
**SECOND DISTRICT COURT, STATE OF UTAH
DAVIS COUNTY, FARMINGTON DEPARTMENT**

RANDY E. MARRIOTT,

Plaintiff,

vs.

TERESA WILHEMSEN, the Utah State
Engineer; WEBER BASIN WATER
CONSERVANCY DISTRICT; and the
UTAH DIVISION OF WILDLIFE
RESOURCES;

Defendants.

**RULING AND ORDER
DENYING PLAINTIFF'S
MOTION TO SUBSTITUTE**

Case No. 230700645

Judge Jennifer L. Valencia

Before the Court is Plaintiff Randy E. Marriott's ("Mr. Marriott") Motion to Substitute Kami F. Marriott as the personal representative of Mr. Marriott's estate, into this dispute in place of Mr. Marriott, which was filed on April 13, 2023. At that time, the matter was assigned to Judge H. Craig Hall in Second District Court, Weber County Case #200906039. Defendants collectively filed their Memorandum Opposing the Motion to Substitute on May 5, 2023. Plaintiff filed its Reply in Support on May 18, 2023. A Request to Submit, including a request for hearing, was filed on June 9, 2023. Also on June 9, 2023, Judge Hall entered an Order Granting Motion to Assign Case to Water Judge and this matter was thereafter assigned to this Court as a designated water judge pursuant to Rule 6-104(2) of the Utah Rules of Judicial Administration. This matter remains assigned to the Second District Court but is now listed as Davis County Case #230700645.

A hearing on the Motion to Substitute was held before this Court on August 8, 2023, during which Plaintiff's interest was represented by Robert Mansfield, Julie Valdes was present on behalf of Defendant Teresa Wilhemsen as the Utah State Engineer ("State Engineer"), and Richard Flint was present on behalf of Weber Basin Water Conservancy District ("Weber Basin"). At the conclusion of the hearing, the Court took the matter under advisement, indicating that it would consider the oral arguments advanced,

confirm applicable legal standards, and issue a written ruling. Having now considered the pleadings, the arguments of counsel, and consulted applicable legal authority, the Court hereby DENIES Plaintiff's Motion to Substitute.

RELEVANT FACTS & PROCEDURAL HISTORY

1. Plaintiff filed an Application to Appropriate Water ("the Application") on June 3, 1997.¹ In January of 1998, the State Engineer held a hearing on the Application.
2. Approximately ten years later,² in January 2008, the State Engineer sent Mr. Marriott a letter requesting additional information and seeking acknowledgement of continued desire to proceed with the Application.
3. Mr. Marriott responded via correspondence filed on February 22, 2008 reaffirming his intent to proceed with the Application.³
4. The State Engineer issued an Order rejecting the Application on December 10, 2018.⁴
5. On December 28, 2018, Plaintiff filed a Request for Reconsideration of the State Engineer's Order.
6. On January 17, 2019, the Request for Reconsideration was considered denied after no action had been taken by the State Engineer within 20 days.⁵
7. Mr. Marriott filed an application for *de novo* review of the State Engineer's Order on February 5, 2019.⁶
8. On November 5, 2019 this action was dismissed without prejudice for failure to notify all parties. The one-year period during which the action could be refiled was thus triggered under Utah Code Ann. § 78B-2-111.

¹ Complaint, p. 3, ¶ 7.

² The reasons for this gap in time are disputed by the parties but are not relevant to the present motion.

³ Complaint, p.3, ¶ 11.

⁴ Mem. Decision, p. 2.

⁵ Complaint, ¶¶ 15-16.

⁶ Mem. Decision, p. 2.

9. Mr. Marriott refiled his Complaint within the one-year period, on October 26, 2020.⁷
10. Mr. Marriott died unexpectedly on February 28, 2023.
11. Weber Basin filed a Statement of the Fact of Death of Mr. Marriott on March 6, 2023.⁸
12. On April 13, 2023, Mr. Marriott's counsel filed the present Motion under Rule 25(a)(1) of the Utah Rules of Civil Procedure, requesting that this court order that the personal representative of Mr. Marriott's estate, Kami F. Marriott, be permitted to substitute as successor to Mr. Marriott in the *de novo* review of the State Engineer's Order.

LEGAL STANDARDS

Utah Rule of Civil Procedure 25(a) permits parties, successors, or representatives of a deceased party to file a motion to substitute in the event that a party to a case dies. Utah R. Civ. P. 25(a)(1) provides that: “[i]f a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.”⁹ The rule further requires that a motion for substitution be made not later than ninety days after service of the suggestion of death upon the record. If the motion for substitution is not made within this time period, the action must be dismissed.¹⁰ Three requirements are therefore distilled from the rule; whether: (1) the motion is timely; (2) the claims pled survive the party's death; and (3) the person proposed for substitution is a “proper party.”^{11 12 13}

⁷ *Id.*

⁸ Mot. to Substitute, at 2, *Marriott v. Wilhemsen*, No. 200906039.

⁹ Utah R. Civ. P. 25(a)(1).

¹⁰ *Id.*

¹¹ See also *Maseda v. Saul*, No. 1:20-CV-01657 JLT (E.D. Cal. Apr. 14, 2021) (applying federal Rule 25 to grant substitution as to disability insurance claim only in judicial review of an administrative decision denying application for Social Security benefits).

¹² 1 C.J.S. Abatement and Revival § 132 (“In order for a claim by or against a party to survive after his or her death, a proper substitution of parties or appointment of a successor must be made.”).

¹³ See also *In re Baycol Prod. Litig.*, 616 F.3d 778, 788 (8th Cir. 2010) (citing *Sinito v. U.S. Dept. of Justice*, 176 F.3d 512, 516) explaining under the federal rule that “[b]ecause the purpose of Rule 25(a)(1) is to protect the

The party seeking substitution under Utah R. Civ. P. 25 bears the burden of demonstrating that these requirements have been met. The Utah Supreme Court in *Trapnell & Associates, LLC v. Legacy Resorts, LCC* emphasized that substitution is not merely permissive, but must proceed via motion to the court pursuant to Rule 7 of the Utah Rules of Civil Procedure, including legal and factual support sufficient for the court to evaluate whether substitution is appropriate.¹⁴ The decision of whether to substitute a party falls within the district court's discretion.¹⁵

A cause of action surviving the party's death is a requirement for substitution. "The determination of whether an action abates or survives upon the death of a party is governed by common-law rules and statutory provisions changing the common law."¹⁶ In its analysis of the survival of claims, the Utah Supreme Court in *Gressman v. State*¹⁷ applied a three-pronged approach. They first considered whether the decedent's claims abated under the common law. Finding that it did not, the *Gressman* Court stated that it may then "only survive under the aegis of a statutory provision;" as such, they next looked to the statute under which the claim arose.¹⁸ Finally, if the statute that creates the cause of action does not address survival of claims, the Court asked whether the claim survived under Utah's general survival statute.¹⁹

As to the first prong, "[a]t common law, personal tort actions abate upon the death of either the claimant or the tortfeasor, while tort claims for property damage or conversion survive."²⁰ Tort claims for property damage or conversion which have survived have typically included those claims which relate to damage of tangible personal property or real property.²¹ The following explanation is also informative:

estate of the decedent, district courts must ensure only 'those individuals who can adequately represent the interests of the deceased party' are substituted under the Rule."

¹⁴ *Trapnell & Associates, LLC v. Legacy Resorts LLC*, 2020 UT 44, ¶¶ 56 and 67.

¹⁵ *Bradburn v. Alarm Prot. Tech., LLC*, 2019 UT 33, ¶ 8 ("A district court's substitution ruling is a discretionary one[.]"); see also *Mower v. Mower*, 2023 UT App 10, ¶ 20.

¹⁶ 1 C.J.S. Abatement and Revival § 132.

¹⁷ *Gressman v. State*, 2013 UT 63.

¹⁸ *Id.* at ¶ 10.

¹⁹ *Id.* at ¶ 23.

²⁰ *Id.* at ¶ 7.

²¹ See *Sevastopoulos v. Wells Fargo Bank, NA*, No. 2:19-CV-00182-CW-DAO, 2020 WL 6940708 (D. Utah Nov. 25, 2020).

“Underlying the distinction between actions that die with the person and those that survive is the basic thought that the reason for redressing purely personal wrongs ceases to exist either when the person injured cannot be benefited by a recovery or the person inflicting the injury cannot be punished, whereas, since the property or estate of the injured person passes to his personal representatives, a cause of action for injury done to these can achieve its purpose as well after the death of the owner as before.”²²

What falls within “property” and, more specifically, what qualifies as damage to a property interest, is key to determining whether a claim abates after a party’s death. A claim simply having an “incidental” effect on property or property rights is insufficient to make an action survivable; the wrong complained of must primarily impact property or property rights.²³

ANALYSIS

As the moving party, the burden of demonstrating it should be awarded the relief sought – an order from the Court granting the substitution of Kami F. Marriott into the dispute in place of the decedent Randy E. Marriott – lies with Plaintiff.

A. Timeliness.

A motion for substitution must be made “not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death.”²⁴ The parties do not dispute that the motion now pending before the Court was timely filed because Plaintiff’s counsel filed the motion within ninety days of the filing of a Statement of the Fact of Death of Mr. Marriott on March 6, 2023.

B. Whether Plaintiff’s claim survived.

It is clear under Utah law that substitution may only be granted when the claims have not been extinguished by the death of a party. As stated in *Wilcox v. Dist. Ct. of Salt Lake County*, survival of the claim is a prerequisite to the substitution of a party under

²² *Barnes Coal Corp. v. Retail Coal Merchs. Ass’n*, 128 F.2d 645, 649 (4th Cir. 1942).

²³ 1 Am. Jur. 2d Abatement, Survival, and Revival § 51.

²⁴ *Supra* Utah R. Civ. Proc. 25(a)(1).

Utah Rule of Civil Procedure 25(a)(1).²⁵ The Court first considers whether Plaintiff's claim abated at Utah common law by asking whether Mr. Marriott's claim is one relating to property damage. More specifically, the question is whether a denied application to appropriate water, or the potential for an approved application to appropriate water in the future, may be considered a property interest sufficient to support the action's survival under Utah common law.

It is a well-supported premise, and not disputed by the parties, that a water right constitutes a property interest held by the owner of the water right and may be transferred during life or at death. However, it has not been explicitly stated in statute or common law, at what point in the multi-step process of obtaining a water right that the property interest actually arises. Here, Plaintiff contends that the potential for the property interest held in an as yet unapproved application to appropriate is sufficient, such that denial of Mr. Marriott's Application qualifies as "property damage" sufficient to support the survival of Mr. Marriott's claim after his death. This Court disagrees.

Plaintiff points to the holding in *Patton v. Brady* stating that when "determining whether a cause of action survives to the personal representative, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced."²⁶ In doing so, Plaintiff equates the denial of Mr. Marriott's Application with "water rights wrongfully denied to his real property."²⁷ However, the unapproved Application in the current claim is distinguishable from water rights as an actual interest in real property. If Mr. Marriott's Application had been approved by the State Engineer, "any right to use water remain[ed] inchoate" until the certificate of appropriation [wa]s issued.²⁸ An approved application to appropriate water does not automatically create a water right; rather, "[t]he Utah Code requires the completion of certain steps before a right to use water—a water right—comes into existence."²⁹ Thus, even if Mr. Marriott's Application had been granted, the approval by the State Engineer

²⁵ See *Wilcox v. Dist. Ct. of Salt Lake County*, 2 Utah 2d 227 (1954).

²⁶ *Patton v. Brady*, 184 U.S. 608, 615 (1902).

²⁷ Reply in Supp. of Mot. to Substitute, at 6.

²⁸ *Loosle v. First Federal Sav. & Loan Ass'n of Logan*, 858 P.2d 999, 1002 (Utah 1993); see also *Little v. Greene & Weed Inv.*, 839 P.2d 791, 794 (Utah 1992).

²⁹ *Little v. Greene & Weed Inv.*, 839 P.2d at 794.

would merely have constituted a “preliminary step” towards a right to use water, but would not have created a perfected water right.³⁰

In *Loosle v. First Federal Sav. & Loan Ass’n of Logan*, the Utah Supreme Court, in determining an action to quiet title to water rights associated with the use of property after sale, held that inchoate water rights were not appurtenant to the land.³¹ This Court acknowledges that the *Loosle* Court recognized that “an inchoate right under an unperfected application can be transferred.”³² However, in *Loosle*, the Court focused on the language of the actual trust deed. Specifically, the trust deed in *Loosle* did not merely make a general conveyance, rather the language expressly included “all ‘rights,’ ‘water,’ and ‘water rights’ now or hereafter attached to the property.”³³

The present case is distinguishable. Mr. Marriott’s Will did not specifically provide for or otherwise attempt to transfer any purported water rights connected to the denied Application.³⁴ Thus, the rationale for the survival of property-related claims, that “the property or estate of the injured person passes to his personal representatives,” is simply inapplicable here since there was no perfected property right established by Mr. Marriott prior to his death and there was no assertion that Mr. Marriott’s estate included even an inchoate water right which remained in dispute. Therefore, this Court finds under Utah common law that Mr. Marriott’s claim for wrongful denial of water rights was extinguished by his death.

Given that Mr. Marriott’s claim does not survive under Utah common law, it may only survive under a statutory provision. The Court then “look[s] first to that statute for an indication of survival or abatement.”³⁵ Mr. Marriott’s claim was filed under Utah Code Ann. § 73-3-14. Nothing in the applicable section addresses the abatement or survival of claims. Thus, Title 73 does not provide a basis for the survival of Mr. Marriott’s claim.

Further, this Court cannot find that Utah’s general survival statute provides a basis for survival of Mr. Marriott’s claim. Utah Code Ann. § 78B-3-107 provides for “cause[s] of action arising out of personal injury to an individual, or death caused by the wrongful

³⁰ *HEAL Utah v. Kane Cnty. Water Conservancy Dist.*, 2016 UT App. 153 ¶ 8.

³¹ *Loosle v. First Federal Sav. & Loan Ass’n of Logan*, 858 P.2d 999, 1002.

³² *Id.* at 1003.

³³ *Id.*

³⁴ See Last Will of Randy E. Marriott.

³⁵ *Gressman v. State*, 2013 UT 63.

act or negligence of a wrongdoer”³⁶ While the general survival statute contemplates the survival of common law tort claims, this action centers upon the de novo review of an application to appropriate water. There is no allegation that Mr. Marriott suffered any injury to his person. Thus, this Court finds that Utah’s general survival statute is inapplicable to the present case.

C. Designation of a proper party.

Utah R. Civ. P. 25(a)(1) requires that the person proposed for substitution is a successor in interest or a legal representative of the decedent. Since the filing of the Motion, Kami F. Marriott has been appointed as the personal representative of Mr. Marriott’s estate, and as such is the successor in interest of Mr. Marriott. The parties do not dispute, and the Court finds that Kami F. Marriott would be the proper party for substitution were each of the requirements of Utah R. Civ. P. 25(a)(1) met.

RULING & ORDER

Based on the foregoing, the Court finds that Plaintiff has not met each of the requirements for substitution under Utah R. Civ. P. 25(a)(1). While Plaintiff’s Motion to Substitute was timely filed and the proper party has been designated as Mr. Marriott’s successor in interest, the cause of action was extinguished upon Mr. Marriott’s death. As survival of the claim is a prerequisite to the substitution of a party under Utah R. Civ. P. 25(a)(1), substitution cannot now be granted. Accordingly, Plaintiff’s Motion to Substitute under Utah R. Civ. P. 25(a)(1) is hereby DENIED. Counsel for Defendants are directed to prepare the final JUDGMENT OF DISMISSAL to fully effectuate the Court’s decision articulated herein.

BY THE COURT:

this 2nd day of October, 2023

Jennifer L. Valencia

Hon. Jennifer L. Valencia
Second District Court Judge

³⁶ Utah Code Ann. § 78B-3-107(1)(a).

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 230700645 by the method and on the date specified.

EMAIL: MELISSA REYNOLDS MELREYNOLDS@HOLLANDHART.COM

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10/02/2023

/s/ CASSEY WURTH

Date: _____

Signature