

07 JUL 13 PM 3:13
STATE OF WASHINGTON
BY DEPUTY
COURT CLERK

36127-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re:

THE IRREVOCABLE TRUST OF MICHAEL A. MCKEAN

MICHAEL A. McKEAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR PIERCE COUNTY

THE HONORABLE SUSAN KEERS SERKO

BRIEF OF APPELLANT

JOHN P. O'CONNOR, WSBA #6806
Attorney for Appellant

2115 North 30th, Suite 201
Tacoma, Washington 98403
(253) 572-4264

 ORIGINAL

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR -1-
ASSIGNMENTS OF ERROR -1-
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR . -1-

B. STATEMENT OF THE CASE -1-

C. ARGUMENT -6-
MOTION TO VACATE ORDERS AND DISMISS FILED BY
MR. MCKEAN WAS TIMELY MADE EVEN THOUGH
ALMOST FOUR YEARS AFTER THE APPOINTMENT OF
CBGS.. -6-

THE ORDERS ENTERED BY THE SUPERIOR COURT IN
THESE PROCEEDINGS ARE VOID -7-

ALL ORDERS WHICH REST ON THE RULING OF THE
DISSOLUTION COURT THAT A CORPORATE TRUSTEE
BE APPOINTED SHOULD HAVE BEEN VACATED . . -13-

THE COURT SHOULD HAVE SET ASIDE THE
APPOINTMENT OF COMMENCEMENT BAY
GUARDIANSHIP SERVICES AND DISMISSED THE
PROCEEDINGS -16-

THE COURT ERRED IN ORDERING 20% OF ANY
DISTRIBUTION MADE TO NORTHWEST COMMUNITY
HOUSING CORPORATION AFTER DECEMBER 30, 1992
SHALL BE REMITTED TO THE TRUSTEE OF THE
IRREVOCABLE TRUST -17-

D. CONCLUSION -17-

TABLE OF CASES AND OTHER AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>In re the Marriage of McKean,</i> 110 Wn. App. 191, 38 P.3d 1053 (2002)	4, 7, 10
<i>Lindgren v. Lindgren,</i> 58 Wn.App. 588, 794 P.2d 526 (1990), <i>review denied</i> , 116 Wn.2d 1009, 805 P.2d 813 (1191)	6
<i>Brenner v Port of Bellingham,</i> 53 Wn.App. 182, 765 P.2d 1333 (1989)	6, 7
<i>Allstate Ins. Co. v. Khani,</i> 75 Wn.App.317, 877 P.2d 724 (1994)	7
<i>In re Marriage of Leslie,</i> 112 Wn.2d 612, 772 P.2d 1013 (1989)	7
<i>In re Himes,</i> 136 Wn.2d 707, 965 P.2d 1087 (1998)	7
<i>State v. Ward,</i> 125 Wn.App. 374,104 P.3d 751, <i>review denied</i> , 155 Wn.2d 1025, 126 P.3d 820 (2005)	7
<i>Scanlon v Witrak,</i> 110 Wn.App. 682, 42 P.3d 447, <i>review denied</i> , 147 Wn.2d 1024, 60 P.3d 92 (2002)	7
<i>State ex rel. Hays v. Wilson,</i> 17 Wn.2d 670, 672, 137 P.2d 105 (1943)	9

<u>State v Nicholson,</u>	
84 Wn.App. 75, 925 P.2d 637 (1996), <i>reviewed denied,</i>	
131 Wn.2d 1025, 937 P.2d 1101 (1997)	12
<u>City of Tacoma v Cornell,</u>	
116 Wn.App. 165, 171 fn9, 64 P.3d 674 (2003)	12
<u>State v Rosenbaum,</u>	
56 Wn.App. 407, 784 P.2d 166 (1989)	12, 13
<u>Smith v Kneisley,</u>	
187 Wn. 699, 60 P.2d 19 (1936)	14
<u>Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc.,</u>	
270 Neb. 337, 701 N.W. 2d 367 (2005)	14
<u>Potter v. Hill,</u>	
43 N.J.Super. 361, 128 A.2d 705 (1957)	14
<u>Mayer v. Rice,</u>	
113 Wn. 144, 193 P. 723 (1920)	14, 15
<u>Allied Fid. Ins. Co. v. Ruth,</u>	
57 Wn.App. 783, 790 P.2d 206 (1990)	15
<u>Brickum Inv.Co. v. Vernham Corp.,</u>	
46 Wn.App. 517, 731 P.2d 533 (1987)	15
<u>Deschenes v. King Co.,</u>	
83 Wn.2d 714, 716, 521 P.2d 1181	16
OTHER AUTHORITIES	PAGE(S)
RCW 11.96A	1, 5, 6, 9, 10, 15
RCW 11.96A.040	5, 10, 16

CR 60(b)(1), (2), and (3)	6
CR 60(b)(5)	6
CR 60(b)	6
I WASHINGTON APPELLATE PRACTICE DESKBOOK (2 nd ed.), ¶ 11.7, page 11-4.	8
RAP 7.2	8
RAP 12.8	9
CR 60	9
Karl B. Tegland, 3 WASHINGTON PRACTICE, <i>Rules Practice</i> (2004), RAP 12.8, page 2122	9
CR 17(a)	9
RCW 11.96A.080	10
RCW 11.96A.030	10
RCW 11.96A.080(1)	10
RCW 11.110.120	11
RCW 11.96A.120	11
RCW 11.42	11
RCW 11.18.200	11
RCW 11.96A.030(4)	11, 13

RCW 11.96A.030(5)	12, 13
81 A.L.R. 712 (1932)	14
7 Moore Federal Practice (2 nd ed.), page 282	14
21 C.J.S. Courts s 118 (1940)	16

A. ASSIGNMENTS OF ERROR:

ASSIGNMENTS OF ERROR

1. The trial court erred in not granting the motion of Michael A. McKean to vacate all orders and dismiss all orders based upon a lack of jurisdiction and upon a lack of standing of Commencement Bay Guardianship Services to initiate any action under RCW 11.96A.
2. The trial court erred in ordering that twenty (20%) percent of any distributions made to Northwest Community Housing would be remitted to the Trustee of the Irrevocable Trust.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err in not dismissing the TEDRA action filed by Commencement Bay Guardianship Services and vacating all orders because Commencement Bay Guardianship Services lacked standing?
2. Did the trial court err in not dismissing the TEDRA action filed by Commencement Bay Guardianship Services and vacating all orders because, based upon lack of standing, the court lacked jurisdiction?
3. Did the court err in ordering that twenty (20%) percent of any money received by Northwest Community Housing was to be dispersed to the Irrevocable Trust of Michael A. McKean?

B. STATEMENT OF THE CASE:

On December 30, 1992, Michael As. McKean created a trust for his children. The trust was named the Irrevocable Trust For Michael Allison McKean's Children. CP 7-44. Included in the assets transferred to the trust were 100 shares of Northwest Community Housing Corporation. CP 43. The trial court determined that these shares represented the 20% interest in

Northwest Community Housing Corporation and therefore concluded that 20% of any funds distributed to Northwest Community Housing Corporation should go to the Irrevocable Trust. CP 817.

This appeal challenges the court's decision with respect to a petition for instructions filed by the respondent, Commencement Bay Guardianship Services on January 4, 2002. CP 1-85. Further, this appeal challenges each order and action taken by the trial court after the original petition was filed. The petition was filed by Commencement Bay Guardianship Services (CBGS) based upon its assertion that it had been "... appointed corporate trustee for the trust of the McKean children."

CBGS was appointed as the trustee by an order dated October 26, 2001 issued by the Honorable Terry Sebring of the Pierce County Superior Court. CP 5-6. The order of October 26, 2001 is based upon the Decree of Dissolution rendered by Judge Sebring in *In re the Marriage of Michael A. McKean and Connie McKean*, Pierce County Cause Number 98-3-01560-7, entered on November 2, 2000. CP 61-68. Judge Sebring's order was based upon his findings in the dissolution of marriage action that "Michael McKean and Connie McKean have not honored the trust status in the past of the assets transferred to the children; and further, the court finds that the friends and relatives of Michael McKean, who presently act as trustees, would not act as independent trustees, and would be subject to the control or direction of Michael McKean;" CP 59. Based upon his findings Judge Sebring, in the decree, ordered that:

"...all property identified in findings of fact-section 2.20(i)- which is held in trust for the Michelle McKean and/or Morgan McKean, shall be transferred to a corporate trustee

which is bonded and licensed by the State of Washington, which Trustee is to act as such on behalf of the children pursuant to whatever the respective trust agreements are for these children and State law. The trustee is to be selected by mutual agreement of the parties, provided that if the parties do not select a trustee by November 1, 2000, then by December 1, 2000, they are each to provide to the court the names of two corporate trustees, and thereafter the court shall select the trustee; provided that if the parties fail to make the transfers of the children's assets to the corporate trustee named by them jointly or named by the court, then all of the assets in the childrens' trusts are deemed to be community assets of the respective party, and if not transferred as ordered, then Michael McKean shall pay Connie McKean one-half of the value of the childrens' trust assets under his control, including the assets controlled by his friends or relatives, after he has subtracted the value of the assets controlled by Connie McKean, it being the Court's intent to divide the trust assets equally; and provided further that for any real estate rental property in trust for the children, Michael McKean may act as the property manager for a reasonable fee to be determined by the corporate trustee." CP 68.

Subsequent to the appointment of CBGS and pursuant to an appeal filed by Michael A. McKean with respect to the court's decisions in the dissolution of marriage action involving him and Connie McKean, the Court of Appeals rendered an opinion relative to Mr. McKean's appeal in the dissolution of marriage action. CP 97-104.

With respect to the dissolution trial court's decision regarding the trust, the Court of Appeals held that "As the trial court lacked in personam jurisdiction over the trustees, it erred in adjudicating matters regarding the trust, including the designation of a trustee." CP 101.

On January 22, 2002, the trial court entered an Order on Petition for Instructions. CP 89-92. On February 1, 2002, the Court of Appeals issued its decision on Mr. McKean's appeal, in which it found that "the trial court lacked in personam jurisdiction over the trustees," and that it had "erred in adjudicating matters regarding the trust, including the designation of a trustee." *In re the Marriage of McKean*, 110 Wn. App. 191, 196, 38 P.3d 1053 (2002). The Court of Appeals also held that "the trial court lacked jurisdiction over the trust property and, consequently, we vacate that order." *Id* at 192, 38 P.3d 1053.

On February 6, 2002, Mr. McKean filed a Motion for Order of Dismissal of this present action and of CBGS as trustee, based on the Court of Appeals' decision in the dissolution action.

On February 11, 2002, CBGS filed a "memorandum on nunc pro tunc and standing" requesting "that the order appointing successor trustee be entered nunc pro tunc to avoid having to re-file the case and to grant jurisdiction to the court's previous orders" and arguing that Mr. McKean "does not have standing to challenge" appointment of a "successor trustee." CP 107-131.

On February 11, 2002, the trial court entered an order stating:

The court will reserve ruling on issue of CBGS appointed trustee nunc pro tunc & issue of whether Michael McKean has standing to challenge the appointment of a successor trustee...and the trustee CBGS has no duties at this time. CP 132.

On February 20, 2002, CBGS filed a Motion for Revision of Order Entered on 2/11/02. CP 147-150.

On March 12, 2002, the court entered Findings of Fact, Conclusions of Law and Order Appointing Successor Trustee. The Honorable Bruce Cohoe signed a finding that “[t]he court has jurisdiction of this trust pursuant to RCW 11.96A.040 and has had jurisdiction since the case was filed on January 4, 2002,” and a conclusion “that it has had jurisdiction over this trust since the filing of the matter on January 4, 2002 pursuant to RCW 11.96A, et seq.” Finally, the court revised the February 11, 2002 Order and appointed CBGS “successor trustee of the Irrevocable Trust of Michael A. McKean as of January 4, 2002, nunc pro tunc.” CP 166-173.

On April 5, 2002, the Mandate was issued on the Court of Appeals decision in the dissolution of marriage case reversing the trial court’s ruling that a corporate trustee should be appointed.

Subsequent to the order of the Honorable Bruce Cohoe on March 12, 2002, the case continued. All matters involved in the case were tried over several days in November and December, 2006, and in January and February of 2007. CP 782. Prior to trial Michael A. McKean filed a Motion to Vacate Order and Dismiss. CP 402-416. The motion was made on the basis that CBGS lacked standing under Chapter 11.96A RCW to initiate proceedings since the Court of Appeals had ruled that the trial court in the McKean dissolution action had lacked jurisdiction to appoint a trustee. CP 405. Therefore, it was asserted by Mr. McKean that the trial court in this trust case lacked jurisdiction because CBGS lacked standing under Chapter 11.96A RCW to initiate any proceedings.

On October 31, 2006, the Honorable Susan Keers Serko, Pierce County Superior Court Judge, entered an order denying Mr. McKean's Motion to Vacate Orders and Dismiss on the basis that the Superior Court has inherent power, duty and jurisdiction to protect children who are beneficiaries of trusts. CP 696.

With respect to the orders relating to Northwest Community Housing Corporation, the court ordered, based upon its conclusion that the trust owned 20% of Northwest Community Housing Corporation, that 20% of any funds which had been distributed to Northwest Community Housing since December 30, 1992 should be delivered to the trustee of the Irrevocable Trust. CP 817.

C. ARGUMENT:

MOTION TO VACATE ORDERS AND DISMISS FILED BY MR. MCKEAN WAS TIMELY MADE EVEN THOUGH ALMOST FOUR YEARS AFTER THE APPOINTMENT OF CBGS.

CR 60(b)(5) provides that a party may be relieved from a final judgment, order, or proceeding where "the judgment [or order] is void."

Although a motion to set aside an order or judgment under CR 60 (b)(1), (2), and (3) must be made within one year of the decision, a motion to vacate judgment or order "may be brought at any time" after entry of the judgment or order. *Lindgren v. Lindgren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009, 805 P.2d 813 (1191); see also *Brenner v Port of Bellingham*, 53 Wn.App. 182, 188, 765 P.2d 1333 (1989) ("motions to vacate under CR 60(b)(5) are not barred by the 'reasonable time' or the 1-year requirement of CR 60(b)"). "Void

judgments may be vacated regardless of the lapse of time.” *Allstate Ins. Co. v. Khani*, 75 Wn.App. 317, 323-234, 877 P.2d 724 (1994) (citing *In re Marriage of Leslie*, 112 Wn.2d 612, 618-619, 772 P.2d 1013 (1989)). “Consequently, not even the doctrine of laches bars a party from attacking a void judgment.” *Id* (citing *Leslie*, 112 Wn.2d at 619-620, 772 P.2d 1013).

In *Brenner*, the Court of Appeals reversed and remanded the case to the trial court with instructions to vacate a 16-year old judgment. Here, Mr. McKean seeks to vacate orders going back only four years. This motion is timely because the orders entered in this case are void for lack of jurisdiction.

**THE ORDERS ENTERED BY THE SUPERIOR COURT IN
THESE PROCEEDINGS ARE VOID**

A judgment is void if the rendering court lacked jurisdiction over the parties or the subject matter of the claim. *In re Himes*, 136 Wn.2d 707, 965 P.2d 1087 (1998); *State v. Ward*, 125 Wn.App. 374, 379, 104 P.3d 751, *review denied*, 155 Wn.2d 1025, 126 P.3d 820 (2005); *Scanlon v Witrak*, 110 Wn.App. 682, 685-686, 42 P.3d 447, *review denied*, 147 Wn.2d 1024, 60 P.3d 92 (2002).

The Court of Appeals ruled “[a]s the trial court lacked in personam jurisdiction over the trustees, it erred in adjudicating matters regarding the trust, including the designation of a trustee.” *In re the Marriage of McKean*, 110 Wn.App. At 196, 38 P.3d 1053. CP 101.

1. The trial court had no jurisdiction to grant a motion appointing a corporate trustee after the Court of Appeals accepted review in the dissolution case.

“Common sense mandates that generally the trial court loses authority to act once the appellate court has accepted review. It is both administratively impractical and disruptive to have more than one court responsible for the same case.” I WASHINGTON APPELLATE PRACTICE DESKBOOK (2nd ed.), ¶ 11.7, page 11-4.

RAP 7.2 provides that, following acceptance of review, “the trial court has authority to act in a case only to the extent provided in the rule[.]” The decree of dissolution in which the provision requiring appointment of a corporate trustee was entered by the court on November 3, 2000. Division Two of the Court of Appeals accepted review of the ruling regarding appointment of a corporate trustee in the dissolution case on January 11, 2001. The order appointing CBGS was entered on October 26, 2001.

RAP 7.2 provides that a trial court has “authority to hear and determine postjudgment motions authorized by the civil rules...or statutes.” There is no civil rule or statute that authorizes a motion for appointment of a corporate trustee. The trial court lacked jurisdiction to entertain the motion requesting appointment of a corporate trustee or to enter an order appointing a corporate trustee while the appeal from the dissolution case was pending.

2. The October 26, 2001 order appointing CBGS as corporate trustee is void for lack of jurisdiction under the McKean decision.

When the Court of Appeals reversed the trial court's ruling that a corporate trustee should be appointed because the dissolution court lacked jurisdiction, the October 26, 2001 order was *ipso facto* rendered void. Discussing RAP 12.8, titled "effect of reversal on intervening rights," one authority wrote:

When a judgment is reversed, proceedings that depended upon the judgment for their validity fall with it. Actions taken in reliance upon the judgment will be undone, and orders entered pursuant to the judgment to a motion to vacate under CR 60. In short, when a judgment is reversed, the courts will afford the relief necessary to place the parties in the position they occupied prior to trial.

Karl B. Tegland, 3 WASHINGTON PRACTICE, *Rules Practice* (2004), RAP 12.8, page 2122.

3. Because the trial court lacked jurisdiction to appoint a corporate trustee, CBGS had no standing to initiate these proceedings under RCW 11.96A

CR 17(a) codifies the rule that an action may only be prosecuted by the "real party in interest" defined as a person or entity who has a substantial and present interest in the matter and is able to show that he or she will benefit by the relief granted. *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 672, 137 P.2d 105 (1943). The trustee of an express trust is specifically named in the Rule as one who "may sue in his own name without joining with him the party for whose benefit the action is brought." CR 17(a).

On January 4, 2002, CBGS initiated these proceedings as "the court appointed Corporate Trustee for the Trust of the McKean Children",

asserting that “Commencement Bay Guardianship Service was appointed Corporate Trustee of the McKean children’s trust by order of the Pierce County Superior Court on October 26, 2001.” CP 1. As discussed above, however, the October 26, 2001 order appointing CBGS as corporate trustee was rendered void by the decision of the Court of Appeals.

CBGS had no standing to initiate these proceedings as trustee, because the trial court lacked jurisdiction to appoint CBGS as corporate trustee.

Although “RCW 11.96A.040 gives the superior court subject matter jurisdiction over trust matters” (*In re Marriage of McKean*, 110 Wn.App. At 196 fn 3, 38 P.3d 1053), a proper party i.e., one with standing, must bring the trust matter before the court. RCW 11.96A.080 describes those persons who are entitled to initiate judicial proceedings under Chapter 11.96A. The statute provides, in pertinent part:

any **party** may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter, as defined by RCW 11.96A.030; {or} the resolution of any other case or controversy that arises under the Revised Code of Washington and references judicial proceedings under this title...

RCW 11.96A.080(1) (emphasis added)

RCW 11.96A.030, in turn, provides the definition of “party” as the term is used in Chapter 11.96A RCW:

- (a) The trustor if living;
- (b) The trustee;
- (c) The personal representative;

- (d) An heir;
- (e) A beneficiary, including devisees, legatees, and trust beneficiaries;
- (f) The surviving spouse of a decedent with respect to his or her interest in the decedent's property;
- (g) A guardian ad litem;
- (h) A creditor;
- (i) Any other person who has an interest in the subject of the particular proceeding;
- (j) The attorney general if required under RCW 11.110.120;
- (k) Any duly appointed and acting legal representative of a party such as a guardian, special representative, or attorney in fact;
- (l) Where applicable, the virtual representative of any person described in this subsection the giving of notice to whom would meet notice requirements as provided in RCW 11.96A.120;
- (m) Any notice agent, resident agent, or a qualified person, as those terms are defined in Chapter 11.42 RCW; and
- (n) The owner or the personal representative of the estate of the deceased owner of the nonprobate asset that is the subject of the particular proceeding, if the subject of the particular proceeding relates to the beneficiary's liability to a decedent's estate or creditor's under RCW 11.18.200

RCW 11.96A.030(4).

CBGS was not a “party” under any of the classifications set out in the statute because the trial court had no jurisdiction to appoint a corporate trustee in the dissolution proceeding. Neither was CBGS a person “interested in the proceeding,” for such persons include only the trustor, the beneficiaries, persons holding powers over the trust assets, or the trustee. RCW 11.96A.030(5). Because the trial court lacked jurisdiction to appoint a corporate trustee, CBGS did not have standing to initiate these proceedings.

4. The March 12, 2002 “nunc pro tunc” order is both invalid and void.

In the March 12, 2002 Findings of Fact, Conclusions of Law and Order Appointing Successor Trustee, it is stated that “Commencement Bay Guardianship Services is appointed successor trustee of the Irrevocable Trust of Michael A. McKean as of January 4, 2002, nunc pro tunc..” CP 172.

A nunc pro tunc order records “some act of the court which was **actually performed** but not entered into the record at that time.” (Citations omitted.) Such an order “may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken. (Citations omitted.)

State v Nicholson, 84 Wn.App. 75, 78-79, 925 P.2d 637 (1996), *reviewed denied*, 131 Wn.2d 1025, 937 P.2d 1101 (1997) (emphasis added.)

A nunc pro tunc order “cannot be used to remedy the failure to take action at that earlier time.” *City of Tacoma v Cornell*, 116 Wn.App. 165, 171 fn9, 64 P.3d 674 (2003). “[A] nunc pro tunc order is not a proper means to remedy omissions.” *State v Rosenbaum*, 56 Wn.App. 407, 411,

784 P.2d 166 (1989). A nunc pro tunc order improperly used to “remedy a prior omission...[is]...invalid. *Rosenbaum*, 56 Wn.App. At 412, 784 P.2d 166.

There was no action taken by the court on January 4, 2002 to appoint CBGS as “successor trustee” of the irrevocable Trust For Michael Allison McKean’s Children. January 4, 2002, is simply the date that CBGS filed its petition for instructions in this case. As discussed above, there was no “corporate trustee” since the trial court lacked jurisdiction to appoint one.

The “nunc pro tunc” order signed on March 12, 2002 is invalid because it was improperly used to remedy a prior omission. Further, because the court had no jurisdiction to appoint CBGS as “corporate trustee”, there was no standing to initiate these proceedings because under RCW 11.96A.030(4), CBGS was not a “party” nor was it a person “interested in the proceedings” under RCW 11.96A.030(5). The March 12, 2002 findings of fact, conclusions of law and order appointing successor trustee are both invalid and void.

**ALL ORDERS WHICH REST ON THE RULING OF THE
DISSOLUTION COURT THAT A CORPORATE TRUSTEE BE
APPOINTED SHOULD HAVE BEEN VACATED**

The general rule on the effect of a reversal in subsequent orders relying on the validity of the reversed decree or order was stated long ago:

In case an appeal is from an interlocutory order or decree and does not have the effect of staying further proceedings, and, pending the appeal, the cause is prosecuted to final judgment or decree against the appellant, such final

judgment or decree will, where the interlocutory order or decree was the foundation of the right of the adverse party to proceed, fall with the reversal of such interlocutory order or decree.

81 A.L.R. 712 (1932).

In *Smith v Kneisley*, 187 Wn. 699, 60 P.2d 19 (1936), the Washington Supreme Court applied this principle:

Joseph B. Smith, having recovered a judgment against Lydia V. Kneisley..., sued out a writ of garnishment in the present ancillary action. He obtained judgment against the garnishee defendants, from which judgment an appeal was taken.

We have reversed the original judgment in the case of *Smith v Kneisley* with directions to dismiss the action, and therefore the garnishment proceeding must fall.

Judgement reversed, with directions to dismiss.

Kneisley, 187 Wn. At 699, 60 P.2d 12.

The general rule followed in Washington is adhered to in other jurisdictions as well. *See, e.g., Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 270 Neb. 337, 338, 701 N.W. 2d 367 (2005). (“Generally, an order, judgment or proceeding dependent on, or ancillary and accessory to, a judgment, order or decree that is reversed shares its fate and falls with it”); *Potter v. Hill*, 43 N.J.Super. 361,707, 128 A.2d 705 (1957). (“Where one judgment is founded on a prior one and the prior judgment upon which it is based has been reversed, the later judgment may be vacated.”) (citing 7 Moore Federal Practice (2nd ed.), page 282).

In *Mayer v. Rice*, 113 Wn. 144, 193 P. 723 (1920), a guardianship was initiated without substantial compliance with the statutes then in effect,

and the ward filed a motion seeking “to quash the guardianship proceedings and the several orders made therein, basing the motion on the ground that the proceedings were void for want of jurisdiction.” *Mayer*, 113 Wn. At 147, 193 P. 723. The ward’s motion was denied, and the ward appealed from the order of denial. *Id.*

The Supreme Court determined that the court had acted without jurisdiction in appointing the guardian. *Mayer*, 113 Wn. At 148, 193 P. 723. As a result, the court concluded “that the proceedings were void,” and ruled:

The order appealed from is reversed, and the cause remanded, with instruction to enter an order **setting aside the order appointing the guardian of the estate of the appellant, and all of the subsequent orders made in such case.**

Mayer, 113 Wn. At 150, 193 P. 723 (emphasis added).

As in *Mayer*, the trial court here had no jurisdiction to appoint a corporate trustee in the McKean dissolution case. There was therefore no “corporate trustee” with standing to initiate these proceedings under Chapter 11.96A RCW. As in *Mayer*, all orders in this case are void for lack of jurisdiction.

“A trial court has no discretion when dealing with a void judgment; the court must vacate it.” *Allied Fid. Ins. Co. v. Ruth*, 57 Wn.App. 783, 790, 790 P.2d 206 (1990) (citing *Brickum Inv. Co. v. Vernham Corp.*, 46 Wn.App. 517, 520, 731 P.2d 533 (1987)). Because all of the orders entered in this case are void for lack of jurisdiction, all should be vacated.

**THE COURT SHOULD HAVE SET ASIDE THE APPOINTMENT
OF COMMENCEMENT BAY GUARDIANSHIP SERVICES AND
DISMISSED THE PROCEEDINGS**

“The rule is well known and universally respected that a court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal.” *Deschenes v. King Co.*, 83 Wn.2d 714, 716, 521 P.2d 1181 (citing 21 C.J.S. Courts s 118 (1940)).

The Court of Appeals ruled that the trial court in the dissolution case lacked jurisdiction over both the trust property and the trustees. The trial court’s ruling that a corporate trustee should be appointed was reversed, and the October 26, 2001 order appointing a corporate trustee in the dissolution case was thereby rendered void.

Because the order appointing CBGS as corporate trustee was void, there was no standing to initiate the proceedings because CBGS and was neither a party nor person interested in the Irrevocable Trust for Michael Allison McKean’s Children under RCW 11.96A.040.

In fact, in these proceedings, CBGS sought nunc pro tunc entry of the order appointing a “successor trustee” in order “to grant jurisdiction to the court’s previous orders.” CP 107. A trial court cannot “grant jurisdiction” to itself that an appellate court has ruled it does not have.

**THE COURT ERRED IN ORDERING 20% OF ANY
DISTRIBUTION MADE TO NORTHWEST COMMUNITY
HOUSING CORPORATION AFTER DECEMBER 30, 1992 SHALL
BE REMITTED TO THE TRUSTEE OF THE IRREVOCABLE
TRUST**

Northwest Community Housing Corporation was not a party to or involved in this action. No claims were brought against Northwest Community Housing.

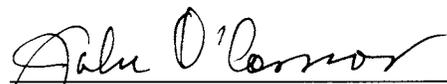
At time of trial Mr. McKean testified that he had transferred to his sister, Shannon Keene, 75% of Northwest Community Housing. CP 803. Because Northwest Community Housing Corporation was not a party involved in this action, the trial court lacked jurisdiction to order it to do anything. Furthermore, even if it did have authority and jurisdiction to mandate certain actions be taken by Northwest Community Housing, it is completely disregarding the possibility that there are expenses (i.e. taxes, legal fees, accounting fees) which must be paid by the corporation before any distributions are made to shareholders.

D. CONCLUSION:

Because of lack of jurisdiction, appointment of the corporate trustee was void, and because of the same lack of jurisdiction, the “nunc pro tunc” appointment of a “successor” corporate trustee was also void. The trial court’s decision should be reversed and the action remanded with directions to vacate all orders entered in this case, including the final judgment and order, and the appointment of the “successor” trustee.

Because the trial court lacked jurisdiction over Northwest Community Housing Corporation, its orders with respect to Northwest Community Housing Corporation should be reversed and vacated.

Respectfully submitted this 13th day of July, 2007.



John P. O'Connor

WSBA NO. 6806, Attorney for Appellant

2115 North 30th Street, Suite 201

Tacoma, Washington 98403

Telephone (253) 572-4264 Fax (253) 593-4503

OFFICE OF THE CLERK
COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

07 JUL 13 PM 3:48

STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

In re:

THE IRREVOCABLE TRUST OF
MICHAEL A. MCKEAN

MICHAEL A. MCKEAN,
Appellant,

COMMENCEMENT BAY
GUARDIANSHIP SERVICES,
Successor Trustee of The Irrevocable
Trust of Michael A. McKean,
Respondent.

NO. 36127-2-II

CERTIFICATE OF SERVICE

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that a true and correct copy of the **Brief of Appellant** was placed for delivery via ABC Legal Messenger Service to the persons listed below on the date listed below:

Robert Blake Nettleton
Neil, Nettleton & Neal, PS
5302 Pacific Ave
Tacoma, Washington 98408

Robin Balsam
609 Tacoma Ave South
Tacoma, Washington 98402

Signed at Tacoma, Washington this 13 day of July, 2007.

[Signature]
Carrey Galloway
2115 North 30th Street, Suite 201
Tacoma, Washington 98403
(253) 572-42694

ORIGINAL