

FILED
Court of Appeals
Division III
State of Washington
2/20/2019 4:40 PM
No. 36282-5-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

Lori Van De Graaf,

Respondent,

v.

Rod D. Van De Graaf,

Appellant.

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Yakima County Superior Court No. 11-3-00982-6
(Additional Suit Money)

REPLY BRIEF RE SUIT MONEY FOR APPEAL

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
I. INTRODUCTION & SUMMARY REPLY.....	1
II. REPLY ARGUMENT	2
A. The Trial Court Abused Its Discretion In Awarding Lori “Suit Money” For The Appeal Because Lori Did Not Meet The Legal Requirement For Such An Award.....	2
1. Lori did not provide any of the required evidence with her motion for additional suit money, which precludes an award because it is an abuse of discretion to enter an order where the facts do not meet the legal standard.....	2
2. Lori’s attempt to bootstrap earlier filings to justify the award fail for at least three reasons.....	5
B. The Only Fees That Should Be Awarded Should Compensate Rod For Lori’s Counsel’s Filings In Seeking The Additional Suit Money.....	6
III. CONCLUSION.....	8

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>Baker v. Baker</i> , 80 Wn.2d 736, 743, 498 P.2d 315 (1972)	3
<i>Bryant v. Bryant</i> , 68 Wn.2d 97, 102, 411 P.2d 428 (1966)	3
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).....	2-4
<i>In re Marriage of Nicholson</i> , 17 Wn.App. 110, 120, 561 P.2d 1116 (1977)	3
<i>Physicians Ins. Exc. v. Fisons Corp.</i> , 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).....	4
Other Authorities	
Wikipedia, https://en.wikipedia.org/wiki/Psychological_projection n (last viewed 10/17/18).	7
Nancy Ann Holman, <i>A Law In The Spirit of Conciliation And Understanding: Washington’s Marriage Dissolution Act</i> , 9 GONZ. L. REVIEW 39 (1973).....	7

I. INTRODUCTION & SUMMARY REPLY

The Response unfortunately tries to transform this relatively simple, two issue appeal into a major event and the chance to add irrelevant documents and arguments, apparently in the hope of diverting the Court from the issues it raises. Despite Commissioner Wasson's October 24, 2018, order on motions which specified that this appeal would not be consolidated with the underlying divorce merits appeal, the Response nevertheless seeks that functional result. But its effect is to demonstrate plainly the Respondent's obsession with punishing Rod by any means possible, proper or not.

The Court should not be diverted.

This reply is intentionally short to re-direct the Court to the Opening Brief and keep the focus on the genuine issues raised by the appeal. Its length contrasts with the over-blown, 36-page Response, another illustration of the Respondent's litigious tactics.

The time and effort spent by the Response on unnecessarily personal attacks on party and counsel will not be responded to in kind. Taking the time for such irrelevant diversion only feeds Respondent's goal of imposing as much additional cost on Rod as possible, while straining the limits of professional conduct. The

Court should recognize those efforts as the product of Respondent's own projections.

Finally, to the extent that any arguments or fact issues presented in the Response are not addressed herein, they are not conceded, but are either adequately dealt with expressly or implicitly in the Opening Brief, or are irrelevant and need not take up any more of the Court's time.

II. REPLY ARGUMENT

A. The Trial Court Abused Its Discretion In Awarding Lori "Suit Money" For The Appeal Because Lori Did Not Meet The Legal Requirement For Such An Award.

- 1. Lori did not provide any of the required evidence with her motion for additional suit money, which precludes an award because it is an abuse of discretion to enter an order where the facts do not meet the legal standard.**

It is axiomatic that a trial court abuses its discretion for making a decision based on untenable reasons when the facts do not meet the requirements for the correct legal standard which is to be applied. *In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997) states the three-part test for analyzing an abuse of discretion:

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.

Littlefield, 133 Wn.2d at 47 (emphasized numbers added).

The order for additional “suit money” must be vacated because Lori did not meet her legal burden for a court to award suit money, to demonstrate her then-present need for the funds to defend against the appeal. *Baker v. Baker*, 80 Wn.2d 736, 743, 498 P.2d 315 (1972). *Accord, Bryant v. Bryant*, 68 Wn.2d 97, 102, 411 P.2d 428 (1966) (“Courts predicate awards of costs and attorneys' fees upon the need of the party seeking them, and exercise their discretion upon the merits of the showing made”); *In re Marriage of Nicholson*, 17 Wn.App. 110, 120, 561 P.2d 1116 (1977) (a trial court “abuses its discretion in awarding fees” absent the showing of need).

Lori filed no papers stating her financial status as of July, 2018. Moreover, the fact she had first filed her merits response brief a month before the suit money hearing demonstrates there was no genuine need and her request was moot. Her “want” for the funds does not meet the legal test. The order granting advance “suit

money” was an untenable abuse of discretion since factual basis to meet the legal standard for such an award was not met. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Lori does not pretend that she supplied contemporaneous financial information with her moving papers in June and July, 2018. Her efforts to back fill her defective motion with papers which were not placed before, nor called to the attention of the Commissioner do not suffice. Nor should they, since as Judge McCarthy found, and which has not been challenged so is a verity, both parties were given ample resources to pay their own fees. That alone requires vacating the order.

The award in those circumstances was an abuse of discretion because it disregarded the legal standard of immediate need based on Lori’s financial circumstances and was premised on a fatally defective motion. Lori’s failure to establish the genuine need at the time she sought the additional advance fees in 2018, and her defective motion, also mean that the trial court was without authority to grant the requested relief. The order must be vacated and the matter remanded for a determination of sanctions per *Fisons*.

2. Lori's attempt to bootstrap earlier filings to justify the award fail for at least three reasons.

First, those materials were not provided or specified in Lori's moving papers, violating CR 7(b)(1) and depriving Rod of a meaningful ability to respond and depriving the trial court of authority to grant the requested relief.

Second, even if earlier, 2017, financial materials had been considered (which they were not), as a matter of undisputed fact they fail to establish that Lori had a present need for the funds in July, 2018 – and in fact could not have established her need in 2017 given the award that was made in the final orders, as pointed out in the underlying dissolution appeal.

Third, Lori could not have established her present financial need to represent herself in the appeal on July 18, 2018, when she had already first filed her merits response brief a month earlier in June, 2018. Her claim of need fails the straight-face test both with that filing, but especially with her August, 2018, filing of over 150 pages of documents in this Court in her motions to get Rod's appeal dismissed.

Fourth, even if Lori could have established her need as of July, 2018 (which she did not), she failed to establish Rod had the present ability to pay, particularly given her monthly maintenance payments he had to make, his stagnant salary barely sufficient to pay the maintenance, the judgment against the family home he was awarded which precluded him getting a mortgage.

But Rod's ability to pay in July, 2018, in fact was not an issue because Lori did not establish the predicate facts – her then-present need in July, 2018, a month after her over length appellate merits brief was first filed, showing that Lori had no need for suit money to defend her position on appeal.

B. The Only Fees That Should Be Awarded Should Compensate Rod For Lori's Counsel's Filings In Seeking The Additional Suit Money.

While Lori complains that Rod should not have appealed, in fact he had no options as the record shows. He appealed to avoid jail threatened by Lori; then went to jail as ordered by the court when he had no more options. That is hardly intransigence or bad faith.

Lori predictably pounds the table seeking fees from Rod and his counsel when it is Lori who has unnecessarily increased the costs of this litigation. Her response in this appeal is yet another example

of her over-reaching in that regard as well as demonstrating, yet again, that she did not need any advance funds in order to represent herself on appeal. While it seems to smack more of desperation than of considered legal reasoning, in fact it may be driven by the fact all her invective of Rod flows from her own projections.¹ Sadly, this is occurring in the so-called age of “no-fault” divorce upon which Washington’s 1973 Dissolution Act was premised, and which was intended to remove as much of the animosity from divorces as possible,² though some practitioners gleefully practice otherwise, undercutting that basic policy.

¹ See Wikipedia, https://en.wikipedia.org/wiki/Psychological_projection (last viewed 10/17/18).

Psychological projection is a theory in psychology in which the human ego defends itself against unconscious impulses or qualities (both positive and negative) by denying their existence in themselves while attributing them to others. For example, a person who is habitually rude may constantly accuse other people of being rude. It incorporates blame shifting.

² See, e.g., Judge Nancy Ann Holman’s classic description of the purpose underlying the 1973 Dissolution Act:

The basic and underlying purpose of the new Dissolution of Marriage Act is to replace the concept of "fault" and substitute marriage failure or "irretrievable breakdown" as the basis for a decree dissolving a marriage.

. . . . The prior divorce law, with its emphasis upon fault, often resulted in parties leaving the courthouse angry and embittered with heightened animosity toward each other and the legal process.

Nancy Ann Holman, *A Law In The Spirit of Conciliation And Understanding: Washington’s Marriage Dissolution Act*, 9 GONZ. L. REVIEW 39 (1973).

III. CONCLUSION

Respondent Lori Van de Graaf failed to establish her present financial need as of July, 2018, when seeking additional suit money. Her appellate filings have regularly demonstrated her lack of need – she was fully represented on appeal without any funds from Rod. The July, 2018 order never should have been entered. It now must be vacated. If the Court believes that the motion was improperly brought, the remand order should include directions for a determination of sanctions.

Respectfully submitted this 20th day of February, 2019.

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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 20th day of February, 2019.

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February 20, 2019 - 4:40 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36282-5
Appellate Court Case Title: In re the Marriage of Lori Van de Graaf and Rod Van de Graaf
Superior Court Case Number: 11-3-00982-6

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