

*Not published*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 21-4168

J. RONI FREUND AND MARY S. MATHEWSON,

PETITIONERS,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before ALLEN, MEREDITH, and LAURER, *Judges*.

**ORDER**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

J. Roni Freund and Mary S. Mathewson, through counsel, jointly petitioned the Court under the All Writs Act to issue a writ of mandamus directed to the Secretary concerning what they claimed to be unlawful "closings" of their legacy administrative appeals despite the filing of timely Substantive Appeals. They also sought to represent a class of purportedly similarly situated claimants. On February 10, 2022, the Court heard oral argument in this matter. It remains under submission.

On August 8, 2022, counsel for petitioner Ms. Freund submitted what counsel entitled a "Solze Notice."<sup>1</sup> Counsel reported that Ms. Freund unfortunately had died on July 7, 2022. On August 19, 2022, the Court ordered counsel to provide a copy of Ms. Freund's death certificate and to show cause why we should not dismiss her request for extraordinary relief.

On September 8, 2022, counsel responded to our August 19 order. Counsel provided a copy of Ms. Freund's death certificate, confirming that she passed away on July 7, 2022.<sup>2</sup> Counsel also stated that Ms. Freund's brother, Mark Freund, had applied to substitute as a claimant in his sister's claim before VA because he had paid a portion of Ms. Freund's burial expenses.<sup>3</sup> Counsel indicated that Mr. Freund wished to prosecute this action as a petitioner in his sister's stead.<sup>4</sup>

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<sup>1</sup> See *Solze v. Shinseki*, 26 Vet.App. 299, 302 (2013) (per curiam order) (holding that parties have a duty to inform the Court of "any development which *may conceivably affect*" the Court's jurisdiction (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring))).

<sup>2</sup> See Response by Petitioner to August 19, 2022, Court Order, Exhibit (Ex.) 1.

<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> *Id.*

On September 14, 2022, Mark Freund filed a motion to substitute into this matter on his sister's behalf. We directed the Secretary to respond to the motion. On September 22, 2022, before the Secretary filed his response, petitioner's and Mr. Freund's counsel submitted another *Solze* notice. Counsel reported that VA had granted Mr. Freund's motion to substitute into his sister's claim at the Agency.<sup>5</sup> On September 27, 2022, the Secretary responded to Mr. Freund's motion to substitute. He informed the Court that the Secretary was not opposed to the motion given the decision to allow Mr. Freund to substitute into his sister's pending claims before VA.<sup>6</sup>

Substitution before the Court most commonly occurs in the context of an appeal. In that situation, the Court in *Breedlove v. Shinseki* held that the enactment of 38 U.S.C. § 5121A, although not directly applicable to this Court, nonetheless altered the underpinnings of this Court's jurisprudence on substitution, and that "a veteran's chapter 11 disability benefits claim survives the death of the veteran, not for the purpose of providing VA benefits to a veteran, but for purposes of furthering the processing of the claim of an eligible accrued-benefits claimant."<sup>7</sup>

Given the Secretary's recognition of Mr. Freund as a proper substitute to continue his sister's pending claims at the Agency and that the Secretary does not oppose substitution at the Court, we will assume that *Breedlove's* logic concerning substitution may apply in the context of a petition. In other words, we will proceed on the basis that the Court's "jurisprudence on substitution" to which *Breedlove* refers includes substitution under the circumstances of this case.<sup>8</sup> That is, because VA has allowed Mr. Freund to substitute into Ms. Freund's claim before the Agency, we conclude it is appropriate to allow substitution in this matter that concerns a petition related to the claim into which Mr. Freund has substituted before VA.

So, it is

ORDERED that Mark Freund's motion for substitution is granted. It is further

ORDERED that the Clerk of the Court change the caption of this matter to reflect that Mark Freund is now the petitioner in place of J. Roni Freund.

DATED: October 12, 2022

PER CURIAM.

Copies to:

John D. Niles, Esq.

VA General Counsel (027)

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<sup>5</sup> Petitioner's Sept. 22, 2022, *Solze* Notice, Ex.

<sup>6</sup> Secretary's Response to Motion to Substitute and the Court's September 19, 2022, Order at 1-2. We note that the Secretary used the terms "appellee" and "appellant" in the title of his response. However, because this is an action under the All Writs Act, the terms are appropriately "respondent" and "petitioner," respectively.

<sup>7</sup> 24 Vet.App. 7, 8 (2010) (per curiam order).

<sup>8</sup> *Id.*