

RULES OF CIVIL PROCEDURE

RULE 17. PARTIES PLAINTIFF AND DEFENDANT: CAPACITY

- (a) **Real Party in Interest.** Except for any action brought under General Laws, chapter 152, section 15, every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the Commonwealth. An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.
- (b) **Infants or Incompetent Persons or Incapacitated Persons.** Whenever an infant or incompetent person, or an incapacitated person as defined in G.L. c.190B has a representative, such as a guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person, or incapacitated person as defined in G.L. c.190B. If an infant or incompetent person, or an incapacitated person as defined in G.L. c.190B does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person, or an incapacitated person as defined in G.L. c.190B not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, or an incapacitated person as defined in G.L. c.190B.

RULE 25 SUBSTITUTION OF PARTIES

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the representative 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 a summons. Unless the motion for substitution is made within one year after the date of approval of the bond of the representative of the deceased party, the action shall, upon notice and hearing, be dismissed unless the failure of the surviving party to move for substitution was the result of excusable neglect. If the court finds that the representative of the deceased party has failed within a reasonable period of time after the date of the approval of his bond to notify in writing the surviving party of the decedent's death and to file a suggestion of death upon the record it shall find excusable neglect for purposes of this rule and Rule 6(b).

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency or Incapacity. If a party becomes incompetent or incapacitated as defined in G.L. c.190B, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

(a) Before Action.

(1) **Petition.** A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court where these rules apply may file a verified petition in the Superior Court in the county or District Court in the judicial district, as the case may be, of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court where these rules apply but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) **Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the Commonwealth in the manner provided in Rule 4 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent or an incapacitated person as defined in G. L. c. 190B the provisions of Rule 17(b) apply.

(3) **Order and Examination.** If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with those rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) **Use of Deposition.** If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the Commonwealth, it may be used in any action involving the same subject matter subsequently brought in such a court, in accordance with the provisions of Rule 32(a).

(b) Pending Appeal. If an appeal has been taken from a judgment of a court of this Commonwealth or before the taking of an appeal if the time therefor has not expired, the court in

which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in that court. In such case the party who desires to perpetuate the testimony may make a motion in that court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in that court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in pending actions.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

RULE 55 DEFAULT

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due and affidavit that the defendant is not an infant or incompetent person or an incapacitated person as defined in G. L. c. 190B, shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person, or an incapacitated person as defined in G. L. c. 190B unless represented in the action by a guardian, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 7 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by statute.

(3) The provisions of subparagraph (b)(2) supplement, but do not supersede, any other requirements of notice established by law.

(4) Affidavit Required. Notwithstanding the foregoing, no judgment by default shall be entered until the filing of an affidavit made by any competent person, on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in the "Servicemembers Civil Relief Act", as set forth in 50 U.S.C. App. §§ 501 et seq., except upon order of the court in accordance with the Act.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

RULE 66 RECEIVERS

(a) An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of this Commonwealth and with the laws thereof. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

(b) Every receiver, within thirty days after his appointment, shall file a detailed inventory of the property of which he has possession or the right to possession, with the estimated values thereof, together with a list of the encumbrances thereon; and also a list of the creditors of the receivership and of the party whose property is in the hands of the receiver, so far as known to him.

(c) Every receiver shall file, not later than the fifteenth day of February of each year, a detailed account under oath of his receivership to and including the last day of the preceding year, substantially in the form required for an account by a conservator in the probate courts, together with a report of the condition of the receivership. He shall also file such further accounts and reports as the court may order.

(d) When an attorney at law has been appointed a receiver, no attorney shall be employed by the receiver or receivers except upon order of court, which shall be made only upon the petition of a receiver, stating the name of the attorney whom he desires to employ and showing the necessity of such employment.

(e) No order discharging a receiver from further responsibility will be entered until he has settled his final account.

(f) The court, in its discretion, may relieve any receiver from any requirement imposed by sections (b)-(e) of this rule.

RULE 72. PROBATE ACCOUNTS

(a) Accounts With Written Assent. If a fiduciary files with his account: (1) the proper filing fee; (2) the written assent or waiver of every person interested in the account, including every person entitled to notice pursuant to G.L. c.190B, §§1-401 and 5-418; and (3) all tax receipts or tax waivers required by law, the court may forthwith allow the account. If any interested person is incompetent or under lawful age, or as defined in G.L. c.190B a protected person or an incapacitated person, the conservator or guardian, as the case may be, shall sign the assent, unless the account is his own account.

(b) Accounts Without Written Assent.

(1) Notice: Form. If the account of a fiduciary is filed for allowance with the proper filing fee and all tax receipts or tax waivers required by law but without the written assent of every person interested in the account, notice of the proceeding for allowance of a fiduciary account or the account of a common trust fund shall be served in accordance with Rule 4(h) on those persons required to be served by G. L. c.190B, §§1-401 and 5-418. The notice in the form of a citation issued by the court shall state a return date pursuant to General Rule 6 of the Probate Courts and state that any person having an interest affected by the account:

(A) may (and, if he desires to preserve his right to file an objection, shall) file an appearance in accordance with Rule 11(b)(2) on or before the return day;

(B) may, upon written request to the accountant (fiduciary) or counsel by registered or certified mail, obtain without cost to himself, a copy of the account except that, in a proceeding for the allowance of an account of a common trust fund, the notice shall state that any person so requesting may obtain without cost to himself a copy of the annual report of said common trust fund for the period of the account, and may obtain a copy of the account on request, subject to such terms, if any, as to costs which the court may determine upon application of the accountant; and

(C) shall, if he desires to object to any item of the account, file within thirty days after the return day (or such other time as the court, on motion with notice to the accountant, may order) a written statement of each such item, together with the grounds for each objection thereto, a copy thereof to be served upon the accountant pursuant to Rule 5.

(2) Guardian Ad Litem. Whenever the court shall, conformably to law, appoint a guardian ad litem to represent any individual or class concerned in the account, the accountant shall forthwith serve upon such guardian ad litem, without cost to the guardian ad litem, a copy of the account and the citation. The guardian ad litem shall within ninety days after the return day file his report, serving a copy thereof upon the accountant and any person who has filed an appearance; provided that the court may upon ex parte application of the guardian ad litem extend the time for filing such report for an additional twenty days or such further time as the court, on motion with notice to the accountant and any person who has filed an appearance, may order.

(3) Failure to Object: Effect. If any person who has filed an appearance shall fail to file an objection within the time specified by par. (b)(1)(C) of this rule, the court, upon motion by the accountant, the guardian ad litem, or any person whose objection is on file (with notice, as the case may be, to the person filing the appearance, the accountant, and any person whose objection is on file), may order the appearance struck.

(4) Objection: Effect. If, at any time, there shall have been filed either (A) an objection pursuant to par. (b)(1)(C) of this rule; or (B) a guardian ad litem's report containing an objection, the account shall thenceforth be regarded as contested, and further proceedings shall be governed by the following rules, in addition to this rule, and none other: Rules 1, 4(h), 5, 6, 7(b)-(c), 10(a) (first sentence, except that the caption shall retain the title and docket number of the underlying Probate Court proceedings), 11(a)-(d), 15, 16, 25-37, 40, 42-46, 52-54, 56-59, 60 (except that the provisions of G. L. c. 206, § 24, shall govern the granting of any relief under Rule 60 [b]; and Rule 60[b][3] shall not apply); 61-65(a)-(d), 65.1, 67-71, 77-83, 85. Any reference in any of the specified rules to "plaintiff" or "defendant," or to any particular type of pleading, shall not apply to any proceeding under this rule, except that the word "pleading" as it may appear in those rules shall be taken to include account, objection, or report, as the case may be.

(5) Objection: Withdrawal; Striking.

(A) Any objection previously filed, whether by an interested person or a guardian ad litem, may be withdrawn by filing a statement to that effect, signed by the person or the guardian ad litem, as the case may be, or counsel, and served on any person (including, as necessary, the guardian ad litem) whose appearance is then on file. The conservator or guardian of an interested person shall sign for the ward, incapacitated or protected person.

(B) The court, upon motion by the accountant, the guardian ad litem, or any person whose objection is on file (with notice, as the case may be, to the accountant, the guardian ad litem, and any person whose objection is on file) may order any objection struck for failure to state a valid ground of objection, for frivolity, or for any other similar reason.

(6) Contested Accounts: Hearings. The accountant, any person whose objection is then on file, or the guardian ad litem may mark a contested account for hearing, or request that the court assign a hearing date; or the court may, of its own motion, assign a hearing date.

(7) Uncontested Accounts. An account shall be regarded as uncontested if:

(A) It shall have been filed pursuant to par. (a) of this rule; or

(B) After the return day (i) either no appearance shall be on file or any appearance or objection previously filed shall have been withdrawn or struck; and (ii) the report of the guardian ad litem, if any, shall be on file and contain no objection.

Judgment on any uncontested account may be entered forthwith subject only to the provisions of Rule 60 (except that the provisions of G. L. c. 206, § 24, shall govern the granting of any relief under Rule 60[b]; and Rule 60[b][3] shall not apply).