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Division II
State of Washington
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No. 53648-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

MARIALYCE ESSER,

Appellant,

v.

GERALD ESSER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finlay

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. Summary of Reply 1

B. Argument 5

1. This appeal goes forward even though Gerald has passed away 5

2. "Must" means "must": *Gannon* is already among the most permissive decisions in the nation on this issue and Gerald's suggested reading would rob it of meaning, leaving Washington as a far outlier 6

3. Mari did not "waive" the *Gannon* hearing because it was not her burden to move for the hearing; it was the guardian's burden and he completely failed to meet it 9

4. The trial court abused its discretion by excluding as irrelevant evidence of Gerald's incapacity at the time of filing the counterpetition for dissolution 11

5. The $47,862.70 of Gerald's post-separation attorneys fees and costs that the court ordered Mari to pay part of is attorneys fees, not a generic "debt" and in the absence of findings and conclusions supporting the fee award, it is an abuse of discretion to order Mari to pay any of it .. 13

C. Conclusion 15

TABLE OF AUTHORITIES

DECISIONS OF THE WASHINGTON SUPREME COURT

Dwyer v. Nolan, 40 Wash. 459, 82 P.746 (1905) 6

In re Marriage of Himes, 136 Wn.2d 707,
965 P.2d 1087 (1998)..... 5

Marriage of Gannon, 104 Wn.2d 121,
702 P.2d 465 (1985) 1-3, 6-11, 15

DECISIONS OF THE WASHINGTON COURT OF APPEALS

In re Marriage of Fiorito, 112 Wn. App. 657,
50 P.3d 298 (2002)..... 5

In the Matter of The Marriage of Tulleners,
453 P.3d 996 (2019) 5-6

DECISIONS OF OTHER STATES

Samis v. Samis, 189 Vt. 434, 2011 VT 21, 22 A.3d 444 (Vt. 2011) 7-8

In addition to the issues and arguments presented in the Opening Brief of Appellant, Mari Esser respectfully offers the following for the consideration of the Court.

A. SUMMARY OF REPLY

On appeal, Mari argues that the trial court lacked authority to proceed with the dissolution because the petitioner's LGAL failed to seek authority by special petition to dissolve the marriage, as required by *Marriage of Gannon*, 104 Wn.2d 121, 702 P.2d 465 (1985). Further, she argues that the trial court abused its discretion when it denied Mari's motion to hold a *Gannon* hearing pretrial. These errors harmed Mari because not only was the dissolution not in Gerald's best interest, but she was forced to pay for an entire trial before finding out the result of a threshold determination.

Additionally, Mari contends that the trial court abused its discretion when it excluded evidence regarding Gerald's incapacity at the time of filing the counterpetition for dissolution as irrelevant to the issue of whether a dissolution is in his best interest.

Finally, Mari argues that the trial court abused its discretion when it ordered Mari to pay $47,862.70 of Gerald's post-separation legal fees and costs without articulating a basis for its award.

Mari asks this Court to remand the matter to a different

judicial officer and to award her attorneys fees on appeal.

In response, Gerald argues that *Gannon*'s language stating that "such authority must be sought specifically by a special petition for that purpose" (104 Wn.2d at 125) is not a "required tool in all cases" (Brf. of Resp. at 22) and does not mean that the petitioner must bring a special petition, rather it simply means that at some point during the trial, the court must determine that the dissolution is in the best interests of the ward. Brf. of Resp. at 20-22.

Gerald further argues that *Gannon* is different from this case because in *Gannon* it was undisputed that the husband was incapacitated at the time the petition for dissolution was filed; and here, while Gerald had been diagnosed with Alzheimer's dementia three years before filing the petition and had been relieved of the legal ability to handle his own finances one year before filing the petition, the trial court refused to hear evidence of Gerald's incapacity at the time he filed the petition, instead assuming he had capacity to file it. Brf. of Resp. at 23.

Regarding the timing of the special hearing, Gerald denies that the plain language of *Gannon* places the burden on him to file a special petition to find that the dissolution is in his best interests, claiming instead that the burden is on Mari to do so and that

because she moved for a *Gannon* hearing a week before trial, she waived the issue. Brf. of Resp. at 24-25.

Concerning Gerald's post-separation attorney's fees that the court ordered Mari to pay, Gerald argues in response that even though these amounts were paid to attorneys to conduct Gerald's post-separation litigation, these are not attorneys fees; they are simply a debt to his children, because his children fronted the money for the legal fees. Brf. of Resp. at 31-33. Moreover, because Mari did not specifically assign error to the trial court's finding that Gerald's children fronted money for other living expenses, Gerald claims that Mari waived the issue. Brf. of Resp. at 34.

Finally, Gerald claims without authority that this Court cannot grant Mari's requested relief because Gerald has passed away.

In reply, Mari maintains that "must" means "must" and the trial court erred because when our Supreme Court says a petitioner "must" do something, it is obligatory, not discretionary. Mari cannot have waived this issue in superior court because she had no burden to raise it. Mari replies that *Gannon* is very like this case because in both instances the petitioners were incapacitated, and the dissolutions were pursued by their representatives. Mari points

out that the trial court's decision that evidence of Gerald's incapacitation at the time of filing the counterpetition would be "irrelevant" lies far outside the consensus of every other state which has found that the timing of capacity relative to divorce filing is central to the determination of the incapacitated person's best interest. Mari assigned error to the best interests determination within the specific context of this issue. Brf. of App. pp.2-3, AoE #3.

Mari argues that the trial court cannot alter the character of attorney's fees by characterizing them as a generic "debt" and the trial court failed to provide sufficient findings of fact and conclusions of law for this court to review the award. It was not necessary to assign error to this "debt" because Mari assigned error to the specific award of attorney's fees, down to the penny. Brf. of App. p. 3 AoE #4.

Finally, Mari analyzes the doctrine of abatement and shows that this court has recently confirmed that a direct appeal of a divorce decree may go forward even when the other party dies during the appeal process.

B. ARGUMENT

1. This appeal goes forward even though Gerald has passed away. Gerald's representative argues that because Gerald passed away during the pendency of the appeal, relief "is no longer possible." He cites no authority to support his argument. Brf. of Resp. at 35. In reality, the opposite is true; Washington law is quite clear that the appeal continues. In *In the Matter of The Marriage of Tulleners*, 453 P.3d 996 (2019), the wife challenged adjustments to the property division and this court remanded, finding that even though the husband died after her appeal was filed, the trial court's property award was reversible. The court based its analysis on *In re Marriage of Fiorito*, 112 Wn. App. 657, 660-63, 50 P.3d 298 (2002) and *In re Marriage of Himes*, 136 Wn.2d 707, 721, 965 P.2d 1087 (1998). The court was careful to distinguish between a motion or independent action to vacate a final judgment in a divorce case after one of the parties to the marriage has died and a direct appeal of a divorce decree. *Tulleners*, 453 P.3d at 1001.

Where there is a motion or independent post-dissolution action, *Tulleners* noted that our Supreme Court has held that "there are no proper parties to the proceeding, and that, in the nature of

things, the plaintiff having died, the question of divorce cannot be relitigated." *Dwyer v. Nolan*, 40 Wash. 459, 460-62, 82 P.746 (1905). Yet as *Tulleners* explains, *Dwyer* was a minority view and the "overwhelmingly majority view was that circumstances can exist where a challenge to a divorce decree should be entertained even if a party to the marriage has died." *Tulleners*, 453 P.3d at 1001; *Himes*, 136 Wn.2d at 721 & n.38. In 1998, *Himes* overruled *Dwyer* and held that courts should decide on equitable grounds whether to vacate a dissolution decree after the death of one of the parties. *Himes*, 136 at 721. *Tulleners* specifically observes that Washington cases do <u>not</u> hold – as Gerald argues they do - that if abatement applies, the decree stands, and the appeal is dismissed. Instead, Washington law holds that the divorce decree itself becomes a nullity. *Tulleners*, 453 P.3d at 1001. *Tulleners* reaffirms that all a party appealing a final divorce decree must do is demonstrate that she is challenging the property provisions, as Mari is, and an appeal may go forward even when the other party dies during the appeal process. *Id*. This appeal continues despite Gerald's passing.

2. <u>"Must" means "Must": *Gannon* is already among the most permissive decisions in the nation on this issue and Gerald's suggested reading of it would rob it of meaning, leaving Washington</u>

as a far outlier. *Gannon*'s rule that a guardian may only prosecute a dissolution by way of special petition and a hearing to determine the ward's best interests lies at the most permissive end of the national spectrum on this issue, as it permits a ward to act in the absence of any statutory authority. *Samis v. Samis*, 189 Vt. 434, 2011 VT 21, 22 A.3d 444, 449 (Vt. 2011). *Gannon* says "[i]n cases in which the guardian or GAL believes a dissolution to be in the best interests of the incompetent ward, such authority **must** be sought specifically by a special petition for that purpose." 104 Wn.2d at 125. [Emphasis added.] Gerald's argument fails to comprehend the larger context in which *Gannon* exists:

> The jurisdictions that do allow guardians to sue for divorce on behalf of persons under guardianship have generally relied on statutory language granting such power. The New Hampshire Supreme Court recently held that a guardian could maintain a divorce action on behalf of a ward because the person under guardianship had initiated the divorce petition before he was deemed incompetent and because of a " catchall" provision present in the New Hampshire guardianship statutory scheme that authorized the probate court to impose additional duties upon a guardian, including the authority to exercise his right to divorce. *In re Salesky*, 157 N.H. 698, 958 A.2d 948, 954-55 (N.H. 2008). The Supreme Judicial Court of Massachusetts has held that a Massachusetts statute specifically allowing a guardian or next friend to sign a divorce libel authorized guardians to file divorce actions on behalf of legally incompetent individuals. *Cohn v. Carlisle*, 310 Mass. 126, 37

> N.E.2d 260, 262 (Mass. 1941); *Cowan v. Cowan*, 139 Mass. 377, 1 N.E. 152, 152 (Mass. 1885); *Garnett v. Garnett*, 114 Mass. 379, 380 (1874). This explicit statutory directive led the court in *Cowan* to reject the argument that a divorce should not be granted because an incompetent spouse had no volition. 1 N.E. at 152.
>
> Even those courts that have held that guardians can petition for divorce without explicit statutory authorization have acknowledged that their decisions are contrary to the majority rule. See, e.g., *Ruvalcaba ex rel. Stubblefield v. Ruvalcaba*, 174 Ariz. 436, 850 P.2d 674, 679-81 (Ariz. Ct.App. 1993) (permitting guardian to bring divorce action while acknowledging that majority of jurisdictions have held divorce is strictly personal and cannot be initiated by guardian); *In re Marriage of Gannon*, 104 Wn.2d 121, 702 P.2d 465, 467 (Wash. 1985) (holding that as general rule guardian cannot dissolve marriage of person under guardianship because marriage is so personal, but there are circumstances where court may authorize guardian to seek dissolution).
>
> Like the majority of jurisdictions around the country, we continue to conclude that the right to end a marriage through divorce is volitional and personal such that the Legislature did not intend, through a general grant of authority, to permit it to be carried out by a guardian. If we were to imply this power, we would encroach on an area that the Legislature has seen fit to address by statute, and without any airing of the multiple issues of public policy that might be relevant to the question.

Samis, 22 A.3d at 449. As the Vermont court's survey of the issue shows, *Gannon*'s requirement of a special petition and pretrial hearing place it at the most relaxed, permissive end of the spectrum of guardians' authority to dissolve their wards' marriages. Gerald's

attempt to recast *Gannon* as merely advising trial courts to make a finding that dissolution is in the ward's best interests at some point in the trial is out of step with both the plain language of *Gannon* and with the broad national recognition that dissolving a marriage is so personal that a guardian generally should not be empowered to dissolve a ward's marriage. This could must hold that when our Supreme Court writes that "such authority **must** be sought specifically by a special petition for that purpose," "must" means "must." 104 Wn.2d at 125. [Emphasis added.]

3. Mari did not "waive" the *Gannon* hearing because it was not her burden to move for the hearing; it was the guardian's burden and he completely failed to meet it. Gerald claims, without any authority whatsoever, that "[t]he *Gannon* holding is not self executing. It requires parties to bring the issue before the court. In a case where the guardian does not request a special hearing, it is incumbent on the opposing party to raise the issue." Brf. of Resp. at 26. He goes on to claim, again without authority, that Mari should be considered to have waived the issue because she did not list it as a defense in her response to his petition for dissolution. *Id*. This is utter nonsense. *Gannon* explicitly places the burden on the petitioner to seek "authority" to proceed on behalf of his ward. 104

Wn.2d at 125. Common sense indicates that in the absence of the guardian petitioning for and obtaining such authority, the guardian does not have authority to pursue the dissolution and the trial court does not have authority to grant a dissolution. The burden is on the guardian, not on the respondent.

When Mari brought the *Gannon* issue to the trial court's attention, instead of following *Gannon* and requiring the guardian to bring a special petition to seek authority to dissolve the marriage, the trial court chided Mari for not bringing the matter sooner and considered assessing attorneys fees against Mari for bringing the her motion to dismiss for failure to comply with *Gannon*. 1 RP 31. The trial court erred in failing to comply with *Gannon*. Further, the trial court expressed a very strong opinion against Mari regarding her reading of *Gannon* as requiring a petition and a special pretrial hearing, and bringing it to the court's attention before the trial.

Gerald claims that Mari participating in discovery and hiring a trial attorney consist of behavior inconsistent with the intention or need for a *Gannon* hearing. Brf. of Resp. at 27. This makes no sense because Mari had petitioned for legal separation and there was going to be some sort of proceeding to resolve that petition, for which she needed to prepare. CP 1. Further, Mari's "intention" is

irrelevant to whether the guardian has obtained authority to proceed with the dissolution on behalf of his ward. Authority has been sought and granted pursuant to *Gannon* or it has not: here, it was not sought. The guardian failed to meet his burden of bringing a petition as required by *Gannon* and the trial court therefore lacked authority to proceed with the dissolution.

4. The trial court abused its discretion by excluding as irrelevant evidence of Gerald's incapacity at the time of filing the counterpetition for dissolution. It is undisputed that Gerald was diagnosed with Alzheimer's in 2014, three years before trial. 4 RP 633-35. Two years after he was diagnosed, he was relieved of responsibility for his finances via a Durable Power of Finances and Gerald was never again able to handle his own affairs. CP 12. Six months later, in March 2017, attorneys-in-fact were put into place to handle Gerald's affairs and Gerald's GAL Mark Elgot indicated that he deemed Gerald competent and able to understand the documents. CP 13. The court referred to Gerald's capacity as being "established" via GAL Mark Elgot's determination of his capacity in March 2017. RP 08/15/19 at p.2; CP 13. Mark Elgot is an attorney with no medical education, yet the court accepted his layperson's assessment of capacity.

Additionally, the court accepted testimony and evidence regarding Gerald's capacity in 2016 and 2018 from another layperson without medical knowledge, LGAL Kogut. 2 RP 115-16; 7 RP 6. Gerald accepts that this layperson's evaluation of capacity is admissible: he notes on page 5 of his brief that "The LGAL reported that, while in 2016 Gerald's dementia was "mild," by May 2018 he suffered from "chronic progressive cognitive dysfunction," with no hope of improvement and was unable to make medical, financial, or personal decisions. CP 526."

Yet when Mari, who lived with Gerald and knew him and his mental state better the GAL or LGAL, attempted to describe his growing incapacity and the comprehension difficulties he was experiencing beginning in 2014, the court excluded her testimony, ruling that it is not relevant because incapacitation is something that requires a medical diagnosis and a layperson cannot say it the way they can say a person was drunk, so the court cannot allow her observations to establish that Gerald was incapacitated based on lack of relevance. 5 RP 690, 694, 699. Any time Mari described Gerald's incompetence, the court chided her: "I've said this now for the fourth time, and I think it should be very, very clear to you...." 5 RP 708.

Since the court accepted two nonmedical witnesses' testimony (Elgot and Kogut) regarding the capacity of a person who had been diagnosed with Alzheimer's, the court's ruling that Mari's testimony regarding capacity is irrelevant because she cannot make a medical diagnosis is unreasonable. What's sauce for the goose is sauce for the gander.

Evidence of Gerald's ability to understand what he was signing and of his vulnerability to influence was necessary to determine whether he, a longtime Alzheimer's sufferer, possessed capacity to sign the petition for dissolution that his adult children arranged to have prepared for him. This inquiry is critical to the issue of whether dissolution is in Gerald's best interests. As other courts that have considered this kind of case have concluded, evidence of the person's capacity at the time of bringing the petition is central to determining whether the dissolution can go forward. (*See* Opening Brief of Appellant pp. 19-22, discussing cases.) Accordingly, the trial court's exclusion of Mari's evidence of Gerald's incapacity at the time of signing the petition is an abuse of discretion.

5. The $47,862.70 of Gerald's post-separation attorneys fees and costs that the court ordered Mari to pay part of is attorneys

fees, not a generic "debt" and in the absence of findings and conclusions supporting the fee award, it is an abuse of discretion to order Mari to pay any of it. The trial court attempted to sidestep this award of attorneys fees by describing it as a generic "debt" owed to Gerald's children because the children fronted the money for the attorneys fees to their father. CP 326. Interestingly, Gerald's Brief of Respondent does not answer the substance of Mari's argument, that the attorney fees are presumptively separately owed by Gerald and that an award of any part of that fee payment by Mari must be supported by findings and conclusions which are lacking here. Gerald's effort to create "waiver" issues regarding the attorney fee award is a red herring.

There was no issue for Mari to "raise" regarding this at trial because there is no dispute as to the actual amount paid or the fact that the payments were for attorney fees and costs of Gerald's post-separation litigation. Mari did not object to the idea of the children being paid back for the attorney fees. As the attorney fees were clearly Gerald's post-separation legal fees, and no argument was made that Mari should pay any part of those attorney fees, there was no reason for Mari to "raise an issue" at trial regarding the fees. Mari did not anticipate that the trial court would recharacterize the

attorneys fees as a generic "debt" until the court produced the final orders. There was simply nothing to object to. Similarly, Mari raised the issue on appeal by assigning error in her opening brief (A of E #4, p. 3) to the specific amount of attorneys fees that were erroneously characterized by the trial court as debt, pointing out that the attorney fee award lacking supporting findings and conclusions, and citing to the relevant cases. This is certainly sufficient for review.

C. CONCLUSION

Under well-established Washington caselaw regarding abatement, this appeal continues even though Gerald has passed away. When our Supreme Court used the word "must" in *Gannon*, placing a burden on the guardian to bring a petition seeking authority to proceed with the dissolution of a ward, it meant "must." The respondent's argument that *Gannon* merely gave the trial court discretion to make a best interests determination when it feels one is needed is directly contrary to the language of *Gannon* and the larger context of this area of the law.

Mari did not "waive" the *Gannon* issue hearing because it was not her burden to seek authority pursuant to *Gannon*; it was the guardian's burden and he completely failed to meet it. Further,

the trial court abused its discretion by excluding as irrelevant evidence of Gerald's incapacity at the time of filing the counterpetition for dissolution. As every other court has recognized, such evidence is critical to the best interests determination.

Finally, the $47,862.70 of Gerald's post-separation attorneys fees and costs that the court ordered Mari to pay part of is attorneys fees, not a generic "debt," and in the absence of findings and conclusions supporting the fee award, it is an abuse of discretion to order Mari to pay any of it.

For all of these reasons, the final orders must be reversed and remanded for a new trial preceded by a pretrial *Gannon* hearing.

DATED this 9th day of July, 2020.

Respectfully submitted:

Sharon J. Blackford, WSBA 25331
Attorney for Marialyce Esser, Appellant

CERTIFICATION OF SERVICE

I, Sharon J. Blackford, certify that on the 9th day of July, 2020, I caused a true and correct copy of **Reply Brief of Appellant** to be served on:

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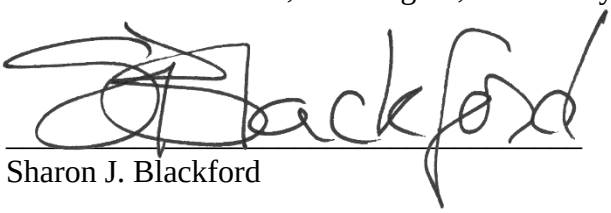
I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Shoreline, Washington, this 9th day of July, 2020.



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