94889-5

Court of Appeals No. 341585-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THOMAS ELDON DILLON,

Petitioner,

v.

DOROTHY ANN CLARK,

Respondent.

PETITION FOR REVIEW

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes

Rules

I. IDENTITY OF PETITIONER

The Petitioner seeking review is Sandra Saffran, Personal Representative of the Estate of Thomas Eldon Dillon. The Petitioner respectfully asks this Court to accept review of the Court of Appeals decision and termination of review designated in Article II of this Petition.

II. COURT OF APPEALS DECISION

The decision of the Court of Appeals for Division III was filed on July 13, 2017. A copy of the Unpublished Opinion is in the Appendix to this brief at pages A-1 through A-7. No motion to publish or motion for reconsideration was filed.

III. ISSUES PRESENTED FOR REVIEW

The decision rendered by the Court of Appeals regarding the interpretation and application of the decision in *In re Marriage of Himes*, 136 Wn.2d 707, 965 P.2d 1087 (1998) to this case was in error.

The decision by the Court of Appeals conflicts with the holding in *Himes* because the holding in *Himes* is not limited to dissolution cases where a judgment has been entered prior to one party's death and equitable principles otherwise justify attack of the judgment.

There is also a substantial public interest in the correct interpretation and application of the *Himes* holding.

IV. STATEMENT OF THE CASE

At issue in this case is the Court of Appeals' interpretation and application of the holding in the *Himes* decision, which overruled the principle in the case of *Dwyer v. Nolan*, 40 Wash. 459, 460-61, 82 P. 746 (1905) that "death of one party to a divorce or dissolution proceeding eliminates the subject matter of the action. *Himes*, 136 Wn.2d at 737.

In this case, the Court of Appeals erred in its interpretation and application of the *Himes* holding by restricting its application only to cases where a judgment has been entered and equitable factors justify attack of the judgment. That is, the Court of Appeals' decision in this case conflicts with the actual holding rendered in *Himes*.

This case and the application of the *Himes* decision also present issues of substantial public interest. It is not uncommon for a party to die during the pendency of a dissolution action, in which case the parties' marital status will impact prenuptial agreements and/or wills. A bright line rule like that announced in *Himes* provides certainty and clarity rather than carving and reading out

exceptions where the *Himes* case did not specifically limit the holding of the case to its facts.

A. FACTUAL BACKGROUND

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. PROCEDURAL BACKGROUND.

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. Elofson denied Saffran's motion for revision on January 25, 2016. CP 77; RP 12.

Saffran timely appealed. The Court of Appeals, Division III, rendered a decision on July 13, 2017 that affirmed the decisions entered by the Commissioner and Trial Court Judge. (See

Appendix A.)

Saffran now petitions for review by the Supreme Court.

V. ARGUMENT FOR REVIEW

Review should be accepted in the instant case pursuant to RAP 13.4(b) because the Court of Appeals decision is in conflict with the plain holding set forth in the *Himes* case. Review should also be granted because this case involves an issue of substantial interest to the general public where the public, and attorneys practicing family law and estate planning law, would benefit from clarification that the holding in *Himes* is not an "exception" to the abatement doctrine set forth in the case of *Dwyer v. Nolan*, 40 Wash. 459, 82 P. 746 (1905), but rather that *Himes* overruled the abatement doctrine.

A. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION AND APPLICATION OF THE *HIMES* CASE.

Review should be granted because the Court of Appeals decision conflicts with the holding in *Himes*.

Himes overruled *Dwyer*, 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.

The Court of Appeals erred in its interpretation and application of the holding in *Himes* when it reasoned that *Himes* is an "exception" to the *Dwyer* rule limited to its factual circumstances. (See A-3.)

Foremost, the holding in *Himes* is clear and unequivocal: "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.

The subject matter of a dissolution action is the parties' marital status: "It will not be gainsaid that an action for divorce is a purely personal action. Nothing is sought to be affected but the marital status of the husband and wife. The distribution of property in such an action is incidental [...]." *Dwyer*, 40 Wash. at 460. (Emphasis supplied.) The marital status of the parties is the subject matter forming the abatement doctrine laid down in *Dwyer,* a doctrine that *Himes* specifically overruled. That is, the death of one party does not eliminate the purely personal nature of a dissolution action. *Himes*, 136 Wn.2d at 737.

The Court of Appeals erred in its interpretation and application of *Himes* by reasoning that "There are circumstances

where the abatement doctrine will not prohibit an attack on a *judgment*, but those exceptions do not authorize the filing or continuation of an action to resolve a status that has already ended." (See A-3, emphasis in Decision.) Yet, *Himes* is really a case to do just that: re-open, that is "continue," an action to correct the first wife's status from that of "divorcee" to that of "widow," even though the second wife's status as "widow" was created by and ended with the death of the husband.

The Court of Appeals also erred in limiting the holding in *Himes* to cases where judgment has been entered and equitable factors permit an "exception" to the abatement doctrine: "First, in every earlier instance where equitable principles have permitted an exception to the abatement doctrine, the case already had reached judgment." (See A-5.) Put differently, the Court of Appeals erred when it considered *Himes* as an "exception" to the abatement doctrine. *Himes* overruled the abatement doctrine in *Dwyer* and did not expressly limit the holding to the facts of the case or otherwise distinguish the holding as an "exception" to the rule in *Dwyer*.

Undoubtedly, a judgment had entered and equitable factors were present in *Himes*. Those facts alone, though, do not serve as an implied limitation on the holding or constitute a limited

"exception" to *Dwyer*. Limiting *Himes* to cases that have already reached judgment and where equitable factors will allow for an attack of the judgment was error because the facts in *Himes* serve as the basis for overruling *Dwyer*.

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 that an established rule is incorrect and harmful before it is abandoned." *Id.* at 653.

Thus, the facts in *Himes* provided the grounds for the Court to break from the doctrine of *stare decisis* and avoid applying the *Dwyer* rule, but the actual facts themselves do not limit the holding in *Himes* or carve out a mere "exception" to the abatement doctrine.

Likewise, the Court of Appeals erred in its interpretation and application of *In re Marriage of Fiorito*, 112 Wn.App. 657, 50 P.3d 298 (2002) to support its proposition that *Himes* created an "exception" to the abatement doctrine rather than overruling in its entirety. (See A-4.)

The *Fiorito* Court correctly acknowledged that the holding in *Himes* was not limited to the facts of the case: "If our Supreme Court had meant to limit its holding [in *Himes*] to factually similar

cases, it could have said so. It did not." *Fiorito*, 112 Wn. App. at 662.

The *Fiorito* case correctly read and applied *Himes* as expressly overruling *Dwyer* and cases that followed: *McPherson v. McPherson*, 200 Wash. 365, 93 P.2d 428 (1939); *Crockett v. Crockett*, 27 Wn.2d 877, 181 P.2d 180 (1947). *Fiorito*, 112 Wn.App. at 661-2.

In *McPherson*, the trial court entered an interlocutory decree that settled property rights and child custody but denied the husband's prayer for divorce. *McPherson*, 200 Wash. at 366. The husband then appealed the interlocutory decree (which left him still married) and then died while the appeal was pending. *Id.* The *McPherson* Court applied the *Dwyer* abatement doctrine and held that the action abated due to the husband's death and that the interlocutory decree in its entirety became a nullity as of the date of husband's death. *Id.* at 372-373.

If *Himes* overruled *Dwyer,* and, by extension, *McPherson*, then the *McPherson* case would not abate under *Himes* today. The dead husband's representative could continue to litigate the interlocutory decree which never did decide the primary subject matter of the *McPherson* dissolution: the parties' marital status.

In this case, would Saffran have been permitted to substitute in Dillon's dissolution matter if an interlocutory decree had been entered and appealed like that in *McPherson* where property interests were initially decided but the parties' marital status was left in limbo? *Himes* and *Fiorito* require an affirmative answer to that question. The outcome of the *McPherson* case today highlights that abatement of a legal action is a question of subject matter and not whether a judgment has been entered.

Judgments can be appealed, set aside, re-opened, amended, vacated, and the like, but judgments themselves cannot abate. Legal actions can abate but judgments cannot because there is nothing in a judgment to abate. Thus, if the law in this state is that the subject matter of dissolution proceeding will abate upon the death of a party unless a judgment has been entered and other equitable factors are present, then the Court could have specified that in *Himes*, or the *Fiorito* Court could have opined that such factors were specific prerequisites as an exception to the *Dwyer* abatement rule. But neither did.

The holding in *Himes* could not be more clear and it is consistent with general principles in other areas of law that allow a personal representative to substitute into the shoes of the decedent

to carry out and complete the decedent's affairs, including legal actions that survive the decedent: "All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise[...]". RCW 4.20.046.

Personal representatives have broad authority "to maintain and prosecute such actions as pertain to the management and settlement of the estate [...]" RCW 11.48.010.

In this case, Dillon initiated this legal action to obtain a divorce from Clark for the purposes of managing and settling his estate. Saffran has authority to maintain that action. RCW 11.48.010. That action survives to Saffran as Dillon's personal representative. RCW 4.20.046. And, the subject matter of the dissolution did not abate upon Dillon's death. *Himes*, 136 Wn.2d at 737.

The Court of Appeals' decision in this case conflicts with the decision and holding rendered in *Himes* and the *Fiorito* case interpreting and applying the *Himes* decision.

Himes was not an "exception" to the abatement doctrine established in *Dwyer*; rather, *Himes* specifically, and without

limitation, overruled that doctrine. The subject matter of dissolution the case, namely the parties' marital status, does not abate upon the death of a party regardless of whether a judgment has been entered or any particular equitable factors are present.

This Court should grant review.

B. CORRECT INTERPRETATION AND APPLICATION OF THE *HIMES* DECISION IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The present case, though unusual, is not uncommon. Unfortunately, people can, and do, die during the pendency of dissolution actions. The public, and attorneys practicing family law and estate planning law, benefit from a clear rule like that set down in *Himes.* The Court of Appeals' decision leaves the public and legal counsel guessing as to which circumstances will constitute an "exception" to the abatement doctrine.

Must a judgment have been entered before *Himes* will apply as an "exception" to the abatement doctrine? If so, then will a judgment alone suffice to create the exception to the *Dwyer* abatement doctrine, or must there be other equitable circumstances in addition to a judgment? If so, then what equitable grounds will suffice? And, what exactly constitutes significant third party interests for the exception to apply? The Court of Appeals' reading

and application of *Himes* and *Fiorito* as cases that are "exceptions" to the *Dwyer* rule creates more questions and uncertainty in the law than they resolve.

To be clear, the Petitioner's primary argument to the Court of Appeals was and remains that the holding in *Himes* overruled without exception or limitation the abatement doctrine established in *Dwyer*. (See *Brief of Appellant* at pp. 6-10.) Saffran only argues equitable circumstances favoring Dillon to the extent that if equitable circumstances must be present for an "exception" to the abatement rule to apply, then the trial court failed to consider the equitable circumstances that would weigh in Dillon's and his Estate's favor. The Commissioner specifically erred in deciding that the exact type of equitable circumstances in *Himes*, namely fraud, are the only equitable circumstances that will allow for an exception to the abatement doctrine. CP 83.

The Court of Appeals' decision highlights the error and confusion that abounds if *Himes* is interpreted and applied as an "exception" to abatement doctrine rather than completely overruling the doctrine.

In this case, the Court of Appeals disagreed that equitable principles should have permitted Saffran to substitute in the

dissolution action so that the action could proceed. (See A-4 to A-5.)

The Court of Appeals reasoned that "[f]irst, in every instance where equitable principles have permitted an exception to the abatement doctrine, the case already had reached judgment." (See A-5.) This is error because it denies Dillon, and subsequently his Estate, equal protection and application of the law.

For example, the primary, distinguishing difference between this case and *Fiorito* is that Dillon died before a judgment was entered. So, regardless of any equitable factors that would support Dillon's final wishes to be divorced from Clark, his Estate is automatically barred from receiving the benefit of an exception to the *Dwyer* abatement rule because a judgment was not entered prior to his death. By contrast, had Dillon lived for a few more months such that a judgment could be entered, then the case would not have abated. Clark could have appealed to attack the judgment and Saffran could substitute into the case as Dillon's personal representative. The mere timing of a party's death should not determine whether a dissolution case abates or not, so the *Himes* decision eliminated the timing of a party's death in a

dissolution proceeding as dictating the success or failure of a party's case.

Consider also that in *Fiorito*, it was actually the decedent's estate that was arguing for application of the *Dwyer* abatement doctrine to seek refuge from the appeal brought by the decedent's wife but was properly denied. *Fiorito*, 112 Wn. App. at 660. That is, the decedent's wife argued that *Himes* applied and that the action did not abate. Yet the opposite is occurring in this case where Clark is demanding that the *Dwyer* abatement doctrine does apply.

It is clear that the *Dwyer* abatement doctrine is confusing to all parties involved and can be used as both a sword and a shield by both the surviving marital partner and the deceased marital partner. Therefore, there is a substantial public interest in leveling the playing field and clarifying that *Himes* entirely overruled the *Dwyer* abatement doctrine.

The Court of Appeals also erred when it reasoned that permitting the dissolution to proceed with the substitution of the personal representative would result in an absurd situation where Clark would remain "married" to her late husband's estate. (See A-5.)

That result is no more of an absurd situation than a divorced spouse challenging a divorce decree for the purposes of reinstating her marital status to a dead man (who incidentally cannot contest the reinstatement of the marriage from the grave) in order to take the status of "widow" from the dead man's second wife. Yet, that is the essence of the *Himes* case.

The Court of Appeals also erred in its reasoning that the present case is substantively analogous to the case of *In re Marriage of Pratt*, 99 Wn.2d 905, 665 P.2d 400 (1983); (See A-6). First, the *Pratt* decision predates the *Himes* decision, and the *Pratt* decision hinged little on the application of the abatement doctrine. *Pratt*, 99 Wn.2d at 908.

The Court in *Pratt* ultimately decided that the issue of standing for an attorney to bring a motion on behalf of his deceased client to enter, *nunc pro tunc,* what was essentially an agreed-upon dissolution decree following the trial court's oral rulings was not the critical issue in the case. "The real issue, however, is not whether respondents had standing to bring their motion, but whether the trial court acted properly on its own motion." *Id.* at 908-9.

Interestingly, the reasoning in Justice Dolliver's dissent in *Pratt* is all the more fitting after the *Himes* decision:

> [I]t would seem to me a desirable public policy to prevent the fortuitous receipt of a windfall by one who had no expectation or moral claim to the inheritance. In refusing to do this the majority destroys the legitimate expectation of those who clearly have an expectation and moral right -- the children of the decedent.

Pratt, 99 Wn.2d at 912 (Dolliver, J, dissenting).

In this case, Clark admitted while Dillon was still alive that the marriage was "irretrievably broken," and requested that the trial court enter a decree of dissolution and "[a]pprove of the prenuptial agreement." CP 87-88. While the dissolution was pending and Dillon was alive, Clark's expectation was that she would be divorced and take according to the terms of the Prenupt, which she herself requested to be approved.

Limiting the decision in *Himes* to cases where a judgment has been entered creates in this case the "fortuitous receipt of a windfall" by Clark, who otherwise had no expectation or moral claim to an inheritance from Dillon. In so limiting the *Himes* decision, the Court of Appeals destroys the legitimate expectation of Dillon who rewrote his will to disinherit Clark with the belief that he would be obtaining a divorce.

There is a substantial public interest in clarifying that the holding in *Himes* means exactly what it says, namely that the

Dwyer abatement doctrine is overruled in its entirety. Said clarification also provides for certainty and would allow attorneys practicing domestic relations and estate planning law to provide clear counsel to their clients in these situations.

Review should be granted because this case presents an issue of substantial public interest for this Court to determine.

VI. CONCLUSION

The Supreme Court should grant review in this matter. The Court of Appeals decision in this case conflicts with the holding in *Himes* because it interprets and applies the *Himes* case as an exception to the *Dwyer* abatement doctrine rather than overruling said doctrine. There is also a substantial public interest in this Court determining the issues presented by this case. The public, and attorneys practicing family law and estate planning law, benefit from a clear rule, and the Court of Appeals decision leaves the public and legal counsel guessing as to which circumstances will constitute an "exception" to the abatement doctrine.

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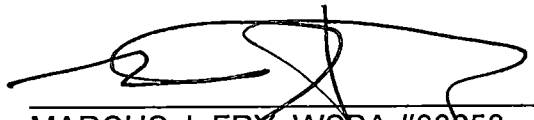
RESPECTFULLY SUBMITTED this 11 day of August, 2017.



MARCUS J. FRY, WSBA #33653
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ATTORNEYS FOR PETITIONER
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APPENDIX A

FILED
JULY 13, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Marriage of THOMAS ELDON DILLON, Appellant, and DOROTHY ANN CLARK, Respondent.	)	No. 34158-5-III UNPUBLISHED OPINION

KORSMO, J. — An estate appeals from the dismissal of the dissolution proceeding that had been in progress at the time of the husband's death. Precedent and policy compel us to affirm. The limited ability to attack an existing dissolution judgment decree after death is fundamentally different than obtaining a decree of dissolution after death.

FACTS

Thomas Dillon married Dorothy Clark in December 2008, some seven months after the couple had signed a prenuptial agreement. That agreement required Dillon's will to leave several items of Dillon's personal property (a house, vehicles titled in his name, any horses he owned) to Clark if they were still married at the time of his death.

Mr. Dillon learned that he was terminally ill with cancer and had only 30 days to live. He immediately instituted dissolution proceedings and soon thereafter changed his

will to disinherit Ms. Clark. Mr. Dillon, age 85, died May 12, 2015, 39 days after filing the dissolution action. Mr. Dillon's daughter, Sandra Saffran, became the personal representative of his estate.

Ms. Saffran promptly moved to substitute the estate in place of Mr. Dillon as the petitioner in the dissolution action in order to continue that proceeding. A court commissioner denied the motion to substitute and, instead, recognized that the dissolution action had abated due to the death of Mr. Dillon. A superior court judge denied the estate's motion to revise that ruling.

Ms. Saffran, on behalf of her father's estate, promptly appealed to this court.

ANALYSIS

The single issue in this case is whether the trial court erred in denying substitution due to the abatement of the dissolution action. The trial court correctly applied this state's long-standing precedent.

The Washington Supreme Court has long recognized "that it is the well-settled law in this state that a divorce action abates on the death of either party." *Osborne v. Osborne*, 60 Wn.2d 163, 165-166, 372 P.2d 538 (1962). The abatement policy dates back to at least *Dwyer v. Nolan*, 40 Wash. 459, 82 P. 746 (1905), *rev'd*, *In re Marriage of Himes*, 136 Wn.2d 707, 965 P.2d 1087 (1998). It has continued into the current dissolution act. *E.g.*, *In re Marriage of Himes*, 136 Wn.2d at 726; *In re Marriage of Pratt*, 99 Wn.2d 905, 908,

665 P.2d 400 (1983); Luvern V. Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375, 418 (1974).

Nonetheless, relying on RCW 4.20.050[1] and seizing on the resolution of *Himes*, the estate argues that when other interests—such as ownership of property—continue to exist despite the death of one of the parties to the marriage, it is appropriate to continue the action. The estate mistakenly applies *Himes* outside of its context. There are circumstances where the abatement doctrine will not prohibit an attack on a *judgment*, but those exceptions do not authorize the filing or continuation of an action to resolve a status that has already ended.

Himes involved an action to resolve which of the decedent's wives was his widow. The Washington husband had divorced his first wife, who lived across the country in Pennsylvania, without actual notice to her, several years before his death. *Himes*, 136 Wn.2d at 711-712. He then remarried a year before he died. *Id.* at 712. The first wife found out about the marriage dissolution shortly before his death when the Navy terminated her benefits; she sought to vacate the judgment due to fraud. *Id.* at 713-714. The second wife argued that the dissolution had been abated by the husband's death, so there was nothing the first wife could attack. *Id.* at 718.

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[1] "No 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*." (emphasis added).

Himes overruled the *Dwyer* principle that the death of a party to a divorce or dissolution "eliminates the subject matter of the action." *Id.* at 737. Instead, the court recognized that equitable principles could justify the surviving party attacking a fraudulent judgment. *Id.* at 736-737.

A few years later this court applied equitable principles recognized in *Himes* and declined to abate a dissolution appeal merely because one of the parties had died during the appeal. *In re Marriage of Fiorito*, 112 Wn. App. 657, 50 P.3d 298 (2002). There the husband had died after the wife had appealed the dissolution in order to challenge the property distribution and support obligations. *Id.* at 659-660. Citing *Himes*, this court permitted the attack on the nonfinal judgment, despite the death of the husband, due to "both equitable grounds and significant third party interests." *Id.* at 663. Specifically, this court relied on the statutory requirement that property be divided in a "just and equitable manner,"[2] and the interest of third parties—the couple's young children—in the child support order. *Id.* In other words, this court allowed an appeal to continue in order to permit resolution of judgment provisions unrelated to the marital status of the couple—the subject of the abatement doctrine.

Relying on *Himes* and *Fiorito*, the estate argues that it is equitable to permit the dissolution to proceed in the trial court because of the interest of the estate and third

[2] RCW 26.09.080.

parties (Mr. Dillon's heirs) in the distribution of his property. For multiple reasons, we disagree.[3] First, in every earlier instance where equitable principles have permitted an exception to the abatement doctrine, the case already had reached judgment. *See Himes*, 136 Wn.2d at 719-726 (discussing cases); *Fiorito*, 112 Wn. App. at 660-663 (same); 20 SCOTT HORENSTEIN, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 31:11, at 58 (2d ed. 2015) (summarizing case exceptions to abatement doctrine). Second, permitting the dissolution to proceed would result in the absurd situation that Ms. Clark would remain "married" to her late husband's estate, prohibiting her from remarrying or otherwise managing her affairs as a single person would, despite the legal impossibility of such a marriage under our statutes, merely because his heirs wished to continue the marital status a bit longer.[4] *See* RCW 26.04.010 (defining marriage as a contract between two individuals).

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[3] Even if the dissolution had been permitted to proceed, nothing would preclude the trial court from exercising its discretion to award all of the separate and community property to Ms. Clark. Due to Mr. Dillon's death, he no longer would have need of that property vis-a-vis Ms. Clark, the only other party to the dissolution.

[4] "If the death of the plaintiff in this case had occurred before judgment, it will not be urged that there could have been a substitution of his executors to represent him in the prosecution of the case. Such a proposition, for manifest reasons, would not be entertained by a court for a moment." *Dwyer*, 40 Wash. at 461. Although *Himes* overruled the *Dwyer* holding that death abates *all* actions relating to a divorce, *Himes* still acknowledged and followed the same general abatement principle recognized in *Dwyer*.

This case is substantively identical to *Pratt*. There the court after a bench trial had issued its oral decision dissolving the marriage and assigning property. The parties reduced the judgment to writing and signed it, but had not presented the decree to the court before the husband died. 99 Wn.2d at 907. The trial court, over the objection of the wife, entered the judgment nunc pro tunc effective to a date when the husband had still been alive. *Id.* In light of the abatement doctrine and the fact that the husband's adult children were not parties to the dissolution action, there was no standing for the husband's counsel to seek entry of the decree since he did not represent a party. *Id.* at 908.

Similarly here, the death of Mr. Dillon abated this action. His estate could not continue the litigation because the marital status had already ended with Mr. Dillon's death. Nothing would be achieved by continuing the litigation to temporarily keep alive a fictitious marriage involving a dead spouse simply so it could end on a different date.[5]

[5] For a dissolution decree to have interrupted this prenuptial agreement, it would have to have been entered at a time when Mr. Dillon was still alive since the prenuptial agreement transferred property upon Mr. Dillon's death. That would be factually impossible now, and there also was no way to retroactively enter a decree of dissolution to an earlier time since Mr. Dillon died during the 90 day waiting period of the statute. For all of these reasons, the estate could not benefit by further litigation.

The trial court correctly denied the motion to substitute parties since the action had ended with the death of Mr. Dillon. Accordingly, 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:

Fearing, C.J.

Lawrence-Berrey, J.

Court of Appeals No. 341585-III

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Facsimile: (509) 575-1883

ATTORNEYS FOR PETITIONER
SANDRA SAFFRAN, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF THOMAS ELDON DILLON

ORIGINAL

STATE OF WASHINGTON)
) ss.
County of Yakima)

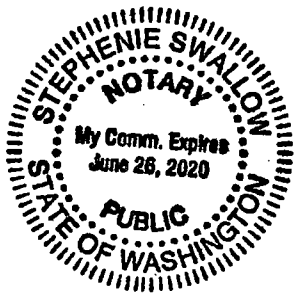
The undersigned, being first duly sworn, on oath deposes and says:

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 August 11, 2017, affiant transmitted via First Class Mail an envelope, containing a copy of the following document(s): **PETITION FOR REVIEW**, directed to:

MR ROBERT G VELIKANJE
LAW OFFICE OF ROBERT G VELIKANJE
205 N 40TH AVENUE SUITE 104
YAKIMA WA 98908-2959

LAUNA J. PETTIT

SUBSCRIBED AND SWORN to before me on 11th day of August, 2017.



Stephenie Swallow
Stephenie Swallow (PRINTED NAME)
Notary Public in and for the State of Washington, residing at Moxee.
My Commission Expires 06-26-2020.