

**RECENT DEVELOPMENTS IN PROBATE LAW
WRONGFUL DEATH CASES**

by

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PROPER PARTY TO FILE A WRONGFUL DEATH ACTION

Probate Lawyers are often called upon to advise others with respect to the appointment of a proper person to bring wrongful death cases and to advise how the proceeds are to be distributed. A number of recent cases have been decided by the Appellate Courts of Alabama which affects such advice and has an impact on the jurisdiction of the Probate Courts in such matters.. This article will review several of the most recent developments.

Code of Alabama (1975) § 6-5-410 provides that “a personal representative may commence an action” for wrongful death. This has been interpreted to mean only an administrator or an executor may bring a wrongful death action. *Hatas v. Partin*, 278 Ala. 65, 175 So.2d 759 (1965). However, the process of opening a decedent’s estate which may be otherwise insolvent for the sole purpose of prosecuting a wrongful death action became onerous and alternate means of bringing an action were sought.

Code of Alabama (1975) § 43-2-250 provides:

When, in any proceeding in any court, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or he is interested adversely thereto, it shall be the duty of the court to appoint an administrator ad litem of such estate for the particular proceeding, without bond, whenever the facts rendering such appointment necessary shall appear in the record of such case or shall be made known to the court by the affidavit of any person interested therein.

Since it has been held that the phrase in 43-2-250 “it shall be the duty of the court to appoint an administrator ad litem” means that an AAL may be appointed by a Probate court or a Circuit Court (see, *Franks v. Norfolk Southern Ry. Co.*, 679 So.2d 214 (Ala. 1996)), a trend in Alabama emerged to file a petition in probate court, not for

Letters of Administration, but for the appointment of an Administrator ad Litem for purposes of bringing a wrongful death law suit. A debate ensued over whether this was a proper use of 43-2-250 which was apparently put to rest in ***Affinity Hospital , LLC v. Williford***, 21 So.3rd 712 (Ala. 2009) which held:

Upon her appointment as administrator ad litem, Williford assumed the limited role of a court-appointed advocate for the interests of Kean's estate, and, as a fiduciary, she was answerable to the probate court for her handling of the affairs entrusted to her. Therefore, we conclude that Williford, acting in her capacity as an administrator ad litem, was a "personal representative" within the meaning of Ala. Code 1975, § 6-5-410, and was, therefore, vested with the authority conferred by that section to file a wrongful-death action.

Debate closed. Nothing could be clearer, right? Not so fast. The ***Affinity*** case was a 5-0 opinion written by Justice Shaw with whom Cobb, Woodall, Parker and Smith concurred. Justice Bolin, a former Probate Judge, was not on the panel and thus took part in the decision. However, he was not without an opinion and seized the opportunity to make his thoughts known by writing a special concurring opinion to a no opinion affirmance in ***Golden Gate National Senior Care, LLC v. Roser***, 1091261 (Ala. 4-13-2012). Justices Murdock and Main joined Justice Bolin's concurring opinion. Justice Shaw dissented.

Justice Bolin's opinion in ***Golden Gate*** distinguishes or criticizes the ***Affinity*** decision because it was based upon the notion that an AAL had to be appointed to represent the interest of the estate in the wrongful death case. However, he points out that the decedent never owned the wrongful death action which arose only after the death of the decedent and has no interest in the proceeds which are, by statute (6-5-410), not a part of the estate and not subject to the claims of creditors of the estate.

The three justices who concurred in the **Golden Gate** special concurring opinion have not reversed the opinion of the five Justices who concurred in **Affinity**. In fact, the Bolin opinion admits that the issue of whether an AAL is a proper party to bring a wrongful death action was not even before the court in **Golden Gate**. So while **Affinity's** approval of an AAL as a proper party to bring a wrongful death action remains the law of Alabama, one should be warned that three Justices on the present court disagree with the rule in **Affinity**. Be warned. The safer practice would be to obtain Letters of Administration or Letters Testamentary prior to filing a wrongful death law suit.

From the foregoing cases, it is apparent that a personal representative, in the narrower sense meaning an administrator or executor, is the safer course for filing as plaintiff in a wrongful death action. How, then does a proper plaintiff sue a deceased defendant/tortfeasor?

FILING SUIT AGAINST A DECEASED DEFENDANT

It is clear that if a defendant has been sued and dies in the course of the litigation, a personal representative must be substituted for the defendant within six months of the filing of a suggestion of death upon the record. **Big Red Elephant v. Bryant**, 477 So.2d 342 (Ala. 1985). However, there is now more confusion over how a plaintiff might file a complaint against a defendant who dies before suit is filed.

In **Maclin v. Congo**, 2110546 (Ala. Civ. App. 9-7-2012), Congo filed tort claims against Brotherton in an automobile crash. A limited appearance was filed on behalf of Brotherton for the purpose of suggesting the death of Brotherton who had died two weeks before the suit was filed, a fact which was not known to the plaintiff at the time the suit was filed. The limited appearance noted that Brotherton was a resident of

Missouri at the time of his death and no estate had been opened and that under Missouri law, no estate could now be opened because the decedent had been dead for over one year. The limited appearance sought to quash service on Brotherton or his estate because there was no one to be served. Congo filed a motion to have the court appoint an Administrator ad litem pursuant to 43-2-250. The trial court granted the motion and appointed Maclin as AAL who filed a motion to dismiss on the basis of lack of jurisdiction because, he argued, there was no defendant and no estate to be represented. The trial court denied the motion to dismiss and the case was tried to a jury which rendered a verdict for the plaintiff. Maclin filed the appropriate post judgment motions which were denied and then filed an appeal to the Alabama Court of Civil Appeals.

The appellate court dismissed the appeal holding “[p]roceedings instituted against an individual who is deceased at the time the action is filed are a nullity and do not invoke the trial court’s jurisdiction.” 2110546 at p.9 *citing A.E. v. M.C.*, ____ So.3rd ____, ____ (Ala. Civ. App. 2012). The *A.E.* case is a custody case in which a father attempted to sue the mother of his child for custody four years after her death. That case adopted language from a Superior Court for the New Haven District in Connecticut [*Noble v. Corkin*, 45 Conn. Supp. 330, 332-33, 717 A.2d 301, 302-03 (1998)] stating that a deceased person is not an entity which can be sued and an action filed against a dead person is void *ab initio*.

The logic is clear and the rule announced is easy to apply. However, neither the *Congo* case nor the *A.E.* case upon which it relies even mentions the Alabama Supreme Court case of *Nelson v. Estate of Frederick*, 855 So.2d 1043 (Ala. 2003) but

instead relied upon the law of Connecticut. The **Nelson** case involved an automobile accident which occurred on March 1, 2000. A year later on March 13, 2001, the defendant/tortfeasor died. Suit was filed against the deceased defendant on March 1, 2002. Twenty nine days after the complaint was filed, an answer was filed “on behalf of Frederick [the deceased defendant]... denying the essential allegations of he complaint and asserting numerous defenses” including that the plaintiff failed to state a claim because he sued more than six months after the death of the defendant which, the estate argued, was “beyond the statutory limitations period.” 855 So.2d at 1045. The court granted a motion to dismiss and the plaintiff filed a motion to amend his complaint to name the administrator of defendant’s estate or alternatively, to appoint an Administrator ad litem, if there was no administrator. The trial court treated the defendant’s motion to dismiss as a motion for summary judgment because it presented facts outside the pleadings in the form of the death certificate of the defendant. The trial court granted summary judgment for the defendant because the defendant had died before the filing of the filing of the complaint and that there was no valid action pending at the time the two year statutory limitations period expired. 855 So.2d at 1045.

The court considered the issue of whether the trial court erred in finding that “no valid action pending at the time the statutory limitations period expired because Frederick had died before Nelson filed his claim” and concluded that the trial court did err in such a finding. 855 So.2d at 1046. This is hardly the rule announced by the Court of Civil Appeals in the **Congo** case. In fact, the Supreme Court in the **Nelson** case went on to conclude that the trial court erred in not appointing an Administrator ad litem in response to the plaintiff’s request. 855 So.2d at 1047. The defendant’s estate

asserted that the plaintiff did not have a valid claim because the defendant was dead at the time the complaint was filed. However, the Court rejected this assertion holding that because the complaint was within the statutory two year statute of limitations (with an added six months due to the death of a defendant), the claim was valid. Citing 43-2-250, the court further held that the trial court “had a duty” to appoint an AAL when requested to do so by the plaintiff. 855 So2d at 1048.

So which is it? The Supreme Court has held that a deceased defendant can be named in a suit and the plaintiff can request the court to appoint an AAL to defend if all of that is done within the statute of limitations for the acts complained of. More recently, the Court of Civil Appeals has not considered the opinion of the Alabama Supreme Court, but has adopted the opinion of a Connecticut court that an action filed against a deceased defendant is a nullity and is void *ab initio*.

PROBATE COURT JURISDICTION OVER WRONGFUL DEATH PROCEEDS

Code of Alabama § 43-2-111 provides that a personal representative “and his sureties” are liable to the parties in interest for the due and legal distribution of proceeds recovered by the PR in a wrongful death action. As previous case above have indicated, only a PR (an Administrator or an Executor) can file a wrongful death action. To give meaning to 43-2-111, there would need to be a surety and it would need to be in some amount relating to the amount recovered in the wrongful death action. A wrongful death case, however, might be threatened, not filed, and settled and released by the PR without the court which issued the Letters of Administration ever knowing it was done or setting a bond amount. In such a case, there would be no trial court where

the wrongful death case is pending to set a bond amount because the case was settled and released without having been filed. To avoid this inadvertent circumvention of 43-2-111, probate courts in modern practice have developed a trend toward endorsing Letters when issued requiring that any PR from settling any litigation on behalf of the estate without prior approval of the Probate Court. Such were the facts in **Taylor v. Newman**, 2100781 (Ala. Civ. App. 10-14-2011).

The Probate Court in the **Taylor** case held a hearing and approved the settlement of the wrongful death case. Some time later, a Rule 60(b) motion was filed to set aside the approval and the discharge of the PR based upon an allegation of a fraud on the court because the PR had falsely claimed to be the sole heir. The Probate Court took testimony and concluded that those claiming to be additional heirs were not reasonably ascertainable and upheld the distribution to and discharge of the PR. Writ of Certiori was sought and was denied without opinion in **Ex parte Taylor**, No.1110519, 2012 WL 1237745 (Ala. April 13, 2012). However, Justice Murdock, joined by Justice Bolin, wrote a special concurring opinion to explain why they did not agree with the reasoning of the Court of Civil Appeals in affirming the result.

The rationale of the concurring opinion is that an Estate cannot file a wrongful death action. Only the PR can file a wrongful death action pursuant to 6-5-410. as a corollary, the Court notes that the proceeds of a wrongful death case are not a part of the decedent's estate. No.1110519 at p.1. The court cited long standing authority in Alabama that the personal representative is authorized to file a wrongful death action as a special trustee for the benefit of the heirs at law and not in his representative capacity for the estate. The Court reviewed the statutory jurisdiction of Probate Courts set out in

Code of Alabama (1975) §12-13-1 and argued that the statute does not authorize a probate court to entertain a motion to approve a wrongful death settlement or to order the distribution of proceeds recovered under such a settlement. The argument was extended to provide that the general equity jurisdiction of the Mobile County Probate court would not allow such issues to be heard by the probate court because the equity jurisdiction is limited to “matters of equity in the administration of estates and to any proceeding involving a testamentary or inter vivos trust.” The last phrase was taken from 19-3B-203(b) which grants trust jurisdiction to any Alabama Probate having equity jurisdiction. Because the trust created by the wrongful death statute is neither inter vivos nor testamentary, the Justices argue no jurisdiction is conferred by the trust code to the probate courts with concurrent equity jurisdiction. This opinion does not cite or distinguish the following holding from ***Regions v. Reed***, 60 So.3rd 868 (Ala. 2010):

Thus, the probate courts of Jefferson, Mobile, and Shelby Counties have concurrent jurisdiction with the circuit courts of those counties to hear any proceeding brought by a trustee or beneficiary concerning the administration of a trust. In other words, the reference in subsection (b) of § 19-3B-203 to probate courts that have been granted "statutory equitable jurisdiction" is an identifying reference, not a limitation on the jurisdiction of the courts so identified. It is those probate courts to which subsection (b) grants "concurrent jurisdiction" with the circuit courts to hear actions concerning the administration of a trust brought by a trustee or beneficiary.

60 So.3rd at 880.

Without citing authority, the opinion further states that 43-2-111 does not confer jurisdiction on the probate court over wrongful death proceeds.

It should be noted that this concurring opinion is not precedent in Alabama, but it does demonstrate what might be in store in future cases.