PRO AMI SETTLEMENTS, CONSERVATORSHIPS AND GUARDIANSHIPS IN ALABAMA[1]

by

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GUARDIANS, CONSERVATORS OR NEXT FRIENDS AS PLAINTIFFS

Actions for personal injury to a minor or a protected person may be brought by that person's guardian, conservator or next friend. See, Code of Alabama (1975) § 6-5-390 and Alabama Rules of Civil Procedure, Rule 17(c). Common practice is to obtain Letters of Conservatorship and/or Guardianship prior to the filing of a lawsuit or thereafter and substitute a Guardian for next friend. Code of Alabama (1975) § 6-7-100. Often the purpose for this is to acquire the authority to obtain medical records of the protected person. A common problem arising from this practice, however, is that upon opening a conservatorship, a bond must be filed and the time starts to run in which an accounting must be filed. If the records reveal that no suit is warranted, it becomes necessary to deal with closing a conservatorship.

One solution to this problem is to obtain Letters of Guardianship which involves no money, but gives the authority to obtain medical records. Code of Alabama § 26-2A-107 and § 26-2A-137 provide for the issuance of Temporary Letters for a single or special purpose. These letters expire on their own terms and require no further court action after they are granted. They can be used to obtain medical records while a suit is being evaluated.

It is perfectly proper to file an action on behalf of a minor or incompetent by a "next friend." Alabama Rules of Civil Procedure (ARCP), Rule 17(c) makes it clear that the proper way to bring a lawsuit on behalf of an incapacitated plaintiff who has had

no guardian appointed is by next friend. “If an infant or an incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem*.” ARCP, Rule 17 (C). The rule could not be clearer. In his book called *Alabama Practice*, Champ Lyons puts it this way, “[a]n incompetent may sue or defend in the name of a representative. Having no representative, he may sue by next friend and defend by guardian *ad litem*.” 1 C. Lyons, *Alabama Practice* at 353 (1973), cited in ***Ridgeway v. Strickland,*** 442 So.2d 106 (Ala. Civ. App. 1983) at 107. *See also,* ***Strange v. Gunn,*** 56 Ala. 611; ***Irwin v. Alabama F. & I. Co.,*** 215 Ala. 328, 110 So. 566; ***Southern R. Co. v. Penny,*** 22Ala. App. 199, 114 So. 15; ***McWhorter v. Cox,*** 195 So. 435, 239 Ala. 441 (1940); ***Maples v. Chinese Palace, Inc.,*** 389 So.2d 120 (Ala. 1980).

It may the preference of the litigator to obtain Letters of Conservatorship of a minor and both Letters of Conservatorship and Guardianship of a protected person prior to the filing of a lawsuit instead of relying upon "next friend" status. When this is done, however, caution should be exercised to keep the Probate matter updated. For example, the initial Letters of Conservatorship are usually issued based upon a minimal bond (now $10,000.00 in Jefferson County). Once the case is settled or resolved, the protected person or minor often receives a sum greatly in excess of the $10,000.00. **Prior to releasing any money to the conservator, the litigator should see to it that the bond amount is increased**. Failure to do so could constitute malpractice or complicity in the mishandling of funds. It should be stressed that the attorney of record for a conservator has a continuing duty to properly handle the conservatorship as long as it continues. The

duty of competent representation does not end with the issuance of Letters of Conservatorship; it begins at that time!

Generally, when the bond is increased, the surety company on the bond will require that the attorney for the conservator or some representative of the surety company maintain joint control over the funds. This joint control arrangement places additional responsibility on the attorney to insure that any distribution of conservatorship funds be made properly. The conservator should be advised that the funds may not be spent, with few exceptions, without prior court approval. The conservator should immediately file a Petition for an Allowance to obtain court approval for items needed. Generally, the Court will not allow the ward's funds to be used to replace the parent's child support obligation or to support the other members of the ward's family. The court will generally approve the use of funds to accommodate the condition of the ward.

Conservatorships involving large sums (several hundred thousand dollars) present special difficulties with investments. All funds must be held in so called "legal investments". Generally, this has to come to mean investments backed by the federal government or one of its agencies. Since FDIC insurance is limited to $100,000.00 per bank, investment solely in bank products is unwieldy. Treasury bills and government bonds are a better alternative for the investments of large conservatorship estates.

If any subrogation is due (or has been guaranteed by the litigator), the Probate Court should be asked to approve this disbursement. Probate Court approval, generally, would not be required where the Circuit Court has approved it in a *Pro Ami* order prior to

determining the net proceeds of a settlement. If, however, a verdict is recovered or the settlement order does not approve subrogation, the Probate Court should authorize any expenditure. The same is true of attorney's fees. The parent or next friend of an injured child may enter into a contingent fee contract with the litigator, but this does not necessarily bind the child or authorize the payment of any such fees from the funds of the child.

If a parent is appointed as conservator before entering into a fee agreement with an attorney, the contract may be binding on the ward under Code of Alabama (1975) § 26-2A-152(19) and (24). However, upon a settlement, the conservator may be made to pay back to the estate of the ward any attorney's fees determined to be unreasonable. The better practice is to open the conservatorship early and obtain approval of the fee contract at that time.

SETTLEMENT CONSIDERATIONS

Sometimes the most difficult matters can involve the least money. Settlement of small cases often presents the question of how much is enough. It should first be noted that no one has the legal authority to settle a case for a minor or incompetent adult unless they have been granted that authority by a court or by the incompetent adult before capacity was lost. Parents are considered the natural guardian of their minor children, but they are not, as such, empowered to settle and release legal claims for them.

A proper settlement is usually in the best interest of the defendant since it is the

defendant who is most interested in obtaining an enforceable release. However, in some small cases, it makes more economic sense to "cut corners." Defendants, wishing to avoid the Guardian *ad litem* expenses and other costs of a *pro ami* settlement, may offer to settle in exchange for an "indemnifying release." Such a document contains a release of the child's claim and a representation, by the signing parent, that he or she has legal authority to settle the claim. While this representation is untrue, the defendant often relies upon it. The next part of the "indemnifying release" is an indemnity stating that should the release be unenforceable or ineffective, the releasing parent will indemnify or hold the defendant harmless for any and all losses (including attorneys fees). The result of this arrangement is if the child later becomes an adult and decides to file suit against the defendant again (perhaps for injuries which have continued or worsened), the defendant will file a third party action against the parent on the indemnity and may include a count for recovery of the legal costs of the second defense. The child will successfully contend that the parent did not have the authority to settle his case while the defendant will contend it relied upon the representation by the parent that the parent had the authority to settle. Indemnifying releases should be avoided.

The "Facility of Payment Act" found at Code of Alabama (1975) § 26-2A-6 authorizes the *receipt* by a custodial parent of funds belonging to a minor child. It does not, however, authorize the parent to settle, release or liquidate a claim. Once a claim is settled or a verdict paid, this act permits lump sums not exceeding $5000 to be paid directly over to the custodial parent.

Because of the cumbersome requirements of a conservatorship and the expenses required to maintain it, small settlements or verdicts for minors often present great difficulty and conservatorships should be avoided for economic considerations. For example, if a conservatorship had to be established for a 16 year old who will be legally competent upon attaining the age of 19 years, a recovery of $9,000 (net to the minor after deducting attorney's fees, expenses and subrogation) might require a bond premium of $200, court costs and guardian *ad litem*'s fees of $500, attorney's fees of $500 and conservator's commissions of $450 for a total of $1650, just to maintain the conservatorship for three years. At "legal investment" rates, one might expect to earn no more than $600 over the three year period. Therefore, the poor child receives less than he started with in the name of "protecting" his money. There are several ways this result might have been avoided.

The Alabama "Facility of Payment" permits the payment of certain small sums due to a minor to the custodial parent, any person having legal custody, a guardian or the probate judge in the minor's county of residence. If a lump sum, the amount must not be greater than $5,000. If a series payments are made, they may not exceed $3,000 in any one year and must not exceed $25,000 in the aggregate during the minority of the child. The act may not be used if there is a known conservator appointed, and it does not authorize the parent (or other person) to settle or liquidate the debt due to the minor. The parent or other person is merely authorized to receive a sum which has been determined to be due. Thus, a proper *pro ami* order should be obtained, but a conservatorship might

be avoided. The act also restricts use of the funds for the health, support, education or maintenance of the minor requires the **payor** of the funds to file a report of such payment with the probate court in the child's county of residence.

The "series of payments" provision of the Facility of Payment act might be coupled with a structured settlement to avoid a conservatorship of a minor in a larger case. For example, a $100,000 settlement for a 15 year old might include terms that call for monthly payments of $150 to the custodial parent during the minority of the child ($1800 per year and not exceeding $25,000 during the child's minority), with the balance paid in a lump sum or several lump sums or in increased monthly payments after the child attains majority.

Even without the use of the Facility of Payment act, a structure may be used to avoid a conservatorship. A structure can provide for no payments during the child's minority with lump sum payments or monthly income after majority. Approval of the structure should be made by court order pursuant to a proper *pro ami* settlement, but once approved, the conservatorship can be avoided because there are no funds due during the child's minority to be administered. In some cases, defense counsel, annuity companies or judges might require the appointment of some personal representative for the minor to sign the acceptance of the annuity assignment. If so, this might be accomplished by the appointment of a temporary guardian or through the authorization of a single transaction under Code of Alabama §§ 26-2A-107 and 26-2A-137.

A single payment for the use and benefit of a minor can made to a parent or other

custodian in excess of the $5,000 authorized by the Facility of Payment act through the use of the Uniform Transfers to Minors Act (UTMA) codified at Code of Alabama § 35-5A-1 *et seq*. UTMA is usually thought of as an estate planning device, but contains provisions which clearly indicate that it was intended to facilitate the settlement of lawsuits for minors. While sections 5, 6 and 7 of the act refer to estate planning types of transfers, section 8 (§ 35-5A-8) specifically allows any obligor owing a liquidated debt to a minor not having a conservator to discharge the obligation by paying the debt to a custodian as long as the debt does not exceed $10,000. The comments to this section actually use a tort judgment debtor as an example of one who may discharge the debt by payment to a custodian. The comment points out that the section is permissive and may be used instead of a conservator, or a conservator may be appointed.

While UTMA does not have the "series of payments" exception contained in the Facility of Payment act, it does increase the lump sum settlement option to $10,000. If no more than $10,000 is distributed as a lump sum, UTMA could be used to settle a larger case when combined with a structure to defer future payments beyond the age of majority in the same manner as the Facility of Payment act.

Most transfers under UTMA remain with the custodian until the minor attains the age of 21 years instead of 19. However, the act specifically provides for UTMA transfers from debtors such as a tortfeasor to be distributed to the minor at age 19. Presumably, this requirement is included to meet constitutional standards. When using UTMA to avoid a conservatorship in settling a case for a minor, care should be taken to observe the

entire act. It should also be noted that UTMA, like the Facility of Payment act, does not grant authority to settle or to liquidate the amount due. In other words, a custodian is not empowered to determine that any offer is fair, reasonable or in the best interest of the minor, but may receive any money due the minor after the settlement has been deemed to be fair after a proper *pro ami* hearing.

Technically, a court appointed conservator has statutory authority to "... settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible." Code of Alabama (1975) § 26-2A-152 (c) (19). The problem with a conservator assuming this authority is that should the settlement be found to have been unreasonable, the conservator would be held personally responsible. Therefore, it is better practice to obtain court approval of a settlement. There might be cases, however, where the authority might be used to avoid an expensive *pro ami* proceeding.

Funds held in a fiduciary capacity in Alabama may not be invested in any private stock company. Const. of Ala. Amend.§ 40. For this reason, conservatorship funds may not be invested in common stock or annuity contracts sold by an insurance company, for example. This rule is circumvented in a structured settlement because the *pro ami* order directs that the defendant shall pay to the plaintiff a specified sum of money per month. It then permits the defendant to fund those payments by purchasing an annuity. The funds of the ward are never received and invested in an annuity, thus there is no investment in a private stock company. It is the approval of monthly payments as a

condition of the settlement that makes a structure work.

Attorneys' fees must be approved before they are paid by a minor or incompetent also. The parent or next friend of an injured child or incompetent may enter into a contingent fee contract with the litigator, but this does not necessarily bind the child or incompetent or authorize the payment of any such fees from the recovery.

If a conservator or guardian is appointed before entering into a fee agreement with an attorney, the contract may be binding on the ward under Code of Alabama (1975) § 26-2A-152(19) and (24). However, upon a settlement, the conservator may be made to pay back to the estate of the ward any attorney's fees determined to be unreasonable. The better practice is to open the conservatorship or guardianship early in large cases and obtain approval of the fee contract at that time. It is much easier to obtain permission than forgiveness. A fifty percent contingent fee does not look as unreasonable at the beginning when recovery is uncertain and thousands of dollars must be risked by the litigator in order to prosecute the case as it might look after a couple of million are "on the table."

PRO AMI **SETTLEMENTS**

The *pro ami* settlement procedure is often misunderstood and is probably done incorrectly more than it is properly accomplished. See, for example, ***Burlington Northern R. Co. v. Warren,*** *574 So.2d 758* (Ala. 1990). If a suit involving a minor or incompetent is settled prior to litigation, during litigation or on appeal, the minor or

incompetent will not be bound to the settlement unless it is found to be fair and reasonable and is approved by the Court. ***Abernathy v. Colbert County Hospital Board,*** 388 So.2d 1207 (Ala. 1980).

If not authorized by the probate court, a **proper** *pro ami* hearing and order is necessary to protect all parties. The case of ***Large v. Hayes by and through Nesbitt***, 534 So.2d 1101 (Ala. 1988) supplies a frightening illustration: a *pro ami* hearing was held in 1982 approving a settlement in a medical malpractice case. The trial court heard testimony *ore tenus* and approved the settlement and attorney's fees as fair, reasonable and in the best interest of the child. In 1988, a guardian *ad litem* for the child filed an action on behalf of the child claiming that the attorney's fee was unreasonable and should be repaid by the trial attorney. The complaint alleged that the parents had breached their duty of care to the child by entering into an unfair contract with the trial attorney which was never approved by any court. A jury agreed and a verdict for over $59,000 was entered against the attorney. The verdict was overturned on appeal, but the case should never have survived a motion for summary judgment. "If there had been no hearing preceding the *pro ami* settlement as required by ***Abernathy***, then clearly an independent action attacking the judgment would have been appropriate." 534 So.2d at 1106.

The *pro ami* process is commenced, after a proposed settlement is reached, by the filing of a Motion for *Pro Ami* Settlement. The motion need only contain a minimal recitation that a settlement is reached and that it must be approved by the court after hearing and notice. It is not necessary to set out the specific terms of the settlement in

the Motion and it may be necessary to avoid this due to confidentiality. A proper *pro ami* hearing should include the appointment of guardian *ad litem* to represent the interest of the child, testimony from which the court can infer that liability was disputed, testimony concerning the nature and extent of injury to the ward, and a written order in which the court finds that the settlement is fair, reasonable and in the best interest of the child. It should be noted that, where appropriate, the court may include a statement to the effect that the settlement, while fair and reasonable, is not adequate to fully compensate the child for his or her injuries. The effect of this statement is to negate claims of subrogation, but care should be taken to afford subrogation claimants due process as discussed above. The Guardian *ad litem* is NOT permitted or authorized to settle or consent to the settlement. He or she must deny the material allegations and demand strict proof. The GAL should examine the parents, attorneys for the plaintiff and defendant and should file a detailed report with the court. He or she should not consent or agree with the settlement, but can indicate that it is not being vigorously opposed by the GAL. The GAL's role may become very important and active where there are apportionment issues such as dividing the settlement proceeds among multiple plaintiffs. Also, the GAL may make recommendations concerning a structured settlement or Special Needs Trust.

Recitations of findings of fact are a good idea in a *pro ami* order, while it might be argued that an official record of the hearing might not be a good idea. Since the trial court is afforded a presumption of correctness in its findings of fact, a record might only serve to prove that there was some lack of evidence to support a necessary finding made

in the order.

The importance of a good *pro ami* order cannot be stressed enough. Many insurance companies insist upon obtaining a release (presumably signed by a parent or next friend) of the claim in addition to the *pro ami* order. The two are, in fact, inconsistent. A release is an agreement while a pro ami order is a judgment. A settlement can be by release or by payment of judgment. In the case of a *pro ami* settlement, the release to the defendant is by payment of judgment. This distinction was clearly drawn by the court in the ***Abernathy*** case quoting with approval ***Tennessee Coal, Iron & Railroad Co. v. Hayes,*** 97 Ala. 201, 12 So. 98 (1892):

> "[The next friend] cannot release the cause of action, nor compromise it, nor submit it to an arbitration the result of which will bind the infant. And being without power to compromise the cause of action, and the court having the power and being charged with controlling the suit to the protection of the infant's interest, an attempted compromise cannot have force and validity injected into it by his mere consent to a judgment for the amount he has assumed to agree to receive in settlement of the cause of action. His mere consent is nugatory. It is as if it were not and never had been. The court *may, upon being advised of the facts, upon hearing the evidence, enter up a valid and binding judgment for the amount so attempted to be agreed upon, but this not because of the agreement at all-that should exert no influence-but because it appears from the evidence that the amount is just and fair, and a judgment therefor will be conservative of the minor's interests.* * * [Emphasis Added.] " 388 So.2d at 1208-1209.

A suggested *pro ami* order is attached as an appendix.

WRONGFUL DEATH AND MIXED CASES OF WRONGFUL DEATH AND PERSONAL INJURY

The single most important Probate matter facing the litigator is the appointment of the personal representative. It is the personal representative of the decedent in a wrongful death action who controls every aspect of the case: the selection of the attorney, the settlement and the distribution of the proceeds.

Every litigator's nightmare is illustrated by ***Strickland v. Mobile Towing and Wrecking Co.,*** 293 Ala. 348, 303 So.2d 98 (1974). The plaintiff filed a complaint for the wrongful death of his decedent on the day before the statute of limitations ran. He alleged that he was the Administrator of the decedent. The defendant moved to dismiss claiming the plaintiff was not the administrator at the time of the filing of the complaint. In fact, the plaintiff had filed a Petition for Letters of Administration prior to filing the complaint, but the Probate Court had not issued the letters until two days after the filing of the complaint.

Seeking to cure this technicality, the plaintiff amended his complaint to allege that he was now the duly appointed personal representative of the decedent. The defendant moved for summary judgment based upon the running of the statute of limitations. The court agreed with the defendant ruling that no lawsuit had been filed before the running of the statute of limitations. The amendment was meaningless because there was no lawsuit to amend. 293 Ala. at 353. "If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed." 203 Ala. at 353.

Fortunately, ***Strickland*** was overruled in ***Ogle v. Gordon***, 706 So.2d 707 (Ala.

1997). In this case, the husband of a decedent filed his petition for Letters of Administration in a timely manner, but due to a mistake by the probate court, letters were not issued until after the expiration of the two-year statute of limitations on the wrongful death case. The court relied upon Code of Ala. (1975) §43-2-831, which was adopted after the ***Strickland*** case. This section provides the "powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to the appointment the same effect as those occurring thereafter." The court in the ***Ogle*** case seemed to rely upon the fact that the personal representative complied with the law by filing in a timely manner implying that it might not be so helpful to the plaintiff who fails to file properly.

Of course, the first mistake in the ***Strickland*** case was filing the complaint on the day before the running of the statute of limitation. However, there are any number of dragons in the appointment of a personal representative which might awaken to devour an otherwise good wrongful death action. For example, before a will can be admitted to Probate, all heirs-at-law are entitled to notice. Should notice be held to be insufficient, the probate of the will and subsequent appointment of the executor may be revoked. The notice requirement is arguably jurisdictional because without notice, the rights of the heirs were cut off without due process of law. Notice and an opportunity to be heard (including meaningful legal representation) is particularly critical where heirs are minors or incompetents.

A fairly recent development among probate courts has been to endorse or limit the

power in Letters of Administration to require that any settlement of a Wrongful death action by the Administrator must be approved by the probate court issuing the letters. This practice was apparently approved in ***Taylor v. Newman,*** No. 2100871, --- So.3d ----, 2011 WL 4867656 (Ala. Civ. App. Oct. 14, 2011). Many believe that this practice constitutes an unnecessary intrusion by the probate court into the Wrongful Death case which is the business of the circuit court or parties involved in the bringing the suit. Many litigators fear that this practice will lead to probate judges modifying fee contracts. While it appears to be the practice in Mobile County for the probate judge to approve fees (See, ***Taylor, supra***), the Jefferson County probate court and many others do not review the fees, but merely place the requirement in order to insure that the Administrator properly increases his/her bond before WD funds are received. Bonding of those funds would appear to be appropriate under Code of Alabama (1975) § 43-2-111.

In the past few years, it has become common to bring Wrongful Death lawsuits using an Administrator ad Litem as the plaintiff appointed under Code of Alabama (1975) § 43-2-250. While some believe this practice is risky, those who employ it have found a safe harbor in **Affinity Hosp. v. Williford,** 21 So.3d 712 (Ala. 2009) which holds that an administrator ad litem has the authority to bring a wrongful death action under the Alabama Wrongful Death statute.

Distribution of Wrongful Death Proceeds. Once a settlement or verdict is obtained in a wrongful death case, the personal representative holds the proceeds, not as an asset of the estate but as a trustee for the benefit of the heirs-at-law. Even if the

decedent had a will leaving everything to someone who is not an heir-at-law and left no assets, the wrongful death proceeds must be distributed to the heirs and none may be used to pay debts; even funeral expenses. The personal representative is "a mere agent of legislative appointment...a conduit" to collect the damages and pay them over to the heirs-at-law. ***Board of Trustees of the Univ. of Ala. v. Harrell,*** 43 Ala. App. 258, 188 So.2d 555 (1965); ***United States Fid. & Guar. Co. v. Birmingham Oxygen Serv., Inc.***, 290 Ala. 49, 274 So.2d 615 (1973). It is not unusual that a personal representative may have personally guaranteed the payment of funeral expenses and is, therefore, tempted to use wrongful death proceeds for this purpose. However worthy the cause, payment of debts are not permitted.

One small crack in the dam on the issue of use of death proceeds to pay debts may be apparent in ***Louisville & N.R.R. v. Perkins,*** 1 Ala. App. 376, 56 So. 105 (1911). In ***Perkins,*** it was held that it was not the intent of the legislature to place a personal obligation on the decedent's representative. Therefore, the fees and costs of the administration of the estate (not the decedent's debts) may be paid out of the wrongful death proceeds. Approval of such payment from the death proceeds should be obtained from an **equity** court since they are part of a trust corpus.

This duty as trustee places a considerable burden on the personal representative and special care should be taken in making the final distribution especially where there are minors or incompetents involved. For example, if an heir is six years old, he may successfully sue the personal representative for an improper distribution thirteen years

later. For this reason, where minors or incompetents are involved, it is advisable to file an action for declaratory judgment seeking court approval of attorney's fees, amount of settlement, fees to the personal representative (as trustee) and method of distribution.

Determination of the identity of the heirs-at-law is often quite complicated. The distribution must be made to those who are heirs at the time of the distribution, not at the time of the decedent's death. ***Holt v. Stollenwerck***, 174 Ala. 213, 56 So. 912 (1911); ***Lowe v. Fulford***, 442 So.2d 29 (Ala. 1983).

The facts of the ***Holt*** case will illustrate the logic. Wife brings an action for the death of husband number 1. Before the case is settled, wife remarries and thereafter dies. Husband number 2 claims that he should receive the proceeds of the death claim wince he is the lawful heir of his wife and her estate had the right to receive the proceeds. The court held that the wife's right to receive the proceeds was inchoate and died with her since she did not take during her life. Since those entitled to a distribution are determined at the time of the settlement, the power of the personal representative becomes greater where there is an immanent birth or death and he or she controls the timing of the settlement.

Ordinarily, a wrongful death case must be brought by the personal representative of the decedent. There are some exceptions, however. Code of Alabama (1975), § 6-5-391, for example permits the parent of a deceased child to file an action for wrongful death without opening an administration of his estate. The wording of this statute created some confusion for several years concerning the proper distribution of the proceeds of the

wrongful death action. *See*, ***Carter v. Beaver***, *577 So.2d 448* (Ala. 1991) which held that the proceeds of a wrongful death action go to the custodial parent who has the exclusive right to bring the action where parents are divorced. However, the code was amended in 1995 (Acts 1995, No. 95-774, p. 1834, §§ 1) to provide, "[A]ny damages recovered in an action under this section shall be distributed according to the laws of intestate succession...".

While a summary of the ***Holt*** and ***Lowe*** cases often leads to the conclusion that wrongful death proceeds are distributed to the heirs at law at the time of the recovery, some recent cases have struggled with that concept. In ***Swiney v. Waters***[2], 716 So.2d 702 (Ala.Civ.App. 1998), ***Miller v. Jackson Hospital and Clinic***[3], 776 So.2d 122 (Ala. 2000),

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2 "Thus, under the statute of distributions, Ms. Walker's heirs at the time of her death were her three surviving daughters, her son, and the children of her two sons who had predeceased her. In *Lowe*, the court considered the husband's right to take a portion of Fulford's wrongful death recovery as a beneficiary of her daughter's —— his wife's —— estate. The husband was not an *heir* to Fulford, and the court's decision that Lowe's right to the proceeds expired when she died before Fulford's wrongful death action was filed removed his only claim to those proceeds. In this case, unlike the husband in *Lowe*, Ms. Walker's grandchildren by her two sons who had predeceased her are heirs entitled to share in the wrongful death settlement proceeds under §§ 6-5-410(c)." 716 So.2d at 704.

3 "The trial court, in entering the summary judgment, held that "one cannot assign a personal injury action to another or appoint an agent or attorney-in-fact to bring a personal injury lawsuit on his behalf." To the extent that statement deals with an assignment of the right to recover for a purely personal tort, it correctly expresses the general rule. See ***Lowe v. Fulford***, 442 So.2d 29, 32 (Ala. 1983) ("`It is . . . well settled that, in the absence of statutory provision, rights of action for torts purely personal do not survive, and are not assignable.'") (quoting ***Holt v. Stollenwerck***, 174 Ala. 213, 215, 56 So. 912 (1911). However, Roy Lee did not attempt to transfer or assign his rights in this action to Charles. Charles, acting as attorney-in-fact, brought this action for the benefit of Roy Lee, and not in his individual capacity to assert rights on his own behalf, as would be

and the ***Lowe***[4] case, there is *dicta* indicating that the filing of the wrongful death action might control the time for determination of the heirs. While such a construction might avoid the problems of the ***Holt*** case, it would arise again if an action was already pending and merely amended to include wrongful death as now permitted under the ***King*** case, *infra*.

The Code does not specifically require a personal representative to file a wrongful death claim or to contest any claim. However, Code of Alabama (1975), § 43-2-840 places the responsibility of a fiduciary upon a personal representative. Also, Code of Alabama (1975) §43-2-111, makes a PR and his or her sureties responsible for the proper distribution of the proceeds collected under the wrongful death statutes. Accordingly, if a beneficiary could demonstrate loss due to the inaction of a personal representative, presumably there could be a recovery for failure to bring a wrongful death action or to contest a claim. Where a PR refuses to bring a wrongful death action or to dispute a claim, an interested party might petition the court to appoint an Administrator *ad Litem* for such purpose under Code of Alabama (1975) § 43-2-250.

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the case with an assignee." 776 So.2d at 125.

4 "Applying *Holt* to the present facts, *there was not even so much as a pending action at the time of Mrs. Lowe's death*; and judgment thereon was not recovered until May 1981. Mrs. Lowe, having died before the wrongful death action was reduced to judgment, had no property right in the potential wrongful death action on behalf of her mother. We affirm the trial court's holding that the plaintiff, Roy Ronald Lowe, individually, and as administrator of the estate of Lou Anne Lowe, deceased, is not entitled to share in the proceeds at issue designated to the Fulford Estate." [emphasis supplied] 442 So.2d at 33.

Mixed cases of personal injury and wrongful death. Formerly, when a plaintiff died of his injuries after filing a personal injury action, it was necessary to dismiss the action and re-file an action for wrongful death under the homicide statute. ***King v. National Spa and Pool Institute, Inc.,*** 607 So.2d 1241 (Ala. 1992). The ***King*** case changed our procedure and created a new world of traps for the litigator. In what appeared to be a help to the litigator, the ***King*** case held that the pending personal injury action could be amended to include a claim for wrongful death where the plaintiff died of the injuries complained of after the commencement of the action. The good news is a plaintiff can present evidence of and recover for the personal injuries **and** recover punitive damages for wrongful death in the same action. The bad news is, the recipients of these two types of damages may well be different creating a potential conflict for the litigator. The actual plaintiff will be the personal representative for both claims, but that client may have adverse groups of "takers" after the case is concluded.

For example, plaintiff is a 60 year old man with two grown children and a wife (not their mother) to whom he was married for 15 years and to whom he left his entire estate by will. Following his injury, he files suit and while the case is pending, he dies of his injuries. Just after the father/plaintiff dies, one of his two sons dies leaving a wife and three children. The plaintiff's wife (stepmother) probates the will, obtains Letters Testamentary, is substituted as plaintiff and the complaint is amended to include wrongful death. Pursuant to a successful mediation, the case is settled for $500,000. Who gets the money and how much? The answer is: we need more facts.

Any part of the recovery which was for personal injuries (not for wrongful death) will go into his probate estate. After payment of all debts, including hospital and/or Medicaid subrogation, the balance, if any, will be distributed to the widow under the terms of the will. Any portion of the settlement which is for the wrongful death claim will be subject to neither Medicaid subrogation nor any hospital lien or any other expense of the estate, but will be distributed one half to the widow and one fourth to the son who was alive at the time of the recovery. The wife of the deceased son gets nothing because, under ***Holt v. Stollenwerck***, her husband had no interest in the claim until the case was settled at which time he had died. The three children of the deceased son share equally their deceased father's one fourth.

Without knowing what part of the settlement is attributed to which claim, the proceeds cannot be properly distributed. Therefore, settlement agreements should set out specific amounts for each claim. This can be quite difficult when the widow is the personal representative and the heirs-at-law are minors who cannot give their consent to the apportionment. These minors have until two years after their 19th birthday to sue the personal representative (the litigator's client) for breach of fiduciary duty and self dealing in making the apportionment. Even though the personal representative has the statutory authority to settle the claim as she sees fit, she would be well advised to seek court approval of the settlement with a hearing and a guardian *ad litem* for the minors. This can be in the form of a proceeding in the nature of a *pro ami* hearing or a declaratory judgment action in the nature of an interpleader.

Apportionment of damages between the personal injury case and the wrongful death case is more difficult when the case is tried to a jury. Few litigators really want to ask the jurors to specify amounts for each claim for fear that they may make a reversible mistake. However, the plaintiff may request the court to make the determination at the conclusion of the trial, or propound interrogatories to the jury ***after*** the verdict is reached. Additionally, the litigator may simply file the declaratory judgment action after recovery of a lump sum. The delay and expense is well spent to avoid trouble among the heirs later. Where the heirs are all competent adults, a written agreement with them should be reached as a condition of disbursing the funds. Usually, they will be most willing to agree if it will speed the receipt of the funds. However, if no agreement is obtained, they may well decide to complain after their money has been spent.