

## LITIGATION AND PROBATE

by

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Delivered at  
Elder Law Section of the  
Alabama State Bar  
June, 2011

## 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. 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 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.

It has been argued that since wrongful death proceeds are not an asset of the estate, they need not be considered in setting the bond. However, Code of Alabama (1975) § 43-2-111 provides that a personal representative **and his**

**sureties** are responsible for the proper distribution of proceeds recovered under §§ 6-5-410 and 6-5-391, *inter alia*.

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 death. ***Holt v. Stollenwerck***, 174 Ala. 213 (1911); ***Lowe v. Fulford***, 442 So.2d 29 (Ala.1983). This apparently bizarre approach makes sense when the facts of the ***Lowe*** 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. ***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 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.

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 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.

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

### **Contested Claims and Liabilities**

Most issues presented to estates for litigation involve a declaratory judgment. Code of Alabama (1975) § 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 administration, 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 [ed. Note: and now Pickens and Shelby also],

the probate court has equity jurisdiction which raises the comfort level of using those courts in declaratory actions. Acts of Alabama No. 91-131. However, 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 administration. See, for example, **Ex Parte Creel**, 719 So.2d 783 (Ala. 1998).

Generally, the Alabama Rules of Civil Procedure apply to all matters in probate courts unless otherwise specified. Code of Alabama (1975) § 12-13-12.

Appeals from probate actions are to Circuit Court and are generally governed by Code of Alabama (1975) §§ 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 or Jefferson [ed. Note: and Pickens and Shelby] Counties have been invoked, an appeal to the Circuit Court would be proper where the matter involves one of the seven items listed in Code of Ala. (1975) § 12-22-21. **Jett v. Carter**, 758 So.2d 526 (Ala.1999) and **Russell v. Russell**, 758 So.2d 533 (Ala. 1999).

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 claim. Code of Alabama (1975), § 43-2-354. 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 appeals. Code of Alabama (1975), § 43-2-354.

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, there could be a recovery for failure to bring a Wrongful Death action or to contest a claim.

## **Will Contests**

Generally, any interested party may contest a will by filing a contest in Probate Court at any time ***before the will is admitted to probate or after the will is admitted to probate*** in Circuit by filing the contest within six months. Code of Alabama (1975), §§ 43-8-190 & 199. Any such interested party who is an infant or a person of unsound mind ***for whom not legal guardian has been appointed*** may file a contest within 12 months of the removal of the disability or within 12 months of the appointment of a guardian, whichever first occurs, but in no event longer than 20 years from admission of the will to Probate. Such

infants or mentally incompetent persons are not given the extension of time if there has been a contest filed and tried by another party. In such cases, the final judgment in the contest will "...be conclusive against all parties." Code of Alabama (1975), § 43-8-201. Presumably, the provision making the other contest binding on all parties would pass constitutional muster only if the infant or person of unsound mind had notice and opportunity to be heard in the first contest. This would suggest that the appointment of a Guardian ad Litem would be required.

The contest may be brought by any interested person. An interested person is any person having an enforceable right or claim. It includes heirs, devisees, children, spouses, creditors, beneficiaries and even persons having a priority to become a personal representative. The meaning of the term varies according to the particular purpose or matter involved in a proceeding. Code of Alabama (1975), § 43-8-1 (14).

If a contest is brought in circuit court after admission of the will to probate, care should be taken to file a separate complaint in circuit court alleging with specificity those elements of a contest set out in Code of Alabama (1975) § 43-8-199. See, ***Simpson v Jones***, 460 So.2d 1282 (Ala. 1984).

Procedurally, there is often confusion over when and how contests are to be filed. The following passage from ***Bond v. Pylant***, 3 So. 3rd 852, 854 (Ala. 2008) is instructive:

"In Alabama, a will may be contested in two ways: (1) under § 43-8-190, Ala. Code 1975, before probate, the contest may be instituted in the probate court or (2) under § 43-8-199, Ala. Code 1975, after probate and within six months thereof, a contest may be instituted by filing a complaint in the circuit court of the county in which the will was probated."

**Stevens v. Gary**, 565 So. 2d 73, 74 (Ala. 1990).<sup>3</sup>

Footnote three noted above states:

The probate courts of Mobile, Jefferson, and Shelby Counties have concurrent jurisdiction with the circuit court to try will contests after a will has been admitted to probate based on local acts. See Act No. 974, Ala. Acts 1961, Act No. 1144, Ala. Acts 1971, and Act No. 2003-123, Ala. Acts 2003, respectively; see also **Coleman v. Richardson**, 421 So. 2d 113 (Ala. 1982)(addressing the concurrent jurisdiction of the Mobile Circuit Court and the Mobile County Probate Court in hearing a will contest after a will has been admitted to probate).

Since the writing of the **Bond** opinion, Pickens County has also been granted statutory equity jurisdiction.

**The usual grounds for the contest involve (1) invalid execution of the will, (2) undue influence, or (3) lack of testamentary capacity.** The elements required for valid execution of the will are set out in Code of Alabama (1975), §43-8-130 *et seq.* A presumption of undue influence arises when: (1) there is a confidential relationship between a favored beneficiary and the testator; (2) there is a dominant and controlling influence by the beneficiary over the testator; and (3) there is undue activity in procuring the execution of the will. **Burns v. Marshall**, 767 So. 2d 347 (Ala. 2000); **Allen v. Sconyers**, 669 So. 2d 113 (Ala.

1995); *Ex parte Helms*, 873 So. 2d 1139 (Ala. 2003); *Hayes v. Apperson*, 826 So. 2d 798 (Ala. 2002).

Lack of testamentary capacity is probably the most difficult to prove since the burden of showing lack of capacity **at the moment of the signing of the will** is on the contestant. Usually, medical or other unbiased testimony is required to carry this considerable burden.

The contest may be brought by any interested person. An interested person is any person having an enforceable right or claim. It includes heirs, devisees, children, spouses, creditors, beneficiaries and even persons having a priority to become a personal representative. The meaning of the term varies according to the particular purpose or matter involved in a proceeding. Code of Alabama (1975), § 43-8-1 (14).

### **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 Code of Alabama (1975), § 43-2-834, it has been implicitly called for under a number of provisions. (See, for example, Code of Alabama (1975) § 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.)

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

