

FILED  
Court of Appeals  
Division III  
State of Washington  
4/17/2019 4:04 PM  
No. 35839-9-III

#352927

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

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Lori Van De Graaf,

*Respondent,*

v.

Rod D. Van De Graaf,

*Appellant*

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

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

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## I. INTRODUCTION

Where the record shows the alleged contemnor does not have the present ability to pay advance appeal fees to his ex-spouse as ordered, may a trial court disregard the party's present financial condition and hold him in contempt and subject to jail because, nine-months earlier, the party arguably had the ability to pay other financial obligations based on the dissolution court's final property division? The short answer is "No." *Holcomb v. Holcomb*, 53 Wash. 611, 613, 102 Pac. 653 (1909), 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", *reversing* the order for contempt and jail for failure to pay \$100 of alimony, which the husband could not pay.

Alternatively, may the trial court, a year after final orders, and after presiding over supplemental proceedings that made painfully clear the alleged contemnor's lack of available funds, rely on the fact that the alleged contemnor "was able to prosecute appeals and give supersedeas bonds" from parental and sibling funds to justify a contempt order and jail? *Holcomb* again says, "No." The issue is

whether the dissolution court – which has jurisdiction over *only* the marital parties and *their* property – can lawfully hold the ex-spouse, here Appellant Rod Van de Graaf (“Rod”), in contempt because his family members – third parties to the dissolution -- refuse to loan him the money the court ordered to be paid to his ex-spouse Respondent Lori Van de Graaf (“Lori”), money he does not have after the property division and maintenance awards.

Once again, *Holcomb* says, “No.” Consistent with earlier law of equity and our state constitution forbidding imprisonment for debt, the Supreme Court expressly rejected the exact same basis the trial court herein used to find contempt and jail Rod: “that the appellant was able to prosecute appeals and give supersedeas bonds in the past.” *See id.* The Court explained why in rejecting the trial court’s rationale, reasoning that still applies:

...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. We think *the inability of the appellant to comply with the terms of the decree was clearly shown*, and the order is therefore reversed without costs to either party.

*Holcomb*, 53 Wash. at 654 (emphasis added). *Holcomb* has not been overruled, is still good law, controls, and requires reversal.

## **II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL**

### **A. Assignments of Error**

1. The trial court erred in entering its orders of contempt for failure to pay suit money in December 2017, January 2018, and July, 2018.

### **B. Issues on Appeal**

1. Must the contempt orders made under pain of jail for failure to pay suit money be vacated because the alleged contemnor, Appellant Rod Van de Graaf, did not have the current ability to pay the \$20,000 ordered for suit money when the orders were entered?
2. Must the dissolution court's order of contempt and jail for an ex-spouse's "failure" to pay court-ordered, advance appeal fees he cannot pay when his relatives refuse or fail to pay the court-ordered funds be vacated because it is contrary to, at least, the Supreme Court decision in *Holcomb v. Holcomb* and the Washington Constitution?

## **III. STATEMENT OF THE CASE<sup>1</sup>**

### **A. Background of the divorce.**

This marital dissolution resulted in a property division that left Rod without liquid or readily accessible financial resources. It nonetheless required him to pay both a large judgment of

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<sup>1</sup> References to the background briefing in the related dissolution appeal, No. 35133-5-III, are to the "Merits OB" and "Merits RpyB". Similarly, any references to clerks papers in the appellate record for the dissolution appeal are designated as "Merits CP \_\_\_\_." Any references to clerks papers in the related "Incarceration Appeal", No. 36283-3-III, are referred to as "IncarAppeal CP \_\_\_\_."

\$1,171,200, based largely on the award to him of the prior family home on Gap Road but occupied rent free by Respondent Lori Van de Graaf (“Lori”) from final orders in February, 2017, until October, 2017 (Merits CP 763-764), and a belated fee award of \$58,675 on reconsideration. Merits CP 829; 967-968. The house was valued at \$1,420,000 for purposes of the property division and determining the judgment owed by Rod to Lori. Merits CP 770. Rod was also ordered to pay maintenance of \$6,000/month for life, even if Lori remarries. Merits CP 765-766, 788. *See* Merits OB, pp. 22-23.

Rod’s income is limited to his monthly salary of \$7,800. *See* Supp CP \_\_ (Sub No. 589, Rod’s declaration); Supp CP \_\_ (Sub No. 617, Rick 1/5/18 Dec.), ¶1.<sup>2</sup> By the time of the December orders, Rod had caught up with prior arrearages and was current in maintenance, having paid Lori a total of \$107,000 in maintenance

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<sup>2</sup> *See also* Declaration of JoAnne G. Comins Rick filed in this Court on January 31, 2018 in support of Rod’s request for a stay (“Rick COA Dec.”, included in the Appendix hereto), ¶¶ 4-15, *esp.* ¶¶ 14-15, describing the January 22 contempt hearing at which Lori’s trial counsel argued that the threat of jail would make Rod “find” the money or get it from his family. The events subject of the related Incarceration Appeal show that was not the case. Rather, the threat of jail was purely punitive, not coercive; a court cannot coerce money from a person who does not have it, any more than it can obtain blood from a stone. The Rick COA Dec. shows that, after presiding over the supplemental proceedings, then approving the supersedeas bond, the trial court knew that the only evidence was that Rod personally had no funds available to pay the suit money. The only available source was his parents or siblings.

and attorney's fees in calendar 2017. *Id.*, ¶3. This exceeded Rod's gross earnings since entry of the Decree by over \$21,000. Rick Dec., ¶3. Further, at her request, Lori had the use of the former family home for over seven months, from entry of the final orders in February, 2017, which transferred it to Rod, until October 1, 2017, rent-free, even though the maintenance allowance was designed to provide for rent. In addition, Lori was awarded over \$98,000 in regular bank accounts (Merits CP 785) and the specified amount of \$816,000 in investment accounts at UBS (Merits CP 785) (later increased to include stock market gains of over \$20,000). Rick Dec., ¶¶5-8.

In ¶ 21 of Rod's declaration dated December 4, 2017, Rod testified that, "After paying the \$6,000 monthly maintenance to Lori, I do not have adequate financial resources available to contribute towards her 'Suit Money,'" and that he received "no liquid cash" in the property division. Supp. CP (Sub No. 589). As explained in the Merits OB, this was because the one liquid asset assigned by the dissolution judge, an insurance policy with a cash value of \$116,000, was in fact owned by a trust and thus was not part of the marital estate and could not be distributed to Rod absent agreement of the

trustees of the trust, who did not agree to do that. *See* Merits OB pp. 39-41; Merits RpyB pp. 18, fn. 8, 20-21.

The Court's attention is also directed to Rod's testimony at the supplemental proceedings held January 3, 2018, (Merits Sealed CP 1970-2066), in which Rod attested that the disclosed accounts were "the full extent of [his] personal accounts" and that he had no retirement account of any kind. *See* Transcript at 29, 42-43.

Rod, thus, has not had the presumed monthly income of \$17,000 that Judge McCarthy used from earlier, pre-trial days of the 2014's-2015's, when the Midvale Cattle business earned much more because cattle prices were substantially higher, its debt load was lower, and regular distributions could be made. But by the end of trial in 2016 when Judge McCarthy wrote his decision, distributions beyond monthly draws could not be made due to low income and bank restrictions, so that Rod was only able to receive the same \$7,800 monthly salary as the other partners. Rod 12/5/17 Dec., ¶¶17-23, Supp. CP \_\_ - \_\_; Merits CP 1638-1643 (declarations of Steve Erickson and Rick Van de Graaf re Midvale finances).

Since Rod was not given liquid assets, or ones which he could use to borrow commercially since his house was fully encumbered

with Lori's judgment lien, Rod has had a tremendously difficult time paying the court-ordered amounts and paying minimal personal living expenses, having to borrow from family to the extent he has been able. Rod's present inability to pay from his own funds was reinforced by Respondent Lori Van de Graaf's effort to enforce the underlying judgment with supplemental proceedings her lawyer conducted on January 3, 2018, and which was supervised by Commissioner Tutsch, who made the January 22 and July 18 and 26 contempt and incarceration rulings. *See* Rick COA Dec., ¶¶2-8 and Supp CP \_\_ - \_\_, (1/5/18 Rick declaration), pp. 4-6, ¶¶ 19-28, summarizing the supplemental proceedings.

Because Lori began enforcement proceedings against Rod, he was forced to seek a formal stay of enforcement of the money judgment pending appeal using the house he was awarded as alternate security. His motion was granted in part by the trial court after hearing on January 8, 2018. The order was entered on January 22, but it required filing of a bond amount of over \$360,000, in addition to the house. *See* the January 23, 2018 Order that granted Rod's request to accept the Gap Road home as alternate security and providing for additional cash bond amount. Supp. CP \_\_ - \_\_ (Sub

No. 633). The supersedeas amount determined by the trial court includes the full \$65,000 in fees on appeal that was requested by Lori in her motion for suit money. The additional cash requirement for the bond was secured by Rod's parents, the bond ultimately was filed, and is in place. Merits CP 2142-2145.

**B. January 22 hearing, and January and July contempt and jail orders.**

The January 22 hearing resulted in an order requiring Rod to pay \$20,000 in suit money by January 31, 2018, 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 28. In addition, the order ruled: "The court finds that Mr. Van de Graaf had the ability to comply with those [earlier] orders and continues to have such ability. His violations are willful." CP 25. Rod respectfully submits there is no competent evidence to support those rulings because, as noted, the trial court had already presided over the supplemental proceedings and the motion to accept the Gap Road home for alternate security to bond the appeal, which still

required his family to come up with a commercial bond of over \$300,000 to secure the full bond amount that the trial court had set.

All this demonstrated to the trial court that Rod had no money of his own with which to pay the ordered suit money of \$20,000. To find contempt and a willful failure to pay the trial court necessarily accepted Lori's counsel's argument that the threat of jail would coerce not Rod, but his family, to make the court-ordered payment – and argument of counsel is not evidence.

In other words, the contempt and jail order was directed at third parties to the divorce, Rod's family members, rather than him, to make the ordered payments, persons over which the divorce court has no jurisdiction. By doing that, the trial court also ignored the long-settled constitutional and common law that a person cannot be imprisoned for failure to pay a debt he or she cannot pay and, effectively, expanded the jurisdiction of the dissolution court to include extended family members, just as Judge McCarthy did in his initial property division and maintenance award when his resulting orders meant that Rod could make required payments only if his family paid for him.

Rod's trial counsel at the hearing, and throughout the dissolution trial and all post-trial hearings, summarized the supplemental and the contempt proceedings.

13. At the January 22 hearing, Lori's counsel argued that if the court threatened to put Rod in jail, he would "find" the money or get the money from his family. But it had just been established at the January 3 supplemental proceedings brought by Lori that Rod did NOT have the present ability to pay from his own financial resources. Lori's counsel thus knew that Rod had no present ability to comply with an order to pay \$20,000 immediately, while also staying current with the \$6,000 monthly maintenance. Nevertheless, Lori's counsel pressed the contempt to get the \$20,000 that he knew from the supplemental proceedings simply was not there. At the hearing, Lori's counsel thus was arguing that putting Rod in jail would punish Rod for being unable to pay and thereby coerce Rod's family to make the payment that Rod cannot.

14. The trial court, Commissioner Tutsch, who has heard all the post-trial hearings since August, 2017, commented that Rod had the ability to pay based on "Judge McCarthy's decision." That decision was entered in February, 2017, and did not involve payment of suit money, only maintenance. Judge McCarthy's February, 2017, ruling was predicated on his letter ruling of November, 2016, which was adopted as findings in the final orders, and any comments on Rod's ability to pay went to maintenance of \$6,000 per month and not to his present circumstances.

15. It appeared to me at the hearing that the Commissioner used an incorrect legal standard – Rod's apparent ability to pay in February 2017 before he paid arrearages and maintenance for the past year, instead of Rod's actual present ability to pay at the time of the hearing, January, 2018. When the correct standard is applied, there is

insufficient evidence to support any finding of Rod’s present ability to pay the required amount. There also is insufficient evidence to support the erroneous finding stated in the order, that Rod has the “present ability to comply” with the order, i.e., by obtaining money from family members, who may or may not want to loan him substantial money for his personal debts that cannot be collateralized with the assets he was left.

Rick COA Dec., ¶¶13-15.

For the reasons given in Ms. Rick’s declaration, Rod filed his notice of appeal from the January 22 contempt order and the accompanying order requiring a review hearing on February 5, 2018 (CP 24), then sought stays from the appellate courts.

Lori continued her full court press in the trial court for immediate payment of the suit money, bringing on a motion to confirm contempt while interim appellate relief was sought, rather than conserve her resources, having a hearing and order “confirming contempt” on March 22, 2018. *See IncarApp. CP 1-74.* Those actions ceased only when the Supreme Court Commissioner, although denying discretionary review on the permanent stay, never the less extended a temporary stay until a Department could review and rule on a motion to modify, which it did on July 11, 2018.

After further appellate proceedings seeking a permanent stay were ultimately denied, the contempt was heard in July, 2018.

Despite the arguments of counsel, and despite having its attention drawn to *Holcomb*, the trial court relied on Judge McCarthy's 2017 rulings, the fact that Rod had secured a bond and was getting his appeal fees paid as the basis to hold Rod in contempt and require he go to the Yakima County jail for five days and nights at hearings on July 18 and 26, 2018. *See* IncarAppeal CP 75-114. As the record shows, the orders prepared by Lori's counsel were inadequate to have the Jail accept him and it was Rod's counsel who had to do extra work to insure that Rod could serve his punishment rather than be subject to yet more motions for the alleged failure to follow the court's order. *See* IncarAppeal CP 98-105 (Rick Dec.); CP 106-111 (Rod Dec.).

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

A trial court's decision in a contempt proceeding is reviewed for an abuse of discretion. *In re Marriage of James*, 79 Wn. App. 436, 439-440, 903 P.2d 470 (1995). The appellate court does not weigh conflicting evidence or substitute its judgment for that of the trial court, *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996), but will uphold challenged factual findings regarding

contempt on appeal if they are supported by substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003).

It is an abuse of discretion to make a decision for untenable reasons, or on an untenable basis, or using the incorrect legal standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997): “A court’s decision is manifestly unreasonable if it is [1] outside the range of acceptable choices, given the facts and the applicable legal standard; [2] it is based on untenable grounds if the factual findings are unsupported by the record; [or 3] it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *Id.*

(emphasized numbers added). *Accord, In re Marriage of Chandola*, 180 Wn.2d 632, 642, 653-56, 327 P.3d 644 (2014) (trial court’s discretion is “cabined” by applicable statutory provisions).

application of the incorrect legal rule is an abuse of discretion requiring reversal. *Physicians Ins. Exc. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (a “trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law”). Appellant respectfully submits that the trial court used the wrong legal standard and the facts did not meet the correct legal

standard because it disregarded Rod Van de Graaf's present, personal ability to pay, and it erred in concluding his failure to pay was willful when it concluded that his family members would make the payment for him following its "coercive" threat of punishment with jail time if payment was not made.

**B. Summary Of Appeal Argument.**

Rod's appeal is based on two points. *First*, the trial court based its determination that Rod could arrange for payment on the wrong evidentiary standard because it was based on the divorce court judge's final orders at the end of the dissolution. *See* Rick COA Dec., ¶14 (Comm. Tutsch "commented that Rod had the ability to pay based on 'Judge McCarthy's decision.' "). This was error for two reasons: 1) Judge McCarthy's ruling from February, 2017, does not pertain to Rod's financial circumstances at the present time he was before Commissioner Tutsch; 2) the dissolution trial judge was not making any findings on an ability of Rod to pay suit money – only to pay maintenance. Moreover, the finding arguably is not adequate for contempt of Rod's personal present ability to pay since it is not that specific, saying he has the ability to comply, and was in response to Respondent's counsel's arguments

that sending Rod to jail would force his parents, third parties to this litigation, to make the payment. This is contrary to *Holcomb*.

*Second*, there is no *evidence* supporting the finding Rod had the ability to pay that is stated in the order because the *only* evidence is that Rod has *no* funds of his own to pay the suit money, and that this was demonstrated both by his declaration and by the supplemental proceedings.<sup>3</sup> Rod’s December, 2017 declaration states he is not “willfully or intentionally ignoring the Court’s order” to pay the suit money, but that he does not have the funds. Supp CP —.

In sum, it is *settled law* that one cannot be sent to jail for contempt for the failure to pay money that he or she does not *currently* have. *Britannia Holdings Ltd., v. Greer*, 127 Wn.App. 926, 933-934, 113 P.3d 1041 (2005); *Holcomb v. Holcomb*, 53 Wash. 611, 612-13, 102 P. 653 (1909). It is the *present* ability to comply (or here, to pay), that is at issue.

To use the classic metaphor, the person in the dock cannot “have the key to the jailhouse door in his or her own pocket” when

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<sup>3</sup> The supplemental proceedings are in the Merits Appeal record as a sealed document at Merits CP 1970-2066.

the funding depends on a third party over whom the alleged contemnor has no control. Thus, it not only is wholly inequitable to punish one person for the failing of such a third party, even an immediate family member as the Supreme Court held in *Holcomb*; it is **reversible error**, as shown by *Holcomb*, which **reversed** a trial court that had held, as did the trial court here, that the alleged contemnor “was financially able to comply with the terms of the decree” and thus was jailed in July, 2018 because his parents would not pay the amount ordered by the Court.

**C. A Finding Of Contempt Requires Evidence Of The Willful Refusal To Obey A Court Order By A Person Who Has It Within His Or Her Power TO Obey That Court Order.**

Washington’s Constitutional Convention chose to ban imprisonment for debt when it was written in 1889, and the public fully endorsed that prohibition that is stated in Const. Art. 1, sec. 17. In short, no person is to be jailed for inability to pay a debt. The law was settled in *Holcomb v. Holcomb*, 53 Wash. 611, 612-13, 102 P. 653 (1909) that an ex-spouse cannot be held in contempt for failure

to pay amounts orders by the Court he did not have the ability to pay and which previously had been paid by his relatives.<sup>4</sup>

It thus is settled law that a defense to contempt is the inability of the alleged *contemnor* to comply with the order. Before a trial court may impose imprisonment a sanction for civil contempt, the court must find that the person in contempt—and not some third party—has a present inability to pay. *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933-34 (2005) (*reversing* contempt order because it contained no finding that debtor has “present ability to pay the purge amount” (emphasis in original); *Holcomb v. Holcomb*, 53 Wash. 611, 612-13, 102 P. 653 (1909) (*reversing* imprisonment of debtor for contempt where there was not evidence that the alleged

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<sup>4</sup> In *Holcomb*, an ex-spouse had been able to meet court obligations due to payments made on his behalf by his mother and brother. However, they stopped making payments for him and the trial court held him in contempt for “his” failure to pay. The Supreme Court *reversed* the finding of contempt in a marital dissolution case, adhering to long-held principles of equity that a person cannot be held in contempt of court when the person does not have the ability to comply with the court’s order. The Court also vacated the subsequent order for imprisonment of the debtor, again because the alleged contemnor was unable to personally comply with the order. *Holcomb* cannot be distinguished from Rod’s case.

contemnor, himself, was able to financial comply with the order).<sup>5</sup>

Thus, 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 (2005).

Imposing a monetary sanction against Rod when he personally was unable to pay created a debtor’s prison – a practice from colonial days which our legislators and the courts have not allowed, and which the Washington Constitution prohibits. Const., Art. 1, sec. 17: “There shall be no imprisonment for debt, except for absconding debtors.”

As in *Holcomb*, Rod had a supersedeas bond put in place by a combination of the trial court accepting his home based on the dissolution court’s value, and his parents paying for a commercial bond for the differences in amount that had to be covered. Family members have also paid for is fees for appeal. Similarly, in

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<sup>5</sup> *Accord, Chetram v. Singh*, 937 So.2d 716, 719 (Fla. Dist. Ct. App. 2006). “The absence of such a finding transforms a coercive civil sanction into a criminal punishment that has been imposed in violation of the contemnor’s constitutional rights.” *Chetram*, 937 So.2d at 719 (holding that incarceration “for the simple failure to pay a debt is prohibited; civil contempt proceedings must not be used to create a debtor’s prison.”).

*Britannia Holdings Ltd., v. Greer*, 127 Wn. App. 926, 933-34

(2005), this Court reversed a contempt order because the debtor did not have the present ability to pay.

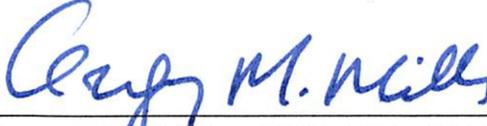
The trial court's January 22, 2018, ruling that there is a present ability to pay was not based on current evidence. It is, therefore, subject to attack for lack of substantial evidence, as pointed out in the motion. *See Holcomb*. The same is true for the July 18 and 26<sup>th</sup> rulings. The fact the trial court rulings are, in fact, based on and derivative from the earlier findings of the divorce court from February 2017 rulings that did not even address suit money, and the third-party funding for Rod's appeal is irrelevant for purposes of determining whether the alleged contemnor is willfully refusing to comply with the court order. Where the only evidence in the record is Rod could not comply with the court's order, it was reversible error and completely improper to find him in contempt, then order him to serve jail time. *Holcomb*, 53 Wash. at 612-613 (emphasis added).

## V. CONCLUSION

Appellant Rod Van de Graaf respectfully asks the Court to vacate the trial court's contempt orders because they were not consistent with the law since there is no evidence that he in fact had the present ability to comply with the court's order to pay \$20,000 of advance attorney's fees for appeal for Respondent. The undisputed evidence, particularly after the supplemental proceedings, was that Rod did not have personal funds to make such payment, nor the ability to borrow such funds because his 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. Since there is no evidence, much less substantial evidence, to support a finding that Rod had the present ability to pay the suit money and therefore willfully was disobeying a court order to make that payment, the contempt and jail orders must be vacated because they are not based on the required legal standard, and the facts do not fit the correct legal standard.

Respectfully submitted this 17<sup>th</sup> day of April, 2019.

**CARNEY BADLEY SPELLMAN, P.S.**

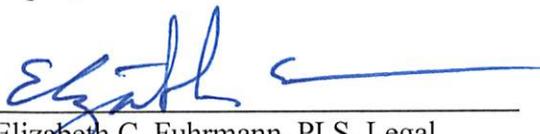
By   
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*Attorneys for Rod D. Van De Graaf*

## CERTIFICATE OF SERVICE

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

David Hazel Hazel & Hazel 1420 Summitview Yakima, WA 98902 P: (509) 453-9181 F: (509) 457-3756 E: <a href="mailto:daveh@davidhazel.com">daveh@davidhazel.com</a>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> email <input checked="" type="checkbox"/> Other – via Portal
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DATED this 17<sup>th</sup> day of April, 2019.

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

**APPENDIX**

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Declaration of Joanne G. Comins Rick in  
Support of Appellant’s Emergency Motion  
for Stay of January 22 Orders, filed in  
Court of Appeals January 31, 2019 ..... A-5 to A-11

FILED  
18 JAN 22 P4:06

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

Lori Van de Graaf

NO. 11-3-00982-6

vs.

Rod Van de Graaf

ORDER <sup>on motion for</sup> ~~sanctions~~ <sup>for</sup> additional ~~sanctions~~ of court order, etc.

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

- ① The court has the power to award additional sanctions, including the imposition of jail time;
- ② The court has considered the evidence and finds that Mr. Van de Graaf is in continued violation of this court's orders of October 2 and December 7, 2017 by failing to transfer any of the 529 funds to Kate.
- ③ He is in continued violation of the court's

DONE IN OPEN COURT this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
JUDGE/COURT COMMISSIONER

Presented by:  
(Copy received)

Approved as to form:  
(Copy received)

\_\_\_\_\_  
Attorney for \_\_\_\_\_

\_\_\_\_\_  
Attorney for \_\_\_\_\_

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

Van de Graaf

NO. 11-3-00982-6

vs.

Van de Graaf

ORDER (page 2)

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

order's regarding payment of suit money,  
currently owing \$20,000;

4. The court finds that Mr. Van de Graaf had  
the ability to comply with these orders and  
continues to have such ability. His violations  
are willful

(4) The court imposes a jail sentence upon  
Mr. Van de Graaf of five days incarceration

DONE IN OPEN COURT this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
JUDGE/COURT COMMISSIONER

Presented by:  
(Copy received)

Approved as to form:  
(Copy received)

\_\_\_\_\_  
Attorney for \_\_\_\_\_

\_\_\_\_\_  
Attorney for \_\_\_\_\_

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

Van de Graaf

NO. 11-3-00982-6

vs.

Van de Graaf

ORDER page 3

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

~~which is so~~ for failure to transfer the  
529 account. The sentence is suspended on  
condition Mr. Van de Graaf <sup>not later than January 25, 2018</sup> transfer \$7,345  
into the account designated in the court's order  
of December 7, 2017. If not, a bench warrant  
shall issue on January 28, 2018  
⑤ The court imposes a separate jail sentence  
upon Mr. Van de Graaf for failure to pay

DONE IN OPEN COURT this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
JUDGE/COURT COMMISSIONER

Presented by:  
(Copy received)

Approved as to form:  
(Copy received)

\_\_\_\_\_  
Attorney for \_\_\_\_\_

\_\_\_\_\_  
Attorney for \_\_\_\_\_

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

Vau de Graaf

NO. 11-3-00982-6

vs.

Vau de Graaf

ORDER page 4

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

suit money. The 5 day sentence is suspended  
on condition that Mr. Vau de Graaf pay the  
remaining balance of \$20,000 to ~~Estimate~~ <sup>Mr. Hazel</sup>  
Smith by January 31, 2018. If not, a bench  
warrant shall issue for his arrest on February  
5 2018. (6) If not paid, Mr. Vau de Graaf shall  
appear in court on ~~January 29, 2017~~ <sup>at</sup> ~~at 1:30 p.m.~~  
and February 5, 2018 at 9:30 a.m.

DONE IN OPEN COURT this 22<sup>nd</sup> day of January, 2018.

Future maintenance  
payments shall be ~~sent~~ <sup>received</sup>  
by Mr. Hazel's office by  
SP on the 1st day check or  
Presented by: money order  
(Copy received) payable to  
Love Vau de Graaf  
Accepted, 7833  
Attorney for P. Litwone

Elisabeth Tutser  
JUDGE/COURT COMMISSIONER

Approved as to form:  
(Copy received) DISPUTED  
[Signature] #11587  
Attorney for RED

**FILED**  
**Court of Appeals**  
**Division III**  
**State of Washington**  
**1/31/2018 8:00 AM**

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re Marriage of:  
LORI VAN DE GRAAF,  
Respondent/Cross-Appellant,  
v.  
ROD D. VAN DE GRAAF,  
Appellant/Cross-Respondent.

No. 35133-5-III  
DECLARATION OF  
JOANNE G. COMINS RICK  
IN SUPPORT OF  
APPELLANT'S  
EMERGENCY MOTION  
FOR STAY OF JANUARY  
22 ORDERS

JOANNE G. COMINS RICK declares:

1. I am trial counsel of record for Appellant Rod D. Van de Graaf and have represented him since October 2012 including through the fall, 2016, trial of this marital dissolution. I am over the age of 18 years old, competent to testify, and have personal knowledge of the facts set forth in this declaration.

2. I represented Appellant at the December 7, 2017, and the January 22, 2018, hearings before the trial court, Commissioner Tutsch, in this matter. I also represented Appellant at the Supplemental Proceedings brought by Respondent on January 3, 2018, which were supervised by Commissioner Tutsch.

3. Attached hereto is a copy of my January 5, 2018 declaration detailing the supplemental proceedings at ¶¶19-28, pp.4-6, and the fact that Rod does not have the present ability to pay the judgment that Lori seeks to enforce, nor any other significant payment, because the maintenance requirement takes all his net earnings and he is out of savings. He has to borrow. Most of his basic living expenses are shared

with, and his major recreation and vacations that Lori complains of are paid for by his fiancée Debbie Cole, as detailed in her declaration which is of record in this appeal and was provided to Commissioner Tutsch in August, 2017.

4. Rod thus does not have the present ability to pay the \$20,000 suit money which was the subject of the hearing on January 22, as detailed in his December 4, 2017 declaration, ¶¶20-23, in the appendix to the stay motion.

5. Rod does not have the money in an account and would have to borrow it. The divorce ruling by Judge McCarathy gave virtually all the liquid assets of the parties to Lori and left Rod with virtually none, a huge judgment of over \$1.229 million which is the first lien on the house he was awarded, encumbers all of it, and which prevents him from being able to borrow money from any entity other than family or friends, who have to take second or third position on the house. It also purportedly awarded Rod the cash value of an insurance policy of \$116,000 that was intended to give Rod some liquidity, but that was not available because it was not a marital asset; the trial court had no jurisdiction over it to make the award and so Rod could not access it, but the court refused to change the property division to take that fact into account. *See* Rod's Opening Brief, pp. 22, 25-26, 38-41 (discussing award of the Beneficial Life Policy).

6. Judge McCarthy's final orders also imposed a maintenance obligation of \$6,000/month. Rod grosses \$7,800/month and, due to the

fall in cattle prices that began before the trial concluded, and the high debt load on his business owned with his two siblings, Midvale Cattle Co., he has not received any distributions beyond his monthly salary and is not likely to in the foreseeable future, as has been explained numerous times, including in my January 5 declaration, ¶2. *See also* Rod's Opening Brief, pp. 14:3-6,; p. 19:3-14.

7. Despite these factors, Rod has caught up with arrearages in maintenance that existed at the time the final orders were entered, is current with his monthly maintenance (though it is difficult to arrange each month), and has also paid additional attorney's fees to Lori for superior court motion practice as ordered by the trial court, as described in my attached declaration at ¶¶ 2-3, such that he paid \$107,000 to Lori in 2017 in maintenance and trial court attorney's fees, which exceeded his ***gross, before tax*** earnings since entry of the Decree by \$21,400. This has been to my prejudice, as I still have a high five-figure AR from the past year that has not been paid.

8. In sum, every penny that Rod has earned in 2017, and more, went to Lori, leaving him nothing to live on, let alone pay these extra "suit money" fees. In contrast, in the property division Lori ended up with all the cash and investments which are increasing in value with the stock market booming. But in December 2016, when the market dropped, and the UBS account was down \$6300 from the guaranteed \$816,000 award which Lori's counsel included in the equalization judgment and never removed, it was confirmed that Rod would have to pay that

difference. However, when, at the time the decree was entered in February and the UBS account was up to over \$834,000 and the trial judge ruled that all \$18,000 of the gains beyond the amount specified in the account that were directed to Lori, also went to Lori.

9. I frankly do not understand how the law properly can require a party to make payments under penalty of jail when they do not, as Rod does not, have the present ability to make the payment in question; particularly where it is not maintenance or child support; and particularly where the other party has ample resources of her own, including receipt of over \$107,000 from the claimed defaulting party in the past calendar year, 10 months of which was rent-free. I am not aware of any case law or statute which requires the parents or other family members of a 59-year-old adult to loan their money to their adult family member for that person to make payments which are supposed to be from his own resources. I also am unaware of case law or statute that requires a person to borrow funds from family when their options for collateral based on their own property have been subsumed by the underlying judgment attached to their real property. In short, where is the legal obligation to have non-parties to the divorce litigation, even if they are family members, be required to make payments required of the impecunious person, who is the only party?

10. It is for these reasons that I consistently and loyally have defended Rod against the contempt motions, and assisted in submitting funds (to insure they are properly credited) when Rod has been able to

make payments for maintenance from his earnings or from borrowing. But when, as now, he does not have the present ability to make the required payment (justified or not), it is my understanding that we have done away with debtors' prisons and that the law of contempt does not require jail time in lieu of the payment, since the jail time cannot force compliance from a person who does not have the funds (as opposed to refusing to pay from available resources), and thus becomes only punitive and, thus, criminal contempt. It is beyond question that the requirements for imposing criminal contempt have not been followed.

11. Lori's counsel claims that the contempt is "coercive" because it will force Rod's family to come to the rescue and bail him out, and make the payments that are under the law, Rod's obligation but which he cannot make. I have not yet seen any case or statute which permits this procedure. Lori's counsel, in drafting written orders on the Court Commissioner's rulings, uses language that blurs the line of criminality: "... 5 days jail suspended on condition that Rod pay \$20,000 cash by January 31st..."

12. At the hearing on January 22, 2018, which I attended, the gist of Lori's declarations as to Rod's ability to pay was that that she heard he was going hunting on vacation out of state so that, therefore, he has the ability to pay her suit money, but is choosing not to. Rod hunts to put meat in the freezer to eat. And Lori forgets that after separation, and certainly after the divorce, she no longer can control what Rod can and cannot do for recreation or living his life, and that he no longer has to answer to her. As established by Rod's fiancée Debbie Cole's declaration,

Ms. Cole paid for the hunting trips that Rod was able to go on, despite the fact Lori's divorce cleaned him out of money so that he otherwise would not be able to take part in any such recreational activities. He is allowed to go on living his life on his own – that is the point of divorce, after all.

13. At the January 22 hearing, Lori's counsel argued that if the court threatened to put Rod in jail, he would "find" the money or get the money from his family. But it had just been established at the January 3 supplemental proceedings brought by Lori that Rod did NOT have the present ability to pay from his own financial resources. Lori's counsel thus knew that Rod had no present ability to comply with an order to pay \$20,000 immediately, while also staying current with the \$6,000 monthly maintenance. Nevertheless, Lori's counsel pressed the contempt to get the \$20,000 that he knew from the supplemental proceedings simply was not there. At the hearing, Lori's counsel thus was arguing that putting Rod in jail would punish Rod for being unable to pay and thereby coerce Rod's family to make the payment that Rod cannot.

14. The trial court, Commissioner Tutsch, who has heard all the post-trial hearings since August, 2017, commented that Rod had the ability to pay based on "Judge McCarthy's decision." That decision was entered in February, 2017, and did not involve payment of suit money, only maintenance. Judge McCarthy's February, 2017, ruling was predicated on his letter ruling of November, 2016, which was adopted as findings in the final orders, and any comments on Rod's ability to pay

went to maintenance of \$6,000 per month and not to his present circumstances.

15. It appeared to me at the hearing that the Commissioner used an incorrect legal standard – Rod’s apparent ability to pay in February 2017 before he paid arrearages and maintenance for the past year, instead of Rod’s actual present ability to pay at the time of the hearing, January, 2018. When the correct standard is applied, there is insufficient evidence to support any finding of Rod’s present ability to pay the required amount. There also is insufficient evidence to support the erroneous finding stated in the order, that Rod has the “present ability to comply” with the order, *i.e.*, by obtaining money from family members, who may or may not want to loan him substantial money for his personal debts that cannot be collateralized with the assets he was left.

I declare under penalty of perjury of the law of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed this 30<sup>th</sup> day of January, 2018, at PROSSER, Washington.

  
JOANNE G COMINS RICK

DECLARATION OF JOANNE G. COMINS RICK IN SUPPORT OF  
APPELLANT’S EMERGENCY MOTION FOR STAY OF JANUARY  
22 ORDERS – 7

\\AN064-0001 2018-01-30.JGCR.Dec.Stay

**CARNEY BADLEY SPELLMAN**

**April 17, 2019 - 4:04 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35839-9  
**Appellate Court Case Title:** In re the Marriage of: Lori Van de Graaf & Rod D. Van de Graaf  
**Superior Court Case Number:** 11-3-00982-6

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