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IN THE
COURT OF APPEALS OF INDIANA

The Estate of Jeffery Bichler by Personal Representatives Jennifer Ivy and Tyler Bichler,

Appellant-Plaintiffs,

v.

Wanda Bichler,

Appellee-Defendant,

and

The Estate of Wanda Bichler by Personal Representatives Kristie Cundiff and Linda Strickland,

Appellee-Intervenor.

February 1, 2022

Court of Appeals Case No. 21A-CT-752

Appeal from the Gibson Superior Court

The Honorable Robert D. Krieg, Judge

Trial Court Cause No. 26D01-1911-CT-1653

Molter, Judge.

[1] Jennifer Ivy and Tyler Bichler sued their stepmother, Wanda Bichler, alleging she killed their father, Jeffrey Bichler. Wanda then died, and her estate ("Wanda's Estate"), through its personal representatives, intervened in the lawsuit. Wanda's attorney, purporting to act on her behalf rather than on behalf of Wanda's Estate or its personal representatives, moved to dismiss Jennifer and Tyler's complaint under Trial Rule 12(B)(2) (lack of personal jurisdiction), Trial Rule 12(B)(6) (failure to state a claim), and Trial Rule 12(B)(7) (failure to join a necessary party) based on their failure to add the personal representatives of Wanda's Estate as defendants. The trial court granted the motion and dismissed the case, but dismissal following a defendant's death is evaluated under Trial Rule 25 and Trial Rule 41(E), not Trial Rule 12, so we reverse.

Facts and Procedural History

[2] Jeffrey Bichler died on November 17, 2017. At the time, he was married to Wanda Bichler and had two adult children from a previous relationship—Jennifer Ivy and Tyler Bichler. Wanda was a beneficiary for approximately $300,000 in benefits from Jeffrey's life insurance policy, and Jennifer and Tyler were named as personal representatives of his estate. Following Jeffrey's death, the life insurance company filed an interpleader action in federal court and deposited the life insurance proceeds with the court.

[3] Later, Jennifer and Tyler, in their individual capacities, filed a wrongful death lawsuit against Wanda on November 7, 2019. They alleged that Wanda shot and killed Jeffrey so she could collect his life insurance proceeds. Wanda

denied killing Jeffrey and filed a counterclaim for defamation in December 2019. Soon after, Wanda passed away on January 30, 2020. The Gibson Circuit Court appointed Kristie Cundiff and Linda Strickland as joint personal representatives of Wanda's estate on April 2, 2020.

[4] After Wanda's death, the parties in the federal interpleader action agreed to dismiss that case and transfer the life insurance proceeds from the federal court to the Gibson County Clerk for distribution following the resolution of Jennifer and Tyler's lawsuit. On April 8, 2020, Jennifer and Tyler amended their Wrongful Death Complaint to add a second count for a state interpleader action for the life insurance proceeds. The amended complaint continued to name Wanda as the defendant rather than the recently appointed personal representatives of her estate.

[5] Later that month on April 29, Wanda's estate moved to intervene on the basis that Wanda, "who was the original Defendant in this action, passed on or about January 30, 2020." Appellant's App. Vol. 2 at 38. The trial court granted that unopposed request. Then, on June 5, 2020, Wanda's estate moved to dismiss the underlying lawsuit pursuant to Indiana Trial Rules 12(B)(2), 12(B)(6), and 12(B)(7) based on the plaintiffs' failure to name the personal representatives of Wanda's Estate as defendants. Jennifer and Tyler opposed the motion to dismiss, and they amended their Wrongful Death Complaint for a second time, adding a claim seeking a constructive trust. Again, they only named Wanda as the defendant, and they did not name the personal representatives of her estate.

[6] On July 28, 2020, the trial court dismissed Jennifer and Tyler's complaint, citing Indiana Trial Rule 12(B), and they now appeal.

Discussion and Decision

[7] The trial court granted the request of Wanda's Estate to dismiss the plaintiffs' complaint under Trial Rule 12(B) without specifying which of the rule's subparts it believed compelled dismissal among those Wanda's Estate cited—Trial Rule 12(B)(2) (lack of personal jurisdiction), Trial Rule 12(B)(6) (failure to state a claim), or Trial Rule 12(B)(7) (failure to join a necessary party). When a trial court grants a motion to dismiss without identifying which of the movant's grounds the trial court accepted, we review all the bases cited. *Lawson v. First Union Mortg. Co.*, 786 N.E.2d 279, 281 (Ind. Ct. App. 2003).

[8] We explain below why none of these subparts warrant dismissal, but, before doing so, we also explain that a threshold error was that a dismissal based on the plaintiffs' failure to substitute the personal representatives of Wanda's Estate as defendants should be evaluated under Trial Rule 25 (governing motions to substitute) and Trial Rule 41(E) (governing dismissals for failure to prosecute or comply with court orders), not Trial Rule 12 (governing defenses based on the pleadings). Indeed, while the motion to dismiss was based on Trial Rule 12, much of the analysis in the appellee's brief is devoted to Trial Rule 25.

I. Motions to Substitute Following a Defendant's Death

[9] When the sole defendant in a personal injury or wrongful death suit dies, that individual ceases to be a party. *See, e.g.*, *Morgan v. Muldoon*, 82 Ind. 347, 352 (1882) ("But as, by his death, he ceased to be a party . . . ."); *cf. Atkins v. City of Chicago*, 547 F.3d 869, 872 (7th Cir. 2008) ("The referent of 'plaintiff' is apparently the deceased William Atkins, though he had ceased, upon his death, to be a party."). The matter is then stayed so that the proper parties may be substituted. *See generally* 1 Am. Jur. 2d Abatement, Survival, and Revival § 44 ("A deceased person cannot be a party to a legal proceeding and the effect of the death is to suspend the action as to the decedent until his or her legal representative is substituted as a party."). The cause of action does not abate. *Horejs v. Milford*, 117 N.E.3d 559, 565 (Ind. 2019) (stating that a cause of action does not abate merely because one of the parties died). By statute, "[i]f an individual who is . . . liable in a cause of action dies, the cause of action survives and may be brought . . . against the representative of the deceased party," with certain exceptions that do not apply here. Ind. Code § 34-9-3-1(a).

[10] When the defendant is not a public official sued in an official capacity, Ind. Trial Rule 25(F), a "motion for substitution may be made by the court, any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons." Ind. Trial Rule 25(A)(1); *see also* Ind. Code § 34-9-3-1(b) (recognizing that "the court, on motion, may allow the action to be continued

by or against the legal representative or successors in interest of the deceased"). "If an action is continued against the legal representatives or successors of a defendant, a notice shall be served on them as in the case of an original notice." Ind. Code § 34-9-3-2.

[11] Indiana Trial Rule 25 largely tracks Rule 25 of the Federal Rules of Civil Procedure. But there is one difference that is important in this case. Rule 25 in the federal rules provides that if the motion to substitute "is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." Fed. R. Civ. P. 25(a)(1). There is no such deadline in our Trial Rule 25(A)(1), and our Supreme Court removed a similar sentence, which read:

> Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, an action pending before judgment shall be dismissed as to the deceased party.

2A Ind. Prac., Rules Of Procedure Annotated R. 25 (4th ed.).

[12] Although Indiana did not adopt the deadline for filing a motion to substitute, the obligation to substitute the proper defendant may still be triggered by filing a Suggestion of Death, which puts everyone on notice that the defendant has died. *See, e.g.*, 10 Ind. Prac., Procedural Forms With Practice Commentary § 57.5 (3d ed.) (providing a form, "Suggestion of Death," for use in Indiana state courts). The trial court may impose a deadline to file the motion, as some

federal courts do, *see, e.g.*, *Russell v. City of Milwaukee*, 338 F.3d 662 (7th Cir. 2003) (involving case in which the trial court set a deadline for substitution), and a party may move for an extension of that deadline when warranted under Trial Rule 6, *see, e.g.*, *Atkins*, 547 F.3d at 871 ("[T]he 90-day deadline for making the motion [to substitute] may be extended pursuant to Rule 6(b)."). If the plaintiff does not comply with the trial court's order, then the trial court can consider dismissal under Trial Rule 41(E)'s framework for dismissing cases based on the failure to comply with court orders. *See Wright v. Miller*, 989 N.E.2d 324, 327–28 (Ind. 2013) (discussing Trial Rule 41(E)'s framework for dismissing cases for failure to comply with court orders). Otherwise, if there is no scheduling order, when a plaintiff is put on notice that the sole defendant has died, and the proceedings are therefore suspended, dismissal based on the plaintiff's failure to revive the proceedings with appropriate haste may be evaluated under Trial Rule 41(E)'s framework for failing to prosecute a claim. *See Chapo v. Jefferson Cnty. Plan Com'n*, 926 N.E.2d 504, 508 (Ind. Ct. App. 2010) ("The purpose of Indiana Trial Rule 41(E) is to ensure that plaintiffs will diligently pursue their claims.").

[13] Here, no party filed a Suggestion of Death. Instead, Wanda's Estate intervened, and the plaintiffs reasonably understood the intervention to act as a substitution of the personal representatives of Wanda's Estate for Wanda as the defendants. The plaintiffs explained this understanding in their opposition to the motion to dismiss, stating that "the argument regarding failure to name a proper party is moot inasmuch as Defendants have intervened on behalf [of]

Wanda Bichler's Estate," but "[i]f the Court deems it necessary, Wanda's estate can be substituted for Wanda individually." Appellant's App. Vol. 2 at 75.

[14] If Wanda's Estate meant for its intervention to operate in some way other than a substitution for Wanda as a defendant, then their motion to intervene created confusion from which they cannot benefit with a dismissal. Trial Rule 24(C) says that when a party moves to intervene, the motion must "set forth and include by reference the claim, defense, or matter for which intervention is sought." Ind. Trial Rule 24(C). Wanda's Estate did not do that. Instead, its motion says that "Wanda Bichler (hereinafter 'Wanda'), who was the *original* Defendant in this action, passed on or about January 30, 2020." Appellant's App. Vol. 2 at 38 (emphasis added). Stating that Wanda was the *original* defendant and that her estate must now intervene because she died would seem to suggest that Wanda's Estate was intervening to replace her in defense of the plaintiffs' claims.[1] As both parties agree, intervention and substitution are not necessarily the same thing, but there is no reason an intervention cannot operate as a substitution when the sole purpose for intervening is to replace the defendant. Correctly identifying in the caption whether a party is merely a

[1] To be sure, in its motion to intervene, Wanda's Estate also noted that "[t]his matter involves approximately $300,000 in life-insurance monies in which Wanda was the named beneficiary," so perhaps Wanda's Estate only wanted to intervene for the interpleader action, and not the wrongful death claim, but it did not say that, and there is no legal mechanism permitting it to benefit through dismissal from the confusion it sowed. Appellant's App. Vol. 2 at 38. The most it could do, in terms of dismissal, was ask the court to stay proceedings based on Wanda's death so that a proper party could be substituted, and then move to dismiss if the plaintiffs failed to do so in a timely manner.

defendant (albeit a substituted one) or an intervening defendant is not an exercise where form trumps substance.[2]

[15] In short, the plaintiffs are required to substitute as defendants the personal representatives of Wanda's Estate, and their failure to do so in a timely manner may subject their suit to dismissal. But there was no suggestion in the trial court that they failed to adhere to any deadline for substitution under Trial Rules 25 or 41(E), so their claims should not have been dismissed.

II. Indiana Trial Rule 12

[16] The motion to dismiss was based on Trial Rule 12, but that rule does not govern the failure to substitute the personal representative for a deceased defendant. The trial court therefore erred by granting the motion.

A. Trial Rule 12(B)(2)

[17] Wanda's Estate urged the trial court to dismiss the plaintiffs' claims pursuant to Trial Rule 12(B)(2) for lack of personal jurisdiction. We review *de novo* Trial Rule 12(B)(2) dismissals, *O'Bryant v. Adams*, 123 N.E.3d 689, 692 (Ind. 2019),

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[2] It makes no difference that the motion to intervene identified Wanda's Estate as the intervening party rather than the personal representatives. By operation of law, the intervention was by the personal representatives, even though it was denoted as the estate. *See Serban v. Halsey*, 533 N.E.2d 162, 164 (Ind. Ct. App. 1989) ("When a personal representative has been appointed within the required statutory period, an action against the estate is an action against the personal representative by operation of law."); *State ex rel. Murray v. Est. of Heithecker*, 333 N.E.2d 308, 312 (Ind. App. 1975) ("Therefore, since the personal representative of a decedent's estate becomes a party by operation of law after a claim is filed against the estate, he is a party to any subsequent litigation on that claim regardless of whether his name appears on further pleadings. Since the Personal Representative is a party in the trial court by operation of law, he is a party on appeal by reason of Rule AP 2, whether or not his name appears on any of the pleadings.").

and, here, we conclude that if the trial court's basis for dismissing the plaintiffs' claims was a lack of personal jurisdiction, that was a legal error.

[18] In the trial court, the argument Wanda's Estate advanced was a single-sentence conclusory argument that "[w]ith Wanda Bichler passing during the pendency of this action, the Court lost jurisdiction over her." Appellant's App. Vol. 2 at 46. It makes the same argument, in the same conclusory fashion, on appeal. Appellee's Br. at 6 (stating that "[a]fter Wanda's death, the Trial Court lost jurisdiction over Wanda, and the real parties in interest became joint personal representatives Kristie and Linda").

[19] This argument misapprehends Indiana law. While it is true that, as discussed above, Wanda's death meant she ceased to be a party, that does not mean the trial court lost personal jurisdiction. For example, Wanda's Estate cites *Hayes v. Shirk*, 78 N.E. 653, 654 (Ind. 1906), and that case explained: "The circuit court had acquired jurisdiction of the person, and subject-matter, in the lifetime of Shirk, and his death did not defeat that jurisdiction."[3] The proceedings are merely suspended until a proper defendant is substituted. So as the plaintiffs correctly argue, since there was jurisdiction over Wanda when she was alive,

[3] "Indiana follows the general rule that the trial court in a dissolution action loses jurisdiction over the case upon the death of one of the principals (the Termination Rule)." *Riggs v. Riggs*, 77 N.E.3d 792, 794 (Ind. Ct. App. 2017) (quotations omitted). That rule does not apply to a Trial Rule 12(B)(2) analysis both because this is not a dissolution case and because a lack of jurisdiction over the case is different than a lack or jurisdiction over the person. *See, e.g.*, *Lizak v. Schultz*, 496 N.E.2d 40, 43 (Ind. 1986) (treating the death of a spouse in dissolution proceedings as impacting subject-matter jurisdiction); *Beard v. Beard*, 758 N.E.2d 1019, 1021 (Ind. Ct. App. 2001) (same).

and there is no dispute that there is jurisdiction over the personal representatives of Wanda's Estate who have intervened as defendants, there is no lack of personal jurisdiction.

B. Trial Rule 12(B)(6)

[20] In the trial court, Wanda's Estate also argued that Trial Rule 12(B)(6) was an appropriate basis for dismissal. That rule says a trial court may dismiss a claim based on the plaintiff's "[f]ailure to state a claim upon which relief can be granted, *which shall include the failure to name the real party in interest under Rule 17*." Ind. Trial Rule 12(B)(6) (emphasis added). Trial Rule 17 in turn says that "[e]very action *shall be prosecuted* in the name of the real party in interest." Ind. Trial Rule 17(A) (emphasis added). We review *de novo* a dismissal under Trial Rule 12(B)(6), and no deference to the trial court's decision is required. *Dominiack Merch., Inc. v. Dunbar*, 757 N.E.2d 186, 188 (Ind. Ct. App. 2001).

[21] A motion to dismiss under Trial Rule 12(B)(6) tests the legal sufficiency of a claim, not the facts supporting it. *Id.* "We must determine whether the complaint states any facts upon which the trial court could have granted relief, viewing the complaint in the light most favorable to the non-moving party." *Id.* We may look only to the complaint and the reasonable inferences to be drawn therefrom and may not rely on any other evidence in the record. *Id.* "A motion to dismiss is properly granted only when the allegations present no possible set of facts upon which the plaintiff could recover." *Id.*

[22] Wanda's Estate argues that its personal representatives are the real parties in interest as the defendants, so the plaintiffs' claims must be dismissed. *See* Appellee's Br. at 6. But there are three problems with this argument. First, in reviewing a Trial Rule 12(B)(6) motion, we are limited to reviewing the complaint, and none of the facts on which Wanda's Estate relies—*e.g.*, that Wanda died, an estate was opened, and personal representatives were appointed—are in the complaint.

[23] Second, Trial Rule 17(A) requires that the *plaintiffs* must be the real party in interest, not the defendants. *See generally* 22 Ind. Prac., Civil Trial Practice § 17.2 (2d ed.) ("The real party in interest requirement applies only to the party asserting a claim for relief such as the original plaintiff, or the defendant asserting a counterclaim, cross-claim or third-party complaint."). Third, if the plaintiff has named the wrong defendant, the remedy is to name the right defendant, not to dismiss the claim. *See* Ind. Trial Rule 15(C).

C. Trial Rule 12(B)(7)

[24] Lastly, Wanda's Estate argues that by failing to substitute its personal representatives, the plaintiffs' claims are subject to dismissal under Trial Rule 12(B)(7) because of the "[f]ailure to join a party needed for just adjudication under Rule 19." *See* Appellee's Br. at 6. Trial Rule 19 requires that a defendant must be joined, if feasible, if in their "absence complete relief cannot be accorded among those already parties," or they have "an interest relating to the subject of the action" and a disposition in their absence may impede their ability to protect their interests or leave any person subject to a substantial risk

of multiple or inconsistent obligations. Ind. Trial Rule 19(A). There are two problems with this argument.

[25] First, Wanda's Estate has already been joined as a party, and it may only act through its personal representatives, so there is no lack of joinder. Wanda's Estate correctly points out that substitution is not necessarily the same as intervention, but that just illustrates that the issue is one of substitution under Trial Rule 25, not joinder under Trial Rule 12(B)(7) and Trial Rule 19.

[26] Second, the remedy for nonjoinder in a case like this, where joinder is feasible,[4] is to join the missing party, not dismissal. *See* Ind. Trial Rule 19(A) ("If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant."); *accord* Ind. Trial Rule 21(A) ("Except as otherwise provided in these rules, failure to name another person as a party or include him in the action is not ground for dismissal; but such omission is subject to the right of such person to intervene or of an opposing party to name or include him in the action as permitted by these rules. Subject to its sound discretion and on motion of any party or of its own initiative, the court may order parties dropped or added at any stage of the action and on such terms as are just and will avoid delay.").

[4] If joinder is infeasible, then there may be circumstances where dismissal may be appropriate. Ind. Trial Rule 19(B). But there is no argument that joinder is infeasible here, nor could there be since Wanda's Estate has already intervened.

[27] Wanda's Estate has not cited any cases affirming the dismissal of a claim under Trial Rule 12(B) based on the failure to substitute the personal representatives of a defendant's estate (or other substitute parties). Instead, dismissal is generally evaluated under Trial Rule 25, *see, e.g.*, *Russell*, 338 F.3d at 665–67, and on appeal, much of the analysis Wanda's Estate provides is under that trial rule. *See* Appellee's Br. at 6, 10–16. This reflects a legal error in the trial court's dismissal, and we must reverse and remand so that the plaintiffs may have the opportunity to substitute the personal representatives as defendants pursuant to Trial Rule 25. If they fail to do so, then dismissal should be evaluated under Trial Rules 25 and 41(E), not Trial Rule 12.

[28] Reversed and remanded.

Vaidik, J., and May, J., concur.