

FILED

MAR 01 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

IN RE:

**JUDITH TULLENERS
Appellant**

V.

**ANDRE TULLENERS
Respondent**

NO. 356418-III

APPELLANT'S SUPPLEMENTAL BRIEF RE: ABATEMENT

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1. Identity of Party Filing Supplemental Brief.
Appellant Judith Tulleners, by and through her counsel, David J. Crouse.
2. Basis for Supplemental Brief.
A supplemental brief was required by the assigned Judge per letter directive.
3. Supplemental Authority:

DISCUSSION

I. CASE LAW IS VERY CLEAR THAT AN APPEAL SHALL PROCEED FOLLOWING THE DEATH OF A PARTY WHERE PROPERTY INTERESTS ARE AT ISSUE.

Although Washington courts have long recognized that a divorce action abates on the death of either party, the abatement doctrine has several exceptions for appellate cases. A court is not deprived of jurisdiction to consider an appeal upon the death of one spouse if equitable grounds supporting review exist. A division of property that is not just and equitable as required by statute provides these required equitable grounds for review.

Under the doctrine of abatement, “a divorce action abates on the death of either party.” Osborne v. Osborne, 60 Wn.2d 163, 165-66 (1962). Washington courts have reasoned that because divorce actions are “purely
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personal” in nature, when one party to the divorce dies, jurisdiction over the case ceases to exist. See Dwyer v. Nolan, 40 Wash. 459, 460–61 (1905), overruled by In re Marriage of Himes, 136 Wn.2d 707 (1998). Notably however, exceptions to this general rule exist. **“The death of one of the parties to a dissolution proceeding during an appeal does not bar review.”** In re Marriage of Fiorito, 112 Wn. App. 657, 659 (2002). (Emphasis added.) An appeal may proceed where equitable grounds supporting review exist, or where the rights of third parties are involved. Id. at 660.

In Marriage of Fiorito, the Division 1 Court of Appeals considered a case very similar to the case at hand. After the divorce decree, findings, and child support order had been signed by the trial court, the wife appealed, arguing that the award of child support was too low and the division of property was not just and equitable as required by RCW 26.09.080. Id. at 659-60. During the pendency of the appeal, the husband died. Id. at 660. The husband’s estate moved to terminate review of the appeal, arguing that his death abated any action regarding the dissolution of his marriage. Id. The husband’s estate relied on the 1905 case of Dwyer v. Nolan, and its progeny, in which the Washington Supreme Court held

that a court had no jurisdiction to vacate a dissolution after the death of one of the parties. Id.

Ultimately, the Court of Appeals rejected the husband's argument and squarely held that the death of one of the parties to a dissolution proceeding during the pendency of appeal does not bar review. Id. at 659. In so holding, the court undertook a lengthy and detailed analysis of Washington's doctrine of abatement, emphasizing that the rule announced in Dwyer and progeny had been expressly overruled by the Washington Supreme Court in Marriage of Himes, 136 Wn.2d 707 (1998). Under the prevailing rule in Himes, the death of a party during an appeal would not deprive the court of jurisdiction if equitable grounds or third party interests supported a review of the decree. See Fiorito, 112 Wn. App. at 662-63. Because the failure of a trial court to divide property in a just and equitable manner fell squarely within the equitable grounds permitting appellate review under Himes, the appeal was considered on its merits.

As detailed by the court in Fiorito, for nearly 100 years, Washington courts held that death of a party to a divorce abated the subject matter of the action *entirely*. Fiorito, 112 Wn. App. at 660-62; see also Marriage of Dillon and Clark, 199 Wn. App. 1054 (2017) (unpublished). However, these early cases focused on the personal nature of divorce proceedings and

the merits of the dissolution itself, not issues concerning the distribution of property. See Crockett v. Crockett, 27 Wn.2d 877 (1947) (“the divorce action being a purely personal one, and one of the parties having died, the subject matter of the action has ceased to exist”); McPherson v. McPherson, 200 Wash. 365, 368 (1939) (“an action for divorce proper, being purely a personal action based upon a personal relationship and status of marriage, terminates with the death of either spouse”); see also Dwyer v. Nolan, 40 Wash. 459, 460–61 (1905), overruled by In re Marriage of Himes, 136 Wn.2d 707 (1998) (“The distribution of property in such an action is incidental, and it is clearly incontestable that upon the death of either party, whether before or after the decree, the subject of the controversy is eliminated”).

In Marriage of Himes, the Washington Supreme court revisited the rigid abatement doctrine and overruled a century of jurisprudence. The court noted that in virtually all other jurisdictions, death of a party to a dissolution proceeding would deprive the court of jurisdiction with respect to the marital status of the parties, but not to property interests affected by the decree. Himes, 136 Wn.2d at 726 (underlining added). The court found Bell v. Bell, a United States Supreme Court case, persuasive. Himes, 136 Wn.2d at 725. In Bell, the Supreme Court held that “a divorce

decree pending appeal does not abate upon the death of a party when property rights are involved.” Bell v. Bell, 181 U.S. 175, 178-79 (1901). In recognition of the rule announced in Bell and its near nationwide adoption, the Washington Supreme Court concluded that its rule in Dwyer needed to be reconsidered on equitable grounds. Since Himes and Fiorito, the inflexible framework which once made up the doctrine of abatement has been replaced. Now, if a party dies during an appeal, the court retains jurisdiction so long as equitable grounds for review exist.

In the case at hand, abatement does not deprive this court of jurisdiction to consider the present issues. Much like the case in Fiorito, Mr. Tulleners passed away after Ms. Tulleners filed her appeal. Critically, Ms. Tulleners appeal does not seek to re-litigate or challenge the merits of the dissolution itself. Instead, the appeal is specifically limited to issues concerning the division of property. The trial court failed to divide the community and separate property in a just and equitable manner, as required by RCW 26.09.080. These were the precise grounds that the Division 1 Court of Appeals recognized as an equitable basis for appellate review in Fiorito. See Fiorito, 112 Wn. App. at 662 (“Ms. Fiorito asserts that the division of property was not just and equitable . . . Because Dwyer is no longer the law in this state and for the additional reasons discussed

above, we conclude that we should review the claims in this case.”).
Accordingly, because equitable grounds for review exist, Ms. Tullener’s
appeal should now proceed.

Respectfully submitted,



David J. Crouse, WSBA #22978
Attorney for Judith Tulleners, Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion to be competent to serve papers.

That on the 1st day of March, 2019, he personally served a copy of the Appellant's supplemental brief to the persons hereinafter named at the places of address stated below which is the last known address.

ATTORNEY FOR RESPONDENT

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DAVID J. CROUSE

SUBSCRIBED AND SWORN to before me this 1st day of March 2019.


NOTARY PUBLIC in and for the State of
Washington, residing in Spokane.
My Commission Expires: 3/9/2020

