Gulf Coast Estate Planning Conference
September 19, 2022

Probate Litigation by R. Mark Kirkpatrick

A. The Ability of the Estate to Sue or be Sued

The personal representative has the power to prosecute or defend claims or proceedings in any jurisdiction for the protection or benefit of the estate and of the personal representative in the performance of his duties, absent some restriction or limitation in the will or court order. *Ala. Code* (1975) §43-2-843. Except for those proceedings that do not survive the death of the decedent, the personal representative (of a decedent domiciled in this state at death) has the same standing to sue and be sued as the decedent had immediately prior to death. *Code* §43-2-833.

A civil action may be brought against an executor or administrator in their representative capacity in the county of their appointment. *Code* §43-2-130. The action cannot be brought before the earlier of notice of the disallowance of the claim or six months from appointment. *Code* §43-2-131.

B. Causes of Action

To determine if a legal (as opposed to an equitable) claim by or against a personal representative survives the decedent's death, you must review the survival statute, *Code* §6-5-462, and the case notes thereunder. The statute provides as follows:

> In all proceedings not of an equitable nature, all claims upon which an action has been filed and all claims upon which no action has been filed on a contract, express or implied, and all personal claims upon which an action has been filed, except for injuries to the reputation, survive in favor of and against personal representatives; and all personal claims upon which no action has been filed survive against the personal representative of a deceased tort-feasor.

Equitable claims, such as a claim of unjust enrichment, are not covered by the survival statute.

The general rule is that under the survival statute an unfiled tort claim does not survive the death of the person with the claim. *Estate of Jones v. State Farm Mut. Auto. Ins. Co.*, 829 So. 2d 170 (Ala. Civ. App. 2002). The statute does provide that personal claims survive against the personal representative of a deceased tortfeasor. *Standard Acc. Ins. Co. v. Whitset*, 270 Ala. 334, 118 So. 2d 922 (Ala. 1960).

An action for wrongful death survives against the personal representative of a deceased defendant and a cause of action for wrongful death also survives. *Ellis v. Zuck*, 1977, 546 F. 2d

643. The survival statute does not apply to an action for injuries from wrongful act resulting in death. Such action is governed by *Code* §6-5-410.

An unfiled contract claim does survive the death of the person with the claim. *McCulley v. SouthTrust Bank of Baldwin County*, 575 So. 2d 1106 (Ala. 1991). But, a claim based on an alleged breach of the fiduciary duty owed by corporate officers not to engage in unfair dealings, for the purpose of buying shareholder stock at less than real value, sounds in tort rather than contract, and thus an unfiled claim for the breach of that duty does not survive the would-be plaintiff's death. *Brooks v. Hill*, 717 So. 2d 759 (Ala. 1998).

It is quite common for disputes to arise over assets improperly taken by someone acting as an agent for the decedent under a power of attorney. In such case, the survival of the cause of action may become an issue. But, as noted above, the survival statute expressly does not apply to equitable claims.

The Supreme Court of Alabama has made clear that while courts of equity have always claimed and exercised exclusive jurisdiction in the cases of trusts and over the conduct of those appointed to execute them, its jurisdiction is not limited to technical trusts, but "embraces within its view the general claims included within what are called quasi trusts, and intervenes to prevent violations of equitable duty by whomsoever committed or whomever may suffer from the violation." *Loftin v. Smith*, 251 Ala. 202, 203, 36 So. 2d 312 (Ala. 1948). In *Loftin*, the personal representative of G. E. Loftin's estate sought an accounting from Walter Loftin, who was employed by G. E. Loftin, deceased, to operate his taxi cab business, and who continued to operate it after the decedent's death, and refused to surrender possession to the decedent's estate.

In *Loftin*, the defendant attacked the sufficiency of the pleadings, asserting lack of subject matter jurisdiction based upon an adequate remedy being available at law, asserting that no reason was averred as to why equity jurisdiction is required for full and complete discovery into the affairs of the cab company, and asserting that no facts were averred showing complainant has no legal means to ascertain the facts averred by the bill. *Id.* at 202. The Supreme Court of Alabama rejected these arguments. In upholding the lower court decree overruling the demurrer filed by the defendant, the Court held that "[w]hile the relation of the principal and agent existing between complainant's decedent and the respondent was dissolved by his death, nevertheless it was defendant's duty to account to decedent's estate, and in continuing his possession of the business and the property used therein, he became a trustee *in invitum*, and the principle stated above [that equity will grant relief irrespective of agent's good or bad faith if agent places himself in a position where his personal interest is in conflict with his duty, or in a position exposing him to temptation of acting contrary to that duty] has been applied to just that situation." *Id.* at 204. (See also *Johnston v. Johnston*, 256 Ala. 485, 55 So. 2d 838 (Ala. 1951), ordering a father to account to his deceased son's estate for profits from a partnership taken by him, the father being found to be a trustee *in invitum*, and affirming that "the equitable action at law for money had and received is merely cumulative and not exclusive of the general jurisdiction in equity for an accounting for funds impressed with a trust." *Id.* at 489; 2A CJS Agency §313, footnote 1, confirming an agent's duty to keep proper accounts and the burden of proving that he or she is entitled to the credit he or she claims; and *Daniel v. Moye*, 2016 WL 6649138 (Ala. 2016), confirming in dicta that a circuit court (after removal) would have subject matter jurisdiction over properly pleaded claims for an

accounting and alleging improper inter vivos transfers as part of the general administration of an estate.)

C. Procedural Rules and Evidentiary Provisions

The jurisdiction of a probate court is limited to matters submitted to them by statute. *AltaPointe Health Sys. Inc. v. Davis*, 90 So. 3d 139, 154 (Ala. 2012). Probate courts are "court[s] of law and, therefore, generally do not possess jurisdiction to determine equitable issues." *Lappan v. Lovette*, 577 So. 2d 893, 896 (Ala. 1991). However, counties with populations of between 300,000 and 500,000 have been given general and equity jurisdiction concurrent with that of the circuit courts "in the administration of the estates of deceased persons, minors, the developmentally disabled, insane, incapacitated, protected or incompetent persons, or the like, and testamentary trust estates." Act 91-131. In these probate courts, such as the ones in Mobile and Jefferson Counties, the Alabama Rules of Civil Procedure govern. Ala. R. Civ. P. 1. The Alabama Rules of Evidence also govern proceedings in all probate courts. See Ala. R. Evid. 101 and 11001 and *Code* §43-8-6.

Although Alabama's Dead Man's Statute, *Code* §12-21-163, precluding an interested survivor from testifying to a statement by or transaction with a deceased person whose estate was interested in the outcome of the suit, has not been repealed by the legislature, Ala. R. Evid. 601 has superseded it. This means that "survivors will be allowed to testify, if their testimony otherwise complies with the rules of evidence, and that the unavailability of the deceased person will be merely a factor for the jury to consider in determining the weight to give the survivor's testimony." *McElroy's Alabama Evidence*, 6th Ed. §102.01.

D. Lost and contested Wills

A contest of the will can either be filed in the probate court, prior to the admission of the will, or in the circuit court, within six (6) months after the admission of the will to probate (See *Code* §43-8-190 and 199). It may be based upon lack of due execution, incompetency of the decedent, undue influence, revocation, fraud, forgery or other valid objection. Before filing a contest, the contesting party must consider *Ala. Code* §43-8-196 (1975), which mandates that costs "be paid by the contesting party if he [she] fails." Further, the Supreme Court of Alabama has held it to be error for a trial court not to award legal fees as part of costs pursuant to *Ala. Code* §43-8-196 (1975) if the contestant fails to present any credible evidence in support of any ground upon which contestant challenged the will. *McGee v. McGee*, 91 So. 3d, 659, 670 (Ala. 2012). Thus, there is a real risk of being hit with legal fees if the contestant loses.

Proving the Will

Ala. Code §43-8-131 (1975) ("*Code*") states:

> Except as provided within section 43-8-135, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by a least two persons each of

whom witnessed either the signing or the testator's acknowledgement of the signature or of the will.

According to the commentary to §43-8-131, it is not necessary that the will be signed in the witnesses' presence. However, the decedent must acknowledge to the witnesses that the document is his or her will or that the signature is his or her signature. And, the witnesses do not have to be in each other's presence when each witnesses the will. See, *Pirtle v. Tucker*, 960 So. 2d 620 (Ala. 2006). The statute does not appear to contemplate that the acknowledgement be formal, i.e., before a notary or some other officer. See, *Burns v. Marshall*, 767 So. 2d 347, 351 (Ala. 2000).

Code §43-8-167 sets out the mode for proving a will (that is not self-proving under *Code* §43-8-132). The proponent of the will must "prove" the will for it to be admitted to probate.

To prove a written will that is not self-proving, testimony must be offered by at least one of the subscribing witnesses or their absence accounted for before you can resort to handwriting evidence. *Code* §43-8-167(a). A self-proved will, one made in compliance with *Code* §43-8-132, may be admitted to probate without the testimony of any subscribing witness, the execution requirements of *Code* §43-8-131 being presumed.

Contest Based on Lack of Proper Execution

If the will is contested for lack of due execution, the non self-proving will must generally be proved by both subscribing witnesses or their absence accounted for. *Code* §43-8-167A(a) There is an exception to this rule if the will is lost and the original is not being offered into evidence. In such case, the testimony of only one witness may be sufficient. (See *Jaques v. Horton*, 76 Ala. 238 (1884)). The reason for the exception is that it is meant to foster the public policy of favoring the testamentary disposition of the decedent's estate, and ascertaining the decedent's intentions. (See *Anderson v. Griggs*, 402 So. 2d 904, 909 (1981)). However, you cannot use the lost will exception merely to revoke an earlier will without seeking to admit the lost will. *Id.*

A second exception may apply where an attesting witness is available at probate, but fails to confirm due execution. Secondary proof, such as handwriting evidence or statements made by the testator bearing on due execution, can be used when the witness cannot remember or to contradict testimony by the witness as to lack of due execution. (See *London v. Harris*, 507 So. 2d 468, 470 (1987)).

When the will is not self-proving, the proponent of the will must reasonably satisfy the trier of fact, judge or jury, from the evidence that the will was signed and witnessed as required by law. He must prove:

1. That the decedent signed the will (or someone signed it for him at his direction and in the decedent's presence); and,

2. The will was signed in front of two witnesses who then signed the will as witnesses in the decedent's presence; or,

1. That the decedent signed the will (or someone signed it for him at his direction and in the decedent's presence); and,

2. The decedent acknowledged before two witnesses that the signature on the will is his signature or the will is his will. The witness must have then signed the will as a witness in decedent's presence.

(See *Alabama Pattern Jury Instruction* ("*APJI*") 38.02). One contesting the will based upon lack of due execution must satisfy the trier of fact that one of the necessary elements did not occur.

Contest Based on Revocation (Lost Will)

To admit a lost will, assuming a contest, the proponent generally must do the following:

1. You must account for the unavailability of the original, submitting testimony about the search, to allow for admissible secondary evidence. (See Ala. R. Evid., Rule 1002, and *Jaques v. Horton,* supra.).

2. You must offer proof of the due execution and existence of the Will through a witness.

3. You must prove the contents of the will either by seeking to admit a copy of the will or by establishing its contents through a witness who read it, or heard it read and remembered its contents. (See *Lovell v. Lovell*, 270 Ala. 720, 121 So. 2d 901, 903 (1960)). You generally authenticate a copy by testimony of someone who compared the copy to the original and found it to be correct, but other evidence can suffice. *Barksdale v. Pendergrass,* 294 Ala. 526, 319 So. 2d 267, 272 (1975).

4. If the will remained in the possession of the decedent (and cannot be found after death), then the presumption of law is that it was destroyed by him, and you must then offer proof that the will was lost by accident or destroyed by someone other than the decedent without his consent or knowledge. This is a fact question for the trier of fact, judge or jury. The proponent of the will has the burden of rebutting the presumption. Such evidence may include testimony suggesting that others had access to the will. You have to be careful here. I recently had the primary beneficiary and executor tell me that the decedent had the original will, but it could not be found. Later, we found that the drafting attorney still had the original. In other words, the client was mistaken about the facts. This was communicated to the Court, raising the presumption of revocation and greatly increasing the burden of proof in the event of a contest. No presumption of revocation would arise when the original was in the hands of the drafting attorney, but cannot

be found. Under that scenario, the proponent of the will would just have to go through the first three steps.

A copy of the memorandum from the Probate Court of Mobile County regarding proof of a lost will and a form of petition is attached to the materials.

Contest Based on Lack of Capacity

The law presumes a decedent has the mental capacity to make a valid will. Thus, a contestant must prove to the reasonable satisfaction of the trier of fact, judge or jury, the decedent lacked the required mental capacity at the time the will was made. Testamentary capacity requires that the decedent had sufficient mind and memory (on the date the will was signed) to know and understand:

1. The property he is about to give by his will;
2. The people to whom he is giving it; and,
3. That he is executing a will.

(See *APJI* 38.03) This is a very low standard. Thus, expert testimony may be necessary for a contestant to establish lack of capacity in the absence of other compelling proof. A contestant may be able to establish a lack of capacity through the testimony of the decedent's attending physician and medical records, but this may prove difficult and less than compelling in the absence of evidence of objective testing or records from a referral to a neurologist or psychologist at or around the time of execution of the will.

Contest Based on Undue Influence

There is confusion about the elements necessary to prove an undue influence case because of a conflict in the case authority. According to *APJI* 38.06 the elements are as follows:

1. That the influencer used undue influence on the decedent;

2. That the undue influence overpowered the decedent's free will and desire about how he wanted to pass on his property; and,

3. That the undue influence caused the decedent to make a will different from what he, if free from the influence, would have made.

But, the notes on use make clear that there is case law suggesting that the elements listed in *APJI* 38.07, labeled presumption of undue influence, may in fact be elements of a prima facia case (as opposed to elements necessary to create a presumption). These elements are as follows:

1. There was a "confidential relationship" between the influencer and the decedent;

2. If the influencer was a beneficiary under the will (as opposed to someone else such as one that may have just been close to a favored beneficiary), that the influencer was a "favored beneficiary" of the decedent's will;

3. The influencer's (or favored beneficiary's) influence was dominant and controlling in his relationship with the decedent; and,

4. The influencer (or favored beneficiary) was unduly active in getting the decedent to make the will as he did and signed.

If the contestant proves all these things, then the proponent of the will must reasonably satisfy the trier of fact, judge or jury, from the evidence that the decedent was not unduly influenced by the influencer (or favored beneficiary) when the decedent made the will. Compare *Ex parte Helms*, 873 So. 2d 1139, 1148 (Ala. 2003), suggesting these are the elements of a prima facie case, *Pirtle v. Tucker*, 960 So. 2d 620, 628 (Ala. 2006), suggesting proof of these elements creates a presumption of undue influence, and *McGee v. McGee*, 91 So. 3d 659, 664 (Ala. 2012), suggesting the contestant has the burden of producing substantial evidence of each element to submit the claim to a jury and withstand a motion for judgment as a matter of law.

The influencer and the decedent are said to have had a confidential relationship if the decedent relied on and trusted the influencer in important affairs. The contestant would therefore want to put on evidence that the influencer had power of attorney and/or paid the decedent's bills. The law presumes that a parent and child have a confidential relationship, that the parent is the dominant party in that relationship, and that business transactions between them are free from undue influence. Thus, the case law places the burden on the contestant to prove that time and circumstances have reversed the order of nature and that the child is the dominant party.

To determine whether the influencer's (or favored beneficiary's) influence dominated and controlled the decedent, the trier of fact may consider the decedent's age and his physical and mental health; whether the decedent was a strong-willed person or was a weak person and easily influenced; whether the influencer was a strong-willed and controlling person; whether the decedent had independent advice about how to make his will; whether the decedent handled his business affairs as he saw fit; whether the influencer had the opportunity and motive to dominate and control the decedent; and any other facts shown by the evidence that help determine this issue. *APJI* 38.07.

A favored beneficiary is one favored over others that the trier of fact finds, under the facts in the case, the decedent would have naturally passed his property to. To determine whether someone was a favored beneficiary, the trier of fact may consider whether the decedent was related by blood to such beneficiary; the harmony within the family; the financial condition of such beneficiary, other beneficiaries and the contestant; whether, before his death, the decedent had given money or property to the contestant; whether such beneficiary had provided care and

performed kind acts for the decedent; whether there was an illicit relationship between such beneficiary and the decedent; whether the decedent had affections for such beneficiary; whether the decedent had sympathy for such beneficiary; whether the decedent felt a personal or moral obligation to such beneficiary; whether the decedent was closer to some other person or persons in the family than he was to such beneficiary; whether the decedent had made an earlier will that disposed of his property in an entirely different way; whether such beneficiary was active in getting the will made and executed; and any other facts shown by the evidence that help determine this issue. *APJI* 38.07.

To determine whether or not this influencer (or favored beneficiary) was unduly active in getting the decedent to make the will as he did and signed, the trier of fact may consider: whether such person started the proceedings for the preparation of the will; whether such person participated in the preparation of the will; whether such person selected or hired the lawyer or the person that prepared the will; whether the person selected the witnesses to the will; whether such person excluded persons from the decedent at or about the time the will was signed; whether after the will was made such person concealed the fact that the decedent had made a will; and any other facts shown by the evidence that help determine this issue. However, if the trier of fact determines that such person was active in the will's preparation, but he acted solely to comply with or to obey the decedent's free and voluntary instructions or directions; then such person's conduct was not undue activity. *APJI* 38.07. In most of these cases, this will be the biggest hurdle for the contestant because the person accused of exercising undue influence will usually claim that they were just following the decedent's instructions. Further, a contestant needs to recognize that in addition to accusing the influencer (or favored beneficiary) of wrongdoing, he is attacking the integrity and professionalism of the drafting attorney. Attorneys, like all humans, will defend their actions, and judges will view such claims with suspicion. Further, one must assume that the judge may be influenced by the drafting attorney's reputation among the bar. These issues need to be weighed when deciding on whether or not to make a jury demand. A jury may be more inclined in general to distrust the actions of an attorney, probably lacking any preconceived notions about reputation.

Code §43-8-196 has been held to authorize an award of attorney fees as part of the costs in a will contest. *Hart v. Jackson*, 607 So. 2d 161, 164 (Ala. 1992). But, it is only authorized "when the contest is without merit." *McGee v. McGee*, 91 So. 3d 659, 670 (Ala. 2012). "That is, if there is some credible evidence offered by the contestant in support of the theory of the contestant, the contestant is not to be charged with paying the attorneys' fees of the proponent." *Id.* However, it is a reversible error not to charge the contestant with fees and costs where no credible evidence is presented on any ground upon which the will is challenged. *Id.*

E. Deed Contests

A suit to cancel a deed is equitable in nature. The suit may be based on fraud, lack of capacity, or undue influence.

The key to proving an undue influence claim, when seeking to invalidate a deed from a parent to a child, is to establish by substantial evidence that the child is the dominant party in the relationship. The Supreme Court of Alabama stated in *Chandler v. Chandler*, 514 So. 2d 1307, 1308 (Ala. 1987) the following:

> The relation of parent and child is per se a confidential one. The law presumes that the parent is the dominant spirit, but this presumption is not conclusive. 'Where it is made to appear by the proof that the child, and not the parent, is the dominant spirit, then the burden of proof is shifted to the former to establish the fairness of the transaction, and that it was not the result of undue influence.' [internal cites omitted]

(See also *Jones v. Boothe*, 270 Ala. 420, 119 So. 2d 203, 206 (1960), explaining that on any inter vivos transactions, the burden shifts to the dominant grantee in a confidential relationship (such as a parent child relationship) "to show the transaction was fair, just and equitable in every respect.")

Although a will contest case, *Furrow v. Helton*, 13 So. 3d 350 (Ala. 2008) has a detailed discussion about the substantial evidence that is necessary to show the child has become the dominant party in the confidential relationship with a parent, contrasting the facts of that case (where the Supreme Court of Alabama found insufficient evidence of domination to submit to the jury) to that offered in *Ex parte Helms*, 873 So. 2d 1139 (Ala. 2003) (where sufficient evidence was established). Contrast this with *McCollough v. Rogers*, 431 So. 2d 1246 (Ala. 1983), holding that the record supported a conclusion that a confidential relationship existed between deceased joint tenant and surviving joint tenant on a bank account, that the surviving joint tenant was the dominant party therein, and that the presumption of undue influence was not overcome. In *McCollough*, the court, citing *Little v. Sugg*, 243 Ala. 196, 8 So. 2d 866 (Ala. 1942), stated that whether the beneficiary was the dominant party is usually a fact question. In *Furrow*, the Supreme Court of Alabama reversed the trial court for letting the undue influence question go to the jury because it found there was not substantial evidence on the dominant party issue. Thus, it appears that the trial court must grant judgment as a matter of law absent a finding that substantial evidence has been presented on the dominant party issue. If it has, then it can go to the jury. If not, it ends there.

"[A] party cannot avoid, free from fraud or undue influence, a contract on the ground of mental incapacity, unless it be shown that the incapacity was of such a character that, a the time of execution, the person had no reasonable perception or understanding of the nature and terms of the contract." *Williamson v. Matthews*, 379 So. 2d 1245, 1247 (Ala. 1980) [internal cites omitted] This standard is sometimes referred to as the capacity for general business affairs. As the Supreme Court of Alabama explained in *Queen v. Belcher*, 888 So. 2d 472, 477 (Ala. 2004):

"Thus, the trial court was correct in recognizing that there are two standards of legal capacity – one for "general business affairs" and one for "a will or other documents"; however, the trial court erred when it held the power of attorney, the partnership agreement, and the trust agreement to the standard applicable to wills. Those are not testamentary documents.

In Abbott v. Rogers, 680 So.2d 315, 317 (Ala. Civ. App. 1996), the Court of Civil Appeals held that a person challenging a conveyance on the ground of mental incapacity need show only "that the grantor was unable to understand and comprehend what he or she was doing" (citing Thomas v. Neal, 600 So.2d 1000 (Ala. 1992)). A trust agreement is an inter vivos conveyance of property, and is, therefore, subject to the standard governing conveyances. *See* I A.W. Scott & W.F. Fratcher, *Scott on Trusts* §§ 18 & 19, at 243-44 (4th ed. 1987) stating that an owner of property is capable of placing that property in trust if he is otherwise capable of conveying it, but if his conveyance would be voidable because of insanity or the like, his declaration of trust would likewise be voidable). This same higher standard has also been applied to powers of attorney. *See* Morris v. Jackson, 733 So.2d 897 (Ala. Civ. App. 1999)."

F. Fiduciary Misconduct, Liability, Disputes with Beneficiaries

A personal representative is a fiduciary. *Code* §43-2-833(a). A personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust. *Code* §43-2-840. "The elements of such a claim are as follows: (1) the existence of a fiduciary duty between the parties; (2) the breach of that duty; and (3) damage suffered as a result of the breach." See *Hensley v. Poole*, 910 So. 2d 96, 106 (Ala. 2005). The limit of liability (except for any penalty for failure to give the publication notice to creditors as provided by *Code* §43-2-60) is the amount of assets which have come into his hands or which have been lost, destroyed, wasted, injured, depreciated or not collected by lack of diligence, or abuse of trust. *Code* §43-2-110.

Unless negated by the terms of a will, a personal representative is subject to a prudent person standard in dealing with the estate. And, if he has special skills, he has a duty to use those skills. He has a duty to settle and distribute the estate of a decedent in accordance with the terms of any probated will and Title 43 of the *Code* (Wills and Decedents' Estate), as expeditiously and efficiently as is consistent with the best interests of the estate and its successors. *Code* §43-2-833. Presumably, a personal representative, like other fiduciaries, owes a duty of loyalty, good faith and fair dealing. (*See Sevigny v. New South Fed. Sav. & Loan Assn.*, 586 So. 2d 884, 886-87 (Ala. 1991), stating that "[t]he principal-agency relationship [conferred by a power of attorney] is fiduciary in nature and imposes upon the agent a duty of loyalty, good faith and fair dealing.")

The personal representative (and surety on his bond) is liable to parties in interest for due and legal distribution of all damages recovered by such representative under *Code* §6-5-391 (wrongful death of a minor), §6-5-410 (wrongful death of an adult), or §25-6-3 (wrongful death of

an employee). *Code* §43-2-111. The damages are not subject to the payment of debts or liabilities, and shall be distributed according to the statute of descent and distributions.

A personal representative, who has wasted or converted to his own use any assets belonging to another decedent (not the estate of the one he was appointed to administer) is liable to that other estate. *Code* §43-2-112. I had this arise in a case. I represented the granddaughter. The grandmother died without a will. The grandmother's only child, my client's mother, predeceased her. The executor of the deceased child's estate obtained funds belonging to the deceased grandmother and administered them according to the predeceased daughter's will, using them to pay the executor back for amounts claimed to be owed and for administrative expenses. The court rendered a judgment against the executor for the amount taken, ruling that the grandmother's assets should have passed to the granddaughter under the laws of descent and distribution.

An "executor *de son tort*" is a person who without authority intermeddles with the estate of a decedent and does such acts as properly belong to the office of executor or administrator. *Johnston v. Johnston*, 256 Ala. 485, 55 So. 2d 838 (Ala. 1951). Such person is liable to the executor or administrator for the value of all the property so taken or received and for all damages caused by his act to the estate. *Code* §43-2-113. A trustee *in invitum* is "[o]ne who being guilty of wrongful or fraudulent conduct is held by equity to the duty and liability of a trustee, in relation to the subject matter, to prevent him from profiting by his own wrong." *Id* at 841. Although every trustee *in invitum* does not relate to the estate of a deceased person, the status of an executor *de son tort* is that of a trustee *in invitum*.

G. Wrongful Death Action

A wrongful death action is the sole remedy for negligence which is the proximate cause of death. 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 brough by a parent of a deceased minor child). Notably, the proceeds are <u>not</u> part of the estate and are not subject to the claims of creditors. The personal representative acts as a trustee to prosecute the case, collect the proceeds, and disburse them to the heirs at law. *Board of Trustees of the University of Alabama v. Harrell,* 188 So.2d 555 (Ala. 1965); *United States v. Birmingham Oxygen Serv., Inc*, 274 So.2d 6519 (Ala. 1973). If the decedent left a Will, naming an executor, the executor has the exclusive right to bring the claim even though the recovery has to be distributed to the heirs at law – not according to the Will.

In *Louisville & N.R.R. v. Perkins*, 56 So. 105 (Ala. 1911), the Supreme Court of Alabama 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. As a result, you should be able to obtain authorization from a circuit court for the payment of expenses of administration, such as legal fees and court costs (not debts or funeral expenses) out of any wrongful death recovery because it is part of "trust corpus" under the theory of the *Harrell* case. This would be advisable for the personal representative to avoid exposure if any one or more of

the heirs are minors or incompetents. If all are adults and competent, then the heirs can enter into an agreement regarding the payment of these expenses.

In *Ex parte Rogers*, 141 So.3d 1038 (Ala. 2013), the Supreme Court of Alabama held that an administrator could not be compensated from wrongful death proceeds based on the statutory formula of Ala. Code §43-2-848 because the proceeds were not assets of the estate. Justice Bolin wrote a concurring opinion suggesting they may and should be compensated as a trustee. This issue was considered in *Burns v. City of Alexander City*, 2016 U.S. Dist. Lexis 71848; 2016 WL 3180762. In that case, the Court denied the personal representatives request for a fee, holding "there is no right to a personal representative fee under state law," and "this court is unwilling to rely on an alternative proposal by only one justice that might allow the contrary."

In *Kirksey v. Johnson*, 266 So.3d 633 (Ala. 2014), the Supreme Court of Alabama held that the probate court has no jurisdiction over wrongful death cases. Thus, it is not appropriate to ask a probate court to entertain a motion concerning the approval of a wrongful death claim settlement or to enter an order concerning distribution of the proceeds. In Judge Davis' court, he does require counsel for the personal representative to file a motion to determine the heirs. The personal representative has the authority to settle and disburse without court approval.

In *King v. National Spa & Pool Institute, Inc.*, 607 So.2d 1241 (Ala. 1992), the Supreme Court of Alabama held that a pending personal injury action could be amended to include a claim for wrongful death where the plaintiff died of the injuries after commencement of the action, allowing recovery for both personal injuries and punitive damages for wrongful death. This creates the potential for a conflict of interest when the decedent leaves a Will because the personal injury damages pass through the estate and pass under the terms of the Will, whereas the wrongful death damages bypass the estate and pass to the heirs at law. Again, if all beneficiaries under the Will and heirs at law are competent adults, then they can enter into an agreement apportioning damages. But if one or more lack capacity because of age or mental infirmity and the case is either settled or the trier of fact does not apportion the damages then the personal representative should seek approval of the settlement (and/or proposed apportionment of damages) with a hearing and a guardian ad litem for any minor or incompetent beneficiary or heir either in the form of a proceeding in the nature of a *pro ami* hearing when minors are involved or a declaratory judgment action in the nature of an interpleader. Otherwise, minors would have two years after their 19th birthday to sue the personal representative for breach of fiduciary duty and self-dealing for allegedly making an improper allocation and disbursement of the recovery.

The typical rule is that "heirs are determined at the time of death." *Lowe v. Fulford*, 442 So.2d 29, 31 (Ala. 1983). But the typical rule does not apply in wrongful death cases. Instead, the proceeds of a wrongful death action must go to the heirs as determined at the time of recovery, not the heirs as of the time of death. *Sims v. Davita Accountable Care Sols., LLC*, 2017 U.S. Dist. Lexis 207879, citing *Holt v. Stollenwerck*, 174 Ala. 213, 56 So. 912 (Ala. 1911); *Lowe*, 442 So.2d at 33. In the *Sims* case, the estate of Renee Kelley filed suit against DaVita. Mrs. Kelly was survived by her husband and her parents. She had no issue, i.e. no child, grandchild, no lineal

descendants. Under the typical rule applicable to the distribution of a probate estate, her surviving spouse would take the first $100,000 in value and the balance would be split between him and Renee Kelly's parents, applying Ala. Code §§43-8-41 and 42. But in this case, Mr. Kelly, the surviving spouse, died before settlement of the wrongful death case. In that situation, the Court held none of the wrongful death proceeds went to his estate. Instead, the wrongful death proceeds passed entirely to Renee Kelly's parents.

H. Declaratory Judgment Action

Ala. Code §6-6-225 provides that the declaratory judgment process may be used to direct a personal representative to do or not do a particular act in their fiduciary capacity, and to resolve disputes involving classes of creditors, heirs, next of kin, questions arising out of estate administration and construction of wills.

I. Petitioning the Court for Instructions

Ala. Code §43-2-834 authorizes the personal representative to petition the probate court for instructions. This procedure can be helpful when a personal representative needs guidance on the interpretation of a Will, the meaning of a statute, or his or her authority to act. With respect to the construction of Wills, Article 8 of Title 43 of Ala. Code contains twelve legal principals to be applied. The petition for instructions is the procedural vehicle available to ask the Court to apply these principals and interpret the Will.

There are also code sections dealing with specific areas. Ala. Code §43-8-50, regarding disputes over advancements, §43-8-73, dealing with elective shares; §43-2-501 regarding final settlements; §43-2-390, authorizing the compromise or settlement of claims; §43-2-837, regarding an action to recover possession of property; §43-2-844, involving transactions authorized only after court approval; §43-2-850, allowing an interested party to get a judicial review of all fees of those employed by the estate.

J. Appeals

An appeal of any final decree of the probate court or from any final judgment, order or decree of the probate court, may lie to either the circuit court or the Supreme Court of Alabama, depending on the subject matter of the order. The seven matters set out in Ala. Code §12-22-21 may be appealed to the circuit court, as follows:

1. Will contest
2. Right to execute a Will or administer an estate
3. Removal of a personal representative of an estate
4. Right to payment of a legacy or distributive share
5. Orders of final settlement of an estate
6. Orders of insolvency of an estate or claims against an insolvent estate

7. Division or partition of real or personal property

This applies even to probate courts with equity jurisdiction. *Jett v. Carter*, 758 So.2d 526 (Ala. 1999). In all other matters not listed in §12-22-21, an appeal lies only to the Supreme Court of Alabama. When an appeal is made to the circuit court its in an appellate capacity and will not substitute its judgment for the probate court unless the probate court's findings are plainly erroneous or manifestly unjust. *Sanders v. Brooks*, 611 So.2d 336 (Ala. 1992). Under Ala. Code §12-22-22, the circuit court's judgement on the appeal may be appealed to the Supreme Court of Alabama. Appeals to the circuit court of orders either denying an application for appointment of a personal representative due to unfitness or removing a personal representative must be filed within 7 days. In all other instances, the appeal must be filed within 42 days.

Ala. Code §43-2-354 sets forth the procedure to contest part or all of a claim. The personal representative gives notice of the contest to the claimant, and then either party may make application to the Court to hold a hearing upon the disputed claim after 10 day's notice. Either party may appeal the probate court's ruling to the circuit court for a trial *denovo* by filing notice of appeal within 30 days.