COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

No. 42184-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

JAMES P. RAMEY

Respondent,

v.

GLORIA L. RAMEY,

Deceased,

BRETT HABERKERN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR JEFFERSON COUNTY
THE HONORABLE KEN WILLIAMS

BRIEF OF RESPONDENT

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I. INTRODUCTION

Gloria Ramey died before final orders were entered in the action to dissolve her marriage to respondent James Ramey. "[I]t is the well-settled law in this state that a divorce action abates on the death of either party." ***Osborne v. Osborne***, 60 Wn.2d 163, 165-66, 372 P.2d 538 (1962). A decree of dissolution can be entered *nunc pro tunc* for mistake, negligence, or inadvertence, but only if "it is necessary to effectuate an important public policy (*i.e.,* avoidance of bigamy or bastardy) or where necessary to correct a clerical or ministerial error." ***Marriage of Pratt***, 99 Wn.2d 905, 909, 665 P.2d 400 (1983); RCW 26.09.290. The trial court properly denied entry of a decree *nunc pro tunc* in this case because there is no public policy reason to effect by its entry, and the failure to enter a decree before the wife's death was not due to "mistake, negligence, or inadvertence." This court should affirm.

II. RESTATEMENT OF FACTS

A. The Parties Separated After Nearly Thirty Years Of Marriage.

Respondent James P. Ramey, born 11/14/1929, and Gloria Ramey, born 10/22/1923, were married in 1969. (CP 1, 4) They

had no children together. (CP 8) Both had adult children from earlier relationships. (CP 8)

James and Gloria separated on January 10, 1998. (CP 1, 4) Gloria moved to Kern County, California, and James remained in Port Townsend, Washington. (CP 8, 183) When they separated, the parties purchased a condominium in California for Gloria and she executed a General Durable Power of Attorney to allow James to manage the community assets, which included an interest in a convenience store in Washington. (CP 8, 184, 186) James provided monthly support to Gloria, from which she paid the mortgage on the condo and her living expenses. (CP 184) Other than these monthly payments, James and Gloria had limited contact after they separated. (*See* CP 184)

B. Ten Years After The Parties Separated, The Husband Filed For Divorce. After A Trial, But Before Final Orders Were Entered, The Wife Died.

On February 15, 2008, James, then age 78, filed a petition in Jefferson County to dissolve the parties' marriage. (CP 1) Gloria, then age 84, answered the petition. (CP 4) A temporary order was entered on March 20, 2009, requiring James to pay Gloria monthly

spousal maintenance of $4,000 and awarding her $15,000 for attorney fees. (CP 16)

On April 20, 2010, more than two years after James filed for dissolution, the matter was tried before visiting Clallam County Judge Ken Williams. (CP 41) Gloria was too ill to travel and appeared at trial through counsel and via videotaped deposition. (CP 41, 100-01)

The trial court issued a memorandum opinion on May 10, 2010. (CP 18) The court expressed its intent to divide the marital estate based on what it determined was the value of the community estate at the time of separation on January 10, 1998, when Gloria moved to California. (CP 20, 23) Gloria was to be awarded her condominium in California and a judgment in the amount of $600,000. (CP 25) Apparently to encourage early payment of the judgment, James was to continue to pay monthly maintenance of $4,000 per month and statutory interest ($6,000 per month at 12%) on the $600,000 judgment until the judgment was paid. (CP 25) Gloria was also to be awarded "reasonable" attorney fees based on her need and James' purported ability to pay. (CP 25)

Gloria's counsel prepared final orders and noted a hearing for presentation for June 18, 2010. (CP 33) The presentation hearing was continued because of the trial court's schedule, and re-noted for July 9, 2010 instead of an earlier date to accommodate Gloria's counsel's schedule. (CP 33, 36)

On June 22, 2010, before final orders were entered and in order to avoid inclusion of a judgment against him in the Decree of Dissolution, James submitted a $600,000 check to Gloria's attorney. (CP 37, 101) With no readily available cash,[1] James borrowed most of the $600,000 to make the payment to avoid 12% statutory interest of $6,000 per month and imposition of an order requiring him to pay $4,000 monthly maintenance until the judgment was paid. (CP 101-02) In the letter transmitting the check to Gloria's counsel, James' counsel made clear that James objected to Gloria's proposed Findings and Decree and intended to file a motion for reconsideration on the issue of attorney fees notwithstanding payment of the $600,000. (CP 37)

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[1] There was no evidence that there was any cash available in the marital estate to satisfy a $600,000 judgment to Gloria. (CP 102) The potential award of community property to James consisted largely of the parties' one-half interest in a convenience store, one-quarter interest in the land on which the store is located, and the residence where James resides. (*See* CP 20-22, 24)

Gloria's counsel apparently mailed the $600,000 check to Gloria's grandson, appellant Brett Haberkern. (CP 37)[2] Mr. Haberkern deposited the check into Gloria's account on June 28, 2010. (CP 34, 76, 78) Gloria died at 6:30 p.m. that same evening of cardiopulmonary arrest and congestive heart failure. (CP 76, 79)

C. The Trial Court Abated The Dissolution Action And Denied The Wife's Counsel's Motion For Entry Of A Decree Of Dissolution *Nunc Pro Tunc.*

James received no official notification of Gloria's death but learned she had died from one of her daughters, with whom James has a good relationship. (CP 100, 101) On June 29, 2010, James' counsel advised Gloria's counsel that James had stopped payment on the $600,000 check, because "there is a question whether a Decree of Dissolution can be entered" after Gloria's death. (CP 40, *citing* ***Pratt v. Pratt***, 99 Wn.2d 905, 665 P.2d 400 (1983)) After payment was stopped, James repaid the loan that he had taken out to pay the $600,000 to Gloria. (CP 102)

On July 7, 2010, nine days after Gloria's death, her counsel asked the court to enter a decree of dissolution *nunc pro tunc*. (CP

[2] A notation on the letter accompanying the check states: "Brett ok's, send 1102 Hilaire Blaise Dr. Bakersefield 93311." (CP 37) This is Mr. Haberkern's address (CP 79, 92), not Gloria's. (*See* CP 38, 79)

32: "Comes Now the Respondent, Gloria L. Ramey, by and through her attorney, Steven L. Olsen, and brings this motion to enter decree *nunc pro tunc*") Gloria's counsel's proposed decree of dissolution included a judgment of $21,749.22 against James for Gloria's counsel's attorney fees. (*See* CP 51) The court denied the motion in a memorandum ruling on August 9, 2010. (CP 80-85)

After the memorandum ruling was issued, appellant Haberkern was appointed as a "Special Administrator" of Gloria's estate, solely for the purpose of pursuing review of the order denying entry of the decree *nunc pro tunc.* (*See* CP 140) On November 10, 2010, Gloria's counsel, who now also represented appellant Haberkern in the Washington probate action, filed an attorney's lien in the dissolution action for "unpaid services rendered to Gloria Ramey [ ] in the amount of $19,088.44." (CP 188)

An order denying entry of a decree of dissolution *nunc pro tunc* was entered on April 28, 2011. (CP 174) In its order, the trial court recognized that RCW 26.09.290 provides statutory authority to enter a decree *nunc pro tunc,* but limits that authority only to "circumstances involving mistake, inadvertence, or neglect; and

then only when necessary to validate a subsequent marriage." (CP 176) The trial court did not find that there was a statutory basis for entry of a decree *nunc* pro tunc, and found that no "important public policy" made it necessary to effectuate entry of the decree *nunc pro tunc*. (*See* CP 175-77)

Appellant Haberkern filed a Notice of Appeal on May 24, 2011. (CP 172) The trial court denied Haberkern's subsequent motion for reconsideration on June 3. 2011. (CP 180)

III. ARGUMENT

A. The Dissolution Action Abated Upon The Wife's Death. There Was No Basis For The Trial Court To Enter A Decree Of Dissolution *Nunc Pro Tunc.*

1. The Supreme Court's Holding In *Marriage Of Pratt* Forecloses Appellant's Challenge To The Trial Court Order Denying Entry Of A Decree Of Dissolution *Nunc Pro Tunc.*

The trial court could not enter a decree of dissolution *nunc pro tunc* because the dissolution action abated upon the wife's death. "[I]t is the well-settled law in this state that a divorce action abates on the death of either party." ***Osborne v. Osborne***, 60 Wn.2d 163, 165-66, 372 P.2d 538 (1962); *see also* ***Vandercook v. Reece***, 120 Wn. App. 647, 650, 86 P.3d 206 (2004) (dissolution action abated after trial and oral ruling when written final orders

were not entered before husband died). Under limited circumstances, a court has statutory authority to enter a decree of dissolution *nunc pro tunc* if "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." RCW 26.09.290. But even then, this authority can be exercised only "where it is necessary to effectuate an important public policy." ***Marriage of Pratt***, 99 Wn.2d 905, 909, 665 P.2d 400 (1983).

The Supreme Court in ***Pratt*** vacated an order entering a decree of dissolution *nunc pro tunc* under circumstances similar to those here. After the trial court issued its oral decision, but before final orders were entered, the husband died. Despite the husband's death, the trial court entered a decree of dissolution *nunc pro tunc.* Because the husband died intestate, the decree had the effect of entitling the husband's adult children from an earlier relationship to the assets awarded to the husband under the decree of dissolution.

In initially affirming the trial court's decision, the Court of Appeals reasoned that had the decree not been entered *nunc pro*

tunc, the wife would have received a "windfall" at the expense of the husband's children, as she would be entitled to all of the community property and one-half of the husband's separate property. ***Marriage of Pratt***, 32 Wn. App. 665-68, 649 P.2d 141 (1983).

The Supreme Court accepted review of this decision, reversed the Court of Appeals, and vacated the decree. ***Marriage of Pratt***, 99 Wn.2d 905, 665 P.2d 400 (1983). The Supreme Court held in ***Pratt*** that "a dissolution proceeding ordinarily abates upon the death of one of the spouses," 99 Wn.2d at 908, 911, and that while a superior court has statutory authority to enter a decree *nunc pro tunc,* "such authority is limited, however, to circumstances involving mistake, inadvertence, or neglect and then only when necessary to validate a subsequent marriage." 99 Wn.2d at 909.

The ***Pratt*** Court held that the "instant case is clearly outside the scope of statutory authority in that the *nunc pro tunc* decree was neither necessary to avoid a bigamous marriage nor necessary to legitimize otherwise illegitimate children." 99 Wn.2d at 909. The Court held that in a "dissolution setting, a court may enter a decree *nunc pro tunc* to make the record reflect *what actually happened.*

In entering a decree *nunc pro tunc* to a date prior to Mr. Pratt's death, however, the trial court improperly attempted to make the record reflect what *might* have happened had Mr. Pratt lived." ***Pratt***, 99 Wn.2d at 911 (emphasis in original).

As in ***Pratt***, entry of a decree of dissolution *nunc pro tunc* in this case was not necessary to validate a subsequent marriage or to legitimize children. The trial court could not enter a decree *nunc pro tunc* when doing so would only reflect what might have happened had the wife not died, and would not affect the identified public policy considerations of legitimizing children or preventing bigamy. Therefore, the trial court properly denied appellant's motion for entry of the decree of dissolution *nunc pro tunc.*

Appellant makes very little effort to distinguish ***Pratt***, merely asserting that the Supreme Court's holding was "dicta" that the trial court was "not required to follow." (App. Br. 25) Dicta are statements in a case that do not relate to an issue before the court and are unnecessary to decide the case. ***Pierson v. Hernandez***, 149 Wn. App. 297, 305, ¶ 23, 202 P.3d 1014 (2009). The Supreme Court's holding in ***Pratt*** that "in a dissolution setting" the trial court may only enter a decree *nunc pro tunc* if "it is necessary to

effectuate an important public policy (*i.e.* avoidance of bigamy or bastardy) or where necessary to correct a clerical or ministerial error" was not dicta, but integral to its decision to reverse the Court of Appeals and vacate the decree. Accordingly, this court is bound by the holding in ***Pratt***. ***Tobin v. Dep't of Labor & Industries***, 145 Wn. App. 607, 615, fn. 6, 187 P.3d 780 (2008) *affirmed*, 169 Wn.2d 396, 239 P.3d 544 (2010) (regardless of appellant's claim that the Supreme Court decision was wrongly decided, the decision is binding on the lower courts).

Appellant in particular misplaces his reliance on ***Garrett v. Byerly***, 155 Wash. 351, 284 P. 343 (1930), *overruled on other grounds by* ***Martin v. Hadenfeldt***, 157 Wash. 563, 568, 289 P. 533 (1930) (App. Br. 13-14, 28) to avoid the binding precedent of ***Pratt***. The ***Garrett*** action arose out of a traffic accident that injured the plaintiff. A trial resulted in a verdict of $2,500 in favor of the plaintiff. After the trial court denied defendant's motion for a new trial, the defendant died. The ***Garrett*** Court held that the trial court could enter a tort judgment on the jury's verdict *nunc pro tunc* if: 1) the cause of action was ripe for judgment at the time of death; 2) the delay in entering judgment was not caused by the party seeking

the decree *nunc pro tunc*; and 3) the judgment would not injuriously affect a subsequently acquired right of innocent third parties. 155 Wash. at 357.

Appellant argues that ***Pratt*** should be read "solely as a case that failed to meet two of three prongs of the ***Garrett*** test." (App. Br. 28) But the ***Pratt*** Court held that the "***Garrett*** requirements have been met herein," and distinguished ***Garrett*** because it "did not arise in a dissolution context." 99 Wn.2d at 909. The ***Pratt*** Court therefore held that even though the "***Garrett*** test" was met, an additional requirement of an important public policy was necessary before a decree of dissolution can be entered *nunc pro tunc.* 99 Wn.2d at 909.

Most importantly, the Court clearly rejected fulfilling the goal of allowing a spouse's relatives to inherit as if the spouse had died after divorce as such an "important public policy." *See* ***Pratt***, 99 Wn.2d at 911. Appellant urges this court to disregard the binding precedent of ***Pratt*** based on "equitable considerations." (App. Br. 22) But our Supreme Court rejected "equitable considerations" similar to those asserted by the appellant here in reversing the Court of Appeals in ***Pratt***. (*Compare* App. Br. 22 with ***Marriage of***

Pratt, 32 Wn. App. at 667,[3] *reversed*, 99 Wn.2d at 911.) The Supreme Court held that "regardless of the apparent equities which favor the respondents [the deceased spouse's children from a previous marriage], there was no second marriage involved and, therefore, no public policy served by entering the decree *nunc pro tunc*." ***Pratt***, 99 Wn.2d at 911.

Even if this court could consider the "equities," the facts present here provide far greater reasons for denying entry of a decree *nunc pro tunc* than in ***Pratt***. There can be no concern that the husband would gain a "windfall" if the decree of dissolution is not entered *nunc pro tunc*, because unlike the deceased spouse in ***Pratt***, the wife here executed a will prior to her death. Her children, not the husband, are beneficiaries of her estate even though husband and wife remained married at her death.

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[3] In reversing, the Supreme Court rejected as a basis for entering a decree of dissolution *nunc pro tunc* the "equities" described by the Court of Appeals: "Justice requires it in this case. The parties were married only four months. The dissolution issues were fully adjudicated. Attorneys for both parties approved the findings, conclusions and decree. The delay was for collateral reasons which, at best, were questionable. The matter should have been over and done with. The real reason Mrs. Pratt now objects to entry of the decree is because it cuts off inheritance rights which she had no reason to expect and which, if left intact, would afford her a windfall." ***Pratt***, 32 Wn. App. at 667.

Further, in ***Pratt***, the surviving spouse had consented to entry of the proposed decree and findings before the other spouse's death. Here, to the contrary, the husband objected to the wife's proposed findings and stated his intent to seek reconsideration of the court's ruling. (CP 37)

Finally, in ***Pratt*** the delay in entering the final papers prior to the spouse's death was attributable to the *surviving* spouse's counsel, who had stalled entry of the decree because he had not been paid his awarded attorney fees. 99 Wn.2d at 907, fn. 1 ("Any questionable conduct in delaying entry of the dissolution decree is attributable solely to Mrs. Pratt's trial counsel.") Here, the delay in entering final papers was not at all attributable to the husband, but was at least partly attributable to the wife's counsel. While it was the court that had initially required the change in presentation date, the court had offered, and the wife's counsel declined, an earlier hearing date. (*See* CP 36)

Pratt governs this case. The trial court properly denied appellant's motion for entry of a decree of dissolution *nunc pro tunc* in this case when there was no "important public policy" warranting such relief.

2. Under The Circumstances Present Here, The Trial Court Did Not Have A Basis To Enter A Decree Of Dissolution *Nunc Pro Tunc.*

Even if the court could ignore ***Pratt's*** holding that entry of a decree *nunc pro tunc* must be "necessary to effectuate an important public policy," there was no statutory basis for entry of a decree *nunc pro tunc* because the trial court did not find (nor could it) that failure to enter the decree of dissolution earlier was due to "mistake, negligence, or inadvertence," as required by RCW 26.09.290. (*See* CP 174-78)

Appellant does not allege that the failure to enter the decree of dissolution was due to mistake or negligence. (*See* App. Br. 22-25) Instead, appellant claims that the decree was not entered before the wife's death due to "inadvertence," because the trial court re-scheduled the original presentation date. (App. Br. 25) Inadvertence is defined as "an accidental oversight; a result of carelessness." Blacks Dictionary (7th Ed. Abridged 2000). The fact that the trial court needed to reschedule the hearing, even if for "personal matters," was neither "accidental" nor "careless," warranting entry of a decree *nunc pro tunc* under RCW 26.09.290.

As appellant correctly notes, "courts have applied this statute [RCW 26.09.290] cautiously." (App. Br. 23) In other words, a court should not enter a decree *nunc pro tunc* unless there is a clear factual basis to do so. Indeed, only one of the cases cited by appellant approves entry of a decree *nunc pro tunc*. In that case, consistent with the holding of ***Pratt***, a *nunc pro tunc decree* was necessary to validate a subsequent marriage. ***In re Tabery***, 14 Wn. App. 271, 540 P.2d 474 (1975) (App. Br. 24) (affirming entry of a decree of dissolution *nunc pro tunc* in order to validate the wife's second marriage; wife had remarried believing that a decree dissolving her previous marriage had already been entered). All of the other cases cited by appellant reject granting the extraordinary relief of entry of a decree *nunc pro tunc*:

The Supreme Court in ***Bruce v. Bruce***, 48 Wn.2d 635, 296 P.2d 310 (1956) (App. Br. 24)[4] affirmed an order denying a motion for a decree of divorce *nunc pro tunc*. There, the wife presented evidence in her default divorce case. The court's minute entry

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[4] ***Bruce*** was decided prior to the enactment of RCW 26.09.290 in 1973 and would have been decided under former RCW 26.08.230, which contained language nearly identical to RCW 26.09.290 setting forth the circumstances in which a decree of dissolution may be entered *nunc pro tunc*.

stated that "evidence was adduced in support of complaint for divorce. Decree granted." ***Bruce***, 48 Wn.2d at 635. Nevertheless, a decree of dissolution was not entered, and the judge died three days later. Thirty-four years later, the wife learned that the decree had not in fact been entered and sought entry of a decree *nunc pro tunc*. The Supreme Court affirmed the trial court's denial of the decree, holding that the purpose of a *nunc pro tunc* decree is "to record judicial action taken, and not to remedy inaction." ***Bruce***, 48 Wn.2d at 636.

Likewise here, a *nunc pro tunc* decree of dissolution could not be entered simply to remedy the "inaction" of the parties and court to enter final orders prior to the wife's death.

In ***State ex rel. Tufton v. Superior Court of Washington for Kitsap County***, 46 Wash. 395, 90 P. 258, 258 (1907) (App. Br. 24), the Supreme Court denied the wife's writ of mandate to compel entry of decree of dissolution *nunc pro tunc* based on an oral ruling issued three years earlier. The Court held that a decree *nunc pro tunc* could not be entered based on the court's oral ruling because it was not a final decision until reduced to judgment based on the well-known rule that "the almost uniform practice is to regard the

oral announcement from the bench as merely a guide to the preparation of written findings, which, when prepared and signed, are regarded as the real findings on which the decree is based; the cause being deemed as still pending until the formal findings and decree are so prepared and signed." ***State ex rel. Tufton***, 46 Wash. at 398.

Likewise here, the court's memorandum ruling was not the equivalent of a final decree. A memorandum ruling is not a final order, but "an expression of the then opinion of the court and should be considered only as a direction to counsel in the preparation of a final order. Until a formal order is entered, the court may change its mind." ***Chandler v. Doran Co.,*** 44 Wn. 2d 396, 400, 267 P.2d 907 (1954).

Finally, in ***Barros v. Barros,*** 26 Wn. App. 363, 366, 613 P.2d 547 (1980) (App. Br. 24), this court vacated an order "correcting" a decree of dissolution *nunc pro tunc*. There, the superior court had orally ruled that the husband's military pension was to be awarded to him, but the resulting decree of dissolution failed to include this award. The husband subsequently remarried and died. Six years after the decree of dissolution was entered, the

husband's widow sought an order "correcting" the decree to include the military pension award, so that his ex-wife could not claim an interest in it. The trial court granted the relief. This court reversed, holding that "a court may not correct its failure to act through the use of a *nunc pro tunc* motion, even if such failure is apparently merely a matter of oversight." ***Barros***, 26 Wn. App. at 365.

Likewise here, the trial court properly refused to enter the decree *nunc pro tunc* when doing so would simply be to remedy its failure to enter final orders sooner. Because there was no statutory basis for the trial court to enter a decree of dissolution *nunc pro tunc*, nor any important public policy consideration to effect, the trial court properly denied entry of the decree of dissolution. This court should affirm.

B. There Is No Basis For An Award Of Attorney Fees To The Estate, And This Court Should Award Attorney Fees To The Husband For Having To Defend Against This Frivolous Appeal.

The dissolution action was abated on the wife's death. Her estate is not entitled to an award of attorney fees under RCW 26.09.140. Instead, attorney fees should be awarded to the husband for having to defend this frivolous appeal. An award of attorney fees on appeal may be appropriate "when there are no

debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court's decision." ***Settlement/Guardianship of AGM***, 154 Wn. App. 58, 83, ¶ 57, 223 P.3d 1276 (2010). Here, the Supreme Court's decision in ***Pratt*** is dispositive; appellant has provided no reasoned argument for this court to ignore Supreme Court precedent. This appeal is meritless and the husband should be awarded his attorney fees. RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal); RAP 18.1.

IV. CONCLUSION.

This court should affirm the order denying entry of a decree of dissolution *nunc pro tunc* and award attorney fees to the husband.

Dated this 20th day of January, 2012.

SMITH GOODFRIEND, P.S.

By: _____
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Attorneys for Respondent

FILED
COURT OF APPEALS
DIVISION II
12 JAN 23 AM 10: 31
STATE OF WASHINGTON
BY DEPUTY

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 January 20, 2012, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 20th day of January, 2012.

V. Isaksen

Victoria K. Isaksen