

## SUBSTITUTION OF A PARTY UPON DEATH

Fla. R. Civ. P. 1.260(a) provides:

“If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion may be made **by any party or** by the successors or representatives from the deceased party. . . . Unless the **motion for substitution** is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.”  
(Emphasis supplied.)

The rule seems pretty clear. When a party dies, there has to be some mechanism to make sure that the case doesn't die along with the party or, alternatively, that it just doesn't go on forever because there is no one to be the party to prosecute or defend the action depending upon which of the parties is no longer with us. The rule was not intended to provide a trap for the unwary or a mechanism by which Court can dismiss perfectly valid claims because of the untimely death of a party.

A recent case reminds the Courts of the purpose for the rule and warns counsel to be aware of the necessity for the filing of appropriate motions for substitution. In Metcalfe v. Lee, 952 So. 2d 624 (Fla. 4<sup>th</sup> DCA 2007), a medical malpractice case took an unexpected turn when the plaintiff died from causes unrelated to the malpractice. One of the defendant's counsel filed a notice of suggestion of death three days after the death. Plaintiff's counsel, well within the ninety-day period, filed a motion for substitution in accordance with the Rule.

The motion asked that the decedent's son be the person substituted to pursue the action and advised the Court that proceedings were underway to have the son appointed as the personal representative of the decedent's estate. A hearing was held pursuant to one of the defendant's motions to dismiss contending that because the ninety-day period referred to in the rule had expired and a party had not yet been substituted, the rule required dismissal.

The creation of a rule of procedure is an intense and laborious process. This writer has previously served on the Rules of Civil Procedure Committee for over 20 years and is very familiar with that process. The Court's have recognized that rules are supposed to be given their plain meaning. Reading the above rule, one would assume that the words "The motion for substitution may be **made by any party or** by the successors or representatives" means that in this case the plaintiff could make the motion. One would also assume that since the rule says "**unless the motion for substitution** is made within 90 days. . . . the action shall be dismissed . . . ." that that requires only that the motion be made and not the actual substitution be accomplished within the ninety-day period. Nevertheless, the trial court reading that same rule concluded that it was necessary under the rule that not only must a personal representative be appointed by the Probate Court in order for the motion to be made but that the motion had to be heard, ruled upon and the party substituted within the 90 days in order to avoid dismissal.

The Fourth District in Metcalfe first discusses who may file the motion. The rule says "any party." The trial court concluded that didn't mean any party, it

meant someone who had been appointed by the Probate Court. The District Court stated differently at Page 897:

The rule states, in pertinent part, that '[t]he motion for substitution may be made by *any party* or by the *successors* or *representatives* of the deceased party.' Fla. R. Civ. P. 1.260(a)(1) (emphasis added). The term 'any' means 'one ... selected without restriction. MERRIAM-WEBSTER ONLINE, <http://www.m-w.com/dictionary>. A 'party' is 'a person . . . taking one side of a . . . dispute.' *Id.* Thus, 'any party' can be a person on one side of a dispute selected without restriction."

This language seems self-evident. If the Rules Committee and the Supreme Court intended by the passage of Fla. R. Civ. P. 1.260(a) to mean that a personal representative had to be appointed before a motion could be made, they would hardly have used the term "any party." If they had meant such an appointment was necessary, it would have been a rather onerous requirement. When someone dies, it usually is not the first thing on their heirs or relatives' minds to hurry down to the Probate Court and obtain a hearing to get someone appointed to continue civil litigation. It would, in essence, put a ninety-day statute of limitations on the case that the rule clearly never intended.

Having found that the trial court engrafted language in the rule that was not there, the Court next turned to the question of what filing a motion within ninety-days means.

At Page 628, the Court held:

"Having determined that the plaintiff's attorney was authorized to serve and file the motion for

substitution, we must now determine if it was timely. The rule has a clear due date: 'Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.' Fla. R. Civ. P. 1.260(a)(1). A notice of hearing must accompany the motion. *Id.* We also note that the language of the rule does not require that the hearing be held within the aforementioned ninety-day period. A motion under this rule is deemed to be made when filed with the clerk along with the corresponding notice of hearing or when both documents are served within the ninety days. (Citing cases.)

Once again, the language in the rule seems pretty self-evident. Engrafting on the rule a requirement that the ninety-day period in the rule means not only that a motion has to be made but that the actual substitution has to be accomplished would have the bizarre effect of requiring the decedent's family to nominate a representative to continue the lawsuit, go to the Probate Court and obtain a hearing for the purpose of establishing an estate, comply with all notice provisions, have a personal representative appointed, then obtain a hearing time before the trial court and with or without the consent of the defendants convince the trial court that the nominee was the appropriate person to continue the litigation under the Rule. All this within ninety days. Not only would that engraft a ninety-day statute of limitation period on the rule that the rule clearly never intended but it would also make it very difficult, if not impossible, to comply with the rule.

In its opinion, the Fourth District quotes from Eusepi v. Magruder Eye Inst., 937 So. 2d 795, 798 (Fla. 5<sup>th</sup> DCA 2006) to remind trial courts that rules are there to assist the parties and the Courts in the fair administration of justice, not to present traps and hurdles designed to unfairly penalize litigants in their pursuit of justice. At Page 629, the Court quotes Eusepi:

“the rule, ‘is in its present form precisely so that the process of substitution of a new party for a party who dies while litigation is pending will not cause otherwise meritorious actions to be lost. The rule is supposed to dispel rigidity, create flexibility and be given liberal effect.’ *Id.* (citing *New Hampshire Ins. Co. v. Kimbrell*, 343 So. 2d 107 (Fla. 1<sup>st</sup> DCA 1977)). We find this analysis to be persuasive especially in light of the rule’s plain language as to when a trial court can dismiss an action-only when there is a failure to make a motion for substitution. Here, because the motion for substitution was timely made, the trial court erred in dismissing the action.”

The admonition of the Fourth District was well deserved. Trial courts should not go out of their way to try to make the prosecution or the defense of claims more difficult than it needs to be. Rules are not there to provide obstructions and traps. They are there to facilitate litigation, not curtail it. This opinion should be a reminder to all Courts of that purpose and a caution to counsel that this Rule exists and must be complied with.

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