

JULY 30, 1992

Dear Greg,

I've been doing some research on Rule 25. Some general comments to follow:

1. Under Rule 25(a), a motion for substitution of a party (due to a death) must be made and notice served on parties no later than 90 days after the death. Notice must be served as provided in Rule 5. Persons not parties must be served as provided for in Rule 4.

2. The question of substitution is governed by controlling substantive law. The issue is phrased as whether or not there is a "right of survival." The survival of Dave's claim will be determined by the law under which the claim arose. I read the hornbooks to say that this could include federal copyright law and/or applicable federal "common law." In any case, I will continue to search for an answer to whether there is law that grants us a right of survival.

a.) Note, actions considered penal in nature are viewed as not surviving a decedent.

3. An example of a "proper party" for substitution is an executor of a decedent's estate. One hornbook, which was digesting case law, noted that designation as a "proper party" requires a determination by the court that the intended substitute is an administrator of decedent's estate. Although, a legal representative should be sufficient. Note, though, that the above encompasses only the starting point or most obvious examples of a sufficient "proper party."

4. Enclosed are copies of pleading forms for making a Rule 25 motion.

5. Please let me know if you have a deadline in mind a brief on class action procedure. Otherwise, I will begin in August and finish it when I start school in September.

Even though I have been calling her office daily, I have been unable to reach Professor Saunders. When I contact her I will ask her for an meeting to discuss the case. More will be revealed.....

Please call if you have any questions. Send my love to Kathy.

Sincerely,

John

P.S. I received a copy of your July 22 letter to Synnestvedt & Lechner. Excellent work. I'm very impressed.

plaintiff and the defendants are _____, _____, and _____ [substituted plaintiffs], the same parties who were ordered substituted by the action of the court upon the motion filed in their behalf. The subject matter of the action is an award of the _____ [state agency, such as: Industrial Accident Board or as the case may be] pursuant to a decision on _____, 19_____, wherein the _____ [agency] awarded _____ [substituted plaintiff] and the two minor plaintiffs a certain sum as death benefits because of the death of _____ [decedent] allegedly from injuries which arose in the course of _____ [his or her] employment. The same accident is involved in this action.

4. For the purpose of this motion all proceedings had in such action are made a part hereof, and such proceedings reflect that _____ [substituted plaintiff] and the two minor plaintiffs, _____ and _____ [substituted minor plaintiffs], are proceeding by way of cross action to recover judgment against _____ [compensation insurer] for compensation at the rate of \$_____ per week for a total of _____ weeks, less compensation in the total sum of \$_____ which it is claimed has already been paid. Such action and the claim therein asserted by the parties who were allowed to substitute has not been disposed of by the court, and it is now in all things pending.

5. The proceeding instituted by substituted plaintiffs is in direct violation of _____ [cite statute] in that _____ [set forth, such as: the court has, by its allowance of substitution permitted substituted plaintiff and the two alleged minor plaintiffs to proceed both against the compensation insurer and the claimed negligent third party at the same time or as the case may be.]

Wherefore, defendant requests that the order rendered on _____, 19_____, granting _____, _____, and _____ [substituted plaintiffs] leave to substitute as parties plaintiffs in the above-entitled action be stricken and that the court grant such other and further relief as may be proper.

Dated _____, 19_____.
[Signature, Verification, see CAPTIONS, PRAYERS, ETC.]

Notes

Test for propriety of substitution, generally. 59 Am Jur 2d PARTIES § 217.

Form 238 Affidavit—Supporting motion to substitute representative after death of party

[Caption, see CAPTIONS, PRAYERS, ETC.]

[Venue]

_____, being first duly sworn, deposes and says:

1. On _____, 19_____, one _____ commenced an action in this court against _____ for _____ [state nature of action]; issue was joined therein by service and filing of defendant's answer and the cause is now awaiting trial.

2. _____ [Plaintiff or Defendant] died _____ [testate or intestate] on _____, 19_____, pending trial of the action; letters _____ [testamentary or of administration] on the estate of _____ [party] were duly issued on _____, 19_____, in the _____ Court of _____, State of _____ to affiant, who qualified and entered on _____ [his or her] duties as _____ [executor or administrator] and is now so acting.

3. Affiant desires to continue the above action as _____ [executor or administrator] of the estate in the place of decedent.

Wherefore, affiant requests such action be so continued and that affiant have leave to amend the _____ [complaint or answer] herein, setting forth the facts stated above, and for such further relief as may be just.

[Signature, Jurat, see AFFIDAVITS]

Notes

Substitution in case of death. 59 Am Jur 2d PARTIES § 231.

Form 239 Affidavit—Supporting motion to substitute executor after death of defendant

[Caption, see CAPTIONS, PRAYERS, ETC.]

[Venue]

_____, the duly appointed and qualified executor of the estate of _____, being first duly sworn, deposes and says:

1. Deponent resides at _____ [address], City of _____, County of _____, State of _____, and is the executor, duly appointed by this court, of the estate of _____, deceased, a necessary party in the above-entitled proceeding.

2. Deceased died on _____, 19_____, after the filing of the complaint herein and before _____, 19_____, the return day of the citation issued on the complaint;

3. Thereafter the will of _____ was duly offered for probate in this court and letters testamentary issued to deponent as executor, and deponent is now acting as such; as such executor deponent now represents the interests of and stands in the place of _____;

4. This motion is made for the purpose of having deponent substituted as a party herein in the place of _____.

5. No previous application has been made for the relief sought herein.

6. There are no persons interested in this application except deponent, _____, _____ [If others are interested state persons and facts.]

Wherefore, deponent requests an order be made herein substituting your deponent as the party defendant herein in the place of _____, deceased.

[Signature, Jurat, see AFFIDAVITS]

Notes

Substitution of party in case of death. 59 Am Jur 2d PARTIES § 231.

Form 240 Order—For substitution of successor in office—Quashing default

[Caption, see CAPTIONS, PRAYERS, ETC.]

This matter came on for hearing on the petition of _____, _____ [title of office], that _____ [he or she] be substituted in place of _____, defendant herein, and that the default entered _____, 19_____, and filed _____, 19_____, be set aside and that _____ be allowed to plead to the complaint; and on reading and filing the petition and on reading and filing the written stipulation of the attorneys for plaintiffs and petitioner, it appears to this court that good cause exists for granting the relief requested.

It is ordered that:

1. _____, as _____ [title of office], be and hereby is substituted in the place and stead of _____ [original defendant] as the party defendant in this case.

Form No. 2352.1(A)

FEDERAL RULES OF CIVIL PROCEDURE,
RULE 25(a)(1)¹

Motion for Substitution of Deceased Defendant by Other
Defendant² *Can we adopt it*

UNITED STATES DISTRICT COURT *to our needs?*
..... District of

(Title of Action) Civil Action No.

Motion for Substitution

Defendants, (AB), Inc., and
(CD), by their attorneys, and
move this Honorable Court for the entry of an Order substituting (EF), Administrator of the Estate of (GH), as a party defendant in place of (GH), deceased. In support of said Motion, Defendants state as follows:

1. (GH), named as a party defendant herein, died on, 19. ., having been validly served herein.

2. On, 19. ., Defendants filed a Statement of the Fact of Death of (GH).

3. (EF), the widower of (GH), was recently named as Administrator of the Estate

¹ See notes to Form No. 2348, *supra*.

² Form adapted from papers in United States v. A & C Invs., Inc., 513 F. Supp. 589 (N.D. Ill. 1981), furnished courtesy of Stephen P. Bedell, Esq., of O'Brien, Carey, McNamara, Scheuneman and Campbell, Ltd., Chicago, Illinois. In an action brought by the government alleging breach of contract and fraud against a corporation, its officers and a government em-

ployee, the district court held that the Fed. R. Civ. P. 9(b) requirement that averments of fraud be pled with specificity applies only to common law claims of fraud and accordingly determined that a cause of action predicated on the False Claims Act for conspiracy to defraud was sufficient under the liberal rules of pleading. However, plaintiff's cause of action based on an alleged breach of contract failed to state a cognizable claim for relief.

of (GH), and, in that capacity, he is the successor in interest of (GH) and a proper party to be substituted in her place.

WHEREFORE, Defendants, (AB), Inc. and (CD), move this Honorable Court for the entry of an Order substituting (EF), Administrator of the Estate of (GH), as a party defendant in place of (GH).

Dated:, 19. .

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Attorney for Defendants
Office and P.O. Address
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