



When a Client Dies During... Litigation

At common law, a personal injury action abates with the death of either party.¹ The Supreme Court in *Johnson v. Consolidated Freightways, Inc.*² discussed the rationale behind the common law: The old non-survival rule sprang from the medieval view of torts as a form of revenge, incapable of being continued on behalf of either victim or wrongdoer. In order to eliminate the inequities to the survivors under the common law principle, Minnesota Statutes section 573.01 (Survival of Causes) provides for the survival of all actions not arising from injury to the person:

A cause of action arising out of an injury to the person dies with the person or the party in whose favor it exists, except as provided in Section 573.02. All other causes of action by one against another, whether arising in contract or not, survive to the personal representatives of the former and against those of the latter.

Minnesota Statutes section 573.02 provides a broad exception for the survival of wrongful death actions, as well as a limited exception for preexisting personal injury actions unrelated to the cause of death.

First, subdivision one generally provides for the survival of actions based on the wrongful conduct that caused the decedent's death. It further provides that where the decedent dies after already having begun a personal injury action, it converts to a wrongful death action for the benefit of the surviving spouse and kin.

Subdivision two addresses a more limited exception for the survival of personal injury actions: when an injury is caused by the wrongful act or omission of any person or corporation and the person thereafter dies

from a cause unrelated to those injuries, the trustee ... may maintain an action for special damages arising out of such injury if the decedent might have maintained the action had he or she lived.

Further, Minnesota Rule of Civil Procedure 25.01 specifically allows for substitution following the death of a party:

If a party dies and the claim is not extinguished or barred, the court may order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process.

In determining which claims survive under Minnesota Statutes section 573.01, it is the nature of the injury, not the remedy, which is dispositive.³

Statutory Application to Specific Causes of Action

All causes of action arising from torts to real or personal property survive.⁴

Legal Malpractice

In *Johnson v. Taylor*,⁵ the Minnesota Court of Appeals reversed the trial court's dismissal of a legal malpractice claim when the plaintiff died of cancer. The *Johnson* court noted that while case law in Minnesota had not specifically interpreted the breadth of the phrase, "arising

out of injury to the person," the Minnesota Supreme Court had previously discussed the distinction between a legal malpractice action and the underlying claim. The court further noted other cases holding that a plaintiff's malpractice action is an independent cause of action not subsumed in a plaintiff's personal injury action. The court concluded that a legal malpractice claim survives the death of the plaintiff, reasoning that the Legislature provided for the maintenance of all actions, except those arising from personal injury.

Breach of Duty of Fair Representation

In *Lipka v. Minnesota School Employees Association Local 1980*,⁶ the Minnesota Court of Appeals held that a school bus driver and custodian's claim for breach of the duty of fair representation did not abate upon her death. The court concluded that this claim was analogous to a claim of legal malpractice, which the *Johnson* court had held is not an injury to person.

Dram Shop

In *Dahl v. Northwestern National Bank of Mpls.*,⁷ the Minnesota Supreme Court held that actions under the Dram Shop Act based on statutory strict liability are tortious in nature, arise out of the injury to the person, and thus do not survive.

MHRA

In *Jenson v. Eveleth Taconite Co.*,⁸ the Eighth Circuit held that employee sex discrimination and harassment claims under the Minnesota Human Rights Act are abated upon the death of the employee.

Fraud

The Minnesota Supreme Court held that a cause of action for fraud survives on the ground that it is not based on injury to the person to a property right.⁹

When a Defendant Dies

What happens to a claim against a tortfeasor that dies? A cause of action arising out of bodily injuries or death caused by the negligence of a decedent survives against the decedent's personal representative.¹⁰

In Sum

The death of your client, either before or after litigation is commenced, does not necessarily sound a death knell to your case. It depends on the nature of the underlying claim.

¹ *Johnson v. Taylor*, 435 NW.2d 127, 128 (Minn. Ct. App. 1989).

² 420 NW.2d 608, 612 (Minn. 1988).

³ See *Estate of Benson by Benson v. Minnesota Board of Medical Practice*, 526 NW.2d 634 (Minn. Ct. App. 1995).

⁴ *Hansen Mercantile Co. v. Wyman Partridge & Co.* 1908, 117 NW. 926 (Minn. 1908).

⁵ 435 NW.2d 127 (Minn. Ct. App. 1989).

⁶ 537 NW.2d 624 (Minn. Ct. App. 1995).

⁷ 121 NW.2d 321 (Minn. 1963).

⁸ 130 F.3d 1287 (8th Cir. 1997).

⁹ *Jandera v. Lakefield Farmers Union*, 150 Minn. 476 (Minn. 1921).

¹⁰ *Poepping v. Lindemann*, 127 NW.2d 512 (Minn. 1964).



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