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No. 97809-3

IN SUPREME COURT
OF THE STATE OF WASHINGTON

COA Nos. 35133-5-III; 36122-5-III; 36282-5-III &
No. 35292-7 (Consolidated with 35499-7-III, 35839-9-III, & 36283-3-III)

Lori Van De Graaf,

Respondent,

v.

Rod D. Van De Graaf,

Appellant

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Hon. Michael G. McCarthy

**ROD VAN de GRAAF'S CONSOLIDATED PETITION FOR
REVIEW**

Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30512

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020

Attorneys for Rod D. Van De Graaf

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I. INTRODUCTION

One central issue of this case is jurisdictional: whether the trial court can take into account in a divorce proceeding the assets of a third party to the divorcing couple, here the husband Rod's parents' family business property which had not been transferred to him and to which he has no vested right by inheritance or otherwise. As became all too apparent at the limited remand proceeding, the trial court had become fixated on the patriarch Dick Van de Graaf and his control over the family business assets and became determined to foil what the trial court seemed to think were improper motives of the patriarch in protecting the assets the senior family member had accumulated over a long lifetime.

But under our system of law and property rights, the head of a family business, male or female, is entitled to do with his or her property as they see fit. There is no requirement it be passed on to succeeding generations at all. Nor that it be distributed equally among the members of succeeding generations. The property could end up skipping a generation. The majority of the property could be gifted to charitable organizations, with only token amounts left for family members. And that is the right of the property holder, to do as he or she determines, and to change their mind when they please.

It is contrary to this system of property law, and to our dissolution system that is premised solely on the property and assets of the divorcing parties, for a trial judge to assume or to guess what any such third-party family business owner will ultimately do with the business. Yet here the

trial judge effectively countermanded the intended disposition of the Senior Van de Graaf's family business property via the maintenance and other awards requiring cash transfers, and declaring the \$2 million Note signed by the parties to acquire the cattle feed business a nullity, allowing the judge to "award" Rod an over-valued share of the business he does own and requiring a cash transfer of the inflated value for that company to the wife – payments only his parents could make.

This case presents a second core theme – the fundamental unfairness of the trial court's using different rules for the two spouses. **First**, on the one hand, it expressly considered Rod's "forseeable future acquisitions" – his expected inheritance from his parents' cattle business – in determining maintenance, and implicitly considered it in the property division, even while declaring otherwise. On the other hand, it refused to accept any evidence of Lori's expected inheritance from her parents' long-time, successful family jewelry business. No explanation was given why that potential "forseeable future acquisition" of Lori should not be taken into account.

Second, when determining maintenance, the trial court considered Rod's higher level of income when his cattle company partnership had higher income in the years before trial, yet refused to even consider the documented contemporaneous income of Lori from her work with the school district. Not only is this contrary to the statute, it is fundamentally unfair to apply different sets of rules to the husband and the wife.

II. IDENTITY OF PETITIONER

Petitioner is Rod D. Van de Graaf (“Rod”), appellant below.

III. COURT OF APPEALS DECISIONS¹

Division III filed its four unpublished decisions on August 29, 2019. Reconsideration was denied September 27. Rod is filing one consolidated petition for review and tendering a filing fee for each case, pursuant to a separate motion. The focus of the Petition is on the decision in No. 35133-5-III (“Decision” or “Merits Decision”) unless noted otherwise.

The Court below affirmed the trial court’s property division, maintenance award, and post-trial suit money award in the “Merits Appeal.” The Court also affirmed three later, post-trial appeals: the CR 60 Appeal related to the failure to correctly describe certain real property awarded to the Respondent wife (Wife); the Suit Money Appeal which addressed later orders for additional suit money after the Merits Appeal was briefed; and the Contempt Appeals which stemmed from enforcement of the erroneous suit money orders.

The appeals stemmed from two fundamental failures to apply settled Washington law in a property division and maintenance award from a long-term marriage. **First**, the trial court imputed to Rod his parents’ assets for purposes of both the property division and the

¹ The four decisions are No. 35133-5-III (the “Merits Appeal”, or “VDG I”, following Division III’s convention); No. 36122-5-III (CR 60 hearing to change legal description to Ellensburg property, “CR 60 Appeal” or VDG III); No. 36282-5-III (“Suit Money Appeal”, VDG II); and No. 35292-7 (Consolidated with 35499-7-III, 35839-9-III, and 36283-3-III), collectively “Contempt Appeals” or VDG IV.

maintenance award, ignoring facts in the record, particularly the economic circumstances of the cattle feed business that Rod operated with his two siblings, and which had cycled down by the time trial had concluded. The trial court made no bones about this, stating in its written letter decision of November 16, 2016, which was adopted and incorporated into the Final Orders of February 17, 2017, that Husband “is a very wealthy man, who is about to become even wealthier....[and] will soon be the co-owner of [his parents’ cattle ranching operation] VDGR.² **I can only estimate his accumulated wealth, which has to be close to 5 or 6 million dollars,** if not more.” CP 787-88. But there is no evidence supporting this conclusion of Husband’s future wealth. It is all speculation. And as the proceedings played out, it proved to be incorrect, as the supplemental proceedings brought by Lori to execute on the large judgment imposed on Rod showed.

No document or evidence shows that Rod has a vested right to the ownership or wealth referenced by the trial judge. Nor is there any evidence of the likely value of any potential inheritance Rod might receive from his parents, if any, a mere expectancy, if that. Nevertheless, the trial court grossly inflated Rod’s net worth and available assets with the estimated assets of third parties to the divorce to justify both the property division and the lifetime maintenance of \$6,000 per month, and the basic

² Even if Rod’s purported later inheritance was relevant to the property division and maintenance award, no document established what he would get or when he would get it, or that, in fact, Rod had a vested right to any share of the cattle business, much less what that share would be worth.

premise which was followed in the trial court by the Commissioner who decided all the post-trial motions. Moreover, by refusing to consider Lori's potential inheritance from her elderly parents, who ran the successful jewelry store in Sunnyside, the trial court made the proceedings fundamentally unfair, violated Rod's right to equal treatment.

Second, the trial court failed to correct plain legal or factual errors when brought to its attention, resulting in legal error. The first was refusing to change the property division when it was learned that the major liquid asset awarded to Rod, the Beneficial Life Insurance policy with cash value valued at \$116,000, was in fact owned by a trust, not by either party or the marital community. It had been ostensibly awarded to Rod to provide him liquid assets (see CP 957:4-6) and to complete a roughly 50-50 division of community property. But when the trial court as informed on Rod's CR 60 motion it was not property of the parties and, thus, outside its jurisdiction, it shrugged (CP 965 ¶4), rather than adjusting the property division, even though informed that including third-parties' property in the property distribution makes the judgment void and requires reversal.

Division III also erred by failing to review materials submitted by Rod following the limited remand to provide findings for the trial court fee award for claimed intransigence. Those materials, in the Appendix at App. A-123-304, demonstrate the personal animus of the trial court toward Rod's father and that said animus tarred Rod by the trial court's disregard of the facts and circumstances, as well as the law. In short, that evidence

“pulled back the curtain” with the trial court’s own words and actions to document why Rod had a fundamentally unfair hearing by showing that: 1) the above errors (and those documented in Rod’s Opening and Reply Briefs) of straying afar from settled Washington law on property division and maintenance (which themselves already require reversal) are more readily understood in that now-bright light; 2) that all orders following the property division must be vacated; and 3) that new proceedings must be before a different judge.

IV. ISSUES PRESENTED FOR REVIEW

1. Does Washington law still limit the trial court’s jurisdiction in marital dissolutions to the property of the parties, or has the law changed to now permit consideration of third parties’ property for purposes of either property division or maintenance awards?
2. Should Washington marital dissolution law be changed to allow a trial court, when making a property division, to include as a basis for its award what it deems the party’s “foreseeable future acquisitions” -- a guesstimate of an unvested “inheritance” the trial court thinks a spouse will or should receive, some time in the future?
3. Has Washington’s marital dissolution law been changed to allow a trial court to speculate on and use a party’s “foreseeable future acquisitions” in calculating a maintenance award, as a guesstimate of an unvested inheritance the trial court thinks a spouse will or should receive some time in the future?
4. Does it violate fundamental fairness, or the equal protection guarantees, to assess the potential or likely inheritance from the family business of the male spouse with elderly parents who control the family cattle business for purposes of a property division and maintenance, but to refuse to consider the potential or likely inheritance from the family business of the female spouse with elderly parents who controlled their family jewelry business?

5. Does it violate fundamental fairness or equal protection guarantees when, in determining maintenance payments, the obligor male spouse's past (and out of date) income history is used, while the recipient female spouse's income history which includes current significant income and benefits as a public employee, are completely ignored?
6. Must the underlying property and maintenance judgments be vacated when it becomes apparent from an outburst in a post-trial hearing that the trial judge was personally angry with and biased against one of the divorced spouses and his father, causing the judge to disregard the facts, circumstances, and the law?

V. STATEMENT OF THE CASE

Because the Merits Decision does not accurately state the record, the Court is respectfully directed to the Opening Brief (facts are at App. A-81-112) and Reply Brief on the merits (at App. A-41-80) as to the basic events, with the following overview observations as to the litigation and Division III's treatment of it.

First, the Merits Decision incorrectly charged Rod with delay tactics at trial and consequent intransigence when, in fact, it was **Lori** who both delayed the trial to September 2016 with her extension request in April 2016³ claiming insufficient information, despite the fact the parties had had two separate, full day mediations in 2015 with extensive exchanges of information,⁴ resulting in the September trial date before Judge McCarthy. And it was **Lori** who secreted away over \$250,000 in

³ See OB p. 1; CP 469-70 (Lori's counsel's request for continuance of the trial date "because all information has not been exchanged between the parties") and CP 471-476 (Rod's objection to continuance).

⁴ See App. A-136-137, pp. 14-15 of Rod's motion and brief to supplement the record, summarizing the two extensive, all-day mediations conducted in 2015 which included full disclosure of financial documents. Rod's trial counsel detailed what was disclosed during the mediations in her declaration, attached at App.A-227-230.

the three years of estrangement that preceded the formal separation, see CP 797; SCP 1443-1448 (bank records), described at OB p. 23, fn. 6, though the Merits Decision chose to sidestep these inconvenient facts that are contrary to Lori's theme it mistakenly adopted. In fact, this illustrates Lori's success in projecting onto Rod her tactics of hyper-aggressive litigation and, unfortunately, getting Division III to accept her unsupported version of facts and the litigation.

Further, this litigation is not understood until one reviews the materials submitted to the Court of Appeals by Rod following the limited remand hearing before the trial court, which gives the full context to the inaccurate claim of intransigence by Rod in the trial court, including explaining the detailed pre-trial discovery of financial information **without** the need for court intervention and the two, full-day mediations the parties engaged in in 2015. See App. A-136-137 (Motion to Supplement, pp. 14-15); App. A-227-230 (trial counsel's declaration ¶¶ 5-16, detailing the two mediations in 2014 and 2015 and the detailed information provided to Lori and her counsel).

Rod's trial counsel's description of the remand hearing from April 2019, made it apparent that the judge had a personal animosity and bias against Rod and his family, and had had it for a long time, drawing back the curtain on the trial court's approach to the case. See App. A-239-242 (counsel's declaration ¶¶ 45-55, describing the April 26 hearing). It then becomes clear why so many of the normal rules of property division were

not followed in the property division and maintenance award – they did not help the judge to the ruling he had decided to impose on Rod.

Division III erroneously chose to not review and consider those materials, even though it was the panel that directed the limited remand and should have wanted to make sure it got the full record from that remand and what it produced. Those materials in the Appendix so the Court can have a full picture of this litigation, including why the findings entered on April 26 to support fees for intransigence are contrary to the record and to the law, as described in the Motion to Supplement. See App. A-141-149, Motion to Supplement pp. 21-27.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- A. Review should be granted per RAP 13.4(1), (2), and (4) to address Division III’s use of a new standard for maintenance awards of considering “a party’s foreseeable future acquisitions”, a euphemism for a future inheritance which is not vested, not certain, at best speculative, and was heretofore prohibited in marital dissolutions.**

Division III’s unpublished Merits Decision papers over the trial judge’s dramatic expansion of judicial authority in marital dissolutions by using the property of third parties to the detriment of the husband while refusing to apply the same standard to the wife. The merits decision affirms the trial court’s use of the husband’s “inchoate”, potential future inheritance in his family’s cattle business for purposes of both property division and maintenance by morphing it into a “pending transfer of one third of his parents’ property” (Slip Op. p. 17) which the Decision stated was “proper”, at least in terms of the permanent maintenance award,

because the trial court was permitted to “ ‘consider’ the ‘likely acquisition’ of this inchoate interest of Rod’s” as part of considering his “ ‘foreseeable future acquisitions’ when dividing property and awarding maintenance.” Slip Op. pp. 16-17.⁵ To the extent there is confusion or a gap in the law on this issue, review should be granted to resolve a critically important issue in future cases where the parties have wealthy parents or are part of family-run businesses with multiple generations.

At the same time it affirmed consideration of the husband’s potential inheritance, the Merits Decision overlooked the trial judge’s **refusal** to consider the wife’s potential future inheritance from her elderly parents’ lucrative jewelry business; it erroneously contended her inheritance was only raised by counsel in argument. Merits Slip Op. at 17, n. 10. In fact, her inheritance was not only raised by counsel (RP 215:5-15), the trial court expressly **refused** to allow any evidence on it. RP 876-

⁵ Citing *In re Marriage of Gillespie*, 89 Wn. App. 390, 948 P.2d 1338 (1997) and *In re Marriage of Olivares*, 69 Wn.App. 324, 848 P.2d 1281 (1993). Neither decision is directly on point with the circumstances in this case. Rather, the Merits Decision lifts the “foreseeable likely acquisitions” phrase from *Gillespie*. It was in fact *dictum* that did not come from either of the decisions *Gillespie* cites, *Olivares* and its alleged reliance on *In re Marriage of Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972), decided under the former statute. Neither *Friedlander* nor *Olivares* says anything like the trial court is to consider “likely future acquisitions” for good reason – that would be speculation. But as discussed *infra*, its use in this Decision to justify a dramatically high and eternal award of maintenance on a basis not derived from the statute nor case law should be examined by this Court so the standard state-wide is clear and consistent with the statute. For example, what is to be the standard of proof for “likely acquisition” of an asset, or expectancy, or inheritance? And if that new element of “likely future acquisitions” is to be part of the consideration for maintenance awards, will there be a requirement that such element is applied to **both** parties?

878. See OB pp. 33-38 (property award argument) and p.11 (issue 12⁶). This one-sided view of inheritance belies Division III’s statement that the “trial judge was not required to ignore the realities of the parties’ actual financial situation merely because the pending property interest was not vested and, thus, not before the court for division,” Slip Op., p. 17, because the trial judge did just that by refusing to allow evidence in of the wife’s future inheritance from the family jewelry business and ignoring the evidence of Lori’s current working ability and income, even if modest.

Consideration of only the husband’s potential inheritance and not the wife’s infected both the property division and the maintenance award.⁷ See OB pp. 38-41 (maintenance award argument); Reply Brief, pp. 3-4 (both), 5-6 (property division), 7-13 (maintenance). Moreover, it is so blatantly and fundamentally unfair by applying different standards to the parties that it was a key part in driving the appeal – everyone wants a fair shake. Both the fundamental unfairness and misapplication of the law need to be addressed to insure the same is not permitted in future cases.

Consideration of a party’s “ ‘foreseeable future acquisitions’ when dividing property and awarding maintenance,” Merits Slip Op. pp. 16-17, is nothing more than a euphemism for an inheritance which is not vested.

⁶ Issue 12 addresses the disparate treatment where it states: “the trial judge has repeatedly failed to follow or apply fundamental precepts of community property law, including taking into account and awarding non-marital assets **and taking into account anticipatory inheritance to one, but not both of the parties**,...” Opening Brief, p.11 (emphasis added).

⁷ The Merits Decision’s contention this lopsided consideration of the husband’s potential inheritance did not affect the property division simply because the trial court stated it “was not before the court for division” is simply incorrect.

It constitutes a dramatic expansion of jurisdiction for the dissolution court which goes far beyond the statute and invites rank speculation.

The only form of “future” assets or income that may be considered is where the spouse’s interest in the future asset had already vested, so that it cannot be taken away, such as stock options and pension rights. *See, e.g., In re Marriage of Short*, 125 Wn.2d 865, 873-75, 890 P.2d 12 (1995) (adopting analysis for division of vested stock options). But the law always has been that a mere expectancy is not a property right subject to division in a divorce. *In re Marriage of Harrington*, 85 Wn. App. 613, 624, 935 P.2d 1357 (1997) (“For purposes of Washington dissolution actions, property... must be something to which there is a right. A mere expectancy is not a right and such is not property. WSBA, Washington Family Law Deskbook § 38.2 (1989).”). *See* OB at 33-36.

The so-called “forseeable future expectations” test is nothing more than the prohibited “mere expectancy” by another name, which have long been out of bounds in Washington. The phrase first appears in *Marriage of Gillespie*, which the Decision cites. In fact, that phrase is unmoored to the statute or any prior case, even though *Gillespie* cites to *Olivares* and its internal cite to *Friedlander* for that proposition. But the phrase is not from the current or prior statute, nor did either *Olivares* or *Friedlander* employ that phrase or use that concept, which is necessarily based on speculation. This case is an example of the mischief that can come from allowing that phrase to creep into our case law; while this Decision is not published, per GR 14.1, it may be – and certainly will be – cited for “persuasive

authority” to trial courts around the state to justify speculation in those cases and assure those judges that they will not be reversed if they use it.

Review should be granted to correct this mistake that is in conflict with this Court’s and Court of Appeals decisions, and which misstates the law such that it is of public interest to clarify that mere expectancies are not before the dissolution court, and clean up the unjustified *dictum* from *Gillespie*.

B. Review should be granted per RAP 13.4(b)(1) and (2) because the Decision conflicts with this Court’s decision in *Arneson v. Arneson* and with Court of Appeals decisions following *Arneson*, all of which forbid asserting jurisdiction over the property of third parties and which require vacating such judgments purporting to include such property as void.

This Court recognized the jurisdictional limits of the marital dissolution court over third party property nearly 70 years ago in *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951). Review should be granted because Division III’s Merits Decision conflicts in several ways with binding law grounded in the jurisdictional basis of dissolutions, which is limited to the assets and liabilities of the spouses. *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, 194-95, 38 P.3d 1053 (2002). Thus, as even the Merits Decision recognized, Slip Op. p.19, the court has a “nondiscretionary duty to vacate a void judgment” where a third party’s property is “divided” by a dissolution court, citing *Allstate Ins. Co. v. Khani*, 75 Wn.App. 317, 323, 877 P.2d 724 (1994). Rod cited more recent decisions which affirm that the judgment must be vacated when the

dissolution court purports to distribute property of third parties. *Accord*, *Marriage of McKean*, 110 Wn. App. at 194-95; *Persinger v. Persinger*, 188 Wn. App. 606, 609, 355 P.3d 291 (2015), particularly where, as here, the property is an integral part of the overall property division, in this case providing Rod his only major source of liquidity. See Merits Appeal Opening Brief, pp. 39-41; Merits Appeal RPY, pp. 18-21.

The Merits Decision mistakenly dismissed Rod’s arguments as made too late on reconsideration, then not meeting the test under Rule 60 because it was not genuinely “newly discovered evidence.” Slip Op., p. 19-20. It fails to address the core argument – that the judgment is void and is subject to being vacated at any time under CR 60(b)(5), which the Decision mistakenly says is the newly discovered evidence provision, which it is not.

The Decision glosses over the fact that Rod provided ample proof to the trial court the policy belongs to a third party. See OB pp. 25, 39-41 and record cites therein; Merits Reply, pp. 17-20, esp. 18-19, and record cites therein. Indeed, Lori herself confirmed this in later post-trial proceedings when she fought successfully to prevent Rod from getting the cash value as part of her overall strategy to place him in an untenable financial position, making him subject to contempt for non-payment absent rescue payments from his parents. See Merits Reply, p. 18, n. 8. The record shows she succeeded because the trial court continually overlooked both the large amount of liquid assets Lori received shortly after the final orders were filed, the November 2016 finding that each

party could pay for their own fees, and that Rod's financial circumstances following the property division could not meet the obligations imposed absent his actual acquisition of substantial wealth from his parents, which the trial court stated was imminent (but as to which Rod had no vested right), and which has not occurred.

Instead, those untenable obligations, Rod's lack of liquidity, and the fluctuating beef and cattle markets which have been moving lower dramatically lowering his overall income,⁸ when pushed by Lori's overreaching and the trial court's erroneous acquiescence, lead to the suit money orders, the contempt proceedings and incarceration orders.

C. Review should be granted per RAP 13.4(b)(1) and (2) because the Merits Decision conflicts with settled law that void judgments are subject to review and vacation under CR 60(b)(5) at any time and the court "has a nondiscretionary duty to vacate a void judgment."

The Decision rejected Rod's arguments that the property division had to be vacated because it incorporated property belonging to a third party, claiming that Rod failed to prove the insurance policy was owned by a third part. Decision, p. 19.

It is axiomatic a void judgment may be vacated at any time. *In re Marriage of Leslie*, 112 Wn.2d 612, 619, 772 P.2d 1013 (1989) (agreeing with Court of Appeals void judgments can be vacated); *Allstate Ins. Co., v. Khani*, 75 Wn.App. 317, 323-324, 877 P.2d 724 (1994) ("Void judgments

⁸ Those changed economic circumstances were subject to his motion to modify the maintenance award, which was also denied and are part of the Merits Appeal. See, e.g., Merits OB, p. 58; Merits RPY, pp. 13-16.

may be vacated regardless of the lapse of time”); *Ballard Sav. & Loan Ass'n v. Linden*, 188 Wash. 490, 492, 62 P.2d 1364 (1936) (adversely affected party “may have the judgment vacated as a matter of right—and this without a showing of a meritorious defense.”).

D. Review should be granted per RAP 13.4(b)(1) and (4) to address the correct application of suit money and because the decisions below conflict with contempt principles – particularly whether the inability to pay excuses a party from payment of maintenance or suit money following a property award that leaves the obligated spouse without the resources to make those payments and still be able to care for him or herself, absent an early receipt of the alleged inheritance the trial court has predicted he will receive or borrowing from family.

Holcomb v. Holcomb, 53 Wash. 611, 102 Pac. 653 (1909) and *Bowers v. Bowers*, 192 Wash. 676, 678, 74 P.2d 229 (1937), stated long ago the basic principle that the inability to pay is a defense to contempt for failing to pay maintenance or other debts. The imposition of \$6,000/month in maintenance in 2017 was an abuse of discretion under the tests stated in *In re Marriage of Littlefield*⁹ when the trial court had evidence Rod’s income from Midvale was greatly reduced at the end of trial than it was in

⁹ *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) states the test this way (emphasized numbers added):

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.

See also, *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, reversing for failure to meet statute’s requirement designed to “prevent[] arbitrary imposition of the [trial] court’s preferences.”).

the earlier periods testified to, and thus based its determination not on current income, but outdated information and Rod's parents' assets.

Moreover, "When the wife has the ability to earn a living," as Lori can help support herself from her teaching,¹⁰ "it is not the policy of the law of this state to give her a perpetual lien on her divorced husband's future income." *Morgan v. Morgan*, 59 Wn.2d 639, 642, 369 P.2d 516 (1962) (holding that a finding that the wife's health may deteriorate and render her incapable of supporting herself did not support maintenance award where she was presently capable). And more to the point, that income and earning capacity must be taken into account along with Rod's when doing the balancing the statute requires. It is fundamentally unfair to look only at one party's earning capacity and not the other party's.

The rulings made by the trial court only make sense when one understands the decision was made to punish Rod even when that meant not following the law. The April 26, 2019 hearing finally brought into the open this pertinent fact, which the Court of Appeals chose to not address. Rod respectfully suggests that if this Court considers that part of the record and then looks at his case from that perspective, it will be constrained to not just restate the correct rules of law to be followed in future cases, but to vacate the property and maintenance awards and remand for a new trial before a different judge who also hears the motions.

¹⁰ See CP 523 (paystub for Lori in the record for January, 2016, showing her 91 hours of work that month at \$29.29/hour, or \$2,665 for the month).

E. Conflict with Intransigence principles and Judicial Disqualification for bias

The panel ordered a limited remand for the trial court to enter findings of fact to support its April 14, 2017 fee award to Lori. Findings were entered on April 26, 2019, after a contested hearing

The Motion to Supplement addressed the legal error and lack of support in the record for the claimed intransigence justifying the fee award made on March 14, 2017, including that it did not meet the test under controlling law for compensating for the additional costs the alleged intransigence supposedly imposed, citing *In re Marriage of Lilly*, 75 Wn. App. 715, 720, 880 P.2d 40, 42 (1994) and Scott J. Horenstein, 20 WASH. PRAC., FAM. AND COMMUNITY PROP. L. § 40:3 (2019 Supp.). App. 1, pp. 19-21.

The purported basis for the March 14, 2017/April 14, 2017 fee award was the additional expense required *at trial* for Lori because the Senior Van de Graaf's finances were both complicated and were not fully disclosed. But aside from the fact those records were largely irrelevant, the proposed supplemental record documents what was known to the parties at the time: that Lori has already received full and extensive discovery of Rod's finances, and of any relevant portions of his parents' finances in helping to establish Midvale for their three children including Rod, initially for the two, separate, day-long mediations. See App 1, pp. 14-15 (Motion); pp. A 104-108 (Comins Rick Dec. ¶¶ 4-15).

There was no "intransigence" at trial that imposed additional costs on Lori, and which the trial court then awarded to her in March, 2017, as a

fitting “punishment” of Rod to fit his “crime” of intransigence. It was, as shown by the declaration of counsel, made up after the fact because the trial court got angry with Rod’s father for bringing a suit on the note in December 2016, then got angry with the Senior Van de Graaf in April, 2017, when he had not supplied the funds to make all the payments ordered by the trial court which Rod had no ability to pay.

VII. CONCLUSION

Rod Van de Graaf asks the Court to grant review and stay the Suit Money appeal, the Ellensburg property description appeal, and the contempt and incarceration appeal (VDG II, III and IV), and address the fundamental misapplication of Washington law and unfairness in the Merits property division and maintenance appeal (VDG I), then dispose of the three stayed appeals based on disposition of the Merits Appeal.

Respectfully submitted this 28th day of October, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By /s/ Gregory M. Miller

Gregory M. Miller, WSBA No. 14459

Jason W. Anderson, WSBA No. 30512

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: daveh@davidhazel.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8 th Avenue North Seattle, WA 98109 P: (206) 624-0974 F: (206) 624-0809 E: cate@washingtonappeals.com valerie@washingtonappeals.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Joanne Rick Halstead & Comins Rick PS PO Box 511 ** 1221 Meade Ave Prosser, WA 99350 P: 509-786-2200; 786-2211 F: 509-786-1128 E: jgcrick@gmail.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal

DATED this 28th day of October, 2019.

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

APPENDIX A
COA NO. 35133-5-III (VDG I)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Marriage of,	)	
	)	
LORI VAN DE GRAAF,	)	No. 35133-5-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ROD D. VAN DE GRAAF,	)	
	)	
Appellant.	)	

KORSMO, J. —

“Millions for defense, not a cent for tribute.”

This motto, adopted by Americans in the wake of the XYZ Affair,¹ apparently also was adopted by appellant Rod Van de Graaf in the wake of Lori Van de Graaf’s filing for dissolution of the couple’s 26-year marriage. The difference in historical outcome—American resolve to live by its principles led to a treaty with the revolutionary French government, while Mr. Van de Graaf’s resolve to fight turned this matter into an extended campaign of scorched earth practices—reflects the differences between resolve practiced by a defender and resolve shown by an aggressor. We largely affirm the trial

¹ EMMA WILLARD, HISTORY OF THE UNITED STATES, OR REPUBLIC OF AMERICA, 288-289 (New York, A.S. Barnes & Co.; Cincinnati, H.W. Derby & Co. 1849).

court's dissolution decree and award respondent Lori Van de Graaf her attorney fees in this appeal.²

To date, the decree has spawned seven appeals, which we have grouped into four. This case, Van de Graaf I, is the substantive appeal from the decree of dissolution. Van de Graaf II involves appeals from trial court orders awarding suit money to Lori. Van de Graaf III is an appeal from an order changing title to real property awarded to Lori. Van de Graaf IV primarily involves appeals from contempt rulings related to the enforcement of the decree and the suit money awards. These cases also include an extensive number of motions before our commissioner, few of which are relevant to this opinion. Originally, the contempt cases were consolidated with this appeal from the dissolution decree, but our commissioner later severed the contempt cases and grouped them together. One result of the reconfiguration is that briefing was completed on some of those rulings when they were consolidated with this case and others originally were not briefed at all due to a stay. Since all of the briefing is now in, we will regroup some of the issues in different configurations than our commissioner did.

This appeal presents eleven issues, which we primarily address in the order raised by the parties. First, however, we turn to a discussion of the facts related to the marriage

² For convenience and clarity, we will refer to the parties by their first names or as appellant or respondent.

and family businesses, before looking at the trial rulings and subsequent procedural history of this case. Then we will consider the issues presented by this appeal.

FACTUAL BACKGROUND

Rod and Lori wed in 1985. He was 27 and she was 24. The couple have four sons who were born between 1986 and 1996. Lori has a bachelor's degree and a teaching certificate. She taught full-time for one year prior to the birth of her eldest son. Since that point she has raised the four children and, later, returned to the classroom as a part-time substitute teacher.

Rod worked as a salaried employee for his family's cattle business, Van De Graaf Ranches (VDGR). The business was founded by his parents, Dick and Maxine Van de Graaf. All three of their children—Rod, Karen, and Rick—worked for VDGR. VDGR is a major cattle operation and owns stockyards and feedlots. Van de Graaf Ranch Properties, a related business, leases land for cattle grazing. In addition, the three children formed various partnerships related to the cattle business that engaged in joint ventures with VDGR. The most significant of those partnerships for purposes of this case was Midvale Cattle Company.

Midvale was created by the three siblings in 1991 as a general partnership, with each of them holding a one-third interest.³ Midvale operated a cattle raising business and

³ In 2003, the three siblings converted Midvale from a partnership to a limited liability company.

leased feedlots and grazing land from their parents' companies. Each of the three siblings borrowed \$2 million from VDGR to capitalize Midvale. Lori and Rod jointly executed a \$2 million promissory note to VDGR. The note was secured by the couple's interest in Midvale and other personal assets.

The original \$2 million promissory note called for semi-annual interest payments and three equal principal payments due in 1995, 2000, and 2005. The note was amended in 1993 to adjust the interest rate, and again in 1995 to extend the principal payment due dates to 2000, 2005, and 2010. Rod and Lori missed the scheduled principal payments, but they did regularly pay interest on the note. Other than \$350,000 Rick paid directly to Dick in 1991 when Dick threatened to "recall" Rick's note following a family dispute, none of the siblings ever paid any principal on their individual notes.

Midvale took over many of VDGR's operations after Dick retired. VDGR gives Midvale favorable terms in the joint business ventures, paying Midvale to manage VDGR land and allowing Midvale to use the land for its cattle business as well as lease the land to others. VDGR pays management fees to Midvale and allows Midvale to keep rents collected for leasing out the VDGR lands. Midvale's owners received "guaranteed payments" on a bi-weekly basis that netted each \$3,846. Midvale also paid health insurance for the entire family and made additional distributions "as needed." The company also paid all of the family's vehicle expenses and wrote off, as business expenses, Rod's hunting trips.

Rod and Rick jointly purchased 342 acres of pasture land near Ellensburg from their parents in 1977. They purchased the land for \$120,000. The brothers paid \$100 down and agreed to pay the balance, with interest, at \$4,800 annually. When Rod and Lori married in 1985, he still owed nearly \$51,000 of his \$60,000 share of the purchase price. The balance was paid off in 2004. The brothers leased the land to VDGR for cattle grazing and used the income from the lease to pay property taxes and water usage.

Prior to Rod's marriage, his parents had created a "cattle account" for him. That account allowed him to buy and sell cattle for his own personal profit separate from VDGR. After his marriage to Lori, he continued his salaried employment with VDGR and also continued to operate the cattle account. By 1989, the cattle account had accumulated profits of nearly \$1.4 million.

The couple used the cattle account profits to build a luxurious home. The family home was described at trial as "massive, well appointed, draped with trophy mounts from [Rod]'s many hunting trips, and featured an indoor pool and Persian carpets." The couple separated in 2011 when Rod moved out that July. He then lived rent free in another house owned by VDGR with his girlfriend and her family.

In 2012, the senior Van de Graafs created an estate plan to transfer 30 percent interests in VDGR to Rick and Karen, but not to Rod. Through a combination of loans and gifts, the parents transferred 90 percent of the VDGR stock in equal shares to Rick, Karen, and a newly created "Maxine Van de Graaf 2012 Family Trust." Dick was the

grantor of the 2012 trust, while Maxine was the beneficiary and trustee. Rod was a “permissible beneficiary” and the first alternate trustee.

For estate tax purposes, VDGR was given a discounted value of \$5.71 million, with the 90 percent transferred to Rick, Karen, and the 2012 trust valued at \$5.1 million. Rick, Karen, and the 2012 trust each borrowed \$833,333 from VDGR to acquire their 30 percent interests. For that sum, which was considered the “sold interest”⁴ in VDGR, the purchasers acquired 1,500 shares of nonvoting common stock in the company. The purchase was financed by royalties received from the sale of manure that Midvale processes and sells. For the 20 years prior to the estate plan, the manure had been sold by Midvale without payment of royalties to VDGR and had earned the partnership up to \$1,000,000 annually.

Rod and Lori had set up “529 education accounts” for their four sons. The couple’s youngest son, N.V.D.G., was 20 and had completed his sophomore year at Washington State University at the time of trial. Rod had also created a uniform gift to minor account (UGTMA) for the boy. At trial, the boy and his mother testified that the UGTMA was not intended to pay for college and that the 529 education account had been exhausted. He was using the 529 account of an older brother who had not completed

⁴ The remaining value of approximately \$866,666 was considered the “gifted interest.”

college. Rod testified that N.V.D.G. had \$123,000 available to him between the two accounts.

PROCEDURAL HISTORY

Lori filed for dissolution of the marriage on October 7, 2011. The following July, the trial court entered temporary payment orders requiring Rod to pay Lori \$3,000 per month in maintenance plus an additional \$1,500 per month to cover utilities and other expenses. Lori remained in the house pending trial.

After extensive pretrial proceedings, a five-day dissolution trial began on September 27, 2016. There was conflicting evidence entered on a number of financial issues. The court entered findings of fact and/or conclusions of law on the following topics germane to this appeal.

Rejecting Rod's argument that Lori had no need for maintenance and/or could return to full time teaching, the court directed that Rod pay Lori spousal maintenance of \$6,000 per month until one or the other died. The court also directed that N.V.D.G. and each parent pay one-third of any college expenses not covered by the child's 529 account.

The court valued the couple's share of Midvale at \$2 million dollars, choosing a valuation midway between Lori's expert's opinion of \$2.2 million and Rod's expert's valuation of \$1.7 million.⁵ The court concluded that the \$2 million promissory note the

⁵ The experts agreed that their differences resulted from the high cattle prices obtained by Midvale in 2014 and the lower prices realized in 2015.

couple had signed was illusory and did not devalue their share of the company.⁶ The court valued the residence at \$1.4 million in accordance with the valuation of Lori's real estate agent; Rod had valued the home at \$772,000. The court determined that the cattle account funds had been comingled with community funds and characterized both the house and the cattle account as community property. Turning to the Ellensburg property, the court ruled that it constituted community property since the bulk of the payments came from community assets.

Determination and treatment of any interest Rod might have in VDGR presented a complicated issue in light of the creation of the Maxine Trust that was being funded, in part, by Rod's Midvale assets, and was clearly designed to be transferred to him. The court stated:

And there is ample evidence that such a transfer is going to take place at some time after the marriage is dissolved. But there is no evidence that she has made such a transfer, so [Rod's] interest in the company remains inchoate. So, I do not believe that Respondent's incipient ownership in the company is an asset subject to division by this court. However, I believe the court can consider the likely acquisition of this interest in determining what is just and equitable in the division of other assets and application of the factors enumerated in RCW 26.09.090.

Clerk's Papers (CP) at 785.

⁶ Subsequent to that ruling, the senior Van de Graafs sued Rod and Lori in an attempt to collect on the note. The trial court dismissed the complaint on Lori's motion for summary judgment, ruling that the claim was barred by the statute of limitations. See Yakima County Superior Court file No. 16-2-03511-39.

The trial court evenly divided the property, although it ordered Rod to make a transfer payment of \$1,171,200 to Lori in order to equalize the two estates. Of the previously noted assets, the court gave Midvale and the family home to Rod, while assigning the Ellensburg property to Lori. The court also gave Rod life insurance policies with a cash value of \$116,000. Rod had testified that the policies belonged to the marital community. The court also denied both parties' requests for attorney fees, ruling that although significant resources had been expended in litigation, "both parties have sufficient wherewithal to pay their own costs and fees." CP at 788.

Rod filed the notice of appeal that initiated this case on March 17, 2017.

Lori sought reconsideration of the attorney fee ruling, arguing under *Friedlander*⁷ that she was entitled to fees for the extraordinary litigation costs engendered by the complicated business concerns and the family's resistance to sharing information about them. The court agreed and awarded Lori her attorney fees for the outstanding balance owed her attorney of \$58,675, approximately one-half of the attorney fees she had incurred to that point.

Lori also brought a motion for contempt due to Rod's failure to pay the monthly maintenance ordered by the court. He, in turn, sought to modify that ruling on the basis that his monthly income was substantially diminished by falling cattle prices, he had not

⁷ *Friedlander v. Friedlander*, 58 Wn.2d 288, 362 P.2d 352 (1961).

received any interest in VDGR, and he could not cash in the insurance policies because they were actually owned by a trust and not by the couple. He subsequently filed a CR 60 motion to vacate the property distribution order using the same argument about the insurance policies.

The trial judge held a hearing April 14, 2017, and found Rod in contempt for willful failure to pay spousal maintenance since November 1, 2016. The court awarded Lori a judgment for the past due support while denying Rod's motion to modify or reduce the support obligation. The court also entered judgment for the attorney fees awarded on reconsideration.

A new contempt motion was filed the following month when Rod failed to comply with the April contempt order. Rod filed a cross-motion for contempt seeking to force Lori to vacate the premises and pay the debts assigned her by the decree. A court commissioner found Rod in contempt for willful failure to pay.

Rod moved to revise the ruling, but the trial judge denied the motion. While revision was pending, Lori filed a motion asking for \$65,000 in suit money to defend against Rod's appeal. The commissioner awarded her \$30,000. Rod was also found in contempt for willful failure to pay child support in July and August 2017.

Rod filed notices of appeal from several of the post-trial rulings, as well as an amended notice of appeal for this case. Meanwhile, he sought multiple extensions of his briefing obligation in this court, leading our commissioner to require the brief by October

31, 2017, and warning that no more extensions would be granted. When that deadline passed without a brief, Lori moved to dismiss the appeal, citing the failure to comply with this court's order as well as the failure to pay the suit money and continued misuse of the appellate rules for purposes of delay. The brief of appellant was filed January 2, 2018.

Lori also successfully sought a new contempt order from the superior court over Rod's failure to pay the suit money. In response to that ruling, Rod paid \$10,000 of the \$30,000 ordered. The commissioner found Rod in willful violation of the suit money rulings and suspended a five-day jail sentence while indicating that a bench warrant would issue if the remaining money was not timely paid. That ruling led Rod to file a series of unsuccessful emergency motions with this court and the Washington Supreme Court seeking stays of the contempt rulings.

Rod filed a supersedeas bond in the amount of \$361,240 on February 21, 2018, to stay enforcement of the equalization payment and the judgment for attorney fees in the trial court. Discovery subsequently showed that Rod's sister and parents had paid nearly \$230,000 in fees and costs for his appellate attorneys as of June 2018. Meanwhile, the superior court commissioner awarded Lori additional suit money. The appeal of that award is the subject of Van de Graaf II.

In August 2018, Lori renewed the motion to dismiss the appeal due to failure to pay the suit money. She alternatively sought to condition Rod's continued participation

in the appeal on his payment of the suit money. Our commissioner denied the alternative relief, but passed the motion to dismiss on to the panel that heard the case.

During our March 2019 term, a panel heard oral argument of this case and also considered, without argument, Van de Graaf II. We directed the trial court to enter findings concerning its attorney fee award in this case. The trial court timely complied with that direction and returned findings to this court. We also lifted the stay of the cases that constitute Van de Graaf IV. Those cases ultimately were heard by this panel without argument on our August 2019 docket. Meanwhile, the same panel considered the Van de Graaf III appeal without argument on June 10, 2019. The other three appeals will be addressed in separate opinions.

ANALYSIS

The initial issue for our consideration is Lori's motion to dismiss the appeal. We then turn to the issues presented by Rod.

Motion to Dismiss

The motion to dismiss is predicated on Rod's failure to prosecute the appeal in a timely fashion and for using the appeal for the improper purposes of delay and imposing costs on her. Although this claim largely was founded on Rod's intransigent behavior in the postdecree time period, matters that primarily are issue in Van de Graaf IV, it is raised in this appeal, in part due to the previous consolidation of the cases. We address the issue in this appeal because of the significance of the motion to the entire litigation.

RAP 18.9(c) permits this court to dismiss an appeal for, among other reasons, want of prosecution or if it was brought solely for purposes of delay. Sanctions may be appropriate where one party is intransigent or uses the rules for delay. *See, e.g., Mattson v. Mattson*, 95 Wn. App. 592, 976 P.2d 157 (1999) (husband's intransigence in making incremental disclosures of his income only when prodded by wife's counsel, and his less than candid portrayal of his termination of optometry clinic lease that led to his voluntary underemployment, justified award of attorney fees to wife on appeal in postdissolution child support modification proceeding).

Although we agree with the trial court that Rod has demonstrated intransigence throughout this entire case, we do not agree that dismissal is required. This court has not found, nor has Lori cited, any previous case in which an appeal was dismissed due to intransigence or purposeful delay. Instead, it appears the usual remedy for intransigence on appeal is to order the intransigent party to pay the other party's attorney fees. *Id.* at 606; *Chapman v. Perera*, 41 Wn. App. 444, 455-456, 704 P.2d 1224 (1985). We will address the appropriateness of a fee award in each case, including at the end of this opinion.

The merits of all of the issues having been briefed and submitted for this court's consideration, dismissal at this stage would serve little purpose where another, adequate, remedy exists. Accordingly, we deny the motion to dismiss these appeals.

General Considerations Governing Rod's Appeal

Before turning to Rod's appeal, a brief discussion of some of the issues is in order due to the overlapping appeals addressing some of the same issues. This case has grown like Topsy and the parties briefed issues in accordance with the original grouping of the appeals. The subsequent deconsolidation means that some issues are briefed in multiple appeals and that others are briefed under cause numbers that no longer include the relevant notice of appeal. Rather than regroup files yet again and introduce more uncertainty in our records, this opinion will note all of the issues raised in this appeal, but we will address those issues in the appeal logic and judicial economy best suggests we resolve them.

With that observation, it is time to recall a few basic principles of our domestic relations laws. Washington is a community property state. Chapter 26.16 RCW. Thus, property "acquired after marriage" "is community property." RCW 26.16.030. The "word 'acquired' should be construed to encompass wages and other property acquired through the toil, talent, or other productive faculty of either spouse." *In re Marriage of Brown*, 100 Wn.2d 729, 737, 675 P.2d 1207 (1984). Each spouse has equal authority to manage community property, but neither can encumber real estate without the consent of the other, and the ability to give away property by gift or bequest is limited. RCW 26.16.030.

Similarly, property acquired before marriage or by gift or inheritance after marriage is the separate property of the recipient spouse. RCW 26.16.010. Thus, the timing of the property's acquisition is key to characterizing the nature of the property. *In re Binge's Estate*, 5 Wn.2d 446, 484, 105 P.2d 689 (1940).

Trial judges have broad discretion in devising fair resolution of marriage dissolution actions. As a result, an oft-cited passage from the Washington Supreme Court concerning the importance of finality in domestic relations rulings guides appellate review:

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.

In re Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). This emphasis on finality and moving forward is reflected in the well-settled standards that govern review of domestic relations cases. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court acts on untenable grounds when its factual findings are not supported by the record; it acts for untenable reasons if it uses an incorrect standard of law or the facts do not meet the requirements of the standard of law. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

We now consider the arguments presented by Rod's appeal.

Consideration of VDGR Property

Rod first argues that both the property division and the spousal maintenance award were flawed by the trial court's consideration of his future inheritance from his parent's estate as represented by the Maxine Trust. He has not demonstrated that the trial court erred.

Prior to making a property division, the dissolution court must determine the nature and extent of the parties' community and separate property. RCW 26.09.080; *In re Marriage of DeHollander*, 53 Wn. App. 695, 700, 770 P.2d 638 (1989). Vested future benefits are subject to division, but unvested expectations such as an inheritance are not. *See, e.g., In re Marriage of Wright*, 147 Wn.2d 184, 189, 52 P.3d 512 (2002) (vested benefits); *In re Marriage of Hurd*, 69 Wn. App. 38, 49, 848 P.2d 185 (1993) (not vested), *overruled on other grounds by In re Estate of Borghi*, 167 Wn.2d 480, 486, 219 P.3d 932 (2009).

Future earning potential is not an asset that can be divided, but it may be considered when distributing the property and awarding maintenance. *In re Marriage of Leland*, 69 Wn. App. 57, 847 P.2d 518 (1993); *In re Marriage of Anglin*, 52 Wn. App. 317, 759 P.2d 1224 (1988); *see also Stacy v. Stacy*, 68 Wn.2d 573, 576, 414 P.2d 791 (1966) (when awarding alimony following a long-term marriage, the court should consider and weigh the future earning capabilities of both parties). The court may also consider the spouses' "foreseeable future acquisitions" when dividing property and

awarding maintenance. *In re Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997); *In re Marriage of Olivares*, 69 Wn. App. 324, 329, 848 P.2d 1281 (1993), *overruled on other grounds by In re Estate of Borghi*, 167 Wn.2d 480.

Rod argues that the trial court erred in considering his pending inheritance. The trial court, however, expressly stated that the VDGR properties were not before the court for division⁸ and the ensuing decree does not mention it.⁹ CP at 770-773, 785. The court did “consider” the “likely acquisition” of this inchoate interest of Rod’s in assessing what was a “fair and equitable” maintenance award (citing to RCW 26.09.090). CP at 785, 787. This consideration was proper. *Gillespie*, 89 Wn. App. 390; *Olivares*, 69 Wn. App. 324.

The trial judge was not required to ignore the realities of the parties’ actual financial situation merely because the pending property interest was not vested and, thus, not before the court for division.¹⁰ The pending transfer of one-third of his parents’

⁸ Given the unprecedented diversion of the Midvale manure asset to partially fund the VDGR stock purchases, and ensuing reduction of Rod’s earning capacity from that community asset, the trial court may well have been justified in treating the trust as an asset of the marital estate because Rod appeared to be purchasing a portion of it. Since the court did not do so, we need not speculate further on this point.

⁹ The \$1.7 million valuation would certainly have skewed the distribution if it had been included.

¹⁰ Rod also argues that the trial court should have considered Lori’s pending inheritance if the court could consider his. The major problem with this argument is that no evidence was presented considering the size or certainty of any pending inheritance; the issue was only mentioned in counsel’s argument to the trial court.

property to Rod would have a direct impact on his future earning capacity, a factor that the court could properly consider in making its award. *Stacy*, 68 Wn.2d 573; *Leland*, 69 Wn. App. 57; *Anglin*, 52 Wn. App. 317. Accordingly, there was no error.

Rod has failed to establish that the trial court erred in its “consideration” of the pending transfer of the VDGR properties to Rod and his siblings.

Life Insurance Policies

Rod argues that the trial court erred in awarding him the value of life insurance policies that he now claims actually belonged to a trust and not the couple.¹¹ The trial court did not abuse its discretion in denying his motion to vacate.¹²

Rod had testified at trial that the life insurance policies were community property purchased by the community and that they held a cash value of \$116,000. The trial court awarded the policies to Rod at that value. In the motion to vacate, Rod alleged that the policies belonged to a trust and not to the community. In denying the motion, the trial court noted that there may have been “some misrepresentation or misunderstanding”

¹¹ Although the order on motion to vacate judgment is before this court in the Van de Graaf IV appeal, we exercise our authority to resolve this aspect of that ruling in this case since the issue would materially affect the dissolution decree that is the subject of this appeal.

¹² Rod also filed a motion to reconsider in conjunction with the motion to vacate. However, the decree was entered February 17, 2017, and the motion to reconsider was not filed until March 10, 2017, rendering it untimely. CR 59(b). Thus, we only address the motion to vacate.

about the policies, but that it “inures not to Mr. Van de Graaf’s benefit.” Report of Proceedings (RP) at 1036.

A court errs when awarding property in a dissolution decree if the parties before the court have no ownership interest in the property. *In re Marriage of McKean*, 110 Wn. App. 191, 194-195, 38 P.3d 1053 (2002). This court reviews a trial court’s CR 60(b) motion for abuse of discretion. *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 894, 1 P.3d 587 (2000). However, a trial court has a nondiscretionary duty to vacate a void judgment. *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994).

Rod never established that this award was void. His own trial testimony established that the life insurance policies were community property, clearly putting them before the trial court. His affidavit in support of the motion to vacate judgment provided little support for his post-trial claim that the life insurance policies were not community property. There was no affidavit from the insurance company establishing ownership of the policies, nor was there any substantive information about the alleged trust that would have allowed the trial court to conclude that it was a third party owner of the policies.

In addition to the failure of proof, none of the CR 60(b) bases Rod asserted for relief help him in this circumstance. His argument that the policies were owned by a trust, if true, would not have been “newly discovered evidence” within the meaning of the CR 60(b)(5) since the facts were discoverable during the many years that the policies had been in existence, including the five years between the separation of the parties and the

ensuing trial. To the extent that he argues that the trial court committed an error of law, CR 60(b) provides him no relief. Because errors of law are to be resolved on appeal instead of by motion to vacate, a trial court abuses its discretion in granting a CR 60(b) motion due to legal error. *Shum v. Dep't of Labor & Indus.*, 63 Wn. App. 405, 408, 819 P.2d 399 (1991) (citing authorities).

The trial court did not err in rejecting the unproven motion to vacate.

Characterization of Ellensburg Property

Rod next argues, correctly, that the trial court erred in its characterization of the Ellensburg property. The error, however, was harmless.

As noted previously, the trial court has an obligation to properly characterize the property before the court. RCW 26.09.080. As also previously noted, the characterization of the property is determined at the time of acquisition of the property.¹³ *Binge's Estate*, 5 Wn.2d at 484.

Here, Rod acquired his one-half interest in the property prior to his marriage to Lori. Thus, the Ellensburg property was appropriately characterized as his separate property. The vast bulk of the payments, 85 percent,¹⁴ were made during the marriage

¹³ This is subject to subsequent decisions of the parties such as the entry of a community property agreement. RCW 26.16.120; Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 WASH. L. REV. 13, 101-103 (1986); Harry M. Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 798-802 (1974).

¹⁴ 51,000/60,000.

from community funds. Thus, while the property was Rod's separate property, the marital community maintained a lien for 85 percent of his purchase price. *See In re Marriage of Elam*, 97 Wn.2d 811, 650 P.2d 213 (1982); *Merkel v. Merkel*, 39 Wn.2d 102, 113-115, 234 P.2d 857 (1951).

In light of the trial court awarding each spouse their own separate property, Rod contends that this characterization error requires either a remand or an award of the land to him. In truth, this error was harmless. All property is before the trial court and the judge has authority to award one spouse's separate property to the other. RCW 26.09.080. The only requirement is that the award be "just and equitable" after consideration of four factors. *Id.*

Anticipating this issue, the trial court expressly stated that "this division of property is fair and equitable *regardless of the characterization of any item as community or separate.*" CP at 787 (emphasis added). The trial judge could not be clearer in his intent. The Ellensburg property was to go to Lori, regardless of how the property was characterized. Even with that award of separate property to her, Rod still owed another \$1.1 million to equalize the community property division; the only remaining alternative was to award her a greater share of the community property. The trial court probably assumed that Rod would rather own Midvale and make an equalization payment than own the Ellensburg grazing land while Lori took his interest in Midvale.

In view of the trial court's clear statement of intent, the mischaracterization of the land as community property did not harm Rod.

Maintenance Award

Rod next contends that the trial court erred in awarding Lori maintenance of \$6,000 a month for life. Having considered the proper factors, the trial court did not abuse its discretion in making the award.

Spousal maintenance is governed by RCW 26.09.090. Its nonexclusive list of factors to be considered includes:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently . . . ;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage . . . ;
- (d) The duration of the marriage . . . ;
- (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
- (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

The purpose of maintenance is to support a spouse until he or she is able to become self-supporting. *In re Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). There is no right to spousal maintenance in Washington, but the decision to grant or deny maintenance is reviewed for abuse of discretion. *In re Marriage of Zahm*, 138

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Wn.2d 213, 226-227, 978 P.2d 498 (1999); *Friedlander v. Friedlander*, 58 Wn.2d at 297-298. Trial courts must consider the statutory factors of RCW 26.09.090. *In re Marriage of Williams*, 84 Wn. App. 263, 267-268, 927 P.2d 679 (1996). However, findings regarding the statutory factors are not necessary as long as it is clear that the court considered them. *In re Marriage of Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004). It is the prerogative of the trial court, rather than the appellate court, to weigh the factors. *Zahm*, 138 Wn.2d at 227.

The court's ultimate concern must be the parties' economic situations postdissolution. *Williams*, 84 Wn. App. at 268. The court is not required to place the parties in precisely equal financial positions at the moment of dissolution. *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). If, as here, the spouses were in a long-term marriage of 25 years or more, the court's objective is to place the parties in roughly equal financial positions for the rest of their lives. *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007). To reach this objective, the court may account for each spouse's anticipated postdissolution earnings in its property distribution by looking forward. *In re Marriage of Wright*, 179 Wn. App. 257, 262-263, 319 P.3d 45 (2013).

Lifetime maintenance awards are generally disfavored. *In re Marriage of Coyle*, 61 Wn. App. 653, 657, 811 P.2d 244 (1991). Nonetheless, "the only limitation placed upon the trial court's ability to award maintenance is that the amount and duration,

considering all relevant factors, be just.” *In re Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). “Where the assets of the parties are insufficient to permit compensation to be effected entirely through property division, a supplemental award of maintenance is appropriate.” *Id.* Maintenance is “a flexible tool to more nearly equalize the postdissolution standard of living of the parties, where the marriage is long term and the superior earning capacity of one spouse is one of the few assets of the community.” *In re Marriage of Sheffer*, 60 Wn. App. 51, 57, 802 P.2d 817 (1990).

Against these stringent standards, Rod argues that the maintenance award was untenable, failed to serve the goal of making Lori self-sufficient, and was unnecessary to effectuate the property division. We disagree with this assessment.

The lifetime payment was not untenable. The trial court correctly observed that Rod was a wealthy man who was about to become even more wealthy. He owned a significant amount of separate property and was awarded the community’s primary income-producing asset, Midvale. The trial court concluded that Rod’s average annual income was in the neighborhood of \$200,000 and his expenses were practically nonexistent since the family companies paid for them. In light of those circumstances, he was capable of paying a lifetime maintenance award.

In contrast, Lori's situation was not as rosy. Her age and health concerns meant that a return to full-time teaching was unlikely and any career would not be lengthy.¹⁵ She had need of support given her comparatively limited income. She was unlikely to ever approach the standard of living previously enjoyed by the couple. Thus, the trial court properly concluded that maintenance was necessary for Lori's support.

While Rod disagrees, the maintenance award also served to justify the property division. The bulk of the couple's income came from Rod's employment and Midvale. Since Midvale was the primary income-producing asset of the couple, the award of that asset to Rod meant that none of the other assets would give Lori an income stream commensurate with their standard of living. Rather than continue joint ownership of Midvale, maintenance served to provide Lori an income from that asset while eliminating her ownership interest in the asset. It is not unusual when a single source is primarily responsible for a couple's income for a court to make a maintenance award in favor of the party who no longer has access to the asset; there simply is no other income-producing asset that could take its place.

The court's maintenance award was supported by tenable grounds in the record. Rod was awarded the primary income-producing asset and there were no additional assets

¹⁵ By the time of trial in 2017, both parties were in their later 50s and had been married nearly 32 years. If the matter had been resolved in 2012, lifetime maintenance might have been unnecessary.

that could have been awarded to Lori. In light of the disparate income resulting from that division and the unlikelihood of Lori ever being able to adequately support herself, the trial court's award was both understandable and reasonable.

The court did not abuse its discretion.

Post-Secondary Support

Rod next argues that the trial court erred in issuing an order for post-secondary support of N.V.D.G. that required the parents and child to each pay one-third of any educational expenses not covered by the 529 education account.¹⁶ Once again, we disagree and conclude that the trial court did not abuse its discretion in this matter.

The trial court has broad discretion to order support for postsecondary education. *Childers v. Childers*, 89 Wn.2d 592, 601, 575 P.2d 201 (1978); *In re Marriage of Newell*, 117 Wn. App. 711, 718, 72 P.3d 1130 (2003). This court will not substitute its judgment for the trial court's judgment if the record shows the court considered all relevant factors and the award is not unreasonable under the circumstances. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990).

The trial court must initially find that the child is dependent and "relying upon the parents for the reasonable necessities of life." RCW 26.19.090(2). Once that threshold

¹⁶ A court commissioner had entered the same ruling at a pretrial hearing three years previously. CP at 365.

requirement is satisfied, the trial court must also consider the following nonexhaustive list of factors:

Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources.

RCW 26.19.090(2). "Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together." *Id.*; *In re Marriage of Cota*, 177 Wn. App. 527, 537, 312 P.3d 695 (2013). The statute does not require the trial court to enter findings. *In re Marriage of Morris*, 176 Wn. App. 893, 906, 309 P.3d 767 (2013).

Rod's argument¹⁷ is that N.V.D.G. had access to the funds in the UGTMA account adequate to pay for his needs, thus rendering the child not dependent on his parents for support. In fact, the existence of the parent-funded accounts proves the opposite. The child did not have an independent source of income, but was dependent on parental funding mechanisms to attend college. He was not an emancipated child, but remained dependent on his parents for his living expenses.

¹⁷ Rod also argues that (1) the trial court sua sponte raised the post-secondary support issue and (2) that findings were required. The answer in both cases is no: (1) RP at 82-83 (pretrial ruling reserving expenses for junior and senior year); (2) *Morris*, 176 Wn. App. at 906.

Regardless, the trial court heard testimony that the UGTMA account was not intended to be used for college education and that the existing 529 education account proved inadequate to cover all of the college expenses, which the parents had intended to pay. Both parents had attended college and evidence concerning their income and resources constituted a significant portion of the trial. N.V.D.G. had completed two years of college before the funding issue arose. The trial court heard evidence on all of the RCW 26.19.090 factors, thus assuring their “consideration” before confirming the educational support award.

Having considered all relevant statutory factors, and many of the suggested factors, the trial court did not abuse its “broad discretion” in awarding post-secondary support.

Attorney Fees

Rod next argues that the trial court erred on reconsideration in granting Lori the \$58,000 balance of her attorney fees due to the contentious nature of the trial litigation. Having initially sent this question back to the trial court for clarification, we now affirm.

Trial courts have the power in dissolution proceedings to order one side to pay the attorney fees of the other when the receiving spouse has need and the paying spouse has the ability to pay. RCW 26.09.140. In its initial letter ruling, the court declined to grant fees to either side under this statute. Citing *Friedlander*, Lori moved to reconsider under the statute as well as arguing that Rod’s intransigence justified an award of fees. The

court granted the motion. The court’s letter briefly remarked on both *Friedlander* and intransigence. We remanded to ascertain the significance, if any, of the intransigence comment. The court entered findings of fact clarifying that Rod’s intransigence was the basis for ordering the award.¹⁸

Friedlander authorizes an award of attorney fees when complicated business and property holdings require extraordinary work for the opposing attorney to untangle and understand the nature of the property interests. 58 Wn.2d at 297. A court may also base a fee award on a party’s intransigence. *MacKenzie v. Barthol*, 142 Wn. App. 235, 242, 173 P.3d 980 (2007); *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969). An award due to intransigence is an equitable remedy. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). Among the remediable instances of intransigence is “when one party made the trial unduly difficult and increased legal costs by his or her actions.” *Id.*

“When intransigence is established, the financial resources of the spouse seeking the award are irrelevant.” *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). Although fee awards due to intransigence should be segregated to address

¹⁸ Although the court’s clarification came after the briefing in this case, there is no need for additional briefing since the topic, although lightly touched on by Rod in this case, has been briefed more thoroughly in the other cases. We note Rod’s objection to the findings in the trial court and will presume he continues those objections in this court, so there is no need for supplemental briefing in order to allow him to assign error.

only the intransigent behavior, there is no need to segregate when the intransigence permeates the proceedings. *In re Marriage of Sievers*, 78 Wn. App. 287, 301, 309, 897 P.2d 388 (1995) (affirming trial court’s award of one-half of wife’s attorney fees where husband’s intransigence “sufficiently permeated the proceedings” to justify such an award). Attorney fee awards based on the intransigence of one party have been granted when the party engaged in “foot-dragging” and was an “obstructionist,” as in *Eide*, 1 Wn. App. at 445; when a party filed repeated unnecessary motions, as in *Chapman*, 41 Wn. App. at 455-456; or simply when one party made the trial unduly difficult and increased legal costs by his or her actions, as in *Morrow*, 53 Wn. App. at 591. This court reviews decisions to award fees or not for abuse of discretion. *In re Marriage of Zeigler*, 69 Wn. App. 602, 609, 849 P.2d 695 (1993).

The combination of *Friedlander* and intransigence provides tenable grounds for the trial court’s fee award. Unwinding the interconnected family businesses, understanding the various ownership groups, and valuing the community and separate property components took extraordinary effort and required the use of an expert. Those problems were complicated significantly by the family’s actions in circling the wagons and limiting information. Rod’s additional behavior in making life as financially difficult for Lori as he could during the years leading to the trial reinforced the conclusion that his family was actively working with him against his spouse.

Under these circumstances, the trial court had no difficulty in assigning the remaining one-half of Lori's attorney fees to Rod's intransigence and ordering that he pay those costs. *See Sievers*, 78 Wn. App. at 301 (award of half of attorney fees due to intransigence permeating trial court proceedings). His strategy was to raise the cost of litigation while limiting her financial ability to compete with him. The trial court did not err in determining that this financial abuse needed to be remedied.

Even without considering the trial court's specific factual findings, which are supported by the evidence, the conclusion that intransigence fueled this litigation is amply supported by the record in this case. There were tenable reasons to award Lori her attorney fees. The court did not abuse its discretion in making its award.

Modification and Contempt Rulings

The next two issues Rod raises—the court's refusal to modify the maintenance award and some of the ensuing contempt rulings—were originally briefed in this case. We defer our consideration of those contentions to the opinion in *Van de Graaf IV* in light of the reassignment of related cases to that matter.

Remand to a New Judge

Rod also asks that we remand this case for further proceedings before a different judge, arguing that Judge McCarthy acted beyond his authority in some of his rulings, thereby evidencing an inability to give Rod a fair trial. This opinion will not require

further action¹⁹ from Judge McCarthy, technically rendering the question moot in this case, but the argument also impacts the remaining appeals. Accordingly, we consider his argument at this time. Since his argument is unpersuasive, we deny the request.

The appearance of fairness doctrine requires recusal where the facts suggest a judge is actually or potentially biased. *Tatham v. Rogers*, 170 Wn. App. 76, 93, 283 P.3d 583 (2012). Judges not only must actually be unbiased, but they also must appear to be unbiased. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). The trial court is presumed to perform its functions without bias or prejudice. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000).

Thus, a party alleging bias must provide evidence of actual or potential bias. *State v. Post*, 118 Wn.2d 596, 618-619, 826 P.2d 172, 837 P.2d 599 (1992). Appellate courts apply an objective test, viewing the evidence as would a reasonable person familiar with all of the facts, to determine if there is the appearance of bias. *In re Marriage of Davison*, 112 Wn. App. 251, 257, 48 P.3d 358 (2002). In the absence of evidence, the claim of bias must be rejected. *Post*, 118 Wn.2d at 619.

As evidence of bias, Rod argues that the court's (allegedly) erroneous rulings against him at trial and on reconsideration (and afterwards) establish Judge McCarthy's

¹⁹ The sole error we have identified—the mischaracterization of the Ellensburg property—is harmless, and the mischaracterization of that property in the trial court's letter opinion has no future consequences, so no remand for correction of that letter is necessary.

bias. They do not. Not only are the claims of error discussed in this appeal without merit, such claims should nearly always be inadequate to establish a claimant's burden. Objectively viewed, an erroneous ruling is simply that—an error of law by a trial court judge. An error, or series of them, seldom will constitute evidence of bias.

The primary case relied on by Rod is not to the contrary. *In re Marriage of Muhammad*, 153 Wn.2d 795, 108 P.3d 779 (2005). There, the Washington Supreme Court held that the trial court abused its discretion where it improperly considered marital fault when dividing the parties' property. In addition to certain inequitable aspects of the property division, the court found that specific language used by the trial court in both oral rulings and the written findings suggested an improper consideration of the wife's "fault" since there was no proper purpose for discussing the wife's actions. *Id.* at 804-805. Under those circumstances, remand to a new judge was appropriate.

More than mere legal error was at issue in *Muhammad*, but nothing other than alleged legal error is at issue here. Accordingly, *Muhammad* does not compel disqualification of Judge McCarthy from future proceedings in this case. Our review of this extensive record convinces us that Judge McCarthy was scrupulously fair and even-handed throughout this case. He maintained an even keel while recognizing (and rejecting) overzealous and improper behavior, including Rod's breaches of fiduciary duty to Lori and the children and his disregard for multiple court orders. We would hope that

all trial judges confronted with scorched earth tactics and bullying behavior would address them with the same equanimity.

The request for remand to a new judge is rejected. Rod's argument comes nowhere near establishing his claim.

Attorney Fees on Appeal

Lastly, we turn to Lori's request for attorney fees on appeal due to Rod's intransigence.²⁰ This request applies to all of the cases on appeal. We will separately address the issue in each of the four opinions. In this instance, we grant the bulk of her request.

An appellate court may grant attorney fees as a sanction when an appeal is frivolous or brought for improper purposes. RAP 18.9(a). The appellate court also may grant attorney fees as a remedy to one party's intransigence. *Mattson*, 95 Wn. App. at 606; *Eide*, 1 Wn. App. at 445-446.

This appeal was not frivolous. Significant financial interests were at issue and Rod identified one error that could have overturned the property division but for the trial judge's skillful resolution of the issue. Accordingly, we decline to impose sanctions for frivolous litigation.

²⁰ Our discussion of Rod's challenge to the initial suit money awarded is deferred to Van de Graaf II.

That does not mean that Rod is home free. While there may have been justifiable reasons for appealing, the appeal itself was conducted in a manner consistent with the delaying tactics used in the trial court. Accordingly, Lori requests that her attorney fees be paid by Rod's lawyers. We have some sympathy for her position because this case has been over-litigated in the extreme, particularly considering the standards of review, but we decline her request. In the absence of evidence that the attorneys have been directing Rod's conduct throughout this litigation, this appears to be at worst a case of poor client control with appellant continuing to act on appeal as he did before trial.²¹

Without hesitation, we reach the same conclusion that the trial court did. This litigation, however justified at its inception by the financial interests at issue, has been conducted in a manner designed to beat down the respondent rather than reach a proper resolution on the merits. Equity demands that she be afforded some relief.

Domestic relations cases spawn more emotionally-fueled litigation than most other legal practice areas. In this case, appellant has purposely imposed costs on respondent. He has accepted the benefits of the decree, but has often declined to comply with his obligations under that document. His behavior has been calculated to raise Lori's legal costs, just as the trial court found he did in the trial proceedings. The intransigence that

²¹ The facts are well known to the parties. We purposely have been vague or conclusory in order to avoid detailed reference to the facts lest they serve as a primer to others.

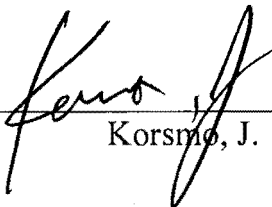
No. 35133-5-III

In re Marriage of Van de Graaf

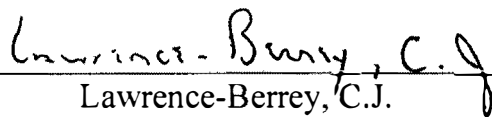
permeated those proceedings likewise permeates this appeal. Thus, even though Rod scored a small victory concerning the characterization of the Ellensburg property, we grant Lori her reasonable attorney fees for the briefing and motions filed under this cause number, subject to her timely compliance with RAP 18.1.

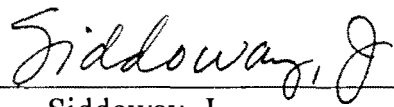
The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Korsmo, J.

WE CONCUR:


Lawrence-Berrey, C.J.


Siddoway, J.

FILED
SEPTEMBER 27, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Marriage of,	)	No. 35133-5-III
	)	
LORI VAN DE GRAAF,	)	
	)	
Respondent,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
v.	)	
	)	
ROD D. VAN DE GRAAF,	)	
	)	
Appellant.	)	
	)	

THE COURT has considered appellant's motion for reconsideration, but without considering appended materials that are not part of the record in this court, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of August 29, 2019 is hereby denied.

PANEL: Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:


ROBERT LAWRENCE-BERREY
Chief Judge

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

*The Court of Appeals
of the
State of Washington
Division III*



August 30, 2019

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
<http://www.courts.wa.gov/courts>

Gregory Mann Miller
Carney Badley Spellman PS
701 5th Ave Ste 3600
Seattle, WA 98104-7010
miller@carneylaw.com

JoAnne G Comins Rick
Halstead & Comins Rick PS
PO Box 511
1221 Meade Ave
Prosser, WA 99350-0511
jgcrick@gmail.com

Jason Wayne Anderson
Carney Badley Spellman PS
701 5th Ave Ste 3600
Seattle, WA 98104-7010
anderson@carneylaw.com

CASE # 351335

In re the Marriage of: Lori Van de Graaf and Rod D. Van de Graaf
YAKIMA COUNTY SUPERIOR COURT No. 113009826

Counsel:

Pursuant to the "Motion and Brief in Support of Supplementing the Appellate Record With Clerk's Papers Re Findings of Fact for Fee Award on Limited Remand," the following notation ruling was entered:

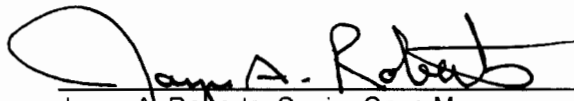
August 30, 2019

The Motion in Support of Supplementing the Appellate Record with Clerk's Papers Re Findings of Fact for Fee Award on Limited Remand is denied given the matter has been decided by opinion filed on August 29, 2019. At the direction of the assignment judge, further record was not required to decide the matter.

**Renee S. Townsley
Clerk**

Sincerely,

RENEE S. TOWNSLEY
Clerk/Administrator


Joyce A. Roberts, Senior Case Manager

RST:jr

c: Catherine Wright Smith
Smith Goodfriend PS
1619 8th Ave N
Seattle, WA 98109-3007
cate@washingtonappeals.com

David Paul Hazel
Attorney at Law
1420 Summitview Ave
Yakima, WA 98902-2941
daveh@davidhazel.com

Valerie A Villacin
Smith Goodfriend PS
1619 8th Ave N
Seattle, WA 98109-3007
valerie@washingtonappeals.com

FILED
Mar 18, 2019
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

LORI VAN DE GRAAF,

Respondent,

v.

ROD VAN DE GRAAF,

Appellant.

No. 35133-5-III

**ORDER REMANDING TO TRIAL
COURT FOR ENTRY OF FINDINGS
AND CONCLUSIONS**

Having found that the record before this Court is inadequate for review of the trial court's award of attorney fees to Ms. Van de Graaf,

IT IS ORDERED that the matter is remanded to the Yakima County Superior Court for the limited purpose of entering findings of fact and conclusions of law pertaining to the court's award of attorney fees. The trial court's order on remand should: (i) identify the basis for the court's award of fees; (ii) include findings of fact consistent with the court's basis for the award; and (iii) explain how the fees awarded relate to the

No. 35133-5-III

Marriage of Van de Graaf

basis for the award of fees. The findings and conclusions shall be entered no later than 60 days from the date of this order. Yakima County Superior Court should then forward a copy of the filed findings and conclusions to the Court of Appeals, Division III.


ROBERT LAWRENCE BERREY
CHIEF JUDGE

FILED
Court of Appeals
Division III
State of Washington
10/8/2018 4:06 PM
No. 35133-5-III
(Consolidated with Nos. 35292-7-III, 35499-7-III, and 35839-9-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

Hon. Michael G. McCarthy

APPELLANT ROD D. VAN DE GRAAF'S REPLY BRIEF

Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30512

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Attorneys for Rod D. Van De Graaf

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I. INTRODUCTION AND SUMMARY REPLY

This case cries out for reversal and remand to a different judge for a genuinely equitable property division and reasonable maintenance amount for a fixed duration. Try as she might, Respondent cannot get around the multiple clear errors that constitute abuse of discretion in the trial court rulings. Reversal is required because the trial court failed to exercise its discretion within the statutory and case law legal boundaries on the evidence before it.

First, it purported to divide and “award” as part of the marital property an insurance policy of over \$116,000 that was not owned by either spouse, a jurisdictional defect rendering the award void and, when that fact was called to its attention on reconsideration, the trial court refused to correct the error. That alone requires reversal.¹

Second, it based its permanent maintenance award on financial figures from 2012, despite the availability of current financial information for the obligated party, Appellant Rod Van de Graaf, which were provided at trial and, despite Rod’s motion to modify the unsupportable maintenance in 2017. The award fails the statutory requirement that the obligated party is able to pay the amount ordered as well as provide for his own needs. The \$6,000/month ordered consumes nearly 77% of Rod’s pre-tax

¹ *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002) (decree with third party property vacated); *Persinger v. Persinger*, 188 Wn. App. 606, 355 P.3d 291 (2015) (void judgments must be vacated).

monthly income of \$7,800 and, given the nature of the overall award and the unavailability of the insurance policy funds, the trial court left Rod bereft of liquid assets to supplement his monthly income.

Third, the trial court failed to take into account for maintenance the fluctuation in cattle prices which affect Rod's income and ability to pay, absent an award of sufficient liquid assets to supplement the fluctuations inherent in the cattle (or any other agricultural) business. Rather, the trial court unrealistically treated the cattle business as a steady-state income machine based on the earlier high cattle price years. Even if there is an arguable justification for that approach in determining the property division (which there is not), those figures cannot equitably be used in calculation of maintenance at the end of trial in fall, 2016, or in denying Rod's motion to modify in April, 2017.

Fourth, the trial court erred in characterizing the Ellensburg property as community when it was purchased by Rod and his brother in 1977, eight years before the marriage. RP 500. At most, there could be a small marital lien on that property, since its taxes and other payments were serviced with separate funding sources rather than community funds or labor. Nevertheless, the trial court ignored the pre-marriage purchase of the property and how it was financially maintained and added the entirety of its value into the community property "pot" which the trial court decided to divide

equally, while leaving both parties to retain all their separate property. This also requires vacation of the overall property division after a proper re-characterization of the Ellensburg property.

Finally, the trial court erred by including in its calculations that it believed Rod would soon inherit Van de Graaf Ranches (“VDGR”) from his parents, Dick and Maxine Van de Graaf, using that “mere expectancy” to drive both the property division and the amount and duration of the permanent maintenance award, which continues even if Respondent remarries. The court’s November 17, 2016, ruling incorporated into the final orders makes this plain:

Rod Van de Graaf is a very wealthy man, who is about to become even wealthier. He is the co-owner of the Midvale Cattle Company, the co-owner of K2R, LLC [sic], and will soon be the co-owner of VDGR. I can only estimate his accumulated wealth, which has to be close to 5 or 6 million dollars, if not more. [Rod] is easily able to support himself and his former spouse, without hardship to either.

CP 787-88 (emphasis added). It then expressly ***added*** that expected inheritance to Rod’s total gross income from Midvale “for 2012” when calculating maintenance, stating, “it is reasonable for the Court to conclude his income will increase once his interest in Van de Graaf Ranches, is formalized” such that his annual income would “translate[] to almost \$17,000 per month. CP 788 (emphasis added).

This is clear error requiring reversal because, as shown in the Opening Brief, there is no ***evidence*** supporting this determination of Rod’s monthly income at the end of trial or in April 2017. This runs

afoul of RCW 26.09.090(f) because the evidence of Rod's income and assets at the end of trial and in 2017 do not support that finding given 1) the decline in the cattle prices from historic highs; 2) the financially tenuous situation of Midvale Cattle Company in 2016 and 2017; and 3) use of a "mere expectancy" that Rod would inherit great wealth "soon" when no document or competent, admitted evidence sets forth any such right that he had or could act on.

It is particularly inequitable since Lori received virtually all the liquid assets from the marriage, is currently continuing to work as a part-time special education teacher in the Sunnyside School District and claims income of over \$21,000 per year, and stands to have her own inheritance from her parents, the owners of the jewelry store in Sunnyside, which the trial court refused to consider.

These errors then drove the erroneous post-trial rulings on contempt (how is a person supposed to make monthly payments based on an "expected" inheritance not received?); suit money (with over \$1 million in liquid assets Respondent claims an immediate need, yet her appellate briefing shows she is fully represented on appeal), and the "529 Account" for their fourth son's final year at WSU, where payment of college bills had never been an issue during the five year pendency of the divorce.

Any response arguments not addressed herein are answered by Rod's Opening Brief, and the Court is respectfully directed there.

II. REPLY ARGUMENT

A. The Trial Court Abused Its Discretion In Dividing The Marital Estate By Considering As Available To Rod Assets In Which He Had No Legal Interest – His Parents’ Business, Van de Graaf Ranches.

Fundamental to a marital property division is that the trial court is to make an equitable disposition “of the property and the liabilities of the parties, either community or separate,” RCW 26.09.080 (emphasis added). Nothing else is before the court in a dissolution. See OB at 33-36.

The statute governing division of marital assets, RCW 26.09.080, lists the factors a trial court is to consider when dividing marital assets and liabilities. Although the statutory factors are not exclusive, nothing in the statute suggests the court may consider acquisitions it finds are likely to occur in the future. Indeed, the plain language of the statute does not allow the court to divide assets based on speculation. The fourth statutory factor is “the economic circumstances of each spouse *at the time the property division is to become effective*[.]” RCW 26.09.080(4) (emphasis added). Lori would have this court rewrite the fourth factor to add the words “and might be in the future.” “[A] court must not add words where the legislature has chosen not to include them.” *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

To be sure, Washington courts have stated a few times that the trial court may consider anticipated future acquisitions. Lori

cites two of them. Response Brief (“RB”) at 26 (citing *Stacy v. Stacy*, 68 Wn.2d 573, 414 P.2d 791 (1966); *In re Marriage of Gillespie*, 89 Wn. App. 390, 948 P.2d 1338 (1997)). But in every such decision, that language was *dictum* and never adopted as a holding. And for good reason: no one, even a court, can reliably predict the future. Lori cites no precedent where the court actually divided or awarded “property” that was an anticipated, unvested future acquisition or inheritance. And Rod has found none.

The only form of “future” assets or income that may be considered is where the spouse’s interest in the future asset had already vested, so that it cannot be taken away, such as stock options and pension rights. *See, e.g., In re Marriage of Short*, 125 Wn.2d 865, 873-75, 890 P.2d 12 (1995) (adopting analysis for division of vested stock options). But the law always has been that a mere expectancy is not a property right subject to division in a divorce. *In re Marriage of Harrington*, 85 Wn. App. 613, 624, 935 P.2d 1357 (1997) (“For purposes of Washington dissolution actions, property... must be something to which there is a right. A mere expectancy is not a right and such is not property. WSBA, WASHINGTON FAMILY LAW DESKBOOK § 38.2 (1989).”). *See* OB at 33-36.

This basic principle has not been changed by the legislature or the courts to date, as confirmed by the FAMILY LAW DESKBOOK; and if it is not divisible property, neither can an expectancy be taken

into account in determining the amount or length of maintenance.²

There is no evidence that Rod had an actual interest, vested or otherwise, in his mother's trust or Van de Graaf Ranches at the time of dissolution. The court thus abused its discretion in considering, when dividing the marital estate, the speculative and unsupported "likelihood" that Rod will acquire that trust in the future, from which he could then inherit a share of his parents' business.

B. The Trial Court Abused Its Discretion In Setting The Amount And Duration Of Maintenance, In Refusing to Modify The Maintenance, And In Finding Rod In Contempt When He Could Not Pay The Maintenance.

- 1. The trial court abused its discretion in setting maintenance that Rod could not afford to pay and making it permanent, even if Lori remarries, when she continues to be able to work, was awarded ample property, and failed to take into account her own likely inheritance.**

In addition to the basic equitable principles described at OB, 46-48,³ maintenance must be based on the parties' current circumstances at the time it is imposed. *In re Marriage of Mathews*,

² The most recent edition of the DESKBOOK (through the 2013 supplement) after discussing unvested stock options, states that "There is no right to an expectancy, such as a prospective inheritance, and thus an expectancy is not divisible "property," language from *Harrington*. WSBA, WASHINGTON FAMILY LAW DESKBOOK § 30.2 (2nd ed. 2004).

³ The trial court may consider the property division when determining maintenance and may consider maintenance in making an equitable division of the property, *In re Marriage of Rink*, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977), and the award must be just in light of all the relevant statutory factors, including the spouse's ability for self-support. *In re Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990).

70 Wn. App. 116, 123, 853 P.2d 462 (1993); *cf. In re Marriage of Scanlon & Witrak*, 109 Wn. App. 167, 178, 34 P.3d 877 (2001) (same re child support). And the statute expressly requires the trial court must take into account “[t]he ability of the spouse . . . from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse . . . seeking maintenance.” RCW 26.09.090(f).

This Court held it is reversible error to fail to consider, or to reasonably take into account, the ability of the obligated spouse to meet his own needs, or if the record does not show the obligated spouse has the ability to meet his needs and the obligations imposed by the trial court. *Matthews*, 70 Wn. App. at 123-125 (maintenance award reversed; trial court failed to accurately take into account obligor’s future income stream).⁴

It has long been, and still is “error to order maintenance in excess of the ability to pay.” Scott Horenstein, 20 WASHINGTON PRACTICE, FAMILY AND COMMUNITY PROPERTY LAW § 34:9.1 (2nd ed., 2015) (hereafter HORENSTEIN), citing *Bungay v. Bungay*, 179 Wash. 219, 223, 36 Pac. 1058 (1934) (holding it is error to consider the obligated spouse’s parent’s income or wealth in determining the spouse’s ability to pay maintenance). Mr. Horenstein explains that

⁴ *Matthews* has been followed by unpublished decisions to reverse where the obligated spouse had not significant personal property from which to satisfy the lifetime maintenance award and under the circumstances, it was unclear if the obligated spouse could support himself after making the maintenance payments.

This is not only a matter of fairness to the obligor spouse, but it is also a matter of judicial economy because if the decreed maintenance is not paid, the court will be burdened with repeated attempts to coerce the performance of an act that cannot be performed.

HORENSTEIN, *supra*, citing to the line of cases holding the “obligor cannot be held to be [in] contempt when there is a pecuniary inability to pay the maintenance” and noting that the “principle is similar to the equitable rule that a court will not enter an injunction which cannot be enforced.” *Id.*, at fn. 2.

This is not *ipse dixit* from Mr. Horenstein. The Supreme Court explained the practical and legal reasons for this salutary rule in the context of a divorce which left the obligated spouse in possession of a farm which provided the funds for child and spousal support, just as Rod here was left in possession of Midvale Cattle Company which provides him with his income from which he must support himself as well as pay maintenance:

It seems to us that, taking the most optimistic view with respect to income that may be derived from farm operations, the decree has imposed an obligation on appellant which he cannot possibly perform. For he has no other source of income. While, in these cases, it is the policy of the law to require fathers to adequately provide for their families, **it is not the policy of the law to impose upon them obligations which they cannot perform.** *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653 [1909]; *Bungay v. Bungay*, 179 Wash. 219, 36 P.2d 1058 [1934]. The interests of the family are much better served by an allowance that can and will be paid than one which will inevitably result, from time to time, in show

cause orders which must be dismissed upon showing of inability to pay. *Holcomb v. Holcomb*, *supra*.

Bowers v. Bowers, 192 Wash. 676, 678, 74 P.2d 229 (1937) (emphasis added).⁵

The imposition of \$6,000/month in maintenance in 2017 was an abuse of discretion under the tests stated in *In re Marriage of Littlefield*⁶ when the trial court had evidence Rod's income from Midvale was greatly reduced at the end of trial than it was in the earlier periods testified to, and thus based its determination not on current income, but outdated information and Rod's parents' assets.

Moreover, "When the wife has the ability to earn a living," as Lori does here from her teaching, "it is not the policy of the law of this state to give her a perpetual lien on her divorced husband's future income." *Morgan v. Morgan*, 59 Wn.2d 639, 642, 369 P.2d 516 (1962) (holding that a finding that the wife's health may deteriorate and render her incapable of supporting herself did not support maintenance award where she was presently capable).

⁵ *Bungay* and *Bowers* have been followed in unpublished decisions as recently as 2010; this principle was not changed by the 1973 Dissolution Act.

⁶ *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) states the test this way (emphasized numbers added):

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.

See also, *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, reversing for failure to meet statute's requirement designed to "prevent[] arbitrary imposition of the [trial] court's preferences.").

Similarly, any consideration of one spouse's future income or financial security must be balanced with a similar consideration of the other spouse's future income or financial security to be "fair, just and equitable" as the statute requires. *Matthews, supra*. That was not done here, despite the trial court's findings showing it should have. Though the trial court found that Lori has health problems, Lori herself testified they were in "remission" and under control, RP 246, a good thing, and the court found that Lori was able to and did work part time as a special-education teacher (CP 787), meaning she could generate at least some income, as the record reflects.⁷ No reason is given for the failure to take into account Lori's current abilities to work and to earn. This was error under *Matthews*.

Like its property division, the trial court's maintenance award was infected by its improper consideration of a possible future inheritance. CP 787. That is not a proper consideration because it does not reflect *current* circumstances. It is particularly improper to factor in against Rod here where the Court did **not** factor in Lori's likely inheritance from her elderly parents who owned the jewelry store in Sunnyside.

Lori argues that Rod nevertheless can presently afford to pay the \$6,000 per month in maintenance ordered, asserting that substantial evidence supports the trial court's finding that Rod's

⁷ See, e.g., CP 523-524 (detailing Lori's pay stubs at over \$29/hour for 91 hours in January, 2016, or gross earnings of over \$2600).

“expected income in the near term will be at least \$200,000 per year.” RB at 40 (citing CP 788). But Lori points to Rod’s supposed income from Midvale Cattle Company *in 2013, 2014, and 2015*—two, three, and four years *before* trial. *Id.* (citing Ex. 25). Worse, she overstates Rod’s reported income for those years. The test, as noted *supra*, is Rod’s *current* income when the obligation takes effect. RCW 26.09.090(f); *Marriage of Matthews*. Moreover, Lori’s figures necessarily rely on the trial court’s assumption of Rod’s future ownership of VDGR, not current income.

Lori purports to derive income for Rod from K-1 tax forms for reporting business income. Rod’s total gross income in 2013, 2014, and 2015 as reflected on the tax returns filed by Rod and Lori was (\$62,611), \$22,237, and \$35,465 respectively (his adjusted gross income was even less). Exs. 6.8, 6.9, 6.10. Further, the undisputed evidence was that Rod’s wages in 2016 and 2017 were less than \$100,000 per year. RP 522; Resp. Ex. 2.9; *see also* CP 535. To make matters worse, the equity distributions from Midvale Cattle Company that the family had relied on to cover expenses in past years stopped because of the company’s precarious financial situation, brought about by continuing losses due to depressed cattle prices. RP 763-64, 768. Those depressed prices are a factor over which Rod has no control. He is not falsely “impoverishing” himself to avoid payment – he simply doesn’t have the income.

Lori's remaining arguments about relative financial resources miss the point. Rod does not contend Lori is "bar[red] from receiving maintenance because she should be able to "match Rod's income" by working. RB at 41. The point is that a maintenance award must be fair to **both** parties. And absent the present means to pay, the trial court's maintenance award is unfair to Rod and inconsistent with the statute and longstanding case law.

The fact that the maintenance award is for life, and even if Lori remarries, makes it even more unfair. Substantial evidence did not support indefinite maintenance. Regardless of her ability to earn income, Lori received nearly \$2.8 million in the property division, mostly in cash, at age 56. CP 3, 763-64, 786. This massive asset award did not merely "weigh against" Lori's request for lifetime maintenance as the trial court found; it militated against that request.

The life-time provision, clearly based on Rod's presumed inheritance, is especially inequitable where the Court failed to take into account Lori's likely inheritance. The trial court's maintenance award was contrary to the evidence and an abuse of discretion.

2. **The trial court abused its discretion by refusing to modify the maintenance based on financial market circumstances it did not anticipate and over which Rod had no control, such that the changed circumstances made the failure to modify the award unfair and untenable under the facts.**

The trial court further abused its discretion by adhering to its excessive maintenance award even after Rod updated his income and asset information after the decree was entered and requested modification. The maintenance award was based in part on three events the court found were imminent but did not, in fact, occur.

First, the trial court found that Rod’s income “in the near term”—including “salary *and distributions*”—would be at least \$200,000 per year. CP 788 (emphasis added). But Rod received no equity distributions from Midvale Cattle Company. Lori emphasizes that the trial court had already considered Rod’s trial testimony about the moratorium on Midvale equity distributions. But the trial court evidently concluded that the moratorium would be short lived, and thus included future “distributions” in Rod’s income. When Rod attested after entry of the decree that he had, *in fact*, received no further distributions (and confirmed that none could be expected for the foreseeable future), this was a changed circumstance relative to the trial court’s findings. CP 879, 887.

Second, the trial court found that Rod would “soon be the co-owner of Van de Graaf Ranches” because his mother supposedly would transfer to him a share of a trust, from which he could expect to inherit a share of his parents’ company. CP 887. But as Lori does not dispute, that had not occurred. Use of that unvested, speculative potential wealth thus did not reflect Rod’s **present** circumstances.

Third, the trial court purported to award Rod the Beneficial Life Insurance policy, with a cash-surrender value of \$116,000. CP 786. But that policy turned out not to be available for distribution because it was not owned by the parties, meaning that Rod ended up with far less cash available to pay expenses like maintenance than contemplated under the property division. *See* OB at 39-41; *infra*, § II.C.2. Lori’s asserts there was “no evidence the court considered this asset as a source to pay his maintenance obligation.” RB at 43. But this ignores that the court did purport to consider, as it must, Rod’s “ability...to meet his own needs.” CP 787. And Lori cannot dispute that had Rod actually received the cash value of the Beneficial Life policy, it would have comprised most—more than 75 percent—of the liquid assets awarded to Rod. CP 785, 786.

Given these changed circumstances that drastically affected Rod’s ability to pay maintenance while also providing for himself, the court abused its discretion in refusing to modify the maintenance payment accordingly. The maintenance award should be vacated and the matter remanded for re-calculation of a fair and equitable award based on Rod’s actual circumstances as of April, 2017, and Rod given credit for the excess payments made from that date forward. And when the market factors rebound, Lori can move to modify the then-appropriate maintenance accordingly. She is not prejudiced by a proper application of the law to the actual facts.

3. The trial court erred in finding Rod in contempt when he was unable to meet his maintenance obligation.

Lori acknowledges that if the maintenance award was unfair to Rod and he could not afford to pay it, then it was error to find him in contempt. RB at 44. The contempt finding should be vacated.

Contrary to Lori's assertion, Rod's ability to afford to pay the maintenance is not a simple matter of credibility determinations. See RB at 45. There is no genuine dispute that Rod has not received further Midvale equity distributions, a trust interest or inheritance, or the proceeds of the Beneficial Life policy—all of which the trial court predicted he would receive promptly after entry of the decree, and each of which were essential to his ability to pay the high amount maintenance under the court's orders. This Court should vacate the contempt orders because there is no basis in the record to find that Rod personally had the ability to pay.

C. The Property Award Must Be Vacated Because the Purported Award Of The Beneficial Life Policy To Rod Renders The Decree Void.

1. Rod did not invite error.

Lori's invited-error argument focuses on the wrong "error." The invited-error doctrine prohibits a party from taking knowing and voluntary actions to "set up" an error and then challenging that same error on appeal. *In re Thompson*, 141 Wn.2d 712, 723-24, 10 P.3d 380 (2000). "The doctrine was designed in part to prevent parties

from misleading trial courts and receiving a windfall by doing so.”

State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009).

The invited-error doctrine does not apply where the appellant gave the trial court an opportunity to correct the original error, and the trial court declined. *See State v. Studd*, 137 Wn.2d 533, 552-53, 973 P.2d 1049 (1999). For instance, in *Studd*, the Supreme Court held that the doctrine did not apply to defendants who proposed an ambiguous jury instruction given by the trial court, but also proposed a curative instruction, which the trial court rejected. *Id.*

To be sure, Rod did (mistakenly) ask the trial court to divide the Beneficial Life policy. RP 670-71. But his precise complaint on appeal is not that the trial court erroneously included the policy in the property division. After the decree was entered, Rod moved to vacate the decree and amend the property division to remove the Beneficial Life policy from the division and otherwise adjust the division to be equitable to **both** parties given the ***parties'*** assets before the Court, per RCW 26.09.080. The trial court refused; it is that refusal that Rod challenges on appeal. Rod cannot be found to have “set up” an error to exploit on appeal when he asked the trial court to correct that precise error. *See Studd*, 137 Wn.2d at 552-53. The invited-error doctrine does not apply.

2. The record establishes a third party owns the Beneficial Life policy, which the trial court purported to award to Rod. This renders the decree void.

Lori is wrong that Rod’s so-called “self-serving declaration” was the sole evidence before the trial court in connection with Rod’s CR 60 motion for relief, showing that the parties did not own the Beneficial Life policy. RB at 32. Lori’s own filings and testimony confirm that fact.⁸ Lori filed papers that established the policy was owned by a trust. They included two documents from Beneficial Life, both addressed to “Rod & Lori Van de Graaf LIT Dated January 1999” (where “LIT” stood for “Life Insurance Trust”). CP 1473, 1475. What is more, Lori’s own cover sheet filed with the documents, signed by her attorney, identified the documents as “Information Regarding the Beneficial Life Insurance Policy – Rod & Lori Van De Graaf Trust[.]” CP 1472 (emphasis added). Lori even testified that premium payments were made to the trust. RP 924-25.⁹

⁸ Rod’s post-trial efforts to access the policy by having the court clerk sign for the trustees, CP 1654-1660, were resisted by Lori on the basis it was non-marital property and the relief denied, CP 1748, keeping those funds from Rod.

⁹ Although two insurance policies insured Rod and Lori’s lives, only one was at issue in the property division. One policy was a term-life policy and thus had no cash-surrender value. RP 518-19; CP 483. The other policy was a universal or “whole life” policy from Beneficial Life Insurance Company. RP 518-19; CP 1473, 1475. The trial court found that the latter policy had a cash-surrender value of \$116,000 and purported to award that policy to Rod. CP 785, 770. As explained in the main text, that policy was owned by a trust.

Given this evidence, Lori’s claim on appeal that the insurance policy is not “indisputably” a non-marital asset is disingenuous. RB at 33. There can be no rational dispute that the policy was owned by neither Rod nor Lori and, thus, was not subject to division by the trial court. *See, e.g., In re Marriage of McKean*, 110 Wn. App. 191, 194-95, 38 P.3d 1053 (2002). This jurisdictional defect renders the judgment void. *Id.*; *Persinger v. Persinger*, 188 Wn. App. 606, 609, 355 P.3d 291 (2015).

Ignoring the voidness issue altogether, Lori argues that Rod is not entitled to relief because the policy’s true owner could have been discovered earlier with reasonable diligence. As she did below, Lori argues that if a mistake was made, Rod should have to live with it. *See* CP 897, 928-30. But there is no diligence requirement to obtain vacation of a void judgment. Diligence is required only in connection with a request for relief under CR 60(b)(3), based on “newly discovered evidence.” And a party may raise voidness at any time—including for the first time on appeal. *Timberland Bank v. Mesaros*, 1 Wn. App. 2d 602, 606, 406 P.3d 719 (2017); *Persinger*, 188 Wn. App. at 609; *cf.* CR 60(b)(5).¹⁰

¹⁰ Lori also ignores that Rod moved for relief under CR 60(b)(1), which authorizes relief in the event of “mistakes...in obtaining a judgment or order.” A mistake of fact by a party, leading to entry of the judgment, is a qualifying “mistake” under this rule. *See Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999) (reversing denial of motion to vacate, holding that a party’s “genuine misunderstanding” was a mistake under CR 60(b)(1)).

A trial court has no discretion; it must vacate a void judgment. *Mitchell v. Kitsap County*, 59 Wn. App. 177, 180-81, 797 P.2d 516 (1990). The remedy on appeal is to vacate and remand. *See Persinger*, 188 Wn. App. at 607. That needs to be done here.

3. The Beneficial Life policy was significant to the property division because it represented three-quarters of the liquid assets awarded Rod. But the void decree must be vacated regardless of the percentage of the marital estate affected.

Lori cites no authority that would allow a void decree to stand, merely because the value of the property the court lacked jurisdiction to award is small relative to the value of the entire marital estate. The sole case Lori cites on this point did not involve a void decree. *See In re Marriage of Pilant*, 42 Wn. App. 173, 180-81, 709 P.2d 1241 (1985). The problem in *Pilant* was that the trial court failed to state its rationale for giving a low value to the husband's vested future retirement benefits. *Id.* The appellate court held that "the erroneous valuation of one item in this particular case" did not require reversal. *Id.* That is a far cry from a void decree that purports to award a third party's property to one of the spouses.

Furthermore, although she disputes that part of the trial court's rationale for awarding the Beneficial Life policy to Rod was to give Rod some liquid assets (in the form of the policy's \$116,000 cash-surrender value), again, Lori cannot deny that the value of the policy comprised most of the liquid assets awarded to Rod. CP 785,

786. This fact meant that Rod's inability to cash in the policy caused a significant hardship, even if the policy's value comprised a relatively small percentage of the overall marital estate. That distinguishes this case from any case where a mistake in the award affected too small a percentage of the overall division to warrant appellate relief. Nor does she state why she fought so hard to keep that money from Rod when it had been awarded to him and she made no claim to it; it could only be a form of punishment or part of a financial squeeze. This Court has to vacate the decree.

D. The Trial Court Erred In Characterizing The Ellensburg Property As Community property.

Respondent cannot dispute the evidence that the Ellensburg property was bought by Rod and Rick in 1977, long before the marriage in 1985. RP 500. See OB at 18. And because that factual base cannot be attacked, Lori also cannot successfully challenge the arguments that characterization of the Ellensburg property was clear error, as set out at OB at 41-46.

This Court recently demonstrated in *Schwartz v. Schwartz*, 192 Wn. App. 180, 192, 368 P.3d 173 (2016), that it is error if the trial court fails to go through the apportionment analysis where there may be a community interest in what was, at the outset, separate property. As for the Ellensburg property, Rod stands by his argument detailed in the Opening Brief that it was separate property before the marriage, was maintained as such throughout the marriage

without the use of community resources or efforts, and at most there could be only a small community lien against it.¹¹

E. Post-Secondary Support Order And Transfer of 529 Account.

1. The trial court erred in failing to make factual findings to support its post-secondary support order.

Lori maintains that the trial court was not required to make findings to support its post-secondary support order, citing *In re Marriage of Morris*, 176 Wn. App. 893, 906, 309 P.3d 767 (2013). RB at 47. But *Morris* is different. In *Morris*, the appellant “did not dispute the appropriateness of postsecondary support under the statutory factors.” *Id.* at 908. Thus, findings on those factors would have been superfluous. *See id.* The sole contested issue was the appellant’s ability to pay the amount of support awarded, and that issue was “a matter of simple math.” *Id.* at 906, 908.

Here, in contrast, Rod disputes the appropriateness of postsecondary support under the statutory factors. Findings of fact are thus required to “demonstrate that the trial court properly exercised its discretion in making the award.” *Morris*, 176 Wn. App.

¹¹ The *Schwartz* analysis also needs to be applied to the family home on remand in order to designate any appropriate amount of community interest, since it was funded at the outset with Rod’s separate funds from his “cattle account” which began long before the marriage. *See, e.g.*, CP 633-636 (post-trial brief). On remand the trial court should be instructed to do a proper analysis of the characterization of the family home so that it is correctly apportioned between separate and community property.

at 906 (quoting *In re Marriage of McCausland*, 159 Wn.2d 607, 620, 152 P.3d 1013 (2007)).

The evidence showed that NVDG had more than sufficient funds available to pay for his final year of college. See OB at 51 and record cites therein. Lori asserts that some of those funds were “not intended as a college fund,” citing testimony by NVDG that his parents had said that his parents would pay his college expenses not covered by the 529 account. RB at 48; RP 407. Certainly, the trial court may consider any pertinent testimony. But there is no indication that the trial court, in exercising its discretion, considered NVDG’s needs in light of the resources available to him, as required by RCW 26.19.090(2). Vacation and remand is required.

2. The trial court erred in ordering Rod to pay funds from the 529 account directly to Nate Van de Graaf.

Lori asserts that the trial court did not award the 529 account to Rod, pointing to the language in the decree awarding Rod “[a]ny and all bank accounts in his name only” but denying him “access to any bank accounts in the names of [NVDG], or [DVDG].” RB at 48; CP 770. Lori is simply wrong: the 529 account was titled in Rod’s name alone. CP 1663, 1735, 1739. It was thus one of the accounts awarded to him. CP 770.

The trial court ordered Rod to pay the balance of the 529 account to Nate. CP 1829-30. The trial court lacked authority to

distribute Rod's funds to NVDG, a third party, for his unconditional use. *See In re Marriage of Soriano*, 445 Wn. App. 420, 421-22, 722 P.2d 132 (1986). Nor was there any legitimate reason to do so. No showing or finding was made that it was not "feasible" to order that the payments be made directly to the school under RCW 26.19.090(6). Moreover, though the court's order required NVDG to "make available" his academic records and grades as a "condition" of receiving postsecondary support, the court set no actual standards for receipt of support. The court thus distributed the 529 account funds to NVDG in advance, without conditions, contrary to the express terms of the statute. This Court should vacate and remand with instructions.

F. The Trial Court's Errors in Awarding Fees to Lori Must Be Reversed.

1. The trial fees must be vacated for lack of necessary findings and as contrary to the unchallenged finding that, given the property award, each party can pay their own fees.

Where, as here, there are no findings as to the appropriateness of the fee award or its amount, the award must be vacated. *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998), *overruled on other grounds*, 173 Wn.2d 643, 272 P.3d 802 (2012) (written findings and conclusions showing the trial court's basis for finding the amount of fees awarded was reasonable are required to sustain a fee award); *In re Marriage of Nelson*, 62 Wn. App. 515, 521, 814

P.2d 1208 (1991) (vacating award for lack of findings); *In re Marriage of Steadman*, 63 Wn. App. 523, 529-30, 821 P.2d 59 (1991) (reversing award for lack of findings).

The award of trial fees below must therefore be vacated for lack of the required findings. *Id.* Indeed, the only findings as to fees are in the trial court’s letter ruling, which found that both parties have sufficient resources to pay their own fees, CP 788 ¶ 4,¹² a finding that was confirmed (not abandoned) by incorporating the November 17 ruling into the final orders in February, 2017. Moreover, the prospect of Respondent having to follow the American Rule of paying for one’s own fees is the most likely “carrot” to curb excessive litigation in the future.

2. The trial court’s suit money award must be reversed and vacated because it applied a test that was untenable under the facts and inconsistent with the legal standard.

The trial court’s suit money award must be reversed because it applied a test that was untenable under the facts and inconsistent with the legal standard, and thus must be vacated. *See* OB at 58-59.

While RAP 7.2(d) recognizes that the trial court has discretion to order “suit money” in the form of the advancement of attorney fees for an appeal of a dissolution decree or modification of

¹² The trial court found: “. . . at the end of the day, both parties have sufficient wherewithal to pay their own costs and fees.” CP 788. Respondent chose to not cross-appeal this finding, so it is a verity on appeal.

a decree, the purpose of such an advance award is, and always has been, to make sure that the requesting spouse has the funds to proceed with the appeal ***based on an immediate need***, one that is genuine.¹³ Thus, in *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360–61, 333 P.2d 936, 937 (1959), suit money was required because the requesting spouse had no control over the ample assets awarded her in dissolution due to the husband’s supersedeas bond, which stayed her access to the assets she was awarded. She needed the funds in order to bring her appeal.

In this case, Lori ***received*** over \$1 million in liquid assets in the spring of 2017 after entry of the final orders and denial of reconsideration. It was ***Rod*** who was stripped of liquid assets, or denied them such as the Beneficial Life policy cash. Despite this disparity in ***her*** favor, Lori nevertheless fought strenuously for suit money for appeal clearly as a tactic to put financial pressure on Rod. She showed no reticence or inability to obtain counsel for lack of funds, instead fighting to keep Rod from accessing any funds awarded to him including, inexplicably, the Beneficial Life policy.

¹³ The purpose of suit money is to afford an impecunious spouse his or her day in court, not to punish the other. See *Stibbs v. Stibbs*, 38 Wn.2d 565, 567, 231 P.2d 310, 311 (1951) (sole purpose of suit money is to “effectively afford wife her day in court”); *State ex rel. Hettrick v. Long*, 183 Wash. 309, 312, 48 P.2d 224, 225 (1935) (“the wife is entitled to attorney’s fees and suit money in order to prosecute or defend an action for divorce...such allowances are made for the very purpose of enabling her to prepare and prosecute, or else defend, the action.”); *State v. Superior Court of King Cty.*, 55 Wash. 347, 351, 104 P. 771, 773 (1909) (“Neither is the order imposed as a penalty . . . and must be sustained on equitable grounds, having reference to the relative situation of the parties.”)

Moreover, Lori engaged in this aggressive litigation when, unlike the wife in *Stringfellow*, the judgment had **not** been superseded by Rod, **and** when she had received substantial liquid assets, failing to show a genuine need for suit money.¹⁴ Having family help in such circumstances is not new in Washington, but those non-parties can and do draw limits, which do not redound to the divorced spouse, *see Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653 (1909) (divorced spouse not in contempt for failure to pay when family members, who had put up supersedeas bond, do not lend further funds).

The test for suit money is present need and ability to pay by the respective ex-spouses under *Stringfellow* and earlier cases. It is not to be used to punish. The test was not met here, requiring vacation of the suit money order and the associated contempt orders.

G. The Remand Should Be To A Different Judge To Preserve The Appearance Of Fairness.

Remanding a case to a different judge is a sensitive issue, as seen by the dissent in *In re Marriage of Mohammed*, 153 Wn.2d 795, 808-09, 108 P.3d 779 (2004) (Alexander, C.J., dissenting). *See*

¹⁴ Rod was able to have the judgment superseded in early 2018 only after Lori forced him into supplemental proceedings and his family agreed to arrange the bond required beyond the house, since he could not pay the \$1.4 million dollar judgment. *See* CP 2154 *et seq.*, supplemental clerk's papers including Rod's reply papers in support of supersedeas, the trial court order granting use of the family home as partial security and setting the additional supersedeas amount which included the amount of Lori's fees she requested for the appeal, and the supersedeas bonds that were filed on behalf of Rod.

OB, pp. 61-63. But at times it must be done to preserve the appearance of fairness, as in both *Mohammed*, 153 Wn.2d at 807-08, and in *Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012), precisely because marital property divisions present “the height of discretion.” *Tatham*, 170 Wn. App. at 105.

Justice Owen’s *Mohammed* opinion provides a useful guide for analyzing why it should be done here. She pointed out there, as Rod pointed out in the Opening Brief and herein, that “[a] number of aspects of the property division strongly indicate that the trial judge went beyond simply looking at the parties’ existing economic circumstances” (*Muhammed*, 153 Wn.2d at 804, emphasis added), in that case adding a jurisdictionally impermissible factor – fault – via the wife’s decision to obtain a protective order against the husband. *Id.* The opinion showed by the trial judge’s statements and orders how this was so. *See id.*, 153 Wn.2d at 805. Similarly here, the trial court’s written findings and later orders show it went beyond “the parties’ existing economic circumstances,” here adding in non-marital property of at least two major forms – Rod’s parents’ business, VDGR, as to which he had no ownership interest; and the Beneficial Life insurance policy, owned by a third party trust. These are basic jurisdictional errors akin to the fault-tinged decision by the trial court in *Muhammad*.

First, as noted herein and in the Opening Brief, the trial court’s written decision that was incorporated into the final orders clearly stated that his parents’ business “soon” would be co-owned by Rod (CP 787-88) – yet there is no evidence that Rod has any current or vested future interest in the business. The only evidence is that VDGR is owned by his parents and not Rod.¹⁵ Yet the trial court expressly took that non-marital property over which Rod had no vested interest or control into account in **both** the property division **and** the maintenance award. **Second**, the trial court refused to correct its “award” of the Beneficial Life policy to Rod, after the fact that it is non-marital property was brought to its attention on reconsideration. As in *Muhammed*, it appears the trial court here held it against Rod that his parents owned the cattle company and had not yet distributed it to him. It determined that the money from VDGR – from Rod’s parents – could and would pay for both the property division and permanent maintenance, an apparent reason why there was no “need” to fix the insurance policy problem when raised. Given the jurisdictional defects here as basic as using fault, the same reason to remand to a different judge applies as in *Muhammed* – the appearance of fairness demands it.

¹⁵ See OB at 15-17 and record cites therein. See also Rod’s post-trial briefing, CP 628-657 (post-trial brief) and CP 666-701 (supplemental post-trial Brief), *esp.* CP 630-31 & 642-646 (post-trial brief) detailing the ownership of the parents’ business and Rod’s lack of interest therein; and CP 666-681, 686-687 (supplemental brief) re the Maxine Trust, VDGR ownership, and VDGR stock.

H. Neither Party Should Be Awarded Fees On Appeal.

Lori's request for fees on appeal should be denied. The trial court was correct in its letter ruling that both parties have sufficient resources to pay their own fees, a finding not challenged by Respondent, who dropped her cross-appeal. The prospect of following the American Rule of paying for one's own fees is the most likely "carrot" to curb excessive litigation in the future.

III. CONCLUSION

Appellant Rod Van de Graaf asks the Court to reverse and vacate the trial court's rulings because of the legal errors and abuses of discretion that marred the proceeding. He asks the Court to remand to a different judge to determine both a reasonable amount of maintenance for a reasonable period of time, as well as a property division that is fair, just, and equitable based on the correct characterization of the property, particularly the Ellensburg property and the family home. He further asks that the Court deny Respondent's request for fees on appeal because she has ample resources to pay her own legal fees from the property division.

Respectfully submitted this 8th day of October, 2018.

CARNEY BADLEY SPELLMAN, P.S.

By 

Gregory M. Miller, WSBA No. 14459

Jason W. Anderson, WSBA No. 30512

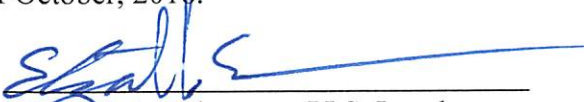
Attorneys for Rod D. Van De Graaf

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: daveh@davidhazel.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8 th Avenue North Seattle, WA 98109 P: (206) 624-0974 F: (206) 624-0809 E: cate@washingtonappeals.com valerie@washingtonappeals.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Joanne Rick Halstead & Comins Rick PS PO Box 511 ** 1221 Meade Ave Prosser, WA 99350 P: 509-786-2200; 786-2211 F: 509-786-1128 E: jgcrick@gmail.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal

DATED this 8th day of October, 2018.


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

CARNEY BADLEY SPELLMAN

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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

Hon. Michael G. McCarthy

APPELLANT ROD D. VAN DE GRAAF'S OPENING BRIEF

Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30512

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Attorneys for Rod D. Van De Graaf

I. INTRODUCTION

This Yakima County divorce proceeding began in October, 2011. It went to trial in September, 2016, only after Respondent Lori Van de Graaf's motion to delay the trial from April 2016 was granted. Judge McCarthy issued a written decision in November, 2016, entered final orders in February, 2017 and post-trial orders in April, 2017. The parties had one college-age, emancipated son at the time of trial, then in his junior year at WSU.

The property division left Appellant Rod D. Van de Graaf¹ with minimal liquid assets, a belated and inflated back maintenance award, and unreasonable maintenance given Lori's asset award, teaching skills, relatively younger age than Rod, and her lack of a disability or disabling health issues. The court also left Rod without a house. Though the old family home was awarded to him, it was in Lori's possession from 2011 until October 1, 2017. Rod thus had judgments and \$6,000/month of maintenance to pay while his shared business was hobbled by low cattle prices and high debt structure so that he (and his partners) received only his minimal monthly draws and no distributions. He had big bills to pay and no way to pay with what was left him after the divorce.

Judge McCarthy left Rod in this position because he failed to distinguish between assets owned by Rod's parents from those owned

¹ The parties are referred to by their first names to avoid confusion and consistent with the naming convention in the record.

by Rod, stating in his ruling that Rod not only had substantial wealth of his own, but was “about to become even wealthier”, presumably because he would inherit substantial wealth from his parents. In other words, Judge McCarthy premised the property division and maintenance award on adding Rod’s parents’ wealth to his own, even though the dissolution court has no jurisdiction over the assets of third parties and under the statute and case law; it may only divide the property actually owned by the parties. This insured that Lori would be a beneficiary of that expected inheritance when it occurred, despite the divorce. While property subject to division in a dissolution may include property in which the spouse has a vested interest in future receipt, no Washington case to date has held that the trial court can take into account what it believes the spouse may possibly receive at some unknown future date, *i.e.*, a mere expectancy.

Thus, the central problem in the property division and maintenance award is the trial court’s erroneous view of the marital assets and its belief that Rod’s parents’ wealth was ***presently*** available to Rod and would provide the funds necessary for Rod to use in equalizing the property division and paying maintenance at twice the amount ordered for the five years pending trial. To do this the trial court had to ignore or disregard numerous rules of substance and procedure. The net result was a property division that is contrary to long standing Washington law. Because of the heightened irregularity of the rulings, and the fact the trial court

engaged in credibility determinations demonstrating a disregard of the testimony of Rod and the witnesses testifying in his behalf, the case should be remanded to a different judge to insure the appearance of fairness and that the law is applied evenly.

In addition to these errors the trial court made two errors related to the Ellensburg property which require reversal. First, the court mischaracterized it as community property, despite the undisputed evidence that it was bought by Rod and his brother Rick nearly a decade *before* the marriage, and despite the fact its taxes and any other costs occurring during the marriage were paid for by fees earned by letting VDGR cattle – owned by Rod’s and Rick’s parents – to graze on the land each summer.

Second, the Ellensburg property was awarded to Lori. This caused two problems. First, the trial court’s property division was keyed to the character of the property. A separate LLC owning real property in Sunnyside and owned jointly by Rod and his two siblings, the “K2R” property, was determined to be separate and one-third interest remained with Rod, though it was not specified in the findings. Lori’s jewelry, insured at \$114,000, remained with her but was also omitted from consideration in the trial court’s property division. The judge’s plan thus was to award Rod and Lori their separate property and divide the community property; but mischaracterizing the Ellensburg property meant that it was

available to award to Lori. This requires vacation of the property award to be re-done under the correct characterization.

Second, awarding the Ellensburg property to Lori was error because it left the couple continuing in business with one another, since Midvale Cattle Company, which Rod was awarded and continues to operate with his siblings, currently uses the Ellensburg property for grazing. It is a basic premise of no-fault divorce that the couple should not be required to remain in any form of business relationship absent a request from them to that effect, since the purpose is to let the parties move on in their lives without future entanglements to their ex-spouse. This is especially important in an acrimonious divorce such as this.

Finally, the trial court also exceeded its jurisdiction by purporting to award to Rod the cash value in the Beneficial Life insurance policy, valued at \$116,000, ostensibly to provide him some liquid assets (*see* CP 957:4-6) and to complete a roughly 50-50 division of community property. But the policy was not owned by either party to the marriage. It is owned by a trust. This jurisdictional defect was brought to the trial court's attention on Rod's CR 60 motion, *see* CP 817-824 (motion, *esp.* CP 821:1-2 & 822-24 discussing and quoting *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002) which reversed the trial court for purportedly dividing a trust in favor of the parties' children as part of a marital dissolution), and CP 955-959 (reply declaration in support of

CR 60 motion, *esp.* CP 958:24-25). Rather than make corrections to formally remove the non-marital asset from the property division and re-distribute the marital property to provide Rod some form of liquid assets, including so he could make the back payments ordered, the court denied the motion without comment. CP 965 ¶4. The provision purportedly awarding the non-marital life insurance was therefore void and vacation is required. *Persinger v. Persinger*, 188 Wn. App. 606, 607, 609, 355 P.3d 291 (2015).

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error – Property Division

1. The trial court erred in entering the final orders with property division.
2. The trial court erred in awarding attorney's fees on reconsideration.
3. The trial court erred in entering a post-secondary support order in February, 2017, for the parties' 21-year old son who was adjudicated to be emancipated as of September 2014 by order entered May, 2014.
4. The trial court erred in its property division, which was not fair, just, and equitable.
5. The trial court erred in failing to value and award all property of the parties, including Lori's jewelry insured at a value of over \$114,000, and failing to formally award to Rod his separate interest in K2R, LLC.
6. The trial court erred by *sua sponte* reversing itself to admit the Maxine Van de Graaf 2012 Family Trust.

7. The trial court erred by finding Rod would soon become an “even wealthier” man by attributing to Rod for purposes of the property division funds the trial court expected Rod’s parents to eventually give to Rod as an inheritance, allowing Lori to inherit a share, despite the divorce.
8. The trial court erred in including the Beneficial Life insurance policy cash value in the property division because it was owned by a trust, not by either of the parties.
9. The trial court abused its discretion on reconsideration by failing to correct the property division by removing the Beneficial Life insurance policy from property awarded to Rod and redistributing only the property that was properly before the court, and awarding it pursuant to its correct characterization.
10. The trial court erred in failing to value or award Lori’s jewelry it found was received as a gift, as to which the parties had an insurance policy in excess of \$100,000.
11. The trial court erred in awarding Lori market gain in the UBS account where the original award specified a dollar amount that was Rod’s responsibility to insure was met – but no more.
12. The trial court abused its discretion on reconsideration by ordering Rod to pay Lori’s attorney’s fees for trial given the size of the property award made to Lori and the fact that Rod was not awarded any liquid assets with which to pay said fees, while Lori was awarded ample assets to pay said fees.
13. The trial court erred in characterizing the Ellensburg property as community property when it was purchased long before the marriage with Rod’s separate funds, was economically maintained by income it produced, and the community was adequately compensated for Rod’s toil such that no community lien was necessary or appropriate.

14. The trial court erred in awarding Lori the Ellensburg property as part of its 50-50 community property division because that property, like Rod's separate K2R property owned with both his siblings, and like Lori's \$114,000 of jewelry, was separate property, not community property.
15. The trial court erred by awarding Lori the Ellensburg property because it results in a continuing post-marriage business relationship with Rod.
16. The trial court erred in calculation of the value of Midvale Cattle Company, particularly by double-counting in its valuation of Midvale Cattle Co., which means that the value stated is inconsistent with the evidence.
17. The trial court erred in refusing to include repayment of the \$2 million promissory note secured against the community share interest in Midvale Cattle Co.
18. The trial court abused its discretion in its award of lifetime maintenance when it failed to take into account Lori's earning history and capacity and its 50-50 division of substantial community property.
19. The trial court erred in allowing Lori to remain in the marital house awarded to Rod for more than 30 days past entry of the final orders where the court did not require payment of rent to Rod for use of his property, nor allow proper rent as an offset against maintenance, and left it vulnerable to neglect by Lori and consequent material reduction in value on receipt by Rod.
20. The trial court erred in refusing to modify maintenance when the undisputed facts showed Rod does not have the income or available assets following the property division to pay the maintenance out of his monthly or annual income, or the ability to sell the house he was awarded because she was in it and it was wholly encumbered by the judgment.

21. The trial court erred by refusing to grant Rod an offset against his maintenance after final orders were entered based on a reasonable rental value of the former marital house awarded to Rod that was still occupied by Lori rent-free.
22. The trial court erred in holding Rod in contempt of court for the willful failure to pay maintenance where his income and available assets allowed him in the property division were insufficient to make the ordered payments.
23. The trial court erred in denying Rod's motion to reduce maintenance based on his inability to pay the required amount from his own earnings.
24. The trial court erred in awarding Lori "suit money" for appeal when she had no present need given the ample assets she was awarded and Rod had no present ability to pay given the lack of liquid assets he was awarded.
25. The trial court erred in ordering post-secondary college expenses for the parties' youngest child, previously emancipated by a 2014 court order which specifically found the child himself had more than adequate financial resources available to pay his entire post-secondary college and related expenses.
26. The trial court erred in ordering Rod to transfer funds awarded to him in the divorce to his son as advance payment of post-secondary education funds, contrary to the statute and the trial court's February 17, 2017 order.
27. The trial court erred in entering the certain findings of fact, which are set out in Appendix A.

B. Issues on Appeal – Property Division.

1. Must the property division be reversed because it was premised on taking into consideration non-marital assets over which the dissolution court has no jurisdiction?
2. Must the property division and maintenance awards both be vacated because they were predicated on including in the distribution to one spouse the future inheritance of the other spouse that the trial judge believed would someday occur and as to which it could not even estimate the amount, and as to which the other spouse had no vested right?
3. Must the property division be vacated because it includes distribution of an asset of a third party, over which the dissolution court has no jurisdiction or authority?
4. Must the trial court's findings as to the alleged anticipatory inheritance by Rod be vacated as unsupported by the evidence?
5. Must the property division be vacated because the Ellensburg property was mischaracterized as community property and the trial court's plan as seen in its distribution scheme was to award each party their separate property and divide the community property evenly, along with effectively awarding Lori a share of Rod's anticipated future inheritance via an inflated, lifetime maintenance award?
6. Must the maintenance award be vacated because the trial court did not take into account Lori's historic and present ability to work as a certified special education teacher and because it essentially used the lifetime award, to continue even if she remarries, as a means to give her a share of what the trial court anticipates to be Rod's future inheritance from his parents who are still alive and well?

7. Must the April 14, 2017 award to Lori of over \$58,000 in attorney's fees be vacated because it is not supported by the required findings and conclusions but, rather, is inconsistent with the unchanged findings and conclusions entered February 17, 2017, that the parties both "have sufficient wherewithal to pay their own cost and fees," particularly where Lori was awarded over \$1M in liquid assets.
8. Must the trial court's contempt orders against Rod be vacated because he did not have the funds from his income or other personal sources to make the ordered payments after the court awarded all the marital liquid assets to Lori and granted her an equalization judgment which resulted in a lien on the house awarded to Rod such that he could not readily get a loan or rent it since Lori remained in it?
9. Must the order awarding suit money to Lori be vacated because it was Lori who had control of the liquid assets following the divorce and therefore had sufficient funds to pay for her cross-appeal and defend against Rod's appeal, while Rod was stripped of any liquid assets and had to borrow funds for his appeal, placing Rod in the position of the financially disadvantaged spouse who was entitled to suit money in *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360–61, 333 P.2d 936, 937 (1959) (suit money required where requesting spouse had no control over or access to the ample assets awarded in dissolution).
10. Must the post-secondary support order specified *sua sponte* by the trial court be vacated because the son had been adjudicated emancipated as of 2014 and was not dependent on his parents for further college support after receiving over \$72,000 in funds in trust and directly for his education?
11. Must the order directing payment of "529 account" moneys directly to the parties' son for his last year of college under the asserted authority of the post-secondary support order be vacated as inconsistent with the applicable statute and unnecessary given his emancipated status and his personal

possession of more than sufficient funds to complete his final year at WSU?

12. Where the experienced trial judge has repeatedly failed to follow or apply fundamental precepts of community property law, including taking into account and awarding non-marital assets and taking into account anticipatory inheritance to one, but not both of the parties, should the case be remanded to a different judge so that the remand proceedings can have an appearance of fairness that the law will be applied fairly to both parties?

III. STATEMENT OF THE CASE

A. Overview Facts.

1. Background and Family Home.

The parties married in 1985 and separated 26 years later, in July 2011. CP 759; RP 239. Their marriage was formally dissolved in early 2017, after a trial in the fall of 2016. CP 763-67. Rod was 58 years old at the time of trial; Lori was 55. RP 239, 472. Rod and Lori have four adult sons. RP 241.

Rod is a business owner and cattle-farm manager. RP 473. He grew up in a family cattle business. RP 473. He began his career as a salaried employee of VDGR, Inc., (“VDGR”) a major cattle operation founded by his parents, Dick and Maxine Van de Graaf, that includes cattle feedlots and grazing. RP 473-75. VDGR owns a feedlot and stock yard. RP 1199. Another company owned by Rod’s parents, Van de Graaf Ranch Properties, LLC, owns raw land that it leases out for cattle grazing. RP 416, 418-19.

While he was still working for their company in the feedlots, Rod's parents established a separate "cattle account" for his use to buy and sell cattle for profit on his own, independent from VDGR. RP 473-74. Rod continued working as a salaried employee of VDGR after marrying Lori. RP 474-75, 477-78. By 1989, Rod had profits of \$1.4 million in his separate cattle account, which Rod and Lori decided to use to build a house. RP 477.

Rod testified to his opinion, following review of an appraisal report in 2012 by a certified appraiser (Ex. 2.21), that the family home was worth \$772,000 at the time of trial. RP 665-68. Lori presented testimony of a real-estate broker, Connie Gustafson, who opined that, even though she found **no** comparable houses in preparing her market analysis, the house could sell for \$1.42 million. RP 232. Ms. Gustafson testified that Lori had "kept [the house] in...great shape" and it "looks very nice." RP 237.

2. Midvale Cattle Company.

In 1991, Rod and his two siblings, Karen and Rick, established Midvale Cattle Company as a general partnership engaged in raising cattle, mainly in feedlots and pastures leased from their parents' companies. RP 478. Each sibling held a 1/3 interest. RP 421-22, 478. To capitalize the business, each partner borrowed \$2 million from VDGR. RP 481. Rod and Lori both executed a \$2 million promissory note to VDGR, secured by their interest in Midvale Cattle Company and other personal assets. RP 309, 478,

481; Resp. Ex. 2.1, 2.2. The other siblings and their spouses executed similar notes. RP 419-20, 587-88. In 2003, the partnership converted to a limited-liability company, Midvale Cattle Company, LLC, with each sibling owning 1/3 of the company. RP 488; Resp. Ex. 2.6.

The original \$2 million promissory note called for semi-annual interest payments and three, equal principal payments due in 1995, 2000, and 2005. Resp. Ex. 2.1. The note was amended in 1993 to adjust the interest rate and in 1995 to extend the principal-payment due dates five years, to 2000, 2005, and 2010. Resp. Ex. 2.1. Rod and Lori missed the scheduled principal payments, but they did regularly pay interest on the note. RP 483, 805-07; Resp. Ex. 2.3. Lori testified she assumed the note had been satisfied because Rod told her they were “debt free.” RP 255-56, 343-44.

The note was restated in 2011, when VDGR distributed approximately 10% of the debt obligation to Dick and Maxine, Rod’s parents, , such that the obligors owed \$1.79 million to the corporation and \$210,000 to the elder Van de Graafs personally. RP 809-11; Ex. _____. Including other debts also reflected in other promissory notes, as of September 2016 Rod and Lori owed Dick and Maxine \$479,074 and VDGR \$2 million—a total of nearly \$2.5 million. RP 810-11.

At trial, Lori’s expert, Kevin Grambush, opined that the parties’ interest in Midvale was worth \$2.22 million as of September

2014, while Rod's expert, Joe Reid, opined it was worth \$1.7 million as of December 2015. RP 371, 552; Resp. Ex. 2.8. Both experts agreed that the primary factor in the difference in value was the valuation date. RP 372-73, 560-61, 571. Cattle prices were at record levels in 2014 but dropped precipitously in 2015, and continued dropping. RP 380-81, 536-64; 763-65.

3. Validity of Promissory Notes Executed by Rod and Lori.

Lori disputed at trial whether the parties' debts to VDGR and Rod's parents were genuine obligations. Lori maintained, based on hearsay, that the promissory notes executed by her and Rod were illusory. RP 1220-21. Rick testified that Maxine and Karen had said not to worry about the \$2 million notes because "in the end you're not going to have to pay that." RP 423-24. In addition, two of Rod's sons testified that Rod himself had said the loans notes were never intended to be repaid. RP 390, 404, 410. They also testified that their grandfather had once said that he planned to forgive the loans someday. RP 400-01, 406, 408-09.

Nevertheless, the evidence showed that all the Van de Graaf siblings made interest payments on their notes in the 26 years following execution of the originals. RP 421, 425, 438-40, 483, 588, 806-07; Resp. Ex. 2.3. Both Karen and Rick testified that the notes remain enforceable. RP 439-40, 1207. Rick even took out a \$350,000 line of credit to make a principal payment on his note

when his father threatened to call it (Dick had a history of adverse actions against his children, including firing Rick multiple times), while Karen purchased a large life-insurance policy to ensure her note would be satisfied in the event of her death. RP 423-24, 591. Rick never heard Rod claim the notes were not enforceable, and Rick admitted that the notes **were** enforceable. RP 437.

In addition, the Van de Graaf family accountant at Moss Adams, Hanna Keyes-Nowlin, testified that not only had the promissory notes **not** been forgiven, she had advised Rick and Karen they should expect to repay the loans in the future because their parents will likely need the money. RP 814-16. She felt that Karen and Rick “[didn’t] have a good understanding of their parents’ holdings or their parents’ ability or future cash flow.” RP 815. She noted that if the loans were forgiven, VDGR would need to report a bad-debt expense and the note holders would have to claim debt-forgiveness income. RP 812.

4. Claimed Expectancy of an Interest in Stock of VDGR, Inc.

Lori not only disputed the notes’ validity, but maintained that Dick and Maxine Van de Graaf conspired to keep assets they otherwise would have given Rod out of his hands until the conclusion of the dissolution case.² She pointed to a 2012

² Of course, even if this is true, Dick and Maxine Van de Graaf have every right to do with **their** property what they want, when they want. Neither Lori nor Rod have any right to their property before they choose to release it. After all, the
(Footnote continued next page)

transaction in which Dick and Maxine divested themselves of 90% of the stock of VDGR. RP 426. This undisputedly was done in anticipation of potential changes in estate-tax laws. RP 426, 1152. The non-voting stock was transferred as a purchase/sale transaction of 30% to Rick, 30% to Karen, and 30% to the “Maxine Van de Graaf 2012 Family Trust.” RP 428, 837; Ex. 44. But even if it was done for other than tax reasons – Dick and Maxine as competent adults were and are free to do whatever they want with their property, when they want. Neither Rod nor Lori have any claim on his parents’ property.

Rick, Karen, and the trust each borrowed \$833,333 from VDGR to acquire their 30% shares, evidenced by and subject to signed promissory notes. RP 429, 837-38, 1143, 1202-04; Pet. Exs. 4, 5.³ Rick gave hearsay testimony that Ms. Keyes-Nowlin told him 30% of the stock was put in a trust rather than transferred to Rod “because of the divorce.” RP 435. Lori went even further and argued that because the stock-purchase loans were being repaid with proceeds of sales of manure⁴—which she claimed belonged to Midvale—this meant that the marital community had *already* acquired 30% of VDGR stock. RP 1228-29.

dissolution is about the fair distribution of the property of the **parties** to the marriage, not anyone else’s property. See RCW 26.09.080.

³ Dick and Maxine personally retained 10% of the stock in VDGR, which was **all** of the voting stock. RP 426, 838-39.

⁴ The trial court excluded testimony about manure sales based on occurring after the date of separation.

Rod testified he first learned of the 2012 stock transfers during Rick's trial testimony. RP 773, 875, 1135. Rod testified that he owns no interest in VDGR and, further, that no one has told him that he will receive any interest in the company. RP 876. The potential beneficiaries of Maxine's 2012 Family Trust were Maxine herself and Dick's "descendants." Ex. 44 at 4-5. Any distributions from the trust during Maxine's life would be purely discretionary. RP 1155-56, 1159-61; Ex. 44 at 5. Distributions after her death are to be made according to her will. Ex. 44 at 5. The trust document mentions Rod by name only as a contingent successor *trustee*. Ex. 44 at 10. If he became trustee, he could not simply distribute assets to himself. RP 1182-83.

5. K2R Properties.

K2R Properties, a general partnership. Rod, Rick, and Karen each have a 1/3 interest and the LLC owns approximately 24 acres of commercial real estate in Sunnyside, Washington, which was purchased in a series of transactions from VDGR. RP 253, 601-02, 819-20; Resp. Exs. 2.14, 2.15, 2.16, 2.18. The property appraised for approximately \$1.2 million as of January 2007. Ex. 2.17. The partnership owed \$600,000 to VDGR on loans used for the purchase. RP 253-54, 760. Lori asked that the property be sold and the value distributed. RP 207.

6. Ellensburg Property.

The record shows that Rod owned a 50 per cent share of 342 acres of pasture land on Hungry Junction Road in Ellensburg, Washington, that he purchased together with his brother Rick in 1977. RP 417, 500. Despite these undisputed facts, Lori testified that she thought that Rod's half share of the land was jointly owned by her, and was community property, RP 251-52, 500, and that the other half share owned by Rick was owned by Rick and his wife, Lori's cousin. RP 251-52. The property was appraised in March, 2012 (by the same certified appraiser who appraised the family residence in 2012 for \$772,000) for \$1.38 million, making each brother's half share worth \$690,000. RP 251-52, 504; Resp. Ex. 13. The property was leased to VDGR for cattle grazing, RP 295, and the income from the lease paid for the property taxes and the water usage. RP 502-03. There was no testimony that any uncompensated community efforts were used to manage the Ellensburg property.

7. Rod's Ability to Work and Income.

Rod has worked physically demanding cattle-ranching jobs his entire adult life. RP 473. He studied farm management at Walla Walla Community College but did not complete a degree. RP 472-73. His responsibilities with Midvale include feeding cattle, servicing equipment, hauling commodities, and handling manure. RP 491; Resp. Ex. 2.9. Rod has chronic back pain. RP 342, 510-11. He had back surgery several years before trial and will likely need

another surgery. RP 510-11. To control his chronic pain, Rod uses over the counter medications and has put off surgery.

Midvale is Rod's sole source of income. RP 491. Rod's expert, Joe Reid, testified that a reasonable annual salary in the industry for Rod's position was \$82,200. RP 569, 574-75. Rod is paid a salary of \$7,692 per month gross or about \$92,300 per year. RP 522; Resp. Ex. 2.9; *see also* CP 535. Although Rod has received equity distributions in the past, those are not wages and are not guaranteed. RP 566-68, 574-75. In fact, Midvale put a moratorium on distributions after April 2016 because of the company's precarious financial situation, and because the bank was threatening to revoke their operating line of credit unless distributions ceased. RP 768. Midvale's future is "bleak" because of depressed cattle prices. RP 763-64.

For over four years preceding trial, Rod paid Lori \$3,000 in monthly maintenance under a temporary order, plus over \$1,500 per month for utilities, insurance, and other expenses. RP 516; CP 69.

8. Lori's Ability to Work and Income.

Lori's parents, now in their 80's, own several jewelry stores in Sunnyside and the Yakima area. *E.g.*, RP 215, 347, 876. Before graduating from college and getting married, she worked as a clerk in their store. RP 304-05. Lori obtained a bachelor-of-arts degree from Eastern Washington University and a teaching certificate. RP 240-41. She taught full time for one year and, after a break while

the children were young, she became a substitute teacher. RP 242, 249. There is “much need” for teachers and substitutes in the Sunnyside School District. RP 599. Further, Lori is trained in the Lindamood-Bell reading program, which is rare and sought after in schools for their special education students. RP 598-99. Around the time of separation, Lori worked part time at a health-food store. RP 250.

Several years before trial, a naturopathic doctor diagnosed Lori with “chronic” Lyme disease, which she experiences as fatigue, swollen joints, impaired cognitive function, and poor sleep. RP 246. Her condition is currently “in remission.” RP 246. Lori testified she was unable to give a “definitive answer” whether she could continue working part time. RP 250. Lori declared her income from substitute teaching as \$720 per month. CP 565.

B. Trial Proceedings and Final Orders

The matter was tried in September and October 2016. In November 2016, the trial court entered a letter ruling setting forth detailed findings of fact and conclusions of law. CP 702-07. In February 2017, the court entered formal findings of fact and conclusions of law, which incorporated a corrected version of the letter ruling. CP 758-62, 783-88. The court also entered a final order and decree, which also incorporated the letter ruling, and—unexpectedly—a child-support order. CP 763-75, 776-81.

Although Maxine Van de Graaf did not testify at trial, the court found in its letter ruling there was “ample evidence” Maxine intended to cause her 2012 Family Trust to transfer its shares of VDGR to Rod “at some time after the marriage is dissolved.” CP 785. The court recognized that this potential future asset was not a marital asset subject to division, but concluded the court could “consider the likely acquisition of this interest in determining what is just and equitable in the division of other assets and application of the factors enumerated in RCW 26.09.090 [regarding maintenance].” CP 785.

The trial court purported to award Rod community and separate assets worth over \$3.6 million. *See* CP 786. Principally, the court awarded Rod the community’s interest in Midvale, which it valued at \$2 million. CP 770. But the court refused to recognize or distribute the debts owed on promissory notes to VDGR and the Van de Graaf parents. The court found:

Respondent’s position is that the 2-million-dollar debt has to be charged against the value of Midvale, effectively making the asset worthless. I am convinced, however, the “debt” is a chimera,^[5] which is masking a gift and is not properly chargeable against the value of Midvale.

⁵ The definition of “chimera” that appears most closely pertinent here is: “an illusion or fabrication of the mind or fancy.” WEBSTER’S THIRD NEW INT’L DICTIONARY 389 (2002).

CP 784; *see also* CP 766 (finding that the notes are “illusory and it would be inequitable to treat them as the obligation of the marital community or either of it’s [sic] members”).

The court awarded Rod the family home, which it valued at \$1.42 million, and the community’s interest in K2R, valued at \$300,000. CP 770. In addition, the court awarded Rod a life insurance policy from Beneficial Life Insurance Company with a cash-surrender value of \$116,000—the main (supposedly) liquid asset awarded to Rod. CP 770.

The trial court awarded Lori nearly \$2.8 million, mostly in cash. *See* CP 786, 763-64. The court awarded Lori a UBS Resource Management Account containing approximately \$816,000 (and directed Rod to restore any shortfall from that amount), plus other accounts containing approximately \$98,000, and entered a judgment of \$1,183,578.62 in Lori’s favor, against Rod. CP 763-64, 772. In addition, the court awarded Lori the community’s 50% interest in the Ellensburg property, valued at \$690,000, CP 773, and allowed her to keep her jewelry collection valued at over \$114,000.

Although the court acknowledged it had awarded Lori “significant assets,” it nevertheless found that her situation was “precarious” and ordered Rod to pay her \$6,000 per month in maintenance “*for life*”—*i.e.*, until the death of either spouse—*not* to terminate upon Lori’s remarriage. CP 765-66, 788 (emphasis added). As part of the basis for this order, the court found

“[c]onservatively” that Rod’s “expected income in the near term,” including both salary and distributions, was at least \$17,000 per month. CP 788. In addition, the court found that Rod has considerable wealth and anticipated future wealth:

Rod Van de Graaf is a very wealthy man, who is about to become even wealthier. He is the co-owner of the Midvale Cattle Company, the co-owner of K2R, LLC [sic], and will soon be the co-owner of VDGR. I can only estimate his accumulated wealth, which as to be close to 5 or 6 million dollars, if not more. [Rod] is easily able to support himself and his former spouse, without hardship to either.

CP 787-88. The court found that Lori is accustomed to the lifestyle of a “very wealthy person,” CP 787, (consistent with her upbringing as the daughter of successful multiple jewelry store owners⁶) suffers from health problems that can be “debilitating at times” (CP 787), and, despite the evidence her fibromyalgia was under control and that Lori was able to, and did work regularly as a certified special education teacher in the Sunnyside School District, is unlikely ever to work full time. CP 787.

In its child-support ruling entered *sua sponte* (see CP 707, 788), the trial court ordered Rod and Lori each to pay 1/3 of college expenses incurred by their adult son, NVDG, to the extent not

⁶ This “wealthy person lifestyle” is seen by the fact she maintained secret Yakima Federal bank accounts, not discovered until June, 2016 (five years into the divorce), into which she had deposited over \$250,000 in the three years before the separation and still had over \$53,000 in cash available at the time of separation and which was not disclosed when seeking temporary maintenance. See CP 797; SCP 1443-1448 (sealed Yakima Federal bank statements).

covered by the 529 college-savings plans they established for him. CP 778. The court ordered Rod alone to provide health, medical, and vision insurance for NVDG “until the child is no longer able to be covered by the insurance.” CP 778.

After initially declining to award fees based on the finding that “both parties have sufficient wherewithal to pay their own costs and fees,” (CP 788), the trial court granted Lori’s request on reconsideration for \$58,675 in fees by letter of March 14, 2017, informing counsel of the amount of the award and instructing Lori’s counsel to prepare “an appropriate order and judgment.” CP 829. A judgment was prepared without any order vacating the prior findings or making new findings to support the fee award, *see* CP 967-968 (judgment on fee award), thus leaving in place the finding that the parties had sufficient funds to pay their own fees.

The unusual circumstances of the fee request and the numerous corrections and material changes made to the trial court’s initial, November 17, 2016, property division ruling, many of which were made without the normally required notice, opportunity to brief, and hearing⁷ in a manner that goes far beyond an appropriate measure of “small county informality,” are best described in Rod’s response of March 3, 2017. CP 792-800.

⁷ *See In re Marriage of Tahat*, 182 Wn. App. 655, 676-678, 34 P.3d 1131 (2014) (reversing this trial judge for failing to give a party a full opportunity to respond to the opposing party’s reconsideration motion).

The parties first discovered after entry of the Decree that the Beneficial Life Insurance policy purportedly awarded to Rod as a \$116,000 cash value asset, ostensibly to provide him some liquid assets (*see* CP 957:4-6) and to complete a roughly 50-50 division of community property, was actually owned by the “Lori and Rod Van de Graaf LIT” (Life Insurance Trust)—an irrevocable trust with trustees who were not even parties to the case. CP 965. The policy thus was not owned or controlled by either party to the marriage and the court had no jurisdiction over it. *In re Marriage of McKean*, 110 Wn. App. 191, 38 P.3d 1053 (2002).

This jurisdictional defect was brought to the trial court’s attention on Rod’s CR 60 motion and reply declaration. *See* CP 817-824 (motion, *esp.* CP 821:1-2 & 822-24 discussing and quoting *Marriage of McKean* to point out that Division II reversed the trial court for purportedly dividing a trust in favor of the parties’ children as part of a marital dissolution; and CP 955-959 (reply declaration in support of CR 60 motion, *esp.* CP 958:24-25). Rather than make corrections to remove the non-marital asset from the property division and re-distribute the marital property to provide Rod reasonable liquid assets so that he could make some of the back payments ordered, the court denied the motion without comment. CP 965 ¶4. This ruling appears to be in sync with the trial court’s express statements that Rod was about to become “even wealthier” than the trial court believed him to be, because he soon would be

receiving a large inheritance from his parents, who still are alive and well, and thus did not have a genuine need for liquid assets to make any of the payments it had ordered, including the new award of over \$58,000 in attorney's fees.

The net result of the trial court's property division was demonstrated in post-trial proceedings. Lori, despite receiving the cash accounts of over \$98,000, the UBS account that escalated from the \$816,000 initially awarded to \$834,000, a judgment lien of over \$1M on the house awarded to Rod so that he could not borrow on its former equity, and being allowed to stay rent-free in the family house after entry of the final orders, demanded immediate payment of the back judgments awarded and continuation of the maintenance ordered by the trial court of \$6,000/month. As shown in the later contempt and suit money proceedings, Rod did not have personal funds to make the court-ordered payments of maintenance or back judgments. His only means to avoid or purge contempt orders and stave off collections has been to borrow from parents or family members. See CP 1723 ¶¶ 8-9 (Rod's declaration).

C. Post-Trial Proceedings.

1. Contempt proceedings – April, May and July, 2017.

Lori brought contempt proceedings against Rod for his failure to make maintenance payments as ordered by the Decree, which were heard on April 14, 2017. At the same time as his response, Rod filed a motion to modify the maintenance award of

\$6,000/month, which he had been unable to pay and which had generated the contempt hearing. See CP 947-949 (Rod’s cross-motion to modify maintenance); CP 955-959 (Rod’s declaration in support of the CR 60 motion detailing the inability to access the Beneficial Life Insurance policy and its \$116,000 cash benefit awarded to him by the trial court to provide Rod some liquid assets because it is owned by a third party, a trust, and so is not an asset of either him or Lori, requiring re-distribution of the property).

On April 14 Rod was held in contempt “for willful failure to pay spousal maintenance since November 1, 2016, as directed by the decree,” then the trial court awarded Lori a judgment for back due maintenance of \$38,311 in addition to the \$6,000 specified in the Decree. CP 693-694. The trial court also “clarified” the Decree to award Lori “any gain” on the \$816,000 in the UBS account awarded to her, which amounted to an additional \$18,000. CP 965. The trial court denied without comment or findings Rod’s motion to reduce or modify maintenance and his CR 60 motion to address the Beneficial Life Insurance policy, *id.*, then signed the judgment for \$58,675 in attorney’s fees it had awarded to Lori on reconsideration. CP 967-968.

Lori brought new contempt proceedings when Rod did not immediately pay the amounts specified in the April 14 order. CP 1532. Rod filed a cross-motion for contempt or for Lori to vacate the house awarded to Rod in the Decree and to pay her own expenses and debts as required by the Decree. CP 1537-1538

(motion); 1539-1558 (Rod’s declaration detailing financial issues behind his inability to pay the maintenance or judgments as ordered). The motion was heard by the commissioner on May 31, 2017, who found Rod in contempt for “willfully” failing to pay despite the financial information provided, CP 1559, which ruling was affirmed on revision on July 10. CP 1649.

As part of his revision brief, CP 1565-1579, Rod raised the point that the commissioner had not made a finding that Rod had the ability to make the payments for which contempt was sought, *see* CP 1566:16-21, and that his inability to pay was a defense to the contempt claim, making the underlying ruling defective. CP 1578. As part of the revision papers, Rod filed a declaration from Steve Erickson, who is the financial manager for Midvale Cattle Company (and has been for 26 years) and the brother-in-law of both Rod and Rick Van de Graaf. CP 1638-1641. Mr. Erickson sets out the financial constraints of Midvale and due to the nature of the cattle operations and their banking relationship, such that Rod’s – and all the partners’ – ability to take draws against their partnership equity for personal needs terminated as of April, 2016, and affirmed that Midvale has no financial or ownership interest in Van de Graaf Ranch Properties, which is wholly owned by Rod’s parents. CP 1639.

Nevertheless, revision was denied even though Rod had demonstrated he did not have the ability to pay the back judgments and maintenance from his own earnings or assets. CP 1649.

2. Suit money request.

Despite the fact that Lori received liquid assets of over \$1M in the final orders, including \$98,000 in cash accounts already under her control and the \$834,000 in the UBS account, and was allowed to remain in the house awarded to Rod rent free for months after it was awarded to Rod, Lori sought suit money of \$65,000, advance money for her cross-appeal and to defend against Rod's appeal on the basis of her alleged ill-health and the trial court's ruling that Rod soon would be an "even wealthier" man. CP 1602-1603. Rod responded, CP 1678-1685 (brief) and CP 1691-1697 (trial counsel declaration summarizing earlier trial court documents relating financial matters since entry of the decree in February, 2017, including Lori's receipt of the full \$834,000 in the UBS account and being awarded bank accounts in her name totaling \$98,000, and Rod's lack of available income or liquid assets to pay the requested suit money, demonstrating a lack of need by Lori and an inability of Rod to be able to pay). After reply papers from Lori (including a declaration from Rod's brother Rick) raised new claims as to Rod's finances, Rod filed sur-rebuttal papers to insure the record was accurate in the form of his declaration and a declaration from Debbie Cole, his girlfriend, CP 1721-1727, who related that she had to pay many of his expenses. Prior to the hearing, Rod filed a Notice of Deposit To The Court Clerk which included an accounting of the payments Rod made on August 28 to become current with all

outstanding judgments or maintenance, with total deposits of \$74,311, providing the deadline for Lori to have to vacate the house awarded to Rod, in which she had lived since separation in 2011, by the end of September. After argument, the superior court commissioner ordered payment of \$30,000. CP 1747.

IV. ARGUMENT

A. ~~Standard of Review and Basic Principles of Property Division.~~

~~RCW 26.09.080 governs the disposition of both separate and community property and is reviewed for an abuse of discretion. The statute requires the court to:~~

~~make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:~~

- ~~(1) The nature and extent of the community property;~~
- ~~(2) The nature and extent of the separate property;~~
- ~~(3) The duration of the marriage or domestic partnership; and~~
- ~~(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.~~

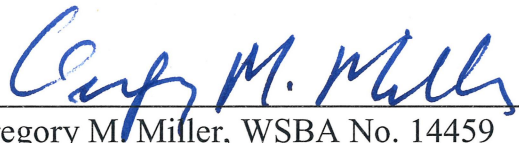
~~RCW 26.09.080.~~

~~In order to properly exercise discretion to make a “just and equitable” property division, the trial court must not only consider the factors listed in the statute, but also apply the underlying~~

~~Finally, given the accumulation of errors and the repeated failure to abide by fundamental jurisdictional tenets of marital property division law, Rod respectfully asks the Court to remand the matter to a different judge so that there is no issue of Rod getting a fair hearing on remand.~~

Dated this 2nd day of January, 2018.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30515
Attorneys for Rod D. Van De Graaf

FILED
Court of Appeals
Division III
State of Washington
9/18/2019 3:45 PM

Nos. 35133-5-III; 36122-5-III; 36282-5-III &
No. 35292-7 (Consolidated with 35499-7-III, 35839-9-III, & 36283-3-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
Honorable Michael G. McCarthy

ROD VAN de GRAAF'S MOTION FOR RECONSIDERATION

Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30512

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Rod D. Van De Graaf

~~**Fourth,** the map in Lori's brief is misleading and does not represent the reality of the situation, as it fails to actually show where the land does lie.~~

~~**In addition,** the treasurer's website shows that "Van de Graaf Ranches, Inc." paid the first half of the taxes on 5/8/2018 for parcel 20588, and that Lori paid the second half taxes on 10/31/2018. But the deed putting this parcel in her name did not get recorded until April 2019. Lori thus cannot claim she first "realized" there was "another parcel" when "she got the tax bill", since tax bills are sent on December 31 for the coming year, when Lori had no arguable legal interest in parcel 20588 on December 31, 2017.~~

B. The Limited Remand For Findings On The Fee Award, Rod's Submission Of The Full Record As To The Findings Entered April 26, 2019, Which The Decisions Overlooked And Did Not Examine.

The panel ordered a limited remand for the trial court to enter findings of fact to support its April 14, 2017 fee award to Lori. Findings were entered on April 26, 2019, after a contested hearing. See App. 1, pp. 38-52 (Rod's objection, his proposed findings, and findings entered on April 26); App. 1, pp. 126-137 (transcript).

Following the hearing Rod moved for reconsideration (App. 1, pp. 53-56), which was immediately denied (App. 1, p. 159) even

thought it was timely (see App. 1, p. 5; p. 53), and even though Rod's motion stated the intent to supplement after receipt of a transcript of the hearing. App. 1, p. 55:15-18. Rod filed an amended notice of appeal of the findings and the denial of reconsideration. App. 1, pp. 156-159. Rod filed a supplement to his reconsideration motion after getting a transcript of the April 26 hearing. App. 1, pp. 57-103 (memorandum); pp. 104-155 (declaration of counsel). The supplement to reconsideration was immediately denied (App. 1, p. 161), and Rod filed another amended notice of appeal to insure that order and its record were brought up. App. 1, pp. 160-162.

Rod submitted a combined motion and brief in support of supplementing the appellate record on August 27, 2019. The Decisions were filed on August 29, 2019, and did not address the motion to supplement or the amended notices of appeal of the April 26, 2019, findings. Those papers are included in the appendix to this motion to reconsider. The index to the appendix to the motion to supplement is at App. 1, p. 37, and p. 180.

The Motion to Supplement stated why the documents are important for the panel to consider:

Supplementing the record is necessary to provide this Court with the full record of the limited remand, which is needed to understand why the trial court erred in entering the findings and why the findings do not cure the defects in the April 14, 2017, order awarding fees to Respondent Lori Van de Graaf.

The April 26 hearing also crystallized and finally brought into overt focus the trial court's unfortunate but clearly stated anger with Rod's father Dick Van de Graaf, a personal animus that resulted in the trial court disregarding the evidence and unfairly punishing Rod. Like the last piece of a jig saw puzzle allowing the picture finally to come into focus in public, the April 26 hearing, when viewed in full context of the record Rod seeks to designate as described herein, reinforces why reversal of the underlying property division and maintenance award and remand to a different judge are required, as well as vacating the April 26 findings themselves. See § IV. B., *infra*, pp. 21-27 [App. 1, pp. 21-27].

This complete record shows: 1) the trial court's legal errors in entering the findings of fact as to its 2017 fee award; and 2) the public display of the trial court's personal animus toward Rod's father, Dick Van de Graaf, and that the animus was applied to Rod, including disregarding the actual evidence in its rulings. The trial court's clear non-party focus and animus that was applied to Rod is a second basis for vacating the April 26 findings, as well as vacating the underlying property division and maintenance awards. It also shows why remand must be to a different judge, one not so personally invested that he or she overlooks the law, in keeping with Washington's long-standing principles requiring both an impartial decision-maker and one who appears impartial.

Motion to Supplement, at App. 1, pp. 2-3. This is the core of the Motion to Supplement, and is detailed at App. 1, pp. 7-19 and pp. 21-27 on the issue of appearance of fairness and impartiality.

The Motion to Supplement also addressed the legal error and lack of support in the record for the claimed intransigence justifying the fee award made on March 14, 2017, including that it did not meet the test under controlling law for compensating for the additional costs the alleged intransigence supposedly imposed, citing *In re Marriage of Lilly*, 75 Wn. App. 715, 720, 880 P.2d 40, 42 (1994) and Scott J. Horenstein, 20 WASH. PRAC., FAM. AND COMMUNITY PROP. L. § 40:3 (2019 Supp.). App. 1, pp. 19-21.

Rod respectfully suggests the panel should consider this pertinent information and reconsider the Decisions.

~~IV. GROUNDS FOR RELIEF AND ARGUMENT~~

~~A. Reconsideration Should Be Granted Per RAP 12.4(e) Where An Appellate Court Decision Overlooks Or Misapprehends The Applicable Law Or Operative Facts, Or a Combination Of The Two.~~

~~RAP 12.4(e) instructs that motions for reconsideration should point to the “points of law or fact which the moving party contends the court has overlooked or misapprehended” and thus states the standard for modifying or changing the initial decision. Our appellate courts grant reconsideration where warranted, both the~~

~~income Rod was left with after the divorce, absent his parents or sister stepping in.~~

~~Rod respectfully suggests that reconsideration should be granted so new decisions can issue which conform to the established Washington law that the property division and maintenance awards are based on the property of the marital parties, not the speculative amounts of assets of their parents or other relatives, which may or may not come to the spouse.~~

D. Reconsideration Should Be Granted Because The Court Failed To Consider The Full Record Related To The Limited Remand On The April 14, 2017, Fee Award Even Though The Record Was Submitted Before The Decisions Were Filed.

There is no indication in the Decisions that the panel considered the full record of the limited remand for findings to support the April 14, 2017, fee award. That full record includes Rod's written opposition to the proposed findings submitted by Lori, the transcript of the hearing, and the reconsideration and supplemental reconsideration papers filed by Rod following entry of the findings. Those papers are included in Rod's motion to supplement the record which was filed August 27, and are attached hereto as its appendix for the panel's convenience.

The purported basis for the March 14, 2017/April 14, 2017 fee award was the additional expense required ***at trial*** for Lori because the Senior Van de Graaf's finances were both complicated and were not fully disclosed. But aside from the fact those records were largely irrelevant, the proposed supplemental record documents what was known to the parties at the time: that Lori has already received full and extensive discovery of Rod's finances, and of any relevant portions of his parents' finances in helping to establish Midvale for their three children including Rod, initially for the two, separate, day-long mediations. See App 1, pp. 14-15 (Motion); pp. A 104-108 (Comins Rick Dec. ¶¶ 4-15).

There thus was no "intransigence" at trial that imposed additional costs on Lori, and which the trial court then awarded to her in March, 2017, as a fitting "punishment" of Rod to fit his "crime" of intransigence. It was, as shown by the declaration of counsel, made up after the fact because the trial court got angry with Rod's father for bringing a suit on the note in December 2016, then got angry with the Senior Van de Graaf in April, 2017, when he had not supplied the funds to make all the payments ordered by the trial court which Rod had no ability to pay.

As shown in the Motion to Supplement and supporting materials, this all came into focus at the April 26 hearing. App. 1, pp. 2-3, pp. 7-19, pp. 21-27. It is respectfully submitted that with this full record, a disinterested person with full knowledge of the facts – which necessarily include the multitude of orders entered which are at odds with settled Washington law, starting with incorporating the Senior Van de Graafs’ assets into the property division and maintenance awards and “awarding” to Rod as a material part of the property division a significant asset that was, in fact, property of a third party and not subject to the dissolution court’s jurisdiction, that the appearance of fairness was violated and the underlying orders must be vacated.

~~E. Rod Is Not Seeking An Exception To The Applicable Legal Rules. He Only Asks That Those Rules Be Applied To His Case On The Basis Of The Facts And That Errors Be Corrected.~~

~~Rod is not asking the Court to grant him special favors, or exception to the normal legal rules. He asks only that those normal legal rules be given effect in his case. If they are, he is confident that the Court will see it has misapprehended the law in the context of the facts of this case and realize that the August 29 decisions must~~

~~fixated on Rod's father and had lost its judicial balance much earlier.~~

~~It is rare, but it can happen. We have the evidence it happened here.~~

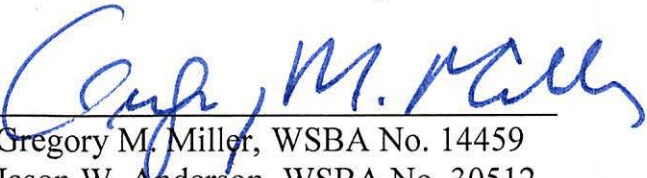
~~With respect, the panel should grant reconsideration to insure
it preserves the rule of law in the Yakima Superior Court and the
legitimacy of the legal system for solving disputes there.~~

V. CONCLUSION

~~Rod Van de Graaf respectfully asks the panel to reconsider its
August 29, 2019, Decisions affirming the trial court's property
division, maintenance, attorney fees, and related rulings for the
reasons given above, and instead reverse and remand for new
proceedings.~~

Respectfully submitted this 18th day of September, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30512

Attorneys for Rod D. Van De Graaf

APPENDIX 1

Page(s)

Motion and Brief in Support of Supplementing the
Appellate Record with Clerk's Papers re Findings
of Fact for Fee Award on Limited Remand,
filed August 27, 2019,.....Appendix 1 Page 1-175

Declaration of Joanne G. Comins Rick in Support of
Motion to Supplement the Appellate Record,
filed August 27, 2019,.....Appendix 1 Page 176-181

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8/27/2019 3:03 PM
WASHINGTON STATE COURT OF APPEALS, DIVISION III

Lori Van de Graaf,
Respondent,
v.
Rod D. Van de Graaf,
Petitioner.

No. 35133-5-III

MOTION AND BRIEF IN
SUPPORT OF
SUPPLEMENTING THE
APPELLATE RECORD
WITH CLERK'S PAPERS
RE FINDINGS OF FACT
FOR FEE AWARD ON
LIMITED REMAND

I. IDENTITY OF MOVING PARTY

Appellant Rod Van de Graaf ("Rod") seeks the below relief.

II. STATEMENT OF RELIEF SOUGHT AND SUMMARY

Rod asks permission per RAP 9.6(a), 1.2, and 7.3, to file supplemental clerk's papers to complete the record of this Court's limited remand for entry of findings of fact to support the trial court's April 14, 2017, award of attorney's fees, consistent with his Amended Notices of Appeal filed June 6 and July 15, 2019,¹ for the

¹ On June 6 Rod filed an amended notice of appeal of the April 26 Order and denial of reconsideration, then his designation of clerk's papers on June 12, 2019. Because of the amended notice, counsel did not think about the normal rule to supplement post-briefing, and the designation was rejected by this Court on June 20. This motion corrects that oversight now that it is apparent a hearing in the trial court on the pending CR 60 motion will not occur promptly, given Judge McCarthy's medical leave. A copy of the supplemental designation is attached to this motion. The Superior Court has paginated the documents, except for the amended notices of appeal, which will be added.

reasons set forth herein, and in any supplemental briefing the Court decides is helpful.

Supplementing the record is necessary to provide this Court with the full record of the limited remand, which is needed to understand why the trial court erred in entering the findings and why the findings do not cure the defects in the April 14, 2017, order awarding fees to Respondent Lori Van de Graaf.

The April 26 hearing also crystallized and finally brought into overt focus the trial court's unfortunate but clearly stated anger with Rod's father Dick Van de Graaf, a personal animus that resulted in the trial court disregarding the evidence and unfairly punishing Rod. Like the last piece of a jig saw puzzle allowing the picture finally to come into focus in public, the April 26 hearing, when viewed in full context of the record Rod seeks to designate as described herein, reinforces why reversal of the underlying property division and maintenance award and remand to a different judge are required, as well as vacating the April 26 findings themselves. *See* § IV. B., *infra*, pp. 21-27.

This complete record shows: 1) the trial court's legal errors in entering the findings of fact as to its 2017 fee award; and 2) the

public display of the trial court's personal animus toward Rod's father, Dick Van de Graaf, and that the animus was applied to Rod, including disregarding the actual evidence in its rulings. The trial court's clear non-party focus and animus that was applied to Rod is a second basis for vacating the April 26 findings, as well as vacating the underlying property division and maintenance awards. It also shows why remand must be to a different judge, one not so personally invested that he or she overlooks the law, in keeping with Washington's long-standing principles requiring both an impartial decision-maker and one who appears impartial.

This motion is based on the accompanying Declaration of JoAnne G. Comins Rick in Support of Motion to Supplement the Appellate Record ("Comins Rick COA Dec."), the appendix of trial court documents from the April 26 hearing and post-hearing filings,² and the authorities and arguments herein.

² Lori's counsel copied this Court on its moving papers for its proposed findings when they were filed in the trial court and they are not included in the Appendix or Rod's supplemental designation since the Court already has them. He will include them in supplemental clerk's papers if so directed.

III. FACTS RELEVANT TO THE MOTION

A. Procedural Facts.

On March 18 this Court ordered a limited remand for purposes of entering findings of fact based on and supporting the trial court's fee award in its March 14, 2017, letter ruling (App. A-10), the order for which was entered on April 14, 2017. The remand order directed the findings be made in 60 days, by May 17, 2019.

Lori's counsel filed a notice of presentation with proposed findings and materials of over 107 pages originally setting it for April 5, which after being continued due to short notice and illness of Rod's counsel, was ultimately heard April 26, still three full weeks before this Court's deadline.³

Rod objected to the findings proposed by opposing counsel in writing (App. A-1-6), and to the limited extent allowed by the trial court at the hearing (*see* App. A-131-135), but they were nevertheless entered exactly as proposed by Lori's counsel at the hearing on April 26, 2019. *See* App. A-11-15.

³ Lori's counsel filed the notice of presentation on March 26, 2019, and set it for April 5, but with inadequate notice and without consulting Rod's counsel. The hearing was re-set for April 12 and then continued to April 26 due to illness of Rod's trial counsel.

Rod moved for reconsideration on May 6 arguing the findings were inconsistent with the state of the record in 2017; Rod's counsel testified she believed the findings were "the result of 'passion or prejudice' on the part of the judicial officer" and thus improper. App. A-17-18. Reconsideration was denied by Judge McCarthy on May 8 without waiting for the supplement or calling for a response (App. A-122),⁴ even though the motion specified that it would be supplemented after receipt of the transcript from the hearing, which was needed to fully set out the issues. See App. A-18:15-18.

The transcript was filed May 14 (see App. A-126) and Rod's counsel thereafter filed her declaration and supplement to the reconsideration motion which focused on the hearing transcript and the state of the record in 2017. App. A-20-66 (supplemental memorandum with attachments including the April 26 transcript); App. 67-118 (declaration of counsel with referenced attachments). The papers were styled as a supplement to the May 6 reconsideration motion, and a motion to vacate per CR 60(b). App. A-20 & A-67. Judge McCarthy denied the supplement to reconsideration on June

⁴ The filed stamp shows it was filed timely on May 6 at 3:52 pm. App. A-16.

13 without calling for a response. *See* App. 124 (“Order on Motion for Reconsideration” signed June 13, underlining the word “reconsideration,” indicating the CR 60 motion was not addressed).

Rod’s counsel thereafter contacted opposing counsel’s office and, when a mutually available June hearing date for the CR 60 motion could not be arranged, filed a motion and order to show cause without oral argument set for June 28, which hearing was later stricken by the court. Comins Rick COA Dec., ¶ 9. On August 12 trial counsel called Judge McCarthy’s chambers to get a hearing date for the CR 60 motion and was told that the judge is “unavailable until further notice.” Comins Rick COA Dec., ¶10. Trial counsel later learned the judge is out on indefinite medical leave. *Id.*

Rod filed an amended notice of appeal of the April 26 findings after reconsideration was denied, giving notice that he believed they are incorrect. App. A-119-122. However, without having the transcript and Rod’s filings objecting to the findings, particularly his post-hearing submissions based on the transcript stating in detail why the findings are in error and not supported by the record, this Court cannot accurately assess the findings since the record before it is materially incomplete. The record therefore

should be supplemented per RAP 9.6(a) and 1.2, and per 7.3 if needed. This motion was brought after it became clear that Judge McCarthy would not be able to consider the CR 60 portion of Rod's post-hearing motion, see Comins Rick COA Dec., ¶ 10, and this Court needs to address the challenged April 26 findings.

B. Substantive Facts Supporting Supplementing The Record.

1. Lori's proposed findings of intransigence.

Lori filed proposed findings which Judge McCarthy signed unchanged. See App. A-11-15 (FOF/COL entered 4/26/19). They asked Judge McCarthy to find that his March 14, 2017 fee award was made to compensate her for Rod's intransigence in the trial that concluded in October, 2016, even though when Judge McCarthy issued his letter ruling after trial in November, 2016, neither party was awarded fees and intransigence was never mentioned.

Lori's proposed findings of intransigence thus created new "facts" to support that new rationale. As Rod's objection and the record show, not only did Judge McCarthy's November, 2016, letter ruling *not* find or mention intransigence, neither the reconsideration moving papers for the fees in February and March 2017, nor any of the colloquy at the March or April 2017 hearings as to the fee award

invoked or mentioned intransigence. Moreover, Judge McCarthy's November 2016 ruling made an affirmative finding, incorporated into the February 2017 Final Orders and never vacated or changed, that both parties had ample resources from the property division to pay their own fees that remained after payments had been made from community funds or Rod's funds during the pendency of the divorce.

Rod therefore objected to the proposed findings as not based on facts in the record, and which were not supported by what had actually occurred. His objections should be added to the record.

2. Rod objected to the proposed findings and offered his own findings which accurately reflected what occurred in 2016 through entry of the fee order on April 14, 2017.

Rod objected to Lori's proposed findings (App. A-1-6), substantively "because the 'facts' asserted in those proposed final findings under the remand order were not brought to the court's attention at the time the Petitioner's 2/2/2017 Motion to Reconsider was made and when the fee request ruling was made 3/14/17." App. A-3:10-13. He proposed his own set of findings. App. A-7-10.

Rod also pointed out how Lori submitted over 107 pages of documents to "support" her proposed findings, coupled with a fast-

track hearing date, despite a 60-day return date to the Court of Appeals, which shows her tactic “to create the most expensive litigation she can.” App. A-2:3-27. She seized it as an “opportunity to change the facts and fabricate novel timelines which are inconsistent with the trial court record in this dissolution in order to make false, disparaging and gratuitous claims against” Rod, App. A-3:1-6, while imposing substantial legal fees on him should he have the temerity to try and set the record straight; it always takes far more time and effort to disprove a falsehood than to baldly assert it.

3. Rod’s objection and proposed findings recounted the actual sequence of events leading to the fee award: Lori’s February 2, 2017 reconsideration motion in which she sought a change to the initial property division and fees because of Dick Van de Graaf’s suit against Rod and Lori over the \$2 million promissory note that was filed in December, 2016, and which Lori’s motion claimed was Dick Van de Graaf’s effort to “undo” Judge McCarthy’s November, 2016 decision.

Rod’s objection and his proposed findings set out the actual sequence of events leading to the fee award of March 14, 2017, which began with Lori’s February 2, 2017 reconsideration motion. See A-3-5 and A-8-9.

Lori's fee motion was part of her reconsideration papers filed on February 2, 2017. CP 717-719 (2/2/17 reconsideration motion, copy attached). Lori's motion sought three changes in the November, 2016 letter decision, including \$50,000 in fees for Lori's expenses in a *different* lawsuit brought in December 2016 by Rod's parents, Dick and Maxine Van de Graaf, against Lori and Rod. *Id.* See A-3-4 (Objection); A-8 (Rod's proposed findings summarizing sequence of events).

After Judge McCarthy effectively granted the first two requests when he entered the Final Orders on February 17, the only part of Lori's reconsideration motion not formally addressed was Lori's fee request. See App. A-3.

On February 21 Judge McCarthy issued an order on reconsideration specifying limited briefing "solely as to the issue of an award of attorney fees to [Lori]" and setting deadlines of March 3 for Rod to file his reply brief, and any response by Lori to be filed by March 10. App. A-3-4. Instead, Lori filed a new "Memorandum on Award of Fees" on March 2 (CP 789-791, attached hereto), which specified fees for trial and cited the fee statute; no claim or mention was made of any alleged intransigence as a basis for the fee award in

the March 2 memorandum. Rod's March 3, 2017 opposition to the fee award was the last pleading filed on that issue. Judge McCarthy then issued his March 14, 2017 letter ruling awarding fees exactly as requested in Lori's March 2 filing, adopting its reasoning and giving her all fees requested. See App. A-4; App. A-8.

As pointed out in his 2019 Objection and proposed findings, nothing new was discussed or filed as to the fee award before or at the April 14, 2017 hearing where the bare award order was entered. See App A-4-5; App. A-8-9.

- 4. Judge McCarthy rails at Dick Van de Graaf at the April 26, 2019 hearing, ignores and cuts short Rod's objections and arguments, enters findings inconsistent with the actual events, and thus ignores the evidence before him and, instead, creates a new history that is not based on the facts or the trial. Trial counsel's post-hearing declaration documents the personal animus of Judge McCarthy toward Rod's father Dick Van de Graaf and that this clear animus brings into focus and establishes his lack of impartiality in the proceeding, and why the findings must be vacated.**

Rod's trial counsel used the transcript and records from the post-trial hearings to document the irregularities in the April 26 hearing and in the entry of Lori's proposed findings, in particular that Judge McCarthy's fixation on Rod's father Dick Van de Graaf

caused him to disregard the evidence and make findings that are not supported by the record.

45. At the April 26, 2019 hearing, I was stunned to observe that Judge McCarthy's personal fury had not abated over the intervening two years and, indeed, at how the Court directed at **Dick** Van de Graaf.

46. The purpose of the April 26th hearing was to enter Findings as the Court of Appeals had ordered on Remand; yet, Judge McCarthy appeared to be reacting emotionally, rather than judicially, to the proposed findings submitted by the Petitioner. With very little prodding, the Court again launched into a recitation about the "house, jewelry and maintenance", which was the basis for accusing Rod of "scorched earth tactics" and "intransigence" but which was, in fact, directed at Dick Van de Graaf.

47. The transcript of the April 26, 2019, hearing does not allow one to see the gestures or understand the highly emotional tones and intensity of voice used by the Court.

48. A fly on the wall would have seen the facial expressions and body language when Judge McCarthy paused while struggling to recall the reason for his prior remarks accusing Rod of "intransigence" and "scorched earth tactics" [Transcript, pages 7-8]; and during the pause that followed, Mr. Hazel quietly cued the Court: "Perhaps a \$2million loan that was a chimera?" And the Court's facial expressions visibly brightened and said: "That would be the other one." [Transcript, page 8]

49. A fly on the wall would have seen the grand gestures of Judge McCarthy's arms, and his tone increasing when taking about Rod's family, and in particular, Rod's father: "...he was kind of like this mythic figure who was talked about but never made a physical appearance in the courtroom, just made the issues that the court had to decide and the issues that Mr. Hazel had to address incredibly more difficult..." [April 26, 2019 Transcript, page 9-10.]

50. The animus towards the Senior Mr. Van de Graaf was even more palpable than it had been before. It seems the Court could not move past its wrath from the first go-around at the APRIL 2017 hearing, when the senior Mr. Van de Graaf had not given Rod the money to pay the amounts for back maintenance to Lori ordered by the Court. As of the APRIL 2017, the Court had to know from the property division it had just completed that Rod could not pay that from his own funds, and also knew that the Senior Mr. Van de Graaf had initiated the suit over the Note against Rod and Lori, and that the Senior Mr. Van de Graaf, obviously, had not given Rod the funds to pay the amounts ordered by the Court. Only at that point did “scorched earth tactics” and “intransigence” appear in the case.

51. Other comments by the Court on April 26, 2019, are equally notable in recognizing that the only “nexus” between the dicta about “scorched earth tactics” and “intransigence” in 2017 and the signing and entry on April 14, 2017 of the Order:Judgment awarding fees, is the date of the hearing when both unrelated events occurred. See page 10 of the April 26, 2019 hearing transcript:

...We believe Mr. Hazel is encouraging you to rely on the record that has happened since that point primarily, especially with the contentious hearings that we primarily, especially with the contentious hearings that we had starting with April 14th. So we're -- I'm simply saying --

But the Court interrupted counsel with

THE COURT: I'm simply saying as well that the comments about scorched earth and the other were made at the same time the order regarding attorney's fees was signed. I think it's part of the record supporting the award.

52. Without question, the Findings entered on April 26, 2019 should be vacated. The proposed Findings submitted by Respondent should have been entered instead because they

reflect the state of the record and the genuine reasons for the fee award at the time it was made in March, 2017, as the undisputed record shows.

53. The fact the Court's anger with Rod's father boiled over at the April 14, 2017 hearing, and then with expanded ferocity at the April 26, 2019 hearing, should not be used to penalize and punish Rod in the dissolution action, because Rod's father is beyond the reach of the Court's jurisdiction, leaving only Rod, the son, to answer.

54. The transfer of the Court's personal frustration with, and personal animus towards, Rod's father to Rod himself is seen in the quotes from the April 26 hearing and is embodied in the April 26, 2019 findings. This is made clear when they are contrasted with the state of the post-trial record from November 2016 up through the March 14, 2017 letter decision, which is when the fact and amount of the fee award was made.

55. This personal animus toward a non-party that the Court applied to Rod, who *is* before the Court, shows a lack of the proper judicial perspective over the actual litigants before the Court and constitutes good reason why the April 26, 2019 findings must be vacated.

Declaration of JoAnne G. Comins Rick in Support of

Reconsideration and CR 60 Motion, App. A-80-83 (emphases added in the declaration) ("Comins Rick Recon. Dec.").

As part of showing the lack of factual foundation for the findings, Rod's trial counsel documented the two, long and extensive pre-trial mediations which provided all the financial documents of Rod that Lori requested, drawing the line only at the personal

documents of Dick and Maxine Van de Graaf. Comins Rick Recon. Dec., pp. 71- App A-67-71. Especially pertinent is the detailed list of information provided to Lori and her attorney during the mediations, 14 items listed from letter “a”. to letter “n”. Comins Rick Recon. Dec., ¶ 13, App. A-69-71. This shows that the claim Lori was denied **Rod’s** financial information is specious. What her counsel wanted, and was unable to get, was the financial information of Rod’s parents, who were not parties to the dissolution. Comins Rick Recon. Dec. ¶¶ 4-8, 14-15, App. A-67-68, 71.

Rod’s trial counsel also detailed what the documents did **not** show: they did **not** show, record, or reference any ownership of or purchase by Rod or his marital community of non-voting shares of VDGR stock because there was no such purchase – none. Comins Rick Recon. Dec., ¶¶ 14-16, App. A-71. Nor was there any “concealing” of **Rod’s** assets or of the marital community from the dissolution court because, in fact, the assets were Dick and Maxine’s, and tightly controlled by them. *Id.*, ¶¶ 14-21, App. A-71-72. Counsel documented the reality of how Dick Van de Graaf was perceived and portrayed, much to the trial court’s later frustration as

for the first time openly demonstrated at the April 26, 2019 hearing.

As put by Lori's counsel in closing argument:

20. In closing argument, [Lori's] counsel stated:
“...this is the drill. The father [Dick] controls everything I, Dick Van de Graaf, as my separate property.”

21. The record is replete with examples of [Lori's] judgmental references to the “mythical figure”, Dick Van de Graaf. The following supporting excerpts from trial transcripts highlight portions of argument and the Senior Van de Graafs into the dissolution, and which the Court unfortunately and erroneously accepted.

Comins Rick Recon. Dec., ¶¶ 20-21 (App-A-72, then citing to and quoting from trial transcript pages RP 204, 207-08, 209, 210, 211, 212-13, 214, 215-16, 217, 218, 1229, 1247-1251, copies of which were attached to the declaration. See App. A-72-76 (quotes); App. A-85-105, copies of the transcript pages which were excerpted. As trial counsel's declaration and the excerpts make clear, Lori's counsel claimed that what Rod was hopefully going to get at some future time from family money and enterprises owned by his parents – but which was not Rod's, nor vested in him – should be part of the property division between him and Lori. *Id.*

Even so, at the end of trial Lori's counsel never once asked, demanded, or suggested that Rod be found intransigent and fees

awarded to Lori on that basis. Her counsel did not request fees on that basis at all. Nor did Judge McCarthy make such a finding on his own immediately after trial, or when entering the Final Orders.

Rather, despite Lori's sturm and drang at trial, trial counsel emphasized the undisputed fact that **"the trial court didn't find Rod to be intransigent nor that Rod was engaged in "scorched earth tactics"** when Judge McCarthy ruled on November 17, 2016. Comins Rick Recon Dec., ¶22, App. A-76. It was not until *after* Dick Van de Graaf filed the lawsuit over the promissory note in December, 2016; and *after* Lori's counsel placed that complaint in the dissolution action; and *after* Lori filed for reconsideration claiming Dick Van de Graaf was trying to undo the dissolution; and *after* the March 14, 2017 fee award had been made; and *after* the March 31, 2017 hearing at which Rod was not able to make payments the judge had ordered because he personally had no such money and could not pay if his parents did not provide the money; only *after all* those events did Judge McCarthy, on April 14, 2017, speak for the first time of "scorched earth" tactics used by Rod, and assert that Rod's financial non-disclosure had forced Lori to expend

more on fees. Comins Rick Recon. Dec., pp. 10-14, ¶¶ 22-44, App. A-76-80.

This “scorched earth” statement was a month *after* Judge McCarthy’s March 14, 2017 determination to award the fees to Lori precisely as requested in her March 2, 2017 papers, without a scintilla of a hint of intransigence by Rod leading up to or during the trial, much less a factual basis for it.

IV. GROUNDS FOR RELIEF AND ARGUMENT

There are no unique rules governing a limited remand and the procedure to bring the remand record to the Court to a pending appeal. Rule 9.6(a) provides that a party may supplement their record designation after its last brief “only by order of the appellate court, upon motion.” Rule 1.2 provides for a liberal interpretation of the rules to “facilitate the decision of cases on the merits” and waiver or alteration of the rules “to serve the ends of justice.” The function of RAP 9.6(a) and RAP 1.2 is to insure the Court has the proper record for a just decision and meet its goal of error correction, and RAP 7.3 embodies the appellate court’s inherent authority to take all actions necessary for the fair review of a case.

Rod’s amended notices of appeal challenge the findings

entered on April 26, and this Court cannot fairly or properly evaluate the challenged findings and act on those amended notices without a full record of that proceeding, including all of Rod's objections. He thus asks that they be added by supplemental designation. The following points show why the record is needed for proper review.

A. The Purported Basis of Intransigence For The Award Of Trial Court Fees Is Both Erroneous And Not Supported By The Record.

1. An award of fees for an amount in excess of the fees allegedly imposed by the party's intransigence is error that must be vacated.

The court may consider whether intransigence of a spouse causes the other spouse to incur additional attorney's fees—however, the fees awarded are limited to the amount needed to compensate the opposing party for the intransigence. *In re Marriage of Lilly*, 75 Wn. App. 715, 720, 880 P.2d 40, 42 (1994). In *Lilly*, this Court held that the trial court erred when it awarded fees "for an extensive period before the current proceedings." *Id.* Thus, as the leading Washington commentator on the subject states the black letter law: "The award [for intransigence], however, should be limited to the amount needed to compensate the opposing party for the intransigence." Scott J. Horenstein, 20 WASH. PRAC., FAM. AND

COMMUNITY PROP. L. § 40:3 (2019 Supp.) (“HORENSTEIN”), citing *Lilly, i.e.*, the penalty should fit the “crime” or misconduct.

This accords with the fundamental principle of proportionate punishment that inheres in judicial sanctions. To the extent that fees are imposed as “punishment” for a party’s intransigent, they are a sanction which should be in proportion to the claimed wrong committed.

As summarized by Horenstein in his Washington Practice treatise (and as similarly suggested by Judge Lawrence-Berry in argument), “vigorously contesting certain issues, or vigorously defending against demands made by the opposing party, does not justify the imposition of attorney's fees.” HORENSTEIN, *supra*.

Moreover, it is hornbook law that findings of fact have to be supported by substantial evidence, *i.e.*, they must reflect the actual evidence and the record.⁵ As demonstrated by the recitation of the facts, *supra*, that is not the case with the April 26 findings, which

⁵ *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). *Accord, In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (abuse of discretion “if the factual findings are unsupported by the record . . . [or] the facts do not meet the requirements of the correct standard).

should be vacated, and is why the post-hearing pleadings were filed along with the amended notices of appeal. And since there still are inadequate findings to support the fee award, the fee award still must be vacated. *In re Marriage of Nelson*, 62 Wn. App. 515, 521, 814 P.2d 1208 (1991) (vacating award for lack of findings); *In re Marriage of Steadman*, 63 Wn. App. 523, 529-30, 821 P.2d 59 (1991) (reversing award for lack of findings).

B. The April 26 Hearing And Findings Confirm Why The Findings Must Be Vacated And The Matter Remanded To A Different Judge For A New Trial.

A multitude of Washington cases provide that a party is entitled to a fair hearing, one in which the decision-maker is free of bias and the appearance of bias. *See Tatham v Rogers*, 170 Wn.App. 76, 90-93, 283 P.3d 583 (2012) (due process “entitles a person to an impartial and disinterested tribunal in both civil and criminal cases” and the appearance of fairness doctrine requires recusal “when the facts suggest that [the judge is] actually or potentially biased.”).

Beginning with *State ex rel. Barnard v. Board of Ed. Of City of Seattle*, 19 Wash. 8, 52 Pac. 217 (1898), our courts have recognized and given effect to each party’s due process right to an impartial decision-maker who had not made up his or her mind

before the hearing and will base his or her decision on the evidence and the law.

Barnard is built on the central tenet of Anglo-American law that an impartial decision-maker is a necessary predicate to the legal system. This began at the outset of the Washington Territory's first code adopted in 1854 with the provision in the venue section that allowed a change of judges for prejudice when an affidavit is filed "stating that the judge or the inhabitants of the county are so prejudiced against him, that he cannot expect an impartial trial," expressly invoking the touchstone principle of impartiality. Laws of 1854 § 16, at 134.⁶

The Court in *Barnard* recognized that "the citizen is **entitled** to a judge who is **absolutely impartial**." 19 Wash. at 19 (emphasis added). To decide the case, the Court had to explain that the right to an impartial decision-maker is fundamental and went beyond the bases specified in the statutory right to change a judge, the successor to the 1854 statute. *See id.* at 13. It concluded: "The principle of

⁶ The first decision to address the change of venue statute was *Ward v. Moorey*, 1 Wash. Terr. 104 (1860), holding that the trial court could inquire of the jurors to "examine into the feelings of the community toward the parties" to determine if it was partial or impartial. The requirements of actual impartiality and the appearance of impartiality have always been core requirements of Washington's legal system.

impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle.” 19

Wash. at 17-18. The Court reached that conclusion in terms particularly applicable here:

[Judicial impartiality] is a fundamental idea, running through *18 and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Cæsar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty, and the lives of its citizens,⁷ and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in *People v. Suffolk Common Pleas*, 18 Wend. 550, “next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.”

⁷ Blackstone’s statement is in accord: “The administration of justice should not only be chaste, but (like Caesar’s wife) should not even be suspected.” III BLACKSTONE’S COMMENTARIES p. 383 ¶ 4 (1768).

Barnard, 19 Wash. at 17-18 (reversing denial of writ of prohibition and issuing writ to exclude tribunal member who stated before proceeding he would ignore the evidence to rule against the petitioner).⁸

Later decisions are in accord that a judge's bias, personal interest, or prejudgment of a case or party are not tolerated, whether under due process or appearance of fairness principles, as all implicate the actual or perceived impartiality of the judge. *See, e.g., Tatham v Rogers*, 170 Wn.App. 76, 90-92 (collecting cases re due process), 92-96 (appearance of fairness cases), 283 P.3d 583 (2012). *Accord, State v. Sledge*, 133 Wn.2d 828, 846 n.9, 947 P.2d. 1199 (1997) (new judge required on remand "in light of the trial court's already-expressed views on the disposition"); *GMAC v. Everett Chevrolet, Inc.*, 179 Wn.App. 126, 154, 317 P.3d 1074, *rev. den.*, 181 Wn.2d 1008 (2014) (remand required to new judge "to provide a fresh perspective to the proper and prompt resolution of this case"); *Custody of R*, 88 Wn.App. 746, 763, 947 P.2d (1997) (new judge

⁸ This analysis anticipates the more recent federal decision of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (expanding the federal due process analysis to include where an interested party has "a significant and disproportionate role" in placing a judge on the case).

required on remand where judge told the appellant it did not “like what you did”, personalizing its comments).

Most recently, the United States Supreme Court has reaffirmed the core requirements of impartiality and the appearance of impartiality to a legitimate legal system:

An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

... Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be granted an opportunity to present his claims to a court unburdened by any “possible temptation ... not to hold the balance nice, clear and true between the State and the accused.” *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

Williams v. Pennsylvania, ___ U.S. ___, 136 S.Ct. 1899, 1909–10 (2016) (vacating Pennsylvania Supreme Court’s reinstatement of death penalty because one participating justice had, as prosecutor 30-years before, gave official approval to seek the death penalty).

Here the April 26, 2019 hearing transcript and the undisputed documentary evidence from earlier proceedings

beginning with the trial court's November, 2016 letter ruling, demonstrate that, unfortunately, because of his expressed personal animosity towards Rod's father Dick Van de Graaf finally made abundantly clear and crystalizing the problem for the first time at the April 26 hearing, Judge McCarthy was not indifferent and impartial when finding the facts and applying the law to Rod.

On this remand proceeding Judge McCarthy was not applying the law such that his errors could be appealed for error, but was directed to find facts, the role most immune from appellate review. Cases and authorities going back to *Barnard* and Blackstone recognize that an appearance of a lack of impartiality cannot be tolerated because there is no ready remedy if the fact-finder ignores evidence when making the findings, as demonstrated here. It is in part because the trial judge in a marital dissolution is both finder of fact and applier of the equitable principles of property division that our courts recognize those decision are the height of judicial discretion and that a property division "tainted by a judge's partiality will evade correction on appeal" in most cases. *See Tatham v. Rogers*, 170 Wn.App. at 105-106.

Now that the April 26 hearing has drawn back the curtain on

Judge McCarthy's unfortunate but very real personal animus and partiality against Dick – and thereby against Rod – Van de Graaf, the April 26 findings must be vacated along with the overall property division and subsequent orders, and the matter remanded to a new judge, as in *Tatham v. Rogers*, among other cases.

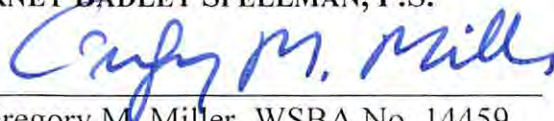
V. CONCLUSION

The record should be supplemented with the transcript and pleadings from and after the April 26 hearing so this Court has the full picture of what occurred, can fairly assess the propriety of the April 26 findings, and so can insure the law was followed and that the legitimacy of the legal system prevails in this contentious case.

Dated this 27th day of August, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By



Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30515

701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020

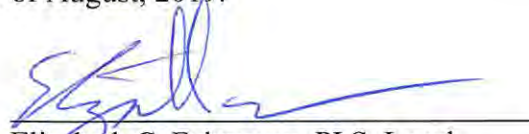
Attorneys for Appellant Rod D. Van De Graaf

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: daveh@davidhazel.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8 th Avenue North Seattle, WA 98109 P: (206) 624-0974 F: (206) 624-0809 E: cate@washingtonappeals.com valerie@washingtonappeals.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Joanne Rick Halstead & Comins Rick PS PO Box 511 ** 1221 Meade Ave Prosser, WA 99350 P: 509-786-2200; 786-2211 F: 509-786-1128 E: jgcrick@gmail.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal

DATED this 27th day of August, 2019.


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

FILED
JUN 12 2019

Tracey M. Stagle
YAKIMA COUNTY CLERK

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

LORI VAN DE GRAAF,

Petitioner,

v.

ROD D. VAN DE GRAAF,

Respondent.

No. 11-3-00982-6

Court of Appeals No. 35133-5-III

**SUPPLEMENTAL DESIGNATION
OF CLERK'S PAPERS**

CLERK'S ACTION REQUIRED

TO: THE CLERK OF THE COURT

Please prepare for transmittal to the WASHINGTON STATE COURT OF APPEALS, DIVISION THREE, Cause No. 35133-5-III, the Clerk's Papers listed below. I understand that, upon receipt of acceptable payment, the Clerk will transmit the Clerk's Papers and exhibits to the appropriate court. I agree to pay the amount owed within 14 days of receiving a copy of the index, regardless of the status of the appeal.

Sub No.	Date Filed	Document Description
	03/25/2019	Notice of Presentation
	03/26/2019	COA Order Remanding to Trial Court for Entry of Findings and Conclusion

DESIGNATION OF CLERK'S PAPERS - 1
VAN064-0001» 5796803

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

Sub No.	Date Filed	Document Description
	03/20/2019	Re Note (Re-Notice of Presentation)
	04/12/2019	Order of Continuance (Stipulated Motion and Order of Continuance due to Illness)
	04/26/2019	Objection to Findings/conclusions
	04/26/2019	Proposed Order Findings
	04/26/2019	Findings of Fact and Conclusions of Law
	05/07/2019	Motion for Reconsideration
	05/09/2019	Order on Motion for Reconsideration
	05/14/2019	Verbatim report of Proceedings (April 16, 2019 Hearing)
	6/11/19	Respondent's Supplemental Memorandum re Motion for Reconsideration of the Trial Court's Findings re Attorney Fees on Remand; and Motion to Vacate Order Denying Reconsideration Re CR 60(b)
	6/11/19	Declaration of Joanne G. Comins Rick in Support of Reconsideration and CR 60 Motion

DATED this 11th day of June, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By



Gregory M. Miller, WSBA No. 14459

Jason W. Anderson, WSBA No. 30515

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:

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Court of Appeals – Division III 500 North Cedar Street Spokane, WA 99201-1905	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other – via Portal

DATED this 11th day of June, 2019.


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

Certificate of Transmittal

I hereby certify that we sent a copy of this to the attorneys for the ~~petitioner/respondent by facsimile~~ by ~~mail (prepaid postage) or by messenger service~~ or by e-mail. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

(Date)

Yakima, WA

FILED
JANELLE RIDDLE, CLERK

17 FEB -2 P4:12

SUPERIOR COURT
YAKIMA CO WA

**SUPERIOR COURT OF WASHINGTON
COUNTY OF YAKIMA**

In re the Marriage of:

LORI VAN DE GRAAF

Petitioner,

and

ROD D. VAN DE GRAAF

Respondent

NO. 11-3-00982-6

**MOTION FOR
RECONSIDERATION**

COMES NOW, the Petitioner, by and through her attorney of record, David Hazel, and moves that the Court reconsider its memorandum decision of November 18, 2016. The motion is made pursuant to CR 59(a) and is based on the following grounds:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

2. Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

6. Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

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6 7. That there is no evidence or reasonable inference from the evidence to justify
7 the verdict or the decision, or that is contrary to law;

8 8. Error in law occurring at the trial and objected to at the time by the party
9 making the application; and

10 9. That substantial justice has not been done.

11 The specific reason as to each ground is as follows:

12 **A. THE JUDGMENT LIEN SHOULD BE \$1,171,200.** The court's memorandum
13 decision valued Midvale at \$2,000,000 and, in its summary, put \$1,000,000 in each spouse's
14 column. The court intended to award that asset to the husband, which changes the totals at
15 the bottom of the court's summary. Wife's total assets are therefore \$1,615,400 less \$8,000 of
16 credit card debts (see third page, fourth full paragraph) for a net of \$1,607,400 and Husband's
17 total net assets total \$3,949,800. 3,949,800 less 1,609,400 divided by 2 equals 1,171,200.

18 **B. THE DECREE SHOULD MAKE CLEAR THAT, ALTHOUGH A**
19 **CHIMERA, ANY OBLIGATION OWED ON THE PROMISSORY NOTES ARE THE**
20 **SOLE OBLIGATION OF HUSBAND FOR WHICH HE MUST HOLD WIFE**
21 **HARMLESS.** Presentation of the decree has been complicated by a summons and
22 complaint filed on December 16, 2016 by Van de Graaf Ranches, Inc. upon Lori Van de
23 Graaf. The action is filed under Yakima County cause number 16-2-03511-39 (a copy has
24 been filed in this case) and is based upon the same promissory notes which this court found to
25 be a chimera for the reasons stated in its memorandum decision. Despite a history of default
26 by all obligors of the notes, including Mr. Van de Graaf's siblings and their spouses dating to
27 1990, no other obligors were named as defendants nor have separate suits been brought
against them. The obvious purpose of the suit is to obtain a judgment only Lori and Rod Van
de Graaf. The suit has caused Lori Van de Graaf to retain the law firm of Larson, Berg and
Perkins which will be a considerable expense to her. The stated purpose of the lawsuit is to
obtain a judgment against Rod and Lori Van de Graaf - jointly and severally - which would
entirely dismantle the work this court did arriving at a just and equitable division of the

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6 marital community's assets Should the plaintiff prevail, Van de Graaf Ranches, Inc. will be
7 free to execute on the assets of one of the defendants. Having listened to the testimony of
8 Moss Adams and two trust and estate attorneys, can there be any doubt in the court's mind
9 which of the defendants would be on the receiving end of levies and garnishments? Or why?
10 Or who would benefit from those efforts to grab money and assets this court set aside for this
11 wife and mother, instead to be placed into the coffers of a company owned ninety per-cent by
the husband's family trusts?

12 Paragraph 20 of the decree should therefore contain the language as proposed by
13 Petitioner that the promissory notes are the sole and separate responsibility of the Husband
14 who shall hold Wife harmless from collection of such debt, including all of her attorney fees
15 and costs incurred in defending such claim or claims.

16 **C. THE COURT SHOULD AWARD SUBSTANTIAL ATTORNEY FEES IN**
17 **THIS ACTION.** The timing and purpose of the 2016 suit is obvious. Even if the court
18 denies the request to award Lori's divorce attorney any attorney fees, taking into account the
19 litigious nature of one of the parties and the complexity of the business dealings of the
20 husband and his family, the sum of \$50,000 is a very reasonable sum to initially set aside to
21 the firm of Larson, Berg and Perkins so that they may vigorously defend the wife and the
22 integrity of this court's judgments and orders. Accordingly, the court should now order the
23 husband to pay that sum.

24 DATED: 2/2/17


DAVID HAZEL, WSBA #7833
Attorney for the Petitioner

Certificate of Transmittal

I hereby certify that we sent a copy of this to the attorneys for the ~~petitioner/respondent~~ by facsimile, by mail (prepaid postage) by attorney messenger service or by e-mail. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

FILED
JANELLE RIDDLE, CLERK

'17 MAR -2 P1:16

SUPERIOR COURT
YAKIMA CO. WA

SUPERIOR COURT OF WASHINGTON
COUNTY OF YAKIMA

In re the Marriage of:

LORI VAN DE GRAAF

NO. 11-3-00982-6

Petitioner,

PETITIONER'S MEMORANDUM
ON AWARD OF FEES

and

ROD D. VAN DE GRAAF

Respondent

The sole issue for reconsideration is Lori's request for an award of attorney fees. RCW 26.09.140 governs an award of attorney fees. It says:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment. Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

In this case, Lori had little financial involvement in the family business enterprises. The case file is replete with examples of her lack of knowledge of even the most basic of financial information which was not shared with her in this twenty-seven year marriage. She

Petitioner's Memorandum on
Award of Fees
Page - 1

Hazel & Hazel
ATTORNEYS & COUNSELORS AT LAW
1420 Summitview
Yakima, Washington 98902

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6 was instead a mother and homemaker. Conversely, Mr. Van de Graaf held all the financial
7 power and information. The trial disclosed the lengths to which his family sought to
8 withhold information about the transfer of assets from Mr. Van de Graaf's parents to their
9 children, matters which were far more than mere expectancies.

10 This case is not unlike *Friedlander v. Friedlander*, 58 Wn. 2d 288, 362 P.2d 352
11 (1961) where the Supreme Court noted "*Prior to trial, appellant's counsel had the serious
12 responsibility of investigating the history and diverse ramifications of the Friedlander
13 enterprises over a period of twenty-seven years. Their client had no intimate knowledge of
14 these matters. Counsel were under a duty to check the accuracy of the various financial
15 records and other data furnished by respondent and to investigate every rumor or fact which
16 might reasonably have a bearing on their client's legal rights in the premises. We must view
17 the situation in which appellant's counsel found themselves as it existed prior to trial and not
18 in the light of facts disclosed at the trial. As the trial court observed, an extraordinary amount
19 of difficult work was done by appellant's counsel. Friedlander v. Friedlander, 58 Wn.2d 288,
20 297 362 P.2d 352 (1961).*

21 Lori's attorney fees as of February 28, 2017 are \$118,805.43 of which \$58,675
22 remains unpaid. See attached client ledger report. These are reasonable fees and my hourly
23 rate is \$250.00. As noted in the *Family Deskbook*, "*need is determined as of the outset of the
24 case, and not necessarily as of the time of trial. The wife, for example, may receive a
25 substantial property and maintenance award in the final decree, but she may also be entitled
26 to attorney fees if the husband has the ability to pay and from the outset she did not have
27 access to the resources necessary to finance her litigation, or if she was forced to invade her
property to finance the litigation but the husband was able to finance his out of current
income.*". *Washington Family Law Deskbook*, Vol.1, pp. 3-9, 3-10.

DATED: 3/1/17


DAVID HAZEL, WSBA No. 7833
Attorney for Petitioner

Petitioner's Memorandum on
Award of Fees
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APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the state of Washington, that on the 25 day of April, 2019 I caused a true and correct copy of the foregoing pleading to be served in the manner indicated below.

ATTORNEY FOR PETITIONER: ☒ U.S. Mail, first class postage prepaid, at Prosser WA
☐ Hand Delivery
☒ Email attachment per Court order June 9, 2016

DAVID HAZEL
1420 SUMMITVIEW
YAKIMA WA 98902

EXECUTED on this 25 day of April, 2019 at Prosser, Washington 

FILED
JUDY M. SLAGLE, CLERK

'19 APR 26 P1:37

SUPERIOR COURT
YAKIMA CO WA

**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF YAKIMA**

In re the Marriage of:

LORI VAN DE GRAAF

Petitioner,

and

ROD D. VAN DE GRAAF,

Respondent.

)
) NO. 11-3-00982-6
)
) RESPONDENT'S OBJECTION TO
) PETITIONER'S PROPOSED
) FINDINGS/CONCLUSIONS RE
) ATTORNEY FEES ON REMAND
) ORDER

COMES NOW THE RESPONDENT, by and through his attorney undersigned, and presents his objections and arguments opposing the Petitioner's Proposed Findings of Fact and Conclusions of Law re Attorney Fees on Remand, as follows, and submitting his counter-proposal herewith.

I. INTRODUCTION AND SUMMARY

On March 18, 2019 the Honorable Robert Lawrence-Berry, Chief Judge of the WA State Court of Appeals for Division III, entered an Order Remanding To Trial Court for Entry of Findings and Conclusions. The provisions on Remand were succinct.

The Court of Appeals ruled "... *that the record before this Court is inadequate for review of the trial court's award of attorney fees to Ms. Van de Graaf...*" and therefore, ordered the matter remanded to the trial court "... *for the limited purpose of entering findings of fact and conclusions of law pertaining to the court's award of attorney fees.*"

The appellate court enumerated the task to be completed: "... *The trial court's order*"

RESPONDENT'S OBJECTION TO PETITIONER'S PROPOSED
FINDINGS/CONCLUSIONS RE ATTORNEY FEES ON REMAND
ORDER

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on remand should: (i) identify the basis for the court's award of fees; (ii) include findings of fact consistent with the court's basis for the award; and (iii) explain how the fees awarded relate to the basis for the award of fees..."

The appellate court established a deadline: "...The findings and conclusions shall be entered no later than 60 days from the date of this order..." and specified the procedure by which the trial court would attain compliance: "...Yakima County Superior Court should then forward a copy of the filed findings and conclusions to the Court of Appeals, Division III." The Remand Order gave the trial court until May 17, 2019 to prepare and file findings and conclusions.

To comply with the Remand Order, all that the trial court has to do is review the letter decision issued on March 14, 2017, to refresh its memory and enter the findings that Mr. Hazel failed to supply to the trial court two years ago. Respondent understood from the record at the time that the fees Petitioner sought were to reimburse her for attorneys fees spent defending herself in the ancillary litigation brought by Van de Graaf Ranches, Inc., for repayment of the \$2 million loaned to Rod and Lori as their portion of the start-up capital in founding Midvale Cattle Co., as that added another level of "complexity" to the dissolution, helping justify an award of fees under *Friedlander v. Friedlander*, 58 Wn.2d 288, 362 P.2d 352 (1961).

Here, Petitioner's counsel prepared proposed *Findings of Fact and Conclusions of Law Re: Attorney Fees* which number one-hundred and seven pages [107 pages], including attachments: a colossal mound of documents and pleadings that go far beyond what the Court of Appeals directed this Court to do or should be done. The Petitioner's March 25th Notice for Entry set a fast-track hearing date for Friday, April 5, 2019, before Judge McCarthy, giving Respondent wholly inadequate prior notice given the enormous size of the filing. The hearing was rescheduled by agreement for April 26, 2019.

Petitioner's rush for immediate consideration of her excessive, redundant, and irrelevant pleadings shows her interest is to create the most expensive litigation she can.

Petitioner's pleadings, both the volume and tenor, show why the Court should disregard that irrelevant filing. The massive and duplicative filing also shows Petitioner's lack

RESPONDENT'S OBJECTION TO PETITIONER'S PROPOSED
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of compliance with the instructions on remand. Rather than what the appellate Court wants to be accomplished, Petitioner wants the remand to be her opportunity to change the facts and fabricate novel timelines which are inconsistent with the trial court record in this dissolution in order to make false, disparaging, and gratuitous claims against Respondent. The proposed findings purport to be supported by a court record that is, in fact, inaccurate and misleading for that purpose, and which counsel can describe in detail at the hearing, and by later declaration as needed.

II. OBJECTION TO PROPOSED FINDINGS

Respondent objects to the entirety of Petitioner's proposed Findings and Conclusions re Attorney Fees. Specifically, objection is made to each paragraph and subparagraph, numbered from one through eight, because the "facts" asserted in those proposed final findings under the remand order were not brought to the court's attention at the time the Petitioner's 2/2/2017 Motion to Reconsider was made and when the fee request ruling was made 3/14/2017.

Out of the three issues that Petitioner requested in her motion for reconsideration, two had been effectively "granted" by the express proposed language in the Decree that was accepted by the Court. The last issue for reconsideration, asking for \$50,000 to pay lawyers to defend petitioner in a separate civil lawsuit, was arguably denied when the Petitioner's proposed language that would have required Rod to pay all the attorney fees Lori incurred defending herself in the other litigation was crossed out by the Court before signing and entering the Final Decree on February 17, 2017, though the fee issue was not formally ruled on.

Thus, the only remaining issue arguably subject to the reconsideration motion after entry of the Decree on February 17 was the request for \$50,000 for petitioner's attorney's fees incurred in the third party litigation defense, which was not granted in the Decree itself, but which also had not formally been denied. That it was still pending became apparent when, on February 21, 2017, Judge McCarthy issued the Order on Reconsideration. That Order limited briefing "*...solely as to the issue of an award of attorney fees to Petitioner*"; and set deadlines for the briefs the order authorized to be filed: by 3/3/2017 when "*...the*

RESPONDENT'S OBJECTION TO PETITIONER'S PROPOSED
FINDINGS/CONCLUSIONS RE ATTORNEY FEES ON REMAND
ORDER

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opposing party shall file a reply brief"; and "...The moving party may file a response no later than 3/10/2017..."

Nevertheless, on 3/2/2017, the day before the respondent's reply brief was due, the Petitioner filed a Memorandum on Attorney Fees, which begins: "...The sole issue for reconsideration is Lori's request for an award of attorney's fees..." with an attached spreadsheet purportedly showing the balance that petitioner still owed to Mr. Hazel for his attorney fees at trial. Petitioner then cited RCW 26.09.140 as authority for the award and further asserted facts not supported by declaration or affidavit: Lori's alleged lack of knowledge of the family's financial affairs and the complexity of the senior Van de Graafs' business dealings, which information was purportedly not shared with Lori.

The Court explained its award of fees to Petitioner in its 3/14/2017 letter ruling which cryptically incorporated the arguments and authorities in Petitioner's 3/2/2017 supplemental brief. Thus, ***the only findings which can support the March 14 ruling and the resulting April 14 fee order must be based on the record before the Court as of March 14, 2017***, when the award and its amount were made.

Without waiving any objection or disagreement as to proper evidence, the most that such findings could state, based on the briefing, is that Petitioner had little knowledge of the community finances; that the Van De Graaf family business dealings were "complicated"; and that these factors increased the work for Mr. Hazel's representation such that, per RCW 26.09.140 and the *Friedlander* decision, the award of \$58,675 is reasonable and appropriate and would cover the balance owed to Mr. Hazel for his trial fees. Without waiving any objections Respondent may have as to the underlying evidence and record, he is submitting herewith proposed findings to this effect that comport with the March 14, 2017 letter, which is what the Court of Appeals Remand Order specified had to be addressed.

As to Petitioner's overblown proposed findings, beyond what is stated in the above paragraph, they do not have support in the fee motion record as of March 14, 2017, when the fee award was made. Petitioner did not request, and the court did not grant, trial fees on the basis Petitioner now proposes, that "...substantial justice had not been done in light of the husband's intransigence...". "Intransigence" appears to be Petitioner's new theme which

RESPONDENT'S OBJECTION TO PETITIONER'S PROPOSED
FINDINGS/CONCLUSIONS RE ATTORNEY FEES ON REMAND
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1 she now weaves throughout her proposed findings on the award of fees as though that was
2 the case when the ruling was made on March 14, 2017. That is not accurate.

3 The fee Order and Judgment proposed by Mr. Hazel in 2017 was based on the
4 Court's March 14, 2017, letter ruling. The Clerk's records show the notice of presentation for
5 that Order and Judgment was filed on March 25, 2017. However, for procedural reasons it
6 was signed and entered exactly as it had been originally proposed weeks later, on April 14,
7 2017, instead of on March 25. The fact of the award and its amount were determined on
8 March 14th and, thus, had nothing to do with any later events. In particular, the fee award
9 was not based on any of the events addressed on April 14th. The colloquy and arguments on
10 April 14th did not affect the fact or the amount of the fee award decided a month earlier. It
11 would be wholly inaccurate and error to include that material as findings related to the award
12 of fees.

13 The record created for the other motions heard on 4/14/2017 is improperly proffered
14 by Petitioner as proposed "findings" for entry of the order awarding her attorney fees which
15 was decided a month earlier. The dicta by the court and the colloquy with counsel are part of
16 the record for the other, unrelated and later motions that the Court heard on 4/14/2017, and
17 must be disregarded for purposes of findings for the earlier-decided fee award.

18 To assist the Court, Respondent is providing proposed findings of fact and
19 conclusions of law that are consistent with the Court's March 14, 2017 ruling.

20 III. CONCLUSION

21 The trial court was directed to enter findings that support its March 14, 2017 fee
22 award. They necessarily must be grounded in the record before the Court when the motion
23 was considered and decided on March 14. The Petitioner's proposed Findings and
24 Conclusions do not once refer to the March 14 ruling. Nor do they adopt the Court's
25 reasoning. Instead, they are invoking later events of April 14. That is wrong.

26 Petitioner's filing is a clear example of excessive, unnecessary over-litigating. The
27 Court of Appeals did not ask Judge McCarthy to create a new history. Yet Petitioner's
28 proposed findings mostly refer to hearings and events that occurred after the March 14

29 RESPONDENT'S OBJECTION TO PETITIONER'S PROPOSED
FINDINGS/CONCLUSIONS RE ATTORNEY FEES ON REMAND
ORDER

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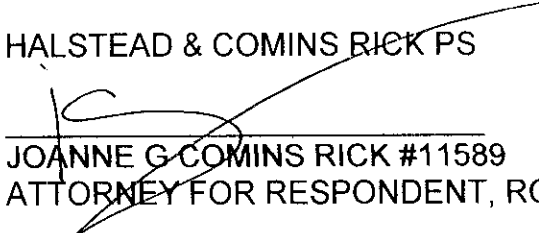
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1 decision was issued. Petitioner's filing is excessive and irrelevant. It appears to be intended
2 to impose unnecessary time and costs on Respondent and the Court. Moreover, it is wholly
3 unresponsive to the Remand Order.

4 Respondent respectfully requests the Court to disregard the filing by Petitioner and
5 enter findings and conclusion in accord with the Remand Order, either the findings proposed
6 herein, or similar thereto.

7 DATED ON THIS 24 DAY OF APRIL 2019.

9 HALSTEAD & COMINS RICK PS

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11 
12 JOANNE G. COMINS RICK #11589
13 ATTORNEY FOR RESPONDENT, ROD VAN DE GRAAF
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28 RESPONDENT'S OBJECTION TO PETITIONER'S PROPOSED
29 FINDINGS/CONCLUSIONS RE ATTORNEY FEES ON REMAND
ORDER

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FILED
MALE / M. SLAGLE, CLERK

'19 APR 26 P1:37

CERTIFICATE OF SERVICE I hereby certify under penalty of perjury of the laws of the state of Washington, that on the <u>25</u> day of <u>April</u>, 2019 I caused a true and correct copy of the foregoing pleading to be served in the manner indicated below.	
ATTORNEY FOR PETITIONER: DAVID HAZEL 1420 SUMMITVIEW YAKIMA WA 98902	<i>Handwritten signature</i> Email attachment per Court order June 9, 2016
EXECUTED on this <u>25</u> day of <u>April</u>, 2019 at Prosser, Washington <i>Handwritten signature</i>	

SUPERIOR COURT
YAKIMA CO WA

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF YAKIMA

In re the Marriage of:	)	NO. 11-3-00982-6
LORI VAN DE GRAAF	)	
	)	
Petitioner,	)	RESPONDENT'S PROPOSED
and	)	FINDINGS AND CONCLUSIONS
ROD D. VAN DE GRAAF,	)	RE ATTORNEY FEES ON
Respondent.	)	REMAND ORDER FROM THE
	)	COURT OF APPEALS:

THIS MATTER is before the Court on the Order Remanding To Trial Court for Entry of Findings and Conclusions issued by the Court of Appeals of Division III on March 18, 2019, "... for the limited purpose of entering findings of fact and conclusions of law pertaining to the court's award of attorney fees." The Remand Order states that "The trial court's order on remand should: (i) identify the basis for the court's award of fees; (ii) include findings of fact consistent with the court's basis for the award; and (iii) explain how the fees awarded relate to the basis for the award of fees."

The Petitioner filed a Notice for Presentation with proposed findings on March 25, 2019, and said hearing was continued to April 26, 2019 by stipulation of the parties and order of the court. Respondent has filed an objection to the Petitioner's proposed findings and has filed his own proposed findings. The Court has considered those papers, the status of the record at the time the fee award was originally made, and arguments of counsel at the hearing on April 26, 2019.

RESPONDENT'S PROPOSED FINDINGS AND
CONCLUSIONS RE ATTORNEY FEES ON REMAND
ORDER FROM THE COURT OF APPEALS

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1 **NOW THEREFORE**, being fully informed, the Court makes the following **FINDINGS OF FACT**:

- 2 1. On February 2, 2017 the Petitioner filed a Motion for Reconsideration requesting the Court
3 change three of its rulings made in the Court's November 17, 2016 letter decision, including that
4 the Court should award substantial attorney's fees of \$50,000 to Petitioner for attorneys hired for
5 a different lawsuit related to enforcement of a promissory note signed by Petitioner and
6 Respondent;
- 7 2. At the February 17, 2017, hearing for entry of the final orders the Court: [a] amended its
8 11/17/2016 property division to address two of Petitioner's requests on reconsideration, as to a
9 judgment lien and that the promissory note obligation was a separate obligation of Respondent
10 from which he must hold Petitioner harmless; and [b] struck the portion of Paragraph 20 that
11 would have required Respondent to pay the requested attorney fees.
- 12 3. On February 21, 2017, the Court signed an Order on Reconsideration that required Respondent
13 to file a reply brief "*solely as to the issue of an award of attorney fees to Petitioner*" by 3/3/2017,
14 and which also permitted Petitioner to file a response to the reply no later than 3/10/2017.
- 15 4. On 3/2/2017, the Petitioner filed a Memorandum re Attorney fees with the Court, which began
16 with the statement that: "*The sole issue for reconsideration is Lori's award of attorney's fees...*"
17 and concluded with a request for the Court to award attorney fees to Petitioner in the sum of
18 \$58,675.
- 19 5. Petitioner's 3/2/17 Memorandum stated, in sum, that Petitioner had little knowledge of the
20 community finances; that the Van De Graaf family business dealings were "complicated"; and
21 that these factors increased the work for representing Petitioner such that, per RCW 26.09.140
22 and the *Friedlander* decision, Petitioner should be awarded \$58,675 as the balance owed to Mr.
23 Hazel for his trial fees.
- 24 6. The Court issued its ruling on the fee request by letter dated March 14, 2017, accepting the
25 request as made by Petitioner, which letter is adopted and incorporated herein. The Court makes
26 the following further findings in support of the March 14, 2014 ruling and the Order and Judgment

28 RESPONDENT'S PROPOSED FINDINGS AND
29 CONCLUSIONS RE ATTORNEY FEES ON REMAND
ORDER FROM THE COURT OF APPEALS

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on fees entered on April 14, 2017.

7. Petitioner had little knowledge of the community finances.

8. The Van De Graaf family business dealings were "complicated".

9. The Petitioner's limited knowledge and the complicated nature of the Van de Graaf family business dealings increased the work for Petitioner's counsel.

10. The outstanding balance owed by Petitioner to her attorney for attorney fees at trial is \$58,675.

11. The Court is familiar with the rates charged in the local community for legal services and finds that the hourly rate and the amount of hours spent by Petitioner's counsel on this matter at trial resulting in the current outstanding balance of \$58,675, was reasonable.

12. The Court's 3/14/2017 letter decision is incorporated herein by reference.

NOW THEREFORE, based on the foregoing FINDINGS OF FACT the Court makes the following **CONCLUSIONS OF LAW**:

1. Petitioner's Motion for Reconsideration is Granted.

2. RCW 26.09.140 applies to and is a proper basis for a fee award to Petitioner.

3. The decision in *Friedlander v Friedlander*, 58 Wn.2d 288, 362 P.2d 352 (1961) is based on similar facts to the facts in this case and supports an award to Petitioner for her trial attorney fees.

4. The amount requested by Petitioner, \$58,675, is reasonable for the work done and results achieved, and Petitioner is awarded this amount, *nunc pro tunc* to April 14, 2017.

IT IS SO ORDERED.

DONE in open court this ____ day of April, 2019.

- PROPOSED -
THE HON. MICHAEL MCCARTHY, JUDGE

RESPONDENT'S PROPOSED FINDINGS AND
CONCLUSIONS RE ATTORNEY FEES ON REMAND
ORDER FROM THE COURT OF APPEALS

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Superior Court of the State of Washington
for the County of Yakima

Judge Michael G. McCarthy
Department No. 2

128 North 2nd Street
Yakima, Washington 98901
Phone: (509) 574-2710
Fax: (509) 574-2701

David Hazel
Hazel and Hazel
1420 Summitview Avenue
Yakima WA 98902

Joanne Comins Rick
Halstead and Comins Rick
PO Box 511
Prosser WA 99350

March 14, 2017

Re: Van De Graaf v. Van de Graaf
Yakima County Cause Number 11-3-00982-6

SUPERIOR COURT
YAKIMA CO WA

17 MAR 14 AM 1:07

FILED
KARLENE RIDDLE, CLERK

Dear Counsel;

I have read and considered the Petitioner's motion for reconsideration as to an award of attorney's fees.

Petitioner's reliance upon Friedlander v. Friedlander, 58 Wn 2d 288, 362 P.2d 352 is well taken. It was clear that Mr. Hazel's task was greatly complicated by the complexity of the Van de Graaf's holdings and the paucity of information being shared with his client

Considering RCW 26.09.140, I believe an award of \$58675 to the Petitioner to cover the balance of Mr. Hazel's fees is reasonable and appropriate. He is asked to prepare and note an appropriate order and judgment.

Very truly yours,

Michael G. McCarthy

FILED
TRACEY H. SLAGLE, CLERK

'19 APR 26 P3:04

**SUPERIOR COURT OF WASHINGTON
COUNTY OF YAKIMA**

In re the Marriage of:

LORI VAN DE GRAAF

Petitioner,

and

ROD D. VAN DE GRAAF

Respondent.

NO. 11-3-00982-6

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
ATTORNEY FEES**

Pursuant to the Court of Appeals' March 18, 2019 Order Remanding to Trial Court for Entry of Findings and Conclusions, the Court makes the following findings of fact in support of its April 14, 2017 award of attorney fees to petitioner Lori Van de Graaf:

1. On reconsideration of its February 17, 2017 Final Divorce Order, this Court awarded attorney fees to the wife because substantial justice had not been done in light of the husband's intransigence, which increased the wife's attorney fees, and the relative financial resources of the parties (RCW 26.09.140) (*See* Dkt. No. 416, 448: CP 829, 967-68)¹;

2. In awarding attorney fees based on intransigence, this Court finds that the husband's actions throughout the litigation unnecessarily increased the wife's attorney fees, including his use of scorched earth tactics to limit the amount of property and spousal maintenance awarded to his wife of 25 years. (*See* 4/14/17 Hearing: RP 1033-34) In particular, the trial court finds that the following positions taken by the husband were unreasonable, yet the wife was nevertheless forced to defend against those positions, which unnecessarily increased her attorney fees:

¹ Clerk's Paper and Report of Proceedings cites are included for the benefit of the Court of Appeals.

a. Husband's claim that the family home, which the parties built near the beginning of their 25-year marriage, was the husband's separate property;

b. Husband's claim that gifts of jewelry to the wife were not "gifts," but investment purchases;

c. Husband's claim that no spousal maintenance should be awarded to his wife of 25 years, despite the fact that she had not worked outside the home since 1986 because she was raising the parties' four sons, and suffers from fibromyalgia, which can be debilitating at times;

(See 4/14/17 Hearing: RP 1033-34; *see also* Dkt. 405: CP 783-88)

3. In awarding attorney fees to the wife based on intransigence, the trial court also considered the burden placed on the wife and her trial counsel to investigate the parties' interests in businesses that have been closely held by the husband and his family members, the complexity of these holdings, and the paucity of information being shared by husband and his family members with the wife. (See Dkt. 406, 416: CP 789-91, 829) In particular, this Court considered the following issues that the wife was forced to address at trial:

a. The valuation of Midvale Cattle Company, in particular due to husband's claim that a nearly 25-year-old \$2 million promissory note to his parents was still enforceable;

b. The husband's interest in Van de Graaf Cattle Company. Although this Court ultimately determined that the husband's interest remains inchoate and this asset was not included or divided as part of the marital estate, the facts surrounding the transfer of the husband's parents' interest in this business to his siblings during the divorce, to the husband's exclusion, raised questions that the wife was warranted in investigating;

(See Dkt. 405, 406, 416: CP 783-89, 789-91, 829)

4. This Court did not attempt to segregate the amount of attorney fees incurred by the wife as a result of the husband's intransigence because it permeated the entire proceeding,²

² *Marriage of Sievers*, 78 Wn. App. 287, 301, 897 P.2d 388 (1995) (affirming award of half of wife's attorney fees incurred because husband's intransigence sufficiently permeated the proceedings); *Burrill v. Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002) ("Where a party's bad acts permeate the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not.")

and as further addressed below, the Court considered the equities of the situation, including the parties' relative financial resources, in awarding attorney fees.

5. Specifically, the Court is aware that the wife had incurred \$118,805.43 in attorney fees, as of February 24, 2017, and of that amount \$58,675 was still due and owing to her attorney. (Dkt. 406: CP 791) This amount – slightly less than half the amount incurred through trial - is a reasonable award of attorney fees, based on wife's counsel's reasonable hourly rate of \$250, the intransigence of the husband, and the equities of the situation, including the parties' relative financial resources. (Dkt. 406: CP 789-91) Although the ledger presented does not show specific entries for the attorney fees incurred, the husband has not disputed that the amount of fees incurred are reasonable. Further, because the trial court's award of attorney fees is based on equitable grounds, it is not necessary for this Court to make lode star findings. Nevertheless, the Court finds that the amount incurred was reasonable, considering that the litigation spanned over 5 years by the time the attorney fee judgment was entered; there was a 7-day trial; the number of disputed issues before, during, and after trial were significant; the resistance by the husband on issues ranging from post-secondary support for the youngest son, character of assets owned by the parties during their 25-year marriage, and spousal maintenance to the wife; the complexity of the parties' holdings because they were intertwined with the husband's family's holdings; and the size of the estate. (See Dkt. 405, 406: CP 783-88, 789-91; 4/14/17 Hearing: RP 1033-34)

6. This Court would also note that the \$58,675 was the balance owed as of February 24, 2017, four months after the conclusion of trial. From the time final orders were entered, on February 17, 2017, through entry of the judgment for attorney fees awarded on reconsideration, entered on April 14, 2017, the wife was forced to file the following motions based on either the husband's noncompliance with the final orders or unreasonable positions he took regarding this Court's decree:

a. Motion for contempt for husband's failure to pay the spousal maintenance awarded in the decree. (Dkt. 409, 410: CP 805, 808) Motion granted (Dkt. 446: CP 963);

b. Motion for clarification of this Court's award of the UBS account, based on husband's position that the wife not entitled to any interest accrued or gains in this account since the date it was valued for trial. (Dkt. 408, 410: CP 802, 808)

1
2
3 Motion granted (Dkt. 446; CP 963), and order issued directing the Clerk to sign all
4 necessary documents to transfer the funds held in the UBS account in the husband's
5 stead (Dkt. 447; CP 966);

6 c. Motion to allow wife to stay in the family residence awarded to
7 husband until 30 days after the husband is in full compliance with the maintenance
8 award because she was without the necessary funds to relocate. (Dkt. 409, 410; CP
9 805, 808) Motion granted (Dkt. 446; CP 963).

10 The wife was also forced to respond to the husband's motions to vacate the decree and modify
11 maintenance (Dkt. 414, 423; CP 817, 877), both of which this Court denied. (See 4/14/17
12 Hearing; Dkt. 446; CP 963) These post-decree orders were entered the same day as the judgment
13 awarding attorney fees to the wife on reconsideration was entered.

14 7. The Court finds that the wife unnecessarily incurred attorney fees post-decree due
15 to actions by the husband that this Court finds intransigent: he willfully violated this Court's
16 decree by not paying maintenance and his position on the UBS account was unreasonable.
17 Further, the husband's motions, which the wife was forced to incur attorney fees to answer, were
18 groundless because they were based on the same facts and evidence that were considered at trial
19 and rejected (maintenance) or could have been considered had that information been presented
20 (CR 60). No attorney fees were awarded to the wife for these motions. (See Dkt. 446, 447, 448;
21 CP 963, 966) However, this Court finds that the husband's actions post-decree reflect a
22 continuation of the intransigent conduct that caused this Court to grant the wife's motion for
23 reconsideration to award her attorney fees, and also supports the reasonableness of the amount
24 of attorney fees ultimately awarded to the wife;

25 8. While this Court had previously found that its property division left the parties
26 with sufficient wherewithal to pay their own attorney fees (See Dkt. 405; CP 788), it has
27 reconsidered that decision and now determined that in light of the \$58,675 still owing to wife's
trial counsel as of February 27, 2017, substantial justice would not be done if the wife is forced
to use her property award to pay attorney fees. The basis for its award of attorney fees to the wife
due to the husband's intransigence is stated above. The basis for its award, under RCW
26.09.140, is as described in this Court's previous ruling, addressing spousal maintenance. (See
Dkt. 405; CP 787-88) Due to the wife's education, age, and health, the wife's financial situation

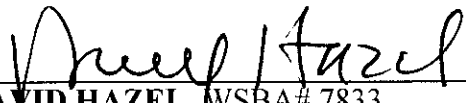
is fixed. Unlike the husband, it is unlikely that she will earn any greater income than she already earns or will acquire any more property than was already awarded to her in the decree. Further, unlike the husband, the wife must rely solely on her property award and spousal maintenance to pay her ongoing expenses, now and in the future. Meanwhile, many of the husband's expenses historically have been and are paid through his business.

Dated: 4/26/19


JUDGE

Presented by:

Approved for Entry:


DAVID HAZEL, WSBA# 7833
Attorney for Petitioner


JOANNE COMINS RICK, WSBA#
Attorney for Respondent

RECONSIDERATION.FF.CONCS. ENTERED.5.6.2019.JGCR.REV.1A

FILED
JANET M. SLAGLE, CLERK

'19 MAY -6 P3:52

CERTIFICATE OF SERVICE	
I hereby certify under penalty of perjury of the laws of the state of Washington, that on the <u>15</u> day of <u>May</u> , 2019, I caused a true and correct copy of the foregoing pleading to be served in the manner indicated below.	
ATTORNEY FOR PETITIONER:	☐ U.S. Mail, first class postage prepaid, at Prosser WA
DAVID HAZEL	☒ Hand Delivery
1420 SUMMITVIEW	☐ Email attachment per Court order June 9, 2016
YAKIMA WA 98900	
EXECUTED on this <u>15</u> day of <u>May</u> at Prosser, Washington.	

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF YAKIMA

In re the Marriage of:

LORI VAN DE GRAAF

Petitioner,

and

ROD D. VAN DE GRAAF,

Respondent.

NO. 11-3-00982-6

RESPONDENT'S MOTION FOR
RECONSIDERATION OF THE TRIAL
COURT'S FINDINGS RE ATTORNEY
FEES ENTERED ON ORDER OF
REMAND

COMES NOW THE RESPONDENT, by and through his attorney undersigned, and moves this Court for reconsideration of its Findings of Fact and Conclusions of Law re Attorney Fees on remand, entered on April 26, 2019, as follows.

I. MOTION

Respondent requests reconsideration of the trial court's findings pursuant to CR 59 which rule provides grounds for asking the Court for reconsideration of its orders:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties: ...

(3) Accident or surprise which ordinary prudence could not have guarded against; ...

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice; ...

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law; ...

(9) That substantial justice has not been done.

Page 1

HALSTEAD & COMINS RICK PS
PO BOX 511
PROSSER, WA 99350
(509) 786-2200

II. BACKGROUND

On March 18, 2019 the Chief Judge of the WA State Court of Appeals for Division III, the Honorable Robert Lawrence-Berry, entered an Order Remanding the matter to the trial court for the "...limited purpose of entering findings of fact and conclusions of law pertaining to the Court's award of attorney fees....".

The Remand further instructed that the trial court's order should: [1] identify the basis for the Court's award of fees; [2] include findings consistent with the court's basis for the award; and [3] explain how the fees awarded relate to the basis for the award of fees.

The Court of Appeals gave a deadline of May 27, 2019 (60 days after entry of the remand order) for the trial court to enter findings consistent with the remand.

The Petitioner proposed Findings for the Court's consideration. At hearing April 26, 2019 Judge McCarthy adopted those proposed findings as his own, and upon signing, entered them exactly as they were written.

III. BASIS

Judge McCarthy's colloquy and his oral comments made during the hearing for Entry of Findings held April 26, 2019 could not have been anticipated by the Respondent; the Court's comments made at hearing suggest or infer that the Findings entered by the Court were the result of "passion" or "prejudice"; that there is no evidence or reasonable inference from the evidence in the record which can support the Court's Findings as they are now entered; that the Court's Findings, as they are now entered, are contrary to law; and that substantial justice has not been done.

At oral argument on April 26th, the petitioner's attorney argued that he thought the "scorched earth" tactics in which the respondent has engaged throughout these proceedings, was something that had "factored into" the Court's decision to award petitioner her trial attorney fees. Mr. Hazel further reminded the Court that the respondent and his family had been intransigent in failing to disclose information about their financial business dealings with Lori.

1 In response, Judge McCarthy commented, to the effect, that he had talked about
2 "scorched earth" at the 2/17/2017 hearing; and explained it was because the respondent
3 thought the house was his separate property; and because respondent didn't want to give
4 her anything, even though it was a 25 year marriage...

5 Respondent's counsel interjected her recollection that the "scorched earth" phrase
6 was not "coined" until the 4/14/2017 hearing.

7 After Judge McCarthy reviewed what appeared to be a transcript of the proceedings
8 on the bench before him, he agreed he made the comment on 4/14/2017. Judge McCarthy
9 then rebuked respondent's counsel by stating, to the effect, that "scorched earth" permeated
10 the respondent's actions throughout the trial; the judge observed that Dick Van de Graaf,
11 Rod's father, had been portrayed as some kind of authoritarian, but that Dick Van de Graaf
12 had not even come to testify at trial; the Court recalled that "none of the family" helped Lori;
13 that Rod's sister wasn't open about their family business dealings and that it was only the
14 brother who testified about what was going on at trial – tainting Rod with what was perceived
15 to be the actions of others in their private business affairs.

16 IV. SUMMARY AND CONCLUSION

17 The record before this Court does not support the Findings that were entered by the
18 Court on April 26, 2017. Therefore, once the Clerk provides to the Respondent, and once
19 Respondent has had transcribed the verbatim record of proceedings from that April 26th
20 hearing, this Motion will be supplemented by further briefing.

21 DATED ON THIS 6th OF MAY 2019

22 HALSTEAD & COMINS RICK PS

23 JOANNE G COMINS RICK #11589
24 ATTORNEY FOR RESPONDENT

25
26
27 Page 3

28 HALSTEAD & COMINS RICK PS
29 PO BOX 511
PROSSER, WA 99350
(509) 786-2200

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF YAKIMA

In re the Marriage of:

LORI VAN DE GRAAF

Petitioner,

and

ROD D. VAN DE GRAAF,

Respondent.

NO. 11-3-00982-6

GR 17 DECLARATION OF
ELECTRONIC TRANSMISSION

I, LORI ~~BIXBY~~, HEREBY DECLARE:

Busby

I am the person who received the attached Respondent's Motion for Reconsideration signed by JoAnne G Comins Rick, of Halstead & Comins Rick PS. I have examined this document which consists of four [4] pages including the completed document and this affidavit, and it is complete and legible.

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED: 5/16/2019

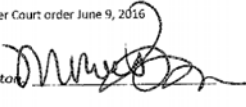
Lori Busby
LORI ~~BIXBY~~ *Busby*

Page 1

HALSTEAD & COMINS RICK PS
PO BOX 511
PROSSER, WA 99350
(509) 786-2200

FILED
TRACEY M. SLAGLE, CLERK

'19 JUN 11 P4:03

CERTIFICATE OF SERVICE	
I hereby certify under penalty of perjury of the laws of the state of Washington, that on the <u>11</u> day of <u>June</u> , 2019 I caused a true and correct copy of the foregoing pleading to be served in the manner indicated below.	
ATTORNEY FOR PETITIONER: DAVID HAZEL 1420 SUMMITVIEW YAKIMA WA 98902	☒ U.S. Mail, first class postage prepaid, at Prosser WA ☒ Hand Delivery Email attachment per Court order June 9, 2016
EXECUTED on this <u>11</u> day of <u>June</u> , 2019 at Prosser, Washington. 	

**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF YAKIMA**

In re the Marriage of:)

LORI VAN DE GRAAF)

Petitioner,)

and)

ROD D. VAN DE GRAAF,)

Respondent.)

NO. 11-3-00982-6

RESPONDENT'S SUPPLEMENTAL MEMORANDUM RE
MOTION FOR RECONSIDERATION OF THE TRIAL COURT'S
FINDINGS RE ATTORNEY FEES ON REMAND; AND MOTION
TO VACATE ORDER DENYING RECONSIDERATION RE CR
60(b)

COMES NOW THE RESPONDENT, by and through his attorney undersigned, and submits this Supplemental Memorandum to the Respondent's Motion for Reconsideration of the April 26, 2019 entry of the Trial Court's Findings re Attorney Fees on Remand; and/or in support of Respondent's CR 60(b) Motion to Vacate the Court's May 8, 2019 Order On Motion for Reconsideration, where the Court denied Respondent's request for reconsideration under CR 59, as follows:

I. INTRODUCTION AND SUMMARY

Judge McCarthy's colloquy and oral comments made during the hearing held April 26, 2019, and his entry of the Findings and Conclusions of Trial Court re Attorney Fees, exactly as originally proposed by Petitioner, were inconsistent with the record when the original fee award was made in 2017 and therefore could not have been anticipated by the Respondent before the hearing, constituting surprise.

Page 1 RESPONDENT'S SUPPLEMENTAL MEMORANDUM RE MOTION FOR RECONSIDERATION OF THE TRIAL COURT'S FINDINGS RE ATTORNEY FEES ON REMAND; AND MOTION TO VACATE ORDER DENYING RECONSIDERATION RE CR 60(b)

HALSTEAD & COMINS RICK PS
PO BOX 511
PROSSER, WA 99350
(509) 786-2200

The Respondent filed his Motion for Reconsideration on May 6, 2019 pursuant to the provisions of CR 59(a). As of that date, arrangements had been made with the court reporter to prepare a written transcript of the record before the Court at the April 26, 2019 hearing; but it was not yet completed. Respondent's Motion, in its *Summary and Conclusion*, advised the Court that additional briefing would be submitted in support of the Motion after the transcript was completed.

Under local court rules, the 30-day deadline for Judge McCarthy to consider the merits of the Motion was **June 6, 2019**. Despite Respondent advising the Court to expect additional briefing once the written transcript was complete, Judge McCarthy issued his Order on Reconsideration denying the Motion on **May 8, 2019**, two days after the Motion was filed and 28 before the deadline for judicial consideration on the merits expired.

A copy of the transcript of the April 26, 2019, hearing is attached hereto as **EXHIBIT A**.

II. PROCEDURAL STATUS

The Respondent previously submitted his Objections to Petitioner's Proposed Findings/Conclusions re Attorney Fees on Remand Order, together with Respondent's Proposed Findings and Conclusions re Attorney Fees on Remand Order from the Court of Appeals, filed and provide before the start of the April 26th hearing for entry of Findings. Those pleadings are incorporated herein by this reference, as if set forth in full; and are intended to supplement this Motion to Vacate. Similarly, the Respondent refers the Court to the substantive portions of the Respondent's Motion for Reconsideration of the Trial Court's Findings re Attorney Fees Entered on Order of Remand which was filed on May 6, 2019.

If the Court's May 8th Order denying respondent's reconsideration is deemed to preclude further consideration of the motion on the merits under CR 59, then Respondent is still entitled to request relief pursuant to CR 60(b), as follows:

CR 60(b) *On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons:*

(1) *Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;*

...

(3) *Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);*

(11) *Any other reason justifying relief from the operation of the judgment.*

The foregoing provisions of CR 60(b) are similar to the grounds for relief in CR 59(a)(3), (5), (7) and (9), as identified in Respondent's May 6th Motion to reconsider. Although the remainder of this memorandum discusses provisions for relief under CR 60(b), the same facts and arguments are applicable and would have been submitted in supplemental briefing pursuant to the provisions of CR 59(a).

III. THE HISTORICAL TIMELINE SHOWS THAT THE "FINDINGS" ENTERED ON APRIL 26, 2019, AS URGED BY PETITIONER, ARE NOT SUPPORTED BY THE RECORD

A. The Timeline of Events Underlying The March 14, 2017 Fee Award and April 14, 2017 Judgment.

NOV 17, 2016: Court issues its letter decision with rulings on the issues at trial as well as a final property division that included value and award of the family residence; Lori's jewelry and spousal maintenance. The Court did not find that Rod had engaged in "scorched earth tactics" nor that he had been "intransigent" in regards to his arguments and positions at trial. The Court does not award either party attorney's fees.

DEC 20, 2016: Civil litigation is filed by Van de Graaf Ranches, Inc., against Rod and Lori, in Yakima County under Cause No. 16-2-03511-39: VAN DE GRAAF RANCHES, INC a Washington Corporation, Plaintiff, vs ROD D VAN DE GRAAF and LORI A VAN DE GRAAF, husband and wife, Defendants. [hereinafter, collectively, "VDGR litigation"]. Service of summons on Rod is made on 12/22/2016 and on Lori on 12/30/2016.

JAN 19, 2017: Mr. Hazel files a Notice of Appearance for Lori in the VDGR litigation.

FEB 2, 2017: Petitioner files Motion for Reconsideration before the Final Decree is entered that, in part, asks for award of attorney fees in the amount of \$50,000 for attorney fees incurred by other lawyers defending Petitioner Lori in other civil litigation, **not** the dissolution action.

FEB 8, 2017: James Berg of Larson, Berg & Perkins PLLC substitutes for Mr. Hazel as Lori's attorney in the VDGR litigation.

FEB 17, 2017: Before signing and entering the Final Decree, the Court strikes the petitioner's proposed language in Section 20 that would hold Respondent Rod liable for paying Petitioner's attorney fees incurred by her other attorneys in another lawsuit. The Court did not expressly address the \$50,000 for attorney fees petitioner sought in her Feb 2nd Motion for Reconsideration for non-dissolution fees incurred in an action brought by a third party to the marriage.

FEB 21, 2017: Court issues an Order on Motion for Reconsideration directing Respondent Rod to submit responsive briefing by March 3, 2017, and limited "only as to the award of attorney fees for Petitioner". The only attorney fees request still subject to a pending motion on February 21 to which Rod could respond were the \$50,000 requested by Petitioner to pay her attorneys hired to defend her in the VDGR litigation, which were not addressed in the February 17 final orders.

MARCH 2, 2017: Petitioner files a Memorandum on Award of Fees that begins: "*The sole issue for reconsideration is Lori's award of attorneys fees...*". Citing to RCW 26.09.140 and relying on the *Friedlander* decision [discussed below], Lori asked this Court to award her attorney fees in the amount that would pay off the \$58,675 balance owed to Mr. Hazel for trial in the dissolution. Procedurally, this March 2nd Memorandum was an orphan pleading, as no motion filed at that point made that request to the Court, as required by court rules.

Notably absent from the March 2, 2017 request in this memorandum is any mention of "scorched earth tactics" or "intransigence" by Rod as a basis for the fee award.

MARCH 3, 2017: The Respondent filed his response briefing as ordered, objecting to an award of non-dissolution attorney fees of \$50,000 as Lori requested in her Feb. 2, 2017 Motion for Reconsideration, objecting to making Rod pay fees for the attorneys she hired to defend her in another civil action.

MARCH 14, 2017: The Court issued its Letter Ruling on Award of Attorney Fees. The Court found "persuasive" the facts, arguments and authorities stated in Petitioner's March 2nd, 2017, Memorandum which the Court adopted as the basis for its ruling to award fees to the Petitioner and in what amount.

Notably absent in the letter ruling is any mention of "scorched earth tactics" or "intransigence" by Rod. The Court directed Mr. Hazel to prepare pleadings consistent with the letter ruling for entry.

MARCH 24/MARCH 27, 2017: Per the March 14th letter ruling, Mr. Hazel prepared a proposed Order:Judgment for attorney's fees, serving a copy on March 27 with notice of hearing for entry set for March 31, 2017.

Notably absent from the proposed Order:Judgment is any mention of "scorched earth tactics" or "intransigence" by Rod.

MARCH 31, 2017: Respondent filed a Motion to Strike the March 31, 2017 hearing for lack of proper notice; and filed an Objection to Entry of Judgment on Petitioner's Motion for Reconsideration re Attorney Fees. Notably absent is any defense against "scorched earth tactics" or "intransigence" by Rod, which was not necessary since no such mention of either had been made by Petitioner, nor included in the proposed order.

MARCH 31, 2017 COURT HEARING: Court grants Respondent's request for a continuance to allow adequate time to respond to Mr. Hazel's proposed Order:Judgment for fees. Entry of the Order:Judgment for fees is set over to April 14th, together with several other pending motions the Court continued to that date, by Order handwritten and entered by Judge McCarthy.

APRIL 14, 2017 HEARING: Mr. Hazel does not file pleadings in response to the Respondent's March 31, 2017 objections to entry of the judgment awarding petitioner's attorney fees. The Respondent presents oral argument, for purposes of "making a record". The Court asks no questions, and Mr. Hazel makes no reply. With a single sentence spoken by the Court,

Petitioner's proposed Order: Judgment of March 24, 2017, the judgment for fees, is signed; Notably, the Court does not mention "scorched earth tactics" or "intransigence" by Rod at entry. **JUNE 2, 2017:** The VDGR litigation is settled with the entry of a Stipulated Agreement and a CR2A agreement. In exchange for not pursuing reconsideration or filing an appeal, all but \$5000 of the approximate \$20,000 incurred as Lori's attorney fees are paid by VDGR; \$20,000 is significantly less than the \$50,000 that Petitioner represented to the Court as the amount she needed for her attorney fees incurred in the VDGR litigation as requested in the Feb 2nd Motion for Reconsideration.

B. There Is No Evidence of Record Which Can Support The Court's Findings As They Are Now Entered.

At the March 31, 2017 hearing, Mr. Hazel had an original Order: Judgment for the fee award ready to be signed and entered by the Court, awarding petitioner the balance of trial fees owed to Mr. Hazel for \$58,675, based on Judge McCarthy's letter ruling of March 14, 2017. **RP 992¹** Respondent objected to entry at the March 31 hearing for lack of notice, given only 4 days before the hearing date.

Mr. Hazel argued against a continuance, claiming that he did give adequate notice; but then concedes:

"Fine. We've clogged your calendar for a perfunctory act of order --- signing a document that you already ordered."

The Court responded:

"Well, I may have to agree with you on that. But on the other hand, it's --- you know --- it's the Respondent's prerogative to be difficult, I guess"

This colloquy confirms that both Mr. Hazel and the Court anticipated that the Order: Judgment awarding fees, as prepared by Mr. Hazel, would be signed and entered at the

¹ The references to the Report of Proceedings are given for consistency with the transcripts submitted to the Court of Appeals; copies of the RP [page#] are attached for the convenience of the trial court.

March 31st hearing; that the presentment of the Order:Judgment for fees was but a "perfunctory act" that "finalized" what the Court "[you] had already ordered." What the court "had already ordered" can only mean what the Letter Decision of March 14, 2017 provided as the facts and rationale supporting the Court's granting on Petitioner's reconsideration the fact of award and the amount of fee.

The comment by the Court, that "*it's the Respondent's prerogative to be difficult*" corroborates that, as far as the Court was concerned, Mr. Hazel's proposed Order:Judgment constituted the "finality" of the Court's letter ruling as to both the fact of and amount of fee award; and the "latest cut-off" date for entering this Order:Judgment for fees was as of the date of the March 31, 2017 hearing. The Court granted the continuance and set a hearing date for entry on April 14, 2017.

At the April 14 hearing, Mr. Hazel advised the Court:

"...we had filed a motion for reconsideration on attorney's fees. I noted this for presentation of a judgment for that amount. Counsel's neglected --- has not agreed to sign it..."

RP 1010 Respondent's counsel presented oral argument consistent with his responsive pleadings previously filed. **RP 1022 - RP 1024.** The Court did not comment or interrupt the respondent's recitation, and Mr. Hazel said nothing further in reply.

The Court made its oral rulings for each of the several motions argued that day. As to the entry of the Order:Judgment re attorney fees, Judge McCarthy made a single comment, to wit: *"...And regarding the judgment for attorney's fees, I will sign the judgment as proposed by Mr. Hazel..."* **RP 1033-1036.**

The foregoing is the entire sum and substance of evidence that is in the record before the Court on the issue of awarding trial attorney fees to the petitioner. It is undeniable that there is nothing more, and that this record only that supports the fact of the award and amount of the fee granted to petitioner for her trial fees. There is no evidence in this limited record regarding the award of fees that will support the Findings which the trial court entered, as proposed by the Petitioner, on April 26, 2019.

1 **III. THE COLLOQUY AND COMMENTS AT THE APRIL 26, 2019 HEARING SHOWING**
 2 **THE COURT'S ANIMUS TOWARD A NON-PARTY, THE SENIOR MR. VAN DE GRAAF,**
 3 **COMBINED WITH SIGNATURE AND ENTRY OF THE PETITIONER'S PROPOSED**
 4 **FINDINGS "AS IS", ARE AN "IRREGULARITY" AND CONSTITUTE "NEWLY**
 5 **DISCOVERED EVIDENCE" AND "SURPRISE" TO THE RESPONDENT, WHICH COULD**
 6 **NOT HAVE BEEN ANTICIPATED PRIOR TO HEARING.**

7 As indicated above, the entire transcript from the April 26th hearing is attached hereto
 8 and incorporated by this reference. Of note are the comments by Mr. Hazel, which can be
 9 considered as an admission that Petitioner's proposed findings are knowingly not responsive
 10 to the Court of Appeals' mandate on remand, but instead were used by Petitioner as an
 11 opportunity to have the Court "re-write history", contrary to the directive of the appellate
 12 court.

13 The Court of Appeals' March 18 instructions on remand were as follows, emphasis
 14 added:

15 The trial court's order on remand should: (i) identify the basis for the court's
 16 award of fees; (ii) include findings of fact consistent with the court's basis for
 17 the award; and (iii) explain how the fees awarded relate to the basis for the
 18 award of fees.

19 Nothing in the Court of Appeals order indicates that the Court is to add new reasons for
 20 awarding fees which had not been part of the original award.

21 Nevertheless, at the April 26 hearing Mr. Hazel told the Court he wanted a new story:

22 *"...The Court of Appeals is inviting; I should say mandating some findings. ... they*
 23 *would really like some direction from you as to what you're thinking was when you*
 24 *issued the order on fees. I think the principle dispute here is how much of a role did*
 25 ***the scorched earth tactics** play. ... I'm not here to tell you what you should have*
 26 ***thought or what you should today think in hindsight from things that have taken***
 27 ***place after the trial.** I think the court is very well prepared to make a finding that there*
 28 *was great deal of scorched earth tactics in this proceeding...The letter itself refers to*
 29 ***the paucity of information that was shared with Lori and myself** during the*
pendency of the proceeding. That, of course, is continuing to this day.

The Court's colloquy at the April 26, 2019 hearing demonstrates that the mention of
 "scorched earth tactics" and "intransigence" continues to invoke the passions of the Court,

even though it has been nearly two years since those comments were first made in *dicta* before the Court made oral rulings on the other hotly contested motions argued at the April 14, 2017 hearing.

Excerpts of the pertinent comments stated by the Court on April 26 include:

I think the comment on April 14th included the comments about the argument that the family home was Mr. Van de Graaf's separate property, that the jewelry was an investment, not a gift. Therefore, it was community property and the issue of maintenance. Mrs. Van de Graaf had essentially been out of the work force for a couple of decades. The argument was made, well, she wasn't entitled to maintenance. She could go right back into the workforce given her age and lack of work experience over that time period.

... I think my point was and certainly my belief is that this litigation, the trial in particular, was extremely difficult. It was extremely difficult because of Mr. Van de Graaf's intransigence. So I think to burden Mrs. Van de Graaf with the fees is not appropriate. My award of fees is based upon the issue of intransigence. ...

-- getting back to the issue of the trial, it was like pulling teeth to get information from your client and from your client's family except for his brother, I guess, would be the only one. Certainly his sister; and his father, it was kind of like this mythic figure who was talked about but never made a physical appearance in the courtroom, just made the issues that the court had to decide and the issues that Mr. Hazel had to address incredibly more difficult.

The printed transcript of what was said at the April 26, 2019 hearing does not pay justice to the gestures and emotional tones used by the Court when talking about **Rod's family**, and in particular, **Rod's father**. See Declaration of JoAnne Comins Rick, ¶¶ 45-55. A fly on the wall would have seen the court making grand gestures with its arms and noted the pause while the Court struggled to find the right words to describe **Rod's father**. The Court's animus towards the Senior Mr. Van de Graaf was palpable. *Id.* It seems to have stemmed from the fact that by April 2017 the senior Mr. Van de Graaf had not given Rod the money to pay the amounts for back maintenance to Lori ordered by the Court, even by April, 2017, which the Court had to know from the property division it had just concluded Rod could not pay from his own funds, and that the Senior Mr. Van de Graaf had initiated the suit over the

Note against Rod and Lori. See Comins Rick Dec., ¶ 24.

Other comments by the Court are equally notable in recognizing that the only "nexus" between the dicta about "scorched earth tactics" and "intransigence" and the signing and entry of the Order: Judgment awarding fees is the date of the hearing when both unrelated events occurred.

Ms. Comins Rick tried to dissuade the Court not to enter the Findings as the Petitioner proposed, at page 10 of the 4.26.2019 transcript:

...We believe Mr. Hazel is encouraging you to rely on the record that has happened since that point primarily, especially with the contentious hearings that we primarily, especially with the contentious hearings that we had starting with April 14th. So we're -- I'm simply saying --

But the Court interrupted counsel with

THE COURT: I'm simply saying as well that the comments about scorched earth and the other were made at the same time the order regarding attorney's fees was signed. I think it's part of the record supporting the award.

Without question, the Findings entered on April 26, 2019 should be vacated. The proposed Findings submitted by Respondent should be entered instead because they reflect the state of the record and the genuine reasons for the fee award at the time it was made in March, 2017, as the undisputed record shows.

The fact the Court's anger with Rod's father boiled over at the April 14, 2017 hearing, and especially at the April 26, 2019 hearing, does not constitute a lawful reason to penalize and punish Rod in the dissolution action, which under the law is only between Rod and Lori. The transfer of the Court's personal frustration with and personal animus towards Rod's father to Rod himself is seen in the quotes from the April 26 hearing and is embodied in the form of the April 26, 2019 findings, particularly when contrasted with the state of the record up through March, 2017 when the fact and amount of the fee award was made.

This personal animus toward a non-party that is applied to Rod, who *is* before the Court, shows a lack of the proper judicial perspective over the actual litigants before the Court and

1 but not from Rod's acts.

2 The Findings entered April 26, 2019, on Remand are thus founded on unsupported *dicta*,
3 not fact, and after-the-fact *dicta* at that.

4 **a. There was nothing intransigent or "scorched earth" about Rod's trial arguments**
5 **on the separate funds put into the family house.**

6 During closing arguments at trial, respondent's attorney recounted the evidence and
7 testimony that had been presented and clearly stated that, by law, the court was free to
8 characterize the house as "separate, community or mixed;" and Rod was leaving it for the
9 court to make that decision.

10 However, it was not "intransigence" for Rod to argue for a credit for \$1 million dollars of
11 separate money he contributed to its construction from funds withdrawn from his separate
12 cattle account, an account which was held and maintained in his name alone at Van de
13 Graaf Ranches, Inc, and at a time when he was employed and paid a more than reasonable
14 salary such that the marital community was fully and properly compensated for his labor.
15 Since he was properly paid for his work, he could properly, under Washington community
16 property law, manage his own separate assets which he did by marketing his own herd of
17 cattle, buying and selling cattle, with all monies exclusively kept and accounted for through
18 his separate cattle account, before and after marriage. Rod's position at trial was supported
19 by evidence in the form of records and testimony and case law. There was nothing
20 "intransigent" about his position.

21 Lori never argued that Rod's salary working at Van de Graaf Ranches, Inc, earned
22 through his own toil and effort on behalf of the community, was inadequate or insufficient to
23 pay for all the expenses, necessities and living needs for the family. These facts are nearly
24 the same as those presented in the *Friedlander* case, discussed in greater detail below.

25 Lori never wanted the house awarded to her; but testified and presented a comparative
26 market analysis by a real estate agent, that put its value at nearly \$1.5 million. Rod relied on

constitutes good reason why the April 26, 2019 findings must be vacated under the listed provisions of CR 60(b), including CR 60(b)(11).

V. THE PHRASE "SCORCHED EARTH" TACTICS WAS DICTA BY THE COURT AT THE APRIL 14, 2017 HEARING; THAT WHICH IS DICTA CAN NEVER BECOME "FINDINGS OF FACT" EX POST FACTO; AND, THERE WAS FULL DISCLOSURE OF ROD'S ASSETS, NOT "PULLING TEETH" WHICH ONLY APPLIED TO THE SENIOR VAN DE GRAAF'S EFFORTS TO KEEP THEIR THIRD-PARTY PROPERTY PRIVATE AND OUT OF THE CASE.

The phrase "scorched earth tactics" is *dicta* by Judge McCarthy, stated in his prefatory comments before ruling on the several other hotly contested motions argued at the April 14, 2017 hearing. The Court "defined" the "scorched earth tactics" ex post facto, using "examples" from the trial that was held some six months earlier, where the Court had never before "objected" to Rod's position about: crediting his separate monies contributed to the construction of the family residence; arguing some of Lori's jewelry had been purchased for investment purposes, because her father, a lifetime jeweler, encouraged such investment; and objecting to "life time spousal maintenance" for Lori, based on her "need", the cash maintenance and expenses he paid since separation; and that her share of the property division would be adequate to meet her future needs.

Factually, the record shows that the Court's use of the pejorative phrase is not supported by the record and arguments at trial or in the subsequent post-Decree matters. Nonetheless, the phrase has since evolved into a "rallying cry" for the Petitioner and her attorneys, used to falsely impugn the integrity of Respondent and relentlessly seeking to taint him in a derogatory, scornful and reproachful light in the eyes of the Court and other judicial officers who have presided in this cause.

In fact, the Court's November 17, 2016 letter decision expressly provided that Rod and Lori would bear their own fees based on the finding that each had ample property. The state of the record for the trial as of November 16, 2016, was that there was **no** "intransigence" and **no** "scorched earth" justifying fee shifting. Rather, the Court ruled that Rod and Lori each should bear their own fees. Any claimed basis for fee shifting occurred after that time,

the appraised value of \$772,000 determined in March 2012 by the same certified appraiser that valued the Ellensburg property at \$1.38 million, which the Court accepted without question. In the November 2016 letter decision, the Court ruled that *Friedlander* was not applicable to the facts of this case; awarded the house to Rod at a price of \$1.42 million; and denied giving Rod credit for the \$1 million contribution for its construction paid from his separate cattle account, ruling that the monies in the account were community funds, because cows were purchased after marriage. See closing argument and colloquy **RP1240 – RP 1242.**

But whatever comments the Court made in its November 17, 2016 ruling fresh after trial, it did **not** rule that these arguments about the character of the house and contribution of separate funds by Rod were a “scorched earth” strategy, nor that it showed intransigence. Rather, the Court recognized these were normal legal positions that parties can and do make and ruled that the parties should each bear their own fees.

b. There was no “scorched earth tactics” involved in Rod’s position regarding Lori’s jewelry, nor was he “intransigent” in making the legal arguments he presented.

The exhibits at trial included records showing the value of Lori’s jewelry acquired during the marriage to be in excess of \$114,000. Rod testified that the jewelry should be awarded to Lori characterized as “mixed: partially separate and partially community”. **RP 761-762**

Rod testified that some of the jewelry had been gifts to Lori; and, some of the jewelry had been purchased for investment purposes, at the encouragement of Lori’s father, who owned a high-end jewelry store, selling fine gems and precious metals in Sunnyside. Lori’s father spent a lifetime as a jeweler in the jewelry business and was encouraging Rod to buy for investment purposes.

Lori testified that some of the jewelry had been purchased “at cost”; and under Rod’s father-in-law’s tutelage, some of the jewelry was purchased for investment and some as gifts.

The Court’s November 17, 2016 letter decision was critical of Rod that he would

1 characterize some of the jewelry as an "investment". However, the Court did not find Rod was
 2 intransigent, nor that he had engaged in scorched earth tactics.

3 Instead, the Court characterized all the jewelry as gifts to Lori and then completely excluded
 4 the asset and the value of Lori's separate jewelry from the final property division.

5 As with the separate contributions to the family home arguments, whatever comments the
 6 Court made in its November 17, 2016 ruling fresh after trial, it did not rule that these arguments
 7 about Lori's jewelry were a "scorched earth" strategy, nor that they showed intransigence.
 8 Rather, the Court recognized these were normal legal positions that parties can and do make
 9 and ruled that the parties should each bear their own fees.

10 **c. Lifetime Spousal Maintenance:**

11 It was within the parameters of the facts and exhibits at trial, and supported by
 12 Washington law, for Rod to oppose awarding "lifetime maintenance" to Lori. **RP 671.**

13 Mr. Hazel argued in his closing at trial that Lori was entitled to a life time award of
 14 maintenance; and also entitled to be awarded the entirety of the property before the Court for
 15 division, except that the Court should award to Rod all of the community interest in Midvale
 16 Cattle Co.

17 The Court ruled that Lori was entitled to lifetime spousal maintenance, based on its view of
 18 the statutory factors; the Court was highly critical that Rod did not agree that additional spousal
 19 maintenance was necessary, but did not characterize it as intransigent or unsupported or
 20 "scorched earth" in its November 17, 2016 letter ruling.

21 Rod's contention was reasonable and supported by facts: he considered that she had her
 22 college degree, experience and master's credentials that allowed her to readily reenter the
 23 teaching profession, including specialized training and skills in highly sought after special
 24 education programs [Lindamood-Bell Learning Process/Reading] which increased her
 25 employment opportunities, and had regular monthly income before trial doing that teaching in
 26 the Sunnyside School District; he considered that she had received nearly \$230,000 cash as

1 spousal maintenance during the pendency of the divorce; he had paid for most of her attorney
 2 fees and contributed \$5000 towards her expert business valuation for trial, had paid for nearly
 3 all of her expenses and she lived in the family home without a mortgage payment, rent-free.
 4 Rod considered that the value of her share of a property division would give her sufficient
 5 financial resources to meet her needs well into the future, not to mention her parents were as
 6 old as his and also financially very well-off, knowing Lori would receive an inheritance from
 7 them.

8 Finally, having participated in two lengthy [12-hours each] mediation sessions, Rod relied
 9 on the information exchanged about their assets and values available for distribution, including
 10 characterization as separate or community. Rod proposed the community property be equally
 11 divided, and by factoring the cash maintenance and expenses he had paid to Lori, her portion
 12 would exceed his share.

13 No matter the difference in valuation between Rod's proposed division and that of the
 14 Court, Rod proposed an equal division of community assets; he never suggested that Lori
 15 should be left "penniless". Regardless of the Court's disagreement with Rod's position, the
 16 Court did not find Rod was intransigent, nor that he had engaged in scorched earth tactics in
 17 its ruling right after trial in November, 2016, as with the other arguments, but ruled that each
 18 should bear their own fees.

19 **c. Rod gave full disclosure of his finances.**

20 As described more fully below, Rod fully disclosed his finances which were examined in
 21 minute detail by Lori, her attorney, and her experts before and during the **two** 12+ hour
 22 mediations held in 2014 and early 2015. See Comins Rick Dec., ¶¶ 4-14. As noted therein,
 23 Lori and her team had not only full access to all Rod's financial information, they received full
 24 copies after each mediation. But because Rod did not own the family businesses, in whole or
 25 in part as did the divorcing husband in *Friedlander v. Friedlander*, 58 Wn.2d 288, 362 P.2d
 26 352 (1961), nor did he have a vested future interest in it, Lori had no legal right to that family

business information which was third party property not before the Court in the dissolution.

As discussed below, Lori's frustration, and the Court's as expressed in April 2014 and April 2019, came from the fact that Mr. Dick Van de Graaf did not give his property away to Rod before the date of separation, when Lori could then arguably have had a claim to it and, to the extent Rod owned or had a vested future right to it, would have had a lawful basis for disclosure of its details. But he may never give any to Rod – that choice is his alone, and his right. It is not lawful to punish Rod for his father's financial control and choices.

VI. SUBSTANTIAL JUSTICE HAS NOT BEEN DONE.

A. Rod disclosed all his finances consistent with *Friedlander v. Friedlander*. The only "frustration" for Lori or the Court was being denied records to which she was not entitled – the personal estate and corporate records of Dick and Maxine Van de Graaf and their businesses, which were not before the dissolution court.

Judge McCarthy stated during the 4.26.2019 hearing:

... I think my point was and certainly my belief is that this litigation, the trial in particular, was extremely difficult. It was extremely difficult because of Mr. Van de Graaf's intransigence...My award of fees is based upon the issue of intransigence....

This comment raises the question: Which "Mr. Van De Graaf"? At first blush, one would infer the judge to mean it was "Mr. ROD Van de Graaf" who was "intransigent", and that's why attorney fees were awarded to Lori. Such an inference could be "reasonable". That is, until the Judge continues with the remainder of his colloquy and says:

-- getting back to the issue of the trial, it was like pulling teeth to get information from your client and from your client's family except for his brother, I guess, would be the only one. Certainly his sister; and his father, it was kind of like this mythic figure who was talked about but never made a physical appearance in the courtroom, just made the issues that the court had to decide and the issues that Mr. Hazel had to address incredibly more difficult.

In fact, the Court's reference to "intransigence" and "scorched earth tactics" are directed at Mr. DICK Van de Graaf, Rod's father; not Rod. Mr. Hazel's objections to the decisions

made by Dick Van de Graaf and his wife, Maxine, were projected onto Rod so that the distinction between that of the parents and that of the divorcing parties became blurred and eventually "indistinguishable" to the Court. Rod became "accountable" for the actions deemed "objectionable" [by the subjective standard applied by Mr. Hazel] which, in fact, had been done by his parents, not Rod. It didn't matter whether the parents' actions were within their rights to undertake – if it was contrary to what the Petitioner demanded, the Court held Rod to account.

These points are supported by excerpts from the trial transcripts, which are described and attached to the Comins Rick Dec., at ¶ 22. They show in clear fashion the deviation the Court made from examining the property of the parties to the divorce, and delved into the property of the two senior Van de Graafs, particularly Dick Van de Graaf, while there was total silence about any family money or resources from Lori's family, which had been ruled inadmissible.

The *Freidlander* court's award of attorney fees to the wife was based on the court finding there was "complexity" about the family-owned jewelry business enterprises that involved the husband, with his brother and his father, combined with a lack of knowledge by the wife about the business enterprises. *Friedlander* found that the additional work for investigating the business enterprises by the wife's attorney was necessary due to the "complexity" of the businesses and the wife's lack of knowledge, and thus awarded a portion of attorney fees to the wife for the extra work.

Under the premise of *Friedlander*, the "complexity" of the businesses at issue were those in which the parties before the court held an ownership interest. Applying *Friedlander* thus necessarily excludes consideration of any business enterprises in which the divorcing parties hold **no** ownership interest. *Friedlander* forces a separation between that which is "owned" by Rod and Lori and that which is not. In this instance, any actions by Dick and Maxine Van de Graaf regarding their financial, business and estate planning enterprises are beyond this Court's purview.

As discussed above, the "complexity of the business enterprises" was a fiction created Lori and her counsel who argued, without a record of supporting evidence, that Rod's

1 Parents were concealing the 1500 shares of VDGR non-voting stock that was "destined" to
 2 be purchased by Rod once the divorce was over, because Rick and Karen were each
 3 already purchasing 1500 shares of VDGR non-voting stock. Arguing that Rod's Parents treat
 4 each of their children "equally" was all that was offered to support the theory of concealment
 5 of assets, based on testimony from Rick Van de Graaf, not from Dick or Maxine Van de
 6 Graaf. Moreover, the 2012 Maxine Trust was created in 2012 -- **after the date of**
 7 **separation** of the parties of July 2011. As a matter of statute, it was not subject to division
 8 by the Court since it was acquired AFTER the community stopped collecting assets and
 9 debts. RCW 26.16.140. The additional "theory" that the stocks were being "paid for" by
 10 manure sales or royalties from Midvale to VDGR had no evidentiary basis since the Court
 11 excluded any evidence about "manure sales" from trial. Rick Van de Graaf's testimony
 12 confirmed these "sales" had all occurred after the date of separation of July 2011.

13 Dick and Maxine Van de Graaf exercised their personal rights to the peaceful
 14 enjoyment and sanctity of privacy of their personal and business affairs, to be left alone and
 15 be free from the harassment and undue "invasion" of their privacy by the court proceeding.
 16 The Court's comment that "it was like pulling teeth to get information from your client's
 17 family..." is exactly on point; but misdirected against Rod's parents.

18 The efforts by Dick and Maxine Van de Graaf, through their attorneys and
 19 accountants, who acted to protect and withhold the confidential, private and personal
 20 business and financial dealings, and estate planning strategies of the Senior Van de Graaf's
 21 from being disclosed to Loris and her counsel was their right because it was **their** property,
 22 not Rod's. The Court's recollection that "...it was like pulling teeth to get information from
 23 your client's family" is spot-on, but created by the improvident actions of Petitioner to seek
 24 non-marital community property, not the fault of Rod's parents who were acting only to
 25 protect themselves and their property from the invasion of privacy for information not relevant
 26 to their son's divorce action.

1 B. THE FOCUS ON THE SENIOR VAN DE GRAAFS AS BEING INTRANSIGENT,
 2 RATHER THAN ROD, IS ALSO SEEN IN THE EFFORT TO GET AN AWARD OF
 3 \$50,000 ATTORNEY FEES FOR LORI TO PAY FOR LAWYERS HIRED TO DEFEND
 4 HER IN THE VDGR LITIGATION.

5 The Petitioner expressly contended it was Rod's *Parents* who were "intransigent" for
 6 filing the VDGR lawsuit and for creating trusts and corporations and partnerships through
 7 which Dick and Maxine Van de Graaf operated and managed their personal wealth, and that
 8 Rod should be punished in the divorce action for their actions.

9 For example, in Petitioner's February 2, 2017 Motion for Reconsideration, Petitioner
 10 asked the court hold *Rod* accountable for the actions of his parents by entering a judgment
 11 against Rod to pay Lori the sum of \$50,000 to cover her attorney's fees in defending herself
 12 against Rod's *Parents'* VDGR civil litigation to collect on the \$2million promissory note that
 13 Rod and Lori signed.

14 The chronology in § III.A., above, shows that it was that request which was pending when
 15 the Court ordered a response by Respondent on February 21, 2017, and which was only
 16 modified at the very last minute – the day before Rod's response was due on March 3, 2017,
 17 to a request for Lori's trial fees in the dissolution, which (conveniently and not coincidentally),
 18 were stated (without adequate documentation) to be just a bit more than was initially
 19 requested on February 2 for the VDGR case. Moreover, it was that third-party litigation
 20 which seemed to cause the Court, for the first time in April, 2017, to talk about intransigence
 21 and scorched earth. But that action was not brought by Rod. Nor can he be deemed
 22 responsible for it, particularly given the extensive testimony and the Court's conclusion that it
 23 was the Senior Van de Graaf, Mr. Dick Van de Graaf, who was in control, hardly Rod.

24 Interestingly, and not surprisingly, the pleadings entered in the VDGR litigation (see
 25 Comins Rick Dec., ¶ 25 and referenced attachment) show that Lori's actual attorney fees had
 26 amounted to approximately \$20,000, nowhere near \$50,000. Further, for purposes of
 27 settling the case, with VDGR foregoing reconsideration and/or appeal, Lori waived all of her
 28 attorney fees except for \$5000, which VDGR paid.

As discussed in detail in the Comins Rick Declaration, Lori and her counsel had access to and possession of all the records and documents regarding the business affairs of Midvale, K2R and the Ellensburg property, as well as the personal assets of the parties, and the value of the family residence, as early as 2013, when the parties prepared to engage in mediation to settle their issues. The parties paid to retain the services of a forensic accountant to consult with the mediator in regards to the financial issues involved in the parties' assets. After mediation concluded, Lori's counsel received a complete copy of the entirety of the forensic accountant's records and files that had been collected from various sources, including notes and the prepared spreadsheets that identified every asset that these parties held an interest, and the values thereof. See Comins Rick Decl., ¶¶ 11-13. Any "paucity of information", if it existed, was for information to which Lori was neither privy to nor entitled to have.

SUMMARY AND CONCLUSION:

The Findings and Conclusions as entered by the Court on remand from the Court of Appeals should be vacated; the proposed findings submitted by the respondent alone present pleadings based on the actual record that existed concurrent to the Court's award of fact and amount of attorney fees.

DATED: 11 JUNE 2019

HALSTEAD & COMINS RICK PS


 JOANNE G COMINS RICK #11589
 ATTORNEY FOR RESPONDENT by
 LIMITED APPEARANCE

1 SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF YAKIMA

3
4 LORI VAN DE GRAAF)

5 Petitioner,)

6 No. 11-3-00982-6

7 And)

8 RON VAN DE GRAAF,)

9 Respondent.)

10
11 VERBATIM REPORT OF PROCEEDINGS
12

13 BE IT REMEMBERED that the above-mentioned cause
14 came on for hearing on April 26, 2019, before the Honorable
15 Michael McCarthy, Yakima County Superior Court, Yakima,
16 Washington.

17 COUNSEL IN ATTENDANCE were Mr. David Hazel,
18 Attorney at Law, Yakima, Washington, representing the
19 Petitioner; Ms. Joanne Comins Rick, Attorney at Law,
20 Prosser, Washington, representing the Respondent.

21
22
23
24 Reported by: Joan E. Anderson
25 CSR No. 2564

Joan E. Anderson, Official Court Reporter, (509) 574-2733

Exh. A Appendix A-199Appendix A-40
APPENDIX 1 - Page 77

P R O C E E D I N G S

1
2 THE COURT: All right. It looks like Van de Graaf
3 is next here. This is Cause No. 11-3-00982-6. Mr. Hazel is
4 here for Lori Van de Graaf, Ms. Comins Rick is here for
5 Mr. Van de Graaf.

6 MR. HAZEL: Yes, your Honor.

7 Your Honor, as you no doubt are well aware, the Court
8 of Appeals is inviting, I should say mandating, some
9 findings. I listened to the oral argument that was before
10 the Court of Appeals. One of the comments was that trial
11 lawyers just sometimes in divorce cases hand up these orders
12 that they write themselves, but they would really like some
13 direction from you as to what you're thinking was when you
14 issued the order on fees.

15 I think the principle dispute here is how much of a
16 role did the scorched earth tactics play. We have put
17 together, and I think you have our bench copy.

18 THE COURT: I've read it.

19 MR. HAZEL: I'm not here to tell you what you
20 should have thought or what you should today think in
21 hindsight from things that have taken place after the trial.
22 I think the court is very well prepared to make a finding
23 that there was great deal of scorched earth tactics in this
24 proceeding. The letter itself refers to the paucity of
25 information that was shared with Lori and myself during the

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1 pendency of the proceeding. That, of course, is continuing
2 to this day.

3 Having in mind the court no doubt has read my
4 materials, read the transcripts, seen the proposed findings,
5 I would note that when I made my submission and noted this
6 for presentation, counsel insisted that I stick to the
7 14-day time rule even though this isn't a temporary order.
8 We voluntarily agreed to do that. We noted it for the
9 following week.

10 The rule being now that we give 14 days notice, the
11 other side is to receive a reply declaration or reply
12 documents three days prior to the hearing. It's now been
13 almost four weeks since this was originally noted. The last
14 noting was moved because she said she was ill.

15 We received only yesterday the proposed findings that
16 were submitted by Ms. Comins Rick. Then it wasn't until
17 last night after 5:00 that she submitted an additional set
18 of findings. I would ask the court to reject those
19 particularly with emphasis upon its omission regarding the
20 findings which I believe should be made and perhaps were
21 made that the husband in this action gauged in very
22 inappropriate and scorched earth tactics. Thank you.

23 THE COURT: All right. Ms. Comins Rick, respond
24 first to the timeliness of your reply.

25 MS. COMINS RICK: Your Honor, other than I've been

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1 sick and actually I'm a sole practitioner and didn't get it
2 done. I apologize to the court.

3 However, these findings are the court's finding to be
4 made. They're not my findings, the respondent's findings.
5 All we did was try to give the court an opportunity to
6 basically assist the court in entering its own findings and
7 conclusions. I don't know that there was actually a time
8 deadline, so to speak, but they were filed.

9 THE COURT: The deadline wasn't 7:30 this morning.
10 That's when the last piece came in over the wire to the
11 administrator's office.

12 MS. COMINS RICK: Your Honor, we did the best we
13 could. That's all I can say.

14 THE COURT: Okay.

15 MS. COMINS RICK: I apologize if they're late.
16 Quite frankly, based on what the petitioner filed, we felt
17 we had to file a response. Otherwise we probably wouldn't
18 have done any of it.

19 THE COURT: I'm not faulting you for filing a
20 response. I'm concerned about how late your response was.

21 This case was originally -- this matter was originally
22 set for presentation on April the 5th. Today is April 26th.
23 That was three weeks ago. As a practical matter, the
24 response came in yesterday afternoon. Then there was
25 further revised proposed findings that came to the

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1 administrator's office at 7:30 this morning.

2 I think Mr. Hazel's objection is well taken. I'm not
3 going to consider the materials that were filed yesterday or
4 this morning as a response to his proposed findings and
5 conclusions.

6 Go ahead, Mr. Hazel. Anything else?

7 MR. HAZEL: No, your Honor.

8 THE COURT: Is there anything else?

9 MS. COMINS RICK: No, your Honor.

10 I think what happened, if the court is looking at the
11 timeline for filing, we set it over to the 12th. Mr. Hazel
12 is right. There wasn't adequate notice particularly because
13 it was 107 pages of proposed pleadings and everything
14 attached to it. It's quite a mountain of information to go
15 through.

16 Mr. Hazel, the 12th was fine. I got sick, and I
17 apologize. I don't know what I can do about being sick.
18 The week following wasn't available for Mr. Hazel. That's
19 why it ended up on the 26th.

20 The court has until May 17th. There's no rush. You
21 know, I'm simply pointing out to the court that we are here.

22 Our position, I'm not trying to change your mind, your
23 Honor. Honestly, I think probably it's the first time I've
24 been in front of you not trying to change your mind. We're
25 simply assisting the court in presenting and making its

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1 final findings and conclusions, and that's done.

2 There's nothing novel. There's nothing new here.
3 There's no other additional information that's been
4 presented that isn't in the record. We've simply put
5 together for the court what we believe is responsive to what
6 the Court of Appeals actually requested.

7 The Court of Appeals wants to know how did you get to
8 entering the fee award on March 14th by your letter
9 decision. That's what the Court of Appeals asked for. The
10 timeframe, when you made that ruling in your decision,
11 that's the timeframe for it. We don't believe whatever you
12 may have said or talked about or done after that --

13 THE COURT: No, it wasn't after. It was before.
14 My comments about scorched earth were on February 17th, a
15 month before the fee award was made.

16 MS. COMINS RICK: Your Honor, my recollection is
17 they were on April 14th. I'm not going to dispute it.
18 That's my recollection on it.

19 THE COURT: I looked it up this morning. I may
20 have said it more than once.

21 MR. HAZEL: I believe the record would show that,
22 your Honor, more than once, the phrase.

23 MS. COMINS RICK: It has certainly been a refrain
24 since the comment was made.

25 THE COURT: It's been a refrain going both ways.

MOTION HEARING

1 There's scorched earth and then there's more scorched earth.

2 MS. COMINS RICK: Your Honor, I'm not here to
3 argue with you. I'm not here to challenge or try to get you
4 to change your mind on what your findings are. I just know
5 that on February 2nd a motion to reconsider was filed by the
6 petitioner. On the 21st your Honor entered an order on
7 reconsideration. You specifically wanted briefing from the
8 respondent by March 3rd on the issue of the award of fees to
9 the petitioner. Mr. Hazel filed a memorandum.

10 THE COURT: I think you're right about the
11 April 14th. I made the comment before.

12 MR. HAZEL: Your Honor, if I could make one
13 comment. Again, the phrase scorched earth is a phrase that
14 has been used in appellate decisions, which sometimes is
15 construed to mean just vigorous assertion of a legal right
16 that doesn't cross the line into other behavior which
17 needlessly leads to needless expense and delay and tactics.
18 I think that's the distinction here.

19 THE COURT: I think the comment on April 14th
20 included the comments about the argument that the family
21 home was Mr. Van de Graaf's separate property, that the
22 jewelry was an investment, not a gift. Therefore, it was
23 community property and the issue of maintenance.

24 Mrs. Van de Graaf had essentially been out of the
25 workforce for a couple of decades. The argument was made,

MOTION HEARING

1 well, she wasn't entitled to maintenance. She could go
2 right back into the workforce given her age and lack of work
3 experience over that time period.

4 MR. HAZEL: Perhaps a \$2 million loan that was a
5 schemer.

6 THE COURT: That would be the other one.

7 MR. HAZEL: The issue there is were those
8 reasonable positions to take or were they positions that
9 were taken simply to put up roadblocks and make this
10 proceeding more litigious than need be.

11 THE COURT: I think my point was and certainly my
12 belief is that this litigation, the trial in particular, was
13 extremely difficult. It was extremely difficult because of
14 Mr. Van de Graaf's intransigence. So I think to burden
15 Mrs. Van de Graaf with the fees is not appropriate. My
16 award of fees is based upon the issue of intransigence.

17 MR. HAZEL: I have prepared proposed findings.

18 THE COURT: I've seen them. I've read them and
19 reviewed them as Ms. Comins Rick has as well. I'm prepared
20 to sign them. Do you have an original?

21 MR. HAZEL: Yes.

22 MS. COMINS RICK: If I may point out one thing,
23 your Honor, just for the record. The discussions that
24 Mr. Hazel just had with you did not occur prior to the
25 letter decision that you made. He filed a memorandum and

MOTION HEARING

1 said these are the reasons why she's entitled to it, because
2 of the complications of the dissolution and because of the
3 information and the complexity, which increased the amount
4 of work he had to do.

5 He relied on the statute, RCW 26.09.140 and the
6 Freelander decision. That's what he submitted to your
7 Honor. Your Honor's letter of March 14th says that.

8 I'm simply making a record on it, what the timeline
9 was. That is when you made your decision. Less than eleven
10 days later Mr. Hazel prepared his proposed judgment and
11 order and you signed it on April 14th without a penny
12 changing about the facts and the award.

13 All this other stuff is absolutely -- yeah, it's part
14 of the record. We don't believe that it had any fact and
15 impact in your March 14th letter decision. Mr. Hazel
16 certainly didn't propose any of that argument in his
17 memorandum to you supporting his request for trial fees.
18 Thank you.

19 THE COURT: I think that Mr. Hazel's -- getting
20 back to the issue of the trial, it was like pulling teeth to
21 get information from your client and from your client's
22 family except for his brother, I guess, would be the only
23 one. Certainly his sister and his father, it was kind of
24 like this mythic figure who was talked about but never made
25 a physical appearance in the courtroom, just made the issues

MOTION HEARING

1 that the court had to decide and the issues that Mr. Hazel
2 had to address incredibly more difficult.

3 MS. COMINS RICK: I'm not arguing with your Honor.
4 I'm simply saying what the Court of Appeals was asking for,
5 my understanding, they're not challenging what you awarded,
6 the fact of the award or the amount. They're simply asking
7 how did you get to that point based on the record before you
8 up until that point. We believe Mr. Hazel is encouraging
9 you to rely on the record that has happened since that point
10 primarily especially with the contentious hearings that we
11 had starting with April 14th. So we're just -- I'm simply
12 saying --

13 THE COURT: I'm simply saying as well that the
14 *comments about scorched earth and the other* were made at the
15 same time the order regarding attorney's fees was signed. I
16 think it's part of the record supporting the award.

17 Mr. Hazel.

18 MR. HAZEL: Ms. Comins Rick, do you care to sign
19 the proposed findings?

20 MS. COMINS RICK: No. They're the court's orders.

21 MR. HAZEL: I'm handing up the proposed orders and
22 findings.

23 THE COURT: All right. I've signed the findings
24 of fact and conclusions of law.

25 MR. HAZEL: Thank you, your Honor.

MOTION HEARING

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Ms. Comins Rick: Thank you, your Honor

THE COURT: Thank you.

I would like to say use I don't think I'll see the
Van de Graaf case again, but I don't think that's probably
true.

(Proceedings were adjourned.)

MOTION HEARING

C E R T I F I C A T E

STATE OF WASHINGTON)

) ss.

COUNTY OF YAKIMA)

I, Joan E. Anderson, Certified Court Reporter of the Superior Court of the State of Washington in and for the County of Yakima, do hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct: That I am the Certified Court Reporter who reported/transcribed the aforementioned proceedings; that the transcript is a true and correct record of the proceedings to the best of my ability, including any changes made by the trial judge reviewing the transcript; that I am in no way related to or employed by any party in this matter, nor any counsel in this matter; and I have no financial interest in the litigation.

Dated the 10th day of May 2019.

/s/ Joan E. Anderson

Joan E. Anderson - Certified Court Reporter
Yakima County Superior Court - Rm. 311
128 N. 2nd Street
Yakima, WA 98901
Phone: (509) 574-2733
E-mail: joan.anderson@co.yakima.wa.us

1 it was emailed to her on the date indicated.

2 But she doesn't do that. She waits until I don't have the
3 ability to show -- print that email.

4 MS. COMINS RICK: Your Honor, attached to my objection is
5 the email I got from Mr. Hazel's office. You can look at it.
6 It's Exhibit B there. It's dated March 27th. I don't know
7 what else I can do. That's what it is. Why would he send it
8 twice? That makes no sense. It wasn't sent until
9 March 27th.

10 We've had this issue before. That's why the Court entered
11 the CR 5 order, so that it would be done by email, so we'd
12 have a date record.

13 It was sent on the 27th. That's the date -- at 9:14 a.m.
14 from Debbie Bartell [phonetic] of Mr. Hazel's office.
15 Attached, please find a copy of the judgment. Notice
16 presentation of judgment. And that's what I received. And
17 that was the first time I received it.

18 So, you know, that is it.

19 MR. HAZEL: Fine. We've clogged your calendar for a
20 perfunctory act of order -- signing a document that you
21 already ordered.

22 THE COURT: Well, I may agree with you on that.

23 But on the other hand, it's -- you know, it's -- it's the
24 respondent's prerogative to be difficult, I guess, might be
25 the -- let's go forward with the motion for contempt, and

1 stuff, get a place, and move on with life.

2 Then the next motion is that we had filed a motion for
3 reconsideration on attorney's fees. I noted this for
4 presentation of a judgment for that amount. Counsel's
5 neglected -- has not agreed to sign it.

6 Then there are the motions filed by Mr. Van De Graaf.
7 They are a motion to vacate the decree. That is based
8 upon --

9 THE COURT: Right. And I'm going to let Ms. Comins Rick.

10 (Interruption in proceedings.)

11 MR. HAZEL: And before I defer, Your Honor, I guess there
12 was one additional motion, and that would be a request for a
13 bench warrant for Mr. Van De Graaf.

14 THE COURT: All right.

15 Ms. Comins Rick, let me -- I'll ask for your response to
16 Mr. Hazel's motions. And then you can present your motions.
17 And then I'll ask for his response to your motions.

18 MS. COMINS RICK: All right. My understanding was that
19 the -- and I noted my CR 60 motion to vacate for next Friday.
20 So I -- is the Court -- because when I filed mine, I was
21 informed that you were involved in a murder trial and the
22 first available Friday that you would have was next Friday
23 the --

24 THE COURT: Yeah. I'm actually --

25 MS. COMINS RICK: -- the 14th. So I was not looking at --

1 math. But --

2 THE COURT: It is half of -- half a month, \$3,000 plus two
3 months, \$6,000. So that's \$12,000. So that's \$15,000.

4 MS. COMINS RICK: Okay.

5 THE COURT: Two and a half months.

6 MS. COMINS RICK: Got you. We were looking at three
7 months times 6,000. So that's fine.

8 But we've paid -- he's paid 18,000 is what I'm saying.

9 We've proof -- he cannot pay -- he's offered to pay 500 a
10 month. I would suggest that, because this matter is up on
11 appeal, that the Court enter an order that if the Court is
12 not inclined to reduce the maintenance at this time, that the
13 Court at least enter an order that requires Mr. Van De Graaf
14 to pay at least 500 a month, and if he does, that he's not
15 going to be found in contempt. So that we aren't back here
16 every month, because he can't continue -- he can't pay the
17 6,000 a month as ordered. We're asking that he not be found
18 in contempt for -- as requested. There's no basis for a
19 judgment of \$38,000 to be entered.

20 It is not willful. It's market conditions which are
21 totally beyond his control, totally beyond the Court's
22 projection, totally beyond Mrs. Van De Graaf's control.

23 So we are asking that he not be found in contempt for that
24 purpose.

25 As to the motion to reconsider attorney's fees that

1 Mr. Hazel filed, Your Honor, Mr. Hazel's original motion
2 asked for \$50,000 to pay attorneys to represent Mrs. Van De
3 Graaf in a third-party litigation action, not for her current
4 attorney's fees incurred at trial.

5 The Court -- after we entered the decree, the Court then
6 issued an order on reconsideration and said solely as an
7 issue of award to the attorney's fees.

8 The only attorney's fees requested were the 50,000 on the
9 third-party litigation.

10 Mr. Hazel then filed a subsequent memorandum claiming that
11 he wanted 58,000 to reimburse his own attorney's fees that
12 had accrued at trial.

13 We filed a memorandum objecting to that. There's no basis
14 for -- there's no cost bill. There's no basis for his
15 request. It's not timely. It wasn't part of his original
16 motion to reconsider. And there's absolutely no factual
17 basis to support a \$58,000 award of attorney's fees to
18 Mr. Hazel. If we're going to -- we don't even have an
19 affidavit saying that these are his expenses. I mean, I've
20 only got a printout of some sheet that documents money in and
21 money out and nothing more.

22 So we're asking, again, that the Court not award -- and
23 not enter that judgment at this time or even later, because
24 the Court was very clear in its decision that the parties
25 would pay their own attorney's fees. The Court said that

1 both parties had the wherewithal to pay their own attorney's
2 fees. And that was very clear.

3 So there's no change of circumstance. There is no basis
4 to reconsider. There was nothing new that occurred, except
5 for the issue of the 50,000 for these other attorneys on
6 third-party litigation.

7 As to my motion to reconsider, you want to wait on that?
8 Or do you want me to proceed on that?

9 THE COURT: Go ahead.

10 MS. COMINS RICK: Your Honor, what we discovered after
11 the --

12 THE COURT: This is your CR 60 motion.

13 MS. COMINS RICK: Yeah, the CR 60.

14 THE COURT: It really looks a lot like a motion to
15 reconsider, but go ahead.

16 MS. COMINS RICK: And I misspoke. It's -- well,
17 Your Honor, it's -- the fact of the matter is the Court
18 awarded the beneficial -- the surrender value of the
19 Beneficial Life policy to Mr. Van De Graaf for \$116 --
20 \$116,000. We contacted the insurance company and discovered
21 that, in fact, the policy is not owned by Rod and Lori. It's
22 owned by a trust. And there are two trustees, and the
23 beneficiaries are the four boys. So this policy should have
24 never been --

25 THE COURT: Four boys?

1 THE COURT: Anything else?

2 MR. HAZEL: No, Your Honor.

3 THE COURT: Okay. All right. First off is that -- a
4 couple of comments. First off, the Court's letter opinion --
5 and I do this frequently in family law cases where there's a
6 significant amount of property that needs to be disposed of.
7 It helps me keep track of things, but that it's a letter
8 opinion is not an order, just the same as the Court's oral
9 remarks are not an order of the Court. The orders are
10 delineated and as orders and as part of the record of the
11 Court. And so to treat the language in the letter opinion as
12 something in the nature of decree or some other type of court
13 order is really -- is incorrect use of that particular type
14 of document.

15 The other point I wanted to make is that throughout this
16 litigation, the kind of the scorched-earth policy that's been
17 followed by the respondent here I think has not -- has not
18 served him well: that this is a 25-year marriage; arguments
19 that the family home was somehow his separate property; that
20 the jewelry that he gave to his wife over the course of the
21 25-year marriage, was not, in fact, a gift, but was a -- was
22 in the nature of an investment argument; and the maintenance
23 issue as well, that it's clear that after a marriage of this
24 length and the fact that Mrs. Van De Graaf was not -- not
25 working outside the home for many years during the marriage,

1 raising the family of four sons, that the issue of
2 maintenance was something that was going to have to be
3 discussed, that there was going to be some type of
4 maintenance award under the circumstances, that -- and the
5 issue really as to -- was going to be how much and for how
6 long as opposed to Mr. Van De Graaf's argument was -- which
7 was there shouldn't be any. So I guess, just making that
8 observation, that this is not -- that scorched-earth policy
9 is -- has not served Mr. Van De Graaf well in this regard.

10 First off, in regard to the issue of contempt, when
11 Mr. Van De Graaf was before the Court two weeks ago on the
12 31st of March, I was -- attempted to be brutally honest with
13 him about what the prospects were for him today if he had not
14 paid the past-due maintenance in the sum of \$15,000. I told
15 him to bring his toothbrush because he would be going to
16 jail. That apparently, he took that to heart and he has not
17 appeared today.

18 But I do believe and find that he is in contempt for not
19 paying the maintenance that was ordered in the final decree.
20 And I will issue a bench warrant for his arrest, set bailing
21 him out of \$15,000 cash only, which could -- will cover his
22 maintenance obligation, at least up to this point.

23 That I won't -- I won't address the issue of his contempt
24 for the -- failing to pay the temporary maintenance that was
25 due and owing and unpaid pre decree.

1 I will, however, enter a judgment for that amount. I
2 believe it was -- it was discussed, I know, at the time of
3 trial. It was referenced in the decree. And that I believe
4 it's right for me to enter a judgment for that \$30,000 or
5 whatever it was -- \$32,000 of back temporary maintenance,
6 which was not paid before the decree was entered.

7 Regarding the UBS account, I think Mr. Hazel's analogy is
8 well taken, that Mrs. Van De Graaf is not here asking for
9 credit for the increase in value of the house since the
10 decree was entered. And so I guess, by the same token, it
11 was the Court's intention to award all of the UBS accounts to
12 her. It had been my understanding, I will be honest, that it
13 was -- that the amount, because it had been utilized over the
14 course of the dissolution as a way of -- for people to access
15 money for attorney's fees and other purposes, that, in fact,
16 I would -- I assumed that the amount was less than the
17 \$816,000. Apparently, the market being what it is, that it's
18 in excess -- somewhat in excess, but in excess of the
19 \$816,000.

20 So I think Mrs. Van De Graaf is entitled to that excess,
21 just the same as Mr. Van De Graaf is entitled to the increase
22 in value of the house or other assets that he may have been
23 awarded in the course of -- in the dissolution.

24 Regarding the issue of when Mrs. Van De Graaf needs to
25 vacate the house, she would -- I will order that she vacate

1 the house 30 days after Mr. Van De Graaf's maintenance
2 account is current. Otherwise, she can stay there.

3 And regarding the judgment for attorney's fees, I will
4 sign the judgment as proposed by Mr. Hazel.

5 Also in regard to -- backing up to the UBS account, I am
6 willing to order the clerk to sign the -- fix -- or sign the
7 documents necessary to effect the transfer of the funds to
8 Mrs. Van De Graaf's name in lieu of Mr. Van De Graaf's
9 signature on the same.

10 MR. HAZEL: I'll hand -- we'll prepare an order this
11 afternoon, Your Honor. And I will hand up the judgment.

12 THE COURT: Okay. I am not -- and I'm not giving any
13 credit to Mr. Van De Graaf for the utilities that he may have
14 paid.

15 And I'm denying the CR 60 motion, his CR 60 motion. If it
16 does -- it may be -- it may well be that there was some
17 misrepresentation or misunderstanding about the nature of the
18 Beneficial Life policy or account. However, that is one that
19 was -- I'm afraid, inures not to Mr. Van De Graaf's benefit.
20 And he will have to seek other remedies in order to address
21 that particular issue.

22 MR. HAZEL: I'll prepare an order, Your Honor.

23 With regard to the bench warrant, is there a form?

24 THE COURT: I -- well, I know the prosecutor's office has
25 them, but I don't, so...

1 is all that Rod might have, and nothing more. Mr. Hazel has
2 not proven anything to this Court in terms of this missing
3 30 percent because it's not missing. It's in Maxine's 2012
4 trust. That's where it is.

5 The other property. Rod had for -- Rod was 28 when he got
6 married. He had been working for Van De Graaf Ranches. He
7 was paid a salary and he was pay -- and he had access to a
8 cattle account that he used to feed cattle. And he could
9 borrow against it, deposit his profits against it. And that
10 separate property was maintained after marriage. He
11 continued to be paid a salary. The community toil, the
12 community labor was compensated.

13 The separate -- the cattle account is his separate
14 property, was his separate property, and was never
15 commingled with any community property after marriage. In
16 1989 --

17 THE COURT: So the revenue that's generated by the cattle
18 account is not a community asset.

19 MS. COMINS RICK: It's the rents and profits of his
20 separate property. It was a carry-on --

21 THE COURT: So when you buy -- after marriage, if you buy
22 a cow, it's not a marital asset. It's not a community
23 asset.

24 MS. COMINS RICK: If it's purchased --

25 THE COURT: And when you sell it, that --

1 MS. COMINS RICK: If it's purchased --

2 THE COURT: -- the income that you get from the sale of
3 the cow is not a community asset.

4 MS. COMINS RICK: If -- I'm sorry. If it is -- if it is
5 purchased with separate money, which is what occurred here,
6 then it remains a separate asset. The community was already
7 being paid a salary. And there's -- was no objection to
8 that issue from the petitioner.

9 She didn't say, "Oh, no. Rod wasn't making enough money."
10 Look at the Friedlander case. The Friedlander case is
11 exactly on point with this situation where the person who --
12 where the jeweler in that case was also -- also had an
13 interest in the business. The Court found that a portion of
14 his income -- I mean his income as -- from the business
15 itself was separate property. And the -- because he was
16 compensated by salary for his work and the community was
17 compensated. And I've mentioned that in my brief --

18 THE COURT: Okay.

19 MS. COMINS RICK: -- on that.

20 Out of that cattle account, Rod wrote a check, set up a
21 house account, and paid exclusively for the construction of
22 the family house. And so if the Court is going to --
23 depending on how far it wants to treat this asset, the Court
24 has to first decide whether it's community, separate,
25 co-mixed. But at the time of acquisition, community --

1 separate property was used to construct the home.

2 The family lived in it. There were, I'm sure, minor
3 upkeep, repairs and whatnot for the community made towards
4 it. And we're proposing the Court can characterize it
5 however it wants to as community or not, but that Rod's
6 initial contribution should be credited against whatever the
7 value the Court comes up with.

8 Now, as to the value of the house, Jason Ray, a certified
9 appraiser, did an appraisal on the Ellensburg property that
10 the petitioner has absolutely no objections about. She
11 loves that appraisal. But the appraisal that he did on the
12 house at 712,000 she totally wants to discount and have the
13 Court ignore because a realtor did a comparable market
14 analysis, which the realtor admitted she couldn't really
15 perform because there's nothing comparable in the area.

16 Now, she's not -- she's not a certified appraiser. She
17 did a market analysis. This Court, we're suggesting, can
18 take a combination of the two numbers and average them or
19 pick any number in between or at either end. But in any
20 event, the separate property and the separate moneys that
21 went into that property for the construction of the property
22 needs to be credited back to Rod.

23 K2R, separate property. No question separate property.
24 There is no community labor involved in that LLC, but it
25 owns more than the railroad -- the grain elevator property.

1 promissory notes to buy interest in the -- in the company?

2 A. Yes.

3 Q. And do you still owe money on those promissory notes in
4 addition to the \$600,000 debt?

5 A. Yes.

6 Q. Has K2R considered doing other things because this land isn't
7 selling outright?

8 A. There's nothing else you can do that...

9 Q. Okay. Was this land used as a farmland before -- before you
10 bought it (inaudible)?

11 A. We unloaded railroad cars of corn there to supply the cattle
12 at the feed lot.

13 Q. Okay. As to Lori's jewelry, was all of it a gift? Were all
14 the pieces of jewelry that were gotten, were they gifts, or
15 were they purchased for some other reason?

16 A. Special occasions, just if I felt like buying a piece for her
17 to be nice to her or --

18 Q. Okay.

19 A. -- different occasions.

20 Q. Did you -- did you invest money in your marriage?

21 A. Yes.

22 Q. And did you invest any monies in diamonds or gold or gems?

23 A. Pardon?

24 Q. Did you invest any money in diamonds or gold or gems?

25 A. In diamonds and gold necklaces.

1 Q. Okay. So how would you -- who did you purchase those
2 investments from?

3 A. From her father that owned the jewelry store and from Dunbar
4 Jewelers mainly.

5 Q. Okay. And you valued it at \$114,000. And you don't have any
6 objection to Lori having it, do you?

7 A. No.

8 Q. Was some of that value considered investments as opposed to a
9 gift?

10 A. Yes. We bought some of them at cost knowing that they were
11 worth a lot more because the price of diamonds they control
12 so it cannot go down.

13 Q. So out of the \$114,000 value, can you tell the judge
14 approximately how much of that you consider to be investment
15 versus gift?

16 MR. HAZEL: Objection, Your Honor. Just because it's an
17 investment -- the evidence is whether it's an investment or
18 not, he gave it to her, so...

19 THE COURT: I think that he's entitled to present his
20 theory, you know, so -- so these would be investments that
21 she wore around her neck.

22 MS. COMINS RICK: Or just --

23 THE COURT: Or on her fingers.

24 MS. COMINS RICK: Or just kept or didn't wear.

25 A. Yeah. Probably the diamonds, maybe probably 80,000.

1 A. Divided evenly.

2 Q. Okay. Some of the attorney's fees have been paid from joint
3 funds. Some have been -- Lori's have been paid. You've had
4 some paid. Do you have any proposal as to how the Court
5 should handle or if the Court should handle any award of
6 attorney's fees?

7 A. I think they should even it out. If one person received more
8 for attorney fees out of the UBS account, then the other
9 person should get it to even it out.

10 Q. Okay. Do you believe the Court should award spousal
11 maintenance to Lori?

12 A. No.

13 Q. And why do you -- what do you base that on?

14 A. Because of all the money she will be receiving and all the
15 money I have already contributed to the spousal support.

16 Q. Do you have any opinion on whether she's able to work or not?

17 A. Yes.

18 Q. And what is that?

19 A. I think she can.

20 Q. Did you ever tell her during your marriage that she shouldn't
21 have to -- she shouldn't work because her income just
22 generates more taxes that have to be paid?

23 MR. HAZEL: Objection. Compound question.

24 THE COURT: I'll sustain the objection. Rephrase it.

25 Q. (By Ms. Comins Rick) Did you -- did you ever encourage Lori

19 1 P403

EXECUTED on this 11 day of June 2019 at Prosser, Washington.

[illegible]

Appendix A-67
APPENDIX 1 - Page 104

- 1 5. Petitioner and her attorney did have access to all the financial information regarding the
2 personal and "business affairs" of the parties to this marriage, and specifically acquired
3 an enormity of financial information and records through the more than two years'
4 mediation process discussed below. What Petitioner and her attorney did not have
5 access to were the personal, financial, business and estate planning affairs of Dick and
6 Maxine Van de Graaf, Rod's **Parents**; *to which they had no right to demand be*
7 *disclosed.*
- 8 6. Therefore, Petitioner's claims about the lack of transparency could only refer to their
9 rejected demands, including the disruption of trial proceedings by the limited appearance
10 of the Van de Graafs' attorneys, which was necessary to protect the disclosure of private
11 and confidential business affairs of Rod's **Parents** and their corporations, companies,
12 trusts and estate planning entities.
- 13 7. The Court ruled that any evidence about **Lori's Parents'** business affairs and wealth,
14 accumulated as life-time jewelers in their business of buying and selling precious gems
15 and fine metals, was entirely **inadmissible**.
- 16 8. Petitioner's attorney muddled the distinction between the assets and business affairs of
17 "Rod and Lori" --- the parties who *were before the court and getting divorced* --- with the
18 assets and business affairs of Dick and Maxine Van de Graaf, Rod's **Parents**, who are
19 alive and well and *still happily married*, and whose property was **not** before the Court.
- 20 9. The parties voluntarily participated in two mediations to reach an agreed resolution to the
21 divorce issues. In December 2013, the parties agreed to Mr. Hazel's proposal to have
22 Mr. Scott Lowry of Walla Walla act as the mediator, and for Mr. Tom Sawatzki, a forensic
23 accountant of Walla Walla, to act as the mediator's financial consultant.
- 24 10. Since the parties held percentage ownership interests in businesses and assets with third
25 parties (i.e., Rod's partnerships with his brother and sister, Rick and Karen), the parties
26 entered an agreed Protective Order ensuring the privacy and confidentiality of persons,
27 entities and information obtained from third parties holding percentage interest in some of
28 the financial businesses affairs related to, but not involved in the divorce action.

29 Page 2
DECLARATION OF JOANNE G. COMINS RICK IN SUPPORT OF
RECONSIDERATION AND CR 60 MOTION

HALSTEAD & COMINS RICK PS
PO BOX 511
PROSSER, WA 99350
(509) 786-2200

1 11. Mr. Sawatzki was provided any and all financial information, documentation, answers and
2 explanations to questions and clarifications, records, and such that he requested; and he
3 had access to communicate directly with third-parties knowledgeable about the business
4 and financial matters of these parties to the marriage.

5 12. The financial information obtained, including updates with current data over the course of
6 the mediation process, including the valuation spreadsheets prepared by Mr. Sawatzki
7 based on that information, were provided to and relied upon by the parties and the
8 mediator during the two mediation sessions [lasting over 12 straight hours each] in which
9 parties engaged, one in 2014 and one in early 2015. Efforts proved unsuccessful.

10 13. Once the mediation process was completed in early 2015, a complete copy of
11 **everything** ... all the files, records, notes, documents, financial statements, reports,
12 analyses, spreadsheets, valuations, audits, etc., that had been either provided to or
13 prepared by Mr. Sawatzki, was given to Mr. Hazel and to me. The information spanned 5
14 years or more. The totality of this information included, but is not limited to, such records
15 as:

- 16 a. Midvale's annual federal income tax returns for each year from 2008 to 2013;
- 17 b. Reports and analyses of Midvale's assets and liabilities prepared by its
18 accountants, Moss Adams;
- 19 c. Agendas, meeting minutes and notes, both formal and internal records for
20 partnership meetings, including assets, liabilities, strategies, investment
21 opportunities, future planning, sales and income sources generated concurrently
22 with the ongoing Midvale business operations and financial affairs, beginning in
23 2008 and for years thereafter;
- 24 d. General ledgers and other accounting information related to Midvale's business
25 operations, some beginning as far back as the mid-1990s;
- 26 e. Accounting for the repayments made on the \$2 million promissory note signed by
27 Rod and Lori for the money they borrowed from Rod's parents and their
28 corporation, Van de Graaf Ranches, Inc, which was used as their portion of start-
29 up capital in forming the Midvale Cattle Co partnership; and records accounting for

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1 the \$2 million promissory notes that were signed by Rick and his wife, and Karen
2 and her husband, for the money they borrowed for their portion of the start up
3 capital in forming Midvale;

- 4 f. Meeting minutes from Van de Graaf Ranches, Inc regarding the \$2 million
5 personal notes owed by Rod, Rick and Karen;
6 g. Records showing partnership distributions, salaries/draws, equity contributions, job
7 descriptions, investments, insurance, employees, operating loans, debts, vehicles,
8 equipment, cattle count, hay and feed, and the like regarding Midvale;
9 h. Copies of leases, loans, purchase and sale agreements, promissory notes for
10 repayment of equipment purchases, and similar financial documents for the past 5
11 years;
12 i. Comparative balance sheets reports generated for Midvale: identifying current
13 assets; fixed assets; liabilities and partnership capital, equity, contributions and the
14 like for the years 2009 through 2013;
15 j. Printouts showing Midvale's "Sales by Item" reports for the years 2009 through
16 2013;
17 k. Meeting minutes and notes compiled from meetings held between Midvale and
18 Moss Adams regarding the financial status, projections, strategies, and the like;
19 records beginning in 2008 through 2013;
20 l. Financial spreadsheets prepared by Tom Sawatzi reporting assets and liabilities
21 and preparing business valuations for the value of Midvale and K2R, and including
22 determining the value of the Ellensburg property, including legal documents for
23 purchasing the land, real estate contract, fulfillment deeds, ledgers of payments
24 made towards the contract purchase, lease agreements and records of income
25 paid for leasing the land, improvements, maintenance, taxes, irrigation and other
26 assessments, etc.;
27 m. Financial spreadsheets prepared by Tom Sawatzi identifying major personal
28 assets of value, financial records, liabilities owed, investments and securities,
29 bank statements and the like held by Rod and Lori as separate or community;

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n. Midvale's assets, including equipment, cattle counts, and manure sales.

14. **Notably absent from these records** is a scintilla of reference to or record of a purchase and sale by Rod or his marital community of any non-voting shares of VDGR stock, nor to the existence of a Maxine 2012 Trust. Not a single spreadsheet identifies the existence of "1500 shares of non-voting VDGR stock" as an "asset" owned by Rod or in which the community held an interest, because, in fact, VDGR stock was not an asset that Rod owned. Rod's Parents did not sell any shares of VDGR stock to Rod or the community. Rod's Parents never told Rod that there were any shares of VDGR stock that were up "for sale" that he could buy; and so, Rod didn't buy what wasn't "for sale": any shares of VDGR stock.

15. **Notably absent from the exhibits, evidence and testimony at trial** is any identification or proof that Rod or the marital community owned any interest or were purchasing or otherwise acquiring a single share, let alone some 1500 shares of non-voting VDGR stock. Lori didn't testify to any value; produced no exhibits to show what value the Court should consider in including this asset in its final property division in the divorce. Rod testified he was shocked to learn that Rod's Parents had offered and permitted Rick and Karen to each purchase 1500 shares of non-voting shares of VDGR stock.

16. The excerpts from the trial transcript, as summarized below, confirm that Petitioner argued that the \$2 million dollar promissory note for the money borrowed from VDGR and Rod's Parents as Rod and Lori's share of start-up capital in forming Midvale, was an invalid debt; which launched Petitioner's efforts to delve into the "complexity" of the businesses and estate planning affairs of Rod's **Parents** by arguing they were using their businesses to conceal assets for Rod or the community from the Court.

17. During the trial, Judge McCarthy conducted an *in camera* inspection of the Maxine 2012 Trust, created **after** the 2011 separation of the parties, and found it to be irrelevant, treating descendants equally, and ruled that it was inadmissible. By the next morning, Judge McCarthy, *sua sponte* reversed himself, unsealed the Maxine 2012 Trust, marked it as Court's Exhibit and admitted it as evidence, with a copy to each party.

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1 18. After a two-week continuance of trial, the expert witnesses who were called to testify and
 2 explain the provisions of the Maxine 2012 Trust only created more confusion and
 3 "possibilities". It made clear: that Dick Van de Graaf had created the Trust as Trustor;
 4 and Maxine Van de Graaf was the Trustee, and the life-time beneficiary. Rod didn't
 5 have any ownership interest in VDGR and wasn't buying non-voting shares of VDGR
 6 stock.

7 19. Dick Van de Graaf was described in testimony as the patriarchal head of the family,
 8 wielding total and tyrannical control over all his business and financial affairs, as well as
 9 his personal and family affairs, and as prone to making random and harsh decisions on a
 10 whim.

11 20. In closing argument, Petitioner's counsel stated: " ...*this is the drill. The father [Dick]*
 12 *controls everything.... "I, **Dick Van de Graaf**, as my separate property..."*

13 21. The record is replete with examples of petitioner's judgmental references to the "mythical
 14 figure", Dick Van de Graaf. The following supporting excerpts from trial transcripts
 15 highlight portions of argument and testimony demonstrating the extreme efforts to bring
 16 the Senior Van de Graafs into the dissolution, and which the Court unfortunately and
 17 erroneously accepted¹.

18 **SUPPORTING EXCERPTS FROM TRIAL TRANSCRIPTS:**

- 19 • [RP 204]: Mr. Hazel does not issue a subpoena to Maxine Van de Graaf to testify at
 20 trial; and had no intention of doing so, even though Maxine attended the trial
 21 proceedings almost daily.
- 22 • [RP 207-208]: Mr. Hazel, in his opening statement at trial, contends that he will
 23 introduce significant information about Van de Graaf Ranches, Inc., ["VDGR"], which is
 24 owned by Rod's parents, Dick and Maxine Van de Graaf; that Midvale Cattle Co [MCC]

25
 26
 27 ¹ The references to the Report of Proceedings are given for consistency with the transcripts submitted to the Court of
 Appeals; copies of the RP [page#] are attached for the convenience of the trial court.

has a "close relationship" with VDGR; and that the \$2million promissory note signed by Rod and Lori for money borrowed to start up MCC, should be valued at zero.

- [RP 209]: Mr. Hazel continues, that based on the change in the estate tax law, "What Dick and Maxine did --- and this will be through the testimony of Rick Van de Graaf" [Mr. Hazel admits he has no intention of having Maxine or Dick testify at trial]; Also that "Dick Van de Graaf rules with an iron fist..."
- [RP 210]: Mr. Hazel alerts the Court there will be an "estate planning issue" [ie., the plans for the estates of Dick and Maxine Van de Graaf, Rod's parents]. Ms. Comins Rick interrupts to advise she is reserving her Motion in Limine to exclude the parents' estate planning, "because they're not dead yet..." Mr. Hazel continues to postulate how VDGR is being "purchased" by Rick, Rod and Karen, each owning a 1/3 interest, "but to delay consummation until the divorce is completed" by putting the purchase of stock into a trust.
- [RP 211]: "Dick Van de Graaf will maintain control of VDGR. But ownership during the pendency of this proceeding is 1/3 Rick, 1/3 Karen and 1/3 Rod. The relevance of that is that the obligation to pay this \$2million is essentially to pay it to himself..."
- [RP 212-213]: Mr. Hazel asserts that acquisition of shares of non-voting stock in VDGR is paid for by MCC's sale of manure. "Dick Van de Graaf has decided he owns it and MCC purchases it..." Mr. Hazel continues..."The payments for the ...manure are paid to VDGR, which in turn puts it into these **trusts**, which in turn pay it out in satisfaction of these notes...That's for the purchase, not the \$2 million...That's to buy into Van de Graaf Ranches..."
- [RP 214]: Respondent's Motion in Limine to exclude testimony about VDGR and the estate planning of Rod's Parents, who are not dead yet, further explains that the trusts to which Mr. Hazel is alluding to don't exist. Rod doesn't own any interest in VDGR; the debt of \$2million is to be repaid by Rod and Lori...

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- 1 • [RP 215-216]: Ms. Comins Rick continuing discussion that an expectation of inheritance
2 cannot be considered in making a property division...The Court: ...Mr. Hazel's
3 argument is that this \$2million promissory note is a sham...and isn't that relevant for my
4 purposes of determining the value of the community?
- 5 • [RP 217]: "...Mr. Hazel's talking about some theoretical other trust that ...Dick Van de
6 Graaf has created... and unless Dick Van de Graaf is going to be testifying that, yes,
7 I've got these trusts, the rest is hearsay, because we don't have any evidence
8 whatsoever... Mr. Hazel has this theory. **We are going to greatly expand this trial if
9 this Court is going to allow testimony on this theory...**" (emphasis added).
- 10 • [RP 218]: "...There is not a single record that Mr. Hazel has produced to show that this
11 trust that he supposedly claims exists, does exist. And he has not subpoenaed --- he
12 could have. Why not go to the [source]? I mean, if you believe that this trust exists, who
13 are you going to ask? You're going to ask Dick Van de Graaf, aren't you? And where is
14 ... Dick Van de Graaf's subpoena? Nowhere..." The court rules to allow testimony on
15 the validity of the \$2Million note because it is a significant debt chargeable to the
16 community. If not, it's something the Court needs to decide.
- 17 • [RP 1229] Mr. Hazel argued this "was a case for life time maintenance"... and that Rod
18 should have to pay maintenance to Lori forever, asking the court hold Rod
19 accountable for the private and personal financial business affairs, decisions and
20 estate planning that Rod's parents made with their money. [RP1231,1232,1233]
- 21 • [RP 1247-1251] On rebuttal closing argument, Mr. Hazel contends that the creation of
22 the "Maxine 2012 Family Trust" was solely for purposes of Rod's Parent's "hiding" stock
23 destined to be transferred to Rod after the divorce was concluded; arguing this "truth" is
24 inferred by the transfer of 30% of VDGR, INC. Non-voting stock to Rick and Karen
25 each, under the terms of a purchase/sale and promissory note to pay \$833,333 each to
26 buy the non-voting stock.
- 27 • [RP 1247] Mr. Hazel queried: "what other reason could there be to do things the way
28 they did, if not to shield the fact of this 30% transfer of Van de Graaf stock to Rod?"

- 1 • [RP1248] Mr. Hazel says: "where they really crossed the line was when we found out
2 during trial that payment for it is from an asset owned by Midvale." Mr. Hazel asks the
3 court to attribute that Rod was "hiding assets" from the court, based on Mr. Hazel's
4 frustration when Rod's Parents' refused to share their personal and business financials
5 with him [Mr. Hazel].
- 6 • [P1248] Mr. Hazel presents a convoluted discussion to justify what is the actual value of
7 VDGR; that part of VDGR was gifted at \$2.6 million, which he concedes is allowed.
8 "you get to gift and have it treated as separate property." But "the \$2.5 million, that's a
9 community asset. Subject to a debt, granted. But that isn't its real value. That's its
10 discounted value. What's it really worth?..."
- 11 • [RP 1248] Mr. Hazel answers himself: "take it at \$2.5 million discounted value.
12 Recognize that it owns 15,000 acres. Recognize that it's the largest operation in the
13 Lower Valley."
- 14 • [RP1249] Ms. Comins Rick objects to the incorrect statement: that the 15,000 acres
15 near Bickelton is not owned by VDGR; it is owned by Van de Graaf Ranch Properties,
16 LLC., a separate business entity from VDGR. These business entities are owned by
17 Rod's Parents; not by Rod and Lori. Mr. Hazel could care less, dismissing there exist
18 distinct entities with: ***"it's splitting hairs...that's splitting hairs, Your Honor."***
(emphasis, mine).
- 19 • [P1250] Mr. Hazel elaborates on his theory that this dissolution case really has Dick
20 Van de Graaf and his assets as central figures: " ...this is the drill. The father [Dick]
21 controls everything. And their view of the community laws, this is a couple that we know
22 have been married for 50 years. He defines in his trust agreements —his interest in the
23 VDGR, INC as his separate property. That's the thinking. That's what it says in all those
24 trusts: "I, Dick Van de Graaf, as my separate property. But when it came time to make
25 the transfer, he [Dick] said: "the way it works now is the manure is Van de Graaf
26 Ranches. You will pay me a royalty." And then what they do is Van de Graaf Ranches
27 writes a check back in an identical amount equal to the stock purchase. And they then

1 give that check to Dick and Maxine. And that is credited against the \$833,000 notes.
2 [P1251]

3 22. The trial court's letter decision of November 17, 2016 ruled the \$2million note was
4 unenforceable; it was a "chimera", a gift. The Court did not allow the debt to be
5 included in its final property division. The Court was also critical of Rod's arguments for
6 a credit of the separate money he contributed to the construction of the house; critical
7 of Rod's testimony that Lori's jewelry was an investment; and was critical that Rod didn't
8 agree to additional spousal maintenance. **But the court didn't find Rod to be**
9 **"intransigent" nor that Rod had engaged in "scorched earth tactics."**

10 23. VDGR filed a lawsuit to enforce repayment of the \$2 million promissory note in
11 December 16, 2016, naming Lori and Rod as defendants.

12 24. Mr. Hazel filed a copy of the VDGR Complaint in the dissolution action; as well as a
13 Notice of Appearance on Lori's behalf on January 20, 2017. The Petitioner filed her
14 Motion for Reconsideration on February 2, 2017 as a counter-measure to protect Lori
15 against a possible judgment award by the Court to Dick Van de Graaf in the VDGR
16 litigation; including requesting that \$50,000 be awarded to Lori as attorney fees to pay
17 lawyers defending her in the other VDGR litigation, although the only attorney in the
18 VDGR litigation who appeared for Lori at that time was Mr. Hazel. See **EXHIBIT 1**,
19 attached.

20 25. In June 2017 the VDGR litigation settled; including that of the approximately \$20,000
21 Lori had incurred in legal fees, all but \$5000 would be waived and paid by VDGR to
22 avoid reconsideration and appeal. See **EXHIBIT 2**, attached.

23 26. Mr. Hazel argued at the February 17, 2017, hearing that there was a plan afoot by **Dick**
24 Van de Graaf and VDGR to completely gut the Court's decision and its final property
25 awarded in its November 17, 2016 letter ruling. The Court granted the proposed
26 changes suggested by Mr. Hazel. The final Decree makes Rod solely liable for
27 repayment of any judgement awarded to collect on the \$2million note and removed Lori
28 from having any liability regarding the note. The Court also changed its original property
29 division, and now awarded the entire \$2million interest in Midvale to Rod, which was the

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security given upon signing the original \$2million note.

27. As a result of these changes, the property award dramatically increased the amount of equalization payment that Rod was ordered to pay in the Final Decree, but the Court delayed when interest would begin to accrue for 6 months, to give Rod incentive to pay off the judgment quickly. But Rod himself did not have the ability to pay off the judgment based on what the Court left him with in February, 2017, with a lump sum or otherwise.

28. Simple math: Rod would have to pay Lori about \$196,667 each month in order to take advantage of the Court's 6-month interest-free payoff incentive for the equalization judgment. This would be in addition to the \$6000 per month cash maintenance that the Court awarded to Lori for life. **Notably, the Court did not find that Rod was "intransigent" or had "engaged in scorched earth tactics" at the February 17, 2017 hearing or in entry of its Final Decree.**

29. The Court denied the fee award of \$50,000 in the final Decree for defending in the VDGR litigation, as Lori had requested in her Motion to Reconsider. However, the week after that hearing, the Court issued its Feb. 23, 2017, Order on Reconsideration. That Order required briefing only as to the issue of attorney fees for the Petitioner, and set a briefing deadline of March 3, 2017, for Respondent's Response; and March 10, 2017, for Petitioner's Reply, if any.

30. Mr. Hazel forwarded a copy of his Memorandum for Award of Petitioner's Attorney Fees to me on March 2, 2017, only one day before my Response for Respondent was due to Judge McCarthy. The opening statement of the Memorandum reformed what was the purpose for petitioner's fee award. It abandoned the original request for \$50,000 to pay Lori's attorney fees in the VDGR litigation and, instead, asked for \$58,675 to pay off the remaining balance of Petitioner's trial attorney fees owed to Mr. Hazel.

31. I recognized there were procedural irregularities created by this "reformed" Memorandum; and that no reconsideration motion had been filed asking the Court for an award of fees in the amount still owed to Mr. Hazel as petitioner's *trial* fees. Nor had any declaration been filed to support the award and the amount of fees requested by

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Memorandum. I was also aware of the past history in this case where my objections to procedural errors have been scoffed at by the Court even when granted. Respondent's Response brief was timely filed on March 3rd, as ordered. No reply on reconsideration was filed by Mr. Hazel.

32. The Court issued its letter ruling of March 14, 2017. In that short letter, the Court explained that the Petitioner's March 2nd Memorandum had been reviewed and would be adopted by the Court as the basis for its decision to award the fees and amount of fees to Petitioner. Judge McCarthy accepted the statutory and legal authority cited and commented that Petitioner's reliance on the *Friedlander* decision is "well taken". The Court's decision awarded attorney fees to Petitioner in the requested amount of \$58,675, accepting Mr. Hazel's unsworn representations at face value as to the amount he was still owed for trial fees and, implicitly concluding, that the amount was reasonable for the work done.

33. Mr. Hazel was asked to prepare written pleadings for entry consistent with the letter ruling, which Mr. Hazel did not do. Instead, an "Order:Judgment" was prepared that started with a Judgment Summary of \$58,675 as "attorney fees", added a single sentence that said Rod shall pay Lori the judgment amount, and ended with date and signature lines for parties and the Court. The scant proposed pleading wasn't served until 4 days prior to hearing.

34. At the March 31, 2017 hearing, I objected to the untimely notice, which Mr. Hazel adamantly denied, arguing he had served it earlier despite documents showing proof to the contrary. I was accused of "wasting the Court's time" when I could have "simply" called Mr. Hazel to ask for more time. The Court granted my request along with the comment to Mr. Hazel: "...it's --- you know --- it's the Respondent's prerogative to be difficult, I guess ...".

35. Also set for the March 31st hearing was the Petitioner's motion for contempt claiming Rod failed to pay spousal maintenance that was owed from May 2016 through March 2017, pre-Decree to post-Decree, in the total amount of \$44,311. Petitioner's motion did not ask for jail time as a sanction.

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- 1 36. During oral argument, the Petitioner agreed that \$6000 of the arrearage had already
2 been included as the judgment for back maintenance awarded in the Final Decree,
3 bringing the total down to \$38,311; and the Court granted a judgment in that amount.
- 4 37. During oral argument, Petitioner contended that Rod hadn't paid any maintenance since
5 the Decree had been entered; and made an oral motion that Rod be put in jail for non-
6 payment. Ignoring the lack of notice to Rod in petitioner's motion; ignoring that the
7 judgment amount of \$38,311 was back maintenance through the end of March 2017,
8 the Court appeared very receptive to the ideal of imposing jail time against Rod.
- 9 38. Judge McCarthy appeared visibly frustrated at Rod's "failure" to pay all the money he
10 owed under the judgments and orders entered over the past month, and warned Rod
11 that he needed to pay \$15,000 to Lori before the next hearing on April 14th, or "bring his
12 toothbrush because he was going to jail." Judge McCarthy issued a written order that
13 said Rod had to pay \$15,000 by next hearing date of April 14, 2017; but the written
14 order did not state 'or else you'll go to jail.'
- 15 39. Rod's defense to contempt that he did not have the present ability to pay, appeared to
16 fall on deaf ears. The Court was aware of the financial resources then available to the
17 parties, which had been laid bare and vetted at trial. The Court also knew what
18 judgment amounts Rod had been ordered to pay. The Court also had to know that Rod
19 did not have the cash resources available to him necessary to pay the back
20 maintenance amounts because the Court had awarded virtually all the liquid assets to
21 Lori in the final property division. The Court thus also had to know that the only
22 available source for such funds was **Dick** Van de Graaf.
- 23 40. I found the Court's threat to throw Rod in jail if he didn't pay the full \$15,000 for
24 maintenance by April 14th to be unduly unfair and inequitable, since the Court's
25 expectation for immediate payment was set on top of Rod's obligation to pay the
26 \$1.8million equalization plus the \$38,311 judgment for back maintenance that had
27 never been requested during trial, together with the pending judgment for \$58,675
28 awarding Lori her attorney fees to pay off the balance owed to Mr. Hazel for trial, that
29 had been set for entry that day.

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1 41. I did the math: excluding the \$15,000 ordered for maintenance; the amount of all the
2 judgments added together came to a total of \$1,896,986. And amortizing that amount
3 over the 6-month grace period that the Court believed would incentivize Rod to make a
4 quick payoff, required Rod's paying \$316,164 per month to make the payoff, or pay it all
5 in a lump sum. It seemed rather arbitrary to me for the Court to expect that Rod could
6 pay \$316,164 per month, plus an additional \$6000 per month for maintenance; starting
7 "immediately" based on the nature and amount of assets Rod received in the final
orders and the undisputed depressed state of the cattle business.

8 42. The only person who had that access to that kind of financial resource was Dick Van de
9 Graaf; NOT Rod. When the Court began its scathing introductory comments to rulings
10 at the April 14, 2017 hearing, it was clear that the Court was infuriated that the \$15,000
11 maintenance hadn't been paid; and drew no distinction between Dick Van de Graaf's
12 "ability to pay" and Rod's "inability to pay."

13 43. This put Rod in the untenable position, caught in "the cross-fire" between the Court and
14 his father. Rod couldn't borrow the \$15,000 the Court ordered him to pay; and he didn't
15 want to go to jail. Rod didn't appear at the April 14th hearing. After concluding the
16 heated oral arguments on other motions, and considering the foregoing, Judge
17 McCarthy appeared profoundly annoyed. I sat while the Judge glared in my direction as
18 he railed, for the first time in the case, that Rod was "intransigent" and had engaged in
"scorched earth tactics" that did not serve him well.

19 44. The Court vented: about how Rod claimed the house was separate property; that Rod
20 dared to even mention that Lori's jewelry was an asset worth \$114,000 when it was
21 clearly gifts given to Lori; and how Rod could even think there shouldn't be any award of
22 future maintenance, when this was a 25+ year marriage, and Lori hadn't worked and
23 had health problems. The Court's inaccurate recollection as to the facts of those
24 matters at the 2017 hearing showed the personal passions of the Court had been
25 inflamed, particularly considering his temperament at the most recent hearing in 2019.

26 45. At the April 26, 2019 hearing, I was stunned to observe that Judge McCarthy's personal
27 fury had not abated over the intervening two years and, indeed, at how the Court clearly

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directed it at **Dick** Van de Graaf.

46. The purpose of the April 26th hearing was to enter Findings as the Court of Appeals had ordered on Remand; yet, Judge McCarthy appeared to be reacting emotionally, rather than judicially, to the proposed findings submitted by the Petitioner. With very little prodding, the Court again launched into a recitation about the “house, jewelry and maintenance”, which was the basis for accusing Rod of “scorched earth tactics” and Rod’s “intransigence” but which was, in fact, directed at Dick Van de Graaf.

47. The transcript of the April 26, 2019, hearing prints the words that were said, but does not allow one to see the gestures or understand the highly emotional tones and intensity of voice used by the Court.

48. A fly on the wall would have seen the facial expressions and body language when Judge McCarthy paused while struggling to recall the reason for his prior remarks accusing Rod of “intransigence” and “scorched earth tactics” [Transcript, page 7-8]; and during the pause that followed, Mr. Hazel quietly cued the Court: “Perhaps a \$2million loan that was a chimera?” And the Court’s facial expressions visibly brightened and said: “That would be the other one.” [Transcript, page 8]

49. The fly on the wall would have seen the grand gestures of Judge McCarthy’s arms, and his voice tone increasing when talking about **Rod’s family**, and in particular, **Rod’s father: “...he was kind of like this mythic figure who was talked about but never made a physical appearance in the courtroom, just made the issues that the court had to decide and the issues that Mr. Hazel had to address incredibly more difficult...”** [April 26, 2019 Transcript, page 9-10].

50. The animus towards the Senior Mr. Van de Graaf was even more palpable now than it had been before. It seems the Court could not move past its wrath from the first go-around at the APRIL 2017 hearing, when the senior Mr. Van de Graaf had not given Rod the money to pay the amounts for back maintenance to Lori ordered by the Court. As of the APRIL 2017 hearing, the Court had to know from the property division it had just completed that Rod could not pay that from his own funds, and also knew that the Senior Mr. Van de Graaf had initiated the suit over the Note against Rod and Lori, and

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1 that the senior Mr. Van de Graaf, obviously, had not given Rod the funds to pay the
2 amounts ordered by the Court. Only at that point did "scorched earth tactics" and
3 "intransigence" appear in the case.

4 51. Other comments by the Court at the April 26, 2019, hearing are equally notable in
5 recognizing that the only "nexus" between the *dicta* about "scorched earth tactics" and
6 "intransigence" in 2017 and the signing and entry on April 14, 2017 of the
7 Order: Judgment awarding fees, is the date of the hearing when both unrelated events
8 occurred. See page 10 of the April 26, 2019 hearing transcript:

9 *...We believe Mr. Hazel is encouraging you to rely on the record that has*
10 *happened since that point primarily, especially with the contentious*
11 *hearings that we primarily, especially with the contentious hearings that we*
12 *had starting with April 14th. So we're -- I'm simply saying --*

13 But the Court interrupted counsel with

14 *THE COURT: I'm simply saying as well that the comments about scorched*
15 *earth and the other were made at the same time the order regarding*
16 *attorney's fees was signed. I think it's part of the record supporting the*
17 *award.*

18 52. Without question, the Findings entered on April 26, 2019 should be vacated. The
19 proposed Findings submitted by Respondent should have been entered instead
20 because they reflect the state of the record and the genuine reasons for the fee award
21 at the time it was made on March 14, 2017, as the undisputed record shows.

22 53. The fact the Court's anger with Rod's father boiled over at the April 14, 2017 hearing,
23 and then with expanded ferocity at the April 26, 2019 hearing, should not be used to
24 penalize and punish Rod in the dissolution action, because Rod's father is beyond the
25 reach of the Court's jurisdiction, leaving only Rod, the son, to answer.

26 54. The transfer of the Court's personal frustration with, and personal animus towards,
27 Rod's father to Rod himself is seen in the quotes from the April 26 hearing and is
28 embodied in the April 26, 2019 findings. This is made clear when they are contrasted
29 with the state of the post-trial record from November 2016 up through the March 14,
2017 letter decision, which is when the fact and amount of the fee award was made.

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DECLARATION OF JOANNE G. COMINS RICK IN SUPPORT OF
RECONSIDERATION AND CR 60 MOTION

HALSTEAD & COMINS RICK PS
PO BOX 511
PROSSER, WA 99350
(509) 786-2200

1 55. This personal animus toward a non-party that the Court applied to Rod, who *is* before
2 the Court, shows a lack of the proper judicial perspective over the actual litigants before
3 the Court and constitutes good reason why the April 26, 2019 findings must be vacated.

4 DATED ON: 11 JUNE 2019; SIGNED AT: PROSSER, WA

5 
6 JOANNE G COMINS RICK
7 WSBA NO 11589
8 ATTORNEY FOR RESPONDENT *by*
9 LIMITED REAPPEARANCE
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28 Page 17

29 DECLARATION OF JOANNE G. COMINS RICK IN SUPPORT OF
RECONSIDERATION AND CR 60 MOTION

HALSTEAD & COMINS RICK PS
PO BOX 511
PROSSER, WA 99350
(509) 786-2200

EXCERPTS OF RP_# REFERENCED IN DECLARATION

1 with counsel and with James Elliott was to the effect that
2 it was unlikely that they would be called, but it's a
3 possibility. And so as I left it with Mr. Elliott is that
4 we may see him again, if they are called in, but probably
5 not.

6 So there's still the potential that they could be called
7 as witnesses. Under the circumstances, I think -- and it's
8 standard operating procedure is potential witnesses, upon
9 the request of one of the parties, have to be excluded. So
10 I will exclude those two witnesses, and at least for the
11 petitioner's case and we can maybe revisit the issue, if
12 they haven't been called in your case in chief. Okay? So
13 the two witnesses will need to have a seat in the hallway.

14 MS. COMINS RICK: Your Honor, my understanding is that --
15 and I'm not aware that Maxine Van De Graaf has been issued a
16 subpoena by Mr. Hazel.

17 MR. HAZEL: I did not issue one to Maxine Van De Graaf.

18 THE COURT: Okay. Then I won't exclude Maxine. But
19 whoever was subpoenaed.

20 MS. COMINS RICK: Karen -- Karen Erickson Van De Graaf was
21 subpoenaed by Mr. Hazel.

22 THE COURT: Okay. Karen will have to have a seat in the
23 hallway.

24 FEMALE SPEAKER: Can I talk to (inaudible)?

25 THE COURT: No. Sorry. You have to have a seat in the

1 just because she's here, and hopefully we can clarify that
2 issue. But she will testify that the fair market value of
3 the home is \$1.4 million. There is no mortgage on that
4 property.

5 The second piece of real estate is some land up in
6 Ellensburg. That has been appraised at \$1.3 million. To
7 our knowledge, there is not debt owed on that.

8 And then the third piece of property, it's hard to
9 describe it just as their property, because it's technically
10 owned by a corporation called K2R. And the marital
11 community has a 50 percent in K2R. But all it owns is a
12 piece of real estate in the main part of Sunnyside. And it
13 has a value which we believe to be quite high.

14 But our proposal is that it simply be sold. During the
15 pendency of this case, a part of it was sold to Columbia
16 River Bank. The remaining portion of it, there have been
17 what my client believes to be an agreed effort to try to
18 sell the property. But that hasn't quite happened yet.
19 We're asking that it be sold.

20 Now, there is debt against that property. There is
21 approximately \$600,000 owed on K2R. However, that debt is
22 to Van De Graaf Ranches. And you're going to hear a lot
23 about Van De Graaf Ranches. Van De Graaf Ranches, in 2011
24 and during the course of this marriage, was owned
25 substantially by Mr. Van De Graaf's parents, who are Dick

1 and Maxine Van De Graaf. That is a separate entity from the
2 main corporate entity of this marital community. The main
3 corporate entity of this marital community is Midvale Cattle
4 Company.

5 Midvale Cattle Company has a very close relationship with
6 Van De Graaf Ranches. And that will be developed throughout
7 the testimony of this trial.

8 But the valuation of Midvale Cattle Company, there are two
9 experts. The husband's expert puts the value at 1.7
10 million. The expert for Mr. -- or Mrs. Van De Graaf, puts
11 value at \$2.3 million -- actually 2.2 and change. So 1.7
12 versus 2.2.

13 The chief issue for this trial, in my opinion -- and I
14 will alert you to it now -- is the validity of a \$2 million
15 debt supposedly owed by this marital community to either
16 Van De Graaf Ranches or Dick and Maxine Van De Graaf. It
17 will be our theory of the case that that debt should be
18 valued at zero. And the evidence we will present in support
19 of that will be the following. Midvale Cattle Company
20 was -- is a partnership for which this marital community
21 owns a one-third interest. Dick and Maxine Van De Graaf
22 have three children. Rod Van De Graaf, the respondent here,
23 is one of those children. The other two are Karen Van De
24 Graaf, who was momentarily in the courtroom, and Rick Van De
25 Graaf.

1 It was our initial thought -- at the commencement of this
2 case and for a long period of time -- that none of the
3 siblings have any interest in Van De Graaf Ranches, who is
4 the chief payee of the \$2 million note. The \$2 million debt
5 initially arose in 1991. And there will be a promissory
6 note to show it. And it says Rod and Lori promise to \$2
7 million to Dick and Maxine.

8 The note was never paid. It's been held in abeyance for
9 26 years. Periodically -- and the note called for a
10 periodic interest payments and every five years an extremely
11 large principal payment. That never happened.

12 So what they would do is just simply rewrite new notes,
13 the most recent of which, I think is in 2012 or 2013. Same
14 idea. Interest payments, which they paid, but never made
15 any of the principal payments.

16 What happened was that Dick and Maxine in 2010, there was
17 no estate tax. Well, there was an estate tax, but the law
18 radically changed in 2010.

19 What Dick and Maxine did -- and this will be through the
20 testimony of Rick Van De Graaf -- and I'll posit this time
21 to tell you that people in the Van De Graaf family do not
22 get along. And that really includes everybody. Rod's been
23 fired from his job. Rick has been fired. Dick Van De Graaf
24 rules with an iron fist.

25 The plan was that what's going to happen is they have an

1 estate planning issue.

2 MS. COMINS RICK: Your Honor, I don't mean to interrupt,
3 but I just want to reserve for the Court a motion in limine
4 to exclude the parents' estate planning, because they're not
5 dead yet. And I'll address that. And I'll let Mr. Hazel
6 continue, but I just -- I want the Court to be aware of
7 that.

8 And I'm sorry, Mr. Hazel.

9 MR. HAZEL: All right.

10 THE COURT: Go ahead.

11 MR. HAZEL: Here's the evidence. Rick Van De Graaf will
12 come in and testify, I'm tired of this not being the truth
13 and the truth not being told. The deal is I, Rick, Rod and
14 Karen, are buying a one-third interest in Van De Graaf
15 Ranches. And trusts were established in 2010, which are
16 part of both exhibit books.

17 And the idea was and is to delay consummation of that
18 transaction until this divorce is completed. And Rick will
19 testify he was party to discussions in which that was
20 specifically stated.

21 So Van De Graaf Ranches was valued for estate purposes at
22 5 million-or-so at a discounted the value. \$2.5 million was
23 treated as a gift to maximize estate tax planning.

24 The remaining balance of 2.5 million, Rick Van De Graaf
25 will tell you, is to purchase 90 percent of Van De Graaf

1 Ranches, each paying \$833,000 -- \$833,000 in the form of a
2 note, the ownership of which and payment for, I'll tell you
3 about in a minute.

4 That transaction has been consummated.

5 There was discussion of creating a new trust with Maxine
6 as the trustee for the benefit of Rod, in which his interest
7 will also be conveyed one-third ownership interest of 90
8 percent of Van De Graaf Ranches. I hesitate for a minute,
9 but I should tell you that Dick and Maxine, the Van De Graaf
10 Ranches, 90 percent of it is common stock. Ten percent is
11 voting stock.

12 Dick Van De Graaf will maintain control of Van De Graaf
13 Ranches. But ownership of Van De Graaf Ranches, during the
14 pendency of this case, is one-third Karen, one-third Rick,
15 and one-third Rod.

16 The relevance of that is that the obligation to pay this
17 \$2 million is essentially to pay it to himself. There will
18 be testimony that Rod himself has said there was never an
19 intent to pay that \$2 million. It was always just part of a
20 gift for which nobody had to pay any gift tax.

21 So that is a substantial and fundamental issue of this
22 case. And it is our belief that the evidence will support
23 the Court finding a valuation of the \$2 million at zero, the
24 \$2 million debt as zero.

25 The other assets consist of a account with UBS financial

1 in Seattle. The balance at the time of separation was
2 \$730,000. Two days after being served, Mr. Van De Graaf
3 took out approximately \$90,000. Throughout the pendency of
4 this case -- I'm not sure the exact amount. It was a large
5 amount. And I believe it was about 90. It's in the record.

6 Throughout the pendency of this case, the Court has
7 authorized withdrawals from that account to pay costs of
8 litigation and other expenses. We have both the statement
9 for what it was at separation and what it is today, but not
10 the -- the amount he withdrew clearly should be debited
11 against him.

12 Getting back to the issue of the payment of the notes,
13 Rick will testify that the way that they're doing that is
14 that Midvale Cattle Company is also in the manure business.
15 And it's a very substantial business. Who would have
16 thought?

17 But Midvale and Van De Graaf Ranches have a relationship
18 and relationship to -- have a relationship regarding the
19 manure business. It's a matter of some debate who really
20 owns the manure. The cattle for Midvale Cattle Company is
21 on land which is leased from Van De Graaf Ranches. So when
22 manure in its raw form, hits the ground, I don't know who
23 owns it. But Dick Van De Graaf has decided he owns it. So
24 Midvale Cattle Company purchases it.

25 Midvale Cattle Company also leases land in the Bickleton

1 area owned by Van De Graaf Ranches. And it's a lot of land.
2 It literally goes from the Columbia River on up to the
3 plateau. It's something like 12,000 acres. The payments
4 for the rental and the manure are paid to Van De Graaf
5 Ranches, which in turn puts it into these trusts, which in
6 turn pays it out in satisfaction of these notes. That's the
7 testimony you're going to hear. That's for the purchase,
8 not the \$2 million. That's to buy into Van De Graaf
9 Ranches.

10 We're not here to say we want half of Van De Graaf
11 Ranches. We're here for the Court to know these facts about
12 this. Great efforts have been undertaken to hide that from
13 Lori. And it was really only through Rick, who came in and
14 said, You're getting the wool pulled had over your eyes.
15 This is what's going on.

16 That is going to put him in a substantially different
17 position than her.

18 Lori, throughout the marriage, primarily has been a
19 homemaker. And you'll hear that. There's four kids. They
20 are great kids. They don't have a relationship with their
21 dad. They will testify they've heard their dad talk about
22 the note.

23 But Lori primarily has been the homemaker. She is a
24 teacher. She has taught. She periodically teaches.

25 And she also has Lyme's disease, which there will be

1 evidence about how that impacts her, how it causes her to be
2 fatigued. The boys will testify to that. She will testify
3 to that.

4 She doesn't have a long career ahead of her. She will be
5 absolutely shunned by this family. She already has been.
6 This is how it works. She is a pariah because of this. And
7 she needs extraordinary help to make it through.

8 And that's why we're here presenting the evidence that
9 we're presenting and asking the Court to apply in earnest In
10 re Marriage of Rockwell and make certain that she's okay.

11 Thank you.

12 THE COURT: Do you wish to make your opening statement?

13 MS. COMINS RICK: Well, I would like to discuss my motion
14 in limine, Your Honor, to exclude any testimony about the
15 Van De Graaf Ranches and the estate planning that went with
16 it. I have no evidence and you'll not find evidence in
17 these notebooks about any of these trusts that Mr. Hazel is
18 alluding to. I've never seen it. And we've asked for
19 discovery. So if this exists, those should have been
20 provided.

21 They don't exist. My client does not own any interest in
22 Van De Graaf Ranches. There's a debt that he and his wife
23 owe to Van De Graaf Ranches. And that is calculated at --
24 currently at 2.4 million with the note and other promissory
25 notes that have been written and are owed to Dick and Maxine

1 personally.

2 Mr. Hazel mentions Rockwell. I would remind the Court
3 that Rockwell is not a case about maintenance it's a case
4 about property division. And, quite frankly, Rockwell
5 should not apply in this case, because what Mr. Hazel is not
6 telling the Court is that Mrs. Van De Graaf here now is a
7 Lindstrand. Her parents own three fine jewelry stores in
8 Sunnyside and the Yakima area. They are quite well off on
9 their own. And she stands with her two siblings to inherit
10 from her parents, who are also in their 80s. We have not
11 brought forward that information because it is not
12 admissible in any dissolution. You cannot consider -- and
13 the Court cannot consider making the property division at
14 expectation of an inheritance.

15 If the inheritance has existed, if there has been
16 transfer, if these trusts are funded and exist and Mr. Van
17 De Graaf can say, hey, I want my money out, then the Court
18 can put it on the table to consider it.

19 THE COURT: As I understand it, Mr. Hazel's argument is is
20 that this \$2 million promissory note is a sham. So is --

21 MS. COMINS RICK: Well, that's what he's saying is --

22 THE COURT: Well, it -- that is what he's saying. And
23 isn't that relevant for my purposes of determining the
24 value --

25 MS. COMINS RICK: I think --

1 THE COURT: -- of community?

2 MS. COMINS RICK: I think that it's an interesting thing
3 to say that one is a sham, but all of the money that has
4 come from this sham isn't a sham. And all the other
5 promissory notes that have been signed are okay. It's just
6 this one that's not okay. This one is the sham. This one
7 was signed in 1990.

8 THE COURT: Yeah, but I guess my point --

9 MS. COMINS RICK: So it's --

10 THE COURT: -- is -- isn't it -- I mean, it's relevant,
11 isn't it? Whether it's a sham or not?

12 MS. COMINS RICK: I think it's -- I think that if there
13 is -- I don't know how the Court can decide if it's a sham,
14 because Dick and Maxine are still alive, and his argument is
15 premised on their estate planning. Okay? So if -- and
16 their estate planning can change tomorrow. There are no
17 trusts that exist such as Mr. Hazel is talking about.

18 We had depositions on Friday, and Mr. Hazel brought out
19 this trust. He says, Look, here's this trust. This trust
20 that he has produced are two. It's one from the Dick,
21 Max -- Dick Van De Graaf family trust to Rod and one from
22 Maxine to Rod in the funded -- in the amounts of \$10,000
23 each.

24 We've -- I've never seen the paperwork on it until
25 Mr. Hazel produced it Friday.

1 However, that amount and the fact that it is part -- that
2 it is a trust and that it has been gifted has been in these
3 pleadings from nearly day one. We've known about it.
4 That's been identified. That's never been hidden. There's
5 20,000 bucks sitting in Columbia Bank in two bank accounts.
6 And you look at my exhibits, and you'll find it. I mean,
7 we've -- we've listed it all along.

8 That's not what Mr. Hazel's talking about. Mr. Hazel's
9 talking about some theoretical other trust that Mr. Van De
10 Graaf has -- Dick Van De Graaf has created. He hasn't
11 produced any. And unless Mr. Van De Graaf -- Dick Van De
12 Graaf is going to be testifying that, yes, I've got these
13 trusts, the rest is hearsay, because we don't have any --
14 any evidence whatsoever.

15 I can speculate that Lori's parents have created this
16 trust, and they're going to leave her a billion dollars,
17 because they've got all this gold and diamonds and gems that
18 they've invested in over the years.

19 Now, I can speculate. Does that make -- does that make
20 her distribution a sham because she might get this? No.
21 And the reason it doesn't is because it's nothing but
22 speculation. Mr. Hazel has this theory.

23 We are going to greatly expand this trial if this Court is
24 going to allow testimony on this theory. There is not a
25 single document that Mr. Hazel has produced in these records

1 to show that this trust that supposedly he claims exists,
2 does exist. And he has not subpoenaed -- he could have.
3 Why not go to the source's mouth? I mean, if you believe
4 that this trust exists, who are you going to ask? You're
5 going to ask Dick Van De Graaf, aren't you?

6 And where is any -- any Dick -- where's Dick Van De Graaf
7 on the subpoena? Nowhere.

8 This note is not a sham. It is signed. It has been paid
9 back on -- and we've got records showing this --

10 THE COURT: Well, this is -- this is really -- sounds more
11 like your closing argument, rather than your opening
12 remarks.

13 MS. COMINS RICK: I'm not -- I'm still looking for a
14 motion in limine, Your Honor. And I --

15 THE COURT: I'm going to allow -- I'm going to allow
16 testimony on the issue of the validity of the \$2 million
17 note. I mean, did -- it's a significant debt chargeable to
18 the community. And if it's not real, then that's something
19 I need to decide.

20 MS. COMINS RICK: Okay. Then we're going to -- that's
21 fine. That's Court's ruling.

22 THE COURT: Okay.

23 OPENING STATEMENT BY MS. COMINS RICK

24 MS. COMINS RICK: In terms of responding to an opening
25 here, more, I've covered the Rockwell issue.

1 asset of Midvale which is funding the purchase of the stock
2 of Van De Graaf Ranches.

3 That's a fact. That is unrebutted. There was no
4 challenge to that. Rod Van De Graaf could have gotten up
5 and said, "No, that's not what we're doing." Hanna
6 Keyes-Nowlin could have said otherwise. But that manure
7 belongs to Midvale, not to Van De Graaf Ranches.

8 We are -- I'm not going to spend a lot of time on the
9 personal property issues except to point out to you that
10 Mr. Van De Graaf got up and said, "Oh, this is my separate
11 property. This is my separate property. Yeah, I bought
12 this." And then he blurts out, "Well, I actually don't pay
13 for any of my hunting things. The company pays for it." I
14 don't need to say anymore. These were purchased by the
15 marital community, and I would urge the Court to adopt her
16 values in total.

17 We come to the issue of spousal maintenance and attorney's
18 fees. This is a case for lifetime maintenance. We know
19 Mr. Van De Graaf gets up and says, I only make this. I only
20 make that. He's not counting what the company pays for in
21 his hunting expeditions, which have included Africa, which
22 include an extremely large number of animal heads that are
23 very expensive to do.

24 His income has averaged, at least for the first number of
25 months, according to our exhibit about \$14,000 per month

1 was never valued by either of those evaluators. They never,
2 neither of them, picked out manure as an asset, because it
3 was gone by then, used to purchase the Van De Graaf stock.

4 And then lastly, the issue of attorney's fees. I have an
5 exhibit which does not include the cost of trial
6 preparation. It does not include the cost of trial. It
7 does not include the \$15,000 owed to Mr. Grambush. And he
8 should be required to pay all of it. You left us the last
9 time with the statement that the Court would reserve the
10 issue of terms for requesting a recess. I don't know what
11 your thought about that is at this time, but what is very
12 troubling here is that -- and I'll give you an example.

13 I -- the Shields case was tried a few courtrooms down;
14 involved a similar issue where there was a trust.
15 Mr. Kennedy was on the other side. And what happened was,
16 is that it was disclosed during the course of this
17 proceeding that a trust was going to be created. And full
18 disclosure and information was given to me in advance so
19 that that issue could be prepared and adjudicated before the
20 Court, which it was.

21 And in this case, it has been the opposite of that. And I
22 will submit to you that that trust was drafted as
23 Mr. Anderton indicated. It was drafted very, very ably.
24 And although it mentions that the three kids are to be
25 treated equally, in order to avail themselves of the Crummey

1 just in distributions. Now, granted, part of that was he
2 wanted to pay his lawyer \$28,000 so he went in and just
3 wrote himself a check, but that significantly guts his
4 little financial declaration which seeks to claim that he's
5 impoverished.

6 He's supporting his girlfriend. He's buying her cell
7 phone. And he's been held in contempt of court numerous
8 times, multiple occasions because he refused to pay basic
9 expenses, including medical expenses for his ailing wife.
10 That's a fact. That's of record. So we are asking that
11 maintenance be that their incomes be divided 50-50 for the
12 remainder of their lives.

13 And I want to point out something else. Lori testified
14 that during this marriage, although she didn't work full
15 time, she busted her tail for Midvale. She did everything
16 from -- I forget the exact terminology she used, but it was
17 literally wrestling with cows. Never got a paycheck, which
18 means she has squat for social security credits. The most
19 she can get is half of whatever his is. And that's grossly
20 unfair.

21 She's 55. Who's going to hire her now? Absent your
22 intervention, she is in a world of hurt. In a divorce case
23 when there has been every effort to hide things, to shield
24 things, to create these complicated, obtuse trusts, which
25 have resulted in the loss of an asset -- which, by the way,

1 appointment, transfer the -- transfers the stock to himself.

2 Or she could have signed a notarized letter. The other
3 question I was dying to ask Hanna Keyes-Nowlin: Have you
4 been designated as an independent co-trustee and did you
5 already do that? But, of course, I wouldn't ask that
6 question because I don't know the answer. But that
7 information is certainly within this side. And the
8 questions that were asked of her were all this: Does Rod
9 today own stock in it? Well, no.

10 Well, but he might. He might very well and just not know
11 about it. But it's very, very clear that that's exactly
12 what's going to happen. Because her company has so far paid
13 \$265,000 of Midvale's money for the purchase of his 30
14 percent. Thank you.

15 THE COURT: Ms. Comins Rick?

16 MS. COMINS RICK: I guess I've never been involved in a
17 case with such -- where counsel comes in with these smoke
18 and mirror allegations and based on nothing but theory and
19 argument asks this Court to find that Mr. Van De Graaf's
20 family is entirely conspiring against this Court to hide an
21 award of assets and stock to Rod. I find this just
22 incredible beyond words.

23 This Court knows that every person on this planet has the
24 right to give and leave an inheritance or not. And you can
25 write a will and you can change that will 16 ways to Sunday,

1 here through part of the trial. Mr. Hazel could have walked
2 over and handed her a subpoena if he really wanted testimony
3 from the parents. He did not. Because having that
4 testimony doesn't allow him the flexibility of creating this
5 argument out of whole cloth that somehow these notes don't
6 exist and yet there is real money that is going through
7 (inaudible).

8 So we're asking the Court to -- I appreciate the Court's
9 time and patience. Thank you.

10 THE COURT: Anything else, Mr. Hazel?

11 MR. HAZEL: Yes, your Honor.

12 It's said that I don't have any evidence for what is
13 determined to be or claimed to be a theory. And we've been
14 waiting for seven days to have some explanation about this
15 trust. The question that I have for Your Honor and counsel
16 never answered is: What other reason would there be to do
17 things the way they did other than to shield the fact that
18 this is a transfer of 30 percent of Van De Graaf Ranch stock
19 to Rod? What other possible reason could there be?

20 You know, Hanna Keyes-Nowlin could have said there's some
21 tax reason for it. We know that's not true. Mr. Boutillier
22 could have said some other reason. The real reason is in
23 the testimony of Matt Anderton, which is reduced to its
24 simplest essence. It is absolutely consistent with what the
25 evidence is and it's not speculation.

1 The evidence is Rick heard his mother say, "Don't worry
2 about the \$2 million note. And that other 30 percent,
3 that's Rod's. We're just going to wait until the divorce is
4 over."

5 And that trust document reduced to its simple essence is
6 this: That stock, without question, that 30 percent is
7 owned by the Maxine Trust. And Maxine gets to appoint who
8 gets it. And she has said, and it's unrebutted because her
9 son Rick heard her say it, "That's Rod's after the divorce."

10 Now, if they had done everything aboveboard, we wouldn't
11 have this problem. But when they really crossed the line
12 was when we come to find out during the trial that the
13 payment for it is an asset which is owned by Midvale. The
14 manure. That's the problem. And that means the marital
15 community now has an interest in that.

16 Now, they get to gift 2.6 million. That's a gift. We'll
17 concede that. You get to gift and have it treated as a
18 separate asset. But the 2.5 million, that's a community
19 asset. Subject to a debt, granted. But that isn't its real
20 value. That's its discounted value. What's it really
21 worth? Well, we haven't had time to come in and do that.
22 But call it the 2.5 million on the discounted value.
23 Recognize it owns 15,000 acres. Recognize that it is one of
24 the largest operations in the Lower Valley.

25 MS. COMINS RICK: I'm going to object to this -- the

1 Lori is how is she going to collect what she's owed.

2 It is our position that, given the discounted value and
3 the community's payment for this stock, that she should be
4 awarded substantially all of the community assets,
5 substantially all, because he's left with 30 percent
6 ownership in Van De Graaf Ranches.

7 And it's not speculation. It's not conjecture. It's the
8 testimony. His own mother says that's his. Bring her in
9 and deny it. Bring somebody in and say, "Oh, Mr. Hazel,
10 you're just all wrong. Rick's not telling the truth. The
11 manure really always was Van De Graaf Ranches'." It wasn't.
12 It only became the property of Van De Graaf Ranches when
13 these notes were signed.

14 And, again, you can look at his testimony. It's right on
15 Page 13, the last time he was in court. The drill is: The
16 father controls everything. And their view of the community
17 property laws, this is a couple who we know to be married
18 for more than 50 years. He defines in these trust
19 agreements the -- his interest in Van De Graaf Ranches as
20 his separate property. That's the thinking.

21 That's what it says in all of those trusts: I, Dick
22 Van De Graaf, as my separate property. But when it came
23 time to make the transfer, he said, "Oh, the way it works is
24 the manure is now Van De Graaf Ranches'. You will pay me a
25 royalty." And then what they do is Van De Graaf Ranches

1 writes a check back in an identical amount equal to the
2 stock purchase. And they then give that check to Dick and
3 Maxine. And that is credited against the \$833,000 notes,
4 exactly as Hanna Keyes said in her letter.

5 And the portion of that letter that's of importance here
6 is in the letter she said: There are certain economic
7 issues going on and we need to make provision for the
8 payment of this \$333,000 notes, the three of them. They
9 have all been paid. They have all been paid through this
10 manure mechanism.

11 And the inference from the evidence is that there is a
12 letter somewhere notarized by Maxine already exercising her
13 power of appointment. And nobody brought her in to
14 contradict that. Thank you.

15 THE COURT: All right. I think, hopefully, you realize
16 you're not going to get a decision today. I think I
17 mentioned that earlier in the proceedings. I do have a lot
18 of material that I need to re-review and review and some
19 case law that I need to read.

20 And so I am going to take the matter under advisement.
21 And it is my hope and that -- actually, my expectation. I
22 like to give myself a deadline, and the deadline that I'm
23 giving to generate a written decision will be the 23rd of
24 November, which is the day before Thanksgiving. So you'll
25 get a decision from me on or before November 23.

EXHIBIT 1

FILED
JANELLE RIDDLE, CLERK

'17 JAN 20 P12:36

SUPERIOR COURT
YAKIMA CO WA

CERTIFICATE OF TRANSMITTAL

I hereby certify that we sent a copy of this to the attorney for the petitioner respondent by mail, postage prepaid, or by attorney messenger service on 1/19/17. I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Yakima, WA, D. Baille

**SUPERIOR COURT OF WASHINGTON
COUNTY OF YAKIMA**

**VAN DE GRAAF RANCHES, INC., a
Washington Corporation,**

Plaintiff,

vs.

**ROD D. VAN DE GRAAF and LORI A.
VAN DE GRAAF, husband and wife**

Defendants.

NO. 16-2-03511-39

NOTICE OF APPEARANCE

TO: The Clerk of the above entitled Court
AND TO: Van De Graaf Ranches, by and through counsel, BRYAN P. MYRE

You will please take notice that the undersigned hereby appears as the attorney of record for the above-named Defendant, Lori A. Van de Graaf, in the above-entitled action, and requests that all further pleadings and papers in this action, other than process, be served upon said attorney at the following address:

David Hazel
HAZEL & HAZEL
1420 Summitview
Yakima, WA 98902
(509) 453-9181

DATED: 1/19/17

David Hazel
DAVID HAZEL, WSBA # 7833
Attorney for the Defendant, Lori A.
Van de Graaf

NOTICE OF APPEARANCE

Page 1

EXHIBIT 2

FILED 09.10.13
JANET E. BIRCHALL CLERK

17 JUN -2 AM 1:17

SUPERIOR COURT
YAKIMA, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

VAN DE GRAAF RANCHES, INC., a
Washington Corporation,

No. 16-2-03511-39

Plaintiff,
vs.

**STIPULATED ORDER GRANTING
DEFENDANT LORI VAN DE GRAAF'S
ATTORNEYS' FEES AND COSTS**

ROD D. VAN DE GRAAF and LORI A.
VAN DE GRAAF, husband and wife,
Defendants.

THIS MATTER having come on for hearing on *Defendant Lori Van de Graaf's Motion to Dismiss and for Summary Judgment* against Plaintiff Van De Graaf Ranches, Inc., said hearing occurring on May 3, 2017; with Plaintiff appearing by and through Lyon Weigand & Gustafson PS, and Jon L. Seitz and Bryan P. Myre, Defendant Lori Van de Graaf appearing by and through Larson Berg & Perkins PLLC, and James S. Berg, and Defendant Rod Van de Graaf appearing by and through Halstead & Comins Rick, PS, and Joanne G. Comins Rick; and the Court having considered the pleadings and exhibits filed by the parties and heard arguments of counsel; and the Court entering an *Order Granting Defendant Lori Van de Graaf's Motion for Summary Judgment* as against Plaintiff ordering that Plaintiff's claim against said Defendant be dismissed with prejudice, that said Defendant be awarded her statutory attorneys' fees and statutory costs and that said Defendant

STIPULATED ORDER GRANTING DEFENDANT LORI VAN DE
GRAAF'S ATTORNEYS' FEES AND COSTS- 1
13664-02\ls\van de graaf dic\rod van de graaf

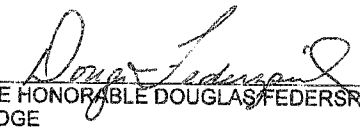
Law Offices
LYON WEIGAND & GUSTAFSON PS
Lyon Law Offices - 222 North Third Street
P.O. Box 1689
Yakima, Washington 98907
Telephone (509) 248-7220
Fax (509) 576-1883

ORIGINAL

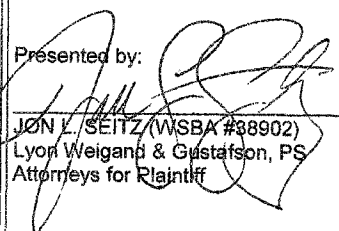
be further entitled to make application to the Court for an award of reasonable attorneys' fees and costs; and before the time by which Plaintiff must move for reconsideration of said Order and/or file a Notice of Appeal to preserve such rights of reconsideration and/or appeal, Plaintiff and Defendant Lori Van de Graaf entered into an agreement whereby Plaintiff agreed to waive all rights to move for reconsideration of the *Order Granting Defendant Lori Van de Graaf's Motion for Summary Judgment* or to appeal said Order to the Court of Appeals in return for Defendant Lori Van de Graaf waiving all claims for statutory attorneys' fees and costs and waiving all but \$5,000 of her claim for reasonable attorneys' fees and costs; and said Parties mutually stipulating to the entry of this Judgment as confirmation of their agreement to resolve any and all disputes between them arising directly or indirectly out of the matters at issue in this litigation, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Lori Van de Graaf is awarded reasonable attorneys' fees and costs in the total amount of \$5,000.00 against and payable by Plaintiff Van De Graaf Ranches, Inc., in full settlement of any and all disputes between them arising directly or indirectly out of the matters at issue in this litigation.

DATED this 12 day of June, 2017


THE HONORABLE DOUGLAS FEDERSPIEL
JUDGE

Presented by:


JON L. SEITZ (WSBA #38902)
Lyon Weigand & Gustafson, PS
Attorneys for Plaintiff

STIPULATED ORDER GRANTING DEFENDANT LORI VAN DE
GRAAF'S ATTORNEYS' FEES AND COSTS- 2
13664-02\ls\van de graaf dic\rod van de graaf

Law Offices
LYON WEIGAND & GUSTAFSON PS
Lyon Law Offices - 222 North Third Street
P.O. Box 1689
Yakima, Washington 98907
Telephone (509) 248-7220
Fax (509) 576-1883

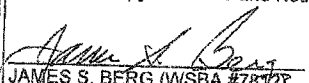
109109109



Appendix A-268

APPENDIX 1 - Page 146
Appendix A-109

1
2 Agreed to, Copy Received and Notice of Presentation Waived
3

4 
5 JAMES S. BERG (WSBA #78127)
6 Larson Berg & Perkins PLLC
7 Attorneys for Defendant Lori Van de Graaf
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STIPULATED ORDER GRANTING DEFENDANT LORI VAN DE
GRAAF'S ATTORNEYS' FEES AND COSTS-3
13064-02/lis/van de graaf dict/van de graaf

Law Offices
LYON WEIGAND & GUSTAFSON PS
Lyon Law Offices - 222 North Third Street
P.O. Box 1089
Yakima, Washington 98907
Telephone (509) 248-7220
Fax (509) 875-1883

FILED
VAN DE GRAAF, CLERK

Page 1 of 2

17 JUN -2 AUG 27

SUPERIOR COURT
YAKIMA CO WA

SUPERIOR COURT, STATE OF WASHINGTON, YAKIMA COUNTY

VAN DE GRAAF RANCHES, INC., a
Washington Corporation,

Plaintiff,

CASE NO. 16-2-03511-39

CR 2A STIPULATION AND
AGREEMENT

vs.

ROD D. VAN DE GRAAF and LORI A. VAN
DE GRAAF, husband and wife,

Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between VAN DE GRAAF
RANCHES, INC. ("VDGR") and LORI VAN DE GRAAF ("Lori"), by and through their
undersigned attorneys pursuant to CR 2A, as follows:

1. On May 3, 2017, following hearing on Lori's motion for summary judgment,
Judge Federspiel granted Lori's motion thereby dismissing her from the above-
captioned case. Said order awarded Lori her statutory costs and fees as the
prevailing party and permitted Lori to make application to the Court for
reasonable attorneys' fees and costs per the terms of the Amended Promissory
Note at issue in the litigation.
2. Lori has incurred legal fees in excess of \$20,000.00 in defense of the matter
and has served VDGR's legal counsel with a motion and supporting
memorandum and declaration for said fees and costs.
3. VDGR reached an agreement with Lori whereby VDGR will not appeal Judge
Federspiel's decision and order in exchange for an agreed upon reduction of

CR 2A STIPULATION AND AGREEMENT- 1

Law Offices
LYON WEIGAND & GUSTAFSON PS
Lyon Law Offices - 222 North Third Street
P.O. Box 1689
Yakima, Washington 98907
Telephone (509) 248-7220
Fax (509) 575-1883

ORIGINAL

Page 2 of 2

Lori's attorneys' fees in the amount of \$5,000.00 payable to Lori's legal counsel.

This agreement is of mutual benefit to VDGR and Lori.

4. VDGR agrees not to appeal this matter, and in exchange for the agreed upon
reduction of legal fees, costs and expenses, VDGR shall pay Lori's attorneys'
fees in the agreed upon sum of \$5000.00 made payable to her legal counsel's
trust account. The parties hereto stipulate to the entry of either a judgment or
agreed order for said fees.
5. The Court shall enforce the stipulations and agreements hereto, which the
parties hereto shall be bound to in the event that Rod Van de Graaf should file
an appeal. This Stipulation and Agreement may be filed with the Court, without
original signatures, by either party hereto for said purposes. And, in any action
to enforce said stipulation, a prevailing party hereto shall be entitled to
reasonable attorneys' fees and costs associated with the enforcement action.
6. This Stipulation and Agreement constitutes all of stipulations and agreements of
VDGR and Lori and their final expression of the same, and there are no other
agreements or stipulations, written or verbal, among VDGR and Lori.
7. This Stipulation and Agreement may be signed in several counterparts,
including copies or facsimiles, each of which shall be deemed an original and all
of which shall constitute one stipulation.

STIPULATED AND AGREED TO this 1 day of June, 2017.

Defendant Lori Van de Graaf by:

Plaintiff VDGR

JAMES S. BERG (WSBA #7812)
Larson Berg & Perkins PLLC
Attorneys for Defendant Lori Van de Graaf

JON L. SEITZ (WSBA #38802)
Lyon Weigand & Gustafson, PS
Attorneys for Plaintiff VDGR

CR 2A STIPULATION AND AGREEMENT- 2

Law Offices
LYON WEIGAND & GUSTAFSON PS
Lyon Law Offices - 222 North Third Street
P.O. Box 1689
Yakima, Washington 98907
Telephone (509) 248-7220
Fax (509) 575-1883

Appendix A-270

APPENDIX 1 - Page 148

Appendix A-111

**EXCERPTS OF TRANSCRIPT OF
APRIL 26, 2019 HEARING
REFERENCED IN DECLARATION**

1 SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF YAKIMA

3 -----
4 LORI VAN DE GRAAF)

5 Petitioner,)

6 And)

7 RON VAN DE GRAAF,)

8 Respondent.)
9)

No. 11-3-00982-6

10 -----
11 VERBATIM REPORT OF PROCEEDINGS
12 -----

13 BE IT REMEMBERED that the above-mentioned cause
14 came on for hearing on April 26, 2019, before the Honorable
15 Michael McCarthy, Yakima County Superior Court, Yakima,
16 Washington.

17 COUNSEL IN ATTENDANCE were Mr. David Hazel,
18 Attorney at Law, Yakima, Washington, representing the
19 Petitioner; Ms. Joanne Comins Rick, Attorney at Law,
20 Prosser, Washington, representing the Respondent.

21
22
23
24 Reported by: Joan E. Anderson
25 CSR No. 2564

Joan E. Anderson, Official Court Reporter, (509) 574-2733

1 There's scorched earth and then there's more scorched earth.

2 MS. COMINS RICK: Your Honor, I'm not here to
3 argue with you. I'm not here to challenge or try to get you
4 to change your mind on what your findings are. I just know
5 that on February 2nd a motion to reconsider was filed by the
6 petitioner. On the 21st your Honor entered an order on
7 reconsideration. You specifically wanted briefing from the
8 respondent by March 3rd on the issue of the award of fees to
9 the petitioner. Mr. Hazel filed a memorandum.

10 THE COURT: I think you're right about the
11 April 14th. I made the comment before.

12 MR. HAZEL: Your Honor, if I could make one
13 comment. Again, the phrase scorched earth is a phrase that
14 *has been used in appellate decisions, which sometimes is*
15 construed to mean just vigorous assertion of a legal right
16 that doesn't cross the line into other behavior which
17 needlessly leads to needless expense and delay and tactics.
18 I think that's the distinction here.

19 THE COURT: I think the comment on April 14th
20 included the comments about the argument that the family
21 home was Mr. Van de Graaf's separate property, that the
22 jewelry was an investment, not a gift. Therefore, it was
23 community property and the issue of maintenance.

24 Mrs. Van de Graaf had essentially been out of the
25 workforce for a couple of decades. The argument was made,

MOTION HEARING

1 well, she wasn't entitled to maintenance. She could go
2 right back into the workforce given her age and lack of work
3 experience over that time period.

4 MR. HAZEL: Perhaps a \$2 million loan that was a
5 schemer.

6 THE COURT: That would be the other one.

7 MR. HAZEL: The issue there is were those
8 reasonable positions to take or were they positions that
9 were taken simply to put up roadblocks and make this
10 proceeding more litigious than need be.

11 THE COURT: I think my point was and certainly my
12 belief is that this litigation, the trial in particular, was
13 extremely difficult. It was extremely difficult because of
14 Mr. Van de Graaf's intransigence. So I think to burden
15 Mrs. Van de Graaf with the fees is not appropriate. My
16 award of fees is based upon the issue of intransigence.

17 MR. HAZEL: I have prepared proposed findings.

18 THE COURT: I've seen them. I've read them and
19 reviewed them as Ms. Comins Rick has as well. I'm prepared
20 to sign them. Do you have an original?

21 MR. HAZEL: Yes.

22 MS. COMINS RICK: If I may point out one thing,
23 your Honor, just for the record. The discussions that
24 Mr. Hazel just had with you did not occur prior to the
25 letter decision that you made. He filed a memorandum and

MOTION HEARING

1 said these are the reasons why she's entitled to it, because
2 of the complications of the dissolution and because of the
3 information and the complexity, which increased the amount
4 of work he had to do.

5 He relied on the statute, RCW 26.09.140 and the
6 Freelander decision. That's what he submitted to your
7 Honor. Your Honor's letter of March 14th says that.

8 I'm simply making a record on it, what the timeline
9 was. That is when you made your decision. Less than eleven
10 days later Mr. Hazel prepared his proposed judgment and
11 order and you signed it on April 14th without a penny
12 changing about the facts and the award.

13 All this other stuff is absolutely -- yeah, it's part
14 of the record. We don't believe that it had any fact and
15 impact in your March 14th letter decision. Mr. Hazel
16 certainly didn't propose any of that argument in his
17 memorandum to you supporting his request for trial fees.
18 Thank you.

19 THE COURT: I think that Mr. Hazel's -- getting
20 back to the issue of the trial, it was like pulling teeth to
21 get information from your client and from your client's
22 family except for his brother, I guess, would be the only
23 one. Certainly his sister and his father, it was kind of
24 like this mythic figure who was talked about but never made
25 a physical appearance in the courtroom, just made the issues

MOTION HEARING

1 that the court had to decide and the issues that Mr. Hazel
2 had to address incredibly more difficult.

3 MS. COMINS RICK: I'm not arguing with your Honor.
4 I'm simply saying what the Court of Appeals was asking for,
5 my understanding, they're not challenging what you awarded,
6 the fact of the award or the amount. They're simply asking
7 how did you get to that point based on the record before you
8 up until that point. We believe Mr. Hazel is encouraging
9 you to rely on the record that has happened since that point
10 primarily especially with the contentious hearings that we
11 had starting with April 14th. So we're just -- I'm simply
12 saying --

13 THE COURT: I'm simply saying as well that the
14 *comments about scorched earth and the other were made at the*
15 same time the order regarding attorney's fees was signed. I
16 think it's part of the record supporting the award.

17 Mr. Hazel.

18 MR. HAZEL: Ms. Comins Rick, do you care to sign
19 the proposed findings?

20 MS. COMINS RICK: No. They're the court's orders.

21 MR. HAZEL: I'm handing up the proposed orders and
22 findings.

23 THE COURT: All right. I've signed the findings
24 of fact and conclusions of law.

25 MR. HAZEL: Thank you, your Honor.

MOTION HEARING

C E R T I F I C A T E

STATE OF WASHINGTON)

) ss.

COUNTY OF YAKIMA)

I, Joan E. Anderson, Certified Court Reporter of the Superior Court of the State of Washington in and for the County of Yakima, do hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct: That I am the Certified Court Reporter who reported/transcribed the aforementioned proceedings; that the transcript is a true and correct record of the proceedings to the best of my ability, including any changes made by the trial judge reviewing the transcript; that I am in no way related to or employed by any party in this matter, nor any counsel in this matter; and I have no financial interest in the litigation.

Dated the 10th day of May 2019.

/s/ Joan E. Anderson

Joan E. Anderson - Certified Court Reporter
Yakima County Superior Court - Rm. 311
128 N. 2nd Street
Yakima, WA 98901
Phone: (509) 574-2733
E-mail: joan.anderson@co.yakima.wa.us

FILED
TRACEY M. SLAGLE, CLERK

'19 JUN -6 P12:50

SUPERIOR COURT
YAKIMA CO. WA

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

LORI VAN DE GRAAF,

Petitioner,

v.

ROD D. VAN DE GRAAF,

Respondent.

No. 11-3-00982-6

COA No. 35133-5-III

AMENDED NOTICE OF APPEAL TO
THE COURT OF APPEALS, DIVISION
III

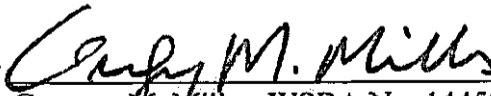
Respondent Rod D. Van De Graaf amends his notices of appeal filed March 17, 2017, May 12, 2017, and August 7, 2017 (consolidated under No. 35133-5-III) to add the orders entered on April 26, 2019 and May 8, 2019, as listed below:

- (1) Findings of Fact and Conclusions of Law Re: Attorney Fees, entered April 26, 2019,
 - (2) Order on Motion for Reconsideration, entered May 8, 2019,
- and all other orders upon which these orders depend or prejudicially affect. Copies of these two most recent specified orders are attached.

DATED this 6th day of June, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By



Gregory M. Miller, WSBA No. 14459

Jason W. Anderson, WSBA No. 30512

Attorneys for Rod D. Van De Graaf

AMENDED NOTICE OF APPEAL TO THE
COURT OF APPEALS, DIVISION III - I
VAN064-0001 5796619

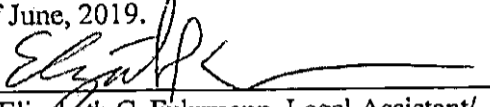
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

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: daveh@davidhazel.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☒ email ☒ Other – via COA Portal
Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8 th Avenue North Seattle, WA 98109 P: (206) 624-0974 F: (206) 624-0809 E: cate@washingtonappeals.com valerie@washingtonappeals.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☒ email ☒ Other – via COA Portal
Joanne Rick Halstead & Comins Rick PS PO Box 511 ** 1221 Meade Ave Prosser, WA 99350 P: 509-786-2200; 786-2211 F: 509-786-1128 E: jgerick@gmail.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☒ email ☒ Other – via COA Portal
Court of Appeals – Division III 500 North Cedar Street Spokane, WA 99201-1905	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other – via COA Portal

DATED this 6th day of June, 2019.


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

AMENDED NOTICE OF APPEAL TO THE
 COURT OF APPEALS, DIVISION III – 2
 VAN064-0001 5796619

CARNEY BADLEY SPELLMAN, P.S.
 701 Fifth Avenue, Suite 3600
 Seattle, WA 98104-7010
 (206) 622-8020

FILED
TRACEY H. SLAGLE, CLERK

'19 APR 26 P3:04

APR 26 2019

**SUPERIOR COURT OF WASHINGTON
COUNTY OF YAKIMA**

In re the Marriage of:

LORI VAN DE GRAAF

Petitioner,

and

ROD D. VAN DE GRAAF

Respondent.

NO. 11-3-00982-6

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
ATTORNEY FEES**

Pursuant to the Court of Appeals' March 18, 2019 Order Remanding to Trial Court for Entry of Findings and Conclusions, the Court makes the following findings of fact in support of its April 14, 2017 award of attorney fees to petitioner Lori Van de Graaf:

1. On reconsideration of its February 17, 2017 Final Divorce Order, this Court awarded attorney fees to the wife because substantial justice had not been done in light of the husband's intransigence, which increased the wife's attorney fees, and the relative financial resources of the parties (RCW 26.09.140) (*See* Dkt. No. 416, 448: CP 829, 967-68)¹;

2. In awarding attorney fees based on intransigence, this Court finds that the husband's actions throughout the litigation unnecessarily increased the wife's attorney fees, including his use of scorched earth tactics to limit the amount of property and spousal maintenance awarded to his wife of 25 years. (*See* 4/14/17 Hearing: RP 1033-34) In particular, the trial court finds that the following positions taken by the husband were unreasonable, yet the wife was nevertheless forced to defend against those positions, which unnecessarily increased her attorney fees:

¹ Clerk's Paper and Report of Proceedings cites are included for the benefit of the Court of Appeals.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: ATTORNEY FEES
Page 1**

Hazel & Hazel
ATTORNEYS & COUNSELORS AT LAW
1420 Summitview
Yakima, Washington 98902
(509) 453-9181 Facsimile 457-3756

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

May 08, 2019

In Re: LORI VAN DE GRAAF Petitioner, and ROD VAN DE GRAAF Respondent.	ORDER ON MOTION FOR RECONSIDERATION No. 11-3-00982-6
---	---

To the Judge/Commissioner:

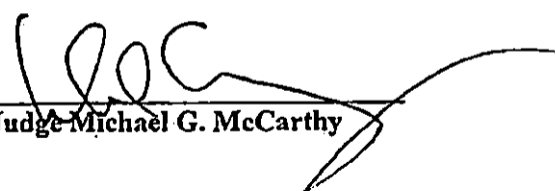
The Court Administrator, having received copies of the Motion for Reconsideration and all documents filed pursuant to this motion, sets June 06, 2019, which is 30 days from date of filing of the Motion as the designated deadline/ chamber day for the undersigned Judge to consider the merits of the Motion and make the following decision.

To the Attorneys of Record:

THIS MATTER having come before the court on or before the above chamber day, and the undersigned Judge, having reviewed the Motion for Reconsideration and supporting documents, it is **ORDERED:**

- ☒ The motion for reconsideration is denied.
- ☐ Opposing counsel shall file a reply on or before _____. The moving party may file a response no later than _____. Copies of the reply and response to the reply shall be given to the court administrator for the judge on the date of filing. If a reply or response is untimely, it/they will not be considered by the court.
- ☐ The Court requests oral argument. The moving party shall confer with opposing counsel and the court administrator to secure a mutually agreeable date for argument to be conducted within 30 days of this order.

DATED this 8 day of May, 2019.



Judge Michael G. McCarthy

FILED
JUL 15 2019

Tracey M. Stagle
YAKIMA COUNTY CLERK

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

LORI VAN DE GRAAF,

Petitioner,

v.

ROD D. VAN DE GRAAF,

Respondent.

No. 11-3-00982-6

COA No. 35133-5-III

AMENDED NOTICE OF APPEAL TO
THE COURT OF APPEALS, DIVISION
III OF JUNE 13, 2019 ORDER

Respondent Rod D. Van De Graaf amends his notices of appeal filed March 17, 2017, May 12, 2017, August 7, 2017, and June 6, 2019 (consolidated under No. 35133-5-III) to add the order entered on June 13, 2019, denying reconsideration, and all other orders upon which this order depends or prejudicially affects. A copy of the June 13, 2019, order is attached.

DATED this 15th day of July, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By

Gregory M. Miller

Gregory M. Miller, WSBA No. 14459

Jason W. Anderson, WSBA No. 30512

Attorneys for Rod D. Van De Graaf

AMENDED NOTICE OF APPEAL TO THE
COURT OF APPEALS, DIVISION III OF
JUNE 13, 2019 ORDER – I
VAN064-0001 5849461

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

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

June 12, 2019

In Re: MARRIAGE OF VAN DE GRAAF LORI VAN DE GRAAF Petitioner, and ROD VAN DE GRAAF Respondent.	ORDER ON MOTION FOR RECONSIDERATION No. 11-3-00982-6
--	---

To the Judge/Commissioner:

The Court Administrator, having received copies of the Motion for Reconsideration and all documents filed pursuant to this motion, sets July 11, 2019, which is 30 days from date of filing of the Motion as the designated deadline/ chamber day for the undersigned Judge to consider the merits of the Motion and make the following decision.

To the Attorneys of Record:

THIS MATTER having come before the court on or before the above chamber day, and the undersigned Judge, having reviewed the Motion for Reconsideration and supporting documents, it is **ORDERED:**

- ☒ The motion for reconsideration is denied.
- ☐ Opposing counsel shall file a reply on or before _____. The moving party may file a response no later than _____. Copies of the reply and response to the reply shall be given to the court administrator for the judge on the date of filing. If a reply or response is untimely, it/they will not be considered by the court.
- ☐ The Court requests oral argument. The moving party shall confer with opposing counsel and the court administrator to secure a mutually agreeable date for argument to be conducted within 30 days of this order.

DATED this 13 day of June, 2019.

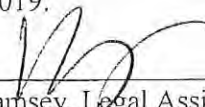

 Judge Michael G. McCarthy

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: daveh@davidhazel.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☒ email ☒ Other – via COA Portal
Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8 th Avenue North Seattle, WA 98109 P: (206) 624-0974 F: (206) 624-0809 E: cate@washingtonappeals.com valerie@washingtonappeals.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☒ email ☒ Other – via COA Portal
Joanne Rick Halstead & Comins Rick PS PO Box 511 ** 1221 Meade Ave Prosser, WA 99350 P: 509-786-2200; 786-2211 F: 509-786-1128 E: jgcrick@gmail.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☒ email ☒ Other – via COA Portal
Court of Appeals – Division III 500 North Cedar Street Spokane, WA 99201-1905	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other – via COA Portal

DATED this 15th day of July, 2019.


 Lana Ramsey, Legal Assistant to
 Gregory M. Miller

AMENDED NOTICE OF APPEAL TO THE
 COURT OF APPEALS, DIVISION III OF
 JUNE 13, 2019 ORDER – 2
 VAN064-0001 5849461

CARNEY BADLEY SPELLMAN, P.S.
 701 Fifth Avenue, Suite 3600
 Seattle, WA 98104-7010
 (206) 622-8020

FILED
TRACEY M. SLAGLE, CLERK
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA
19 MAY 14 12:09

LORI VAN DE GRAAF)

Petitioner,)

And)

RON VAN DE GRAAF,)

Respondent.)

No. 11-3-00982-6

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that the above-mentioned cause came on for hearing on April 26, 2019, before the Honorable Michael McCarthy, Yakima County Superior Court, Yakima, Washington.

COUNSEL IN ATTENDANCE were Mr. David Hazel, Attorney at Law, Yakima, Washington, representing the Petitioner; Ms. Joanne Comins Rick, Attorney at Law, Prosser, Washington, representing the Respondent.

Reported by: Joan E. Anderson
CSR No. 2564

ORIGINAL

P R O C E E D I N G S

THE COURT: All right. It looks like Van de Graaf is next here. This is Cause No. 11-3-00982-6. Mr. Hazel is here for Lori Van de Graaf, Ms. Comins Rick is here for Mr. Van de Graaf.

MR. HAZEL: Yes, your Honor.

Your Honor, as you no doubt are well aware, the Court of Appeals is inviting, I should say mandating, some findings. I listened to the oral argument that was before the Court of Appeals. One of the comments was that trial lawyers just sometimes in divorce cases hand up these orders that they write themselves, but they would really like some direction from you as to what you're thinking was when you issued the order on fees.

I think the principle dispute here is how much of a role did the scorched earth tactics play. We have put together, and I think you have our bench copy.

THE COURT: I've read it.

MR. HAZEL: I'm not here to tell you what you should have thought or what you should today think in hindsight from things that have taken place after the trial. I think the court is very well prepared to make a finding that there was great deal of scorched earth tactics in this proceeding. The letter itself refers to the paucity of information that was shared with Lori and myself during the

1 pendency of the proceeding. That, of course, is continuing
2 to this day.

3 Having in mind the court no doubt has read my
4 materials, read the transcripts, seen the proposed findings,
5 I would note that when I made my submission and noted this
6 for presentation, counsel insisted that I stick to the
7 14-day time rule even though this isn't a temporary order.
8 We voluntarily agreed to do that. We noted it for the
9 following week.

10 The rule being now that we give 14 days notice, the
11 other side is to receive a reply declaration or reply
12 documents three days prior to the hearing. It's now been
13 almost four weeks since this was originally noted. The last
14 noting was moved because she said she was ill.

15 We received only yesterday the proposed findings that
16 were submitted by Ms. Comins Rick. Then it wasn't until
17 last night after 5:00 that she submitted an additional set
18 of findings. I would ask the court to reject those
19 particularly with emphasis upon its omission regarding the
20 findings which I believe should be made and perhaps were
21 made that the husband in this action gauged in very
22 inappropriate and scorched earth tactics. Thank you.

23 THE COURT: All right. Ms. Comins Rick, respond
24 first to the timeliness of your reply.

25 MS. COMINS RICK: Your Honor, other than I've been

1 sick and actually I'm a sole practitioner and didn't get it
2 done. I apologize to the court.

3 However, these findings are the court's finding to be
4 made. They're not my findings, the respondent's findings.
5 All we did was try to give the court an opportunity to
6 basically assist the court in entering its own findings and
7 conclusions. I don't know that there was actually a time
8 deadline, so to speak, but they were filed.

9 THE COURT: The deadline wasn't 7:30 this morning.
10 That's when the last piece came in over the wire to the
11 administrator's office.

12 MS. COMINS RICK: Your Honor, we did the best we
13 could. That's all I can say.

14 THE COURT: Okay.

15 MS. COMINS RICK: I apologize if they're late.
16 Quite frankly, based on what the petitioner filed, we felt
17 we had to file a response. Otherwise we probably wouldn't
18 have done any of it.

19 THE COURT: I'm not faulting you for filing a
20 response. I'm concerned about how late your response was.

21 This case was originally -- this matter was originally
22 set for presentation on April the 5th. Today is April 26th.
23 That was three weeks ago. As a practical matter, the
24 response came in yesterday afternoon. Then there was
25 further revised proposed findings that came to the

1 administrator's office at 7:30 this morning.

2 I think Mr. Hazel's objection is well taken. I'm not
3 going to consider the materials that were filed yesterday or
4 this morning as a response to his proposed findings and
5 conclusions.

6 Go ahead, Mr. Hazel. Anything else?

7 MR. HAZEL: No, your Honor.

8 THE COURT: Is there anything else?

9 MS. COMINS RICK: No, your Honor.

10 I think what happened, if the court is looking at the
11 timeline for filing, we set it over to the 12th. Mr. Hazel
12 is right. There wasn't adequate notice particularly because
13 it was 107 pages of proposed pleadings and everything
14 attached to it. It's quite a mountain of information to go
15 through.

16 Mr. Hazel, the 12th was fine. I got sick, and I
17 apologize. I don't know what I can do about being sick.
18 The week following wasn't available for Mr. Hazel. That's
19 why it ended up on the 26th.

20 The court has until May 17th. There's no rush. You
21 know, I'm simply pointing out to the court that we are here.

22 Our position, I'm not trying to change your mind, your
23 Honor. Honestly, I think probably it's the first time I've
24 been in front of you not trying to change your mind. We're
25 simply assisting the court in presenting and making its

1 final findings and conclusions, and that's done.

2 There's nothing novel. There's nothing new here.
3 There's no other additional information that's been
4 presented that isn't in the record. We've simply put
5 together for the court what we believe is responsive to what
6 the Court of Appeals actually requested.

7 The Court of Appeals wants to know how did you get to
8 entering the fee award on March 14th by your letter
9 decision. That's what the Court of Appeals asked for. The
10 timeframe, when you made that ruling in your decision,
11 that's the timeframe for it. We don't believe whatever you
12 may have said or talked about or done after that --

13 THE COURT: No, it wasn't after. It was before.
14 My comments about scorched earth were on February 17th, a
15 month before the fee award was made.

16 MS. COMINS RICK: Your Honor, my recollection is
17 they were on April 14th. I'm not going to dispute it.
18 That's my recollection on it.

19 THE COURT: I looked it up this morning. I may
20 have said it more than once.

21 MR. HAZEL: I believe the record would show that,
22 your Honor, more than once, the phrase.

23 MS. COMINS RICK: It has certainly been a refrain
24 since the comment was made.

25 THE COURT: It's been a refrain going both ways.

1 There's scorched earth and then there's more scorched earth.

2 MS. COMINS RICK: Your Honor, I'm not here to
3 argue with you. I'm not here to challenge or try to get you
4 to change your mind on what your findings are. I just know
5 that on February 2nd a motion to reconsider was filed by the
6 petitioner. On the 21st your Honor entered an order on
7 reconsideration. You specifically wanted briefing from the
8 respondent by March 3rd on the issue of the award of fees to
9 the petitioner. Mr. Hazel filed a memorandum.

10 THE COURT: I think you're right about the
11 April 14th. I made the comment before.

12 MR. HAZEL: Your Honor, if I could make one
13 comment. Again, the phrase scorched earth is a phrase that
14 has been used in appellate decisions, which sometimes is
15 construed to mean just vigorous assertion of a legal right
16 that doesn't cross the line into other behavior which
17 needlessly leads to needless expense and delay and tactics.
18 I think that's the distinction here.

19 THE COURT: I think the comment on April 14th
20 included the comments about the argument that the family
21 home was Mr. Van de Graaf's separate property, that the
22 jewelry was an investment, not a gift. Therefore, it was
23 community property and the issue of maintenance.

24 Mrs. Van de Graaf had essentially been out of the
25 workforce for a couple of decades. The argument was made,

1 well, she wasn't entitled to maintenance. She could go
2 right back into the workforce given her age and lack of work
3 experience over that time period.

4 MR. HAZEL: Perhaps a \$2 million loan that was a
5 schemer.

6 THE COURT: That would be the other one.

7 MR. HAZEL: The issue there is were those
8 reasonable positions to take or were they positions that
9 were taken simply to put up roadblocks and make this
10 proceeding more litigious than need be.

11 THE COURT: I think my point was and certainly my
12 belief is that this litigation, the trial in particular, was
13 extremely difficult. It was extremely difficult because of
14 Mr. Van de Graaf's intransigence. So I think to burden
15 Mrs. Van de Graaf with the fees is not appropriate. My
16 award of fees is based upon the issue of intransigence.

17 MR. HAZEL: I have prepared proposed findings.

18 THE COURT: I've seen them. I've read them and
19 reviewed them as Ms. Comins Rick has as well. I'm prepared
20 to sign them. Do you have an original?

21 MR. HAZEL: Yes.

22 MS. COMINS RICK: If I may point out one thing,
23 your Honor, just for the record. The discussions that
24 Mr. Hazel just had with you did not occur prior to the
25 letter decision that you made. He filed a memorandum and

1 said these are the reasons why she's entitled to it, because
2 of the complications of the dissolution and because of the
3 information and the complexity, which increased the amount
4 of work he had to do.

5 He relied on the statute, RCW 26.09.140 and the
6 Freelander decision. That's what he submitted to your
7 Honor. Your Honor's letter of March 14th says that.

8 I'm simply making a record on it, what the timeline
9 was. That is when you made your decision. Less than eleven
10 days later Mr. Hazel prepared his proposed judgment and
11 order and you signed it on April 14th without a penny
12 changing about the facts and the award.

13 All this other stuff is absolutely -- yeah, it's part
14 of the record. We don't believe that it had any fact and
15 impact in your March 14th letter decision. Mr. Hazel
16 certainly didn't propose any of that argument in his
17 memorandum to you supporting his request for trial fees.
18 Thank you.

19 THE COURT: I think that Mr. Hazel's -- getting
20 back to the issue of the trial, it was like pulling teeth to
21 get information from your client and from your client's
22 family except for his brother, I guess, would be the only
23 one. Certainly his sister and his father, it was kind of
24 like this mythic figure who was talked about but never made
25 a physical appearance in the courtroom, just made the issues

1 that the court had to decide and the issues that Mr. Hazel
2 had to address incredibly more difficult.

3 MS. COMINS RICK: I'm not arguing with your Honor.
4 I'm simply saying what the Court of Appeals was asking for,
5 my understanding, they're not challenging what you awarded,
6 the fact of the award or the amount. They're simply asking
7 how did you get to that point based on the record before you
8 up until that point. We believe Mr. Hazel is encouraging
9 you to rely on the record that has happened since that point
10 primarily especially with the contentious hearings that we
11 had starting with April 14th. So we're just -- I'm simply
12 saying --

13 THE COURT: I'm simply saying as well that the
14 comments about scorched earth and the other were made at the
15 same time the order regarding attorney's fees was signed. I
16 think it's part of the record supporting the award.

17 Mr. Hazel.

18 MR. HAZEL: Ms. Comins Rick, do you care to sign
19 the proposed findings?

20 MS. COMINS RICK: No. They're the court's orders.

21 MR. HAZEL: I'm handing up the proposed orders and
22 findings.

23 THE COURT: All right. I've signed the findings
24 of fact and conclusions of law.

25 MR. HAZEL: Thank you, your Honor.

1 Ms. Comins Rick: Thank you, your Honor

2 THE COURT: Thank you.

3 I would like to say use I don't think I'll see the
4 Van de Graaf case again, but I don't think that's probably
5 true.

6 *(Proceedings were adjourned.)*

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C E R T I F I C A T E

STATE OF WASHINGTON)

) ss.

COUNTY OF YAKIMA)

I, Joan E. Anderson, Certified Court Reporter of the Superior Court of the State of Washington in and for the County of Yakima, do hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct: That I am the Certified Court Reporter who reported/transcribed the aforementioned proceedings; that the transcript is a true and correct record of the proceedings to the best of my ability, including any changes made by the trial judge reviewing the transcript; that I am in no way related to or employed by any party in this matter, nor any counsel in this matter; and I have no financial interest in the litigation.

Dated the 10th day of May 2019.

/s/ Joan E. Anderson

Joan E. Anderson - Certified Court Reporter
Yakima County Superior Court - Rm. 311
128 N. 2nd Street
Yakima, WA 98901
Phone: (509) 574-2733
E-mail: joan.anderson@co.yakima.wa.us

CARNEY BADLEY SPELLMAN

August 27, 2019 - 3:03 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35133-5
Appellate Court Case Title: In re the Marriage of: Lori Van de Graaf and Rod D. Van de Graaf
Superior Court Case Number: 11-3-00982-6

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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 and related
cause numbers

DECLARATION OF
JOANNE G. COMINS RICK
IN SUPPORT OF MOTION
TO SUPPELEMENT THE
APPELLATE RECORD

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, and the April 26, 2019 entry of findings as to a fee award. I am over the age of 18 years old, licensed to practice law in Washington, competent to testify, and have personal knowledge of the facts set forth in this declaration.
2. Attached hereto is the index to the appendix of trial court documents that appellate counsel for Mr. Van de Graaf is filing in conjunction with his motion to supplement the appellate record as to the limited remand ordered by this Court for entry of findings to support the trial court's April 14, 2017 attorney's fee award to Respondent herein Ms. Lori Van de Graaf. I was either served with or filed each of those documents as part of the trial court proceedings.
3. Appellate counsel for Mr. Van de Graaf filed an amended notice of appeal as to the findings and denial of reconsideration. App. A-119; App. A-123. It is my belief and understanding that these pleadings are necessary for the Court to have a full picture of the proceedings at

which the findings were entered so it can understand why the trial court erred in entering them, why they do not cure the defects in the April 14, 2017 order awarding fees to Lori Van de Graaf, and why any remand must be to a different judge. The details are in my pleadings and my declaration contained in the appendix.

4. I objected to the findings proposed by opposing counsel in writing (App. A-1-6) and orally at the hearing.

5. Following entry of the findings and conclusions by Judge McCarthy on April 26, 2019 exactly as proposed by opposing counsel (App. A-11-15), I moved for reconsideration on May 6, 2019 because it was inconsistent with the state of the record in 2017 and were the result of “passion or prejudice” on the part of the judicial officer. App. A-17-18.

6. The “Order on Reconsideration” form used by Yakima County Superior Court states that once the administrator has received the motion, the matter is calendared for the judge to decide within 30 days how to rule on it. Here the motion was summarily denied by Judge McCarthy on May 8 without calling for a response (App. A-122), even though the motion specified that it would be supplemented after receipt of the transcript from the proceeding. The transcript was not completed and filed until May 14, 2019. App. A-126.

7. I thereafter completed and filed my declaration and supplement to the reconsideration motion which focused on the hearing transcript and the state of the record in 2017, while also addressing matters in other cases in what was for me an unusually busy late spring and early

summer. The papers were styled as both a supplement to the May 6 reconsideration motion, and a motion to vacate per CR 60(b) in order to insure consideration.

8. Judge McCarthy summarily denied the papers as to the reconsideration on June 13 without calling for a response. *See App. 1-124*, underlining the “reconsideration” portion and thus indicating that the CR 60 motion had not been disposed of.

9. I thereafter contacted opposing counsel’s office and, when an early mutually available hearing date for the CR 60 motion could not be arranged, filed a motion and order to show cause without oral argument on June 28. That June 28 hearing was later stricken by the court.

10. On August 12 I called Judge McCarthy’s chambers to try and get a hearing date for the CR 60 motion and was told that he is “unavailable until further notice.” I have since learned that he out on indefinite medical leave.

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 15th day of AUGUST 2019 at PROSSER,
Washington.



JOANNE G. COMINS RICK

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: daveh@davidhazel.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8 th Avenue North Seattle, WA 98109 P: (206) 624-0974 F: (206) 624-0809 E: cate@washingtonappeals.com valerie@washingtonappeals.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Joanne Rick Halstead & Comins Rick PS PO Box 511 ** 1221 Meade Ave Prosser, WA 99350 P: 509-786-2200; 786-2211 F: 509-786-1128 E: jgcrick@gmail.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal

DATED this 27th day of August, 2019.


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

APPENDIX

	<u>Page(s)</u>
Respondent's Objection to Petitioner's Proposed Findings Conclusions re Attorney Fees on Remand Order filed April 26, 2019 (CP 2319-2324),.....	A-1 to A-6
Respondents Proposed Findings and Conclusions Re Attorney Fees on Remand Order from the Court of Appeals, filed April 26, 2019 (CP 2325-2328),.....	A-7 to A-10
Findings of Fact and Conclusions of Law Re Attorney Fees, entered April 26, 2019 (CP 2329-2333),.....	A-11 to A-15
Respondent's Motion for Reconsideration of the Trial Court's Findings Re Attorney Fees Entered on Order of Remand, filed May 7, 2019 (CP 2334-2338),.....	A-16 to A-19
Respondent's Supplemental Memorandum re Motion for Reconsideration of the Trial Court's Findings re Attorney Fees on Remand, and Motion to Vacate Order Denying Reconsideration re CR 60(b), filed June 11, 2019 (CP 2352-2397),.....	A-20 to A-66
Declaration of Joanne G. Commins Rich in Support of Reconsideration and or 60 Motion, filed June 11, 2019 (CP 2398-2449),.....	A-67 to A-118
Amended Notice of Appeal to the Court of Appeals, Division III, filed June 6, 2019 (CP ____ - ____, Index 852),.....	A-119 to A-122
Amended Notice of Appeal to the Court of Appeals, Division III, filed July 15, 2019 (CP ____ - ____, Index 870),	A-123 to A-125
Verbatim Report of Proceedings / April 26, 2019, filed May 14, 2019 (CP 2339-2351),	A-126 to A-137

CARNEY BADLEY SPELLMAN

August 27, 2019 - 3:03 PM

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Appellate Court Case Title: In re the Marriage of: Lori Van de Graaf and Rod D. Van de Graaf
Superior Court Case Number: 11-3-00982-6

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CARNEY BADLEY SPELLMAN

September 18, 2019 - 3:45 PM

Transmittal Information

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Appellate Court Case Number: 35133-5
Appellate Court Case Title: In re the Marriage of: Lori Van de Graaf and Rod D. Van de Graaf
Superior Court Case Number: 11-3-00982-6

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- jgcrick@gmail.com
- valerie@washingtonappeals.com

Comments:

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Filing on Behalf of: Gregory Mann Miller - Email: miller@carneylaw.com (Alternate Email:)

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Seattle, WA, 98104

Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20190918154354D3825928

APPENDIX B
COA No. 36282-5-III (VDG II)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Marriage of,	)	
	)	
LORI VAN DE GRAAF,	)	No. 36282-5-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ROD D. VAN DE GRAAF,	)	
	)	
Appellant.	)	

KORSMO, J. — This is Van de Graaf II. *See In re Marriage of Van de Graaf*, no. 35133-5-III (Van de Graaf I), for details. At issue is the propriety of trial court orders directing appellant Rod Van de Graaf (Rod) to pay “suit money” to respondent Lori Van de Graaf’s attorneys (Lori) to defend against the Van de Graaf I appeal. We affirm.

PROCEDURAL HISTORY

The facts are known to the parties and will not be recited here, although interested persons can find some of the information in our Van de Graaf I opinion. After five years of litigation, the trial court awarded both parties an equal seven-figure distribution of assets, although there was comparatively little in the way of liquid assets since the primary holdings were businesses and real estate. Rod was ordered to pay Lori \$6,000

per month in support and make a transfer payment of approximately \$1.17 million, in addition to paying Lori \$58,675 for attorney fees expended in the trial court. Rod appealed to this court; we upheld those awards in Van de Graaf I.

Rod had stopped paying spousal support in late 2016 and, after the decree of dissolution entered, did not make the transfer payment and did not pay the attorney fee award. As a result, in the early days of the appeal, Lori had no income. Rod later resumed paying the spousal maintenance and stayed the transfer payment and the attorney fee judgment by posting a supersedeas bond.

Lori sought \$65,000 in “suit money” from Rod to pay for her appellate attorneys. Yakima County Superior Court Commissioner Elisabeth Tutsch eventually ordered Rod to pay \$30,000 to the appellate attorneys. As a result of contempt motions, Rod made a payment of \$10,000 that he alleged was loaned to him by his sister. The remaining \$20,000 was never paid.

Meanwhile, extensive enforcement actions occurred in the trial court, requiring Lori to expend fees on attorneys in that court as well as on appeal.¹ She sought additional suit money. Commissioner Tutsch eventually ordered Rod to pay an additional \$80,000 in suit money on top of the \$30,000 previously ordered. Clerk’s Papers at 13. He

¹ Many of these actions are at issue in Van de Graaf IV.

appealed that ruling to this court. The single \$10,000 payment is the only suit money advanced by Rod to this point, leaving him \$100,000 in arrears on those orders.

This court considered this appeal without hearing argument during its March 2019 docket week.

ANALYSIS

The primary issue presented in this appeal involves the commissioner's suit money orders.² Lori also seeks her attorney fees in this court due to Rod's intransigence, while he defends that argument by insisting that he is entitled to attorney fees due to Lori's pursuit of the fees despite his inability to pay and her improper briefing in the trial court. We address first the suit money argument before jointly, although briefly, considering the attorney fee arguments.

Suit Money

Rod argues that Lori was financially able to finance her own appeal and that he is not able to do so. We defer to the trial court's factual findings to the contrary.

Advance payment of attorney fees to support an appeal is authorized by RCW 26.12.190(1) and RAP 7.2(d). *Stringfellow v. Stringfellow*, 53 Wn.2d 359, 360-361, 333 P.2d 936 (1959); *In re Parentage of J.H.*, 112 Wn. App. 486, 499, 49 P.3d 154 (2002). RCW 26.09.140 and RCW 26.12.190 authorize the court to award "suit money" on any

² The initial order was originally part of Van de Graaf I, but we have moved our consideration of that issue to this case.

basis that “may appear just and equitable” “after considering the financial resources of both parties.” An award of suit money is appropriate where the requesting party demonstrates a need for advance fees for appeal, and the other party has the ability to pay. *E.g., Baker v. Baker*, 80 Wn.2d 736, 748-749, 498 P.2d 315 (1972) (award of suit money pending appeal was not an abuse of discretion where all of the income producing community property and practically all of the parties’ liquid assets were controlled by the nonrequesting spouse); *Stringfellow*, 53 Wn.2d at 360 (trial court should have awarded suit money, alimony, and attorney fees for trial fees where husband retained control and management of the community assets awarded to wife through the use of a supersedeas bond, wife received no alimony or attorney fees at trial, and the only assets available to her were the family residence, a car, and her personal effects).

We review an award of suit money for abuse of discretion. *Bennett v. Bennett*, 63 Wn.2d 404, 417-418, 387 P.2d 517 (1963). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Rod argues that Lori received the largest liquid asset, a retirement account, making her the person most capable of paying for her appellate fees. There are multiple problems with this argument. First, the account is not a true liquid asset. The nature of a retirement account is such that when a party withdraws money prematurely from an account, significant financial penalties and taxes attach to the transaction, increasing the

party's current costs and reducing future retirement benefits. Second, Rod was the person who received the most liquid asset—his income from the family cattle business partnership with his siblings. During the post-decree litigation, he has been taking a reduced monthly draw of \$7,800 from that operation. Rod possessed the most liquid assets.

On the other side of the ledger, Rod's claim of inability to pay fell on deaf ears in the trial court. The commissioner disbelieved Rod and found him in contempt. The commissioners of both this court and the Washington Supreme Court denied his numerous emergency motions for similar reasons—Rod simply did not demonstrate his inability to pay. The sudden reduction in income resulting from his reduced monthly draw from the family business appeared suspicious, and he did not provide business records to support his claim that reduced business income necessitated the reduction. In addition, his own monthly expenses were minimal. There was testimony that the family businesses paid for Rod's housing and other expenses and there was no evidence that he had any additional expenses other than his support obligation. In addition, he was expending large sums to prosecute the appeals in this case. He also owned significant personal property.

In sum, the record reflected both that Rod had an ability to pay and that Lori did not. The decision to award suit money to her was understandable. There was no abuse of discretion.

Additionally, we believe that the trial court also was free to consider the nature of this litigation in reaching its decision. The original trial judge, the Honorable Michael McCarthy, found that Rod was intransigent and engaged in scorched earth litigation practices designed to impose financial hardship on Lori. On appeal, Rod continued to spend large sums on his attorneys, supposedly based on loans from his parents and sister. The desire to spend money he did not have while refusing to pay his court-ordered suit money obligation could be seen as just one more instance of attempting to force Lori to waste resources. This, too, would justify the suit money award.

The suit money orders were well within the discretion of the commissioner. There was no error.

Attorney Fees

We jointly consider the competing arguments concerning attorney fees on appeal. We award Lori her attorney fees for briefing of this appellate cause number due to Rod's intransigence.

Attorney fees may be awarded on appeal in dissolution cases when one party has need for an award and the other party has the ability to pay. RCW 26.09.140. They also may be awarded on appeal due to intransigence. *In re Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999); *Eide v. Eide*, 1 Wn. App. 440, 445-446, 462 P.2d 562 (1969).

In Van de Graaf I, this court awarded Lori her fees on appeal due to Rod's intransigence. We do so again here.

There is no right to appeal a civil case at public expense, except in a few very narrow circumstances. *E.g., In re Marriage of King*, 162 Wn.2d 378, 174 P.3d 659 (2007). Accordingly, most litigants who cannot afford a discretionary civil appeal either represent themselves or forego the appeal altogether. Here, Rod has chosen a different path—partial payment of appellate expenses through the largesse of his family. We use the word “partial” purposefully. Scorched earth litigation is designed to impose costs on all involved, often with the goal of leaving the winner with a pyrrhic victory. Here, Rod's efforts to extensively litigate without cost to himself and to force Lori to bear significant costs (or give up) while refusing to pay the suit money is just another example of his intransigence. He simply cannot claim poverty while pursuing expensive, discretionary litigation. No rational person would borrow and spend many times the original suit money order to challenge that award.

That conclusion, along with the trial court's rejection of his claims of inability to pay, eliminates Rod's argument that Lori has been improperly pursuing payment from him. As to his claim that Lori's trial court briefing was deficient, we see no error. More importantly, Rod has not demonstrated how the motion for additional suit money harmed his ability to defend against the claim. By that point, the trial court had already awarded the first \$30,000 in suit money, Rod still had not paid the judgment to Lori, and the court

No. 36282-5-III

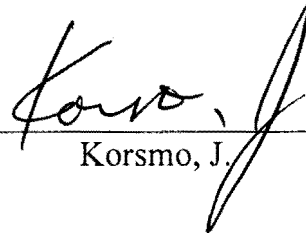
In re Marriage of Van de Graaf

and parties were well aware of the extensive litigation in both the trial court and this court concerning the decree. Referring the trial court to the files and previous rulings in the case was adequate notice of why Lori was seeking more suit money. Litigation continued with no payments from Rod and expenses for both parties mounting quickly. Rod has not demonstrated reversible error occurred.

We grant Lori her reasonable attorney fees for the briefing and motions filed under this cause number, subject to her timely compliance with RAP 18.1.

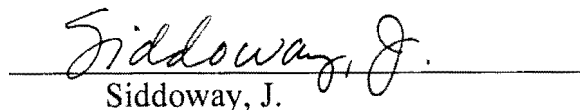
The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Korsmo, J.

WE CONCUR:


Lawrence-Berrey, C.J.


Siddoway, J.

FILED
SEPTEMBER 27, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Marriage of,	)	No. 36282-5-III
	)	
LORI VAN DE GRAAF,	)	
	)	
Respondent,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
v.	)	
	)	
ROD D. VAN DE GRAAF,	)	
	)	
Appellant.	)	
	)	

THE COURT has considered appellant's motion for reconsideration, but without considering appended materials that are not part of the record in this court, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of August 29, 2019 is hereby denied.

PANEL: Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:



ROBERT LAWRENCE-BERREY
Chief Judge

APPENDIX C
COA No. 36122-5-III (VDG III)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Marriage of,	)	
	)	
LORI VAN DE GRAAF,	)	No. 36122-5-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ROD D. VAN DE GRAAF,	)	
	)	
Appellant.	)	

KORSMO, J. — This is Van de Graaf III. *See In re Marriage of Van de Graaf*, no. 35133-5-III (Van de Graaf I), for details. This appeal from a CR 60 motion involves a boundary description. We affirm, but remand for the trial court to correct the description.

PROCEDURAL HISTORY

As stated in Van de Graaf II, the facts are known to the parties and will not be recited here, although interested persons can find some of the information in our Van de Graaf I opinion. After five years of litigation, the trial court entered a decree of dissolution that is the primary topic of Van de Graaf I.

One piece of property awarded by the decree was the Ellensburg area grazing land valued at \$1.3 million. Appellant Rod Van de Graaf (Rod) owned the property in partnership with his brother, Rick. The trial court awarded Rod's one-half interest in the property to respondent Lori Van de Graaf (Lori). This court upheld the award in Van de Graaf I despite the trial court's mischaracterization of the land as community rather than separate property.

The two men had purchased the property on contract from their parents prior to the marriage between Rod and Lori. This land, originally about 343 acres in size, was known as tax parcel 835436. A neighbor subsequently proposed a trade of a seven acre parcel of his land for a ten acre part of the brothers' grazing land in order to allow both parties to consolidate their properties on separate sides of an irrigation ditch. The deal was consummated and boundary adjustments were entered. The land acquired by the brothers in the trade is tax parcel 20588.

Trial testimony did not reveal that the Ellensburg property consisted of two parcels, although the written appraisal of the property noted the existence of the two parcels. The trial court directed that the "Ellensburg property" be given to Lori. The decree awarded Lori parcel 835436. While Van de Graaf I was pending in this court, Lori received a tax statement indicating that the property consisted of two tax parcels. She filed a CR 60 motion to correct the decree to account for both parcels.

Rod objected, contending that the trial court lacked authority to amend the decree because of the pending appeal and arguing that parcel 20588 was never before the court in the dissolution trial and was not awarded to Lori. The trial judge, the Honorable Michael McCarthy, characterized the problem as a scrivener's error and ordered that an amended decree be entered accounting for both parcels. Clerk's Papers (CP) at 27. The court also denied Rod's motion for reconsideration. CP at 36.

The amended decree listed both parcel 835436 and 20588. However, the legal description for parcel 20588 was erroneous. CP at 47. Rod timely appealed to this court. In his reply brief, Rod argued that the description for parcel 20588 actually came from parcel 20587, a parcel that Rod and Rick had transferred to their neighbor as part of the trade. In response to a question from this court, Lori admitted that the description for 20588 in the amended decree was erroneous, but argued that it was not the description for parcel 20587.

The panel that heard the first two appeals considered this appeal without hearing argument on June 10, 2019.

ANALYSIS

Rod argues that the trial court (1) erroneously granted relief under CR 60(a), (2) lacked authority to act without this court's prior permission pursuant to RAP 7.2(e), and (3) erred in considering Lori's CR 60 motion in violation of CR 7. Lori requests that we

impose attorney fees against Rod for frivolous and vexatious litigation. We consider the contentions in the order listed.

CR 60 Relief

Rod argues that the trial court committed substantive error by amending the decree to include omitted property that had not been before the court. However, we agree with the trial judge that the omission of the second (and much smaller) parcel from the decree of dissolution was a scrivener's error that simply failed to fully describe the Ellensburg property previously awarded to Lori.

CR 60(a) authorizes a trial court to correct clerical mistakes in judgments or orders at any time, either on the court's own initiative or the motion of any party. *In re Marriage of Getz*, 57 Wn. App. 602, 604, 789 P.2d 331 (1990). This court reviews a trial court's decision whether to vacate or amend a judgment or order under CR 60 for an abuse of discretion. *Shaw v. City of Des Moines*, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002). Discretion is abused when it is exercised on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In contrast, CR 60(b) allows a trial court acting on a timely motion to relieve a party from a judgment or order based on a mistake, fraud, and other circumstances. The essential difference in the two rules is whether the error was clerical (CR 60(a)) or judicial (CR 60(b)). *Marchel v. Bunger*, 13 Wn. App. 81, 84, 533 P.2d 406 (1975). If the

erroneous judgment or order accurately reflects the court's ruling, the error is judicial.

Id.; *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). If the ruling does not accurately reflect the ruling, the error is clerical. *Id.* CR 60(a) does not allow a judge to change his or her mind and reach a result contrary to the original intent. *Presidential Estates*, 129 Wn.2d at 326; *Getz*, 57 Wn. App. at 604.

There must be some support in the record for determining the judge's original intent. *Presidential Estates*, 129 Wn.2d at 326-327; *Getz*, 57 Wn. App. at 604; *Marchel*, 13 Wn. App. at 84. Nonetheless, the trial judge may draw on his or her recollection of the proceedings in determining the court's intentions at the time it entered the original judgment. *Getz*, 57 Wn. App. at 604-606.

The judge's original intent is primarily a question of fact: what did the ruling intend to accomplish? Here, that question is easily answered. Judge McCarthy noted that his intent all along was to award the entirety of Rod's share of the Kittitas County grazing land to Lori. This intent also is objectively supported by the record. Throughout the trial testimony, and in various writings, the property was consistently described as the "Ellensburg property" by the judge and both parties. *E.g.*, CP (No. 35133-5-III) at 703 (court's letter decision awarding the property to Lori), 725 (Rod's proposed findings of fact), 769 (decree). This view is corroborated further by the fact that the property appraisal from which the trial court drew its valuation correctly referenced both tax parcels.

There simply was no indication in the trial record that there were multiple properties in Kittitas County owned by Rod and Rick Van de Graaf. Thus, there is no basis for concluding that the references to, and the court's award of, the "Ellensburg property" was intended to encompass less than the entirety of Rod's interest in the Kittitas County land he held in partnership with his brother. The fact that the decree of dissolution failed to properly *describe the entire* property was not the result of a conscious judicial decision to silently withhold some of that land for Rod's benefit.

Accordingly, the trial court did not abuse its discretion by amending the property description in the dissolution decree to reflect its original award of the entire Ellensburg property to Lori. The record supports the view that the parties had always considered all of the grazing land to constitute the "Ellensburg property." The trial court's use of that same phraseology has consistently demonstrated the intent to encompass all of the partnership land. The correction of the inadequately described property in the original decree was proper under CR 60(a). This was a scrivener's error, pure and simple.

The order granting relief and amending the original decree is affirmed.

RAP 7.2(e)

Rod next argues that the trial court lacked authority to amend the dissolution decree while that judgment was on appeal in Van de Graaf I. In light of our resolution of the first issue, his argument fails.

RAP 7.2(e) provides that while a trial court has authority to consider and determine postjudgment motions while a case is on appeal, the court may not enter an order that “will change a decision then being reviewed by the appellate court” without first obtaining the permission of the reviewing court. In accordance with the plain language of the rule, the typical practice is to present a motion to the trial court and, if the court indicates its intent to enter an order changing the decision, the proponent of the change then obtains the appellate court’s permission to have the order entered. *E.g., State v. Duncan*, 111 Wn.2d 859, 865-866, 765 P.2d 1300 (1989).

The correction of a clerical error by use of CR 60(a) normally will not *change* a ruling under review by an appellate court. As just noted, a clerical error is not an expression of the judge’s true intent. Thus, the correction of a clerical error does not alter a trial judge’s ruling, but merely the expression of the ruling. Accordingly, use of CR 60(a) to correct a scrivener’s error will not necessarily require permission of the appellate court under RAP 7.2(e). *E.g., Marquis v. City of Spokane*, 76 Wn. App. 853, 862, 888 P.2d 753 (1995), *aff’d*, 130 Wn.2d 97 (1996) ; *Olsen Media v. Energy Sci. Inc.*, 32 Wn. App. 579, 587-588, 648 P.2d 493 (1982) (entry of revised findings and conclusions does not “change” a decision being reviewed so as to require approval of the Court of Appeals pursuant to RAP 7.2(e) if the revision does not require additional evidence and does not affect the judgment in a substantive manner).

The correction to the judgment and sentence did not change the judgment under review, but merely attempted (unsuccessfully) to more accurately express the description of the property awarded to Lori. At issue in Van de Graaf I was the characterization of the Ellensburg property as community or separate property, and the trial court's award of that property to Lori. The attempted correction of the property description simply did not change the judgment under review.

Under the facts of this case, Rod's RAP 7.2(e) challenge is without merit.

CR 7

Rod also challenges the trial court's failure to strike Lori's original CR 60(b) motion to correct the judgment, arguing that it was insufficient under CR 7. The trial court's conversion of the motion to a CR 60(a) proceeding moots this challenge.

As noted previously, CR 60(a) permits the court itself to initiate the correction of a scrivener's error. Here, the original CR 60(b) motion called the matter of the incomplete description in the decree to the attention of the trial judge. Recognizing the scrivener's error in the original decree, the judge ordered a correction. The adequacy of the original CR 60(b) motion is a moot point in light of the trial court's action to correct the error under CR 60(a).

Attorney Fees

Lori seeks her attorney fees on appeal, arguing that this appeal was frivolous and a further example of Rod's demonstrated intransigence. While we have great sympathy for both arguments, we decline to exercise our discretion in her favor in this instance.

We previously have upheld the trial court's intransigence finding in *Van de Graaf I* and also awarded attorney fees to Lori on that basis in both that appeal and in *Van de Graaf II*. Rod's actions in fighting the correction of the decree and appealing that decision despite the fact he would not realistically benefit from the challenge indicate the frivolous nature of the appeal and further demonstrates the intransigent attitude that has permeated this case for the better part of the past decade.

Nonetheless, mistakes were made and still need to be corrected. Despite the fact that the correct legal description was used in the transfer deed and the fact that the two parcels were identified in the appraisal report, both the decree and the amended decree have the wrong property description. While it appears to have been by accident, Rod's appeal did at least bring the latter error to light. We remand to the trial court to correct the property description in the amended decree.

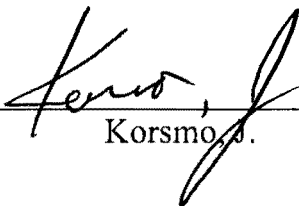
Accordingly, we decline to award Lori her actual attorney fees related to this appellate cause number.

CONCLUSION

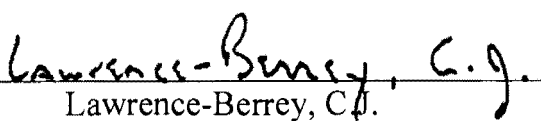
We deem Lori the substantially prevailing party in this appeal. RAP 14.2. She is entitled to her statutory costs and fees upon timely compliance with RAP 14.4. She is not entitled to her actual attorney fees.

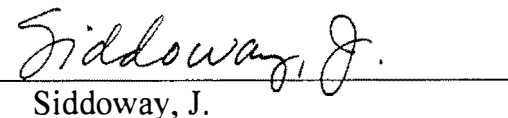
The judgment is affirmed, but the case is remanded for further correction of the scrivener's error, discussed above, in the amended decree.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Korsmo, J.

WE CONCUR:


Lawrence-Berrey, C.J.


Siddoway, J.

FILED
SEPTEMBER 27, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Marriage of,	)	No. 36122-5-III
	)	
LORI VAN DE GRAAF,	)	
	)	
Respondent,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
v.	)	
	)	
ROD D. VAN DE GRAAF,	)	
	)	
Appellant.	)	
	)	

THE COURT has considered appellant's motion for reconsideration, but without considering appended materials that are not part of the record in this court, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of August 29, 2019 is hereby denied.

PANEL: Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:



ROBERT LAWRENCE-BERREY
Chief Judge

APPENDIX D
COA No. 35292-7-III
(Consolidated with Nos. 35499-7-III,
35839-9-III, & 36283-3-III)
(VDG IV)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Marriage of,	)	
	)	
LORI VAN DE GRAAF,	)	No. 35292-7-III
	)	(Consol. with Nos. 35499-7-III,
	)	35839-9-III, & 36283-3-III)
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ROD D. VAN DE GRAAF,	)	
	)	
Appellant.	)	

KORSMO, J. — This is Van de Graaf IV. *See In re Marriage of Van de Graaf*, no. 35133-5-III (Van de Graaf I), for details. These four consolidated cases involved in this appeal generally revolve around contempt and modification rulings stemming from the dissolution decree at issue in the first appeal. We affirm the trial court and award respondent Lori Van de Graaf (Lori) her attorney fees for responding to these four consolidated cases.

PROCEDURAL HISTORY

As stated in previous opinions, the underlying facts are known to the parties and will not be recited here, although interested persons can find some of the information in our Van de Graaf I opinion. After five years of litigation, the trial court entered a decree

of dissolution that is the primary topic of Van de Graaf I. Aspects of the decree that figure into this appeal include the trial court's directives that appellant Rod Van de Graaf (Rod) pay his former wife \$6,000 per month in maintenance, contribute to the college expenses of their younger son, and make a transfer payment of approximately \$1.17 million to Lori in order to equalize the property distribution. Rod also was awarded the family home.

Rod appealed the decree (Van de Graaf I) in March 2017. He thereafter initially declined to make any of the noted payments, eventually claiming an inability to pay despite receiving several million dollars in assets under the decree. Superior court commissioner Elisabeth Tutsch ordered in June 2017, that Rod advance "suit money" to Lori in light of his failure to pay her while funding extensive post-decree litigation in the trial and appellate courts.¹

The failure to make maintenance and college support payments led Lori to seek enforcement of the decree by repeated motions for contempt. In response to the first motion, Rod moved to modify the maintenance award five weeks after the decree was filed.² In support of his motion to modify the spousal maintenance award, Rod argued that his monthly income had been reduced to \$7,800 from the \$17,000 monthly average

¹ We upheld the suit money awards in Van de Graaf II.

² He also sought to vacate the decree due to concerns about the ownership of the life insurance policies awarded to him. We rejected that argument in Van de Graaf I.

used by the court in setting the award.³ The dissolution trial judge, the Honorable Michael McCarthy, found Rod in contempt and issued a bench warrant for his arrest on April 14, 2017, due to “willful failure to pay spousal maintenance” since the previous November. Judge McCarthy also denied the motion to modify. Clerk’s Papers (CP) (no. 35133-5-III) at 963-965. The order also indicated that Rod could purge the contempt by complying with the decree for six consecutive months. The warrant was quashed three days later after Rod paid the arrears.

Commissioner Tutsch found Rod in contempt again on May 31, 2017, due to failure to pay that month’s maintenance. Rod purged that contempt order by making the payment, advising the court that he had to borrow money to do so.

Lori sought suit money from Rod in June 2017. In late August, Commissioner Tutsch awarded Lori \$30,000 of the requested \$65,000 in suit money and also found Rod in contempt for failing to make the July and August maintenance payments. Rod failed to pay any of the suit money, leading to a contempt motion in November. Rod made the same financial argument to the commissioner that he had made to Judge McCarthy in the spring—his income had been reduced to \$7,800 per month. He alleged the \$6,000

³ The financial arrangements are discussed more fully in *Van de Graaf I*. Rod and his siblings operated a business, Midvale, that managed their parents’ cattle business. The reduction in income was attributed to a decline in cattle prices, but, as we discussed in *Van de Graaf I*, a significant asset of Midvale’s was diverted to pay for Midvale’s purchase of the parents’ business operations as part of the senior Van de Graafs’ estate planning.

monthly maintenance payment to Lori left him insufficient income to pay other expenses, although he had been able to borrow funds to pay \$38,000 to Lori in order to bring his maintenance arrearages up to date. On December 7, 2017, Commissioner Tutsch found Rod⁴ in contempt of court. Rod was ordered to make the \$30,000 payment by December 22 and was also assessed \$1,000 in costs. He did not appeal that ruling.

He paid Lori's attorneys \$10,000 on December 22 that he borrowed from his sister. He also sought to supersede the judgments against him by using the former family home as collateral.⁵ Meanwhile, Lori conducted a debtor's examination as part of supplemental proceedings in January 2018. Her renewed motion for contempt was heard by Commissioner Tutsch that same month.⁶ The commissioner rejected Rod's poverty claim "on the same basis that Judge McCarthy entered the decree," concluding that "he has contemptuously, willfully disregarded the orders that had been entered." Report of Proceedings (RP) (no. 351335) at 1176. "I don't accept that he is unable to pay those orders." *Id.*

⁴ Rod's appellate attorney was found in contempt in August 2018, due to a billing records discovery dispute and was ordered to pay \$750 to Lori's trial attorney to cover expenses related to a deposition. In *Van de Graaf I*, we denied Lori's request to have Rod's attorneys pay the attorney fees owed her counsel.

⁵ A supersedeas bond subsequently was approved in February 2018.

⁶ Our record shows that financial information disclosed during the debtor's examination was filed in superior court until the following month, making it unlikely that any of it was before the court during the January contempt hearing.

On January 22, 2018, the commissioner ordered Rod to pay the remaining \$20,000 and suspended a five day jail sentence on condition that payment be made by January 31, 2018. The court also approved use of the former family home as alternate security conditioned on the filing of a supersedeas bond. The contempt order begat an unsuccessful series of “emergency” motions to this court and the Washington Supreme Court as Rod sought to stay the jail sentence. The appellate court commissioners also concluded that Rod had failed to prove his claim of inability to pay. During this period, Lori’s attorneys began seeking information concerning the amount spent by Rod for his appellate attorneys and other post-decree litigation.

Additional contempt orders were entered by Commissioner Tutsch on March 22 and July 18, 2018, with the commissioner reiterating her findings that she found the claim of inability to pay unproved. Lori demonstrated that by June 8, 2018, Rod’s appellate attorneys had been paid the sum of \$230,438.66.⁷ Lori was awarded an additional \$80,000 in suit money. In response to Lori’s motions to enforce the contempt rulings, Commissioner Tutsch ordered Rod to begin serving the previously suspended five day jail sanction. He did so beginning July 27, 2018.

Rod’s appeal from the April 14, 2017 contempt and modification orders was assigned cause no. 35292-7-III. The January 22, 2018 jail sanction order was separately

⁷ See Appendices A and B to Lori’s Reply to Motion to Dismiss filed under cause no. 35133-5-III on October 15, 2018.

No. 35292-7-III, 35499-7-III, 35839-9-III, 36283-3-III)
In re Marriage of Van de Graaf

appealed and assigned cause no. 35839-9-III. He also appealed from Judge McCarthy's July 10, 2018 order denying revision of Commissioner Tutsch's May 31 contempt order. That appeal was assigned no. 35499-7-III. Rod also appealed the July 18, 2018 incarceration order. That matter was assigned cause no. 36283-3-III.

After originally being consolidated in different manners, the four noted files were reconsolidated under 35292-7-III. The panel that heard the first three Van de Graaf cases considered the consolidated Van de Graaf IV appeals, along with issues reserved by the first case, on the court's August 12, 2019 nonargument docket.

ANALYSIS

This appeal addresses the 2017 modification ruling that was reserved from Van de Graaf I, as well as the various contempt rulings recited above. We initially note standards of review common to both issues. We will then turn to the modification ruling before considering Rod's arguments that he lacked the ability to pay and that jail was an improper punitive sanction rather than a permissible coercive sanction. Finally, we consider Lori's request for attorney fees on appeal.

Common Matters

After noting some standards governing our review of this case, we briefly turn to Lori's motion to dismiss these appeals for mootness.

The overriding issue in this appeal is a factual one. Accordingly, consideration of the rules governing review of factual findings and credibility determinations is in order.

Those rules can be clearly stated: appellate courts defer to the trial court's credibility determinations and do not reweigh evidence even if reviewing courts would have resolved conflicting evidence differently. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Stated another way, an appellate court is not in a position to find persuasive evidence that the trier of fact found unpersuasive. *Quinn*, 153 Wn. App. at 717.⁸

This court reviews a trial court's decision following a bench trial to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). "Substantial evidence" is sufficient evidence to persuade a fair-minded person of the truth of the declared premise. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000). In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). Conclusions of law are reviewed de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

⁸ These standards acknowledge that the written word does not always faithfully convey the import of spoken language, nor do words alone reflect the speaker's true meaning. "Fair speech may hide a foul heart." J.R.R. Tolkien, *The Two Towers*, 360 (Ballantine Books 1972) (1955). Whether fair words reflect a fair heart, let alone the truth of the assertion, is a matter on which we must defer to the trial judge.

Appellate courts accord trial courts deference in a number of areas, including, as noted above, the weight to be given to evidence. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In a bench trial, judges are presumed to follow the law and to consider evidence solely for proper purposes. *State v. Adams*, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970); *State v. Bell*, 59 Wn.2d 338, 360, 368 P.2d 177 (1962).

Lori argues that this appeal should be dismissed as moot, arguing that Rod's inability to pay argument has been rejected on multiple occasions by both this court and the Washington Supreme Court and that no effective relief could be granted Rod since he has served his five day jail sanction.⁹ The first of those arguments addresses either issue or claim preclusion, something that does not exist in the absence of a final judgment. *See generally*, Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985). Whether facts support interlocutory review is a totally different question than whether the evidence at trial supported the factual determination. Her first argument is unpersuasive. The second might technically be true, but the earlier orders of contempt still have meaning and, in light of the behavior to date, the trial court would benefit from confirmation of its ability to order incarceration under

⁹ Her related motion to dismiss all of the appeals due to intransigence and lack of diligence in prosecuting them was denied in *Van de Graaf I*.

these circumstances. Accordingly, we deny the motion and now turn to the issues presented by the appeal.

Modification

Rod's appeal of the denial of his motion for modification of the maintenance obligation was deferred from Van de Graaf I to this case, primarily because the maintenance issue led to the initial contempt rulings. We conclude that the trial court did not abuse its discretion.

In accordance with RCW 26.09.170(1), maintenance may only be modified upon a showing of "a substantial change in circumstances that the parties did not contemplate at the time of the dissolution decree." *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001). "The phrase 'change in circumstances' refers to the financial ability of the obligor spouse to pay vis-à-vis the necessities of the other spouse." *Id.* (quoting *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987)). Whether modification should be granted is reviewed for abuse of discretion. *In re Marriage of Drlik*, 121 Wn. App. 269, 274, 87 P.3d 1192 (2004).

Here, the trial court did not grant the petition for modification because it was not convinced that there had been a change in circumstances.¹⁰ The trial court originally had determined that Rod's monthly income was \$17,000 and ordered that he pay \$6,000 to

¹⁰ Accordingly, we need not consider whether Rod established the other requirements for modifying his maintenance obligation.

Lori every month as spousal maintenance. We upheld that award in Van de Graaf I. Only five weeks after the trial court’s oral ruling was committed to paper, Rod sought to modify based on an unanticipated change in circumstances—the reduction of his income to \$7,800 per month after he and his siblings eliminated their monthly “equity draws” from Midvale.¹¹

As we noted previously, this court cannot find persuasive evidence that the trial court determined was unpersuasive. *Quinn*, 153 Wn. App. at 717. That simple proposition controls our analysis just as it undermines Rod’s. The trial court did not believe the income was reduced. We cannot reweigh Rod’s evidence and come to a different conclusion.

That recognition is sufficient to resolve this issue (and the next one), but we also note that the evidence amply backs the trial court. The reduction in income appears to be a voluntary decision resulting from the diversion of the manure asset and the desire to fund the senior Van de Graafs’ estate plan. The voluntary choice to fund other projects is not a significant and unanticipated change in circumstances.

¹¹ Although his initial request was poorly supported, Rod later marshalled additional evidence in support of his argument during the contempt proceedings. Since we must address his more complete arguments with respect to the contempt contentions, we consider that same evidence at this time rather than limit Rod to his initial showing.

In addition, the decision to spend¹² what now is likely more than a quarter million dollars to appeal while initially claiming inability to pay any obligations under the decree and then refusing to even advance the remaining \$20,000 of the original suit money award supports the view that the alleged inability to pay is a choice rather than impecunity. This view is also consistent with the intransigent behavior demonstrated by Rod throughout this litigation. He has acted to make the process as financially difficult for Lori as possible by driving up expenses and limiting her income.

Understandably, the trial court concluded that the income reduction was voluntary rather than unanticipated. This, also, was a very tenable basis for denying the motion to modify the support obligation. The court did not err.

Inability to Pay

Rod challenges the court's contempt findings on the basis that he lacked the present ability to pay. His argument fails, largely for the reasons just noted.

Contempt of court is the intentional disobedience of a lawful court order. *In re Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995) (citing RCW 7.21.010(1)(b)). In a dissolution proceeding, the court has the authority to enforce its decree and orders in a contempt proceeding. *In re Marriage of Matthews*, 70 Wn. App. 116, 126, 853 P.2d

¹² If he genuinely is using borrowed funds for the appeal, that fact only compounds his sins. He is using a loan for a discretionary appeal instead of complying with mandatory court orders.

462 (1993).¹³ Inability to comply with the court order is a defense if the person is unable to comply through no fault of his own. *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933-934, 113 P.3d 1041 (2005). A party resisting a finding of civil contempt bears the burden of production as well as the burden of persuasion regarding any claimed inability to comply with the court's order. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). When the civil contempt involves payment of a specific sum of money, the court must find that the party has control of sufficient assets to comply with the order, although the court need not identify a specific funding source. *Britannia Holdings*, 127 Wn. App. at 934. A finding of contempt is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.3d 189 (2008).

Rod argues that the court erred in two respects: (1) it relied on the financial information from the time of the dissolution rather than his present reality, and (2) it wrongly considered his family's ability to support him as a source of payment. Neither error existed.

Rod's first argument unnecessarily focuses on his present *income* instead of his present *ability* to pay. The decree awarded him roughly \$3.9 million in assets,¹⁴

¹³ Child support and visitation issues are subject to RCW 26.09.160.

¹⁴ Since Rod had not complied with the requirement that he transfer \$1.17 million to Lori, the entire property award is properly considered in adjudging his *ability* to pay.

including the sole income-producing asset, Midvale. Even if the court had accepted Rod's claim that his income had been reduced to \$7,800 a month, it was not required to ignore the rest of his financial holdings. In considering ability to pay, the trial judge knew that Rod held assets worth nearly \$4 million, was making at least \$93,600 per year, had practically no expenses, and was spending tens of thousands of dollars to litigate the case. Those were the facts governing nearly each and every one of the contempt hearings at issue here.¹⁵ Any trial judge could find present ability to pay the initial suit money award or the monthly support obligations that were the subjects of the numerous contempt hearings.

There was no error in finding a present ability to pay. For these reasons, and those discussed previously, Rod's defense of inability to pay was also unavailing. Thus, the first challenge fails.

The second challenge is largely based on an ancient case that is neither legally nor factually apropos, *Holcomb v. Holcomb*, 53 Wash. 611, 102 P. 653 (1909). Although Rod spends a great deal of time arguing *Holcomb*, we need not spend much time with it. *Holcomb* comes from a time when the appellate courts exercised de novo consideration of the facts, something no longer done. *Thorndike*, 54 Wn.2d at 575. *Holcomb* is no

¹⁵ The house was not encumbered by the supersedeas bond until February 2018, after the initial contempt orders. Rod's remaining assets, including the \$2 million interest in Midvale, were never encumbered.

longer good law on the topic of appellate court reweighing of factual matters. Moreover, the rule of law Rod would draw from that case—that courts cannot consider borrowing capacity—did not long exist, if *Holcomb* ever even stood for that proposition. *See Croft v. Croft*, 77 Wash. 620, 624, 138 P. 6 (1914) (loan received, but not used toward dissolution decree obligations, considered evidence of ability to pay); *accord Hubbard v. Hubbard*, 130 Wash. 593, 228 P. 692 (1924) (court faulted father in contempt action for making only one attempt to borrow funds to pay decree obligations).

The trial court could have considered Rod’s ability to obtain loans to pay his obligations, whether that money came from family or commercial lenders. To the extent it was even considered here, however, it was in the context of Rod choosing to spend money he supposedly did not have on something that he was not required to do. If he could not afford the entire costs of scorched earth litigation, he should not have lit the first match.

The trial court had tenable bases on which to conclude Rod had the ability to pay each of the various contempt orders it entered. There was no abuse of discretion.

Incarceration

Rod also challenges the court’s imposition of a five day jail sanction, arguing that it was punitive rather than coercive in nature, and therefore improper. We disagree.

The primary thrust of Rod’s argument is one that we have already rejected—that the court did not consider only his ability to pay, but included that of his family members

as well. Noting the fact that Rod's family would pay the bills when push came to shove is not the same thing as looking to the family's ability to pay. The record amply supports the conclusion that *Rod* had the ability to pay.

Moreover, the contempt order truly was coercive rather than punitive. Remedial sanctions are authorized by RCW 7.21.030, also referred to as "civil contempt." *In re Det. of Young*, 163 Wn.2d 684, 693 n.2, 185 P.3d 1180 (2008). A "remedial sanction" is one which is "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3).

RCW 7.21.030(2), in relevant part, outlines the possible remedial sanctions available for contempt:

If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

- (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1)(b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.
- (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
- (c) An order designed to ensure compliance with a prior order of the court.

Punitive sanctions are authorized by RCW 7.21.040, also known as "criminal contempt." *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 105, 52 P.3d 485 (2002). "'Punitive sanction' means a sanction imposed to punish a past contempt of

court for the purpose of upholding the authority of the court.” RCW 7.21.010(2). If a court seeks to impose punitive sanctions, a prosecutor must file a complaint or information and certain other procedures must be followed that are generally consistent with a criminal case. RCW 7.21.040(2).

[A] sanction is punitive if there is a determinate sentence and no opportunity to “purge” the contempt. . . . [I]t is remedial where it is indeterminate and the contemnor is released upon complying with the court’s order. A punitive sanction generally is imposed to vindicate the court’s authority, while a remedial sanction typically benefits another party.

Rhinevault v. Rhinevault, 91 Wn. App. 688, 694, 959 P.2d 687 (1998) (internal citations omitted).

Noting the fixed nature of the penalty and the lack of protections required for criminal contempt, Rod argues that the court erred in imposing the jail sanction. Because the incarceration was not for a past offense, it was not criminal in nature.

A critical factor in distinguishing between civil and criminal contempt is the triggering mechanism for the sanction. If the purpose of the sanction is to force a person to do something, it is coercive and hence “remedial.” *In re Pers. Restraint of King*, 110 Wn.2d 793, 799-800, 756 P.2d 1303 (1988). Where a sanction is imposed for past conduct, it typically is punitive. *Id.* A civil sanction “is conditional and indeterminate, *i.e.*, where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order.” *Id.*

Here, Rod was given plenty of time to pay up. The court repeatedly considered his argument that diminished income left him without ability to afford his obligations, but was, in each instance, unconvinced and unmoved. Having determined there was an ability to pay, the court imposed a sanction that could be avoided by complying with the existing order. Since Rod had the opportunity to purge the contempt, it was civil in nature. *Rhinevault*, 91 Wn. App. at 694.

The court did not erroneously impose a criminal contempt sanction in place of a civil contempt sanction. There was no abuse of the court's considerable discretion in ascertaining Rod's ability to pay.

Attorney Fees

Lastly, we take up Lori's request that attorney fees be imposed due to Rod's intransigence. We granted a similar request in the first two Van de Graaf appeals, but denied her request in the third case. We also grant the request here.

There is little need to recite the bases for our ruling since we have done that in the first two cases. Having affirmed the trial court's determination that Rod was willfully refusing to pay his obligations, it necessarily follows that these appeals further demonstrate the intransigence previously found.¹⁶ In light of the trial court's factual

¹⁶ We are not finding the appeals to be frivolous. Although a very weak argument, Rod at least could assert that he was the victim of a financial downturn and could no longer afford the appeal he had put in motion. We also need not reach the issue of whether attorney fees should be imposed under the contempt statute, RCW 7.21.030(3).

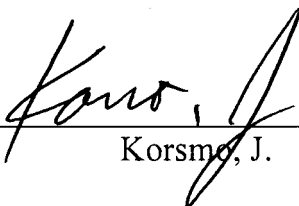
No. 35292-7-III, 35499-7-III, 35839-9-III, 36283-3-III)
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findings, these appeals are nothing more than Rod's latest attempts to avoid meeting his obligations to his former wife.

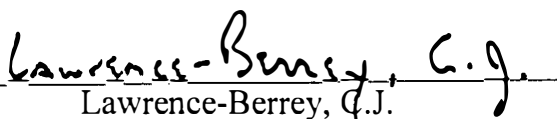
We grant Lori her reasonable attorney fees for the briefing and motions filed under these four cause numbers, subject to her timely compliance with RAP 18.1.

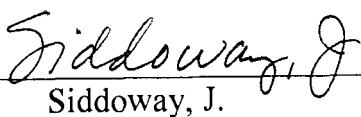
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Korsmo, J.

WE CONCUR:


Lawrence-Berrey, C.J.


Siddoway, J.

FILED
SEPTEMBER 27, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Marriage of,	)	No. 35292-7-III
	)	
LORI VAN DE GRAAF,	)	(Consol. with Nos. 35499-7-III,
	)	35839-9-III, & 36283-3-III)
Respondent,	)	
	)	
v.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
ROD D. VAN DE GRAAF,	)	
	)	
Appellant.	)	
	)	

THE COURT has considered appellant's motion for reconsideration, but without considering appended materials that are not part of the record in this court, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of August 29, 2019 is hereby denied.

PANEL: Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:



ROBERT LAWRENCE-BERREY
Chief Judge

CARNEY BADLEY SPELLMAN

October 28, 2019 - 4:41 PM

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