Roy's Trial Law Tip No. 97

Your Client Dies Before Trial! Now What?

by Roy D. Wasson
board certified in Appellate Practice
Fellow of the Academy of Florida Trial Lawyers

You represent a seriously injured plaintiff and are close to starting trial when the unexpected news comes that your client has passed away. That may or may not be the end of your case. You still could have a valuable claim to pursue, depending on the cause of death, the existence of wrongful death survivors, and other factors. The process to keep the case alive and worth pursuing is not complicated, but it helps to have a roadmap to follow. This author has been down this road before, is currently handling such a case; and offers this outline of the basics.

First, consider whether you can and should convert your personal injury case into a wrongful death case. That is only possible, of course, only where the death was caused by the injuries sustained in the event upon which you were bringing a personal injury claim. Section 768.20, Fla. Stat. provides: "When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate." If the client died of unrelated causes, on the other hand, you have no wrongful death claim, but still have a bodily injury "survival" claim for the plaintiff's post-injury, pre-death pain and suffering and other damages *See, e.g.*, *Diamond v. Whaley, Chapman & Hannah, M.D., P.A*., 550 So. 2d 54 (Fla. 2d DCA 1989).

But if the cause of death was the defendant's negligent act that was the basis for your personal injury claim, a wrongful death case will lack value if there are no statutory survivors with significant noneconomic damages. Without survivors a wrongful death case will usually be worthless. In my current case the plaintiff was never married and had no children. He would have had no significant loss of net accumulations to his estate, so any theoretical wrongful death claim would be worthless. My client, who suffered a fractured skull and debilitating brain damage for years since he was hit in the head by falling concrete, had huge pre-death damages. He died from unrelated causes, so we are continuing to prosecute the pre-death BI case. Sometimes the cause of death is uncertain and the existence of significant pre-death damages and large potential losses by statutory survivors may make it hard to choose which theory to pursue. In that situation plead in the alternative and the cause of death will be a fact

question for the jury. See *Smith v. Lusk*, 356 So. 2d 1309, 1311 (noting that it is a "time honored practice" for parties to plead a survival damages claim and a wrongful death claim in the alternative).

The first thing to do after you make the decision to continue litigating the case is to find a probate lawyer to open an estate and have a personal representative appointed. You cannot take substantive action after your client dies in the name of the decedent. If there are no close relatives willing to handle the role as personal representative, ask another trial lawyer to step into that role and be a face the jury can see at counsel table during trial.

Simultaneous with opening the estate, you should file a motion to substitute parties to replace the decedent with the personal representative. Although the lawsuit "abates" upon your client's death, it remains open for the purpose of substituting the personal representative:

> [W]e hold that when a personal injury action "abates" pursuant to section 768.20, this does not require that the entire case be deemed immediately void and must be dismissed, or that it "self-destruct[s] like the secret message on a rerun of 'Mission Impossible.'" *Niemi*, 862 So. 2d at 33. Instead, "abate," as that term is used in section 768.20 must be interpreted to cause the case to be suspended until the personal representative of the decedent's estate is added as a party to the pending action and receives a reasonable opportunity to amend the complaint to state the damages sought under a wrongful death claim or to state both a claim for survival damages and, in the alternative, wrongful death where—as here—the cause of the decedent's death may be disputed by the parties.

Capone v. Philip Morris United States, 116 So. 3d 363, 366-67 (Fla. 2013):

Note that the deadline to file such a motion to substitute is 90 days after any party files a "Suggestion of Death" disclosing that your client has died. Fla. R. Civ. P. 1.260(a)(1) provides:

> (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. . . . 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.

Many cases have been dismissed for missing that deadline.

On the other hand, dismissal for failure to timely substitute is not mandatory and that time deadline may be extended:

> "While the language of Rule 1.260 is mandatory, the statute has been interpreted liberally to allow substitution of a party after 90 days of the suggestion of death upon a showing of excusable neglect, inadvertence, mistake, fraud, etc." as provided for in Florida Rule of Civil Procedure 1.540(b)(1). *Pearl v. Kelly*, 442 So. 2d 1012, 1013 (Fla. 3d DCA 1983) (citations omitted); *see also Mims ex rel. Mims v. Am. Senior Living of Dade City, FL, LLC*, 36 So. 3d 935, 936 (Fla. 2d DCA 2010) ("Rule 1.260(a)(1) has been liberally interpreted to permit a substitution of parties beyond the ninety-day period set forth in the rule."). A party is also entitled to move for an extension of time in which to substitute parties if they have not been able to timely do so. *Pearl*, 442 So. 2d at 1013.

Sammons v. Greenfield, 270 So. 3d 534, 537 (Fla. 2d DCA 2019).

You have no duty to file a Suggestion of Death as to your own client, but do not conceal the death or delay substituting parties. Even if no one files a Suggestion of Death triggering the 90-day deadline to move to substitute parties, you should file the motion to substitute promptly. I have fought motions to dismiss based on the argument that the delay between counsel learning of the death and moving to substitute was too long

If you have not filed a lawsuit yet when your client dies, be careful to satisfy the statute of limitations should you decide to go forward with the case. Of course the two-year wrongful death statute of limitations does not start to run until the death. What about the case where you have not yet filed a lawsuit and the four-year personal injury statute of limitations is approaching too fast to get the PR formally appointed? You do not need a formal appointment to get the lawsuit filed to preserve th cause of action. Instead, you can file the lawsuit in the name of the person you plan to have appointed as prospective PR. That tolls the statute of limitations, even if you end up having a different person appointed to that role:

> Finally, although McIntosch was not yet personal representative at the time of filing, section 733.601, Florida Statutes (2020), provides that a personal representative's powers "relate back in time to give acts by the

> person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment." *See also Cunningham v. Florida Dep't of Child. & Fams*., 782 So. 2d 913, 916 (Fla. 1st DCA 2001) (holding "when letters of administration are granted, they relate back to the intestate's or testator's death") (citing *Griffin v. Workman*, 73 So. 2d 844 (Fla. 1954)). In *Cunningham*, we further held that, if a personal representative is improperly appointed and a substitute is later named, the second appointment relates back to the original complaint and the substituted personal representative may go forward with the action. Id. "It follows, from the fact that the plaintiff can amend to reflect his capacity as personal representative, that claims which are properly recoverable by the personal representative . . . will also relate back." *Id*. (quoting *Talan v. Murphy*, 443 So. 2d 207, 209 (Fla. 3d DCA 1983)).

McKenzie v. Hi Rise Crane, Inc., 326 So. 3d 1161, 1164 (Fla. 1st DCA 2021).

In summary, the death of your client before trial may be the end of your case if no wrongful death action is viable, but if there are survivors with good damages and where the cause of death may be uncertain, even though your client has died you may be able to:

Keep tryin!

Roy