# Arizona Court of Appeals
Division One

LINDA VAN EMMERIK,

Petitioner,

*vs.*

THE SUPERIOR COURT OF MARICOPA COUNTY, and the Hon. Robert A. Colosi, a judge *pro tempore* thereof,

Respondents, and

PAUL M. SHAPIRO, as Personal Representative of the Estate of Jerry Lee Todd, Deceased, and KATHY JO TODD,

Real Parties-Respondent in Interest.

No. 1 CA-SA 98-0213

Maricopa County Superior Court No. DR 97-17899

REPLY TO RESPONSE TO SPECIAL ACTION PETITION

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Arizona Court of Appeals

**Division One**

No. 1 CA-SA 98-213

*VanEmmerik. vs. Superior Court (Hon. R. A. Colosi, J.* pro tem.*) and Shapiro & Todd*

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# REPLY TO RESPONSE TO SPECIAL ACTION PETITION

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## ARGUMENT

### I. Kathy Jo's arguments for non-abatement of the divorce action are unpersuasive.

Kathy Jo continues to cite *Allen v. Allen*, 129 ARIZ. 112, 628 P.2D 995 (App. Div. 1 1981) as if it supported her position here, without bothering to explain how it might. What is the final order which Kathy Jo contends may one day be entered to end the divorce action, and under Rules 54 (e) and 58 (a) as interpreted in *Allen* dated *nunc pro tunc* to the day before Jerry's death? When may this event be expected to occur? Is there any limit to the time which may pass between Jerry's death and the entry of his divorce decree (or whatever terminal order Kathy Jo projects)?

Kathy Jo quotes part of a sentence from the AM. JUR. 2D article entitled *Divorce and Separation*:

> [M]any courts hold that insofar as a divorce action seeks an adjudication of property rights, the cause of action survives and may be revived by the proper party in interest for the exclusive purpose of determining the property rights …"

And she ends her quotation there, with what would seem to be something of a pregnant ellipsis. After one of the spouse-parties has died, are we to understand, "many courts" will carry on with a divorce proceeding for the purpose of imposing, ultimately, a division of marital property which is *not* incidental to any divorce, a proceeding in which the dead spouse obviously can play no part?

The mystery disappears if we read the whole sentence:

> Although the death of a spouse ends the cause of an action for divorce and abates any pending action for divorce, many courts hold that insofar as a divorce action seeks an adjudication of property rights, the cause of action survives and may be revived by the proper party in interest for the exclusive purpose of determining the property rights; and where the divorce court entered a decree determining such rights and a party died before an appeal was perfected or decided, the action may be revived for the purpose of prosecuting an appeal on the property questions. 24 AM. JUR. 2D Divorce and Separation § 177 (1983).

This sentence, and in fact the whole of § 177, deals with the question of whether, how and by whom an appeal may be commenced or pursued after the death of a spouse-party, where a divorce decree was entered (actually or constructively) prior to such death.[1]

In *Cox v. Williams*, 502 N.W. 2D 128, 130 (1983), while it is true that the particular dispute before the court related to step-parent visitation, the court's discussion of the jurisdictional principles involved could hardly have been of more general applicability, nor its conclusion more categorical: "Jurisdiction over divorce actions terminates upon the death of one of the parties."[2] In *Wood v. Parkerson*, 430 P.2D 467, 468 (1967) the Colorado Supreme Court raised "this jurisdictional issue" sua sponte, and for the first time in the proceeding, at the oral argument of the appeal. The particular proceeding leading to the appeal was brought to enforce a divorce-court order for grandparental visitation, but again the reasoning of the court was broad and categorical: "The divorce proceedings abated upon the death of [wife] and thereafter the trial court

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1. The rigor with which the "abatement on death" rule has been applied to divorce actions is illustrated by *Begbie v. Begbie*, 128 CAL. 154, 60 P. 667 (1900) (death of a spouse during pendency of appeal from final divorce decree terminated action and appeal, leaving survivor a widow and not a divorcé). *Quaere* whether under A.R.S. § 25-325 (A) the result in a similar case would depend upon whether or not the appellant had challenged the finding of marital brokenness.

2. The Wisconsin Supreme Court elaborated, quoting from a previously approved Wisconsin Court of Appeals decision, "Jurisdiction of divorce actions is purely statutory, and the authority of the court is confined to those express and incidental powers that are conferred by statute. Because no statutory authority indicate[s] that divorce actions survive the death of one of the parties … jurisdiction terminates in that circumstance."

had no jurisdiction … ."[3] In fact, *none* of the authorities which Kathy Jo dismisses as "limited to custody, visitation and future support issues" is so limited; not one contains a single word limiting its effect in such manner. If Kathy Jo considers that a decision might otherwise be unhelpful to her cause, and if it happened to involve an actual custody, visitation or support issue, then Kathy Jo simply states that the decision was expressly "limited" to such issues.

"Contrary to the more modern approach chosen by this court in *Allen v. Allen*" – in such terms would Kathy Jo dismiss *Rivera v. Conway*, 741 P. 2D 1381 (N.M. 1987) and *Tiedman v. Tiedman*, 255 N.W. 2D 632 (1977). Kathy Jo's reliance on *Allen v. Allen* is, as we have seen, misplaced. But even if the connection between Kathy Jo's position and the holding of *Allen v. Allen* were less tenuous, it should not help her case to point out that other courts would consider this court's ruling in *Allen v. Allen* to represent an unwarranted enlargement of divorce jurisdiction. Anyway, Kathy Jo misreads these cases. In *Rivera v. Conway* the court stated, "In this case there was no judicial action prior to the death of petitioner's husband upon which a nunc pro tunc divorce decree could be predicated." 741 P. 2D at 1382. It is hard to imagine how the case could have been more succinctly and tellingly distinguished from *Allen*, and the same words would apply equally well to the present case.[4]

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3. Elaborating, the court quoted with approval a Texas case: "An action for divorce is of a purely personal nature. … Such actions, in the absence of a statute providing to the contrary, abate absolutely upon the death of either party before judgment and cannot be revived in the name of or against the representatives of the deceased party." 430 P.2D at 468-69, citing *Ex parte Cahill*, 286 S.W.2D 210 (Tex. Civ. App. 1961).

4. As for *Tiedman v. Tiedman*, there is no indication that nunc pro tunc judgments are in any event permitted by or known of in Michigan procedure. Furthermore, the court stressed that the trial judge had done no more than state orally his intention to grant a divorce and include certain terms. One cannot help but wonder whether the result would have been different if the record had instead presented a written, though informal, memorandum of an actual trial court decision – something like a minute entry reflecting the court's rulings after a bench trial, say.

## II. Kathy Jo's argument that the automatic preliminary injunction affords an independent basis for the exercise of continuing divorce jurisdiction is also unpersuasive.

Kathy Jo apparently concedes, now, that the Respondent Court no longer has jurisdiction to grant final relief in the dissolution action (Response, p. 5, bottom). For purposes of Kathy Jo's "Request for Attorney's Fees" (Response, pp. 12 ff.), to the extent said Request may deserve or require the Court's attention, VanEmmerik would like to point out that it took this special action to wrest that concession from Kathy Jo. Her "agreement" with this point, voiced four or five different times in her Response in this action, was never previously expressed, and her pleading in the underlying action praying for a decree of dissolution remains unamended. The questions which are obviously left by this concession, moreover, are ignored or evaded in Kathy Jo's Response.

If an action is properly commenced but before proceedings affecting the merits have taken place exiguous developments deprive the trial court of jurisdiction to grant final relief in the action: (1.) Is there a legal basis for the trial court's continuing entertainment of the action? (2.) If the event which made the granting of final relief beyond the court's jurisdiction[5] is not sufficient to bring about the termination of the action, what event will be? And (3.) How, other than by dismissal, shall the action be terminated?

Kathy Jo does not acknowledge, much less answer, questions 2 and 3. As to question 1, Kathy Jo asserts that "the superior court has the authority to remedy violations of its orders even after a party to the action dies." The "order" she has in mind, in this case, is the automatic preliminary injunction under A.R.S. § 25-315.

And has that preliminary injunction been dissolved? Assuredly it has not. How long, therefore, shall it bar Kathy Jo's disposition of any of the (former) marital property?

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5. Or official notice thereof, such as the suggestion of death made in the divorce action here presented by Jerry Todd's former divorce lawyer soon after Jerry died, or a motion to dismiss based upon such event, such as VanEmmerik's motion to dismiss the divorce action which the trial court denied the same day this special action was commenced.

If the marriage dissolution action giving rise to the automatic preliminary injunction is not to terminate in a decree of dissolution, and it is not to be dismissed, then will the preliminary injunction be enforceable against Kathy Jo for the rest of her life, and thereafter against her probate estate, as she now claims it is enforceable against Jerry's?

Is the statutory preliminary injunction to be viewed as an end in itself? Or is it rather only a means to an end, that end being the fair division of property and debts if and when a decree of dissolution is made? Or to approach the matter a little differently, if we define "remedy" as the judicial means by which a right is enforced or the violation of a right is prevented or redressed, what is the "right" belonging to Kathy Jo for which she demands of the superior court this "remedy"? Does each divorce litigant have a "right" to enforce the preliminary injunction against the other, which is independent of his or her right to a fair and equitable division of property and debts in a final divorce decree? If so, how does the possessor of such a right lose it? For if the right to enforce the preliminary injunction is independent of the right to an equitable division of property in a final decree, why should the termination of the divorce action (in a decree, by dismissal or otherwise, if there is an otherwise) affect that right?

Needless to say, none of the reported Arizona divorce cases cited by Kathy Jo involves such *in vaccuo* enforcement of the statutory preliminary injunction (and neither does the Utah case she cites).

What Kathy Jo does produce is *Westlake North Property Owners v. Thousand Oaks*, 915 F. 2D 1301, 1303 (9th Cir. 1990), which states in a dictum that a district court may impose sanctions under F.R.CIV.P. 11 even as it is dismissing the action in which the sanctioned misconduct occurred for lack of subject matter jurisdiction. Cited in *Westlake* is *Orange Production Credit Ass'n v. Frontline Ventures, Ltd.*, 792 F. 2D 797, 801 (9th Cir. 1986), in which the same proposition was set forth as a holding and not dictum. Neither case involves enforcement of a preliminary injunction after termination of the

action in which the injunction was issued, nor addresses in any way the ancillary nature of a preliminary injunction or any other sort of temporary or interim order.[6]

These cases do point us in the direction of an important distinction, though. Obviously, the sanction imposed on plaintiff and its lawyers in *Orange Production Credit Ass'n* had nothing to do with – was not even derivatively connected to – the vindication of any of the claims or defenses which might have been asserted in the action if the district court could have entertained it. The Rule 11 proceeding and sanction were wholly collateral to and independent of the underlying debt-collection dispute. If a matter is wholly collateral to and independent of the underlying action and is based on an unrelated set of rights and responsibilities, then of course that collateral and independent matter may proceed to adjudication (under whatever style or caption, so long as those involved understand the nature of the proceeding) regardless of the pendency or termination of the underlying action.

Here, for example, if the trial court wished to pursue Jerry Todd's or Mr. Winsberg's alleged "violations" of the automatic preliminary injunction as a criminal contempt, such a proceeding would not necessarily be affected by the subsequent dismissal of the divorce action. Whether such prosecution proceeded under the *Todd v. Todd* caption (along with all the other matters that action seems destined to be "consolidated with) or the County Attorney filed a new complaint under *State v. Winsberg & Others (Not Necessarily Living)*, such a purely punitive proceeding would

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6. In a state court of general jurisdiction, imposition of a sanction as provided by rule, against a person who had come before the court to invoke its jurisdiction and in the course of doing so had breached the court's rules of practice, would be jurisdictionally unproblematical. But the federal district courts are courts of special jurisdiction, and the Constitution restricts "the judicial Power of the United States" to certain specified types of "Cases and Controversies." There is a large body of case law expounding the limits and extent of the federal courts' subject-matter jurisdiction and discussing the restrictions on federal judicial action when subject-matter jurisdiction is questionable or lacking. *Orange Production Credit Ass'n v. Frontline Ventures, Ltd.*, 792 F. 2D 797, 801 (9th Cir. 1986) involved the district court's act of imposing sanctions against plaintiff and its lawyers while dismissing plaintiff's complaint for want of federal subject-matter jurisdiction. The circuit court's discussion of district court authority in such circumstances can easily be misunderstood if read without awareness of this special constitutional and historical background.

obviously survive the termination of the divorce action as such, and it would obviously afford ample protection for the dignity of the trial court.

### III. This special action does not involve the probate matter or any civil action which Kathy Jo may have brought or may hereafter bring.

It should scarcely need to be said that the question of abatement of the divorce action can in no way be affected by the "consolidation" of that action with the probate matter or any other case, action or proceeding. VanEmmerik does not recall having "claim[ed] that a positive ruling [in the present special action] will eliminate [Kathy Jo's] actions below."

With respect to Kathy Jo's child support claim, if indeed it "has been raised properly as part of the probate action" and is "independent" of the divorce action, then quite obviously the granting of the relief sought in this special action would in no way affect it.

### IV. Kathy Jo's "Request for Attorney's Fees" is absurd.

Kathy Jo's ungrounded assertions regarding the previous special action which arose out of the *Todd v. Todd* marital dissolution action, 1 CA-SA 98-0137, are dealt with in a footnote.[7]

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7. The previous special action had absolutely nothing to do with "the fact that Jerry Todd died before Mrs. Todd's requests for relief could be heard" – unless, had Jerry lived, the DR judge who received Kathy Jo's application for temporary orders wouldn't have sent it over to DR administration, and they wouldn't have sent it out to a DR commissioner, and all the parties who appeared before Mr. Anderson wouldn't have addressed and referred to him as "the Commissioner," and the minutes kept for Mr. Anderson by the clerk wouldn't have identified him as "Commissioner Anderson," and the non-interim order which Kathy Jo somehow got Mr. Anderson to sign a month or so after he had "on his own motion, transferred the matter to the presiding probate judge" wouldn't have been fraudulently entitled "Interim Order," *or*, had Jerry lived, the DR action would have been permanently assigned to Mr. Anderson as a judge pro tempore of the Superior Court, and he would have disclosed to all and sundry that in the Todd v. Todd matter he was sitting as a judge pro tem., and had his minute entries so entitled, and so signed himself. If Mr. Todd's survival would have had either of those two sets of consequences, then it may be said that the previous special action "based its issues on the fact that Jerry Todd died" with such inconsiderate timing.

But if Jerry Todd and all the silent majority of mankind had never passed away, they still couldn't make the previous special action have anything to do with the "homestead," its occupation or use.

It is unfortunate that Kathy Jo has seen fit to give wider publication to the reflections which Judge pro tem. Colosi felt compelled to have his division deputy clerk minute for him on the day the present special action was commenced. These are dealt with in a footnote.[8]

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8. Judge pro tem. Colosi ("JptC") apparently felt VanEmmerik should give the trial division "courtesy notice" of her intent to bring a special action. JptC didn't explain how he thought such notice could have been given by VanEmmerik. JptC considers any attempt at written communication between litigants and himself or his staff, apart from pleadings, motions, applications and the like duly filed and served in a pending matter, to constitute an improper attempt at *ex parte* communication – even where everybody else involved in the matter is simultaneously sent copies and the letter or other written communication fully reflects that fact. JptC feels so strongly about this that he vehemently rejects such communications if they reach his office. JptC feels so incredibly strongly about this that he has even filed bar complaints, to the astonishment of bar counsel, who sit there murmuring "How can it be *ex parte*, if everybody got a copy?" JptC does have telephones provided by the County, but he doesn't have anybody answering them, generally speaking; and besides, it's very hard to see how a telephonic communication could be made any less *ex parte* than a letter sent simultaneously to the court and all parties.

JptC didn't provide any of the four attorneys concerned any "courtesy notice" of the fact that he wasn't actually going to hear any of the matters he had set for hearing on July 27, although JptC knew as early as _____ (June 18, maybe? Not having had an opportunity to cross-examine JptC as to his mental operations, VanEmmerik is at a disadvantage here) that he wasn't going to. Unlike the others, JptC. wouldn't have had to invent some exotic new form of pleading ("General Notice of Tentative Planning and/or Expectations of Counsel," maybe?) in order to get the word out.

JptC didn't mention that he had not, even as he spoke, yet ruled on VanEmmerik's motion to dismiss the divorce action on grounds of abatement, the granting of which would have made the present special action superfluous. JptC doesn't explain how VanEmmerik could have known that JptC would deny that motion. In fact, VanEmmerik did not know that JptC would deny that motion. With the motion to dismiss not ruled upon, and varous divorce-case "temporary orders" matters scheduled for hearing on the afternoon of July 27, VanEmmerik chose the commencement of this special action as the least of several evils, rather expecting that the abatement motion would be granted (it is the law, after all) and that she would then be castigated, attacked and probably fined for having commenced the special action unnecessarily.

JptC also didn't explain how the special action, with or without the "courtesy notice" that would have been so hard to give, in light of his epistolophobic predilections, should have been expected, by VanEmmerik or anybody else, to cause *any* "disruption to [the scheduled] proceedings" (even if said proceedings had proceded, which they didn't, though nobody but JptC knew beforehand that they wouldn't), much less "maximum" disruption. What JptC finally talked himself around to was that VanEmmerik's attorney had kept everybody waiting half an hour or so, and order VanEmmerik's attorney to pay their attorney's fees accordingly.

Now in the world of law as one of those involved would view it, VanEmmerik's attorney apologized, and paid the modest sum required, and everybody moved on. But as Kathy Jo would see it, vast issues of good and evil, righteousness and malfeasance, are involved, and the tale, the horrible, searing tale of that awful half-hour spent waiting, waiting, waiting, and that wicked, malicious scheme of "maximum disruption" that surely must have been the sole cause of that horrid, unendurable half-hour – this is a story that must be told again and again, in whatever action, case or proceeding she (or her representatives) may encounter VanEmmerik (or hers), in courts high and low. This savage, life-threatening injury must be kept ever fresh: Lest we forget! Lest anybody forget!

The sundry grievances collected at pp. 14-15 of the Response are dealt with in a footnote.[9]

DATED: August 13, 1998.

Brian K. Stanley
*Attorney for Petitioner Linda VanEmmerik*

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9. A. Notice of Appearance …

"Unqualified" appearance? He didn't say "*de bene esse*" at the courthouse door? How can you be sure? This is supposed to mean that VanEmmerik waived objections to personal jurisdiction. But: (1.) Under modern rules of procedure, she didn't waive such objections unless she filed an answer without making them, which she had not done; and (2.) She never asserted the defense of lack of personal jurisdiction, anyway.

B. Reply to Response to Application …

In the cited footnote, VanEmmerik pointed out that: (1.) She had never filed an answer nor been required to file an answer, and therefore could not have waived defenses which, under modern rules of procedure, she wouldn't waive unless she filed an answer without asserting them; and (2.) If and when she answered, she might have grounds to assert lack of personal jurisdiction as a defense. (Kathy Jo's attorney apparently doesn't realize it, and God forbid he should say "Thank you" if he did, but VanEmmerik's attorney did him a big favor here.)

C. Motion to Dismiss …

Winsberg couldn't move for dismissal on December 23, 1997, because Winsberg didn't become a party until May, 1998. Winsberg purported to file a motion on behalf of his dead ex-client, but obviously he could do nothing of the sort. But even treating this non-party's non-motion as if it were a motion made by Mr. Todd (a month or so after he died, and disregarding the obvious absurdity of Mr.Todd's asserting that the action had abated by virtue of his own death), any ruling on Mr. Todd's motion to dismiss would have no effect on VanEmmerik's right to bring a similar motion, or on the necessity of her doing so in order to protect her own record.

D. Minute entry 5 …

Because VanEmmerik was present when Mr. Anderson, however he may have been sitting, announced his sage interpretation of *Allen v. Allen*, that's supposed to preclude VanEmmerik from filing a special action challenging said sage interpretaton?

E. Motion to Dismiss …

See item 3, above.

F. Interested Party's Disclosure Statement …

Since when does a party "affirmatively ask the court to adjudicate" anything in a Disclosure Statement?

G. Motion to Dismiss …

What, again?

Arizona Court of Appeals

**Division One**

No. 1 CA-SA 98-0213

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**REPLY TO RESPONSE TO SPECIAL ACTION PETITION**

CERTIFICATE OF COMPLIANCE

Petitioner Linda VanEmmerik, by and through her attorney undersigned, certifies compliance with Rule 7 (e), Rules of Procedure for Special Actions. The Reply is double-spaced except for quotations and footnotes and uses proportionally spaced 14-pt fonts, except that slightly smaller fonts may be used for footnotes, superscripts or tables, and slightly larger fonts may be used for document or section headings.

DATED: August 13, 1998.

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Brian K. Stanley
*Attorney for Petitioner Linda VanEmmerik*