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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:
LORI VAN DE GRAAF,
Respondent,
and
ROD D. VAN DE GRAAF,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR YAKIMA COUNTY
THE HONORABLE MICHAEL G. McCARTHY

CORRECTED BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent Lori Van de Graaf, age 57, and appellant Rod Van de Graaf, age 60, married on August 3, 1985. (RP 239; CP 3) Throughout the marriage, Rod worked in the Van de Graaf family's cattle feedlots and related enterprises, Van de Graaf Ranches (VDGR), which have made him a "very wealthy man." (CP 787; RP 421, 797) The parties "lived well;" their home "was massive, well appointed, draped with trophy mounts from [Rod]'s many hunting trips, and featured an indoor pool and Persian carpets." (CP 787) Lori, who earned her teaching degree before the marriage, has stayed home to care for the family since their eldest son's birth in 1986; their three younger sons were born in 1988, 1992, and 1996. (RP 240-41)

Rod left the family home on July 8, 2011, to live (rent-free, in a house owned by VDGR) with his girlfriend. (RP 239, 707-08) Lori began this dissolution action on October 7, 2011. (CP 3, 606) It took almost five years of contentious litigation for the case to come to trial before Yakima County Superior Court Judge Michael McCarthy on September 27, 2016. After a quarter-century of marriage, Rod spent the years of separation conspiring with his parents to reduce the size of the marital estate and limit any property or maintenance award to Lori. Rod proposed leaving Lori with only her jewelry and half the

community retirement accounts, worth less than \$500,000. (See Ex. 32) Despite Lori's debilitating medical conditions and a 30-year absence from the work force, Rod argued that Lori should be awarded no maintenance, claiming she should "have [gone] back to work" and that he had "already contributed" to her support during the separation. (RP 671-72)

The trial court instead equally divided a marital estate valued at \$5.5 million (not including Rod's \$1.7 million "inchoate" interest in VDGR), finding its "division of property is fair and equitable regardless of the characterization of any item as community or separate." (CP 787) The court awarded Lori, who it found was in a "precarious" financial position, lifetime modifiable maintenance of \$6,000 a month – less than a third of Rod's historical and anticipated income. (CP 788) The trial court faulted Rod's "scorched earth" litigation tactics in awarding Lori \$58,657 in fees that remained unpaid after a 7-day trial – a fraction of the fees she had incurred battling Rod's post-separation divorce planning. (RP 1033)

Rod continues his economic bullying on appeal. Aided by his parents and appellate counsel, Rod refuses to comply with the decree and needlessly increases Lori's costs while assigning error to virtually every aspect of the trial court's wholly discretionary decisions. This

brief first corrects the misstatements of the opening brief, setting out the facts supporting the trial court findings. It then addresses those assignments of error that Rod actually argues. This Court should affirm and award Lori fees under RCW 26.09.140 and RAP 18.9.

II. RESTATEMENT OF FACTS

A. The court equally divided the marital estate, valued at over \$5.5 million, awarding the wife an equalizing judgment to accommodate the husband’s insistence he be awarded his businesses and the family home.

Yakima County Superior Court Judge Michael G. McCarthy valued and characterized the assets before it, finding the marital estate, including separate and community property, to be worth more than \$5.5 million, after a 7-day trial, and awarding Lori a \$1,171,200 equalizing judgment to divide the marital estate equally:

	Lori	Rod
Midvale Cattle		\$2,000,000
Family home		\$1,420,000
Ellensburg	\$690,000	
K2R		\$300,000
UBS investment account	\$816,000	
Other accounts	\$ 98,000	\$36,000
Beneficial life insurance		\$116,000
Personal property	\$11,400	\$77,800
Credit card debt	(\$8,000)	
<i>Subtotal</i>	<i>\$1,604,700</i>	<i>\$3,949,800</i>
Equalizing judgment	\$1,171,200	(\$1,171,200)
Total	\$2,778,600	\$2,778,600

(CP 763, 770-71, 786) The trial court rejected Lori’s request for a disproportionate division, finding “this division of property is fair

and equitable and regardless of the characterization of any item as community or separate.” (CP 787) This section addresses the assets included, as well as those interests the trial court did not include, in its equal division of the marital estate:

- 1. The court awarded Rod the community’s interest in Midvale, a cattle business valued at \$2 million. The court neither valued nor awarded Rod’s “inchoate” interest in VDGR.**

When the parties married in 1985, Rod was working for Van de Graaf Ranches, Inc. (“VDGR”), a company owned by his parents Dick and Maxine that operates cattle feedlots (among other enterprises). (RP 473) In 1990, Rod and Lori formed Midvale Cattle Company (“Midvale”) with Rod’s siblings, Karen Erickson and Rick Van de Graaf, as equal owners. (RP 243, 414-15) It is undisputed that the parties’ interest in Midvale was community property. (CP 784)

After Rod’s father Dick retired from VDGR (which still owned the feedlots), Midvale took over many of its operations, providing many of the same services that the siblings had performed as VDGR’s salaried employees. (RP 310, 415, 478) VDGR gives Midvale favorable terms in their joint business ventures, paying Midvale to manage land owned by VDGR and allowing Midvale to use VDGR land to feed and raise cattle and lease out some of the land to others,

keeping both the management fees paid by VDGR and the rents that Midvale collects for leasing out VDGR's land. (RP 787-88)

The parties received both "guaranteed payments," including a bi-weekly net payment of \$3,846 and health insurance for the entire family, and additional "distributions" from Midvale "as needed." (RP 521, 525, 529) Rod's reported annual income from 2007 (four years before separation) through 2015 (four years after separation), averaged \$220,752. (See Ex. 25) Midvale also paid all the family's vehicle expenses; Rod, an avid hunter, wrote off his hunting expenses for gear, mounts, and travel all over the world as Midvale business expenses. (RP 260, 626, 709-10, 715, 729, 782)

Lori's expert valued Midvale at \$2,218,000 as of September 30, 2014. (Ex. 1.8) Rod's expert valued the business at \$1,705,500 as of December 31, 2015. (Ex. 2.8) The trial court found the difference "attributable to a change in the price of cattle between the two dates," "reconcile[d] the valuations" at \$2 million, and awarded Midvale, the parties' largest asset, to Rod. (CP 784; RP 669)

- a. The court rejected Rod's claim that Midvale had no value because of a 26-year-old promissory note to VDGR that the court found to be a "chimera."**

When Midvale was formed in 1990, the Van de Graaf siblings and their spouses signed identical \$2,000,000 promissory notes in

favor of VDGR, secured by their interests in Midvale. (RP 419-20, 481, 587-88) The notes provided that interest would accrue at 8.93%, payable semiannually, and that principal would be due in three equal installments on or before October 1995, October 2000, and October 2005. (Ex. 2.1; RP 481-82) The promissory notes were amended twice during the marriage, in 1993 and 1995, to reduce the interest rates and extend the principal payment due dates to October 2000, October 2005, and October 2010. (Ex. 2.1)

Lori, Rod's brother Rick, and two of the parties' sons all testified that both Rod and his father Dick had told them that the notes would never be collected. (See RP 256, 392, 400-01, 404, 406, 423-26) Other than \$350,000 Rick paid Dick (not VDGR) in 1991, when his father tried to "recall" Rick's note after a "fight" (RP 424), none of the siblings had ever paid any principal on their individual notes. (See 439; Ex. 2.4 at 3) After Lori filed this action, VDGR made a "demand" to Rod and his siblings to pay the notes. (RP 425) But their mother Maxine told Rick "not to worry," because "it's just something we have to do because of the divorce." (RP 426)

Rod claimed he signed a new promissory note after VDGR held a "special meeting" in December 2011 to authorize an "amendment" to the 1995 promissory note (Ex. 2.4; RP 484-87), and

asked the trial court to treat this note as a community debt against Midvale (RP 669), “effectively making the asset worthless.” (CP 784) The trial court rejected Rod’s gambit, “convinced” this purported debt¹ was a “chimera, which is masking a gift and is not properly chargeable against the value of Midvale.” (CP 784) The trial court found the notes and debt in favor of VDGR and the parents “are illusory and it would be inequitable to treat them as the obligation of the marital community or either of its members.” (CP 766)

Although Rod assigns error to this finding (App. Br. 7), he has waived his assignment of error by providing no argument or authority to support his challenge. *Diehl v. Mason County*, 94 Wn. App. 645, 651, 972 P.2d 543 (1999) (“We will address only those issues specifically argued in the brief, as an assignment of error not supported by argument or authority is deemed waived.”).

- b. The court found that a trust formed to hold Rod’s interest in VDGR would be distributed to him soon, but declined to treat it as an asset of the marital estate.**

Rod did not convince the trial court that Midvale was worthless, but he did succeed in insulating his beneficial interest in VDGR from distribution as part of the marital estate. After the

¹ Rod testified to but never sought to admit the promissory note that he claimed he signed after the parties’ separation. (RP 487)

parties separated in July 2011, Rod's parents made an estate plan that allowed Rod's siblings, but not Rod, to each acquire a 30% interest in VDGR. (RP 837, 1133-34) Through a combination of gifts and loans, the parents transferred 90% of VDGR in equal shares to Rod's siblings and to a newly created trust (the "2012 Trust"). (RP 426-27, 837, 1133-34) The estate plan accountant told Rod's brother Rick that the 2012 Trust was holding Rod's interest in VDGR "because of the divorce, it has be that way." (RP 435)

Rod's father Dick is the grantor of the 2012 Trust, his mother Maxine is the trustee, and Rod is the first alternate trustee. (RP 1152-53, 1169) During her life, Maxine is the beneficiary of the 2012 Trust and Rod is a "permissible beneficiary." (RP 1155-56) Maxine can designate Rod to receive the property of the 2012 Trust at any time, including upon her death.² (RP 1168-69; Ex. 44)

VDGR was given a discounted value of \$5.71 million for estate purposes; the 90% of VDGR transferred to Rod's siblings and the 2012 Trust was valued at \$5.1 million. (See RP 427, 429, 936-39; Ex. 1.13) Rod's siblings and the 2012 Trust each entered into a Purchase

² Although Rod assigns error to the trial court's admission of the 2012 Trust under seal (App. Br. 5), he has also waived that assignment of error by failing to provide any authority or argument to support his challenge. *Diehl*, 94 Wn. App. at 651.

and Sale and Assignment Agreement to acquire 1,500 shares of non-voting common stock in VDGR. (RP 429-30; Ex. 4) The purchase price for the “sold interest” was \$833,333.33; the balance was the “gifted interest.” (RP 426; Ex. 4, ¶ 1) To finance the “sold interest,” the siblings and the 2012 Trust each executed promissory notes, to be paid from income they received as 30% owners of VDGR for “royalties” for manure that Midvale processes and sells. (RP 430-31, 433-35, 1143-44, 1146-47, 1197-99; see Ex. 5) In the 20-plus years prior to the 2012 “estate plan,” Midvale had been considered the owner of feedlot manure, and VDGR had never charged Midvale a “royalty.” (RP 1197, 1199) Midvale has earned up to a million dollars a year from manure sales. (RP 1196)

Lori argued that Rod owned the 30% interest in VDGR held by the 2012 Trust, as there was no reason for the parents to treat Rod differently than his siblings. (See CP 613-14) The trial court found that “it would appear that Dick Van de Graaf and Maxine Van de Graaf have created a means by which [VDGR] can be effectively transferred to their three children; Rick, Karen, and the Respondent,” noting that “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.” (CP 784) The trial court nonetheless declined to treat the 2012 Trust’s interest in VDGR as an asset in the property distribution because “there is no evidence that [Maxine] 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.” (CP 784)

2. As he requested, the court awarded Rod the family home, which it found was community property at its appraised value of \$1.42 million.

The parties built their’ “massive,” “well appointed” home (CP 787) with funds from their “cattle account” in the early 1990s. (RP 243, 477) The trial court found the family home to be community property because the “cattle account” contained proceeds from Rod’s “side business of buying, raising, and selling his own cattle.” (CP 783) The trial court found “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.” (CP 783-84)

Although an appraiser hired by Rod valued the home at \$1.42 million (RP 232, 237), Rod testified it was worth only \$772,000. (RP 666) The trial court valued the home, owned free and clear, at \$1.42 million, finding the appraiser’s “opinion more accurately reflects the residence’s market value, which is the critical factor in this litigation.” (CP 784) Lori did not want the house (CP 263), and at Rod’s request (RP 668) the trial court awarded it to him.

Rod has let the family home stand empty since evicting Lori, choosing instead to live rent-free in another house owned by VDGR. (CP 1978, 1987) He does not challenge the trial court’s characterization, valuation, and distribution of the family home on appeal.

3. As he requested, the court awarded Rod K2R, LLC, a real estate partnership with his siblings, valued at \$300,000.

Rod is also partners with his siblings in K2R, LLC, which owns 25 acres in Sunnyside. VDGR had sold its interest to the siblings, who planned to develop and sell the property, in 2007. (RP 599, 601, 733; Ex. 2.17 at 9) The purchase price was funded by \$224,000 loans

to each sibling; Rod's parents forgave a portion of the loans annually as a gift. (RP 819-22) K2R had turned down an offer to sell six of the 25 acres for \$40,000 per acre at the time of trial. (RP 732-33) The trial court found Rod's interest in K2R was separate and awarded it to him at a net value of \$300,000. (CP 770, 784)

On appeal, Rod inexplicably claims that the court "failed to formally award to Rod his separate interest in K2R, LLC" (App. Br. 5) even though the decree plainly awards K2R to him as his "sole and separate property." (CP 770)

4. The court did not value or award Rod's interest in Whiskey Ranch, LLC, which is held in trust for him by his parents.

Rod's minority interest in Whiskey Ranch, LLC, which owns real property in the Yakima valley, is held in trust by his parents, who own the majority interest. (RP 444, 818-19) The trial court did not value or award any interest in Whiskey Ranch to either party.

5. The court awarded Lori the community's UBS retirement account, but Rod refused to comply with the decree.

The parties had a UBS retirement investment account, opened in the 1990's, worth \$729,449 when they separated in 2011. (RP 258, 504; Ex. 1.7) Rod withdrew all the cash in this account, \$40,000, after Lori began this action, and has never accounted for that

withdrawal. (RP 719-20; *see* Ex. 1.7) Interim orders authorized additional UBS withdrawals to pay attorney and expert fees, reserving allocation of those withdrawals for trial. (RP 890-91, 899)

Due entirely to a favorable market, the UBS account had grown to \$816,000 by the time of trial. (RP 508) The trial court found the UBS account was community property and awarded it to Lori, but rejected her request to order Rod to reimburse the account for his unilateral withdrawal of \$40,000. (CP 785; RP 291) Instead, the court directed Rod “to make up any present shortfall need to restore the account” if the value of the UBS account dropped below \$816,000 by the time final orders were entered, “since substantial withdrawals were made for the benefit” of Rod. (CP 785)

After final orders were entered, Rod refused to transfer to Lori the portion of the UBS account that exceeded \$816,000. (*See* CP 808-09) Rod claimed he was entitled to retain the \$16,000 in gains on the account since trial because the UBS account had been in his name, and the decree awarded Rod “any and all bank accounts in his name.” (CP 882-83, 909) The trial court entered an order confirming that in awarding the entire UBS account to Lori, it intended to award her any increase in value. (CP 964-65; RP 1035) When Rod refused to sign the necessary documents, the trial court

ordered the court clerk to sign in Rod's name "all documents necessary to transfer" the UBS account to Lori. (CP 966)

Although Rod assigns error to the trial court's award to Lori of the market gain in the UBS account (App. Br. 6), he has waived that assignment of error by failing to provide any authority or argument to support his challenge. *Diehl*, 94 Wn. App. at 651.

6. The court awarded Lori the community's interest in Ellensburg real property owned with Rod's brother, but Rod refused to comply with the decree.

The parties owned 340 acres of pasture in Ellensburg with Rod's brother Rick. (RP 500) The brothers had purchased the property from their parents in 1977 for \$120,000, paying \$100 down. (RP 500-01) Each brother was to pay the balance, with interest, by paying \$4,800 to their parents annually. (RP 500-01; Ex. 2.11) When the parties married in 1985, nearly \$51,000 of Rod's \$59,900 share of the purchase price was still owed. (RP 501; Ex. 2.11) The parties paid off the balance in 2004, 19 years later. (Ex. 2.11)

Lori asked that the Ellensburg property be characterized as community property and awarded to her; she was "okay" with owning the property with Rod's brother because she and Rick have a good relationship. (*See* RP 1220) The trial court found the parties' interest in the property was community, recognizing that though Rod

had acquired his interest in the Ellensburg property prior to marriage, more than half the payments were from community property, and the deed was conveyed after marriage. (CP 784-85) The trial court valued the parties' interest in the property at \$690,000 and awarded it to Lori. (CP 785) The trial court further found that even if the Ellensburg property were not community, its property division was "fair and equitable regardless of the characterization of any item as community or separate." (CP 787)

Rod did not stay enforcement of the award of the Ellensburg property to Lori, but refused to transfer the property to Lori after final orders were entered. On Lori's motion, the trial court entered an order directing the court clerk to sign a quit claim deed in Rod's stead. (CP 1676) On appeal, Rod challenges the trial court's characterization of the Ellensburg property and its award to Lori.

7. The court denied Rod's motion to vacate its property division because it included a life insurance policy, worth 2% of the marital estate, that Rod claimed was owned by a trust.

The trial court awarded Rod a Beneficial Life Insurance Policy that at trial he asserted had a cash surrender value of \$116,000, and that he asked the court to divide equally between the parties. (CP 770, 785; RP 670-71; Ex. 32) A month after entry of the decree, Rod asked the trial court to vacate its property distribution under CR 60,

claiming that the life insurance policy was not owned by the parties, but by an irrevocable life insurance trust. (CP 817-24) Rod's reply declaration was the only evidence supporting his CR 60 motion (CP 955-59), which the trial court denied. (CP 965) On appeal, Rod claims that this Court should remand the entire case to a different judge because of this decision.

8. Rod has not paid the equalizing judgment, the only liquid asset awarded to Lori.

To equalize the division of the marital estate, the trial court awarded Lori a \$1,171,200 judgment. (CP 763) In calculating the judgment, the trial court did not include Rod's unvalued interest in Whiskey Creek, his inchoate interest in VDGR, or jewelry that Rod had given Lori during the marriage, rejecting as "without merit and border[ing] on the absurd" Rod's argument that Lori's jewelry was an "investment." (CP 786) Had the trial court included Lori's jewelry in its property division at the value Rod proposed, it would have increased her share of the marital estate by 1%. Although Rod assigns error to the trial court's decision to exclude Lori's jewelry in calculating its equal division of the marital estate (App. Br. 5, 6), he has waived that assignment of error by failing to provide any authority or argument to support his challenge. *Diehl*, 94 Wn. App. at 651.

The trial court gave Rod six months, until August 2017, to pay the equalizing judgment before interest would accrue, “to give [him] an incentive to pay it off quickly.” (CP 763-64, 787) But Rod did not pay the judgment by August 2017, or after. After ignoring the obligation for months, in March 2018 Rod finally stayed enforcement of the judgment, using the family home as alternate security and posting a bond of \$381,240. (Supp. CP 2128-30, 2142-45)

Rod claims throughout his opening brief that in addition to this judgment, “Lori was granted over \$100,000 in liquid assets.” (App. Br. 60; *see also* App. Br. 22, 23, 26, 29, 53) The trial court’s asset list includes “other accounts” of \$98,000 to Lori, and \$36,000 to Rod. (CP 786) But Lori’s supposed “liquid assets” are a Yakima Federal account that contained \$53,000 at the time of separation, but that (because Lori had used it for living expenses) held only \$100 by the time of trial five years later (RP 275-76, 326, 350, 925-26; Ex. 2.24 at 15, 21), and three retirement accounts in Lori’s name with a combined value of \$44,912. (RP 291-92; Exs. 1.1, 2.40, 32)

B. The court awarded lifetime maintenance to Lori, who has health issues that “can be totally debilitating at times,” finding that her ability to ever work full-time was “remote.”

Rejecting Rod’s request to deny Lori any maintenance (RP 671-72), the trial court expressly considered the factors under RCW

26.09.090, weighing the significant assets awarded to Lori against her “age and health problems,” including that she “suffers from fibromyalgia which can be totally debilitating at times,” and “the likelihood of her holding a fulltime teaching position is very remote.” (CP 787) The trial court found that while Lori’s standard of living during the marriage was “that of a very wealthy person,” her ill health leaves her in a “precarious” financial situation. (CP 787)

The trial court found that Rod was “a very wealthy man, who is about to become even wealthier,” and considered Rod’s ownership interests in Midvale and K2R and that he will likely “soon be the co-owner of Van de Graaf Ranches,” in estimating “his accumulated wealth, which has to be close to 5 or 6 million dollars, if not more. [Rod] is easily able to support himself and his former spouse, without hardship to either.” (CP 787-88) The trial court found that, “conservatively,” Rod’s income in the near term will be “at least \$200,000 per annum, . . . almost \$17,000 per month,” and that “it is reasonable . . . to conclude his income will increase once his interest in Van de Graaf Ranches is formalized.” (CP 788)

Accordingly, the trial court found that Rod’s ability to pay and Lori’s needs “are both served by a monthly maintenance obligation

of \$6,000 for life” (CP 788), and ordered Rod to pay monthly maintenance of \$6,000 beginning November 1, 2016. (CP 765)

Rod challenges the maintenance award on appeal.

C. Rod contumaciously defied orders, both during the dissolution action and after entry of the decree.

1. The court “preserved” over \$40,000 in temporary support orders in the final decree because Rod was in arrears.

During nearly five years before trial, Lori filed 21 pre-trial motions to enforce orders that Rod violated, to pursue financial assistance, or to compel Rod’s compliance with discovery. (*See* CP 26, 71, 121, 443, 505; Supp. CP 2067-69, 2071-72, 2080-81, 2085-87, 2089, 2091, 2095, 2097, 2106) Rod also brought several motions to reduce or terminate support to Lori, who had been awarded temporary undifferentiated family support of \$3,000, plus payment of other expenses. (*See e.g.* CP 363, 478)

By the time of trial, Rod had been found in contempt three times. (RP 709) As he does on appeal, Rod repeatedly pled “poverty” in refusing to comply with court orders to provide financial support to Lori and their sons, regularly leaving Lori in dire straits. (*See* RP 707, 709-10) Lori became so desperate to make ends meet that, four months before trial, she asked the court to allow her to sell some of Rod’s hunting mounts. (Supp. CP 2093-94) The trial court denied

Lori's motion, but found Rod in contempt, finding that the "husband has the ability to pay maintenance/family support but not the willingness." (CP 562-63) Rod was still in arrears in temporary maintenance when final orders were entered. The trial court "preserved" those obligations in the final decree, "with regard to payment of spousal maintenance husband's obligation to pay medical bills and other debts." (CP 767)

Final orders dissolving the parties' marriage were entered on February 17, 2017. (CP 758, 763, 776) Rod filed a notice of appeal on March 17, 2017 (CP 830), and thereafter filed three more notices of appeal from orders entered because Rod refused to comply with the final orders. (See CP 973, 1651, 1940) This Court consolidated review of all the orders that Rod challenges.

2. The court found Rod in contempt three times for failing to pay maintenance, after denying his motion to modify the obligation filed only five weeks after the decree was entered.

Lori moved for contempt in March 2017 because Rod was still in arrears under the temporary orders and had not paid any maintenance under the final decree. (CP 805) Rod filed a "cross-motion" to modify maintenance, claiming that he was no longer receiving distributions from Midvale and asking the trial court to reduce his maintenance obligation to \$500 a month. (CP 877-80)

On April 14, 2017, the trial court found Rod in contempt for “willful failure to pay spousal maintenance since November 1, 2016, as directed by the decree.” (CP 963) The trial court found that Rod had also failed to pay the temporary maintenance preserved in the decree, that he owed Lori \$44,311 in back support, and denied Rod’s motion to modify maintenance. (CP 964, 965) Rod was found in contempt two more times for failing to pay maintenance in May and August 2017. (CP 1559, 1673)

Despite having not paid (or stayed) the equalizing judgment and being in arrears on maintenance, and even though he was still living rent-free in a home owned by VDGR, Rod sought twice to evict Lori from the family home, where the trial court had ruled she could stay until May 1, 2017. (*See* CP 879, 1650) The trial court twice ruled, in April and July 2017, that Lori could remain in the home until Rod reduces his arrearage to zero. (CP 965, 1650) Rod finally paid back maintenance on August 28, 2017 (CP 1730), three days before he would have been jailed for continuing contempt. (CP 1728)

On appeal, Rod challenges the trial court’s orders finding him in contempt and denying his motion to modify maintenance.

3. The court found Rod in contempt after he refused to transfer accounts to the parties' youngest son so he could pay for college.

During the marriage, the parties funded 529 plan accounts for each of their sons to use for college. (RP 730) Only the parties' youngest son Nate, 20 years old and starting his junior year at Washington State University, was still dependent by the time of trial. (RP 403) The court had entered a temporary order directing Rod to make available to Nate his 529 plan as well as UTMA accounts held for his benefit shortly before Nate graduated from high school in June 2014. (CP 365) As these funds might be exhausted before Nate completed his undergraduate education, the court reserved on the sufficiency of the funds still available to Nate "into his third and fourth years. So if he's still under the age of 23, he could come back. The mother can come back." (RP 81-82)

Nate's 529 plan was exhausted by the end of his sophomore year. (RP 407-08) To pay for his junior year, Nate was using funds in the 529 plan set aside for an older brother who did not attend college. (RP 396-97, 507) Consistent with how the parents treated their two oldest sons, Nate and Lori understood that the parents would pay any post-secondary expenses after the 529 plans were exhausted because funds in the UTMA accounts were not intended for college expenses, but for

any post-graduate endeavors such as a business or home. (RP 339-40, 407; *see also* CP 274, 323) The trial court ordered that any “tuition, room and board, fees and books, not covered by any college savings plan” be paid by the parties and Nate “on a one-third each basis.” (CP 778)

After the final orders were entered, Rod withdrew Nate’s college funds from his 529 plan. (CP 1708, 1722) Lori had to file several motions to compel Rod to pay Nate’s postsecondary expenses from these funds. (*See* CP 1853, 1885; Supp. CP 2109) On August 28, 2017, the trial court ordered Rod to pay the “WSU fall semester amount in full by 9/5/2017” and that “the remaining funds of the 529 account now in father’s possession must be used for subsequent college bills pursuant to the decree.” (CP 1746) On October 2, 2017, the trial court amended its order to require Rod to make the remaining balance of the 529 plan (approximately \$16,000) available to Nate “to pay his additional expenses associated with the costs of attending college,” including the “costs for room, board, and books.” (CP 1829) The trial court found Rod in contempt a third time on December 7, 2017, for failing to comply with these orders (CP 1882), and ordered Rod to deposit the remaining funds withdrawn from the 529 plan into Nate’s account. (CP 1884) On January 22, 2018, the trial court found Rod (for the fourth time) in continuing contempt. (CP 1936-37)

Rod challenges these orders on appeal, as well as the trial court's order requiring the parties and Nate to share the cost of his postsecondary education after the 529 plans were exhausted.

4. Rod stayed enforcement of the award of a fraction of Lori's fees incurred because of his "scorched earth" tactics. Rod remains in contempt for failing to pay Lori suit money.

Lori asked the trial court to reconsider its initial denial of her request for attorney fees and award her \$58,675, the balance of fees still owed her trial attorney, but less than half the amount she had incurred. (CP 717, 788-90) The trial court granted reconsideration, finding that Lori's "task was greatly complicated by the complexity of the Van de Graaf's holdings and the paucity of information being shared" (CP 829) and Rod's "scorched earth" tactics. (RP 1033) The trial court found "an award of \$58,675 to the Petitioner to cover the balance of [her] fees is reasonable and appropriate." (CP 829)

Because Rod refused to pay (and eventually superseded) the equalizing judgment and fee award, the trial court awarded Lori "suit money," initially ordering Rod to pay \$30,000 to Lori by October 27, 2017. (CP 1747) On December 7, 2017, the trial court found Rod in contempt and ordered him to pay the suit money award by December 22, 2017. (CP 1881-82) Rod paid only \$10,000 of the suit money award, and has been found in contempt two more times. (CP 1937;

Supp. CP 2146) Having paid his appellate lawyers over \$70,000 in this Court and the Supreme Court to resist paying the remaining \$20,000 of suit money, Rod also challenges the suit money award in this appeal.

III. ARGUMENT

A. The trial court did not include Rod's inchoate interest in VDGR as an asset of the marital estate. (Response to App. Br. 32-38)

Rod's challenge to the property distribution is based on the false premise that the trial court "included the assets of Rod's parents in the property division." (App. Br. 33) This claim is completely belied by the record. While the trial court believed that his mother would indeed transfer the 2012 Trust's 30% to Rod soon after the divorce was over, the court specifically found that Rod's "incipient ownership" in VDGR remained "inchoate," and as such, was not "an asset subject to division by this court." (CP 785)

That the trial court did not distribute any interest that Rod had in VDGR is plain from the court's property division. The trial court did not value or characterize any interest in VDGR, and did not include it in the list of assets distributed between the parties. (See CP 718, 770-71, 786) If the trial court *had* included a 30% interest in VDGR in its division of the marital estate, it would have increased

the total value of the marital estate to \$7,257,200, from \$5,557,200, which would have left Lori with only 38% of the marital estate. To effect an equal division of a marital estate valued at \$7,257,200, the trial court would have had to award Lori an equalizing judgment of \$2,021,200, rather than the \$1,171,200 that it did.

Even though the trial court did not distribute as an asset any interest Rod had in VDGR, the trial court properly found that it 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 [spousal maintenance].” (CP 785) In dividing property under RCW 26.09.080, the court also may consider the “the total property possessed by or likely to be acquired by the parties.” *Stacy v. Stacy*, 68 Wn.2d 573, 576-77, 414 P.2d 791 (1966); see also *Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997). In making a just and equitable division of the marital estate, “it is not so much the quantum of property to be put in hand of either or the amounts of income to be taken from one spouse and awarded to the other, but rather the condition in which the parties will be left by the decree that governs these decisions.” *Stacy*, 68 Wn.2d at 577. Here, the trial court found “ample evidence” that Rod would receive his interest in VDGR soon

after the dissolution was final (CP 785), thus leaving him in a far better financial position than Lori.

Further, “in making its property distribution, the trial court may properly consider a spouse’s waste or concealment of assets.” *Marriage of Wallace*, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002) (affirming property division premised on the manipulation of business assets by husband and his father to keep them out of marital estate, including demand for payment of a note after the parties separated), *rev. denied*, 149 Wn.2d 1011 (2003). The trial court clearly believed Rod and his parents were attempting to conceal Rod’s inevitable interest in VDGR, and that but for the parties’ pending divorce, Rod would have received his 30% interest just as his siblings had. (*See* CP 785) When a court “believe[s] the husband had concealed assets . . . [it] ha[s] a right to take that factor into consideration in dividing the property.” *Marriage of Nicholson*, 17 Wn. App. 110, 118, 561 P.2d 1116 (1977) (affirming disproportionate award to wife).

In the end, Rod’s appeal boils down to ill-tempered grouching about the *fact* that the trial court was not completely taken in by the Van de Graaf family’s “circling of the wagons” in aid of his post-separation divorce planning. A trial court’s factual determinations withstand challenge on appeal when supported by substantial

evidence. *Marriage of Lutz*, 74 Wn. App. 356, 370, 873 P2d 566 (1994) (substantial evidence supported findings that husband schemed with family members to hide property in order to deprive wife of her interest). Substantial evidence, including but not limited to the testimony of Rod's brother Rick that Rod would have received his interest in VDGR but for the divorce, supports the trial court's factual determinations, on which it based its fair and equitable equal division of the parties' substantial marital estate at the end of their long-term marriage. (RP 428, 435)

B. The court properly characterized the Ellensburg property as community property. But even if it was Rod's separate property, subject to a community lien, the court would have distributed this asset to Lori. (Response to App. Br. 41-46)

The trial court plainly stated that it "believed its property division is fair and equitable regardless of the characterization of any item as community or separate." (CP 787) Rod ignores this finding in arguing that the trial court erred in characterizing the Ellensburg property, requiring remand because "the character of property was [] material to how the court made its division." (App. Br. 45)

The trial court did not err in characterizing the Ellensburg property when 85% of the purchase price was paid after the parties married. (*See Ex. 2.11*) Although the real estate contract had been

executed eight years before, the last contract payment was made, and the deed conveyed, 19 years after the parties married. (Ex. 2.11; CP 784-85) Even if the trial court should have characterized the property as separate and merely awarded the community a \$586,000 lien for its post-marital contributions, as Rod argues (App. Br. 43-44), remand is not necessary because the trial court found that it would have awarded the Ellensburg property to Lori even if it was Rod's separate property.

Rod does not have a "sanctified right" to his separate property. (App. Br. 42) "[S]eparate property is no longer entitled to special treatment." *Marriage of Larson & Calhoun*, 178 Wn. App. 133, 140, ¶ 16, 313 P.3d 1228 (2013), *rev. denied*, 180 Wn.2d 1011 (2014). "All property of the marital partners, both separate and community, is before the court and available for distribution;" "[t]he characterization of property does not control the division of it upon dissolution." *Marriage of Pilant*, 42 Wn. App. 173, 176-77, 709 P.2d 1241 (1985); RCW 26.09.080.

"Mischaracterization of property is not grounds for setting aside a trial court's allocation of liabilities and assets, so long as the distribution is fair and equitable." *Marriage of Griswold*, 112 Wn. App. 333, 346, 48 P.3d 1018 (2002) (quoted case omitted), *rev.*

denied, 148 Wn.2d 1023 (2003). A trial court's property division is not "unfair merely because it chose to ignore the true source of some property." *Pilant*, 42 Wn. App. at 178. "Where there is mischaracterization, the trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly influenced by characterization and (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization." *Griswold*, 112 Wn. App. at 346 (quoted case omitted). Here, the trial court was clearly not "significantly influenced" by the character of the Ellensburg property in awarding it to Lori, as it found that its "division of property is fair and equitable regardless of the characterization of any item as community or separate." (CP 787)

Finally, the trial court did not abuse its discretion by awarding Lori the Ellensburg property based on Rod's claim that it leaves them in "common ownership of property." (App. Br. 45-46) While there was evidence that VDGR leases the Ellensburg property, Rod has no ownership interest in the Ellensburg property, and Lori does not have an ownership interest in VDGR.

C. The court’s denial of Rod’s CR 60 motion to eliminate a life insurance policy as an asset is no grounds to remand to a different judge for redistribution of the marital estate. (Response to App. Br. 39-41, 61-63)

“A trial court’s denial of a motion to vacate under CR 60(b) will not be overturned on appeal unless the court manifestly abused its discretion.” *Marriage of Olsen*, 183 Wn. App. 546, 557, ¶ 25, 333 P.3d 561 (2014) (quoted case omitted), *rev. denied*, 182 Wn.2d 1010 (2015). The court here did not abuse its discretion in denying Rod’s CR 60 motion to vacate the decree based on his assertion that the Beneficial Life Insurance policy awarded to him was not owned by the parties, but rather a trust. Nor is this decision a basis for remanding to a different judge for redistribution of the marital estate.

1. Rod invited any error by asserting that the parties owned the policy and asking the court to distribute it at trial.

Rod’s claim that “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” (App. Br. 39) seeks to overturn a ruling that Rod invited. Rod testified at trial that the policy was a community asset with a value of \$116,000, and asked the trial court to divide it equally between the parties. (RP 518, 519, 670-71; Ex. 32; CP 632) “The invited error doctrine prohibits a party from setting up an error below and then complaining of it on appeal.” *Marriage of Morris*, 176

Wn. App. 893, 900, ¶ 15, 309 P.3d 767 (2013); *Marriage of Huff*, 834 P.2d 244, 254 (Colo. 1992) (rejecting wife’s challenge to award of an irrevocable life insurance trust on the grounds the court did not have subject matter jurisdiction over the trust; “the wife’s financial affidavits and statements submitted to the trial court treated the trust as marital property. . . . A party on appeal ‘may not avail himself of an alleged error which he induced the [trial] court to commit.’”) (brackets in original). As Rod asked the court to treat and to distribute the life insurance policy as a community asset, the trial court did not abuse its discretion to deny Rod’s contrary motion when, rather than divide the asset, the court awarded it entirely to him.

2. Rod presented inadequate evidence to support his claim that the parties do not own the policy.

The trial court also did not abuse its discretion because Rod’s claim that the parties did not own the life insurance policy was supported by only Rod’s self-serving declaration, repeating hearsay statements of what he was purportedly told by the insurance agent and an attorney who drafted the trust. (CP 956-59) Rod offered neither the policy itself nor a copy of the trust to prove that the policy was not a community asset.

Because Rod failed to present any evidence to support his claim that the insurance policy was not a marital asset, this case is

distinguishable from those cited by Rod. The court sought to assert jurisdiction over what were indisputably non-marital assets in both *Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002) (App. Br. 39) (trust assets held for the benefit of the parties' children and controlled by third party trustees), and *Marriage of Persinger*, 188 Wn. App. 606, 355 P.3d 291 (2015) (App. Br. 40), (worker's compensation benefits; RCW 51.32.040(1) made transfer void).

Even if a trust, and not the parties, owned the policy, this was not "newly discovered evidence which by due diligence could not have been" discovered earlier, warranting vacation of the decree under CR 60(b)(3). *See Marriage of Maddix*, 41 Wn. App. 248, 253, 703 P.2d 1062 (1985) (reversing order to vacate decree based on wife's claim that the parties' business had been improperly valued; it was "incumbent" on her to "protect her interests prior to entry of the final decree"). Rod had exclusive control over the parties' finances, including the parties' life insurance policies. (CP 897, 930; *See* RP 518-19, 670-71; Ex. 32; CP 632) Rod failed to provide any reason that he could not, with "due diligence," have discovered the purported true owner of the life insurance policy in the five years between the parties' separation and trial, or in the three months between the trial court's letter ruling awarding the policy to him and entry of final

orders. In fact, Rod had written checks to the “Rod and Lori Van de Graaf trust” to pay the policy premiums (RP 924-25, 927; Ex. 39); if Rod “had knowledge of the true” owner of the policy, he could not “return to court to do what should have been done prior to entry of the final decree.” *Maddix*, 41 Wn. App. at 253.

3. Even if the parties did not own the policy, remand to address an asset worth 2% of the marital estate is not warranted.

There is no basis to remand, even if the life insurance policy was not owned by the parties, because the trial court would not have altered its fair and equitable property distribution. *See Pilant*, 42 Wn. App. at 181 (remand not necessary when alleged error does not impact an otherwise fair and equitable distribution of property). There is no support in the record for Rod’s claim that the trial court awarded him the life insurance policy “to give him some nominal liquid assets,” and that it was “therefore an integral part of the property division scheme the trial court devised.” (App. Br. 40) Instead, the trial court denied his CR 60 motion even though it recognized that Rod would have fewer assets if, as he claimed, Rod would be unable to obtain the cash surrender value of the policy. (RP 1036: “[I]t may well be that there was some misrepresentation or misunderstanding about the nature of the

Beneficial Life Policy or account. However, that is one that was – I’m afraid, inures not to Mr. Van de Graaf’s benefit.”)

The life insurance policy constituted only 2% of an estate valued at \$5.557 million. If the policy were removed from the property distribution, Rod’s share of the marital estate would be reduced to 49% from 50%. Remand is not warranted because any alleged error would not change what the trial court had determined was an “otherwise fair and equitable distribution” of an over \$5.5 million estate. (CP 787) *See Pilant*, 42 Wn. App. at 181 (reversal not warranted when impact of alleged error in “the otherwise fair and equitable distribution of an estate worth between \$546,000 and \$675,000” was between 7% and 9% of the estate).

4. Even if remand were warranted, there is no reason for it to be to a different judge.

Rod’s demand that further proceedings be heard by a judge other than Judge McCarthy, based solely on the denial of his CR 60 motion, is meritless. (App. Br. 61) “Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” *Santos v. Dean*, 96 Wn. App. 849, 857, 982 P.2d 632 (1999) (quoted case omitted), *rev. denied*, 139 Wn.2d 1026 (2000). That Judge McCarthy ruled against Rod does not “raise genuine questions as the jurist’s open-mindedness.” (App. Br. 62) Judge

McCarthy did not ignore a “legal rule” (App. Br. 62) in denying Rod’s motion on the basis that Rod was not credible. Credibility determinations, even those made from written affidavits, are within the province of the trial court. *Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664 (2003). Here, however, the trial court also had days of testimony, and months of contumacious conduct, to assess Rod’s credibility.

D. The court did not abuse its discretion in awarding spousal maintenance, or in denying a motion to modify the award five weeks after entry of the decree. (Response to App. Br. 46-49, 58)

1. Substantial evidence supports Lori’s need for maintenance: she has debilitating health issues, has not worked full-time for 30 years, and her financial condition is “precarious.”

The trial court did not abuse its discretion in its award after a long-term marriage of lifetime monthly maintenance of \$6,000 per month to Lori, who has not worked full-time since 1986, when the parties’ oldest son was born, and who has “totally debilitating” health issues.³ The trial court has “broad discretionary powers” in awarding maintenance; its award “will not be overturned on appeal absent a showing of manifest abuse of discretion.” *Marriage of Washburn*, 101

³ Lori suffers from Lyme’s disease and fibromyalgia, which cause reduced cognitive function, insomnia, fatigue, and swollen joints that prevent her from standing for long periods. (RP 246-50)

Wn.2d 168, 179, 677 P.2d 152 (1984). “The only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be ‘just.’” *Marriage of Wright*, 179 Wn. App. 257, 269, ¶ 23, 319 P.3d 45 (2013) (quoted case omitted), *rev. denied*, 180 Wn.2d 1016 (2014); *Washburn*, 101 Wn.2d at 182 (“RCW 26.09.090 places emphasis on the justness of an award, not its method of calculation”). The “economic condition in which a dissolution decree leaves the parties is a paramount concern in determining issues of property division and maintenance.” *Marriage of Morrow*, 53 Wn. App. 579, 586, 770 P.2d 197 (1989) (quoting *Washburn*).

Rod’s claim that lifetime maintenance is “disfavored” (App. Br. 47) ignores that when “maintenance can be terminated depends on the particular facts and circumstances of each case. . . . In some cases, a lifetime award of maintenance may even be just.” *Marriage of Spreen*, 107 Wn. App. 341, 348, 28 P.3d 769 (2001) (citations omitted). Our courts have regularly upheld awards of lifetime maintenance to spouses whose health issues limit their ability to become self-supporting. This Court held that the wife’s “physical disability warrants a higher award than would otherwise be appropriate” and made “lifetime maintenance reasonable” in *Morrow*, 53 Wn. App. at 588. *Accord, Marriage of Tower*, 55 Wn.

App. 697, 698, 780 P.2d 863 (1989) (affirming lifetime maintenance to spouse whose “progressively debilitating disease ‘substantially limited’” her activities), *rev. denied*, 114 Wn.2d 1002 (1990).

Because the trial court here clearly considered “all relevant factors” under RCW 26.09.090 (CP 787-88), Rod misplaces his reliance on *Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993) (App. Br. 47), where this Court reversed a lifetime maintenance award “because it does not evidence a fair consideration of the statutory factors.” In *Mathews*, the trial “court did not find [that the wife’s] health problems prevented her from working,” but the Court recognized that “[o]ur courts have approved awards of lifetime maintenance in a reasonable amount when it is clear the party seeking maintenance will not be able to contribute significantly to his or her own livelihood.” 70 Wn. App. at 124 (citing cases). Here, the trial court found that Lori’s health problems made the possibility of her ever working full-time “very remote.” (CP 787)

2. Substantial evidence supports Rod’s ability to pay maintenance: his large income is largely in his control, and his expenses are minimal.

A party’s employment income alone is not the test in determining an award of maintenance. Rod’s claim that he lacks the

“actual, current, personal income” to pay monthly maintenance of \$6,000 (App. Br. 47) ignores that a court can look beyond employment income in determining one spouse’s ability to provide maintenance to the other. *See e.g. Marriage of Zahm*, 91 Wn. App. 78, 83-84, 87, 955 P.2d 412 (1998), *aff’d*, 138 Wn.2d 213, 978 P.2d 498 (1999) (although (harmless) error to list as an asset, court could consider retired spouse’s social security benefits in awarding maintenance); *Wright*, 179 Wn. App. at 262, ¶ 7, 270, ¶ 25 (in dissolving long-term marriage, court must “look forward” and may consider a spouse’s “anticipated postdissolution earnings” in dividing property and awarding maintenance). Instead, it is “the ability of the spouse [] from whom maintenance is sought to meet his or her need and financial obligations while meeting those of the spouse [] seeking maintenance.” RCW 26.09.090(1)(a).

The trial court did not “give Lori a substantial amount of the inheritance it expects Rod to receive” in awarding maintenance. (App. Br. 49) A court may consider “the total property possessed by or *likely to be acquired by the parties* in awarding maintenance.” *Stacy*, 68 Wn.2d at 576-77 (1966) (emphasis added). In finding that Rod “is easily able to support himself and his former spouse, without hardship to either” (CP 788), the trial court properly considered the

likelihood that Rod would “soon be the co-owner of Van de Graaf Ranches,” and will “become even wealthier.” (CP 787-88)

Moreover, the trial court’s decision that Rod’s “ability to pay and [Lori]’s needs are both served by a monthly maintenance obligation of \$6000 for life” (CP 788) is well-supported by the evidence of Rod’s past and future income. Substantial evidence supports the trial court’s finding that Rod’s “expected income in the near term will be at least \$200,000 per year.” (CP 788) Rod had *reported* income of \$201,855 in 2015; \$179,686 in 2014; and \$203,123 in 2013, from Midvale alone (Ex. 25), excluding all unreported income that Rod receives through VDGR, such as the cash rent that he collects and keeps from VDGR properties or from distributions from K2R. (RP 716-18)

Because Rod’s monthly income of at least \$17,000 is more than adequate to meet his monthly maintenance obligation of \$6,000 to Lori, this case is not like *Bungay v. Bungay*, 179 Wash. 219, 223, 36 P.2d 1058 (1934) (App. Br. 46-47), where the trial court’s maintenance award was “impossible” to perform because the husband only earned \$200 per month but was ordered to pay both \$125 per month to the wife for support and the mortgage, taxes, and utilities, for the home where the wife and children reside. Here, in

contrast, the trial court's decision leaves Rod with nearly twice the income as Lori even after paying maintenance.

Even with Lori's sporadic part-time income as a substitute teacher, she will never be able to match Rod's income. Thus, Lori's capacity to earn some income independently (App. Br. 48-49) was not a bar to the trial court's award of maintenance under the circumstances. *Marriage of Fernau*, 39 Wn. App. 695, 704, 694 P.2d 1092 (1984) (capacity of spouse receiving maintenance to support herself is only one factor to be considered in fixing a maintenance award); *see also Wright*, 179 Wn. App. at 269, ¶ 24 (wife was not "required to work before an award of maintenance is appropriate"). This is particularly true when Lori has far more expenses than Rod, who lives rent-free and has many "common expenses" paid by Midvale. (CP 788)

3. The court did not abuse its discretion in denying Rod's motion to modify maintenance five weeks after trial.

The trial court did not err in denying Rod's motion to modify maintenance, made five weeks after final orders were entered. (CP 877) Whether a party presents adequate grounds to modify maintenance "is addressed to, and rests within, the sound judgment and discretion of the trial judge." *Lambert v. Lambert*, 66 Wn.2d 503, 508, 403 P.2d 664 (1965); *Marriage of Fox*, 87 Wn. App. 782, 784,

942 P.2d 1084 (1997). A maintenance award can be modified “only upon a showing of a substantial and material change in the condition and circumstances of the parties.” *Lambert*, 66 Wn.2d at 508; RCW 26.09.170(1)(b). The showing must be of “an *uncontemplated* change of circumstances occurring since the former decree.” *Holaday v. Merceri*, 49 Wn. App. 321, 331, 742 P.2d 127 (emphasis in original), *rev. denied*, 108 Wn.2d 1035 (1987); *Lambert*, 66 Wn.2d at 509. Rod failed to show a substantial change of circumstance in his ability to pay maintenance that was “uncontemplated” when the trial court entered its final order five weeks earlier.

Rod relied on three purported “changes of circumstance” to support his request to modify maintenance: 1) cattle prices were down; 2) he was not receiving distributions from Midvale; and 3) he was unable to cash in the life insurance policy that he was awarded. (See CP 878-80) But the trial court considered the first two circumstances before, during, and after trial, having considered exhaustive evidence that cattle prices were down, and that Midvale had temporarily stopped issuing distributions. (See CP 638, 784; RP 221, 381, 530, 1001) Even if these were not uncontemplated changes, the trial court was justified in finding they did not impact Rod’s ability to pay maintenance.

First, there was no evidence that the moratorium for Midvale distributions was permanent. Second, the evidence did not support Rod's claim that the price of cattle significantly impacts his income from Midvale. Rod claimed at trial that the cattle market "crashed" in 2008, with prices slowly recovering before peaking in 2014, with a decline following. (CP 638) But in the year of the "crash," Rod's income was more than double that in the following years: He had reported income of \$432,786 in 2008; \$220,114 in 2009; \$172,882 in 2010; \$219,516 in 2011; \$201,511 in 2012; \$203,123 in 2013; \$179,686 in 2014; and \$201,855 in 2015. (Ex. 25) Falling cattle prices did not affect Rod's ability to pay, or support a modification of, his spousal maintenance obligation.

Finally, as argued above (Argument § C.3, *supra* at 34), Rod's inability to cash in the life insurance policy did not affect his ability to pay maintenance because there was no evidence the court considered this asset as a source to pay his maintenance obligation.

4. The court did not abuse its discretion in finding Rod in contempt for repeatedly refusing to pay maintenance. (App. Br. 54-58)

A trial court's decision on contempt is reviewed for abuse of discretion. *Marriage of Davisson*, 131 Wn. App. 220, 224, ¶ 6, 126 P.3d 76, *rev. denied*, 158 Wn.2d 1004 (2006). Rod claims that the trial

court abused its discretion because “he did not have the ability to make the payments which had been required, nor was he *intentionally* being disobedient.” (App. Br. 55, emphasis in original) But the trial court is “in a much better position than we are to determine the truth of his statements, and whether or not he made full and fair disclosure” of his ability to comply with a court order. *Hubbard v. Hubbard*, 130 Wash. 593, 594, 228 P. 692 (1924) (affirming contempt when husband who farmed land held in his mother’s name upon which he was paying “indebtedness and encumbrances” claimed he was unable to pay alimony; [t]here is nothing involved but the a question of fact as to appellant’s ability to pay. He is an interested party, and his testimony must be weighed in light of that fact.”).

The trial court was justified in finding Rod in contempt for failing to pay his maintenance obligation for the same reasons it refused to modify maintenance. The trial court was free to disbelieve Rod’s claims that the “depressed status of the cattle market” and the “debt structure of Midvale”⁴ prevented him from anticipating “any

⁴ This “debt structure” included, of course, the 2012 “divorce planning” under which Midvale began paying VDGR “royalties” for manure it had sold on its own account for the previous 20 years. *See* Facts § A.1(b), *supra* at 7. By January 2018, the trial court also had evidence that in addition to his “monthly draws,” Rod has received over \$231,000 in cash, purportedly loans from his family members, far exceeding his expenses and amounts paid toward his court-ordered obligations. (*See* CP 1959-70)

distributions beyond his monthly draw” (App. Br. 56) in a way that impacted his ability to pay maintenance.

“Where competing documentary evidence had to be weighed and conflicts resolved,” this Court defers to the trial court’s credibility determinations, because “trial judges decide factual domestic relations questions on a regular basis” and “consequently stand in a better position than an appellate judge” to resolve factual disputes. *Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003); quoting *Jannot*, 149 Wn.2d at 126. The trial court was warranted in its skepticism of Rod’s unsupported claims of poverty and inability to pay Lori monthly maintenance. See *Phillips v. Phillips*, 165 Wash. 616, 619-20, 6 P.2d 61 (1931) (rejecting husband’s claims he lacked ability to pay alimony because “[s]ignificantly, there is not in the record one word of detailed information concerning the amount of the doctor’s bills, grocery bills or living expenses referred to by him,” which purportedly left him unable to comply; “[t]here is no suggestion of willingness on his part to pay anything in the future.”). Even without additional distributions from Midvale, Rod receives \$7,692 net per month (CP 1642) and unlike Lori, Rod has limited expenses – he pays no rent, and Midvale pays his health insurance, vehicle expenses, cell phone, and subsidizes utility payments for the home he shares with

his girlfriend and her family, who also live there rent-free. (CP 788, 896, 1642, 1717-18) Rod also regularly accepts cash from third party lessees of VDGR that he keeps for himself. (RP 717-18)

Finally, the trial court was not required to “credit” Rod for any expenses he paid on the family home that at his insistence he was awarded. (App. Br. 57) “[W]hether or not to charge rent is a matter on which a court may exercise some discretion.” *Marriage of Lindemann*, 92 Wn. App. 64, 78, 960 P.2d 966 (1998), *rev. denied*, 137 Wn.2d 1016 (1999). Nor was Rod entitled to a credit for the home’s rental value for the months Lori was allowed to remain there because Rod refused to pay her spousal maintenance. (*See Facts* § C.2, *supra* at 20) It was well within the trial court’s discretion to decline to give Rod a credit for Lori’s use of the home while he remained in contempt of his maintenance obligation, particularly when it did not award Lori attorney fees for the multiple motions necessary to enforce the maintenance award.

E. The court did not abuse its discretion in awarding postsecondary support for the parties’ youngest son, or in requiring Rod to transfer the son’s college account to him. (App. Br. 49-52, 60-61)

The trial court did not award postsecondary support for the parties’ youngest son “*sua sponte*” (App. Br. 49-50); the issue had been reserved in an earlier pretrial order. (RP 81-82; CP 365) The

issue of postsecondary support was clearly before the trial court, which considered the son's dwindling resources to pay for the two years of college that he had remaining. (*See* RP 407-08)

In ordering the parties and son to share the cost of postsecondary expenses to the extent not covered by his 529 plan, the trial court did not abuse its "broad discretion" to award postsecondary support if in the child's "best interests." *Marriage of Kelly*, 85 Wn. App. 785, 792, 934 P.2d 1218, *rev. denied*, 133 Wn.2d 1014 (1997). The trial court was not required to make "findings, oral or written, to support its postsecondary support order." (App. Br. 51) "There is no such requirement for written findings in RCW 26.19.090. Rather, it requires that the court 'determine' whether the child is dependent upon the parents and exercise its discretion 'upon consideration' of relevant factors." *Marriage of Morris*, 176 Wn. App. 893, 906, ¶ 28, 309 P.3d 767 (2013), quoting 26.19.090(2).

Here, substantial evidence supports the trial court's award of postsecondary support on each of the RCW 26.19.090 factors. The trial court had evidence of the parties' "standard of living and current and future resources." As the son had already completed two years at WSU, the trial court considered the son's "prospects, desire, aptitudes, abilities or disabilities." Further, as evidenced by the

parents' contribution to 529 plan accounts for all their sons, the trial court considered the "expectations of the parties for their children when the parents were together," and the "amount and type of support that the child would have been afforded in the parents had stayed together." RCW 26.19.090(2).

Rod's challenge is premised on the fact that (as with their older sons) Nate had UTMA accounts, available to him when he turned 21, in addition to the 529 plan. However, there was evidence that those accounts were not intended as a college fund; the parents' "expectations" were that none of their sons would be required to use their UTMA accounts for college expenses. (RP 339-40, 407; CP 274, 323; Supp. CP 2074-75)

The funds in the 529 plan were not awarded to Rod as his "separate funds per the final Decree," and the trial court did not impermissibly "distribute marital property to a third person" (App. Br. 60) by ordering Rod to transfer the funds from the 529 plan to Nate. Although that did not stop Rod from emptying Nate's account days later (*see* Facts § C.3, *supra* at 22), the decree specifically states Rod "does not receive or have access to any bank accounts in the names of Nate Van de Graaf, or Drew Van de Graaf." (CP 770)

The trial court's order allowing Nate to manage the funds from the 529 plan so he could directly pay postsecondary expenses is not inconsistent with RCW 26.19.090(6), which provides that "[t]he court shall direct that either or both parents' payments for postsecondary educational expenses be made directly to the educational institution if feasible." Rod's court-ordered "payments for postsecondary educational expenses" is exclusive of the funds from the 529 plan, which are to be used before either party must contribute to the son's postsecondary support. (CP 1829: "These orders allocate costs to both parents and Nate *after* the 529 account designated for Nate has been exhausted.") (emphasis in original) Further, the trial court required Nate to "make available all academic records and grades to both parents as a condition of receiving postsecondary education, pursuant to RCW 26.19.090(4)." (CP 1830)

In any event, RCW 26.19.090(6) does not "require that Rod make the payment directly to the school, not to [the son]" (App. Br. 60), but instead gives the trial court discretion to order a parent to pay postsecondary support directly to the child if direct payments are not "feasible." Here, the trial court found that it was not "feasible" for Rod to pay the 529 plan funds to the school directly because *Rod's* contumacious delays required Lori to file multiple motions to ensure

the postsecondary expenses were paid. The trial court did not abuse its discretion in ordering Rod to pay 529 funds directly to the son.

F. The court did not abuse its discretion in awarding Lori a fraction of the fees she incurred because of Rod’s “scorched earth” tactics, or in awarding her suit money to defend this meritless appeal.

1. Lori’s need and Rod’s ability to pay and intransigence support the award of the unpaid portion of Lori’s trial court fees. (Response to App. Br. 52-54)

The trial court did not abuse its discretion in awarding Lori a fraction of her fees to pay down her receivable with her trial counsel, based on her need and Rod’s ability to pay under RCW 26.09.140 and because Rod’s intransigence unnecessarily increased Lori’s attorney fees. Rod cannot meet the “high burden of showing abuse of trial court discretion in its attorney fee award.” *Walsh v. Reynolds*, 183 Wn. App. 830, 857, ¶57, 335 P.3d 984, (2014), *rev. denied*, 182 Wn.2d 1017 (2015).

Rod relies on the trial court’s initial ruling denying Lori’s request for attorney fees to claim that she was not entitled to an award of attorney fees. (App. Br. 52-53, *citing* CP 788) But in granting Lori’s motion for reconsideration of that decision, the trial court did not “simply enter the judgment.” (App. Br. 53) Instead, the trial court properly relied on RCW 26.09.140 and *Friedlander v.*

Friedlander, 58 Wn.2d 288, 362 P.2d 352 (1961), as the bases for its decision to award fees to Lori. (CP 829)

Rod first repeats his baseless claim that Lori did not have a need because “she still had over \$98,000 in her personal bank accounts.” (App. Br. 53) Lori had spent most of that money on living expenses years before trial; the remaining “other accounts” awarded to her were illiquid retirement accounts. (Facts § A.8, *supra* at 16) In any event, a trial court does not abuse its discretion by awarding attorney fees to a party “who has received assets during the relationship and after dissolution.” *Walsh*, 183 Wn. App. at 857, ¶ 57; *see also Morrow*, 53 Wn. App. at 590 (“A spouse’s receipt of substantial property or maintenance does not preclude the spouse from also receiving an award of attorney fees and costs when the other spouse remains in a much better position to pay.”). The trial court had ample grounds to find that Rod had the ability to pay Lori’s attorney fees, and to reject Rod’s claim that market factors and his inability to cash in the life insurance policy dramatically reduced his income. (*See* Argument § D.2, *supra* at 38)

Further, Rod does not challenge the trial court’s award of fees to Lori based on his intransigence. “When intransigence is established, the financial resources of the spouse seeking the award are irrelevant.” *Morrow*, 53 Wn. App. at 590-91 (“The necessity of

having to unravel numerous transactions to establish community interests justifies an award reflecting the fees and costs incurred in the process.”). The trial court properly considered Rod’s “scorched earth” tactics and the wholly unreasonable positions that he took (RP 1033), which made “the proceeding unduly difficult or costly.” *Marriage of Wixom*, 190 Wn. App. 719, 725, ¶ 10, 360 P.3d 960 (2015), *rev. denied*, 185 Wn.2d 1028 (2016) (citing *Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992)).

Finally, the trial court properly relied on *Friedlander*, where, as here, the wife’s attorney “had the serious responsibility of investigating the history and diverse ramifications of the [husband’s family] enterprises over a period of twenty-seven years. Their client had no intimate knowledge of these matters. Counsel were under a duty to check the accuracy of the various financial records and other data furnished by respondent and to investigate every rumor or fact which might reasonably have a bearing on their client’s legal rights in the premises.” 58 Wn.2d at 297; *see also Morrow*, 53 Wn. App. at 591. The trial court similarly (and correctly) found that Lori’s “task was greatly complicated by the complexity of the Van de Graaf’s holdings and the paucity of information being shared.” (CP 829)

2. The court did not abuse its discretion in awarding Lori suit money after Rod refused to pay the equalizing judgment or fee award pending appeal. (Response to App. Br. 58-60)

The trial court did not abuse its discretion in awarding suit money to Lori to defend Rod's appeal when he first refused to pay, and then stayed enforcement of the equalizing judgment and the \$58,675 awarded to pay the balance of attorney fees owed to her trial counsel. "[W]here a husband has maneuvered himself, however lawfully, into possession and control of all of the income-producing property of the community and practically all of its liquid assets, the trial court can, and should, require him to adequately support the wife pending appeal," including by an award of suit money. *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360-61, 333 P.2d 936 (1959).

Rod claims that an award of suit money to Lori was not warranted because she "has already received a substantial property award." (App. Br. 59) But because Rod first refused to pay, and then stayed enforcement of, the equalizing judgment, Lori was deprived the only liquid portion of her property award. Further, because Rod stayed enforcement of the \$58,675 judgment to pay the attorney fees Lori owed to her trial counsel, Lori was left to pay the balance of her fees from the assets that were left in her control, which with the exception of a \$100 bank account were not liquid, requiring her to

cash in a portion of the UBS retirement accounts, at significant cost. (CP 1704-05) Lori showed a “genuine need” for an award of suit money. (App. Br. 59) The trial court did not abuse its discretion in awarding her suit money to defend Rod’s appeal.

G. This Court should award Lori fees on appeal.

The “scorched earth” tactics that justified the trial court’s award of attorney fees also warrant an award of attorney fees on appeal. “[A] party’s intransigence in the trial court can also support an award of attorney fees on appeal.” *Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999). Not only does Rod’s “intransigence at trial and his appeal of that outcome” warrant an award of fees on appeal, *Mattson*, 95 Wn. App. at 606, his intransigence and “scorched earth” tactics in this Court and the Supreme Court, replete in the extraordinary motions practice reflected in this Court’s files, warrant an award against him and his counsel. *Wixom*, 190 Wn. App. at 728, ¶ 20. Lori will separately bring a RAP 18.9(a) motion for her fees and other relief on appeal.

IV. CONCLUSION

This Court should affirm the trial court’s fact-based, wholly discretionary decisions and award Lori her fees against Rod and his counsel for having to respond to this appeal.

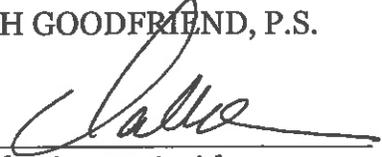
Dated this 3 day of July, 2018.

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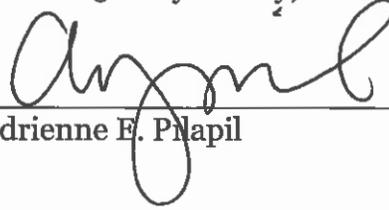
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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 3, 2018, I arranged for service of the foregoing Corrected Brief of Respondent, to the Court and to the parties to this action as follows:

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SMITH GOODFRIEND, PS

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