of Fact from April 14, 2017 Order (CP 963-965) | B-1 to B-3 |
| Appendix C: | Challenged Findings of Fact from May 31, 2017 Order (CP 1559) and July 10, 2017 Revision Order (CP 1649) | C-1 to C-2 |

TABLE OF AUTHORITIES

| | <u>Page(s)</u> |
|--|--------------------|
| Washington Cases | |
| <i>Arneson v. Arneson</i> , 38 Wn.2d 99, 227 P.2d 1016 (1951)..... | 33, 34, 39, 60, 62 |
| <i>Beam v. Beam</i> , 18 Wn. App. 444, 569 P.2d 719 (1977)..... | 41 |
| <i>Bungay v. Bungay</i> , 179 Wash. 219, 36 P.2d 1058 (1934) | 46, 47, 58 |
| <i>Cleaver v. Cleaver</i> , 10 Wn. App. 14, 516 P.2d 508 (1973)..... | 48 |
| <i>Cogle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (1990)..... | 31 |
| <i>Farmer v. Farmer</i> , 172 Wn.2d 616, 259 P.3d 256 (2011)..... | 32, 34 |
| <i>Freeburn v. Freeburn</i> , 107 Wash. 646, 182 Pac. 620 (1919), <i>overruling on other grounds recognized by</i> <i>Best v. Best</i> , 48 Wn.2d 252, 292 P.2d 1061 (1956) | 34 |
| <i>Graves v. Duerden</i> , 51 Wn. App. 642, 754 P.2d 1027 (1988)..... | 54, 55 |
| <i>Guye v. Guye</i> , 63 Wash. 340, 115 Pac. 731 (1911)..... | 42 |
| <i>Hogberg v. Hogberg</i> , 64 Wn.2d 617, 393 P.2d 291 (1964)..... | 47 |
| <i>In re Buchanan's Estate</i> , 89 Wash. 172, 154 P. 129 (1916) | 43 |
| <i>In re Estate of Binge</i> , 5 Wn.2d 446, 105 P.2d 689 (1940)..... | 41 |

| | <u>Page(s)</u> |
|---|-----------------------|
| <i>In re Estate of Borghi</i> , 167 Wn.2d 480, 219 P.3d 932 (2009)..... | 42 |
| <i>In re Marriage of Chandola</i> , 180 Wn.2d 632, 327 P.3d 644 (2014)..... | 31 |
| <i>In re Marriage of Didier</i> , 134 Wn. App. 490, 140 P.3d 607 (2006)..... | 55 |
| <i>In re Marriage of Elam</i> , 97 Wn.2d 811, 650 P.2d 213 (1982)..... | 41, 43 |
| <i>In re the Marriage of Farmer</i> , 172 Wn.2d 616, 259 P.3d 256 (2011)..... | 32 |
| <i>In re Marriage of Horner</i> , 151 Wn.2d 884, 93 P.3d 124 (2004)..... | 50 |
| <i>In re Marriage of Irwin</i> , 64 Wn. App. 38, 822 P.2d 797 (1992)..... | 46 |
| <i>In re Marriage of Kelly</i> , 85 Wn. App. 785, 934 P.2d 1218 (1997)..... | 51 |
| <i>In re Marriage of Kile and Kendall</i> , 186 Wn. App. 864, 347 P.3d 894 (2015)..... | 42 |
| <i>In re Marriage of Leland</i> , 69 Wn. App. 57, 847 P.2d 518 (1993)..... | 34 |
| <i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997)..... | 31, 54 |
| <i>In re Marriage of Mason</i> , 48 Wn. App. 688, 740 P.2d 356 (1987)..... | 52 |
| <i>In re Marriage of Mathews</i> , 70 Wn. App. 116, 853 P.2d 462 (1993)..... | 47, 48, 58 |
| <i>In re Marriage of McKean</i> , 110 Wn. App. 191, 38 P.3d 1053 (2002)..... | 4, 25, 34, 39, 60, 62 |

| | <u>Page(s)</u> |
|---|-----------------------|
| <i>In re Marriage of Meyers</i> , 123 Wn. App. 889, 99 P.3d 398 (2004)..... | 54 |
| <i>In re Marriage of Morrow</i> , 53 Wn. App. 579, 770 P.2d 197 (1989)..... | 48, 52 |
| <i>In re Marriage of Muhammad</i> , 153 Wn.2d 795, 108 P.3d 779 (2005)..... | 31 |
| <i>In re Marriage of Pearson-Maines</i> , 70 Wn. App. 860, 855 P.2d 1210 (1993) | 44 |
| <i>In re Marriage of Scheffer</i> , 60 Wn. App. 51, 802 P.2d 817 (1990)..... | 46 |
| <i>In re Marriage of Skarbak</i> , 100 Wn. App. 444, 997 P.3d 447 (2000)..... | 45 |
| <i>In re Marriage of Soriano</i> , 44 Wn. App. 420, 722 P.2d 132 (1986)..... | 33, 39, 60, 62 |
| <i>In re Marriage of Tahat</i> , 182 Wn. App. 655, 34 P.3d 1131 (2014)..... | 24, 62 |
| <i>Johnston v. Beneficial Mgmt. Corp. of Am.</i> , 96 Wn.2d 708, 638 P.2d 1201 (1982)..... | 55 |
| <i>Koon v. Koon</i> , 50 Wn.2d 577, 313 P.2d 369 (1957)..... | 59 |
| <i>Lemon v. Waterman</i> , 2 Wash. Terr. 485, 7 P. 899 (1885)..... | 35 |
| <i>Lunsford v. Waldrip</i> , 6 Wn. App. 426, 493 P.2d 789 (1972)..... | 59 |
| <i>Persinger v. Persinger</i> , 188 Wn. App. 606, 355 P.3d 291 (2015) | 5, 36, 39, 40 |
| <i>Physicians Ins. Exc. v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993)..... | 32, 40, 54 |

| | <u>Page(s)</u> |
|---|-----------------------|
| <i>Roberts v. Roberts</i> , 69 Wn.2d 863, 420 P.2d 864 (1966)..... | 59 |
| <i>Schwartz v. Schwartz</i> , 192 Wn. App. 180, 368 P.3d 173 (2016)..... | 45 |
| <i>Shannon v. Shannon</i> , 55 Wn. App. 137, 777 P.2d 8 (1989)..... | 45 |
| <i>Stringfellow v. Stringfellow</i> , 53 Wn.2d 359, 333 P.2d 936 (1959)..... | 10, 59 |
| <i>Tatham v. Rogers</i> , 170 Wn. App. 76, 283 P.3d 583 (2012)..... | 61, 63 |

Statutes and Court Rules

| | |
|-----------------------------|------------------|
| CR 52(a)(2)(B)..... | 50 |
| CR 60 | 4, 5, 25, 27, 39 |
| RAP 12.8..... | 52 |
| Laws 1869, pp 318-323..... | 42 |
| Laws 1873, p. 452, §10..... | 42 |
| RCW 7.21.010(1)..... | 55 |
| RCW 7.21.010(3)..... | 55 |
| RCW 7.21.030–.050 | 55 |
| RCW 26.09.080 | <i>passim</i> |
| RCW 26.09.090 | 21 |
| RCW 26.16.010 | 41, 42 |
| RCWA 26.16.010..... | 42 |

| | <u>Page(s)</u> |
|-----------------------|----------------|
| RCW 26.09.140 | 52 |
| RCW 26.16.200 | 42 |
| RCWA 26.16.200..... | 42 |
| RCW 26.19.090 | 50 |
| RCW 26.19.090(2)..... | 50 |
| RCW 26.19.090(3)..... | 61 |
| RCW 26.19.090(4)..... | 61 |
| RCW 26.19.090(6)..... | 60, 61 |

Treatises & Other Authorities

| | |
|--|--------|
| Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921)..... | 31 |
| Harry Cross, <i>The Community Property Law in Washington</i> , 61 WASH. L. REV. 11 (1986)..... | 35, 41 |
| Horenstein, 20 WASH. PRAC., FAMILY AND COMMUNITY PROPERTY LAW (2 nd Ed. 2015) §32.28 | 45 |
| Kirkwood, M.R., <i>Historical Background and Objectives of the Law of Community Property in the Pacific Coast States</i> , 11 WASH. L. REV. 1 (1936)..... | 35 |
| WEBSTER’S THIRD NEW INT’L DICTIONARY (2002) | 21 |

I. INTRODUCTION

This Yakima County divorce proceeding began in October, 2011. It went to trial in September, 2016, only after Respondent Lori Van de Graaf's motion to delay the trial from April 2016 was granted. Judge McCarthy issued a written decision in November, 2016, entered final orders in February, 2017 and post-trial orders in April, 2017. The parties had one college-age, emancipated son at the time of trial, then in his junior year at WSU.

The property division left Appellant Rod D. Van de Graaf¹ with minimal liquid assets, a belated and inflated back maintenance award, and unreasonable maintenance given Lori's asset award, teaching skills, relatively younger age than Rod, and her lack of a disability or disabling health issues. The court also left Rod without a house. Though the old family home was awarded to him, it was in Lori's possession from 2011 until October 1, 2017. Rod thus had judgments and \$6,000/month of maintenance to pay while his shared business was hobbled by low cattle prices and high debt structure so that he (and his partners) received only his minimal monthly draws and no distributions. He had big bills to pay and no way to pay with what was left him after the divorce.

Judge McCarthy left Rod in this position because he failed to distinguish between assets owned by Rod's parents from those owned

¹ The parties are referred to by their first names to avoid confusion and consistent with the naming convention in the record.

by Rod, stating in his ruling that Rod not only had substantial wealth of his own, but was “about to become even wealthier”, presumably because he would inherit substantial wealth from his parents. In other words, Judge McCarthy premised the property division and maintenance award on adding Rod’s parents’ wealth to his own, even though the dissolution court has no jurisdiction over the assets of third parties and under the statute and case law; it may only divide the property actually owned by the parties. This insured that Lori would be a beneficiary of that expected inheritance when it occurred, despite the divorce. While property subject to division in a dissolution may include property in which the spouse has a vested interest in future receipt, no Washington case to date has held that the trial court can take into account what it believes the spouse may possibly receive at some unknown future date, *i.e.*, a mere expectancy.

Thus, the central problem in the property division and maintenance award is the trial court’s erroneous view of the marital assets and its belief that Rod’s parents’ wealth was *presently* available to Rod and would provide the funds necessary for Rod to use in equalizing the property division and paying maintenance at twice the amount ordered for the five years pending trial. To do this the trial court had to ignore or disregard numerous rules of substance and procedure. The net result was a property division that is contrary to long standing Washington law. Because of the heightened irregularity of the rulings, and the fact the trial court

engaged in credibility determinations demonstrating a disregard of the testimony of Rod and the witnesses testifying in his behalf, the case should be remanded to a different judge to insure the appearance of fairness and that the law is applied evenly.

In addition to these errors the trial court made two errors related to the Ellensburg property which require reversal. First, the court mischaracterized it as community property, despite the undisputed evidence that it was bought by Rod and his brother Rick nearly a decade *before* the marriage, and despite the fact its taxes and any other costs occurring during the marriage were paid for by fees earned by letting VDGR cattle – owned by Rod’s and Rick’s parents – to graze on the land each summer.

Second, the Ellensburg property was awarded to Lori. This caused two problems. First, the trial court’s property division was keyed to the character of the property. A separate LLC owning real property in Sunnyside and owned jointly by Rod and his two siblings, the “K2R” property, was determined to be separate and one-third interest remained with Rod, though it was not specified in the findings. Lori’s jewelry, insured at \$114,000, remained with her but was also omitted from consideration in the trial court’s property division. The judge’s plan thus was to award Rod and Lori their separate property and divide the community property; but mischaracterizing the Ellensburg property meant that it was

available to award to Lori. This requires vacation of the property award to be re-done under the correct characterization.

Second, awarding the Ellensburg property to Lori was error because it left the couple continuing in business with one another, since Midvale Cattle Company, which Rod was awarded and continues to operate with his siblings, currently uses the Ellensburg property for grazing. It is a basic premise of no-fault divorce that the couple should not be required to remain in any form of business relationship absent a request from them to that effect, since the purpose is to let the parties move on in their lives without future entanglements to their ex-spouse. This is especially important in an acrimonious divorce such as this.

Finally, the trial court also exceeded its jurisdiction by purporting to award to Rod the cash value in the Beneficial Life insurance policy, valued at \$116,000, ostensibly to provide him some liquid assets (*see* CP 957:4-6) and to complete a roughly 50-50 division of community property. But the policy was not owned by either party to the marriage. It is owned by a trust. This jurisdictional defect was brought to the trial court's attention on Rod's CR 60 motion, *see* CP 817-824 (motion, *esp.* CP 821:1-2 & 822-24 discussing and quoting *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002) which reversed the trial court for purportedly dividing a trust in favor of the parties' children as part of a marital dissolution), and CP 955-959 (reply declaration in support of

CR 60 motion, *esp.* CP 958:24-25). Rather than make corrections to formally remove the non-marital asset from the property division and re-distribute the marital property to provide Rod some form of liquid assets, including so he could make the back payments ordered, the court denied the motion without comment. CP 965 ¶4. The provision purportedly awarding the non-marital life insurance was therefore void and vacation is required. *Persinger v. Persinger*, 188 Wn. App. 606, 607, 609, 355 P.3d 291 (2015).

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error – Property Division

1. The trial court erred in entering the final orders with property division.
2. The trial court erred in awarding attorney's fees on reconsideration.
3. The trial court erred in entering a post-secondary support order in February, 2017, for the parties' 21-year old son who was adjudicated to be emancipated as of September 2014 by order entered May, 2014.
4. The trial court erred in its property division, which was not fair, just, and equitable.
5. The trial court erred in failing to value and award all property of the parties, including Lori's jewelry insured at a value of over \$114,000, and failing to formally award to Rod his separate interest in K2R, LLC.
6. The trial court erred by *sua sponte* reversing itself to admit the Maxine Van de Graaf 2012 Family Trust.

7. The trial court erred by finding Rod would soon become an “even wealthier” man by attributing to Rod for purposes of the property division funds the trial court expected Rod’s parents to eventually give to Rod as an inheritance, allowing Lori to inherit a share, despite the divorce.
8. The trial court erred in including the Beneficial Life insurance policy cash value in the property division because it was owned by a trust, not by either of the parties.
9. The trial court abused its discretion on reconsideration by failing to correct the property division by removing the Beneficial Life insurance policy from property awarded to Rod and redistributing only the property that was properly before the court, and awarding it pursuant to its correct characterization.
10. The trial court erred in failing to value or award Lori’s jewelry it found was received as a gift, as to which the parties had an insurance policy in excess of \$100,000.
11. The trial court erred in awarding Lori market gain in the UBS account where the original award specified a dollar amount that was Rod’s responsibility to insure was met – but no more.
12. The trial court abused its discretion on reconsideration by ordering Rod to pay Lori’s attorney’s fees for trial given the size of the property award made to Lori and the fact that Rod was not awarded any liquid assets with which to pay said fees, while Lori was awarded ample assets to pay said fees.
13. The trial court erred in characterizing the Ellensburg property as community property when it was purchased long before the marriage with Rod’s separate funds, was economically maintained by income it produced, and the community was adequately compensated for Rod’s toil such that no community lien was necessary or appropriate.

14. The trial court erred in awarding Lori the Ellensburg property as part of its 50-50 community property division because that property, like Rod's separate K2R property owned with both his siblings, and like Lori's \$114,000 of jewelry, was separate property, not community property.
15. The trial court erred by awarding Lori the Ellensburg property because it results in a continuing post-marriage business relationship with Rod.
16. The trial court erred in calculation of the value of Midvale Cattle Company, particularly by double-counting in its valuation of Midvale Cattle Co., which means that the value stated is inconsistent with the evidence.
17. The trial court erred in refusing to include repayment of the \$2 million promissory note secured against the community share interest in Midvale Cattle Co.
18. The trial court abused its discretion in its award of lifetime maintenance when it failed to take into account Lori's earning history and capacity and its 50-50 division of substantial community property.
19. The trial court erred in allowing Lori to remain in the marital house awarded to Rod for more than 30 days past entry of the final orders where the court did not require payment of rent to Rod for use of his property, nor allow proper rent as an offset against maintenance, and left it vulnerable to neglect by Lori and consequent material reduction in value on receipt by Rod.
20. The trial court erred in refusing to modify maintenance when the undisputed facts showed Rod does not have the income or available assets following the property division to pay the maintenance out of his monthly or annual income, or the ability to sell the house he was awarded because she was in it and it was wholly encumbered by the judgment.

21. The trial court erred by refusing to grant Rod an offset against his maintenance after final orders were entered based on a reasonable rental value of the former marital house awarded to Rod that was still occupied by Lori rent-free.
22. The trial court erred in holding Rod in contempt of court for the willful failure to pay maintenance where his income and available assets allowed him in the property division were insufficient to make the ordered payments.
23. The trial court erred in denying Rod's motion to reduce maintenance based on his inability to pay the required amount from his own earnings.
24. The trial court erred in awarding Lori "suit money" for appeal when she had no present need given the ample assets she was awarded and Rod had no present ability to pay given the lack of liquid assets he was awarded.
25. The trial court erred in ordering post-secondary college expenses for the parties' youngest child, previously emancipated by a 2014 court order which specifically found the child himself had more than adequate financial resources available to pay his entire post-secondary college and related expenses.
26. The trial court erred in ordering Rod to transfer funds awarded to him in the divorce to his son as advance payment of post-secondary education funds, contrary to the statute and the trial court's February 17, 2017 order.
27. The trial court erred in entering the certain findings of fact, which are set out in Appendix A.

B. Issues on Appeal – Property Division.

1. Must the property division be reversed because it was premised on taking into consideration non-marital assets over which the dissolution court has no jurisdiction?
2. Must the property division and maintenance awards both be vacated because they were predicated on including in the distribution to one spouse the future inheritance of the other spouse that the trial judge believed would someday occur and as to which it could not even estimate the amount, and as to which the other spouse had no vested right?
3. Must the property division be vacated because it includes distribution of an asset of a third party, over which the dissolution court has no jurisdiction or authority?
4. Must the trial court's findings as to the alleged anticipatory inheritance by Rod be vacated as unsupported by the evidence?
5. Must the property division be vacated because the Ellensburg property was mischaracterized as community property and the trial court's plan as seen in its distribution scheme was to award each party their separate property and divide the community property evenly, along with effectively awarding Lori a share of Rod's anticipated future inheritance via an inflated, lifetime maintenance award?
6. Must the maintenance award be vacated because the trial court did not take into account Lori's historic and present ability to work as a certified special education teacher and because it essentially used the lifetime award, to continue even if she remarries, as a means to give her a share of what the trial court anticipates to be Rod's future inheritance from his parents who are still alive and well?

7. Must the April 14, 2017 award to Lori of over \$58,000 in attorney's fees be vacated because it is not supported by the required findings and conclusions but, rather, is inconsistent with the unchanged findings and conclusions entered February 17, 2017, that the parties both "have sufficient wherewithal to pay their own cost and fees," particularly where Lori was awarded over \$1M in liquid assets.
8. Must the trial court's contempt orders against Rod be vacated because he did not have the funds from his income or other personal sources to make the ordered payments after the court awarded all the marital liquid assets to Lori and granted her an equalization judgment which resulted in a lien on the house awarded to Rod such that he could not readily get a loan or rent it since Lori remained in it?
9. Must the order awarding suit money to Lori be vacated because it was Lori who had control of the liquid assets following the divorce and therefore had sufficient funds to pay for her cross-appeal and defend against Rod's appeal, while Rod was stripped of any liquid assets and had to borrow funds for his appeal, placing Rod in the position of the financially disadvantaged spouse who was entitled to suit money in *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360-61, 333 P.2d 936, 937 (1959) (suit money required where requesting spouse had no control over or access to the ample assets awarded in dissolution).
10. Must the post-secondary support order specified *sua sponte* by the trial court be vacated because the son had been adjudicated emancipated as of 2014 and was not dependent on his parents for further college support after receiving over \$72,000 in funds in trust and directly for his education?
11. Must the order directing payment of "529 account" moneys directly to the parties' son for his last year of college under the asserted authority of the post-secondary support order be vacated as inconsistent with the applicable statute and unnecessary given his emancipated status and his personal

possession of more than sufficient funds to complete his final year at WSU?

12. Where the experienced trial judge has repeatedly failed to follow or apply fundamental precepts of community property law, including taking into account and awarding non-marital assets and taking into account anticipatory inheritance to one, but not both of the parties, should the case be remanded to a different judge so that the remand proceedings can have an appearance of fairness that the law will be applied fairly to both parties?

III. STATEMENT OF THE CASE

A. Overview Facts.

1. Background and Family Home.

The parties married in 1985 and separated 26 years later, in July 2011. CP 759; RP 239. Their marriage was formally dissolved in early 2017, after a trial in the fall of 2016. CP 763-67. Rod was 58 years old at the time of trial; Lori was 55. RP 239, 472. Rod and Lori have four adult sons. RP 241.

Rod is a business owner and cattle-farm manager. RP 473. He grew up in a family cattle business. RP 473. He began his career as a salaried employee of VDGR, Inc., (“VDGR”) a major cattle operation founded by his parents, Dick and Maxine Van de Graaf, that includes cattle feedlots and grazing. RP 473-75. VDGR owns a feedlot and stock yard. RP 1199. Another company owned by Rod’s parents, Van de Graaf Ranch Properties, LLC, owns raw land that it leases out for cattle grazing. RP 416, 418-19.

While he was still working for their company in the feedlots, Rod's parents established a separate "cattle account" for his use to buy and sell cattle for profit on his own, independent from VDGR. RP 473-74. Rod continued working as a salaried employee of VDGR after marrying Lori. RP 474-75, 477-78. By 1989, Rod had profits of \$1.4 million in his separate cattle account, which Rod and Lori decided to use to build a house. RP 477.

Rod testified to his opinion, following review of an appraisal report in 2012 by a certified appraiser (Ex. 2.21), that the family home was worth \$772,000 at the time of trial. RP 665-68. Lori presented testimony of a real-estate broker, Connie Gustafson, who opined that, even though she found *no* comparable houses in preparing her market analysis, the house could sell for \$1.42 million. RP 232. Ms. Gustafson testified that Lori had "kept [the house] in...great shape" and it "looks very nice." RP 237.

2. Midvale Cattle Company.

In 1991, Rod and his two siblings, Karen and Rick, established Midvale Cattle Company as a general partnership engaged in raising cattle, mainly in feedlots and pastures leased from their parents' companies. RP 478. Each sibling held a 1/3 interest. RP 421-22, 478. To capitalize the business, each partner borrowed \$2 million from VDGR. RP 481. Rod and Lori both executed a \$2 million promissory note to VDGR, secured by their interest in Midvale Cattle Company and other personal assets. RP 309, 478,

481; Resp. Ex. 2.1, 2.2. The other siblings and their spouses executed similar notes. RP 419-20, 587-88. In 2003, the partnership converted to a limited-liability company, Midvale Cattle Company, LLC, with each sibling owning 1/3 of the company. RP 488; Resp. Ex. 2.6.

The original \$2 million promissory note called for semi-annual interest payments and three, equal principal payments due in 1995, 2000, and 2005. Resp. Ex. 2.1. The note was amended in 1993 to adjust the interest rate and in 1995 to extend the principal-payment due dates five years, to 2000, 2005, and 2010. Resp. Ex. 2.1. Rod and Lori missed the scheduled principal payments, but they did regularly pay interest on the note. RP 483, 805-07; Resp. Ex. 2.3. Lori testified she assumed the note had been satisfied because Rod told her they were “debt free.” RP 255-56, 343-44.

The note was restated in 2011, when VDGR distributed approximately 10% of the debt obligation to Dick and Maxine, Rod’s parents, , such that the obligors owed \$1.79 million to the corporation and \$210,000 to the elder Van de Graafs personally. RP 809-11; Ex. _____. Including other debts also reflected in other promissory notes, as of September 2016 Rod and Lori owed Dick and Maxine \$479,074 and VDGR \$2 million—a total of nearly \$2.5 million. RP 810-11.

At trial, Lori’s expert, Kevin Grambush, opined that the parties’ interest in Midvale was worth \$2.22 million as of September

2014, while Rod's expert, Joe Reid, opined it was worth \$1.7 million as of December 2015. RP 371, 552; Resp. Ex. 2.8. Both experts agreed that the primary factor in the difference in value was the valuation date. RP 372-73, 560-61, 571. Cattle prices were at record levels in 2014 but dropped precipitously in 2015, and continued dropping. RP 380-81, 536-64; 763-65.

3. Validity of Promissory Notes Executed by Rod and Lori.

Lori disputed at trial whether the parties' debts to VDGR and Rod's parents were genuine obligations. Lori maintained, based on hearsay, that the promissory notes executed by her and Rod were illusory. RP 1220-21. Rick testified that Maxine and Karen had said not to worry about the \$2 million notes because "in the end you're not going to have to pay that." RP 423-24. In addition, two of Rod's sons testified that Rod himself had said the loans notes were never intended to be repaid. RP 390, 404, 410. They also testified that their grandfather had once said that he planned to forgive the loans someday. RP 400-01, 406, 408-09.

Nevertheless, the evidence showed that all the Van de Graaf siblings made interest payments on their notes in the 26 years following execution of the originals. RP 421, 425, 438-40, 483, 588, 806-07; Resp. Ex. 2.3. Both Karen and Rick testified that the notes remain enforceable. RP 439-40, 1207. Rick even took out a \$350,000 line of credit to make a principal payment on his note

when his father threatened to call it (Dick had a history of adverse actions against his children, including firing Rick multiple times), while Karen purchased a large life-insurance policy to ensure her note would be satisfied in the event of her death. RP 423-24, 591. Rick never heard Rod claim the notes were not enforceable, and Rick admitted that the notes *were* enforceable. RP 437.

In addition, the Van de Graaf family accountant at Moss Adams, Hanna Keyes-Nowlin, testified that not only had the promissory notes *not* been forgiven, she had advised Rick and Karen they should expect to repay the loans in the future because their parents will likely need the money. RP 814-16. She felt that Karen and Rick “[didn’t] have a good understanding of their parents’ holdings or their parents’ ability or future cash flow.” RP 815. She noted that if the loans were forgiven, VDGR would need to report a bad-debt expense and the note holders would have to claim debt-forgiveness income. RP 812.

4. Claimed Expectancy of an Interest in Stock of VDGR, Inc.

Lori not only disputed the notes’ validity, but maintained that Dick and Maxine Van de Graaf conspired to keep assets they otherwise would have given Rod out of his hands until the conclusion of the dissolution case.² She pointed to a 2012

² Of course, even if this is true, Dick and Maxine Van de Graaf have every right to do with *their* property what they want, when they want. Neither Lori nor Rod have any right to their property before they choose to release it. After all, the
(Footnote continued next page)

transaction in which Dick and Maxine divested themselves of 90% of the stock of VDGR. RP 426. This undisputedly was done in anticipation of potential changes in estate-tax laws. RP 426, 1152. The non-voting stock was transferred as a purchase/sale transaction of 30% to Rick, 30% to Karen, and 30% to the “Maxine Van de Graaf 2012 Family Trust.” RP 428, 837; Ex. 44. But even if it was done for other than tax reasons – Dick and Maxine as competent adults were and are free to do whatever they want with their property, when they want. Neither Rod nor Lori have any claim on his parents’ property.

Rick, Karen, and the trust each borrowed \$833,333 from VDGR to acquire their 30% shares, evidenced by and subject to signed promissory notes. RP 429, 837-38, 1143, 1202-04; Pet. Exs. 4, 5.³ Rick gave hearsay testimony that Ms. Keyes-Nowlin told him 30% of the stock was put in a trust rather than transferred to Rod “because of the divorce.” RP 435. Lori went even further and argued that because the stock-purchase loans were being repaid with proceeds of sales of manure⁴—which she claimed belonged to Midvale—this meant that the marital community had *already* acquired 30% of VDGR stock. RP 1228-29.

dissolution is about the fair distribution of the property of the *parties* to the marriage, not anyone else’s property. *See* RCW 26.09.080.

³ Dick and Maxine personally retained 10% of the stock in VDGR, which was *all* of the voting stock. RP 426, 838-39.

⁴ The trial court excluded testimony about manure sales based on occurring after the date of separation.

Rod testified he first learned of the 2012 stock transfers during Rick's trial testimony. RP 773, 875, 1135. Rod testified that he owns no interest in VDGR and, further, that no one has told him that he will receive any interest in the company. RP 876. The potential beneficiaries of Maxine's 2012 Family Trust were Maxine herself and Dick's "descendants." Ex. 44 at 4-5. Any distributions from the trust during Maxine's life would be purely discretionary. RP 1155-56, 1159-61; Ex. 44 at 5. Distributions after her death are to be made according to her will. Ex. 44 at 5. The trust document mentions Rod by name only as a contingent successor *trustee*. Ex. 44 at 10. If he became trustee, he could not simply distribute assets to himself. RP 1182-83.

5. K2R Properties.

K2R Properties, a general partnership. Rod, Rick, and Karen each have a 1/3 interest and the LLC owns approximately 24 acres of commercial real estate in Sunnyside, Washington, which was purchased in a series of transactions from VDGR. RP 253, 601-02, 819-20; Resp. Exs. 2.14, 2.15, 2.16, 2.18. The property appraised for approximately \$1.2 million as of January 2007. Ex. 2.17. The partnership owed \$600,000 to VDGR on loans used for the purchase. RP 253-54, 760. Lori asked that the property be sold and the value distributed. RP 207.

6. Ellensburg Property.

The record shows that Rod owned a 50 per cent share of 342 acres of pasture land on Hungry Junction Road in Ellensburg, Washington, that he purchased together with his brother Rick in 1977. RP 417, 500. Despite these undisputed facts, Lori testified that she thought that Rod's half share of the land was jointly owned by her, and was community property, RP 251-52, 500, and that the other half share owned by Rick was owned by Rick and his wife, Lori's cousin. RP 251-52. The property was appraised in March, 2012 (by the same certified appraiser who appraised the family residence in 2012 for \$772,000) for \$1.38 million, making each brother's half share worth \$690,000. RP 251-52, 504; Resp. Ex. 13. The property was leased to VDGR for cattle grazing, RP 295, and the income from the lease paid for the property taxes and the water usage. RP 502-03. There was no testimony that any uncompensated community efforts were used to manage the Ellensburg property.

7. Rod's Ability to Work and Income.

Rod has worked physically demanding cattle-ranching jobs his entire adult life. RP 473. He studied farm management at Walla Walla Community College but did not complete a degree. RP 472-73. His responsibilities with Midvale include feeding cattle, servicing equipment, hauling commodities, and handling manure. RP 491; Resp. Ex. 2.9. Rod has chronic back pain. RP 342, 510-11. He had back surgery several years before trial and will likely need

another surgery. RP 510-11. To control his chronic pain, Rod uses over the counter medications and has put off surgery.

Midvale is Rod's sole source of income. RP 491. Rod's expert, Joe Reid, testified that a reasonable annual salary in the industry for Rod's position was \$82,200. RP 569, 574-75. Rod is paid a salary of \$7,692 per month gross or about \$92,300 per year. RP 522; Resp. Ex. 2.9; *see also* CP 535. Although Rod has received equity distributions in the past, those are not wages and are not guaranteed. RP 566-68, 574-75. In fact, Midvale put a moratorium on distributions after April 2016 because of the company's precarious financial situation, and because the bank was threatening to revoke their operating line of credit unless distributions ceased. RP 768. Midvale's future is "bleak" because of depressed cattle prices. RP 763-64.

For over four years preceding trial, Rod paid Lori \$3,000 in monthly maintenance under a temporary order, plus over \$1,500 per month for utilities, insurance, and other expenses. RP 516; CP 69.

8. Lori's Ability to Work and Income.

Lori's parents, now in their 80's, own several jewelry stores in Sunnyside and the Yakima area. *E.g.*, RP 215, 347, 876. Before graduating from college and getting married, she worked as a clerk in their store. RP 304-05. Lori obtained a bachelor-of-arts degree from Eastern Washington University and a teaching certificate. RP 240-41. She taught full time for one year and, after a break while

the children were young, she became a substitute teacher. RP 242, 249. There is “much need” for teachers and substitutes in the Sunnyside School District. RP 599. Further, Lori is trained in the Lindamood-Bell reading program, which is rare and sought after in schools for their special education students. RP 598-99. Around the time of separation, Lori worked part time at a health-food store. RP 250.

Several years before trial, a naturopathic doctor diagnosed Lori with “chronic” Lyme disease, which she experiences as fatigue, swollen joints, impaired cognitive function, and poor sleep. RP 246. Her condition is currently “in remission.” RP 246. Lori testified she was unable to give a “definitive answer” whether she could continue working part time. RP 250. Lori declared her income from substitute teaching as \$720 per month. CP 565.

B. Trial Proceedings and Final Orders

The matter was tried in September and October 2016. In November 2016, the trial court entered a letter ruling setting forth detailed findings of fact and conclusions of law. CP 702-07. In February 2017, the court entered formal findings of fact and conclusions of law, which incorporated a corrected version of the letter ruling. CP 758-62, 783-88. The court also entered a final order and decree, which also incorporated the letter ruling, and—unexpectedly—a child-support order. CP 763-75, 776-81.

Although Maxine Van de Graaf did not testify at trial, the court found in its letter ruling there was “ample evidence” Maxine intended to cause her 2012 Family Trust to transfer its shares of VDGR to Rod “at some time after the marriage is dissolved.” CP 785. The court recognized that this potential future asset was not a marital asset subject to division, but concluded the court could “consider the likely acquisition of this interest in determining what is just and equitable in the division of other assets and application of the factors enumerated in RCW 26.09.090 [regarding maintenance].” CP 785.

The trial court purported to award Rod community and separate assets worth over \$3.6 million. *See* CP 786. Principally, the court awarded Rod the community’s interest in Midvale, which it valued at \$2 million. CP 770. But the court refused to recognize or distribute the debts owed on promissory notes to VDGR and the Van de Graaf parents. The court found:

Respondent’s position is that the 2-million-dollar debt has to be charged against the value of Midvale, effectively making the asset worthless. I am convinced, however, the “debt” is a chimera,^[5] which is masking a gift and is not properly chargeable against the value of Midvale.

⁵ The definition of “chimera” that appears most closely pertinent here is: “an illusion or fabrication of the mind or fancy.” WEBSTER’S THIRD NEW INT’L DICTIONARY 389 (2002).

CP 784; *see also* CP 766 (finding that the notes are “illusory and it would be inequitable to treat them as the obligation of the marital community or either of it’s [sic] members”).

The court awarded Rod the family home, which it valued at \$1.42 million, and the community’s interest in K2R, valued at \$300,000. CP 770. In addition, the court awarded Rod a life insurance policy from Beneficial Life Insurance Company with a cash-surrender value of \$116,000—the main (supposedly) liquid asset awarded to Rod. CP 770.

The trial court awarded Lori nearly \$2.8 million, mostly in cash. *See* CP 786, 763-64. The court awarded Lori a UBS Resource Management Account containing approximately \$816,000 (and directed Rod to restore any shortfall from that amount), plus other accounts containing approximately \$98,000, and entered a judgment of \$1,183,578.62 in Lori’s favor, against Rod. CP 763-64, 772. In addition, the court awarded Lori the community’s 50% interest in the Ellensburg property, valued at \$690,000, CP 773, and allowed her to keep her jewelry collection valued at over \$114,000.

Although the court acknowledged it had awarded Lori “significant assets,” it nevertheless found that her situation was “precarious” and ordered Rod to pay her \$6,000 per month in maintenance “*for life*”—*i.e.*, until the death of either spouse—*not* to terminate upon Lori’s remarriage. CP 765-66, 788 (emphasis added). As part of the basis for this order, the court found

“[c]onservatively” that Rod’s “expected income in the near term,” including both salary and distributions, was at least \$17,000 per month. CP 788. In addition, the court found that Rod has considerable wealth and anticipated future wealth:

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 as 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. The court found that Lori is accustomed to the lifestyle of a “very wealthy person,” CP 787, (consistent with her upbringing as the daughter of successful multiple jewelry store owners⁶) suffers from health problems that can be “debilitating at times” (CP 787), and, despite the evidence her fibromyalgia was under control and that Lori was able to, and did work regularly as a certified special education teacher in the Sunnyside School District, is unlikely ever to work full time. CP 787.

In its child-support ruling entered *sua sponte* (see CP 707, 788), the trial court ordered Rod and Lori each to pay 1/3 of college expenses incurred by their adult son, NVDG, to the extent not

⁶ This “wealthy person lifestyle” is seen by the fact she maintained secret Yakima Federal bank accounts, not discovered until June, 2016 (five years into the divorce), into which she had deposited over \$250,000 in the three years before the separation and still had over \$53,000 in cash available at the time of separation and which was not disclosed when seeking temporary maintenance. See CP 797; SCP 1443-1448 (sealed Yakima Federal bank statements).

covered by the 529 college-savings plans they established for him. CP 778. The court ordered Rod alone to provide health, medical, and vision insurance for NVDG “until the child is no longer able to be covered by the insurance.” CP 778.

After initially declining to award fees based on the finding that “both parties have sufficient wherewithal to pay their own costs and fees,” (CP 788), the trial court granted Lori’s request on reconsideration for \$58,675 in fees by letter of March 14, 2017, informing counsel of the amount of the award and instructing Lori’s counsel to prepare “an appropriate order and judgment.” CP 829. A judgment was prepared without any order vacating the prior findings or making new findings to support the fee award, *see* CP 967-968 (judgment on fee award), thus leaving in place the finding that the parties had sufficient funds to pay their own fees.

The unusual circumstances of the fee request and the numerous corrections and material changes made to the trial court’s initial, November 17, 2016, property division ruling, many of which were made without the normally required notice, opportunity to brief, and hearing⁷ in a manner that goes far beyond an appropriate measure of “small county informality,” are best described in Rod’s response of March 3, 2017. CP 792-800.

⁷ *See In re Marriage of Tahat*, 182 Wn. App. 655, 676-678, 34 P.3d 1131 (2014) (reversing this trial judge for failing to give a party a full opportunity to respond to the opposing party’s reconsideration motion).

The parties first discovered after entry of the Decree that the Beneficial Life Insurance policy purportedly awarded to Rod as a \$116,000 cash value asset, ostensibly to provide him some liquid assets (*see* CP 957:4-6) and to complete a roughly 50-50 division of community property, was actually owned by the “Lori and Rod Van de Graaf LIT” (Life Insurance Trust)—an irrevocable trust with trustees who were not even parties to the case. CP 965. The policy thus was not owned or controlled by either party to the marriage and the court had no jurisdiction over it. *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002).

This jurisdictional defect was brought to the trial court’s attention on Rod’s CR 60 motion and reply declaration. *See* CP 817-824 (motion, *esp.* CP 821:1-2 & 822-24 discussing and quoting *Marriage of McKean* to point out that Division II reversed the trial court for purportedly dividing a trust in favor of the parties’ children as part of a marital dissolution; and CP 955-959 (reply declaration in support of CR 60 motion, *esp.* CP 958:24-25). Rather than make corrections to remove the non-marital asset from the property division and re-distribute the marital property to provide Rod reasonable liquid assets so that he could make some of the back payments ordered, the court denied the motion without comment. CP 965 ¶4. This ruling appears to be in sync with the trial court’s express statements that Rod was about to become “even wealthier” than the trial court believed him to be, because he soon would be

receiving a large inheritance from his parents, who still are alive and well, and thus did not have a genuine need for liquid assets to make any of the payments it had ordered, including the new award of over \$58,000 in attorney's fees.

The net result of the trial court's property division was demonstrated in post-trial proceedings. Lori, despite receiving the cash accounts of over \$98,000, the UBS account that escalated from the \$816,000 initially awarded to \$834,000, a judgment lien of over \$1M on the house awarded to Rod so that he could not borrow on its former equity, and being allowed to stay rent-free in the family house after entry of the final orders, demanded immediate payment of the back judgments awarded and continuation of the maintenance ordered by the trial court of \$6,000/month. As shown in the later contempt and suit money proceedings, Rod did not have personal funds to make the court-ordered payments of maintenance or back judgments. His only means to avoid or purge contempt orders and stave off collections has been to borrow from parents or family members. *See* CP 1723 ¶¶ 8-9 (Rod's declaration).

C. Post-Trial Proceedings.

1. Contempt proceedings – April, May and July, 2017.

Lori brought contempt proceedings against Rod for his failure to make maintenance payments as ordered by the Decree, which were heard on April 14, 2017. At the same time as his response, Rod filed a motion to modify the maintenance award of

\$6,000/month, which he had been unable to pay and which had generated the contempt hearing. *See* CP 947-949 (Rod’s cross-motion to modify maintenance); CP 955-959 (Rod’s declaration in support of the CR 60 motion detailing the inability to access the Beneficial Life Insurance policy and its \$116,000 cash benefit awarded to him by the trial court to provide Rod some liquid assets because it is owned by a third party, a trust, and so is not an asset of either him or Lori, requiring re-distribution of the property).

On April 14 Rod was held in contempt “for willful failure to pay spousal maintenance since November 1, 2016, as directed by the decree,” then the trial court awarded Lori a judgment for back due maintenance of \$38,311 in addition to the \$6,000 specified in the Decree. CP 693-694. The trial court also “clarified” the Decree to award Lori “any gain” on the \$816,000 in the UBS account awarded to her, which amounted to an additional \$18,000. CP 965. The trial court denied without comment or findings Rod’s motion to reduce or modify maintenance and his CR 60 motion to address the Beneficial Life Insurance policy, *id.*, then signed the judgment for \$58,675 in attorney’s fees it had awarded to Lori on reconsideration. CP 967-968.

Lori brought new contempt proceedings when Rod did not immediately pay the amounts specified in the April 14 order. CP 1532. Rod filed a cross-motion for contempt or for Lori to vacate the house awarded to Rod in the Decree and to pay her own expenses and debts as required by the Decree. CP 1537-1538

(motion); 1539-1558 (Rod's declaration detailing financial issues behind his inability to pay the maintenance or judgments as ordered). The motion was heard by the commissioner on May 31, 2017, who found Rod in contempt for "willfully" failing to pay despite the financial information provided, CP 1559, which ruling was affirmed on revision on July 10. CP 1649.

As part of his revision brief, CP 1565-1579, Rod raised the point that the commissioner had not made a finding that Rod had the ability to make the payments for which contempt was sought, *see* CP 1566:16-21, and that his inability to pay was a defense to the contempt claim, making the underlying ruling defective. CP 1578. As part of the revision papers, Rod filed a declaration from Steve Erickson, who is the financial manager for Midvale Cattle Company (and has been for 26 years) and the brother-in-law of both Rod and Rick Van de Graaf. CP 1638-1641. Mr. Erickson sets out the financial constraints of Midvale and due to the nature of the cattle operations and their banking relationship, such that Rod's – and all the partners' – ability to take draws against their partnership equity for personal needs terminated as of April, 2016, and affirmed that Midvale has no financial or ownership interest in Van de Graaf Ranch Properties, which is wholly owned by Rod's parents. CP 1639.

Nevertheless, revision was denied even though Rod had demonstrated he did not have the ability to pay the back judgments and maintenance from his own earnings or assets. CP 1649.

2. Suit money request.

Despite the fact that Lori received liquid assets of over \$1M in the final orders, including \$98,000 in cash accounts already under her control and the \$834,000 in the UBS account, and was allowed to remain in the house awarded to Rod rent free for months after it was awarded to Rod, Lori sought suit money of \$65,000, advance money for her cross-appeal and to defend against Rod's appeal on the basis of her alleged ill-health and the trial court's ruling that Rod soon would be an "even wealthier" man. CP 1602-1603. Rod responded, CP 1678-1685 (brief) and CP 1691-1697 (trial counsel declaration summarizing earlier trial court documents relating financial matters since entry of the decree in February, 2017, including Lori's receipt of the full \$834,000 in the UBS account and being awarded bank accounts in her name totaling \$98,000, and Rod's lack of available income or liquid assets to pay the requested suit money, demonstrating a lack of need by Lori and an inability of Rod to be able to pay). After reply papers from Lori (including a declaration from Rod's brother Rick) raised new claims as to Rod's finances, Rod filed sur-rebuttal papers to insure the record was accurate in the form of his declaration and a declaration from Debbie Cole, his girlfriend, CP 1721-1727, who related that she had to pay many of his expenses. Prior to the hearing, Rod filed a Notice of Deposit To The Court Clerk which included an accounting of the payments Rod made on August 28 to become current with all

outstanding judgments or maintenance, with total deposits of \$74,311, providing the deadline for Lori to have to vacate the house awarded to Rod, in which she had lived since separation in 2011, by the end of September. After argument, the superior court commissioner ordered payment of \$30,000. CP 1747.

IV. ARGUMENT

A. Standard of Review and Basic Principles of Property Division.

RCW 26.09.080 governs the disposition of both separate and community property and is reviewed for an abuse of discretion. The statute requires the court to:

make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.09.080.

In order to properly exercise discretion to make a “just and equitable” property division, the trial court must not only consider the factors listed in the statute, but also apply the underlying

principles and presumptions established by the appellate courts, and then make a decision within all those parameters. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) states what has become the regularly used three-part test to analyze abuse of discretion, there reversing because the test was not met:

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.

Littlefield, 133 Wn.2d at 47 (emphasized numbers added). *Accord 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.”).⁸ It has long been the rule, and the application of the appellate courts, that application of the incorrect legal rule is

⁸ The trial judge is not an untethered “knight errant” who may do whatever “justice” he or she deems fit because it is “family law”. Rather, the judge is tied to the applicable legal rules and facts of the case. *See Coggle v. Snow*, 56 Wn. App. 499, 504-07, 784 P.2d 554 (1990) quoting and discussing Justice Benjamin Cardozo’s famous reflection on the nature of judicial discretion in Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* (1921). Unbridled discretion means, as a practical matter, there are no rules, no accountability, and no predictability for clients and their counsel – there is no law. This case is an unfortunate example of the trial court repeatedly ignoring applicable rules of law to reach a result not justified by the law or the facts.

an abuse of discretion requiring reversal. *Physicians Ins. Exc. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (a “trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law,” and thus fails to apply the correct legal rule, vacating the trial court ruling).

B. The Overall Property Division and Maintenance Award Were Inequitable and Failed the Test of RCW 26.09.080. They Were Dramatically Skewed By Adding Rod’s Parents’ Assets To Rod’s Assets And Thus Placing Rod In An Impossible Financial Position In Which He Has Been Unable To Pay Court-Ordered Payments Maintenance Or The Property Division Judgment, Or Fees From Either His Income Or The Assets He Was Left With, Forcing Rod To Borrow Money To Make Sufficient Payments To Avoid Or Purge Contempt.

1. Basic principles of property division.

In a dissolution action, the trial court must order a “just and equitable” distribution of the parties' assets and liabilities, whether community or separate. RCW 26.09.080. All property is before the court for distribution. *In re the Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011). In reaching a just and equitable property division, the trial court must consider (1) the nature and extent of 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 property division is to become effective. RCW 26.09.080. These factors are not exclusive. RCW 26.09.080.

Lori argued in closing that she was “throwing herself on the mercy of the Court” and asking it to ensure she was properly taken care of for the rest of her life in the manner to which she had become accustomed. *See* RP 1230 (“Absent your intervention, she is in a world of hurt.”). The property and maintenance awards must be vacated because the trial court in fact followed this standard, which is not the correct legal standard.

2. **The trial court erroneously included the assets of Rod’s parents in its property division when the receipt of such assets at some time in the future, if at all, is nothing but a mere expectancy which is not “vested” and is not certain, unlike pension rights, disability rights, or stock option rights. The trial court broke a fundamental rule of marital law which is that only the property of the parties is before the court for distribution, not the property of third parties. The trial court exceeded its jurisdiction by including third party assets as what Rod was deemed to own and have available for purposes of both property division and maintenance.**

The governing statute, RCW 26.09.080, directs trial courts to “divide the property and the liabilities of the parties.” It does not include expectancies or speculative potential inheritances. By its terms, the statute is limited to the property and liabilities of the *parties*. Washington courts have consistently recognized that the dissolution court cannot “divide” property which does not belong to the parties. *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951); *In re Marriage of Soriano*, 44 Wn. App. 420, 421-22, 722

P.2d 132 (1986) (quoting, citing, and applying *Arneson*); *In re Marriage of McKean*, 110 Wn. App. at 194-95 (court has no jurisdiction over trust established for benefit of divorcing parents' children, even though the parents were the trustees, reversing the trial court).

A mere expectancy is not a property right subject to distribution in a dissolution action. *In re Marriage of Leland*, 69 Wn. App. 57, 63, 847 P.2d 518 (1993), citing *Freeburn v. Freeburn*, 107 Wash. 646, 182 Pac. 620 (1919), *overruling on other grounds recognized by Best v. Best*, 48 Wn.2d 252, 258, 292 P.2d 1061 (1956). Thus, consideration and application in a marital property division of an unvested expectancy is a jurisdictional error. Vested rights in future interests, where those future interests fully exist at the time of the divorce, can be and are divided, the most prominent being pension, disability, and stock option rights.⁹

However, for good, jurisdictional reasons no Washington case has held that a potential future *inheritance* can be divided or taken into account. By nature, a mere expectancy in a future inheritance is not vested and always is subject to change by the maker of the will or trust (other than an irrevocable trust which specifies the property that is to be transferred), so long as they are alive and competent. While the trial court here may have genuinely believed that Rod

⁹ *E.g.*, *Farmer v. Farmer*, 172 Wn.2d 616, 259 P.3d 256 (2011) (vested stock options are divisible property in divorce).

would inherit substantial money from his parents when they die, that is still mere speculation and subject to many possible ways such an “expectancy” could be frustrated before it came to fruition. These include events out of the control of Rod or his parents such as economic collapse of their assets due to changed market conditions or a general economic depression, to changes of heart by the parents. They could skip a generation and leave their assets to their grandchildren or even to third party institutions.

In 1869 Washington “established the system of community property between husband and wife, the incidents of which are well known to the bar and the public.” *Lemon v. Waterman*, 2 Wash. Terr. 485, 492, 7 P. 899 (1885).¹⁰ It is a hallmark of the community property system as adopted in Washington, that in order for a property division to be fair, just, and equitable, all property of the community must be before the court, separate and community. RCW 26.09.080. If now, after nearly 150 years of property divisions¹¹ which have *not* included inheritances, Washington is now going to consider *mere expectancies* of future inheritances or bequests, which

¹⁰ The system in place by statehood, with some changes and adjustments, was modeled on the California statute with its underlying basis in the civil law and, particularly, in the Spanish law. *Id.*, 2 Wash. Terr. at 493. See M.R. Kirkwood, “*Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*,” 11 WASH. L. REV. 1, 8 (1936); Harry Cross, *The Community Property Law in Washington*, 61 WASH. L. REV. 11, 17-20 (1986).

¹¹ The current comprehensive scheme of community property was adopted in 1883, revising the earlier 1879 statutes which had put in place a preliminary version of community property law.

are not, in fact, property of the parties, this would be a sea-change that surely should be made by the legislature, which put in place the statutory system of community property.

Moreover, great mischief would abound if mere expectancies were to become part of marital distributions. These problems support the public policy reasons why mere expectancies, as a species of non-marital property that is beyond the dissolution court's jurisdiction, are not, and cannot be included in a property division under RCW 26.09.080. That species of property simply is not listed in the statute. Any such change would have to come from the legislature.

Finally, treating such expectancies as part of the property division undercuts the fundamental jurisdictional basis of the dissolution court because it is in effect adding a third party's property into the property of the parties and making it a part of the overall property division and maintenance. The logical effect of that is to make the overall judgment void as beyond the dissolution court's jurisdiction and require the entire judgment be voided, not just some portions. *See Persinger*, 188 Wn. App. at 609.

Judge McCarthy made that crystal clear in his ruling, stating, contrary to the evidence of the property and income that Rod actually had, that Rod was already a "very wealthy man" and soon would be "even more wealthy" (CP 787-788) such that he could give unlimited support to Lori and she was excused from ever having to be

responsible for herself, even should she remarry, contrary to the underlying and fundamental purpose of maintenance of helping a financial dependent spouse become self-sufficient. And this ruling was made with admittedly *no* evidentiary support as to the supposed amount of future wealth Rod will have – the judge admitted he did not know.

It is helpful to keep in mind the imbalance that occurs if this “expected inheritance” of Rod is brought into play in a dissolution, and particularly in *this* property division. *First*, it is not an accepted rule in Washington – it is contrary to the accepted rule in Washington, as set out *supra* for the excellent reason that it is a mere expectancy and not a vested interest; and that expectancy may never come to fruition as the testator or trustor can change their mind at any time. *Second*, allowing the “expected inheritance” of Rod’s parents because they are in their 80’s would be fundamentally unfair to Rod because he was not able to present *Lori’s* expected inheritance from her wealthy parents who are in their 80’s, and have three successful jewelry stores in Sunnyside and in the Yakima area. As Rod’s counsel explained,

. . . what Mr. Hazel is not telling the Court is that Mrs. Van De Graaf here now is a Lindstrand [her maiden name]. Her parents own three fine jewelry stores in Sunnyside and the Yakima area. They are quite well off on their own. And she stands with her two siblings to inherit from her parents, who are also in their 80s. *We have not brought forward that information because it is not admissible in any dissolution. You cannot*

consider – and the Court cannot consider making the property division at expectation of an inheritance.

RP 215: 5-15 (emphasis added). *See* RP 876-78 (later questions to Rod to address Lori's family's wealth and her likely inheritance not permitted).

The patent unfairness of allowing Rod's potential inheritance here is reinforced by the fact that the trial court did not similarly consider Lori's potential inheritance from *her* wealthy, elderly parents, and that under his approach she too soon would become a very wealthy woman after they passed their successful jewelry business – or its sale value – to her and her two siblings.

In short, whatever category of property is to be considered in a marital dissolution, the same category of property must be considered as to *both* parties for the division to be considered fair. And under the statute, it must be property of the parties. Thus, even assuming that Rod's potential inheritance could be considered, which it cannot, then Lori's had to be considered as well. And where Rod's counsel raised the fact of Lori's expected considerable inheritance on the second day of trial, the trial court could not in fairness change 150 years of community property law considerations for only one of the parties, but not both.

C. The Property Division Must Be Vacated Because The “Award” To Rod Of The Beneficial Life Insurance Policy Is Void As Beyond The Court’s Jurisdiction And Authority Because The Policy Was Not Owned By Either Rod Or Lori.

The trial court also exceeded its jurisdiction by purporting to award to Rod the cash value in the Beneficial Life Insurance policy, valued at \$116,000, ostensibly to provide him some liquid assets (*see* CP 957:4-6) and to complete a nominally 50-50 division of community property. But as set out *supra*, the policy was not owned by either party to the marriage, but by a trust, as to which the dissolution court has no authority or jurisdiction. *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002) (reversing the trial court for purportedly dividing a trust in favor of the parties’ children as part of a marital dissolution). As discussed *supra*, this is a jurisdictional defect. *See Arneson v. Arneson*, and *In re Marriage of Soriano*, *supra*. The award of the third-party insurance policy is void and thus error which requires at minimum vacation and remand. *McKean; Persinger v. Persinger*, 188 Wn. App. 606, 607, 609, 355 P.3d 291 (Div. III, 2015).

The correct character of the property and the jurisdictional defect was brought to the court’s attention by Rod’s CR 60 motion following the final orders when parties learned of its the ownership by the trust. CP 817-824. *See* CP 817-824 (Rod’s motion, *esp.* CP 821:1-2 & 822-24 discussing and quoting *McKean*, and CP 955-959 (reply declaration in support of CR 60 motion, *esp.* CP 958:24-25).

Although Lori argued that the motion was too late, it is well established that a jurisdictional defect like this that results in a void order can be raised at any time. *Persinger, supra*. Nevertheless, rather than make corrections to formally remove the non-marital asset from the property division and re-distribute the marital property to provide Rod some form of liquid assets, including so he could make some of the back payments ordered, the trial court denied the motion without comment in April, 2017. CP 965 ¶4. It thus refused to remove the insurance policy from the property division spreadsheet or otherwise make accommodation to the parties for the mistake brought to its attention.

The trial court awarded the policy to Rod to give him some nominal liquid assets. It therefore was an integral part of the property division scheme the trial court devised. But since the goal behind awarding that property to Rod could not occur for reasons which Rod cannot cure and the trial court cannot cure, it therefore requires reversal as to the entire property division.

The trial court's refusal to correct this clear mistake as to the non-marital estate life insurance policy and re-distribute the marital estate is also an abuse of discretion for failing to apply the correct law. *Fisons*. It becomes particularly troubling to think it can be cured by remand to the same judge since it shows a second instance of the judge refusing to follow long-established, settled, and binding law on the proper treatment of non-marital property not owned or

controlled by either party. It raises serious questions as to the potential fairness of a remand when considered with the just-discussed use of a projected inheritance to guide both the property division and the maintenance award.

D. The Trial Court Committed Clear Error By Characterizing The Ellensburg Property As Community When It was Purchased Nearly Ten Years Before The Marriage On A Real Estate Contract. Rod Is Entitled By RCW 26.16.010 To Keep His Pre-Marital Separate Property And Also The “Rents, Issues, And Profits Thereof”. At Most, Lori Could Have Sought A Community Lien Based On Uncompensated Labor During The Marriage, Which She Did Not Seek Nor Prove.

- 1. The Ellensburg property was separate property and Lori failed to establish a right to a community lien under *Marriage of Elam* for any increase in its value during the marriage attributable to uncompensated toil of Rod.**

As noted, Rod bought the Ellensburg property in 1977 by real estate contract with his brother Rick, nearly nine years before Rod’s marriage in 1985. The Supreme Court restated the rule from Prof. Cross in 2009 that confirms this was Rod’s separate property:

. . . the character of property as separate or community property is determined at the date of acquisition. Harry M. Cross, *The Community Property Law in Washington*, 61 WASH. L. REV. 13, 39 (1986). Under the “inception of title” theory, property acquired subject to a real estate contract or mortgage is acquired when the obligation is undertaken. *Id.*; see also *In re Estate of Binge*, 5 Wn.2d 446, 105 P.2d 689 (1940); *Beam v. Beam*, 18 Wn. App. 444, 453, 569 P.2d 719 (1977).

In re Estate of Borghi, 167 Wn.2d 480, 484, 219 P.3d 932 (2009).
Accord In re Marriage of Kile and Kendall, 186 Wn. App. 864, 347 P.3d 894 (2015). This law has not changed – Rod’s fifty per cent share of the Ellensburg property was Rod’s separate property at the time of his marriage nearly nine years later.

Since long before statehood spouses in Washington have been imbued with a “sanctified” right to his or her separate property. This right in separate property also is worthy of protection from the “arbitrary imposition of the court’s preferences.” The right is expressly protected by RCW 26.16.010, which dates to the original community property statutes in 1869. *See* RCWA 26.16.010 (West 2016), “Historical and Statutory Notes” tracing the statute to Laws 1869, pp 318-323. Complementing this right of a spouse in his or her separate property and to its gains and increases during marriage is the statutory protection of the non-owning spouse from the ***debts and liabilities*** flowing from the other spouse’s separate property stated in RCW 26.16.200, which dates to 1873. *See* RCWA 26.16.200 “Historical and Statutory Notes” tracing the statute to Laws 1873, p. 452, §10.

The Supreme Court has recognized this core principle since at least 1911 and has not retreated from it. *See Guye v. Guye*, 63 Wash. 340, 352, 115 Pac. 731 (1911) (“the right of the spouses in their separate property is as sacred as is the right in their community property”), quoted in *Borghi*, 167 Wn.2d at 484.

The Supreme Court settled in 1982 of whether community contributions will change the character of the pre-marital separate property and demonstrates why the trial court must be reversed and its decision as to the Ellensburg property vacated. In *In re Marriage of Elam*, 97 Wn.2d 811, 650 P.2d 213 (1982), after restating that “the right of the spouses in their separate property is as sacred as is the right in their community property,” the Court settled conflicting decisions in the divisions of the Court of Appeals for how community contributions to separate property – including a business – would be treated. Very simply, the character would not change. Rather, the marital community could share in the increase in value of the separate property or business, but only to the extent of the community contributions which were not otherwise compensated.

Accordingly, we hold that any *increase in the value of separate property* is presumed to be separate property. This presumption may be rebutted by *direct and positive evidence* that the increase is attributable to community funds or labors. This rule entitles each spouse to the increase in value during the marriage of his or her separately owned property, *except to the extent to which the other spouse can show* that the increase was attributable to community contributions.

Elam, 97 Wn.2d at 816-17 (emphasis added). There was no discussion of changing the character of the property.¹²

¹² This case is plainly distinguishable from the circumstance where a relatively small investment of separate property became so intermingled with community property through expenditure of community labor and resources as to have lost its identity and separate character. *See, e.g., In re Buchanan’s Estate*, 89 Wash. 172, 176, 154 P. 129 (1916).

The ruling by the trial court here that the Ellensburg property's character changed from separate to community based on some later community contributions was error, particularly given the initial contract terms being negotiated nearly nine years before the marriage and the fact the property by and large paid for itself without any labor by being a grazing land for the VDGR cattle.

At most, there might be a community lien, but only for the amount of the increase that Lori could show was due to the actual community contributions to the separate property. *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 869, 855 P.2d 1210 (1993) (if the separate property increase is rebutted, the "community receives that portion of the increase attributable to community contributions," citing to Prof. Cross). It was for Lori to present the proof of the community contributions to the increase in the Ellensburg property's value for purposes of implying a lien against the separate property. Since Lori chose not to make such proof, the presumption was not rebutted.

2. The award of the Ellensburg property to Lori must be vacated as contrary to the trial court's distribution scheme which left each party with their separate property and because it improperly put her in business with her former husband after an acrimonious divorce.

Though not doing so expressly, the trial court demonstrated its property award scheme by what it did with the properties. The properties it found to be separate, it left with its owner. It thus

divided only the property it determined to be community property. The character of the property was thus material to how the court made its division. Under these circumstances, the mischaracterization of the Ellensburg property, valued at \$690,000, must be deemed material and requires vacating the entire award.

In the course of the property division, the trial court failed to include in the property division the two properties it found were separate, Lori's jewelry (which was insured for over \$100,000) and Rod's interest in the K2R property in Sunnyside. They are not seen on the list of divided property in its findings at CP 786, but remained with their owners. The property division must be vacated and remanded where, as here, the trial court's division of property was the result of a mischaracterization of the property and it is not clear that if characterized properly, it would have been divided the same way. *Schwartz v. Schwartz*, 192 Wn. App. 180, 192, 368 P.3d 173 (2016), quoting *Shannon v. Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989). *Accord In re Marriage of Skarbak*, 100 Wn. App. 444, 450, 997 P.3d 447 (2000).

Finally, the award of the Ellensburg property to Lori must be vacated because it essentially puts Rod in business with his ex-wife, contrary to the goal and requirements of the Dissolution Act. *See Horenstein*, 20 WASHINGTON PRACTICE, FAMILY AND COMMUNITY PROPERTY LAW (2nd Ed. 2015), §32.28 (citing the salutary general rule that a court abuses its discretion where the spouses "remain in

common ownership of property” following the dissolution). Had the court correctly characterized the Ellensburg property as separate, as the law requires under the facts, then like K2R it most likely would have remained with Rod, just as Lori’s jewelry remained with her. Moreover, this would accord with the recognized sanctity of maintaining a person’s ownership of their separate property, particularly where that property is part of and will remain integral to a family farm or business. Given the acrimony of this divorce, it is poor judgment at best to create a situation where Rod and Lori have any business dealings with each other.

E. The Maintenance Award Was Untenable.

The purpose of spousal maintenance is to support a spouse until he or she has become self-supporting. *In re Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797 (1992). It can help “equalize the postdissolution standard of living of the parties, where the marriage is long term and the superior earning capacity of one spouse is one of the few assets of the community.” *In re Marriage of Scheffer*, 60 Wn. App. 51, 57, 802 P.2d 817 (1990). There is generally no need to award maintenance to a spouse who, as here, receives significant property. *See Irwin*, 64 Wn. App. at 55. And it is an abuse of discretion to consider the assets of a parent or other individual not a party to the dissolution action in setting maintenance. *Bungay v. Bungay*, 179 Wash. 219, 223, 36 P.2d 1058 (1934) (it is error to consider the income or wealth of the husband’s father.) The

Supreme Court explained in *Bungay* this common sense rule: “we know of no rule of law which, under circumstances as here exist [divorce], makes a father liable for the indebtedness of an adult son, and the law can look only to [the husband’s] earning power as the measure of his duty to provide.” *Id.* This principle still obtains.

It also is an abuse of discretion to order maintenance that a spouse is not able to pay. *Bungay*, 179 Wash. at 223-24. This rule also still obtains. To be lawful, the maintenance award must take into account the obligor’s ability to meet his needs and financial obligations. *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462 (1993); *Bungay*, 179 Wash. at 223. A maintenance obligation must be based on actual, current income rather than potential income. *Mathews*, 70 Wn. App. at 123. Because the trial court ignored these basic rules for dissolutions, and because the facts do not support the ability of Rod to pay the maintenance ordered from his actual, current, personal income,¹³ the maintenance order must be vacated.

Indefinite maintenance is disfavored, as “one spouse should not be given a perpetual lien on the other spouse’s future income.” *Marriage of Sheffer*, 60 Wn. App. at 54 (citing *Hogberg v. Hogberg*, 64 Wn.2d 617, 619, 393 P.2d 291 (1964)). The circumstances where

¹³ See CP 947-949, Rod’s cross-motion to reduce maintenance, and associated filings under seal at SCP 1465-1471 (business loan agreements), SCP 1472-1482 (Beneficial Life Insurance Policy information);

indefinite maintenance can be justified are limited, such as where a just and equitable property division is not otherwise possible because a spouse has transferred assets to third parties, *see In re Marriage of Morrow*, 53 Wn. App. 579, 584-89, 770 P.2d 197 (1989) (affirming lifetime maintenance where the transfers precluded a just and equitable division of property), or “when it is clear the party seeking maintenance will not be able to contribute significantly to his or her own livelihood.” *Mathews*, 70 Wn. App. at 124. In *Mathews*, the court held that indefinite maintenance was an abuse of discretion absent a finding that the wife’s health problems “prevented her working.” *Id.*; *see also Cleaver v. Cleaver*, 10 Wn. App. 14, 20-21, 516 P.2d 508 (1973) (holding that indefinite maintenance was an abuse of discretion where the trial court failed to take into account the property awarded to the wife and her ability to work).

Here, the trial court did not find that maintenance was necessary to achieve a just and equitable property division; the court found that the property division was just and equitable on its own. CP 787. Moreover, the court recognized that “significant assets have been awarded to the Petitioner, so this factor may weigh against her request for lifetime maintenance.” CP 787. Although the court found that Lori’s health problems “can be totally debilitating at times,” CP 787, the court did not find that she is incapable of working to support herself. Indeed, the court found that Lori “is qualified as a special education teacher and has recently

worked as a substitute in special education.” CP 787. Lori herself testified that her health problems are in “remission” and under control. RP 246. Although the court found she is unlikely to hold a fulltime teaching position, RP 787, this does not mean she cannot generate significant income.

The trial court found that Rod “is a very wealthy man, who is about to become even wealthier” because he “will soon be the co-owner of [VDGR].” CP 787. Based on no evidence, the court found it could “only estimate [Rod’s] accumulated wealth, which has to be close to 5 or 6 million dollars, if not more.” CP 787-88. This, and the lack of any express provision to terminate upon remarriage, demonstrate that the trial court’s ultimate purpose in awarding permanent maintenance was to give Lori a substantial amount of the inheritance it expects Rod to receive at some future time from his parents. Meanwhile, the trial court did not take into account the substantial wealth of Lori’s own elderly parents. *See* RP 215, 347, 876. The award of lifetime maintenance under these circumstances was an abuse of discretion that should be vacated.

F. The Trial Court’s *Sua Sponte* Post-Secondary Support Order For The Emancipated Son With His Own Assets Far Beyond The Requirements For His Senior Year At WSU Must Be Vacated.

The trial court *sua sponte* ordered Rod and Lori each unconditionally to pay 1/3 of the college expenses incurred by their adult son, NVDG, to the extent not covered by the college-savings

accounts they established for him, and ordered Rod alone to provide health, medical, and vision insurance for NVDG “until the child is not longer able to be covered by the insurance.” CP 778.

Support for postsecondary educational expenses is governed by RCW 26.19.090. Before ordering parents to pay such expenses, the court “shall determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life.” RCW 26.19.090(2). Further, in exercising its discretion to determine whether and for how long to order support, the court “shall” consider at least the following factors listed in the statute:

Age of the child; the child’s needs; the expectations of the parties for their children when the parents were together; the child’s prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents’ level of education, standard of living and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

RCW 26.19.090(2).

When a statute requires the court to consider particular factors in exercising its discretion, the record must reflect that the court did so. *In re Marriage of Horner*, 151 Wn.2d 884, 895-97, 93 P.3d 124 (2004) (holding that a trial court abused its discretion in failing to discuss each statutory factor for child relocation, either in its written findings or oral ruling); *see also* CR 52(a)(2)(B) (trial court must enter findings in connection with all final decisions in divorce

proceedings). A trial court's findings in support of a postsecondary-support order must "reflect a consideration of all relevant factors." *In re Marriage of Kelly*, 85 Wn. App. 785, 793-94, 934 P.2d 1218 (1997) (affirming a support order where the appellant did not show that the court failed to consider the statutory factors).

Here, the trial court made no findings, oral or written, to support its postsecondary support order. CP 776-81, 788. The court could not even recall whether the issue of postsecondary support was addressed at trial. CP 788 ("I do not recall specifically whether this issue was addressed directly. . . .").

NVDG was 20 years old at the time of trial. RP 403. The court made no finding that NVDG was unable to provide for himself or that the accounts established for his benefit were insufficient to cover his college expenses. Those accounts contained \$123,000 when NVDG began college, and the balance of his brother's account, containing at least \$35,000, was also made available to him. RP 407-08, 506; CP 361-62. Moreover, at the time of trial, NVDG was entitled to receive a uniform gift to minors act account ("UGM") when he turned 21, in March of 2017. NVDG did, in fact, receive the over \$72,000 in that account in March of 2017. CP 1740-41.

Given these facts of NVDG's emancipation and wealth, which were before the trial court, it was a manifest abuse of discretion to enter the child support order. This Court should reverse

and vacate the postsecondary-support order as an abuse of discretion.

G. The Award of \$58,000 in Attorney’s Fees on Reconsideration Was Error for Failing to Meet the Legal Requirements for a Fee Award.

It is settled that the trial court has two bases to award fees in a dissolution: balancing the need of one party against the other party’s ability to pay; and intransigence. RCW 26.09.140; *In re Marriage of Morrow*, 53 Wn. App. at 590. There are no findings made here for either Lori’s need and Rod’s ability to pay, and the record would not support such findings had they been made. Nor are there any findings that Rod was intransigent. Without a proper basis, the fee award must be vacated and the payment returned with interest per RAP 12.8. *In re Marriage of Mason*, 48 Wn. App. 688, 693, 740 P.2d 356 (1987) (restitution of attorney’s fees awarded below “is a matter of right under RAP 12.8” after reversal on appeal).

The trial court made its findings in the final order via its letter rulings, first in November 2016, then as corrected in February, 2017. The court’s findings in its November 2016 letter ruling make plain that the award as given did not require an award of fees to Lori:

Finally, the Petitioner has asked for an award of attorney fees and expert witness costs. The Respondent has made a similar request. It is true that both parties have expended significant resources in this litigation. ***The Court’s order to the Respondent to restore the balance in the UBS account will somewhat soften the blow for the Petitioner,***

but at the end of the day, both parties have sufficient wherewithal to pay their own costs and fees.

CP 788 (emphasis added).

The trial court did not change these initial findings when making its “corrections” in February, 2017. *Compare*, CP 707 and 788. It neither vacated those findings nor made new findings related to the fee award in April, 2017, but simply entered the judgment. *See* CP 697 (fee judgment). It thus did not couch its belated ruling on fees with adequate findings of Lori’s need and Rod’s ability to pay. Nor could it have on the facts in front of it. Indeed, the trial court’s other ruling in April, awarding Lori the gain in the UBS account far beyond the \$816,000 required, means that the “blow” of even more money from the UBS account would sweeten, if not further “soften” the “blow” of Lori having to pay her own fees with the now even more “sufficient wherewithal to pay [her] own fees and costs.”

As detailed *supra*, by February 2017, Lori had been awarded all the liquid assets of the marriage and still had over \$98,000 in her personal bank accounts. *See* CP 786 (“Other Accts” awarded to Lori). She did not, in fact, have a need as she had ample assets to pay her own fees, both liquid and illiquid. In contrast, Rod received virtually no liquid assets and his income from the cattle business was dramatically reduced by market factors lowering the cost of cattle by over 50%, something over which he had no control. *See* CP 947-48, Rod’s declaration detailing same. The one asset the trial court

apparently awarded to Rod as a potential liquid asset, the Beneficial Life Insurance policy with a cash value of about \$116,000, not only was not marital property, but was tied up in a trust which owned the policy such that it has not been signed over to Rod, because the final trustee who must sign it over is beholden to Lori and, in such an acrimonious divorce, that non-party has refused to sign it over. This illustrated the legal error of the trial court in both awarding the policy to Rod in the first instance, then failing to rectify that error when brought to its attention on reconsideration.

H. The contempt orders of must be vacated because the trial court erroneously failed to give effect to the reduced income to Rod caused by the steep decrease in cattle prices, over which Rod had no control, and the fact the property award left Rod with no assets to pay maintenance other than his substantially reduced income, and the court refused to modify the maintenance order to be in accord with Rod's actual income.

Superior court contempt orders are reviewed for an abuse of discretion. *In re Marriage of Meyers*, 123 Wn. App. 889, 892, 99 P.3d 398 (2004). As noted *supra*, failing to apply the correct legal standard is an abuse of discretion, or entering an order where the facts do not meet the legal standard is also an abuse of discretion. *Fisons*, 122 Wn.2d at 339; *Littlefield*, *supra*, 133 Wn.2d at 47.

In contempt proceedings, reviewing courts apply a strict construction rule to judicial decrees that are the basis for the contempt motion. *Graves v. Duerden*, 51 Wn. App. 642, 647, 754 P.2d 1027

(1988). An order in a contempt proceeding will not be expanded beyond the plain meaning of its terms read in light of the issues and purposes of the order; the facts found must constitute a plain violation of the order. *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 712–13, 638 P.2d 1201 (1982). The purpose of this rule is to protect persons from contempt proceedings based on violations of judicial decrees that are unclear or ambiguous, or that fail to explain precisely what must be done. *Graves*, 51 Wn. App. at 647–48. A contempt is an intentional failure to obey a court order. Implicit in the intentional failure is the ability to comply with said order.

A sanction is remedial and “imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act *that is yet in the person's power to perform.*” RCW 7.21.010(3) (emphasis added). RCW 7.21.010(1) defines the acts constituting contempt: “ ‘Contempt of court’ means *intentional*: ... (b) [d]isobedience of any lawful judgment, decree, order, or process of the court.” RCW 7.21.030–.050 provide general guidelines for civil (remedial), criminal (punitive), and summary contempt of court, respectively.

In re Marriage of Didier, 134 Wn. App. 490, 500–01, 140 P.3d 607 (2006). In this case the contempt orders against Rod have to be vacated because at the time they were entered, he did not have the ability to make the payments which had been required, nor was he *intentionally* being disobedient.¹⁴ The facts before the court

¹⁴ Rod was left in a compromised financial position by the final Decree because the trial court said it believed he would soon be receiving substantial money from his parents. Rod has only been able to obtain the money to become
(Footnote continued next page)

therefore failed to meet the legal requirements for contempt and they should be vacated.

Rod's lack of wherewithal to make the ordered payments is set out in his cross-motion to modify the maintenance amount, which detailed the depressed status of the cattle market, the debt structure of Midvale which, when combined with the depressed beef market, prevented him from anticipating or getting any distributions beyond his monthly draw, and the fact the final orders demonstrate he was not awarded sufficient liquid assets with which to make the payments not covered by his income. *See* CP 947-949 (Rod's declaration), showing Lori with the liquid assets and Rod with income insufficient to pay the \$6,000 per month maintenance and his own living expenses; CP 786 showing the property distribution. *See also* SCP 1449-1464 (sealed financial source documents including UBS and pay stub information), SCP 1465-1471 (sealed business loan agreement), and SCP 1472-1482 (sealed information re Beneficial Life Insurance policy).

Despite this evidence of Rod's lack of funds such that he did not have the power to perform the payment orders, he was held in contempt, apparently on the same basis that the trial court made its property division and maintenance award – because Rod was going to get a large inheritance from his parents. But even assuming such

and stay current with maintenance by borrowing from friends and family members.

a future expectancy, that does not translate to the ability to make present payments based on future funds not received, particularly when measured against a house that was awarded with an immediate judgment lien against it that made it impossible to obtain a commercial loan or cajole a friend or family member to readily take a note secured by the debt-hobbled house.

The April 14 and May 31 contempt orders also should be vacated because the trial court erroneously failed to give effect to any of the credits which should have been awarded to Rod for paying living expenses of Lori for which she was responsible, both pre- and post-decree, and for a rental value for the house she remained in even though it was awarded to Rod as of the date of the Decree, particularly as the Decree specified Lori was to hold Rod harmless for those her expenses. *See* CP 939-947.¹⁵ This includes giving Rod credit for the rent Lori should have been paying him for use of the house awarded to him in the final orders entered February 2017, particularly when it must be presumed that the monthly

¹⁵ *See* Rod's declaration at CP 939-946, detailing \$23,207 in various house-related expenses that were Lori's responsibility which he paid between May, 2016 and entry of the decree for which he requested credits as offsets towards a \$6,000 past due maintenance amount specified in the Decree and towards the equalization judgment. CP 939-944. He requested a \$9727 offset against the \$15,000 maintenance claimed owing for various post-decree expenses the Decree specified were Lori's responsibility, but which Rod paid. (CP 944-946:1-4). Rod also requested a credit towards current maintenance for value of the house Lori was permitted to remain in after it had been awarded to Rod in the Decree. CP 946-47.

maintenance included an allowance for housing costs, be it mortgage or rent. It would be inequitable to hold otherwise.

I. The Trial Court’s Refusal to Modify Maintenance Was Contrary to the Undisputed Facts and Must Be Vacated.

As discussed *supra*, it is an abuse of discretion to order maintenance that a spouse is not able to pay, *Bungay*, 179 Wash. at 223-24, and that, to be lawful, the maintenance award must take into account the obligor’s ability to meet his needs and financial obligations based on his or her actual, current income rather than potential income. *Mathews*, 70 Wn. App. at 123; *Bungay*, 179.

Rod requested in his April 7, 2017 filing that his maintenance be modified to \$500/month based on his actual income. *See* CP 947-954, *esp.* CP 948-949 & ¶¶ 20-24, detailing his finances. The trial court’s refusal to modify the maintenance in any amount when presented with the fact of Rod’s inability to pay based on his actual, current income, was an abuse of discretion and requires reversal. *Mathews; Bungay.*

J. The Post-Trial Orders for Suit Money and the Sua Sponte Transfer of Marital Property to One of the Children for Post-Secondary Support Must Be Vacated.

1. The award of suit money was erroneous for failing to meet the legal standard and for disregarding the facts and circumstances.

The purpose of an advance award of attorney’s fees is not to determine in advance that the requesting spouse will receive a fee

award at the end of the appeal and provide for it early; rather, it is to make sure that the requesting spouse has the funds to proceed with the appeal based on an immediate need. *See Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360–61, 333 P.2d 936, 937 (1959) (suit money required where requesting spouse has no control over the ample assets awarded in dissolution due to supersedeas staying access to the assets). Thus, there is no entitlement to fees, where, as here, the requesting spouse has already received a substantial property award and cannot show a genuine need. *Koon v. Koon*, 50 Wn.2d 577, 581–82, 313 P.2d 369, 372 (1957) (emphasis added): “A [requesting spouse] is not entitled to free litigation...if the [requesting spouse] has money of her own, it is error to award attorney's fees.” *See Lunsford v. Waldrip*, 6 Wn. App. 426, 431, 493 P.2d 789, 793 (1972) (“Attorney fees to a former spouse should, with reasonable exceptions, be awarded upon a showing of need. Need in this sense does not necessarily mean destitution or poverty but it does mean an absence of funds and a lack of ability to get them without extreme hardship. Even when these requirements are met there is no absolute right to the award. It should be granted in the discretion of the trial court if the other has the ability to pay.”); *Roberts v. Roberts*, 69 Wn.2d 863, 420 P.2d 864 (1966) (“A wife is not entitled to the costs of her litigation when she is financially able to pay for it herself.”).

As described numerous places, Lori was granted over \$100,000 in liquid assets while Rod had precious few, and with an income stream that could not pay both the required maintenance and his living expenses, much less additional expenses or other judgments awarded. On this record it was an abuse of discretion to award suit money because Lori had ample funds to finance her own cross-appeal and defense against Rod's appeal, while Rod has to borrow funds to proceed.

2. The transfer of the “529 Account” funds directly to NVDG under the authority of the post-secondary support order must be vacated because it is inconsistent with the post-secondary support statute.

First, though the 529 funds are held by Rod for the benefit of NVDG's education if needed, they are Rod's separate funds per the final Decree. It is hornbook law that the dissolution court cannot “distribute” marital property to a third person (*see, e.g., In re Marriage of Soriano*, 44 Wn. App. at 421-22; *Arneson v. Arneson*, *supra*; *In re Marriage of McKean*, *supra*), which necessarily would include a child of the divorcing couple.

Second, to the extent the child support order providing the basis for this order, the governing statute requires that Rod make the payment directly to the school, not to NVDG. RCW 26.19.090(6). This makes meaningful the conditions for receiving the funds that the student must both remain in good academic standing and provide

to the parent information as to his academic standing. *See* RCW 26.19.090(3) (requiring active pursuit of schooling and being in good standing such that “The court-ordered postsecondary educational support shall be automatically suspended during the period or periods the child fails to comply with these conditions.”); RCW 26.19.090(4) (must make records available); and RCW 26.19.090(6) (“court shall direct” parents’ payments be made “directly to the educational institution if feasible.”).

K. The Case Should Be Remanded to a Different Judge.

It is not often that the appellate courts will send a case to a different judge. Nor should it be. Our judges are presumed to be fair and to follow the law, and capable of correcting errors made in an earlier trial on a remand. Normally it is only done where necessary to preserve the appearance of fairness. *See, e.g., In re Marriage of Mohammed*, 153 Wn.2d 795, 108 P.3d 779 (2004) (remanding to new judge to insure appearance of fairness on remand.)¹⁶ This is one of those rare cases where it is needed.

Judge McCarthy is an experienced judge who, presumably in most cases, follows the law and exercises his discretion within its

¹⁶ *Accord Tatham v. Rogers*, 170 Wn. App. 76, 105, 283 P.3d 583 (2012) (“there is a vast discretion vested in a trial judge and often no reasons need be given for the exercise of such discretion. Accordingly, *it might often be difficult to tell whether any improper motive entered into a trial court’s decision.*”) (emphasis added).

parameters.¹⁷ Here the law is well established that the divorce court has before it *only* the property of the parties and cannot consider or divide property of others,¹⁸ including, what is pertinent here, trust property for the benefit of the parties' children for whom the parents are trustees. *Marriage of McKean, supra*, 110 Wn. App. 191 at 194-95.

Despite being apprised of the legal rule, and also despite the more pertinent fact that, unlike *McKean*, here *neither* Rod *nor* Lori were trustees for the trust that owned the insurance, Judge McCarthy, without giving any reasons, refused to change his decision, thus refusing to bring the property division into accord with the most basic jurisdictional principles governing marital property divisions. Such a refusal of basic jurisdictional principles raises genuine questions as to the jurist's open-mindedness, particularly should he or she be reversed and faced with a remand.

That is why there no reasonable explanation for the appealed decisions so wracked with major mistakes that hurt Rod beyond what the law contemplates. A disinterested observer, once apprised of the nature and number of rulings made against Rod in this trial, would not believe that Rod could get a fair trial on remand. It must

¹⁷ *But see In re Marriage of Tahat*, 182 Wn. App. 655, 677-78, 334 P.3d 1131 (2014) (trial court reversed for hearing and granting reconsideration before allowing opposing party the opportunity to respond to the motion).

¹⁸ *See, e.g., In re Marriage of Soriano*, 44 Wn. App. 420, 421-22, 722 P.2d 132 (1986), quoting and citing *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951).

be remanded to a different judge so that the normal the trial court's broad discretion is exercised within the boundaries of the legal rules. *See Tatham v. Rodgers*, 170 Wn. App. 76, 105, 283 P.3d 583 (2012) (“A property division proceeding before a single superior court judge presents the height of discretion”).

V. CONCLUSION

Appellant Rod Van de Graaf respectfully asks the Court to vacate the property division entered February 17, 2017, because it is not fair, just, and equitable as required by statute, and because it is otherwise contrary to law since it contains a void provision purporting to award property not belonging to either party and the property division is based on mischaracterized property, among other errors; to vacate the April 14 attorney's fees judgment and order restitution; to vacate the contempt orders of April 14 and May 31, 2017 (as affirmed on revision on July 10, 2017); to reverse the trial court's denial of Rod's motion to modify his maintenance; to vacate the suit money order and order restitution; and to vacate the order to transfer funds to a non-marital person for the post-secondary support as outside the authority of the trial court.

Finally, given the accumulation of errors and the repeated failure to abide by fundamental jurisdictional tenets of marital property division law, Rod respectfully asks the Court to remand the matter to a different judge so that there is no issue of Rod getting a fair hearing on remand.

Dated this 2nd day of January, 2018.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30515
Attorneys for Rod D. Van De Graaf

VI. APPENDICES

- Appendix A:** Challenged Findings of Fact from Final Orders entered 2/17/17 (CP 760, 766), as amended 2/27/17 (CP 783-788)..... A-1 to A-8
- Appendix B:** Challenged Findings of Fact from April 14, 2017 Order (CP 963-965) B-1 to B-3
- Appendix C:** Challenged Findings of Fact from May 31, 2017 Order (CP 1559) and July 10, 2017 Revision Order (CP 1649) C-1 to C-2

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:

| | |
|--|---|
| David Hazel Hazel & Hazel 1420 Summitview Yakima, WA 98902 P: (509) 453-9181 F: (509) 457-3756 E: daveh@davidhazel.com | <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> email <input checked="" type="checkbox"/> Other – via Portal |
| Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8 th Avenue North Seattle, WA 98109 P: (206) 624-0974 F: (206) 624-0809 E: cate@washingtonappeals.com valerie@washingtonappeals.com | <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> email <input checked="" type="checkbox"/> Other – via Portal |
| Joanne Rick Halstead & Comins Rick PS PO Box 511 ** 1221 Meade Ave Prosser, WA 99350 P: 509-786-2200; 786-2211 F: 509-786-1128 E: jgcrick@gmail.com | <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> email <input checked="" type="checkbox"/> Other – via Portal |

DATED this 2nd day of January, 2018.



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

APPENDIX A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

9. Community Personal Property

The spouses' community personal property is listed in Exhibits A & B. This Exhibit is attached and made part of these Findings.

Conclusion: The division of community personal property described in the final order is fair (just and equitable).

10. Separate Personal Property

The **Petitioner's** separate personal property is listed in Exhibit B. This Exhibit is attached and made part of these Findings.

The **Respondent's** separate personal property is listed in Exhibit A. This Exhibit is attached and made part of these Findings.

Conclusion: The division of separate personal property described in the final order is fair (just and equitable).

11. Community Debt

The spouses' community debt is listed in Exhibits C & D. This Exhibit is attached and made part of these Findings.

Conclusion: The division of community debt described in the final order is fair (just and equitable).

12. Separate Debt

The **Petitioner's** separate debt is listed in Exhibit D. This Exhibit is attached and made part of these Findings.

The **Respondent's** separate debt is listed in Exhibit C. This Exhibit is attached and made part of these Findings.

Conclusion: The division of separate debt described in the final order is fair (just and equitable).

13. Spousal Support

Spousal support was requested.

Conclusion: Spousal support should be ordered because:
[The Petitioner has a need for support and the Respondent has the ability to pay.]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Termination: Spousal support will end when either spouse dies. It will not terminate upon wife's remarriage.
Date:
Other:

Make all payments to the other spouse directly by direct deposit/transfer to a bank account identified by the receiving party.
The receiving party must notify the paying party of any address or account change.

14. Fees and Costs (*Summarize any money judgment in section 1 above*)

Each spouse will pay his/her own fees and costs.

15. Protection Order

An *Order for Protection* was entered with this court on October 5, 2016.

16. Restraining Order

No one requested a *Restraining Order*.

17. Children

There are no dependent children of this marriage.

18. Parenting Plan

There are no dependent children of this marriage or the court does not have jurisdiction over the children.

19. Child Support

There are no dependent children of this marriage or the court does not have jurisdiction over child support.

20. Other orders

[The Court finds that the promissory notes and debt in favor of Van de Graaf Ranches, inc., and Dick and Maxine Van de Graaf are illusory and it would be inequitable to treat them as the obligation of the marital community or either of it's members.] The Court's written memorandum decision is incorporated herein. If the holder of such obligation

6



Superior Court of the State of Washington
for the County of Yakima

Judge Michael G. McCarthy
Department No. 2

128 North 2nd Street
Yakima, Washington 98901
Phone: (509) 574-2710
Fax: (509) 574-2701

AS CORRECTED ON FEBRUARY 25, 2017

David Hazel
Hazel and Hazel
1420 Summitview
Yakima WA 98902

Joanne Comins Rick
Halstead and Comins Rick
PO Box 511
Prosser WA 99350

November 17, 2016

Re: Marriage of Van de Graaf
Yakima County Cause Number 11-3-00982-6

SUPERIOR COURT
YAKIMA COUNTY, WA

FEB 27 17 08:35

FILED
JANELLE RIDDLE, CLERK

Dear Counsel;

The court, in a dissolution action, is charged with characterizing the property of the parties as community or separate, assigning values to the property and then making a fair and equitable division of the same, with regard to its character. RCW 26.09.080. This matter presents issues both as to characterization and distribution.

The parties were married on August 3, 1985. They have 4 grown sons. They separated in the latter part of 2011. The duration of the marriage was a little over 26 years.

The Respondent argues the family home is his separate property. His contention is based upon the premise that the home was constructed with profits generated by his sale of cattle. This business was started before marriage and continued after marriage, eventually accumulating a sufficient balance in the "cattle account" to fund the construction of the home.

The Respondent's reliance upon Friedlander v. Friedlander, 58 Wn2d 288, 362 P.2d 352 (1961) is misplaced. In the present case, the Respondent was paid a wage by the feedlot, and he had a side business of buying, raising and selling his own cattle which were kept at the feedlot. This arrangement cannot be construed as a device which insulated the income from his second job from the reach of the community property laws. After marriage, cattle bought and sold by the Respondent, and monies deposited to the "cattle account" were community assets. Profits which accrued prior to the marriage were the Respondents' separate property, but by commingling separate and community assets in a single account, those pre-marriage monies became a

community asset as well. Consequently, the family home, constructed using both community funds and commingled separate funds, is community property.

[I accept the valuation offered by Ms. Gustafson of \$1,420,000 for the family home. I believe her opinion more accurately reflects the residence's market value, which is the critical factor in this litigation, rather than its value as some type of investment or rental property]

The Respondent concedes that one third of Midvale Cattle Company is a community asset. Petitioner's expert, Kevin Grambush, testified this asset was worth \$2,218,000.00 as of September 30, 2014. The Respondent's expert, Joseph Reid valued the asset at \$1,705,500 as of December 31, 2015. The testimony suggested the difference in the valuations is attributable to a change in the price of cattle between the two dates. [In order to reconcile the valuations, I am going to set the value at \$2,000,000.]

One area of focus for the litigants was a Promissory Note for \$2,000,000 which was executed on November 1, 1990, by the parties in favor of Van de Graaf Ranches. This note, along with 2 identical notes executed by the Respondent's siblings/partners and their respective spouses, memorialized loans which were intended to fund Midvale Cattle at its inception.

The notes contained a requirement that interest be paid semi-annually and that principal payments of \$666,666 be made every five years. The notes have been renewed on a regular basis, but no payments have been made by the Respondent despite the passage of 26 years. Additionally, there was testimony from 2 of the parties' sons, Nate and Drew, that the Respondent and his father, Dick Van de Graaf, made statements to the effect that the funds were never intended to be paid back.

[Respondent's position is that the 2-million-dollar debt has to be charged against the value of Midvale, effectively making the asset worthless. I am convinced, however, the "debt" is a chimera, which is masking a gift and is not properly chargeable against the value of Midvale. The community's share of Midvale Cattle is worth \$2,000,000 and the note is not an encumbrance upon that asset.]

The next asset to be characterized and valued is K2R, which is an LLC which owns property in Sunnyside. The owners of the LLC are the Respondent and his two siblings. I will accept the Respondent's position in regard to valuation (\$300,000) and his characterization of the property as separate.

The next asset is the property near Ellensburg. Respondent characterizes this property as separate. It was purchased by Respondent and his brother Rick pursuant to a Real Estate Contract entered into in 1977, which was [several years] before marriage. The contract called for periodic payments which were made from the time of execution to the date of fulfillment [in 2004] when title transferred. Although the deed [ostensibly] conveyed title to the Respondent and his brother as their separate estate, [the fact of the matter is more than half the payments came from

community funds and]the final conveyance occurred[9 years]after the date of marriage. [Consequently, I believe the property is community.]The property was appraised at \$1380000,[so the community's 50% interest is worth \$690,000. I award the 50% to the Petitioner.]

[There was considerable testimony and angst about the Respondent's interest, inchoate or not, in Van de Graaf Cattle Company. It would appear that Dick Van de Graaf and Maxine Van de Graaf have created a means by which the Cattle Company can be effectively transferred to their three children; Rick, Karen and the Respondent. Rick and Karen each have assumed ownership of 30% of the company, 10% (and the only voting stock) remains with Dick and Maxine, and the last 30% is held in trust by Maxine.]

[By the terms of the trust, which is irrevocable, Maxine is invested with a great deal of discretion. Clearly, she could transfer the 30% interest to the Respondent at any time, if she chose to do so. And there is ample evidence that such a transfer is going to take place at some time after the marriage is dissolved. But there is no evidence that she has made such a transfer, so Respondent's interest in the company remains inchoate. So, I do not believe that Respondent's incipient ownership in the company is an asset subject to division by this court. However, I believe the court can consider the likely acquisition of this interest in determining what is just and equitable in the division of other assets and application of the factors enumerated in RCW 26.09.090.]

Moving on to bank and investment accounts, I will first take up the UBS account. Both parties agree it is a community asset. The Petitioner asks for an unequal division of this asset, which under the circumstances identified above, is a fair and equitable disposition.[The Respondent asserts the account balance at separation was \$816000] The Petitioner is awarded this sum. Since substantial withdrawals were made for the benefit of the Respondent, he is directed to make up any present shortfall needed to restore the account to that balance. Any withdrawals made to pay the Petitioner's fees or costs will be included in this reimbursement. I will address this issue at the end of my ruling.

[The Respondent is awarded the value of the Beneficial Life Insurance policy in the sum of \$116000.] He is also awarded the Bank of America Joint checking account and the Columbia Bank accounts, in the total sum of approximately \$36000. The Petitioner is awarded the value of her Chase IRA, Principal Funds, JP Morgan and Yakima Federal accounts, in the total sum of approximately \$98000.

The Petitioner shall be responsible for the Bank of America and Nordstrom cards balances (approximately \$8000).

There is a substantial amount of personalty which is subject to characterization, valuation and division. Taking the mounts first, I believe they are all properly characterized as community property, including the African trophies. If they were not acquired during marriage, community assets of some type were used to fund the various hunting trips and taxidermy fees. For instance,

the taxidermy down payment [Respondent's Exhibit 20] for the African mounts was made in February 2011, which would indicate the animals had been shot at some time prior to that date, which was well in advance of the date of separation.

Petitioner values them, collectively, at \$47000. Respondent's value is closer to \$30,000. I find a fair and equitable valuation to be \$36,000. They are all awarded to the Respondent with the exception of the Zebra rug, which is awarded to the Petitioner. It was the only dead animal she requested.

In regard to firearms, the Respondent values his collection at approximately \$8000, and Petitioner assigns a value of \$9700. I believe a value of \$8800 is appropriate and award the firearms to the Respondent with the exception of the Remington 243 which is awarded to the Petitioner. As and aside, Respondent argues the Howla 243 is his separate property, since it was a gift. He is correct in that regard. However, his assertion that the Winchester Model 70 is also separate because it was won at a gun show, is incorrect. It is community property.

Before turning to household furnishings, I want to address the Respondent's position that the jewelry, gifted to the Petitioner, was an investment and therefore properly characterized as community in nature. To be perfectly frank, this argument is without merit and borders on the absurd. Over the course of a 25-year marriage, Mr. Van de Graaf periodically gave his wife jewelry, not as investments, but as gifts. The jewelry is the Petitioner's separate property and given the totality of the circumstances, it is not subject to valuation or division in this proceeding.

Going to household furnishings and other miscellaneous property, I have attached as Appendix A, a spread sheet coble from one of Respondent's Exhibits, which delineates the various items, values them and directs their disbursement. The total awarded to the Petitioner is approximately \$10000. And the amount awarded to the Respondent is approximately \$33000.

In summary, the Court has made the following division of property:

| To Petitioner | | To Respondent | |
|---------------|--------------|---------------|--------------|
| | | House | \$1420000 |
| Midvale | 0 | Midvale | \$2000000 |
| Eburg | \$690000 | Eburg | 0 |
| UBS | \$816000 | [Beneficial] | [\$116000] |
| Other Accts | \$98000 | Other Accts | \$36000 |
| Zebra | \$1000 | Mounts | \$36000 |
| Remington | \$400 | Guns | \$8800 |
| HFG | \$10000 | HFG | \$33000 |
| [Total] | [\$994400] | Total | \$3649800 |

Therefore, the Court will award judgement against the Respondent, not including contributions he is to make to restore the UBS account balance.. I would be inclined to have the judgment forego interest for a period of time to give the Respondent an incentive to pay it off quickly.

I believe this division of property is fair and equitable and, although it does not fulfill the Petitioner's request for a disproportionate division, I believe it, along with maintenance, will leave her with adequate resources to live comfortably. I would also note that I believe this division of property is fair and equitable regardless of the characterization of any item as community or separate.

The Court will next address the Petitioner's request for maintenance. RCW 26.09.090 directs the Court to consider various factors

The first factor the Court is to look at the financial resources of the Petitioner, including property apportioned to her in this action and her ability to meet her needs independently.

It is true that significant assets have been awarded to the Petitioner, so this factor may weigh against her request for lifetime maintenance.

The second factor is the time needed for the Petitioner to acquire education and training so that she can re-enter the workforce and support herself. The Petitioner is qualified as a special education teacher and has recently worked as a substitute in special education. [However, given her age and health problems, the likelihood of her holding a fulltime teaching position is very remote. I find this factor supports the request for maintenance.]

The third factor is the standard of living established during the marriage. The Van de Graaf family lived well. Their house was [massive, well appointed, draped with] trophy mounts from the Respondent's many hunting trips, and featured an indoor pool [and Persian carpets. The lifestyle enjoyed by the Petitioner was that of a very wealthy person. This factor significantly supports the request for maintenance.]

The fourth factor is the duration of the marriage. The parties were married for 26 years. This also supports the Petitioner's request.

The fifth factor is the age, physical and emotional condition and financial obligations of the Petitioner. This factor also supports the argument for maintenance. She is 55 years old, suffers from fibromyalgia [which can be totally debilitating at times] and she shortly will be responsible for her own health insurance. [Her situation is precarious. This factor supports her request for maintenance.]

The final listed factor is the ability of the Respondent to meet his own needs as well as the maintenance needs of the Petitioner. [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, and [will soon be the co-owner of Van de Graaf Ranches. I can only estimate his

accumulated wealth, which has to be close to 5 or 6 million dollars, if not more. The Respondent is easily able to support himself and his former spouse, without hardship to either.]

After weighing the statutory factors, I have come to the conclusion that an award of maintenance is fully justified, and in fact is mandated, in this matter. The next issue is the amount and duration.

Exhibit 21 shows the [Respondent's income [salary and distributions] from the Midvale Cattle Company for 2012 to be \$173,000, gross.] Testimony established that other common expenses [truck payments, fuel, etc] were provided to the Respondent by Midvale. [And he had other income, in the form of distributions, from K2R. Further, it is a reasonable for the Court to conclude his income will increase once his interest in Van de Graaf Ranches is formalized.]

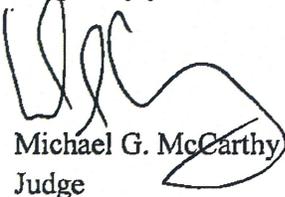
[Conservatively, the Respondent's expected income in the near term will be at least \$200,000 per annum, which translates to almost \$17000 per month. I believe the Respondent's ability to pay and the Petitioner's needs are both served by a monthly maintenance obligation of \$6000 for life.]

Finally, the Petitioner has asked for an award of attorney fees and expert witness costs. The Respondent has made a similar request. It is true that both parties have expended significant resources in this litigation. The Court's order to the Respondent to restore the balance in the UBS account will somewhat soften the blow for the Petitioner, but at the end of the day, both parties have sufficient wherewithal to pay their own costs and fees.

Finally, I do not recall specifically whether this issue was addressed directly, but I will order post-secondary support for the youngest son, with Petitioner, Respondent and child being responsible for tuition, room and board, fees and books, not covered by any college savings plan, on a one-third each basis.

Mr. Hazel is requested to prepare and present the final paperwork.

Very truly yours,



Michael G. McCarthy
Judge

APPENDIX B

FILED
JANELLE RIDOLE CLERK

'17 APR 14 P3:31

SUPERIOR COURT
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

In re Marriage of
Lori Van de Graaf
vs.

NO. 11-3-00982-6

Rock Van de Graaf

ORDER For Bench Warrant,
finding contempt re: UBS
account, family home, and CR 60

THIS MATTER HAVING COME ON for hearing, before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

① Respondent was advised of knight warnings on 3/31/17 to at least pay \$15,000 by today at 1:30 p.m. He has refused to do so; [He is in contempt of court for willful failure to pay spousal maintenance since Nov. 1, 2016 as directed by the decree] The court ~~declines~~ declines to rule on contempt for failure to pay pre-decree maintenance but preserved temporary maintenance in the decree and awards Petitioner a judgment for back due maintenance

DONE IN OPEN COURT this _____ day of _____, 20_____.

JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

Approved as to form:
(Copy received)

Attorney for _____

Attorney for _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

Van de Graaf

NO. 11-3-00982-6

vs.

ORDER (page 2)

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

in the sum of \$38,311 through March, 2017 (which is in addition to the judgment of \$6,000 in past due maintenance in the decree, Mr. Van de Graaf may purge the contempt by future compliance of the with the terms of the decree for a period of 6 months.

② A bench warrant for Mr. Van de Graaf's arrest shall issue with bond set at \$15,000 cash only.

③ The decree is clarified to award the entire

DONE IN OPEN COURT this _____ day of _____, 20____.

JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

Approved as to form:
(Copy received)

Attorney for _____

Attorney for _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

Van de Graaf
vs.

NO. 11-3-00982-6
ORDER page 3

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

UBS account to Petitioner, including any penalty on the \$84,000 awarded her.

(4) Respondent's motion under CR 60 is denied.

(5) Respondent's motion to reduce/modify maintenance is denied

(6) Because of husband Respondent's failure to ~~maintain~~ pay maintenance awarded in the decree, wife shall continue to have exclusive use and possession of the residence at 5652 Cay Road, Outlook until 30 days after
DONE IN OPEN COURT this 14th day of April, 2017.

Respondent
bring his maintenance
obligation current,
Presented by:
(Copy received)

D. Cecep/ferap
Attorney for _____

[Signature]
JUDGE/COURT COMMISSIONER
MICHAEL McCARTHY

Approved as to form:
(Copy received)

Ms. Connie Rick left
Attorney for court without
signing

APPENDIX C

FILED
JANELLE RIDDLE, CLERK

C

'17 MAY 31 P12:24

SUPERIOR COURT
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

LORI VAN DE GRAAF PET

NO. 11.3.00982.6

vs.

FRED VAN DE GRAAF RESP

ORDER ON CONTEMPT

Clerk's action required

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

① Back maintenance owed has not been paid current, calculated as follows: $\$38,311$ (May 2016 - MAR 2017) + $\$11,500$ (APR & MAY 2017) = $\$49,811$; less $\$19,000$ (cash paid to registry & withdrawn 4/19/2017 by Lori) = $\$30,811$ + $\$6000$ (maintenance for June 2017) = $\$36,811$ maintenance owed through June 2017. ② ~~He~~ ^{Lori} is in contempt for

^{willfully} ~~not~~ failing to pay maintenance as ordered; ③ Fred can purge contempt by keeping maintenance paid current ~~through~~ for the next 6 months; ④ Court is imposing 5 days jail SUSPENDED ON CONDITION that Fred pays $\$6000$ owed for June 2017 by June 27, 2017. A review hearing shall be held June 28, 2017 @ 9:30 am and the Clerk shall calendar the same if Fred has not paid the $\$6000$ for June 2017, he shall personally appear on June 28, 2017 hearing.

DONE IN OPEN COURT this 31st day of May, 2017.

~~Signature~~

Elisabeth T. [Signature]
JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

Approved as to form:
(Copy received)

Meredith [Signature] 7833
Attorney for Petitioner

[Signature] 11589
Attorney for RESPONDENT

W. W. R. D.
CLERK

'17 JUL 10 AM 11:37

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

Lori Van de Graaf

NO. 11-3-00982-6

vs.

Rod Van de Graaf

ORDER on Revision

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

[Service upon Mr. Van de Graaf and notice to him that jail time was possible was adequate in relation to the May 31, 2017 hearing.] The motion for revision is denied.

DONE IN OPEN COURT this 10th day of July, 2017

[Signature]
JUDGE/COURT COMMISSIONER

MICHAEL MCCARTHY

Presented by:
(Copy received)

Approved as to form:
(Copy received) OBJECTIONS PRESERVED

[Signature] 7833
Attorney for Refuse

[Signature] #11589
Attorney for Rep

CARNEY BADLEY SPELLMAN

January 02, 2018 - 4:02 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35133-5
Appellate Court Case Title: In re the Marriage of: Lori Van de Graaf and Rod D. Van de Graaf
Superior Court Case Number: 11-3-00982-6

The following documents have been uploaded:

- 351335_Briefs_20180102160039D3403158_9169.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Opening Brief FINAL.PDF
- 351335_Motion_20180102160039D3403158_9548.pdf
This File Contains:
Motion 1 - Waive - Page Limitation
The Original File Name was Motion for overlength brief.pdf

A copy of the uploaded files will be sent to:

- anderson@carneylaw.com
- cate@washingtonappeals.com
- daveh@davidhazel.com
- fuhrmann@carneylaw.com
- jgcrick@gmail.com
- miller@carneylaw.com
- valerie@washingtonappeals.com

Comments:

Sender Name: Elizabeth Fuhrmann - Email: fuhrmann@carneylaw.com

Filing on Behalf of: Gregory Mann Miller - Email: miller@carneylaw.com (Alternate Email:)

Address:

701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20180102160039D3403158