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Court of Appeals  
Division II  
State of Washington  
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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

DONNA LYNNE TIME, APPELLANT

v.

GREGORY MYRON TIMS, RESPONDENT

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Appeal from the Superior Court of Pierce County  
The Honorable Timothy L. Ashcraft

No. 15-3-03071-9

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**RESPONDENT OPENING BRIEF**

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TUELL & YOUNG, P.S.

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A. STATEMENT OF THE CASE.

Appellant ("Donna Tims"<sup>1</sup>) appeals the decision of a court commissioner to deny her motion to vacate a decree of dissolution and property settlement agreement on March 7, 2018. Donna also appears to appeal the decision of a trial court judge to deny her motion for revision on March 30, 2018.

Donna and Greg were married on August 6, 1993 at Virginia Beach, Virginia. CP 2. On August 12, 2015, Donna filed a Petition for Dissolution, with the assistance of attorney Tammis F. Greene. CP 77.

On December 2, 2015, attorney Tammis F. Greene, representing Donna, presented final pleadings in the Dissolution of Marriage without Children, including Findings of Fact and Conclusions of Law, Decree of Dissolution, and a sealed Property Settlement Agreement. CP 1-19. The trial court approved the final pleadings on December 2, 2015. CP 16-19.

The Property Settlement Agreement included the following award to Greg of "any and all retirement, pension and any and all other benefits incident to or resulting from Husband's employment including but not limited to his US Military Retirement pay." CP 4.

Greg participated in the dissolution proceedings pro se. CP 80.

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<sup>1</sup> For the Court's convenience, the parties will be referred to herein as Donna and Greg. No disrespect is intended.

Greg died intestate on February 5, 2017. CP 80.

On February 9, 2017, Thomas R. McKee was appointed as Administrator of the Estate of Gregory Myron Tims in Pierce County Court No. 17-4-00260-0, at the request of and for the benefit of the decedent's sister, Patricia Chalpin, the sole heir of Greg's estate. CP 80.

The major asset of the Estate of Gregory Myron Tims is a one-half interest in real property that is to be sold pursuant to the Property Settlement Agreement between Donna and Greg. CP 3. Donna owns the other one-half interest and is the current occupant of the residence. CP 3-5. The Property Settlement Agreement requires that Donna and Greg sell the residence and divide the proceeds after accounting for costs incurred by Donna in making certain improvements. CP 3-5. The Property Settlement Agreement required that the real property to be listed by March 2016. CP 3.

Between February 5, 2018 and February 12, 2018, Donna filed numerous pleadings with the Pierce County Superior Court seeking to vacate the December 2, 2015 Decree of Dissolution and Property Settlement Agreement. CP 20-65. Donna's Motion to Set Aside and Vacate Judgment/Order filed February 12, 2018 argued that she was entitled to relief under CR 60(b)(4), CR 60(b)(5), CR 60(b)(9), and CR 60(b)(11). CP 54-55.

The primary basis for Donna's claims appears to be the

allegation that Greg committed fraud by obtaining Donna's signature on a Form DD 2656-2 or about August 28, 2015 that impacted her eligibility to Survivor Benefit Plan (SBP) benefits.

The Estate of Gregory M. Tims ("Estate") responded to Donna's Motion to Set Aside and Vacate Judgment/Order as the successor in interest to Greg on March 1, 2018. CP 66-96. The Estate argued that Donna: (a) had inappropriately categorized the Decree of Dissolution and Property Settlement Agreement as a default judgment; (b) had tried to introduce testimony about statements made by the now deceased Greg contrary to the Deadman's Statute; (c) had failed to meet her burden of establishing fraud by clear and convincing evidence and was not prevented from participating in the divorce; (d) had failed to show that the Decree of Dissolution and Property Settlement Agreement were void; (e) had failed to show that Greg's death was an unavoidable casualty or misfortune that impacted the entry of the Decree of Dissolution or negotiation of the Property Settlement Agreement; and (f) had failed to show that extraordinary circumstances existed to support vacation of the court's final orders. CP 66-76.

A hearing was conducted on Donna's Motion to Set Aside and Vacate Judgment/Order before Pierce County Superior Court Commissioner Terri S. Farmer on March 7, 2018. CP 103-104. The Court Commissioner issued an Order denying Donna's Motion. This

Order states:

- There is no basis under the law to vacate the Decree dated 12/2/2015.
- Ms. Tims was represented by counsel at the time of the Decree and that counsel prepared the paperwork.  
(CP 103)

On March 13, 2018, Donna filed a Motion to Revise the commissioner's ruling. CP 105-108. On March 30, 2018, the Honorable Timothy L. Ashcraft of the Pierce County Superior Court conducted a hearing on Donna's Motion to Revise. CP 112-113. The trial court denied Donna's Motion to Revise. CP 112-113.

Donna gave notice of her appeal to this Court on May 17, 2018 designated the decision which she wanted reviewed as "an order denying motion of vacating an order rendered in Pierce County, Washington Superior Court on March 7, 2018 by the Honorable Court Commissioner Terri S. Farmer. Subsequently, an order on motion for revision was denied by the Honorable Timothy Ashcroft on March 30, 2018."

B. ARGUMENT.

1. THE COMMENCEMENT OF THE APPEAL IS NOT TIMELY AND SHOULD BE DISMISSED.

A notice of appeal should be filed within 30 days of a court's decision under RAP 5.2. Based on the Appellant's Opening Brief and Clerk's Papers, this appeal appears to be, mostly, an appeal from the original order denying Donna Tim's motion to set aside and vacate

judgment/order entered on March 7, 2018. This appeal may also include an appeal from the trial court's denial of a motion for revision entered on March 30, 2018. In either instance, this appeal is untimely and should be dismissed. Thirty days from March 30, 2018 would be Sunday, April 29, 2018, with Monday April 30, 2018 being the next business day. The date of the Notice of Appeal is May 17, 2018, which is well beyond the 30 day deadline for a timely appeal of the trial court's order denying the motion for revision.

With a few exceptions, an appeal of a trial court decision should be made within 30 days of the entry of the trial court decision. RAP 5.2(a) CR 5(e) and CR 58.

RAP Rule 5.2. Time Allowed to File Notice provides:

*(a) Notice of Appeal. Except as provided in RAP rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).*

Section (e) does not apply in this case.

- i. The Court of Appeals is Authorized to Dismiss Review of the Case.

Rule of Appellate Procedure 18.9(c) provides that "[t]he appellate

court will, on motion of a party, dismiss review of a case ... (3) except as provided in rule 18.8(b), for failure to timely file a notice of appeal...." RAP 18.9(c).

The exception provided by RAP 18.8(b) is only for extraordinary circumstances. RAP 18.8(b) provides that "[t]he appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal.... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section." RAP 18.8(b).

ii. Donna's Reasons for Filing An Untimely Appeal Are Not Due to Extraordinary Circumstances

The test to determine whether an untimely appeal has been a result of extraordinary circumstances has rarely been satisfied. Beckman ex rel. Beckman v. State, Dep't of Soc. & Health Servs., 102 Wn. App. 687, 693, 11 P.3d 313, 316 (2000), Reichelt v. Raymark Indus., Inc., 52 Wn. App. 763, 765, 764 P.2d 653, 654 (1988). In each of those cases showing extraordinary circumstances, the moving party actually filed the notice of appeal within the 30-day period but some aspect of the filing was challenged. See Weeks v. Chief of State Patrol, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982), notice timely filed, but filed in wrong court; State v.

Ashbaugh, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978), notice timely filed but rejected by court for lack of filing fee; Structurals N.W., Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 714, 658 P.2d 679 (1983), notice timely when filed within 30 days of entry of stipulated “amended” judgment. Reichelt v. Raymark Indus., Inc., 52 Wn. App. 763, 765–66, 764 P.2d 653, 654 (1988). In each case, the defective filings were upheld due to “extraordinary circumstances”, i.e., circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct. Reichelt v. Raymark Indus., Inc., 52 Wn. App. 763, 765–66, 764 P.2d 653, 654 (1988).

Donna asserts that she failed to timely file her appeal because she suffered an unspecified medical emergency and was unsuccessful in trying to negotiate a buy-out of the Estate of Greg M. Tim's one-half interest in her residence. *See* Appellant's Motion on Late Filing of Appeal. However, these explanations are not indicative of reasonable diligence on the part of the Appellant, nor do her actions show a filing of even a deficient notice within the allowable time.

iii. Request for Sanctions for Frivolous

Appeal For the Purpose of Delay.

The present Appeal is frivolous and designed to delay matters related to the probate administration of the Estate of Gregory M. Tims. The award of costs and sanctions is within the Court's authority. RAP 18.9(a), RAP 14.2. The Appellant is the current occupant of real estate, which she co-owned with the decedent. The Estate has attempted to work with the Donna and her three previous attorneys (Kurt Salmon, Gregory C. Abel, and Steven W. Davies) regarding Donna's possible purchase of the Estate's one-half interest in the real property (in order to become the sole owner), or the potential sale of the real property in its entirety to a third party. Donna has taken steps repeatedly to delay the resolution of this issue.

Under RAP 18.9(a) "[t]he appellate court on its own initiative or on motion of a party may order a party...who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay...."

The test for evaluating whether an appeal is frivolous involves several considerations, as outlined by the court in Streater v. White, 26 Wn. App. 430, 434-35, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). The primary inquiry is "whether, when considering the record as a

whole, the appeal is frivolous, i.e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." Streater v. White, 26 Wn. App. 430, 434, 613 P.2d 187, 191 (1980).

The Streater Court outlined the considerations it used in determining whether an appeal is frivolous and, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, as follows: "(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." Streater v. White, 26 Wn. App. 430, 434–35, 613 P.2d 187, 191 (1980).

Washington courts have also determined that where an appellant missed their opportunity to appeal and no longer had that right under RAP 2.2, that the appellant was unable to meet the first consideration. In re Marriage of Penry, 119 Wn. App. 799, 804, 82 P.3d 1231, 1234 (2004). The Penry Court therefore determined that when the appellant no longer

had the right to appeal, the "appeal [was] frivolous in the extreme." In re Marriage of Penry, 119 Wn. App. 799, 804, 82 P.3d 1231, 1234 (2004).

In the present case, Donna has filed her Notice of Appeal more than 30 days after the most recent trial court decision from which she appeals. The Appellant missed her opportunity to appeal and no longer has the right to appeal under RAP 2.2. Therefore, just as in the Penry matter, her appeal should be determined to be frivolous in the extreme, and sanctions imposed and costs awarded.

2. THE TRIAL COURT APPROPRIATELY DENIED DONNA'S MOTION TO REVISE.

If this Court does not dismiss the present appeal as untimely, then the trial court's decisions must be affirmed because the trial court did not abuse its discretion in denying Donna's motion for revision.

i. The Standard of Review for Denial of CR 60 Motion is Abuse of Discretion.

When a superior court judge receives a case through a motion for revision, the judge takes "jurisdiction of the entire case as heard before the commissioner." State ex rel. Biddinger v. Griffiths, 137 Wash. 448, 451, 242 P. 969 (1926). The superior court judge cannot accept new evidence, and reviews the record established before the commissioner. RCW 2.24.050. The judge reviews the law and evidence de novo. State v. Ramer, 151 Wn.2d 106, 113, 116-17, 86 P.3d 132 (2004) (de novo

standard applied even when commissioner heard live testimony). Should the judge disagree with the commissioner's disposition, the judge may issue his or her own independent factual findings and legal conclusions. *Id.* at 113, 86 P.3d 132; Iturribarria Perez v. Bazaldua Garcia, 148 Wn. App. 131, 138, 198 P.3d 539 (2009); Grieco v. Wilson, 144 Wn. App. 865, 877, 184 P.3d 668 (2008), *aff'd by In re Custody of E.A.T.W.*, 168 Wn.2d 335, 227 P.3d 1284 (2010).

Any subsequent appeal to the Court of Appeals is one that reviews the decision of the superior court judge, not the commissioner. Ramer, 151 Wn.2d at 113, 86 P.3d 132. Matter of Marriage of Lyle, 199 Wn. App. 629, 632–33, 398 P.3d 1225, 1228 (2017). The superior court's decision is then reviewed for an abuse of discretion. In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801 (2004).

A trial court's denial of a CR 60 motion to vacate and a motion for reconsideration are both reviewed for abuse of discretion. Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. In re Marriage of Horner, 151 Wn.2d 884, 893, 93 P.3d 124 (2004).

ii. The Record on Appeal is Not Adequate

for Review.

A party seeking review bears the burden to perfect the record so that the reviewing court has before it all the evidence relevant to the issues raised on appeal. RAP 9.1-9.7; State v. Vazquez, 66 Wn. App. 573, 583, 832P.2d 883 (1992).

Donna only provides a transcript of the March 7, 2018 hearing before Commissioner Terri S. Farmer as part of the Clerk's Papers, but does not include the transcript from the March 30, 2018 hearing on her motion for revision before the Honorable Timothy L. Ashcraft. Moreover, Donna does not cite to any part of the hearing before Judge Ashcraft to argue or establish that the court abused its discretion in denying her motion for revision. Since, any subsequent appeal to the Court of Appeals is one that reviews the decision of the superior court judge, not the commissioner, the record on appeal is not adequate for review. Donna has failed to provide any support for a basis to substantiate a finding that the trial court abused its discretion in considering Donna's motion for revision.

iii. Finality in Family Law Cases.

Moreover, appellate courts are reluctant to change the trial court's decision in family law cases absent abuse of discretion because the parties' emotional and financial interest are best served by finality. In re Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985).

iv. Pro Se Litigants Are Held to Same Standard as Attorneys.

Pro se litigants are held to the same standards as attorneys and must comply with all procedural rules on appeal. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

Donna Tims has employed three different attorneys since Greg's passing, but opted not to seek their assistance or the assistance of other counsel to file this appeal. Donna should be required to comply by the same rules as attorneys, in terms of filing her notice of appeal within the required timeline, perfecting the record for adequate appellate review, supporting her arguments with citations to the record or to appropriate legal authority, and not raising new issues on appeal for the first time.

3. COSTS AND ATTORNEY'S FEES.

i. Respondent Requests Costs on Appeal.

Pursuant to RAP 14.2, the Estate of Gregory M. Tims requests this Court award it costs on appeal, should it be determined the substantially prevailing party.

E. CONCLUSION.

This Court is respectfully asked to dismiss this untimely appeal, affirm the decisions of the trial court, and impose sanctions and costs for frivolous appeal.

In the alternative, this Court is respectfully asked to affirm the decisions of the trial court. The court commissioner did not err when it denied Donna Tims's motion to set aside and vacate judgment/order on March 3, 2018. The trial court did not err when it reviewed the entire set of pleadings presented to the court commissioner. The trial court did not err when it denied Donna Tims's motion for revision on March 30, 2018.

DATED: August 27, 2018.

TUELL & YOUNG, P.S.

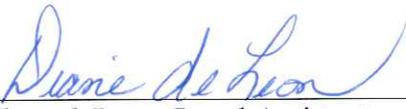
  
MICHAEL T. SMITH, WSBA No. 38746

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of August, 2018, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S BRIEF**, by the method indicated below and addressed to the following:

Donna L. Tims  
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donnatims@outlook.com

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile
- E-Mail

  
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Diane deLeon, Legal Assistant

**TUELL & YOUNG, P.S.**

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