

[CAPTION]

MOTION FOR SUBSTITUTION

Now comes _____, a _____ in this action, and shows the court that _____, a _____ in this action, (*died*) (*became incapacitated*) on or about _____, 20____, and that _____ (*is*) (*are*) the lawful (*successor(s)*) (*representative(s)*) of _____.

It is therefore requested that the court enter an order that _____ be substituted in this action as _____ in the place of _____.

(*Signature of attorney*)
(*Name*), Attorney for (party)
Bar Registration Number
Address
Telephone
[Facsimile number]
[Email address]

NOTICE OF HEARING

Please take notice that the above motion will be brought on for hearing before the court on _____, 20____, at _____ o'clock __M. or as soon thereafter as counsel can be heard.

Attorney

CERTIFICATE OF MAILING

The undersigned hereby certifies that a copy of the above Motion for Substitution and Notice of Hearing was mailed to the following, postage prepaid, on the _____ day of _____, 2____.

(Attorney)

Authority

K.S.A. 60-225, 60-1801, 60-1802.

Notes on Use

This form only deals with substitutions necessitated by death or incapacity. The language should be adapted for other circumstances requiring a substitution of parties. "Incapacitated person" is defined in K.S.A. 77-201 *Thirty-first*.

K.S.A. 60-225 provides for the substitution of parties in the instances of death, loss of capacity, transfers of interest, or death or separation from office of a public officer. The rule is not applicable to any other situations, although parties may also be added or dropped pursuant to other procedural rules, such as those governing joinder, intervention, and real party in interest. In the instance of a party's death, K.S.A. 60-225(a)(1) provides for substitution of parties only in cases in which the claim prosecuted or defended by the deceased party is not extinguished by the party's death. K.S.A. 60-1801 governs which causes of action survive the death of the person entitled to or liable for those causes of action. K.S.A. 60-1802 states that only libel, slander, malicious prosecution and nuisance actions are abated by the death of a party when the action is pending in any court. The court is required to dismiss the deceased party if a motion for substitution is not filed within a "reasonable time" after the party's death is suggested upon the record. The Motion for Substitution, along with a Notice of Hearing, must be served on all parties as set forth in K.S.A. 60-205, and upon nonparties in the same manner as service of a summons. A motion under this section can be made by any party or by the successors or representatives of the deceased party.

A motion for substitution for a party that becomes incapacitated is made in the same way as when a party dies, but the substitution is permissive rather than mandatory. Substitution is also permissive in cases involving a transfer of interest. The court can direct the person to whom the interest is transferred to be substituted or joined with the original party, or may simply allow the action to continue by or against the original party.

When a public officer is a party to an action and subsequently dies, resigns or is otherwise separated from office, K.S.A. 60-225(2)(d) allows the action to be continued and maintained by the public officer's successor. If not successor is appointed or elected, the court may appoint a successor to prosecute or defend the action.

Comment

Substitution of parties and revivor of actions are different names for the same thing. *Livingston v. Bias*, 7 Kan.App.2d 287, Syl. ¶ 1, 640 P.2d 362 (1982). Substitution of parties is purely statutory law and strict compliance must be shown. *Army Nat'l Bank v. Equity Developers, Inc.*, 245 Kan. 3, 774 P.2d 919 (1989). When named defendant died during pendency of action, and no motion for substitution of parties was made within a reasonable time after the death was suggested on the record as required by K.S.A. 60-225(a)(1), the action was dismissed. *Livingston* at 289. A dismissal pursuant to K.S.A. 60-225 (a)(1) operates as an adjudication on the merits unless the order otherwise specifies, and the action cannot be refiled. *Livingston v. Estate of Bias*, 9 Kan.App.2d 146, 673 P.2d 1197 (1984).

Subsection (a) also applies to cases on appeal, and if a motion for substitution is not made to the appellate court in a reasonable time after death is suggested on the record, the appeal will be dismissed. *Long v. Riggs*, 5 Kan.App.2d 416, 617 P.2d 1270 (1980). K.S.A. 60-225(a) does not apply where the party dies before the action is filed. If the named defendant is dead at the time the case is filed, the trial court has no jurisdiction to proceed. *Moore v. Luther*, 29 Kan.App.2d 1004, 35 P.3d 277 (2001).