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No. 36283-3-III

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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  
Honorable  
(Incarceration Orders NOA Filed 8/17/18)

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**BRIEF OF APPELLANT ROD D. VAN DE GRAAF - Incarceration  
Order**

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## I. INTRODUCTION

Under Washington statutes and the constitution, civil confinement to jail is limited to coerce behavior that was ordered by the Court which a party has the ability to comply with, but willfully refuses to do, such as refusing to pay court-ordered payments. But Washington law has been steady in adhering to the model adopted with this Country's founding that we do not have debtor's prisons. No person is to go to jail for failure to pay when they do not have the ability to pay. Thus the Constitutional Convention adopted Const., Art. 1, sec. 17 in 1889, ratified by the People, which states: "There shall be no imprisonment for debt, except for absconding debtors."

Soon thereafter the Supreme Court applied that principle in the context of a divorce case, *Holcomb v. Holcomb*, 53 Wash. 611, 612-13, 102 P. 653 (1909). The Court held that an ex-spouse and appellant cannot be held in contempt for failure to pay amounts ordered by the trial court where the evidence shows he did not have the present ability to pay. The fact that his legal bills had previously been paid by his relatives did not subject him to contempt or jail when they stopped paying. In *Holcomb*, an ex-spouse had been able

to meet prior court obligations due to payments made on his behalf by his mother and brother. However, when they stopped making payments for him, the trial court held the ex-husband in contempt for “his” failure to pay. The Supreme Court *reversed* the finding of contempt, holding that a person cannot be held in contempt when the person does not have the ability to comply with the court’s order. *Id.* The Court also vacated the order for imprisonment, again because the alleged contemnor was unable to comply with the order.

This appeal is a simple and basic case that is controlled by the record and by *Holcomb*. Rod’s case cannot be distinguished from *Holcomb*. The record simply does not contain substantial evidence to support a finding of Rod’s present ability to pay and, thus, cannot sustain a conclusion of his willful failure to follow the court’s order.

This appeal is a good reminder for busy trial courts and practitioners that, however much they want to get the money a court orders be paid to their client by another party, the legal requisites must be met, including proof of the obligor’s present ability to pay, and that third parties’ assets cannot be used in determining that ability to pay. It should also be used to remind that “collection” tactics via contempt may not be used to harass or punish.

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

### **A. Assignment of Error**

1. The trial court erred in ordering Rod to jail for an alleged contempt where he did not have the ability to pay the amount ordered.

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

1. Must the incarceration order that is based on Appellant's alleged willful refusal to pay \$20,000 of suit money to his ex-wife be vacated because it cannot be deemed willful where Appellant did not have the money to make the payment and Washington does not permit incarceration for debt?
2. Must the trial court's determination Appellant had the present ability to pay and willfully refused to pay as ordered be vacated because it is not supported by the evidence before the Court of Appellant's then-current circumstances, which only supported a finding he did not have the present ability to pay?
3. Must the incarceration order be vacated as an impermissible penal order in this civil proceeding?

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

#### A. Background Facts

The background of the dissolution property division, and maintenance issues which are on appeal are detailed in the Merits OB and RB, and summarized in the Contempt OB, pp. 3-8. The critical part of the facts are stated therein – that Rod did not have the present ability to pay the \$20,000 ordered by the court due to the property award, maintenance, decreased income from a depressed cattle market, and the fact the property division was explicitly premised on the concept that Rod “soon be a very wealthy man” in receipt of a large portion of his parents’ accumulated ranch wealth, as Judge McCarthy put it in his letter decision of November, 2016, and which the trial court commissioner later relied on in requiring the suit money, then finding contempt.

The Contempt OB also summarizes Respondent Lori Van de Graaf’s continued full court press to get the judgment and the suit

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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 “Contempt Orders Appeal”, No. 35839-9-III, are referred to as “Contempt CP \_\_\_\_.” Any references to the opening brief in that appeal are designated as “Contempt OB” \_\_\_\_.

money through supplemental proceedings and repeated motions to have Rod thrown in jail, even when the issue of enforcement of contempt was temporarily stayed by the appellate courts. *See, e.g.*, Contempt OB at 11; CP 75-76 (6/11/18 Order for Incarceration obtained notwithstanding the stay issue by the Supreme Court).

Once Rod's efforts to avoid jail had run their course, he again presented the evidence to the trial court with which it was familiar since it had presided over his supplemental proceedings in January, 2018 (*see* Merits Sealed CP 1970-2066), and which previously had been filed (e.g., CP 4-6 (3/19/18 Dec. of Rod), CP 17-27 (3/19/18 Rick Dec.), which showed he had no assets with which to pay the \$20,000 ordered.

When that was to no avail, Rod attempted to report to the Yakima County Jail to serve his time, but the record reflects that the orders prepared by Lori's counsel and entered by the trial court were defective. As a result, the jail would not accept Rod and a bench warrant was issued, which had to be quashed after *Rod's* counsel took the time and effort to obtain proper orders so he could serve the time and not have additional orders entered against him as a result of Lori's counsel's defective orders. *See* RP 92-97 (Rod's 7/31/18

Dec.); 98-104 (Rick 7/31/18 Dec.); CP 106-110 (Rod's 2<sup>nd</sup> 7/31/18 Dec.); CP 112-113 (Order for incarceration prepared by Rod's counsel); CP 114 (Order to jail dated 8/8/18); and CP 115 (Order quashing bench warrant for contempt dated 8/13/18).

#### 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”).

**B. The Contempt and Jail Order Must Be Vacated Because It Is Not Supported BY Substantial Evidence That Rod Had The Present Ability To Pay the \$20,000 Ordered.**

As with the Contempt Appeal, Rod respectfully submits that the trial court used the wrong legal standard and the facts did not meet the correct legal standard, resulting in an abuse of discretion. The trial court disregarded the current evidence before it of Rod’s present, personal ability to pay, *i.e.*, that he did *not* have such an ability to pay, relying instead on the February 2017 and November, 2016 orders of Judge McCarthy as to maintenance and on the fact Rod could not pay his own appeal costs but they were being paid by

his family members. It consequently 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.

As noted in the Contempt Appeal, this amounted to merging Rod’s financial capacity with his parents, effectively expanding the jurisdiction of the dissolution court beyond the marital parties to include the parents of one of the parties though not those of the other.

Whatever a trial court may think it does in terms of “doing justice” while sitting in equity, dissolutions are statutory proceedings in which the court has limited jurisdiction; it has authority over *only* the marital couple and *their* property, and it may not directly or indirectly assert authority over the persons or properties of third parties. *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951); *In re Marriage of Soriano*, 44 Wn. App. 420, 421-22, 722 P.2d 132 (1986); *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002).

Finally, review of the chronology of the contempt proceedings and the Lori’s “Keystone Cops” routine of subjecting

Rod to jail in July-August of 2018, when viewed against the backdrop of the facts of the case with the amounts of money that Lori actually had at her disposal from the property division and the payments from Rod in 2017 when she was “rent free” post-divorce in the Gap Road home, demonstrates plainly that the contempt efforts were intended to be punitive. Nothing more, nothing less.

As the Supreme Court reminded the Bench and Bar 30 years ago, “civil and criminal contempt sanctions employ different procedures and are applied for fundamentally different purposes.” *King v. Department of Social and Health Services*, 110 Wash.2d 793, 800, 756 P.2d 1303 (1988). The contempt and incarceration orders proffered by Lori’s counsel from the outset were modeled on punishment. But it is basic that the courts “may not impose a criminal contempt sanction unless the contemnor has been afforded those due process rights extended to other criminal defendants,” *id.*, which was not done. Here, the process was being abused. The trial court erred in finding contempt and ordering incarceration when the actual evidence in the record did not support it. This case should be reversed in such a way that reminds the courts and the Bar of the

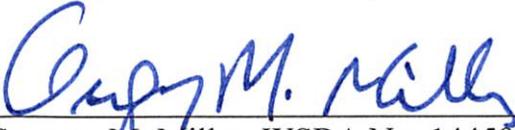
proper uses of contempt, the legal requisites, and that the appellate courts will insure they are followed.

**V. CONCLUSION**

Appellant Rod Van de Graaf respectfully requests the Court to vacate the order of incarceration because it was wrongfully issued without the proper evidentiary basis.

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



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