

## **RULE 4:26. Parties Plaintiff And Defendant**

### **4:26-1. Real Party in Interest**

Every action may be prosecuted in the name of the real party in interest; but an executor, administrator, guardian of a person or property, trustee of an express trust or a party with whom or in whose name a contract has been made for the benefit of another may sue in the fiduciary's own name without joining the person for whose benefit the suit is brought. A trustee of an express trust may be sued without joining the beneficiaries of the trust unless it shall affirmatively appear in the action that a conflict of interest exists between the trustee and the beneficiaries.

*Note: Source-R.R. 4:30-1; amended July 13, 1994 to be effective September 1, 1994.*

### **4:26-2. Minor or Mentally Incapacitated Person**

- **(a) Representation by Guardian.** Except as otherwise provided by law or R. 4:26-3 (virtual representation), a minor or mentally incapacitated person shall be represented in an action by the guardian of either the person or the property, appointed in this State, or if no such guardian has been appointed or a conflict of interest exists between guardian and ward or for other good cause, by a guardian ad litem appointed by the court in accordance with paragraph (b) of this rule.
- **(b) Appointment of Guardian Ad Litem.**
  - **(1) Appointment of Parent in Negligence Actions.** In negligence actions, unless the court otherwise directs, a parent of a minor or mentally incapacitated person shall be deemed to be appointed guardian ad litem of the child without court order upon the filing of a pleading or certificate signed by an attorney stating the parental relationship, the child's status and, if a minor, the age, the parent's consent to act as guardian ad litem and the absence of a conflict of interest between parent and child.
  - **(2) Appointment on Petition.** The court may appoint a guardian ad litem for a minor or an alleged mentally incapacitated person, upon the verified petition of a friend on his or her behalf. In an action in which the fiduciary seeks to have the account settled or has a personal interest in the matter, the petition shall state whether or not the guardian ad litem therein nominated was proposed by the fiduciary or the fiduciary's attorney. Each petition shall be accompanied by the sworn consent of the proposed guardian ad litem, stating his or her relationship to the minor or alleged mentally incapacitated person and certifying that he or she has no interest in the litigation, or if such interest exists, setting forth the nature thereof, and that he or she will with undivided fidelity perform the duties of guardian ad litem, if appointed. The court shall appoint the guardian ad litem so proposed unless it finds good cause for not doing so, in which case it shall afford the petitioner opportunity to file a new petition seeking the appointment of another person within 10 days of the rejection. If such new petition is not filed within such time, or if filed, is not granted, the court, when designating some other person as guardian ad litem, shall state for the record its reasons for rejecting petitioner's nominee. A conflict of interest between the petitioner and the minor or alleged mentally incapacitated person shall be good cause for rejection of the petitioner's nominee. Only one guardian ad litem shall be appointed for all minors or alleged mentally incapacitated persons unless a conflict of interest exists.
  - **(3) Appointment on Party's Motion.** On motion by a party to the action, the court may appoint a guardian ad litem for a minor or alleged mentally incapacitated person if no petition has been filed and either default has been entered by the clerk or, in a summary action brought pursuant to R. 4:67 or in a

probate action, 10 days have elapsed after service of the order. Notice of the motion shall be served at least 10 days before the return date fixed therein upon the appropriate persons designated in R. 4:4-4(a)(1)(2)(3) or (c) either personally, at the time of service of process or thereafter, or by registered or certified mail, return receipt requested. The court on ex parte motion may, in lieu thereof, fix such notice of the motion, given to such persons in such manner as it deems appropriate.

- **(4) Appointment on Court's Motion.** The court may appoint a guardian ad litem for a minor or alleged mentally incapacitated person on its own motion.
- **(c) Allowance of Fees.** A guardian ad litem appointed pursuant to this rule or R. 4:26-3(c) (failure of virtual representation) who intends to apply for an allowance of a fee shall serve upon all parties and file with the court at least 7 days before the hearing a written notice of the amount applied for stating that the report and affidavit of services (unless no such affidavit is required under R. 4:87-7) have been filed and that copies thereof will be furnished on request.
- **(d) Filing Foreclosure Reports.** Notwithstanding the appointment of a guardian ad litem in a foreclosure action to represent the interests of a minor or incapacitated person by a judge, if the written report of the guardian ad litem raises no objection or dispute as to the right to foreclosure, the report shall be filed with the Superior Court Clerk in Trenton. Reports which raise an objection or dispute shall be filed with the judge who appointed the guardian ad litem.

Note: Source-R.R. 4:30-2(a)(b)(c), 7:12-6; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (b)(3) amended July 13, 1994 to be effective September 1, 1994; caption amended, and paragraphs (a), (b)(1), (b)(2), (b)(3), and (b)(4) amended July 12, 2002 to be effective September 3, 2002; new paragraph (d) added July 9, 2008 to be effective September 1, 2008.

#### **4:26-3. Virtual Representation of Future Interest**

- **(a) Representation by Presumptive Taker.** In an action affecting property in which any person in being or unborn has or may have a future interest other than a life or lesser estate, or where it is not known or is difficult to ascertain who is the person or class having such interest, it shall be necessary to join as parties to the action only the person or persons who would be entitled to such property if the event or contingency terminating all present estates and successive life or lesser estates therein had occurred on the date of the commencement of the action, and the judgment entered therein shall be binding upon all persons, whether in being or not, who may claim the future interest in the property, unless it shall affirmatively appear in the action that there exists a conflict of interest between the persons so joined and the persons not joined. Should such conflict exist, the court may, in its discretion, appoint from among the persons then next entitled upon the occurrence of the event or contingency, one person to represent all persons (whether in being or not) who may claim any future interest in the property.
- **(b) Representation by Donee of Power of Appointment.** Where a party to an action is the donee of a power of appointment of any type, it shall not be necessary to join the potential or permissible appointees of the power or takers in default, and the judgment entered therein shall be binding upon the appointees, unless it shall affirmatively appear in the action that there exists a conflict of interest between the donee of the power and the appointees.
- **(c) Representation by Other Parties or Guardians.** In an action in which the interests of a person not in being are or may be affected or in which it is not known or is difficult to ascertain who is the person or class affected thereby and as to which paragraphs (a) and (b) are inapplicable because of the lack of a representative as therein described or because of the nature of the interest involved, the court, in its discretion, may appoint a party to the action to represent such persons, and the judgment entered therein shall be binding upon the persons so represented. If, however, it shall appear

that no party to the action adequately represents the interests of such persons, the court shall appoint a guardian ad litem to represent them.

- **(d) Joinder of Additional Parties.** Notwithstanding paragraphs (a), (b) and (c) hereof, the court, in its discretion, may require the joinder of additional persons.

**Note:** Source-R.R. 4:30-3. Paragraph (b) amended July 14, 1992 to be effective September 1, 1992.

#### **4:26-4. Fictitious Names; In Personam Actions**

In any action, irrespective of the amount in controversy, other than an action governed by R. 4:4-5 (affecting specific property or a res), if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion, prior to judgment, amend the complaint to state defendant's true name, such motion to be accompanied by an affidavit stating the manner in which that information was obtained. If, however, defendant acknowledges his or her true name by written appearance or orally in open court, the complaint may be amended without notice and affidavit. No final judgment shall be entered against a person designated by a fictitious name.

**Note:** Source-R.R. 7:4-5 (first paragraph); amended July 15, 1982 to be effective September 13, 1982; amended July 26, 1984 to be effective September 10, 1984; amended July 13, 1994 to be effective September 1, 1994.

#### **4:26-5. Unknown Defendants: In Rem Actions**

- **(a) Applicability.** R. 4:26-5 applies only to actions governed by R. 4:4-5 (actions affecting specific property or a res).
- **(b) Description of Unknown Defendants.** When it shall appear by the affidavit of inquiry required by R. 4:4-5(a)(3) that the affiant has been unable to ascertain whether or not any person who is a proper party defendant is married, or, if married, the given name of the wife of such male defendant or the surname and either the given name or initial thereof of the husband of such female defendant, or that the affiant has been unable to ascertain whether or not any person who is a proper party defendant is still the owner of the specific property or res or any interest therein, and has been unable to ascertain the names and residences of any of the person's successors in right, title and interest in the same, or that the affiant has been unable to ascertain whether or not such person is still alive, or if such person is known or believed to be dead, that the affiant has been unable, in either case, to ascertain the names and residences of such person's heirs, devisees or personal representatives or his, hers, their, or any of their, successors in right, title or interest in the property or res or interest therein, or of such of them as may be proper parties defendant in the action, any such person or unknown person or persons may be made a party defendant by such of the following designations as may be appropriate:
  - **(1)** As to any such male person and such wife, if he has any, by designating such male person by his proper given name and surname, as it appears of record or otherwise, and by designating such wife by the given name and surname of such male person, as it so appears, with "Mrs." prefixed thereto; or
  - **(2)** As to any such female person and such husband, if she has any, by designating such female person by her proper given name and surname, as it appears, of record or otherwise, and by designating such husband either
    - **(i)** By the name of such female, as it so appears, as "Mr. ..., husband of ..." using such surname of such female person in the first blank and such given name and such surname of such female person in the second blank; or

- **(ii)** By the name "John Doe, husband of ..., said name of John Doe being fictitious," using the given name and surname of such female person in the blank; or
  - **(3)** As to any such person, whether such person is still alive or whether it is not known whether such person is alive or dead, or if such person is known or is believed to be dead, and as to any such person's unknown heirs, devisees or personal representatives or his, hers, their, or any of their successors in right, title and interest in such specific property or interest therein or such res, thus: "..., his or her heirs, devisees and personal representatives and his, hers, their, or any of their, successors in right, title and interest," using the name of such person in the blank.
- **(c) Designation of Unknown Owner or Claimant.** When it shall appear by the affidavit of inquiry required by R. 4:4-5(a)(3) that the affiant has been unable to ascertain the name or names of any unknown owner or claimant, such unknown owner or claimant may be made a party defendant and shall be sufficiently described for all purposes including service of process by the designation "Unknown Owner (or Unknown Claimant), his or her heirs, devisees and personal representatives, and his, hers, their or any of their successors in right, title and interest." Where title to real property or an interest therein or a lien or encumbrance thereon is involved, the inquiry shall include, and the affidavit of inquiry shall recite, reasonable diligence in searching the title, or having it searched, for a period of 60 years immediately prior to the commencement of the action. If such search does not disclose the name of a person who it is alleged or claimed owns the same or a part thereof, or some interest therein, or holds a lien or encumbrance thereon, the action may proceed against unknown owners or unknown claimants.
- **(d) Other Designations.** Where the manner of joining or designating an unknown defendant is not specifically fixed by this rule, the court may on motion with or without notice order the action to proceed against such defendant by fixing the manner and the designation by which the person shall be made a party defendant, adding a description of the person's interest in the action and stating so much of the person's name as is known.
- **(e) Effect of Designation.** The person or persons designated as set forth in R. 4:26-5 shall be deemed as a party defendant to the action and as sufficiently described for all purposes, including service of process.

Note: Source-R.R. 4:30-4(a)(b) (first sentence) (c)(d)(e); introductory paragraph and paragraphs (b), (c) and (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended July 23, 2010 to be effective September 1, 2010; paragraph (b) amended March 8, 2011 to be effective immediately.

#### **4:26-6. Initials or Contractions of First Name or Names; Effect on Filing of Complaints; Entry of Judgment; Notice or Certificate of Indebtedness**

Actions may be instituted against defendants designated by an initial letter or letters or a contraction of a given first name or names. Neither final judgment nor notice or certificate of indebtedness shall, however, be entered or filed against a defendant so designated unless either the defendant has been designated as provided by R. 4:26-5 or the plaintiff amends the complaint to state at least one full given name of the defendant or the court otherwise orders.

Note: Source-R.R. 7.4-5 (second paragraph). Amended July 7, 1971 to be effective September 3, 1971; caption and text amended July 24, 1978 to be effective September 11, 1978.

#### **4:26-7. Public Officers**

A public officer suing or being sued in an official capacity may be described by the official title without the use of the officer's name.

**Note: Amended July 13, 1994 to be effective September 1, 1994.**