

No. 36657-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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CHRISTOPHER SMITH, Appellant

v.

CHRISTA SMITH, Respondent.

REPLY BRIEF OF APPELLANT

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I. SUMMARY

Christa Cote Bird was married to Melvin Bird. **CP 364** A totally disabled mother of two, she was unable to provide much financially for herself or her children. **RP 201-202** Ms. Bird met and married Mr. Smith, without the formality of actually divorcing Mr. Bird. **CP 364** In Mr. Smith, Ms. Smith found a ready-made millionaire, a member of the inner circle of the California music industry. **CP1** As the “wife” of Mr. Smith, Ms. Smith lacked for nothing. **CP1** She lived a life of luxury amongst the elite of California. **CP1** Ms. Smith continued to be totally disabled, and did not contribute financially to the marital estate. **RP201.**

After some rather aggressive lawyering at the trial court level, Ms. Smith found herself becoming a millionaire through a default decree of dissolution that granted her an expensive residential property that was solely in Mr. Smith’s name, that granted her over a million dollars in proceeds from the forced sale of Mr. Smith’s own home in California, and that furthermore awarded her generous spousal support based on her pre-marital disability. **CP527.**

This is noteworthy because based on her own testimony, Mr. Smith did not earn a million dollars during their marriage. **RP208 & Trial Exhibit 2.** Based on her evidence, Mr. Smith earned \$774,542.00 during

the marriage. Even assuming that Mr. and Ms. Smith didn't spend one dime on community living expenses (which would contradict her testimony about their lifestyle during this period), and instead poured 100% of his community earnings into assets during this time, the community would not even have as much community property as Ms. Smith has been awarded as approximately one-half of the community estate.

Mr. Smith appealed the decree in part to regain the separate property the trial court stripped from him, and restore the parties to the status quo.

To protect this windfall decree, Ms. Smith attempts to distract the court from the critical issues which are against her, including the fact that there is no evidence that Mr. Smith was ever served with the Order to Show Cause re: Contempt/Judgment. **CP72** It is the violation of this order that the trial court relied upon in ordering Mr. Smith in default, striking his pleadings, and prohibiting his attorney from participating in any way in the ongoing litigation. **CP80**

Ms. Smith's most vehement defense is that under RAP 2.5(a), the Court of Appeals cannot consider any issues not raised at the trial level. She is wrong. In fact, the long-standing case law on point is that "...this rule does not apply when the question raised affects the right to maintain

the action.” *Jones v. Stebbins*, 122 Wn.2d 471 (1993), citing *New Meadows Holding Co. v. Washington Water PowerCo.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984).

Because each of Mr. Smith’s main issues on appeal deal directly with Ms. Smith’s right to maintain the action, or the denial of his right to maintain the action, the permissive rule of RAP 2.5(a) does not apply. *Id.*

II. OBJECTION TO APPELLANT’S RESTATEMENT OF FACTS

Ms. Smith asserts that the husband failed to assign error to the trial court’s findings. Apparently, Ms. Smith overlooked the very first paragraph of Appellant’s Brief, I.A.1. Mr. Smith properly assigned error to all of the trial court’s findings.

Appellant objects to Respondent’s Restatement of Facts, in that much of Ms. Smith’s “Restatement of Facts” is actually argument. Rather than making tedious line by line objections, Mr. Smith trusts the Court of Appeals is able to discern that portion which is reflected on the record, and that portion which is Ms. Smith’s spin on the record.

III. ARGUMENT

1. Lack of Personal Jurisdiction

A. RCW 4.16.170

Ms. Smith attempts to avoid the statutory rules governing filing and service of process by claiming that there is no statute of limitations on

divorce, thus stating that the 90 day time limit in RCW 4.16.170 is “irrelevant”. However, RCW 4.16.170 was incorporated by reference under 4.28.011, and is not “irrelevant”.

Moreover, RCW 26.09.010 states that “ Except as otherwise specifically provided herein, the practice in civil action shall govern all proceedings under this chapter...” Thus, those rules governing civil practice set out in RCW Chapter 4 – Civil Procedure, of which RCW 4.16.170 and 4.28.011 are subsections, are incorporated into dissolution actions. Ms. Smith’s argument that the 90 day time restriction for service after filing does not apply is incorrect.

As noted in the original Brief of Appellant, Ms. Smith’s jurisdictional problems started from the very beginning. “First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process.” *Scott v. Goldman*, 82 Wn.App. 1 (1996), citing *In re Logg*, 74 Wn.App. 781, 786, 875 P.2d 647 (1994) (quoting *Painter v. Olney*, 37 Wn.App. 424, 427, 680 P.2d 1066, review denied, 102 Wn.2d 1002 (1984)).

B. WAIVER

Ms. Smith then argues that husband has waived his objection under *Boyd v. Kulczyk*, 115 Wn.App. 411, 415, 63 P.3d 156 (2003). At the trial court level, Ms. Smith successfully convinced the trial judge that Mr.

Smith should not be allowed to make objections. Now on appeal, she argues that his failure to object over the court's ruling should prevent him from appealing.

In any event, Boyd is not on point because Mr. Smith immediately objected to the court's jurisdiction, and brought a motion to dismiss.

Moreover, here, on Ms. Smith's motion, the trial court specifically struck all of Mr. Smith's pleadings, entered a default against him, and prohibited his attorney from making objections. Thus, the reasoning in Boyd is inapplicable, because in Boyd, the appellant was in fact able to make objections on the record, but failed to do so.

C. ISSUES NOT RAISED AT TRIAL

The general rule is that a party may not raise an issue for the first time on appeal that it did not raise below. *RAP 2.5(a); State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). By its own terms, however, the rule is permissive and does not automatically preclude the introduction of an issue at the appellate level. *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993). Even so, "... this rule does not apply when the question raised affects the right to maintain the action." *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984).

“At the outset, we note that RAP 2.5(a) is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level. Likewise, under RAP 12.1(b), an appellate court may consider an issue not set forth in the briefs. Thus, the Court of Appeals had authority to consider Jones' contentions concerning the applicability of CR 4(d)(4) and whether Citizens controlled that issue. If Jones had not raised the issue regarding the applicability of CR 4(d)(4), the Court of Appeals would have affirmed the trial court's dismissal, since the court rejected Jones' other contentions. Therefore, since Jones' argument was essential to maintain the action, the exception from New Meadows applies. We hold that the Court of Appeals in this case properly allowed Jones to raise an issue for the first time on appeal.” *Jones v. Stebbins*, 122 Wn.2d 471 (1993).

D. RETURN OF SERVICE

The fact that Mr. Smith was not properly served is underscored by the fact that the return of service itself is deficient on its face. **CP712**

CR 4(g)(2) provides that the affidavit of service must be “endorsed upon or attached to the summons”. Here, the affidavit of service is neither endorsed upon nor attached to the summons. **CP712**

E. OUT OF STATE AFFIDAVIT

RCW 4.28.185 provides that “Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.” (Emphasis added).

Court's interpreting that provision have held that substantial, rather than strict, compliance with RCW 4.28.185 (4) is permitted. *Sharebuilder*

Sec. Corp. v. Hoang, 137 Wn.App. 330, 334 (2007), citing *Barr v. Interbay Citizens Bank of Tampa*, 96 Wn.2d 692 (1981). However, substantial compliance means that, viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state. *Id* (emphasis added).

In *Sharebuilder*, the court vacated a judgment where a review of all the affidavits on file prior to judgment did not demonstrate clearly that the defendant could not be served in Washington. The court noted, “The mere statement that Hoang was served at her California residence does not lead to the logical conclusion that she could not be served within the state. She might also have a residence in Washington or frequent Washington for business purposes.” *Id* at 335.

The situation here is exactly the one foreseen by the court in *Shareholder*. Whereas in *Shareholder*, the court merely envisioned the possibility that in-state service could have taken place, here a review of all affidavits shows conclusively that Mr. Smith could have been served in Washington. *See discussion infra*.

Here, Ms. Smith’s Declaration re: Out of State Service stating that Mr. Smith could not be served in the State of Washington (**SSCP1 and 2**) directly contradicts her own earlier declarations in which she testifies to

just the opposite; that he was in fact able to be served in the State of Washington. *See infra*.

In fact, Mr. Smith was served papers in the State of Washington with the Temporary Order for Protection. **CP1** This occurred just six days prior to Mr. Smith being served with the dissolution papers in California.

At the same time Ms. Smith was arranging for Mr. Smith to be served in California, she knew that he was required to personally appear for the testamentary hearing regarding the Order for Protection.

Here, Ms. Smith's own declarations and pleadings filed prior to her Declaration re: Out of State Service show that Mr. Smith could have been served in Washington. In her original pleadings, she references having had him served with a Protection Order by a Sheriff's deputy on February 28, 2006 while Mr. Smith was in Washington. **CP1**. This is a mere seven days prior to the date she filed the Petition for Dissolution.

Moreover, the Declaration of Christa Smith in Opposition to Motion to Dismiss for Lack of Jurisdiction acknowledges that Mr. Smith appeared on March 22, 2006 for a testimonial trial regarding the protection order with Judge Swanger, along with the deputy who served the Temporary Order of Protection on Mr. Smith. **CP20** This is six days after

Mr. Smith was served in California. In that declaration, Ms. Smith further states: “We have all three lived in a home we purchased in Vancouver, Washington, since fall of 2003. He admits in his California Petition that we both live in Vancouver, Washington (attached). His letter to the bank, dated October 7, 2003 indicates his intention to be a Washington resident. The husband also stays in California. We own property in both states.”

The declarations and affidavits of Mr. Smith lend further support to the fact that he could be served in Washington. In his Declaration of Respondent in Response to Petitioner’s Motion re: Temporary Orders filed on April 11, 2006 (**CP22**), Mr. Smith notes that when he would visit his daughter in Washington, he would spend quality time with their daughter hiking, skating, going to the lake, shopping, etc... He testified that he would drive her to and from school. He had personal possessions in the Washington home that he retrieved when he was served with the Temporary Protection Order.

Mr. Smith also requested the return of additional personal property located in the Washington home as part of the temporary order in the dissolution action. **CP22**

The Declarations of Third Parties also demonstrates that Mr. Smith could have been served in Washington.

The Declaration of Kendra Vaught submitted by Ms. Smith notes that she has witnessed Mr. Smith visiting in Battle Ground, and that he returns to California “after a few weeks”. **CP 34.**

The Declaration of Catherine Michl-Cote, mother of Ms. Smith, also notes that she has seen Mr. Smith in Washington. **CP35.**

Here, viewing all affidavits filed prior to judgment, the logical conclusion must be that service could have been had within the state, and personal service out of state was improper.

If a plaintiff has not complied with *RCW 4.28.185(4)*, then there is no personal jurisdiction and the judgment is void. *Sharebuilder at 335, citing Hatch v. Princess Louise Corp., 13. Wn.App. 378, 380, 534 P.2d 1036 (1975)*. Whether the defendant presents a meritorious defense is irrelevant. *Id.*

2. Lack of Proper Service of Motions and Orders

It is clear that Ms. Smith used invalid methods of service throughout the litigation below. Her main defense to this is to assert that she “substantially complied.” However, in addressing this issue, she overlooks the fact that as to the critical orders, there was no compliance, much less substantial compliance.

The most critical failure is that there is no evidence that Mr. Smith was ever served with notice of the court's December 16, 2006 Order on Show Cause re: Contempt/Judgment before he was ordered in default of that order. **CP72 and 80** There is no service by courier; there is no service by mail; there is no signature by his counsel.

There is simply no evidence that he received that Order on Show Cause. His own testimony was that he never received that Order until after he was held in default. **CP131** And without the evidence that he was served with that order, it was error for the court to order his pleadings stricken and that he be held in default. *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 54 P.3d 665 (2002).

Even beyond that complete failure of notice, Ms. Smith's other methods of service are defective as well. The theory of "substantial compliance" does not allow the use of methods of service not provided for in the court rules. While most of Ms. Smith's arguments on this point would simply repeat Mr. Smith's earlier appeal, it is worth noting the Supreme Court's opinion as to service on a messenger.

Delivery to Courier

The validity of service by courier was addressed by the Washington State Supreme Court in *Continental Sports Corp. v. Dept. of L&I*, 128 Wn.2d 594, 910 P.2d 1284 (1996). There, the court held that

delivery to a courier is not equivalent to service by mail. “In short, we are not willing to hold that mail is anything other than postal matter carried by the United States Postal Service. If the Legislature chooses to broaden the term mail to include postal matter sent via a private courier service such as Federal Express, it is capable of expressing that intention. It has not done so and we will not add words to the statute.”

It is noteworthy that in the Washington Practice Civil Procedure, service by messenger is addressed as follows: “Typically the messenger service that serves the documents will prepare and file an affidavit (or declaration) of service.” Wash Prac Civ Pro 50.5.

In Continental, the Washington Supreme Court held that the service substantially complied with the rule in that instance, only “Because Federal Express furnished Continental with a receipt which indicated the date and time Continental deposited the notice of appeal with Federal Express, the Department was able to ascertain that the notice of appeal was sent to the Board on the final day of the appeal period.

Continental at 603-4.

Here, there is no affidavit of the courier, nor is there any receipt by which Mr. Smith or the court could ascertain when the pleadings were delivered.

3. No CR 26(i) conference

Ms. Smith simply tries to avoid conceding that email does not constitute a CR 26(i) conference by hopefully suggesting that three attempted emails does satisfy that requirement. She cites no authority for such a proposition. If letters do not constitute a CR 26(i) conference, then clearly email cannot. *Rudolph v. Empirical Research Inc.*, 107 Wn.App. 861 (2001).

4. No Stipulation

Having failed to demonstrate that any CR 26(i) conference ever took place, Ms. Smith attempts to circumvent the issue by claiming that counsel for Mr. Smith “stipulated” to the entry of the order, by signing the order “service accepted, forma and content approvaed and consent to entry granted” at the bottom of the order. **CP748** That assertion is meritless.

Stipulations are governed by CR 2A and RCW 2.44.010(1). Courts in Washington have already held that an attorney’s signature of an order entered by the court does not constitute a “stipulation” to the terms of that order. *De Lisle v. FMC Corp.*, 41 Wn.App. 596 (1985). To hold otherwise would render every contested order of the court a “stipulation”. Such is clearly not the intent of the rule or the statute.

5. No Written Findings Supporting Default

It is crystal clear that the court did not enter written findings which would support the ultimate sanction of default at the time that the court entered that order. **CP481**

It is also clear that after having held Mr. Smith in default and stricken his pleadings, Ms. Smith made a belated attempt to back-fill the record by offering evidence at the default trial. RP 177-188.

Such a procedure violates Due Process, because it prevents Mr. Smith from offering evidence, or objecting to evidence, at a time when it would serve a purpose. *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 54 P.3d 665 (2002). Notably, when Mr. Smith's attorney attempted to participate at this later hearing, the court prohibited his involvement.

RP186-187

Ms. Smith's reliance on the trial court's belated findings is inappropriate and is not sufficient to remedy the trial court's failure to make written findings supporting the default at the time that it entered the default order.

6. Lack of Valid Marriage

Ms. Smith attempts to circumvent the invalidity of her marriage to Mr. Smith by asserting a California decree *nunc pro tunc*. That decree is invalid under either Washington or California law.

Respondent requested supplemental Clerk's Papers to address the post-decree issues of maintenance and child support. Appellant has requested Supplemental Clerk's Papers to address those issues, which are fully incorporated by reference herein. As these Supplemental Clerk's Papers also address the issue of the invalidity of the marriage, they are referred herein.

Ms. Smith admits that she was legally married to Melvin Bird on the date that she performed a marriage with Mr. Smith. Four years after the second marriage, she attempted to effect a retroactive divorce by filing for a decree of dissolution *nunc pro tunc* from Mr. Bird. Mr. Bird did not appear at the hearing, and a California judge entered a decree *nunc pro tunc* effective October 28, 1997. That decree is invalid on its face because the effective date chosen by Ms. Smith is not allowed under California law.

Procedural History

A review of the procedural history of Ms. Smith's dissolution from Mr. Bird is necessary for a full understanding of this case. A copy of the

Case History provided by the California Court is attached. Copies of the relevant documents that were filed have been requested, but not yet received from the court.

On January 28, 1997, Melvin Bird, Jr. filed a petition for dissolution of his marriage to Christa Cote Bird.

According to the Case Summary provided by the California Court, no further action was taken on the case until April 22, 1998, when the court entered an order continuing a trial date.

On October 29, 1997, Ms. Bird married Mr. Smith.

On July 16, 1998, Petitioner (Mr. Bird) filed Proof of Service.

On May 11, 2001, Respondent (Ms. Smith) first appeared through counsel, and filed certain documents and motions with the court.

On May 18, 2001, Respondent (Ms. Smith) filed a Proof of Service on Respondent.

On June 14, 2001, the court entered a judgment on Respondent's (Ms. Smith's) motion for custody, visitation, child support and spousal support, and granting a motion for separate trial and termination of marital status *nunc pro tunc*, terminating the marital status on October 28, 1997.

On August 13, 2001, the court held a mandatory settlement conference, and set a trial date.

On November 7, 2001, the court held a trial and granted a judgment.

Validity of California Marriage

The question of whether the decree of dissolution is valid (and the underlying order to pay spousal maintenance), turns upon whether Mr. and Ms. Smith entered a legally valid marriage on October 29, 1997. Whether the analysis is done based on Washington law or California law, the conclusion is inescapably that no valid marriage was entered by the parties.

Washington law regarding valid marriages

For Washington to recognize the validity of the earlier marriage, it must have been legal in the State of Washington.

Washington law provides that marriage is prohibited “When either party thereto has a wife or husband living at the time of such marriage...” RCW 26.04.020(1)(a). Even marriages in other states are only recognized as valid so long as they are not prohibited under subsection (1)(a). RCW 26.04.020(3). Thus, even if the laws of California allowed Ms. Smith to marry while she was currently married, under Washington law, the marriage would be prohibited.

Thus, under Washington law, the question turns on whether Mrs. Smith had a husband living at the time of her marriage to Mr. Smith. Obviously she did, and her marriage to Mr. Smith was prohibited by law.

Ms. Smith attempted to remedy that defect four years after the date of her second marriage. The validity of that attempted remedy will be addressed below.

California law regarding valid marriages

California law provides that “An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage.” *California Family Code Section 301.*

More specifically, California law provides that “A subsequent marriage contracted by a person during the life of a former husband or wife of the person, with a person other than the former husband or wife, is illegal and void from the beginning, unless: (1) The former marriage has been dissolved or adjudged a nullity before the date of the subsequent marriage.” California Family Code, Section 2201(a).

Thus, under California law, the question turns on whether Mrs. Smith was “an unmarried female” at the time of her marriage to Mr. Smith. Again, obviously she was not, and her marriage to Mr. Smith was illegal and void from the beginning.

Again, the question turns to whether her attempted remedy four years after the marriage is valid or not.

California law regarding when decrees may be granted

The first legal hurdle for Ms. Smith to overcome is that the date she chose for a *nunc pro tunc* decree has to be allowable under California law. By way of example, in Washington a decree of dissolution *nunc pro tunc* effective as of one date after the filing of the Petition would be invalid, because Washington law states that “no decree of dissolution may be entered before 90 days has elapsed from the filing and service of a summons and petition for dissolution.” RCW 26.09.030.

California has a similar, though longer, waiting period. Under California law no judgment of dissolution is final for the purpose of terminating the marriage relationship of the parties until six months have expired from either the date of service of a copy of summons and petition or the date of appearance of the respondent, whichever occurs first. California Family Code 2339(a) (emphasis added) (subject to certain provisions not relevant here, such as death of one party).

Thus, under California law, no decree of dissolution can even be entered at the earliest until six months has elapsed from the date of service of a copy of the summons and petition. Here, the proof of service was not filed until July 16, 1998, so a decree of dissolution would not be valid

until six months later, on January 16, 1999. Moreover, here Ms. Smith did not even appear before the court until May 11, 2001, thus a decree would not be final until November 11, 2001.

Thus, the effective date for the *nunc pro tunc* decree of October 28, 1997 violates the statutory rules of California law, and is invalid on its face.

California law regarding issuing decrees *nunc pro tunc*

Ms. Smith faces further hurdles for her four-year late attempt to remedy the second marriage. And that is that California law strictly limits the use of *nunc pro tunc* decrees. Even if the summons and petition had been timely served, California law has certain restrictions against the entry of decrees of dissolution *nunc pro tunc*. These laws prohibit an effective date of October 24, 1997 in this case.

The California Family Code provides that “The court shall not cause a judgment to be entered *nunc pro tunc* as provided in this section as of a date before trial in the matter, before the date of an uncontested judgment hearing in the matter, or before the date of submission to the court of an application for judgment on affidavit pursuant to Section 2336 [relating to default of a party]. *California Family Code 2346 (d)*.”

Thus, California law requires one of three circumstances that would give rise to an effective date for a *nunc pro tunc* decree of

dissolution. Either (a) a trial in the matter, (b) an uncontested judgment hearing in the matter, or (c) the submission of an application for judgment after the default of one party. No Decree of Dissolution may be entered with an effective date prior to at least one of those dates.

First, here, the record shows that no trial took place until November 7, 2001. So October 28, 1997, is not a valid date for a decree *nunc pro tunc* under the first provision.

Second, here, the record shows that there was no uncontested judgment hearing in the matter. That is, unless one counts the trial held on November 7, 2001 where the Petitioner was not present. So October 28, 1997, is not a valid date for a decree *nunc pro tunc* under the second provision.

Third and finally, here, Ms. Smith never submitted an application for judgment after the default of a party. So October 28, 1997, is not a valid date for a decree *nunc pro tunc* under the third provision.

Thus, under the laws of the State of California, the only valid date for a decree of dissolution in this case is the date of trial, November 7, 2001, four years after Ms. Smith attempted to marry Mr. Smith.

Courts in California have stressed the limited scope in which *nunc pro tunc* orders and judgments may be used.

“The scope of orders and judgments **nunc pro tunc** in California has consistently been described by our Supreme Court in the following terms: "A court can always correct a clerical, as distinguished from a judicial error which appears on the face of a decree by a **nunc pro tunc** order. [Citations omitted.] It cannot, however, change an order which has become final even though made in error, if in fact the order made was that intended to be made.... "The function of a **nunc pro tunc** order is merely to correct the record of the judgment and not to alter the judgment actually rendered-not to make an order now for then, but to enter now for then an order previously made. The question presented to the court on a hearing of a motion for a **nunc pro tunc** order is: What order was in fact made at the time by the trial judge?" (Estate of Eckstrom (1960) 54 Cal.2d 540, 544 [7 Cal.Rptr. 124, 354 P.2d 652], italics omitted.) The court went on to hold **nunc pro tunc** orders may not be made to "make the judgment express anything not embraced in the court's decision, even though the proposed amendment contains matters which ought to have been so pronounced. [Citations omitted.]" (Ibid.) "It is only when the form of the judgment fails to coincide with the substance thereof, as intended at the time of the rendition of the judgment, that it can

be reached by a corrective **nunc pro tunc** order." (Id. at p. 545; accord, *Martin v. Martin* (1970) 2 Cal.3d 752, 761, fn. 12 [87 Cal.Rptr. 526, 470 P.2d 662]; *Estate of Careaga* (1964) 61 Cal.2d 471, 474 [39 Cal.Rptr. 215, 393 P.2d 415]; *Estate of Goldberg* (1938) 10 Cal.2d 709, 714-715 [76 P.2d 508].)

As amplified in 46 American Jurisprudence Second (1994) Judgments, section 166 at pages 494-495: "The general rule is that an amendment of the record of a judgment, and a **nunc pro tunc** entry of it, may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, or to supply a judicial omission or an affirmative action which should have been, but was not, taken by the court, or to show what the [57 **Cal.App.4th 891**] court might or should have decided, or intended to decide, as distinguished from what it actually did decide, even if such failure is apparently merely an oversight.

The power of the court in this regard is to make the journal entry speak the truth by correcting clerical errors and omissions, and it does not extend beyond such function. Although grounds may exist for opening, modifying, or vacating the judgment itself, in the absence of such grounds, the court may not, under the guise of an amendment of its records, revise or change the judgment in

substance and have such amended judgment entered **nunc pro tunc**.... A **nunc pro tunc** order is not appropriate to rescue subjective judicial intentions when a judge failed in any way to act on those intentions in entering judgment." (Italics added, fns. omitted.)

Hamilton v. Laine, 57 Cal.App. 4th 885, 67 Cal.Rptr.2d 407 (1997).

Here, Ms. Smith attempts to use the *nunc pro tunc* mechanism to circumvent the fact that she attempted to marry Mr. Smith when she was already married to Mr. Bird. As the court in *Hamilton* makes it clear, this is not an appropriate use of *nunc pro tunc* judgments.

IV. RESPONDENT'S MOTION TO DISMISS

Ms. Smith's reliance on *Pike v. Pike*, 24 Wn.2d 735, 167 P.2d 401 (1946), is misplaced for several reasons. First among them the fact that Mr. Smith was not held in contempt for failing to comply with the decree. Instead, Ms. Smith simply brought a motion for contempt on . The trial court held a hearing with extensive briefing, and declined to hold Mr. Smith in contempt.

Even if he had been held in contempt for failure to pay spousal maintenance, as Ms. Smith hoped, *Pike* would still not support Ms. Smith's motion to dismiss. In *Pike*, the trial court awarded custody of the

parties' child to the father. *Id.* The mother absconded with the child and secreted them from the court's jurisdiction, meanwhile appealing the trial court's findings. *Id.* The court noted that "that portion of the decree relative to the care, control, and custody of the children cannot be executed." *Id at 741.*

Even in that extreme situation, the court did not dismiss the appeal outright, but rather entered an order which would dismiss the action in 10 days unless the wife returned the child. *Id at 742.*

Here, there is no evidence that Mr. Smith has secreted or absconded with funds that would make execution of the court's ruling impossible. Indeed, the court has already effected the transfer of property to Ms. Smith that is the subject matter of the appeal. **CP527** Thus, the reasoning of the court in *Pike*, which is to use the coercive effect of a threatened dismissal, can have no possible useful influence here, where Ms. Smith has custody of the parties child and already possesses the property awarded to her by the trial court.

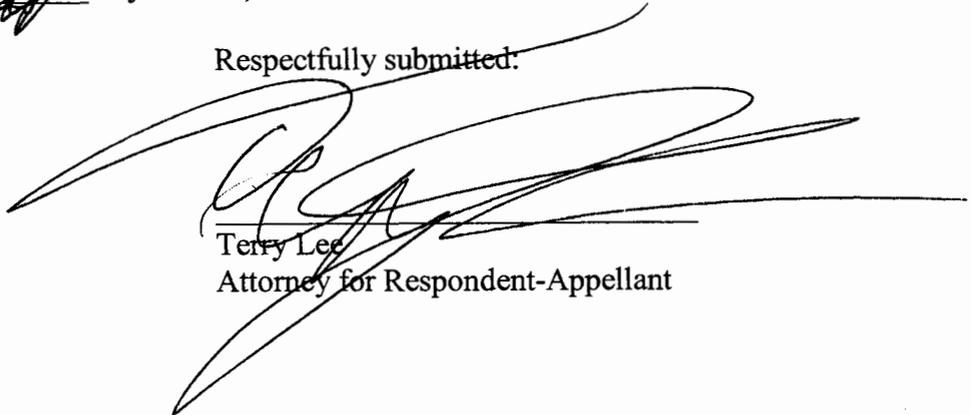
V. CONCLUSION

For these reasons Respondent-Appellant Christopher Smith urges this Court to vacate the decree of dissolution and other orders of the Superior Court, to remand this matter for dismissal of the dissolution proceeding, and further to require that the trial court enter orders restoring

to Mr. Smith the property which was disposed of by the decree of dissolution, and to order such other relief consistent with law and the facts set forth herein.

Dated this ~~27~~³⁰ day of June, 2008

Respectfully submitted:

A large, stylized handwritten signature in black ink, consisting of several sweeping loops and lines, positioned above the typed name and title.

Terry Lee
Attorney for Respondent-Appellant

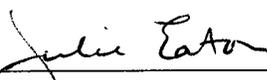
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 3, 2008, I arranged for service of the foregoing REPLY BRIEF OF APPELLANT, to the court, to counsel for the parties, and to the court report referenced above to this action as follows:

Office of Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Overnight Mail
Catherine W. Smith Edwards, Sieh, Smith & Goodfriend, P.S. 1109 First Avenue, Suite 500 Seattle, WA 98101-2988	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Scott J. Horenstein The Scott Horenstein Law Firm 900 Washington Street, Suite 1020 Vancouver, WA 98666-1570	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger on 06/04/08 <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

Date at Vancouver, Washington, this 3rd day of June, 2008.



Julie Eaton

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