

# **RECENT DEVELOPMENTS IN PROBATE/ESTATE PLANNING LAW**

**Presented By\*:**

**Brian T. Williams**  
Attorney at Law  
Dominick Feld Hyde, PC  
1130 22nd Street South, Suite 4000  
Birmingham, AL 35205  
205-536-8888  
bwilliams@dfhlaw.com

**Ashley L. Neese**  
Attorney at Law  
Dominick Feld Hyde, PC  
1130 22nd Street South, Suite 4000  
Birmingham, AL 35205  
205-536-8888  
aneese@dfhlaw.com

\* Special thanks to Amy Adams  
of Balch & Bingham LLP, as portions  
of this outline are from her presentation  
at the 2016 probate seminar.

## **I. Current Jefferson County Probate Procedure**

Assuming a waiver of notice from each heir and no unusual circumstances, non self proved Wills do not have to have a hearing for witness to testify - traditional procedures are followed (i.e., witness comes in for testimony to be taken, but no hearing regarding the petition for probate. § 43-8-167).

Recently announced that the new Probate Chief Clerk will be Pamela Jones, and Thomas Parchman III will be Deputy Chief Clerk. Octavia Henry will be Principal Accountant, and Daniel Nash will continue as Senior Accountant. Judge King believes that with these additions, the Probate Court will catch up and stay current with consent settlements, and again commence the settlement docket.

All Judicial filing fees must be paid at time of filing. Publication costs included in court costs for probate of will and intestate administration. No more checks to Ala Messenger.

New computer system currently can't print a list of claims filed/therefore, must "manually" check for claims.

## **II. Alabama Legislation**

**A. "New" LLC Act** applicable to all LLCs after 1/1/17

**B. Common Law Marriage abolished in Alabama** on or after January 1, 2017 (Act 2016-306)/(HB332)

**C. Alabama Limited Partnership Law Replacement Act 2016-379 (HB 202)** - added new (10A-9A-1.01 et seq) and repealed old 10A-9-.01 through 10A-9-12.03 and made amendments to other provisions of Title 10A, effective 1/1/17 - note 10A-9A-11.01 regarding application to existing relationships.

**D. Enable Savings Plan** - ABLE accounts for Alabama residents.

**E. New Divorce Default Rules**

For "**Revocable**" transfers and joint property, effective 9/1/15 (Act 2015-312)

Primarily for Revocable Trusts and Beneficiary Designations, so we still need to make sure that our documents have divorce clauses if the Trust is irrevocable

See below: Kowalski v Upchurch

**F. Increased Exemptions and Allowances (SB 327) (from \$15,500 to \$37,500)**

(i) § 43-8-110. Homestead allowance (from \$6000 to \$15,000).

(a) A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of fifteen thousand dollars (\$ 15,000). If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to fifteen thousand dollars (\$ 15,000) divided by the

number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided in the will, by intestate succession or by way of elective share.

Amendment.

The 2015 amendment substituted "fifteen thousand dollars (\$ 15,000)" for "\$ 6,000.00" in the first two sentences of (a).

(ii) § 43-8-111. Exempt personal property (from \$3500 to \$7500).

If the decedent was domiciled in this state at the time of death the surviving spouse is entitled to receive, in addition to the homestead allowance, property of a value not exceeding seven thousand five hundred dollars (\$ 7,500) in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than seven thousand five hundred dollars (\$ 7,500), or if there is not seven thousand five hundred dollars (\$ 7,500) worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the seven thousand five hundred dollars (\$ 7,500) value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

Amendment.

The 2015 amendment substituted "seven thousand five hundred dollars (\$ 7,500)" for "\$ 3,500.00" throughout the section.

(iii) § 43-8-113. Homestead allowance and exempt property (from \$6000 to \$15,000).

If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He or she may determine the family allowance in a lump sum not exceeding fifteen thousand dollars (\$ 15,000) or in periodic installments not exceeding \$ 500.00 per month, and may disburse funds of

the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

**Amendment.**

The 2015 amendment, substituted "fifteen thousand dollars (\$ 15,000)" for "\$ 6,000.00" and deleted "for one year" following "\$ 500.00 per month."

**III. Alabama General Counsel Opinions**

**a. Advertising on Groupon and Similar Deal of the Day Websites**

**R0 2012-01**

**QUESTION:**

May an attorney use websites such as Groupon or other "daily deal" websites to market discounted legal services in the form of redeemable certificates to prospective clients?

**ANSWER:**

No. The use of daily deal websites, such as Groupon, violates or potentially violates a number of rules of professional conduct.

**b. Representation of an Estate and Client Identity**

**ETHICS OPINION 2010-03**

**QUESTION #1:**

When a lawyer is retained to assist in the administration or probate of an estate, whom does the lawyer represent?

**QUESTION #2:**

What is a lawyer's ethical responsibility when he discovers that the Personal Representative has misappropriated estate funds or property?

**ANSWER #1:**

Generally, the lawyer represents the individual that hired him to assist in the administration or probate of the estate. If that person has only one role and is not a fiduciary, the lawyer represents only that person, unless the client and lawyer agree otherwise. If the person is the Personal Representative, the lawyer represents the Personal Representative individually, unless the Personal

Representative and lawyer agree otherwise. The lawyer must be careful not to, either by affirmative action or omission, give the impression that he also represents the beneficiaries of the estate. As a result, if the client is the Personal Representative only, the lawyer must advise the heirs and devisees ("beneficiaries") and other interested parties in the estate known to the lawyer that the lawyer's only client is the Personal Representative in order to avoid violating Rule 4.3. A lawyer must comply with certain duties upon undertaking representation of a fiduciary or risk violating certain rules of professional conduct. If the lawyer failed to give such notice, it could be found that he has undertaken to represent both the fiduciary and the beneficiaries of the estate.

ANSWER #2:

When a lawyer has actual knowledge that the Personal Representative has misappropriated estate funds, the lawyer's first duty is to remonstrate with the Personal Representative in an effort to convince the Personal Representative to either replace the misappropriated funds or to inform the court of the Personal Representative's misappropriation. If the Personal Representative refuses to do so, the lawyer should withdraw from the matter and, upon withdrawal, ask the court to order an accounting of the estate.

#### **IV. Recent Alabama Cases**

##### **SOL and Jurisdiction**

***Tender Care Veterinary Hospital, Inc. V First Tuskegee Bank*** - Supreme Court affirms Montgomery County Circuit Court's grant of summary judgment finding that two year statute of limitation applies to breach of fiduciary duty claims not involving a trust and that the statute runs from date aggrieved party acquires knowledge of the relevant facts.

***Ex Parte Grant (In re: Grant v Wiley Sanders Trucking Lines, Inc.)*** - Supreme Court issues Writ of Mandamus holding that Montgomery County Circuit Court did not have jurisdiction to declare the appointment of an administrator of an estate void, even though it did have the discretion to stay a wrongful death proceeding until a court of competent jurisdiction resolves who is the proper administrator.

***Ray v Huett*** - Supreme Court reverses Tallapoosa County Circuit Court's judgement in a will contest, holding that the Circuit Court exceeded its authority in attempting to construe various devises in the Will. The Supreme Court stated that will contests filed under §43-8-190 have historically been considered limited to the issue of whether or not the purported Will was valid or invalid; and, that the Circuit Court's order indicated it had not made a determination as to the validity of the Will.

***Ladd v Stockham*** - Supreme Court affirms Jefferson County Circuit Court's grant of summary judgement against a beneficiary of trusts based on §19-3B-1005 because claim not filed until more than 2 years after beneficiary had knowledge of alleged breach and more than 2 years after resignation of one trustee. Supreme Court reverses Circuit Court's denial of award of attorney's fees and expenses. Supreme Court holds that such fees and expenses are allowed by §19-3B-709 and §34-3-60.

***Ex parte Scott (In re: Estate of Lange)*** - Supreme Court issues Writ of Mandamus directing Jefferson County Probate Court to vacate an escrow order which required all beneficiaries of the estate who resided in Alabama to pay into Probate Court any moneys due them from the estate. The escrow order was issued in response to a "Motion for Escrow" filed by an administrator of the estate in connection with an order requiring the estate to indemnify him for any and all costs he incurred in defending against a claim for unpaid legal fees filed against him in England by a London law firm and any judgement entered against him on account of same. The London law firm had represented him in a proceeding in London regarding the validity of a Will and had prevailed on its claim against him for the legal fees. The Supreme Court held that because the assets in which some of the beneficiaries had an interest derived from real property located in England, those assets were not subject to the jurisdiction of the Jefferson County Probate Court.

***Ex Parte K.R. (In re: Adoption Petition of K.G.S.)*** - Supreme Court overrules Application for Rehearing with respect to its prior issuance of writ of mandamus holding that orders entered by a lawyer appointed as temporary judge by the clerk of the Mobile County Probate Court (after Probate Judge recused himself) were void because only the presiding Circuit Judge (pursuant to §12-1-14.1) or the Supreme Court (pursuant to §12-13-37) had the authority to appoint a temporary judge when a Probate Judge recuses himself.

### **Contract to Make a Will**

***Estate of Leroy Hill v Hill*** - Application for rehearing overruled with respect to Supreme Court's affirmance without opinion of a Circuit Court jury verdict finding a breach of a contract to make a will based on what I understand to be testimony of interested parties regarding the existence and content of the alleged contract

***Butler v Butler*** - Supreme Court reverses the Elmore County Circuit Court's determination that a Will was invalid because it violated a contract to make a Will which precluded the decedent from changing an earlier Will. The Supreme Court discussed the requirements of §43-8-250 in order to prove a contract to make a Will and found none present in the case. Although the decedent and her pre-deceased spouse had signed a joint trust which the survivor could not change, their virtually identical pour over Wills (to the joint trust) did not contain any language regarding an agreement that the survivor could not change her Will. The Supreme Court remanded to the Circuit Court for proceedings consistent with the findings of the Supreme Court.

### **Same Sex Marriage**

***Obergefell v Hodges*** - Supreme Court upholds same sex marriage.

***Searcy and McKeand v Strange*** - U S. District Court holds that Alabama's same sex marriage ban unconstitutional. Context was adoption of "spouse's child".

***Ex Parte E.L. (In re: EL v VL)*** - In accordance with the US Supreme Court's decision, the Alabama Supreme Court vacated its earlier judgment holding that the lower Courts erred by giving full faith and credit to a same sex Georgia adoption and, instead, affirmed the lower Court's decisions.

## **Power of Attorney**

***Troy Health and Rehabilitation Center v. McFarland*** - Supreme Court reverses trial court's refusal to compel arbitration, finding that a principal had requisite capacity when he signed a POA appointing an agent who agreed to the arbitration provisions in question. The Supreme Court noted that despite the principal's history of mental and substance abuse problems, the POA was signed by two witnesses who affirmed that the principal was cogent and able to handle his affairs.

## **Procedure**

***Ex parte Baker (In re: Baker v Higgins)*** - Supreme Court reverses Court of Civil Appeals affirmance of Circuit Court's removal of administration of estate to Circuit Court and appointment of an administrator with the will annexed. Although the Probate Court had appointed an Administrator ad Colligendum prior to the purported removal to the Circuit Court, the Supreme Court held the Circuit Court lacked subject matter jurisdiction. **Specifically, because the Probate Court did not appoint an administrator with the will annexed, and did not issue letters of general administration with the will annexed prior to the purported removal, the administration of the estate had not been properly "initiated" by the Probate Court.** Accordingly, the Circuit Court's judgments were void and, because a void judgment cannot support an appeal, the Court of Civil Appeals also lacked jurisdiction. Therefore, the Supreme Court reversed the judgment of the Court of Civil Appeals, vacated the Circuit Court's rulings, and remanded the matter to Probate Court.

***Daniel v Moye*** - Supreme Court reverses Escambia County Circuit Court's determination that it had no jurisdiction over a will contest because the Petition for Removal was filed in the Probate, rather than the Circuit, Court. The Supreme Court reviewed the filing requirements for petitions for removal under §12-11-41 and determined that the copy of the Petition for Removal, which was filed in the Circuit Court, was sufficient to give it jurisdiction.

***Kirkley v Phillips*** - Supreme Court dismisses appeal from the Lee County Circuit Court notwithstanding Court's certification that its order was final pursuant to ARCP 54(b). The case involved family disputes including whether members of an LLC could exercise an option to purchase LLC interests the decedent gave pursuant to his Will and other legal and equitable claims. The Supreme Court held that the trial Court exceeded its discretion in certifying the order as final when the trial Court was continuing to exercise jurisdiction over claims that were on appeal or closely intertwined with those on appeal

## **Wrongful Death**

***Roger Alvarado, M.D. v. The Estate of Madeline Kidd*** -

Law: A Personal Representative of an estate is the proper person to bring a wrongful-death action in this case. See § 6-5-410(a), Ala. Code 1975.

§ 43-2-831, Ala. Code 1975 provides, in part, that "[t]he powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter.

In this case, the Court adopted the reasoning in the *Wood v. Wayman* cases that stated that relation back generally cannot be used to prevent a wrongful-death claim from being time-barred where the personal representative is appointed after the two-year limitations period has expired. A wrongful-death action, although brought by the personal representative, is not derivative of the decedent's rights and that damages awarded in a wrongful-death action are not part of the decedent's estate (damages are distributed to the heirs according to the laws of intestate succession). Thus, the Court in *Wood* determined that a wrongful-death action would not be "beneficial to the estate," a condition to allowing a personal representative to use relation back under § 43-2-831. Therefore, the Court in *Wood* concluded that "the relation-back provision in § 43-2-831 does not apply to a wrongful-death action brought under § 6-5-410." 47 So. 3d at 1217. Thus, the Court in *Wood*, distancing itself from certain language in *Ogle*, removed § 43-2-831 as a foundation for applying relation back to personal representatives in wrongful-death cases.

On November 16, 2012, Madeline Kidd died intestate after surgery at Mobile Infirmary Medical Center. On November 10, 2014, James Kidd, Madeline's husband, petitioned the probate court for letters of administration. The next day, although he had not yet been appointed personal representative of Madeline's estate by the probate court, James sued the Medical Center and other related defendants alleging wrongful death and medical malpractice. The probate court granted James's petition on November 26, 2014, ten days after the expiration of the two-year limitations period for filing a wrongful death action. Consequently, the defendants filed motions for summary judgment, alleging that because only the personal representative of Madeline's estate could bring the wrongful death action and James was not appointed to that role until after the statute of limitations had expired, James's action was time-barred. James argued that the relation-back doctrine prevented his claim from being time-barred, and the trial court agreed and denied the defendants' motions. The trial court did, however, certify the issue for permissive appeal. The Alabama Supreme Court reversed, holding that James's claims did not relate back to the date he filed his petition. According to the Court, relation back generally cannot be used to prevent a wrongful death claim from being time-barred where the personal representative is appointed after the expiration of the limitations period. The Court noted there is an exception to the rule where a personal representative is appointed after the expiration of the limitations period due to the inadvertence of the probate court, but the Court determined there was no inadvertence by the probate court in this case due to the short time period between James's petitioning for letters for administration and the probate court's granting his petition.

Because the Alabama Wrongful-death Act is a statute of creation, the limitations period in the Act is not a statute of limitations. Ala. Code § 6-5-410(d) requires suit brought within two years after death. This is not a statute of limitations, but of the essence of the cause of action, to be disclosed by averment and proof. In a statute of creation, the limitation period is so inextricably bound up in the statute creating the right that it is deemed a portion of the substantive right itself.

However, *Wood* also indicates that an exception to that general rule exists: A personal representative appointed after the limitations period has expired may relate the appointment back to the filing of the petition within the limitations period if the delay in appointment is due to inadvertence by the probate court, as in *Ogle v. Gordon*.



***Ex parte Hubbard Properties, Inc.***, - Louis Chatman was a resident of the Warrior Gardens Apartments, owned and operated by Hubbard Properties, Inc. and Warrior Gardens, LLC. Chatman died from a fire that occurred in his apartment. Though the county administrator had been appointed administratrix of Chatman's estate by the Jefferson Probate Court, Chatman's wife nonetheless filed a wrongful death action against Hubbard and Warrior after the county administratrix's appointment. Later, Chatman's wife filed a motion to substitute the administratrix of Chatman's estate as the plaintiff, and the trial court granted her motion. Hubbard and Warrior moved for summary judgment, which the court denied. Hubbard and Warrior then filed a petition for a writ of mandamus alleging that the action filed by Chatman's wife was a nullity because wrongful death actions may only be brought by the administrator or executor of an estate, which she was not, and the motion to substitute did not cure the error. The Alabama Supreme Court agreed, holding that because the county administrator was appointed administratrix of Chatman's estate before the wrongful death action was filed, the action was a legal nullity, and as such, the administratrix could not be substituted as the proper plaintiff to overcome that fatal flaw.

***Northstar Anesthesia of Alabama, LLC v Noble*** - Supreme Court reverses Trial Court's denial of a Motion for Summary Judgment in a wrongful death action. The wrongful death action was filed by a PR who had been discharged in a consent settlement before filing the action and who was not "re-appointed" until after the action was filed and after the SOL had expired. The Supreme Court held that the action was a nullity because the PR was not the PR at the time the action was filed. The Supreme Court refused to apply relation back to the "re-appointment", noting that relation back generally can't be used to prevent a wrongful death claim from being time barred where the PR was not appointed until after the SOL had expired; and, deferring to the legislature to provide a relation back or other savings provision.

***Ex parte Bio-Medical Applications of Alabama, Inc. (In re: Howard v Providence Hospital)*** - Supreme Court issues writ of mandamus holding that Summary Judgment was due to be entered in a wrongful death action because the plaintiff who filed the action was not the PR - his brother was the PR. The Trial Court had denied the MSJ and granted a motion to substitute the PR as the plaintiff. The Supreme Court rejected the plaintiff's argument that he had acted as the agent of the PR pursuant to §43-2-843(17) because that section only applies to "any act of administration" and does not apply to a wrongful death action.

***Stinnett v. Kennedy*** - Supreme Court reverses trial court's dismissal of a wrongful death claim in a medical malpractice action seeking damages for the wrongful death of a previable fetus. The claim was based on § 6-5-391, entitled "wrongful death of a minor." The Supreme Court discusses Mack v. Carmack, 79 So.3d 597 (Ala. 2011)[20 ALW 37-1], which recognized that the Wrongful Death Act permits an action for the wrongful death of a previable fetus.

#### **Payment of Attorney Fees**

***Whele v Bradley*** - Withdrawing its 3/14/14 opinion and substituting this new opinion therefor, Supreme Court affirms award of about \$2 million of PR fees awarded by the Bullock County Circuit Court, but reverses the Court's denial of a claim made by some beneficiaries that the PRs had to pay interest to the estate on the fee because it was paid prior to Court approval and the Will did not authorize payment of the PR fees

without court approval. The Supreme Court noted that it has long held that, pursuant to §43-2-509, or its predecessor, a personal representative must pay interest from the date he or she pays himself or herself compensation without court approval to the date he or she obtains court approval for the compensation amount at issue. The Supreme Court also reversed the Circuit Court's award of attorney's fees and costs to the PRs because the award was based on an oral motion with no evidence to document the fees and no articulation by the Court of the decisions made, the reasons supporting the decisions and the performance of attorney fee calculation.

***Leonard v. Woodruff et al.*** - Approved award of personal representative's attorney fees for out of state litigation by a legatee against the personal representative personally but reversed lower court decision charging fees to the plaintiff-legatee's distributive share because of insufficient evidence.

***Ex parte Hill (In re: Hill v Hill)*** - Supreme Court refuses to grant mandamus relief with respect to orders entered by the Mobile County Circuit Court, holding that \$13 million contingency fee owed to attorneys (who successfully represented children of the decedent in a breach of a contract to make a will action) could be considered an estate expense. However, the Supreme Court reversed the Circuit Court's order of a cash lump sum to the attorneys, finding such an award was not in accordance with the contingent fee agreement.

### **Creditor Protection**

***Bentley v Bentley*** - Court of Civil Appeals affirms Trial Court's determination that husband's interest in family partnership was subject to division in a divorce even though husband had made no contributions to it nor had he received any distributions from it. The husband's share of the partnership's income was reported on the husband's and wife's joint income tax returns. The Court of Civil Appeals noted that it had previously held in *Kreitzberg v Kreitzberg* 80 So. 3d 925 (Ala Civ App 2011) that the fact that a party's separate property might create tax liabilities that are borne by both parties is not, in itself, a basis for a conclusion that the separate property was used for the common benefit of the parties under §30-2-51 (a). However, the Court noted that both of the parties in this case testified that they treated the husband's interest in the partnership as part of their retirement plan and that they had forgone other retirement planning activities because of it. Therefore, the Court found that the parties' agreement constitutes use of the property for the common benefit of the parties under §30-2-51(a).

***Schlumpf v. D'Olive*** - Alabama Supreme Court held that real property in an intestate estate cannot be sold solely to pay the debt secured by a mortgage on the real property when the mortgagee did not file a claim against the estate because the power of sale depends on the existence of the necessity for its exercise in the administration of the estate.

***Ex parte Avant Bank (In re: Iberiabank v Niland)*** - Supreme Court reverses the Trial Court's vacating of a sheriff's sale on account of Iberiabank executing a writ of execution on JTWROS property owned by the surviving owner on account of a judgement obtained against the deceased owner. The Supreme Court held that Iberia's claim on the JTWROS was extinguished at the death of the deceased owner because an estate in joint tenancy passes to the survivor free and exempt from all charges made by the deceased cotenant. The Supreme Court noted that "no severance of the tenancy occurred until [the deceased owner's] death.

## **Guardianships and Conservatorships**

***Barber v Barber*** - Court of Civil Appeals affirms summary judgment in favor of Conservator. The defendant to the Conservator's action asserted that the Conservator failed to register the letters in the appropriate Alabama Court. The Court noted that the issue of the authority to bring the action was an issue of capacity, which is an affirmative defense which defendant failed to raise in its pleadings. The Court also rejected defendants other arguments, finding that the affidavit filed by the Conservator was sufficient to shift to the defendant the burden to present evidence that a genuine issue of material fact existed.

***Mousseau v Wigley*** - Court of Civil Appeals affirms the Calhoun County Circuit Court's dismissal of appeal by one daughter from the Probate Court's appointment of another daughter as guardian of their mother. The probate Court allegedly never sent a copy of the judgment and the appellant did not receive a copy until 37 days after entry of the judgment. The appeal was filed after the 42 day deadline and no motion was filed in the Probate Court under ARCP 77(d) asking the Probate Court to extend time. Instead, ARCP 77(d) was mentioned for the first time in response to the motion to dismiss. Hence, the request for relief was filed in the wrong court.

## **Life Insurance/Annuities**

***Barton v Liberty National Life Insurance Company*** - Court of Civil Appeals reverses Jefferson County Circuit Court's dismissal of claim relating to payment of life insurance proceeds. Court of Civil Appeals holds that §27-14-3(f) does not allow for the change of a beneficiary on a life insurance policy of another when the proposed new beneficiary does not possess an insurable interest in the insured.

***Ex parte Liberty National Life Insurance Company (In re: Barton v. Liberty National Life Insurance Company)*** - "Based on the plain and unambiguous language ... [of] Section 27-14-3(f) ... an insurable interest in personal insurance need exist only at the time the policy becomes effective ...." No insurable interest is necessary for subsequent assignment of the policy (see Ala. Code§ 27-14-21 (b)) or "at the time the loss occurs."

***Aderholt v McDonald*** - Supreme Court affirms Walker County Circuit Court's grant of summary judgment to ex wife of decedent on her claim to all of life insurance proceeds from policy naming her as sole beneficiary. Decedent's mother, as administrator of his estate, argued policy was merely to secure alimony and that ex wife was entitled to only the amount of proceeds equal to the remaining unpaid alimony. The Supreme Court said that the fact that the ex wife was named beneficiary of the policy was controlling;[Query whether result would be different under "new" §30-4-17, effective 10/1/15?].

***Kowalski v Upchurch*** - Court of Civil Appeals reverses trial court's grant of summary judgment in favor of son and against ex-husband with respect to the proceeds of an annuity owned by son's mother. Court of Civil Appeals holds that ex-husband was entitled to annuity proceeds, distinguishing between divorce judgment's awarding ownership to ex-wife / son's mother and ex-husband's rights as a beneficiary.

## **Personal Representative**

***Ex parte Adams (In re: Estate of Clifford Wayne Cleveland, deceased)*** - In 2014 (168 So3d 40) ("Adams 1"), the Supreme Court denied issuing writ of mandamus relief from an Autauga County Circuit Court order prohibiting a personal representative from hiring attorneys or other professional and appointing a substitute co-personal representative (for one that had resigned) because motions apparently seeking the same relief were still pending in the Circuit Court. In Adams 1, the Supreme Court agreed there was no authority supporting the appointment of a substitute copersonal representative, citing §43-2-847. The Circuit Court removed the substitute co-personal representative, but denied a motion for recusal of the Judge and issued a preliminary injunction prohibiting sale of certain estate property pending the determination of the estate's solvency. The Supreme Court refused to issue a writ of mandamus recusing the Judge (saying that although the Judge's alleged incidents of unprofessional behavior was troubling, judicial bias (as opposed to bias from a personal source) does not disqualify a Judge), but reversed the preliminary injunction because it did not contain the required explanation for the issuance, citing *Stephens v Colley* 160 So3d 278 (Ala 2014).

***Macfarlanes, LLP v Charles Lange Clark*** – US District Court for the Southern Division of the Northern District of Alabama denies a motion to dismiss a London law firm's action to enforce a London Court's "default" judgment against an Alabama citizen (who is the administrator of an Alabama estate) in his individual (as opposed to administrator) capacity, but orders mediation and withholds decision regarding abstention (i.e., abstaining from the action in deference to the Probate Court) until after mediation. The Alabama administrator disputed his individual liability for the legal fees for services rendered to the estate, alleging he hired the London law firm only in his capacity as administrator of the estate. London law firm based its action to enforce on the new Alabama Uniform Foreign-Country Money Judgments Recognition Act, §6-9-250, et seq ("FCMJJA") and comity.

***Wylie v. Estate of Cockrell*** - Supreme Court affirms the Probate Court's order (which was affirmed by the Circuit Court) removing a PR from her position based on (1) her failure to file an accurate and complete accounting after being ordered to do so multiple times, (2) her improper transfer of estate assets to decedent's girlfriend based on misunderstanding of the meaning of the term "curtilage" in the will (where PR had not consulted attorney to determine same); and (3) her improper conversion of LLC membership interest to personal use in violation of Alabama LLC law, which vested in residual devisees the financial rights of the decedent upon his death. Probate court erred, however, in assessing GAL's attorneys fees against former PR, because the record did not demonstrate the GAL's time spent working on the case to justify the fee; remand was thus necessary to assess fees.

***Thames v Thames*** - Court of Civil Appeals affirms Montgomery Probate Court's finding that daughter of decedent was not an Alabama resident (and therefore not eligible to serve as administrator of her father's estate) notwithstanding her filing of a declaration of residency and her relocation to her brother's home in Alabama. The appellate Court also affirmed the Probate Court's rejection of other objections by the children of the decedent to the Probate Court's appointment of the decedent's widow (who is not the mother of the children) as administrator.

## **Miscellaneous**

***Thrasher v Thrasher and Reed*** - Court of Civil Appeals reverses Montgomery County Circuit Court's holding that a surviving spouse had forfeited a life estate in the marital residence by failing to live in it. The Court of Civil Appeals held that there was no language of defeasance in relevant antenuptial agreement indicating that the spouse's failure to live there or to maintain it resulted in a forfeiture of her life estate.

***Watkins v Watkins*** - Court of Civil Appeals affirms trial court's determination that claimant was common law married to decedent, finding that claimant had not met the "clear and convincing" burden of proof in view of the fact that claimant and decedent had kept their alleged marriage a secret to at least one entire community (the one where decedent's former wife lived). The Court discusses the elements of common law marriage in the opinion

***RES-GA Lake Shadow, LLC v Kennedy*** - Court of Civil Appeals reverses Montgomery County Circuit Court's dismissal of claims under the Alabama Fraudulent Transfer Act ("AFTA"). Court of Civil Appeals clarified that a prior holding (*Aliant Bank v Davis* 198 So3d 508 (Ala Civ App 2015)) did not hold as a matter of law that transfers assets made pursuant to a divorce agreement are not subject to AFTA. Whether the AFTA applies is to be determined on a case by case basis.

## **V. Not Alabama Cases – But Relevant to Alabama Law**

***Kimberly Rice Kaestner 1992 Family Trust v North Carolina Dept of Revenue*** - North Carolina's statute is unconstitutional to the extent that it seeks to impose income tax on an out of state trust whose only contact with North Carolina is the presence of a North Carolina resident beneficiary.

**Alabama's definition of a resident for purposes of the taxation of Trust income is very broad – if a Trust is administered in Alabama, a Trustee is located in Alabama, or a beneficiary lives in Alabama.**

**New Jersey Appellate Division** holds that New Jersey can't tax the out of state income of a resident trust (created under the Will of a New Jersey resident) if the trust has no New Jersey Trustee and no New Jersey property because it was unfair of New Jersey to retroactively change a position announced in an official publication. The New Jersey Tax Court had ruled in favor of the taxpayer on constitutional grounds.

***Smoot III v Smoot (DC Ga)*** - Executor/decedent's son's §2206 claim to recover from decedent's ex-wife/life insurance beneficiary portion of estate taxes attributable to proceeds of life insurance she received was upheld on summary judgment.

***Estate of Morrisette 146 TC No. 11*** - Economic benefit regime applies to family split dollar arrangement. Valuation of receivable (greater of cash value or premiums paid) held by Mother's revocable trust still to be determined. Taxpayer position is that no gift occurred (other than economic benefit of coverage, valued at \$636,687) due to retained rights in policies and that the receivable must be discounted to reflect future payment date. Net effect would be to incur transfer tax on only about \$8, 115,687 (the economic benefit plus the alleged \$7.479 million value of the receivable as of death of the Mother) on premium payments of \$30 million.

**Alhadi v Commissioner TC Memo 2016-74** - Over \$900,000 of money received by a caregiver is income taxable as proceeds of undue influence and elder abuse. Caregiver's returns also found to be fraudulent.

**Green v US (US DC Okla)** - In a second order in this case (the first allowing the taxpayer trust a deduction under §642(c) for full FMV of property purchased with gross income from prior years), the Court denies the government's motion for summary judgment to disallow a deduction for cash payments mistakenly made by Hobby Lobby that was intended to be made by a partnership of which the trust owned 99%. The mistake was due to a bookkeeping error which was corrected. The Court allowed the deduction.

**ALA CODE § 40-15B-4** – Until 2007, Personal Representative did not have the power to go after beneficiaries of nonprobate assets for his/her share of estate taxes.

**Preventing Will Contests** - New Hampshire now allows pre-mortem proof of validity of a Will.

## **VI. Other Cases/IRS Rulings that Effect Probate and Estate Planning**

**PLR 201507040** - Surviving Spouse who was sole trustee of trust named as beneficiary of IRA was permitted to roll over, or transfer by trustee to trustee transfer, the IRA to an IRA in her own name. Ruling is based on surviving spouse / trustee's power to revoke the trust in whole or in part and transfer trust assets to herself.

**Dahl v Dahl (Utah)** - Utah Supreme Court reversed Trial Court's determination that Nevada DAPT's assets were protected from divorcing spouse. Utah Supreme Court applied Utah law even though the stated choice of law in the trust was Nevada, discussed Utah's strong public policy interest in the equitable division of marital assets, used the terms "strong public policy" and "repugnant" and found that the DAPT was revocable (due to unfortunately worked sentence and notwithstanding that trust title and another trust provision declared it to be an "irrevocable" trust).

**Specht v US (DC OH)** - Government granted summary judgment on late filing and late payment penalties. Executor's reliance on attorney who lied to the executor did not constitute reasonable cause. Executor had lots of evidence that attorney was not doing her job and advice was not of the kind on which a taxpayer may rely under Boyle.

**CCA 201507018** - Transaction in which partner/taxpayer assigned stated partnership units to charity, and claimed corresponding charitable contribution deduction, only to then have charity sell, within 1 day, those units to partner's wholly-owned corp. in exchange for promissory note, should be recast pursuant to substance over form doctrine and deduction denied. Rather than receiving partnership interest, in substance charity received partner's mere promise to make payments to charity via corp. of amounts and at times of his choosing. So, partner was treated as directly, or indirectly via trust, transferring units to corp. Corp. was entitled to treat payments under note as charitable contributions by corp. to charity when payments were actually made. Moreover, org. was never bona fide partner in partnership and Reg. § 1.701-2's partnership anti-abuse provision applied to disregard charity as a partner thereby voiding purported §743(b) basis adjustment. Major problem - partner had complete control over transactions due to provisions of partnership agreement.

**Program Manager Technical Advice 2014-018 (foreign account reporting)** - Executor's failure to provide information regarding foreign accounts required to be furnished on Form 1040 under § 6038D results in suspension of statute of limitations under § 6501(c)(8) for assessment regarding decedent's final form 1040 and estate's forms 1041 and 706.

**Morris v Commissioner (TC Memo 2015-82)** - Beneficiary of father's IRA who was also the personal representative of his father's estate is taxable on entire IRA proceeds notwithstanding that he shared the IRA proceeds with his siblings. Paralegal at law firm assisting in the settlement of the estate had told him that there would be no tax due on the IRA distribution, apparently referring only to estate taxes.

**Kunkel v Commissioner (TC Memo 2015-714) (charitable deduction)**- No deduction for charitable contributions because no §170(f)(8) contemporaneous written acknowledgment obtained charities.

**Ellis v Commissioner (8th Cir)** - Affirms Tax Court's conclusion that payments made by LLC owned by taxpayer's self-directed IRA constituted prohibited transactions, resulting in deemed distribution of entire IRA and accuracy related penalty under §6662 and 10 % penalty under §72(t).

**Legal Zoom v North Carolina Bar Association** - The complaint alleges that the NC Bar Association is subject to anti-trust laws because it is controlled by "active market participants" and is not "actively supervised by a politically accountable state official." See North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101 (2015).

LegalZoom Settles with North Carolina Bar - LegalZoom will vet its documents with NC lawyers and inform customers that blank templates aren't substitute for in-person legal advice. Bar will support legislation to clarify UPL.

**Woebbling Settlement** - IRS accepts Wandry formula and agrees §2702 and §2036 do not apply because of 10% equity.

**Baker v Wood, Ris and Hoffman (Col. 2016)** - Upholds privity in estate planning, reported to be well reasoned in rejection of both the third party contract theory and the so called California balancing test.

**Mallory TC Memo 2016-110** - Termination of life insurance policy with outstanding loans results in constructive distribution, taxable to the extent it exceeded the investment in the contract.

## **VII. Other Issues of Interest**

**2704(b) Proposed Regs Issued** - Will not be effective until the future, if at all, but will change the discount rules regarding many Family Entities.

**2017 AEA is \$5,490,000; annual exclusion remains \$14,000.**

**Potential for Marital and Charitable Deduction valuation mismatch** if dividing business ownership in funding shares. Note Chenoweth discussion of same in a premium context. Note Ahmanson.

**Dillard v Schlusell** - "Estate planning" defense to fraudulent transfer action fails.

**Death during a §1031 transaction** not taxable as long as transaction completed after death. *Morris v Commissioner* 55 TC 636 (1971)

**Amending another firm's planning documents** - How do or can we limit our responsibility?

### **Portability**

**New South Dakota Special Spousal Trust** - similar to Alaska and Tennessee statutes allowing creation of community property trusts to obtain double basis step up under §1014(b)(6).

**Testamentary Powers that require exercise of power under a "Will" - does it require probate of the Will?**

**Legal invoices should be sterile (makes privilege issue moot).**

(i) Other Questions?

**Credit shelter still preferred to portability:** temporary (therefore risk of adverse repeal), no GST portability, no asset protection, no income splitting, etc.

### **Disclaimer planning**

**Late portability election – 9100 relief**

**Add language to prenuptial agreements**

**Portability default choices in our documents:**

- ▶ Executor Shall Elect Portability at Estate's Expense
- ▶ Executor Shall Elect Portability at Spouse's Expense
- ▶ Executor May Elect Portability at Estate Expense
- ▶ Executor May Elect Portability at Spouse's Expense
- ▶ Executor Shall Elect Portability at Estate's Expense at Spouse's Request
- ▶ Executor Shall Elect Portability at Spouse's Expense at Spouse's Request
- ▶ Executor May Elect Portability at Estate's Expense, but Shall Elect Portability if Spouse Pays

**IRS Provides Guidance on its Website Regarding How to Open and Fund MyRAs.**

**Dangers of Naming Trust as Beneficiary of Annuity – immediate taxation**



**Closing Letters** - IRS will issue Closing Letters only upon request. Do we also want to request duplicate receipts under §1643(b)?

**Anticipated Valuation Discount Regs under 2704(b) (Disallowance for Family Transfers?).**

When finalized – appears that there will be no discounts for transfer of interests in a family business – not even for minority/nonvoting/nontransferable interests

**Highway Bill**

- (i) Basis reporting requirements
- (ii) Changes to some filing deadlines for years beginning after 2015 - Partnerships and S corporations returns due date is 15th day of 3rd month after end of tax year; C corporations due date is 15th day of 4th month. Also changed extension periods for partnerships (from 5 months to 6 months) and for estates and trusts (from 5 months to 5 and ½ months).

Don't forget that some States still have estate or inheritance taxes on estates with less than the Federal AEA.

**Rev Proc 2016-42** - Sample provisions for CRAT to avoid any problem with the “more than 5 % possibility of exhaustion” test of Rev Rul 77-374.

**US v McNicol (1st Cir)** - Affirms District Court's grant of summary judgment to government holding executrix/spouse who distributed estate to herself (**some before she was appointed executrix**) with knowledge of tax liabilities personally liable under 31 USC §3713(b).

**Estate of Marion Levine v Commissioner (Tax Court Docket No. 9345-15, 7/13/16)** – Grants taxpayer MSJ regarding Intergenerational Split Dollar agreement based on Morrisette

**Pfannenstiehl Overturned** - Massachusetts Supreme Judicial Court overturns Trial Court's holding that a spouse's interest as one of a class of beneficiaries of a discretionary spendthrift trust was part of the marital estate subject to division in a divorce. Supreme Court determined that the interest was only an expectancy and not a property interest, but said that the Trial Court could consider the expectancy in a revised equitable division of the marital property.

**Estate of Jameson (2016 WL 4249142, New Jersey Superior Court, Appellate Division)** -Affirms Probate Court's dismissal of Will contest, finding that alleged anti Jewish motives of a testator for disinheriting his daughter (as opposed to anti Jewish conditions upon a bequest imposed by a testator ) do not violate public policy and are not grounds for a will contest.