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WASHINGTON STATE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Lori Van De Graaf,

Respondent,

v.

Rod D. Van De Graaf,

Appellant

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
(Contempt Orders NOA Filed 1/31/18)

**REPLY BRIEF OF APPELLANT ROD D. VAN DE GRAAF -
Contempt Orders**

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I. INTRODUCTION AND SUMMARY OF REPLY

The Court should vacate the trial court's contempt orders against Appellant Rod Van de Graaf because they were not consistent with settled Washington law that a person cannot be held in contempt when they do not personally have the means to comply with the court's order, and thus were impermissibly punitive.

All Rod's assets and income have been laid bare before the court since the divorce trial and through the 2018 supplemental proceedings. He is not hiding anything. After the property division and maintenance award, Rod has no money or ability to borrow except if family members agree. The law requires **substantial evidence** to support a finding that **Rod** has the **present ability** to pay to sustain the contempt and incarceration orders. The Response is unable to establish that predicate because the record is devoid of such evidence. The trial court and Response thus assert payment should and could come, not from Rod, but from his family members from *their* funds. That fails the test of personal ability to pay, and *Holcomb*. The contempt and incarceration orders must be vacated.

II. REPLY ARGUMENT

- A. **The contempt orders must be vacated because Rod did not have the present, personal ability to pay and cannot properly be held in contempt because his family members refuse to make the payments for him from their own money.**

First and foremost, the controlling law is *Holcomb v.*

Holcomb, 53 Wash. 611, 613, 102 Pac. 653 (1909). That decision held “it is always a defense...to show the disobedience was not willful, but was the result of pecuniary inability or other misfortune over which the accused had no control”. 53 Wash. at 613.¹ In that case the Supreme Court *reversed* the order for contempt and jail for failure to pay \$100 of alimony, which the husband could not pay, and was imposed by the trial court after the husband’s brother and mother stopped making the court-ordered payments. The trial court in *Holcomb*, thus, attempted to require third parties to the dissolution to make payments of one of the parties, which is beyond the

¹ The *Holcomb* court *reversed* a finding of a trial court imprisoning a debtor where the record was that:

the judgment was based upon the fact that the appellant was able to prosecute appeals and give supersedeas bonds in the past, rather than upon the testimony or the absence of testimony. But *the fact that the appellant's mother may have heretofore advanced money to pay alimony, or the fact that his brother may have given security to keep him out of prison, affords no sufficient basis for the order appealed from.*

Holcomb, 53 Wash. at 613 (emphasis added).

authority of the court.

The law has not changed in over 100 years to expand the jurisdiction of the dissolution court to allow it to assert authority over a spouse's extended family members and require them to pay his or her court-ordered obligations. Nor is that expansion of jurisdiction something the courts can do on their own. As a statutory proceeding, only the legislature has that authority and, to date, it has not seen fit to so expand the dissolution court's authority to third parties. The Response Brief has no answer to this argument or authority, which alone requires reversal and vacation of the contempt orders.

Nowhere does the Response show *any* evidence of Rod's personal ability to pay the suit money. And substantial evidence of **Rod's** present ability to pay is required to sustain the trial court contempt orders' finding that his failure to pay is willful because he has the means to pay. All the Response can do is point to Rod's family, pound the table, and assert he can "get" the money there since they are paying his appeal fees.

But under *Holcomb*, which is binding on this Court, a divorced spouse cannot be held in contempt for failure to make a

court-ordered payment when he personally is bereft of funds and his only source of additional funds – family members – will not make the payment, or stop making payments.

The Response has no answer to *Holcomb* or this argument. It cannot be distinguished, as it respects the jurisdictional boundaries and limits of the dissolution court to the persons and property of the ex-spouses, and not to their extended family members.

However much a well-meaning trial court or court commissioner may believe an ex-spouse's family money *should* be used since they are paying the ex-spouse's appeal fees (and/or may have paid the trial fees), the dissolution court has no jurisdiction over anyone or any property other than the spouses and the *marital* property. *Arneson v. Arneson*, 38 Wn.2d 99, 277 P.2d 1016 (1951); *In re Marriage of Soriano*, 44 Wn. App. 420, 722 P.2d 132 (1986); *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002).

More to the point for the procedure here, even such a genuinely held belief of potential extended family financial capability by the trial court is not substantial evidence that supports a finding of *Rod's* ability to make the payment. And it is the *alleged contemnor's* ability or inability to pay that is the basis for holding

him in contempt as *Holcomb* and later cases show or, as here, vacating a contempt order that is not supported by substantial evidence.

As explained in the Opening Brief, here there is zero evidence of **Rod's** ability to pay. To hold otherwise means that the marital dissolution courts may expand their jurisdiction beyond the parties and their property to extended family members' personal assets. That has never been the law, nor should it be the law.

As detailed in the Opening Brief, the undisputed evidence after the supplemental proceedings is that Rod did not have personal funds to make such payment. The Response cannot meaningfully challenge the facts, as Respondent confirmed the lack of funds by bringing the supplemental proceedings. Rod's family refused to loan him funds for that purpose and he was unable to secure a loan from a commercial source given the judgment against him and lien against the only asset against which he could borrow commercially, the former family home, which moreover is helping secure the bond superseding the judgment. Holding him in contempt in those circumstance is an abuse of discretion because it exceeds the jurisdiction of the Washington courts in dissolution matters, and is

contrary to the common law tradition long followed in Washington that a person cannot be held in contempt when they do not have the personal ability to comply with the order.

The Response Brief cites cases imposing contempt in circumstances where the alleged contemnor hid assets, stopped working or hid income so as to make a false appearance to the trial court of an inability to pay. That is not the case here because the dissolution trial and the later supplemental proceedings established just what assets Rod was left with, what his earnings were from Midvale, and thus what was available to make any other payments once the elements of the property division were taken into account, specifically the equalization judgment which tied up the house he was awarded, and the maintenance obligation of \$6,000 per month as against his monthly pre-tax income of \$7,800, all of which is set out in the Opening Brief.

The divorce laid bare everything Rod had and what he was left with. And those amounts were confirmed during the supplemental proceedings in January 2018. Rod was not hiding

anything, nor did Lori or the Commissioner contend that he was.²

They simply said – Rod, your family can pay, go get the money from them. Rod, however, has no control over his family members and whether they would pay the court-ordered amount.

B. The contempt order also must be vacated because it was punitive, not remedial.

As noted in the Opening Brief, absent a *sustainable* finding of a present ability to pay the contempt amount, the “contempt was not coercive but impermissibly penal.” *Britannia Holdings Ltd., v. Greer*, 127 Wn. App. 926, 934, 113 P.3d 1041 (2005). OB, p. 18-19. Moreover, in this case the contempt orders also confirmed by their *text* that they were impermissibly punitive by imposing a determinative sentence without a purge clause.

² Thus, Rod’s circumstances are in sharp contrast to *In re Marriage of Dodd*, 120 Wn.App. 638, 645, 86 P.3d 801 (2004), in which the father was “not being honest in stating his income” and secretly funneling income to avoid payment of child support such that the trial court and this Court imputed income to him for purposes of calculating child support. They also are in contrast to *Marriage of Didier*, where the father was not being honest in his income such that the trial court imputed income to him and held him in contempt for failing to make payments consistent with the imputed income. *In re Marriage of Didier*, 134 Wn. App. 490, 498, 140 P.3d 607 (2006).

The January 22, 2018 order of contempt provided in relevant part as to the suit money issue in ordering that it be paid by January 31, 2018. It provided as follows:

5. The court imposes a separate jail sentence upon Mr. Van de Graaf for failure to pay suit money. The 5 day sentence is suspended on condition that Mr. Van de Graaf pay the remaining balance of \$20,000 to Mr. Hazel by January 31, 2018.

6. If not paid, Mr. Van de Graaf shall appear in court on February 5, 2018 at 1:30 pm.

CP 27-28.

The January 22, 2018, contempt order was punitive and not coercive because it did not contain a proper purge clause. It imposed a determinate sentence if payment was not made by January 31, 2018, which had no provision for vacation on payment, the same construction reversed as punitive in *In re Marriage of Didier*, 134 Wn. App. 490, 503-505, 140 P.3d 607 (2006). *Didier* explained:

If the [contempt] order is remedial, then the proceeding is civil and does not offend [the party's] due process rights. However, if the order is punitive, then the proceeding is criminal and due process affords [the alleged contemnor] the same rights as a criminal defendant, including the right to a jury trial. *See In re Pers. Restraint of King*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988) (citing *State v. Boatman*, 104 Wn.2d 44, 46-47, 700 P.2d 1152 (1985)).

Didier, 134 Wn.App. at 495. The contempt order of January, 2018, was punitive, not civil, and was the predicate for the later order entered by the trial court commissioner. It must be vacated along with the later contempt and incarceration orders based on it, and the ultimate punishment of imprisonment because Rod was not afforded his full due process rights. *Didier* explained that

A civil contempt sanction will stand as long as it serves coercive, not punitive, purposes. *See United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826–27, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); *King*, 110 Wn.2d at 799–800, 756 P.2d 1303.

Didier, 134 Wn. App. at 501.

The January 22 contempt order does not contain a proper purge clause such that Rod as the alleged contemnor carried the keys to the jail house door in his pocket. Instead, the order imposed a determinate 5-day sentence with no provision for early release on payment. *Didier* reversed just such an order for just that reason, focusing on the terminology used in the order:

¶ 29 But in her order finding Michael in contempt, the commissioner stated that she was imposing a 30–day jail sentence:

Michael Didier is hereby *sentenced* to thirty days in Pierce County Jail beginning June 17, 2005 unless he pays the judgment costs and attorney fees in

full prior to June 17, 2005. If Mr. Didier makes substantial payments toward the amount above, the court may *entertain* a motion to modify this Order.

CP at 118 (emphasis added).

¶ 30 **The use of the term “sentenced” suggests the court’s punitive thinking here.** Nevertheless, we look to the specific provisions of the order to determine whether the order is punitive or coercive. Judy argues that the order is civil and coercive because it contains a provision that allows Michael to avoid incarceration if he pays his outstanding *504 obligations, approximately \$4,900, or makes a substantial payment thereto. She argues that if Michael is found in contempt and put in jail, he could gain his release simply by making a substantial payment toward his obligation. **But the language of the court’s order does not support Judy’s argument.**

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¶ 31 The order contains an adequate purge provision for the period of time prior to June 17, 2005; if Michael pays \$4,900 before June 17, 2005, he will have satisfied his obligation and avoided incarceration. But if he does not pay before June 17, 2005, the order requires that he serve 30 days incarceration (as failure to timely pay) and that, even if he pays while incarcerated, he is not entitled to immediate release, but he is merely permitted to file a motion to modify the order imposing the 30–day sentence, which the court may (or may not) grant.

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¶ 34 Under the court’s order here, after June 17, 2005, Michael could not purge his contempt and be immediately released solely by paying the money owed. Thus, as to that portion of the court’s contempt order after June 17, 2005, the 30–day jail term was a penalty. **It was not wholly coercive, it**

was punitive and was, therefore, not a sanction lawfully available to the trial court in a civil contempt action.

Didier, 134 Wn. App. at 503-05 (emphasis added)(italics in original).

These principles set out in *Didier* apply no less here. The January 22 contempt order was written to impose a “sentence” of five day’s jail if the money was not paid by January 31, with no purge clause, making it punitive.

The trial court commissioner’s later orders in summer, 2018, did not change the purpose and effect of the predicate, January 22, 2018, contempt order. For one thing, given the evidence before the court, it knew in July, as it also knew in January, that Rod had no funds of his own to pay the ordered amount, but that he had to obtain it from family. *See* CP 90-96 (declaration of counsel dated March 19, 2018); CP 4-6 in Incarceration Appeal, No. 36283-3-III (March 19, 2018 declaration of Rod); CP 92-98 and 106-111 in Incarceration Appeal (declarations of Rod). As *Britannia Holdings*, recognized, without a sustainable finding of present ability to pay, “the contempt was not coercive but impermissibly penal”. 127 Wn. App. at 934.

The contempt and jail orders entered by the trial court commissioner could not even arguably be made to coerce Rod to make a payment that was within his power to perform. They were, plain and simple, orders to punish Rod for his family's refusal to pay his obligation for him, and in fact were expressly designed to get Dick Van de Graaf or other family members to make the payments for Rod. That is beyond the authority of the court for contempt, as well as beyond the authority of the marital dissolution court.

III. CONCLUSION

Here there really is no dispute about Rod's lack of available assets or his limited income ,which is used up by his maintenance payments which are current, all of which were disclosed in the dissolution trial in 2016, then re-confirmed in the supplemental proceedings held in January 2018 while Rod was getting a supersedeas bond in place.

The only evidence in the record is that Rod does not personally have the money to pay the court ordered suit money. There is no evidence that he has the ability to obtain the money from his family members since they have continually refused to the point of his serving five days in jail. Nevertheless, Lori's counsel and the

trial court commissioner all focused on the fact that his family has the money and he should be able to get it from them – in short, that because Rod’s parents or siblings are paying his legal fees for the appeal, they also should be made to pay the fees ordered by the court for suit money.

But as noted in the Opening Brief, and as to which Lori has no response, this argument necessarily expands the jurisdiction of the dissolution court beyond the parties to the marriage to include their family members and the non-spousal family assets. There is no statutory or other justification for such an expansion of trial court authority. Rather, because the dissolution court is strictly limited to the parties to the marriage and *their* property,³ the court cannot obtain the funds from third parties, directly or indirectly. It certainly cannot use contempt powers to expand its jurisdiction. But because that is the actual effect of the contempt orders here, to try and coerce third parties to pay the obligation Rod did not have the ability to pay, they constitute abuses of discretion as outside the court’s lawful

³ RCW 26.09.080. *See Arneson v. Arneson*, 38 Wn.2d 99, 277 P.2d 1016 (1951); *In re Marriage of Soriano*, 44 Wn. App. 420, 722 P.2d 132 (1986); and *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002).

authority. As argued throughout, there is no evidence that **Rod** had the ability to pay the suit money. To hold otherwise means that the marital dissolution courts are expanding their jurisdiction beyond the parties and their property. The contempt orders must be vacated, as well as the incarceration order which is predicated on them.

Finally, it is understandable – and seen throughout the record – that the dissolution judge and Lori were frustrated by the fact Rod’s father, Dick Van de Graaf (“senior Van de Graaf”, holds the purse strings and controls his personal and business assets tightly. Senior Van de Graaf has set up his children with many strings attached, which allow them to operate Midvale but not actually own the main assets he retains control of, in particular, Van de Graaf Ranchs Inc. Rod cannot change that, any more than can the dissolution court, because the senior Van de Graaf’s property is not before the court. Nor is the senior Van de Graaf personally subject to the dissolution court’s jurisdiction.

The divorce divided up **Rod’s** and **Lori’s** assets, then left Rod with extremely little because the dissolution court believed that Rod “soon would be a very wealthy man.” That was in 2016. It has yet to occur, and may never occur given the fluctuations and vagaries of

the cattle business this day and age, and the changes any patriarch can make to their wealth, whether by donations, generation-skipping mechanisms, or outright disinheritance. Where, as here, the divorced spouse has no vested right in any assets of the older generation, those assets cannot be imputed to him, nor can he be penalized for the older generation's refusal to pay court-ordered amounts, as *Holcomb* holds.

Holding Rod in contempt in those circumstance was an abuse of discretion because it exceeds the jurisdiction of the Washington courts in dissolution matters, is contrary to the settled common law that a person cannot be held in contempt when they do not have the personal ability to comply with the order, and contrary to the specifically on point decision of *Holcomb*, which controls.

Appellant Rod Van de Graaf respectfully asks the Court to apply the settled law and vacate the contempt orders against him because there is no evidence of his personal ability to pay the amounts ordered by the trial court when the contempt orders were entered, and because the dissolution court has no jurisdiction over extended family members and their assets.

Respectfully submitted this 22nd day of May, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By 
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CERTIFICATE OF SERVICE

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

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DATED this 22nd day of May, 2019.



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