

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

MARCIA K. LAPHAM,	)	CASE NO.: AB 2017-150(H)
	)	DCD No.: 1-17-48007
Claimant-Appellant,	)	
	)	
vs.	)	D/A: February 13, 1990
	)	
RESEARCH CORPORATION OF THE	)	
UH,	)	
	)	
Employer-Appellee,	)	Jun 30 2023, 2:51 pm
	)	<b>FILED</b> <sup>SK</sup>
and	)	Labor and Industrial Relations
	)	Appeals Board
HAWAII EMPLOYERS' MUTUAL	)	
INSURANCE COMPANY,	)	
	)	
Third-Party	)	
Administrator-	)	
Appellee.	)	
	)	
	)	
	)	

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ORDER HOLDING CASE IN ABEYANCE  
and  
NOTICE OF INTENTION TO DISMISS

On July 18, 2017, Claimant appealed the Director's June 28, 2017 Decision to the Labor and Industrial Relations Appeals Board ("Board").

On July 8, 2021, **Amber Schneider**, daughter of Claimant, filed with this Board a Death Certificate, confirming that Claimant died on May 16, 2021.

On April 26, 2023, the Board received a signed Stipulated Compromise and Release Agreement (“settlement document”) from Employer RESEARCH CORPORATION OF THE UH, signed by Employer’s counsel and Ms. Schneider. The settlement document reflected that Ms. Schneider is the Successor Trustee of The Marcia Kathleen Lapham Revocable Living Trust. The Board declines to approve said settlement document.

On June 21, 2023, the Board held a status conference in the above-entitled matter. Katherine M. Nohr, Esq. appeared at this conference on behalf of Employer. No one appeared on behalf of Claimant. Ms. Nohr orally represented that on or about June 9, 2023, Ms. Schneider was appointed as special administrator of the Estate of the Decedent, Marcia Lapham.

The Board is not in receipt of a written appearance by a court-appointed personal representative or special administrator of Claimant’s estate.

To date, Ms. Schneider has not informed the Board that she has been judicially appointed as a personal representative or special administrator of Claimant’s estate or that she desires to substitute in as a party to this appeal.

However, a courtesy copy of this order and notice, herein, will be provided to Ms. Schneider at her last known address and at her last known email address.

To date, no court-appointed personal representative or special administrator of Claimant’s estate has appeared in this appeal.

The following legal authorities are relevant:

“A deceased person cannot be a party to a legal proceeding, and the effect of death is to suspend the action as to the decedent until his legal representative is substituted as a party.” *Bagalay v. Lahaina Restoration Foundation*, 60 Haw. 125 (1978) (citations omitted.)

“As a general rule, the authority of counsel to proceed with a case is terminated upon the death of the party being represented . . . but the courts can pass upon questions raised and listen to suggestions as to their disposal from an attorney who is an officer of the court . . . .” *Id.*

“ . . . an heir of an undistributed estate, who has not been judicially appointed as the personal representative of a decedent’s estate, is not a ‘proper party’ for substitution . . . .” *Roxas v. Marcos*, 89 Haw. 91 (1998), (analyzing the application of HRCP Rule 25(a)(1) and citations omitted).

“The majority rule in other jurisdictions is that only judicially appointed representatives may be substituted for a decedent party.” *Id.* (Citations omitted.)

§ 12-47-25, LAB Rules: “Upon motion and for good cause shown, the board may order substitution of parties, except that in the case of a party’s death, substitution may be ordered without filing a motion.”

§ 371-4(k), HRS: “The board may make or issue any order or take other appropriate steps as may be necessary to enforce its rules and orders and to carry into full effect the powers and duties given to it by law.”

§ 560:1-302(a), HRS: “To the full extent permitted by the Constitution and except as otherwise provided by law, the court has jurisdiction over all subject matter relating to: (1) Estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons . . . .”

§ 560:3-103, HRS: “Except as otherwise provided in article IV, to acquire the powers and undertake the

duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.”

§ 560:3-105: “Persons interested in decedents’ estates may apply to the registrar for determination in the informal proceedings provided in this article, and may petition the court for orders in formal proceedings within the court’s jurisdiction including but not limited to those described in this article. The court has exclusive jurisdiction of formal proceedings to determine how decedents’ estates, subject to the laws of this State, are to be administered, expended, and distributed. The court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent.”

§ 560:3-703(c): “Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this State at the decedent’s death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as the decedent had immediately prior to death.”

The Board’s order herein is consistent with the common law principle that “if a party dies before a verdict or decision is rendered, the action abates as to him and must be dismissed unless it is revived by substitution of a personal representative.” *Bagalay*, 60 Haw. 135 (emphasis added). Our Hawai‘i Supreme Court has made it clear that it is improper to continue legal proceedings because a “deceased person cannot be a party to a legal proceeding, and the effect of death is to suspend the action as to the decedent

until his legal representative is substituted as a party.” *Id.* (Emphasis added.)

In this respect, the order that follows is consistent with and mindful of practice and precepts of common law.

This order concerns ascertaining the identity of a possible person who may be substituted for a party who is now deceased. The Board’s order, herein, is consistent with the procedure undertaken by the Intermediate Court of Appeals of the State of Hawai‘i (“ICA”) in *City and County of Honolulu v. Sharon Black*, CAAP-11-0000748, (Haw. App. 2013), wherein a self-represented appellant died after filing an opening brief at the ICA. Although *Black* is not a published decision and is of limited precedential value, it is noteworthy that in its effort to ascertain the identity of a proper person to substitute for the deceased appellant, the ICA placed the onus on the appellee to confirm with the court whether a special administrator or personal representative had been appointed to represent the appellant’s estate and to give the personal representative or special administrator, if any, notice: (1) of the pending appeal, copies of the opening brief, and copies of the answering brief; (2) that s/he must enter an appearance to indicate the estate’s plan to continue with the appeal within the time frame specified by the ICA; and (3) that failure to do so in a timely manner may result in the dismissal of the appeal. The ICA also ordered the appellee to file a declaration indicating compliance with the foregoing.

Just as the ICA placed the onus on the appellee to confirm whether a personal representative had been appointed and to provide relevant notice of

and documents pertaining to the pending appeal to the court, the Board, by way of this order, orders Employer to do the same.<sup>1</sup> The reasonableness of the ICA in effecting such a procedure is apparent. The Employer, as the remaining party to this appeal, is the only party that has a vested interest in resolving the appeal, whether by dismissal or decision.

Further, the Board's order for the Employer to assist in ascertaining the identity of a person who may be lawfully substituted for a party who is now deceased requires only a quick, electronic search because that person must be appointed by the circuit court. *See generally*, HRS Chapter 560, Uniform Probate Code. Because the person who may be lawfully substituted for Claimant can be approved only by Hawai'i's Circuit Court, a search (electronic<sup>2</sup> or otherwise) of the Hawai'i State Judiciary court records will quickly reveal if a special administrator or personal representative has been appointed.

The Board's order and notice of intention to dismiss herein will be published on the Board's website for at least 180 days. The inherent capabilities of the internet allow this order and notice to reach a world-wide public audience because the order and notice will be available for viewing 24

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<sup>1</sup> The Board is quasi-judicial in nature; thus, where there exists no statutory authority or specific guidance regarding the exact manner by which an appeal to the Board should be handled upon the death of a party, as here, a reasonable course of action is to seek guidance from higher courts and established rules.

<sup>2</sup> E.g., eCourt\* Kokua:

<http://jimspss1.courts.state.hi.us:8080/eCourt/ECC/ECCDisclaimer.iface;jsessionid=0F58DB78EAA3F8907C968D76149C0FAF>

hours a day, 7 days a week, for as long as it is posted. Further, an internet search of Claimant's name will yield instant retrieval of this order and notice, available for review without incurring any subscription costs or membership.<sup>3</sup>

Publication of the Board's order herein and its notice of intention to dismiss this appeal provides additional notice beyond what the ICA or the court rules provide. In *Black*, the ICA did not publish a notice of intent to dismiss before dismissing the appellant/decedent's appeal. Rather, the ICA noted that no one representing appellant/decedent's estate moved to substitute as a party for appellant/decedent and ordered the appeal dismissed. Similarly, there is no publication requirement in Rule 25(a)(1) of the Hawai'i Rules of Civil Procedure, which states that "[i]f a party dies and the claim is not thereby extinguished," "[u]nless the motion for substitution is made not later than 120 days after the death is suggested. . . the action shall be dismissed as to the deceased party."

Being fully advised in the premises,

IT IS HEREBY ORDERED that the above-captioned appeal be held in abeyance until **October 24, 2023**, pending the Board's receipt of a written appearance by a court-appointed personal representative or special administrator of Claimant's estate. Such appearance is to be made on or before

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<sup>3</sup> Publication via the Board's website is far superior to placement of a legal notice publication in a newspaper of general circulation, where the notice may only appear on 3 occasions on random dates and, perhaps, on a Sunday, and may only be available to subscribers of that particular newspaper publication.

**October 24, 2023.** Extensions by the Board may be granted upon good cause shown or at the discretion of the Board.

If the Board does not receive any of the above-referenced, written appearances on or before **October 24, 2023** and no extension of this deadline is granted by the Board, IT IS HEREBY ORDERED that Employer will have until **November 13, 2023** to confirm, in writing, whether or not a special administrator or personal representative of Claimant's estate was appointed on or before **October 24, 2023**, and:

1. If a special administrator or personal representative of Claimant's estate was not appointed on or before October 24, 2023, Employer shall file a declaration with the Board that confirms this, on or before **November 13, 2023**.
2. If a special administrator or personal representative of Claimant's estate has been appointed, Employer shall, on or before **November 13, 2023**:
  - a. Provide the special administrator or personal representative with written notice of the appeal herein, any and all Pretrial Orders pertaining to this appeal, and this Order Holding Case in Abeyance;
  - b. Give notice to the special administrator or personal representative that, on or before **December 23, 2023**, the special administrator or personal representative must enter an appearance in this appeal and indicate whether the estate plans to continue the appeal with a substitute party or the appeal will be dismissed; and
  - c. File a declaration with this Board that confirms compliance with this order and includes the identity and contact information of the special administrator or personal representative of Claimant's estate.

YOU ARE HEREBY NOTIFIED that this appeal may be dismissed after **October 24, 2023**, unless an appearance is made by either a court-



appointed personal representative of Claimant's estate or a special administrator of Claimant's estate. Extensions by the Board may be granted upon good cause shown or at the discretion of the Board.

Dated: Honolulu, Hawaii,

Jun 30 2023

A handwritten signature in black ink, reading "Damien A. Elefante". The signature is written in a cursive, flowing style.

DAMIEN A. ELEFANTE, Chair

A handwritten signature in black ink, reading "Marie C.L. Laderta". The signature is written in a cursive, flowing style.

MARIE C.L. LADERTA, Member

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*Marcia K. Lapham v. Research Corporation of the UH, et al.; AB 2017-150(H); Order Holding Case in Abeyance and Notice of Intention to Dismiss*

CONCURRENCE/DISSENT:

I concur that the identification and appearance of a court-appointed personal representative of Claimant's estate is necessary for further progression through the appeal, whether by litigation or settlement. I agree that holding the case in abeyance to allow for such appearance would be appropriate. I also agree with providing notice of an intent to dismiss the appeal if no timely appearance is filed.

I otherwise disagree. My check of eCourt Kokua on June 22, 2023, indicated that Ms. Schneider had already been appointed as the Special Administrator for the estate of Ms. Lapham, consistent with Attorney Nohr's representation. Given the information available at this time, I disagree with posting this order on the Board's website.

Although the Board is quasi-judicial, it is not part of the Judiciary and I don't believe it holds the same powers as a judge or panel of judges of the Judiciary.



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MELANIE S. MATSUI, Member

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*Marcia K. Lapham v. Research Corporation of the UH, et al.; AB 2017-150(H); Order Holding Case in Abeyance and Notice of Intention to Dismiss (Concurrence/Dissent)*

Marcia K. Lapham, Deceased  
Claimant-Appellant

Katharine M. Nohr, Esq.  
For Employer/Insurance Carrier-Appellee

Amber Schneider, courtesy copy via email and U.S.P.S.  
Successor Trustee of The  
Marcia Kathleen Lapham  
Revocable Living Trust

This certifies that the foregoing is a  
full, true, and correct copy of the  
original on file in this office.

  
*/s/ S. Kaaihue for LIRAB*

A certified copy of the foregoing was served upon the above-captioned parties or  
their legal representatives on the date of filing noted above.

LABOR APPEALS BOARD - 830 PUNCHBOWL ST, RM 404, HONOLULU, HI 96813 - (808)586-8600

If you need a language interpreter or if you need an auxiliary aid/service or other  
accommodation due to a disability, please contact the Board at (808) 586-8600  
and/or [dlir.appealsboard@hawaii.gov](mailto:dlir.appealsboard@hawaii.gov) as soon as possible, preferably at least ten  
(10) business days prior to your hearing or conference date. Requests made as early  
as possible have a greater likelihood of being fulfilled. If a request is received after  
the reply date, the Board will try to obtain the interpreter, auxiliary aid/service, or  
accommodation, but the Board cannot guarantee that the request will be fulfilled.

Upon request, this notice is available in alternate/accessible formats such as large  
print, Braille, or electronic copy.

Equal Opportunity Employer/Program  
Auxiliary aids and services are available  
upon request to individuals with disabilities.  
TDD/TTY Dial 711 then ask for (808) 586-8600

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*Marcia K. Lapham v. Research Corporation of the UH, et al.; AB 2017-  
150(H); Order Holding Case in Abeyance and Notice of Intention to Dismiss*