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Dead party, dead appeal

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In November 1789, Benjamin Franklin wrote "Our new Constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes." Litigators know that there is a third certainty: the inevitable appeal. Given that yesterday was Halloween and this is an appellate column, let's see what happens when we combine death and appeals. (We'll leave taxes to other columnists, like Robert Wood.)

The Grim Reaper visits everyone, including litigants and lawyers, and rarely at a convenient time. If those left behind are not diligent, the consequences on a pending appeal can be fatal. In Mitchell v. Lents, 2022 WL 4494146 (Sept. 28, 2022, E076315), for example, even though the appellant passed away while his appeal was pending, the attorneys were the ones who killed the appeal.

The story is a strange one. On the eve of trial, Lents' lawyer, Coppola, resigned from the practice of law, leaving Lents without representation on the day a jury trial was to begin. For his failure to appeal, the trial court sanctioned Coppola, and he appealed the sanctions order. (Yes, sanctions exceeded $5,000 and so were appealable.) Before oral argument, however, Coppola's wife notified the Court of Appeal that he had died. The Court of Appeal requested that Coppola's wife or successor-in-interest provide information about the administration of his estate and ordered his successor-in-interest or personal representative to file a request to substitute into the case. But just as Coppola disappeared at trial, his wife disappeared on appeal. No response to the court's requests was filed, so the court dismissed the appeal as moot.

Dead men may tell no tales, but they can appeal. Under Code of Civil Procedure section 903, if a decedent "would, if still alive, have a right of appeal," then "either the attorney of record representing the decedent in the court in which the judgment was rendered, or the executor or administrator of the estate of the decedent, may file a notice of an appeal …"

Generally, it is improper to render a judgment for or against a dead party without first substituting his executor or administrator. Kern v. Kern, 261 Cal. App. 2d 325, 328 (1968). Many cases hold that such post mortem orders are void, though some cases find such a technical lapse to be a mere irregularity. Id. (collecting cases).

As for dying while an appeal is pending, the Code of Civil Procedure has a chapter titled "Effect of Death," at sections 377.10 to 377.62, making clear that pending litigation does not necessarily abate but may survive and proceed, as long as a post-mortem motion and declaration are filed to substitute the decedent's personal representative or successor-in-interest. Code Civ. Proc. §§ 377.21, 377.31-377.32; see § 377.41 (actions against decedents may proceed against a personal representative or successor-in-interest). California Rules of Court 8.36, covering substitution of parties and counsel, applies to situations involving death.

Federal court has similar rules. Under Federal Rule of Appellate Procedure 43(a), a decedent's personal representative may be substituted into an appeal as a party via a motion to the circuit clerk by the representative or any party. If the would-be appellant dies before a notice of appeal is filed, the decedent's personal representative or attorney of record can file the notice of appeal and then move to substitute in. If, however, a would-be appellee dies before a notice of appeal is filed, the appellant "may proceed as if the death had not occurred," but a substitution must eventually be made. Under any of these circumstances, however, if a substitution motion is not filed within whatever time the court sets—or otherwise "within a reasonable time"—the court may dismiss the appeal.

In Rodriguez Sarmiento v. Rodriguez Sarmiento, 100 F. App'x. 645, 646-47 (9th Cir. 2004), for example, the appellant died while her appeal was pending, but a Rule 43(a)(1) substitution was not sought "within a reasonable time." Thus, the court concluded there was no party before it with standing to pursue the appeal, so the appeal was dismissed for lack of jurisdiction. Id.

What about entity clients? Sure, they can't die a physical death, but they can become "incapacitated" if the Secretary of State suspends them. See Rev. & Tax. Code § 23301; Corp. Code § 2205. If that happens in state court, the other side must timely object (Washington Mutual Bank v. Blechman, 157 Cal. App. 4th 662, 669-70 (2007)), and the suspended corporation is barred from participating until it comes back to life (e.g., Sade Shoe Co. v. Oschin & Snyder, 217 Cal. App. 3d 1509, 1511-13 (1990)). In federal court, the law of the state of incorporation governs a corporation's capacity to sue. See Fed. R. Civ. Proc. 17(b)(2); U.S. v. 2.61 Acres of Land, More or Less, Situated in Mariposa County, State of Cal., 791 F.2d 666, 668 (9th Cir. 1985).

Again, while this column does not offer tax advice, to proceed with litigation, suspended corporations should file the necessary paperwork with the Secretary of State, and pay all necessary taxes, penalties, and interest to get back into good standing. See Rev. & Tax. Code § 23305; Corp. Code § 2205(d); Tabarrejo v. Superior Court, 232 Cal. App. 4th 849, 862 (2014). Once revived, the corporation can resume participating in the case. Peacock Hill Ass'n v. Peacock Lagoon Constr. Co., 8 Cal. 3d 369, 374 (1972); Gar-Lo, Inc. v. Prudential Sav. & Loan Ass'n, 41 Cal. App. 3d 242, 244 (1974).

A suspended corporation may file a motion to continue a trial to obtain time to get its status in order – because to hold otherwise would defeat the purpose of enforcing payment of corporate taxes and fees. See Schwartz v. Magyar House, Inc., 168 Cal. App. 2d 182, 188 (1959); 2.61 Acres of Land, 791 F.2d at 668-69. A suspended corporation can also file a notice of appeal, because "the corporation's later reinstatement ma[kes] the earlier, invalid but timely, notices of appeal valid and still timely." See Bourhis v. Lord, 56 Cal. 4th 320, 329 (2013) ("what is jurisdictionally required is that the notice of appeal be timely, not that it be filed by an active corporation"). But keep in mind that when a suspended corporation files an action during its suspension, the statute of limitations continues to run. And if the statute expires before the corporation's revival, the action will be time-barred even if the complaint would otherwise have been timely. See Sade Shoe Co., 217 Cal. App. 3d at 1512-13.

The emotional impact of death packs a wallop, and often the procedural niceties are ignored. As we have seen (e.g., Lents), the consequences may be dismissal. But courts sometimes cut parties some slack.

In King v. County of Los Angeles, 885 F.3d 548, 553 (9th Cir. 2018), for example, the appellant died during the appeal, but the court still issued an opinion without a Rule 43(a)(1) substitution. However, the court instructed the clerk "to hold the mandate for ninety days, pending a motion for substitution of a personal representative under [Rule] 43(a)(1)." Id. at 559. The court warned that if the deadline passed without a substitution motion, the appeal would be dismissed as moot. Id.

The Court of Appeal was more generous in Epis v. Bradley, 2022 WL 3593978 (Aug. 23, 2022, A160244), where the parties apparently proceeded without a substitution through two appeals, even though one of the respondents died during the first. The court cautioned that "we expect parties to follow the

rules governing substitution of parties." But because there had been no objection to the respondent's estate appearing in the appeal without filing a substitution motion, the court simply deemed the executor to have substituted in as the respondent. Id. at n.1.

Often what happens is that someone helpfully mentions in briefing that a party has died. The court then orders a substitution. E.g., Osornio v. Weingarten, 124 Cal. App. 4th 304, 313, n.2 (2004). At the Supreme Court, of course, death is even less important. "On issues of great public interest" – i.e., anything at the Supreme Court – the Court may resolve the matter despite mooting events. See Konig v. FEHA, 28 Cal. 4th 743, 746 n.3 (2002). A further interesting exception is that although the usual rule precludes recovery of punitive damages against a decedent's personal representative or successor-in-interest (Code Civ. Proc. § 377.42), if the defendant dies while an appeal is pending, the plaintiff may enforce the entire judgment against an appeal bond that covers punitive damages. Whelan v. Rallo, 52 Cal. App. 4th 989, 995-96 (1997) ("After judgment is entered, the plaintiff should not be required to bear the risk the defendant's death during the appeal process will work a de facto reversal of punitive damages otherwise properly imposed.").

Following these rules can ensure you don't end up being the attorney who kills your dead client's appeal. Federal criminal practitioners need not worry, however, because if a defendant dies after conviction but before the appellate process plays out, the conviction and any related judgments must be abated and dismissed under the "rule of abatement ab initio," and "substitution is not required." See United States v. Rich, 603 F.3d 722, 724 n.4 (9th Cir. 2010); United States v. Oberlin, 718 F.2d 894, 895-96 (9th Cir. 1983). But that's surely a macabre and Pyrrhic way to "win." For civil practitioners, however, we'll let satirist Ambrose Bierce have the last word: "Death is not the end; there remains the litigation …"