

FILED

JUL 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29363-7-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DEVLIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

SECOND SUPPLEMENTAL BRIEF OF APPELLANT REGARDING
CONTINUING VALIDITY OF ORDER OF INDIGENCY

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A. STATEMENT OF ISSUE

When a party substitutes for a deceased indigent appellant in an appeal of a criminal conviction pursuant to RAP 3.2, the original order of indigency must apply.

B. ARGUMENT

Leslee Devlin, as administrator of the estate of her deceased brother Christopher Devlin, filed a motion to substitute the estate as a party in this appeal pursuant to RAP 3.2 and State v. Webb, 167 Wn.2d 470, 219 P.3d 695 (2009). The Court granted that motion.

At this Court's direction, counsel has previously filed a brief addressing the continued validity of Mr. Devlin's order of indigency. Counsel has noted that the substituted party is not Leslee Devlin in her personal capacity but rather in her capacity as personal representative of her brother's estate. Thus, the question is not whether Ms. Devlin herself is indigent but rather whether the estate of an indigent defendant is indigent. Counsel has also noted the Supreme Court in both Webb and State v. Devin, 158 Wn.2d 157, 142 P.3d 599 (2006), permitted appointed counsel to continue as counsel of record.

1. The reasoning of other jurisdictions and public policy lead to the conclusion that counsel of record should be permitted to continue in this matter. Since the vast majority of jurisdictions continue to apply the doctrine of abatement *ab initio* there is little case law addressing the procedure by which an estate may prosecute an appeal following the death of an indigent appellant. However, two jurisdictions, Alaska and Maryland, which have recently abandoned the majority rule for a rule similar to the created in Webb have specifically addressed this question. State v. Carlin, 249 P.3d 752 (Alaska 2011); State v. Surland, 392 Md. 17, 895 A.2d 1034 (2006).

The Alaska Supreme Court noted that the purpose of appointed counsel is to provide indigent persons representation that mirrors that provided by retained counsel. 249 P.3d at 765-66. Since retained counsel could continue to prosecute an appeal following the appellant's death the same must be true of appointed counsel. Id. This reasoning is consistent with other constitutional guarantees provided to indigent appellants. See e.g., Draper v. Washington, 372 U.S. 487, 499, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963) (an indigent appellant must be provided a record on review that is equal to that available to an appellant with means). The

Alaska court also recognized a contrary rule, one removing appointed counsel from the case at the time of appellant's death, would as a practical matter prevent appointed counsel from even notifying the court of the appellant's death and leave no one to prosecute the appeal, thereby risking dismissal for want of prosecution. 249 P.3d at 765. Thus, there is both a constitutional and practical dimension to rule employed by the Alaska court.

As a further practical consideration the Maryland court reasoned:

Because counsel, whether private counsel or the Public Defender, 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, unless a substituted party obtains other counsel, counsel of record should not continue to prosecute the appeal, as they were employed or appointed to do so.

Surland, 392 Md. at 37,.

Counsel has not found a case in which a court has permitted substitution of a party but not permitted counsel of record to continue. Indeed, in at least one case the court appointed counsel of record as the substitute. State v. Salazar, 123 N.M. 778, 786, 945 P.2d 996 (1997).

The substitution rule is of relatively recent origin. As Webb explained it is an effort to strike a middle ground between the

majority rule of abatement *ab initio*, and the harsh remedy employed by only a handful of courts, dismissal of the unresolved appeal. 167 Wn.2d 476-77. Webb noted the minority rule requiring courts to affirm even potentially improper convictions “would be violative of the convicted criminal defendant’s fundamental rights, even though he be deceased.” Webb, 167 Wn.2d at 476 (citing State v. McGettrick, 31 Ohio St.3d 138, 141-43, 509 N.E.2d 378 (1987)). But that harsh remedy cannot be avoided if a deceased indigent appellant’s estate is not entitled to the benefit of the finding of indigency.

Requiring a personal representative to personally bear the costs of prosecuting the appeal is contrary to statutes concerning payment of probate costs by the estate. RCW 11.48.210 permits a personal representative to recover compensation from the estate for the cost of administration. And importantly, these provisions do not turn upon the personal representative’s personal ability to pay those cost.

The personal representative cannot proceed pro se in the criminal appeal as they are not representing themselves or their own interests but rather the interests of the estate. Therefore, unless the personal representative is a licensed attorney they

cannot represent the estate in the appeal. Thus, the only way the substituted party could continue the appeal is if they retain counsel. That outcome reserves Webb for the wealthy. And for the overwhelming majority of appellants in criminal cases there is no ability to avoid the harsh outcome and violation of rights that Webb sought to avoid

2. RAP 15.2(b) sets forth the procedure for determining indigency in this matter. Courts rely on the rules of statutory construction to interpret court rules. State v. Blilie, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). Generally, courts attempt to give effect to the plain terms of a statute. Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982); see also, State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (every statutory term is intended to have some material effect).

RAP 15.2(b) sets for the procedure by which to determine indigency in “for appellate review of . . . criminal prosecutions.” RAP 15.2(c) applies to “cases not governed by [RAP15.2](b).” Because this an appeal of a criminal case by the plain terms of the rule the procedure in RAP 15.2(b) applies.

Having complied with the provisions of RAP 15.2(b), Mr. Devlin, through his estate, is entitled to the benefit of appellate

review of the underlying criminal conviction. The record indicates Mr. Devlin's estate, as did Mr. Devlin in life, has only minimal assets. Nothing in the court rules, case law, or sound public policy requires the personal representative to bear the costs associated with completing the appellate process.

C. CONCLUSION

When a party substitutes for an indigent party on appeal the original order of indigency must apply.

Respectfully submitted this 22nd day of July 2011.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JULY, 2011, I CAUSED THE ORIGINAL **SECOND SUPPLEMENTAL BRIEF RE: CONTINUING VALIDITY OF ORDER OF INDIGENCY** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY, DPA LARRY STEINMETZ, DPA SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260-0270	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF JULY, 2011.

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