

# **Handbook for Alabama Probate Judges**

**Tenth Edition**

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## **Volume 1**

- **The Historical Background of the Office of the Probate Judge**
- **The Legal Framework of the Office of the Probate Judge**
- **The Administrative Functions of the Probate Judge**
- **The Judicial Functions of the Probate Judge**
- **The Functions of the Probate Judge as Chairman of the County Governing Body**



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## PREFACE

One of the longstanding relationships of the Alabama Law Institute is that which is enjoyed with the Alabama Probate Judges' Association. It has been a great privilege to have partnered with them for more than thirty years to provide meaningful educational and training resources. This edition of the Handbook for Alabama Probate Judges is just the most recent example of this productive partnership.

The Alabama Law Institute, in conjunction with the Alabama Probate Judges' Association, has published this Handbook to update *A Manual for Alabama Probate Judges* written by Coleman B. Ransone, Jr. That manual was originally published in 1960 by the Bureau of Public Affairs and Administration of the University of Alabama with a second edition, by Professor Ransone, later published in 1974. In 1982, the Alabama Law Institute published a third edition which was edited by Keith B. Norman. The fourth edition was edited by Robert L. McCurley, Jr. The fifth, sixth, seventh, eighth, and ninth editions were edited by Penny A. Davis.

This tenth edition, edited by Michael Hill, incorporates changes in Alabama law since the last edition and expands the scope of forms included in the book. For the first time, the forms are published in a separate book for ease of reference.

The primary purpose of this Handbook is to serve as a quick reference for probate judges in finding legal sources of the duties with which they are entrusted by law. For newly elected probate judges especially, this Handbook can be an important tool in providing a general overview of the office and in helping to familiarize them with their many responsibilities.

We would again like to thank Penny Davis for her assistance with this edition. Even in retirement, she continues to dedicate a significant portion of her time with the Institute educating local officials throughout Alabama, particularly Probate Judges. Penny's assistance and advice for updating this important publication were invaluable. Likewise, we are grateful to Jill Colburn, for her patient efforts formatting this manuscript.

The Institute also wishes to express its appreciation to the following persons for their help in reviewing, proofing, and providing valuable insight in the preparation of this draft: Honorable Eldora Anderson, Perry County; Honorable Steven Blair, Coffee County; Honorable Judge Al Booth, Autauga County; Honorable Stacy Brooks, Covington County; Honorable Greg Cain, Morgan County; Honorable Patrick Davenport, Houston County; Honorable Don Davis, Mobile County; Honorable George Diamond, Randolph County; Honorable Robert Agerton, Escambia County; Honorable Brandy Easlick, Chambers County; Honorable Bill English, Lee County; Honorable Chris Greene, Blount County; Honorable Laurie Hall, Marengo County; Honorable Stephanie Kemmer, Bibb County; Honorable Alan King, Jefferson County; Honorable Alice Martin, Calhoun County; Honorable Sheila Moore, Winston County; Honorable Steve Norman, Butler County; Honorable Greg Norris, Monroe County; Honorable Ronnie Osborn, DeKalb County; Honorable John Paluzzi, Pickens County; Honorable Steven Reed, Montgomery County;

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Finally, we would like to express our gratitude to Mallory Hall and Katie Windle who provided research assistance on this publication while they were law students at the University of Alabama's Hugh F. Culverhouse School of Law and working for the Institute as Law Clerks.

**It should be emphasized that this publication is not an authoritative statement of the law, nor is it a substitute for the Code or other legal materials explanatory thereof. This publication seeks to serve only as a general guide to the specific mandates of Alabama's laws regulating probate judges. Users of this publication who have need of authoritative legal statements should seek such assistance from the appropriate legal source.**

Although the Alabama Law Institute is a state agency, no conclusions concerning policies of the State of Alabama are to be drawn from this volume. This statement is also true with respect to the position of the University of Alabama for their earlier editions. The findings and conclusions of the study are those of the editor, who takes sole responsibility for the accuracy of the study and for any interpretations of the cases presented.

Clay Hornsby  
Deputy Director  
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## I.

### **THE HISTORICAL BACKGROUND OF THE OFFICE OF THE JUDGE OF PROBATE**

The organization of the probate courts in Alabama would be difficult to understand without reviewing the historical development of the office. The development of these courts was greatly influenced by colonial institutions that preceded them and these in turn were to a large extent modeled after English practice. Thus, to understand the organization of our present-day courts, it is necessary to review their development in England and in the colonies.

#### **A. THE ENGLISH FOUNDATION**

The history of probate of wills and administration of estates in Great Britain is closely related to the history of the ecclesiastical courts in that country. Unfortunately, the exact date of origin is not known with any certainty for either the ecclesiastical courts or probate and administration. Sir Henry Spelman set 1151 as the date that civil and canon law was imported to England, while Sir William Blackstone set it around the 12th century. However, it seems rather definite that neither kind of court had been established before the Norman conquest in 1066.

In 1066 the probate of wills and administration of estates did not take the form that we know at the present time. However, such jurisdiction and procedures as did exist were exercised by the secular courts, generally the county court, which had been established in England during the pre-Norman period. Both the civil and the ecclesiastical authorities united for the administration of justice with no distinction between secular and spiritual matters.

Following the conquest, the Norman laws and customs which were instituted in England divided the jurisdiction over legal matters between spiritual and secular courts. Gradually, jurisdiction over various phases of probate and administration was transferred from the secular to ecclesiastical courts. By 1084, some jurisdiction over the administration of estates had been transferred to the ecclesiastical courts. A century later the spiritual courts also had acquired jurisdiction over certain cases involving wills, and it may be surmised that authority to probate testaments followed shortly thereafter. This authority was fully established by the fourteenth century.

The division of authority between secular and spiritual courts was based upon the type of property involved. The spiritual courts exercised jurisdiction over personal property, while the secular courts exercised jurisdiction over real property. During the reign of Henry 1 (1100-1135)

an attempt was made to reunite the ecclesiastical and civil courts into one system. However, the clergy opposed the unification, and when Stephen ascended to the throne in 1135 separate jurisdictions were re-established. From that point on the ecclesiastical courts, although their authority was challenged from time to time by overloads and by common law courts, remained as a separate system of courts until the nineteenth century.

Another significant legal development during this period was the rise of chancery courts. Through various means these courts had gained and were exercising extensive jurisdiction over the administration of estates by the eighteenth century.

During the period of America's colonization, jurisdiction over the probate of wills and administration of estates in Great Britain was divided among the ecclesiastical courts, common law courts, and chancery courts. Influence from this practice in the handling of probate and administration can be seen in several colonies. In fact, the division of jurisdiction over the probate of wills and administration of estates among courts of probate or other inferior courts exercising this authority, chancery courts, and law courts in some of our states today can be traced to this early English practice. Although occurring after the colonization period, the development of courts of probate in Great Britain culminated in 1857 when they were formally established as separate courts.

## **B. EARLY AMERICAN PRACTICE**

Early American statesmen naturally were influenced by English practice in establishing colonial governments, including the organization of the court system. However, ecclesiastical courts were never established in America. Therefore, the division that existed in Great Britain never took root in this country.

Originally colonial governments tended to vest all jurisdiction over judicial matters in the ordinary civil courts. This practice evoked criticism from the Crown because it did not adhere to English law and custom. To meet this criticism, the jurisdiction over probate to wills and the administration of estates generally was assigned to the governor and his assistant, although it was common for the legislature itself to administer estates. However, this arrangement failed to meet the needs of a rural society, and local courts that were closer to the people to be served were established throughout each colony. These courts were known by various titles. The most common names were probate courts, orphans' court, and surrogates' court. Courts of ordinary were common. The county court in several colonies was vested with this jurisdiction.

Separate probate courts were established in some colonies at a very early date. For example, Connecticut established a probate court in Hartford, New Haven, Fairfield and New London counties in 1716. Probate courts were established in Massachusetts in 1784. However, the practice in most colonies and in the newly organized states was to assign this jurisdiction to another court, most frequently the county court. In 1645, Virginia assigned jurisdiction over probate and administration to the county court. These courts were usually multi-headed bodies with numerous other responsibilities. Ordinarily, the county court was the chief administrative and legislative body in the county, in addition to its role as an inferior court with limited criminal and civil jurisdiction. A court of this type, although not always called the county court, exercised jurisdiction over probate and administration in all of the southern colonies at one time or another during the period in which Alabama was being settled.

Even the county courts were required to sit as an orphans' court for exercising jurisdiction over probate and orphans' business. Separate days were set aside for these matters and different rules guided the proceedings. The practice of establishing separate courts or separate divisions resulted in the recognition of probate jurisdiction as a distinct and independent branch of law based upon its own set of principles and rules of procedure. The results are clearly evidence in current probate practice.

In summary, at an early date in American history, local courts were vested with jurisdiction over the probate of wills and administration of estates. In some colonies separate specialized courts were established in each county to exercise this jurisdiction, while in others the county court or a similar body was vested with this responsibility in addition to several other functions. The most significant aspect of these early courts, however, was the recognition of probate jurisdiction as an independent branch of law in both types of courts. It was from this background that Alabama's first system of courts was established.

### **C. THE DEVELOPMENT OF THE OFFICE IN ALABAMA**

Obviously early Alabama statesmen were influenced by practices in surrounding states and the Mississippi Territory in the establishment of the state's first courts. Although for a short period separate courts of probate had existed in the Mississippi Territory, the practice of requiring the county or inferior court to sit as an orphans' court prevailed. This court, like its counterpart in most other southern states, was also the chief administrative and legislative body in the county and an inferior court with limited criminal and civil jurisdiction. The county court arrangement was continued during the period Alabama was organized as a territory.

The Alabama legislature at its first session established the same type of court system that had existed in the territory with only minor deviations. An inferior court consisting of five members was established in each county. It was required to sit at certain intervals as an orphans' court to handle probate and orphans' business. Moreover, it was the chief administrative and legislative body in the county and an inferior court with limited criminal and civil jurisdiction. In essence, it was simply a carry-over of the territorial county court.

It was not until 1821 that a significant change was made in the county court. In that year the composition of the court was changed from five justices and a clerk to one judge and a clerk. At the time there was established in each county a separate court of county commissioners, consisting of four commissioners and the county judge. This arrangement provided for some separation of the judicial function from the administrative and legislative function at the county level. The county court was vested mainly with the same judicial powers of its predecessor, the county judge with the same powers formerly exercised by the chief justice of the inferior court. The administrative and legislative functions such as the control over roads, ferries, bridges, and the management of public buildings were assigned to the new commissioners' court. No other significant changes were made in the county court until mid-century.

In 1850, a court of probate as we know it today was established in each county. The positions of clerk and judge of the county court were consolidated into an office of judge of probate. Unlike the county judge who was appointed for a six-year term, the judge of probate was to be popularly elected for a term of six years. Jurisdiction of the old county court was for the most part simply transferred to the court of probate, the major exception being criminal and civil jurisdiction, neither of which has vested in the new court. The judge of probate was given the authority formerly exercised by the county judge and clerk of the county court, with authority to appoint his own clerk. Like his predecessor, the judge of probate was made a member of the court of county commissioners.

Since 1850 there have been several important changes in the legal framework of the office of the judge of probate. Most of the early changes made added new duties to those already assigned or expanded existing areas of responsibility. Additional responsibilities in election administration, licensing and records are good examples of the expansion. The most important addition was made in 1866 when the judge of probate was designated as ex officio judge of the county court. Exceptions to this law were made in several counties between 1866 and 1915. In 1915 the judge of probate was re-established as ex officio judge of the county court in all counties with a population less than 50,000.

Another important addition to the duties of the judge of probate was the designation as judge of the juvenile court in all counties in which a separate juvenile court had not been established. He was vested also with jurisdiction over desertion and non-support cases, both in 1915.

However, not all changes have been addition or expansions to the functions of the office. For example, in 1919 the clerk of the circuit court was designated ex officio clerk of the county court, and in 1935 duties relating to the welfare were transferred to the county welfare department. Moreover, judges of probate are now the chairperson of the county commission in only fifteen counties: Cherokee, Choctaw, Cleburne, Dale, Dallas, Franklin, Geneva, Hale, Henry, Lamar, Lauderdale, Lee, Monroe, Tuscaloosa, and Washington.

Another change in responsibilities came with the adoption of the judicial article. Prior to its adoption in 1973, and the subsequent passage of implementing legislation, Alabama judges of probate performed functions as ex officio judges of other courts. The first of these groups of functions included the county court. Basically, the county court had original jurisdiction, concurrent with the circuit court, of all misdemeanors committed in the county. Title 13, Sections 313-349 of the 1958 Code of Alabama describe the county courts as they formerly existed in Alabama.

The second set of functions involving another ex officio duty involved the juvenile court. The judges of probate, sitting as judge of the juvenile court had original and exclusive jurisdiction over all children under sixteen years of age. That jurisdiction extended to eighteen years of age for girls and at the discretion of the court having jurisdiction of the offense committed, it could be extended to eighteen years of age for boys. The judge had authority to hear, determine, and adjudicate all questions and cases relating to dependency, neglect, and delinquency of children within the above age limits. All cases were tried by the judge who rendered the decision without the intervention of a jury. Moreover, the judges of probate acting as juvenile judge could issue judgments and orders for the custody, discipline, supervision, care, protection, or guardianship as determined by the court to be in the best interest of the child. These duties were set forth in Title 13, Sections 351-383 of the 1958 Code of Alabama.

A final function formally assigned to the probate court was the jurisdiction over desertion and non-support cases. This was covered in Title 34, Sections 89-104 of the 1958 Code.

With the adoption of the judicial article, these former duties of the probate court have been placed within the jurisdiction of the district court or, in some instances, the circuit court.



## **II.**

### **THE LEGAL FRAMEWORK OF THE OFFICE OF THE JUDGE OF PROBATE**

#### **A. THE CONSTITUTIONAL AND STATUTORY BASE**

The new judicial article which was ratified in December of 1973, did not alter the status of the probate court. While it is a constitutional court in the sense that the Constitution provides that there must be a probate court in each county, the Constitution does not specify the qualifications of the office. It is especially significant that the judicial article does not require that the judge of probate be licensed to practice law in the state, which is one of the qualifications of all of the other judges in the judicial system. On the other hand, if the judge of probate does happen to be a lawyer, he<sup>1</sup> like all other judges, is prohibited from practicing law while holding the office of judge of probate. Following retirement as judge of probate, however, he may practice law and draw his retirement.

Also interesting is that Ala. Const. Amend. 328, § 6.08 on "Prohibited Activities" does not prohibit the judge of probate from holding another office of public trust, or from being in a political party organization or from campaigning for other candidates. This section reads "no judge, except a judge of the probate court, shall seek or accept any non-judicial elective office, or hold any other office of public trust, excepting service in the military forces of the state or federal governments." Thus, the judge of probate is recognized as being in a special category. This is necessary because although a judge of probate has significant legal functions, he also has many political and administrative roles that would be difficult to perform if he followed the same code of conduct as other judges.

The Code of Alabama, 1975, and its supplements contain the general statutory provisions affecting the office. References to the office and its duties are scattered throughout the Code, but Sections 12-13-1 through 12-13-70 contain most of the provisions relative to the legal framework of the office. The state legislature also has passed many local acts and general acts of local application affecting the office of judge of probate in various counties. However, the Alabama

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<sup>1</sup>Words in the masculine gender include the feminine consistent with Alabama Code § 1-1-2.

Supreme Court ruled in the case of *Peddycoart v. City of Birmingham*<sup>2</sup> that population classifications used to create general acts of local application are unconstitutional. In response to the Peddycoart decision, the Alabama Legislature passed Amendment 375. That amended § 110 of the Alabama Constitution and permitted the creation of eight classifications of municipalities. [See § 11-40-12]<sup>3</sup>. The legislature also proposed another amendment to the constitution to protect all general acts of local application enacted before the Peddycoart decision. This proposed amendment was ratified by Alabama voters as Ala. Const. amend. 389. As a consequence of the Peddycoart ruling, many acts that at one time could be enacted as general acts of local application must now be enacted as local legislation in accordance with advertisement requirements of section 106 of the Alabama Constitution.

As a consequence, there are literally hundreds of local acts and general acts of local application that continue to apply to specific counties. Several of these general acts of local application cover many counties, either because of the specified population range or because of court interpretation. These acts are covered in this handbook. Local acts and most general acts of local application are not covered in this handbook. It would, in effect, take a different manual for each of Alabama's 67 counties to completely cover such acts. Consequently, each new judge of probate is urged to acquaint himself with the local acts and the general acts of local application that apply to his county. A knowledge of these acts, in addition to the information found in this handbook, is necessary for a basic understanding of the judge of probate's function in a specific county.

## **B. THE LIMITED JURISDICTION OF THE PROBATE COURT**

The court of probate has original and general jurisdictions over the following matters:

- (1) The probate of wills;
- (2) The granting of letters of testamentary and of administration and the repeal or revocation of the same;
- (3) All controversies in relation to the right of executorship or of administration;
- (4) The settlement of accounts of executors and administrators (personal representatives);
- (5) The sale and disposition of the real and personal property belonging to and

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<sup>2</sup>354 So. 2d 808 (Ala. 1978).

<sup>3</sup>Unless otherwise stated, all citations in this book are to the Code of Alabama, 1975.

the distribution on intestates' estates;

- (6) The appointment and removal of guardians for minors and persons of unsound mind;
- (7) All controversies as to the right of guardianship and the settlement of guardians' accounts;
- (8) The allotment of dower in land in the cases provided by law;
- (9) The partition of lands within their counties;
- (10) The change of the name of any person residing in their county, upon filing a declaration in writing, signed by him, stating the name by which he is known and the name to which he wishes it to be changed.

[§ 12-13-1]. Likewise, the probate courts are granted jurisdiction by statute in other areas including:

- (1) Proceedings related to the establishment and operation of water management districts; [§§ 9-9-1 through 80]
- (2) Eminent domain proceedings; [§§ 18-1A-1 through 311]
- (3) Petitions of adoption; [§§ 26-10A-1 through 38]
- (4) The sale and redemption of lands sold for the payment of delinquent taxes; [§§ 40-10-1 through 30, 40-10-120 through 143].

Additionally, 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. [*Regions Bank v. Reed*, 60 So.3d 868 (Ala. 2010), *see* § 19-3B-203(b)].

Several probate courts have been granted limited equitable jurisdiction by local acts or constitutional amendments. In some counties, equitable jurisdiction is only granted to a judge of probate in a county if that judge is learned in the law. [Currently: Shelby and Pickens]. Some counties require a judge to be learned in the law. [Currently: Jefferson and Mobile].

### **C. VALIDITY ACCORDED PROBATE COURT DECISIONS**

Orders, judgments, and decrees issued by probate courts are accorded the same validity and presumption accorded courts of general jurisdiction. [§ 12-13-1 (c)]. Probate courts may issue show cause orders and attachments for contempt of court, or its process, by any executor, administrator (personal representative), guardian, or other person, and may punish by fine, imprisonment, or both. [§§ 12-1-8, 10 and 12-13-1, 9]. If the judge of probate is a licensed attorney

in the state of Alabama, he or she has the same power to punish for civil contempt as a circuit court judge does. [§ 12-13-9]. The court also has authority to preserve and enforce order in its proceedings, to compel obedience to its judgments, orders and process, to control the proceedings of the officers of the court and other persons connected with proceedings therein, to administer oaths necessary in the exercise of its powers and duties, and to amend and control its process and orders to make them conform to law and justice. [§ 12-1-7].

Alabama law permits the removal of administration of estates and guardianships from probate courts to circuit courts at any time before final settlement by a petition of removal. [§§ 12-11-41 and 26-2-2]. Under this authority concurrent jurisdiction over administration of estates and guardianships may exist among the probate courts, circuit courts, and other courts having appropriate jurisdiction.

Unless a law expressly establishes a specific procedure for probate courts, their rules of evidence, of pleading and practice, and their modes of obtaining evidence by oral examination or by deposition, of compelling attendance of witnesses, and of enforcing orders, and judgments must conform to the procedures applicable to circuit courts so far as the same are appropriate. [§ 12-13-12]. The Alabama Rules of Civil Procedure became applicable in probate court so far as the application is appropriate and except as otherwise provided by statute. (By order Alabama Supreme Court, effective January 1, 2013).

The judge of probate is empowered to take, certify, and administer oaths unless the affidavit is expressly restricted to some other officer, to issue process of garnishment upon decrees for money in the court of probate, to cause juries to be empaneled and sworn for cases permitting or requiring juries, and to appoint guardians and administrators ad litem when necessary. He has authority and responsibility to employ a chief clerk and other clerks deemed necessary for performing the duties of the office and authority to authorize persons to make abstracts of titles of lands sold at judicial sales. [§§ 12-13-40, 12-13-7]. The judge of probate in all counties has functions in the electoral process.<sup>4</sup> The judge of probate has licensing functions except in those counties that have provided for a licensing commissioner by local law. The judge is also designated as a conservator of the peace in his respective county. [§ 12-13-39].

When there is no contest, the judge of probate may delegate all ministerial and judicial acts within his authority, except hearing and granting writs of habeas corpus, to the chief clerk.

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<sup>4</sup>See *Alabama Election Handbook*, 18th ed., developed by the Alabama Law Institute, for a listing of specific duties.

However, all acts of the office staff are performed in the name of the judge unless there is a vacancy in the office. [§ 12-13-14].

#### **D. ETHICS ACT<sup>5</sup>**

In 1973, the Alabama Legislature passed the Alabama Ethics Act. It has been revised many times since then and the frequency of revisions has increased in recent years. The law defines "Public Official" as including, in pertinent part, "[a]ny person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations..." [§ 36-25-1]. The law also defines a "Public Employee" as including, in pertinent part, "[a]ny person employed at the state, county, or municipal level of government or their instrumentalities..." [§ 36-25-1]. As a result, judges of probate and county employees are required to comply with the provisions of this law.

The purpose and objective of the Alabama Ethics Act, is to prevent conflicts of interest and thus instill public confidence in the elected and appointed officials covered by the law. [§ 36-25-2]. The Ethics Act is supported by Ala. Const. § 101, which prohibits any county official from accepting any fee, money, office, appointment, employment, reward, or thing of value in exchange for influencing legislation.

Basically, the Ethics Act contains two broad categories of provisions. The first category relates to disclosure, and the second category is a set of ethical principles of conduct with which a public official and public employee must comply. All judges of probate, and many county employees, must file an annual "Statement of Economic Interest" with the Alabama Ethics Commission by April 30 of each year. [§ 36-25-14]. Any candidate for the office of judge of probate must file a financial disclosure statement simultaneously with the date he or she files his or her qualifying papers with the appropriate election official. [§ 36-25-15]. **Failure to do so can result in removal from the ballot.** [§ 36-25-15(c)].

Some judges of probate and all county employees who file statements of economic interests must also attend mandatory training on the Ethics law. [See §§ 36-25-4.2(a)(4) and 36-25-4.2(e)]. This training can be done by accessing the Ethics Commission training video on their website at: [www.ethics.alabama.gov](http://www.ethics.alabama.gov).

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<sup>5</sup>The structure for the information on the Ethics Act in this chapter was provided by Jim Sumner, former Director of the Alabama Ethics Commission.

The Statement of Economic Interests package may be sent to the county soon after the first of the calendar year with a form to be copied and distributed to each filing public official and employee. The form can also be filled out on the Ethics Commission's website and printed out for mailing before April 30.

The information contained in an SEI becomes a public document once it is received in the Commission office and is therefore available to the general public and to the media via through the commission's website.

A brief review of the ethical principles of conduct with which a public official such as a judge of probate (and a public employee) must comply is also important. Those key principles are below:

(1) A judge of probate may not use his/her official position to obtain personal gain for self, family, or business. [§ 36-25-5].

(2) A judge of probate may accept, solicit, or receive contributions only for use in influencing the outcome of an election, and only if he or she follows the procedures of the Fair Campaign Practices Act.<sup>6</sup> [§§ 36-25-6 and 17-5-7(b)(1)].

- A judge of probate may not accept, solicit, or receive contributions more than twelve months before an election in which he intends to be a candidate. [§ 17-5-7(b)(2)].
- A judge of probate may solicit contributions for up to 120 days after an election to pay off campaign debts, although he or she must follow all the rules of Alabama law in doing so. [§ 17-5-7(b)(3)].
- A judge of probate shall not accept, solicit, or receive contributions with the intent of corruptly influencing official actions. [§ 17-5-7(c)(2)].
- A judge of probate may not use contributions for personal use. [§ 36-25-6].

(3) A judge of probate is prohibited from soliciting or accepting any money (other than his regular pay) for advice or assistance on matters pertaining to the Legislature, lobbying a legislative body, an executive department, or any public regulatory agency or other body of which

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<sup>6</sup>See § 17-5-1 *et seq.*

he or she is a member. [§ 36-25-7(d)].

(4) A judge of probate may not use confidential information obtained as a result of his or her elected position to obtain financial gain for the judge of probate or any other person. [§ 36-25-8].

(5) A judge of probate may not serve as a member of a regulatory agency that regulates any business with which he or she is associated unless specifically provided by law. [§ 36-25-9(a)].

(6) A judge of probate may not vote or participate in any matter in which that judge of probate or a family member has any financial gain or interest. [§ 36-25-9(c)].

(7) If a judge of probate, a family member, or a business with which either is associated, represents a client, for a fee, before any state, county, or municipal agency, board, or department, the Alabama Ethics Commission must be notified within ten days after the first day of such appearance. [§ 36-25-10].

(8) A judge of probate, member of his/her household, or a business with which either is associated, may contract to do work for state, county, or municipal governments only if he or she participates in competitive bidding in which there are no outside negotiations, and only if a copy of the contract is filed with the Alabama Ethics Commission within ten days after the contract has been entered into. [§ 36-25-11].

(9) A judge of probate may not solicit or accept anything of value (other than in the ordinary course of business) from a person associated with a business which is regulated by the agency, board or commission on which the judge of probate serves. [§ 36-25-12].

(10) No judge of probate or family member of the judge of probate shall solicit or receive a thing of value from a lobbyist, subordinate of a lobbyist, or principal. [§ 36-25-5.1].

(11) A lobbyist, or principal may offer or provide and a judge of probate may receive a “thing of value.” The definition of “thing of value” includes a number of exceptions that judges of probate and public employees should review. For the list of exceptions, see § 36-25-1(34)(b)(1-18).

(12) One exception to “thing of value” is for items of de minimis value. “De minimis” value is defined as: “a value twenty-five dollars (\$25) or less per occasion and an aggregate of

fifty dollars (\$50) or less in a calendar year from any single provider, or such other amounts as may be prescribed by the Ethics Commission from time to time by rule pursuant to the Administrative Procedure Act or adjusted each four years from the date of the enactment of this amendatory act to reflect any increase in the cost of living as indicated by the United States Department of Labor Consumer Price Index or any succeeding equivalent index.”

(13) A judge of probate may not solicit a thing of value from a person or business he or she has authority over (one he or she “inspects, regulates, or supervises”) or who has a matter pending before him or her. [§ 36-25-5(e).]

(14) A judge of probate may not use public equipment or property for private benefit or business benefit. [§§ 36-25-5(c) and –(d).]

(15) A judge of probate may not solicit a lobbyist for anything even if it is not a “thing of value”.

(16) A judge of probate or former judge of probate may not serve for a fee as a lobbyist or otherwise represent a client before any agency, commission, or department of which he or she has been a member within the past two years. [§ 36-25-13.]

(17) A judge of probate also may not represent a client or employer before any government body at the state or local level. [§ 36-25-23(a).]

(14) The Ethics Act also includes a provision that requires each judge of probate and spouse of each judge of probate who is employed by, or who has a contract with the state or federal government, to notify the Ethics Commission of such employment within 30 days of beginning employment or within 30 days of the beginning of the contract. [See § 36-25-5.2(b)]. The filing has certain requirements which are listed in Section 36-25-5.2(c)(1-6). Each judge of probate or the spouse of the judge of probate is responsible for promptly notifying the Ethics Commission of any changes to the terms of his or her employment. [See § 36-25-5.2(d)].

Like any other citizen, judges of probate may request an advisory opinion from the Alabama Ethics Commission on any real or hypothetical situation that may pertain to the Ethics Law. Additionally, they may request that an inquiry be made into any allegations or complaints concerning actions they believe are in violation of the ethics law. [§ 36-25-4].

Judges of probate have a duty to file a report with the Ethics Commission on any matters which come to their attention in their official capacity which constitute a violation of the Ethics

Law. [§ 36-25-17].

## **E. LIMITATIONS UNDER ALABAMA'S TAXPAYER AND CITIZEN PROTECTION ACT**

*a. Limitations on Business Transactions Conducted by Unauthorized Aliens.* An alien not lawfully present in the United States shall not enter into or attempt to enter into a public records transaction with the state or a political subdivision of the state and no person shall enter into a public transaction or attempt to enter into a business transaction on behalf of an alien not lawfully present in the United States. [§ 31-13-29(b)].

Any person entering into a public records transaction or attempting to enter into a public records transaction with this state or a political subdivision of this state shall be required to demonstrate his or her United States citizenship, or if he or she is an alien, his or her lawful presence in the United States to the person conducting the public records transaction on behalf of this state or a political subdivision of this state. [§ 31-13-29(c)]. United States citizenship shall be demonstrated by presentation of one of the documents listed as follows:

- (1) The applicant's driver's license or nondriver's identification card issued by the division of motor vehicles or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship.
- (2) The applicant's birth certificate that verifies United States citizenship to the satisfaction of the county election officer or Secretary of State.
- (3) Pertinent pages of the applicant's United States valid or expired passport identifying the applicant and the applicant's passport number, or presentation to the county election officer of the applicant's United States passport.
- (4) The applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States Bureau of Citizenship and Immigration Services by the county election officer or the Secretary of State, pursuant to 8 U.S.C. § 1373(c).
- (5) Other documents or methods of proof of United States citizenship issued by the federal government pursuant to the Immigration and Nationality Act of 1952, and amendments thereto.

- (6) The applicant's Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number.
- (7) The applicant's consular report of birth abroad of a citizen of the United States of America.
- (8) The applicant's certificate of citizenship issued by the United States Citizenship and Immigration Services.
- (9) The applicant's certification of report of birth issued by the United States Department of State.
- (10) The applicant's American Indian card, with KIC classification, issued by the United States Department of Homeland Security.
- (11) The applicant's final adoption decree showing the applicant's name and United States birthplace.
- (12) The applicant's official United States military record of service showing the applicant's place of birth in the United States.
- (13) An extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States.

[§ 31-13-28(k)]. For purposes of this section, "public records transaction" means applying for or renewing a motor vehicle license plate, applying for or renewing a driver's license or nondriver identification card, or applying for or renewing a business license, applying for or renewing a commercial license or professional license. Public records transaction does not include applying for a marriage license or any transaction relating to housing under Title or the ownership of real property, including the payment of property taxes, or the payment of any other tax to the state or a political subdivision thereof, or any other transaction. [§ 31-13-29(a)].

An agency of this state or a county, city, town, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901. [§ 31-13-29(e)]. Furthermore, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c), and an official of this state or political subdivision of this state shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States. [§ 31-13-29(f)]. Violation of this section by an alien not lawfully present or by a person knowingly acting on behalf of an alien not lawfully present is a Class C felony. [§ 31-13-29(d)].

**b. Information Relating to Immigration Status.** Officials or agencies of the state or any political subdivision thereof, including, but not limited to, an officer of a court of the state, may not be prohibited or in any way be restricted from sending, receiving, or maintaining information

relating to the immigration status, lawful or unlawful, of an individual or exchanging that information with any other federal, state, or local governmental entity for the following:

- (1) Determining the eligibility for any public benefit, service, or license provided by any state, local, or other political subdivision of this state.
- (2) Verifying any claim of residence or domicile if determination of residence or domicile is required under the laws of this state or a judicial order issued pursuant to a civil or criminal proceeding of this state.
- (3) Pursuant to 8 U.S.C. § 1373 and 8 U.S.C. § 1644.

[§ 31-13-6(c)].

***c. Enforcement of and Compliance with State Immigration Laws.*** All state officials, agencies, and personnel, including, but not limited to, an officer of a court of this state, shall fully comply with and, to the full extent permitted by law, support the enforcement of this chapter. [§ 31-13-6(b)].

No official or agency of this state or any political subdivision thereof, including, but not limited to, an officer of a court of this state, may adopt a policy or practice that limits or restricts the enforcement of this chapter to less than the full extent permitted by this chapter or that in any way limits communication between its officers or officials in furtherance of the enforcement of this chapter. If, in the judgment of the Attorney General of Alabama, an official or agency of this state or any political subdivision thereof, including, but not limited to, an officer of a court of this state, is in violation of this subsection, the Attorney General shall report any violation of this subsection to the Governor and the state Comptroller and that agency or political subdivision shall not be eligible to receive any funds, grants, or appropriations from the State of Alabama until such violation has ceased and the Attorney General has so certified. [§ 31-13-6(a)].

Every person working for the State of Alabama or a political subdivision thereof, including, but not limited to, a law enforcement agency in the State of Alabama or a political subdivision thereof, shall have a duty to report violations of this section of which the person has knowledge. Any person who willfully fails to report any violation of this section when the person knows that this section is being violated shall be guilty of obstructing governmental operations as defined in Section 13A-10-2. [§ 31-13-6(f)].

## F. EX OFFICIO DUTIES OF THE JUDGE OF PROBATE

*a. Chairman of the Governing Body.* Currently only in thirteen<sup>7</sup> of Alabama's sixty-seven counties is the judge of probate a member of the county governing body, which is now called the county commission in all counties that do not provide otherwise by local law. [§ 11-3-1]. In these counties the judge of probate is not only the chairman of the governing body, but is also responsible for recording the official proceedings of the county commission. [§ 11-3-18]. In those counties in which the judge of probate serves as chairman of the county commission, he is likewise responsible for supervising the maintenance of the county fiscal records, and must vote on issues before the county commission in case of a tie vote by the commissioners. [§§ 11-3-20, 11-8-7, and 11-8-8].

*b. Miscellaneous Duties.* Other duties have been assigned to the judge of probate in various counties by local acts. Miscellaneous functions imposed on various judges include those of purchasing agent, forest warden, custodian of county funds, county treasurer, and membership on various boards.

Additional duties have been assigned by several county governing bodies. Ex officio duties such as custodian of county funds, membership on county hospital boards, county library boards, civil defense agencies, and industrial development boards, and purchasing agent are fairly common, especially in counties in which the judge of probate is presiding officer of the county governing body.

## G. ELECTION, TERM, QUALIFICATIONS, VACANCIES AND REMOVAL

*a. Election and Term.*<sup>8</sup> The judge of probate is elected by the qualified electors in each county for a term of six years (i.e., 2012, 2018, etc.). The term of office begins on the first Monday after the second Tuesday in January following his election, and continues until his successor is elected and qualified. [§ 17-14-6, Ala. Const. amend. 328, § 6.15; § 36-3-2].

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<sup>7</sup>Blount, Cherokee, Choctaw, Cleburne, Dallas, Franklin, Geneva, Hale, Henty, Lamar, Lee, Monroe, and Tuscaloosa.

<sup>8</sup>See *Alabama Election Handbook*, 18<sup>th</sup> ed. published by the Alabama Law Institute for additional details.

**b. Qualifications.** A judge of probate must be a citizen of the state and must have resided in the county for which he was elected or appointed for one year preceding the election or appointment. [§ 12-13-31]. Also, all counties in which “equity jurisdiction has been conferred on the judge of probate or is vested in his office by general or local law” have the requirement that the judge of probate be “learned in the law” in addition to all other qualification. [First Special Session, 1964, Act. No. 99]

**c. Vacancies.** Vacancies in the office of the judge of probate are filled by gubernatorial appointment. Appointees hold office until the election and qualification of their successors. [§ 17-14-6, Ala. Const. amend. 328, § 6.14].

**d. Removal.** Judges of probate may be removed from the office by impeachment. The office is also vacated: when the judge of probate accepts another state, county, or municipal office; when the judge is sentenced to the penitentiary; or when the judge is declared insane. [§§ 36-9-2, 3,4 and 36-11-1]. Amendment 328, § 6.19 of the Alabama Constitution further provides that a judge of probate who has been indicted as a felon is disqualified from acting as a judge.

## **H. SPECIAL JUDGE OF PROBATE**

When a judge of probate has a personal interest in a case before the probate court or is otherwise incompetent to perform his or her duties as judge of probate, either the judge of probate or the chief clerk must certify that fact to the Chief Justice of the Alabama Supreme Court. Thereafter, the Supreme Court will appoint a person possessing the qualifications of a judge of probate to act as special judge of probate. If the special judge of probate fails or refuses to act, or, before concluding a matter or proceeding, dies or otherwise becomes incompetent, or fails or refuses to continue to act, and the disqualification of the ordinary judge of probate continues, the Alabama Supreme Court, upon these facts being certified to it, will appoint another special judge of like qualification. [§§ 12-1-12, 12-13-37, and 12-13-38].

Also, if there is a need for a special judge of probate, the Supreme Court may appoint a special judge for temporary service. The appointment confers on the special judge all of the powers, authority and jurisdiction of the judgeship to which he or she is appointed. The special judge appointed under this section is entitled to compensation and expenses as provided by law. [§ 12-1-14].

Also, the presiding circuit court judge may appoint a special judge of probate for temporary service. “Temporary service” means no more than 180 consecutive days. However, the special judge may be reappointed for more than one period of 180 consecutive days. The appointment

confers on the special judge all of the powers, authority and jurisdiction of the judgeship to which he or she is appointed. However, a special judge appointed under this section does not receive any compensation for his or her services. [§ 12-1-14.1].

Although not required by statute, the letter of appointment should be placed on file in the probate office for permanent keeping.

### I. BONDS

Before persons elected to the office of judge of probate may assume the duties of the office, they must execute a surety bond. The bond is based on a percentage of the total annual collection recorded in the latest audit report for each office published at least four months prior to the date the bond is required to be filed. The table for computing the amount of bond is as follows:

**TABLE FOR COMPUTING AMOUNT OF BOND**

<u>Annual Collections</u> <u>Over</u>	<u>But Not</u> <u>Over</u>	<u>Amount of</u> <u>Bond</u>	<u>Of Excess</u> <u>Over</u>
Zero	\$250,000	\$25,000	_____
250,000	\$1,000,000	\$25,000 + 5%	\$250,000
\$1,000,000	_____	\$62,500 + 1%	\$1,000,000

[§ 12-13-33]. This bond serves as security against neglect or omission of duty. [§ 36-5-18].

### J. OATH

The judge must subscribe as well to the following oath before assuming the duties of the office:

"I, ..., solemnly swear (or affirm, as the case may be), that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God."

[Ala. Const. art. XVI, § 279.] The oath must be filed in the office of the clerk of the circuit court in the county. [§ 36-4-3]. On assuming the duties of the office, the judge must obtain a seal of office. [§ 12-13-35].

Judges of probate are often called upon to administer oaths of office for various municipal, county and state officials.

#### **K. WHEN COURT DEEMED OPEN AND WHERE CASES MAY BE HEARD**

The probate court is to be open, except on Saturdays, Sundays, and legal holidays, with authority to do all things in relation to granting letters testamentary or of administration or guardianship and making all other necessary orders that are grantable as a matter of course. [§ 12-13-3].

The probate court may try cases, sign and issue orders and hear and determine any matter, case or proceeding at the county seat or any other place in the county provided by law. [§ 12-13-4]. Moreover, in those counties with two county seats, such as Coffee County (1907 Ala. Acts 140), and Jefferson County (1915 Ala. Acts 490), two probate offices must be established, and a set of records must be maintained in each office. Judges in counties with such arrangements should review the appropriate act for office organization and terms of court.

#### **L. JUDGE OF PROBATE FEES**

*a. General Fees.* Although the present law sets out a schedule of fees at length, it nonetheless contains a statement expressly providing that it should not repeal, amend nor affect any local law or general law of local application prescribing fees for judges of probate. Consequently, any local legislation prescribing fees for judges of probate remains in effect. For judges of probate, in general, the act provides that the following fees for service in the probate offices shall be charged and paid into the county treasury or to the judge of probate, as may be authorized or required by law. [§ 12-19-90]. Probate court fees must be collected at the time a pleading is filed or at the termination of the suit, whichever the court decides. § 12-19-43(a)]. Probate courts may also require security deposits to cover unanticipated costs. [§ 12-19-43(b)].

*b. UCC Fees.* In addition to the fees set out in § 12-19-90, judges of probate are entitled to a fee for filing in their offices financing statements or other records recording a creditor's security interest in consumer goods of a debtor. The fee is \$20.00 if the record is in writing and is 1 or 2 pages and \$2.00 for each additional page. The fee is \$15.00 if the record is communicated by another medium authorized by filing-office rule. The number of names to be indexed does not affect the filing fee. [§ 7-9A-525].

The fee for filing and indexing an initial financing statement for a manufactured-housing transaction is \$10.00 if the financing statement indicates that it is filed in connection with a manufactured-home transaction. There is no filing fee for the filing of a termination statement. The fee for responding to an information request, including for a certificate showing whether there is on file any financing statement naming a particular debtor, is \$20.00 if the request is made in writing and \$15.00 if the request is made by another medium authorized by the filing office. These fees apply to each debtor named in the submitted request where the request seeks information on more than one debtor. Also, an additional \$100.00 fee is required when the request seeks expedited response by the Secretary of State. [§ 7-9A-525].

No fee is required with respect to a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under Section 7-9A-502(c). However, the recording and satisfaction fees that otherwise would be applicable to the mortgage apply.

An additional fee of \$5.00 is applicable to all of the above fees where the filing or request is submitted on a non-standard form. From January 1, 2002 through December 31, 2011, if the first mailing address of the debtor or debtors on the initial finance statement is located in a county in Alabama, \$5.00 of the filing fee associated with the filing of the financing statement in the office of the Secretary of State shall be rebated to the judge of probate of the county where the address is located. After December 31, 2011 this rebate ended. [§ 7-9A-525]. The judge of probate, in addition to the fees, must collect a mortgage tax of fifteen cents per \$100.00 (or fraction thereof) of the secured debt. [§ 40-22-2].

***c. Filing Fees for All Entities.*** In lieu of all other charges and fees the judge of probate shall charge and collect the judge of probate shall collect the following fees when the filing the instruments described below are delivered to him for filing:

- (1) Certificate of formation and restated certificate of formation, \$100.00 for the State of Alabama, \$50.00 for the judge of probate.
- (2) Amendments to certificate of formation, \$50.00 to the State of Alabama, \$25.00 to the judge of probate.
- (3) Name reservations filed less than 24 hours, \$25.00 for the State of Alabama. For naming reservations filed 24 hours or more, \$10.00 for the State of Alabama.
- (4) Certificate of termination, \$100.00 for the State of Alabama, \$50.00 for the judge of probate.
- (5) Certificate of merger; articles of consolidation or share exchange, \$100.00 for the State of Alabama, \$50.00 for the judge of probate.

- (6) Foreign entity registration including registration of foreign limited liability partnership, \$150.00 for the State of Alabama.
- (7) Certificate of existence filed less than 24 hours, \$25.00 for the State of Alabama. For certificate of existences filed 24 hours or more, \$10.00 for the State of Alabama.
- (8) Registered limited liability partnership registration, \$100.00 for the State of Alabama, \$50.00 for the judge of probate.
- (9) Registered limited liability partnership annual report, \$100.00 for the State of Alabama.
- (10) Partnership statement (filing or certifying), \$25.00 for the State of Alabama, \$25.00 for the judge of probate.
- (11) Any other filing instrument required or permitted to be filed under this title, \$25.00 for the State of Alabama. \$25.00 for the judge of probate.

[§ 10A-11-4.31]. **Note:** This section was derived from the prior Alabama Business Corporation Act § 10-2B-1.22, bringing into a single section the various filing fee provisions previous scattered throughout Title 10 and rationalizes those fees so that the fee for filing a certificate of formation is the same without regard to the type of entity being formed.

When appropriate, two checks shall accompany a filing instrument, one payable to the judge of probate for all charges for the judge of probate, and one payable to the State of Alabama covering all charges for the Secretary of State. In the case of any filing instrument delivered for filing to the judge of probate accompanied by a check for the charges to the Secretary of State, the check for the secretary of State shall be forwarded by the judge of probate to the Secretary of State. In the case of any filing instrument delivered for filing to the Secretary of State accompanied by a check for the judge of probate, the check for the judge of probate shall be forwarded by the Secretary of State to the judge of probate. [§ 10A-1-4.31(b)].

Additionally, the judge of probate shall charge and collect \$1.50 per page for furnishing a certified copy of any filing instrument related to an entity and \$5.00 for the certificate and affixing a seal to the documents. [§ 10A-1-4.31(h)].

**d. Sale of Land.** The judge of probate is entitled to a fee of \$5.00 for each notice to a delinquent property owner to show cause why a decree of sale should not be rendered and for each decree of sale.[§ 40-10-27].

**e. Posting of Fee Lists.** Judges of probate must post a complete list of all fees allowed by law to them. This list must be posted in a conspicuous place in the office and copies must be

furnished on application. Judges who do not comply with this requirement are not authorized to collect or receive fees for their services during time the list is not posted. [§ 12-19-40].

### **M. COSTS OF THE PROBATE OFFICE**

The funds for financing the office of the judge of probate in counties in which the judge is compensated by fees are obtained from a percentage of fees generated by the probate office and paid into the county treasury as provided by local act. Salaries for employees are generally paid from these generated fees. Expenses for office equipment and supplies are paid from county commission funds. [§ 11-8-13]. A few local acts have been passed to authorize the payment of the chief clerks, or a similar official's salary from public funds.

In counties in which the judge has been placed on a salary, all expenditures are made from monies provided by the county general fund. [§ 12-13-20]. The standard fees, commissions, and allowances continue to be collected in most counties but they are deposited in the county or state treasury. The county commission is charged with the responsibility of providing proper utilities to all offices in the courthouse, including the probate office. [§ 11-12-13].

### **N. JUDGES OF PROBATE COMPENSATION**

Sections 11-2A-1 through 8 make substantial alterations to the system of compensation for judges of probate. The Act places counties into categories based on population as of the last census as follows:

<b>Category</b>	<b>Population</b>
1	In excess of 450,000
2	350,001 to 449,999
3	200,001 to 350,000
4	50,001 to 200,000
5	19,000 to 50,000
6	Less than 19,000

The last decennial census as of this writing was the 2010 Census. Using the 2010 census, the counties are categorized as follows:

<b>Category</b>	<b>Counties</b>
1	Jefferson
2	Mobile
3	Madison, Montgomery
4	Baldwin, Blount, Calhoun, Colbert, Cullman, DeKalb, Elmore, Etowah, Houston, Jackson, Lauderdale, Lee, Limestone, Marshall, Morgan, Shelby, St. Clair, Talladega, Tuscaloosa, Walker
5	Autauga, Barbour, Bibb, Butler, Chambers, Cherokee, Chilton, Clarke, Coffee, Covington, Dale, Dallas, Escambia, Franklin, Geneva, Lawrence, Macon, Marengo, Marion, Monroe, Pickens, Pike, Randolph, Russell, Tallapoosa, Winston
6	Bullock, Choctaw, Clay, Cleburne, Conecuh, Coosa, Crenshaw, Fayette, Greene, Hale, Henry, Lamar, Lowndes, Perry, Sumter, Washington, Wilcox

[County and City Data Book]. Of course, subsequent censuses will alter the category into which a county will fall.

Effective October 1, 2000, the minimum compensation for judges of probate in Categories 1 and 2 shall be provided by local law. The annual compensation for judges of probate in Category 3 counties shall be increased by 20 percent effective Oct. 1, 2001, if their compensation has not been increased by general or local law during the period from Oct. 1, 1996 to Oct. 1, 2001. Judges of probate in Category 4 shall have a minimum compensation of that proscribed by general law as of September 30, 2000 plus 20 percent. Judges of probate in category 5 shall have a minimum compensation of that proscribed by general law as of September 30, 2000 plus 17 percent. Judges of probate in category 6 shall have a minimum compensation of that proscribed by general law as of September 30, 2000 plus 15 percent. [§ 11-2A-2(2)].

In addition, Chapter 11-2A increases the compensation for some judges of probate according to their duties. Any judge of probate in Category 4, 5, or 6 shall receive an additional

\$2,500 if he or she is required to serve as chairperson of the county commission. Any judge of probate who is charged by law with the administration of a “one-stop” tag program shall receive additional compensation of at least \$3,000. [§ 11-2A-3].

Beginning with the fiscal year commencing on October 1, 2001, judges of probate shall be entitled to the same uniform increases in compensation, including cost-of-living increases, longevity increases, merit raises, and bonuses that are granted to county employees by the county commission at the time of the approval of the county budget. The increases shall be in the same amount or percentage as the amount or percentage provided to county employees. [§ 11-2A-4].

The act is not applicable to Barbour, Tuscaloosa, Cullman, St. Clair, Pike, Henry, Coffee, Russell, Geneva, Dale, or Fayette counties unless approved by a resolution of the respective county commission. [§ 11-2A-7(b)]. Sections 11-2A-2 and 11-2A-3 are not applicable in Pickens County unless adopted by the county commission. [§ 11-2A-7(c)]. The county governing body of any county may exempt the county from the provisions of Chapter 11-2A provided the exemption encompasses all of §§ 11-2A-2, 11-2A-3, and 12-19-90. [§ 11-2A-2(7)]. The increases in compensation are not applicable to any judge of probate whose salary is greater than the minimum authorized by general law plus the increase authorized by the act. [§ 11-2A-6]. The Act is not applicable to any judge of probate whose salary is tied to a state elected official or to those judges of probate whose salaries are determined by local law and are greater than those authorized by the Act. [§ 11-2A-7].

The general law at the time of the passage of Act 2000-108 provided as follows: In the event a judge of probate who is on a salary serves as chairman of the county commission, he is not to receive less than \$55,000 in total compensation. Similarly, no judge of probate who is on a salary and who does not serve as chairman of the county commission is to receive total compensation of less than \$52,500 in total compensation. This law in no way affects those judges of probate who in the first instance earn more than \$55,000 a year or earn more than \$52,500 in the second instance. Any funds needed to ensure that the judge of probate receives his total compensation shall be paid out of the county's general fund. Furthermore, these provisions in no way affect the compensation of judges of probate of counties where they are compensated on the basis of the fee system. [§ 12-13-20]. Judges compensated on a fee basis may now receive a net annual income of more than \$75,000 from fees. [§ 11-2A-8 (removing cap on fee-based salaries)].

Additionally, the judge of probate of every county is entitled to receive from the county treasury payment for expenses, including but not limited to, membership dues and other expenses, incurred in attending state or national conferences, schools and other functions including but not limited to, the personnel in his office, pertaining to his official position as judge of probate. This

payment is in addition to all other compensation and allowances now provided by law. Such payments are paid on warrants approved by the county commissions of each county drawn on any funds in the county treasury not otherwise appropriated. [§ 12-13-19].

Constitutional amendments have been adopted to permit the legislature to "fix, alter, and regulate" the fees, commission, percentages, allowances or salary, and to provide the method of compensation to the judge of probate in many counties.

### **O. STAFFING THE PROBATE OFFICE**

The judge of probate is permitted to employ from fees derived by his office a chief clerk<sup>9</sup> and such other clerks as he deems necessary. This practice generally exists in counties in which the judge is paid from fees, although local acts have been passed to permit partial payments from public funds in a few such counties.

Judges who have been placed on a straight salary receive an allowance for clerical assistance from public funds. Some of the acts fixing the clerical allowance also include the number of clerks which may be employed. However, it is more common for the act to specify the maximum allowance for clerical assistance. A few such acts have permitted the county governing body to fix the maximum.

No general law has been enacted pertaining to the number of clerks, deputies, and assistants or the amount of the salary for persons employed in the judge of probate's office. The number of employees varies among the several counties according to the work load. Except in counties with a merit system, the number of employees and salary are usually fixed by the judge, who also has complete authority to employ and dismiss the employees in the probate office.<sup>10</sup> Under the merit system, the number of employees and salary is determined by the county commission.

**Note:** Please see page 19, entitled "*Limitations Under Alabama Taxpayer and Citizen Protection Act* (Immigration laws)" for additional requirements for staffing the probate office.

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<sup>9</sup>While not specifically required, a judge of probate is advised to make the appointment of a "chief clerk" in writing to avoid any future unforeseen difficulties.

<sup>10</sup>Merit systems have been established in several counties. Examples include: Geneva, Jefferson, Marion, and Tuscaloosa counties. Montgomery County has a hybrid system, with the chief clerk and executive assistant serving at the pleasure of the judge, while the judge's other employees are under the merit system.

## P. CHIEF CLERK

**a. Duties.** The judge of probate has the authority and the responsibility to employ a chief clerk and other clerks deemed necessary for performing the duties of the office and to authorize person to make abstracts of titles of land sold at judicial sale. [§ 12-13-40]. The chief clerk shall have the following duties:

- (1) To issue letters testamentary, or administration and of guardianship, when there is no contest.
- (2) To administer oaths relating to the business of the court and to take and certify acknowledgments and poof of instruments authorized to be recorded.
- (3) To solemnize matrimony, approve bonds and appoint guardians ad litem.
- (4) To admit wills to probate and records and to pass and allow accounts of executors, administrators and guardians, when there is no contest.
- (5) To do all other acts and things and perform all other duties, ministerial and judicial, when there is no contest, that the judge of probate may do and perform.

All these duties must be performed in the name of the judge of probate except when there is a vacancy in that office. [§ 12-13-14]. Furthermore, the clerk or the judge of probate may take acknowledgments of a conveyance in the name of the judge. [§ 35-4-24; *Pioneer Sav. & Loan Co. v. Barclay*, 19 So. 308 (Ala. 1896)].

The satisfaction of a mortgage must be witnessed by the judge of probate or his clerk if such entry is requested in writing. [§ 35-10-27]. Requirement of attestation by the judge or clerk is designed to prevent unauthorized or fraudulent cancellations. [*Lewis v. Cannon*, 113 So. 577 (Ala. 1927)].

**b. Oath and Bond.** Prior to assuming his or her duties, the chief clerk must take oath and give a bond with surety payable to the judge of probate for any act of misfeasance or malfeasance of the chief clerk while performing his or her duties of office. The bond must be approved by the judge of probate, filed and recorded in the office of the clerk of the circuit court of that county. [§ 12-13-13].

**c. Restrictions of the Types of Duties Performed By Chief Clerk.** No judge of probate or clerk shall prepare or assist in the preparation of any paper, document or instrument which is to be heard or determined by the judge of probate or which might become a subject of controversy before the judge. However, the judge or clerk may prepare or assist in the preparation of acknowledgments and proof of conveyances, affidavits, oath, affirmations or any instrument which by law is required to be prepared by such judge. [§ 12-13-16].

***d. Performance of the Duties of the Judge of Probate in the Event of Vacancy.***

Whenever a vacancy in the judge of probate's office occurs, the chief clerk shall during such vacancy and until the qualification of a lawful successor, perform all the duties of that office that he is authorized to perform when there is no vacancy. Furthermore, the chief clerk may make all necessary orders for the continuance of cases and proceedings pending in the probate court.

When such duties are performed as a result of the vacancy in the office, the chief clerk shall perform such duties in his or her own name as the clerk of the probate court.

When a judge of probate has a personal interest in a case for the probate court or is otherwise incompetent to perform his or her duties as judge of probate, either the judge of probate or the chief clerk must certify that fact to the Chief justice of the Alabama Supreme Court. Thereafter, the Supreme Court will appoint a person possessing the qualifications of a judge of probate to act as a special judge of probate. [§§ 12-1-12, 12-13-37 and 12-13-38].

Also, if there is a need for a special judge of probate, the Supreme Court may appoint a special judge for temporary service. The appointment confers on the special judge all of the powers, authority and jurisdiction of the judgeship to which he or she is appointed. The special judge appointed under this section is entitled to compensation and expenses as provided by law. [§ 12-1-14].

Also, the presiding circuit court judge may appoint a special judge of probate for temporary service. "Temporary service" means no more than 180 consecutive days. However, the special judge may be reappointed for more than one period of 180 consecutive days. The appointment confers on the special judge all of the powers, authority and jurisdiction of the judgeship to which he or she is appointed. However, a special judge appointed under this section does not receive any compensation for his or her services. [§ 12-11-14.1].

The clerk must not practice law in the probate office in which he or she works. [§ 34-3-14].

***e. Salary.*** The judge of probate is permitted to employ at his own expense a chief clerk and such other clerks the judge deems necessary to perform the functions of his office. [§ 12-13-40]. Some local acts have been passed to authorize the payment of the chief clerk or other officials' salary from public funds. In those counties in which the judge has been placed on a salary, expenses for the judge of probate's office are provided through the county general fund.

**f. Fiduciary Funds.** Every clerk shall prepare in writing a report showing the amount of all fiduciary funds in the hands of the clerk. The report should designate the name of the owner and the case or circumstance under which the funds were received. The statement shall be verified. [§ 19-3-81]. The clerk shall file that report with the judge of probate at the first session of probate court after January 1st of each year. [§ 19-3-82].

**g. Appellate Duties.** Most appeals from judgment by probate court are heard by the Supreme Court or de novo by the Circuit Court. [§ 12-22-20]. Appeals concerning guardianship [§ 26-2A-36] and adoption [§ 26-10A-26] are heard by the Alabama Court of Civil Appeals. In addition, orders of commitment are appealed to the circuit court de novo unless the judge of probate is an attorney, in which case the appeal is to the Alabama Court of Civil Appeals. [§ 22-52-15]. Cases that are heard by the appellate courts are governed by the Alabama Rules of Appellate Procedure (ARAP). [§ 12-22-21]. The chief clerk's appellate duties are governed by the ARAP. [See ARAP 17 for the duties of clerks].

Jefferson and Mobile counties retain general equity jurisdiction. [§ 43-8-9]. Therefore, all appeals from those probate courts are heard by the appellate courts, except eminent domain. [§ 18-1A-283].

**h. Liability for Delayed or Defective Record.** If, by reason of negligence or delay by the clerk or judge of probate, the record on appeal is not delivered to the appellate court in time to be filed or is so defective that the appellate court cannot proceed on the appeal, the clerk or judge of probate forfeits to the aggrieved party \$200 and is further liable to the party for all damages sustained by the negligence or delay of the clerk or judge of probate. [§ 12-22-60].

Furthermore, the clerk or judge of probate is liable to the appellee for damages sustained for taking insufficient surety unless the surety was generally reputed good for the amount. However, neither the clerk nor the judge of probate is required to receive any one as surety who refuses to answer an oath as to his sufficiency. [§ 12-22-41].

**i. Failure to Deliver Books to Successors in Office.** Any clerk or other person in the judge of probate's office who obtains books, papers, money or other property belonging to the office and upon vacancy thereof fails or refuses to deliver such property to the lawfully qualified successor must upon conviction be fined not less than \$200. [§ 12-13-18].

### **III.**

## **THE ADMINISTRATIVE FUNCTIONS OF THE JUDGE OF PROBATE**

### **A. GENERAL**

The duties and responsibilities of the judge of probate are many and varied. Some duties are administrative in nature, others are judicial, and some of them are even legislative in character.

As judges of probate who have held office previously are well aware, the duties and responsibilities assigned to them are spread throughout the Code and in some cases are also found in individual acts. However, many newly elected judges may not be familiar with the multitude of functions for which they are responsible.

The explanations of various aspects of the office are necessarily general in nature, and judges should review the provisions of the law for a complete discussion. However, to assist the judge of probate in finding the applicable provisions, the proper Code citation has been included for each function discussed. Likewise, the procedures used in carrying out the judges' duties are so numerous that they can be discussed only briefly. Therefore, each procedural discussion sets forth the proper section of the Code or the proper act number and year.

### **B. CODIFICATION OF LOCAL ACTS**

In researching their duties judges should keep in mind the fact that provisions on the probate office may be found not only in the 1975 Code of Alabama but also in the local acts applicable to their respective counties. Moreover, court decisions interpreting various provisions of law are important sources of information. Newly elected judges might inquire as to whether local acts applicable to their counties have been codified recently. The Legislative Services Agency's Legal Division has begun to compile local acts. Also, county governing bodies are permitted to codify local acts every ten years and to publish local acts in a newspaper published and "at least, partly printed in the county" within 60 days following each session of the legislature. [§§ 11-13-1 through 2].

### **C. PENALTIES**

A judge of probate is subject to a host of possible penalties for improperly handling the duties connected with the office. The following are some of the pertinent offenses:

(1) Any judge of probate or clerk who prepares or assists in the preparation of any paper, document, or instrument to be heard by the judge, violating the requirements set forth in article 1 or chapter 13, is guilty of a misdemeanor and must forfeit \$300. One third of the money is to be paid to state and the remainder paid to the person instituting a civil action in the circuit court for this penalty. [§ 12-13-16].

(2) A failure by any judge of probate to collect the recording registration tax after filing for record any mortgages, deeds of trust, or other instrument in the name of a mortgage, is guilty of a misdemeanor and is subject to a fine of not less than \$10 nor more than \$100 if convicted. [§ 12-13-53].

(3) Mishandling of state or county deposits can result in a misdemeanor conviction and a fine of not more than \$2,500 and removal of any state or county official so charged. [§ 41-14-16].

(4) Any judge of probate who knowingly receives any other or higher fees than are allowed by law shall forfeit \$50 to be recovered in the name of the person aggrieved. This penalty shall be no bar to an indictment for extortion. Moreover, a judge of probate who corruptly receives any fee or item of costs not authorized by law will be, on conviction, fined not less than \$100 nor more than \$500, and the grand jury must present an indictment, if justified by the evidence. Upon such conviction, the office shall be vacated and the fact of such certified to the governor by the presiding judge. [§ 12-19-47].

#### **D. MAINTAINING RECORDS**

The judge of probate is required to preserve all documents, files, papers, and letters, together with all attachments required by law to be recorded and filed in his office. These records must be kept in a manner to permit convenient reference. [§§ 12-13-41 and 36-12-2].

Furthermore, uniformity in size and style of records and books must be maintained, and records must be in ink and on paper of quality sufficient to ensure permanence. [§ 36-12-3].

Unless otherwise provided by law, all records are open to public inspection and, when requested, the judge must furnish copies of them upon the payment of lawful fees. [§ 12-13-50]. However, the regular copy fee may not be assessed if individuals use personal cameras or other electronic devices to make a copy of a public record. [Ala. A. G. Opinion No. 2009-706]. Nonetheless, reasonable limitations may be placed upon the public's access to records and the

public's ability to use personal electronic devices to duplicate records to ensure that the operations of such actions do not unduly interfere with the operations of the office. [Ala. A. G. Opinion No. 2009-706 and A.G.Opinion No. 92-00154].

Alternatively, the Probate Court may provide access to the general public, via a website, to the digitized images of probate documents maintained by the Probate Court, without charging a fee, in addition to providing for courthouse public examination of probate documents.<sup>1</sup>

Some records, such as records in adoption proceedings are confidential and may only be disclosed in accordance with the adoption laws. [§§ 26-10-28 and 26-10A-31].

Before recording any document (except federal and state tax liens) as public record with the probate court that conveys any interest in real or personal property (deeds, mortgages, etc.) or purports to encumber an interest in real or personal property (e.g., liens), Social Security numbers and birthdates should be redacted, so as to make that information illegible. [§ 12-13-22]. Any other document, including military discharge forms, that is filed as public record in the probate court should be redacted in the same manner. [§ 12-13-22].

Unfortunately, no one title, chapter, article, or section of the Code explains the records which are maintained by the judge of probate. The listing which follows highlight many of the records which must be maintained by the judge. A more complete description of records discussed below are found in the applicable provisions of the Code which are cited at the end of each section.

**a. Fee Books.** Judges of probate must enter in a fee book all fees received by virtue of the office, stating for what and from whom it was received. This book must always be available for public inspection in the judge of probate's office. [§ 12-19-45].

**b. Minutes of the Court of Probate.** Minutes of all official acts and proceedings in the court of probate must be kept. Within three months after the act or proceedings, the minutes must be recorded in a well-bound book. [§ 12-13-41(2)].

**c. Court Docket.** The judge must keep a well-arranged docket recording the date of issue and return of all processes, the day set for hearing, the type of notice ordered, and other conditions of a pending proceeding, plus all fees accruing and to whom they are due. [§ 12-13-41(4)].

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<sup>1</sup>Official Opinion of Alabama Attorney General Bill Pryor, 2001-004 (Oct. 10, 2000), available at <https://ago.alabama.gov/documents/opin/2001-004.pdf> (last visited Dec.14, 2018).

**d. Sheriff's Fees.** The judge must keep a correct account of all fees accruing to the sheriff for services rendered in relation to proceedings in the court of probate. The name of the attorney for the plaintiff must also be entered in this fee book. These fees must be paid to the sheriff on demand. No final settlement of any estate may be made until the sheriff is paid the fees due. [§ 12-13-41 (5 and 6)].

**e. Acts, Reports and Digests.** The judge of probate must maintain all acts, reports, and digests furnished by the State. When received, they should be kept available for convenient reference in either the office of the judge of probate or the county's bar library if there is one in the county. [§ 12-13-41(8)].

**f. Census Reports.** The judge of probate is responsible for providing a suitable and convenient place in his office for keeping United States census reports. These reports must be preserved and free access to them must be permitted. [§ 12-13-41(10)].

**g. Liens of Judgments and Decrees.** A large and well-bound book must be kept for registering liens of judgments and decrees. In addition, both direct and indirect indexes to these books must be maintained. [§ 12-13-41(12)].

**h. Conveyances.** A large, well-bound book must be kept for registration of deeds and deeds of conveyances and other separate books of like character must be kept for the registration of mortgages and other instruments to secure payment of debts. [§ 12-13-41(11)].

**i. Notices of Adverse Possession.** A well-bound book with an index must be maintained for the registration of notices of adverse possession. [§ 12-13-41(13)].

**j. Indexes.** The judge of probate must keep four well-bound books of suitable size and grade of paper, in which to make a general direct and a general reverse index of each instrument filed and recorded in his office. Two of these books are to be used for conveyances of real property, the other two for conveyances of personal property and all other instruments entitled to be recorded in his office. The indexes should alphabetically list the parties, the maker for the direct index and receiver for the reverse index. Also to be included are the date and character of each instrument and the date the instrument was filed for record. An instrument conveying both personal and real property must be entered in the indexes for both types of property opposite the names in the indexes. After recording each instrument, the judge shall indicate the pages and books in which the instrument was recorded. An index for each volume of record is not required. **Note:** A failure to comply strictly with these provisions will subject the judge of probate to a \$100 fine for each

failure and liability for damage caused to any person instituting a suit for civil action. [§ 12-13-43].

**k. Record of Election Results.** The judge of probate should keep the ballot accounting certificate and the first copy of certificates of results for public inspection or election contest, or both. [§ 17-12-12]. Federal law requires the maintenance of election records of federal elections for 22 months. [42 U.S.C. § 1974].

### E. INSTRUMENTS TO BE RECORDED

Judges of probate must keep large and well-bound books for recording, word for word, conveyances of property and all other instruments authorized to be recorded, together with acknowledgments, proofs, schedules, plats, surveys, or other necessary attachments. [§ 35-4-58].

The following records when executed in accordance with law shall be admitted to record in the office of the judge of probate:

- (1) Plats or maps [§ 35-2-51]; aerial photographs of land in respective county [§ 35-2-80];
- (2) Vacation of plats or streets or alleys [§§ 35-2-53 through 62];
- (3) Judgment regarding vacation [§ 35-2-60];
- (4) Deeds, mortgages, deeds of trust, bills of sale, leases or memoranda of leases, contracts or other documents purporting to convey any right, title, easement, or interest in any real estate or personal property, all assignments of mortgages, deeds of trust or other securities for debt or extension agreements [§§ 35-4-51 through 35-4-51.1] (except as otherwise provided in UCC);
- (5) Petitions, decrees, or orders of bankruptcy [§ 35-4-52];
- (6) Patents from this state or the United States to lands in this state [§ 35-4-56];
- (7) Lis pendens [§ 35-4-130];
- (8) Notice of actions affecting the title of property [§ 35-4-131];
- (9) Notice of levy [§ 35-4-132];
- (10) Notice of trust to be recorded [§ 35-4-257];
- (11) Documents and instruments concerning condominiums [§ 35-8-11];
- (12) Notice of liens [*see generally* § 35-11-1 et seq.]; and
- (13) Living Wills. In 2006, the Legislature provided for the filing of a living will with the judge of probate of one's county of residence. [2006 Ala. Acts 413]. "Living will" is defined as specified in Section 22-8A-3. The fee for filing a living will is \$5.00, which shall be deposited in the county general fund, in addition to

any other recording fees required by general or local law. § 22-8A-14(b). While a living will is not to be open to the general public for inspection (though it is open for inspection and copying by medical personnel, members of the immediate family, and persons with power of attorney or other legal authority), a judge of probate is not liable for any inspection or copying of a living will. § 22-8A-14(c). Also, the recording of a living will has no bearing on the validity of the will. § 22-8A-14(c)(2).

(14) A judge of probate may also charge the standard fee of one dollar fifty cents (\$1.50) a page for copies provided in Section 10A-1-4.31(h). *See also* Chapter 2 of this handbook.

The judge must indicate in the margin of the instrument the day, month, and year that instruments are received for recording. A signed certificate must also be made on the instrument showing when it was received and recorded together with the book and page in which it was recorded. Instruments may be recorded by a fair hand, typewriter, photostat or photograph machine, or any other printing or writing apparatus which will record verbatim. [§ 35-4-58].

## **F. BONDS**

All county officials of all counties in Alabama must execute official bonds payable to the State of Alabama for the faithful performance of their duties and such additional official bonds as public interest and provisions of the law may require. [§ 11-2-1]. The judge of probate approves, records, and files surety bonds for most county and municipal officials in the county as well as bonds for certain other persons required by law to execute bonds. These officials and other individuals requiring bond are as follows:

- (1) All county officials and employees requiring a bond except the bond of the judge of probate must be filed in the office of the judge of probate. [§ 11-2-3]. The official bond of the judge of probate is determined using the table in Section 12-13-33. It cannot be less than \$25,000 and must be filed and recorded in the office of the clerk of the circuit court. Duplicate copies of the bonds of the judge of probate, tax collector, and tax assessor must be filed with the state comptroller. [§ 11-2-3];
- (2) Bond of circuit clerk can in no case be less than \$5,000 [§ 12-17-91];
- (3) Register of the circuit court must be under at least a \$5,000 bond [§ 12-17-111];
- (4) Bond for the superintendent of public works must be at least \$1,000 [§ 14-4-12];

- (5) Bonds of municipal officers or employees handling money or exercising authority over municipal property [§ 11-43-13];
- (6) Bond for constables shall be \$1,000 [§ 36-23-4];
- (7) Bonds of county surveyors shall be \$1,000 [§ 11-7-2];
- (8) Bond for tax assessor must not be less than \$5,000 [§ 40-4-1];
- (9) Bond given by administrators and executors (personal representatives) [§ 43-2-1];
- (10) Bond for county treasurer must not be less than \$15,000; in counties where population is over 150,000, such bond must not be less than \$50,000 [§ 11-4-22];
- (12) An appeal bond, approved by the judge of probate, is required for contesting an election [§ 17-16-62];
- (12) Bond given by conservator [§ 26-3-12];
- (13) Bond for county health officers shall be in the amount of \$10,000 [§ 22-3-7];
- (14) Parental bond when minors marry (except common law marriages) [§ 30-1-5] [*See Adams v. Boan*<sup>2</sup>];
- (15) Bond for nonresidents of Alabama who do not have a place of business in Alabama and who bring used motor vehicles into the state for sale [§ 32-16-2];
- (16) Commissioners in municipalities with a commission form of government require a bond of \$5,000 [§§ 11-44-9 and 11-44-79].

A judge of probate, clerk or register taking insufficient surety is liable to an appellee for damages sustained, unless the surety was generally reputed good for the amount when received. However, the judge of probate, clerk, and register are not required to accept a surety who refuses to take an oath that he or she is sufficient. [§ 12-22-41]. *See* page 156, Filing of Bond.

## G. OATHS

In addition to surety bonds, the judge of probate also files and records oaths of office by judges of inferior courts and other officials whose duties are confined to his or her county [§ 36-4-4], persons supervising prisoners sentenced to hard labor [§ 14-4-14], commissioners in municipalities with a commission form of government [§§ 11-44-9 and 11-44-79]. Upon filing the oaths, the judge must endorse thereon the day and year on which the oath was filed. [§ 36-4-7].

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<sup>2</sup>559 So. 2d 1084 (Ala. 1990).

## H. CORPORATIONS

**a. Articles of Incorporation and Other Filings.** Judges of probate receive articles of incorporation under the laws of Alabama. Upon finding that the articles conform to law, the judge of probate is required to file the articles, issue a certificate of formation to the incorporators or their representatives, and within ten days send the Secretary of State a copy of the certificate of formation or amendments which alter the name of a corporation with a certified copy of the articles of incorporation or amendment. These documents must indicate the place and date as well as the time of filing. Moreover, a properly indexed book must be kept for recording articles of incorporation. [§ 10A-1-4.02].

Judges of probate may sign an agreement with the Secretary of State to allow for Articles of Incorporation to be filed electronically, directly with the Secretary of State's Office. This automated process requires a joint agreement with the Secretary of State and the Judge of probate. If interested, the Judge of probate should contact the Secretary of State's Office.

The judge of probate also has other filing duties related to corporations. The judge of probate is required to file and deliver via certified mail to the Secretary of State within ten days the:

- (1) Articles or amendment of articles of incorporation;
- (2) Certificate of formation;
- (3) Any amendments or restatements of the certificate of formation;
- (4) Certificate of dissolution, other than a statement of dissolution of a general partnership or a statement of cancellation by an LLP;
- (5) Certificate of revocation;
- (6) Any other document required or permitted to be filed under Title 10A and not expressly required to be filed by the Secretary of State or other filing officer;
- (7) Articles of correction of any document required or permitted to be filed by the judge of probate. [§ 10A-1-4.02]

**b. Incorporation Fees.** With regard to the filing of documents and issuing of certificates of incorporation, judges of probate are permitted to collect fees specified in the code. [§ 10A-1-4.31]. (*See also* pages 28-31) and Appendix A.

**c. Special Corporations.** For special types of corporations other laws have been adopted. The Code citations for these special corporation provisions include:

<b>Municipalities (Incorporation &amp; Dissolution)</b>	§ 11-41-1 et seq.
<b>Water Conservation &amp; Irrigation Corporations</b>	§§ 9-10-31 through 9-10-32
<b>Associations of Retail Merchants</b>	§ 10A-20-13.01
<b>Wholesale Merchants Associations</b>	§ 10A-20-14.01
<b>Banks &amp; Banking Institutions</b>	§§ 5-7A-4, 5-7A-23
<b>Single Tax or Cooperative Associations</b>	§§ 10A-20-9.01 through 19A-20-9.05
<b>Mutual Farming or Trucking Associations</b>	§§ 2-10-92, 2-10-107
<b>Marketing Associations</b>	§§ 2-10-35, 2-10-56 through 2-10-57, 2-10-72 through 2-10-74
<b>Credit Unions</b>	§ 5-17-2
<b>Churches &amp; Public Societies</b>	§ 10A-20-2.01
<b>Healthcare Service Plans</b>	§§ 10A-20-6.02, 10A-20-6.06
<b>County Public Building Authorities</b>	§§ 11-15-5, 11-15-18
<b>Athletic &amp; Recreational Facilities</b>	§§ 11-59-5 through 11-59-6, 11-59-14 through 11-59-15
<b>County Hospital Boards</b>	§§ 22-21-74, 22-21-82
<b>Public Building Authorities</b>	§§ 11-56-5, 11-56-20
<b>Industrial Development Boards</b>	§§ 11-54-84 through 11-54-85, 11-54-94

<b>Gas Districts</b>	§ 11-50-392
<b>Water Works Boards</b>	§§ 11-50-232 through 11-50-233
<b>Airport Authorities</b>	§ 4-3-4
<b>Non-Profit Corporations</b>	§§ 10A-1-5.32 through 10A-1-5.33, 10A-3-3.01 through 10A-3-3.04, 10A-1-3.11, 10A-3-4.01 through 10A-3-4.03, 10A-3-5.04, 10A-1-4.02, 10A-3-7.01, 10A-3-7.04, 10A-3-7.06, 10A-3-7.16

### I. OTHER RECORDS AND FILES

The judge of probate must also keep the records and files listed below. These records may be kept as a set of specific documents or as a book for recording certain types of papers, reports, or other types of records. These files and records and the Code sections explaining the duties of the judge of probate in connection with them are as follows:

- (1) A copy of field notes on the original government surveys of land in the county when they are furnished by the county governing body [§ 11-3-25; *see also* § 12-21-41];
- (2) Copies of rules, regulations, and notices issued by the Department of Agriculture and Industries when they are furnished by the Department [§ 2-2-17];
- (3) Alabama coordinate system maps [§ 35-2-6];
- (4) Surveys and plat maps for town lots [§§ 35-2-50, 51 and 52];
- (5) Honorable discharges from the Armed Forces of the United States [§ 31-1-1];
- (6) Decrees for quieting title [§ 6-6-544];
- (7) Complaints alleging nuisances [§ 6-5-143];
- (8) Certificates of limited partnerships (plus continuations and dissolutions) [§§ 10A-1-3.04, 3.05, 4.01, 4.03];

- (9) Certificates of qualification to practice chiropractic, dentistry, as medical doctors, as osteopathic doctors, podiatry and veterinary medicine [§§ 34-9-12, 34-24-164, 34-29-84, 34-24-273 and 34-24-342];
- (10) Stock Breeder's certificates [§ 2-15-312];
- (11) Lis pendens [§§ 35-4-130, 131, and 134, *see also* § 6-5-146, § 35-4-132];
- (12) Registry of marriage<sup>3</sup> licenses [§§ 30-1-12 and 30-1-13];
- (13) Reports of persons receiving aid from the Department of Human Resources [§ 38-1-4];
- (14) Book of land sales (Tax Delinquency Book) [§§ 40-10-2, 3, 4, 11, 15, 18 and 27];
- (15) Applications on controversies as to advancements [§ 43-8-50];
- (16) Applications to correct marriage licenses and certificates [§§ 30-1-16 and 17];
- (17) Records of persons sentenced to hard labor [§§ 14-4-4 and 14-4-5];
- (18) Certificates of land redemption [§ 40-10-127];<sup>4</sup>
- (19) Labels, stamps, marks, and brands on beverage containers [§ 8-12-20];
- (20) Probated wills [§§ 43-8-169, 170 and 200];
- (21) Records of letters testamentary and of administration issued [§ 43-2-1];
- (22) Mechanic and materialmen liens [§§ 35-11-213, 215 and 216];
- (23) Tax liens [§ 40-1-2];
- (24) Hospital liens [§ 35-11-371];
- (25) Record of fiduciary funds [§§ 19-3-81 through 85];
- (26) Prescriptions for medical uses of alcoholic beverages [§§ 28-4-156, 159 and 161];
- (27) Declarations of claims of exemptions [§§ 6-10-21 and 6-10-105];
- (28) License forms received and issued [§§ 9-11-33, 40-12-10, 40-12-21 and 40-12-22];
- (29) Notices of animals impounded as estrays [§ 3-2-21];
- (30) Instruments requiring a mineral documentary and tax stamp [§§ 40-20-33 and 34];
- (31) Judgments and decrees rendered in other courts submitted for record [§ 6-9-210];

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<sup>3</sup>Alabama no longer recognizes common-law marriages entered after January 1, 2017. [§ 30-1-20].

<sup>4</sup>Judges of probate in counties with a population over 400,000 at the last or subsequent federal decennial census should also *see* Act 520, 1947. This Act is codified in 1958 Code of Ala. Appx., §§ 849-906.

- (32) Itemized statements of election campaign expenses by candidates for city commission under a commission form of government [ §§ 11-44-44 and 92];
- (33) Records related to the establishment of a commission form of government in a municipality [ §§ 11-44-51 and 96];
- (34) Lists of registered and qualified electors and poll lists [ §§ 17-4-1, 2, 4; 17-3-60];
- (35) Records of driver's licenses issued [ § 32-6-5];
- (36) A copy of each weekly newspaper published in the county [ § 6-8-40; *see also* §§ 11-13-2, 3 and 5]; and
- (37) Living wills [ §§ 22-8A-1 through 22-8A-14].

Of course, the judge of probate also maintains petitions and records related to court proceedings and copies of all reports submitted by his office. Even some decrees granted in circuit courts (such as permission for the spouse of a person declared mentally incompetent to convey the property belonging to that person and decrees for the relief of minors over eighteen from the disabilities of non-age) are filed in the office of the judge of probate. [ §§ 30-4-35, 26-13-7 and 8].

There are also a number of records which must be maintained in the performance of other duties. These form a substantial part of the administrative work load but can be best understood in relation to the duties themselves. A description of these records is included in the discussion of these duties in subsequent subdivisions of this chapter.

## **J. LICENSING**

As noted earlier, the functions of the judge of probate in regard to the issuance of licenses is greatly reduced in those counties with a full-time license commissioner. In other counties, issuing licenses has been the most time-consuming duty of the judge of probate during the months of October, November and December. Automobile tags were formerly issued during this period. Beginning in 1981, the issuance of automobile tags was placed on a year-round basis. The order of issuance is now determined by an alphabetical listing of the owner's last name. [*See* § 32-6-61]. The seasonal increase in workload is most pronounced for business, occupational, and professional licenses. Hunting and fishing licenses are issued most often during game seasons, which permit a greater dispersion of the workload. The issuance of marriage licenses and the receipt of applications for driver's licenses approach consistency throughout the year.

**a. General Provisions.** The general provisions governing licenses are set out in §§ 40-12-1 through 28. The subject matter discussed in these provisions includes such information as the change of place of business, alteration of licenses, form of licenses, exemptions, and required

records. Procedures for the relief from mistakes in the payment of license taxes are explained in §§ 40-12-23 and 24; exemptions from business and occupational license taxes for veterans are explained in §§ 40-12-340 through 352 and §§ 40-12-370 through 377.

As a part of the responsibility related to licenses, the judge of probate must keep an accurate account of all licenses issued to him by the Departments of Finance and Conservation. To ensure proper control, periodic reports and transfer of funds collected from the sale of licenses are required. These reports are explained in the next section of this chapter. At the end of the year unused license forms and stubs together with the license stubs for the licenses issued must be returned to the state agency responsible for the license - for example, hunting and fishing licenses are returned to the Department of Conservation. This is described in greater detail in §§ 9-11-33 and 36 and §§ 40-12-21 and 22.

Under Alabama law, any person entering into a business transaction or attempting to enter into a business transaction with the state or a political subdivision thereof, is required to demonstrate his or her United States citizenship or lawful presence. Business transactions include applying for or renewing motor vehicle tags, driver's licenses, and nondriver identification cards, as well as applying for or renewing a business license. Other transactions may meet the definition of "business transaction" as well. A list of documents that may be used to establish citizenship is found in Section 31-13-28(k).

**b. Boat Licenses.** The judge of probate (or person authorized to issue automobile license plates) issues certificates of registration for vessels used upon the waters of the state. The judge of probate collects the registration fees and remits all money to the State Treasurer within 10 days after the first of each month except a \$1.00 issuance fee. In counties in which the judge of probate is on the fee system, that issuance fee is kept by the judge of probate. In counties in which the judge of probate is paid a salary the issuance fee is paid into the county treasury. [§ 33-5-10].

**c. Business, Vocational, and Occupational.** The number of specific types of licenses issued by the judge of probate in these classes are too numerous for a listing here. They are enumerated and explained in Sections 40-12-40 through 180. The judge of probate or other county licensing official should electronically receive all business privilege license application information. [§ 40-12-30(c)].

For licenses to operate billiard rooms *see also* Sections 34-6-30 through 35. Blank license forms are furnished by the State Department of Finance.

Persons are required to demonstrate United States citizenship or lawful presence when applying for or renewing a business license. § 31-13-29(a) and (c). A list of qualifying documents can be found in Section 31-13-28(k).

**d. Certificates of Title.** Judges of probate who issue license plates are designated as agents of the Department of Revenue for the purpose of processing applications and collecting fees for certificates of title. [§ 32-8-34]. The judge of probate collects, in addition to the transaction fee a designated agent commission of \$1.50 and an additional \$1.50 by virtue of the judge of probate's position as a county elected official. [§ 32-8-6 and 7]. The transaction fees are remitted to the Department of Revenue by no later than ten (10) calendar days after receipt of the application. [§ 32-8-35(g)].

**e. Deed and Mortgage Tax.** Before recording any deed or mortgage the judge of probate must collect the prescribed tax on all deeds and mortgages. Failure to do so is a misdemeanor punishable by a fine of between \$10 - \$100. [§ 12-13-53].

**f. Driver's Licenses.** The judge of probate receives fees for and issues driver's licenses and temporary instruction permits. The explanation of this duty is found in §§ 32-6-3, -4, -4.1, -5 and -8.

Persons are required to demonstrate United States citizenship or lawful presence when applying for or renewing a driver's license. § 31-13-29(a) and (c). A list of qualifying documents can be found in Section 31-13-28(k).

**g. Hunting and Fishing.** The judge of probate issues both hunting and fishing licenses. Blanks for hunting and fishing licenses are furnished to judges of probate by the State Department of Conservation. When special agents are designated to issue these licenses, they receive their blank forms through the judge of probate and are responsible to him. In addition to hunting and fishing licenses, the judge also issues licenses to capture and kill fur bearing animals, with the required stamps or tags to be attached to the fur, skin, or pelt. The judge also issues licenses for fur dealerships, for spearfishing, for fishing with commercial fishing gear, and for commercial salt water fishing. The provisions on hunting and fishing licenses are in Sections 9-11-36 through 71, 171, 172, 141 through 147, 153, 191 through 193, and Sections 9-12-80, 82, 87, 93, 95, and 113.

**h. Marriage.** The judge of probate is responsible for issuing marriage licenses. Many of the criteria to be met by applicants as well as the judge of probate's duties with respect to recording marriage licenses and marriage certificates are set forth in Sections 30-1-3 through 19. No marriage license may be issued to any person under the age of sixteen, to any previously unmarried

person under the age of eighteen without the consent of a parent or guardian [ §§ 30-1-4 and 30-1-5; *Wood v. Farnell*, 50 Ala. 546 (1874)], or to any couple whose marriage would be deemed incestuous by Section 13A-13-3. The judge is responsible for the illegal issue of a marriage license to a minor, even if the license was issued without the judge's knowledge by a clerk in the judge's office. [*Wood v. Farnell*, 50 Ala. 546 (1874)].

A marriage license may not be denied to same-sex couples on the basis of sex. [*Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); *Searcy v. Strange*, 81 F.Supp.3d 1285 (S.D. Ala. 2015)].

Alabama Code Section 30-3-194(c) states that each party's social security number should appear on the marriage license. However, a social security number is not required to receive a marriage license. Persons who do not have a social security number should submit an affidavit attesting to the fact that he or she was never issued a social security number.<sup>5</sup> A marriage license can be issued to an applicant who is not a United States citizen.<sup>6</sup>

For every marriage license granted, the judge of probate must collect, in addition to all other required fees, \$30.00 which must be forwarded to the district attorney. The fund created by these fees is used to maintain domestic violence shelters and programs in the judicial circuit. [ § 30-6-11].

*i. Motor Vehicle Tags and Special Permits.* The judge of probate is responsible for the issuance of motor vehicle license tags, which are issued on a year-round basis. [ § 32-6-61]. This responsibility requires close coordination with the county tax assessor and tax collector because the ad valorem tax and certificate of title fees are also collected at the time the issue of new tags is made. A full explanation of this duty is in Sections 32-6-60 through 63, Sections 32-8-30 through 49, Sections 40-12-240 through 274, and Sections 40-12-300 through 301.<sup>7</sup>

Persons are required to demonstrate United States citizenship or lawful presence when applying for or renewing a motor vehicle tag. § 31-13-29(a) & (c). A list of qualifying documents can be found in Section 31-13-28(k).

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<sup>5</sup>Official Opinion of Alabama Attorney General Troy King, 2008-100 (June 25, 2008), available at <https://ago.alabama.gov/documents/opin/2008-100.pdf> (last visited Dec. 14, 2018).

<sup>6</sup>Official Opinion of Alabama Attorney General Troy King, 2004-176 (July 13, 2004), available at <https://ago.alabama.gov/documents/opin/2004-176.pdf> (last visited Dec. 14, 2018)

<sup>7</sup>See *Handbook for Alabama Tax Administrators*, 8<sup>th</sup> ed., published by the Alabama Law Institute.

**j. Public Warehouses.** Licenses to operate a public warehouse are issued by judges of probate but only after a permit from the commissioner of agriculture and industries has been received. The license and permit are explained in Sections 8-15-3, 5, 7, 8 and 9.

## K. REPORTS

One of the important administrative functions of the judge of probate is the submission to various state departments of a number of specialized reports. The major reports required and the Code sections relating to them are discussed in the following paragraphs.

**a. Adoptions, Annulments and Revocations.** A monthly report of orders of adoptions, annulments and revocations must be submitted to the Department of Human Resources between the first and tenth of the month following the report period. Forms for this report are furnished by the Department. Also, a copy of this report must be submitted to the bureau of vital statistics. [ §§ 12-13-44 and 26-10A-32].

**b. Business, Professional and Occupational.** A monthly report of all business, professional and occupational licenses issued must be submitted to the Department of Revenue and Comptroller within twenty days following the reporting period. For the months of October, November, and December, the deadline is extended to the 30th day following the end of month. This report contains the type of license issued, the amount collected for each license, the name of the person from whom the license fee was collected, and the date of collection. Reports are required even though no licenses were issued during the reporting period.

Remittance of both state and county license fees collected for each type of license during the reporting period, minus the authorized percentage for the judge of probate, is required at the time that these reports are submitted. The provisions of the Code detailing these reports are Sections 40-12-1, 2, 21 and 22.

An annual report of the disposition of all license forms must be submitted to the Department of Finance. With this report the judge must attach all unused license forms and stubs of a proper accounting for them and the stubs of all licenses issued. This report must be submitted between the first and tenth of October. It is explained in Section 40-12-21.

**c. Certificates of Title.** Applications for certificates of title are to be forwarded to the Department of Revenue within ten (10) calendar days after receipt of the application. [ § 32-8-35(g)].

**d. Deaths and Vacancies in Public Offices.** The judge of probate is responsible for submitting a notice to the Governor of Alabama of deaths of United States Senators and Representatives residing in the county. In the case of the death of the Governor, the judge of probate is to give notice to the Lieutenant Governor. Similarly, in the case of death of any other officer, the appropriate judge of probate gives notice to the officer who fills the vacancy. [§ 36-9-6].

Resignations of constables must also be reported to the Governor by the judge of probate. [§ 36-9-13].

All public officials, except constables, who move from their district, circuit, or county must be reported to the official who would receive notice of his or her death. [§ 36-9-14].

**e. Driver's Licenses.** At the close of business each Monday the judge of probate must submit to the Department of Public Safety a report of applications for driver's licenses, and for renewal of driver's licenses received and the number of temporary driver's permits issued during the previous week. The monthly report is also required. The monthly report must be submitted between the first and tenth of the month following the report period. Copies of this report are submitted to the Director of Public Safety, Comptroller, and Treasurer. Funds collected, less any percentages or amounts authorized for the judge of probate are remitted to the state treasurer with the copy of the monthly report submitted to him. These reports are explained in Section 32-6-5.

**f. Hunting and Fishing.** Reports of hunting and fishing licenses; fur licenses, stamps and tags; licenses to use commercial fishing gear; commercial salt water fishing licenses; and licenses for fur dealerships sold each month must be submitted to the Department of Conservation. This report is submitted the first day of the month following the reporting period. It contains the following information: the number and kind of licenses issued, the names of persons to whom the licenses were issued and their addresses, the serial number of the license issued opposite the name of the recipient, and the amount of money collected. The money collected, minus the percentage authorized for the judge of probate, must be remitted to the Department of Conservation with the report. These reports are explained in Sections 9-11-37, 60 and 143 and Section 9-12-119.

**g. Incorporation Reports.** Within ten days after the issuance of the certificate of incorporation, the judge of probate must send the Secretary of State a copy of the certificate of incorporation. A certified copy of the articles of incorporation must also be included upon which must be indicated the place, date and time of their filing. [§ 10A-1-4.02]. In addition, a certified copy of each court order incorporating a community as a municipal corporation is also submitted to the Secretary of State. [§ 11-41-4].

**h. Marriage.** Any change in marriage licenses, applications for marriage licenses, or marriage certificates must be promptly reported to the state bureau of vital statistics following the procedure outlined in Section 30-1-16. The judge of probate must also forward to the district attorney each month all fees collected for domestic violence prevention. [See § 30-6-11].

**i. Motor Vehicle.** A monthly report of motor vehicle licenses sold must be submitted to the Department of Revenue and Comptroller between the first and twentieth day of the month following the report period except in October, November and December, when the deadline is extended an additional ten days. The report contains a list of licenses issued, the amount collected for each license tag, the name and address to whom each license was issued, the number of the tag, the motor number or vehicle identification number, and the date issued. Even though no licenses are issued, a report must be submitted. Monies collected from the issuance of this license, less the percentage authorized for the judge of probate must be remitted to the state and county treasurers or to the municipality, as provided by Section 40-12-270. Under local laws monies collected may also be paid to Boards of Education, hospitals, etc. Remittance is made at the time the report is submitted. A failure to comply with these provisions could result in impeachment of the judge of probate. The requirements of this report are found in Section 40-12-269.

**j. State Land Purchases.** Whenever a delinquent taxpayer attempts to redeem land which has been bid in by the state, the judge of probate must obtain the Land Commissioner's approval for the redemption. [§ 40-10-126]. Within five days from the redemption of any real estate bid by the state, the judge of probate must notify the tax assessor and tax collector of the county and, on demand, pay to them the cost and fees to which they are respectively entitled. [§ 40-10-130]. At the end of any month during which no land has been redeemed, the judge of probate must report that fact to the land commissioner and to the tax collector. [§ 40-10-129].

**k. Other Reports.** A poll list of qualified electors must be certified to the Secretary of State of Alabama [§ 17-4-2]. In addition, the judge of probate shall prepare a separate, correct alphabetical list of all the names of qualified electors for each voting place for all elections held in the state, and shall certify the list to the election officials appointed for each election. [§ 17-6-5].

The names of attorneys who have paid their license fees must be reported to the presiding judge of the circuit in the county as soon as possible after the first of the year. [§ 40-12-49].

Any fiduciary funds under the trust of the judge of probate must be reported to his court within the first ten days of January. The report must show the amount of fiduciary funds under his trust, the name of the owner, and the circumstances under which they were received. They must

be recorded in a book kept for that purpose. [§§ 19-3-81 and 19-3-85]. The administration of fiduciary funds is described in the next section of this chapter.

## **L. FIDUCIARY FUNDS**

The judge of probate is entrusted by law with certain special funds. These include funds for certain minors, funds received from the disposition of real and personal property when no heir can be ascertained, and funds for heirs in foreign states who are not represented at proceedings by counsel of their own choosing.

**a. Auditing of Public Accounts.** The Department of Examiners of Public Accounts is the legislative audit agency in Alabama which is required to audit the records and accounts of each state and county agency. The Department also has the duty to prepare the bookkeeping, accounting and reporting system for each state and county office.

The Department strives to promote accounting and financial reporting systems which meet generally accepted accounting principles, and to perform audits which meet generally accepted auditing standards.

A major concern in an audit is that the financial records of the audited office accurately account for all funds handled by the office and that the office has complied with the applicable laws and regulations. The laws and regulations cover competitive bidding laws, conflicts of interests, constitutional and statutory restrictions placed on the use of particular funds, budgeting, financial reporting, and bonding requirements.

By statute a copy of each audit report is forwarded to the governor and a copy to the presiding circuit judge in the county in which the office is located. By departmental policy a copy of each report is forwarded to the audit official(s), a copy to the county commission and copies to those officials or agencies requesting copies.

**b. Disposition of Personalty and Realty.** Money and proceeds from the disposition of personal property are received and safeguarded by the judge of probate when an heir or person entitled to it cannot be ascertained within one year. The judge also performs the same duty in relation to funds and proceeds from the disposition of real property when no heir or person entitled thereto can be ascertained within two years. These funds must be deposited in the state treasury within three months after they are received. The procedure to be followed in handling these funds is found in Sections 43-6-4, 5, 6 and 7.

**c. Heirs in Foreign Countries.** Funds for heirs in foreign countries, not represented in the settlement of an estate by counsel of their own choosing, must be turned over to the consular officer of the foreign country. [§ 6-8-20].

**d. Minor.** Any person who is under a duty to pay money or deliver personal property to a minor may do so by paying or delivering to it:

- (1) the person having the care and custody of the minor with whom the minor resides;
- (2) a guardian of a minor; or
- (3) the judge of probate where the minor resides.

[§ 26-2A-6]. However, there are some limitations on the amount that may be paid out under this section. They are:

- (1) \$5,000 if paid in a single payment; or
- (2) \$3,000 a year if paid in a series of payments; and
- (3) a maximum of \$25,000 during minority of the ward unless it is paid through a conservator or judge.

The money paid out must be applied to the health, support, education and maintenance of the minor. [§ 26-2A-6(c)].

Payments under this section are not allowed if payor knows that the minor has a conservator or there is a proceeding pending to appoint a conservator.

Moreover, before the person who is obligated to make the payment is discharged of that duty notice must be given. Notice must be filed with the judge of probate in the county in which the minor resides if the minor is a resident of Alabama. If the minor is a nonresident, notice must be filed with the judge of probate or similar officer in the county in which the debtor or creditor resides. [§ 26-2A-6].

## M. CONDUCT OF ELECTIONS

The judge of probate has a number of duties relating to state and county elections. The judge of probate is an elected county official and is the chief election official in each county. [§ 17-9-2] Please consult the current edition of the *Alabama Election Handbook* published by the Alabama Law Institute for a detailed summary of Alabama's election laws and the role of the judge of probate's office in the election process.

## IV.

### THE JUDICIAL FUNCTIONS OF THE JUDGE OF PROBATE

The judge of probate is designated by the Constitution as a member of the judicial branch of the state government. The duties of the judge of probate touch on the whole scope of government -- executive, legislative, and judicial -- at the county level. The focus of this chapter is on the judge's judicial duties.

#### A. THE SCOPE OF JUDICIAL FUNCTIONS

First, each of these duties under present law is judicial by virtue of the fact that they require a decision by a judicial officer. Second, all decisions and appeals remain within the judiciary established by the state statute or state constitution. Third, all decisions by the judge of probate are by legal process without resort to another court except on appeal. Fourth, decisions of the court are accorded the same validity and presumption accorded a general court of law.

It should be noted, however, that the judge of probate is not required personally to perform all judicial duties within the jurisdiction of court. The chief clerk may perform all acts which may be performed by the judge when there is no contest. [§ 12-13-14].

As part of the judicial function, the judge is required to maintain petitions initiating judicial proceedings and to maintain a well arranged docket, showing the date of the issue and return of all process, the day set for the hearing, the kind of notice ordered, the returns of the sheriff, and other entries as may be necessary to show the true condition of all proceedings pending in the court, and all fees accruing in the case and to whom due. In addition, minutes of all official acts and proceedings must be kept and recorded in well-bound books within three months of the entry.

The judge of probate must become familiar with certain remedies and procedures. They are discussed in several titles of the Code of Alabama. However, in addition to any special procedures which may be explained in sections on specific issues, the judge of probate should read the general provisions of rules and remedies which are explained in Titles 6 and 12 of the Code of Alabama, the Alabama Rules of Civil Procedure and the Alabama Rules of Evidence. Probate courts cannot administer remedies except as provided by the statutes. [*Kish Land Co., LLC v. Thomas*, 42 So. 3d 1235 (Ala. Civ. App. 2010).]

The judge of probate, within the jurisdiction of the probate court, may declare rights, status, and other legal relations whether further relief is or could be claimed. The declaration may be

negative or affirmative in form and effect. Moreover, when a declaration is issued it has the force and effect of a final judgment or decree. Requests for declaratory judgments or decrees may be refused if the decision would not terminate the uncertainty or controversy giving rise to the proceeding. [§§ 6-6-222, 229 and 230].

The judicial authority of the judge of the probate court extends to many fields. As the title suggests, the judge of probate has the authority to probate wills, to grant executorships and appoint administrators (personal representatives), and to remove executors and administrators (personal representatives). In addition, the judge of probate also has duties and powers in many areas, including the following:

- (1) To appoint and remove guardians and/or conservators for minor children and mentally incompetent persons;
- (2) To establish drainage districts;
- (3) To hear and decide on petitions requesting condemnation of privately owned land;
- (4) To hear and decide election contests in certain proceedings;
- (5) To preside over adoption proceedings;
- (6) To order the sale of lands for the payment of delinquent taxes;
- (7) To hear and decide petitions for the redemption of lands sold for delinquent taxes;
- (8) To receive petitions, determine the sufficiency thereof and conduct elections for the establishment and dissolution of municipalities;
- (9) To receive and decide petitions for the adoption of a commission form of government and for alterations of municipal boundaries;
- (10) To hear and decide claims for exemptions from executions, attachments, and garnishments, including authority to hear and decide homestead exemptions; and
- (11) To conduct capacity hearings and involuntarily commit persons for mental health treatment.
- (12) To determine competency of persons to vote.
- (13) To preside over trust administration matters (limited to certain judges with equity jurisdiction under Section 19-3B-203).

Each of these powers will be discussed individually.

## **B. JUDICIAL IMMUNITY**

The immunity of a judge of probate for judicial acts has been recognized in this state since at least 1884. *Grider v. Tally*, 11 Ala. 422 (1884). Like *Grider*, subsequent decisions have generally focused on whether a judge's actions were made while acting in a judicial capacity. This

factual determination, which can only be made by a court of competent jurisdiction, depends on whether (1) the act complained of constituted a normal judicial function, (2) the events occurred in the judge's chambers or in open court, (3) the controversy involved a case pending before the judge, and (4) the confrontation arose immediately out of a visit to the judge in his or her judicial capacity. *Sibley v. Lando*, 437 F. 3d 1067, 1070 (11<sup>th</sup> Cir. 2005), *citing Scott v. Hayes*, 719 F. 2d 1562, 1565 (11<sup>th</sup> Cir. 1983).

Even if, however, an action is judicial in nature, judicial immunity may be overcome if the act complained of is taken in the complete absence of jurisdiction. *Stegeman v. Georgia*, 290 Fed. App'x 320, 324 (11<sup>th</sup> Cir. 2008), *citing Mireles v. Waco*, 502 U.S. 9, 9-12, 112 S.Ct. 286, 287-88, 116 L.Ed. 2d 9 (1991). As explained by the Supreme Court of the United States, if a judge of probate with jurisdiction over only wills and estates tried a criminal case, he or she would be acting in the clear absence of jurisdiction and would not be immune from liability for his or her action. *Bradley v. Fisher*, 80 U.S. 335, 351 (1871), *cited in Gore v. City of Hoover*, 559 So. 2d 163, footnote 3 (Ala. 1990), overruled on other grounds by *Franklin v. City of Huntsville*, 670 So. 2d 848 (Ala. 1995).

Additionally, judicial immunity does not bar an action, including those brought pursuant to 42 U.S.C. § 1983, seeking prospective injunctive relief. *Bearden v. Coker*, 121 So.3d 359 (Ala. Civ. App. 2012), *citing Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S. Ct. 1970, (1984); opinion to Honorable James H. Lackey, Judge, Municipal Court, Ala. Op. Att'y Gen. No. 85-00275 (Apr. 1, 1985).

### C. SERVICE OF PROCESS

**NOTE: This section describes the general rules of service of process under the Alabama Rules of Civil Procedure. By order of the Alabama Supreme Court the Alabama Rules of Civil Procedure, became applicable in probate court so far as the application is appropriate and except as otherwise provided by statute. (Effective January 1, 2013).**

*a. Generally.* Upon the filing of a complaint, or other document required to be served in the manner of the original complaint, the clerk shall issue the required summons or other process of service upon each defendant. Upon request of the plaintiff, separate or additional summons shall issue at any time against any defendant. [Ala. R. Civ. P. 4(a)(1)].

The summons, or other process, shall be signed by the clerk, contain the name of the court and the name of the first party on each side with an appropriate indication of other parties when multiple parties are involved, state the name and the address of the plaintiff's attorney or the

plaintiff's address, and the time within which the rules require the defendant to appear and defend. Furthermore, the form shall notify the defendant that, in case of the defendant's failure to appear, judgment by default will be rendered against the defendant for the relief demanded in the complaint. [Ala. R. Civ. P. 4(a)(2)].

A copy of the complaint, showing the case number assigned to the action, or other document to be served shall accompany each summons or other process. [Ala. R. Civ. P. 4(a)(3)].

***b. Time Limit for Service.*** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or its own initiative, after at least fourteen (14) days' notice to the plaintiff, may dismiss the action without prejudice as to the defendant upon whom service was not made or direct that service be effected within a specified time. However, if the plaintiff shows good cause for the failure to serve the defendant, the court shall extend the time for service for an appropriate period. [Ala. R. Civ. P. 4(b)].

In computing any period of time prescribed or allowed, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday or a legal holiday, or when the act to be done is the filing of a paper in court, a day on which weather or conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day that is not one of the aforementioned days. When the period of time prescribed is less than eleven (11) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. [Ala. R. Civ. P. 6(a)].

***c. Upon Whom Process Served.*** Service of process, except service by publication as provided in Ala. R. Civ. P. 4.3, shall be made as follows:

**Individual**

By serving the individual or by leaving a copy of the summons and complaint at the individual's dwelling house with some person of suitable age and discretion then residing therein or by a copy of the summons and complaint to get an agent authorized by appointment to receive the service of process.

<b>Minor</b>	By serving any of the following: the father, the mother, the guardian, the caretaker, the individual with whom the minor lives, the spouse (if the minor is married), or the minor individual (if the individual is over the age of twelve (12) years).
<b>Incompetent Not Confirmed</b>	By serving the incompetent and that person's guardian. If no guardian has been appointed, by serving the incompetent and a person with whom the incompetent lives or a person who cares for the incompetent.
<b>Incompetent Confined</b>	By serving the superintendent of the institution or similar official or person having the responsibility for custody of the incompetent person.
<b>Incarcerated Person</b>	By serving the individual, except that when the individual to be served is a minor, by serving any one of the following: the father, the mother, the guardian, the individual having care of the minor, or the minor individual (if the individual is over the age of twelve (12) years).
<b>Corporations and Other Entities</b>	By serving an officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process.
<b>State</b>	By serving the officer responsible for the administration of the department,

agency, office, or institution, and by serving the state attorney general.

**Local Governments  
and Other  
Governmental  
Entities**

By serving the chief executive officer or the clerk, or other person designated by appointment or by statute to receive service of process, or upon the attorney general of the state if such service is accompanied by an affidavit that all such persons herein are unknown or cannot be located.

[Ala. R. Civ. P. 4(c)(1-8)].

*d. Service by a Process Server.* Service of process may be by the sheriff or constable of the county in which the party to be served resides or may be found or by a private process server as provided in the Rules [Ala. R. Civ. P. 4(i)(1)].

*e. Service by Certified Mail.* When the plaintiff files a written request with the clerk for service by certified mail, service of process shall be made by that method. Alternatively, the attorney or party filing the process and complaint may initiate service certified by mail as provided in the rule. [Ala. R. Civ. P. 4(i)(2)(a)].

The clerk shall place a copy of the process and complaint or other document to be served in an envelope and shall address the envelope to the person to be served with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified mail with instructions to forward, return receipt requested, with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. The case number of the case in which the pleading has been filed shall be included on the return receipt. The clerk shall forthwith enter the fact of mailing on the docket sheet of the action and make a similar entry when the return receipt is received. [Ala. R. Civ. P. 4(i)(2)(B)].

Service by certified mail shall be deemed complete and the time for answering shall run from the date of delivery to the named addressee or the addressee's agent as evidenced by signature on the return receipt. [Ala. R. Civ. P. 4(i)(2)(C)].

Consequently, if the receipt shows failure of delivery to the addressee or the addressee's agent, the clerk shall follow the notification procedure set forth in Ala. R. Civ. P. 4(i)(1)(D). Failure to make service within the thirty (30) day period and failure to make proof of service do not affect the validity of service. [Ala. R. Civ. P. 4(i)(2)(D)].

**f. Service Refused.** If service of process is refused, and the certified mail receipt or the return of the person serving process states that service of process has been refused, the clerk shall send a copy of the summons or other process and complaint or other document to be served to the defendant to the address set forth in the complaint or other document by ordinary mail. Service shall be deemed complete when the fact of mailing is entered or recorded. [Ala. R. Civ. P. 4(e)].

**g. Service by Publication.** Service by publication is proper for historically equitable claims involving property under the control of the court (e.g., administration of an estate, interpleader, partition) or marital status which claim has heretofore been deemed appropriate for service by publication where the identity of the residence of a defendant is unknown or where a resident defendant has been absent from his residence for more than thirty (30) days since the filing of the complaint and the method of service by publication in such instances is not specifically provided by statute. [Ala. R. Civ. P. 4.3(a)(1)]. Additionally, service by publication is proper for claims, whether legal or equitable, against a defendant who avoids the service of process as described in Ala. R. Civ. P. 4.3(c). However, before such service of process can be made either the party or the party's counsel must file an affidavit with the court averring the necessity of utilizing the procedure for service by publication [Ala. R. Civ. P. 4.3(d)]. [Ala. R. Civ. P. 4.3(a)(2)]. An affidavit submitted in support of a motion requesting service of process by publication must set forth facts showing that the defendant has avoided service. Service of process by publication is not proper simply because the defendant may be difficult to locate; there must be some element of culpability on the part of the defendant, and that culpability must be shown by facts set forth in an affidavit submitted in support of a motion requesting service of process by publication. *See Lovell v. Costigan*, 185 So. 3d 1130 (Ala. Civ. App. 2015). Service by publication for adoptions must also be made in compliance with the Alabama Rules of Juvenile Procedure and Ala. Code § 26-10A-17. **Note:** For more information on service by publication, *see* Ala. R. Civ. P. 4.3.

**Note:** This is only a general overview of service of process. Other statutes may provide specific procedures for service of process for other procedures (e.g., guardianships, administration of estates, conservatorships, etc.). Please see the appropriate section of the Alabama Code for any other provisions that may apply, as well as the Alabama Rules of Civil Procedure. For example, the following is a list of **some** of the provisions of the Alabama Code that have their own rules for service of process:

Guardianship	§ 26-2A-103 and § 26-2A-50
Conservatorship	§ 26-2A-134
Adoption	§ 26-10A-17
Will Probate	§ 43-8-164, -165, -166
Settlement of Estates	§ 43-2-505
Mental Commitment	§ 22-52-3

The above list is not meant to be exhaustive, but simply representative of the other provisions in the law that deal with service of process. Determining proper notice is a crucial function of the judge of probate. Improper notice can be the grounds to set aside any rule or decision of the court, even after lengthy proceedings. Therefore, all judges of probate should familiarize themselves with Alabama Rule of Civil Procedure 4 and the other provisions of the Alabama Code dealing with service of process.

#### **D. PRETRIAL MOTIONS**

A pretrial motion is aptly described by its name. It is a motion filed before trial, usually to resolve an issue of law or the admissibility of a piece of evidence. Pretrial motions can be filed in any type of probate case but are usually filed in cases that are complex or contested. A ruling on a pretrial motion can speed up the main hearing and, in some cases, can resolve the contested issues altogether. However, in most instances, the judge of probate is not required to rule on a pretrial motion and can reserve a ruling until the main hearing or even until the end of the case.

The presiding judge of each judicial circuit may authorize pretrial motion hearings in probate courts to be conducted by telephone conferencing or other audio-video telecommunications means. The presiding judge shall develop and publish procedures for the conduct of the civil hearings in probate courts in his or her judicial circuit. The telephone or audio-video telecommunications device used in the hearing shall enable the judge and all parties to converse simultaneously with each other. [§ 12-1-24].

#### **E. WILLS AND ADMINISTRATION**

From the title, "Judge of Probate," it is obvious that one of the major responsibilities of the judge of probate is to probate wills and grant letters testamentary and letters of administration. They involve important actions which are sometimes very technical from a legal standpoint. This jurisdiction is one of the few which is original, general, and unlimited and which is derived from the state constitution itself. (*See Jordan v. Jordan*, 38 So. 2d 865 (Ala. 1956).). A brief explanation of the procedure involving the probate of wills and administration of estates follows.

**a. Requirements for Making a Will.** To make a will, the following requirements must be met:

- (1) Anyone who is at least 18 years old and of sound mind may make a will. [§ 43-8-130].
- (2) A will must be written. [§ 43-8-131].
- (3) It must be signed by the testator, or in the testator's name by another person in the testator's presence and at his direction [§ 43-8-131], and
- (4) It must be signed by at least two witnesses [§ 43-8-131; *see also* § 43-8-134].

If the document submitted for probate does not meet all of these requirements, it is not a legal will and should not be admitted to probate.

The Uniform Electronic Transactions Act (UETA) specifically excludes the act from applying to the “creation and execution of wills, codicils, or testamentary trusts.” Thus, an electronic signature on a will falls under the exclusionary provisions of the UETA and is not a valid signature. [§ 8-1A-3 (b) (1)].

**b. Effect of Divorce; Pretermitted Children.** A divorce or annulment revokes all provisions of a will relating to the former spouse. Remarriage (to the spouse named in the will) revives those provisions, unless they have also been revoked by some other means. [§ 43-8-137]. Similarly, a spouse who marries the testator after the execution of the will, and who is left out of the will, receives an intestate share of the estate. This does not apply if it appears that the testator either intended the omission or provided for the spouse outside the will in lieu of a bequest. [§ 43-8-90].

Children who are born or adopted after the execution of the will, and who are not provided for in the will, are entitled to the share of the estate equal to what they would have received had the parent died intestate. Again, this does not apply if it appears that the omission was intentional; or if the testator meant to provide for the child outside the will; or if, when the will was executed, the testator had one or more children and left his estate to the omitted child's other parent. [§ 43-8-91; *Gray v. Gray, III*, 947 So.2d 1045 (Ala. 2006)].

**c. Right of Surviving Spouse to Elective Share.** The surviving spouse may elect to take either what he or she is left under the will, or a statutory elective share. Section 43-8-70 defines the elective share as the lesser of (1) all the estate, reduced by the value of the surviving spouse's separate estate (the separate estate is defined in Section 43-8-70(b) or (2) one-third of the estate. [§ 43-8-70]. An election must be exercised by filing a petition for elective share with the probate

court within six months after the date of death or the probate of the will, whichever is later. The court has discretion to extend this deadline. [§ 43-8-73].

After notice and hearing, the court may order the elective share to be paid from the assets of the estate. [§ 43-8-73]. Other rules relating to the elective share, including the formulation for apportioning the estate to satisfy the share, are found in Sections 43-8-71, 72, 74 and 75.

**d. Who May Probate a Will.** Upon the death of a testator, any executor (personal representative), devisee or legatee named in the will or any person interested (financially) in the estate or who has custody of the will may have the will proved before the proper probate court. [§ 43-8-160].

**e. When and Where a Will Must be Probated.** To be effective, a will must be filed for probate within five years of the date of the testator's death. [§ 43-8-161]. Nonetheless, the statute providing that wills must be filed within five years from the date of death is a statute of limitations which must be pled in order to be enforced. [*Hollis v. Wallace*, 481 So. 2d 875 (Ala. 1985)]. Generally, wills must be filed for probate in the county where the deceased lived, or in the case of an out-of-state decedent, the will may be probated in a county where the decedent leaves assets. Under Section 43-8-162 venue is also proper in the probate court of the county designated by the testator in the testator's will provided the testator owns property in that county upon the testator's death. [§ 43-8-162].

**f. Duty of Person with Custody of Will.** After the testator's death any person who is in possession of the will has a duty under Section 43-8-270 to deliver it to a person who is able to secure probate of the will or to an appropriate court. Failure to deliver will make the custodian liable to anyone who sustains damages because of his retention of the will. Also, the probate court may order the custodian to produce the will; failure to comply with this order may subject the possessor to a penalty for contempt of court. [§ 43-8-270].

**g. Digital Assets.** The Revised Uniform Fiduciary Access to Digital Assets Act [§§ 19-1a-1 through 19-1a-18] expands a fiduciary's duties to manage tangible assets to digital assets. However, access to electronic communications require the owner's consent. [§ 19-1A-15].

**h. Notice to Next of Kin; Proof of Will.** Upon the application to prove a will, made by an interested party, at least ten days' notice must be given to the surviving spouse and next of kin, or either of them, who resides or is otherwise in Alabama, before the application can be heard. [§ 43-8-164].

Generally, a will must be proved by one or more subscribing witnesses. If all the witnesses are dead, incompetent, etc., proof must be made of the testator's handwriting, and that of one witness. When no subscribing witnesses can be found, proof of their death, incapacity, etc., must be shown before the court will allow proof of handwriting. [§ 43-8-167]. If there is no contest, the testimony of one attesting witness is sufficient. However, if there is a will contest, proof of two witnesses or proof by one witness and a proper accounting for the other witness is required. [§ 43-8-167].

*i. Self-Proving Wills.* Since 1981 Alabama law has provided for wills which are considered self-proving. Any will may be simultaneously executed, attested, and made self-proved by the testator's acknowledgment and affidavits of the witnesses, each made before any notary public or other officer authorized to administer oaths in Alabama. The form for self-proving wills is provided in Section 43-8-132 of the Code. The language of a self-proving will does not have to match exactly, but it must be in substantially that form. Such execution must be evidenced by the officer's certificate under seal. Likewise, an attested will may at any time after its execution be made self-proved by attaching proper acknowledgments, to the existing will. Self-proving wills generally dispense with procedures described above and below for proving wills except in the case of proof of fraud or forgery. [§§ 43-8-132 and 133].

*j. When Subscribing Witnesses are Unavailable to Prove Will.* When the subscribing witnesses reside out of state or are physically unable to testify, the judge of probate may issue a commission to take the testimony of such witnesses to prove the will. [§ 43-8-168]. (The procedure for probating foreign wills appears in Section 43-8-175). If it appears from the proof taken before the judge of probate that the will was properly executed and witnessed, the testimony must be reduced to writing, signed by the witness and immediately recorded in a book kept for such purpose. [§ 43-8-169]. Every will proved and recorded must have a certificate appearing thereon, endorsed by the judge of probate specifying the date of probate, the book and the page or pages on which it is recorded. [§ 43-8-170]. A will which is withdrawn prior to its becoming probated must also be recorded by the judge of probate. [§ 43-8-173]. Also, secondary evidence, such as a signature on another legal document, is admissible in the absence of primary proof. *Woodruff v. Hundley*, 127 Ala. 640, 29 So. 98 (1900).

*k. Lost Will.* The lost will exception, a product of the common law, has been preserved and read into the statute, so that a "lost will may be established by the testimony of a single witness, who read it, or heard it read, and remembers its contents." *Lovell v. Lovell*, 121 So. 2d 901 (1960). "The exception, which relaxes the requisite proof for probating a lost will, is in keeping with the public policy of this State in carrying out the last intent of the testator." *Anderson v. Griggs*, 402 So.2d 904 (Ala. 1981). While an essential element in proof of establishment of a lost will is

assertion of knowledge of contents of such a will, in proving, the contents of a lost instrument as a will, it is not necessary to prove words of an instrument; proof of substance of contents is all that is required. *Anderson v. Griggs*, 402 So. 2d 904 (Ala. 1981). In a proceeding to probate a lost or destroyed will, the proponent must establish: (1) the existence of a will—a written instrument, signed by the testator or another person, in the testator’s presence, at the testator’s direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator; (2) the loss or destruction of the instrument; (3) the non-revocation of the instrument by the testator; (4) the contents of the will in substance and effect. “When the will is shown to have been in the possession of the testator, and is not found at his death, the presumption arises that he destroyed it for the purpose of revocation; but the presumption may be rebutted, and the burden of rebutting it is on the proponent.” *Spencer III v. Spencer*, 2018 WL 915097 (Ala. 2018)(quoting *Barksdale v. Pendergrass*, 319 So.2d 267 (Ala. 1975).

**I. Will Contest.** A will before the probate court may be contested by any interested person or by any person who, if the deceased had died intestate, would have been an heir or distributee of the estate. [§ 43-8-190]. Creditors of the heirs at law of a deceased person are not “persons interested in the estate” and thus, have no right to contest the probate of a will. *Owens et al. v. Thurmond’s Adm’r*, 40 Ala.289 (Ala. 1866).

A will may be contested in two ways. First, before probate, a contest may be instituted in the probate court. Second, after probate and within six months thereof, a contest may be instituted by filing a complaint in the circuit court of the county in which the will was probated. [*Stone v. Parish*, 70 So. 3d 420 (Ala. Civ. App. 2011)].

A probate court must order the transfer of a will contest brought in that probate court upon the demand of any party to the contest at the time of the filing of an initial pleading. [§ 43-8-198]. Furthermore, a will contest by an interested party is permitted only if the will has not yet been admitted to probate. [§ 43-8-190].

When a complaint contesting a will and a petition to transfer the case to the circuit court is filed, the probate court has a mandatory duty to transfer the will contest to the circuit court and can take no further action concerning the validity of the will. [§ 43-8-198].

Just as a court lacking subject-matter jurisdiction has no authority to do anything other than enter a judgment of dismissal, a probate court confronted with a proper and timely transfer demand accompanying a will contest can do nothing but comply with the mandate of the legislature and refer the contest to the appropriate circuit court. [§ 43-8-198].

Upon transferring of a will contest from the probate court, the circuit court acquired exclusive subject-matter jurisdiction to adjudicate merits of a will contest, and the circuit court was required to exercise that jurisdiction before remanding case back to probate court. [§ 43-8-198].

The circuit court has no authority to remand a will contest that has properly been transferred from a probate court without having adjudicated the merits of the contest. [§ 43-8-198].

The judge of probate must on application of either party issue subpoenas for witnesses to appear on the day fixed for the trial, before a jury drawn as provided by statute. [§§ 43-8-191, 192 and § 12-16-78]. If the probate court rules that the will is invalid, it cannot be probated. Otherwise, the will must be admitted to probate. [§ 43-8-195].

**m. *Transfer of Contest to Circuit Court.*** Usually, such contests are conducted in the circuit court upon the demand of any party to the contest, made to the judge of probate at the time of the initial pleading. When a transfer of contest to the circuit court is requested, the judge of probate must enter an order transferring the contest to the appropriate circuit court, certifying all papers and documents pertaining to the contest to the clerk of the circuit court. [§ 43-8-198]. If the contest is denied in circuit court, the case is transferred back to probate court for further administration of the estate. In the event the will has been admitted to probate, a contesting party must, within six months, file a complaint with the circuit court. [§ 43-8-199].

**n. *In Terrorem Clause.*** *In terrorem* clauses apply “to legacies given upon condition that the recipient shall not dispute the validity or the dispositions of the will” [Black’s Law Dictionary, Revised 4<sup>th</sup> Ed.] Thus, *in terrorem* clauses are sometimes used in wills to keep beneficiaries from contesting a will by either completely disinheriting the beneficiary or reducing the beneficiary’s share to a nominal amount if the beneficiary challenges the will. *In terrorem* clauses are enforced in Alabama, but they are to be narrowly construed to *avoid* a forfeiture. [*Harrison v. Morrow*, 977 So. 2d 457 (Ala. 2007)].

**o. *Executor’s (Personal Representative’s) Letters Testamentary.*** Whenever a will has been admitted to probate, the judge of probate may issue letters testamentary to:

- (1) the person(s) named as executor(s) (personal representative(s)) in the will,
- (2) who is (are) at least 19 years old, and
- (3) who has (have) never been convicted of a serious crime, and
- (4) who is (are) otherwise capable of discharging the requisite duties of trust.

A non-resident of the state can only be appointed an administrator when he is, at the time, executor or administrator (personal representative) of the same estate in another state. [§§ 43-2-20, 21 and 22]. However, a non-resident can be appointed an executor. [§ 43-2-191].

**p. Co-representatives.** Generally, if two or more persons are appointed co-representatives, and unless the will or a statute provides otherwise, the concurrence of all is required of all acts connected with the administration and distribution of the estate. The code enumerates a few exceptions to that general rule. [§ 43-2-846].

Unless the will provides otherwise, every power exercisable by personal co-representatives may be exercised by one or more remaining after the appointment of one or more is terminated. Furthermore, if one of two or more who are nominated as personal co-representatives is not appointed, those appointed may exercise all of the powers incident to the office of personal representative. [§ 43-2-847].

**q. Renunciation of Appointment as Executor (Personal Representative).** Any person named as an executor (personal representative) in a will may renounce such appointment by appearing before the judge of probate and declaring the renunciation or by a certified instrument in writing which must be filed and recorded in the judge of probate's office. [§ 43-2-25]. Letters testamentary to others named in a will are permitted upon renunciation or failure of a named executor (personal representative) to apply for such within 30 days after probate. [§ 43-2-26].

**r. Failure of Executor (Personal Representative) to Apply for Letters Testamentary.** An executor should apply for letters testamentary within 30 days after probate. [§ 43-2-26]. If, for whatever reason, there is a failure of executors (personal representatives) to apply for letters testamentary and the residuary legatee fails to apply, refuses to accept or is unfit to serve, then the principal legatee is entitled to letters of administration with the will annexed. Otherwise, such letters may be granted to the same persons and in the same order as letters of administration are granted in cases of intestacy. [§ 43-2-27].

## F. ADMINISTRATION OF ESTATES

**a. Jurisdiction of Probate Court.** In regard to the administration of estates, the probate court is a court of general and original jurisdiction. [See Ala. Const. 1901, § 144; 1975, § 12-13-1(b)]. The circuit court can obtain jurisdiction over a pending administration of an estate only by removing the administration from the probate court to the circuit court after letters of administration have been issued. [§ 12-11-41; § 12-11-41.1; see *Ex parte Terry*, 957 So.2d 455, 457-58 (Ala. 2006); *Ex parte McLendon*, 824 So. 2d 700, 704 (Ala. 2001)]. After removal,

jurisdiction of the administration of the estate remains exclusively with the circuit court, unless Section 11-11-41.1 applies. *Allen v. Estate of Juddine*, 60 So. 3d 852 (Ala. 2010). Under Section 12-11-41.1, counties in which the judge is required to be learned in the law, a case may be transferred back to the probate court under subsection (a).

The probate court must *act* upon the petition and thereby activate the proceedings by appointing a personal representative of an estate before the circuit court can remove the administration of the estate from the probate court. [*Ex parte Smith*, 61 So. 2d 1374; § 12-11-41].

The probate court cannot itself cause the removal of the administration of an estate as a whole to a circuit court. [§§ 12-11-41, 43-8-198].

The administration of any estate may be removed from the probate court to the circuit court at any time before a final settlement thereof, by any heir, devisee, legatee, distributee, executor, administrator or administrator with the will annexed of any such estate, without assigning any special equity. An order of removal must be made by the court, upon the filing a sworn petition by any such heir, devisee, legatee, distributee, executor, administrator or administrator with the will annexed of any such estate, reciting that the petitioner is such heir, devisee, legatee, distributee, executor, administrator or administrator with the will annexed and that, in the opinion of the petitioner, such estate can be better administered in the circuit court than in the probate court. [§ 12-11-41; see *DuBose v. Weaver*, 68 So. 3d 814 (Ala. 2011); *Hodges v. Hodges*, 72 So. 3d 687 (Ala. Civ. App. 2011)].

***b. Granting Letters of Administration.*** A person who dies without making a valid will is deemed to have died intestate. A person who dies with a valid will is deemed to have died testate. The rules for administration of an estate are sometime different depending on whether the deceased died testate or intestate. The probate court has authority to grant letters of administration as follows:

- (1) Where the intestate, at the time of his death, was an inhabitant of the county.
- (2) Where the intestate, not being an inhabitant of the state, dies in the county, leaving assets therein.
- (3) Where the intestate, not being an inhabitant of the state, dies out of the county, leaving assets therein.
- (4) Where the intestate, not being an inhabitant of the state, dies, leaving no assets therein, and assets are afterwards brought into the county.
- (5) Where the intestate, being an inhabitant of the state, dies, leaving no assets subject to administration in the county of his residence, and no administration has been

granted in such county within three months after the death of the intestate, then administration may be granted in any county where the intestate leaves assets. [§ 43-2-40].

**c. Order of Administration and Time of Administration.** The administration of an intestate estate must be granted to one of the following persons, both willing and satisfactory to serve, in the stated order:

- (1) The spouse, or
- (2) The next of kin entitled to share in the distribution of the estate, or
- (3) The largest in-state creditor of the estate, or
- (4) Such other person as the judge of probate appoints.

In those counties with a population of 400,000 or more, or any county having an elected general or county administrator, the county administrator may handle the administration of an estate. [§ 43-2-42]. The probate court has no discretion in issuing letters of administration when there is no question relating to the qualification of the person requesting the letters. [*Ogle v. Gordon*, 706 So. 2d 707 (Ala. 1997)].

A spouse, the next of kin or largest in-state creditor must apply for letters of administration within forty days after intestate's death or relinquish their right to administration. Any person with a right to administration, however, may relinquish such right in the same manner as an executor (personal representative). [§ 43-2-43].

An adverse interest in estate does not disqualify a person from being appointed an administratrix. [*Carleton v. Carleton*, 84 So. 3d 84 (Ala. Civ. App. 2011)].

Funeral expenses are debts of the estate, even if paid after the decedent's death. Thus, the individual who paid the funeral expenses and became the largest creditor of the estate was entitled the priority to be appointed administrator as the largest creditor. [*Douglas v. King*, 990 So. 2d 534 (Ala. 2004)].

**d. Granting of Letters to Several Kindred Persons.** If several persons of the same degree of kindred to the intestate are entitled to the administration or when several people are equally entitled to such, the court may in its discretion grant letters of administration to one or more of equal standing. [§ 43-2-44].

***e. Priority Among Different Letters.*** A person to whom general letters are issued first has exclusive authority under the letters until the appointment is terminated or modified. If through error general letters are afterwards issued to another, the first person appointed as a personal representative is to recover the property and estates of the subsequently appointed personal representative. However, the acts of the later appointed personal representative that were done in good faith without notice of the first letters are not void for want of validity of appointment. [§ 43-2-832].

***f. When Letters May Be Granted.*** No letters of administration can be granted until the expiration of five days after the death of the intestate is known. [§ 43-2-45].

***g. County or General Administrators.*** Each judge of probate must appoint a suitable person as a general administrator within the county. This person must take charge of the estates of deceased persons or act as special administrator in the appropriate instance. This office expires with the expiration of the term of the appointing judge of probate. [§ 43-2-170]. However, when there is no general administrator, the judge may appoint the sheriff of the county. [§ 43-2-172].

***h. Non-Resident Administrators.*** A non-resident of Alabama may not be appointed as an administrator unless the non-resident is at the time the executor or administrator of the same estate in some other state or jurisdiction who is duly qualified under the applicable laws of that state or jurisdiction. [§ 43-2-22(a)]. The application filed by a non-resident for letters testamentary or of administration must include his name and post office address. Any subsequent changes of address must be by a written statement filed in the probate court granting the letters. [§ 43-2-190].

***i. Administration of Estates of Persons Presumed Dead.*** Whenever letters of administration on the estate of any person presumed to be dead on account of absence for five or more years from the place of his last place of domicile in Alabama are applied for, it is the duty of the judge of probate, to whom the application is made, to accept and file the application. Testimony must be taken with respect to whether the petitioner is entitled to such letters. If the court is satisfied by the testimony that the applicant would be entitled to receive the letters were the supposed decedent in fact dead, the court must advertise in a local newspaper, for four consecutive weeks, that the application has been filed; the day of hearing must be set no sooner than two weeks following the last notice. [§ 43-2-230].

**G. PROVISIONS APPLICABLE TO BOTH  
EXECUTORS AND ADMINISTRATORS (PERSONAL REPRESENTATIVES)**

**NOTE:** Under Section 43-8-1(22), “personal representative” is defined as follows:

**Personal Representative.** Includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

*a. Notice of Appointment.* Executors and administrators (personal representatives) must within one month from the grant of letters give notice of their appointment stating:

- (1) The name of the deceased;
- (2) The day on which letters were granted;
- (3) By which court;
- (4) The county; and
- (5) Notify all persons having claims against the estate to present them within the time limits set by law.

Notice can be given by weekly publication in a local newspaper once a week for three consecutive weeks. If there is no local or county newspaper, notice should appear in a newspaper published nearest to the courthouse or in an adjoining county. Actual notice must be given to known or reasonably ascertainable creditors by the personal representative. In addition to publishing a notice once a week for three successive weeks in the newspaper, the Code prescribes that actual notice must be sent by first-class mail to the creditor's last known address within six months from the grant of letters. [ §§ 43-2-60 and 61].

*b. Bonds.* Every person appointed a personal representative or special administrator must give bond payable to the judge of probate. Unless otherwise directed, the bond must be in the amount of the aggregate capital value of the property of the estate in the personal representative's control, plus one year's estimated income, and minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary lacks power to sell or convey without court authorization. In lieu of securities on a bond, the court may accept other collateral for the performance of the bond, including a pledge of securities or other assets or a mortgage of land. The court may increase or decrease the bond any time that such adjustment is necessary to protect the estate. [ § 43-2-851]. If a judge of probate orders an insufficient bond or no bond when a bond should have been ordered, the judge of probate, personally as well as the judge's surety, may be liable to any injured party.

A personal representative may be exempt from giving bond by an express provision in the decedent's will. Nevertheless, the court may require a bond even though it has been exempted by the will when in the court's own opinion the estate is likely to be wasted or upon affidavit of an interested person alleging that that person's interest is or will be endangered from lack of security. [§ 43-2-851].

**c. Administrator Ad Colligendum.** A judge of probate is permitted to appoint a special administrator ad colligendum for the purpose of collecting and preserving the assets of a deceased until letters testamentary or of administration have been properly issued. This special administrator, under the direction of the judge of probate, can sell such goods that are perishable or wasting upon notice as prescribed by the judge of probate. Similarly, the special administrator may give receipts for moneys collected, satisfy liens and mortgages paid to him and preserve such goods and chattels at a reasonable expense as determined by the probate court. [§ 43-2-47]. Because the special administrator ad colligendum is not a personal representative of an estate, appointment of an administrator ad colligendum alone is insufficient to initiate the general administration of an estate. [*Ex parte Baker*, 2015 WL 643759, \*3-\*4 (Ala. 2015)]. The authority of the special administrator ad colligendum ends upon the issuance of letters testamentary or administration. [§ 43-2-47(d); *Ex parte Baker*, 2015 WL 643759, \*4 (Ala. 2015)].

**d. Administrator Ad Litem.** 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. [§ 43-2-250].

Only a “personal representative” may bring a wrongful-death action under § 6-5-410. According to *Affinity Hospital v. Williford*, an administrator ad litem is a personal representative because, although the administrator ad litem is appointed for a special and limited purpose, that purpose entails the fiduciary duties of deceased’s estate (including bringing a wrongful death action). [21 So. 3d 712 (Ala. 2009)]. However, the court in *Kirksey v. Johnson* is critical of this ruling, and the concurrence by Justice Bolin concludes that an administrator ad litem is not a personal representative and thus cannot bring a wrongful-death action. [*Kirksey v. Johnson*, 166 So.3d 633, 649 (Ala. 2014); *Golden Gate Nat'l Senior Care, LLC v. Roser*, 94 So.3d 365 (Ala. 2012); *Ex Parte Continental Motors, Inc.*, 2018 WL 3197479 (Ala. 2018)].

The Probate Court does not have subject-matter jurisdiction to oversee the settlement of a wrongful-death action or to oversee distribution of wrongful-death-proceeds proceeds. [*Kirksey v. Johnson*, 166 So.3d 633, 648 (Ala. 2014)]. Further, a wrongful-death action cannot be brought by the estate of the decedent; accordingly, the proceeds from a wrongful-death action are not part of the decedent's estate. [*Kirksey v. Johnson*, 166 So.3d 633, 645 (Ala. 2014)].

**e. Filing of Claims and Priorities of Debts.** All claims against the estate of a deceased must be presented within six months after the grant of letters testamentary or of administration. Unless presented within the six months or five months after notice first published, they are forever barred, and payment is prohibited. Provided, however, a creditor entitled to actual notice must be allowed 30 days after notice to present the claim. Actual notice must be given from the personal representative to creditors who are known or reasonably ascertainable. [§§ 43-2-60 and 61; § 43-2-350; *Sullivant v. Sullivan*, 976 So. 2d 991 (Ala. 2007)]. A verified claim or statement must be filed in the judge of probate's office which granted the letters testamentary. [§§ 43-2-350 and 43-2-352]. Minors and people of unsound mind are allowed six months after the appointment of a guardian or six months after removal of their disability to file a claim. [§ 43-2-351]. The debts against the estate of the decedent must be paid in the following order [§ 43-2-371]:

- (1) Funeral expenses;
- (2) Fees and charges of administration;<sup>1</sup>
- (3) Expenses of the last illness;
- (4) Taxes assessed on estate of decedent prior to death;
- (5) Debts to employees from services rendered in the years of decedent's death; and
- (6) Other debts.

**f. Exempt Property and Allowances.** The surviving spouse is entitled to an exemption from administration (and thus claims against the estate) for a homestead allowance in the amount of \$15,000. If there is no surviving spouse, each child, regardless of whether the child is a minor

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<sup>1</sup>Reasonable attorney fees and costs incurred by an heir of deceased beneficiary of will, in settled actions against personal representative of testator's estate, alleging that personal representative was mishandling and misappropriating assets of testator's estate, thereby adversely affecting the value of beneficiary's estate, constituted fees and charges of administration for beneficiary's estate, for purposes of statutory priority for payment of debts of estates of decedents. Thus, the payment of attorney fees falls under Section 43-2-371(2) as a part of "[t]he fees and charges of administration" of the estate. Therefore, the payment of attorney fees has priority over the payment of all other debts of the estate other than the funeral expenses. [*Archer ex rel. Archer v. Estate of Archer*, 45 So. 3d 1259 (Ala. 2010)].

or whether the child was dependent on the decedent, is entitled to an equal share of the \$6,000 allowance. [§ 43-8-110; *Hines v. Enis*, 39 So.3d 1164 (Ala. Civ. App. 2009)]. In addition, the spouse or if no surviving spouse, such children jointly are entitled to exempt property of a value not exceeding \$7,500 in excess of security interests therein. This exemption applies to furniture, automobiles, appliances, furnishings and personal effects. [§ 43-8-111]. Upon proof, the spouse and children supported by the decedent are also entitled to a reasonable amount of money out of the estate for their maintenance during the period of administration. [§ 43-8-112]. Generally, the family allowance does not exceed \$15,000 per year. However, that amount can be increased or decreased by court order. [§ 43-8-113]. All of these exemptions are in addition to amounts left to the spouse or children under the will or by means of intestate succession or an elective share.

**g. *Inventory of Estate.*** Every executor or administrator (personal representative) is required to collect and take into his possession the decedent's property except the real or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless needed for administration or unless otherwise directed in a will. [§ 43-2-837].

Generally, within two months of appointment, a personal representative must also file an inventory of all property of the decedent, including details of the debts accruing to the decedent. However, the testator can by express provisions in the will exempt the personal representative from filing an inventory. [§ 43-2-835]. General language in a will that grants broad discretion to a personal representative in distributing property under that will does not satisfy the requirement in § 43-2-835(b) that there be an “express provision” exempting the personal representative from filing an inventory. *Green v. Estate of Nance*, 971 So. 2d 38 (Ala. Civ. App. 2007).

Nonetheless, the court can order an inventory if the judge determines that the estate is likely to be wasted or any interested person will be prejudiced without an inventory. [§§ 43-2-835 and 836].

**h. *Appraisal and Setting Apart of Exemptions.*** The probate court may, if necessary, appoint appraisers for the estate, who are to be charged with the duty of setting apart the exempt personal property for the surviving spouse and/or minor child(ren). [§§ 6-10-80 and 81]. The appraisers must also appraise the decedent's homestead. [§ 6-10-82]. If the value of the homestead exceeds \$6,000, the probate court must appoint three commissioners to set off the homestead exemption. [§ 6-10-83]. If the persons interested in the decedent's estate are not satisfied with the reports or allotments of the appraisers or commissioners, they may file exceptions in the probate court. The rules governing notices, hearings and proceedings on such petitions, as well as miscellaneous related matters, are found in Sections 6-10-85 through 107.

Upon the showing of good cause, the probate court may authorize the executor or administrator (personal representative) to keep the real and personal estate together for any period the court deems advisable though not more than ten years. [§ 43-2-330].

*i. Powers of Personal Representatives Without Prior Court Approval.* Except as restricted or otherwise provided by will or by an order of the court and subject to the priorities in Section 43-8-76, a personal representative, acting prudently for the benefit of the interested persons, may properly:

- (1) Retain assets owned by the decedent pending distribution or liquidation, including those in which the representative is personally interested or which are otherwise improper for trust investment.
- (2) Receive assets from fiduciaries, or other sources.
- (3) Perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as the personal representative may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may do either of the following:
  - a. Execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land.
  - b. Deliver a deed in escrow with directions that the proceeds when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.
- (4) Satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances.
- (5) If funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, or other prudent investments which would be reasonable for use by trustees generally.
- (6) Abandon personal property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate.
- (7) Vote stocks or other securities in person or by general or limited proxy.

- (8) Pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims.
- (9) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held.
- (10) Insure the assets of the estate against damage, loss and liability and the personal representative against liability as to third persons.
- (11) Borrow money without security or with security of personal property to be repaid from the estate assets or otherwise; and advance money for the protection of the estate.
- (12) Effect a fair and reasonable compromise with any debtor or obligor, or extend, renew, or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge, or other lien upon property of another person, the personal representative may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owners thereof in satisfaction of the indebtedness secured by the lien.
- (13) Pay taxes, assessments, and other expenses incident to the administration of the estate.
- (14) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.
- (15) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term not to exceed one (1) year.
- (16) Allocate items of income or expense to either estate income or principal, as permitted or provided by law
- (17) Employ necessary persons, including appraisers, attorneys, auditors (who may include certified public accountants, public accountants or internal auditors), investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act without independent investigation upon recommendations of agents or advisors; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary.
- (18) 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 duties of the personal representative.
- (19) Continue any unincorporated business or venture in which the decedent was engaged at the time of death as provided in any of the following:

- a. In the same business form for a period of not more than one year from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will.
  - b. In the same business form for any additional period of time that may be approved by order of the Court in a proceeding to which the persons interested in the estate are parties.
  - c. Throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees, of the business who are competent adults object to its incorporation and retention in the estate.
- (20) Incorporate any business or venture in which the decedent was engaged at the time of death.
- (21) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.
- (22) Satisfy and settle claims and distribute the estate as provided in Title 43. [§ 43-2-843].
- These powers may be restricted or expanded by the will or by court order. [§ 43-2-843].

***j. Powers of Personal Representative Requiring Prior Court Approval.*** Section 43-2-844 enumerates the powers of a personal representative that require prior court approval. These powers are as follows:

- (1) Acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset.
- (2) Make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, or raze existing or erect new party walls or buildings.
- (3) Subdivide, develop or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration.
- (4) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term of more than one (1) year.
- (5) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.

- (6) Sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances.
- (7) Pay compensation of the personal representative. However, the will may expressly authorize the personal representative to perform any of these functions without prior court approval.

**k. When an Annual or Partial Settlement is Required.** Every executor or administrator (personal representative) must make settlements annually unless waived in the will or at any other time when necessary for the interest of the estate. [§ 43-2-500].

**l. When Final Settlement May Be Made.** A final settlement may be made any time after six months from the grant of letters if the debts are all paid and the condition of the estate in other respects is otherwise capable of being settled. [§ 43-2-501].

**m. Notice Required.** Upon the filing of accounts, vouchers, evidence, and statements, the judge of probate is required to appoint a day for settlement and must give notice of such date in a county-wide newspaper for three consecutive weeks or by posting notices at public places throughout the county. If the settlement is final the judges of probate must also give ten days' notice of the day set for making settlement to every adult distributee residing in the state whose place of residence is known or can be reasonably ascertained and to all sureties on the bond of executors or administrators (personal representatives) as well. The notice must include the name of the executor or administrator (personal representative), the name of the deceased, the day appointed for settlement and the nature of the settlement, (i.e., whether annual or final.) [§ 43-2-505].

**n. Settlement by Consent Without Notice.** When all the heirs and next of kin are of age and proof is provided that all legal charges of the estate have been paid in full, the probate court, upon petition of the personal representative consented to by written instrument properly executed and acknowledged by all heirs and next of kin, may approve a consent settlement without notice or publication or posting. In the event that a distributee is either a minor or of unsound mind and has a duly appointed guardian, the guardian may approve a consent settlement on behalf of the ward. The guardian, however, must be a disinterested party to the settlement. [§ 43-2-506].

**o. Compelled Settlement.** An executor or administrator (personal representative) may be compelled to make a settlement following service of citation. A failure to file accounts and vouchers on the day named in the citation will result in the probate court or other court having jurisdiction of the estate seeking settlement by attachment or stating the account against the

executor or administrator (personal representative) from the materials on file or other available information and charging the individual with the assets which he or she may have handled. [§ 43-2-530].

***p. Presumption of Settlement.*** An estate is presumed settled 20 years and six months after letters testamentary or letters of administration on such estate were issued. [§ 43-2-660]. Such presumption may be raised by a petition filed, usually by the executor or administrator (personal representative), with the probate court. The court must grant a hearing on the petition. [§ 43-2-661].

***q. Sale of Personal Property.*** Any part of the personal property of a decedent may be sold by order of the probate court on the written application of the executor or administrator (personal representative), verified by affidavit. Sale may be ordered for the payment of debts, to make distribution among the distributees or legatees or to prevent waste or destruction of property likely to waste or of a perishable nature.<sup>2</sup> The sale of the latter must be proved beneficial to the estate. [§ 43-2-410]. If the property is perishable, no notice of application for sale is required to be given to adversely affected parties if the judge of probate is satisfied of the truth of the allegations contained in the application. [§ 43-2-411]. The executor or administrator (personal representative) must give notice of the day, place, and terms of sale as well as a description of the property for three successive weeks by publication or posting. [§ 43-2-413]. Such sales may be for cash or on credit not exceeding 12 months as the court may direct. [§ 43-2-415].

***r. Sale of Real Estate.*** Lands may be sold by the executor or administrator (personal representative) with the will annexed, for the payment of debts when the will otherwise gives no power to sell. [§ 43-2-441]. This is also true when the deceased dies intestate. [§ 43-2-442]. However, in those instances there must be court approval prior to the selling of real property. [§ 43-2-844]. If the lands of an estate cannot be equitably divided among the heirs or devisees, it can be sold by order of the probate court having jurisdiction of the estate, upon written consent of an adult heir or devisee. [§ 43-2-443].

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<sup>2</sup>In case law, perishable property, has been described as follows: “all that is necessary to be shown is that the property in the hands of the court is likely to waste or be destroyed by keeping. In other words, quoting from the foregoing case, “If it is shown that, by keeping the article, it will necessarily become, or is likely to become, worthless to the creditor, and by consequence to the debtor, ...” [116 Ala. 224, 22 So. 579], then it does not matter what the subject matter is. ‘It [can] be cotton bales, live stock, hardware, provisions, or dry goods.’ *McCreery v. Berney National Bank*, supra.” *McCullough v. McCullough*, 269 Ala. 417, 420, 113 So. 2d 499, 501 (Ala. 1959).

**s. *The Application for Sale of Land.*** The application for the sale of lands either for the payment of debts or for division must be made by the executor or administrator (personal representative) in writing verified by affidavit to the probate court. The application must describe the lands accurately and must give the names of the heirs or devisees and the places of their residences. The application must also state whether any of the heirs or devisees are under the age of 19 or of unsound mind, and it must name those heirs. [§ 43-2-444]. The probate court must appoint a day, not less than 30 days from the time of the making of the application, for hearing the application, and in the event heirs are either minors or of unsound mind, must appoint a guardian ad litem to represent the infirmed party or parties. The guardian ad litem and all adult heirs or devisees, must be notified at least ten days prior to the day set for the hearing. [§ 43-2-445]. Following the hearing of the application by the executor or administrator (personal representative), the court may direct a sale of all or such portion of the real estate as may be necessary to pay the debts, if the power is not otherwise provided. [§ 43-2-450]. A deed or patent is sufficient evidence to authorize the court to proceed to hear the application. [§ 43-2-453]. Unless the probate court has taken evidence by deposition showing the necessity of the sale, no order for sale may be granted when minors or persons of unsound mind or possible unknown parties exist, whether or not the allegations in the petition are denied by the appointed guardian. [§ 43-2-452].

Notice of the sale for three weeks by either publication or posting is required. [§ 43-2-455].

**t. *Report and Examination of Sale.*** The executor or administrator (personal representative) must within 30 days after a sale report on oath the proceedings to the court, indicating the pecuniary interest of the executor or administrator (personal representative), if any, in the sale. The probate court is to examine the sale and examine any witnesses relating to the sale. [§ 43-2-459]. If it appears from the report of either the administrator or executor (personal representative) that he was directly or indirectly the purchaser at the sale or otherwise had an interest adverse to the heirs, the probate court shall set a day for hearing the report. All parties are to be given ten days' notice of the hearing. [§ 43-2-460].

**u. *Vacation of Sale When Deemed Unfair.*** In the event the court is satisfied that the sale was conducted unfairly or that the amount for which the land was sold is greatly less than its real value, the probate court has the authority to vacate the sale either in whole or in part. Likewise, should the court confirm that the sureties taken on notes or bonds of the purchasers or the security given is insufficient, the sale may not be confirmed until sufficient security for the purchase money is given to satisfy the court. If such security is not given within ten days, the sale must be vacated as to the purchaser.

When any sale of land is vacated, in whole or part, the probate court must direct another sale in accordance with the general procedure as outlined above. [§ 43-2-461].

**v. Confirmation of Sale.** If the court is satisfied with all aspects of the sale, an order of confirmation is to be made ten days after the report is filed. [§ 43-2-462]. The executor or administrator (personal representative) must report to the probate court the payment of purchase money for land sold on credit within 30 days following such payment. [§ 43-2-463]. Upon such report of payment of purchase money, the court must order a conveyance to be made to such purchaser. [§ 43-2-464].

**w. Citation to Report Sale of Land.** Should the executor or administrator (personal representative) fail to properly report the sale of any land, the purchaser, on a motion in the probate court, may have a citation issued requiring the executor or administrator (personal representative) to appear before the probate court within 20 days of service to report the sale. In the event the executor or administrator (personal representative) fails to appear following the issuance of the citation, the probate court is to review all aspects of the sale on the day set or other day set by the court to determine if it was regular and fair. The probate court, upon a determination that all aspects of the sale were proper and the purchase money was paid by the purchaser, must authorize a conveyance of title to the land to the appropriate purchaser. [§ 43-2-465].

**x. Resignation, Death, or Removal of an Administrator or Executor (Personal Representative).** An executor or administrator (personal representative) may resign by submitting a written resignation to be filed and entered on the record in the court having jurisdiction of the matter. [§ 43-2-270]. The probate court having jurisdiction of the estate may grant letters of administration in case of intestacy or letters of administration with the will annexed should an administrator or executor (personal representative) die, resign, or be removed. [§ 43-2-272]. Grounds for removal of an administrator or executor (personal representative) include: imbecility; intemperance; sickness rendering the individual incapable of discharging required duties; failure to do any act when lawfully required by the judge of probate; maladministration of the estate; the use of estate funds for personal benefit, or a prison or jail sentence of 12 or more months. [§ 43-2-290 and § 43-2-291].

**y. Successor Personal Representative.** A successor personal representative has the same power and duty as the original personal representative except as to any power made expressly personal to the personal representative named in the will. [§ 43-2-845].

**z. Compensation of Personal Representatives.** The personal representative is entitled to reasonable compensation for his or her services. Factors to be considered by the court in

determining the amount include such things as the difficulty and novelty of the estate, the skill required to perform the service, the customary fee charged in that locality, the amount involved and the results obtained, the nature and the length of the professional relationship with the decedent, the experience, reputation, diligence and ability of the personal representative. Additional factors are also enumerated in Section 43-2-848.

Nevertheless, the fee shall not exceed two and a half percent of the value of all the property received and under the possession and control of the personal representative, and two and a half percent of all disbursements. However, the court may allow reasonable compensation for any extraordinary service performed for the estate. [§ 43-2-848].

Notwithstanding the foregoing, the decedent or all of the affected beneficiaries can agree in writing with the personal representative as to the amount or the method for determining the compensation for the personal representative. This agreement will be binding on all parties provided that the agreement is not unconscionable. [§ 43-2-848]. The court may allow compensation or attorney fees up to the time of settlement. [§ 43-2-682].

Payment of compensation to a personal representative without prior court approval be must be *expressly* authorized by the will. [§ 43-2-844(7); *Wehle v. Bradley*, 49 So. 3d 1203 (Ala. 2010), distinguished by *Ruttenberg v. Friedman*, 97 So. 3d 114 (Ala. 2012)].

## **H. SMALL ESTATES ACT**

A surviving spouse or person who is to inherit all or a portion of an estate is entitled to the property of a decedent without waiting for the appointment of a personal representative or the probate of will if all of the following conditions exist:

- (1) The value of the entire estate does not exceed \$25,000 (amount adjusted annually to reflect adjustments in the Consumer Price Index);
- (2) The decedent died a resident of the state of Alabama;
- (3) No petition for the appointment of a personal representative is pending or has been granted;
- (4) At least 30 days have elapsed since the notice of the filing of the petition was published as hereinafter provided.;
- (5) All funeral expenses of the decedent have been paid or arrangements have been made by the surviving spouse or distributee to pay for such;
- (6) When the decedent died intestate, the awards due under the Alabama descent and distribution statute have been determined by the judge of probate;

- (7) When the deceased died testate, the document purported to be the will must be properly executed on its face, witnessed and attested in compliance with Alabama law and filed in the judge of probate's office;
- (8) Notice of the filing of a petition for summary distribution must be published one week in a newspaper of general circulation in the county in which the decedent was domiciled, or if there is no newspaper of general circulation in the county, then notice must be posted at the county courthouse for one week; and
- (9) All the claims against the decedent's estate have been paid or arrangements for the payment out of the estate of the decedent have been made by the surviving spouse or other distributee according to the following schedule of priority:
  - a. Funeral expenses;
  - b. Judges of probate fees;
  - c. Expenses incurred in the decedent's last illness
  - d. Taxes (state, county and municipal) which accrued prior to decedent's death;
  - e. To secured creditors;
  - f. To unsecured lienholder;
  - g. To each remaining general unsecured creditor of the decedent; then
  - h. To those entitled to take under descent and distribution or to each devisee entitled to take under any testamentary disposition of the decedent.

[§ 43-2-692]. When all the above conditions occur, the judge of probate shall enter an order directing summary distribution of the estate. [§ 43-2-693].

**a. Bank Accounts of Deceased Depositors.** When a decedent dies leaving \$5,000 or less deposited in a bank, the bank, at its discretion, may pay the funds to:

- (1) The surviving spouse directly, or
- (2) If there is no spouse, to the adult children, or
- (3) To the person having the actual custody and control of the minor children of the deceased.

If the person having custody of the minor child(ren) is not the legal guardian of the child(ren), a bond must be approved by the judge of probate in double the amount of the deposit to be paid over by the bank.

In the event there is no surviving spouse or children, a bank may pay to the person who is the next of kin of the deceased and who would inherit this personal property under the law of distribution. For the bank to be fully protected, an affidavit of a reputable citizen as to the facts of death of the depositor and the family relationship between the deceased and the party receiving the deposit is required.

Payment of a deceased depositor's account is limited under this provision. First, the bank cannot pay if the accounts of the deceased total more than \$5,000. Second, no payment may be made by the bank before the lapse of 60 days from the date of the depositor's death. Finally, this provision is inapplicable if letters testamentary or letters of administration have been issued to a personal representative or if a proceeding is pending in a court having jurisdiction of the estate. [§§ 5-5A-38 and 5-5A-39].

### **I. ADVANCEMENTS**

A duty closely related to the administration of estates is the judge of probate's authority to receive petitions, conduct the necessary proceedings, and decide on advancements made from an estate. [§§ 43-8-50 through 54].

### **J. EXEMPTIONS**

The judge of probate may receive petitions and conduct necessary proceedings on claims for exemptions from executions, attachments and garnishments. As part of this jurisdiction, the judge of probate has authority to receive petitions claiming a homestead or other exemption, to conduct the necessary proceedings, and to grant final decrees awarding the exemption when justified. The procedures to be followed are outlined in the following sections: claim and contest of exemptions, Sections 6-10-20 through 43 (*see* Section 6-10-21 concerning recordation); exemption from administration and payment of debts, Sections 43-8-110 through 115; and exemptions to surviving spouses and minor children, Sections 6-10-80 through 107. Sections 6-10-80 through 107 set forth the procedure to follow for the appointment of appraisers and the procedure to follow for the hearing.

### **K. PROPERTY AND CONVEYANCES**

The judge of probate will invariably be confronted with matters related to property and conveyances. Some actions will be related to records, while others will be in relation to proceedings in court.

*a. General.* The judge of probate has authority to partition personal, real or mixed property held in joint ownership, and to partition or permit the sale of crops held in joint ownership upon application. Property held by joint tenants may be partitioned, decrees may be issued for the sale of property for distribution, and crops may be partitioned among joint tenants.

Information on both property and conveyances is found in Title 35 of the Code. The provisions regarding partition in probate court are explained in Sections 35-6-40 through 66; recordation and registration generally, Sections 35-4-50 through 76; recordation necessary as to purchasers, mortgagees, and judgment creditors, Sections 35-4-90 through 98; lost or unclaimed property; Sections 35-12-1 through 6; 35-12-70 through 96; and liens, Sections 35-11-1 through 454.

***b. Proof of Value.*** In 2012, Section 40-22-1 was amended to require a person presenting a deed, bill of sale, or other instrument conveying any real or personal property within this state or any interest in any such property to the judge of probate for recording to present proof of the actual purchase price of property *or* actual value of the property. [Alabama Act 2012-494]. If proof is not presented, the privilege or license tax will be based upon the assessed value of the property *and* the person failing to submit the required proof shall be subject to monetary penalties for failure to comply with the law. [Alabama Act 2012-494; § 40-22-1].

Subsection (h) provides: Any person who submits an instrument for recording pursuant to this section and intentionally fails to submit proof of the value of the property or the actual purchase price paid for the property as required in subsection (c) following a specific request for such proof from the probate office or who presents false proof of same, in addition to payment of the tax due as calculated on the actual value of the property, shall pay a penalty of one hundred dollars (\$100) or 25 percent of the privilege or license tax actually due, whichever is greater. The judge of probate shall assess penalties as set out in subsection (h) to be paid in addition to the tax due. [§40-22-1].

## **L. GUARDIANSHIPS**

Under the format developed by the Alabama Uniform Guardianship and Protective Proceedings Act, the responsibility of care for the person is under the guardianship provisions and the responsibility for the care of one's property is under the conservator provisions. [§§ 26-2A-1 through 26-2A-160]. Generally speaking a guardian is responsible for food, clothing, medical, and shelter issues relating to a minor or incapacitated adult.

***a. General.*** The provisions relating to the guardian of the person are generally divided into guardians of minors and guardians of incapacitated persons. [§§ 26-2A-72 through 26-2A-111]. The guardians appointed under guardianships prior to January 1, 1988 have all of the same powers as guardians and conservators under the Alabama Uniform Guardianship and Protective Proceedings Act. [§ 26-2A-8].

At any point in a proceeding, a court may appoint a guardian ad litem, who must be an attorney, to represent the interest of a minor or other person if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. [§ 26-2A-52.] Generally, fees for the guardian ad litem are paid from the estate. However, if the Department of Human Resources is the petitioner the guardian ad litem's fees for representation of incapacitated person are properly taxed to the county department of human resources (DHR) as costs in the event the assets of the estate in a protective proceeding or in a guardianship proceeding are insufficient to pay them. [§ 26-2A-142; *Calhoun County Dept. Of Human Resources v. Frye*, 74 So. 3d 958 (Ala. Civ. App. 2011)].

**b. Delegation of Parental Powers.** A parent or guardian of a minor or incapacitated person may delegate temporary powers regarding health, support, education or maintenance of the person or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward. This may be accomplished by a properly executed power of attorney. [§ 26-2A-7].

**c. Testimony.** Generally, witness testimony must be taken in open court. [Ala. Rule of Civ. Pro. 43(a)]. In *Greener v. Killough*, 1 So.3d 93 (Ala. Civ. App. 2008) the court stated that a probate court exceeded its discretion by allowing a physician to testify by telephone in a hearing on a daughter's petition to be appointed guardian and conservator for her mother. However, in a footnote, the court stated, "Nothing in this opinion should be construed as preventing the parties from "taking testimony by agreement in a manner different from ... [the manner] provided [in Rule 43(a)] unless the court limits or prohibits such agreed manner." Rule 43(a), Ala. R. Civ. P. (emphasis added). We merely hold that in the absence of an agreement of the parties to accept testimony by telephone, the trial court has no discretion to allow testimony by that means."

**d. Guardian of Minors.**

**1. Appointment.** A person may become a guardian of a minor by either parental appointment or by appointment by the court. [§ 26-2A-70]. A parent may appoint a guardian for their unmarried minor by either a will or other writing that is signed by the parent and attested to by two witnesses. [§ 26-2A-71]. A parental appointment becomes effective under the enumerated circumstances under the statute, such as when there is no surviving parent who has parental rights and the guardian files an acceptance with the court. [§ 26-2A-71].

**2. Objection by Minor of Fourteen or Older to Parental Appointment.** A minor who is 14 years of age or older may prevent a parental appointment or cause it to terminate

by filing a written objection to the appointment with the probate court. However, the court may in a later proceeding appoint the parental nominee or any other suitable person. [§ 26-2A-72].

**3. Court Appointment of Guardian.** When there is no parent having parental rights of a minor, a guardian may be appointed by the court. A parental appointment has priority. However, if the parental appointee fails to file an acceptance of the appointment within 30 days, the court may proceed in making another appointment. [§ 26-2A-73].

The court may appoint a temporary guardian even if all parental rights have not been terminated. The temporary guardian has the full authority of a general guardian. Nevertheless, the temporary guardianship may not last more than six months. [§ 26-2A-73].

**4. Venue.** The venue in a guardianship proceeding is where the minor resides or is present at the time of the filing of the proceedings. [§ 26-2A-74].

**5. Procedure, Duties and Terminations.** Section 26-2A-75 establishes the procedure for the court appointment of guardians. If the minor is 14 years of age or older, the court shall appoint the person nominated by that minor unless that appointment would be contrary to the child's best interest. [§ 26-2A-76].

The powers and duties of the guardian are enumerated in Section 26-2A-78 of the Code of Alabama. Sections 26-2A-79 through 26-2A-81 of the Code of Alabama provides for termination, resignation and removal of guardians.

**e. Guardians of Incapacitated Persons.** An incapacitated person is someone who is incapable of handling their financial affairs because of mental illness or deficiency, physical illness or disability, aging, drug use or other similar causes. [§ 26-2A-208].

**1. Appointment.** A guardian for an unmarried, incapacitated person may be appointed by a parent by will or other writing signed by the parent and attested to or acknowledged by at least two witnesses. The spouse of a married, incapacitated person may appoint a guardian for the incapacitated person by a will or other writing which is signed by the spouse and attested to or acknowledged by at least two witnesses. [§ 26-2A-100].

**2. Jurisdiction.** In 2010, the Legislature passed the Alabama Uniform Adult

Guardianship and Protective Proceedings Jurisdiction Act. [Alabama Act 2010-500 §§ 26-2B-101-503]. This Act determines which state has jurisdiction over interstate adult guardianship cases. [§§ 26-2B-101-503]. It also provides that Alabama can decline to exercise jurisdiction if Alabama acquired jurisdiction based on unjustifiable conduct or may decline jurisdiction if Alabama determines that another state is a more appropriate forum. [§ 26-2B-207, § 26-2B-206].

The act provides for a transfer of a guardianship or conservatorship to another state from Alabama. [§ 26-2B-301]. The act provides for a transfer of a guardianship or conservatorship from another state to Alabama. [§ 26-2B-302].

**3. Venue.** The venue is the place where the incapacitated person resides or is present at the time of the commencement of the proceedings. And, if the incapacitated person is admitted to an institution pursuant to a court order, venue can also be in the county in which the court is located. [§ 26-2A-101].

**4. Procedure and Notice.** An incapacitated person or an interested person may petition for the appointment of a limited or general guardian. The court shall appoint an attorney to represent the incapacitated person unless he or she already has counsel. [§ 26-2A-102].

Notice and other aspects of the proceeding are covered under Sections 26-2A-102 and 26-2A-103 of the Code. Notice must be served personally on the alleged incapacitated person who may not waive notice.

**5. Priorities and Duties.** Section 26-2A-104 provides a numerical listing of priorities for guardianship with the spouse and other relatives having the highest priority. Nevertheless, unless for good cause, the court shall appoint as guardian the person nominated in the incapacitated person's most recent durable power of attorney. [§ 26-2A-104].

A private non-profit corporation can be appointed as guardian for a person designated as "developmentally disabled" and determined by the probate court as needing some degree of guardianship. Developmentally disabled is defined as a person whose impairment of general intellectual functioning manifested by age 22 and resulted in mental retardation, cerebral palsy, epilepsy or autism. Furthermore, the private non-profit corporation's board is required to have a minimum 35% of its membership representing parents or siblings of persons with developmental disabilities. The corporation must also

be set up to provide a lifetime of service to those persons placed under its care. [§ 26-2A-104.1].

The general powers and duties of guardians are also enumerated. [§ 26-2A-105].

**6. *Temporary Guardian.*** If an emergency exists and an incapacitated person has no guardian and no other person appears to have authority to act, the court, without notice, may appoint a temporary guardian. Generally, the authority of a temporary guardian may not extend beyond 30 days. [§ 26-2A-107]. However, under the Alabama Uniform Adult Guardianship Act, when issues concerning interstate jurisdiction exist, an emergency guardian can be appointed for up to 90 days. [§ 26-2B-204].

Moreover, if an appointed guardian is not effectively performing his or her duties, the court may appoint a temporary guardian for a period not to exceed six months. [§ 26-2A-107].

**7. *Corporate Guardians for Developmentally Disabled.*** An Alabama private non-profit corporation that is qualified under the Internal Revenue Code as a 501(c)(3) tax exempt corporation may be designated to serve as a guardian for a person with developmental disabilities. The Alabama Department of Mental Health is required to assist the courts in the implementation of this new law and is required to develop guidelines for the provisions of services to be performed by the corporation under this section. [§ 26-2A-104.1].

***f. Alabama Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.*** [§§ 26-2B-101–503].

**1. *Communication Between Courts.*** A court of this state may communicate with a court in another state concerning a proceeding arising under this act. The court may allow the parties to participate in the communication. If the parties are not allowed to participate in the communication, the court shall give all parties the opportunity to present facts and legal arguments before the court issues an order establishing jurisdiction. [§ 26-2B- 104].

Except for communications concerning schedules, calendars, court records, and other administrative matters:

- (a) the court shall make a record of any communication under this section; and
- (b) promptly inform the parties of the communication and grant them access to

the record. [§ 26-2B- 104].

**2. Cooperation Between Courts.** An Alabama court may request another state court to do any of the following:

- (a) hold an evidentiary hearing;
- (b) order a person in that state to produce evidence or give testimony;
- (c) order an evaluation or assessment of the respondent;
- (d) order an investigation of a person involved in a proceeding;
- (e) forward to our court a certified copy of the transcript or other record of a hearing, any evidence, evaluation or assessment, etc.;
- (f) issue orders to assure the appearance of necessary persons;
- (g) issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state. [§ 26-2B-105].

**3. Taking Testimony in Another State.** The court on its own motion may order that the testimony of an out-of-state witness be taken in another state and may prescribe the manner and the terms upon which the testimony is to be taken. For example: testimony of an out-of-state witness may be offered by deposition. A witness may be deposed or testify by telephone or audiovisual or other electronic means. [§ 26-2B-106].

**4. Definitions; Significant Connection Factors.** “Home state” is the state in which the respondent was physically present, including temporary absences, for at least six consecutive months immediately before the filing of the petition; (or if no state meets that criteria, where the respondent was physically present, including any temporary absences, for six consecutive months prior to that time) “Significant-connection state” is a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available. [§ 26-2B- 201].

**5. Jurisdiction.** When the jurisdiction is contested, the proceeding may be removed to circuit court by the court’s own motion or in accordance with Section 26-2-2. This provision does not limit the jurisdiction of Alabama probate courts with Equity Jurisdiction. [§ 26-2B- 203].

**6. Special Jurisdiction.** A court of this state lacking jurisdiction under Section 26-2B-203 has special jurisdiction to do any of the following:

- (a) appoint an emergency guardian for a respondent who is physically present in this state (not exceeding 90 days);
- (b) issue a *protective order* with respect to real or tangible personal property located in this state;
- (c) appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to Section 26-2B-301.

If Alabama was not the respondent's home state on the date the petition for an emergency guardian was filed, the court shall dismiss the proceeding at the request of the court of the home state (whether dismissal is requested before or after the emergency appointment).

The court may entertain successive petitions based upon its special jurisdiction under this section provided that the court receives no request for dismissal from the court of the respondent's home state and the court determines that the need for guardianship and/or conservatorship under this section continues. [§ 26-2B-204].

**7. *Appropriate Forum.*** An Alabama court may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum. If Alabama declines to exercise its jurisdiction under subsection (a), it shall either dismiss or stay the proceeding.

The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state. [§ 26-2B-206].

**8. *Jurisdiction Declined by Reason of Conduct.*** If Alabama determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may:

- (a) decline to exercise jurisdiction;
- (b) exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, (including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction); or

- (c) continue to exercise jurisdiction. [§ 26-2B-207].

**9. Information to Be Submitted to Court.** Except as otherwise provided in this section, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the respondent's present address or whereabouts, the places and addresses where the respondent has lived during the last five years. The affidavit required by this section is based upon the UCCJEA affidavit (child custody).

As noted in the comments to that code provision, this provision allows for the nondisclosure of information when disclosure might place the incapacitated individual at risk.

Use of the particular form in the commentary is not mandated, however, the content is mandated. [§ 26-2B-210].

**10. Transfer of Guardianship or Conservatorship to Another State.**

- (a) **Notice.** Notice of a petition must be given to the persons that would be entitled to notice of a petition in Alabama for the appointment of a guardian or conservator under current law. On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition to transfer to another state. [§ 26-2B-301].
- (b) **Provisional Order.** The court shall issue a provisional order provisionally granting a petition to transfer a guardianship or conservatorship; and shall direct the guardian to petition for guardianship or conservatorship in the other state if the court is satisfied that the guardianship or conservatorship will be accepted by the court in the other state and the court finds that:
  - (1) protected person will move permanently to other state or has significant connections to other state;
  - (2) no objection to transfer or transfer not contrary to interest of protected person; and
  - (3) adequate arrangements have been made for protected person's property. [§ 26-2B-301].
- (c) **Guardian Ad Litem.** The court may appoint a guardian ad litem to represent the respondent and may require prepayment of the guardian ad litem fees. [§ 26-2B-301].

**11. *Accepting Guardianship or Conservatorship Transferred from Another State.***

- (a) **Notice.** Notice of the petition must be given:
  - (1) To the same persons who would be entitled to notice in Alabama and the transferring state; and
  - (2) Same manner as notice is required to be given in Alabama. [§ 26-2B-302].
- (b) **Hearing.** The court shall hold a hearing on the petition on request of:
  - (1) the guardian or conservator;
  - (2) the incapacitated or protected person;
  - (3) or other person required to be notified of the proceeding; or
  - (4) on the court's own motion. [§ 26-2B-302].
- (c) **Petition.** The petition must include the following:
  - (1) a certified copy of the other state's provisional order of transfer.
  - (2) an inventory of the protected person's estate as of the date of the petition
  - (3) proof of the conservator's bond; and
  - (4) final accounting. [§ 26-2B-302].
- (d) **Provisional Order.** The court shall issue a provisional order granting the petition filed unless:
  - (1) an objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or
  - (2) the guardian or conservator is ineligible for appointment in Alabama.
  - (3) petitioner fails to comply with the provisions of subsection (a). [§ 26-2B-302].
- (e) **Final Order.** The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in Alabama:
  - (1) upon its receipt a final transfer order from the other state; and
  - (2) proof or compliance with Alabama's bond law. [§ 26-2B-302].
- (f) **Modification.** Not later than 90 days after issuance of a final order accepting transfer, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state. Such modification may include, among other things, an inventory or an

accounting as required pursuant to Alabama law. [§ 26-2B-302].

- (g) **Form.** A sample “General Information and Asset Summary Sheet” is in the Alabama Comment. Although the use of this specific form is not mandated by this section, it is designed to provide the court with some of the information required under subsection (a). [§ 26-2B-302].

**12. Recording and Recognition of Orders from Other States.** An out-of-state guardian or conservator may record an order in Alabama by recording certified copies of the order and letters of office as a foreign judgment in an Alabama court:

- (a) after giving notice to the appointing court of their intent to register; and  
(b) if a petition for the appointment of a guardian or conservator is not pending in Alabama. [§§ 26-2B-401 and 402].

**13. Effect of Recording.** After recording the out-of-state guardian or conservator may exercise in Alabama all the powers authorized under Section 26-2A-160 (Foreign conservator). [§ 26-2B-403].

**g. Guardian for Incompetent Veteran.**

**1. To Receive Veterans' Benefits.** Whenever the Veterans' Administration requires that a guardian be named for a veteran ward before the United States will pay any benefits, the procedure for such appointment and the limitations of the appointment are set forth in Sections 26-9-1 through 26-9-19 of the Code of Alabama.

**2. Commitment of Incompetent Veterans to Veterans' Hospital.** Any incompetent veterans who are eligible for treatment in a United States Veterans' Hospital may be directed by an Alabama court to a Veterans' Hospital for treatment. [§ 26-9-13].

**3. Sale and Purchase of Real Estate.** The guardian of the veteran ward may invest the ward's funds by making real estate loans and may purchase a home or farm for the ward. The title to the land is held in the name of the ward. Any real property purchased by the guardian for the ward must be free and clear from any encumbrance. [§ 26-9-10].

**h. Guardian for Handling Funds from Governmental Entities.** A recipient of social security or other public assistance who appears to be physically or mentally incapable of managing his or her monthly assistance payments and who has no guardian may have a legal representative appointed to receive and disburse the recipient's assistance payments. This is done through a

petition to the judge of probate with the approval of the Alabama Department of Human Resources. [§ 38-1-3].

It is important to note that the Social Security Administration takes the position that it is not bound by the court appointments of a state judge of probate. While they often accept the court appointed guardian or conservator, they have their own rules and procedures to appoint a representative payee for social security payments.

### M. CONSERVATOR OF PROPERTY

**a. In General.** The Alabama Uniform Guardianship and Protective Proceedings Act distinguishes between a guardian of the person and a conservator of the estate of a minor or incapacitated person. (The duties of a guardian appointed prior to January 1, 1988, relating to the property of a ward will be performed by a conservator. Curators appointed under Chapter 26-7A (repealed) are considered conservators after January 1, 1997 and have the powers and duties of a conservator pursuant to Chapter 26-2A subject to limits imposed by the court on the curator.) [§ 26-2A-9].

Upon petition and after notice and hearing in accordance with the provisions of the act, the court may appoint a conservator. [§ 26-2A-130].

**b. Removal.** A guardianship proceeding may be removed from probate court to circuit court at any time prior to final settlement by the guardian, guardian ad litem, next friend of the ward, or anyone entitled to support out of the estate of the ward. [§ 26-2-2]. Under limited circumstances, the circuit court may remand the case back to the probate court, but only in those counties where the judge of probate is required to be learned in the law. [§ 26-2-3]. The removal of a conservatorship proceeding from probate court to circuit court is governed by the statute addressing the administration or conduct of any guardianship or conservatorship, not the statute governing the removal of administration of estates from probate court. [*Hoff v. Goyer*, 107 So. 3d 1085 (Ala. 2012); § 26-2-3].

**c. Venue.** Venue is where the protected person resides or in any place where the property of the protected person is located if that person does not reside within Alabama. [§ 26-2A-101].

**d. Petition, Notice and Hearing.** The petition must furnish the court with certain information which is in the statute. [§ 26-2A-133]. The provisions for notice and hearing are quite specific. [§§ 26-2A-134 and 26-2A-135].

Among others, notice must be given to the person alleged to be incapacitated, his or her spouse, and adult children, or if none, his or her parents. Notice must be served personally on the alleged incapacitated person. Notice to other persons as required by subsection (a)(1) must be served personally if the person to be notified can be found within the state. In all other cases, required notices must be given as provided in Section 26-2A-50(d). The person alleged to be incapacitated may not waive notice. [§ 26-2A-103]. If the incapacitated person is a minor, the following must also be given notice: (1) the minor if 14 years old or older; (2) the person having the principal care of the minor; and (3) the parents of the minor. [§ 26-2A-75].

**e. Court's Protective Powers.** The court is to use its extensive powers of the protected person's estate in a manner to encourage the development of maximum self-reliance and independence of a protected person. [§ 26-2A-136].

After establishing the necessity for a conservator, the court is authorized to make protective arrangements for the protected person's property without appointing a conservator. The court may appoint a special conservator to assist with the protective arrangements. [§ 26-2A-137]. The court may also authorize the transfer of oil, gas, and other mineral rights of a protected person without appointing a conservator. [§ 26-2A-137(b)].

**f. Testimony.** Generally, witness testimony must be taken in open court. [Ala. Rule of Civ. Pro. 43(a)]. In *Greener v. Killough*, 1 So.3d 93 (Ala. Civ. App. 2008) the court stated that a probate court exceeded its discretion by allowing a physician to testify by telephone in a hearing on a daughter's petition to be appointed guardian and conservator for her mother. However, in a footnote, the court stated, "Nothing in this opinion should be construed as preventing the parties from "taking testimony by agreement in a manner different from ... [the manner] provided [in Rule 443(a)] unless the court limits or prohibits such agreed manner." Rule 43(a), Ala. R. Civ. P. (emphasis added). We merely hold that in the absence of an agreement of the parties to accept testimony by telephone, the trial court has not discretion to allow testimony by that means."

**g. Priorities.** Section 26-2A-138 establishes priorities for appointment as a conservator. A person within several of the categories of priorities may designate a substitute and transfer the priority to the substitute. The court may select a conservator with a lower priority if it is in the best interest of the protected person. [§ 26-2A-138].

**h. Bond.** The court must require a conservator to post bond unless the protected person had specifically exempted the conservator from giving bond in the document nominating the conservator. The judge of probate may incur personal liability for failing to order a required bond or for ordering an insufficient bond. Generally, the bond must be in an amount of the aggregate

capital value of property within the conservator's control, plus one year's estimated income, and minus the value of the securities or land which the conservator cannot sell or convey without court authorization. [§ 26-2A-139].

*i. Compensation.* Conservators, attorneys and others are entitled to reasonable compensation from the estate for the services they have rendered. [§ 26-2A-142].

*j. Inventory, Records and Accounts.* Within 90 days after appointment, a conservator shall prepare and file a complete inventory of the estate subject to the conservatorship. A copy shall be furnished to a protected person who is at least 14 years old if practicable. The parent or guardian with whom the protected person resides shall also be given a copy. [§ 26-2A-146]. The conservator must give an accounting to the court at least every three years. [§ 26-2A-147].

*k. Title to Property.* The appointment of a conservator vests in the conservator title as trustee to all of the property of the protected person in the conservator, or to the part of the property specified in the order. This includes the title to any property currently held or thereafter acquired and includes previously held property for the protected person. [§ 26-2A-148].

*l. Recording of Conservator's Letters.* Subject to the general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give record notice of title between the conservator and the protected person. [§ 26-2A-149].

*m. Conflict of Interest.* The sale to or purchase from a conservator, spouse, agent or attorney of a conservator, any person related to a conservator by blood or marriage within the fourth degree, or any corporation, trust or other organization in which a conservator has a substantial beneficial interest is voidable unless approved by the court. [§ 26-2A-150].

*n. Powers.* Section 26-2A-152 of the Code of Alabama divides the powers of a conservator into (1) actions that may be taken without court authorization or confirmation, and (2) actions that require court authorization. This section should be carefully reviewed prior to performing any action relating to real property. Furthermore, two additional sections concerning conservator's powers should also be reviewed. They are as follows:

§ 26-2A-153 Distributive Duties and Powers of a Conservator.

§ 26-2A-154 Enlargement or Limitation of Powers of a Conservator.

***o. Standard of Care and Performance.*** A conservator is required to use the same standard of care in his or her dealings that would be exercised by a prudent person dealing with the property of another. However, if a conservator has special skills or is appointed as a conservator on the basis of representations of special skills or expertise, the conservator is under a duty to use those skills. [§ 26-2A-145].

***p. Failure of Conservator to Obey Process to Appear and File Accounts and Vouchers.*** If a conservator fails to obey any court order requiring him or her to appear and file his or her accounts and vouchers for a final or partial settlement, the probate court may, by attachment, compel his or her appearance and may, if on appearance he or she refuses to file such accounts and vouchers or to show good cause for his or her omission, imprison him or her for a period not exceeding six months. [§ 26-5-35].

## **N. HEARINGS FOR COMMITMENT TO MENTAL INSTITUTIONS**

***a. Petition for Hearing.*** When any person desires to have another person involuntary committed to the custody of the Alabama State Department of Mental Health or other such facility, a petition executed under oath must be filed with the judge of probate of the county in which the respondent, the person who is the subject of the hearing, is located. The petition must contain:

- (1) The name and address of the respondent;
- (2) The name and address of the respondent's spouse, legal counsel or next of kin, if known;
- (3) The reason the petitioner believes the respondent is mentally ill;
- (4) A detailed description of specific acts, behavior, or threats evidencing the person's mental illness and threat of harm to himself or others; and
- (5) The names and address of other persons with knowledge of such person's mental illness who could be called as a witness; [§ 22-52-1.2] and
- (6) The petition may be accompanied by any other relevant affirmation.

***b. Review of Petition by Judge of Probate.*** The judge of probate is required to review such petitions immediately and require the petitioner to be sworn and answer under oath questions regarding the petition and the person sought to be committed. The judge will order the petition dismissed without further proceedings if it appears from either the petition or testimony that the petition is totally without merit. [§ 22-52-2].

**c. Service of Notice by Sheriff.** When the petition has been reviewed, the judge of probate is to order the sheriff of the county where the respondent is located to serve the respondent with a copy of the petition and the order for a hearing. This notice must include:

- (1) The time, date, and place of the hearing;
- (2) Clear statement of the purpose and possible consequences of the proceedings;
- (3) Alleged factual basis for the proposed commitment;
- (4) Statement of the legal standards on which commitment is authorized; and
- (5) List of names and addresses of possible witnesses.

Adequate notice of a hearing must be given to the respondent. [§ 22-52-3].

**d. Appointment of Attorney and Guardian Ad Litem for Persons Sought to Be Committed.** When the petition has been filed, the judge of probate must appoint a guardian ad litem to represent and to protect the rights of the respondent. If the judge of probate determines that the respondent either lacks the funds with which to employ an attorney or the mental ability to secure the services of an attorney, the judge of probate is responsible for appointing an attorney to represent the person. The attorney may be the same person as the guardian ad litem. The judge of probate shall immediately inform the attorney of his appointment. No statement made or act done by the respondent in the presence of the judge of probate prior to obtaining an attorney shall be considered by the judge of probate in determining whether the respondent should be committed. [§ 22-52-4].

The judge of probate is also required to appoint an attorney to serve as the advocate in support of the petition to commit and in all related matters. Such attorney is unnecessary in the event that the person or persons filing the petition employ an attorney to appear in support of the petition. [§ 22-52-5].

The Alabama Department of Mental Health or designated mental health facility must be informed of the pendency of the petition and the date of the final hearing to commit. [§ 22-52-6].

**e. Person to Be Committed Brought Before Judge of probate.** When a petition has been filed seeking to have limitations placed upon the liberty of a respondent pending the outcome of a final hearing on the merits, the judge of probate is to order the sheriff of the county where the respondent is located to serve a copy of the petition upon the respondent and bring the respondent before the judge of probate immediately. The judge of probate is then to determine from an interview with the respondent and other available persons, what limitations if any should be imposed on the person's liberty and if any temporary treatment is required pending further hearings. If limitations on the respondent's liberty is ordered, the judge of probate may order the

respondent detained at a designated mental health facility or hospital. [§ 22-52-7].

**f. When Limitations on Liberty Permitted Pending Final Hearing.** No limitation is to be placed on such person's liberty nor treatment imposed unless it is necessary to prevent a person from doing substantial and immediate harm to himself or others, or to prevent the respondent from leaving the jurisdiction of the court. The respondent is not to be placed in a jail or other detention facility for persons accused or convicted of committing crimes. [§ 22-52-7]. *See Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984).

**g. Medical Examination Can Be Ordered.** The judge of probate is authorized to order medical or mental health examination of the respondent and order the sheriff to compel such attendance at designated times or places. If temporary treatment or admittance to a hospital is ordered, such treatment shall be supervised by a licensed medical doctor or qualified mental health professional who has willingly consented to admit and treat the respondent. [§ 22-52-7].

**h. When Probable Cause Hearing Held.** When a respondent sought to be committed has any limitation imposed upon his liberty or temporary treatment imposed, the judge of probate is to set a probable cause hearing within seven days of such imposition. If the judge of probate finds that probable cause exists and that such respondent should be detained temporarily, and, further, that temporary treatment would be in the best interest of the respondent, an order stating such and setting the date, time and place of a final hearing on the merits must be entered. [§ 22-52-8].

**i. Final Hearing: When.** The final hearing must be held within thirty days of the date the person was served with a copy of the petition. [§ 22-52-8].

**j. Conduct of Hearings.** The following rules apply to all hearings, including probable cause hearings and final hearings for involuntary commitment:

- (1) The respondent shall be present unless, prior to the hearing, the attorney for such person has filed in writing a waiver of the presence of such person on the ground that the presence of the respondent would be dangerous to such person's physical or mental health or that such person's conduct could reasonably be expected to prevent the hearing from being held in an orderly manner, and the judge of probate has judicially found and determined from evidence presented in an adversary hearing that the respondent is so mentally or physically ill as to be incapable of attending such proceedings. Upon such findings an order shall be entered approving the waiver.
- (2) The respondent shall have the right to compel the attendance of any witness who may be located anywhere in the state of Alabama and to offer evidence including

the testimony of witnesses, to be confronted with the witnesses in support of the petition, to cross-examine them and to testify in his own behalf, but no such person shall be compelled to testify against himself. The attorney representing the respondent shall be vested with all of the rights of said person during all of the hearings if such person is not present in court to exercise his rights.

- (3) The judge of probate shall cause the hearing to be transcribed or recorded stenographically, mechanically or electronically and shall retain such transcription for a period of not less than three years from the date the petition is denied or granted and not less than the duration of any commitment pursuant to such hearings
- (4) All hearings shall be heard by the judge of probate without a jury and shall be open to the public unless the respondent or his attorney requests in writing that the hearings be closed to the public.
- (5) The rules of evidence applicable in other judicial proceedings in this state shall be followed in involuntary commitment proceedings. [§ 22-52-9].

**k. Findings by the Judge of probate.** If at the final hearing the judge of probate finds, based on clear and convincing evidence, that the respondent meets the criteria for involuntary commitment, an order shall be entered for either outpatient treatment or inpatient treatment. The least restrictive and available alternative must be ordered. [§ 22-52-10.1].

**l. Outpatient Treatment.** A respondent may be committed to outpatient treatment if the probate court finds, based upon clear and convincing evidence, that the respondent is mentally ill and as a result of the illness will, if not treated, continue to suffer mental distress and experience deterioration of the ability to function independently. The court must also find that the respondent is unable to make a rational and informed decision as to whether treatment for mental illness would be desirable. [§ 22-52-10.2].

The probate court will not order outpatient treatment unless a designated mental health facility has consented to treat the respondent on an outpatient basis under the terms and conditions set forth by the probate court. The order for outpatient treatment shall also contain the general condition that the respondent follow the directives and treatment established by the designated mental health facility. An order for outpatient treatment shall not exceed 150 days. [§ 22-52-10.3].

Any material noncompliance with the outpatient treatment order shall be reported in writing immediately by the designated mental health facility to the probate court and the report is required to be sworn. The report will set forth the need to revoke the outpatient order. If at the hearing to consider the motion for revocation of the outpatient treatment order, the probate court

finds, based upon clear and convincing evidence, that the conditions of outpatient treatment have not been met, the probate court may order commitment to inpatient treatment. [§ 22-52-10.3].

The county will not be financially responsible for the costs of outpatient mental health services. [§ 22-52-10.3].

***m. Inpatient Treatment.*** The probate court will order a respondent committed to inpatient treatment if it finds, based on clear and convincing evidence, that:

- (1) The respondent is mentally ill;
- (2) As a result of the mental illness, the respondent poses a real and present threat of substantial harm to self and/or others;
- (3) The respondent will, if not treated, continue to suffer mental distress and experience deterioration of the ability to function independently; and
- (4) The respondent is unable to make a rational and informed decision as to whether treatment for mental illness would be desirable.

[§ 22-52-10.4]. The least restrictive alternative necessary and available for the treatment of the respondent's mental illness shall be ordered. [§ 22-52-10.1]. If no treatment is presently available but that confinement is necessary to prevent harm to himself and others, the order committing the respondent shall provide that, should treatment for the respondent's mental illness become available while the respondent is confined, such treatment will be made available to him immediately. [§ 22-52-10.4].

The probate court may order that the respondent be committed to inpatient treatment at either a state mental health facility or a designated mental health facility. An order for inpatient treatment shall not exceed 150 days. The county will not be financially responsible for the costs of inpatient mental health services. [§ 22-52-10.5].

A petition for renewal of an inpatient commitment may be filed by the director of a state mental health facility or his designee at least 30 days prior to the expiration of the current commitment order. The petition, together with a copy of the original commitment order and copies of any subsequent renewal commitment orders shall be filed with the probate court in the county where the facility is located. [§ 22-52-10.6].

Whenever it becomes necessary that a special judge of probate is needed with regard to the renewal of commitment orders, it will be the responsibility of the judge of probate in the county so affected to determine, select and appoint the special judge of probate who shall be paid that compensation as determined by the judge of probate, not to exceed \$100 per case. The county

where the hearing for renewal is held shall be allowed a fee of \$20 per case to compensate the county for additional record keeping. [§ 22-52-10.6].

The qualifications for a special judge of probate is that he shall be:

- (1) A citizen of Alabama;
- (2) Previously served for a minimum of six years as an Alabama judge of probate or shall be licensed to practice law in this state;
- (3) Take the present oath of office upon entering his official duties; and
- (4) Serve without bond.

[§ 22-52-10.6]. Any hearing conducted shall be held in the facilities where the person committed is a patient. An attorney is to be appointed to serve as guardian ad litem to represent and protect the rights of the respondent. The written acceptance of the appointment shall be returned to the judge of probate at least five days prior to the hearing.

Adequate written notice shall be provided to the respondent prior to the hearing. The Commissioner of the Alabama Department of Mental Health shall designate one or more members of his staff to serve as advocate in support of the petition and such advocate shall be required to be an attorney. The hearing shall be conducted in accordance with Section 22-52-9. A copy of the order shall be forwarded to the probate court having original jurisdiction. The burden of proof shall be to prove, based on clear and convincing evidence, the criteria as prescribed in this article. The Alabama Department of Mental Health shall provide the advocate in support of the petition and the expert witness at no cost to the State General Fund; and all other costs allowable by law shall be paid as prescribed in Section 22-52-14. [§ 22-52-10.6].

Any order renewing an order for inpatient treatment shall not exceed a period of one year. [§ 22-52-10.6].

***n. Order for Involuntary Commitment for Inpatient Treatment to be Entered into Criminal Justice Information System and NICS.*** When the judge of probate of a county enters an order for the involuntary commitment of a person pursuant to Section 22-52-10.1, and the order is for a final commitment for inpatient treatment to the Department of Mental Health or a Veterans' Administration Hospital, or as otherwise provided by law, the judge shall immediately forward the order to the Alabama Law Enforcement Agency (ALEA) in the manner provided by the Alabama Justice Information Center (AJIC) Commission and the order shall be entered in the National Instant Criminal Background Check System. The AJIC may allow a judge of probate access to its system for involuntary commitment hearings, name-change petitions, and other official probate functions. [§22-52-10.8(a)].

When any individual who has been committed is released from commitment, the person may petition the judge of probate for a review of the person's mental capacity to purchase a firearm. After review, the judge of probate may enter an order finding that the person is not subject to a mental infirmity requiring a limitation on the purchase of a firearm. A copy of the order shall be forwarded to the ALEA directing that the prior order be removed from the National Instant Criminal Background Check System. [§§ 22-52-10.8(b), 22-52-10.9].

***o. Retention of Jurisdiction.*** The probate court committing any person retains jurisdiction over such person concurrently with the probate court of the county in which the person is subsequently located for as long as the person is in custody of the department of mental health or other public facility. [§ 22-52-11].

***p. Appeals.*** An appeal from an order of the probate court committing a person lies to the circuit court for trial de novo unless the judge of probate who granted the petition was learned in the law, in which case the appeal lies to the Alabama Court of Civil Appeals on the record. Notice of appeal must be given in writing within five days after the respondent has received actual notice of the granting of the petition, at which point the judge of probate is to determine and enter an order setting forth the limitations to be placed upon the liberty of the person sought to be committed pending the appeal. [§ 22-52-15].

***q. Transfer of Committed Persons to the Custody of the Veterans Administration.*** Any person committed by the judge of probate to the custody of the Alabama State Department of Mental Health and who is entitled to care or treatment offered by the United States Veterans Administration or another U.S. government agency, may be transferred by the department of mental health to the government agency on such terms as agreed upon by the department of mental health and the government agency. [§ 22-52-13].

***r. Fees and Costs.*** The fees of the attorneys appointed by the judge of probate as guardian ad litem and as advocate for the petition are set at the rates established in Section 15-12-21; any reasonable costs for the testimony of any expert and all other costs allowed by law are payable from the general fund upon an order of the judge of probate. However, if the petition is denied, and the petitioner is not an indigent or public official acting within the scope of his or her duty, the petitioner may be ordered to pay all costs. Similarly, if the petition is granted and the person to be committed is not an indigent, the judge of probate may order all costs paid from the estate of the person committed. [§ 22-52-14].

## O. CHILDREN

**a. Adoption.** “In Alabama, the right of adoption is purely statutory and in derogation of the common law, ... and unless the statute by express provision or necessary implication confers the right of adoption, such right does not exist.” *Evans v. Rosser*, 280 Ala. 163, 164-65, 190 So.2d 716, 717 (1966)(citing *Doby v. Carroll*, 274 Ala. 273, 147 So.2d 803 (1962)). Furthermore, “[w]e have always required strict adherence to the statutory requirements in adoption proceedings.” *McCoy v. McCoy*, 549 So.2d 53, 57 (Ala. 1989)(citing *Ex parte Sullivan*, 407 So.2d 559 (Ala. 1981)).

The authority to receive petitions for adoption, to hold hearings, to examine parties concerned, and to issue final orders is delegated to the probate court under general law. [§ 26-10A-3].

**1. Petition.** A petition for adoption needs to be filed with the probate court clerk within 30 days after the minor is placed with the prospective adoptive parent(s) for the purpose of adoption, unless the minor is in custody of the Department of Human Resources or a licensed child placing agency. However, a petition for good cause may be filed beyond the 30 day period. The petition must be signed, verified by each petitioner, and allege:

- (a) The full name, age and place of residence of each petitioner and if married, the place and date of marriage;
- (b) The date and place of birth of the adoptee (except in the case of abandonment);
- (c) The birth name of the adoptee and the adoptee's proposed new name;
- (d) Where the adoptee is residing at the time of the filing of the petition, and if not yet in the custody of a petitioner, when the petitioner intends to acquire custody;
- (e) That each petitioner desires to establish a parent and child relationship between himself and the adoptee and that he is a fit and proper person able to care for and provide for the adoptee's welfare;
- (f) The existence and nature of any prior court orders known to the petitioner which affect the custody, visitation or access to the adoptee;
- (g) The relationship, if any, of each petitioner to the adoptee; and
- (h) The names and addresses of all persons known to the petitioner at the time of filing from whom consents or relinquishments to the adoption are required.

The petition shall be accompanied by a copy of the child's birth certificate. [§ 26-10A-16]. Unless service has been previously waived, notice of pendency of the adoption proceeding shall be served by the petitioner on:

- (a) any person, agency, or institution whose consent or relinquishment is required by Section 26-10A-7, unless consent has been implied.
- (b) the legally appointed custodian or guardian of the adoptee.
- (c) the spouse of any petitioner who has not joined in the petition.
- (d) the spouse of the adoptee.
- (e) the surviving parent or parents of a deceased parent of the adoptee.
- (f) Any person known to the petitioners as having physical custody, excluding licensed foster care or other private licensed agencies or having visitation rights with the adoptee under an existing court order.
- (g) the agency or individual authorized to investigate the adoption under Section 26-10A-19.
- (h) any other person designated by the court.
- (i) the Department of Human Resources.
- (j) the father and putative father of the adoptee if made known by the mother or otherwise known by the court unless the court finds that the father has given implied consent to the adoption, as defined in Section 26-10A-9.

[§ 26-10A-17].

**2. Notice.** The notice must specifically state that the person served must respond to the petitioner within thirty (30) days if he or she intends to contest the adoption. [§ 26-10A-19(b)]. Proof of service of the notice on all persons for whom notice is required must be filed with the court before the adjudicational hearing, provided in Section 26-10A-24. [§ 26-10A-17(e)].

**3. Native Americans.** Special provisions apply if the child to be adopted is of native American ancestry. [Indian Child Welfare Act, 24 U.S.C. §§ 1901, etc.].

**4. Interlocutory Decree.** Once a petitioner has received the adoptee into his home for the purpose of adoption and a petition has been filed, an interlocutory decree shall be entered delegating the petitioner custody. However, if the child has been relinquished to the Department of Human Resources or a licensed child placing agency, custody and

responsibility for support and maintenance shall be retained by the Department of Human Resources or licensed child placing agency. [§ 26-10A-18].

**5. Investigation.** A pre-placement investigation is required to determine the suitability of each petitioner and the home in which the adoptee will be placed. A copy of the pre-placement investigation shall be filed with the court when the petition for adoption is filed.

An individual may initiate a pre-placement investigation by a direct request to the Department of Human Resources or by filing a request with the probate court. The court may appoint any agency or individual qualified under Section 26-10A-19(d) to perform the investigation. Unless the investigation has been performed within 24 months of the petition or an investigation is dispensed with by court order for good cause shown on the record, no decree of adoption shall be entered until there is a full post-placement investigation.

The investigator shall complete and file his written report within 60 days from the receipt of notice of the proceedings. The report shall include sufficient facts for the court to determine whether there has been compliance with consent or relinquishment provisions of the Adoption Code. [§ 26-10A-19]. However, the law provides that petitions from step-fathers, step-mothers or closely related persons need not be investigated, unless otherwise directed by the court. The adoptee must have also resided with the step-parent or a relative for a period of one year before the filing of the adoption petition unless this provision is waived by the court for good cause. [§§ 26-10A-27 and 26-10A-28].

**6. Pending Custody Actions.** The probate court may stay any adoption proceedings if it is determined that there are any other pending custody actions concerning the adoptee, either in this state or another. If granted, the stay will remain in effect until a determination has been made by an appropriate court with jurisdiction pursuant to the provisions of the Uniform Child Custody Jurisdiction Act or the Parental Kidnapping Prevention Act. [§ 26-10A-21].

**7. Consent.** Consent to the petitioner's adoption or relinquishment for adoption to the Department of Human Resources or a licensed child placing agency shall be required of: 1) the adoptee, if the adoptee is 14 years of age or older lacks the mental capacity to give consent; 2) the adoptee's mother; 3) the adoptee's presumed father, under certain circumstances; 4) the agency to which the adoptee has been relinquished or which holds permanent custody and which has placed the adoptee for adoption, unless the court finds the adoption is in the best interest of the child and the agency unreasonably withheld

consent; and 5) the putative father if he is made known by the mother or is otherwise known to the court and he responds to the court within 30 days of being notified. [§ 26-10A-7].

The probate court may not grant an adoption of a child without a waiver of notice or consent from a father listed on the child's birth certificate, as Ala. Code § 26-10A-7(a)(3)(d) gives a presumed father an unqualified right to object to the child's adoption, even absent his filing with the Putative Father Registry. [*M.M. v. D.P.*, 10 So. 3d 605 (Ala. Civ. App. 2008)].

**8. Putative Father Registry.** The Department of Human Resources maintains a putative father registry that keeps the names, Social Security number, date of birth, and addresses of 1) any person adjudicated by a court of this state to be the father of a child born out of wedlock; 2) any person who has filed with the registry before or after the birth of a child born out of wedlock, a notice of intent to claim paternity of the child; 3) any person adjudicated by a court of another state or territory of the United States to be the father of a child born out of wedlock, where a certified copy of the court order has been filed with the registry by the person or any other person; and 4) any person who has filed with the registry an instrument acknowledging paternity.

A person filing a notice of intent to claim paternity of a child or an acknowledgment of paternity shall include: 1) The father's name, Social Security number, date of birth, and current address; (2) the mother's name, including all other names known to the putative father that have been used by the mother, Social Security number, date of birth, and address, if known; (3) the father's current income and financial information by attaching a child support obligation income statement/affidavit form to be prescribed by regulations of the department; (4) the child's name and place of birth, if known; and (5) the possible date or dates of sexual intercourse.

The clerk of the court which determines a man to be the father of a child born out of wedlock shall immediately notify the Department of Human Resources of the determination of paternity. The Department of Human Resources shall, upon request, provide the names and addresses of persons listed with the registry to any court. [§ 26-10C-1].

**9. Dispositional Hearing.** When the pre-placement investigation has been completed, a dispositional hearing shall be held as soon as possible or no later than 90 days after the filing of the petition. The dispositional hearing is the only one necessary to complete the adoption if there is no motion for a contested hearing. [§ 26-10A-25]. In the

event of a contested adoption, a guardian ad litem shall be appointed for the adoptee, or for any incompetent or minor who is or would be a party to the proceeding. [§ 26-10A-22]. The probate court may not dismiss a petition for adoption prior to a dispositional hearing due to the court's own concerns that it lacks jurisdiction. [§ 26-10A-25; *In re Adoption of F.I.T.*, 43 So.3d 621 (Ala. Civ. App. 2010)].

**10. Final Decree.** A final decree of adoption will be granted if the probate court finds based on clear and convincing evidence, that the best interests of the adoptee will be served by the adoption and the other requirements delineated in Section 26-10A-25(b) have been met. The written decree shall include the new name of the adoptee. The names of the natural or presumed parents shall not be included in the final decree. [§ 26-10A-25].

Prior to the issuance of the final decree, the records in the adoption proceedings shall be open to inspection only by the petitioner, his attorney, the investigator, and any attorney appointed for or retained by the adoptee. All hearings in adoption proceedings shall be confidential and held in closed court. Only interested parties are granted admittance. After the final decree has been issued, all papers, pleadings and other documents pertaining to the adoption shall be sealed, kept as a permanent record of the court and withheld from inspection. No person shall have access to them nor identifying information disclosed, except upon order of the court in which the decree of adoption was entered or as provided in Section 22-9A-12 through the Office of Vital Statistics. [§ 26-10A-31].

Within ten days of the final decree's issuance, the judge or clerk of the court must send a copy of the final order to the Department of Human Resources. A certificate of the final order must also be sent to the State Registrar of Vital Statistics. [§ 26-10A-32]. Appeals from a final decree of adoption must be filed with the Alabama Court of Civil Appeals within 14 days of the date of the final decree. [*C.M.K. v. E.D.K.*, 2010 WL 2070954 (Ala. Civ. App. 2010)].

**b. Foreign Adoption: Certificate of Foreign Birth Without Judicial Proceedings.** Beginning January 1, 2013, the State Registrar is authorized to issue a Certificate of Foreign Birth without judicial proceedings if certain criteria are satisfied. [§ 22-9A-11.1].

**c. Adult Adoption.** In 1998 the Adoption Code was amended to allow for adoption of adults who are mentally retarded or totally and permanently disabled. [Alabama Act 98-101]. In 2004, the Adoption Code was further amended to expand the adults who could be adopted to include adoptions by relatives and stepparents and adults who consent to being adopted by a

married couple. [Alabama Act 2004-528]. A stepparent cannot adopt an adult stepchild under Ala. Code § 26-10A-6(2)(c) after the death of the spouse who was the stepchild's parent, as the death of the spouse extinguishes the stepparent-stepchild relationship for the purposes of this statute. [*Hays v. Hays*, 946 So. 2d 867 (Ala. Civ. App. 2006)]. The forms for the consent or relinquishment or the withdrawal of consent or relinquishment for an adult adoption were required to be developed by the Administrative Office of Courts. [§ 26-10A-12]. Special rules relating to the consent for an adult adoption are in Sections 26-10A-7 and 11.

**d. Legitimation.** A father seeking to legitimate a child is required to file a notice of declaration of legitimation with the judge of probate of the county of either his or the child's residence. Notice of the declaration of legitimation, consistent with Rule 4 of the Alabama Rules of Civil Procedure, must be given both to the mother and to the child. In the event the mother makes a timely objection to the prospective legitimation or to the extent the court feels such to be in the best interest of the child, the probate court is to appoint a guardian ad litem to represent the child. Upon either the response of the mother or the expiration of time for such response, the probate court must conduct an informal hearing at which all interested parties may present evidence concerning legitimation. Following such hearing the court must issue an order granting or denying the declaration of legitimation. [§ 26-11-2]. A similar procedure is followed if a petition is filed for a name change in conjunction with a petition for a declaration of legitimation. [§ 26-11-3].

Alternatively, the paternity of an illegitimate child may be established after the death of the father through adjudication resulting in judicial determinations of paternity. [*Cotton v. Terry*, 495 So.2d 1077 (Ala.1986)]. Section 43-8-48(2)b., rather than the 2008 AUPA, governs judicial determinations of paternity for purposes of intestate succession. [*Clemons v. Howard*, 124 So.3d 738 (Ala. Ct. Civ. App. 2013)].

**e. Change of Name.** See Change of Name under Miscellaneous in Chapter IV, page 115.

## **P. EMINENT DOMAIN**

**a. Jurisdiction.** Jurisdiction to condemn privately owned land rests in the probate court. The judge receives petitions for condemnation, conducts the necessary proceedings, and issues the final condemnation order. [§§ 18-1A-1 through 311]. In addition to condemnation for public uses, this jurisdiction extends to the erection of dams for mills, gins or factories, [§§ 18-2-1 through 21], and to rights-of-way for private owners. [§§ 18-3-1 through 22].

The jurisdiction of the probate court and the procedure to be followed in condemnation cases are explained in Title 18 of the Code of Alabama. Other important provisions are Sections 42-2-1 through 12, which explain condemnation action on land sought by the United States.

**b. Authority.** The exercise of eminent domain by the state requires that the taking of land must be for public use and just compensation must be paid the landowner. [1901 Ala. Const. Art. 1, § 23]. The Alabama Constitution provides for the exercise of eminent domain by cities, counties and other corporations and individuals vested with the right to take property for public use. [1901 Ala. Const. Art. XII, § 235].

The Legislature has placed some restrictions on the exercise of eminent domain authority by any state agency or official. For example, property may not be condemned for any nongovernmental retail, office, commercial, residential, or industrial use or development, but this restriction does not apply to property considered to be a blight in an area covered by a redevelopment or urban renewal plan. Nor does the limitation apply to the condemnation of property for public utility purposes (i.e., gas, water, electricity) or for streets and roadways, government buildings, or park and recreation facilities. [§ 18-1B-2]. In 2015, the Legislature passed a law that prohibits a government entity from acquiring mortgages or deed of trust through the exercise of its eminent domain power unless there is a public use for the property. [§§ 11-47-170, 11-80-1, and 18-1B-2].

Additionally, if condemned property is not ever used for the purposes for which it was condemned or for some other public purpose, and is to be sold, the property shall be first offered for sale to the person or persons from whom the property was condemned, or his or her known or ascertainable heirs or assigns, in the manner prescribed by law. [§ 18-1B-2].

***c. Procedure Prior to Commencement of Condemnation Action.***

**1. Appraisal.** Before beginning a condemnation action, a condemnor must have the property appraised to determine the amount that would constitute just compensation for the taking. The owner or the owner's representative must be given a reasonable opportunity to accompany the appraiser during the inspection of the property. [§ 18-1A-21].

**2. Offer.** Before beginning a condemnation action, a condemnor must offer the owner an amount believed to be just compensation. The condemnor shall provide the owner with a written statement and summary showing the basis for the amount determined to be just compensation. [§ 18-1A-22].

**3. *Payment or Deposit Before Surrender of Possession.*** An owner is not required to surrender possession of the property before the condemnor either pays the agreed purchase price or pays or deposits the amount awarded. [§ 18-1A-23].

**4. *Notice.*** Except in an emergency, a condemnor may not require an occupant of the condemned property to move prior to a 90-day notice of the move. [§ 18-1A-24].

**5. *Uneconomic Remnant.*** If the acquisition of part of the property would leave the owner with an uneconomic remnant, the condemnor must offer to buy the remnant. [§ 18-1A-27].

**6. *Entry.*** A condemnor and its agents may enter the property for a reasonable time to make suitability studies. [§§ 18-1A-50 through 18-1A-54].

**7. *Offer as Prerequisite.*** The condemnor must offer to acquire the property at its approved offer by purchase before commencing the condemnation action in court. [§ 18-1A-55].

***d. Commencement of Condemnation Action.***

**1. *Filing a Complaint.*** A condemnation action is begun by filing a complaint in the probate court in the county in which the property is located. [§ 18-1A-71].

**2. *Service of Process.*** When the complaint has been filed, the probate court must set a date for the hearing and issue notice to the defendant unless notice has been waived. [§ 18-1A-74]. The probate court shall conduct a hearing within 45 days (unless continued when necessary to provide reasonable notice or for other compelling reason) after the complaint is filed. The probate court must hear the allegations of the complaint, any objections, and any legal evidence, and, within 10 days after the hearing, shall make an order granting or refusing the complaint. [§ 18-1A-276].

**3. *Defendant's Response.*** The defendant may respond but is not required to do so unless he or she challenges the right to condemn or disputes the area to be acquired or remain. [§ 18-1A-90].

**4. *Withdrawal of Deposited Funds Before Judgment.*** The defendant by motion may withdraw the amount of the offer prior to the entry of judgment. [§ 18-1A-110].

**e. Commissioners**

**1. Appointment of Commissioners.** Within ten days after the complaint is granted, the judge of probate must appoint three citizens of the county to serve as commissioners. [§ 18-1A-279].

**2. Commissioner's Hearing and Assessment of Damages.** After notice to all parties the commissioners must hold a hearing to receive evidence relating to compensation. [§ 18-1A-281].

**3. Commissioner's Report.** Within 20 days from their appointment, the commissioners must make a written report to the probate court stating the amount of damages and compensation ascertained. [§ 18-1A-282].

Within seven days of receipt of the commissioner's report, the probate court must issue an order recording the report and condemning the property upon payment or deposit into probate court the damages and compensation assessed. [§ 18-1A-282].

**4. Appeal to Circuit Court.** Within 30 days of the order of condemnation, any party may appeal to the circuit court for a trial de novo. [§ 18-1A-283, *Boutwell v. Alabama*, 968 So. 2d 1015 (Ala. 2007)].

**f. Measure of Damages**

**1. "Fair Market Value".** The definition of "fair market value" is "as the price the property would bring when offered for sale by a willing seller who is not forced to sell and which is sought by a willing buyer who is not required to buy, after due consideration of all the elements affecting value." [§ 18-1A-172] [*See also Messer v. United States*, 157 F.2d 793 (5th Cir. 1946)].

**2. Before and After Value.** In a partial taking, the owner is entitled to the difference between the fair market value of the entire property before the taking and the fair market value of the remainder after the taking. [§ 18-1A-170].

**3. Incidental Benefits.** The amount of compensation a landowner may be entitled to may not be reduced because of any incidental benefits which may accrue to the remaining land. However, in condemnation of lands for rights-of-way for public highways, water or sewer lines, the value of the enhancement to the remaining lands of the landowner

may be considered as a set-off against damages. [§ 18-1A-171].

If the part of the tract of land remaining after the taking is worth as much or more after the completion of the project as the entire tract was worth immediately before the taking, the landowner has sustained no damage and is not entitled to any compensation. [*Morgan County v. Hill*, 257 Ala. 658, 60 So.2d 838 (1952)].

However, when the scope of an easement burdening a portion of a landowner's property is so sweeping as to be the equivalent to the taking of a fee-simple title to the property, the court must order that the owner of the property be compensated as if the entire fee-simple to the property on which the easement lay had been taken. [*City of Huntsville v. Rowe*, 889 So. 2d 553 (Ala. 2004) (stating that the city's taking of a portion of the landowners' property for an underground sewer line was required to be compensated as if an entire fee-simple title to the property on which the easement lay had been taken)].

**4. Highest and Best Use.** The condemnee is entitled to consideration for condemnation on the basis of the highest and best use to which the property could be put. [*Sayers v. City of Mobile*, 276 Ala. 589, 165 So. 2d 371 (1964)]. The highest and best use of the property is a jury question, if demanded. [§ 18-1A-174].

**5. Prejudgment Interest.** Prejudgment interest on a condemnation award begins to run on the date that a city posts an appeal bond and not on the date of the condemnation application. [*Samford University v. City of Homewood*, 959 So. 2d 64 (Ala. 2006)].

## Q. NOTARIES PUBLIC

The judge of probate shall report to the Secretary of State the name, county of residence, date of issuance, and date of expiration of the commission of each notary public appointed and commissioned. [§ 36-20-70]. It is unconstitutional to deny a commission as notary public to a legal alien who has in all other respects complied with the statutory requirements pertaining to office of notary public. [*Babcooke v. Duncan*, 486 So.2d 431 (Ala. 1986) citing *Bernal v. Fainter*, 467 U.S. 216, 104 S.Ct 3212, 81 L.Ed.2d 175 (1984)].

**a. Bond.** The notary public must give a bond to be approved by the judge of probate of the county of the residence of the notary public for the sum of \$25,000 dollars payable to the State of Alabama. The bond must be executed, approved, filed and recorded in the office of the judge of probate of the county of the notary public's residence, before the notary enters his or her duties of office. [§ 36-20-71(a)]. All existing notaries public functioning on January 1, 2012, shall

continue to function pursuant to their existing bond for the remainder of their existing commission. [§ 36-20-71(b)].

**b. Seal and Office.** Furthermore, each notary must provide a seal of office which must by impression or stamp give the notary's name, office, state and county for which the notary has been appointed. [§ 36-20-72]. The jurisdiction of notaries public shall not be limited to the counties of their residence and extends to any county of the state. [§ 36-20-70]. Each notary holds office for a period of 4 years which can be renewed. [§ 36-20-70]. The judge of probate shall collect a fee of ten dollars (\$10) for each notary commission issued. [§ 36-20-70].

**c. Authority.** Notary publics have the authority to:

- (1) administer oaths in all matters incident to the exercise of their office;
- (2) take acknowledgments or proof of instruments of writing relating to commerce or navigation and certify the same and all other of their official acts under their seal of office;
- (3) demand acceptance and payment of bills of exchange, promissory notes and all other writings which are governed by the commerce law as to the days of grace, demand and notice of nonpayment and protest the same for nonacceptance or nonpayment and to give notice thereof as required by law; and
- (4) exercise such other powers as, according to commercial usage of the laws of this state, may be belong to a notary public.

[§ 36-20-73].

**d. Fees.** Notaries public are entitled to the sum of five dollars (\$5) for carrying out any of the enumerated powers in Section 36-20-73. [§ 36-20-74].

**e. Exceeding Authority.** Any person who, having been a notary, willfully performs or assumes the authority to perform a notarial act after his or her commission expires, with knowledge that his or her commission has expired or any person who without a notary's commission assumes the authority and performs a notarial act shall be guilty of a Class C misdemeanor. [§ 36-20-75].

## **R. RETIRED OR SUPERNUMERARY JUDGES OF PROBATE**

Every judge of probate who meets the requirements for retirement shall be entitled to receive a pension as provided in Article 4 of Section 18 of Title 12 of the Code of Alabama. Furthermore, every judge of probate who has retired pursuant to this article may, on the request of the Chief Justice, be called to active duty status as a judge of probate. Retired judges of probate who are called into active duty are entitled to certain compensation. [§§ 12-18-88, 12-18-90 and § 12-1-18].

Any judge of probate who qualifies to retire from active service with a benefit from the judicial retirement fund is entitled to participate in the State Employees' Health Insurance Plan. [§ 36-29-16].

Retired judges of probate are authorized by statute to solemnize marriages. [§ 30-1-7].

## **S. CANONS OF JUDICIAL ETHICS**

The Alabama Canons of Judicial Ethics is a set of rules governing the behavior and activities of judges. Because judges of probate are judicial officers, these rules do apply to judges of probate. However, because judge of probate are charged with many administrative and executive duties, the rules are slightly modified to govern judge's of probate unique position. A judge of probate should be familiar with all of the Canons of Judicial Ethics and pay special attention to the section concerning judges of probate. Please review the Canons of Judicial Ethics and Appendix B in the Handbook to determine which Canons apply to the judge of probate. All of the Canons of Judicial Ethics and the Compliance with the Canons of Judicial Ethics are located in the Rules of the Alabama Supreme Court currently in Volume 23B of the Code of Alabama.

## **T. MISCELLANEOUS**

*a. Appointment of Special Coroner.* The judge of probate has authority to appoint a special coroner under the following conditions:

- (1) When the coroner has not qualified or the office is vacant and the emergency requires such officer;
- (2) When the coroner is absent from the county, having no deputy therein;
- (3) When the coroner is imprisoned; or,
- (4) When the sheriff and coroner are both parties or both interested. [§ 11-5-10]

**b. Awarding Attorney Fees.** In appropriate cases, when it is provided for by law, statute or contract, the judge of probate may award reasonable attorney fees to a prevailing party. The determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and its determination on such an issue will not be disturbed on appeal unless in awarding the fee the trial court exceeded that discretion. *State Bd. of Educ. v. Waldrop*, 840 So.2d 893, 896 (Ala. 2002); *City of Birmingham v. Horn*, 810 So.2d 667, 681-82 (Ala. 2001); *Ex parte Edwards*, 601 So. 2d 82, 85 (Ala. 1992), citing *Varner v. Century Fin. Co.*, 738 F.2d 1143 (11th Cir. 1984). *Pharmacia Corp. v. McGowan*, 915 So. 2d 549, 552 (Ala. 2004). In determining the reasonableness of an attorney fee, the court may consider:

- (1) the nature and value of the subject matter of the employment;
- (2) the learning, skill, and labor requisite to its proper discharge;
- (3) the time consumed;
- (4) the professional experience and reputation of the attorney;
- (5) the weight of his responsibilities;
- (6) the measure of success achieved;
- (7) the reasonable expenses incurred;
- (8) whether a fee is fixed or contingent;
- (9) the nature and length of a professional relationship;
- (10) the fee customarily charged in the locality for similar legal services;
- (11) the likelihood that a particular employment may preclude other employment; and
- (12) the time limitations imposed by the client or by the circumstances.

[*Pharmacia Corp. v. McGowan*, 915 So. 2d 549 (Ala. 2004)(quoting *Van Schaack v. AmSouth Bank, N.A.*, 530 So. 2d 740, 749 (Ala. 1988)]. These criteria are for purposes of evaluating whether an attorney fee is reasonable; they are not an exhaustive list of specific criteria that must all be met. *Beal Bank v. Schilleci*, 896 So. 2d 395, 403 (Ala. 2004), citing *Graddick v. First Farmers & Merchants Nat'l Bank of Troy*, 453 So. 2d 1305, 1311 (Ala. 1984). *Pharmacia Corp. v. McGowan*, 915 So. 2d 549, 553 (Ala. 2004).<sup>3</sup>

The Alabama Litigation Accountability Act governs the awarding of attorney fees in limited circumstances involving frivolous actions. [§§ 12-19-270–276].

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<sup>3</sup>A trial court's order regarding an attorney fee must allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how it calculated the attorney fee." *Horn*, 810 So.2d at 682, citing *American Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 427 (11<sup>th</sup> Cir. 1999); see also *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933.

**c. Burial Places.** The judge of probate receives and takes action on petitions to locate and extend boundaries of rural burial places. However, before such an application may be approved, the judge must request the county board of health to investigate the request and to recommend action to be taken. Due weight must be given to the conclusions expressed by the board of health in the final decision on the application. [§ 22-20-4].

If the petition is approved, the judge of probate must appoint commissioners to survey, map and plat the land and to fix the boundary. [§ 11-17-2]. He receives a report from the commissioners and the payment of damages, if any, from the petitioners. [§§ 11-17-3 through 5]. The report and all proceedings are recorded in the probate office. [§ 11-17-5]. Appeals on the amount of the damages assessed by the commissioners are heard by the judge in the same manner in which contested wills are heard, including the requirements of trial by jury. [§§ 11-17-7 and 10]. Sections 11-17-1 through 17 and 22-20-4 explain the duties and responsibilities of judges of probate in regard to burial places.

**d. Change of Name.** The probate court has authority to change the name of any person residing in the county upon receipt of a declaration from the person whose name is to change. [§§ 12-13-1,<sup>4</sup> 26-10A-25(c), and 26-11-3]. A probate court's jurisdiction to change the legal name of a child is limited to legitimation proceedings and does not extend to custody disputes. *See Russell v. Fuqua*, 176 So. 3d 1224 (Ala. 2015).

**e. Contested Elections.** The judge of probate receives statements contesting the election results of judges of the circuit court, and constables whose duties are limited to his county. When such statements are received a trial of the contest must be held. The judge then determines the correct election results and enters a corresponding judgment. Appeals in contested election cases lie to the Alabama Supreme Court. [§§ 17-16-54, -58, -59].

**f. Correction of Marriage Licenses.** The judge of probate upon the receipt of a proper petition and proof of error, has authority to correct marriage licenses, applications for marriage licenses, and marriage certificates. *See* Section 30-1-16 for a more detailed explanation.

**g. Declaration of Residence.** In 2012, a procedure was established for a Notarized Declaration of Residence. [§ 12-13-23]. The new law allows a person absent from the state for military duty, eleemosynary journey, mission assignment, or other similar venture to designate

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<sup>4</sup>According to a November 19, 1980 opinion of the Attorney General's office, the probate court's jurisdiction over name changes extends to petitions to change the name of a minor. [Ala. Op. Att'y Gen. No. 81-00073 (Nov. 18, 1980)].

their residency by filing with judge of probate a Notarized Declaration of Residence. [§ 12-13-23(b)]. However, there are some limitations of the effectiveness of the Declaration. For example, this section does not affect the person right to register to vote or qualify for elected office. [§ 12-13-23(d)]. Likewise, this Declaration does not satisfy the requirements for certain enumerated benefits. [§ 12-13-23(g) and (i)].

***h. Discretion to Authorize an Agent with the Right of Disposition of a Deceased Person.***

The judge of probate of the county of a decedent's residence may award the right of disposition to the person the judge determines to be the most fit and appropriate to manage the right of disposition and make decisions regarding the remains of the decedent if the persons possessing the right of disposition do not agree. [§ 34-13-11].

If two or more persons who possess an equal right of disposition are not able by majority vote to agree upon the disposition of the remains of the decedent, any of those persons or the funeral establishment with the custody of the remains may file a petition asking the judge of probate to make a determination in the matter. In making such a determination, the judge of probate shall consider all of the following:

- (1) The reasonableness and practicality of the proposed funeral and disposition arrangements.
- (2) The degree of the personal relationship between the decedent and each person possessing a right of disposition.
- (3) The financial ability and willingness of each person possessing a right of disposition to pay the cost of the funeral and disposition arrangements.
- (4) The convenience and needs of other family members and friends who wish to pay their respects and the degree to which the funeral arrangements would allow maximum participation by all who wish to pay their respects.
- (5) The desires of the decedent.

[§ 34-13-11(c)].

**NOTE:** Section 34-13-11(a) lists the priority in which the right to control the disposition of a deceased person shall vest. Section 34-13-11(c) states when the right of disposition shall be forfeited and passed to the next qualifying person.

***i. Drainage Districts.*** The probate court has "jurisdiction, power and authority" to establish, alter, and dissolve drainage or water management districts; to locate and establish levees, drains or canals; to cause any ditch, drain or water course to be constructed or altered; to construct

levees or embankments and outlets; and to erect flood gates and pumping stations for reclaiming wet, swamp, or overflow lands. [§§ 9-9-5, 50, and 57]. This authority may be exercised upon the receipt of a proper petition. [§§ 9-9-7, 50, and 57]. When such petition is received, the court in which it is filed has original and exclusive jurisdiction co-extensive with the boundaries and limits of the district without regard to county lines. [§ 9-9-8]. A record of all reports, surveys, and proceedings by the court is required for each district. [§ 9-9-6]. The duties and responsibilities of the judge of probate in the establishment and administration of drainage districts, together with procedures to be followed are explained in Title 9, chapter 9.

***j. Filing of Bond.*** Generally, public official's bond must be filed within 40 days after declaration of election or after appointment to office. [§ 36-5-2]. No officer, with whom any official bond is required to be filed, shall allow the same to be filed in his office, unless the approval of the proper officer appears thereon, endorsed in accordance with the Code. [§ 36-5-8]. Every officer, in whose office the official bond of any public officer is filed, must endorse on such bond the day and year when the same was filed and sign his name to such endorsement. [§ 36-5-9]. Any officer who fails to endorse the date of the filing of an official bond as required by law must, on conviction, be fined not less than \$50.00. [§ 36-5-10].

If any officer required by law to give a bond fails to do so timely, then he vacates his office. In such case, it is the duty of the officer in whose office such bond is required to be filed at once to certify such failure to the appointing power, and the vacancy must be filled as in other cases. [§ 36-5-15]. If any public officer required by law to give a bond fails to do so timely, notice of such failure must be given by the officer in whose office such bond is required to be filed in two days to the district attorney of the circuit to which such county belongs. [§ 36-5-16]. Any officer who omits to give notice of failure by a public officer to file his official bond as required by law must, on conviction, be fined not less than \$100. [§ 36-5-17].

***k. Filing of False Liens.*** In 2012 the Legislature amended the code and created the crime of offering a false instrument for recording against a public servant which is now a Class C felony. [§ 13A-9-12].

The Act also provides that a person or entity whose rights are affected by the filing of a false lien or other instrument may petition the judge of probate to nullify or expunge the filing. [§ 13A-9-12 (e)]. Within 14 days of the filing of the petition, the judge of probate shall give written notice of the filing of the petition to the person or entity who filed the lien or instrument or who claims the rights or interests thereby. The notice must state that any additional proof of the validity of the lien or instrument shall be filed with the judge of probate within 14 days of the date of

mailing the notice and that the failure to do so could result in the lien or instrument being nullified or expunged. [§ 13A-9-12 (e)].

If the petition is not granted within 28 days of the date that it is filed, the petition shall be deemed denied. An order granting or denying a petition, if rendered, shall be delivered to the parties by the judge of probate by certified first class mail, but shall not be enforced, acted upon or effective before the expiration of 28 days from the date of mailing or the final adjudication of any and all appeals of that decision, at which time any final order granting the petition shall be recorded and indexed in order to provide notice that the lien or instrument has been nullified or expunged. [§ 13A-9-12 (e)].

If appealed, a notice of the appeal shall also be filed with the judge of probate, who shall file the notice as a *lis pendens* filing. [§ 13A-9-12 (e)].

***l. Mandatory Continuing Judicial Education.*** The Alabama Supreme Court entered an Order effective January 1, 2011 requiring all judges of probate to comply with annual mandatory judicial education as outlined in Section VII of the Rules for Mandatory Continuing Judicial Education. All judges of probate are required to earn a minimum of 12 approved judicial education credits each calendar year. The program is administered by the Alabama Law Institute.

By Resolution of the Alabama Probate Judges' Association, the requirements for mandatory judicial education were extended to the chief clerks. The Rules for Mandatory Continuing Judicial Education for Probate Court Chief Clerks became effective on January 1, 2012. All chief clerks are required to earn a minimum of 12 approved judicial education credits each calendar year. The program is administered by the Alabama Law Institute.

***m. Mine Surveys.*** Authority is delegated to the probate court to receive applications made by adjacent land owners and lessees for permission to enter and survey mine operations in order to ensure that the mine operators are not encroaching on their property. Upon receipt of an application, the judge must conduct hearings to determine the merits of the request. When the application is considered to be justified, the judge must make an order requiring the Department of Industrial Relations to employ an engineer to survey the mine. A report of the survey must be filed in the judge of probate's office. [§ 25-9-321].

***n. Municipalities.*** The judge of probate receives petitions, holds hearings, and conducts elections and other proceedings for the establishment and dissolution of municipal corporations, and for the reinstatement of dormant municipal corporations. [§§ 11-41-1 through 4, 7, and 21 through 23]. He receives petitions and conducts hearings and proceedings for the institution of a

commission form of government in municipalities. [§§ 11-44-2 and 6]. The judge also issues court orders confirming election results on the question of merger, annexation, and change of municipal limits. [§§ 11-42-2, 3, 42 through 44, 51, 127, 151, and 154]. Hearings are conducted by the judge of probate on proposals to reduce municipal limits and, if objections are presented, an order of election on the question must be made. When an objection to the reduction is not presented, the judge may enter an order establishing the municipal limits as proposed by the municipal governing body. [§§ 11-42-20 through 205]. The order to be entered and records to be kept in these proceedings and elections vary from case to case and are explained in the Code titles mentioned above.

***o. Public Improvement Authorities.*** The judge of probate receives petitions for establishing improvement authorities and has summary jurisdiction upon the complaint of an elector to determine the sufficiency of the petition. After hearing complaints on the petition, an order is issued based upon the evidence received. Summary proceedings must be initiated within ten days after the petition is filed.

If the petition is received and complaints disposed of not less than thirty days nor more than sixty days prior to a general city or town election, the question must be proposed at the general election. Otherwise, a special election must be held. Notice of the election must be given by publication in a newspaper with general circulation in the territory at least once on the same day of each week for three consecutive weeks. [§§ 39-7-4 through 8].

***p. Refund of Taxes.*** The judge of probate also receives petitions claiming that excess ad valorem taxes were paid by mistake or error. The judge receives these petitions, examines the evidence presented, and decides on the merits of the claim. If the allegation is correct, a refund may be ordered for the petitioner. *See* §§ 40-10-160 through 166 for more details.

***q. Rites of Marriage.*** The judge of probate has the authority to solemnize marriages when the parties possess a valid marriage license. [§§ 30-1-7 and 9].

***r. Sale of Land for Delinquent Taxes.*** The probate court is empowered to order the sale of land for the payment of delinquent county and state ad valorem taxes, and of municipal taxes due as a result of local improvement assessments. [§ 40-10-1]. Action is initiated upon the receipt of a report from the tax collector stating an inability to collect the taxes assessed against the property. [§ 40-10-1]. Upon receipt of this report, the judge issues a notice of delinquency and proposed sale to the delinquent taxpayer. [§ 40-10-4]. If the address of the delinquent taxpayer is not known notice must be published once a week for three consecutive weeks in a newspaper published in the county. If no newspaper is published in the county, notice must be posted at the

courthouse for three consecutive weeks. [§ 40-10-5]. At the hearing, if there is no contest of the allegation, the judge issues a decree for the sale of land. [§ 40-10-8]. If there is a contest, the judge hears the evidence and decides if it is sufficient to prevent a sale. If the evidence is not sufficient, the judge must order the sale to be conducted. [§ 40-10-11]. The sale must be advertised at least thirty days before its commencement. [§ 40-10-12]. Appeals from the decrees for the sale of land go to the circuit court. [§ 40-10-25].

The judge of probate must attend these sales and keep a record describing the parcel of land sold, to whom the land was sold, price paid, and the date of the sale. When there is no sale, the reason must be stated in the record. The record of sales must also include the type of tax penalties and the amount of the fees and costs of each case. [§ 40-10-15]. If no bid offered at the sale is sufficient to pay the sum specified in the decree of sale, the judge of probate must bid that sum for the state. [§ 40-10-18]. After such sales have been completed, they must be confirmed by the court within five days of the tax collector's report of the sale unless an objection with merit is filed. [§ 40-10-13]. Redemption proceedings initiated within three years from the date of sale, or the issuance of deeds to purchasers when redemption proceedings have not been initiated within this period are also handled by the judge of probate. [§§ 40-10-29 and 121].

For those municipalities which elect to permit the county tax collector to collect municipal taxes, the judge of probate has the same authority and responsibility in tax sales and redemption proceedings which he has for county and state taxes. [§§ 11-48-56, 57, 59; 11-51-61, 64, 70, and 71].

For a more in-depth discussion of delinquent tax sales, tax deeds and duties of the Land Commissioner, see *Handbook for Alabama Tax Administrators*, Seventh Edition, published by the Alabama Law Institute.

***s. Redemption of Land Sold for Taxes.*** Article 5 of Chapter 10 of Title 40 covers the redemption of land that has been sold for taxes. The right of redemption is established in Section 40-10-120 which is as follows:

“Real estate which hereafter may be sold for taxes and purchased by the state may be redeemed at any time before the title passes out of the state or, if purchased by any other purchaser, may be redeemed at any time within three years from the date of the sale by the owner, his or her heirs, or personal representatives, or by any mortgagee or purchaser of such lands, or any part thereof, or by any person having an interest therein, or in any part thereof, legal or equitable, in severalty or as tenant in common, including a judgment creditor or other creditor having a lien thereon, or on any part thereof; and an infant or insane person entitled to redeem at any time before

the expiration of three years from the sale may redeem at any time within one year after the removal of the disability; and such redemption may be of any part of the lands so sold, which includes the whole of the interest of the redemptioner. If the mortgage or other instrument creating a lien under which a party seeks to redeem is duly recorded at the time of the tax sale, the party shall, in addition to the time herein specified, have the right to redeem the real estate sold, or any portion thereof covered by his or her mortgage or lien, at any time within one year from the date of written notice from the purchaser of his or her purchase of the lands at tax sale served upon such party, and notice served upon either the original mortgagees or lienholders or their transferee of record, or their heirs, personal representatives, or assigns shall be sufficient notice.” [§ 40-10-120].

The process for the redemption of land sold to the state, including the amount to be deposited with the probate court, is set out in Section 40-10-121. The process for the redemption of land sold to a party other than the state, including the amount to be deposited with the probate court, is set out in Section 40-10-122. Both of these Sections provide that a party seeking to redeem property sold for unpaid taxes must pay a twelve percent<sup>5</sup> interest rate on the taxes due at the time of default. Upon payment as required by law, the judge of probate shall issue a certificate of redemption. [§ 40-10-127]. Payment includes the amount to be deposited directly with the probate court to cover the tax-sale price, interest, and unpaid taxes under § 40-10-122(a), as well as any insurance premiums and improvement costs owed under § 40-10-122(c). [*Wall to Wall Props. v. Cadence Bank, N.A.*, 163 So. 3d 384 (Ala. Ct. Civ. App. 2014)].

A party aggrieved by the erroneous issuance of a certificate of redemption may petition a circuit court in the county in which the probate court lies for a writ of mandamus to compel the vacating of the certificate. [§ 6-6-640; *Wall to Wall Props. v. Cadence Bank, N.A.*, 163 So. 3d 384 (Ala. Ct. Civ. App. 2014)]. A petition for a writ of mandamus filed in a circuit court under § 6-6-640 must be filed without unreasonable delay. Any more specific deadline for filing a petition for a writ of mandamus found in Rule 21, Ala. R. App. P., applies only in the three designated appellate courts in this state and not in the circuit court. See Rule 1, Ala. R. App. P.

Distinct lots or parcels of land may be redeemed without redeeming the entire property. Any owner desiring to redeem any one or more parcels of land must also pay all tax on personal property assessed against him in said assessment, together with all costs of court and advertising fees. [§§ 40-10-123–126].

Within five days from the redemption of any real estate bid in by the state, the judge of probate shall notify the tax assessor and tax collector of his county and shall, on demand, pay to

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<sup>5</sup> This rate will decrease to eight percent on January 1, 2020.

them the costs and fees to which they are respectively entitled. [§ 40-10-130]; [§§ 9-9-5, 50, and 57].

***t. Social Security Number and Birthdate Redaction.*** Before recording any document that conveys any interest in real or personal property (deeds, mortgages, etc.) or purports to encumber an interest in real or personal property (e.g., liens), (except federal and state tax liens) as public record with the probate court Social Security numbers and birthdates must be redacted, to make that information illegible. [§ 12-13-22]. Any other document, including military discharge forms, that is filed as public record in the probate court should be redacted in the same manner. [§ 12-13-22]. The person submitting the document should redact, remove or otherwise make illegible the social security number, otherwise the judge of probate can do so under the authority given under subsection (c) of Section 12-13-22.

Additional limitations are placed on the use of social security numbers on documents available for public inspections in Section 41-13-6. Moreover, Section 4-13-7 places limitation on identifying information of state employees on records available for public inspection including social security numbers.

In contrast, there are some statutes that require the inclusion of the social security number on some documents such as marriage licenses. [§ 30-3-194].

***u. Taxpayer About to Jeopardize Possibility of Tax Collection.*** When the tax collector has good reason to believe that any person owing taxes is about to leave or remove his property from the county, or that such person is closing out or going out of business or disposing of substantially all of his personal property and thereby the collection of such taxes is endangered it is the tax collector's duty to make out and certify to the judge of probate a bill against such person for the amount of such taxes and any fees due the assessor or collector. (Advertisements in newspapers or otherwise of sales of any personal property as a closing out sale, fire sale, bankrupt sale, or any sale of like character shall be prima facie evidence that the collection of taxes due on property so advertised is endangered within the meaning of this section.)

Upon the approval thereof by the judge of probate in writing endorsed thereon, such bill shall operate as a writ of fieri facias (writ of execution) which the collector is authorized to execute by levy and sale, in the same manner as sheriffs are authorized to execute such writs when issued out of the circuit court. Said writ may be executed in any county of the state where property of the taxpayer is found. [§ 40-5-31].

## V.

### THE FUNCTIONS OF THE PROBATE JUDGE AS CHAIRMAN OF THE COUNTY GOVERNING BODY

#### A. GENERALLY

One of the most distinctive features of county government in Alabama is the great diversity marking the composition of functioning of the county commissions. In particular, the number of members on each commission and the role of the judge of probate in the body vary from county to county.

The number of members on the county commission varies from three to eight, with five members being the most common number. While the general law provides that the judge of probate shall be a member of the county commission, over a period of years a majority number of judges have been removed from the county commission and no longer serve as chairman of these bodies.

Even in the counties where the judge of probate is the chairman of the county commission, his duties and responsibilities in that position vary considerably from county to county. Some duties are assigned by state statutes, while others may be delegated, formally or informally, by the county commission. Such delegation makes a complete and accurate discussion of these duties and responsibilities difficult.

The number and kind of duties which are delegated to a particular judge of probate vary from county to county. Consequently, in one county the judge will be expected to carry the major burden of county operations, while in others the commissioners will assume the greater part of the workload.

*a. Administrative Tasks.* Unless otherwise provided by local law or court order, the judge of probate shall serve as the chairperson of the county commission. [§ 11-3-1]. As chairman of the county commission, the judge of probate is assigned several administrative tasks -- by state law and by delegations by the commission. When acting in this capacity, the judge of probate has basically the same powers as chairperson but does not vote except in the event of a tie. [§ 11-3-20]. The judge is responsible for recording the proceedings of the commission. [§ 11-3-20]. The judge of probate is also assigned the responsibility for the maintenance of county fiscal records by general law and is responsible for ensuring that these records are current and

accurate. This duty includes supervising the accounts, auditing claims against the county, and issuing warrants. The performance of most of these duties may be delegated to subordinate personnel in the office. However, the judge must personally review each claim against the county, determining the factual and legal sufficiency of the claim. [§§ 11-8-9, 11-12-10 through 11-12-12]. The duties of the judge of probate and county commission in relation to the fiscal records and claims against the county are explained in Sections 11-8-1 through 6, Sections 11-8-9 through 12, and Sections 11-8-15 through 17. Other administrative duties include the preparation of a tentative budget, purchasing for the county, and the preparation of the agenda for the commission.

**b. County Board of Health.** In addition to those duties delegated to the judge of probate by the commission, in those counties in which the judge of probate is chairman of the county commission he is ex officio a member of the County Board of Health. [§ 22-3-1]. The duties and responsibilities of this board are explained in Section 22-3-2.

**c. Keeping Other Members of the Commission Informed on Matters.** The judge of probate is ordinarily expected by the members of the county commission to keep them informed on matters affecting the commission's activities. This is particularly true in counties which do not have full-time commissioners. Included in the matters normally brought to their attention are new opinions by the attorney general, recent court decisions, and new statutes affecting the jurisdiction and authority of the governing body. Citations of existing laws applicable to questions pending before the commission may also be requested.

In most of the counties in which the judge of probate is chairman of the county commission, the commissioners are part-time officials who are often more directly concerned with roads, bridges, and highways than some of the other functions of the governing body. Therefore, the judge of probate is expected to bring to the attention of the commissioners the duties and responsibilities of the county commission in relation to other county functions. For example, the judge of probate usually notifies the commissioners of certain official and board members who must be appointed by the commission. The judge is generally responsible for the codification and publication of local acts applicable to the county, and for an explanation of the fiscal responsibilities of the governing body.

**d. Preparation of Budgets.** Section 11-8-3 sets out the requirements and procedures for establishing the county general fund budget. Generally speaking, the judge of probate, as chairman of the county commission, is expected to prepare or compile the tentative budget or to supervise its preparation for submission to the county commission. All county officials must submit a tentative budget, and in counties in which budget practices are not elaborate, all agency budgets are simply compiled and submitted to the county governing body. Please *see* the

*Handbook for Alabama County Commissioners, 11<sup>th</sup> Ed.* for a comprehensive review of the laws concerning purchases and competitive bid laws.

***e. Responsibility for Other Executive Acts.*** It is not uncommon for other executive acts of the commission to be delegated to the judge. Among these are: making contacts with state agencies; publishing of receipts and expenditures; arranging contracts in cooperation with the county attorney; and procuring forms of books which the commission is required to provide for other county officials.

***f. Summary.*** This enumeration does not cover all of the ex officio duties of the judge of probate as chairman of the county commission. Many other duties have undoubtedly been assigned by the county governing body itself. Local acts may also impact on the duties of the judge of probate in his or her role as the chair of the county commission. For more information concerning Alabama county commissioners *see Handbook for Alabama County Commissioners, 11th ed.*, published by the Alabama Law Institute.



**APPENDIX A**

Under Section 10A-1-4.31, the judge of probate or the Secretary of State, as the case may be, shall collect the following fees when the filing instruments described in this title are delivered to him or her for filing:

Filing Instrument	Fee for State of Alabama	Fee for Probate Judge
(1) Certificate of formation and restated certificate of formation	\$100	\$50
(2) Amendment to certificate of formation	\$50	\$25
(3) Name reservations A. Less than 24 hours B. 24 hours or more	\$25 \$10	No fee No Fee
(4) Certificate of dissolution (other than a statement of dissolution or cancellation under Chapter 8A)	\$100	\$50
(5) Certificate, articles, or statement of merger; statement of conversion, articles of consolidation or share exchange	\$100	\$50
(6) Foreign entity registration including a statement of foreign limited liability partnership	\$150	No fee
(7) Certificate of existence A. Less than 24 hours B. 24 hours or more	\$25 \$10	No fee No fee
(8) Statements and any document required or permitted to be filed with the Secretary of State under Chapter 8A	\$100	No fee

(9) Certified statements and any document required or permitted to be filed with the judge of probate under Chapter 8A		\$100
(10) Any other filing instrument required or permitted to be filed under this title	\$25	\$25

When appropriate, two checks shall accompany a filing instrument delivered to the judge of probate or the Secretary of State for filing, one payable to the judge of probate for all charges for the judge of probate, and one payable to the State of Alabama covering all charges for the Secretary of State. In the case of any filing instrument delivered for filing to the judge of probate accompanied by a check for the charges for the Secretary of State, the check for the Secretary of State shall be forwarded by the judge of probate to the Secretary of State. In the case of any filing instrument delivered for filing to the Secretary of State accompanied by a check for the judge of probate, the check for the judge of probate shall be forwarded by the Secretary of State to the judge of probate

The judge of probate shall collect the following fees for copying and certifying the copy of any filing instrument relating to an entity:

- (1) Two dollars (\$2) a page for copying; and
- (2) Ten dollars (\$10) for the certificate.

## APPENDIX B

### CANONS OF JUDICIAL ETHICS

#### Compliance with the Canons of Judicial Ethics

C. Probate Judge. Probate judges in Alabama are charged with many administrative and executive duties not judicial in nature. However, when a probate judge performs judicial duties then applicable canons should be followed. A probate judge is not expected to comply with the following:

5B(2), 5E and G, 6C, and 7.

In lieu of the provisions of 3A(5), the following shall be applicable to probate judges:

A probate judge should dispose promptly of the business of the court, being ever mindful of matters taken under submission.

In lieu of the provisions of 3B, the following shall be applicable to probate judges:

It is desirable that a probate judge should diligently discharge his administrative responsibilities, facilitate the performance of the administrative responsibilities of other judges and court officials, require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him, initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the probate judge has personal knowledge, and not approve compensation for appointees beyond the fair value of services rendered.

A probate judge should consider himself the conservator of all estates under his jurisdiction.



## **GLOSSARY OF TERMS**

**Note:** The terms in this glossary are generally descriptive of their use in probate court. Please see the appropriate statutes in the Alabama Code for a more precise meaning of these terms.

**"Advancement"** - money or property given by a parent to his child or, sometimes, presumptive heir, or expended by the former for the latter's benefit, by way of anticipation of the share which the child will inherit in the parent's estate and intended to be deducted therefrom. It is the latter circumstance which differentiates in advancement from a gift or a loan.

**"Ala. Code"** - stands for the Code of Alabama, the 'official' name of the laws of our state.

**"Alabama Law Institute"** - an organization created by act of the Legislature in 1967 and became the Law Revision Division of the Legislative Services Agency in 2017. The purpose of the Institute is to clarify and simplify the laws of Alabama, to revise laws that are out-of-date and to fill in gaps in the law where there exists legal confusion. For more information about the Institute, please visit <http://www.lsa.state.al.us/ali/ali.aspx>.

**"Beneficiary"** - as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer.

**"Bond"** - is a financial security provided to the court by the personal representative and/or a bonding company to ensure that the personal representative of the estate faithfully does the job of the personal representative.

**"Claim"** - is a claim against the estate of the decedent, including those for debts of the decedent that arise before or after the death of the decedent.

**"Claimant"** - is the person or entity making a claim against the decedent's estate.

**"Codicil"** - is an amendment to a will.

**"Creditor"** - is a person or entity to whom a debt is owed by the decedent.

**"Decedent"** - is the person who has died and whose will is being probated or whose estate is being administered.

**"Deed"** - is a document that conveys title to real property from one owner to another.

**"Descendant"** - is the child, grandchild, great-grandchild, etc. of a decedent.

**"Devise"** - when used as a noun, means a testamentary disposition of real or personal property and when used as a verb, means to dispose of real or personal property by will.

**"Devisee"** - any person in a will to receive a devise.

**"Distributee"** - any person who is entitled to receive property of a decedent from the decedent's estate.

**"Domicile"** - is a person's usual and permanent place of abode. Evidence of domicile includes registering to vote, using the address as a permanent place, etc. It is the place a person intends to return to, even when currently residing elsewhere. Domicile is important when determining the venue of the case.

**"Estate"** - includes the property of the decedent whose affairs are subject to the probate court's jurisdiction.

**"Ex-Parte Communication"** - is a prohibited communication between the court and one party without the consent of, or notice to, another party who would be adversely affected by the communication.

**"Executor"** - is a person appointed by a testator to carry out the directions and request in the testator's will and to dispose of the property according to the testator's wishes after the testator's death. In Alabama an executor is called a Personal Representative.

**"Fiduciary"** - is a person or entity, who acts primarily for another's benefit in matters connected with that duty. A fiduciary is held to the highest degree of good faith in performing his or her duties. A personal representative is a fiduciary.

**"Filing Fee"** - the fee required for filing a case with the probate court.

**"Guardian"** - a person who has qualified as a guardian of a minor or incompetent person pursuant to testamentary or court appointment but excludes one who is a guardian ad litem.

**"Guardian ad Litem"** - an attorney appointed to represent, prosecute or defend an action on behalf of a party incapacitated.

**"Heirs"** - those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to inherit the property of a decedent.

**"Interested Person"** - any person having an enforceable right or claim, which may be affected by the proceeding, and may include heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding. "Interested person" also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning of "interested person" as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

**"Intestate"** - means having died without a valid will.

**"Issue"** - is all descendants, of all generations, of a deceased person.

**"Jurisdiction"** - is the authority for a court to act on a matter. Probate courts are of "limited jurisdiction," and only have the authority to act over certain proceedings.

**"Minor"** - a person who is under 19 years of age.

**"Nonresident Decedent"** - a decedent who was domiciled in another jurisdiction at the time of his death.

**"Notarization"** - is the attestation by a Notary Public that a document was signed under oath and that the person whose signature appears on the document is that person. Notaries in the State of Alabama are appointed and commissioned by the probate judges of the various counties. *See* Sections 36-20-70 through 75 for further information on notarial acts. Certain documents filed in a probate case must be notarized before being accepted by the court for filing.

**"Notice"** - or "giving notice" is a written "announcement" to persons entitled to know what has transpired or will transpire in a case.

**"Organization"** - a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal entity.

**"Parent"** - under estate law "parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under Chapter 8 of Title 43 by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

**"Person"** - an individual, a corporation, an organization, or other legal entity.

**"Personal Property"** - is all the property that is not land, real estate or real property. Some examples are bank accounts, stocks, bonds, insurance policies, pension plans, jewelry, furniture and motor vehicles.

**"Personal Representative"** - is a person who administers the estate of the decedent by giving notice of his/her appointment, paying claims of the estate and then distributing the estate according to the will. This term includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

**"Petition"** - is a written document filed with the probate court asking the court to exercise the court's authority in a legal matter.

**"Petitioner"** - is the person who presents a petition to the probate court to begin a legal action. For example, a person petitions to be appointed a personal representative.

**"Pleading"** - is a legal document filed with the court. Pleadings and papers filed in the court include a caption or heading that identifies the state, county, and name of the court; the names of the parties; and a title describing the type of paperwork being submitted.

**"Power of Attorney"** - is a signed document that authorizes another person on someone's behalf. A power of attorney terminates upon the incompetency of the person who granted the power of attorney unless it is a durable power of attorney.

**"Pro se"** - is the Latin phrase for acting without an attorney.

**"Probate"** - technically is the court procedure by which a will is proved to be valid or invalid. Common usage of this term now means all matters relating to the administration of an estate, including estates with wills and intestate estates.

**"Real Property"** - includes land, houses, farms, leases, oil, gas, mineral, water and timber rights.

**"Revoked or Revocation"** - when used in the context of wills and administration, refers to a will or other document that the decedent has canceled. If a will is revoked, it has no effect.

**"Seal"** - means a notary seal or stamp, seal of the court, etc., which proves the authenticity of a document.

**"Statute of Limitation"** - is a law that sets a time limit for starting a case.

**"Testator"** - is someone making, or who has made, a will, or someone who dies leaving a valid will.

**"Trust"** - is an entity set up during a person's lifetime through a written trust agreement. Trust assets are held for the beneficiary by another person, the trustee.

**"Unrevoked"** - when used in the context of wills and administration, refers to a will or other document that has not been invalidated or canceled.

**"Venue"** - is the place where the case should be filed.

**"Will"** - is a document that provides for the distribution of the assets of a person's estate upon death. A will also typically designates a personal representative and can appoint a guardian for minor children. Certain formalities must be followed when executing the will in order for the will to be considered valid.

**"Witnesses"** - when used in the context of wills and administrations, refers to persons attesting to having watch a testator sign his/her will.



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