

LITIGATING THE CASE IN PROBATE COURT

By

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Birmingham Bar Association
March 18, 2016

Rules of Probate Procedure

When there is no specific statute providing for a specific procedure in probate court, the circuit court rules apply to probate court. Ordinarily, this would mean the Alabama Rules of Civil Procedure, but it may cause the application of a code section to the probate court. In ***Burton v. Burton***, 710 So. 2d 1257 (Ala. Civ. App. 1997), it was held that ARCP Rule 59 applies to the probate court in determining when a notice of appeal must be filed in a will contest case. In that case, a post judgment motion was filed after 30 days from the entry of judgment. The notice of appeal was filed 122 days after the entry of judgment because the appellant believed the post judgment motion tolled the running of the 42 day appeal period. The court held that since the post judgment motion was not filed timely, it did not toll the running of the appeal period.

Generally, however, the Alabama Rules of Civil Procedure apply to Probate Court. Care should be taken to make sure that the relief sought in probate court is within the jurisdiction of that probate court. In Alabama, the probate courts of only four counties have the potential to have equity authority. Jefferson and Mobile Counties require their probate judges to be “learned in the law,” and those courts have equity jurisdiction “concurrent with” that of the circuit court when that jurisdiction is invoked.¹ The probate courts of Pickens and Shelby County have equity power if the judge of probate of that county is licensed to practice law in Alabama.² If the court does not have equity authority and the relief sought requires equity jurisdiction, the case should be removed to circuit court.³

Removal to Circuit Court is often used and is relatively easy to accomplish. The Petition to remove is filed in the Circuit Court and, according to the statute, “... an

¹ Alabama Acts of 1971 No. 1144.

² Constitution of Alabama, Amendment No. 758.

³See generally, Ala. Code § 12-11-41.

order of removal *must* be made by the court.”⁴ The removal is generally granted “over the counter,” or *ex parte*.

All cases are not removable from probate court to circuit court. In *Ex parte Smith*, 619 So. 2d 1374 (Ala. 1993), a petition for probate of a will was filed in the probate court for Madison County. Before any action was taken on the petition, the case was ordered removed to the circuit court. The Supreme Court held that the removal was improper and premature reasoning that the removal statute, Ala. Code §12-11-41, permits the removal of the administration of estates. Since no action had been taken by the probate court, there was no administration to remove. The court stated, “[t]he circuit court cannot assume jurisdiction over the administration of an estate when the administration has not yet begun.” 619 So. 2d at 1375. The mere filing of a petition does not constitute an administration. “The circuit court cannot initiate the administration of an estate because the administration is a matter exclusively in the jurisdiction of the probate court.” *citing* Ala. Code §12-13-1 and *Ex parte Pettus*, 17 So. 2d 409 (Ala. 1944).

In *Oliver v. Johnson*, 583 So. 2d 1331 (Ala. 1991), the Supreme Court held that it is improper for a circuit court, after a proper removal, to hear one issue and remand to the probate court for final settlement. The case had been removed to resolve some issue which was being contested between interested parties. The matter ended in a settlement and the circuit entered an order of dismissal and the first appointed administrator resigned. Subsequently, the probate court appointed a successor administrator and the circuit court set that appointment aside and appointed a different successor administrator. The Supreme Court affirmed the circuit court citing Amendment 364 (adopted in 1977) to the Constitution of Alabama which states, in part, “...whenever the circuit court has taken jurisdiction of the settlement of any estate, it

⁴Ibid.

shall have the power to do all things necessary for the settlement of such estate, including the appointment and removal of administrators, executors, guardians, and trustees and including action upon the resignation of either of them.”

The court held, “[o]nce the administration and settlement of an estate are removed from the probate court, the probate court loses jurisdiction over the estate, and the circuit court obtains and maintains jurisdiction until the final settlement of the estate.” 583 So. 2d at 1332. Citing *Hinson v. Naugher*, 93 So. 560 (Ala. 1922), the court held that once removed from probate to circuit, the jurisdiction of the circuit court becomes “**exclusive** and efficient, and the court must operate to a final settlement governed by its own procedure.”

Many counties have a traditional practice of remanding from circuit back to probate either for a final settlement after a particular matter is resolved in the circuit court or for issuance of successor letters. The latter practice is based upon the old concept that the probate court possesses original and exclusive jurisdiction to issue letters. Applying Const. Amend. 364 as stated in the *Oliver* case, however, this practice appears to be not only unnecessary, but incorrect. Taken together, the *Oliver* and *Nelson*⁵ cases have concluded that after proper removal, the exclusive jurisdiction of the probate court is transferred to the circuit court and only it can enter a final settlement or issue successor letters. The *Nelson* case cites voluminous authority for the proposition that once an administration is properly removed from Probate to Circuit, the Circuit court cannot remand the case for final settlement, but must enter the final settlement.⁶ The code has now been amended to permit remand after the conclusion of the contested matter in Jefferson and Mobile Counties only⁷.

⁵ *Ex Parte Nelson*, 644 So. 2d 1266 (Ala. 1994).

⁶ *Hinson v. Naugher*, 93 So. 560 (Ala. 1922), *Cater v. Howard*, 159 So. 830 (Ala. 1935), *Johnson v. Johnson*, 41 So. 2d 287 (Ala. 1949), *Opinion of the Clerk No. 32*, 390 So. 2d 1040 (Ala. 1980).

⁷ Ala. Code § 12-11-41.1

Caveat: Much has been said about the proper place to file claims against the estate. Code of Ala. §§ 43-2-350 and 352 require claims to be filed in “the office of the judge of probate of the county *in which letters were granted.*” It has been argued, therefore, that even after removal to circuit, claims must still be filed in the probate office. This issue appears to be unresolved.

The Uniform Trust Act⁸ provides that probate courts in Alabama which have equity jurisdiction also have concurrent jurisdiction with the Circuit Court for trust cases.⁹ There is no statute authorizing removal of a trust case from Probate Court after the UTC jurisdiction has been invoked.

Appeals from probate or from a probate court exercising equity jurisdiction will be dealt with below.

Determining Title and Discovery of Assets

It is rare that litigation is needed to discover assets since once appointed, the personal representative has the authority to obtain financial information of the decedent. However, litigation may become a large part of the duties of a personal representative.

In Alabama, a wrongful death action is the sole remedy for negligence which is the proximate cause of death. The wrongful death statute in Alabama is like none other in the United States. All damages are punitive and the right to bring the action rests exclusively in the personal representative of the decedent (except if brought under the Worker’s Compensation statute or if brought by a parent of a deceased minor child). The proceeds of the wrongful death action, however, are not a part of the estate and are not subject to the claims of creditors. They are to be collected by the personal representative as a trustee for the heirs at law of the decedent. If the decedent left a will naming a personal representative, that executor will have the exclusive right to file, maintain and

⁸ Ala. Code § 19-3B-1 *et seq.*

⁹ Ala. Code § 19-3B-203(b).

settle the wrongful death action. The proceeds, however, must be distributed to the decedent's intestate heirs even if the will leaves his entire estate to someone else. The heirs will receive all of the proceeds even if the estate is insolvent and is insufficient to pay the funeral expenses.

Another unusual aspect of the Alabama wrongful death statute is that the distribution must go to the heirs at law **as determined at the time of recovery** instead of the heirs at the time of the decedent's death¹⁰. This apparently bizarre approach makes sense when the facts of the *Holt* case are considered. A wife brought an action for the death of her first husband. During the pendency of the action, she remarried and later died. Her second husband claimed the proceeds from action for the death of the first husband contending that he was entitled to receive all of her estate which included the proceeds. The court determined that this would be an unjust result and held that wrongful death proceeds must pass to the heirs at law as determined at the time of the recovery.

Once a settlement or verdict is obtained in a wrongful death case, the personal representative holds the proceeds, not 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.¹¹ 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.

¹⁰*Holt v. Stollenwerck*, 174 Ala. 213 (1911); *Lowe v. Fulford*, 442 So. 2d 29 (Ala. 1983).

¹¹*Board of Trustees of the Univ. of Ala. v. Harrell*, 188 So. 2d 555 (Ala. 1965); *United States Fid. & Guar. Co. v. Birmingham Oxygen Serv., Inc.*, 274 So. 2d 615 (Ala. 1973).

One small exception on the issue of use of death proceeds to pay debts may be apparent in *Louisville & N.R.R. v. Perkins*, 56 So. 105 (Ala. 1911). In the *Perkins* case, it was held that the legislature never intended to place a personal financial obligation on the decedent's representative to administer the estate and prosecute a wrongful death action. 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 a court having equity authority since they are part of a "trust corpus" under the theory of the *Harrell* case. It is recommended that an action for declaratory judgment be filed separately or as an amendment to the wrongful death case, notify all the heirs-at-law, have a hearing, and obtain an order authorizing the expenditure of funds from the wrongful death proceeds for the payment of the expenses of administration. Of course, if all of the heirs are adults and of sound mind, this can be done by agreement, but their agreement should be obtained in writing. Where those entitled to receive a share of a wrongful death claim are minors or incompetents, it is prudent to obtain court approval (giving due process) of any settlement, attorney's fees or expenses in order to avoid any allegations of breach of fiduciary duty against the personal representative. For example, if an heir is six years old, he may successfully sue the personal representative for an improper distribution thirteen years later (after attaining majority). While the personal representative has the authority to settle and disburse without court approval, future liability may be avoided by obtaining approval in advance where anything out of the ordinary is requested.

There are currently unresolved issue concerning the jurisdiction of a probate court over wrongful death proceeds, the distribution thereof, and compensation of the personal representative who brings a wrongful death case.

This last issue relies principally upon *Ex parte Rodgers*, 141 So. 3d 1038 (Ala. 2013) and Justice Murdock's special concurring opinion in *Ex parte Taylor*, 93 So. 3d 118 (Ala. 2012). The *Rodgers* case holds that an administrator, in his or her capacity as

administrator, may not be compensated from wrongful death proceeds based upon the statutory formula for compensation of personal representatives because the proceeds from the wrongful death recovery are not assets of the estate¹². Justice Bolin wrote a specially concurring opinion suggesting that while the personal representative may not be compensated in his or her capacity as personal representative of the decedent's estate, he or she may and should be compensated as a trustee.

Justice Murdock's special concurring opinion in *Ex parte Taylor, supra* in which Justice Bolin concurred, addresses the issue of probate jurisdiction although that issue was not before the court in that case. So it should be noted that the rationale in the special concurring opinion, while well stated, is one side of the issue, and is not a holding of the Supreme Court nor does it necessarily state the current opinion of a majority of the justices. In that opinion, after citing 12-13-1, et seq., Justice Murdock states,

The foregoing categories of jurisdiction concern matters relating to the administration of a decedent's estate; they do not authorize the probate court to entertain a motion concerning the approval of the settlement of a wrongful-death claim by a personal representative or to enter an order concerning the distribution of the proceeds from a settlement in such an action as part of the final settlement of the estate. Likewise, matters concerning the personal representative's settlement of a wrongful-death claim and the distribution of the proceeds therefrom do not fall within the Mobile Probate Court's general equity jurisdiction, which is limited to matters of equity "in the administration of the estates," Act No. 91-131, Ala. Acts 1991, and to "any proceeding involving a testamentary or inter vivos trust." Ala.Code 1975, § 19-3B-203.

There is also some doubt and controversy concerning whether the appointment of an Administrator ad Litem grants such AAL the authority to maintain and settle a wrongful death case. The controversy was brought about by the concurring opinion of Justice Bolin in *Golden Gate Nat. Senior Care, LLC v. Roser*, 94 So. 3d 365 (Ala.

¹² This case relates to compensation to a personal representative and not to the attorney for eh personal representative which distinguishes this case from *Louisville & Nashville R.R. Co. v. Perkins, supra*.

2012). The cited opinion is admitted to be mere dicta and currently courts are compelled to follow the law as stated in the controlling case of *Affinity Hospital , LLC v. Williford*, 21 So. 3d 712 (Ala. 2009).

Justice Bolin's criticism of the *Affinity Hospital* case in the *Golden Gate* case and Justices Murdock's and Bolin's writings in *Taylor* in perhaps heralded the ultimate rulings on these issues in *Kirksey v. Johnson*, 266 So. 3d 633 (Ala. 2014). This case reaffirms and clarifies the holdings and dicta of *Rodgers*, *Taylor* and *Golden Gate*. This opinion, written by Justice Parker, is over 20 pages long and contains concurring opinions by 4 justices and one dissenting opinion. In summary, the case relies heavily upon the *Taylor* case written by Justice Murdock for the proposition that the Probate Court has no jurisdiction over wrongful death cases under any theory. It is also highly critical of the *Affinity Hospital* holding that an Administrator *ad Litem* can bring a wrongful death action. The prudent conclusion draw from these cases is that the probate can appoint an Administrator of a decedent's estate who should then maintain a wrongful death case in the Circuit Court which has jurisdiction over all aspects of the wrongful death case.

Formerly, when a plaintiff died of his injuries after filing a personal injury action, it was necessary to dismiss the action and refile an action for wrongful death under the homicide statute¹³. 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

¹³ *King v. National Spa and Pool Institute, Inc.*, 607 So. 2d 1241 (Ala. 1992).

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.

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.

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*¹⁴, 716 So. 2d 702 (Ala. Civ. App. 1998), *Miller v. Jackson Hospital and Clinic*¹⁵, 776 So. 2d 122 (Ala. 2000), and the *Lowe*¹⁶ 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.

The Code does not specifically require a personal representative to file a wrongful death claim or to contest any claim. However, Ala. Code, § 43-2-840 places the responsibility of a fiduciary upon a personal representative. Also, Ala. Code §43-2-

¹⁴ “Thus, under the statute of distributions, Ms. Walker's heirs at the time of her Page 705 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.

¹⁵ “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*, 56 So. 912 (Ala. 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 the case with an assignee.” 776 So. 2d at 125.

¹⁶ “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.

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 Ala. Code § 43-2-250.

Declaratory Judgment, Contested Claims and Liabilities

Most issues presented to estates for litigation involve a declaratory judgment. Ala. Code § 6-6-225 provides that estates may resolve disputes involving classes of creditors, heirs, next of kin, questions arising out of estate administration, construction of wills by declaratory judgment. It also provides that the declaratory process may be used to direct personal representatives to do or not do any particular act in their fiduciary capacity. In some instances, such a ruling might be obtained within the pending estate administration¹⁷, while on other occasions, a separate action in Circuit Court may be filed to obtain such an order applying to an estate. There is no set rule to determine which procedure should apply in which case. It should be noted that in Jefferson and Mobile counties, the probate court has equity jurisdiction which raises the comfort level of using those courts in declaratory actions¹⁸. It has been held that probate courts not having general equity power still have jurisdiction to declare the rights or standing of parties to an estate administration¹⁹. Generally, the Alabama Rules of Civil Procedure apply to all matters in probate courts unless otherwise

¹⁷ *Ex parte Creel*, 719 So. 2d 783 (Ala. 1998).

¹⁸ Alabama Acts of 1971 No. 1144.

¹⁹ *See*, fn4.

specified²⁰.

Petitioning the court for instructions

The most valuable tool available to any personal representative in executing a will or administering an intestate estate is the Petition for Instructions. While the petition for instructions has been codified relatively recently at Ala. Code, § 43-2-834, it has been implicitly called for under a number of provisions²¹.

At any time the personal representative of the decedent is called upon to interpret the words of a will, the meaning of a statute, or to determine his authority or lack of authority to act under certain circumstances, it is entirely appropriate for him to petition the probate court for instructions. In doing so, the personal representative should determine what parties would be interested in the outcome of such instructions and notify such persons of the pending petition. For example, if a personal representative asks the probate court to interpret a provision of a will, he should notify all persons who would take under any interpretation of the will, generally including those who would take by intestate succession. If the personal representative asks the court to determine whether or not a debt is due, he should not only notify those persons who take under the will or by intestacy, but he should notify the creditor as well. In the event an estate is likely to be insolvent, it is a good idea to notify all creditors of any matter which would result in reducing the amount of the estate to be distributed.

The most common use of the petition for instruction has to do with construing wills. Article 8 of title 43 of the Code of Alabama (1975) contains twelve legal principals to be used in construing wills. The petition for instructions is the procedural

²⁰Ala. Code § 12-13-12.

²¹ See, for example, Ala. Code § 43-8-50, resolving disputes over advancements; § 43-8-73 regarding a petition for elective shares; § 43-2-501, regarding final settlements; § 43-2-390, authorization to compromise or settle claims; § 43-2-837, regarding an action to recover possession of property; § 43-2-844 involving transactions authorized for personal representative after court approval; § 43-2-850 involving proceedings for review of employment of agents and compensation of personal representative and employees of the state.

vehicle through which a court is asked to apply these principals.

Discovery

The Alabama Rules of Civil Procedure, generally, do not apply to most probate courts in Alabama unless that court has equity jurisdiction which has been invoked.²² Therefore, in those three counties²³ in Alabama where equity jurisdiction is available, it should be invoked so that the Alabama Rules of Civil Procedure may apply. Where equity jurisdiction is not available and extensive or contentious discovery is needed, it is advisable to remove the matter to circuit court.²⁴ However, if a particular probate court is equipped and willing to issue orders pertaining to discovery, there is statutory authority which would permit it. Ala. Code § 12-13-1(c), provides: “All orders, judgments and decrees of probate courts shall be accorded the same validity and presumptions which are accorded to judgments and orders of other courts of general jurisdiction.” Thus, a subpoena or order enforcing discovery should be afforded validity. One might argue that some other form of discovery such as a Request for Admission would not be available in probate court without an order allowing it.

Appeals

Appeals from probate actions are to Circuit Court and are generally governed by Ala. Code §§ 12-22-20, 21 and 22, however, there are several situations within the probate code which designate a specific procedure for an appeal. It should be noted that even where the equity jurisdiction of the probate courts of Mobile, Shelby, Pickens or Jefferson county have been invoked, an appeal to the Circuit Court would be proper for those seven matters set out in 12-22-21²⁵. It might be argued that the holding of the

²² See, ARCP Rule 1(a).

²³ See, fn1 and fn2.

²⁴ See, fn3.

²⁵ *Jett v. Carter*, 758 So. 2d 526 (Ala. 1999).

Jett case might also apply to Shelby and Pickens County, however, a careful reading of that case together with the Constitutional Amendments granting equity jurisdiction to those counties may reveal a distinction for those counties from Jefferson and Mobile.²⁶ In all other matters not listed in 12-22-21, an appeal from the probate courts of Jefferson, Pickens, Shelby and Mobile Counties would lie only to the Supreme Court.²⁷

If the personal representative wishes to contest all or any part of the claim, he or she may do so by filing a notice with the claimant that the claim is contested. Upon written application by either party, the Court will give ten days notice and hold a hearing upon the disputed claim²⁸. After the claim is adjudicated by the Probate Court, either party may appeal for a trial *de novo* in the Circuit Court by filing a notice of appeal within 30 days. A jury may be demanded on appeal. Appeal for error may be taken from the Circuit Court if notice is filed within 42 days as in the case of other appeals²⁹.

Appeals are governed by § 43-2-709 and lie directly to the Supreme Court of Alabama or the Court of Civil Appeals and must be made within forty-two (42) days of the rendition of any order or decree declaring the estate insolvent. The issue of insolvency may be

²⁶The *Jett* decision held that an appeal to the circuit court from probate, even after the invocation of the probate court's equity jurisdiction, would lie if, and only if the appeal was from a matter included in one of the seven categories listed in § 12-22-21 relying upon the wording of Act No. 1144 wherein it "... grants to the Jefferson County Probate Court 'general jurisdiction *concurrent with that of the Circuit Courts* of this state' ...". [emphasis supplied] 758 So. 2d at 529. The Supreme Court complained that Act No. 1144 was difficult to apply "... because the scope of the jurisdiction conferred by Act No. 1144 is not precisely defined." 758 So. 2d at 530. Such is not the case with Constitutional Amendment No. 758 which grants equity power to the judge of probate of Shelby County if that judge is licensed to practice law in Alabama. Apparently, the drafter of the Amendment had the benefit of having read the *Jett* opinion. Amendment 758 states, "the judge of probate shall possess the power and authority of a circuit judge trying the case and the case shall be treated *in all respects* in the same manner as a case filed in circuit court." [emphasis supplied.] The jurisdiction conferred seems clear. The probate judge becomes a circuit judge. Appeals from the orders of circuit judges lie to the Supreme Court, not to other circuit judges.

²⁷ *Russell v. Russell*, 758 So. 2d 533 (Ala. 1999).

²⁸ Ala. Code § 43-2-354.

²⁹ *Ibid*.

appealed even though a final judgment has not been entered.