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(consolidated)

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 ELISABETH M. TUTSCH

BRIEF OF RESPONDENT RE:
JANUARY 2018 SANCTIONS ORDER AND
JULY 2018 INCARCERATION ORDERS

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I. INTRODUCTION

Husband challenges the January 2018 order threatening incarceration for his violation of the August 2017 order requiring him to pay \$30,000 in suit money to the wife and the July 2018 orders ultimately incarcerating him when he continued to refuse to comply with the suit money order.¹ Husband's challenge to these orders is premised entirely on his claim that he did not have the "present ability" to comply with the suit money order that is currently being reviewed by this Court in Cause no. 351335.

This Court should affirm and award the wife fees under RCW 26.09.140, and pursuant to RCW 7.21.030(3), for having to defend on appeal the trial court's orders, which arise from a December 2017 contempt order that husband did not appeal. The trial court, which is in the best position to make the determination, did not find the husband's pleas of poverty credible, and there was substantial evidence from which the trial court could find that the husband indeed had the present ability to comply with the suit money order, but refused to do so. Further, both this Court and the Supreme Court

¹ Appellant filed two opening briefs even though this Court consolidated his appeals of these orders under Cause No. 352927 in the October 24, 2018 Commissioner's Ruling filed in Cause no. 351335. Respondent files this single response brief pursuant to RAP 10.1(g).

have already rejected husband's fact-based challenge to the trial court's discretionary decision in motions brought by the husband in the underlying dissolution appeal, and this Court cannot provide any relief to the husband in this appeal.

II. RESTATEMENT OF FACTS

A. **In March 2017, the husband appealed a property award that left him with most of the parties' \$5.5 million estate.**

On February 17, 2017, each party was awarded half of the \$5.5 million marital estate when their 26-year marriage was dissolved after a 7-day trial to Yakima County Superior Court Judge Michael McCarthy. (Cause no. 351335 CP 759, 763, 770-75, 786)² Among the assets awarded appellant Rod Van de Graaf was a one-third interest, valued at \$2 million, in Midvale Cattle, a business owned by him outright with his siblings, and the \$1.42 million family home, owned free and clear. (Cause no. 351335 CP 770-71, 784, 786) Rod was also awarded his one-third interest in separate real property that he owns outright through an LLC with his siblings, valued at \$300,000. (Cause no. 351335 CP 771) The trial court did not include in the value

² As directed in this Court's March 18, 2019 letter ruling, the Clerk's Papers and Verbatim Report of Proceedings are cited by "case number and the appropriate CP or VRP number."

of the marital estate Rod’s “inchoate” interest in Van de Graaf Ranches, another business owned by Rod’s family that the trial court found he would “soon be the co-owner of.” (Cause no. 351335 CP 785, 787)

To equalize the property division, the trial court awarded respondent Lori Van de Graaf a \$1,171,200 judgment. (Cause no. 351335 CP 763, 772-73, 786-87) The trial court also awarded Lori lifetime monthly maintenance of \$6,000, based in part on Rod’s monthly historical income of \$14,441. (Cause no. 351335 CP 765-66, 788) The trial court found as a matter of fact, based on substantial evidence, that “[c]onservatively, [his] expected income in the near term will be at least \$200,000 per annum, which translates to almost \$17000 per month.” (Cause no. 351335 CP 788) In awarding Lori \$58,675 in attorney fees – only a portion of what she actually incurred – the trial court faulted Rod’s “scorched earth” litigation tactics.³ (Cause no. 351335 RP 1033-34; Cause no. 351335 CP 967)

³ As directed by this Court in an order entered on March 18, 2019 in the dissolution appeal, Cause No. 351335, the trial court recently entered findings more thoroughly documenting and confirming its award of fees based on findings of Rod’s intransigence. See April 30, 2019 letter filed in Cause no. 351335, attaching findings.

Rod's appeal of the decree ("the dissolution appeal") is being considered by this Court under Cause No. 351335. Oral argument in the dissolution appeal was heard March 12, 2019.

B. In August 2017, the trial court awarded the wife partial suit money of \$30,000, payable by October 2017, after the husband failed to comply with any aspect of the decree until found in contempt multiple times.

On April 14, 2017, Judge McCarthy, who had presided over the dissolution trial, issued a bench warrant for Rod's arrest for his repeated "willful failure to pay spousal maintenance," and set bail at \$15,000. (Cause no. 351335 CP 974-75) Three days later, and despite repeated (and repetitive) claims that he did not have the ability to pay, Rod paid the arrears on his maintenance obligation. (Cause no. 351335 CP 969-70)

When Rod was again found in contempt for failing to pay maintenance on May 31, 2017, Yakima County Superior Court Commissioner Elizabeth Tutsch ("the trial court") ordered "5 days jail suspended on condition that Rod pays \$6000 owed for June 2017 by June 27, 2017." (Cause no. 351335 CP 1559) Rod once again came into (temporary) compliance with his maintenance obligation. (Cause no.

351335 CP 1628-29) Rod appealed these contempt orders, under Cause nos. 35927 and 354997.⁴

Rod neither stayed nor paid the equalizing judgment or trial court fee award, depriving Lori of property she could have used to pay attorney fees on appeal. Lori therefore asked the trial court for an award of \$65,000 in suit money to defend the appeal, relying on *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360-61, 333 P.2d 936 (1959).⁵ (Cause no. 351335 CP 1602-05) On August 28, 2017, the trial court granted Lori's motion in part, awarding her \$30,000 in suit money and ordering Rod to pay the award by October 27, 2017. (Cause no. 351335 CP 1747)(“August 2017 suit money order”)

Review of this August 2017 suit money order is also being considered as part of the dissolution appeal under Cause no. 351335.

⁴ In the October 24, 2018 Commissioner's Ruling, review of these orders was “deconsolidated” from the dissolution appeal, and consolidated with review of the January 2018 sanctions order and July 2018 incarceration orders. However, since the merits of these orders were already addressed in the briefs filed in the dissolution appeal, they are not repeated here. (See Cause no. 351335 Resp. Br. Argument § D.4)

⁵ Rod on February 21, 2018 posted a \$361,240 bond to stay enforcement of both the equalizing judgment awarded to Lori in the decree and the judgment for attorney fees. (Cause no. 351335 CP 2128-30, 2196) In addition to the bond, Rod was allowed to use the family residence awarded to him as alternate security to stay enforcement of the judgments. (Cause no. 351335 CP 2128-30)

C. In December 2017, after the husband failed to pay the suit money award as ordered, the trial court found he was capable of complying with the suit money order and found him in contempt.

On November 15, 2017, Lori filed a contempt motion for Rod's failure to comply with the August 2017 suit money order by October 27, 2017, as previously ordered. (Cause no. 351335 CP 1852-56) Rod claimed that he lacked the financial resources to pay the suit money award. (Cause no. 351335 CP 1877) Despite historically receiving over \$14,000 per month from the business he owns with his siblings, Rod claimed he was now receiving only \$7,800 as his partnership draw each month. (Cause no. 351335 CP 1877) However, Rod presented no financial documentation of his income, assets, or expenses to support his claim that he lacked the ability to comply with the suit money order.

Based on Rod's ability to "fund[] all other legal and lifestyle demands without issue," Lori refuted Rod's claim that he lacked the ability to pay the suit money award:

Rod states that he has no money, but he has proven capable of funding all other legal and lifestyle demands without issue, with the exception of when the financial obligation involves me. As an example, in the middle of his constant lack of money argument, a few months ago he went on a big game hunting trip to Africa. There aren't any impoverished individuals that I am aware of that are going on African safaris.

(Cause no. 351335 CP 2125)

On December 7, 2017, the trial court found Rod in contempt for his “willful failure” to comply with the August 2017 suit money order, and assessed terms of \$1,000. (Cause no. 351335 CP 1881) The trial court ordered that Rod could purge his contempt by paying the “\$30,000 suit money within 15 days, to wit by the close of business on December 22, 2017.” (Cause no. 351335 CP 1881-82)

Rod did not appeal this December 7, 2017 contempt order.

D. In January 2018, the trial court again found the husband capable of complying with the suit money order, and threatened him with incarceration unless he complied.

Anticipating that Rod would not pay the total amount of suit money awarded to her by December 22, 2017, as ordered, Lori filed a motion for additional sanctions, including incarceration, on December 20, 2017. (Cause no. 351335 CP 1885) And as expected, Rod did not comply with the August 2017 suit money order or the December 2017 contempt order, paying only \$10,000 of the \$30,000 ordered. The \$10,000 payment was made with a check drawn on an account in the name of Rod’s sister. (Cause no. 351335 CP 1955)

In her motion, Lori asserted that even if the business owned by Rod and his siblings had reduced the amount of his monthly partnership draw, Rod still had the ability to comply with the August

2017 suit money order, noting that the business paid for nearly all of Rod's expenses and that in addition to the house that had been awarded to him free and clear (which remained unoccupied), he was living in another house rent free, and that in addition to his partnership draws, Rod receives cash rental payments for properties owned by the business. (Cause no. 351335 CP 1908)

In previously finding Rod in contempt on December 7, 2017, the trial court stated "I can't find that he doesn't have the ability to pay it on the record that's before me now." (Cause no. 351335 RP 1138) The "record" before the trial court did not improve by the time it considered Lori's motion for additional sanctions on January 22, 2018. Rod did not file a personal declaration explaining his reason for not paying the full amount of the suit money award by December 22, 2017, as previously ordered. Rod once again did not provide any documentation of his income, assets, or expenses to support his claim that he lacked the ability to comply with the suit money order. Instead, Rod's trial counsel submitted a declaration reiterating the same unsupported claims made in Rod's previous unsupported declaration. (See Cause no. 351335 CP 1917)

On January 22, 2018, the trial court found Rod "in continued violation of the court's orders regarding payment of suit money,

currently owing \$20,000 [and] the court finds that Mr. Van de Graaf had the ability to comply with those orders and continues to have such ability. His violations are willful.” (Cause no. 351335 CP 1942-43) (“January 2018 sanctions order”) The trial court imposed a suspended 5-day sentence “on condition that Mr. Van de Graaf pay the remaining balance of \$20,000 to Mr. Hazel by January 31, 2018. If not, a bench warrant shall issue for his arrest on February 5, 2018.” (Cause no. 351335 CP 1944-45)

E. The husband appealed the January 2018 sanctions order and began a six-month battle in the appellate courts to avoid being sanctioned for his noncompliance with the suit money order. The appellate courts also rejected his pleas of poverty.

Rather than comply with the August 2017 suit money order by January 31, 2018, Rod appealed the January 2018 sanctions order, under Cause no. 358399 (Cause no. 351335 CP 1940), and mounted a months-long campaign in the appellate courts to avoid being sanctioned for his noncompliance with the August 2017 suit money award. This offensive only concluded more than six months later, when on July 11, 2018, a Department of the Supreme Court denied Rod’s motion to modify Supreme Court Commissioner Michael Johnston’s ruling denying discretionary review of this Court’s ruling

denying a stay of the January 2018 sanctions orders.⁶ (See Cause no. 362825 CP 172-73, 209)

In his ruling denying discretionary review, Commissioner Johnston noted that the record supported the trial court's finding that Rod had the ability to pay the partial suit money award. (Cause no. 362825 CP 159: "The record includes Mr. Van de Graaf's bank records and other financial information, which appear to be sufficient to support that finding.") Commissioner Johnston also noted that, despite Rod's assertions that his income has dropped and he is unable to obtain further loans, "the trial court disbelieved those assertions, and clearly that court was in a better position to make such factual determinations than this court in the context of this emergency motion." (Cause no. 362825 CP 159)

Commissioner Johnston's ruling was consistent with the ruling of this Court's Commissioner Monica Wasson denying Rod's emergency motion for stay of the January 2018 sanctions order: "the superior court, who judges credibility, had reason to believe that he had the funds to pay the \$20,000 that remains due and to disbelieve

⁶ A more complete history of this motions practice is set out in respondent's August 29, 2018 motion to dismiss filed in Cause no. 351335. See also Cause no. 362825 Resp. Br. Restatement of Facts §§ D, E.

his counsel's assertions to the contrary." (Cause no. 362825 CP 194) Commissioner Wasson also later rejected Rod's "excuse" for failing to pay suit money, that "his parents have paid for the \$350,000 supersedeas bond and his appellate attorney fees in the amount of \$230,000, but they won't pay the 'suit money' he has been ordered to pay." (Cause no. 362825 CP 212) Commissioner Wasson noted that Rod's refusal to pay the "remaining suit money because he states he has no money to do so" was not believed by the trial court. (Cause no. 362825 CP 212)

F. In July 2018, after husband's efforts to stay enforcement of the sanctions order failed, the trial court incarcerated him for 5 days.

By June 2018, when he finally exhausted his unsuccessful "suit money" motions practice in the appellate courts, Rod had paid his appellate counsel over \$230,000. (Cause no. 362825 CP 212) Of that amount, approximately \$109,000 had been incurred and paid before he filed his opening brief on January 2, 2018, and the start of his motions practice on January 31, 2018. (See Cause no. 362825 CP 165-68) Thereafter, while pleading poverty as the reason he could not pay Lori \$20,000 in suit money, in the six-month period between entry of the sanctions order in January 2018 and June 2018, Rod paid over \$121,000 to his appellate counsel.

Rod's costly litigation strategy in the appellate courts, while ultimately not successful, did achieve a temporary stay of the January 2018 sanctions order. The parties once again appeared before the trial court (for the sixth and final time on the issue of the August 2017 suit money order), on July 18, 2018. By then, Rod had filed four additional notices of appeal since his initial notice challenging the orders dissolving the parties' marriage; he filed two more notices of appeal a month later. (*See* Cause no. 351335 CP 973, 1651, 1940; Cause no. 362825 CP 41, 117)⁷

Lori asked the trial court to finally incarcerate Rod, in the hopes of compelling him to comply with the suit money order (just as earlier threats of jail had caused him to comply with his maintenance obligation, after similar pleas of poverty). (CP 1-2) Lori noted that, based on the funds Rod had received between March 2017 and June 2018 from his family and business, Rod had a cash surplus of over \$140,000 after paying maintenance, other court-ordered obligations, and his own attorney fees. (Cause no. 362825 CP 188-89, 203)

⁷ Rod also filed a notice of appeal of a CR 60 order correcting a clerical error under Cause no. 361225.

In deciding whether to finally incarcerate Rod for his continued contempt of the partial suit money order, the trial court considered Rod's new declaration, repeating his claims he did not have the ability to pay the award. (See CP 5-6) The trial court also considered Lori's declaration disputing Rod's claims that the "cattle market [] crashed," resulting in his alleged reduced draws from the business owned by him and his siblings (CP 31), and noting that, (while not denying he has this source of income) Rod has never accounted for rent he receives in cash in addition to his draws from the business. (CP 30) Based on the evidence before it, the trial court once again found Rod's claims of inability to comply with the suit money order "unpersuasive," and found Rod "does have the ability to pay, and that he is willfully refusing to comply with a court order." (CP 121-22)

In a July 18, 2018 order, the trial court ordered Rod to provide proof of payment of the August 2017 suit money order by July 26, 2018. (CP 122) When Rod did not pay the full suit money award by July 26, 2018, the trial court further found: "I don't find it credible that Mr. Van de Graaf doesn't have the money to pay. I know that this case has been litigated extensively, and Mr. Van de Graaf has found the money to pay for appellate attorneys and go up and down the court of appeals." (Cause no. 362825 RP 18) Therefore, as ordered on July 18, 2018, Rod

was required to report to jail on July 27, 2018, where he was to remain for five days (or less if he complied with the suit money order). (CP 122, 123) The trial court’s July 26 order included an additional finding that Rod “has the present ability to pay the \$20,000 suit money as he has resources to pay attorneys for this appeal and before this Court.” (CP 123)

Rod served his time in jail and appealed the July 17, 2018 order and the July 26, 2018 order (collectively, “July 2018 incarceration orders”), under Cause no 362833 (CP 117), which was consolidated with his appeal of the January 2018 sanctions order under Cause no. 358399. (Cause no. 362825 CP 213) This response brief is being filed in this consolidated appeal.

III. RESPONSE ARGUMENT

A. This Court should dismiss this appeal as moot, because this Court has already decided the merits of the issues raised in this appeal, and because it cannot provide the husband any effective relief.

This case is technically moot because the appellant has already served the sentence imposed for contempt. As a consequence, effective relief cannot be afforded to him. *Dependency of A.K.*, 162 Wn.2d 632, 643, ¶ 11, 174 P.3d 11 (2007) (“This case is technically moot, petitioners have each served the sentence imposed

for contempt.”); RAP 10.4(d) (“a party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits.”). Further, there are no grounds to warrant this Court’s exercise of discretion to reach a moot issue because this appeal raises no issues that are of “continuing and substantial public interest.” *See Dependency of A.K.*, 162 Wn.2d at 643, ¶ 12. Instead, the questions raised in this appeal are wholly private and fact-based in nature, governed entirely by the trial court’s assessment of the credibility of the husband and his claims that he lacked the present ability to comply with the August 2017 suit money order, thus depriving the wife of funds from which to defend an appeal prosecuted by counsel who were at the same time being fully paid for their services.

This Court should also dismiss the appeal because both this Court and the Supreme Court have already rejected the issues raised in this appeal, including whether substantial evidence supports the trial court’s findings that the husband had the ability to comply with the suit money order, whether the trial court could consider the husband’s ability to borrow funds to comply with the suit money order, and whether incarceration is an appropriate sanction for his contempt. (Cause no. 362825 CP 157-61, 190-96) In each instance, this Court and the Supreme Court answered affirmatively, and this

Court need not address these same issues in this appeal. This Court similarly declined to address issues resolved during appellate motions practice in *Wixom v. Wixom*, 190 Wn. App. 719, 360 P.3d 960 (2015), stating that appellant “Mr. Caruso reargues the attorney fees/sanctions are improper because the trial judge should have been recused for conflict of interest. This argument has been decided by our Supreme Court in answer to Mr. Caruso’s motion for discretionary review and will not be addressed further.” 190 Wn. App. at 725, ¶ 11, *rev. denied*, 185 Wn.2d 1028 (2016).

B. The trial court did not abuse its discretion in imposing sanctions against the husband for failing to comply with the suit money order after finding him in contempt because it did not find credible his claims that he lacked the ability to comply with the order.

If this Court considers the husband’s appeal on the merits, it should affirm. “Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal.” *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (quoted source omitted). The party resisting a finding of contempt has “both the burden of production and the burden of persuasion regarding his claimed inability to comply with the court’s order.” *Moreman*, 126

Wn.2d at 40. He must “offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible.” *Moreman*, 126 Wn.2d at 40-41. “Where competing documentary evidence had to be weighed and conflicts resolved,” credibility determinations should be made by the trial court, 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) (quoted source omitted); *Marriage of Akon*, 160 Wn. App. 48, 57, ¶ 26, 248 P.3d 94 (2011) (“In evaluating the persuasiveness of the evidence and the credibility of witnesses, we must defer to the trier of fact”).

Here, the trial court did not abuse its discretion in finding the husband in contempt and imposing sanctions, including incarceration, when he failed to meet his burden of providing credible evidence that he could not comply with the August 2017 suit money order. In challenging the trial court’s January 2018 sanctions order and July 2018 incarceration orders in this appeal, the husband relies on unsupported, self-serving statements, made by him and his trial counsel, that the trial court disregarded as not credible in finding that the husband “does have the ability to pay [the suit money

award], and that he is willfully refusing to comply with a court order.” (CP 121, 123; Cause no. 351335 CP 1942-43; *see also* Cause no. 362825 CP 159, 194, 212) This Court should defer to this determination, because in deciding whether a party has the ability to comply with a court order, 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.” *Hubbard v. Hubbard*, 130 Wash. 593, 594, 228 P. 692 (1924); *Rideout*, 150 Wn.2d at 351.

In *Hubbard*, for instance, the Supreme Court affirmed an order of contempt when the husband presented only “his own testimony” to support his claim that he was unable to comply with the decree. 130 Wash. 593. Because the Supreme Court recognized that the husband “is an interested party and his testimony must be weighed in light of that fact,” the Court concluded, “we cannot say that the trial court was not justified in holding that appellant could have raised that sum by the sale or pledging of [property]; or that he might not have obtained further advances to that extent upon his fruit crop.” *Hubbard*, 130 Wash. at 594.

Here, the husband bore the burden of offering “evidence as to his inability to comply and the evidence must be of a kind the court finds credible.” *Moreman*, 126 Wn.2d at 40-41. The husband never

presented any detailed, never mind credible, information regarding his finances, and the trial court properly found that he had not met his burden to avoid contempt. As in *Phillips v. Phillips*, 165 Wash. 616, 619-20, 6 P.2d 61 (1931), where “significantly, there [was] 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” that purportedly left the husband unable to comply with an order, this Court should affirm the trial court’s January 2018 sanctions order and July 2018 incarceration orders.

The husband here had “a duty to do something other than ignore the trial court's orders.” *Marriage of Mathews*, 70 Wn. App. 116, 126, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993). But “ignore the trial court’s orders” is all the husband has done. The trial court did not abuse its discretion in finding the husband in contempt, sanctioning him, and ultimately incarcerating him after giving him multiple opportunities to comply with the suit money order.

C. Substantial evidence supports the trial court’s finding that the husband had the present ability to comply with the suit money order.

1. The trial court’s orders were based on “current evidence” of the husband’s ability to comply with the suit money order.

To avoid the trial court’s adverse credibility findings, the husband argues that the trial court erred when entering the January 2018 sanctions order and July 2018 incarceration orders because the trial court’s findings that he had the “present ability” to comply with the August 2017 suit money order were purportedly “not based on current evidence.” (Sanctions App. Br. 15, 19; Incarceration App. Br. 7)⁸ In particular, the husband argues that in sanctioning him in its January 2018 order, the trial court relied solely on the February 2017 findings regarding the husband’s financial ability, made by the dissolution judge at the conclusion of trial. (Sanctions App. Br. 19) While the trial court did mention the February 2017 findings in making its ruling, it also stated that it considered “*all* the evidence that has been filed in the case” and based on that evidence, the trial

⁸ Citations to “Sanctions App. Br.” are to the brief filed by the husband under Cause no. 358399. Citations to the “Incarceration App. Br.” are to the brief filed by the husband under Cause no. 362833.

court could not “accept that he is unable to pay those orders.” (Cause no. 351335 RP 1176, emphasis added)

Among the “current evidence” the trial court considered in finding the husband’s claims that he was unable to comply with the suit money order not credible was his trial counsel’s January 9, 2018 declaration stating that the husband “does not have, and has not been able to borrow, the additional \$20,000 and therefore, is not capable of complying with the order.” (Cause no. 351335 CP 1917) The trial court considered that declaration against evidence, disclosed during supplemental proceedings on January 3, 2018, that between November 17, 2017, when the wife filed her motion for contempt, and December 22, 2017, when the husband was ordered to pay the remainder of the suit money award, the husband had in fact “borrowed” at least \$75,500 from his parents:

| | |
|--------------------|-------------|
| November 27, 2017: | \$15,000.00 |
| December 1, 2017: | \$ 6,000.00 |
| December 21, 2017: | \$25,000.00 |
| December 22, 2017: | \$29,500.00 |

(Cause no. 362825 CP 203; Cause no. 351335 CP 1966-69, 2037)

Based on this “current evidence,” coupled with the February 2017 findings in which Judge McCarthy found a history of “loans” by the

husband's parents that were in fact "gifts" (Cause no. 351335 CP 784),⁹ the trial court properly rejected the claims by the husband and his counsel that he lacked the ability to comply with the suit money order as not credible, causing it to not "accept that he is unable to pay those orders." (Cause no. 351335 RP 1176)

Prior to entering its July 2018 incarceration orders, the trial court once again considered "current evidence" before finding that the husband's claims that he lacked the ability to pay the suit money order not credible. For instance, the trial court considered that, even if the husband's partnership draws from his business were reduced as he claimed, he had enjoyed a total inflow of cash of nearly \$362,700 between February 2017 and June 2018. (Cause no. 362825 CP 188-89, 203) Even after deducting payments to his attorneys, and those court-ordered maintenance obligations that the husband

⁹ Significantly, the husband has not in the dissolution appeal challenged the trial court's determination that previous "loans," which had financed the transfer of the Midvale business from Rod's parents to Rod and his siblings, were a "chimera" "masking a gift." (Cause no. 351335 CP 784) The trial court did not abuse its discretion in considering this family history of "gift loans" in finding that Rod had the present ability to comply with the suit money order. As Commissioner Wasson of this Court recognized, the husband's use of "borrowed" funds to defend against, but not to pay, the suit money award "leads to an inference that he does not want to fund Ms. Van de Graaf's response to his appeal, despite the superior court's order." (Cause no. 362825 CP 194)

actually did pay through June 2018, the husband had cash left of over \$140,000. (Cause no. 362825 188-89, CP 203) Based on this “current evidence,” the trial court found “I don’t find it credible that Mr. Van de Graaf doesn’t have the money to pay.” (Cause no. 362825 RP 18)

The husband thus misplaces his reliance on *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 113 P.3d 1041 (2005), *rev. denied*, 156 Wn.2d 1032 (2006) to claim that the trial court abused its discretion in finding him in contempt. (Sanctions App. Br. 15, 17-18) There, Division One reversed a contempt order because the trial court’s finding that defendants had the ability to comply was based on funds that had been available to defendants two years earlier. Division One concluded that this finding was insufficient to support its contempt order because the trial court could not have found that defendants had the “present ability to pay” when the funds that had been available to defendants had indisputably been transferred away two years earlier. *Britannia Holdings, Ltd.*, 127 Wn. App. at 934, ¶ 18. Nevertheless, Division One rejected defendants’ contention that “the court must identify a specific fund from which the purge amount must be paid.” *Britannia Holdings, Ltd.*, 127 Wn. App. at 934, ¶ 19. Instead, Division One concluded that the court need only find that

an alleged contemnor has “control of sufficient assets.” *Britannia Holdings, Ltd.*, 127 Wn. App. at 934, ¶ 19.

In this case, there was substantial evidence that the husband had “control of sufficient assets” to support the trial court’s findings in its January 2018 sanctions order and in its July 2018 incarceration orders that the husband was presently able to comply with the suit money order. The husband argues that he did not have “control of sufficient assets” because he was unable to borrow funds to pay the suit money order “because his family refused to fund him loans for that purpose” (Sanctions App. Br. 20), and any “funding depends on a third party over whom the alleged contemnor has no control.” (Sanctions App. Br. 16) But no family member submitted a declaration stating for what purposes they would (or would not) allow the husband to use funds that they have provided, or could provide, to him.

In any event, there was sufficient evidence before the trial court in both January 2018 and July 2018 to support the trial court’s finding that the husband had the present ability to comply with the suit money order without borrowing additional funds. For instance, there was evidence that the husband had *already* borrowed nearly \$232,000 by December 22, 2017 – the date he had been ordered to

pay the suit money award after first being found in contempt (Cause no. 362825 CP 203; Cause no. 351335 CP 1959-69), and the husband had never provided an accounting for those funds he had received.¹⁰ (CP 30) While the husband provided copies of his “personal” bank statements in supplemental proceedings in January 2018 (Cause no. 351335 CP 1980, 2039-62), he did not provide any statements for accounts in the name of the business he owns with his siblings, which could hold funds available to him including borrowed funds, that could be used to comply with the suit money order. The husband did not provide any bank statements at all in July 2018, prior to the incarceration orders being entered.

Based on the evidence that was before it, and the presumption that “one is capable of performing those actions required by the court,” *Moreman*, 126 Wn.2d at 40, the trial court could properly conclude that in January 2018 and July 2018, the husband still had

¹⁰ Although the husband claimed that he used some of these funds to pay his attorney, proof of how much he paid his appellate attorney, and when, was not disclosed until October 2018, after significant resistance on the part of his appellate counsel (including being held in contempt) to providing that information. That information is now before this Court in Cause no. 351335 in respondent’s reply in support of her August 29, 2018 motion to dismiss (Oct. 15, 2018 Reply, Exhibit A), which has been set over for consideration by the panel deciding the dissolution appeal. (Cause no. 36825 CP 213)

“control of sufficient assets” from both borrowed funds and the partnership draws from his business to pay the remaining \$20,000 owed under the August 2017 suit money order. (See CP 121, 123; Cause no. 351335 CP 1942-43)

2. A trial court does not abuse its discretion in considering whether a party has the ability to borrow funds with which to comply with an order requiring payment.

A trial court does not abuse its discretion in considering whether a party has the ability to borrow funds with which to comply with an order requiring payment. In *Hubbard*, for instance, the Supreme Court affirmed an order finding the husband in contempt when he “says he applied to his bank for a loan, and his application was refused, [he] shows no other attempt to borrow the money necessary to pay” his court-ordered obligation. 130 Wash. at 593; see also 130 Wash. at 594 (noting that trial court was justified in finding husband in contempt when he could have “pledged” property or obtained “further advances” from his business). Similarly, the Supreme Court affirmed an order finding the husband in contempt when husband is “evidently able to obtain money to meet the demands of the decree” in *Croft v. Croft*, 77 Wash. 620, 624, 138 P. 6 (1914) (quoted source omitted); see, e.g., *Smith v. Whatcom*

County Dist. Court, 147 Wn.2d 98, 112, 52 P.3d 485 (2002) (in determining whether a party has the ability to comply with an order, the court must consider ability to pay and “bona fide efforts to acquire resources to pay”).

In support of his argument that he could not be found in contempt based on his ability to borrow money from family members, the husband relies almost entirely on *Holcomb v. Holcomb*, 53 Wash. 611, 102 P. 653 (1909)(Sanctions App. Br. 1-2, 16-19; Incarceration App. Br. 1-2). But *Holcomb* does not “control” the trial court’s discretionary decisions. First, as just addressed, cases decided since *Holcomb* have held that the trial court can consider an alleged contemnor’s ability “to acquire resources,” including by borrowing funds, to comply with the order, prior to finding the party in contempt and sanctioning them. *See Smith*, 147 Wn.2d at 112 (2002); *Hubbard*, 130 Wash. at 593, 594 (1924); *Croft*, 77 Wash. at 624 (1914).

Second, *Holcomb* dates from a time when the Supreme Court considered factual issues in divorce cases de novo. Exercising its equitable authority the Court found “the inability of the appellant to comply with the terms of the decree was clearly shown” and “without apparent contradiction” in *Holcomb*, 53 Wash. at 613. Here, unlike

in *Holcomb*, the husband's ability to comply with the suit money order was clearly contradicted. (See Argument §§ B, C.1, *supra*)

Third, unlike in *Holcomb*, the trial court's finding that the husband had the present ability to comply with the suit money order was not based solely on third parties' payment of his attorney fees and the posting of a bond. Instead, it was based on evidence from which the trial court could find that between the funds already provided to the husband, his partnership draws from his business, rental payments he receives in cash, and the fact that the majority of his expenses are paid through the business owned by him and his siblings, the husband had the present ability to comply with the suit money order. (See Argument § C.1, *supra*)

Finally, the husband's claim that the trial court's orders are erroneous because they are premised on his ability to borrow funds is similar to an argument rejected by the California Court of Appeals in *Marriage of Dick*, 15 Cal. App. 4th 144, 18 Cal. Rptr. 2d 743 (1993). The *Dick* Court noted that "[h]usband's claim that the temporary spousal support and attorney fees awards were based on his ability to borrow is a deceptive characterization of the trial court's order based on husband's testimony that he was without the means to pay the sums ordered, and had no hidden assets. It is clear that the trial

court utterly disbelieved him, and its assessment of husband's credibility is binding on this court." 15 Cal. App. 4th at 160. The same is true here; the trial court "utterly disbelieved" the husband's claims that he could not comply with the suit money order, and this Court defers to that determination. (Argument § B, *supra*)

Because the trial court's findings that the husband had the present ability to comply with the suit money order were based on substantial ("current") evidence, this Court should affirm the trial court January 2018 sanctions order and its July 2018 incarcerations orders.

D. After finding the husband had the present ability to comply with the suit money order, it was well within its discretion to order his incarceration to compel compliance.

This Court must reject the husband's challenge to the provision of the July 2018 orders incarcerating him for his contempt because it is likewise premised entirely on his discredited claim that he did not have the present ability to comply with suit money order. (Incarceration App. Br. 7-10) The husband argues that by incarcerating him when he lacked the ability to comply with the suit money order, the trial imposed a "punitive" sanction akin to debtor's prison. (Incarceration App. Br. 1) But the trial court *did* find the

husband had the ability to pay the suit money award, and that he willfully refused to do so. (See CP 121, 123; see also Argument §§ B, C.1) Therefore, the sanction of incarceration was not punitive, but “remedial,” as its purpose was to coerce the husband “to perform an action that is yet within the person’s power to perform.” RCW 7.21.030(2)(a).

Incarceration as a sanction is remedial, not punitive, when an order, like the one here, contains a purge clause that would either prevent the party’s incarceration entirely or immediately provide for his release upon compliance with the order, and limits the time of any incarceration to a duration that does not become punitive if the order is not complied with. See *Marriage of Haugh*, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990) (contempt order directing father “to spend 10 days in jail, but suspend[ing] the sentence on condition that he comply” “clearly was coercive” because the “purpose of the sanction is to coerce compliance with a lawful court order, and a contemnor is jailed only so long as he fails to comply with such order,” citing *In re King*, 110 Wn.2d 793, 799, 756 P.2d 1303 (1988) and *State ex rel. Herron v. Browet, Inc.*, 103 Wn.2d 215, 218, 691 P.2d 571 (1984); RCW 7.21.030(2)(a).

After finding the husband in contempt because he had the present ability to comply with the suit money order, but willfully refused to do so, the trial court had authority to order the husband's incarceration to coerce the husband's compliance. RCW 7.21.030(2)(a). Incarceration was not punitive because the husband could be released immediately upon his compliance with the suit money order, and even if he did not comply with the order, the order provided for his release after five days, ensuring that the incarceration did not become merely punitive. *Haugh*, 58 Wn. App. at 6.

The trial court's July 2018 orders incarcerating the husband for five days unless he complied with the suit money order was wholly within the trial court's discretion to make, based on its findings, supported by substantial evidence, that the husband ability to comply with the suit money order, but willfully refused to do so.

E. This Court should award the wife fees under RCW 26.09.140 and RCW 7.21.030(3).

This Court should award the wife attorney fees for having to respond to this appeal, based on her need and the husband's ability to pay. RCW 26.09.140. This Court should also award attorney fees based on the utter lack of merit of this appeal, which raises the same arguments that have already been rejected at every judicial level in

this state. (*See* Cause no. 362825 Resp. Br. 27-28) This Court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). Further, “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).

An award of attorney fees to the wife in this case is wholly warranted. It can hardly be denied that based on the length of the marriage, the parties’ economic circumstances, and the property available for distribution, that the wife would be entitled to some equalizing judgment. (*See* Cause no. 351335 Resp. Br. 3-16) The husband’s decision to stay enforcement of the entire judgment – whether in concert with his family or not – rather than pay some portion of it to allow the wife some ready funds to defend his appeal of the final dissolution orders necessitated the wife’s suit money request and award. To then refuse to comply with the order requiring him to pay a portion of the suit money requested by the wife, and force her to incur unnecessary fees in the trial and appellate courts, was wholly intransigent.

This entire exercise, which wasted the resources of the trial court, this Court, and the Supreme Court, could have been avoided had the husband taken a tiny fraction of the money he was paying his appellate attorneys to plead poverty and used it instead to comply with the suit money award – a payment that, were he successful in his dissolution appeal, could have been credited against the equalizing judgment. *See Stringfellow v. Stringfellow*, 56 Wn.2d 957, 962, 350 P.2d 1003 (1960). By then appealing those orders sanctioning him for his noncompliance, the husband remains intransigent in this Court, warranting an award of attorney fees to the wife. *Mattson*, 95 Wn. App. at 606.

Finally, this Court should award attorney fees to respondent under RCW 7.21.030(3) for having to defend the January 2018 sanctions order and July 2018 incarceration orders, all of which arise from the December 2017 contempt order from which the husband did not appeal. *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 502-03, 903 P.2d 496 (1995), *rev. denied*, 129 Wn.2d 1010 (1996) (appellate court may award attorney fees incurred in defending a contempt order on appeal under RCW 7.21.030(3)).

IV. CONCLUSION

This Court should affirm the trial court's January 2018 sanctions order and July 2018 incarceration orders in their entirety, and award the wife attorney fees on appeal.

Dated this 8th day of May, 2019.

SMITH GOODFRIEND, P.S.

By: 

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WSBA No. 34515

Attorneys for Respondent

DECLARATION OF SERVICE

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

That on May 8, 2019, I arranged for service of the foregoing Brief of Respondent Re: January 2018 Sanctions Order and July 2018 Incarceration Orders, to the court and to the parties to this action as follows:

| | |
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DATED at Seattle, Washington this 8th day of May, 2019.



Sarah N. Eaton

SMITH GOODFRIEND, PS

May 08, 2019 - 12:00 PM

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