FOR PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

GORGONIUS JONES, **PLAINTIFF,** **V.** **LOCKHEED MARTIN CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MARTIN MARIETTA CORPORATION, MARTIN MARIETTA ALUMINUM, INC., AND MARTIN MARIETTA ALUMINUM PROPERTIES, INC.; MARTIN MARIETTA CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MARTIN MARIETTA ALUMINUM, INC. AND MARTIN MARIETTA ALUMINUM PROPERTIES, INC.; AND GENERAL ENGINEERING CORPORATION,** **DEFENDANTS.**	**SX-08-CV-057** **ACTION FOR DAMAGES** **JURY TRIAL DEMANDED** *** **CONSOLIDATED UNDER: IN RE: ALUMINA DUST CLAIMS, SX-09-MC-031**
ANGEL VELEZ, **PLAINTIFF,** **V.** **LOCKHEED MARTIN CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MARTIN MARIETTA CORPORATION, MARTIN MARIETTA ALUMINUM, INC., AND MARTIN MARIETTA ALUMINUM PROPERTIES, INC.; MARTIN MARIETTA CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MARTIN MARIETTA ALUMINUM, INC. AND MARTIN MARIETTA ALUMINUM PROPERTIES, INC.; AND GENERAL ENGINEERING CORPORATION,** **DEFENDANTS.**	**SX-08-CV-249** **ACTION FOR DAMAGES** **JURY TRIAL DEMANDED** *** **CONSOLIDATED UNDER: IN RE: ALUMINA DUST CLAIMS, SX-09-MC-031**

RUDOLPH CHRISTOPHER,

PLAINTIFF,

V.

LOCKHEED MARTIN CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MARTIN MARIETTA CORPORATION, MARTIN MARIETTA ALUMINUM, INC., AND MARTIN MARIETTA ALUMINUM PROPERTIES, INC.; MARTIN MARIETTA CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MARTIN MARIETTA ALUMINUM, INC. AND MARTIN MARIETTA ALUMINUM PROPERTIES, INC.; AND GENERAL ENGINEERING CORPORATION,

DEFENDANTS.

SX-08-CV-297

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

* * *

CONSOLIDATED UNDER: IN RE: ALUMINA DUST CLAIMS, SX-09-MC-031

Appearances:

THOMAS ALKON, ESQ.
Law Office of Thomas Alkon, P.C.
2115 Queen St.
Christiansted, VI 00820
For Plaintiffs and their Personal Representatives

KEVIN A. RAMES, ESQ.
SEMAJ I. JOHNSON, ESQ.
K.A. Rames, P.C.
2111 Company St., Suite 3
Christiansted, VI 00820
For Defendants Lockheed Martin Corporation, Martin Marietta Corporation, Martin Marietta Aluminum, Inc., and Martin Marietta Aluminum Properties, Inc.

EUGENIO W.A. GÉIGEL-SIMOUNET, ESQ.
Law Offices of Wilfredo A. Géigel
20 Anchor Way
Gallows Bay, VI 00824
For Defendant General Engineering Corporation

WILLOCKS, Harold W.L., Administrative Judge

MEMORANDUM OPINION

BEFORE THE COURT, in each individual case captioned above, is a motion to substitute a personal representative in place of a plaintiff and to continue the plaintiff's lawsuit following his death. Felicite Jones and Luz M. Velez motioned to substitute themselves in place of their husbands, Gorgonius Jones and Angel Velez, respectively. Neisha Christopher-Christian motioned to substitute herself in place of her father, Rudolph Christopher. Collectively, Movants will be referred to as "Personal Representatives." For the reasons stated below, the Court will grant the motion in *Velez* and the motion in *Jones*, even though the motion in *Jones* was filed late. However, the Court will not grant the motion in *Christopher* at this time.

GORGONIUS JONES

Factual and Procedural Background[1]

Gorgonius Jones (hereinafter "G. Jones") sued Lockheed Martin, Martin Marietta Corporation, and General Engineering Corporation ("GEC") on January 24, 2008 for damages allegedly from exposure to asbestos and other toxic substances during the time he worked at the former Martin Marietta alumina refinery on St. Croix. G. Jones also sued both Lockheed Martin and Martin Marietta in their individual and successor capacities to Martin Marietta Aluminum, Inc. and Martin Marietta Aluminum Properties, Inc. Lockheed Martin appeared and on July 25, 2008, answered the complaint on its own behalf and on behalf of the Martin Marietta defendants. GEC was served, but did not answer the complaint. G. Jones did

[1] *Jones*, *Christopher*, and *Velez*—along with several other individual cases—are being coordinated at present under a master case, *In re: Alumina Dust Claims*. Although the motions addressed here were filed in both the master case and in the individual cases, the relief sought has no bearing on the master case or any of the other cases grouped under it. Since common questions of law are raised, and because the factual and procedural background of all the cases under the master case is largely the same, the Court, for the sake of convenience, has addressed the motions in the same opinion. However, separate orders shall be issued in each individual case. *Accord In re: Cases Removed to Dist. Ct. of the V.I.*, SX-98-CV-109 et seq., 2016 V.I. LEXIS 154, *3-4 n.1 (Super. Ct. Sept. 21, 2016) ("[E]ven though one opinion is used to address issue[s] common to multiple cases, separate orders have to be issued in each individual case." (citation omitted)).

not motion the Clerk to enter default against GEC.

G. Jones passed away on November 9, 2011. Nearly four years later, his wife, Felicite Jones (hereinafter "F. Jones"), on June 8, 2015, filed the motion now before the Court to substitute herself in place of her husband. Lockheed Martin did not file a response in opposition. F. Jones did not serve GEC with a copy of her motion. After G. Jones had died, but before F. Jones moved for substitution, the attorney who previously represented G. Jones filed a petition with the Probate Division of the Superior Court to have F. Jones appointed as personal representative of her husband's estate.

F. Jones filed her petition on May 21, 2012, together with an affidavit and a death certificate for G. Jones. The supporting documentation showed that G. Jones died on November 9, 2011, on St. Croix; that Felicite was his wife; and that she wanted to pursue a survival action and commence a wrongful death action on his behalf. The petition was not served on the Defendants, G. Jones's heirs, or anyone else. Notice of the petition was not filed in the *Alumina Dust Claims* master case or in *Jones*. The Clerk's Office docketed the petition, opened a miscellaneous probate case numbered SX-12-MP-007, and assigned it to a Superior Court magistrate judge. On May 29, 2012, the court granted the petition and appointed F. Jones personal representative of her husband's estate. On June 1, 2012, the Clerk's Office entered the order and closed the miscellaneous case. Three years later, F. Jones filed the motion in *Jones* that is now before the Court to request leave to substitute herself in place of her husband.

Discussion

Section 78 of Title 5 of the Virgin Islands Code provides that "[n]o action shall abate by the death or disability of a party or by the transfer of any interest therein, if the cause of action survives or continues." Personal injury or tort claims generally survive the death of a party. *See generally id.* § 77. Hence, if a party dies while a case is pending, "the court may at any time within two years thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest."

Id. § 78. Here, F. Jones filed a motion. Ergo, she has satisfied the "on motion" requirement of the statute. But F. Jones did not file her motion "within two years []after" G. Jones's death. *Id.* She also did not serve all parties. Since "written motion[s] must have been served on all of the parties who have appeared in the case to be properly before the court," *Ayala v. Lockheed Martin Corp.*, SX-08-CV-296, 2017 V.I. LEXIS 39, *10 (Super. Ct. Mar. 3. 2017); *accord* V.I. R. Civ. P. 5(a), the Court must first consider whether F. Jones's motion is properly before the Court.

G. Jones named Lockheed Martin, Martin Marietta, and GEC as defendants. Lockheed Martin appeared and answered the complaint on its own behalf and on behalf of the Martin Marietta defendants. GEC did not appear. G. Jones did not request entry of default against GEC prior to his death. However, GEC remains a party to this case, even though it is technically in default since it failed to appear within twenty days after it was served. *See* Super. Ct. R. 32(a) (rule in effect in 2008 when GEC was served). But motions need not be served on parties who fail to appear. *See* V.I. R. Civ. P. 5(a)(2) ("No service is required on a party who is in default for failing to appear.") (stated exceptions inapplicable here); *accord Ayala*, 2017 V.I. LEXIS 39 at *17 ("[S]ince GEC had not appeared in *Jones* or filed an answer by the time when Lockheed Martin filed its motion, Lockheed Martin was not obligated to serve its Motion to Consolidate on GEC, at least as to that one case." (citation omitted)). Hence, when F. Jones filed her substitution motion on June 8, 2015, the only party she had to serve was Lockheed Martin. Therefore, her motion is properly before the Court.

Lockheed Martin did not respond to F. Jones's motion and GEC was not served. Consequently, the motion is unopposed. However, "a 'motion is not automatically granted simply because it is unopposed.' That is, courts must still determine whether granting the motion is appropriate." *Id. at* *19 (quoting *In re: Alumina Dust Claims*, SX-09-MC-031, 2017 V.I. LEXIS 2, *26 (Super. Ct. Jan. 10, 2017)). Here, the concern is that G. Jones passed away on November 9, 2011 and F. Jones did not seek leave to substitute into this case as his personal representative until four years after his death. Her motion was filed nearly a year and a half beyond the two-year substitution deadline. Hence, the question becomes whether the delay can be excused. *Cf. Ventura v. People*, 64 V.I. 589, 617 (2016) ("When a party fails to raise a defense of untimeliness, thereby forfeiting that defense, a court should proceed to the merits of a case." (citation omitted)). Since GEC forfeited the right to object to the delay by defaulting, and Lockheed Martin waived the right to object by not filing a response, the Court can only excuse F. Jones's delay if the statutory deadline is a claims-processing rule and not a jurisdictional limitation on the Superior Court's authority.

"[W]hen dealing with a statutory filing deadline, a *court must* 'attempt to ascertain the Legislature's intent' to determine whether the deadline is jurisdictional—requiring the dismissal of an untimely filing—or merely a claims-processing rule that 'does not intend to limit a court's authority to hear a case.'" *In re: Q.G.*, 60 V.I. 654, 657 n.2 (2014) (emphasis added) (brackets omitted) (quoting *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 435 (2013)). The question raised here—whether the two-year statutory deadline to substitute a personal representative in place of a party who died while a civil action is pending—is a question of first impression in the Virgin Islands. This question is important and "'not merely academic, for a claims-processing statute may be equitably tolled or judicially modified, while failure to comply with a jurisdictional statute can never be excused' and such failure may be invoked at any stage of the proceedings, even by the court *sua sponte*." *Allen*, 60 V.I. at 435-36 (ellipsis omitted) (quoting *First Am. Dev. Group/Carib, LLC. v. WestLB AG*, 55 V.I. 594, 611 (2011)).

Ordinarily, when the language of a statute is clear, courts apply the statute as written. *See, e.g., In re: Petition for the Expungement of Criminal Records of Callwood*, 66 V.I. 299, 306 (2017) ("It is well-established that 'if the language of a statute is clear and unambiguous, there is no need to resort to any other rule of statutory construction.'" (brackets omitted) (quoting *Shoy v. People*, 55 V.I. 919, 926 (2011)).

Courts also should avoid creating ambiguity in statutes where there is none. *Cf. Callwood*, 66 V.I. at 305. At first blush, Section 78 of Title 5 of the Virgin Islands Code appears to be clear, but some ambiguity appears upon further scrutiny. Further, the statute also raises several questions as to procedure,[2] one of which is at issue here: must a court dismiss a case if a motion to substitute is not timely filed. Courts in the Virgin Islands have touched on the issue. *See, e.g.*, *Richards v. Nolind & Assocs. W. Indies, Inc.*, 1:98-cv-149, 2010 U.S. Dist. LEXIS 114562, *12 (D.V.I. Oct. 26, 2010) ("The statute allows the court discretion to deny a motion that is made within the two years, but there is no mention of the court's discretion to consider the motion timely when it exceeds the two year limitation."); *see also Hodge v. McGowan*, 50 V.I. 296, 308 (2008) (*per curiam*) ("[T]he substitution of a deceased party must occur within two years of death. As stated above, Hodge's death was not suggested on the record until more than ten years after her death, and at no time has the required motion for substitution been filed with the trial court. Furthermore, the statute clearly states that a court has the discretion to deny a motion to substitute even when timely made within two years following death." (footnote omitted)). However, both in *Richards* and in *Hodge*, the specific question of whether courts have discretion to allow substitution more than two years after death was not addressed. It must be addressed here because F. Jones's motion is unopposed.

The Virgin Islands substitution statute provides in pertinent part as follows:

> No action shall abate by the death or disability of a party or by the transfer of any interest therein, if the cause of action survives or continues. In case of the death or disability of a

---

[2] If "a non-party cannot file a motion to substitute parties," *Alumina Dust Claims*, 2017 V.I. LEXIS 2 at *28 (quotation marks, brackets, and citation omitted), and if death terminates an attorney's authority to act on his client's behalf, including filing anything in the client's case, *cf. id.* at *29 n.11; *accord Antoine v. Hess Oil V.I. Corp.*, SX-05-CV-508, 2017 V.I. LEXIS 44, *12-13 (Super. Ct. Mar. 10, 2017), then who files the suggestion of death or the motion to substitute? Here, Lockheed Martin was the only party left in *Jones* with any authority to file papers in that case. GEC failed to appear. G. Jones had died and his death terminated his attorney's authority to act on his behalf. *See, infra*. It may have fallen to Lockheed Martin to suggest G. Jones's death on the record and start the substitution clock. *Cf., infra*, note 8. Although the issue is raised in these case, the Court does not have to decide them here because any errors were technical, not substantive, and Lockheed Martin has not objected.

> party, the court may at any time within two years thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest. 5 V.I.C. § 78.

According to the plain language, the statute applies when an action is pending and one or more of the parties to the case dies or becomes disabled. If an action is not pending, substitution is not at issue.[3] But if a civil action is pending, and one of the parties dies or becomes disabled, then substitution can occur "on motion" "within two years" after the death or disability, provided that the action (including cross-claims, counterclaims, and third-party claims, presumably) can be continued by or against the deceased party, notwithstanding that party's death or disability (or dissolution for corporations). But the statute does not provide any further guidance beyond how (on motion) and when (within two years).

Generally, "a statutory requirement is only jurisdictional if there is a 'clear sign' of the Legislature's intent." *Stewart v. V.I. Bd. of Land Use Apps.*, 66 V.I. 522, 536 (2017) (quoting *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 300 (2014)). That "clear sign" is missing here. By employing the word "may," the statute clearly vests courts with discretion to allow an action to be continued by or against a personal representative. *Accord Hodge*, 50 V.I. at 308 ("[T] the statute clearly states that a court has the discretion to deny a motion to substitute even when timely made within two years following death." (emphasis added)). But do courts retain their "discretion to consider the motion timely when it exceeds the two year limitation." *Richards*, 2010 U.S. Dist. LEXIS 114562 at *12. That is the question raised here and it is complicated by the different and conflicting authorities that converge in this area of the law.

Deciding what claims (if any) continue after death is a question of substance that legislatures typically resolve. Historically, "[a]t common law, all personal injury, or tort, claims ended, or abated, when the person who was injured died or when the person who caused the injury, the tortfeasor, died."

---

[3] *See* 5 V.I.C. § 37(a)-(b) (civil action can be commenced or defended by a personal representative).

Der Weer v. Hess Oil V.I. Corp., 61 V.I. 87, 98 (Super. Ct. 2014). Eventually, state and territorial legislatures, including the Virgin Islands Legislature, resolved this substantive question through legislation. *See* 5 V.I.C. § 77 ("A thing in action arising out of a wrong which results in physical injury to the person . . . shall not abate . . . by reason of the death of the person injured."); *cf. Antoine*, 2017 V.I. LEXIS 44 at *10 ("'[T]he defect in the common-law system of remedies on the death of a party has led to adoption of statutes by the territorial and state Legislatures providing that an action shall not abate on the death of a party where a cause of action survives, or that specified actions or actions for specified causes shall not abate.'" (quoting *Phillips Petro Co. v. Davis*, 147 P.2d 135, 141 (Okla. 1942), parenthetically)). Hence, deciding which claims survive a person's death is a question legislatures decide. But deciding how to continue a claim already pending in court, and what steps must be taken to allow a representative or a successor to substitute into that pending action—this is a question of procedure that courts generally decide.

Historically, before courts began to promulgate their own rules of procedure, legislatures often addressed matters of procedure. But once courts began to adopt comprehensive rules of procedure, conflicts arose between those procedural rules the courts had promulgated and the procedural statutes legislatures had enacted. Almost invariably, courts resolved the conflicts in favor of the rules that they, themselves, had promulgated. *See, e.g., State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994) ("Determination of procedural matters is a judicial function. The legislature, for its part, determines matters of substantive law."); *State v. Connery*, 661 P.2d 1298, 1300 (Nev. 1983) ("[T]he authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature. We have held that the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect. Furthermore, where, as here, a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls." (citations omitted)); *Petrarca v. Halligan*, 522 P.2d 827, 829 (Wash. 1974) ("Where rule of court is inconsistent with the procedural statute, the power of this court to establish the procedural rules for the courts of this state is supreme."); *accord Gerace v. Bentley*, 65 V.I. 289, 302-03 (2016) (collecting cases where court rules prevail over procedural statutes) ("[T]he overwhelming majority of other jurisdictions where the legislature and the judiciary have been vested with concurrent authority to promulgate procedural rules have held that conflicts between rules promulgated by the judiciary and rules promulgated by the legislature are resolved in favor of the judiciary.")), *writ granted sub nom*, *Vooys v. Bentley*, No. 16-3912 (3d Cir. Mar. 23, 2017). *But cf. Bowyer v. Taack*, 817 P.2d 1176, 1178 (Nev. 1991) ("[A]pparent conflicts between a court rule and a statutory provision should be harmonized and both should be given effect if possible." (citing *State v. Ryan*, 691 P.2d 197, 206 (Wash. 1984)), *superseded on other grounds as recognized in McCrary v. Bianco*, 131 P.3d 573 (2006); *see also Johnson*, 514 N.W.2d at 554 ("But . . . due respect for coequal branches of government requires this court to exercise great restraint in considering the constitutionality of statutes particularly when the consideration involves what is a legislative function and what is a judicial function."). This conflict—between a procedural statute and a rule of procedure—is also raised here, now that the Supreme Court of the Virgin Islands promulgated the Virgin Islands Rules of Civil Procedure. *See generally In re: Adoption of the V.I. Rules of Civ. P.*, Prom No. 2017-001, 2017 V.I. Supreme LEXIS, *125-27 (V.I. Apr. 3, 2017) (promulgating V.I. R. Civ. P. 25 – rule governing procedure for substitution after death of a party). But the conflict is made more complicated because, in the Virgin Islands, the Supreme Court of the Virgin Islands and the Legislature of the Virgin Islands have *concurrent* authority to address matters of procedure. *See Gerace*, 65 V.I. at 302 ("Although the Legislature—subject to the authority of Congress under the territorial clause of the United States Constitution—possesses the exclusive right to codify substantive law, the Revised Organic

Act clearly provides the Legislature and the Judiciary with *concurrent authority* to promulgate procedural court rules." (emphasis added)); *accord Ventura*, 64 V.I. at 616 ("[S]ection 21(c) of the Revised Organic Act 'vests the Virgin Islands Judiciary *and* the Virgin Islands Legislature with authority to promulgate procedural rules.'" (emphasis added) (quoting *In re: Holcombe*, 63 V.I. 800, 828 (2015))).

Any defects the Virgin Islands may have inherited when the Territory received the common law in 1921 were quickly cured by statute. *Cf.* V.I. Code Ann tit. 5, § 75 (1967 ed.) (historical revision note) (explaining that the Virgin Islands death and survival statutes derive from the 1921 Codes). Section 77 of Title 5 of the Virgin Islands Code governs what claims survive an individual's death while Section 78 of Title 5 of the Virgin Islands Code provides the procedure for substitution after death in a pending civil action. The former is substantive, while the latter is either procedural or jurisdictional. If Section 78 is only procedural, then the question will become whether Section 78 was superseded when the Supreme Court of the Virgin Islands promulgated the Virgin Islands Rules of Civil Procedure, which took effect on March 31, 2017[4] and apply prospectively to all cases commenced after that date as well as retrospectively to all cases, such as *Jones*, that were pending when time the rules went into effect.[5] But if Section 78 is jurisdictional, then the Court will have to deny F. Jones's motion and dismiss G. Jones's complaint because "failure to comply with a jurisdictional statute can never be excused." *Allen*, 59 V.I. at 435-36

---

[4] Because March 31st is a holiday, *see* 1 V.I.C. § 171(a), and because March 31, 2017 fell on a Friday, the true effective date of the Virgin Islands Rules of Civil Procedure was Monday, April 3, 2017.

[5] The Virgin Islands Rules of Civil Procedure apply to all "action[s] pending on the effective date of the rules or amendments, unless: (A) the Supreme Court of the Virgin Islands specifies otherwise by order; or (B) the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice." V.I. R. Civ. P. 1-1(c). How Rule 1-1 should be construed is not clear yet, nor is the impact (if any) of the promulgation order that adopted the rules. In the order adopting the rules of civil procedure, the Virgin Islands Supreme Court decreed "that all Rules of the Superior Court inconsistent with the Virgin Islands Rules of Civil Procedure are **HEREBY REPEALED**." *In re: Adoption of V.I. Rules of Civ. P.*, 2017 V.I. Supreme LEXIS 22 at *2. The order did not include a savings clause or condition its repeal on the findings permitted by Rule 1-1. The questions raised here certainly are not academic here because applying repealed law constitutes reversible error. *Cf. Gov't of the V.I. v. Connor*, 60 V.I. 597, 599 (2014) (*per curiam*) ("Since the Superior Court erroneously invoked . . . an effectively repealed statute . . . we summarily reverse and remand." (citation omitted)).

(quotation marks and citation omitted). However, since Section 78 preceded Rule 25, and further because F. Jones filed her substitution motion before Rule 25 went into effect, the Court will consider whether Section 78's two-year statutory deadline is jurisdictional first, before turning to Rule 25. If only Rule 25 applied, the answer would be clear: "It is well established that time limits set *exclusively* by court rules are mere claims-processing rules which do not affect a court's subject-matter jurisdiction even if they may result in dismissal if violated." *Gov't of the V.I. v. Crooke*, 54 V.I. 237, 253-54 (2010) (citing *Bowles v. Russell*, 551 U.S. 205, 210-11 (2007)).

Although, as noted earlier, the substitution statute is somewhat unclear, the historical background provided in the Virgin Islands Code does shed some light. The historical note to Section 78 explains that—unlike Sections 75, 76, and 77 of Title 5 of the Virgin Islands Code, which were based on California law—Section 78 was carried over into the Virgin Islands Code in 1957 from the "1921 Codes, Title III, ch.3 § 11." V.I. Code Ann. tit. 5, § 78 (1998 ed.) (history note). Title III, Chapter 3, Section 11 of the Code of Laws for the Municipality of St. Thomas and St John—commonly known, together with the Code of Laws for the Municipality of St. Croix, as the 1921 Codes—provides in its entirety as follows:

> No action shall abate by the death or disability of a party or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court may at any time within two years thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest.

St. Thomas/St. John Munic. Code, tit. III, ch. 3, § 11 (1921),[6] *repealed by* 1 V.I.C. § 5. The version carried forward into the Virgin Islands Code is identical word-for-word to the version in the 1921 Codes.

Considering that much of the 1921 Codes was, in turn, borrowed from other jurisdictions, *cf. People v. Simmonds*, 58 V.I. 3, 16 (Super. Ct. 2012), the Court must consider the source of the 1921 provision to determine whether there was any "known and settled construction, which those statues had

---

[6] "St. Jan" in the original.

received," *Willis v. E. Trust & Banking Co.*, 169 U.S. 295, 307 (1898), before the statute was borrowed in 1921 since "the purpose of the borrowed-statute doctrine is to predict what the Legislature intended when it enacted a substantive law." *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 420 (2016) (citing *V.I. Gov't Hosps. & Health Facilities Corp. v. Gov't of the V.I.*, 47 V.I. 430, 441-42 n.11 (Super. Ct. 2006)). Moreover, determining which jurisdiction a statute was borrowed from

> is critical to the Court's analysis . . . since "the language of a Virgin Islands statute which has been taken from the statutes of another jurisdiction is to be construed to mean what the highest court of the jurisdiction from which it was taken had, prior to its enactment in the Virgin Islands, construed it to mean." *Simmonds*, 58 V.I. at 16 (quoting *Berkeley v. W. Indies Enter., Inc.*, 10 V.I. 619, 625 (3d Cir. 1973)).

Lastly, trial courts do not have the authority to modify or depart from the construction given to a borrowed statute before it was borrowed. Instead, the power to abrogate or modify binding precedent—presumably including precedent that accompanies borrowed statutes—is vested solely in the highest court of a jurisdiction. *Cf. V.I. Gov't Hosps. & Health Facilities Corp.*, 47 V.I. at 442 ("[T]he borrowed statute *shall be construed* to mean what the highest court from the borrow[ed] statute's jurisdiction, *prior* to the Virgin Islands enactment, construed the statute to mean." (first emphasis added) (citation omitted)). *But cf. Briggs & Co v. District of Columbia*, 196 F.2d 241, 243 (D.C. Cir. 1952) ("But at least in the absence of a more settled interpretation, or one of high state judicial authority, *we are free* to apply the District statute differently." (emphasis added) (footnote omitted)); *see also, e.g., State ex rel. Mankin v. Wilson*, 569 P.2d 922, 925 (Mont. 1977) ("While this Court will consider the construction placed on the borrowed statute, such construction *is not binding upon this Court*." (emphasis added) (citing *State ex rel. Dept. of Highways v. Hy-Grade Auto Court*, 546 P.2d 1050 (1976)); *Pope v. Brock*, 912 So. 2d 935, 938 (Miss. 2005) ("While statutory interpretation by another state's supreme court is not binding upon this Court . . . we may consider a sister state's interpretation of its statutes where there is clear evidence that our Legislature consciously borrowed statutory language from that state's enactment." (citation omitted)). Consequently, the duty of a trial court regarding borrowed legislation is first to determine which jurisdiction the statute was borrowed from, then to discern whether the highest court of that jurisdiction settled the meaning of its statute, and finally to apply the settled meaning, if any. *Cf. V.I. Gov't Hosps. & Health Facilities Corp.*, 47 V.I. at 442 n.13 & 443-44 (considering Oregon law after determining that Virgin Islands borrowed its writ of review statute from Alaska who in turn borrowed it from Oregon); *Simmonds*, 58 V.I. at 24-26 (applying Texas and Puerto Rico law after concluding that the Virgin Islands borrowed its aggravated assault and battery statute from Puerto Rico who in turn borrowed it from Texas).

Statutes allowing a personal representative to substitute into a pending civil action upon the death of one of the parties had been in place across the United States long before the Virgin Islands became a territory of the United States in 1917. Many of the statutes in force around that time were like the version the Virgin Islands enacted in 1921.[7] However, the closest cousin (if not the grandparent) of Section 78 of Title 5 of the Virgin Islands Code was Section 867 of Title XIII of the Compiled Laws of the Territory of Alaska, which provides in pertinent part as follows:

> No action shall abate by the death or disability of a party or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court may at any time within two years thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest. Compiled Laws of Terr. Alaska, tit. XIII, ch. 3, § 867 (1913).

Section 867 of Title XIII of the Compiled Laws of Alaska is identical to Section 11 of Title III of the 1921 Codes, which in turn is identical to Section 78 of Title 5 of the Virgin Islands Code. Considering that "a significant portion of the 1921 Codes was borrowed or adapted from The Compiled Laws of the Territory of Alaska of 1913," *Tyson v. People*, 59 V.I. 391, 407 (2013), the Court concludes that Section 78 of Title

[7] *Cf., e.g., Irwin v. Wright*, 258 U.S. 219, 222-23 (1922) ("'An action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.'" (quoting Ariz. Civ. Code § 461 (1913 ed.)).

5 of the Virgin Islands Code was borrowed from the Territory of Alaska. *Cf. Willis*, 169 U.S. at 307 ("The resemblance between the provisions of the Massachusetts statute of 1860 and of the act of Congress of 1864 is so remarkable, that it is evident that the latter were taken from the former.").

But this does not end the inquiry here because there are no reported decisions by the courts of the then-Territory of Alaska construing Alaska's substitution statute. There are reported decisions by Oregon courts, however, which is where Alaska borrowed its statute from. *See Bermudez v. V.I. Tele. Corp.*, 54 V.I. 174, 187 n.4 (Super. Ct. 2011) ("The 1921 Codes had been 'developed by two young lawyers, Leslie Curry and Denzil Noll, both of whom had come to the U.S. Virgin Islands from the Territory of Alaska soon after 1917. Taking as their lodestar the Alaska Code which, in turn, was derived from the Oregon Code, these two young lawyers compiled two separate codes—one for each municipality." (quoting Gov. John D. Merwin, *The U.S. Virgins Come of Age: A Saga of Progress in the Law*, 47 A.B.A. J. 778, 779 (1961)); *accord Jennings v. Alaska Treadwell Gold Mining Co.*, 170 F. 145, 148 (9th Cir. 1909) ("The Alaska Code of Civil Procedure is substantially the same as the Oregon Code of Civil Procedure."); *Mackay v. Fox*, 121 F. 487, 489 (9th Cir. 1903) (noting that "Oregon law . . . prevailed in Alaska."). Since Alaska borrowed its statute from Oregon, courts have looked to Oregon case law to determine if there was a known and settled construction in Oregon before Alaska borrowed the statute. *Accord V.I. Gov't Hosps. & Health Facilities Corp.*, 47 V.I. at 441-43. *Contra Bermudez*, 54 V.I. at 190 n.12. However, two points must be acknowledged at the outset.

First, Oregon's statute differed from the version in force in the Territory of Alaska. *See, e.g.*, *White v. Johnson*, 40 P. 511, 514 (Ore. 1895) ("Section 38, Hill's Code, provides that 'No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representative or successor in interest.'"). Specifically, Alaska's substitution statute, like the Virgin Islands' statute, allowed for substitution within two years after death, disability, or dissolution, not one year like the Oregon statute. Further, marriage was not listed as a status akin to death or disability.

Second, it was Congress, not the territorial government of Alaska, who borrowed Oregon's substitution statute for Alaska, possibly as early as 1884, but certainly in 1900. *See* Frederic E. Brown, *The Sources of the Alaska and Oregon Codes: Part II: The Codes and Alaska, 1867-1901* 2 UCLA Alaska L. Rev. 87, 90 (1973) ("The Alaska Government Act of 1884 . . . provided that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." (paragraph break, quotation marks, and footnote omitted)); *see also* An Act Making further provision for a civil government for Alaska, and for other purposes, ch. 786, 31 Stat. 321, 337 (1900) ("No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court may at any time within two years thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest.") (substitution statute adopted by Congress, later codified as Title II, Chapter 3, Section 35 of what became the Alaska civil code). Congress passed a general decree in 1884 that the laws of Oregon were in force in the Territory of Alaska. Then in 1900, Congress adopted a civil code specifically for Alaska. "By adopting the laws of Oregon for Alaska in 1884, Congress had necessarily also adopted the interpretations of these laws by the Courts of Oregon. Brown, *Sources of the Alaska and Oregon Codes*, 2 UCLA Alaska L. Rev. at 99 n.51. This legislative intent was again ascribed to Congress's work in 1900, since Territorial Alaska's civil code was taken largely from Oregon. *See id.* at 109 ("'This bill has been examined by a committee of Alaskan lawyers, and they have suggested to us the changes which they desired. The committee of the House has to a large extent conformed to the suggestions of

Alaskan lawyers. It was not the purpose of the committee to go over the laws of Oregon that are applicable to Alaska and entirely recast them. We took them as we found them except so far as the lawyers of Alaska desired to change them.'" (brackets and footnote omitted) (quoting 33 Cong. Rec. 4895, 5977 (1900) (remarks by Representative Henry R. Gibson of Tennessee)).

Although examining Oregon case law is not always necessary, *cf. Bermudez*, 54 V.I. at 190 n.12, it is necessary here because Alaskan Courts did not have occasion to interpret their substitution statute before the Virgin Islands borrowed it. Oregon Courts did and that construction would have accompanied the statute into the Territory of Alaska. Hence, the Court will turn to Oregon to determine whether Oregon Courts had given a known and settled construction of its statute before Alaska borrowed it. However, because decisions rendered after a statute is borrowed are only persuasive, decisions by the Supreme Court of Oregon concerning Oregon's substitution statute might not be binding after 1884, and certainly not after 1900. In this instance, the date is important because the Court has not uncovered any reported decisions before 1884, and at least one court had concluded that, by 1900, Oregon law was supplanted in Alaska. *See Petterson v. Berry*, 125 F. 902, 903 (9th Cir. 1903) ("At the time of the making of the note and mortgage in question the general laws of the state of Oregon, so far as applicable, governed in Alaska by virtue of the act of Congress . . . . But at the time of the commencement of this suit the act of Congress approved June 6, 1900, and entitled An act making further provision for a civil government for Alaska, and for other purposes, had supplanted the laws of Oregon for that territory, and was in force there." (internal citation and quotation marks omitted)). *But cf. Kulawik v. Era Jet Alaska*, 820 P.2d 627, 631 (Alaska 1991) ("Congress enacted Alaska's original wrongful death statute in 1900, adopting a modified version of Oregon's wrongful death statute." (footnote omitted)). Notwithstanding the historical uncertainty, the Court will still look to Oregon case law for guidance since Oregon courts did construe Oregon's substitution statute prior to 1900.

One of the earliest cases to consider Oregon's substitution states was not decided by the Supreme Court of Oregon, but by the Circuit Court for the District of Oregon, which was the predecessor court to the United States District Court for the District of Oregon. In *Barker v. Ladd*, 2 F. Cas. 815 (C.C.D. Ore. 1874) (No. 990), Judge Matthew P. Deady denied an untimely motion for substitution for a plaintiff. The *Barker* court explained that under federal law that was in effect at the time,

> the representative of the deceased party may voluntarily appear and make himself a party to the suit, and if he neglects or refuses to do so, the adverse party may, if he desire it, have a *scire facias* against him to compel him to do so. No time is limited within which these proceedings may take place. But the law of the state (Code Or. § 37) also provides that no action shall abate by the death of a party; and that 'in case of the death of a party, the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representative." *Id.* at 816.

Oregon law went "farther," the court concluded, "and in effect prescribes that th[e] right must be exercised within one year, or else it is taken away or barred." *Id.* "It is a statute of limitations," the court held, "upon the right to maintain or continue this action." *Id.* Since the "motion comes too late and cannot be allowed," the court denied it with costs. *Id.*

Two years later, the Supreme Court of Oregon reached the same conclusion in *Dick v. Kendall*, 6 Ore. 166 (1876). The question there concerned the impact of a party's death on a pending appeal. The court held

> [t]hat the representatives or successors in interest of a deceased party have one year after the death of the party to apply for leave to continue the suit; and the application to the proper court, by proper petition and proof of serving of notice, is in time, if made within one year, although the court may not in fact make the order allowing the motion until after the expiration of the year.
>
> That the suit is suspended during the period between the death and the order allowing the representatives to continue the suit, and that this period is not to be deemed any part of the time limited for taking an appeal. *Id.* at 167.

Later, in *Long v. Thompson*, 55 P. 978, 979 (Or. 1899), the Oregon Supreme Court reiterated that "the motion for a substitution must be made within a year after the death." (citing *Dick*, 6 Ore. 166; *Barker*, 2 F. Cas. 815; *In re: Bainbridge*, 67 Barb. 293 (N.Y. Sup. Ct. 1875)). Again that same year, 1899, the court reiterated in *White v. Ladd*, 56 P. 515 (Ore. 1899), a case in which the defendant died without having been served, that

> if the application for the continuance was made within the year, it was sufficient upon which to revive the action, within the authority of *Dick v. Kendall*, 6 Ore. 166. The plaintiff has brought himself within the doctrine of that case, unless it was necessary, before the order of substitution could have been made and entered, that the executrix should have had notice of the pendency of the application for substitution, where a party to the record died after he had been duly served with summons, and regularly brought into court. . . . The reason for directing that a party sought to be substituted be notified of the proceeding in such case is to afford him an opportunity for being heard upon the propriety of making the order of continuance as against him. The issues of the case remain the same after the substitution as before, and such party is entitled to be heard only in opposition to the order. *White*, 56 P. at 516-17 (citing *Dunham v. Carson*, 42 S.C. 383 (20 S.E. 197) (paragraph break omitted).

Barker, *Dick*, *Long*, and *White* make clear that before 1900, the settled and accepted interpretation of Oregon's substitution statute was that motions to substitute had to be filed within the statutory deadline, though did not have to be decided before that deadline, for the court to continue to have jurisdiction over the case. If the motion came too late, it was denied and the complaint was dismissed. In other words, the deadline set by statute was akin to a statute of limitations. A subsequent decision, which is only persuasive authority, further supports this conclusion:

> The administrator in this case has no standing or right to appear therein unless he either has been substituted in the action or is entitled to be substituted, and this is part of the relief he seeks by this motion to vacate, but his application was not made within a year from the death of his testator, and comes too late. In *Long v. Thompson*, 34 Ore. 359 (55 P. 978), it is held that the motion for substitution must be made within the year. To the same effect is *Dick v. Kendall*, 6 Ore. 166. And in *Barker v. Ladd*, 3 Sawy. 44 (F. Cas. No. 990), it is held that this Section 38 is a statute of limitations, and if the right to move for substitution is not exercised within one year it is taken away: *Matter of Borsdorff*, 17 Abb. Pr. (N.Y.) 168, 171. Therefore the administrator has no standing to ask for substitution or to reply in the action. *Stivers v. Byrkett*, 108 P. 1014, 1016 (Ore. 1910), *reh'g denied*, 109 P. 386 (Ore. 1910).[8]

[8] The court also noted in *Stivers* that "[t]he death may be suggested by either party, and the motion should be made by the party desiring to proceed with the action." 108 P. at 1016.

Case law, scholarly articles, and legislative history point to Oregon as the source of Alaska's substitution statute. Notwithstanding the minor differences, the Oregon and Alaska statutes are remarkably similar. Settled construction by Oregon courts would have accompanied its substitution statute into Alaska, since Congress is presumed to be aware of the interpretation that Oregon courts gave to Oregon's statutes. *See* Brown, *Sources of the Alaska and Oregon Codes*, 2 UCLA Alaska L. Rev. at 99 n.51; *accord Willis*, 169 U.S. at 307. Since Congress borrowed Alaska's statute from Oregon, and since the Virgin Islands, in turn, borrowed its statute from Alaska, the construction given by the Oregon Supreme Court before 1900 accompanied the statute. Since no court with supreme judicial authority—whether in Alaska or the Virgin Islands—altered the historical and settled construction before 1921, the known and settled construction by Oregon courts is binding on how Section 78 of Title 5 of the Virgin Islands Code is construed.

A motion to substitute filed pursuant to Section 78 of Title 5 of the Virgin Islands Code "must be made within [two] year[s] after the death," *Long*, 55 P. at 979, "or else" the right "is taken away or barred." *Barker*, 2 F. Cas. at 816. But if Oregon courts concluded that their substitution statute was akin to "a statute of limitations upon the right to maintain or continue [a civil] action," *id.*, then Section 78 of Title 5 of the Virgin Islands Code is also akin to a statute of limitation. However, more recent precedent, also binding, dictates that "the statute of limitations is an affirmative defense that must be specifically pleaded at the first opportunity or else is waived." *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 536 (2015) (citations omitted); *accord Allen*, 59 V.I. at 436 ("And 'because claims-processing rules are equivalent to the statute of limitations and other affirmative defenses, litigants who seek to invoke a claims-processing rule to dismiss or limit an appeal must do so *at the first opportunity* prior to the case becoming fully briefed.'" (emphasis added) (quoting *In re: Guardianship of Smith*, 54 V.I. 517, 524 n.5 (2010)). Consequently, the Court holds that the two-year statutory deadline in Section 78 of Title 5 of the Virgin Islands for substituting parties after death, disability, or dissolution is not jurisdictional. *Accord Stewart*, 66 V.I. at 538-39 (statutory deadline for seeking appellate review under 12 V.I.C. § 913(d) is not jurisdictional). Instead, like a statute of limitation, Section 78 is simply a rule for processing a party's claims. Accordingly, failure to raise the timeliness of a substitution motion means the untimeliness defense is either waived or forfeited. "When a party fails to raise a defense of untimeliness, thereby forfeiting that defense, a court should proceed to the merits of a case." *Ventura*, 64 V.I. at 617 (citation omitted); *Rennie*, 62 V.I. at 536 ("the statute of limitations is an affirmative defense that must be specifically pleaded at the first opportunity or else is waived." (citations omitted)).

Here, F. Jones "acknowledges being 'out of time.'" (Mot. to Substitute Personal Rep of Estate of Gorgonius Jones as Pl. 1, filed June 8, 2015, *Jones v. Lockheed Martin Corp.*, et al., SX-08-CV-057 (hereinafter "Jones Mot.").) But she contends that "equitable considerations" support excusing any delay. *Id.* Sections 76, 77, and 78 of Title 5 of the Virgin Islands Code "reflect the Legislature's humane and remedial scheme," she argues, "to obviate the harshness of prior law that ended all personal injury claims on death." *Id.* F. Jones is correct in that, her husband's tort claim would have abated at common law. Virgin Islands law modified the common law and now permits pending tort claims to continue, albeit for two years after death. F. Jones's claim would have abated but for the Virgin Islands survival statutes. Yet, notwithstanding that more than two years has now passed since G. Jones's died, his claims have now been revived. *Cf. Fox v. Nick*, 660 N.W.2d 881, 886 (Neb. 2003) ("The substitution of a new party to proceed with the prosecution or defense of a claim is the revivor of an action. The death of a party to a legal proceeding, where the cause of action survives, suspends the action as to decedent until someone is substituted for decedent as a party." (quoting 1 C.J.S. *Abatement and Revival* §155 (1985)); *accord A.J. Armstrong Co. v. Hufstedler*, 405 P.2d 411, 412 (N.M. 1965) (revival of claim against defendant's estate) ("It is fundamental that a pending action cannot be prosecuted after the death of a party defendant thereto, so as to affect the decedent's estate, until it is revived against his personal representative or successor in interest."). GEC forfeited the right to oppose F. Jones's motion by defaulting. Lockheed Martin waived the right to oppose when it failed to file a response. If the motion had been opposed, the Court might have had to dismiss G. Jones's complaint. In this instance, however, the Court need not consider whether "attorney inadvertence," (Jones Mot. 3), could suffice to overrule an objection by an opposing party to the timeliness of a substitution motion.

Having concluded that the statutory deadline for substituting a personal representative upon the death of a party is akin to a statute of limitations, the question that now remains is what impact the promulgation of Virgin Islands Rule of Civil Procedure 25 has had on Section 78 of Title 5 of the Virgin Islands Code. The Supreme Court of the Virgin Islands has recognized that "the Revised Organic Act clearly provides the Legislature and the Judiciary with concurrent authority to promulgate procedural court rules." *Gerace*, 65 V.I. at 302; *see also* 48 U.S.C. 1611(c). While the Virgin Islands Supreme Court has not held that a procedural statute must yield if it conflicted with a rule of procedure that Court had promulgated, the Court has implied as much. *See id.* at 302-03 ("[T]he overwhelming majority of other jurisdictions where the legislature and the judiciary have been vested with concurrent authority to promulgate procedural rules have held that conflicts between rules promulgated by the judiciary and rules promulgated by the legislature *are resolved in favor of the judiciary*." (emphasis added) (citing *Hickson v. State*, 875 S.W.2d 492, 493 (Ark. 1994); *State v. Griffith*, 539 P.2d 604, 610 (Idaho 1975); *Winberry v. Salisbury*, 74 A.2d 406, 414 (N.J. 1950); *Waples v. Yi*, 234 P.3d 187, 191 (Wis. 2010); *Adams v. Rubinow*, 251 A.2d 49, 56 (Conn. 1968). Not to be an *agent provocateur*, but if both branches do, in fact, have concurrent authority to promulgate rules of procedure, then the Virgin Islands Judiciary and the Virgin Islands Legislature may be in route to a head-on collision. It also begs the question, can the Creator (the Virgin Islands Legislature), with the power to establish and abolish courts, be restricted by the Createe's (the Virgin Islands Supreme Court's) interpretation of the legislature's authority. Here, though the concept of separate but equal branches of government is embraced and universally accepted, *see, e.g., id.* at 301, in truth it is *splendide mendax* – a fleeting illusion that will never be achieved under the current system. In most States and Territories, as well as in the federal system, the branches of government are co-equal because they were established as such by written constitution. *See, e.g.*, *Villani v. Seibert*, 159 A.3d 478, 497 n.4 (Pa. 2017) (Donohue, J., dissenting) ("The General Assembly also has the power to 'establish additional courts or divisions of existing courts, as needed, or abolish any statutory court or division thereof.' These sections are germane to the point that any legislative authority within the judicial branch *was limited and defined by the citizens*." (emphasis added) (quoting Pa. Const. art V, § 8)); *cf. Johnson*, 514 N.W.2d at 553-54 ("[S]ince the 1956 amendment to the Judiciary Article of the Minnesota Constitution removed the constitutional requirement that pleadings and proceedings be under the direction of the legislative body, under the separation of powers doctrine the legislature has no constitutional authority in their enabling acts or otherwise to reserve a right to modify or enact statutes that will govern over court rules of procedure already in place." (quotation marks, citations, brackets, and footnotes omitted)); *see also Adams*, 251 A.2d at 56 ("The effect of the development in the understanding of the true meaning of the constitutional provision for separation of powers, in the intervening years since 1818, as far as rule making is concerned, is that the General Assembly has no power to make rules of administration, practice or procedure which are binding on either of the two *constitutional* courts and that any attempt on its part to exercise such power is dependent, for its efficacy, upon the acquiescence of the constitutional court involved." (emphasis added) (citing *In re: Appeal of Dattilo*, 72 A.2d 50 (Conn. 1950)). By contrast, the Virgin Islands Legislature, pursuant to authority granted by Congress, created the Supreme Court of the Virgin Islands and can theoretically "uncreate" or dissolve the Virgin Islands Supreme Court or any other court in the Virgin Islands. The power to establish necessarily implies the power to abolish. *See, e.g.*, *State ex rel. Cheek v. Rollings*, 308 S.W.2d 393, 397-98 (Tenn. 1957) ("Since the Constitution gives to the General Assembly the right to establish such courts, it likewise has the right to abolish such courts whenever, in the opinion of the Legislature, the public welfare requires this to be done. The discretion of the Legislature is not subject to review by the courts."); *accord Bank of State v. Cooper*, 10 Tenn. (2 Yer.) 599, 601 (1831) ("The right of appeal is only conferred by statute. No constitutional provision requires that it should exist. . . . It would be perfectly competent for the legislature to abolish the supreme court, and take away the right of appeal from the county to the circuit court. Each would then exercise its own peculiar jurisdiction, and be supreme within its sphere of action."). However, considering that "concurrent rulemaking authority does not mean . . . co-equal rulemaking authority," *Gerace*, 65 V.I. at 303-04 (citations omitted), and notwithstanding that the other jurisdictions that have been established by constitution conflicts between rules promulgated by the judiciary and rules promulgated by the legislature are resolved in favor of the judiciary," *id.* at 303-04 (citations omitted), it may be the case that "[t]he rules governing practice and procedure of the courts established by local law . . . shall be governed," first "by local law," and then, in the absence of local law, by "the rules promulgated by those courts," 48 U.S.C § 1611(c), at least until such time as when the Virgin Islands adopts a constitution. If this is correct, then Section 78 remains valid, notwithstanding Rule 25's promulgation.

In this instance, however, the conflict (if any) between Section 78 and Rule 25 need not be resolved because the result in *Jones* would be the same. The Virgin Islands Supreme Court has repeatedly stated "that time limits set exclusively by court rules are mere claims-processing rules which do not affect a court's subject-matter jurisdiction even if they may result in dismissal if violated." *Ventura*, 64 V.I. at 616-17 (quoting *Crooke*, 54 V.I. at 253-54, parenthetically). Further, it is "[t]he Virgin Islands Legislature [who] unquestionably possesses the authority to determine the jurisdiction of Virgin Islands courts," *Stiles v. Yob*, S. Ct. Civ. No. 2016-0027, 2016 V.I. Supreme LEXIS 23, *8 (June 8, 2016), and not the courts themselves. Here, the result would be the same, even if Section 78 of Title 5 of the Virgin Islands Code (a procedural statute) was implicitly repealed when the Supreme Court of the Virgin Islands exercised the authority the Legislature granted it to promulgate rules of procedure for Virgin Islands courts, specifically Rule 25.[9] Both roads lead to the same end: Defendants do not have a right to object to G. Jones's claims being revived. Hence, notwithstanding the delay, F. Jones's motion to substitute will be granted.

ANTONIO VELEZ

Factual and Procedural Background

Like G. Jones, Antonio Velez (hereinafter "A. Velez") also sued Lockheed Martin, Martin

---

[9] In fact, if Rule 25 did supersede Section 78, and if the new rules do apply retroactively, it is possible that F. Jones's motion was not late, but early. Another Superior Court judge recently observed that

> [c]ourts in the Virgin Islands have not considered yet whether Section 78 of Title 5 of the Virgin Islands Code requires that a suggestion of death be placed on record and if so, who can file it and on whom must it be served. Some courts [in other jurisdictions] have held that the time to file a motion to substitute does not begin to run until a suggestion of death, or at least a motion to substitute, has been served on the deceased party's representative or successor because courts only have power, or jurisdiction, over the parties to a case. The personal representative or successor must be made a party first before the court acquires jurisdiction over a nonparty. *Antoine*, 2017 V.I. LEXIS 44 at *12-13 (footnotes omitted).

Furthermore, federal courts have held that, "'regardless of whether the parties have knowledge of a party's death,'" "'[t]he running of the . . . limitations period under Rule 25(a)(1) is not triggered *unless* a formal suggestion of death is made on the record.'" *Id.* at *13 n.5 (quoting *Grandbouche v. Lovell*, 913 F.2d 835, 836 (10th Cir. 1990, parenthetically). Virgin Islands Rule of Civil Procedure 25(a) appears to be modeled largely after Federal Rule of Civil Procedure 25(a), though the two rules differ in one important aspect: the Virgin Islands rule expressly incorporated the two-year deadline imposed by Section 78 of Title 5 of the Virgin Islands Code and not the ninety-day deadline provided by the federal rules. Since the Virgin Islands Rules of Civil Procedure apply retroactively, and if Rule 25 implicitly repealed Section 78, and further considering that applying repealed law is reversible error, see *Connor*, 59 V.I. at 599, then the two-year deadline for substitution may not have begun to run yet since the suggestion of death is the formal event under federal law that starts the running of the clock. Technically speaking, the Plaintiffs' deaths have not been formally suggested on the record yet, or perhaps only as of the date when each substitution motion was filed. If Section 78 was not implicitly repealed, then the Court agrees with the other Superior Court judges who have observed that courts should apply the procedure in effect at the time a motion was filed. *See, e.g., Edwards v. Hess Oil V.I. Corp.*, SX-15-CV-382, 2017 V.I. LEXIS 94, *5 n.3 (Super. Ct. June 28, 2017) ("[R]ather than reaching back in time, Rule 1-1 must require that the rules in effect prior to March 31, 2017 continue to govern motions pending as of that date, but for all motions filed after March 31, 2017, the new rules will apply unless application to the case (not a particular motion) would be unjust or infeasible." (citing *Webster v. FirstBank P.R.*, 66 V.I. 514, 519 n.3 (V.I. 2017))); *accord Augustin v. Hess Oil V.I. Corp.*, SX-13-CV-427, et al., ___ V.I. ____, _____ n.9, 2017 V.I. LEXIS 133, *50 n.9 (Super. Ct. Aug. 23, 2017) ("Because these motions were filed before Rule 25(a) was promulgated, the Court applies the procedure in effect at the time, section 78 of title 5 of the Virgin Islands Code." (citing *Edwards*)). The difference here, however, at least in *Jones* and *Christopher*, is that the substitution motions were filed more than two years after death, which necessarily raises the question whether the deadline is inflexible or can be overlooked and, further, whether the new rule implicitly repealed the old statute.

Marietta, and GEC for damages allegedly from exposure to asbestos and other toxic substances during the time he worked at the former Martin Marietta alumina refinery on St. Croix. In his complaint filed May 15, 2008, A. Velez also sued Lockheed Martin and Martin Marietta in their individual and successor capacities to Martin Marietta Aluminum, Inc. and Martin Marietta Aluminum Properties, Inc. As in *Jones*, Lockheed Martin appeared and answered A. Velez's complaint on its own behalf and on behalf of the Martin Marietta defendants. But unlike in *Jones*, GEC appeared and answered A. Velez's complaint on August 1, 2008.

In April 2012, A. Velez dismissed his claims against GEC by stipulation. His stipulation stated that "the parties ha[d] resolved their differences" and "requested that the present action be dismissed with prejudice" as between him and GEC. (Pl's Stip. for Dismissal 1, filed Apr. 12, 2012, *Velez v. Lockheed Martin Corp., et al.*, SX-08-CV-249.) The Court approved A. Velez's stipulation by order entered April 26, 2012. A. Velez passed away on June 6, 2016.

Approximately five months later, his wife, Luz Velez (hereinafter "L. Velez") filed the motion now before the Court to substitute herself in place of her husband to continue this lawsuit. As GEC had been dismissed by stipulation, L. Velez did not serve GEC with a copy of her motion. Lockheed Martin was served but did not file a response. Before L. Velez filed her substitution motion, the attorney who previously represented her husband filed a petition with the Probate Division of the Superior Court to have L. Velez appointed as personal representative of A. Velez's estate. L. Velez filed her petition on August 29, 2016, together with an affidavit and a death certificate for A. Velez. The supporting documentation showed that A. Velez died on January 6, 2016, on St. Croix; that L. Velez was his wife; and that she wanted to pursue a survival action and commence a wrongful death action on his behalf. The petition was not served on the Defendants, A. Velez's heirs, or anyone else. Notice of the petition was also not filed in the *Alumina Dust Claims* master case or in *Velez*. The Clerk's Office docketed L. Velez's petition, opened a miscellaneous probate case numbered SX-16-MP-014, and assigned it to a Superior Court magistrate judge. One day later, the court granted the petition and appointed L. Velez as personal representative of A. Velez's estate. The Clerk's Office entered the order the following day, August 31, 2016, and closed the case. Three months later, L. Velez filed the motion now before the Court for leave to substitute herself in place of her husband to continue this action as his personal representative.

Discussion

A. Velez sued Lockheed Martin and GEC. Prior to his death on January 6, 2016, A. Velez had agreed to dismiss his claims against GEC with prejudice. His attorney filed a stipulation to that effect on April 12, 2012, signed by counsel for both parties, which the Court approved by order entered April 26, 2012. Thus, when L. Velez filed her substitution motion on December 2, 2016, Lockheed Martin was the only remaining defendant in *Velez*. She served Lockheed Martin[10] and Lockheed Martin did not respond. L. Velez's motion was timely filed because it was filed within two years from the date of A. Velez's death. Ergo, her motion is properly before the Court. It will be granted by separate order, notwithstanding the same question discussed above, whether the promulgation of Rule 25 of the Virgin Islands Rules of Civil Procedure implicitly repealed Section 78 of Title 5 of the Virgin Islands Code. L. Velez's motion was timely under Section 78 and would have been premature if governed now by Rule 25.

RUDOLPH CHRISTOPHER

Factual and Procedural Background

---

[10] Whether L. Velez should have served GEC is unclear. Case law does not address whether current parties must continue to serve court papers on parties previously dismissed from a case. At first blush, it may seem unnecessary and could also increase costs unnecessarily. But with the advent of electronic service and the variety of ways of effecting service, *cf.* V.I. R. Civ. P. 5(b)(2), (c), it might not be as burdensome as before. Moreover, former parties may want to be (or perhaps even should be) kept abreast of the status of the case. *Cf. Stiles v. Yob*, S. Ct. Civ. No. 2016-0027, 2016 V.I. Supreme LEXIS 23, *8 (June 8, 2016) (interlocutory appeal by intervenor dismissed for lack of jurisdiction); *St. Croix, Ltd. v. Shell Oil Co.*, 60 V.I. 468 (2014) (order dismissing two of three defendants for lack of personal jurisdiction appealed nine years later). *See also Anderson-Tully Co. v. Fed. Ins. Co.*, 347 F. App'x 171, 175-76 (6th Cir. 2009) (holding that stipulations for dismissal must be signed by all parties, including dismissed parties, who have appeared to take effect without court approval).

Like G. Jones and A. Velez, Rudolph Christopher (hereinafter "Christopher") also sued Lockheed Martin, Martin Marietta, and GEC for damages allegedly from exposure to asbestos and other toxic substances during the time he worked at the former Martin Marietta alumina refinery on St. Croix. In his complaint filed on June 9, 2008, Christopher sued Lockheed Martin and Martin Marietta in their individual and successor capacities to Martin Marietta Aluminum, Inc. and Martin Marietta Aluminum Properties, Inc. Lockheed Martin appeared and on July 7, 2008 answered Christopher's complaint on its own behalf and on behalf of the Martin Marietta defendants. GEC appeared and answered Christopher's complaint on August 1, 2008.

Christopher passed away on September 29, 2010. Nearly two years later, on April 13, 2012, Christopher, through his former attorney, filed a stipulation to dismiss his claims against GEC. The stipulation stated that "the parties ha[d] resolved their differences" and "requested that the present action be dismissed with prejudice" as between that plaintiff and GEC. (Pl's Stip. for Dismissal 1, filed Apr. 13, 2012, *Christopher v. Lockheed Martin Corp., et al.*, SX-08-CV-297.) Unaware that Christopher had passed away, the Court approved the stipulation by order entered April 26, 2012.

Nearly five years after Christopher died, his daughter, Neisha Christopher-Christian (hereinafter "Christopher-Christian"), filed, on June 9, 2015, the motion now before the Court to substitute herself in place of her father and continue this lawsuit. Christopher-Christian only served Lockheed Martin since GEC was dismissed. Lockheed Martin did not file a response in opposition. Before Christopher-Christian moved for substitution, the attorney who previously represented her father filed a petition with the Probate Division of the Superior Court to have Christopher-Christian appointed as personal representative of Christopher's estate. The petition was filed on October 15, 2013 together with an affidavit and a death certificate for Christopher. The supporting documentation showed that Christopher died on September 29, 2010, on Puerto Rico; that Christopher-Christian was his daughter; and that she wanted to pursue a survival action and commence a wrongful death action on his behalf. The petition was not served on Defendants, Christopher's heirs, or anyone else. Notice of the petition was also not filed in the *Alumina Dust Claims* master case or in this individual case. The Clerk's Office docketed the petition, opened a miscellaneous probate case numbered SX-13-MP-015, and assigned it to a Superior Court magistrate judge. On November 7, 2013, the court granted the petition and appointed Christopher-Christian personal representative of her father's estate. The Clerk's Office entered the order the same day and closed the miscellaneous case. Approximately a year and a half later, Christopher-Christian filed the motion in *Christopher* now before the Court for leave to substitute herself in place of her father and continue this case.

Christopher-Christian did not state, however, in either her June 9, 2015 Motion or her October 15, 2013 Petition that she had already filed a petition with the Probate Division to probate her father's estate. On July 19, 2011, the Clerk's Office opened a probate proceeding, captioned *In re: Estate of Rudolph J. Christopher* and numbered SX-11-PB-050. The court granted Christopher-Christian's petition and issued letters of administration to her, authorizing her to act as administrator of Christopher's estate. In one of the inventories later filed, Christopher-Christian listed on status report a lawsuit her father filed, which is still pending in the Superior Court, *Rudolph Christopher v. Amerada Hess Corporation, et al.*, SX-06-CV-235. She did not list this case that her father filed against Lockheed Martin and GEC. Notwithstanding that the 2006 lawsuit was listed as personal property of Christopher's estate, the court issued a final adjudication, as amended on June 6, 2012, and distributed Christopher's estate, but did not address the 2006 lawsuit. Christopher-Christian was later discharged as administrator by order entered October 5, 2012 and the probate case was closed.

Discussion

Christopher passed away on September 29, 2010. Christopher-Christian did not motion for leave to substitute herself until June 9, 2015. As in *Jones*, the substitution motion in *Christopher* is also late. Further, like *Jones*, Lockheed Martin did not respond. If that ended the matter, the Court could grant Christopher-Christian's motion for the same reasons as those given for F. Jones's motion. By not responding, Lockheed Martin lost the right to object to the timeliness of Christopher-Christian's substitution motion. But the matter does not end here.

GEC was dismissed from *Christopher* in 2012 by stipulation. However, Christopher-Christian's motion now reveals that her father died two years earlier, in 2010. The question becomes who authorized Christopher's former attorney to settle his claim with GEC two years after he died and four years before a personal representative motioned to substitute into this case. Although Christopher-Christian was appointed as administrator in 2011, and later as personal representative in 2013, she did not motion for leave to substitute into this lawsuit until 2015. Given the concerns raised here, the Court must withhold ruling on Christopher-Christian's motion at this time.

Courts in the Virgin Islands have recognized that death terminates the attorney-client relationship. *See, e.g.*, *Sweeney v. Ombres*, 60 V.I. 438, 440 (2004); *Jacobson v. Haynes*, Civ. No. 68/2002, 2004 V.I. LEXIS 26 (Super. Ct. June 4, 2004); *Alumina Dust Claims*, 2017 V.I. LEXIS 2 at *29 n.11; *Antoine*, 2017 V.I. LEXIS 44 at *11; *Antoine v. V.I. Port Auth.*, Civ. No. 2001/63, 2008 U.S. Dist. LEXIS 55692, *18 (D.V.I. July 22, 2008) ("Plaintiffs' counsel is not a party to the action and his authority to act on behalf on Johnson terminated upon Johnson's death."). Attorneys too have referred to this rule in arguments made in court papers. *See, e.g., Hodge*, 50 V.I. at 307 (referring to statement by counsel) ("At trial, on February 26, 2007, counsel for Miller stated that their agency relationship with Hodge had terminated at her death."); *Antoine*, 2017 V.I. LEXIS 44 at *4 (citing *Restatement (Second) of Agency* § 120 (1957) and *Restatement (Third) of the Law Governing Lawyers* § 31(2)(b) (2000) as relied on by defendant for claim that authority of plaintiff's attorney to serve summons ended when the plaintiff died). This Court has also previously observed that,

> [o]rdinarily, the death of the client revokes his attorney's authority to act for him. Courts in the Virgin Islands have acknowledged this general rule. But it appears that no court in the Virgin Islands has yet considered whether adopting this common law rule is appropriate for the Territory. Assuming . . . that the attorney-client relationship does terminate upon the death of the client, it would also follow then that the former attorney of a deceased client does not necessarily become the attorney for the personal representative of the deceased client or his estate. The better course, if the same attorney is later retained by the deceased client's personal representative or estate, would be for that attorney to reappear by notice and identify her or his new client, and thereby avoid any doubt as to the attorney's authority to act. *Alumina Dust Claims*, 2017 V.I. LEXIS 2 at *29 n.11 (quotation marks, brackets, and citations omitted).

But while courts and counsel have both recognized the rule that death generally terminates an attorney's authority to act on behalf of his client, no court in the Virgin Islands has formally adopted this rule yet.

When presented with a question concerning what law applies, and the law is not settled by binding precedent or statute, courts applying Virgin Islands law must consider and weigh three factors: what approach Virgin Islands courts have taken in the past, what approach courts in other jurisdictions take, and lastly, what approach represents the soundest rule for the Virgin Islands. *See Gov't of the V.I. v. Connor*, 60 V.I. 597, 603 (2014) (*per curiam*) ("[T]he Superior Court, when considering a question not foreclosed by prior precedent from this Court, must perform a three-part analysis as set forth in *Banks* [*v. International Rental and Leasing Corporation*, 55 V.I. 967 (2011)]."); *see also Davis v. HOVENSA, LLC*, 63 V.I. 475, 486 (Super. Ct. 2015) ("A *Banks* analysis consists of a balancing of the following three non-dispositive factors: (1) past practices of courts in this jurisdiction; (2) approaches taken by other jurisdictions; and most importantly, (3) which approach represents the soundest rule for the Virgin Islands." (citing *King v. Appleton*, 61 V.I. 339, 349-50 (2014)).

The first factor is neutral here. While Virgin Islands courts have referenced the general rule that the death of the client ends the attorney's authority to act on that client's behalf, courts in the Virgin Islands have not expressly held that the rule applies in the Virgin Islands. Hence, the Court cannot discern a specific "past practice[] of courts in this jurisdiction" that stands out. *Davis*, 63 V.I. at 486.

The second factor is persuasive. Most courts in other jurisdictions follow the rule that death terminates an attorney's authority to act on behalf of his client. *See, e.g.*, *Swartfager v. Wells*, 128 P.2d 128, 130 (Cal. Ct. App. 1942) ("'The authority of an attorney necessarily ceases with the death of the client, for no one can act for a dead man. After the death of the client, his attorney therefore becomes a stranger to the proceedings.'" (citation unattributed)); *Hoffman v. Cohen*, 538 A.2d 1096, 1101 (Del. 1988) (stating that "the general rule [is] that the death of a client terminates the relationship and revokes the authority of the attorney to act." (quotation marks omitted) (citing *Coleman v. Durden*, 338 A.2d 570, 570-71 (1975) (*per curiam*))); *Brantley v. Fallston Gen. Hosp.*, 636 A.3d 444, 445 (Md. 1994) ("Ordinarily, under well-established principles of agency law, an agent's authority terminates upon the death of the principal. The lawyer-client relationship is not excepted from this rule." (internal citation omitted)); *Clay v. Huntley*, 787 N.E.2d 317, 323 (Ill. Ct. App. 2003) ("Generally, the relationship of attorney and client is terminated by the death of the client, and thereafter, the authority of the attorney to represent the interests of a deceased client must come from the personal representatives of the decedent. An attorney's employment and his authority are revoked by the death of his client, so an attorney cannot proceed where he does not represent a plaintiff or defendant." (internal citation omitted)); *England v. Barstow*, 282 N.E.2d 58, 59 (Ohio. Ct. App. 19720 ("'Death is a tyrant that disregards all the relations between attorney and client; his stroke dissolves them.'" (quoting *Cisna's Adm'n v. Beach*, 15 Ohio 300, 300-01 (1846)); *Teter v. Irwin*, 71 S.E. 115, 117 (W. Va. 1911) ("We cannot hold that the powers of an attorney of a client continue after the client's death. The law is very decided to the contrary. 'The death of the client, or, in case of a corporation or partnership, its dissolution, operates as an immediate termination of the relation; although the case for which he was employed may be still pending, the attorney has no authority to appear for the heirs or the personal representative unless employed by them.'" (citation source unattributed)). *But cf. Coleman*, 338 A.2d at 570 (attorney-client relationship not terminated where attorney retained by insurance company and not client individually) ("The death of the client does not terminate the relation or revoke the authority of the attorney where the client does not retain the control and direction of the attorney in the performance of his services." (brackets, quotation marks, and citation omitted)).

Turning to the third factor, considering that Virgin Islands courts have recognized, but not yet adopted, the rule that death terminates the attorney-client relationship, and further considering that the majority of other jurisdictions follow this rule, the Court concludes that the soundest rule for the Virgin Islands is to join the majority. The reason for this rule should be apparent. Since "[a]n attorney's employment and his authority are revoked by the death of his client . . . [the] attorney cannot proceed where he does not represent a party to the action." *Robinson*, 27 N.E.3d at 185 (citations omitted); *cf. State v. Dickens*, 519 P.2d 750, 754 (Kan. 1974) (two year suspension for attorney who settled claim after client's death and retained client's funds)). "In every suit, there must always be a plaintiff, a defendant, and a court." *Robinson v. Orthotic & Prosthetic Lab, Inc.*, 27 N.E.3d 182, 185 (Ill. Ct. App. 2015) (citing *Mitchell v. King*, 55 N.E. 637, 639 (1899)).

> The common law principle is 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. 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. 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. *Bagalay v. Lahaina Restoration Found.*, 588 P.2d 416, 423 (Haw. 1978) (quotation marks and citation omitted).

Accordingly, the Court hold that "'death of the client revokes his attorney's authority to act for him,'" *Alumina Dust Claims*, 2017 V.I. LEXIS 2 at *29 n.11 (quoting *Hamilton v. Hughey*, 588 P.2d 38, 40 (Ore. 1978), parenthetically), and that that same attorney has no authority to act in a pending case on behalf of a deceased client unless and until the client's heirs, executor, administrator or duly-appointed personal representative re-retain the same attorney or the client otherwise authorized the attorney to act after his death.

When Christopher-Christian petitioned the Probate Division to have her father's estate probated, she was represented by counsel. The attorney who appeared on behalf of Christopher in this case and who filed the petition to have Christopher-Christian appointed personal representative is not the same attorney who represented Christopher-Christian in the probate case. That attorney listed on a January 13, 2012 quarterly accounting the 2006 lawsuit, *Christopher v. Amerada Hess Corporation, et al.*, as property of Christopher's estate. This lawsuit was not listed. But even though at least one pending civil action was listed as personal property, the court did not distribute Christopher's interest in any lawsuit. Rather, the court distributed Christopher's assets and then relieved Christopher-Christian of her fiduciary duties as administrator. A year later, in 2013, Christopher-Christian filed an *ex parte*, non-adversarial, miscellaneous probate petition to be reappointed as a personal representative and two years after it was granted, Christopher-Christian filed the motion now before the Court to substitute into this case to continue her father's claims. Neither the Defendants nor Christopher's heirs have received notice of Christopher-Christian's 2013 miscellaneous probate petition or of her subsequent appointment as Christopher's personal representative.

Many concerns are raised here, including some that cannot be resolved on the present record.[11] However, the concern that is most apparent—that Christopher's claim against GEC was compromised after his death—is troubling enough that the Court is compelled to vacate the April 26, 2012 Order, to

---

[11] Another concern is that Christopher's former attorney filed a response in opposition to Lockheed Martin Corporation's July 15, 2011 summary judgment motion a year after Christopher had died. Because his former attorney lacked any authority to act in *Christopher*, the Court could strike the response. However, the Court declines to exercise that authority at this time because Christopher-Christian (or someone else, should her substitution motion ultimately be denied) can ratify the actions Christopher's former attorney took, even though they exceeded his authority at the time. *See*, *infra*.

strike the April 13, 2012 Stipulation purportedly filed by Christopher, and to reinstate the claims Christopher asserted in his June 9, 2008 Complaint against GEC. "[I]t is so fundamental as to not require a citation that it is the client, *and not the lawyer*, that is vested with the ultimate decision of whether to settle a civil claim." *In re: Suspension of Welcome*, 58 V.I. 236, 250 (2013) (*per curiam*) (citation omitted) (emphasis added); *accord Kinkaid v. Cessna*, 430 A.2d 88, 90 (Md. Ct. Spec. App. 1981) ("[A]n attorney has no implied authority to compromise his client's claim. Express authority is required." (citations omitted)); *see also Antoine*, 2017 V.I. LEXIS 44 at *12 n.5 ("'Because the attorney's power to act ceases with the client's death, counsel has no power to continue or terminate an action on behalf of a dead client.'" (quoting *Ripple v. Wold*, 580 N.W.2d 625, 626 n.2 (S.D. 1998), parenthetically)); Eunice A. Echelberger, *Authority of Attorney to Compromise Action – Modern Cases*, 90 A.L.R. 4th 326, 333 (1991) ("Although an attorney has authority over the procedural aspects of litigation, an attorney generally does not have authority to compromise an action merely by virtue of the attorney-client relationship."). Furthermore, and out of an abundance of caution, GEC will be ordered to disclose in writing and under seal whether (and if so, how much) it paid to Christopher's former attorney to compromise Christopher's claims, and to whom the monies were paid, if any. Christopher's personal representative can later choose to ratify the dismissal of GEC. *Cf. Henritzy v. Gen. Elec. Co.*, 451 N.W.2d 558 561 (Mich. Ct. App. 1990) ("[U]nder principles of agency law, the subsequent ratification of the settlement agreement by Plaintiff's personal representative was effective."); *see also* Eunice A. Echelberger, *Ratification of Attorney's Unauthorized Compromise of Action*, 5 A.L.R. 5th 56 (1995). But the terms and conditions of that dismissal must be disclosed *in camera* first. *Cf. Island Tile & Marble, LLC*, 57 V.I. at 621.

At this juncture, the Court must withhold ruling on Christopher-Christian's motion until the Court is satisfied that allowing the substitution would be "consonant with justice." *Id.* (quotation marks and citation omitted). The Superior Court is "required to serve as a guardian for the interests of the absent relatives," *id.*, particularly in cases in which personal representatives pursue claims on behalf of heirs and estates. Before Christopher-Christian or anyone else can substitute into this case as personal representative to continue Christopher's lawsuit, the parties must first address whether the safer course here would be to move to reopen *Estate of Christopher*, particularly considering that Christopher still has two lawsuits pending and further that, in a survival action, "damages recovered shall form part of the estate of the deceased." 5 V.I.C. § 77. Nevertheless, Christopher's estate was probated, distributed, and closed, notwithstanding his two pending lawsuits. To whom Christopher's chose in action belongs now must be addressed. *See Estate of Ludington v. Jaber*, 54 V.I. 678, 687 (2011) ("An interest in a pending lawsuit is a thing in action." (quotation marks and citation omitted)); *see also id.* at 682 n.2 ("The terms thing in action and chose in action are synonymous and used interchangeably. A chose in action is an intangible, personal property right to bring an action to receive or recover a debt, money, or damages. A chose in action, also known as a thing in action, in its classic sense is a legal claim; that is, something on which an action; or lawsuit might be founded." (quotation marks and citation omitted)); *cf. Fritzel v. Roy Johnson Constr.*, 594 N.W.2d 336, 338-39 (S.D. 1999) ("If a decedent's chose in action is not assigned to another person or entity, any right of recovery can 'only be maintained by the duly authorized representative of that estate, i.e., the executor or administrator.'" (quoting *Johnson v. Zimmerman*, 102 N.Y.S.2d 868, 870 (N.Y. 1951)).

Lastly, because GEC must be reinstated, Christopher-Christian must also serve her substitution motion on GEC and GEC (but not Lockheed Martin) must be given time to respond. The Court cannot determine yet, as Christopher-Christian claims, that GEC "has not suffered <u>any</u> prejudice" by her delay. (Mot. to Substitute Personal Rep of Estate of Rudolph Christopher as Pl. 2, filed June 9, 2015, *Christopher v. Lockheed Martin Corp., et al.*, SX-08-CV-297.) Christopher-Christian did not serve her substitution motion on GEC. Hence, GEC did not respond. Whether GEC will respond and whether it will oppose her motion is for GEC to decide. Since GEC must be reinstated into this case, it must also be given a chance to respond to the motion.

CONCLUSION

For the reasons stated above, the Court will grant the motion in *Velez* since L. Velez timely requested leave to substitute herself in place of A. Velez and continue his lawsuit. The Court will also grant the motion in *Jones*, notwithstanding that F. Jones filed her motion more than two years after G. Jones died. Section 78 of Title 5 of the Virgin Islands Code is akin to a statute of limitations and GEC and Lockheed Martin both lost the right to object to the delay. Further, even though Virgin Islands Rule of Civil Procedure 25 may have superseded Section 78 of Title 5 of the Virgin Islands Code, the result would be the same here in *Jones*: the deadline to substitute a personal representative is not jurisdictional. Hence, F. Jones's motion will also be granted. But the Court cannot grant Christopher-Christian's motion at this time. Death terminates the attorney-client relationship, including an attorney's authority to compromise his client's claims. The record now shows that Christopher's former attorney exceeded his authority when he filed a stipulation to dismiss Christopher's claim against GEC after Christopher died. Christopher's claims against GEC must be reinstated and Christopher-Christian must serve her motion on GEC. Appropriate orders follow in each case.

DONE and so ORDERED this 22 **day of November, 2017.**

HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

ATTEST:
Estrella H. George
Clerk of the Court

By: ______________________
Court Clerk Supervisor

Dated: 11/22/17