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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**

REPLY BRIEF

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A. Summary of Argument

By statute and by common law, a trial court has inherent power to enter a decree of dissolution nunc pro tunc. RCW 26.09.090, *Pratt v Pratt*, 99 Wn.2d 905, 665 P.2d 400 (1983).

Application of the statute is limited to situations of inadvertence defined by its general meaning. Application by case law is limited to matters of public policy, which is not defined.

The ruling in *Pratt* has been interpreted by the trial court as strictly limiting the definition of public policy. But the narrow definition of public policy in *Pratt* occurs only as dicta; because it does not apply to the facts of the case in *Pratt*, nor in the present matter.

The trial court has erred in its interpretation of the statute and of the common law, finding entry of a written opinion nunc pro tunc to be outside its authority or discretion; when, in fact, it has such authority. Interpretations of law are subject to review de novo.

B. Argument

- I. TRIAL COURT IS NOT BOUND BY
PRATT V PRATT, 99 WN.2D 905, 665 P.2D 400 (1983)
 - i. THE *PRATT* COURT'S INTERPRETATION OF RCW
26.09.090 IGNORES THE LANGUAGE OF THE STATUTE

The *Pratt* court makes repeated references to its authority to enter a decree of dissolution nunc pro tunc.

“[A] trial court has inherent power to enter a decree nunc pro tunc.” *Pratt*, 99 Wn.2d at 908.

“A court has statutory authority to issue a dissolution decree nunc pro tunc.” *Id.*

“Clearly a trial court has inherent authority to enter a decree nunc pro tunc in a dissolution case.” *Id.* at 909.

The *Pratt* court then says that its statutory power is limited to validating a subsequent marriage. *Id.* However, the statute contains no such limitation:

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 status 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 as of the date affixed to such final judgment, upon the filing thereof.

RCW 26.09.290.

It is perhaps useful to note that the second sentence of the statute addresses specifically situations when a prior decision has been entered in an earlier dissolution but was not filed immediately. The statute restores the parties to their status as single persons at the time of the judgment thereby validating a subsequent marriage if other timing restrictions have been met. There is no indication that the provisions of this second sentence, applicable to a specific set of circumstances, are intended to limit application of the first sentence of the statute.

ii. *PRATT'S LIMITED DEFINITION OF PUBLIC POLICY IS BASED UPON DICTA*

Although the statute is not limited to issues of bigamy and bastardy, the *Pratt* court then applies the concept of validating a subsequent marriage or avoiding bastardy to its interpretation of case law. In fact, the cases cited by the court do not concern matters of a subsequent marriage or bastardy, with the exception of *In re Tabrey*, 14 Wn.App. 271, 276, 540 P.2d 474 (1975), which concerns validating a later marriage; but which decision was based on equitable consideration. Additionally, the *Pratt* case did not contain issues of bastardy and subsequent marriage, nor does the present case.

Respondent correctly notes, ““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.”” *Pierson v. Hernandez*, 149 Wn. App. 297, 202 P.3d 1014 (2009), Respondent’s Brief pg. 10. However, Respondent goes on to claim that the *Pratt* discussion of bastardy and bigamy is not dicta but “integral to its decision.”

Clearly, as these issues were not part of the *Pratt* case (neither party had remarried and there was no claim of illegitimate offspring) nor the cases cited by *Pratt*, 99 Wn.2d at 909 – 910; (see also Appellate Brief pgs. 25 – 28), they cannot possibly be integral to the decision and are in fact dicta, Respondent’s circular reasoning to the contrary notwithstanding.

That the *Pratt* court was not intending to create a new definition of public policy limited only to bastardy or bigamy is reflected in the court’s own summary of the case which states that a nunc pro tunc decree of dissolution may be entered when “mandated by public policy considerations.” *Id* at 906. The considerations are not further defined to limit the court’s discretion.

Respondent also correctly notes the legal principle that decisions of higher courts establish precedent. (Respondent’s Brief, Page 11). However, dicta from a higher court are not binding, as discussed. Nor is

the Court of Appeals precluded from distinguishing between cases when issues differ. *Pratt*, relied on entirely by the Respondent, is patently distinguishable from the present case, despite Respondent's unsubstantiated claims to the contrary.

In *Pratt*, the court had given an oral ruling granting a divorce. *Pratt*, 99 Wn.2d at 907. Here, the Judge had issued a signed, written opinion, reflecting the fully adjudicated proceeding. CP 110.

In *Pratt*, the delay was caused by Mrs. Pratt's attorney. *Pratt*, 99 Wn.2d at 907. Here, Judge Williams found neither party was responsible for the delay of entry, which was instead caused by the court. CP153, FOF 1.10. Error has not been addisned to this finding.

Mr. Pratt died intestate. *Pratt*, 99 Wn.2d at 907. Gloria Ramey had a valid will. CP 136, FOF 1.10. Error has not been assigned to this finding.

The Pratt's dissolution trial occurred less than a year after Mr. Pratt had filed a complaint for dissolution; the parties had separated four months after their wedding. *Pratt*, 99 Wn.2d at 906. The Ramey marriage of 27 years before separation had been defunct for over a decade, eliminating any logical argument that the parties' irreconcilable

differences would alter after Judge Williams' written opinion following trial.¹

“A nunc pro tunc order should be granted or refused, as justice may require in view of the circumstances of the particular case.” *Mitchell v. Overman*, 103 U.S. 62, 26 L.Ed. 369 (1880). The matters of the Pratt dissolution and the Ramey dissolution are clearly distinguishable and the Court is not bound to apply the findings of *Pratt* under the particulars of this case.

II. THE LANGUAGE OF RCW 26.09.090 PERMITS ENTRY OF A DIVORCE DECREE NUNC PRO TUNC

Respondent argues that the delay of entry in this matter does not fall under RCW 26.09.090 because the delay was not caused by “inadvertence.” Respondent relies upon the legal definition in *Blacks Dictionary* for support.

However, courts construe statutory language according to its plain and ordinary meaning. *Tobin v. Dep't of Labor & Indus.*,

¹ Nor is there any reason to believe the Judge's written opinion would be altered. As noted in the dissenting opinion in *Pratt*, regarding the claim that entry of the decree nunc pro tunc should not be permitted due to the possibility that the court or parties could change their minds, “Since, as Hume observed, the future can never be predicted, our expectation the future will be like the past (e.g. that the sun will rise tomorrow morning) has no basis in reason; it is purely a matter of belief. Hume also asserted, however, that such theoretical skepticism is irrelevant to the practical concerns of daily life. Such is the case here. . . . The litigation was over; this court should not now indulge a hyper-technical reluctance but should allow the decree nunc pro tunc to be entered so as to make the record speak the truth. *Id.* at 912. Citations omitted.

145 Wn. App. 607, 187 P.3d 780 (2008), (quoting *Flanigan v. Department of Labor & Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994), which then relies upon Webster’s Third New Int’l Dictionary.) The dictionary definition of “inadvertence” back forms to “inadvertent” which then gives “unintentional” as a second meaning. Clearly, the injustice of denying entry of a fully adjudicated case in a marriage which had been defunct for twelve years was an unintended consequence of Judge Williams’ personal emergency.

Precedent for not allowing a delay caused by the court to affect a just outcome for the parties was established long ago. “[W]here the delay in rendering a judgment or 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. . . . It is the duty of the court to see that the parties shall not suffer by the delay.” *Garrett v Byerly*, 155 Wash. 351, 359, 284 P. 343 (1930), quoting *Mitchell v. Overman*, 103 U.S. 62,26 L.Ed. 369 (1880).

Delays caused by the court will not defeat the right to a judgment nunc pro tunc. *Garrett*, 155 Wash. at 357.

III. THE HOLDING THAT DISSOLUTION ACTIONS ABATE UPON THE DEATH OF A PARTY, RELIED UPON IN PART IN *OSBORNE V OSBORNE*, 60 WN.2D 163, 372 P.2D 538 (1962), AND FULLY BY RESPONDENT, WAS OVER-RULED BY *IN RE THE MARRIAGE OF HIMES*, 136 WN.2D 707, 965 P.2D 1087 (1998), AND IS THEREFORE NOT CONTROLLING HERE

Respondent relies upon *Osborne v. Osborne*, 60 Wn.2d 163, 372 P.2d 538 (1962), for the proposition that Judge Williams' ruling is moot as divorce actions abate upon the death of a party. *Id.* at 165-166. However, the same case also says, "It is true that, as the appellant points out, the cases do not go so far as to say that the court lacks jurisdiction to vacate a divorce decree nunc pro tunc after the death of one of the parties. The office of an order or decree nunc pro tunc is to record judicial action taken and not to remedy inaction." *Id.* at 167.

But *Osborne* relies upon *Crockett v Crockett*, 27 Wn.2d 877, 181 P.2d 180, which in turn relied upon "the leading case of *Dwyer v. Nolan*, 40 Wash. 459, 82 P. 746." *Osborne*, 60 Wn.2d at 166. These cases have been over-ruled by *In re Marriage of Himes*, 136 Wn.2d 707, 965 P.2d 1087 (1998), fully undermining the proposition that abatement upon death is "well-settled law." *Osborne*, 60 Wn.2d at 165-166. The *Himes* court further notes that *Osborne* invited review of those earlier, now over-ruled cases, when the facts merited such review. "There may be good reasons why this court should reconsider the rule and perhaps

modify it.” *Osborne*, 60 Wn.2d at 166. The *Himes* court states, “The *Osborne* court indicated that the issue should be revisited on the right facts ... the right facts exist here.” Even the *Pratt* court, while citing to *Osborne*, seemed to find reason not to adhere blindly to the rule Respondent espouses here, “We have held that a dissolution proceeding *ordinarily* abates upon the death of one of the spouses,” *Pratt*, 99 Wn.2d at 909.(emphasis added)

As noted by Judge Williams, “It may be hard to find a more compelling case for a nunc pro tunc dissolution decree.” CP 85 The definitive rule that dissolution proceedings abate upon death has been overturned by *Himes*.

IV. PUBLIC POLICY CONSIDERATIONS AND EXISTING LAW, SPECIFICALLY RCW 11.12.230 REQUIRE ENTRY OF JUDGE WILLIAMS’ DECISION IN THIS CASE

The definition of public policy is not limited by either statute or common law, and there is, in fact, substantial public policy to be served by granting Mr. Ramey’s plea for dissolution nunc pro tunc.

The Rameys separated on January 10, 1998, after 27 years of marriage. CP 1. For the next decade, they had almost no contact except for the preparation of taxes which Jim continued to file as a married man and for a monthly check to Gloria of \$2,000 – which included her social security. CP110. Jim Ramey continued to invest community funds and

amassed substantial wealth CP110. Gloria, who was 73 at the time the couple separated, lived off her monthly check. When her health deteriorated, James Ramey filed for divorce.

Gloria executed a Will, naming her grandson Brett Haberkern, as her personal representative, giving \$5000 to friend, and leaving her remaining assets to her two daughters. CP 136.

Upon Judge Williams' denial of Appellant's motion to enter the Decree of Dissolution nunc pro tunc, James Ramey obtained an ex parte order appointing him administrator of his estranged wife's estate, more than 40 days after Ms. Ramey's death.

But established law is clear that the wishes of a deceased as expressed in a will must be given full consideration. RCW 11.12.230 provides:

Intent of Testator Controlling. All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.

By declining to enter the decree nunc pro tunc based on public policy considerations, which are not pertaining to this case, the court acts in direct opposition to established law and public policy considerations which are, in fact, pertinent here.

V. AN AWARD OF ATTORNEY FEES IS WARRANTED UNDER RCW 26.09.140

Respondent urges the Court to view this appeal as frivolous. In so doing, Respondent asks the Court to ignore the fact that Judge Williams found, “It may be hard to find a more compelling case for a nunc pro tunc dissolution decree,” CP 85, and that Judge Wood specifically authorized Brett Haberkern to pursue the appeal of the ruling. CP136. It is also notable that the *Pratt* decision, so relied upon by Respondent, was a narrow decision, with three judges dissenting. That the Respondent does not want to consider the merits of the argument does not outweigh the perceptions of Judges Williams and Wood, the dissenting judges in *Pratt*, the *Himes* court, the *Garrett* court, and the Supreme Court Justices in *Mitchell v. Overman*.

An appeal is frivolous ““if there are no debatable issues upon which reasonable minds might differ and it is so devoid of merit that there is no reasonable possibility of reversal.””²

In determining whether an appeal is frivolous, the court considers, in addition to the forgoing definition of “frivolous appeal” the following

² *State v. Chapman*, 140, Wn.2d 436, 454, 998 P.2d 282 (2000), (quoting *State ex rel Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P. 2d 64 (1998)), cert. denied, 531 U.S. 984, 121 S.Ct. 438, 148 L.Ed.2d 444 (2000).

principles: RAP 2.2 gives a civil appellant the right to appeal, all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant, the records should be considered as a whole, and an appeal that is affirmed simply because the court rejects the arguments is not frivolous. *Satterlee v. Snohomish*, 115 Wn. App. 229, 237 – 238, 62 P.3d 896 (2002), *In re Marriage of Wagner v. Wheatley*, 111 Wn. App. 9, 18, 44 P.3d 860 (2002).

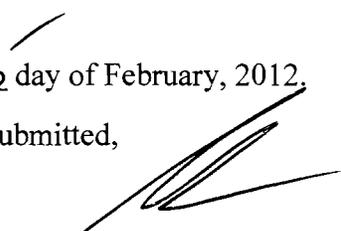
Appellant reiterates the request for attorney fees under RCW 26.09.140, based in part upon Mr. Ramey's ability to pay and the fact the funds of Gloria Ramey's estate are trapped in ancillary probate.

C. Conclusion

Gloria Ramey's estate respectfully requests this Court find that the trial court erred in denying entry of the Decree of Dissolution nunc pro tunc and remand the case for entry of the decree; awarding all fees to Ms. Ramey's estate.

Dated this 15 day of February, 2012.

Respectfully submitted,



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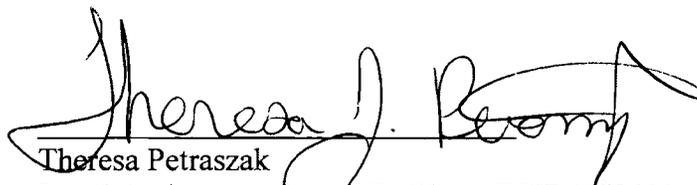
DECLARATION OF SERVICE

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

That on February 15, 2012, I arranged for service of the foregoing Reply Brief, to the court and to the parties to this action as follows:

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DATED at Bainbridge Island, Washington this 15th day of February, 2012.


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