



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

MAY 27 2025

DON KEENAN,

Plaintiff-Appellee,

v.

TODD RUSS, in his capacity as the Treasurer
of the State of Oklahoma

Defendant-Appellant.

JOHN D. HADDEN
CLERK

No: SD-122686

Received:	5-27-25
Docketed:	
Marshal:	
COA/OKC:	
COA/TUL:	

APPELLANT'S RESPONSE TO STATEMENT/BRIEF ON EFFECT OF APPELLEE'S DEATH

Appellee's death, for which the State again offers its condolences, has created a procedural quandary because there is no settled law or procedure in Oklahoma on how to address the death of an appellee during the early stages of an appeal. As explained below, Appellant believes the most prudent approach is for the Court to use its authority under Rule 1.1(c) of the Oklahoma Supreme Court Rules to apply the established procedures of 12 O.S. § 2025 to require Appellee to be substituted. Alternatively, if the Court does not believe it has the power to order substitution under existing statutes or rules, which is certainly possible, then abatement of the case and vacation of the underlying judgment is appropriate under the common law.

I. No Attorney Is Currently Representing Appellee in This Case.

As a preliminary matter, Appellee's former counsel acknowledges the black-letter law that his authority to represent Appellee "cease[d] upon the death of that party." *Campbell v. Campbell*, 1994 OK 84, ¶ 25, 878 P.2d 1037, 1043. And the "attorney does not act for the deceased's representatives or successors until those successors are officially appointed as representatives and after they then retain the deceased's attorney." *Id.* Consequently, as odd as it may seem, there is no one currently representing Appellee in this appeal, and Appellant will have no choice but to move to strike

subsequent filings made on Appellee's behalf. Therefore, as a practical matter, absent a procedure for substitution, Appellee can no longer defend the trial court's judgment in this case.

II. Section 1081 of Title 12 Does Not Apply to This Case.

Appellee's former counsel cites 12 O.S. § 1081 to argue that no substitution is required. But in *Gardner v. Boston*, 1977 OK 201, ¶ 14, 571 P.2d 437, 440, this Court made clear that 12 O.S. § 1081 relates "to those cases where a trial court judgment has become final without appeal or judgments that have become final on appeal." While Appellee's former counsel discounts *Gardner* because it predates the Oklahoma Pleading Code, the text of 12 O.S. § 1081 has remained unchanged since *Gardner* was decided in 1977. Therefore, this Court's interpretation of 12 O.S. § 1081 in *Gardner* remains good law. The present dispute involves an appeal that is not yet final. Accordingly, Section 1081 of Title 12 does not and cannot apply to this unfortunate development.

III. Appellant Believes the Procedures Outlined in 12 O.S. § 2025 Should Govern Substitution. Alternatively, Under the Common Law Rule, the Case Must Be Abated and the Judgment Below Vacated.

In *Gardner*, this Court held that 12 O.S. § 1080 applied "to actions pending in the trial court or cases pending on appeal." 1977 OK 201, ¶ 14, 571 P.2d at 440. But as Appellee's former counsel accurately states, 12 O.S. § 1080 was repealed in 1984 and replaced by the Oklahoma Pleading Code. Section 2025 of Title 12 appears to be the successor to 12 O.S. § 1080.

It is unclear whether 12 O.S. § 2025 applies to an appeal. Section 2001 of Title 12 indicates that the Oklahoma Pleading Code, which includes Section 2025, "governs the procedure in the *district courts* of Oklahoma in all suits of a civil nature whether cognizable as cases at law or in equity except where a statute specifies a different procedure." (emphasis added). But the statutes are silent as to whether these procedures also apply to appeals. And there is no apparent Oklahoma analogue to Rule 43 of the Federal Rules of Appellate Procedure, which governs substitution of parties during a federal appeal. Thus, the application of the procedures outlined in 12 O.S. § 2025 to appeals appears

to be unsettled and uncertain.

Rule 1.1(c) of the Oklahoma Supreme Court Rules provides that “[a]ny point of practice or procedure which stands unsettled by statutory or decisional law and is not specifically addressed by these rules will be resolved by the Supreme Court as the orderly administration of legal process may require.” Consequently, considering that this Court previously held that the predecessor to 12 O.S. § 2025—12 O.S. § 1080—applied “to actions pending in the trial court or cases pending on appeal,” *Gardner*, 1977 OK 201, ¶ 14, 571 P.2d at 440, it makes sense to apply the procedures in 12 O.S. § 2025 to substitute a deceased appellee during the appeal. The fact that legal counsel cannot represent a deceased appellee until retained by the deceased appellee’s authorized successor or representative also suggests that this is the appropriate procedure.

Alternatively, if the Court does not believe it has the power to order substitution under existing statutes or rules, which is certainly possible, then the common law governs. *See Tucker v. ADG, Inc.*, 2004 OK 71, ¶ 19, 102 P.3d 660, 668 (“the common law remains in full force and effect unless a statute explicitly or by necessary implication provides to the contrary” (internal citations omitted)). “At common law all pending actions abated by the death of either party, regardless of the fact that the cause of action might survive. Where the cause of action did survive, it was necessary to bring a new action.” *State ex rel. Mitchell v. City of Shawnee*, 1934 OK 203, ¶ 22, 31 P.2d 552, 556. “[A]n abatement is an overthrow of a suit, the equivalent of a dismissal, resulting from the fact that the defendant pleads some matter that defeats the action, either for the time being or permanently.” 1 AM. JUR. 2D ABATEMENT, SURVIVAL, AND REVIVAL § 1. Further, “an action which has been abated is dead, and any further enforcement of the cause of action requires the bringing of a new action provided that a cause of action remains.” *Id.* Consequently, the default common law rule is to declare this case abated and preclude further enforcement of the trial court’s judgment, *i.e.*, vacate it. Therefore, if the Court does not believe it has the power to order substitution under existing statutes

or rules, then this case must be abated and the trial court's judgment vacated.

IV. Standing Is Not Relevant to the Procedure for Substitution.

Appellee's former counsel spends a large portion of his brief attempting to justify standing of Appellee or some hypothetical future party. But the issue currently before the Court is the effect of Appellee's death on the appeal, not whether some hypothetical future party has standing.

Appellant certainly reserves the right to continue challenging standing in this case. In fact, Appellant does not believe any party, inclusive of Appellee, has standing because there has been no showing that the Energy Discrimination Elimination Act ("the Act"), codified at 74 O.S. §§ 12001–12006, "**will result** in an illegal expenditure of public funds or the imposition of an illegal tax." *Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs.*, 2002 OK 71, ¶ 10, 55 P.3d 1072, 1078 (emphasis added). Under Appellee's claim, the alleged unlawful activity is that Oklahoma Public Employee Retirement System's ("OPERS") funds are not being used for their proper and exclusive purpose of benefiting pensioners. But in August 2023, the Trustees of OPERS voted 9–1 to exempt the OPERS pension system from the Act's divestment requirements. *See* Paul Monies, *Oklahoma Public Employees Pension System Takes Exemption to Banking Law*, OKLAHOMA WATCH (Aug. 23, 2023).¹ Thus, there can be no possible taxpayer standing to challenge the Act because there is no evidence that the Act will result in an illegal expenditure of public funds or imposition of an illegal tax.

Nevertheless, the Court does not have to address standing at this point because the issue presented is simply the effect of Appellee's death on the appeal.

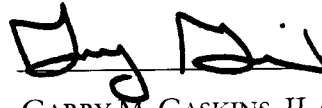
CONCLUSION

Appellant believes the most prudent approach is for the Court to use its authority under Rule 1.1(c) to apply the established procedures of 12 O.S. § 2025 to require the Appellee to be

¹ Available at <https://oklahomawatch.org/2023/08/23/oklahoma-public-employees-pension-system-takes-exemption-to-banking-law/>.

substituted. Alternatively, if the Court does not believe it has the power to substitute a party during an appeal under existing statutes or rules, then abatement of the case and vacation of the underlying judgment is appropriate under the common law.

Respectfully submitted,



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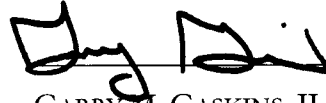
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CERTIFICATE OF SERVICE

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