

**NOTE: A PROCEDURAL QUAGMIRE: HOW TO  
PROCEED WITH AN ACTION IN MINNESOTA WHEN A  
CLIENT DIES *EN PENDENTE LITE***

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I.	HYPOTHETICAL SITUATION .....	1188
II.	SUBSTANTIVE LAW RELATED TO PERSONAL INJURY LAW .....	1191
	A. <i>Historical Bar to Actions Resulting in Personal Injury or Death Is Gradually Reversed</i> .....	1191
	1. <i>An Action Is Personal to the Claimant</i> .....	1191
	2. <i>Wrongful Death Actions</i> .....	1191
	B. <i>Minnesota’s Wrongful Death Statute</i> .....	1195
	C. <i>Historical Analysis of Assignability</i> .....	1196
	1. <i>The English Legal System: Prohibitions on Personal Actions</i> .....	1196
	2. <i>History of Assignments in the United States: From Complete Bar to Dependence on Type of Cause of Action</i> .....	1197
	3. <i>The Policy Changes: What Type of Claim Is It?</i> .....	1198
	D. <i>Minnesota’s Stance on Assignment</i> .....	1199
	E. <i>From Wrongful Death to Survival Statutes</i> .....	1200
III.	MINNESOTA’S SURVIVAL STATUTE .....	1201
	A. <i>The Minnesota Supreme Court: Complete Bar on Intentional Torts Under Survival Statutes Violates Due Process</i> .....	1201
	B. <i>The Minnesota Legislature Responds</i> .....	1202
IV.	THE PROBLEM ILLUSTRATED: MINNESOTA PROBATE JURISDICTION VERSUS DISTRICT COURT JURISDICTION.....	1203
	A. <i>Deciphering Control of the Action</i> .....	1203
	B. <i>The Court Reviews the Problem of Jurisdiction: The Case of Milner v. First Bank of Minneapolis</i> .....	1206

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V.	PROCEDURAL ANALYSIS.....	1208
A.	<i>Procedure for Wrongful Death Claim: Minnesota Rule 144</i>	1208
B.	<i>General Procedure When a Party Dies Pending Action (En</i>	
	<i>Pendente Lite) .....</i>	1210
	1. <i>Minnesota Rule 25</i> .....	1210
	2. <i>Federal Procedure</i> .....	1214
VI.	ANALYSIS .....	1215
A.	<i>Jurisdictional and Procedural Issues Involving Actions</i>	
	<i>Pending Under Minnesota's Survival Statute .....</i>	1215
B.	<i>Issues Related to Attorney's Actions as Governed by the</i>	
	<i>Rules of Professional Conduct .....</i>	1216
VII.	A PROCEDURE THAT WILL RESOLVE THE ISSUE.....	1217
VIII.	CONCLUSION .....	1223

#### I. HYPOTHETICAL SITUATION

Lawrence Tate was riding his bicycle home from work when a car ran a stop sign and struck him. Mr. Tate retained an attorney, James Olsen, to bring a personal injury claim against the driver of the car for injuries suffered in the accident. But because the attorney failed to file the lawsuit in a timely manner, the claim against the driver was forever barred by the statute of limitations.

Instead, Mr. Tate hired another attorney and filed a malpractice claim against Mr. Olsen. Unfortunately, shortly after filing the malpractice claim against Mr. Olsen, Mr. Tate died in a plane crash while returning from a business trip.

Under Minnesota law, two legal claims survive Mr. Tate's death: (1) a claim which can be filed against the airline for his death in the crash under Minnesota's so-called "wrongful death statute," and (2) the malpractice claim against Mr. Olsen.<sup>1</sup>

Because Mr. Tate died in the plane crash, a claim is allowed to proceed under the wrongful death statute. Actions brought under the wrongful death statute are guided through each step of the adjudicative process because Minnesota has a rule that establishes the procedure for the continuance of wrongful death claims.<sup>2</sup> The wrongful death claim will have a much simpler path to follow to resolution than the malpractice action, for the personal

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1. See *infra* Part II.A for a discussion on why Mr. Tate's original claim against the driver for injuries suffered in the bicycle accident would not survive his death.

2. See *infra* Part V.A.

representative appointed on behalf of Mr. Tate, for any attorneys, and for the court involved in the case.

Pursuant to both statutory and common law in Minnesota, the malpractice claim will “survive” the death of the claimant.<sup>3</sup> But in contrast to claims filed under the wrongful death statute, there is no rule governing the procedure for pursuing actions that continue under the “survival statute.” Consequently, there is much confusion for the parties and court officials involved with Mr. Tate’s malpractice action.

Several things may cause confusion in a survival action. For example, it is possible that only the attorney will know of a pending action at the death of his client. If this is the case, how does the probate court learn of the action? How, and from whom, does an attorney receive compensation for handling a survival action? Who notifies the district court of the death of a party? How does the district court in which the action is pending learn of the appointment of a personal representative? Professional responsibility rules require an attorney to diligently handle a matter to its conclusion.<sup>4</sup> An attorney is also required to communicate regarding issues to be decided by the client, including evaluation of settlement offers.<sup>5</sup> How can an attorney comply with rules and procedures if she is not sure who the client is after the client has died but before a personal representative is appointed? Who is authorized to accept a settlement on behalf of the decedent? These are but a few of the questions that arise when a party dies before the completion of an action but the action still survives under Minnesota law. These issues could be resolved with the enactment of a procedure to be followed by parties, attorneys, and court officials when a party dies before the action being resolved.

To avoid the issues shown above, Minnesota would benefit from the adoption of a clear procedure for the continuance of a cause of action which falls under Minnesota’s survival statute similar to the rule governing an action brought under the wrongful death statute.<sup>6</sup>

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3. See MINN. STAT. § 573.01 (2006). See also *Johnson v. Taylor*, 435 N.W.2d 127 (Minn. Ct. App. 1989).

4. See MINN. RULES OF PROF’L CONDUCT R. 1.3 (2005).

5. See *id.* R. 1.4 (2005).

6. In order to clarify which actions are being discussed, this Note will use the term “wrongful death action” for actions filed after the death of the injured person that are based on the cause of the death as filed under Minnesota Statutes

This Note uses the procedure governing wrongful death actions to demonstrate how legal practitioners would benefit from a similar procedure governing survival actions. This Note first explores the history of the substantive law pertaining to personal injury litigation, including wrongful death actions, to demonstrate the divergent paths to be taken procedurally for the two possible causes of action brought on behalf of Mr. Tate.<sup>7</sup> It then explains how the law evolved from a complete bar on actions brought on behalf of another person to statutorily allowing them to continue in certain prescribed circumstances.<sup>8</sup>

Part III addresses how Minnesota's survival statute has evolved since its original enactment when Minnesota was still a territory to its current form.<sup>9</sup> The discussion on Minnesota's survival statute uses an actual case to show the confusion surrounding jurisdiction over a survival action.

Part IV defines the probate court's role in a survival action and compares the jurisdictional issues between the probate court and district court in handling a present action after a party dies without complete adjudication of the matter. Parts V and VI analyze the jurisdictional issues.<sup>10</sup> Finally, Part VII offers a solution to the jurisdictional conflict between the probate and district court discussed in Part IV and an explanation why such a solution would be beneficial to practitioners in Minnesota and the rest of the country.<sup>11</sup>

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section 573.02 (also referred to as the "wrongful death statute"). The Note will use the term "survival action" for actions that survive the death of the party but are *unrelated* to the cause of death of the party as filed under Minnesota Statutes section 573.01 (also referred to as the "survival statute") (originally drafted as REV. STAT. MINN., ch. 78, § 3 (1851)).

7. *See infra* Part II.

8. *See infra* Part II.C.

9. *See infra* Part III. While the survival statute allows an action to survive the death of *either* the plaintiff or the defendant, this Note is mostly concerned with actions surviving the death of a plaintiff. Part V.B briefly addresses the procedural issues surrounding the continuation of a claim in which a defendant dies during the action.

10. *See infra* Parts V, VI.

11. *See infra* Part VII.

## II. SUBSTANTIVE LAW RELATED TO PERSONAL INJURY LAW

### A. *Historical Bar to Actions Resulting in Personal Injury or Death Is Gradually Reversed*

#### 1. *An Action Is Personal to the Claimant*

In order to understand how actions survive the death of a party and to provide a framework in which to analyze a possible procedure for such actions, it is necessary to understand how the law and public policy surrounding the abatement, survival, or transfer of an action evolved. Historically, an action for death or injury was seen as a personal issue, barring it from the possibility of pursuit by anyone other than the injured (or deceased).<sup>12</sup> The law gradually recognized actions as separate from the person and allowed them to proceed on behalf of the deceased's survivors. Fears that allowing someone other than an original party to the action to continue pursuing it would lead to rampant corruption began to abate. As a result, courts began allowing actions to be assigned to another party who could then pursue the action.<sup>13</sup> Legislatures passed statutes allowing actions to be pursued after the death of the party, even when the death was unrelated to the proceeding, by a representative on behalf of the deceased's estate.<sup>14</sup>

#### 2. *Wrongful Death Actions*

Before the nineteenth century, Mr. Tate's hypothetical action against the airline would have been barred because the law did not recognize the right to sue for wrongful death.<sup>15</sup>

In early Anglo-Saxon law, homicide—intentional or not—was considered a civil offense for which the wrongdoer was required to pay the kinsmen of the decedent.<sup>16</sup> In the thirteenth century, a change in social attitudes led to homicide being viewed as a crime

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12. See *infra* Part II.A.

13. See *infra* Part II.C.

14. See *infra* Part II.E.

15. Of course, an even better reason why Mr. Tate's action against the airline would not have been sustainable before the nineteenth century is that the Wright brothers' famous Kitty Hawk flight did not occur until 1903, making it impossible for Mr. Tate to even be on a plane before the twentieth century.

16. 1 STUART SPEISER & JAMES E. ROOKS, JR., *RECOVERY FOR WRONGFUL DEATH* § 1:3 (4th ed. 2005).

against the state.<sup>17</sup> As a result, private actions by the survivors were barred.<sup>18</sup>

Although personal injury lawsuits began to emerge in the fourteenth and fifteenth centuries, even as late as the early eighteenth century personal injury litigation was still uncommon.<sup>19</sup> In cases of domestic injury, the common law only recognized wrongs done to “the superior of the parties related.”<sup>20</sup>

In the early nineteenth century, economic life changed as industrialization led to a separation of work and domestic life.<sup>21</sup> A new type of personal injury lawsuit began to emerge, which did not involve a master or his loss of services in a servant.<sup>22</sup> Lawsuits allowed a laborer incapacitated by injury the possible means to maintain an income to support his household with an income that was now separate from his employment.<sup>23</sup>

But an off-hand remark indicating that wrongful death claims were not actionable made by Lord Ellenborough in the 1808 English case of *Baker v. Bolton*<sup>24</sup> put an end to such lawsuits and

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17. *Id.* (citing Gustavus Hay, Jr., *Death as a Civil Cause of Action in Massachusetts*, 7 HARV. L. REV. 170, 170–71 (1893)).

18. *Id.* Because a person’s property was forfeited, it was pointless to sue for a civil remedy as there was no way to satisfy a civil judgment. *Id.* (citing T. A. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 611 (1960)).

19. See John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 722 (2000). The Black Death of the 1340s led to severe labor shortages in England causing Parliament and courts to develop ways to protect masters’ rights to the services of their servants. *Id.* at 723. The result was allowing a master to seek recovery, in a trespass action, against third parties who intentionally injured his servant when the injury resulted in the master losing the services of the injured servant. *Id.*

20. *Id.* at 724. In early English law, every man had a “property” right “in the service of his domestics” so that he could bring an action to recover damages for the loss of such services. *Id.* (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES \*429). On the other hand, “the loss of the inferior by such injuries” was unrewarded. *Id.* (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES \*142-43). Thus, actions against heads of household were barred. *Id.* at 726.

21. *Id.* at 727. Before the nineteenth century, the central mode of economic life was the household structure, which consisted of the master (head of household), wife, servants, and children such that work, leisure, and domestic life were all “acted out” in the same place and by the same participants. *Id.* at 725. This left little room for litigation over personal injuries within a household. *Id.* at 726.

22. *Id.* at 730.

23. *Id.* at 731.

24. (1808), 1 Camp. 493, 170 Eng. Rep. 1033.

eventually led to a complete bar on wrongful death actions.<sup>25</sup> Lord Ellenborough's remark in *Baker* has been cited in hundreds of decisions in the United States courts when referring to wrongful death actions<sup>26</sup> and is still mentioned by our highest courts.<sup>27</sup>

Early American courts allowed wrongful death actions before the *Baker* case.<sup>28</sup> Some jurisdictions in the United States ignored *Baker*,<sup>29</sup> while others followed the English ruling.<sup>30</sup> This split among jurisdictions created a large amount of litigation in the United States.<sup>31</sup> The divide, coupled with a marked increase in accidents due to the burgeoning industrial economy, forced states to review their policies on wrongful death actions.<sup>32</sup> Massachusetts enacted

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25. *Id.* (noting that in an action for the death of a man's wife in a stage coach accident, when applying the felony-merger doctrine "[i]n a civil court, the death of a human being could not be complained of as an injury").

26. SPEISER & ROOKS, *supra* note 16, § 1:2. *See also* Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 757 (1877) (holding that the life insurance company was not able to recover from the defendant, even though the defendant was responsible for the insured's death).

27. SPEISER & ROOKS, *supra* note 16, § 1:2. *See also* Smith v. Whitaker, 734 A.2d 243, 248 (N.J. 1999) (stating that the principle that no civil remedy was available at common law for a personal injury resulting in death is traceable to *Baker*).

28. *See* Witt, *supra* note 19, at 731–33. *See also* Cross v. Guthery, 2 Root 90, 1794 WL 198, at \*1 (Conn. Super. Ct. 1794) (allowing husband to recover damages when surgeon operated unskillfully on his wife, causing her death).

29. *See, e.g.,* LaFage v. Jani, 766 A.2d 1066, 1076 (N.J. 2001) (stating that New Jersey recognized common-law wrongful death action before passing its statute in 1848); Shields v. Yonge, 1854 WL 1606, at \*6 (Ga. 1854) (allowing a father to sue for damages after the death of his minor son).

30. *See, e.g.,* Eden v. Lexington & Frankfort R.R., 53 Ky. 204 (1853) (explaining that, although Connecticut and New Hampshire enacted statutes to allow for actions in wrongful death, nothing in Kentucky had changed the common-law rule that a "cause of action for injuries to the person dies with the person injured," so an action brought by a widow against a railroad for the loss of her husband was barred); Carey v. Berkshire R.R., 55 Mass. 475, 478 (1848) (holding that, according to the decision set forth in *Baker*, an action brought by a widow against a railroad corporation to recover damages for the loss of her husband due to the careless actions of the railroad could not be maintained).

31. *See* Witt, *supra* note 19, at 733. *See also* Plummer v. Webb, 19 F. Cas. 894, 896 (D. Me. 1825) (holding that a party with an interest in the services of one who is injured may sue for compensation so long as he can prove either "actual damage" or that allowing such action is the intent of the law); Shields, 1854 WL 1606, at \*5 (ruling common-law actions for wrongful death allowed so long as they do not involve felony homicide).

32. *See* Witt, *supra* note 19, at 733. *See also* Needham v. Grand Trunk Ry., 38 Vt. 294 (1865) (explaining that Vermont passed a wrongful death statute in 1849 in response to the numerous deaths resulting from wrongful acts committed and suffered, which cost the survivor the loss of the "natural support and protection" of the deceased, and for which the common law failed to provide a remedy to any survivors).

the first wrongful death statute in the United States that inverted the previous model of common-law personal injury litigation, no longer limiting actions to compensation for heads of household, but allowing recovery to support widows and minor children dependent on the laborers' wages.<sup>33</sup> Other states followed Massachusetts and enacted wrongful death statutes,<sup>34</sup> recognizing a new model of family and leading to protections for the family unit organized around male wage earners.<sup>35</sup> These statutes typically provided for the recovery of damages in cases of death "caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action" and recover damages.<sup>36</sup> By 1869, twenty-nine of thirty-seven states had enacted wrongful death statutes<sup>37</sup> and today all fifty states have enacted statutes allowing wrongful death actions.<sup>38</sup> The majority of these statutes allow an

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33. 1840 MASS. ACTS 224. The Massachusetts Act stated that if the negligence of a common carrier led to the death of a passenger, the carrier would be held liable and fined accordingly. *See also* Witt, *supra* note 19, at 733–34.

34. *See* Witt, *supra* note 19, at 734–35. The newly enacted American wrongful death statutes were modeled on the private tort model of the Lord Campbell's Act enacted by English Parliament. *Id.* Lord Campbell's Act overturned the common-law rule set forth in *Baker* which barred liability in tort for killing another. *Id.*

35. *Id.* at 720. Wrongful death statutes were based increasingly on the family paradigm in which husband worked and wife was separated from the market and relegated to domestic roles. *Id.* A wife could bring an action for the wrongful death of her husband, but no such remedy was available to a husband. *Id.* For a discussion on the unequal treatment of gender in tort law, see generally Witt, *supra* note 19 (analyzing the change in tort law as household structures and values changed and concluding that tort law has played a substantial role in defining gender and family roles); *see also* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998) (arguing that tort law devalues or undervalues the lives, activities, and contributions from women and people of color). For a discussion on the evolution of loss of consortium claims brought by the surviving partner in a same-sex relationship, see John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911 (2001) (stating that because courts are reluctant to recognize that same-sex couples have intimate relationships, courts fail to recognize a right to recover for a loss of that intimacy). For an analysis of the changes, both at common law and legislatively, to wrongful death laws related to causes of action filed by same-sex partners, see John G. Culhane, *Even More Wrongful Death: Statutes Divorced from Reality*, 32 FORDHAM URB. L.J. 171, 177–80 (2005) (discussing a recent California case in which a lesbian woman was granted standing to bring a wrongful death lawsuit on behalf of her deceased partner, which prompted California's legislature to amend its wrongful death statute to allow actions brought by a surviving same-sex partner).

36. *See* Witt, *supra* note 19, at 734.

37. *Id.* at 736.

38. SPEISER & ROOKS, *supra* note 16, § 1:11 (stating "[a]t the present time there are statutes in all American states that create a right to recover for wrongful

action to be filed to recover damages so as to compensate the “next of kin” for the loss of the decedent.<sup>39</sup>

*B. Minnesota’s Wrongful Death Statute*

Minnesota’s wrongful death statute was enacted when Minnesota was still a territory.<sup>40</sup> It authorized the decedent’s personal representative to seek recovery for the exclusive benefit of the widow and next of kin and distribute it in proportion to the rest of the decedent’s property.<sup>41</sup>

In early wrongful death actions, the sole purpose of recovery was compensation of the surviving beneficiaries for pecuniary losses.<sup>42</sup> Therefore, an action was not maintainable if there was no surviving spouse or next of kin of decedent.<sup>43</sup> The Minnesota Supreme Court overturned this rule in *Johnson v. Consolidated Freightways, Inc.* when it held that a trustee may recover on behalf of the beneficiary’s estate.<sup>44</sup> Later amendments provided maintenance of the action by a court-appointed trustee with distribution of damages proportionate to the pecuniary loss severally suffered by the death.<sup>45</sup> Minnesota’s current wrongful death statute reads: “[w]hen death is caused by the *wrongful act* or omission of any person or corporation, the trustee appointed . . . may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission.”<sup>46</sup>

The current statute would permit Mr. Tate’s wrongful death action (described in the introduction to this Note) to proceed against the airline with the appointment of a trustee to pursue the interests of Mr. Tate’s beneficiaries as specified in Minnesota’s

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death”).

39. See Witt, *supra* note 19, at 736.

40. REV. STAT. TERR. MINN., ch. 78, § 3 (1851) (“When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former, may maintain an action against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission . . .”).

41. *Id.*

42. *Johnson v. Consol. Freightways, Inc.*, 420 N.W.2d 608, 611 (Minn. 1988).

43. *Id.*

44. *Id.* at 613 (stating that damages are limited to the pecuniary losses based on the time between the injury to the victim and his death).

45. 1905 MINN. REV. LAWS, ch. 87, § 2.

46. MINN. STAT. § 573.02, subdiv. 1 (2006) (emphasis added).

wrongful death statute.<sup>47</sup>

C. *Historical Analysis of Assignability*

Mr. Tate's action for malpractice would not have survived in the courts before the mid-nineteenth century, because there was a complete bar on assigning or transferring causes of action between parties.<sup>48</sup> The evolution of assignability of claims shows the shift in legal thinking regarding the existence of a claim independent from the claimant.

1. *The English Legal System: Prohibitions on Personal Actions*

Claims that had to be asserted by action in the early courts, termed "choses in action," included rights to debts, contract damages, rights arising from torts, and rights in personal property.<sup>49</sup> Because they involved personal rights, it followed logically that these personal actions could not be assigned to another person.<sup>50</sup>

And in fact, due to abuses of the court system, assignment of personal claims even came to be banned outright. In the medieval English courts, because of the inability of the courts to self-regulate, bribery of both judges and juries led to widespread corruption.<sup>51</sup> It was consequently possible for litigants from aristocratic families to carry out their feuds with other aristocracy through the courts, attempting to consolidate larger estates.<sup>52</sup> By assisting others in suits for recovery of land, they could take an interest in the land in

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47. *Id.* Upon written petition by the surviving spouse or next of kin, the court having jurisdiction over the action appoints a trustee to commence or continue the action and obtain recovery of damages. *Id.* § 573.02, subd. 3. The full procedure governing a wrongful death action is described *infra* Part V.A.

48. See Kevin Pennell, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem*, 82 TEX. L. REV. 481, 483 (2003) (explaining that a chose in action is a right to receive debts or damages, and rights were considered personal and non-transferable to others).

49. W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997, 997-98 (1920) (detailing the history of the treatment of choses in action by the common law).

50. *Id.* at 1016. An assignment is "[t]he transfer of rights or property." BLACK'S LAW DICTIONARY 128 (8th ed. 2004).

51. See Patrick T. Morgan, *Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims*, 66 MO. L. REV. 683, 691 (2001) (illuminating the multitude of problems with the complex and corrupt medieval courts).

52. *Id.*

return.<sup>53</sup> The practice of holding such land interests was known as champerty.<sup>54</sup> Another practice, maintenance, allowed feudal lords to support and uphold their tenants' lawsuits, clogging the courts as a means to carry on their disputes with other lords.<sup>55</sup>

Besides overwhelming the courts, the use of maintenance and champerty in assisting with litigation became disfavored as un-Christian.<sup>56</sup> Legislation and common law responded with prohibitions of these practices, attempting to relieve the overused judicial system.<sup>57</sup> And the law came to forbid in general the assignment of so-called "personal actions," thus allowing the judiciary to rid itself of the corruption that had become associated with these actions through maintenance and champerty.<sup>58</sup>

2. *History of Assignments in the United States: From Complete Bar to Dependence on Type of Cause of Action*

The prohibitions on champerty and maintenance gained a different use in American law as a means to protect important sources of economic growth—such as railroads—by barring claims from those who could ill-afford to withstand the cost of litigation.<sup>59</sup> Early English common law stated that "no man could purchase another's right to a suit, either in whole or in part."<sup>60</sup> American courts followed England and based their decisions disallowing assignments on the public policy concern that courts should not be

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53. *Id.*

54. *Id.* The modern definition of champerty is "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds." BLACK'S LAW DICTIONARY 246 (8th ed. 2004).

55. See Morgan, *supra* note 51, at 692. The modern definition of maintenance refers to "[a]ssistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation." BLACK'S LAW DICTIONARY 973 (8th ed. 2004).

56. See Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 58 (1935) (explaining that a litigious spirit did not coincide with the Christian spirit of charity). Use of the judicial system to protect one's rights was acceptable, but use of those same courts in order to intervene in litigation on another's behalf was deemed meddling. *Id.*

57. See 7 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 523–24 (Methuen & Co. Ltd. & Sweet & Maxwell Ltd. 1937) (1925) (stating that most statutes have consolidated champerty and maintenance).

58. See Morgan, *supra* note 51, at 693.

59. E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 6–10 (3d ed. 1999). See also Radin, *supra* note 56, at 65–66.

60. Lytle v. State, 17 Ark. 608, 627 (1857).

used to enforce any action that hinted at maintenance and champerty.<sup>61</sup> Many courts believed that this prohibition spared individuals who suffered a personal tragedy the intrusion of others seeking to purchase their tort claim.<sup>62</sup>

### 3. *The Policy Changes: What Type of Claim Is It?*

In the early twentieth century, maintenance gradually ceased to be a reason to object to the assignment of an action and the complete bar on assignments increasingly became reversed.<sup>63</sup> Advancing conditions of commercial interests and a burgeoning economy led the judiciary and legislatures to modify the flat prohibition on assignments.<sup>64</sup> Courts also stated that the original laws barring champerty and maintenance were intended to prevent the interference of strangers in an action, but that those who agree to aid a party to an action should not be regarded as committing unlawful maintenance.<sup>65</sup>

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61. See Morgan, *supra* note 51, at 695. American courts still use the so-called dangers of champerty and maintenance as justifications to prevent assignments. See also *Travelers Indem. Co. v. Vaccari*, 310 Minn. 97, 100–01, 245 N.W.2d 844, 846 (1976) (stating that subrogation does not create the same risk of champerty and maintenance as does assignment).

62. See *Peck v. Heurich*, 167 U.S. 624, 630 (1897) (explaining that if assignment was permitted, the judiciary would soon be overcome with “baseless litigation” and lead to lawyers who speculate, and hence gamble, on the outcome of a suit). See also *Huber v. Johnson*, 68 Minn. 74, 77–79, 70 N.W. 806, 807–08 (1897) (stating that prohibition against champerty and maintenance was to “prevent officious intermeddlers from stirring up strife . . . or speculative litigation which would . . . lead to corrupt practices and pervert the remedial process of the law”). This fear of corruption or perversion of the process of law can still be seen in laws regulating the solicitation of clients. See MINN. RULES OF PROF’L CONDUCT R. 7.3 (2005). In addition, “ambulance chaser” generally is a derogatory term for one who solicits cases for an attorney in return for a percentage of the recovery. See BLACK’S LAW DICTIONARY 88 (8th ed. 2004).

63. *Bouvier v. Baltimore & N.Y. Ry. Co.*, 51 A. 781, 785 (N.J. 1902) (stating that maintenance was “entirely the creature of English statutory law, and of the judicial construction of such law, and . . . there existed no rational ground for the contention that any part of the law of maintenance in any form remained in force”).

64. *Hillsdale Distillery Co. v. Briant*, 129 Minn. 223, 226, 152 N.W. 265, 266 (1915). Courts have stated that experience has shown that no evil results from the assignment of rights of action but, in fact, the public good is greatly promoted by the free circulation of property in action, as well as of property in possession. See *Thalhimer v. Brinckerhoff*, 3 Cow. 623 (N.Y. Sup. Ct. 1824).

65. *Thalhimer*, 3 Cow. at 623 (holding that an agreement between the plaintiff and a third party with regard to the action was not void within the provisions of the act prohibiting champerty and maintenance and should be upheld).

Most states modified the common-law rule to allow actions that survive the death of the holder to be assigned.<sup>66</sup> The apprehension that “justice would be trodden down” if an action was transferred was no longer considered valid.<sup>67</sup> The evolution of society reached a point that the harms associated with champerty and maintenance were effectively controlled by other measures.<sup>68</sup> American courts began to recognize that the evils of assigning a claim were no longer relevant and started allowing assignment.<sup>69</sup>

*D. Minnesota’s Stance on Assignment*

Minnesota allows assignment of an action if the action meets the statutory survival test.<sup>70</sup> The relationship between the survivability of a claim and its assignability appears to stem from dictum in the case of *Comegys v. Vasse*.<sup>71</sup> In *Comegys*, the United States Supreme Court stated that because personal tort claims abated at the death of the owner, they were not assignable.<sup>72</sup> But other causes of action, that survive the death of the victim, may be assigned.<sup>73</sup>

Minnesota expressly addresses the assignment or transfer of an

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66. See Isaac Marcushamer, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543, 1553 (2005).

67. *Winn v. Ft. Worth & R.G. Ry. Co.*, 33 S.W. 593, 594 (Tex. Civ. App. 1896). The bar on assignments rule was never followed in the courts of equity as it was deemed unjust. *Id.*

68. See Marcushamer, *supra* note 66, at 1553. Such safeguards include causes of action for malicious prosecution and abuse of process, and sanctions for those found to be instituting or maintaining frivolous actions. Susan Lorde Martin, *Financing Plaintiffs’ Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REFORM 57, 83–84 (2000). In addition, lawyers are bound by professional rules of conduct that disallow excessive fees, and the doctrines of unconscionability, duress, and good faith establish standards of behavior for those entering into contracts for the support of litigation. *Id.*

69. See Marcushamer, *supra* note 66, at 1553–54.

70. See *Regie De L’Assurance Auto. Du Quebec v. Jensen*, 399 N.W.2d 85, 89 (Minn. 1987) (stating that an action is assignable if it meets the survivability test under Minnesota Statutes section 573.01 (1986)); *Jandera v. Lakefield Farmers Union*, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921) (stating that Minnesota abrogated the common-law rule by allowing all causes of action to survive except those arising out of an injury to the person); *Peterson v. Brown*, 457 N.W.2d 745, 748 (Minn. Ct. App. 1990) (affirming that assignability of an action is governed by Minnesota Statutes section 573.01 (1990)).

71. 26 U.S. 193 (1828).

72. *Id.* at 213.

73. *Id.* (stating that claims arising out of property may be assigned).

action by statute.<sup>74</sup> A plaintiff who was assigned a cause of action may continue the action for the benefit of the assignee.<sup>75</sup> But the Minnesota Supreme Court has ruled that an assignment of a cause of action for personal injury, and by extension a wrongful death action, is prohibited.<sup>76</sup>

According to the court in *Peterson v. Brown*, the following actions are assignable: fraud and misrepresentation, claimed violations of a property right, negligence claims, and breach of contract claims.<sup>77</sup>

*E. From Wrongful Death to Survival Statutes*

Just as the wrongful death statute was a response to the general failure at common law to provide a remedy for wrongful death, there was a similar common-law failure to provide a remedy to a person who died before commencing or completing an action unrelated to the death of the party but which existed at the time of death.<sup>78</sup> Historically, actions for recovery of civil damages would abate if the “injured” person died before commencement or completion of the action for which he suffered injuries.<sup>79</sup>

States remedied this concern by enacting survival statutes permitting recovery by a personal representative, usually on behalf of the estate, for damages the decedent could have recovered had he lived.<sup>80</sup> The test of survivability of the cause of action is usually

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74. MINN. STAT. § 540.12 (2006) (originally enacted as Rev. St. (Terr.), c. 70, § 37 (1851)). “No action shall abate by reason of the death or disability of a party, or the transfer of the party’s interest, *if the cause of action continues or survives.*” *Id.* (emphasis added).

75. *Aaberg v. Minn. Commercial Men’s Ass’n*, 161 Minn. 384, 385, 201 N.W. 626, 627 (1925). Although not addressed in this paper, the Minnesota Supreme Court has also ruled that a verdict for a personal injury suit is assignable. *See Kent v. Chapel*, 67 Minn. 420, 422, 70 N.W. 2, 3 (1897).

76. *See, e.g., Travelers Indem. Co. v. Vaccari*, 310 Minn. 97, 100–01, 245 N.W.2d 844, 846 (1976) (allowing assignment of rights to medical payments already made by the tortfeasor but denying assignment of an injured party’s claim against a tortfeasor who was under no pre-existing duty to compensate the injured party); *see also Regie De L’Assurance Auto. Du Quebec v. Jensen* 399 N.W.2d 85, 89 (Minn. 1987) (ruling that an action can only be assigned if it survives to the personal representative of the deceased, which is inapplicable in a wrongful death case because the death creates a wrongful death action).

77. 457 N.W.2d 745, 749 (Minn. Ct. App. 1990).

78. SPEISER & ROOKS, *supra* note 16, § 1:13.

79. *Id.*

80. *See* MINN. STAT. § 573.01 (2006).

the nature of the action.<sup>81</sup>

### III. MINNESOTA'S SURVIVAL STATUTE

Minnesota law regarding survival actions has seen a gradual expansion in suits allowed to survive the death of a party. The original survival statute provided that a cause of action arising out of an injury to a person died with the death of either the injured party or the tortfeasor, with the exception of actions for wrongful death.<sup>82</sup> In 1941, the legislature amended the survival statute to allow causes of action growing out of personal injuries that were the result of the *negligence* of the decedent.<sup>83</sup>

The legislature extended the survival statute in 1967 to allow causes of action brought in “strict liability, statutory liability or breach of warranty.”<sup>84</sup> In *Wild v. Rarig*, the Minnesota Supreme Court interpreted Minnesota Statutes section 573.01 to mean that the survival statute was still not applicable “to intentional torts such as assault, battery, and false imprisonment.”<sup>85</sup> Intentional torts were barred from survival under section 573.01 until 1982, when the court ruled that the complete bar on the survival of intentional torts violated the equal protection provision of the Minnesota Constitution.<sup>86</sup>

#### A. *The Minnesota Supreme Court: Complete Bar on Intentional Torts Under Survival Statutes Violates Due Process*

In *Thompson v. Petroff*, the court stated that simply because the Minnesota legislature intentionally excluded intentional torts from the survival statute did not mean it acted rationally in doing so.<sup>87</sup> The *Thompson* court stated that prohibiting the survival of intentional tort actions did not serve any purpose in modern tort law.<sup>88</sup> The only apparent reason for the omission of intentional

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81. 1 C.J.S. *Abatement and Revival* § 147 (2006).

82. 1849 Minn. Laws 403.

83. *Lavalle v. Kaupp*, 240 Minn. 360, 361–63, 61 N.W.2d 228, 229–30 (1953) (emphasis added).

84. MINN. STAT. ANN. § 573.01 (2006).

85. 302 Minn. 419, 446, 234 N.W.2d 775, 792–93 (1975).

86. *Thompson v. Petroff*, 319 N.W.2d 400, 407 (Minn. 1982).

87. *Id.* at 404 (stating that both *Lavalle* and *Wild* were only concerned with statutory interpretation and did not address the question of the act's constitutionality).

88. *Id.* at 405 (citing *Moyer v. Phillips*, 341 A.2d 441, 443–45 (Pa. 1975), which held tort actions survivable because survival statutes were designed “in

torts from survival statutes was the “legislature’s failure to keep up with the development of modern tort law.”<sup>89</sup>

As stated earlier,<sup>90</sup> historical common-law rules regarding abatement of tort actions were based on the medieval concept of revenge. The Minnesota Supreme Court found that these notions were no longer relevant in the current tort system that provides for compensation, rather than punishment of a tortfeasor.<sup>91</sup> The majority in *Thompson* stated that the distinction between intentional torts and all other causes of action is not only irrelevant to the statute, but also arbitrary.<sup>92</sup>

Based upon this analysis of the history and purpose of survival statutes with regard to modern theories of tort law, the Minnesota Supreme Court held that the survival statute failed the rational basis test and violated the equal protection provision of the Minnesota Constitution.<sup>93</sup> The court struck the middle sentence of section 573.01, effectively allowing all causes of action to survive the death of a party except for those arising out of wrongful death.<sup>94</sup> The court recognized that *Thompson* overturned long-standing common-law principles, as well as current legislation, and noted that such endeavors should not be taken lightly.<sup>95</sup> But the court stated that the current law no longer served societal needs.<sup>96</sup> The new rule of *Thompson* was to be applied to all cases after the date of its decision.<sup>97</sup>

#### B. *The Minnesota Legislature Responds*

In 1983, the Minnesota Legislature amended the survival

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accordance with modern theories of tort law,” which places more stress on compensatory than punitive damages).

89. *Id.*

90. *See supra* Part II.A.

91. *See Thompson*, 319 N.W.2d at 405.

92. *Id.*

93. *Id.* at 406 (stating that because the court held that Minnesota Statute section 573.01 violated the Minnesota Constitution, it did not need to decide whether it violated the United States Constitution).

94. *Id.* at 407 (striking “except a cause of action arising out of bodily injuries or death caused by the negligence of a decedent”). Wrongful death actions are governed by Minnesota Statute section 573.02. *Id.*

95. *Id.* (recognizing that the effect of the decision overturned “a common-law rule of long standing and ancient origin” that the Minnesota Legislature adopted in the nineteenth century).

96. *Id.* (explaining that the rule should be replaced with one reflecting needs of people and demands of justice).

97. *Id.*

statute to conform to the court's decision in *Thompson* and applied the rule to all causes of action arising on or after that date.<sup>98</sup> The current language of the survival statute states that all causes of action not arising under the wrongful death statute survive to a personal representative.<sup>99</sup>

As illustrated in the analysis above, wrongful death and survival statutes differ in theory and practice. Wrongful death statutes generally create a new cause of action for the death itself and are for the benefit of the heirs of the person killed.<sup>100</sup> On the other hand, survival statutes allow actions already commenced at the time of the person's death to "survive" her death and continue for the benefit of the decedent's estate.<sup>101</sup>

#### IV. THE PROBLEM ILLUSTRATED: MINNESOTA PROBATE JURISDICTION VERSUS DISTRICT COURT JURISDICTION

##### A. *Deciphering Control of the Action*

In order to understand the problems that arise due to the lack of a clear procedure for survival actions, this Note explores the jurisdictional problem created when a party dies while an action is still pending. As will be explained, the probate court and the district court have distinct spheres of jurisdiction.

The jurisdiction of the Minnesota judiciary was set forth in the Minnesota Constitution.<sup>102</sup> Specifically, the Minnesota probate courts have original jurisdiction for "the administration of estates of deceased persons."<sup>103</sup> The Minnesota courts are clear that,

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98. MINN. STAT. § 573.01 (2006).

99. *Id.* See also *Johnson v. Taylor*, 435 N.W.2d 127, 128–29 (Minn. Ct. App. 1989) (providing another example of the Minnesota Supreme Court applying the revised statute).

100. See SPEISER & ROOKS, *supra* note 16, § 1:13 (citing *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573 (1974)). See also *Martz v. Reviser*, 284 Minn. 166, 169, 170 N.W.2d 83, 85 (1969) (stating that "[t]he recovery in such an action . . . shall be for the exclusive benefit of the surviving spouse and next of kin, to be distributed to them as is personal property of persons dying intestate"); *Kuhlne v. Swedlund*, 220 Minn. 573, 576, 20 N.W.2d 396, 398 (1945).

101. See SPEISER & ROOKS, *supra* note 16, § 1:13. See also MINN. STAT. § 573.01 (2006); *Johnson*, 435 N.W.2d at 128 (stating that "there is no reason why an estate that has been injured or depleted by [the wrong of] another should not be compensated whether the injured party is living or not").

102. MINN. CONST. art. VI.

103. MINN. CONST. art. VI, § 11 (formerly MINN. CONST. art. VI, § 6). See also *Leslie v. Minneapolis Soc. of Fine Arts*, 259 N.W.2d 898, 903 (Minn. 1977)

according to the Minnesota Constitution and statutory enactment, probate courts possess exclusive subject-matter jurisdiction that is separate and distinct from the jurisdiction of the district courts.<sup>104</sup> The principal function of the probate court is to administer a decedent's estate by determining who is entitled to share in such estate, and the court's decree is not subject to collateral attack.<sup>105</sup> The probate court is granted "all powers, legal or equitable, essential to a complete exercise of the plenary and exclusive jurisdiction" provided under Minnesota Constitution article 6, section 11, as distinct from the general jurisdiction granted to district courts.<sup>106</sup>

On the other hand, the Minnesota Constitution confers original jurisdiction over all civil cases to the district court.<sup>107</sup> But this does not include jurisdiction over matters rightly before the probate court.<sup>108</sup> In *Leslie v. Minneapolis Society of Fine Arts*, the Minnesota Supreme Court ruled that the exclusive subject matter jurisdiction possessed by probate courts is "separate and distinct" from the jurisdiction held by the district courts.<sup>109</sup> Probate courts have no jurisdiction to consider issues unrelated to the administration, settlement, or distribution of a decedent's estate.<sup>110</sup> Therefore, probate courts have no authority to decide an action rightly pending before a district court, such that district court jurisdiction in Minnesota remains wholly separate from that granted probate court.<sup>111</sup> The district courts, by statutory direction, only have appellate jurisdiction over matters pertaining to the

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(containing further explanation of the jurisdiction held by Minnesota's probate courts).

104. *Murray v. Calkins*, 191 Minn. 460, 463, 254 N.W. 605, 607 (1934). *See also* MINN. STAT. § 524.3-105 (2006).

105. *In re Iverson*, 249 Minn. 156, 160, 81 N.W.2d 701, 704 (1957).

106. *Vesey v. Vesey*, 237 Minn. 10, 10, 53 N.W.2d 809, 810 (1952).

107. MINN. CONST. art. VI, § 3.

108. *See Vesey*, 237 Minn. at 13, 53 N.W.2d at 812 ("Since the probate court has exclusive original jurisdiction to adjudicate and determine whether a person qualifies as an heir . . . it follows that the district court is wholly without such original jurisdiction and may not, by injunction or otherwise, impair or otherwise interfere with the probate court's original exercise thereof.").

109. 259 N.W.2d 898, 903 (Minn. 1977).

110. *In re Iverson*, 249 Minn. at 160, 81 N.W.2d at 704; *Leslie v. Minneapolis Soc. of Fine Arts*, 259 N.W.2d 898, 903 (Minn. 1977) (stating it has been frequently held that probate courts have no "independent jurisdiction in equity or at law over controversies between the representatives of the estate, or those claiming under it, with strangers claiming adversely, (or) of collateral actions"); *Wilson v. Erickson*, 147 Minn. 260, 261-62, 180 N.W. 93-94 (1920).

111. *Leslie*, 259 N.W.2d at 903.

estates of deceased persons, versus original jurisdiction, which is granted to the probate courts.<sup>112</sup>

As will be illustrated and discussed later in this section, jurisdiction is an issue for parties deciding how to proceed with survival actions that are rightly before the district court when the probate court is tasked with handling the decedent's estate.

Minnesota's survival statute specifically states that an action surviving the death of a party survives to that party's personal representative,<sup>113</sup> and Minnesota law holds that probate courts have the exclusive power to appoint a personal representative.<sup>114</sup> Before an action still pending at a party's death may continue, Minnesota law dictates that a personal representative must be appointed to administer the estate.<sup>115</sup> Therefore, if a client dies pending completion of an action already before the district court, it is up to the probate court to appoint a personal representative in order to proceed with the action.<sup>116</sup> The district court does not have the jurisdiction to appoint a personal representative or to interfere with the probate court's ability to administer the decedent's estate.<sup>117</sup> Therefore, parties to a survival action must deal with both the probate court and the district court, each with its own distinct jurisdiction over the matter, neither of which works in conjunction with the other.

In a survival action, the district court *retains* exclusive jurisdiction over the pending action, while the probate court *gains* exclusive jurisdiction over administering the decedent's estate.

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112. *Iverson*, at 160, 81 N.W.2d at 704 (ruling that the district court only has the right to take a proper appeal after probate court has handled a case because the district court "has no right to make a determination, in the absence of a determination of the probate court"). *See also In re Hauge's Estate*, 219 Minn. 192, 197, 17 N.W.2d 305, 307 (1945) (stating district court cannot interfere with constitutional jurisdiction of probate court, except by appellate or remedial jurisdiction).

113. MINN. STAT. § 573.01 (2006).

114. *Id.* § 524.3-103 (requiring personal representative to be appointed by order of the probate court or probate registrar and stating the administration of the estate is commenced by the issuance of Letters of Administration to the qualified personal representative). *See also* Minn. *Odd Fellows Home v. Pogue*, 245 Minn. 539, 73 N.W.2d 615 (1955); *Wilson v. Erickson*, 147 Minn. 260, 261, 180 N.W. 93, 93 (1920).

115. MINN. STAT. § 524.3-601 (2006) (providing first that a personal representative shall qualify by filing a bond and oath of office, or a statement of acceptance of the duties, with the appropriate court).

116. *Id.*

117. *See Vesey v. Vesey*, 237 Minn. 10, 13-14, 53 N.W.2d 809, 812 (1952).

This disconnect between the jurisdiction of the probate court and the district court has led to a gap in the pursuit of an existing action that survived the party's death. The district court handling the action can order a substitution of parties.<sup>118</sup> But the substitution of parties requires the appointment of a personal representative, which must be handled in probate court.<sup>119</sup> Therefore, the district court is paralyzed, and the pending action stalled, until the probate court takes action.

The paralysis resulting from the separate and distinct spheres of jurisdiction of the probate and district courts cannot be overcome by agreement between the parties, as the Minnesota Supreme Court prohibits parties from consenting to confer control in excess of a court's jurisdiction.<sup>120</sup> As a result, the parties in a survival action cannot agree to submit to probate jurisdiction for the pending matter nor agree to allow the district court to exercise jurisdiction over appointing a personal representative. The parties are, in effect, trapped between the "exclusive jurisdiction" of two courts, which can be confusing to practicing attorneys attempting to handle a deceased client's action properly and expeditiously. A procedure detailing the proper steps for the attorneys, parties, and courts to follow would alleviate this confusion and avoid the delay regarding the surviving action.

*B. The Court Reviews the Problem of Jurisdiction: The Case of Milner v. First Bank of Minneapolis*

The jurisdictional conflict between the probate and district courts is illustrated in *Milner v. First National Bank of Minneapolis*.<sup>121</sup> In *Milner*, the Minnesota Supreme Court decided whether survival statutes or probate statutes governed a contract action that survived the death of a defendant.<sup>122</sup>

In *Milner*, the plaintiff commenced a breach of contract action,

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118. See *infra* Part V.B.

119. See MINN. STAT. § 524.3-614 (2006).

120. See *In re Hudson's Guardianship*, 226 Minn. 532, 539, 33 N.W.2d 848, 854 (1948).

121. 228 Minn. 324, 37 N.W.2d 450 (1949).

122. See *id.* at 327, 37 N.W.2d at 450. The court compared Minnesota Statutes section 525.411 (repealed and amended as Minnesota Statutes sections 524.3-803, -804, -810) with Minnesota Statutes section 525.431 (repealed and amended as Minnesota Statutes sections 524.3-803, -804, -812), ruling that the action may proceed to final judgment once the court, on motion, substitutes the defendant's representative as the defendant. *Id.* at 327, 37 N.W.2d at 451.

but when the defendant died before trial, First National Bank was appointed executor and the plaintiff moved for substitution of the executor of the estate in place of defendant.<sup>123</sup> The district court granted the substitution and First National Bank appealed, asserting that under the probate statutes, the district court ceased to have jurisdiction when the defendant died, thus requiring the plaintiff to proceed with the contract action in probate court.<sup>124</sup>

The Minnesota Supreme Court analyzed the issue using the language in Minnesota Statutes sections 573.01 and 540.12.<sup>125</sup> Section 573.01 states that all causes of action not arising out of personal injury survive to, and against, the personal representative of the decedent.<sup>126</sup> Section 540.12 states that if an action survives the death of a party, it shall not abate by reason of the death of a party, and that where an action survives, the court, on motion, may substitute the representative.<sup>127</sup> The court compared sections 573.01 and 540.12 against section 525.43 of the probate code, which provides that all lawsuits where a cause of action survives may be prosecuted to completion—despite the death of any party—with the representative being substituted for the deceased party.<sup>128</sup> The court stated that unless there was statutory language nullifying the express language of sections 571.03, 540.12, and 525.43, the cause of action survived to the plaintiff against the personal representative of the decedent.<sup>129</sup>

The appellant attempted to counter the language in the above sections by asserting that, under sections 525.411 and 525.431 of Minnesota's probate code, the district court's jurisdiction over a contract dispute ended with the death of the defendant.<sup>130</sup> The

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123. *Id.* at 325, 37 N.W.2d at 450.

124. *Id.* at 325–26, 37 N.W.2d at 450. Defendant claimed that Minnesota Statutes section 525.411 governed the filing of a claim against a decedent's estate. *Id.* Defendant also asserted that Minnesota Statutes section 525.431, which stated that “no action at law shall lie against a representative for the recovery of money upon any claim required to be filed by section 525.411” was controlling. *Id.* at 327, 37 N.W.2d at 451.

125. *Id.* at 326, 37 N.W.2d at 451. *See also* MINN. STAT. §§ 573.01, 540.12 (2006).

126. *Milner*, 228 Minn. at 326, 37 N.W.2d at 451.

127. *Id.* The court specifically stated that the plaintiff complied with the requirement for substitution set forth in section 540.12. *Id.*

128. MINN. STAT. § 525.43 (1970) (repealed and amended as Minnesota Statutes sections 524.3-803, -806 (2006)).

129. *Milner*, 228 Minn. at 326, 37 N.W.2d at 451.

130. *Id.* at 325, 37 N.W.2d at 450. First Bank also stated that, after the defendant's death, the plaintiff should have filed the contract claim in probate

court ruled that sections 525.411 and 525.431 were not applicable to an action already pending at the time of the defendant's death.<sup>131</sup> Nothing in the language of section 525.411 or 525.431 relates to an action already pending at the time of death, so no conflict existed between the statutes, because section 573.01 gave the plaintiff "an absolute right" to continue the action after the defendant died.<sup>132</sup> The definite language of survival statutes clearly authorized the district court to order the substitution and any other interpretation would lead to "duplication and a multiplicity of actions."<sup>133</sup>

The ruling in *Milner* clarified that sections 573.01 and 540.12 govern a survival action with respect to jurisdiction and the substitution of parties. But it did not clarify the proper procedure to be followed by the parties in proceeding with such action. *Milner* reiterated that the probate court has jurisdiction over a decedent's estate while the district court maintains jurisdiction over the pending action.<sup>134</sup> *Milner* demonstrates how the separate jurisdictional spheres of the district and probate courts can cause confusion and lead to increased litigation to settle a survival action. While *Milner* did clarify which statutes apply to survival actions, the appeal took place after First National was appointed as executor and the plaintiff had filed a motion to substitute. What happens to an action after the death but before a party has been substituted? Parties would benefit from a procedure with clear instructions on how to proceed in an action pending the death of a party.

## V. PROCEDURAL ANALYSIS

### A. Procedure for Wrongful Death Claim: Minnesota Rule 144

Minnesota courts and the legislature have clarified the substantive law of survival actions by stating which actions survive

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court because under section 525.431 she had no authority to proceed against the estate's representative. *Id.* at 327, 37 N.W.2d at 451.

131. *Id.* at 327, 37 N.W.2d at 451 (stating sections 525.411 and 525.423 would be controlling only if there was no action pending at the time of defendant's death).

132. *Id.* (noting that section 525.43 makes express provision for the continuation of survival actions and for substituting the representative of the deceased).

133. *Id.*

134. *Id.*

and in what forum they are litigated. But the procedure for how these actions continue—exactly what steps should occur when a plaintiff or defendant dies—is incomplete. In accordance with section 573.02, Minnesota established a rule of practice governing the procedure for commencing a wrongful death action.<sup>135</sup> Rule 144 of the Minnesota Rules of General Practice is derived from Rule 2 of the former Code of Rules for the District Courts and was adopted shortly after the wrongful death statute itself was made law.<sup>136</sup> According to the rule, an application for the appointment of a trustee of a wrongful death action under section 573.02 shall be made by “the verified petition of the surviving spouse or one of the next of kin of the decedent.”<sup>137</sup> The rule goes on to detail the requirements for inclusion in the petition.<sup>138</sup> The petition required under Rule 144 is common enough that there is a form available that allows the trustee to simply fill in the blanks, provide a notarized signature, and file with the appropriate court.<sup>139</sup>

In the next section, the rule states the notice and hearing requirements for appointing a trustee.<sup>140</sup> The rule even goes so far as to state the language to be used in the caption on the petition.<sup>141</sup> The fourth provision explains the procedure for transferring the action to a different county.<sup>142</sup> The rule also gives a detailed procedure for how the trustee shall handle the distribution of any funds recovered in the action.<sup>143</sup>

As noted, Minnesota provides clear guidance on how to proceed with wrongful death actions. A wrongful death claim cannot, by definition, be filed until after the death of the injured person, so the action is not disrupted by death in the way that a survival action is. A wrongful death action already involves a party

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135. See generally MINN. R. GEN. PRACTICE 144 (2006) (giving detailed explanation of the procedure and timeline for appointing a trustee to represent the next of kin of the decedent via petition).

136. DAVID F. HERR & LAURIE A. KINDEL, GENERAL RULES OF PRACTICE ANNOTATED, 3A MINNESOTA PRACTICE SERIES 267 (2006 ed.).

137. See generally MINN. R. GEN. PRACTICE. 144 (2006).

138. *Id.* at 144.01 (requiring dates and places of decedent’s birth and death, name, age, and addresses of decedent’s surviving spouse and next of kin).

139. Miller & Davis Forms, WL database MILDAV, Form No. 3281 (1998).

140. MINN. R. GEN. PRAC. 144.02 (2006) (stating that the petition will be heard upon such notice and in the manner determined by the court unless: (1) waived by next of kin listed on petition; or (2) court determines it is unnecessary).

141. *Id.* at 144.03 (quoting “[I]n the matter of the appointment of a trustee for the next of kin of \_\_\_\_\_, Decedent”).

142. *Id.* at 144.04.

143. *Id.* at 144.05.

who is motivated to pursue the claim for her own benefit.<sup>144</sup> Since the party pursuing a wrongful death claim will be the one who potentially benefits from the action, it is a reasonable assumption that she will keep the action moving forward. On the other hand, the deceased was the “motivated party” in a survival action. But after the death, a third party is now required to pursue the action to conclusion, even though it will benefit the deceased’s estate and not the third party.<sup>145</sup> This issue is even more drastic if the decedent is the defendant to an action. In this case, it is likely no one will be motivated to act as the personal representative to keep the action moving forward to conclusion. Thus, practitioners handling a survival action must muddle through a confusing labyrinth of conflicting statutes and jurisdictional issues.

*B. General Procedure When a Party Dies Pending Action (En Pendente Lite)*

*1. Minnesota Rule 25*

As described above, Minnesota provides no procedural guidance on handling an action when a party to that action dies before its completion. Instead, a lawyer must rely on the rules and statutes that do exist to decipher how best to continue such an action on behalf of his client.

Rule 17.02 of the Minnesota Rules of Civil Procedure states that if a party to an action is “incompetent” and has an appointed representative, the representative may sue or defend on behalf of the incompetent party. Does the death of a client qualify as his being incompetent? It is unlikely that a deceased client would be treated under Rule 17, because a client’s death is dealt with under Rule 25. But a procedure dealing specifically with handling a survival action would clarify conflicts between different Rules.

The Minnesota Rules of Civil Procedure state that an action that survives the death of a plaintiff shall not abate, but will survive to the substituted representative.<sup>146</sup> Rule 25.01 applies to the substitution of parties after an action has been commenced.<sup>147</sup> But

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144. MINN. STAT. § 573.02 (2006) (stating that recovery in wrongful death action is for “the exclusive benefit of the surviving spouse and next of kin”).

145. SPEISER & ROOKS, *supra* note 16, § 1:13.

146. MINN. R. CIV. P. 25.01.

147. See DAVID HERR & ROGER HAYDOCK, MINN. PRACTICE SERIES, CIVIL RULES

Rule 25.01 does not set forth a specific timeframe for bringing a motion for substitution.<sup>148</sup> It is a generally accepted practice for attorneys in Minnesota to file such a motion for substitution within a “reasonable time” after the death of the party.<sup>149</sup>

According to Rule 25.01, the party requesting substitution must serve the other parties as provided in Rule 5 and give proper notice of hearing in accordance with Rule 4.<sup>150</sup> Additionally, the Rule does not state who may bring the motion, making it difficult for any party to argue prejudice by failure of the other to seek substitution.<sup>151</sup>

Rule 25.01 deals with only half of the problem—the district court. It does not deal with the issue of who should be appointed as the personal representative on behalf of the decedent. By statute, this step is required before anything further can happen on the action once a party dies.<sup>152</sup> The person being substituted in the action in district court should be the personal representative as appointed by the probate court. But these actions do not happen simultaneously, which means that there will be a time when there is no party to the action in district court. And though parties may expect an attorney for the deceased party to notify the court and opposing parties, of the death, there is no requirement for the lawyer to do so.<sup>153</sup>

The death of a plaintiff is not the only issue affecting the

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ANNOTATED 1, at 571 (4th ed. 2006). Rule 3.01 of the Minnesota Rules of Civil Procedure states that an action is commenced when the summons is served on the defendant or date of acknowledgement of mail service or service delivered by the sheriff. MINN. R. CIV. P. 3.01.

148. MINN. R. CIV. P. 25.01. Minnesota does not follow the federal rule requiring a motion for substitution to be made within ninety days of the suggestion of death. *Id.* (citing FED. R. CIV. P. 25.01).

149. *Id.* It has been determined that courts have discretion in determining the definition of “reasonable” related to the substitution of a party following death. *See generally* Willoughby v. St. Paul German Ins. Co., 80 Minn. 432, 83 N.W. 377 (1900); Hunt v. Hoerr, 78 Minn. 281, 80 N.W. 1120 (1899). In *Bisson v. Estate of Dean ex. rel. Eller*, No. A03-2037, 2004 WL 1615219, at \*3 (Minn. Ct. App. 2004), the defendant argued that the estate is not responsible for a claim brought against it because the respondent did not properly substitute the estate after the defendant died before the trial. The court ruled that since Rule 25.01 of the Minnesota Rules of Civil Procedure “does not limit the time within which the motion to substitute must be made,” the district court properly allowed substitution *two years after the trial ended*. *Id.* (emphasis added).

150. HERR & HAYDOCK, *supra* note 147, at 570.

151. *Id.*

152. *See supra* Part IV.

153. HERR & HAYDOCK, *supra* note 147, at 570.

survivability of an action. What happens if the defendant to an action brought under section 573.01 dies? Courts have stated that a cause of action does not exist in the abstract, but against somebody.<sup>154</sup> Therefore, a civil action can only be commenced by serving a summons on the defendant.<sup>155</sup>

In the absence of statutes to the contrary, the death of the defendant will abate a cause of action.<sup>156</sup> Some jurisdictions hold that the death of the defendant terminates any right of recovery unless the statute expressly provides that such action survives.<sup>157</sup> Other jurisdictions claim that the statutes intend to provide compensation to the plaintiff regardless of whether the defendant survives the action.<sup>158</sup>

The Minnesota Supreme Court has ruled that it is proper to make a distinction between proceedings brought against an individual on one hand, and those against his estate on the other.<sup>159</sup> By virtue of the survivorship statute, a claim against a decedent may be brought against the personal representative of the decedent's estate.<sup>160</sup> Once a personal representative has been appointed on behalf of the decedent's estate, all proceedings to enforce the claim are governed by section 524.3-104 of the Minnesota Statutes.<sup>161</sup>

If a party dies before the commencement or completion of an action, the attorney is forced to negotiate a perplexing maze of probate and survival statutes. Rule 4.03 of the Minnesota Rules of Civil Procedure, which governs the service of process on an individual, is silent regarding service upon a deceased individual or his estate.<sup>162</sup> If the defendant dies before the lawsuit is

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154. See, e.g., *Wood v. Martin*, 328 N.W.2d 723, 725 (Minn. 1983).

155. MINN. R. CIV. P. 3.01.

156. See 25A C.J.S. *Death* § 17 (2006). See also 1 C.J.S. *Abatement and Revival* § 147 (stating specifically that tort actions were considered to be for the punishment of the wrongdoer, so that if he died, his personal representative could not be prosecuted for the wrong committed by the deceased).

157. 22A AM. JUR. 2D *Death* § 12 (2006).

158. *Id.*

159. *Wood*, 328 N.W.2d at 724–25 (citing *Poepping v. Lindemann*, 268 Minn. 30, 35, 127 N.W.2d 512, 516 (1964)) (ruling that an action brought by a wife against her husband “survives” against his estate in the event of his death).

160. MINN. STAT. § 524.3-104 (2006) (stating an action to enforce a claim against a decedent's estate, or his successors, may not be revived or commenced until a personal representative has been appointed).

161. *Id.*

162. See MINN. R. CIV. P. 4.01.

commenced, the claim generally abates.<sup>163</sup> But according to the survival statute,<sup>164</sup> an action may still be brought against the personal representative of the decedent's estate.<sup>165</sup> As previously explained, a personal representative is defined as someone who qualifies to serve as such, is appointed by the court, and accepts the appointment.<sup>166</sup> Because the personal representative has the capacity to be sued, he becomes the proper defendant for claims against the decedent's estate.<sup>167</sup>

Minnesota law states that an action may not be revived against a decedent's successors until a personal representative has been appointed.<sup>168</sup> What is the procedure for commencing (thus serving) an action against a decedent when no personal representative has been appointed? In circumstances where prompt action is required to guard and preserve an estate before a personal representative being appointed, a special administrator may be appointed in the interim.<sup>169</sup> According to statute, an appointment may be made informally or formally.<sup>170</sup>

If there is no urgency to the appointment, the court may, after notice and hearing, require a formal proceeding for appointment of the special administrator.<sup>171</sup> In the event of an emergency, the notice requirement may be waived or altered by the court.<sup>172</sup> But in order to appoint a special administrator, the court must find that it is "necessary to preserve the estate or secure its proper administration."<sup>173</sup>

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163. *Zahler v. Manning*, 295 N.W.2d 511, 513 n.2 (Minn. 1980).

164. *See discussion supra* Part III.

165. MINN. STAT. § 573.01 (2006). *See discussion supra* Part III.

166. MINN. STAT. § 524.3-602 (2006).

167. *Van Slooten v. Estate of Schneider-Janzen*, 623 N.W.2d 269, 271 (Minn. Ct. App. 2001) (holding that the decedent's spouse was not properly served when he was not appointed as a personal representative).

168. MINN. STAT. § 524.3-104 (2006). *See also Van Slooten*, 623 N.W.2d at 271 (stating that an attempt to commence a personal injury action against an auto driver who died was ineffective as served against the deceased's husband when no personal representative had been appointed).

169. MINN. STAT. § 524.3-614 (2006).

170. *Id.* An informal appointment is done by filing an application with the Probate Registrar who then makes the appointment "when necessary to protect the estate of the decedent." *Id.* § 524.3-614, subdiv. 1. Informal appointment must be made before the appointment of a personal representative, requires no notice, and grants the special administrator all the same powers to handle the estate as a personal representative. *Id.* § 524.3-614, subdiv. 2.

171. *Id.* § 524.3-614, subdiv. 2.

172. *Id.*

173. *Id.* The formally appointed administrator is not required to account for

The proper procedure is to request the probate court to appoint a special administrator and then to serve him with notice of the action. Of course, this assumes the party bringing suit knows the defendant died before service.

## 2. *Federal Procedure*

In analyzing an issue, it is helpful to look to other jurisdictions for guidance. But no other state has a procedure governing the interplay of the district court and probate court in survival actions. Therefore, this Note addresses the procedure followed by the federal courts as a comparison to Minnesota's procedure for survival actions.

A substitution of parties is authorized in an action in federal court where a party dies and the claim is not extinguished.<sup>174</sup> The death must be "suggested upon the record" so that the action proceeds against or in favor of the surviving party.<sup>175</sup>

The federal courts have rules governing the substitution of parties subsequent to a death.<sup>176</sup> If a party dies but the claim survives, the court may order substitution of parties upon proper motion made no later than ninety days after the death is suggested on the record.<sup>177</sup> Courts have been forced to decide what constitutes a suggestion of death which would trigger the ninety-day period.<sup>178</sup>

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assets to a general administrator as is required of the informally appointed special administrator. *Id.*

174. FED. R. CIV. P. 25(a)(1). A survival action is governed by the survival statute of the state in which the action arose. *In re Daniel's Estate*, 208 Minn. 420, 426, 294 N.W. 465, 468 (1940).

175. FED. R. CIV. P. 25.

176. *Id.*

177. *Id.* 25(a)(1). Until 1963, federal procedure required a substitution to be made within two years starting from the *time of death*, otherwise the action was dismissed as to the deceased party. Benjamin Kaplan, *Amendments to the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 HARV. L. REV. 801, 806-07 (1964) (emphasis added). But requiring a substitution within a specific time dating from the death could cause hardship to the deceased's action. *Id.* For instance, the party's death may not come to the attention of the other party or to his own counsel. *Id.* at 807. And the penalty of dismissal may be out of proportion to the offense. *Id.*

178. *Al-Jundi v. Rockefeller*, 8 F.R.D. 244 (W.D.N.Y. 1980) (holding that suggestion of death was insufficient, as it failed to list names of executors to the estate); *but see Yonofsky v. Wernick*, 362 F. Supp. 1005, 1011 (S.D.N.Y. 1973) (ruling that suggestion of death was sufficient, despite failure to identify person to be substituted).

## VI. ANALYSIS

*A. Jurisdictional and Procedural Issues Involving Actions Pending Under Minnesota's Survival Statute*

The difference in jurisdiction between probate and district courts leads to a gap in adjudicating survival actions. This occurs because the original action was filed in, and is governed by, the district court. But administering the deceased's estate, which includes the surviving lawsuit, appears to be the exclusive jurisdiction of the probate court. Courts have stated that when a court of competent jurisdiction obtains jurisdiction of both the subject matter and the parties to a cause, "its authority continues until the matter is finally disposed of."<sup>179</sup> No other court is at liberty to interfere with such action.

Therefore, the Minnesota Supreme Court has reiterated the principle that once an action is before the district court, the probate court cannot interfere and vice versa.<sup>180</sup> And the court has ruled that the exclusive jurisdiction over the estate of the deceased enjoyed by the probate court is "inclusive of both settlement and the determination of the person to whom property passes."<sup>181</sup>

Due to this disparity in jurisdictions, those left behind to continue an action on behalf of the deceased are confronted with an untenable situation. The action cannot continue in district court until the probate court appoints a personal representative.<sup>182</sup>

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179. *Shapiro v. Larson*, 206 Minn. 440, 444, 289 N.W. 48, 50 (1939).

180. *See generally Vesey v. Vesey*, 237 Minn. 10, 53 N.W.2d 809 (1952).

Since the probate court has *exclusive original* jurisdiction to adjudicate and determine whether a person qualifies as an heir, devisee, or legatee who may lawfully take a share of a deceased person's estate, it follows that the district court is wholly without such original jurisdiction and may not, by injunction or otherwise, impair or otherwise interfere with the probate court's original exercise thereof. In the settlement and distribution of the estates of deceased persons, the district court has only appellate jurisdiction, with the sole exception that it may exercise a *purely ancillary* jurisdiction *to aid* (but not to controvert or obstruct) the probate court in the performance of its proper functions in those special cases where, without such aid, the probate court would manifestly be unable to afford an adequate remedy for an alleged wrong to the estate, the heirs, legatees, or creditors.

*Id.* at 13–14, 53 N.W.2d at 812 (emphasis added).

181. *Id.* at 13, 53 N.W.2d at 811 (citing *In re Estate of Peterson*, 202 Minn. 31, 277 N.W. 529 (Minn. 1938)).

182. *See supra* Part IV for a discussion of probate and district court jurisdiction.

If the probate court has exclusive jurisdiction over this process, how does the district court learn about the death or decide how the action should continue? By whom, on behalf of whom, and on what timeline does the action continue?

This confusion is unique to survival actions because wrongful death actions are not created *until* the death of the injured party. It is the death that created the action, which means the wrongful death lawsuit is filed and adjudicated completely in district court. In addition, Rule 144 of the Minnesota Rules of General Practice exists to make the path of a wrongful death suit easier to discern by all parties involved in the action.<sup>183</sup>

Minnesota law has adopted the federal procedure for substitution of parties after death, but neglected to enact any procedure for attorneys or courts to follow with regard to survival actions. The lack of a clear procedure, and the resulting confusion, not only leads to further litigation but also creates a situation in which an attorney could be disciplined for violating the rules of professional conduct.

*B. Issues Related to Attorney's Actions as Governed by the Rules of Professional Conduct*

The Rules of Professional Conduct, as adopted by Minnesota, govern the actions of attorneys practicing in this state. Most lawyers practice with an eye toward following these rules while working to diligently resolve a matter for their clients. But the lack of procedure governing the proper handling of a survival action puts an attorney at risk of discipline for violating the rules.

An attorney is required to act with "reasonable diligence and promptness" when representing a client.<sup>184</sup> Minnesota Rules of Professional Conduct, Rule 1.3, requires an attorney to pursue the client's matter despite "opposition, obstruction, or personal inconvenience to the lawyer" and to act with commitment and zeal on behalf of the client.<sup>185</sup> Rule 1.3 also requires a lawyer to carry a matter "through to conclusion" unless she is terminated by the client.<sup>186</sup>

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183. *See supra* Part V.A.

184. MINN. RULES PROF'L CONDUCT R. 1.3 (2005).

185. *Id.* *See also In re Anderson*, 546 N.W.2d 298, 298 (Minn. 1996) (giving attorney public reprimand and two-year supervised probation for neglecting a legal matter).

186. MINN. RULES PROF'L CONDUCT R. 1.3 (2005).

Minnesota Rules of Professional Conduct, Rule 1.4, states that a lawyer shall promptly inform the client of any circumstance requiring the client's consent, consult with the client regarding objectives, and keep the client reasonably informed about the status of the matter.<sup>187</sup> How does an attorney comply with these rules if he does not have a client—or is unsure who the client is? The rule requires the lawyer to promptly consult with the client on decisions deemed to be the province of the client.<sup>188</sup> When a lawyer receives a settlement offer from opposing counsel, he is required to promptly inform the client regarding whether to accept such offer.<sup>189</sup> This is not possible if the client has died and no personal representative has been appointed to represent the decedent. The situation is further complicated by the fact that there is no set timeframe in which the probate court must appoint a personal representative. There is no guidance for an attorney handling a claim after his client dies but before a personal representative, or new client, has been appointed. The attorney is caught between the jurisdiction of the district court, which is unable to handle matters related to the deceased client's estate, including the lawsuit, and the probate court, which is now required to become involved in a matter properly before the district court by appointing a "new client" before the claim may proceed.

Attorneys have reason to fear sanctions when handling survival actions: attorneys who have been found in violation of the professional rules when handling probate matters have been subject to discipline.<sup>190</sup> While death of the client would most likely be considered a mitigating factor in a case where an attorney has been brought up on disciplinary charges, she would still incur the damage of having to defend the claim. A specific procedure governing such actions would insulate her from this possibility by giving her a specific path to follow after her client dies.

#### VII. A PROCEDURE THAT WILL RESOLVE THE ISSUE

A survival action is for the benefit of the estate of the

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187. *Id.* R. 1.3.

188. *Id.* R. 1.4 cmt.

189. *Id.*

190. *In re Ruhland*, 689 N.W.2d 167, 168 (Minn. 2004) (upholding sanction giving attorney public reprimand and two-year probation for failing to act with diligence or adequately communicate with client in probate matter).

deceased.<sup>191</sup> The Minnesota Supreme Court stated that there is no reason why an estate that has suffered an injury should not be compensated, whether or not the injured party survives the outcome of the trial.<sup>192</sup> Since the deceased party filed the lawsuit and continued to pursue it until death intervened, it logically follows she would want to see it to conclusion. This assumption calls for enacting a procedure to facilitate the continuation of the action until it has been satisfactorily concluded for *her* benefit. The decedent cannot speak for herself, so it is up to her lawyer to speak for her and handle the matter upon her death.<sup>193</sup> It is possible that only her lawyer will be aware of the deceased client's goals with regard to the action, so he should be given the opportunity to convey those wishes to whoever is appointed personal representative. An official procedure by which the action is continued, both in probate and district court, will allow for the possibility that the deceased client's wishes with regard to the action will be honored.

In order to assist practitioners in dealing with the jurisdictional issues between district court and probate court<sup>194</sup> when handling a survival action, Minnesota should adopt the following procedure.

The procedure would require the deceased's attorney to file a "death notification" simultaneously with both the probate court and the district court in which the original action is being heard.<sup>195</sup> Further, the procedure would require the attorney to file such notification within ninety days of learning of the client's death.<sup>196</sup> While this does place responsibility for handling the matter with the attorney, it is possible that he may be the only person who

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191. See SPEISER & ROOKS, *supra* note 16, § 1:13.

192. See *Johnson v. Consol. Freightways, Inc.*, 420 N.W.2d 608, 612 (Minn. 1988)

193. The author recognizes that some deceased parties to pending litigation may be acting *pro se*. But a procedure assisting in such a matter is beyond the scope of this Note.

194. See discussion *supra* Part IV.

195. Under Minnesota law, while the probate court has *exclusive* jurisdiction in determining how decedents' estates are to be administered, probate court also has *concurrent* jurisdiction of "any other action" to which an estate, "through a personal representative," may be a party. MINN. STAT. § 524.3-105 (2006) (emphasis added). Therefore, it will not violate statutory law to enact a procedure requiring the district court and probate court to work together in handling a survival action. *Id.*

196. Requiring the attorney to file within ninety days of *learning* of his client's death will avoid the issues associated with instituting a deadline, such as that discussed in footnote 177, commencing with the death itself.

knows about both the lawsuit and the death, so he should be entrusted with the task of at least allowing the lawsuit to proceed if and when a personal representative is appointed.<sup>197</sup> Under the Minnesota Rules of Professional Conduct, an attorney is already required to maintain communication with a client.<sup>198</sup> Therefore, if the attorney is handling the matter properly there should not be too much of a delay in learning of the death.

While Minnesota does have a policy for substituting a deceased party in a lawsuit, there is no procedural deadline for filing the substitution of party.<sup>199</sup> The courts allow the filing to take place within a “reasonable time.”<sup>200</sup> But the “reasonable time” standard is relatively vague and does not provide clear guidance to attorneys handling such matters.<sup>201</sup> A “hard” deadline of ninety days in which an attorney must simultaneously notify the district and probate courts of the death will then trigger a timeframe in which the parties must file the Rule 25.01 substitution required by the Minnesota Rules of Civil Procedure. Once the attorney files the notice of death, he, and the party he represents, would have sixty days to file a substitution of party. Minnesota Rules of Civil Procedure, Rule 25.01, requires notice to be served upon all parties to the action. Therefore, under the procedure described above, the district court and the parties to the action are on notice that a party died, the court was informed of the death, and the party suffering the loss is dealing with the matter.

The procedure takes the additional step of informing the probate court of the necessity of appointing a personal

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197. The procedure should also clearly state the compensation to which an attorney handling such an action is entitled. Since there is no clear “client” in a survival action, the attorney is at risk of being unable to collect fees for time spent on the matter. The procedure shall state that the attorney is to be fairly compensated by the estate of the deceased until such time as a personal representative is appointed. Once a personal representative is appointed, he will become the client and the attorney will again have a proper “party” from whom he may obtain proper compensation.

198. MINN. RULES PROF'L. CONDUCT R. 1.3 (2005).

199. MINN. R. CIV. P. 25.01.

200. *Id.* See generally *Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 437, 83 N.W. 377, 379 (1900) (denying appellants' claim that court should have denied substitution due to creditors' delay in making their application for substitution and noting that timeframe to make application is within the court's discretion).

201. This was demonstrated in *Bisson v. Estate of Dean ex. rel. Eller*, in which the appellate court allowed substitution two years after the trial ended. No. A03-2037, 2004 WL 1615219, at \*3 (Minn. Ct. App. July 20, 2004).

representative to handle the matter in the deceased's "absence." The district court, upon learning of a party's death, shall issue an order to the survivors to the suit to submit a motion to the probate court to appoint a personal representative within thirty days of receiving the substitution of party notice. Since it is entirely possible that the probate court will not appoint a personal representative within thirty days, filing a motion to have one appointed within the deadline will avoid the default deadline to file for a substitution. A personal representative must be appointed before the district court will grant a motion for substitution.<sup>202</sup> If the motion for substitution that is required to be filed with the district court under Rule 25.01 must be done within sixty days of filing the notice of death, the thirty-day deadline to file for the appointment of a personal representative is fair to allow the probate court to be in step with the district court.

If the survivors to the suit cannot timely agree on a personal representative, the probate court has the power to appoint a special administrator.<sup>203</sup> Generally, the duties of the special administrator are described as those of the personal representative.<sup>204</sup> Because the probate court has the ability to appoint either the personal representative or the special administrator, the main procedural issue in a survival action is the separate jurisdictions of the probate and district courts.<sup>205</sup>

The stalemate created when a party dies during a lawsuit is analogous to a claim pending when a corporation files for bankruptcy. According to bankruptcy law, once a corporation files for protection, an automatic stay goes into effect.<sup>206</sup> The automatic stay under bankruptcy law is a temporary injunction which prevents creditors from taking further action to recover their property.<sup>207</sup> The stay acts to preserve the status quo of the "deceased corporation" at the time bankruptcy was filed (or the "party died") and is "intended to give debtors a breathing spell to put their

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202. MINN. R. CIV. P. 25.01.

203. MINN. STAT. § 524.3-614 (2006). Minnesota law states that the person named as executor in the will is to be named as the special administrator. *Id.* § 524.3-615.

204. *Id.* § 524.3-616 (stating that the special administrator must manage and preserve the assets of the estate).

205. *See supra* Part IV.

206. 11 U.S.C. § 362(a) (2000).

207. Timothy P. Branigan & Lawrence D. Coppel, *Pitfalls for the Unwary: When to File a Bankruptcy Case*, 35-Oct. Md. B.J. 24, 26 (2002).

financial affairs in order.”<sup>208</sup>

The procedure described in the beginning of this section to assist attorneys and parties in handling survival actions should act in the same manner as the automatic stay does in bankruptcy actions. By preserving the status quo of a lawsuit, such a rule allows the parties a “breathing spell” to take stock of the lawsuit and the next steps to take when a party dies. The survivors to the suit should be given a reasonable amount of time to assess the deceased’s claim and decide whether to pursue it further and whom to appoint as the personal representative. It is possible that the heirs of the deceased knew nothing, or very little, about the pending claim and should be given the proper “breathing room” to make an informed decision on whether to pursue the action.

But the district court should also be kept informed of the new situation. Generally this is done by filing a motion to substitute parties.<sup>209</sup> The motion to substitute requires a personal representative to be appointed as the substitute for the deceased party.<sup>210</sup> Therefore, if a personal representative has not yet been appointed—which is highly likely, as this requires the cooperation of the probate court—a motion for substitution cannot be filed with the district court. As previously described, the probate court does have the authority to appoint a special administrator to handle the deceased’s matters until a personal representative is appointed.<sup>211</sup> This does not resolve the issue of having two courts with separate jurisdictions involved in the matter. There is no timeframe in which the probate court must appoint the special administrator.<sup>212</sup> As a result, the attorneys and parties to the action are still in limbo while waiting for the probate court to act. A procedure that acts to immediately preserve the status quo upon the death of a party would alleviate the pressure felt while waiting for the probate court to act. Requiring the deceased’s attorney to file a simultaneous motion notifying both the probate and district courts within ninety days of the death of the party would ensure that the two courts are on the same page with regard to the status of the lawsuit. The probate court should then immediately appoint a special administrator to allow the matter to effectively be “stayed”

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208. *Id.*

209. MINN. R. CIV. P. 25.01(a).

210. *Id.*

211. MINN. STAT. § 524.3-614 (2006).

212. *See id.*

until the proper personal representative is appointed.

The Bankruptcy Code states that in order to remove the automatic stay, a hearing must be held within thirty days.<sup>213</sup> This reduces unnecessary delay and forces the parties involved to handle a matter they may otherwise ignore or allow to expire. A “dead corporation” most likely has no more motivation to handle a “lingering” claim against it than does a third party to handle a survival action on behalf of a dead person.<sup>214</sup> If a party to a survival action wants to “remove” the court-appointed personal representative, it must file a motion before both the probate court and the district court seeking removal. But a party should not simply seek the removal of the court appointed representative but should simultaneously file a motion to appoint a new one. This will force the party to handle the matter in a quick and efficient manner.

Under the Bankruptcy Code, “any willful violation of a stay provided by this section shall recover actual damages.”<sup>215</sup> Sanctions serve as an additional method of forcing parties to deal in a proper manner with each other and the courts in the absence of an original “party.” Similarly, Minnesota’s procedure for handling a survival action should include sanctions against a party who attempts to move the action forward without utilizing the proper procedure. If a party learns of another party’s death during the action and attempts to improperly settle the matter (e.g., settling with the estate instead of the properly appointed personal representative), or files discovery with the district court in an attempt to gain an underhanded advantage, the party, and the attorney, should be sanctioned accordingly. The policy for having a procedure governing survival actions is to assist the deceased’s attorney, since the client can no longer speak for himself. Therefore, an attempt to take advantage of the death by the opposing party should be dealt with through appropriate sanctions.

This would give attorneys a clear path to follow and allow them to avoid possibility of violating Rules of Professional Conduct.<sup>216</sup>

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213. 11 U.S.C. § 362(c)(4)(B) (2000).

214. If the deceased is a defendant in a lawsuit, the heirs will most likely have even less motivation to be appointed as the personal representative to defend against the claim.

215. 11 U.S.C. § 362(k)(1).

216. *See supra* Part V.

2007]

WHEN A CLIENT DIES *EN PENDENTE LITE*

1223

### VIII. CONCLUSION

The Minnesota Supreme Court has stated that the legislature has the authority to regulate the practices of the probate court as long as it does not deprive the court of its constitutional jurisdiction.<sup>217</sup> Therefore, it is not a violation to enact rules to govern the procedure of an action after a client dies. A concrete procedure would give Minnesota practitioners a clear path to follow in working toward a beneficial conclusion for their deceased clients.

The procedure outlined in this Note allows all parties involved to be notified in a timely manner of the death of a party. In addition, it puts both the district and probate courts on notice of the death and of the need to substitute parties. This allows both courts to ensure that the status quo of the lawsuit is preserved pending the appointment of the proper personal representative.

The emergency appointment of a representative to appear on behalf of the deceased client prevents the matter from defaulting due to inaction. And the opposing party still has the opportunity to settle the matter by negotiating with the personal representative appointed by the court, with the court having final approval of the settlement. No other jurisdiction has enacted rules specific to handling a survival action. Thus, Minnesota has an opportunity to act as a model for the rest of the country.

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<sup>217</sup>. State *ex rel.* Preis v. O'Brien, 186 Minn. 432, 433, 243 N.W. 434, 435 (1932).