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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**Court of Appeals No. 341585**

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**STATE OF WASHINGTON, COURT OF APPEALS  
DIVISION III**

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THOMAS ELDON DILLON,

Appellant,

v.

DOROTHY ANN CLARK,

Respondent.

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**REPLY BRIEF OF APPELLANT**

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**I. ARGUMENT IN REPLY.**

**A. SUMMARY OF REPLY ARGUMENT.**

The holding in Himes is unequivocal and is not limited to or distinguished upon its own facts. Dorothy Clark's ("Clark") position and arguments are based upon the same faulty interpretations of the case that led to the errors below made at the trial court level.

Additionally, the precedent Clark cites is unpersuasive and questionable insofar as the cases cited find their support in the arcane rule established in Dwyer, which was expressly overruled in Himes.

In sum, the trial court below erred by limiting the ruling in Himes as it did, and the decision entered below should be reversed so as to permit Sandra Saffran ("Saffran") to substitute in the dissolution proceeding for a divorce decree to be entered for Thomas Dillon ("Dillon").

**B. THE HOLDING IN HIMES IS UNEQUIVOCAL AND DOES NOT REQUIRE ANYTHING MORE THAN A PLAIN READING.**

The holding from the case In re Marriage of Himes, 136 Wn.2d 707, 965 P.2d 1087 (1988) is plain: "We overrule the 1905 decision in *Dwyer v. Nolan* which established the principle that

death of one party to a divorce or dissolution proceeding eliminates the subject matter of the action [...].” Himes, 136 Wn.2d at 737 (emphasis supplied).

If the death of one party to a dissolution action does not eliminate the subject matter of the action, then the factual distinction of whether a final decree has been entered or not has no importance. A final decree is a procedural point in a case that does not determine the subject matter of a case.

Likewise, the factual distinction of whether there is fraud, or some other inequitable circumstances, does not have any impact on the subject matter of a dissolution action because parties to a dissolution action can obtain a decree dissolving the marriage by demonstrating (or agreeing) that a marriage is irretrievably broken. RCW 26.09.030(a)&(c). Though fraud or inequitable circumstances might be present in any given dissolution action, fraud or inequitable circumstances do not, in themselves, establish the subject matter that allows a dissolution action to be filed, heard and decided.

Clark acknowledges that a “general reading” of the Himes ruling supports Saffran’s position. Respondent’s Brief, p. 2. Clark then argues her position from the same factual premises that led to

the trial court's error in this case, that is, limiting the Himes holding to its facts when there are no such limitations in the holding itself:

The difficulty in accepting a general reading of that holding relates to the fact that a Decree had already been entered in Himes and many years later the courts were asked to "right a wrong" if you will as it relates to a rather large asset and fraud perpetrated upon the court and the wife in that action. Himes is easily distinguishable on those grounds alone.

Respondent's Brief, p. 3.

As previously argued in the Appellant's initial brief, the Supreme Court, had it wanted to limit the application of Himes, could have easily done so, but it did not. This was noted by the Court in the case In re Marriage of Fiorito, 112 Wn. App. 657, 50 P.3d 298 (2002).

[The Appellant] argues that the rule announced in *Himes* is limited to cases where fraud is involved. We do not read so narrowly the decision to overrule *Dwyer*. If our Supreme Court had meant to limit its holding to factually similar cases, it could have said so. It did not.

In re Marriage of Fiorito, 112 Wn.App. at 662 (emphasis supplied).

Another error in the argument and reasoning that Himes is limited to factually similar cases is due to a failure to consider the doctrine of *stare decisis* and the requisite factual showing that must

be made before precedent will be overruled. Interpreting the facts in Himes as an implied limitation on its holding is error because the facts merely serve as the requisite basis for overruling Dwyer. That is, the facts in Himes provided the grounds for the Himes Court to break from the doctrine of *stare decisis* and avoid applying the Dwyer rule, but the facts themselves actually do not limit the Supreme Court's holding in Himes.

*Stare decisis* is a court doctrine “to accomplish the requisite element of stability in court-made law ...].” In re Stranger Creek & Tributaries, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). “The doctrine requires a clear showing than an established rule is incorrect and harmful before it is abandoned.” In re Stranger Creek & Tributaries, 77 Wn.2d at 653.

The procedural and factual backdrop in Himes supplied the “clear showing” that the established rule in Dwyer was incorrect and harmful, which thereby allowed the Himes Court to expressly overrule the Dwyer decision as controlling precedent. The procedural and factual backdrop did not, however, actually limit the holding in Himes to be applied only in cases where a final dissolution decree has been entered and there is an instance of fraud, or a large asset at stake, or some other “wrong to be

righted.” That was the error made below by the trial court, and it serves as the crux of Clark’s position and argument on appeal.

The Himes decision unequivocally overruled the precedent established in Dwyer. The new rule and law established in Himes is that death of one party to a divorce or dissolution proceeding does not eliminate the subject matter of the action. The subject matter of a dissolution case does not depend upon the procedural fact of a final decree having been entered. Likewise, the subject matter of a dissolution case does not depend upon the presence of fraud or inequitable circumstances in order for a dissolution case to be brought, heard and decided. Therefore it was an error of law to distinguish and limit the holding in Himes to its facts because the facts in Himes only establish the “clear grounds” for the Himes Court to reconsider the Dwyer rule and break from the doctrine of *stare decisis*.

The trial court’s decision in this case limited the scope and application of the Himes decision to its own facts, which was an error of law in applying the case because the subject matter of a dissolution proceeding does not abate upon the death of one of the parties to the matter regardless of whether a final decree has been entered or whether fraud or some other inequitable circumstances

are present.

The Appellant otherwise incorporates and reasserts those arguments and points of authority previously made in the Appellant's initial brief.

The trial court's decision must be reversed with instructions to allow Saffran to substitute in the action as Dillon's personal representative for purposes of having a decree entered that dissolves the marriage between Dillon and Clark.

**C. CLARK CITES NO CASES THAT WOULD LIMIT OR RESTRICT APPLICATION OF THE HIMES DECISION TO ITS OWN FACTS OR SIMILAR FACTS.**

Clark does not cite to any precedent that would support the position taken, namely that the Himes ruling is limited to dissolution cases where a final decree has been entered and some kind of fraud or other inequitable circumstances are present.

Clark cites the case of Crockett v. Crockett, 27 Wn.2d 877, 181 P.2d 180 (1947) for the proposition that Saffran cannot substitute into the dissolution action, even when acting as a duly appointed personal representative of her father's estate. Respondent's Brief, p.3. The Crockett case does not support this position following the decision in Himes.

The Crockett case is one of the progeny of cases following the Dwyer case, and the Crockett case specifically cites the Dwyer decision to support its own decision that a personal representative could not move to vacate the dissolution decree that had been entered. Crockett, 27 Wn.2d at 889-90. The Supreme Court, though, expressly overruled the Dwyer case and in so doing also considered the progeny of cases following it, including the Crockett case. Himes, 136 Wn.2d at 723-4; In re Marriage of Fiorito, 112 at 661 (The Himes case expressly overruled Dwyer and cases following it, including Crockett).

Clark also cites the case of In re Tabery, 14 Wn. App. 271, 540 P.2d 474 (1975)<sup>1</sup> for the proposition that Saffran cannot substitute into Dillon's dissolution action as a third party needing protection from abatement due to her inheritance rights and interests. Respondent's Brief, p. 4.

The Tabery case is neither persuasive nor on point as to the issues in this case.

Tabery considered whether a *nunc pro tunc* divorce decree could be entered for a surviving spouse as to her first marriage in

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<sup>1</sup> Cited as Estate of Glen Curtis Carter, 14 Wn.App. 271, 540 P.2d 474 (1975) in Respondent's Brief.

order to validate her second marriage so that she could have her mother-in-law removed as the administratrix of the second husband's estate. Tabery, 14 Wn.App at 273-4. The Court held that the mother-in-law, as her son's nontestamentary heir, had no vested rights of the type that would prevent the court from entering a *nunc pro tunc* decree in the surviving spouse's first marriage. Id. at 275. The court reasoned that though a dissolution action generally abates upon the death of a party, courts nonetheless have power to enter *nunc pro tunc* decrees in dissolution actions: "If the death of a party to a divorce action does not deprive the court of jurisdiction to vacate a divorce decree nunc pro tunc, neither should it impair the court's power to enter a nunc pro tunc decree." Id. at 275-276.

Clark is merely misdirecting this Court's attention by framing the issues and arguments as Saffran "needing protection from abatement" and attempting to do an " 'end around' the designation of Clark as that of surviving spouse as opposed to an ex-spouse." Respondent's Brief, p. 4-5.

To the contrary, this case is about whether Himes removed the barrier of an arcane rule nearly a century old so that Saffran, as Dillon's personal representative, can carry out what was clearly and

undisputedly one of Dillon's last wishes, that is, to obtain a divorce from Clark. As argued above, the answer is unequivocally yes because Dillon's death did not abate the subject matter of the dissolution action he filed.

The only wrong to be righted, as it were, is the erroneous interpretation and application of the Himes decision whereby the trial court limited the Himes decision to its own facts and thereby did not apply the rule in this case.

The trial court's ruling that the marriage dissolution action abated due to Dillon's death must be reversed with instructions that the matter proceed with Saffran permitted to substitute for Dillon as his personal representative in the matter.

## **II. CONCLUSION.**

The Appellant incorporates those arguments and points of authority previously made in the Appellant's initial brief.

Clark has failed to present any binding or persuasive authority to support her basic argument that the Supreme Court in Himes limited its holding and application of the rule to cases where a final dissolution decree has been entered and there are instances of fraud or other inequitable circumstances. Clark's position merely tracks that of the trial court's, which erroneously interprets Himes

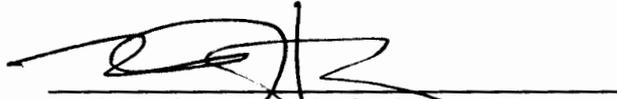
by limiting its application. Otherwise, Clark's response is a misdirection, reframing the issues into ones that are not before this Court and do not need to be decided.

The holding in the Himes case is plain. Himes overruled the arcane proposition set forth in Dwyer that death of a party to dissolution action abates the subject matter of the action. The Himes decision is not limited to its facts. Instead, the facts in Himes only serve to provide the clear showing that the Dwyer rule was harmful so that the Himes Court could break from the doctrine of *stare decisis* and overrule Dwyer. Supporting that position is the Fiorito case, a case that considered the holding in Himes and determined that the Himes decision is not limited in its application to dissolution cases involving fraud or other inequitable circumstances.

In Washington, the death of a party to a dissolution action no longer eliminates the subject matter of the action. The trial court erroneously interpreted and limited the Himes ruling to the facts of that case when deciding that Dillon's death abated the dissolution proceeding that Dillon initiated. Therefore, the trial court's decision was an error of law that must be reversed, and instruction should be given to permit Saffran to substitute in Dillon's place in the

dissolution proceeding.

**RESPECTFULLY SUBMITTED** this 18 day of January,  
2017.



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ORIGINAL

STATE OF WASHINGTON        )  
  ) ss.  
County of Yakima                )

The undersigned, being first duly sworn, on oath deposes and says:

That affiant is a citizen of the United States, of legal age, not a party interested in the above entitled matter, and competent to be a witness in said cause; that on January 20, 2017, affiant transmitted via First Class Mail an envelope, containing copies of the following document(s): **REPLY BRIEF OF APPELLANT; and this AFFIDAVIT OF MAILING** directed to:

**MR ROBERT G VELIKANJE  
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LAUNA J. PETTIT

SUBSCRIBED AND SWORN to before me on 20 day of  
January, 2017.



  
Lisa Peters (PRINTED NAME)  
Notary Public in and for the State  
of Washington, residing at Naches.  
My Commission Expires 10/1/2020.