

FILED

AUG 10 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29363-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Division III

STATE OF WASHINGTON
Respondent

v.

CHRISTOPHER H. DEVLIN
Appellant

BRIEF OF AMICUS CURIAE
WASHINGTON STATE OFFICE OF PUBLIC DEFENSE

Sean Flynn, WSBA#39242
Washington State Office of Public Defense
711 Capitol Way South, Suite 106
P.O. Box 40957
Olympia, WA 98504-0957
360-586-3164



TABLE OF CONTENTS

I. <u>INTRODUCTION</u>	1
II. <u>INTEREST OF AMICUS CURIAE</u>	2
III. ARGUMENT	2
A. WASHINGTON AND OTHER COURTS RECOGNIZE THAT SUBSTITUTION PROTECTS A DECEASED DEFENDANT’S RIGHT TO APPEAL, WHICH MANDATES THE CONTINUED REPRESENTATION OF APPOINTED COUNSEL WHEN NECESSARY TO ENSURE THE RIGHT TO COUNSEL.....	3
B. SUBSTITUTION OF THE PERSONAL REPRESENTATIVE FOR THE ESTATE OF AN INDIGENT DEFENANT DOES NOT AFFECT THE DETERMINATION OF INDIGENCY	8
C. ALLOWING A FULL REVIEW ON THE MERITS SERVES IMPORTANT INTERESTS BEYOND THE LIMITED PERSONAL INTERESTS OF THE HEIRS	10
IV. CONCLUSION.....	12

TABLE OF AUTHORITIES

TABLE OF CASES

Washington Cases

<i>Dutch Village Mall v. Pelletti</i> , no. 65209-5-I, 2011 WL 2611745 (Div. I, July 5, 2011)	6
<i>Hendrix v. Rhay</i> , 56 Wn.2d 420, 353 P.2d 878 (1960).....	5
<i>Howe v. Whitman Cnty.</i> , 120 Wn. 247, 258, 206 P. 968 (1922	9
<i>Marina Condo. Homeowner's Ass'n v. Stratford at Marina, LLC</i> , 161 Wn. App. 249, 254 P.3d 827 (2011)	6
<i>State v. Devin</i> , 158 Wn.2d 157, 142 P.3d 599 (2006)	4, 5
<i>Sadler v. Wagner</i> , 3 Wn. App. 353, 475 P.2d 901 (1970)	9
<i>State v. Robinson</i> , 153 Wn.2d 689, 107 P.3d 90 (2005)	4
<i>State v. Webb</i> , 167 Wn.2d 470, 219 P.3d 695 (2009)	5, 10, 11

Other Cases

<i>Douglas v. California</i> , 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963))	4, 7, 8
<i>Evitts v. Lucey</i> , 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).....	4
<i>Gollott v. State</i> , 646 So.2d 1297 (Miss. 1994)	4, 11

<i>Griffin v. Illinois</i> , 351 U.S. 12, 76 S.Ct. 585, 591, 100 L.Ed. 891.....	
(1956)).....	4, 5
<i>Guest v. Hansen</i> , 603 F.3d 15 (2d. Cir. 2010)	6
<i>Jones v. Corr. Med. Servs. Inc</i> , 401 F.3d 950 (8th Cir. 2005)	6

<i>Pridgen v. Andresen</i> , 113 F.3d 391 (2d. Cir. 1997)	6
<i>State v. Carlin III</i> , 249 P.3d 752 (Alaska 2011)	4, 7
<i>State v. Gartland</i> , 149 N.J. 564, 694 A.2d 564 (1997)	5, 8
<i>State v. Makaila</i> , 79 Hawai'i 40, 897 P.2d 967, 970 (1995)	5
<i>State v. McDonald</i> , 144 Wis. 531, 424 N.W.2d 411 (1988)	4
<i>State v. McGettrick</i> , 31 Ohio. St. 138,509 N.E.2d 378 (1987)	4
<i>State v. Salazar</i> , 123 N.M. 778, 945 P.2d 996 (1997)	5, 8
<i>Surland v. State</i> , 392 Md. 17, 895 A.2d 1034, 1045 (2006)	8
<i>United States v. Moehlenkamp</i> , 557 F.2d 126, 128 (7th Cir. 1977)	5
<i>United States v. Oberlin</i> , 718 F.2d 894 (9th Cir. 1983)	5

CONSTITUTIONS

Wash. Const. art. I § 22	4
--------------------------	---

STATUTES

RCW 2.48.170	6
RCW 2.70.005	2
RCW 2.70.020(5)	2
RCW 2.70.020(7)	2
RCW 10.73.150	2
RCW10.101.020(2)	10

RULES AND REGULATIONS

RAP 15.2(b)	3, 9, 10
RAP 15.2(c)	3
RAP 15.2(f)	9
RAP 15.2(g).....	2

I. INTRODUCTION

The commissioner's ruling, January 19, 2011, granting Leslee Devlin's request to substitute in this appeal as personal representative of Christopher Devlin's estate, raised *sua sponte* the issue of whether Mr. Devlin's original order of indigency authorized Ms. Devlin to continue to proceed with the appeal at public expense. The order of indigency relates to Mr. Devlin's ongoing constitutional right to appeal, and therefore should continue to authorize expenditure of public funds as necessary to protect that right.

The federal and state constitutions require the state to pay for the costs of appeal, including the appointment of counsel, for an indigent party where the right to appeal exists. Washington and other state courts that allow for substitution of a party when a criminal defendant dies recognize the importance of protecting the defendant's right to appeal. The right to appointment of counsel and defense costs paid at public expense must follow where courts have intended to protect the right to appeal.

To determine the indigency of the personal representative of an estate, the court can look only to the assets of the estate. The estate is the substituted party and the personal representative appears only in a representative capacity on behalf of the estate. An order of indigency may

continue throughout review where the indigent status of the party has not changed.

II. INTEREST OF AMICUS

The Washington State Office of Public Defense (OPD) is an independent judicial branch agency, created to implement the statutory and constitutional right to counsel and to ensure the effective and efficient delivery of indigent services funded by the state. RCW 2.70.005. OPD recommends criteria and standards for determining and verifying indigency at both the trial and appellate levels. RCW 2.70.020(5). OPD does not provide direct representation to clients. RCW 2.70.020.

OPD's appellate program administers state funds appropriated for appellate defense services for indigent parties who are entitled to review at public expense, RCW 10.73.150, and coordinates with the appellate courts to determine how appellate attorney services should be provided, RCW 2.70.020(7). OPD designates counsel for appointment by the appellate courts, RAP 15.2(g), and processes attorney and other expenses necessary for review.

III. ARGUMENT

This court has requested amicus to submit briefing on whether the personal representative of Mr. Devlin's estate may proceed under his original order of indigency. Specifically, the court has asked amicus to address: (1) Whether there are cases from other jurisdictions that may be relevant to this issue; (2) In the event it is determined that the estate cannot proceed under the deceased criminal defendant's order of indigency, whether the substituted party's indigency should be determined under RAP 15.2(b) or under RAP 15.2(c); and (3) Whether there are compelling public policy considerations. OPD will address these questions as they relate to the constitutional right to counsel.

A. WASHINGTON AND OTHER STATES RECOGNIZE THAT SUBSTITUTION PROTECTS A DECEASED DEFENDANT'S RIGHT TO APPEAL, WHICH MANDATES THE CONTINUED REPRESENTATION OF APPOINTED COUNSEL WHEN NECESSARY TO ENSURE THE RIGHT TO COUNSEL.

Before his death, Mr. Devlin asserted his right to appeal from his conviction and sentence in Spokane Superior Court and was authorized to seek review at public expense. If his right to appeal continues after his death, then the right to counsel and defense costs at public expense must also continue to protect that right.

The state constitution guarantees a criminal defendant's right to appeal. Wash. Const. art. I § 22; *State v. Devin*, 158 Wn.2d 157, 170, 142 P.3d 599 (2006). The right to counsel attaches where the state has provided a right to appeal. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); *Evitts v. Lucey*, 469 U.S. 387, 392, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (recognizing the right to counsel as "necessary to make [the] appeal 'adequate and effective'" (quoting *Griffin v. Illinois*, 351 U.S. 12, 20, 76 S.Ct. 585, 591, 100 L.Ed. 891 (1956))). The state must provide counsel at public expense for indigent parties where the right to counsel exists. *Robinson*, at 694; *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

Washington and other courts have recognized that substitution of a party upon the death of the defendant pending appeal preserves a defendant's right in order to appeal to avoid automatic dismissal.¹ In

¹ At least seven states (including Washington) that have adopted some kind of substitution procedure, have recognized the ongoing right to appeal. See *State v. Carlin III*, 249 P.3d 752, 761 n. 49 (Alaska 2011) (recently counting eight states (nine including Alaska) that recognize substitution in lieu of abatement or dismissal). See *Carlin at 762* ("While abatement is contrary to the victims' rights under the Alaska Constitution, relying on the presumption of guilt after conviction to leave the conviction intact is contrary to the defendant's right to appeal."); *State v. McGettrick*, 31 Ohio. St. 138, 509 N.E.2d 378, 380 (1987) (recognizing the deceased defendant's "'constitutional right to a direct review of his criminal conviction.'"); *Gollott v. State*, 646 So.2d 1297, 1304 (Miss. 1994) ("Full review . . . preserv[es] the vested right of the criminal defendant to his appeal."); *State v. McDonald*, 144 Wis. 531, 424 N.W.2d 411, 414 (1988) (explaining that the right to appeal "serves as a safeguard to protect a defendant against errors in the criminal proceedings [and] [a] defendant who dies pending appeal, irrespective of

State v. Webb, 167 Wn.2d 470, 219 P.3d 695 (2009), the supreme court determined that the right to appeal does not require abatement *ab initio* upon a defendant's death, but specifically acknowledged the significance of the defendant's ongoing right to appeal. *Id.* at 475-76; *see Devin*, 158 Wn.2d 157. The court looked to other state courts that had adopted the same substitution approach based on the reasoning that dismissing the appeal without appellate review "would be violative of the convicted criminal defendant's fundamental rights, even though he be deceased." *Webb*, at 476 (*quoting State v. McGettrick*, 31 Ohio. St. 138, 509 N.E.2d 378, 380 (1987)).²

As substitution protects the right to appeal, the right to counsel must also continue to ensure meaningful review. "[I]f [a defendant] is denied the services of an attorney [at public expense] at the . . . appellate stage, the constitutional right to appellate review is illusory." *Hendrix v.*

the cause of death, is no less entitled to those safeguards."); *State v. Salazar*, 123 N.M. 778, 945 P.2d 996, 1004 (1997) (recognizing that substitution vindicates a defendant's constitutional right to a direct appeal); *State v. Gartland*, 149 N.J. 564, 694 A.2d 564, 568 (1997) (recognizing the "important interests of the defendant . . . at stake if an erroneous conviction is left standing," although not referring specifically to a defendant's right to appeal); *but see State v. Makaila*, 79 Hawai'i 40, 897 P.2d 967, 970 (1995) (adopting substitution but recognizing no constitutional interests).

² Federal courts also have long recognized that death does not deprive a defendant of the right to "resolution of the merits of his direct appeal," because the appeal is an "integral part of [our] system of finally adjudicating [his] guilt or innocence." *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977) (*quoting Griffin v. Illinois*, 351 U.S. 12, 18); *see also United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983).

Rhay, 56 Wn.2d 420, 423, 353 P.2d 878 (1960). The appeal effectively cannot be maintained without continued representation, and therefore the state remains obligated to protect the right to counsel.

In this case, the estate is the substituted party. An estate can only be represented by an attorney in court. *See Marina Condo. Homeowner's Ass'n v. Stratford at Marina, LLC*, 161 Wn. App. 249, 254 P.3d 827, 834 (2011) (recognizing that an artificial entity, like a corporation, must be represented by an attorney); *and see Jones v. Corr. Med. Servs. Inc.*, 401 F.3d 950, 951 (8th Cir. 2005). The personal representative cannot appear *pro se* to represent the interests of the estate, which would constitute the unauthorized practice of law. RCW 2.48.170; *See Dutch Village Mall v. Pelletti*, no. 65209-5-I, 2011 WL 2611745, at *1 (Div. I, July 5, 2011) (“Representing another person or entity in court is the practice of law.”); *Pridgen v. Andresen*, 113 F.3d 391, 393 (2d. Cir. 1997) (“[A]n administratrix or executrix of an estate may not proceed *pro se* when the estate has beneficiaries or creditors other than the litigant.”).³ If the assets of the estate are insufficient to retain an attorney, the estate

³ A personal representative may be allowed to appear *pro se* if he or she can affirmatively establish that he or she is the sole beneficiary of the estate. *See Guest v. Hansen*, 603 F.3d 15, 21 (2d. Cir. 2010). In this case, it is established that Mr. Devlin has two surviving children, which would preclude Ms. Devlin from asserting that she is the sole beneficiary of the estate.

cannot participate in the appeal. If no one can file or respond to pleadings, the appeal would have to be abandoned.

A back door dismissal would offend the intent of *Webb* in establishing a procedure for the appeal to continue. Only through the continued representation of appointed counsel can this procedure be implemented. Even more problematic, the effective denial of the right to appeal based solely on the indigency of a party would risk violating the principle of equal protection. *See Douglas*, 372 U.S. 353.

Several of the courts that recognize substitution have avoided this dilemma by allowing appointed counsel to continue representation after substitution, although not expressly on constitutional grounds. Most recently, in *State v. Carlin III*, 249 P.3d 752 (Alaska 2011), the Alaska supreme court allowed the public defender to continue representation upon substitution of the personal representative of the estate because it found the state had intended the public defender to provide comparable representation to privately retained counsel. The court reasoned that the personal representative of an estate with assets could elect to continue the services of a privately retained attorney, and therefore the same should be available for the estate of an indigent defendant who was appointed an attorney at public expense. *Id.* at 765-66. While the court based its comparability analysis on the state's public defender act, such reasoning is

consistent with the principles of equal protection. *See Douglas*, 372 U.S. 353.

Other courts have allowed appointed counsel to continue representation based on practical and policy considerations. *See Surland v. State*, 392 Md. 17, 895 A.2d 1034, 1045 (2006) (recognizing that appointed counsel “is usually already in the case and, but for the appellant’s death, would be obliged to see it through, we see no reason why . . . counsel already of record should not continue to prosecute the appeal, as they were employed or appointed to do so.”); *State v. Salazar*, 123 N.M. 778, 945 P.2d 996, 1004 (1997) (allowing counsel to continue because the issues had been briefed and before the defendant’s death and that concluding the appeal would serve the interests of society by resolving several important legal issues in the case); *State v. Gartland*, 149 N.J. 564, 694 A.2d 564, 568 (1997).

Amicus has found no case that expressly denied appointed counsel to continue representation upon substitution. This is not surprising, given that these courts also allow for substitution in recognition of the right to appeal. The purpose for substitution as set out in *Webb* and other cases following the substitution approach accord with the continued representation of appointed counsel in this case.

B. SUBSTITUTION OF THE PERSONAL REPRESENTATIVE FOR THE ESTATE OF AN INDIGENT DEFENDANT DOES NOT AFFECT THE DETERMINATION OF INDIGENCY

The appellate courts will presume the continued indigency of a party “throughout the review,” unless the trial court finds that the party is no longer indigent. RAP 15.2(f). In this case, there is no indication that the defendant’s financial condition assessed at the beginning of the appeal has improved. Although a party has been substituted in this case, the right to appeal has not expired and the fact indicate that estate has no assets. Pursuant to *Webb*, the substituted party would assert the same right to appeal as the defendant, under RAP 15.2(b)(1)(a).

If the court determines that substitution warrants a new order of indigency, the personal representative would seek the order on behalf of the estate. The personal representative only appears as the substituted party in a representative capacity of the estate. *Sadler v. Wagner*, 3 Wn. App. 353, 355, 475 P.2d 901 (1970) (“For purposes of the administration of the estate, the administratrix stands in the shoes of the decedent.”). Indeed, Ms. Devlin had to seek permission from the probate court to pursue the appeal on behalf of the estate. She would not have needed authorization if she were representing her own personal interests. See *Howe v. Whitman County*, 120 Wn. 247, 258, 206 P. 968 (1922) (“It is

elementary law that an executor or administrator cannot join a cause of action in his individual right to a cause of action in his representative capacity.” (Internal quotation marks and quoted authority omitted)).

Furthermore, the personal representative would only report the assets of the estate to determine indigency. The trial court determines indigency of “the party seeking review at public expense.” RAP 15.2(b). In this case, the personal representative appears on behalf of the estate, which is the substituted “party” seeking review. The indigency statute defines “indigent” as a person who is “[u]nable to pay the anticipated cost of counsel . . . because his or her available funds are insufficient to pay any amount for the retention of counsel.” RCW 10.101.020. The assets available to the personal representative are limited to the assets of the estate, not his or her personal assets. The indigency statute expressly excludes consideration of family and friends’ resources in determining the defendant’s indigency. RCW 10.101.020(2). The state does not hold third parties responsible for providing the constitutional right to counsel.

**C. ALLOWING A FULL REVIEW ON THE MERITS
SERVES IMPORTANT INTERESTS BEYOND THE
LIMITED PERSONAL INTERESTS OF THE HEIRS**

The *Webb* court establishes that substitution could be used for the purpose of continuing an appeal on the merits in order to pursue reversal of the conviction. *Webb*, 167 Wn.2d at 478 (recognizing a distinct and

separate purpose of substitution to allow the appeal to be pursued on the merits). An appeal on the merits, which serves several important interests beyond the personal interests of the decedent's heirs.

The state has a strong interest in ensuring "that the conviction and sentence are fairly and properly entered." *Id.* at 475. For example, the *Webb* court noted that a restitution order would be improper if based on an erroneous conviction or sentence. *Id.*⁴ Furthermore, the courts and public have an interest in protecting the integrity of the judicial system to make sure errors are exposed and corrected and not buried with the defendant. *See Gollott*, 646 So.2d 1297, 1304 ("Leaving convictions intact without review by this Court potentially leaves errors uncorrected which will ultimately work to the detriment of our justice system."). Review on the merits, therefore could produce valuable precedent to develop the case law and inform future practice. The assets of the estate are relevant where the heir of the deceased personally substitutes to seek relief from the financial penalties imposed, or in probate court, but should not be determinative of the right to pursue an appeal on the merits.

⁴ The heirs presumably could not personally challenge the restitution order to show that the financial penalties imposed an unfair burden on them. *See id.* at 477 (noting that heirs may seek substitution "to show that criminal financial penalties imposed on the defendant, other than restitution payable to the victim or victims, would result in an unfair burden on the heirs.").

While these important interests support a full review on the merits, the state also has an interest in protecting the expenditure of state funds, including funding of public defense.⁵ But, cases with similar facts to this case rarely occur, and therefore will not likely impose a substantial strain on the state's budget for public defense. The appointment of counsel remains vital to the protection of the integrity of the judicial system to afford meaningful review, even where the defendant has died on appeal.

IV. CONCLUSION

The constitutional right to appeal, as recognized in Washington and other states allowing for substitution, requires the expenditure of public funds to ensure that the right is protected. It follows in this case that the personal representative substituted on behalf of the indigent defendant's estate may pursue this appeal at public expense, if the assets of the estate continue to meet indigency standards. As it has in the past, and consistent with *Webb*, OPD would recognize the continued authorization for expenditure of public funds under the defendant's original order of indigency because the order was authorized throughout the review and substitution has not changed the state's obligation to fund the appeal at public expense.

⁵ The commissioner's January 19, 2011 ruling expressed concern over the costs of this appeal in reaching the question posed to amicus.

Respectfully submitted this 8th day of August, 2011.



Sean J. Flynn #39242
Washington State Office of Public Defense
Attorney for Amicus

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29363-7-III
)
 v.)
) CERTIFICATE OF MAILING
 CHRISTOPHER DEVLIN,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on August 8, 2011, I mailed one original and three copies of the Brief of Amicus Curiae Washington State Office of Public Defense in this matter, addressed to:

David L. Donnan
Gregory Charles Link
Washington Appellate Project
1511 3rd Avenue, Suite 701
Seattle, WA 98101-3635

Mark Erick Lindsey
Larry D. Steinmetz
Spokane County Prosecutor's Office
1100 West Mallon Avenue
Spokane, WA 99260-2043

Renee S. Townsley, Clerk
Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201-1905

Pamela Beth Loginsky
WA Association of Prosecuting Attorneys
206 10th Avenue SE
Olympia, WA 98501-1399

8-8-11
(Date)

Olympia, WA
(Place)


SEAN FLYNN (Signature)