I really meant to dress up for Halloween this year. I always intend to have an exciting and clever costume, and I usually end up finding something that doubles as pajamas and makes my work day interesting. One year I was a dragon (in one-piece dragon pajamas), and one year I was Chewbacca (in one-piece Chewbacca pajamas). This year it just didn’t happen. It seems like things are speeding up. I am aware that my inability to pull together a Halloween costume is not the end of the world, but it’s a good reminder to slow down and take stock of where we are.

Our Section has been very busy over the last few months: The chair of our pro bono committee, Brooks Jaffa, has been heavily involved in coordinating legal relief efforts to North Carolinians hurt by the hurricanes this fall. There is a great need for legal help with hurricane relief. The relief effort comes in waves, as claims are filed and considered. If you can help, please sign up with Disaster Legal Services on the NCBA website. Brooks is also looking at refreshing the Hospice pro bono program.

Our Section continues to produce top notch CLE programs, including the fiduciary litigation CLE that will introduce the Fiduciary Litigation Manual. I want to thank the members of our Section who contributed to the manual. Our Fiduciary Litigation Committee is the newest standing committee of our Section, and it has really flourished through the hard work of its members. I remember Jim Hickmon presenting the idea of a standing fiduciary litigation

Ultimately, death stops for nothing. This includes lawyers and litigation. When a party to an ongoing lawsuit passes away, confusion about how to proceed and who to proceed against may follow. After death intervenes, however, these issues must be addressed.

At the moment of death the deceased party as a person loses not only the ability to continue prosecuting or defending the action against himself or herself individually, but also his or her authority and standing to do so. See Purvis v. Moses H. Cone Mem’l Hosp. Serv. Corp., 175 N.C. App. 474, 482, 624 S.E.2d 380, 386 (2006) (citing Pierce v. Johnson, 154 N.C. App. 34, 40, 571 S.E.2d 661, 665 (2002)). Under North Carolina law, the authority of the deceased party to pursue or defend a claim by or against the party in his or her individual capacity passes to the personal representative or collector of his or her estate (collectively, the “PR”), if the claim itself survives the death of the party. N.C.G.S. § 28A-18-1. Accordingly, the PR must be substituted as the party in the action in order for the lawsuit to continue.

Rule 25(a) of both the North Carolina Rules of Civil Procedure (the “North Carolina Rule”) and the Federal Rules of Civil Procedure (the “Federal Rule”) (collectively, the “Rules”) sets forth the procedure for substituting the PR for the deceased party if the claim may proceed post mortem. While the basic framework of the Rules is similar, some significant procedural differences exist between the North Carolina Rule and the Federal Rule. Despite these disparities, the result the North Carolina Rule and the Federal Rule seek to achieve is the same: the efficient substitution of the PR for the deceased party as the party to the lawsuit, thereby permitting the litigation to proceed with minimal delay.

This article discusses how Rule 25(a) operates under both the North Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure. As there are some slight variations in how the Federal Rule operates in each of federal judicial circuits, emphasis will be placed on how the Federal Rule operates in the Fourth Circuit and, more specifically, in the United States District Courts in North Carolina.

Before delving into the Rules, it is first necessary to review them. The North Carolina Rule provides:

(a) Death – No action abates by reason of the death of the party if the cause of action survives. In such case, the court, on motion at any time within the time specified for the

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The Life of a Lawsuit After the Death of a Party

By Brooks F. Jaffa
presentation of claims in N.C.G.S. 28A-19-3, may order the substitution of said party’s personal representative or collector and allow the action to be continued by or against the substituted party.

N.C. R. Civ. P. 25(a). The more robust Federal Rule provides:

(1) Substitution if the Claim Is Not Extinguished. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent’s successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) Continuation Among the Remaining Parties. After a party’s death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) Service. A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.


Both the North Carolina Rule and the Federal Rule apply the same two-step framework. First and foremost, the survivorship of the claim upon death must be ascertained. If the claim can proceed, the second step is the proper and timely substitution of the PR of the deceased party as the proper party. Though the requirements are the same under the North Carolina Rule and the Federal Rule, the manner in which they are satisfied differs.

Step 1: Determining Whether the Claim Survives

In North Carolina the determination of whether a claim survives the death of a party follows a different path depending on whether the claim arises under federal or state law. When a claim is brought under federal law, federal law determines the survivability of the claim. See Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 n.3 (4th Cir. 1985) (citing 7A C. Wright & A. Miller, Fed. Prac. & Proc. § 1952 at 642 (1972)). Conversely, the survivability of a state law claim brought on diversity jurisdiction is determined by the law of the state under which the claim arises. See id.

Step 2: Properly Substituting the Personal Representative of the Estate

If the claim can proceed, the PR of the estate must be timely and properly substituted as the proper party under the Rules. The greatest variance between the North Carolina Rule and the Federal Rule involves the proper substitution of parties. The failure to comply with the applicable requirements of Rule 25(a) may result in the dismissal of the matter.

North Carolina

Pursuant to the provisions of the North Carolina Rule, a motion to substitute the PR for the deceased party must be made within the time for presentation of claims against the estate under N.C.G.S. Section 28A-19-3. Under most circumstances, this requires that the motion to substitute the PR be properly made within the standard ninety-day period for creditor’s claims. N.C.G.S. § 28A-19-3(e), (a).

Although the procedure and time frame for substitution is consistent regardless of whether the decedent was the plaintiff or defendant, there are a few differences in how the procedure operates depending on whether the decedent was the plaintiff or defendant. Most of these differences stem from the diverging interests of plaintiffs and defendants, i.e. plaintiffs will want the action to continue while defendants will not.

If the decedent was the plaintiff, the procedure typically runs smoothly because the PR will generally move to substitute himself or herself as the party in the action shortly after being appointed in order to minimize the delay in litigation. However, if the decedent was the defendant, the situation is more complicated because in the vast majority of cases the interest of the estate and its beneficiaries rests in the cessation of the litigation and the PR would therefore be disinclined to move for his or her substitution as a party to the litigation before the claims period expires. Accordingly, to ensure that the matter against the deceased defendant is not dismissed, the plaintiff must file the motion to substitute within the claims period. The claim will be considered as properly presented against the estate upon the earlier of the court ordering the substitution of the PR or the filing of the motion to substitute with the court and serving the PR with the motion. N.C.G.S. § 28A-19-1(c).

Sometimes a plaintiff may be forced to determine how to proceed when no PR has been appointed for the deceased defendant. As the North Carolina Supreme Court in Ragan v. Hill pointed out, “Our [North Carolina’s] statutory scheme ... presumes the appointment of a personal representative or collector to receive those claims.” Ragan v. Hill, 337 N.C. 667, 673, 447 S.E.2d 371, 375 (1994). Without a substituted PR, it is well established that the action cannot continue as to the deceased party. Id. Attempts to substitute either the estate of the decedent or a non-existent PR are insufficient as they would not
comply with the requirements of either N.C.G.S. Section 28A-18-1 or the North Carolina Rule. Dixon v. Hill, 174 N.C. App. 252, 260, 620 S.E. 2d 715, 720, disc. review denied, 360 N.C. 289, and cert. denied, Hill v. Dixon, 548 U.S. 906 (2006). If the heirs or those designated in the will to administer the estate of the deceased defendant will not open the estate or otherwise seek the appointment of a PR, the only option left to the plaintiff, and the proper course of action, is to request the appointment of a public administrator for the appropriate county as the PR for the deceased defendant’s estate pursuant to N.C.G.S. Section 28A-12-4. Boiling v. Greer, No. COA15-681, 2016 WL 4367256 at *3-4 (N.C. Ct. App. 2016).

It is necessary to note, however, that before a public administrator can apply for letters of administration C.T.A. pursuant to N.C.G.S. Section 28A-12-4, one of several enumerated requirements must first be met. N.C.G.S. § 28A-12-4. In most cases where there is an ongoing lawsuit, two of these conditions, (1) the deceased party died intestate without known heirs or (2) any person entitled to apply for letters requests the appointment of a public administrator, will not be applicable. The remaining condition, that it has been over six months since the passing of the defendant who owned property and no person has applied to be the PR, oftentimes will have to be satisfied to allow the plaintiff to request a public administrator be appointed as the PR for the deceased defendant. See id. Accordingly, in instances in which a defendant dies and those entitled to apply for appointment as the PR of his or her estate take no action to do so, the underlying action cannot progress for at least six months as the court has no authority to issue any rulings related to the deceased party.

Once it becomes apparent that this is the situation, the best course of action is for the plaintiff to file a motion to stay until such time as a public administrator can be appointed as the PR and substituted. This has two distinct benefits. First, such a motion informs the court that the plaintiff intends to continue the matter and allows the court to make any necessary adjustments to the scheduling order. Second, it often signals to the heirs of the deceased defendant that the matter will continue, thus prompting them to procure the appointment of a PR instead of waiting for a public administrator to be appointed as the PR, thereby retaining more control over the litigation.

Federal

Similar to the North Carolina Rule, the Federal Rule requires the timely submission of a motion to substitute a PR for a deceased party. Also similar, the failure to adhere to the requisite timeframe can result in the dismissal of the action by or against the deceased party. However, the triggering event for the time in which a motion to substitute must be filed is different under the Federal Rule than under the North Carolina Rule.

In federal court, a motion to substitute the PR for the deceased party must be filed within ninety days of the service of a statement noting the death, commonly called a “suggestion of death,” on all other parties to the matter and the appropriate nonparties. See Fed. R. Civ. P. 25(a). In the Fourth Circuit, the PR of the deceased party is the nonparty who must be served with the suggestion of death by Rule 4 service in order to trigger the ninety-day period in which a motion to substitute must be filed. See Fariss 769 F.2d at 962-3; see also Kessler v. Se. Permanente Med. Grp. of P.A., 165 F.R.D. 54, 56 (E.D.N.C. 1995) (citing Fariss, 769 F.2d 958) (“Moreover, the law within this circuit has been interpreted as requiring that the suggestion must be served upon non-parties, in particular, decedent’s personal representatives pursuant to F.R.Civ.P. 4.”); see also 7C Wright & Miller, Fed. Prac. & Proc. § 1955 (3d ed. 2018 update). Additionally, a suggestion of death must identify the PR of the deceased party who may be substituted to be effective. Kessler, 165 F.R.D. at 56. Notwithstanding the foregoing, however, if a proper motion to substitute is made and served on all of the necessary parties before a suggestion of death is filed, the filing of a suggestion of death is rendered unnecessary as the motion to substitute takes its place.

Only the remaining parties to the action or the PR for the deceased party can file a suggestion of death or a motion to substitute. Fariss, 769 F.2d at 962. The attorney for the deceased party cannot file a suggestion of death because his or her authority to act on behalf of the deceased party ceases at the death. Id.

If an insufficient suggestion of death or motion to substitute is filed or is improperly served, the attorney for the party who would benefit from the deceased party remaining in the action may wish to file a response to the suggestion of death or a motion to substitute; this provides the court with notice of the deficiencies, thereby preventing the court from improperly commencing the ninety-day substitution period. Further, if appropriate and known, that party may want to alert the court about the efforts underway to obtain the appointment of a PR to substitute for the deceased party. In some cases, the former attorney for the deceased party may want to file this response for the benefit of the court, even though the attorney no longer has the authority to act on the deceased party’s behalf.

For example, if a defendant in a multi-defendant lawsuit dies and one of the co-defendants files a suggestion of death that does not identify the PR of the deceased defendant’s estate or does not properly serve the suggestion of death on the PR, the plaintiff would be well advised to file a response informing the court of the insufficiencies in the suggestion of death or its service. Further, if the plaintiff knows that the reason the PR was not appropriately identified or served is because no estate has been opened for the deceased party (generally because heirs of the deceased party do not want the suit to continue), the plaintiff should inform the court of this, as well as the actions that the plaintiff is taking to obtain the appointment of a public administrator to represent the estate and the likely duration of the appointment process. Such actions will prevent issues later and permit the court to make any necessary adjustments to its scheduling order.

Conclusion

Death may stop for nothing. In most instances however, death does not stop an ongoing lawsuit. By scrupulous adherence to the requirements of Rule 25(a), the personal representative can be substituted for the deceased party, thereby allowing the lawsuit to continue despite death’s unwelcome intervention.

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