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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

S.A. THOMAS,	)	Case No. CV 04-08448 DDP (SHx)
	)	
Plaintiff,	)	
	)	<b>ORDER DENYING EX PARTE</b>
v.	)	<b>APPLICATION TO SUBSTITUTE</b>
	)	<b>PLAINTIFF</b>
LEROY BACA, et al.	)	
	)	
Defendants.	)	[Dkt. No. 970]

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Presently before the court is Plaintiffs' Ex Parte Application to substitute Dwain Gipson ("Dwain") for his deceased brother, Plaintiff Eric L. Gipson.

**I. INTRODUCTION**

Plaintiff Eric L. Gipson ("Gipson") passed away on June 13, 2014, less than two weeks before the scheduled trial date. His brother, Dwain, now seeks to substitute in as a plaintiff under Federal Rule of Civil Procedure 25(a). Defendant opposes the substitution and contends that Dwain lacks standing.

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1 II. **DISCUSSION**

2 A. Substitution of Parties under FRCP 25

3 Under Federal Rule of Civil Procedure 25, “[i]f a party dies  
4 and the claim is not extinguished, the court may order substitution  
5 of the proper party. A motion for substitution may be made by any  
6 party or by the decedent’s successor or representative.” Fed. R.  
7 Civ. P. 25(a)(1).

8 Rule 25 is a procedural rule, and controls the manner of  
9 effecting substitution in federal courts. In re Baycol Products  
10 Litigation, 616 F.3d. 778, 788 (8th Cir. 2010). “The question of  
11 who is a proper party,” however, is a substantive issue, on which  
12 the court must look to state law. Id.; Fox v. County of Tulare,  
13 No. 11-cv-520 AWI, 2014 WL 897040 \*6 (E.D. Cal. Mar. , 2014).

14 Rule 25(a) should be applied flexibly and liberally to  
15 substitute parties who would best represent the decedent’s  
16 interests. Baycol, 616 F.3d at 789. Nevertheless, “the party  
17 seeking to bring a survival action under Section 1983 bears the  
18 burden of demonstrating that a particular state’s law authorizes a  
19 survival action and that the plaintiff meets that state’s  
20 requirements for bringing a survival action.” Moreland v. Las  
21 Vegas Metropolitan Police Dept., 159 F.3d 365, 369 (9th Cir. 1998);  
22 42 U.S.C. § 1988(a).

23 B. California Survivorship Law

24 1. Gipson’s Claim Is Not Extinguished

25 Here, Defendant does not dispute that under California law,  
26 Gipson’s Section 1983 claim survives his death.

27 2. Whether Dwain Is A “Proper Party”

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1 In California, a survival claim "passes to the decedent's  
2 successor in interest, subject to . . . the Probate Code, and an  
3 action may be commenced by the decedent's personal representative  
4 or, if none, by the decedent's successor in interest." Cal. Code  
5 Civ. P. §377.30.

6 i. Whether Dwain Is Gipson's "Personal  
7 Representative"

8 Under the California Probate Code, "'personal representative'  
9 means executor, administrator, successor personal representative .  
10 . . or a person who performs substantially the same function under  
11 the law of another jurisdiction . . . ." Cal. Prob. Code § 58.  
12 Here, Plaintiffs do not assert that Dwain is the executor of  
13 Gipson's estate or performs other functions that would qualify him  
14 as a "personal representative." Even if Dwain had made such a  
15 claim, a person has no power to administer a decedent's estate  
16 until appointed by the court as personal representative.<sup>1</sup> Cal.  
17 Prob. Code § 8400(b).

18 ii. Whether Dwain is Gipson's "Successor in  
19 Interest"

20 "'[D]ecedent's successor in interest' means the beneficiary of  
21 the decedent's estate or other successor in interest who succeeds  
22 to a cause of action or to a particular item of the property that  
23 is the subject of a cause of action." Cal. Code Civ. P. § 377.11.  
24 A "beneficiary of the decedent's estate" means a beneficiary named  
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27 <sup>1</sup> Prior to court appointment, even a named executor's power is  
28 limited to measures necessary to maintain and preserve the estate.  
Cal. Prob. Code § 8400(b).

1 in a decedent's will or a beneficiary under California's rules of  
2 intestacy. Cal.Civ.P. Code § 377.10.

3 Here, though the ex parte application refers to Dwain as a  
4 "successor," there is no indication that he was named as a  
5 beneficiary in Gipson's will. It is unclear whether Gipson died  
6 intestate. Gipson's deposition testimony suggests that Gipson has  
7 two children, a surviving parent, and at least one other sibling  
8 apart from Dwain. (Declaration of Justin W. Clark, Ex. A.) Thus,  
9 under California's law of intestate succession, it does not appear  
10 that Dwain is Gipson's successor in interest. See Cal. Prob. Code  
11 § 6402.

12 III. **CONCLUSION**

13 Because Dwain has not established that he is either Gipson's  
14 personal representative or successor in interest, Plaintiffs have  
15 not carried their burden to show that Dwain is a "proper party" for  
16 purposes of substitution under FRCP 25(a). The ex parte  
17 application is, therefore, DENIED.<sup>2</sup>

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19 IT IS SO ORDERED.

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22 Dated: June 20, 2014

  
DEAN D. PREGERSON  
United States District Judge

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24  
25 <sup>2</sup> Rule 25(a)(1) also states that claims must be dismissed if  
26 a motion for substitution is not filed within 90 days of a  
27 statement noting the Plaintiff's death. Defendant appears to  
28 suggest that a motion for substitution cannot be filed until the  
ninety day period begins. Having denied the ex parte application,  
the court does not address this additional argument, which, in any  
event, has not been fully developed by the parties.