

FILED
Court of Appeals
Division III
State of Washington
3/11/2019 4:06 PM

No. 356418-III

COURT OF APPEALS, DIVISION III,
FOR THE STATE OF WASHINGTON

Judith Tulleners, Appellant

v.

Estate of Andre Tulleners, Respondent

**REPLY to Appellant's Supplemental Legal
Argument, re: Abatement on Death**

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1. IDENTITY OF REPLYING PARTY

The Estate of Andre Tulleners appears to REPLY to the Supplemental Brief of the Appellant (Judith Tulleners) on Abatement.

2. RELIEF REQUESTED

The court was asked to declare whether the appeal should be abated, or should continue, given the absence of third-party interests and given the absence of any inequitable behavior by Andre Tulleners.

3. REPLY TO THE 3/1/19 RESPONSE OF JUDITH TULLENERS

A. All Prior Filings of Andre Tulleners and His Counsel are Incorporated

The Estate of Andre Tulleners incorporates all prior briefing filed by Andre, on behalf of Andre, or by his counsel, Craig A. Mason.

The legal issue remains that the case law indicates that previous exceptions to the abatement doctrine indicated that third party interests were a basis, and were possibly the basis, for the exception, and the law remains un-determined. Hence, declaration of the law was requested, or abatement was requested if that was determined to be the state of the law.

B. Ms. Tulleners' 2/4/19 Brief Identified the Issue

As Ms. Tulleners quotes on page 7 of her Response, the *Fiorito* case did involve “equitable grounds and significant third party interests,”

In re Marriage of Fiorito, 112 Wash. App. 657, 663, 50 P.3d 298, 302 (2002) (emphasis added).

The new issue of law is: *Are equitable grounds sufficient, in general and on these facts in particular, without third party interests, to avoid the general rule of abatement of the appeal?*

C. Judith Tulleners' Legal Argument of 3/1/19

In her supplemental legal authority and argument provided on 3/1/19, Ms. Tulleners provided additional citation and argument to which a reply is provided in number sections below.

1. *In re Marriage of Fiorito*, 112 Wash. App. 657 (2002):

Children's Interests

As has already been briefed, *Fiorito* provided that the third-party interests of the children in child support would preclude abatement of the appeal. There are no children's interests at issue in Tulleners. *Compare e.g.*, 112 Wash. App. at 663.

The *Fiorito* exception to the rule of abatement rested upon third party interests. The dicta on equitable interests remains to be construed.

2. *In re Marriage of Himes*, 136 Wash. 2d 707 (1998):

Husband's Fraud in Obtaining the Decree

The case of *In re Marriage of Himes* is a perfect instance of equitable concerns, about inequitable behavior of a party, providing an

exception to the rule of abatement in that the husband had been found to have filed a false affidavit of service (emphasis added):

The trial court properly determined the transaction with deceased person statute does not preclude the declarations of Ms. Robyn E. Himes and Ms. Keitha Hetrick. The record supports the trial court's finding that Petitioner Frances A. Himes had the same address for 21 years, the address which Victor P. Himes noted on his Navy transfer request in 1973, and Frances A. Himes remained a Navy dependent until 1994 when the Navy contacted her at that address. There was sufficient evidence upon which the trial court could conclude that Victor P. Himes fraudulently obtained the 1987 default dissolution decree by filing a false affidavit of service.

In re Marriage of Himes, 136 Wash. 2d 707, 729, 965 P.2d 1087, 1098

(1998) (footnote omitted). And further:

....Victor P. Himes at all times knew Petitioner Frances A. Himes' address. His purported service by publication, based upon the false claim he did not know his wife's whereabouts and could not with diligence locate her, was invalid. Consequently, the court did not have jurisdiction over the parties and the default decree entered in the Snohomish County Superior Court on December 21, 1987 is void.

We overrule the 1905 decision in *Dwyer v. Nolan* which established the principle that death of one party to a divorce or dissolution proceeding eliminates the subject matter of the action, and reverse the Court of Appeals which reversed the decision of the Snohomish County Superior Court granting Petitioner Frances A. Himes' motion to vacate the default dissolution decree. We affirm the decision of the trial court.

In re Marriage of Himes, 136 Wash. 2d 707, 737, 965 P.2d 1087, 1102

(1998) (footnotes omitted).

3. *Matter of Marriage of Dillon & Clark*, 199 Wash. App.

1054 (2017): Unpublished Authority of Judith Tulleners

As *Dillon & Clark*, cited by Judith Tulleners, is unpublished, GR

14.1 is first reviewed, in relevant part:

(a) Washington Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate....

(c) Citation of Unpublished Opinions in Subsequent Opinions. Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.

Perhaps the present case (Tulleners) is the appropriate time for a published case to resolve this matter.

In *Dillon & Clark* the dissolution had not yet been reduced to a judgment, and the refusal of the trial court to substitute the estate of the deceased spouse was then appealed, and Division III upheld the trial court's abatement of the dissolution, distinguishing *Himes* (emphasis added):

Himes overruled the *Dwyer* principle that the death of a party to a divorce or dissolution "eliminates the subject matter of the action." *Id.* at 737. Instead, the court recognized that equitable principles could justify the surviving party attacking a fraudulent judgment. *Id.* at 736–737.

A few years later this court applied equitable principles recognized in *Himes* and declined to abate a dissolution appeal merely because one of the parties had died during the appeal. *In re Marriage of Fiorito*, 112 Wn. App. 657, 50 P.3d 298 (2002). There the husband had died after the wife had appealed the dissolution in order to challenge the property distribution and support obligations. *Id.* at 659–660. Citing *Himes*, this court permitted the attack on the nonfinal judgment, despite the death of the husband, due to “both equitable grounds and significant third party interests.” *Id.* at 663. Specifically, this court relied on the statutory requirement that property be divided in a “just and equitable manner,”² and the interest of third parties—the couple's young children—in the child support order. *Id.* In other words, this court allowed an appeal to continue in order to permit resolution of judgment provisions unrelated to the marital status of the couple—the subject of the abatement doctrine. Relying on *Himes* and *Fiorito*, the estate argues that it is equitable to permit the dissolution to proceed in the trial court because of the interest of the estate and third parties (Mr. Dillon's heirs) in the distribution of his property. For multiple reasons, we disagree.

Matter of Marriage of Dillon & Clark, 199 Wash. App. 1054, review denied sub nom. *In re Marriage of Dillon & Clark*, 189 Wash. 2d 1028, 406 P.3d 637 (2017) (footnotes omitted).

The scope of *Himes* -- where there are no glaring equitable issues and where there are no third party interests -- remains to be determined.

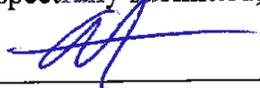
4. CONCLUSION AND RELIEF REQUESTED

The court is asked to consider abating the appeal, given the death of Mr. Tulleners. In any event, the court is asked to clarify the doctrine of abatement on these facts, where there are no third-party interests under the

marriage (children), as under *Fiorito*, and where Andre Tulleners has engaged in no fraud or any other inequitable act (contra *Himes*).

Respectfully submitted,

3/11/19



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DECLARATION OF SERVICE

I, Lori Mason, declare under penalty of perjury under the laws of the State of Washington, that on March 11, 2019, I provided, via electronic filing, a copy of our Reply to Appellant's Supplemental Legal Argument to the following:

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