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

IN RE THE MARRIAGE OF:

JAMES P. RAMEY, Respondent

v.

**GLORIA L. RAMEY,
by BRETT HABERKERN, Appellant**

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court erred by concluding that it lacked inherent common law authority to enter a Decree of Dissolution Nunc Pro Tunc even while noting compelling equities to do so.

2. The trial court erred by concluding that it lacked statutory authority to enter a Decree of Dissolution Nunc Pro Tunc under RCW 26.09.290 when delay of final entry had been caused by inadvertence on the part of the court and not the parties.

3. The trial court erred by concluding that it was required to follow dicta in a prior case otherwise distinguishable from the present case.

Issues Pertaining to Assignments of Error

1. Is a divorce court precluded from entering a Decree of Dissolution Nunc Pro Tunc after the death of a party when the case had been tried; the court had issued a written memorandum opinion finding the marriage had been defunct for more than a decade, and awarding the wife \$600,000, which was paid prior to the wife's death; Findings of Fact/Conclusions of Law and Decree of Dissolution had been prepared; presentation had been noted but entry was delayed at the court's request; and compelling equities in favor of entering the decree have been identified by the court?

2. Is a divorce court precluded from entering a decree of dissolution nunc pro tunc when the statutory provisions permitting such a decree have been met and no objection has been made to the court's finding that the marriage had been defunct for more than a decade?

3. Is a trial court required to follow the dicta of a prior distinguishable case?

B. Statement of the Case

Procedural History

Gloria and Jim Ramey were married in 1969 and lived in Port Townsend, Washington. CP 1, CP 18 The parties separated on January 10, 1998. CP 1 Gloria Ramey moved to Bakersfield, California CP 8; James Ramey remained in Port Townsend. CP 18

On February 15, 2008, Jim Ramey filed a Petition for Dissolution of Marriage in Jefferson County, Washington. CP 1

On August 26, 2009, Gloria Ramey executed her Will in Kern County, California. CP 109-110

The dissolution trial was heard by Clallam County visiting Judge Williams in Jefferson County, on April 20-21, 2010. CP 80

On May 10, 2010, Judge Williams issued his written opinion. CP 20 In that opinion, Judge Williams ruled that the marriage was defunct as of January 10, 1998. CP 20 The court then divided the community

property as it existed when Gloria moved, with adjustments made to reflect current values, resulting in an award to Gloria Ramey of \$600,000 and her California condominium. CP 20, 25

Final orders were noted to be entered on June 18, 2010, in consultation with Judge Williams' scheduler. CP 26

On June 11, 2010, the presentation of final orders was rescheduled for July 9, 2010 at the request of the court. CP 35

On June 21, Mr. Ramey paid the \$600,000 (through his attorney's trust account) "In full satisfaction of Judge Williams' award" CP 36; which was deposited into Ms. Ramey's account on June 28, 2010. CP 78

Ms. Ramey died later that same day. CP 79

On June 29, Mr. Ramey's attorney (Peggy Ann Bierbaum) stopped payment on her trust account check CP 39; and returned the \$600,000 to Mr. Ramey. CP 102

On July 6, 2010, Mr. Ramey moved to abate the Dissolution Proceeding. CP 28-29

On July 7, Ms. Ramey's estate moved to enter the Decree of Dissolution Nunc Pro Tunc. CP 32

On July 12, 2010, Mr. Ramey filed objections to the proposed pleadings. CP 48-65

Ms. Ramey's estate filed a response to the motion to abate on July 14, 2010. CP 66-75

These motions were heard on July 16, 2010. CP 163

Judge Williams issued his Memorandum Opinion on August 3, 2010, denying Ms. Ramey's motion to enter the decree of dissolution nunc pro tunc. CP 80

On August 17, 2010, Brett Haberkern filed for Probate of Ms. Ramey's Will in Kern County, California. The will was admitted to probate and Mr. Haberkern was appointed executor. CP 93

On August 26, 2010, James Ramey filed ancillary probate in Jefferson County Superior Court, and petitioned to be appointed Administrator of Ms. Ramey's Estate as "surviving spouse." CP 106

On December 10, 2010, Mr. Haberkern petitioned to remove Mr. Ramey as Administrator and rescind Mr. Ramey's letters of administration. CP 111-112 In the alternative, he moved to require Mr. Ramey to post an Administrator's Bond, or sequester the \$600,000. CP 111-112

On February 18, 2011, the will was admitted to probate in Jefferson County but the other motions were denied by Clallam County visiting Judge George Wood. CP 111-112

On February 14, 2011, Judge Wood entered an order authorizing Mr. Haberkern to pursue this appeal of Judge Williams' rulings which denied entry of the Decree of Dissolution Nunc Pro Tunc. CP 89

On March 23, 2011, Ms. Ramey's estate submitted proposed findings of fact and order denying the motion for entering the dissolution decree nunc pro tunc.

March 10, 2011, Sherry Nolan, one of Gloria Ramey's heirs, assigned 10% of her inheritance to Mr. Haberkern.

March 11, 2011, Mr. Ramey filed an amended inventory of Ms. Ramey's estate, stating the value of the ancillary estate is \$642,000.

The hearing on the presentation of findings and the order denying the nunc pro tunc motion was held April 19, 2011; the order was entered April 28, 2011. CP 167

On April 26, 2011, Mr. Haberkern filed a motion in Jefferson County Superior Court for reconsideration of Judge Williams' order. CP 161 This was denied June 3, 2011. CP 180

On May 24, 2011, Mr. Haberkern appealed Judge Williams' order denying the motion to enter the dissolution decree nunc pro tunc. CP 172

Statement of facts

James and Gloria Ramey were married in 1969. CP 1 They lived in Port Townsend, Washington. CP 18

They separated on January 10, 1998 after 29 years of marriage. CP 1 Ms. Ramey moved to Bakersfield, California; and remained there for the rest of her life. CP 8 James Ramey remained at the family home in Port Townsend. CP 18

On January 7, 1998, prior to leaving Port Townsend, the Rameys' attorney, Craddock Verser, prepared a durable power of attorney, which Ms. Ramey signed; giving Mr. Ramey authority to execute documents on her behalf. CP 18

On January 8, 2004, Mr. Ramey used this power of attorney to create a trust; and deeded the family home into the trust. CP 18 Mr. Ramey has lived with another woman since Mrs. Ramey left for California. CP 19

For the next ten years following separation, Mr. Ramey sent Ms. Ramey \$2,000 per month. CP 19 This included her Social Security; which continued to be deposited into a joint account. CP 19

During that time, Mr. Ramey accrued an estate estimated by the court to be in excess of \$2.3 million. CP 20

Following a fall by Ms. Ramey and hospitalization CP 8, Mr. Ramey filed for dissolution of marriage in Jefferson County Superior Court on February 15, 2008. CP 1 The Petition alleged that the marriage was defunct since the time of separation. CP 1 On March 20, 2009, the

Jefferson County Superior Court entered a temporary order awarding Ms. Ramey \$4,000 per month maintenance. CP 15

On August 26, 2009, Ms. Ramey executed a Will; naming her grandson, Brett Haberkern as personal representative. CP 109-110 Except for a \$5000 cash gift to a friend, the Will left all of Ms. Ramey's assets to her two daughters, Sharon Nolan (Mr. Haberkern's mother) and Nikki Smith. CP 109-110

The divorce trial was held on April 20-21, 2010, in front of visiting Judge Ken Williams. CP 80

On May 10, 2010, Judge Williams filed his memorandum opinion. He ruled that the marriage was defunct and stated,

“Because the marriage is defunct as of January 10, 1998, the earnings and accumulations of each party subsequent to that time, would be deemed separate property of the party earning or accumulating them. The issues before this Court then, become issues of valuation and characterization.”

CP 20

The court then awarded Ms. Ramey \$600,000 and her California condominium. CP 18-25 Everything else was awarded to Mr. Ramey; including the parties' interest in the corporation owning Penny Saver Mart, the land upon which the Penny Saver Mart sits, the Port Townsend family home, and substantial investments. CP 18-25 The court also ruled that Mr. Ramey would incur 12% simple interest on the \$600,000 until

paid and would be required to continue to pay \$4,000 per month maintenance until the \$600,000 was paid . CP 18-25 Essentially, it would cost Mr. Ramey \$10,000 per month to delay payment of the \$600,000 award. CP 110

On May 21, 2010, undersigned counsel delivered proposed Findings of Fact and Conclusions of Law and Decree of Dissolution to opposing counsel and the court and (in consultation with Judge Williams' scheduler) noted up presentation of these pleadings for June 18, 2010. CP 26

Prior to the June 18, 2010 hearing, the Clallam County Superior Court scheduler advised counsel that Judge Williams would be unavailable on June 18, 2010, due to a family emergency. CP 35, 80

Undersigned counsel (in consultation with Judge Williams' scheduler) re-noted presentation of final pleadings for July 9, 2010. CP 33

On June 21, 2010, Mr. Ramey's attorney, Peggy Ann Bierbaum sent Ms. Ramey's counsel her trust account check in the amount of \$600,000. CP 36-37 Ms. Bierbaum's cover letter stated that the enclosed check was in "full satisfaction" of Judge William's award. CP 36

Ms. Bierbaum's trust check was deposited into Ms. Ramey's account on June 28, 2010. CP 78

After the check was deposited, Ms. Ramey died. CP 79

On June 29, 2010, Ms. Bierbaum issued a stop payment order on her trust check. CP 39 The following day, without notice to undersigned counsel, Ms. Bierbaum distributed the \$600,000 back to Mr. Ramey. CP 102

On July 6, 2010, Mr. Ramey then moved to abate the dissolution proceedings. CP 28-29 On July 7, 2010, undersigned counsel brought a motion to enter the Decree of Dissolution Nunc Pro Tunc. CP 32 These motions were heard on July 16, 2010. On August 3, 2010, Judge Williams entered a memorandum opinion, denying the motion to enter the decree nunc pro tunc and granting the motion to abate. He stated the delay in entry of the Decree was caused by him, not the parties, and added:

“It may be hard to find a more compelling case for a nunc pro tunc dissolution decree.”

CP 80-85

Judge Williams based his ruling on *Pratt v. Pratt*, 99 Wn.2d. 905, 908, 665 P. 2d 400 (1983).

On August 26, 2010, Mr. Ramey filed a petition for ancillary administration of Ms. Ramey’s estate in Jefferson County Superior Court. CP 106-110 Without notice, Mr. Ramey obtained an ex parte order appointing him administrator of his estranged wife’s estate. CP 88 The Rameys’ former attorney, Craddock Verser, signed the order. CP 88

On August 17, 2010, the Superior Court for Kern County, California, admitted Ms. Ramey's Will to probate; and appointed Brett Haberkern as personal representative of her estate. CP 93

On December 18, 2010, Mr. Haberkern filed a motion in Jefferson County Superior Court to remove Mr. Ramey as personal representative, or in the alternative, require Mr. Ramey to post bond, or in the alternative, require Mr. Ramey to sequester the estate's assets. CP 111-112 At the same time, Mr. Haberkern filed a petition to admit Ms. Ramey's Will to probate and requested appointment as Executor. CP 111

These motions were heard on January 28, 2011, before Clallam County visiting Judge George Wood. CP 111-112 Judge Wood denied Mr. Haberkern's motions; but gave Mr. Haberkern authority to proceed with the appeal of Judge Williams' ruling that denied the estate's motion to enter the decree nunc pro tunc. CP 89

Judge Wood's order was entered on February 18, 2011. CP 111-112 Appeal from that order was commenced on March 9, 2011. However, the Court of Appeals Commissioner dismissed the appeal, ruling that Judge Wood's order was not an appealable final order. The Commissioner also denied Mr. Haberkern's Motion for Discretionary Review.

On March 10, 2011, Sharon Nolan assigned a portion of her inheritance from Ms. Ramey's estate to her son, Brett Haberkern.

On April 19, 2011, a hearing was held on presentation of Findings of Fact, Conclusions of Law, and Order from Judge Williams' August 3, 2010, memorandum opinion denying entry of a nunc pro tunc Decree of Dissolution.

On April 28, 2011, Judge Williams entered Findings of Fact and Conclusions of Law and Order denying the motion to enter the decree nunc pro tunc. CP 163-167 (**APPENDIX 1**) On March 11, 2011, Mr. Ramey filed in the probate court an amended inventory of estate assets; which indicated that the Estate's assets (\$642,000) were approximately the same amount as awarded by Judge Williams' May 10, 2010, memorandum opinion.¹ CP 143-146 On April 26, 2011, Ms. Ramey's estate brought a motion for reconsideration, based on Mr. Ramey's inventory. CP 161

On May 24, 2011, Mr. Haberkern appealed Judge Williams' order denying motion to enter decree nunc pro tunc. CP 172 On June 7, 2011, Judge Williams filed his memorandum opinion denying Ms. Ramey's estate's motion for reconsideration based upon *Pratt v. Pratt*. CP 180 (**APPENDIX 2**)

C. Summary of Argument

A trial court has inherent power under common law to enter a decree of dissolution nunc pro tunc when the case was ripe for judgment,

¹ A copy was not provided to Mr. Haberkern nor his attorneys, prior to March 10, 2011. CP 140.

delay of entry was not caused by the parties, and no evidence supports a finding that subsequently acquired rights of innocent third parties would be seriously harmed by entry of the decree.

A trial court also has statutory power to enter a decree of dissolution nunc pro tunc under RCW 26.09.290 when, as in this case, delay of entry has been caused by the court's inadvertence.

In declining to enter the decree of dissolution nunc pro tunc, the court found that a narrowly defined public purpose was required, limited to bastardy and prior marriage. CP 165-167 However, this limitation is based only on dicta, not on statute or common law, and courts are not required to follow dicta.

D. Argument

1. UNDER COMMON LAW, A TRIAL COURT HAS INHERENT POWER TO ENTER A DECREE OF DISSOLUTION NUNC PRO TUNC WHEN THE CASE WAS RIPE FOR JUDGMENT, DELAY OF ENTRY WAS NOT CAUSED BY THE PARTIES, AND NO EVIDENCE SUPPORTS A FINDING THAT SUBSEQUENTLY ACQUIRED RIGHTS OF INNOCENT THIRD PARTIES WOULD BE SERIOUSLY HARMED BY ENTRY OF THE DECREE.

"The entry of a nunc pro tunc decree of divorce is . . . within the courts' inherent power." *Bruce v. Bruce*, 48 Wn.2d 635, 636, 296 P.2d 310 (1956) It is a discretionary power which is to be used "as justice may require in view of the circumstances of the particular case." *Mitchell v.*

Overman, 103 U.S. 62, 65, 26 L.Ed. 369 (1880).

In *Garrett v. Byerly*, 155 Wash. 351, 284 P. 343(1930), a case regarding negligence in a traffic accident and the later death of a party before the court had ruled on a motion for a new trial, *Id.* at 352, the court recognized the inherent common law power of a court to enter a decree nunc pro tunc when a party has died before entry of the final decree. *Id.* at 357. In doing so, the *Garrett* court set forth three limitations on the exercise of this power. *Id.* First, the cause at the time of death must be ripe for judgment. *Id.* Second, the delay in entering judgment must not have been caused by the party seeking the decree nunc pro tunc. *Id.* Third, the judgment must not injuriously affect subsequently acquired rights of innocent third parties. *Id.*

The *Garrett* requirements have clearly been met in the present case. The decision was ripe for judgment in that a trial had occurred and a written opinion was filed by the court.² CP 20. The delay was not caused by either party but instead by the court. CP 80 There are no subsequently acquired rights of third parties which will be injuriously affected by a nunc pro tunc decree as Gloria Ramey died testate. CP 109-110

While *Garrett* addresses a decree other than a dissolution,

² In finding the marriage defunct as of January 1998, the Court arguably has already determined that Gloria Ramey was a single woman nunc pro tunc; the decision primarily addresses property distribution.

subsequent dissolution cases have relied on *Garrett* in holding that a trial court has inherent authority to enter a decree nunc pro tunc in a dissolution case. *Pratt*, 99 Wn.2d. at 908, *In re Tabery (Estate of Carter)*, 14 Wn. App. 271, 540 P.2d 474 (1975).

Dissolution cases where entry of a decree nunc pro tunc has been denied depend on the circumstance of each case *Mitchell*, 103 U.S. at 65; each are distinguishable from the present case.

For example, in *Bruce v. Bruce*, a wife believed she had obtained a divorce based on an oral decree in court. *Bruce*, 48 Wn.2d at 636. However, the judge died before any written findings of fact or conclusions of law had been entered, leaving only the minute entry of the proceeding. *Id.* at 635. When the wife discovered thirty-four years later she was not in fact divorced and petitioned the court to enter the order she believed she had obtained, the court refused to do so, noting there was no record on which to base the decree. *Id.* at 636. Instead, scant clerk's minutes merely stated "evidence was adduced in support of complaint of divorce... Decree granted." *Id.* at 635. The Supreme Court noted that the trial court had failed to comply with the statutory requirement that the court shall state the facts found upon which the decree is rendered and declined to enter the decree. *Id.* at 636. The Supreme Court did not say that a Nunc Pro Tunc Decree couldn't have been entered under those circumstances – only that

the trial court did not abuse its discretion in refusing to do so when statutory provisions had not been met.

The Court further stated,

"The office of such order or decree is to record judicial action taken, and not to remedy inaction. It 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."

Id. (citations omitted)

Similarly, in *Barros v. Barros*, 26 Wn. App. 363, 613 P.2d 547 (1980), the court denied a motion to "correct" a dissolution decree nunc pro tunc based upon an oral ruling which was not reflected in the written divorce decree. *Id.* at 364., The Appellate Court ruled that a court may not correct its judicial mistakes through use of a nunc pro tunc remedy. *Id.* Specifically, omission of an asset in the written decree was not the type of mistake or circumstance envisioned by the court in fashioning a Nunc Pro Tunc remedy. *Id.*

In the above cited cases, the court refused to use its power to attempt to establish what did not happen.

The present case is distinguishable. Judge Williams had issued and filed a complete written opinion and award. Hence, issuing the final order nunc pro tunc would, in fact, record what had actually happened, not calling for any speculation or later interpretation.

The equities of the present case are similar to those addressed in *Tabery*, decided 19 years after *Bruce v. Bruce*. In *Tabery*, during probate of an estate, the widow discovered that her previous divorce decree had not been entered prior to her remarriage as she had believed. *Tabery*, 14 Wn. App. at 273. Upon the death of her second husband, the deceased's mother was appointed administratrix, claiming the widow had not been divorced from her first husband and therefore was not the surviving spouse. *Id.* The court granted the widow's motion to enter the first divorce decree nunc pro tunc reflecting a date before her remarriage, citing equitable considerations, case law and judicial discretion. *Id.* at 276. "The entry of a nunc pro tunc decree of divorce is . . . within the court's inherent power." *Id.* at 274, citing *Bruce*, 48 Wn.2d 635.

Further, while it is generally true that a dissolution proceeding abates on the death of one of the parties, *Tabrey*, 14 Wn. App at 275, a dissolution may be entered nunc pro tunc even under those circumstances. *Id.* citing *Osborne v. Osborne*. 60 Wn.2d 163, 167, 372 P.2d 538 (1962).

For example, opposing counsel cites *Pratt v. Pratt*, as holding that a divorce proceeding abates upon death of a party. But the *Pratt* court, while acknowledging that dissolution proceedings *ordinarily* abate upon death of one of the parties, then analyses the decision of the lower courts under theories of nunc pro tunc, not abatement. *Pratt*, 99 Wn.2d. at 909

(emphasis added). The *Pratt* court also notes, “In addition to statutory authority we have recognized the inherent common law power of a court to enter a decree nunc pro tunc when a party has died before entry of the final decree.” *Pratt*, 99 Wn.2d at 909, citing *Garrett*, 155 Wash. 351.

Barros v. Barros, likewise recognizes that while the death of a spouse would normally abate a divorce action, in certain situations it may still be appropriate to employ a nunc pro tunc motion. *Barros*, 26 Wn. App. at 365, citing *Osborne v. Osborne*, 60 Wn.2d 163; *Tabery*, 14 Wn. App. 271.

The *Barros* court notes that “application of the nunc pro tunc concept” can be appropriate “where the motion is used to remedy a situation created by the death of a party after submission of the case but before judgment.” *Barros*, 26 Wn. App. at 365. Such is the present case.

Further, the *Tabery* court, in supporting the use of judicial discretion, references the facts in *Osborne v. Osborne*, and states:

If the death of a party to a divorce action does not deprive the court of jurisdiction to Vacate a divorce decree nunc pro tunc, neither should it impair the court's power to Enter a nunc pro tunc decree. This appears to be the general rule recognized by H. Clark, the Law of Domestic Relations 384 (1968):

One final rule governing parties to divorce suits says that the death of a party at any time before the entry of the final decree abates the action automatically. This result occurs even though the death follows an interlocutory decree of

divorce. *It does not, however, where the case was fully adjudicated so that a final decree should have been entered before the death of a party but the decree was not in fact entered for some reason. In this unusual situation a divorce decree nunc pro tunc may be entered.*

Tabery, 14 Wn. App. at 276. (emphasis added)

In *Mitchell*, the United States Supreme Court approved entry of a nunc pro tunc judgment when the Plaintiff died after the trial court issued its ruling:

We content ourselves with saying that the rule established by the general concurrence of the American and English courts is, that where the delay in rendering a judgment or a decree arises from the act of the court, that is where the delay has been caused either for its convenience or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim *actus curioe neminem gravabit*, - which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice,-it is the duty of the court to see that the parties shall not suffer by the delay. A *nunc pro tunc* order should be granted or refused, as justice may require in view of the circumstances of the particular case. These principles control the present case. Stutzman was alive when it was argued and submitted. He was entitled at that time, or at the term of submission, to claim its final disposition. A decree was not then entered because the case, after argument, was taken under advisement. The delay was altogether the fact of the court. Its duty was to order a decree *nunc pro tunc*, so as to avoid entering an erroneous decree.

Mitchell, 103 U.S. at 64-65.

There is no reason to suggest that Washington State has deviated from the common law of the United States. Indeed, *Mitchell*, was quoted with approval by the *Garrett* court, 155 Wash. at 359, when, as in *Mitchell*, delay in entering the decree was caused solely by the court. Such is the situation here as noted by Judge Williams. CP 80

Further, in the present case, in declining to enter the decree, the trial court speculated that the rights of Gloria's heirs could be affected and noted this was a consideration in the *Pratt* ruling.

The issue of the rights of third parties is addressed in *Garrett*. As noted above, *Garrett*, while confirming courts have inherent common law power to enter a Nunc Pro Tunc Decree after the death of one of the parties, sets three conditions for exercising such power:

- 1) The cause at the time of death was ripe for judgment
- 2) The delay in entering judgment must not have been caused by the party seeking the nunc pro tunc decree
- 3) The nunc pro tunc decree must not injuriously affect subsequently acquired rights of innocent third parties

155 Wash. at 357.

This Court has found that conditions 1 and 2 were met³; but speculated that the Estate may be substantially larger than the court

³ As to condition 1, the court noted "certainly the equities in this case would take note that nearly all except the final signatures on the papers had been done..."CP 84.As to condition 2, the court noted that "the court had to reschedule the entry of the findings at the last minute as a result of personal matters of the undersigned," CP 80 and "there was

awarded. CP 84 This speculation appears to be part of the court's decision to deny entry of the decree nunc pro tunc.

However, now that Mr. Ramey has filed an Inventory in the Ancillary Probate, stating the Estate's net value is nearly identical to the trial court's award, CP 144, the trial court's concern regarding the third condition has been removed. Neither party has asserted injurious effect on the rights of third parties.

Gloria Ramey's will leaves her share of the community property, minus a \$5000 cash gift to a friend, to her daughters. CP 91 Under the findings of the court and under the inventory submitted by James Ramey, the value of Gloria's share of the estate is nearly identical; therefore, there is no change in the expectations of her heirs and no injury. In the present case, entry of the Decree would not injuriously affect the heirs but would merely accelerate receipt of the inheritance intended by Gloria Ramey to which they are entitled in recognition of the wishes of the testator. RCW 11.12.230.

The satisfaction of all three *Garrett* conditions distinguishes this case from *Pratt* not only because one of the attorneys in *Pratt* deliberately delayed presentation of the Findings and Decree in order to collect his fee,

no fault of either party that the decree was not entered prior to Ms. Ramey's death." CP 85.

but also because the inheritance of the heirs in *Pratt* would be dramatically affected based on the marital status of the parties in that case. Such is not the present case.

The rights of third parties are also addressed in *Tabery*, discussed above. There, a decedent's mother argued that her rights, which would be affected by entry of a dissolution decree nunc pro tunc, were vested and that a decree could not under the law affect her rights. *Tabery*, 14 Wn. App at 274. In ruling against this contention, the court referred to an Oregon Supreme Court case which "pointed out that an interest acquired by inheritance is 'not the kind of vested right protected from the entry of a nunc pro tunc decree.'" *Id.* at 274-275, citing *In re Estate of Kelley*, 210 Or. 226, 310 P.2d 328 (1957) The Oregon court quotes the analysis stated in 1 A. Freeman, *Law of Judgments* s 138, at 262 (5th ed. E. Tuttle 1925) as follows:

The expression so frequently made that a nunc pro tunc entry is not to affect the rights of third persons must not be understood as signifying that effect must be denied to such an entry in all cases where third persons have acquired interests. Courts in determining whether or not to amend or perfect their records are controlled by considerations of equity. If one not a party to the action has, when without notice of the rendition of the judgment or of facts from which such notice must be imputed to him, advanced or paid money or property, or in other words, has become a purchaser or encumbrancer in good faith and upon a valuable consideration, then the subsequent entry of such judgment nunc pro tunc will not be allowed to prejudice

him. Otherwise its effect against him is the same as if it had been entered at the proper time.

Tabrey, 14 Wn. App at 275.

The *Tabrey* court found it was not required to suspend its own judgment. Likewise the court here was not so required.

This case had been fully adjudicated; the court had issued a written memorandum finding the marriage defunct since 1998 as originally argued by Mr. Ramey; Mr. Ramey had paid in full the obligation as decreed by the court. The final decree would have been entered prior to Mrs. Ramey's death but was delayed through no fault or action of either party. Equitable considerations, supported by statute and case law, clearly favor the entry of the decree nunc pro tunc.

II. UNDER STATUTORY AUTHORITY, A DIVORCE COURT HAS AUTHORITY TO ENTER A DECREE OF DISSOLUTION NUNC PRO TUNC WHEN THE STATUTORY PROVISIONS PERMITTING SUCH A DECREE HAVE BEEN MET AND ALL PARTIES HAVE AGREED THE MARRIAGE HAD BEEN DEFUNCT FOR MORE THAN A DECADE

RCW 26.09.290 provides for a final decree of dissolution nunc pro tunc.

Whenever either of the parties in an action for dissolution of marriage or domestic partnership is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed or entered, if no appeal has been taken from the interlocutory order or motion for a new trial made, the court, on the motion of

either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed and entered therein granting the dissolution as of the date when the same could have been given or made by the court if applied for.

The court may cause such final judgment to be signed, dated, filed and entered nunc pro tunc as aforesaid, even though a final judgment may have been previously entered where by mistake, negligence or inadvertence the same has not been signed, filed, or entered as soon as such final judgment, the parties to such action shall be deemed to have been restored to the statute of single persons as of the date affixed to such judgment and any marriage or any domestic partnership of either of such parties subsequent to six months after the granting of the interlocutory order as shown by the minutes of the court, and after the final judgment could have been entered under the law if applied for, shall be valid for all purposes of the date affixed to such final judgment, upon the filing thereof.

RCW 26.09.290.

The statute allows for the entry of a decision nunc pro tunc when the delay has been caused by mistake, negligence or inadvertence and the parties, in the judgment of the court, are entitled to such an entry. The statute does not contain a public policy requirement or otherwise limit the court.

Courts have applied this statute cautiously, as reflected by case law noted above. However, cases repeatedly recognize that the granting of a divorce decree nunc pro tunc is within the court's discretion and depends upon the circumstances of each case. *Pratt*, 99 Wn.2d 905

(holding that an *oral* decision was not an adequate basis on which to enter a decree nunc pro tunc); *Bruce*, 48 Wn.2d 635 (holding that *statutory provisions* of entering a decree had not been met when no written decree had been issued) *State ex rel Tufton v. Superior Court*, 46 Wash. 395, 90 P. 258 (1907) (finding a *delay caused by the parties* made entry of the decree nunc pro tunc improper); *Barros*, 26 Wn. App. 363 (holding that entering an order nunc pro tunc is not an acceptable method to *correct* its own judicial ruling); *Tabery*, 14 Wn. App. 271 (permitting entry of a divorce decree nunc pro tunc as delay was *caused by the court*). “The entry of a nunc pro tunc decree of divorce is . . . within the court's inherent power.” *Id.* at 274, citing *Bruce*, 48 Wn.2d 635. “It rests in the discretion of the court.” *Id.*

In *Pratt*, the court had given an oral ruling declaring a divorce but relied on Mr. Pratt's attorney to prepare the final decree. *Pratt*, 99 Wn.2d. at 907. There was a delay while Mrs. Pratt's attorney sought payment of fees from Mr. Pratt as had been decreed in the oral ruling. *Id.* Mr. Pratt died before the court had reviewed or approved the final orders as written by counsel. *Id.* The Supreme Court, overruling the trial court and the appellate court, denied a motion to enter the dissolution decree nunc pro tunc to record a date prior to Mr. Pratt's death. “A court's limited power to enter a decree nunc pro tunc in a dissolution setting cannot be

exercised in the absence of a ministerial or clerical error or an important public purpose for so doing.” *Id.* at 911.

The present case is in opposition to *Pratt*, and unique in its circumstances. As noted by the presiding judge, the delay resulting in the failure to enter the court’s decision prior to Gloria Ramey’s death was inadvertently caused by the court and not by any action of either party. The statutory requirements have been met, permitting entry of the decree.

III. A TRIAL COURT IS NOT REQUIRED TO FOLLOW DICTA OF A PRIOR CASE

“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum and need not be followed.” *State v. Potter*, 68 Wn. App. 134, 150, 842 P.2d 481 (1992). Dicta is not controlling precedent. *Noble Manor v. Pierce County*, 133 Wn.2d 269, 289, 943 P.2d 1378 (1997) (concurring opinion).

In reinforcing the court’s right to enter a decree nunc pro tunc under statutory authority and under “inherent common law power” *Id.* at 909, the *Pratt* court posits a permissible circumstance would be limited to public purpose. *Pratt*, 99 Wn. 2d. at 909, referencing *Tabery*. The *Pratt* court then suggests that a valid public purpose for the use of a nunc pro tunc dissolution decree would be limited to the need to avoid bigamy

or bastardy. *Pratt*, 99 Wn.2d at 909-910, referencing *Tufton*, 46 Wash. 395, *State v. Ryan*, 146 Wash. 114, 261 P. 775 (1927), *Barros*, 26 Wn. App. at 365-366.

But the cases cited in *Pratt* as the basis for the court's decision do not, in fact, address issues of bastardy or bigamy or further define public policy. In fact, neither *Pratt* nor the cases cited by the *Pratt* court address issues of bastardy or bigamy.

In *Tufton*, cited by *Pratt*, the court denied the nunc pro tunc motion when the decree had been oral only and the delay had been caused by one of the parties; *State v. Ryan* is a criminal case and addressed altering a judgment and sentence; and *Barros v. Barros* denied a motion to alter an existing final decree based on an oral ruling. None of the cited cases include facts related to bastardy or bigamy or limit the discretion of the court. Furthermore, none of the cases cited by *Pratt* for the proposition that a public policy element is required actually state such a test. The *Pratt* court, with no analysis, simply made that requirement up.

Tabery, also is incorrectly referenced in *Pratt* as a ruling limiting use of the nunc pro tunc motion to times when it is necessary to validate a subsequent marriage. *Pratt*, 99 Wn.2d. at 909. But while the *Tabery* court noted that the parties had believed themselves to be married and the

ruling did validate that marriage, the holding rests upon the rights of an intervening third party, laws of descent and distribution, equitable considerations and the furtherance of justice. *Tabery*, 14 Wn. App. at 276. *Tabery* does not limit the court's discretion to validating marriages. *Id.*, only that it not be manifestly unreasonable. *Id.*

Issues of bigamy and bastardy were not before these courts nor were they issues in *Pratt*. Hence the discussion in *Pratt* is dicta.

Subsequent Supreme Court decisions have cited *Pratt* for the holding that entry of a nunc pro tunc decree can be justified when there is an important public purpose for so doing. *State v. Smissaert*, 103 Wn.2d, 636, 641, 694 P.2d 654 (1985), citing *Pratt*, 99 Wn.2d at 911. But the issues in *Smissaert*, a criminal case, deal with sentencing, not bigamy or bastardy. The *Smissaert* court does not impose the limitations of the *Pratt* dicta in finding a valid public policy for entry of a decree nunc pro tunc.

Similarly, in *Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 19, 985 P.2d 391 (1985), the court ruled against entering an order nunc pro tunc when the delay was caused by one of the parties, but found the other elements had been met and did not address a further need for public policy. The issues in *Stella Sales* relate to the purchase of property and, again, do not include questions of bigamy or bastardy.

In summary, *Pratt* should be read solely as a case that failed to meet two of the three prongs of the *Garrett* test. On that basis alone Mr. Pratt's estate was not entitled to entry of a nunc pro tunc decree.

To the extent that *Pratt* adds a fourth public policy prong to the *Garrett* test, such a ruling should be disregarded as dicta.

Even if *Pratt* could be read as anything but dicta, its misplaced reliance on *Truiston*, *Ryan*, and *Barros*, without any analysis suggests that *Pratt* should be read narrowly and limited to its facts.

The facts of this case meet the *Garrett* test and statutory requirements. If this court does read *Pratt* as good law, adding a Public Policy test, we submit that honoring Gloria Ramey's wishes as stated in her will, satisfies that test in following established law not only under RCW 26.09.290 but also RCW 11.12.230 which requires courts to "have due regard for the direction of the will and the true intent and meaning of the testator."

IV. THE COURT SHOULD AWARD REASONABLE ATTORNEY FEES TO THE ESTATE.

Ms. Ramey's Estate requests that this court award attorney's fees to the estate as provided by RCW 26.09.140 and RAP 18.1. In awarding attorney fees on appeal, the court examines the arguable issues and the financial situation of the parties. *Mansour v. Mansour*, 126 Wn. App. 1,

17, 106 P.3d 768 (2004), *Matter of Marriage of Booth*, 114 Wn.2d 772, 791 P. 2d 519 (1990). Attorney fees were awarded by the trial court's memorandum opinion based upon Mr. Ramey's ability to pay and Mrs. Ramey's lack of ability. CP 25 Here the equities of the case, Mr. Ramey's ability to pay as found by the trial court, and the fact that the funds of the estate are now trapped in ancillary probate, meet the provisions of RCW 26.09.140⁴ and the requirements of RAP 18.1.

E. Conclusion

The Court stated, "it may be hard to find a more compelling case for a nunc pro tunc dissolution decree."

This case had been fully adjudicated; the court had issued a written memorandum finding the marriage defunct since 1998 as originally argued by Mr. Ramey; Mr. Ramey had paid in full the obligation as decreed by the court. The final decree would have been entered prior to Mrs. Ramey's death but was delayed through no fault or action of either party.

⁴ RCW 26.09.140 states: The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

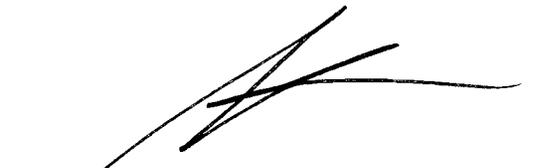
The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

Under statute and case law, the court has discretionary power to enter a decree nunc pro tunc. Equitable considerations clearly favor the entry of the decree. This case is an appropriate situation for such a ruling. Justice, which is itself an important public policy, would be served by honoring the opinion already issued.

Ms. Ramey's Estate respectfully requests this court find that the trial court erred in denying the motion to enter the decree of dissolution Nunc Pro Tunc and remand the case for entry of the decree.

Dated this 5 day of December, 2011.

Respectfully submitted,



STEVEN L. OLSEN, WSBA No. 9601
Attorney for Brett Haberkern

OLSEN & McFADDEN, INC., P.S.
216 Ericksen Avenue NE
Bainbridge Island, WA 98110
Phone: (206) 780-0240
Fax: (206) 780-0318

Brief of Appellant

APPENDIX 1

FILED
2011 APR 28 AM 11:46
IN SUPERIOR COURT
JEFFERSON COUNTY CLERK

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5 **Superior Court of Washington**
6 **County of Jefferson**

7 In re the Marriage of:

8 JAMES P. RAMEY

Petitioner,

9 and

10 GLORIA L. RAMEY

Respondent.

No. 08-3-00032-2

**Findings of Fact and
Conclusions of Law and
Order on Motion to Enter
Decree Nunc Pro Tunc**

11
12 This matter came on to be heard on July 16, 2010, on Respondent's motion to enter
13 Findings of Fact and Conclusions of Law, and Decree of Dissolution Nunc Pro Tunc.

14 Respondent appeared by and through her attorney, Steven L. Olsen. Petitioner appeared
15 by and through his attorney, Peggy Ann Bierbaum.

16
17 The Court considered the Proposed Findings of Fact and Conclusions of Law, Decree of
18 Dissolution, Cost Bill, and Supplemental Attorney's Fee Declaration presented by Respondent,
19 Petitioner's objections thereto, Respondent's Motion to Enter Decree Nunc Pro Tunc, and
20 counsel's Declaration and Memorandum in support thereof, Petitioner's Motion to Strike
21 Hearing, Respondent's Response to Motion to Abate, Declarations of Brett Haberkern, the
22 evidence produced at trial, and argument of counsel, hereby makes the following :

23 **FINDINGS OF FACT**

24 1.1 This matter was tried before the undersigned judge on April 20, 2010.

25 Findings of Fact and Conclusions of Law & Order on
Motion to Enter Decree of Dissolution Nunc Pro Tunc

- 1

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Attorneys at Law
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- 1 1.2 The Court issued a Memorandum Opinion on May 5, 2010.
- 2 1.3 The court found that this marriage was defunct as of January 10, 1998, when Ms.
- 3 Ramey left the family home in Port Townsend and moved to Bakersfield, California.
- 4 1.4 Based on the evidence presented, the court determined the value and character of
- 5 assets at the time of separation, noting that much of the real estate and business
- 6 interests of the parties remained in community ownership.
- 7 1.5 The court concluded that a \$600,000 distribution to Ms. Ramey, plus her Bakersfield
- 8 Condo and mortgage, was an equitable distribution, leaving the remainder of the
- 9 parties' assets to Mr. Ramey. The court also ruled that the \$600,000 award would
- 10 bear 12% interest (\$6,000 per month) and that Mr. Ramey must continue to pay
- 11 \$4,000 per month maintenance until the \$600,000 was paid.
- 12 1.6 In consultation with the court's scheduler, Petitioner noted up presentation of
- 13 Proposed Findings, Conclusions, and Decree on May 21, 2010, for June 18, 2010.
- 14 1.7 On June 11, 2010, the parties were advised by the court scheduler that the court had
- 15 to reschedule the hearing as a result of personal matters of the undersigned judge.
- 16 1.8 In consultation with the court scheduler, Respondent re-noted presentation for
- 17 Findings, Conclusions, and Decree of Dissolution for July 9, 2010.
- 18 1.9 Nearly all, except the court's final signatures on the papers, had been done; and
- 19 would have been done but for the court's personal matters.
- 20 21 1.10 The parties' actions, and in particular Respondent, did not cause delay in entry of
- 22 Findings, Conclusions, and Decree of Dissolution. They had no control over the
- 23 court's personal matters, requiring rescheduling of presentation.
- 24 25

1 1.11 Respondent died on June 28, 2010.

2 1.12 The court issued its Memorandum Opinion, denying Respondent's motion to
3 enter a nunc pro tunc Decree on August 3, 2010.

4 Based on the foregoing Findings of Fact, the court makes the following:
5

6 **CONCLUSIONS OF LAW**
7

- 8 1. The marriage of James and Gloria Ramey was defunct as of January 1, 1998; and was
9 irretrievably broken from that time.
- 10 2. RCW 26.09.290 provides statutory authority to enter a dissolution decree nunc pro
11 tunc.
- 12 3. *Pratt v. Pratt*, 99 Wn.2d 905 (1983), held that such statutory authority is limited to
13 circumstances involving mistake, inadvertence, or neglect; and then only when
14 necessary to validate a subsequent marriage.
- 15 4. The court also has inherent common law power to enter a decree nunc pro tunc when
16 a party has died before entry of a final decree, if:
- 17 a. The cause of action was ripe for judgment at the time of death
18 b. The delay in entering judgment must not have been caused by the party
19 seeking the decree nunc pro tunc
20 c. The judgment must not injuriously affect subsequently acquired rights of
21 innocent third parties.
- 22 5. The *Pratt* court adds a fourth condition: that entering a nunc pro tunc decree is
23 necessary to effectuate an important public policy. This condition is not met.
24

1 6. Because the fourth condition, as stated in *Pratt*, has not been met, the court lacks
2 authority to enter a nunc pro tunc Decree of Dissolution.

3 Accordingly:

4 **ORDER**

5 IT IS HEREBY ORDERED that Respondent's motion to enter Nunc Pro Tunc Findings
6 of Fact, Conclusions of Law, and Decree of Dissolution is DENIED.

7 IT IS FURTHER ORDERED that Petitioner's Motion to Abate this proceeding is
8 GRANTED.

9 Dated this _____ day of _____, 2011.

10
11
12 _____
13 Judge Ken Williams

14 Presented by:

15 Without waiving objection to failure of the court to enter Respondent's proposed
16 findings/conclusions:

17 _____
18 STEVEN L. OLSEN, WSBA #9601

19 Attorney for Brett Haberkern, Executor of the Estate of GLORIA RAMEY

20 Approved for Entry:

21 Notice for presentation waived:

22 *See attached*

23 _____
24 PEGGY ANN BIERBAUM, WSBA #21398

25 Attorney for the Petitioner

Findings of Fact and Conclusions of Law & Order on
Motion to Enter Decree of Dissolution Nunc Pro Tunc

- 4

OLSEN & McFADDEN, INC., P. S.
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216 Ericksen Avenue, NE
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1 6. Because the fourth condition, as stated in *Pratt*, has not been met, the court lacks
2 authority to enter a nunc pro tunc Decree of Dissolution.

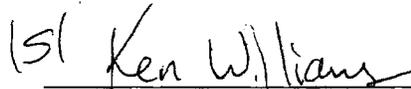
3 Accordingly:

4 **ORDER**

5 IT IS HEREBY ORDERED that Respondent's motion to enter Nunc Pro Tunc Findings
6 of Fact, Conclusions of Law, and Decree of Dissolution is DENIED.

7 IT IS FURTHER ORDERED that Petitioner's Motion to Abate this proceeding is
8 GRANTED.

9 Dated this 26 day of April, 2011.

10
11 
12 _____
13 Judge Ken Williams

14 Presented by:

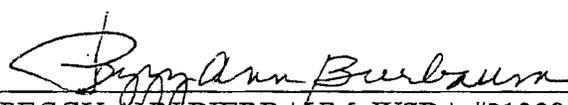
15 Without waiving objection to failure of the court to enter Respondent's proposed
16 findings/conclusions:

17 
18 _____
19 STEVEN L. OLSEN, WSBA #9601

20 Attorney for Brett Haberkern, Executor of the Estate of GLORIA RAMEY

21 Approved for Entry:

22 Notice for presentation waived:

23 
24 _____
25 PEGGY ANN BIERBAUM, WSBA #21398

Attorney for the Petitioner

Findings of Fact and Conclusions of Law & Order on
Motion to Enter Decree of Dissolution Nunc Pro Tunc

- 4

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APPENDIX 2

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SUPERIOR COURT OF WASHINGTON
COUNTY OF JEFFERSON

In re the Marriage of:)
)
JAMES P. RAMEY,)
)
) Petitioner,)
)
) and)
)
GLORIA L. RAMEY,)
)
) Respondent.)
)

NO. 08-3-00032-2
MEMORANDUM OPINION
ON MOTION TO RECONSIDER

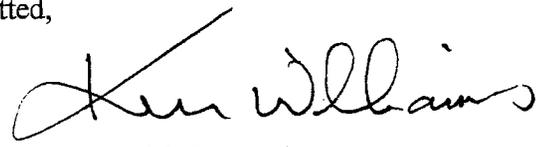
This matter came before the undersigned a motion to reconsider a decision of this Court denying the filing and signing of a Decree of Dissolution of marriage nunc pro tunc.

The Court has reviewed the new information and reread the applicable cases, and in particular the case of Pratt v. Pratt, 99 Wn. 2d 905, 665 P. 2d 400 (1983).

On review this Court finds, as it previously did, that the language in Pratt precludes filing a dissolution decree on a nunc pro tunc basis under the circumstances of this particular case. Accordingly the request for reconsideration is denied.

DATED this 3RD day of June, 2011.

Respectfully submitted,



KEN WILLIAMS
JUDGE

DECLARATION OF SERVICE

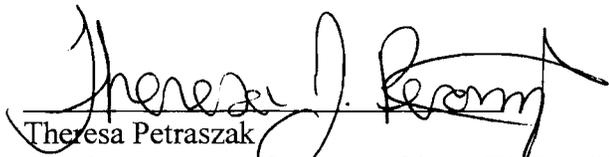
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 6, 2011, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:


DEC 11 10 51 AM '11

Office of Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Susan J. Allen W.C. Henry and S.J. Allen PO Box 576 Port Townsend, WA 98368	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Peggy Ann Bierbaum 800 Polk Street, Suite B Port Townsend, WA 98368	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Catherine W. Smith & Valerie Villacin 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"/> E-Mail

DATED at Bainbridge Island, Washington this 6th day of December, 2011.


Theresa Petraszak
Legal Assistant to Steven L. Olsen, WSBA #9601