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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 341585

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

THOMAS ELDON DILLON,

Appellant,

v.

DOROTHY ANN CLARK,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION.

The matter on appeal involves whether the decision of In re Marriage of Himes, 136 Wash.2d 707; 965 P.2d 1087 (1998), that overruled that principle that death of one party during a pending divorce proceeding eliminates the subject matter of the action, applies in the case at bar where the death of a party occurs shortly after the filing of a petition for dissolution.

II. ASSIGNMENTS OF ERROR.

A. THE TRIAL COURT ERRED IN HOLDING THAT BECAUSE DILLON HAD NOT OBTAINED A FINAL DECREE OF DISSOLUTION, LIKE IN HIMES, THE DISSOLUTION ACTION ABATED DUE TO THE DEATH OF DILLON.

Issue to be answered under this assignment of error:

Does the holding in Himes mandate that Dillon's dissolution action abate because Dillon died prior to obtaining a final decree of dissolution?

B. THE TRIAL COURT ERRED THAT THE HIMES CASE REQUIRED A FINDING OF FRAUD TO AVOID ABATEMENT OF THE DISSOLUTION ACTION DUE TO THE DEATH OF DILLON.

Issue to be answered under this assignment of error:

Does the holding in Himes mandate that a trial court find fraud in order to avoid the abatement of a dissolution proceeding

upon the death of one of the parties?

III. STATEMENT OF THE CASE.

A. A SUMMARY OF FACTS.

Thomas Dillon (hereinafter "Dillon") and Dorothy Clark (hereinafter "Clark") entered into a Prenuptial Agreement (hereinafter "Prenupt") on May 6, 2008. CP 36. Under the terms of the Prenupt, if Clark is Dillon's surviving spouse, she can assert a claim under the Prenupt that requires Dillon to leave his residence and motor vehicles to Clark. CP 30.

Dillon and Clark married on December 15, 2008, a little more than seven months after execution of the Prenupt. CP 4:4. Less than seven years later, on March 7, 2015, Dillon and Clark separated. CP 4:6.

On April 3, 2015, Dillon filed a Petition for Dissolution of Marriage (hereinafter "Dissolution Petition") in Yakima County Superior Court. CP 3. At the time of filing for divorce, Dillon had cancer and was given a prognosis of 30 days to live. CP 9:19. In a supporting declaration filed with the Dissolution Petition, Dillon asserted that Clark "is more interested in my money than in my health or care" and that Clark "has spent a lot of [Dillon's] money on

useless things.” CP 10: 9-11. He claimed that Clark “has stated that she wants [him] gone” and that she “interfere[s] with [Dillon’s] medical treatment against [his] wishes.” CP 10:16-17. He also alleged that he desired to pursue an expensive experimental treatment, but that “[Clark] is opposed to this treatment because of the money.” CP 10:13-14.

On April 14, 2015, Clark filed a Response to Petition and under Section 1.1, titled “Admissions and Denials,” admitted to the allegation contained in Paragraph 1.4 of Dillon’s Dissolution Petition that the “marriage is irretrievably broken.” CP 87. Clark’s Response to Petition requested that the trial court enter a decree of dissolution and “[a]pprove of the prenuptial agreement.” CP 88. Dillon died on May 12, 2015, prior to the finalization of his divorce. CP 67.

B. COMMISSIONER’S DECISION.

On November 2, 2015, Sandra Saffran (hereinafter “Saffran”), Personal Representative for the Estate of Dillon, moved to be substituted in place of Dillon in the dissolution case due to his death. CP 18. Yakima County Superior Court Commissioner Kevin S. Naught (“Commissioner”) held that “[t]he marriage dissolution action abates due to Mr. Dillon’s death.” CP 82. The

Commissioner supported this ruling on two points of distinction derived from the decision In re Marriage of Himes, 136 Wn.2d 707; 965 P.2d 1087 (1998).

The first distinction was that in Himes, the Court granted reopening of the divorce proceeding after the death of one of the parties, but granted such a reopening after a final decree of dissolution had been entered. CP 83. The Commissioner noted that, in the case at bar, only “temporary orders have been entered” and that as a consequence, Dillon’s dissolution proceeding terminated upon his death. CP 83.

As a second point of distinction, the Commissioner found that the Supreme Court in Himes based its holding on equitable grounds which he found were not present in Dillon’s case. CP 83. The Commissioner pointed to the fact that there had been fraud committed by the decedent in Himes, but no such facts were present in the instant case. CP 83.

In response to the decision of the Commissioner, Saffran moved for a revision. The Honorable David A. Eloffson denied Saffran’s motion for revision on January 25, 2016. CP 77; RP 12.

IV. ARGUMENT.

Marriage is no longer simply about a personal relationship

between two individuals. The idea of marriage has evolved. It is a partnership between two individuals who care about one another and who contribute towards the success of such a partnership, often in the form of assets and/or income. In fact, committed intimate partners and registered domestic partnerships are now common terms in the state of Washington and are the consequence of the courts and the state legislature seeking to define relationships in order to dictate how to divide and allocate assets and income between the partners upon a cessation of their relationship. The Washington Supreme Court in Himes recognized this and overturned the longstanding belief that a marriage dissolution proceeding abates upon death because there is more at stake in a dissolution than just formally terminating an emotionally committed relationship with another, which is one's right to property. Such right often forms the central nervous center in dissolution cases, often making them more painful and contentious than emotionally separating from one another.

Dillon was given a death sentence that was anticipated to be carried out in 30 days. One of the very first things he did was to seek a divorce from Clark. Dillon was already physically separated from Clark, but the filing for dissolution of his marriage was

necessary to address her rights to property that he owned. The Yakima County Superior Court's misapplication of Himes has resulted in reinstating the notion that death ends a dissolution proceeding. This has blocked a dying man's last wish to protect his property rights. But for his death and the misapplication of an arcane rule that Himes sought to do away with, Dillon, through his Personal Representative, could seek court resolution and finality of preserving his property so that it may follow his last wishes expressed in his last will and testament.

The Commissioner's ruling that, based upon Himes, Dillon's dissolution proceeding abated upon his death constitutes an interpretation of case law, and therefore, is a question of law that is to be reviewed by this Court de novo. State v. Willis, 151 Wn.2d 255; 87 P.3d 1164, 1166 (2004).

A. THE TRIAL COURT ERRED IN HOLDING THAT BECAUSE DILLON HAD NOT OBTAINED A FINAL DECREE OF DISSOLUTION, LIKE IN HIMES, THE DISSOLUTION ACTION ABATED DUE TO THE DEATH OF DILLON.

As believed to be said by the great Benjamin Franklin, "in this world nothing can be said to be certain, except death and taxes." Our statutes in the state of Washington recognize such by

addressing what happens when a litigant dies providing that “[n]o action shall abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, if the cause of action survives or continues...” RCW 4.20.050.

In Himes, the Washington Supreme Court was confronted with a situation where a husband had obtained a divorce decree by default utilizing an affidavit containing untrue statements so that he could marry another woman. In re Marriage of Himes, 136 Wn.2d 707; 965 P.2d 1087 (1998). The husband’s first wife sought to set aside the decree based upon the fraud. Id. at 1090. Upon a hearing for revision, the trial court granted the request to vacate the decree. Himes at 1091. The Division One Court of Appeals, however, held that it was required to reverse the trial court based upon a 1905 Washington Supreme Court decision rendered in Dwyer v. Nolan, 40 Wash. 459; 82 P. 746 (1905), which stood for the proposition that, upon the death of a party to a dissolution action, subject matter jurisdiction is eliminated and the action abates. Himes at 1092. In reversing the appellate court and overturning Dwyer, the Supreme Court in Himes stated that the dissolution decree did more than impact just the marital status of the couple, but impacted the first wife’s right to income as a

surviving spouse. Id. at 1101.

In the case at bar, the decision of the Yakima County Superior Court Commissioner distinguished Himes, noting that a decree had been entered in Himes as opposed to temporary orders that had been entered in the instant case. CP 68. However, the Commissioner did not cite to any decision supporting the position that a dissolution proceeding still abates upon death. In fact, in 2002, the Division One Court of Appeals stated that the Himes case overruled not only Dwyer, but the cases that flowed therefrom in reliance thereupon, including McPherson v. McPherson, 200 Wn. 365; 93 P.2d 428 (1939) and Crockett v. Crockett, 27 Wn.2d 877; 181 P.2d 180 (1947). In re Marriage of Fiorito, 112 Wn. App. 657; 50 P.3d 298, 302 (2002).

The Supreme Court in Himes placed no limitations on the application of its ruling and its overturning of the longstanding rule proclaimed in Dwyer—that death of a litigant in a divorce action terminates subject matter jurisdiction. Moreover, the Himes decision did not restrict its ruling to divorce cases involving final decrees. If the Himes Court wished to limit the application of its decision to cases where a final decree of dissolution was entered, as the Commissioner suggests the decision in Himes does, it could

have done so in its ruling.

Additionally, the Commissioner's concern that only temporary orders had been entered fails to give due consideration to the other facts of this case. Clark, in her response to the Dissolution Petition, agreed to the assertion that the marriage to Dillon was irretrievably broken and also sought a decree of dissolution as well. CP 87-88. Thus, the only issue that remained pertained to the award and allocation of property and income, which is addressed by the Prenupt signed by Clark and Dillon.

Under the Prenupt, each party was awarded their separate property, their community property (if any) should be divided equally, and both spouses were prohibited from making a claim for spousal maintenance against the other. CP 31. If the dissolution proceeding did not abate, the trial court, then, is only left with issuing a final decree of dissolution based upon the pleadings and the Prenupt, and there is sufficient evidence in the record for the trial court to do this. Therefore, it was error for the Commissioner to not apply the holding of Himes to the case at bar. Himes should not be distinguished on narrow points of distinction and this case is another prime example, like that in Himes, why the arcane rule does not and should not apply. The Commissioner's decision

should be reversed and the Personal Representative should be permitted to substitute so that a dissolution decree can be entered.

B. THE TRIAL COURT ERRED THAT THE HIMES CASE REQUIRED A FINDING OF FRAUD TO AVOID ABATEMENT OF THE DISSOLUTION ACTION DUE TO THE DEATH OF DILLON.

In his ruling, the Commissioner added an alternative basis to support his decision. Again, the Commissioner sought to distinguish Himes from the case at bar holding that the Supreme Court in Himes “based its ruling on equitable grounds, which are not present in this case.” CP 68. The Commissioner further pointed out that fraud was involved in Himes and that the Supreme Court vacated the dissolution decree upon equity. CP 68. Such a ruling limits the application of Himes when the Supreme Court did not do so.

The Division One Court of Appeals was confronted by the same argument, i.e., whether the Himes decision was limited to cases involving fraud. In re Marriage of Fiorito, 112 Wn. App. 657; 50 P.3d 298 (2002). In Fiorito, after the entry of a decree of dissolution, the wife appealed the decision, but while the appeal was pending, the husband died. Id. at 659. The personal

representative for the husband's estate asserted that his death terminated the case under Dwyer and that the ruling in Himes was limited to cases where fraud was present. Fiorito at 660. The Division One Court of Appeals disagreed with the husband's estate, stating that "[i]f our Supreme Court had meant to limit its holding to factually similar cases, it could have said so. It did not." Id. at 662. The Division One Court of Appeals further rejected the argument of the husband's estate that his wife had "no 'substantial property interest' at stake." Id.

As reflected in Fiorito, the Himes decision does not require a finding of fraud in order to avoid abatement at death. Moreover, even if Himes was limited to requiring the examination of equity and the property interest at stake, the facts of the instant case weigh heavily in favor of Dillon and his estate being allowed to proceed to finalize the divorce.

The Dillon estate has a significant property interest at stake. If Clark remains as surviving spouse, Clark will be entitled to Dillon's home, a horse, and his vehicles under the terms of the Prenupt. CP 30. This is something that cannot be remedied in the probate proceeding of Dillon's estate. Either Clark is Dillon's surviving spouse or she is not, and only a decree of dissolution can

resolve that precise issue.

Moreover, the equities in this matter dictate that Dillon's estate be permitted to finalize the divorce. Dillon had 30 days to live. CP 9:19. Dillon could have chosen a number of different paths to spend his time and energy because of the short window of time he was given. He chose to pursue a divorce from Clark. His chosen path is understandable in light of his allegations in his declaration that Clark engaged in financial exploitation, abuse, and neglect. CP 9-11.

Without a decree of dissolution, Clark remains a surviving spouse, and benefits from the terms of the Prenupt despite the horrendous actions she engaged in towards Dillon. Like any other individual, Dillon sought to get his affairs in order. Dillon was staring death in the face and he recognized the need for a divorce to free him from the obligations imposed by the Prenupt in remaining married to Clark. It would be unjust and inequitable for Clark to be able to benefit from the fact that Dillon did not live long enough to complete the divorce he desperately sought.

V. ATTORNEY'S FEES AND COSTS ON APPEAL.

Dillon does not request attorney's fees and costs in pursuing this appeal, as Paragraph 9.2 of the Prenupt provides that "each

[party] shall be responsible for and bear his or her own attorney's fees and costs incurred in connection with such dissolution or separation." CP 31.

VI. CONCLUSION.

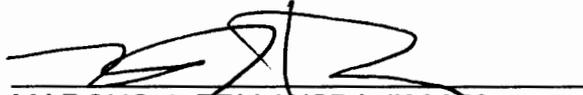
The trial court erred when it ruled that the dissolution proceeding abated upon the death of Dillon. This decision is contrary to the Washington Supreme Court's holding in the Himes case. The Supreme Court's holding in Himes did not require a finding a fraud, a final decree of dissolution, or an examination of equitable factors. Rather, the Supreme Court simply and plainly held that the death of a party in a dissolution action no longer eliminates the subject matter of the action.

Finally, if equity is to be considered, then it undoubtedly favors Dillon in the case at bar. Dillon only had 30 days to live, yet despite this prognosis, the first action he took was to seek to dissolve his marriage of six years to Clark. It would be unfair to now allow Clark the fruits of maintaining her position as surviving spouse under the Prenupt solely because Dillon's cancer ended his life before he could complete the divorce.

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RESPECTFULLY SUBMITTED this 21st day of July,
2016.



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