REVISITING *AFFINITY HOSPITAL, L.L.C. V. WILLIFORD*

By: Will Starnes

Under Alabama law, only the personal representative of a decedent's estate may commence a cause of action for wrongful death.[1] Traditionally, this meant only an executor or administrator of a decedent's estate could properly file a wrongful death action. The Alabama Supreme Court expanded this rule in *Affinity Hospital, L.L.C. v. Williford*, holding that an administrator *ad litem* also has capacity to file a wrongful death action. *Affinity Hospital*, a 5-0 decision, held that Doris Williford, as the administrator *ad litem* of Kristopher Mark Kean's estate, "was a 'personal representative' within the meaning of [Alabama Code Section] 6-5-410, and was, therefore, vested with the authority conferred by that section to file a wrongful-death action."[2] A reasonable interpretation of *Affinity Hospital*, as set forth in this article, is that the Court's holding should be limited to the facts of that case and that administrators *ad litem* generally are not personal representatives and do not have capacity to file wrongful death actions under Alabama's Wrongful Death Act.

The Court in *Affinity Hospital* addressed whether the "'administrator *ad litem*' had 'the capacity to file [the] wrongful death suit [in question].'"[3] The Court did not address whether the administrator *ad litem* "was properly appointed in the first place."[4] The "circuit court *assumed* that Williford was properly appointed as an administrator *ad litem*."[5] Importantly, whether "an administrator *ad litem* can be appointed only in connection with an *existing* proceeding" was "outside the scope of the [question]" before the Alabama Supreme Court.[6]

I. The Supreme Court's Holding in *Affinity Hospital, L.L.C. v. Williford.*

In *Affinity Hospital*, the decedent, Kean, committed suicide at Trinity Medical Center in February 2006.[7] A year later, Kean's mother "petitioned the Jefferson County Probate Court to appoint the county administrator, Doris Williford, as administrator *ad litem* of Kean's estate."[8] The petition alleged Kean "died under 'unusual circumstances,' that his death required 'further investigation,' and that [she] desired to obtain medical records held by Trinity Medical Center 'in order to determine whether there [were] grounds to assert a wrongful death claim on behalf of the estate of the decedent.'"[9] Williford was appointed administrator *ad litem*, and "[o]n July 23, 2007, Williford filed a wrongful-death action . . . against Affinity Hospital, L.L.C., d/b/a Trinity Medical Center . . . (hereinafter referred to collectively as 'Trinity')."[10] Trinity answered the complaint and moved for summary judgment, arguing "Williford, acting as an administrator *ad litem* of Kean's estate and not as a 'general administrator' appointed pursuant to [Section] 43-2-42, lacked the authority to file the wrongful-death action."[11]

On April 15, 2008, the Jefferson County Probate Court appointed Williford as the "Administrator of the estate of Kristopher Mark Kean, deceased, so that the wrongful death claim [could] be pursued on behalf of the estate."[12] Williford amended the complaint to "change the capacity in which she sued[,]" substituting "Doris Williford, General County Administrator as the Personal Representative and Administrator of the Estate of Kristopher Mark Kean" as the named plaintiff.[13] Trinity moved to dismiss the amended complaint claiming that Williford sued in the wrong capacity and the suit was a nullity.[14] The trial court denied Trinity's motion to dismiss and its motion for summary judgment but certified the following question of law for immediate appeal: "Did the administrator *ad litem* have the capacity to file this wrongful death suit in the first instance?"[15]

The Alabama Supreme Court concluded, "Williford, as the administrator *ad litem*, had the capacity to file the wrongful-death action in this case."[16] The Court's opinion noted that "[n]o authority [had] been cited indicating that an administrator *ad litem* [lacked] the power of a 'personal representative' for purposes of prosecuting a wrongful-death action."[17] Nothing

before the Court demonstrated "that an administrator *ad litem* [could not] perform the duties of a 'personal representative' in a wrongful death action . . . ."[18]

II. Alabama's Wrongful Death Act.

Under Alabama law, a cause of action for wrongful death "is statutory and did not exist at common law."[19] Alabama's Wrongful Death Act is governed by Section 6-5-410 of the Alabama Code. That section states, in part, "A personal representative may commence an action . . . for the wrongful act, omission, or negligence of any person, persons, or corporation, . . . whereby the death of the testator or intestate was caused . . . ."[20] To qualify as a personal representative, an individual must be the estate's executor or administrator. Without that appointment, the lawsuit is a nullity.[21] The personal representative "acts as an agent of legislative appointment for the purpose of effectuating public policy. And this right is vested in the personal representative alone, except in the case of minors."[22] In *Downtown Nursing Home v. Pool*, the Alabama Supreme Court held that because the plaintiff "filed suit without having been appointed executor or administrator[,]" he "did not qualify under [Section] 6-5-410 as a personal representative [and the] suit was a nullity."[23]

III. Administration of Estates.

Probate courts have original and general jurisdiction over the administration of estates, including "[t]he granting of letters testamentary and of administration . . . ."[24] To file a wrongful death claim under *Alabama Code Section* 6-5-410, an estate must be opened and an administrator/executor must be appointed pursuant to the requirements of Alabama Code Sections 43-2-42 or 43-2-20.[25] It is not enough to simply request appointment by the probate court, because "[t]he administration of an estate does not commence with the filing of a petition for letters of administration or of a petition . . . for letters testamentary. Instead, the administration of an estate commences when the probate court takes action upon a petition to initiate proceedings."[26] Before this "commencement," a probate estate "has no legal existence, and no lawsuit can be filed on its behalf . . . ."[27]

A. Administrators Ad litem.

The appointment of administrators *ad litem* is codified in Section 43-2-250.[28] "[T]the text of [Section] 43-2-250 . . . requires a trial court to appoint an administrator *ad litem* if the estate of a deceased person must be represented in 'the particular proceeding . . . .'"[29] While a "circuit court cannot initiate the administration of an estate, because the initiation of administration is a matter exclusively in the jurisdiction of the probate court[,]"[30] it can appoint an administrator *ad litem* pursuant to Section 43-2-250. More specifically, it "is the 'duty' of *any court* to appoint an administrator *ad litem* when there is *a proceeding in a court* in which *the estate of a deceased person* must be represented and either there is no administrator or executor or the executor or administrator is interested adversely to the estate."[31] Justice Michael Bolin explained that, as a consequence, the appointment of administrators *ad litem* is confined to existing cases: "[T]he need for an administrator *ad litem* occurs <u>when there is already an existing civil proceeding</u> ('in any proceeding in any court') that is in need of someone to substitute for a deceased party, who either has no personal representative or has one who is conflicted."[32]

B. Distinguishing Administrators/Executors from Administrators Ad litem.

A circuit court can appoint an administrator *ad litem* in an existing proceeding, but "[t]he appointment of an administrator *ad litem* <u>does not</u> 'open' or commence the administration of an estate."[33] If an administrator *ad litem* can be appointed only in the absence of an executor or administrator, the administrator *ad litem* cannot be the executor or administrator.[34] The powers afforded a personal representative as general administrator include the power to "[p]rosecute 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."[35] Alternatively, an administrator *ad litem* is granted only those powers given

to him or her by the court for the particular proceeding at issue.[36] "[T]he role of an administrator *ad litem* is limited, and an administrator *ad litem* has never been known to be a substitute for a personal representative."[37]

This limitation in power is significant because: Only the general administrator of an estate is issued letters under Alabama Code Sections 43-2-42 and 42-2-20; only the general administrator is required to provide notice of appointment pursuant to Sections 43-2-60 and 43-2-61 of the Alabama Code; only the general administrator must satisfy the bond requirements of Sections 43-2-851 and 43-2-852 of the Alabama Code; only the general administrator, "and the sureties on his bond[,]" are subject to liability under *Alabama Code Section* 43-2-111 for distributing wrongful death damages.[38] None of these requirements/liabilities apply to administrators *ad litem*.

IV. Distinguishing the Supreme Court's Holding in *Affinity Hospital.*

The holding in *Affinity Hospital* should be limited to the facts of that case, because the Alabama Supreme Court did not address "[w]hether a proceeding must be pending or existing before an administrator *ad litem* can be appointed . . . ."[39] The Court in *Affinity Hospital* acknowledged that "[a]n administrator and an administrator *ad litem* serve in different fiduciary capacities and are separate and distinct parties."[40] Even Williford, in her brief to the Supreme Court, agreed she was seeking an exception to the rule which should not apply in all cases.[41]

Under *Affinity Hospital*, a circuit court could approve a plaintiff's request for appointment as administrator *ad litem*. That plaintiff, having circumvented the jurisdiction of the probate court, could then file a wrongful death case on behalf of a decedent's estate. Under this scenario, allowing an administrator *ad litem* to file a wrongful death claim requires the courts of this state to ignore the safeguards of the Wrongful Death Act and the probate process of appointing a proper representative. Those safeguards exist to require a petitioner to establish capacity for appointment and may be scrutinized by the courts and disallowed where the law so requires.

Since the Alabama Supreme Court delivered its opinion in *Affinity Hospital*, the make-up of the Supreme Court has changed. *Affinity Hospital* was a 5-0 decision. Only two of those five Justices remain on the Supreme Court. Justice Bolin was not on the panel that decided *Affinity Hospital*. As a former Probate Judge with over fourteen years of experience on the bench, "[Justice Bolin is] experienced and familiar with the interplay of opening a decedent's estate in the probate court for the primary purpose of allowing a personal representative to file a wrongful-death claim in the circuit court."[42]

Since *Affinity Hospital*, Justice Bolin has addressed this issue in a number of special concurrences. In *Golden Gate National Senior Care, LLC v. Roser*, Justice Bolin stated that an administrator *ad litem* does not have capacity to file a wrongful death suit.[43] In *Ex parte Wilson*, he wrote, "An administrator *ad litem* [cannot] initiate a wrongful-death action when the question of the capacity of the administrator *ad litem* to bring such an action is properly and timely presented to the trial court."[44]

Alabama's wrongful death statute has no common law predecessor and the statute must be strictly construed.[45] Justice Bolin points out that if the legislature intended administrators *ad litem* to be proper parties to file wrongful death actions, it could have included them as proper parties under Alabama's wrongful death statute:

> It is noteworthy that the predecessor section to [Section] 43–2–250 regarding administrators *ad litem* was first enacted in 1876, while it was the later Code of 1886 that moved the "Act to Prevent Homicides," the original wrongful-death statute, from the criminal-law index to the civil-law index, so the legislature was aware of the then relatively new concept in Alabama of administrators *ad litem*. . . . The legislature could have listed administrators *ad litem* as proper parties, or alternate parties, to bring a wrongful-death proceeding if it had chosen to do so. *See Noonan v. East-West Beltline, Inc.*, 487 So. 2d 237, 239 (Ala. 1986) ("It is not proper for a court to read into the statute something which

the legislature did not include although it could have easily done so.").[46]

In *Wood v. Wayman* -- decided after *Affinity Hospital* -- the Supreme Court held that "a wrongful-death action is not filed for the benefit of the estate, because the personal representative who brings such an action does not represent the estate."[47] On the other hand, an administrator *ad litem* can only be appointed in an existing civil proceeding when "*the estate of a deceased person must be represented.*"[48]

Thus, the purported role of an administrator ad litem as a plaintiff in a wrongful death case is contradictory: If a "decedent's estate is not interested in a wrongful death action or in any proceeds derived from such an action[,]" how can an administrator ad litem have capacity to file a wrongful death action where his or her appointment is only proper as a representative of the estate?[49] The answer is the administrator *ad litem* cannot have capacity, because the administrator *ad litem* was never intended to be the proper party to file a wrongful death action.

V. The Plaintiff Must be a Properly Appointed Personal Representative at the Time Suit is Filed.

The issue of establishing capacity to file suit within the statutory period is paramount.[50] This conclusion is supported by *Downtown Nursing Home, Inc. v. Pool*, in which the Alabama Supreme Court held that because the plaintiff filed suit "without having been appointed executor or administrator," he did not qualify under Section 6-5-410 as a personal representative, and the suit was a nullity.[51] A "nullity" is "[s]omething that is legally void," as if it had never taken place.[52]

A number of subsequent opinions from the Alabama Supreme Court support the holding in *Pool*, including *Waters v. Hipp*, in which the plaintiff did not petition the probate court for appointment as executor/administrator before filing a wrongful death action.[53] Citing *Pool* approvingly, *Waters* held, "One who sues under this section without having been appointed executor or administrator does not qualify under this section as a personal representative, and the suit is a nullity."[54]

While *Strickland v. Mobile Towing & Wrecking Company, Inc.* was partially overruled by *Ogle v. Gordon*, 706 So. 2d 707 (Ala. 1997), the following statement remains true:

> The provision that a wrongful death action shall be brought only in the name of the administrator or executor of the estate of the deceased means the legally appointed administrator or executor of the estate of the deceased person. . . . [A]n appointment by the Probate Court [is] necessary to give the administratrix authority to act, and in the absence thereof, she [has] no legal capacity to institute [a] wrongful death action.[55]

In *Ogle*, the decedent was killed in a car accident on May 28, 1992.[56] The husband of the decedent petitioned the probate court for letters of administration and filed a wrongful death claim on September 30, 1992, less than five months after the decedent's death.[57] The probate court delayed and did not grant letters of administration to the husband until January 19, 1995, more than two years after the decedent's death.[58] The trial court granted the defendants' motion for summary judgment, holding the plaintiff's action "was barred by [Section] 6-5-410 because the letters were not issued by the probate court until after the two years had run."[59]

On appeal, the Supreme Court reversed and remanded the trial court's ruling, holding that the "dereliction" of the probate court should not bar the plaintiff's action.[60] The Court applied Alabama Code Section 43-2-831 to the specific facts before it to allow the plaintiff's untimely appointment to relate back.[61] Section 43-2-831 states, in pertinent part, "The duties and powers of a personal representative commence upon appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. . . ."[62] In applying this section, the Court stated, "*Strickland* correctly points out that under the doctrine of relation back one must have something to relate back to, and we note that in the

present case the filing of the original petition [in the probate court] is the event to which the appointment would relate back.[63]

In *Wood v. Wayman*, the Alabama Supreme Court discussed in detail the issue of relation back under Section 43-2-831. In *Wayman*, the question before the Supreme Court was whether the plaintiff's appointment as personal representative of the decedent's estate, which was "accomplished after the statute of limitations for a wrongful death medical malpractice claim expired," related back to the filing of the complaint.[64] The defendant-physicians appealed when the trial court denied their motion to dismiss "on the basis that the two-year period of [Section] 6-5-410 was tolled by the filing of an action" by someone other than the properly appointed personal representative.[65] The Supreme Court reversed the trial court's judgment and stated the action was filed "by a person who had no authority under [Section 6-5-410] to file a wrongful-death action."[66]

The Court held that "an action brought under the wrongful-death statute is not brought on behalf of the estate, and because the estate gains no benefit from even a successful wrongful-death action, the relation-back provision in [Section] 43-2-831 does not apply to a wrongful-death action brought under [Section] 6-5-410."[67] The Court went on to distinguish its holding in *Ogle*, stating:

> The legal issue presented in *Ogle* was not one of relation back; rather, the 'legal question presented [was] whether the failure of the probate court to issue letters of administration within the two-year period after the death requires the dismissal of a wrongful death action that was timely filed by the person later issued letters of administration.' *Ogle,* 706 So. 2d at 707. This Court decided that, under the circumstances of that case, it did not.[68]

The Court explained that in the *Ogle* it permitted relation back by virtue of Section 43-2-831 "solely because of the 'inadvertence' of the probate court, which caused the long delay after [the plaintiff] timely filed both his petition and his complaint within four months of the decedent's death."[69] In *Wood*, the Supreme Court found nothing to support the plaintiff's argument "that her appointment as personal representative of [the] estate [related] back to the date of the filing of the wrongful-death action."[70] The Court further stated, "This case is similar to *Downtown Nursing Home,* in which we held that the doctrine of relation back did not apply."[71]

VI. Conclusion.

The issue the Alabama Supreme Court did not address in *Affinity Hospital* -- whether a proceeding must be pending or existing before an administrator *ad litem* can be appointed -- is significant. Under Alabama's Wrongful Death Act, a plaintiff is required to establish his or her capacity as the personal representative of the decedent's estate within the statutory period provided by Alabama Code Section 6-5-410. The plaintiff must establish this capacity before a probate court, because probate courts have exclusive jurisdiction over the administration of estates.

A circuit court can appoint an administrator *ad litem* to represent a decedent's estate. This appointment does not commence the administration of an estate, however, because a circuit court cannot initiate the administration of an estate. Furthermore, an administrator *ad litem* can be appointed only in an existing civil proceeding when *the estate of a deceased person must be represented.* On the other hand, a wrongful death action is not filed for the benefit of the estate, and the personal representative does not represent the estate.

Administrators *ad litem* were never intended to be proper parties to file wrongful death actions. As noted by Justice Bolin, if the legislature intended administrators *ad litem* to be proper parties to file wrongful death actions, it could have included them as proper parties under Alabama's wrongful death statute. Given Justice Bolin's wealth of knowledge

in probate law and the change in the make-up of the Supreme Court since its opinion in *Affinity Hospital*, the Alabama Supreme Court may be willing to revisit its holding in *Affinity Hospital*. Defense counsel would be wise to raise lack of capacity as an affirmative defense in all wrongful death cases.[72]

Will Starnes is an associate with Starnes Davis Florie, LLP. His practice is devoted to civil litigation, where he focuses primarily in the areas of medical malpractice defense and commercial litigation. As part of Starnes Davis Florie's collegiate sports group, Will also represents universities in NCAA compliance investigations. He is a member of the Alabama State Bar, the Alabama Defense Lawyers Association, the Defense Research Institute, and the American Bar Association. Will graduated from Auburn University in 2007, where he majored in Economics and minored in Business Administration. In December 2010, Will graduated from the Cumberland School of Law and business school at the Brock School of Business, earning his J.D./M.B.A.

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1 *See* Ala. Code § 6-5-410.

2 *Affinity Hosp., L.L.C. v. Williford*, 21 So. 3d 712, 718 (Ala. 2009).

3 *Id*. at 718 n.4.

4 *Id*.

5 *Id*. (emphasis in original).

6 *Id*. (emphasis in original).

7 *Id*. at 713.

8 *Id*.

9 *Id*.

10 *Id*.

11 *Id*.

12 *Id*.

13 *Id*.

14 *Id.*

15 *Id*. at 713-14.

16 *Id*. at 719-720 (emphasis added).

17 *Id*. at 718.

18 *Id. See also Hernandez v. Hankook Tire Am. Corp.*, No. 2:12-CV-03618-WMA, 2013 WL 5874774, at *2 (N.D. Ala. Oct. 30, 2013) (following the holding in *Affinity Hospital* and finding that the plaintiff, as administrator *ad litem*, had standing to pursue a wrongful death claim).

19 *Downtown Nursing Home, Inc. v. Pool*, 375 So. 2d 465, 466 (Ala. 1979) (citing *Kennedy v. Davis*, 55 So. 104, 105-06 (Ala. 1911)).

20 Ala. Code § 6-5-410.

21 *See Pool*, 375 So. 2d at 466 ("The words 'personal representative' . . ., when used in the wrongful death statute, can only mean the executor or administrator of the injured testator or intestate." (citing *Hatas v. Partin*, 175 So. 2d 759, 761 (Ala. 1965)).

22 *Pool*, 375 So. 2d at 466 (citing *Holt v. Stollenwerck*, 56 So. 912, 912-13 (Ala. 1911)).

23 *Id. See also Waters v. Hipp*, 600 So. 2d 981, 982 (Ala. 1992) ("One who sues under [Section 6-5-410] without having been appointed executor or administrator does not qualify under this section as a personal representative, and the suit is a nullity." (citing *Pool*, 375 So. 2d at 466)).

24 Ala. Code § 12-13-1(b)(2).

25 *See* Ala. Code § 43-2-831 ("The duties and powers of a personal representative commence upon appointment."). *See also* Ala. Op. Att'y Gen. No. 2012-004, 2011 WL 7444084, at *2 (Oct. 21, 2011) ("Section 43-2-42 of the Code authorizes the probate judge to appoint certain persons therein named to open and administer an intestate estate."); Ala. Code § 43-2-20 (When a will is "admitted to probate in this state, the judge of the court in which the will was probated may issue letters testamentary, according to the provisions of this article, to the persons named as the executors in such will, if they are fit persons to serve as such.").

26 Ala. Op. Att'y Gen. No. 2012-004, at *1 (citing *DuBose v. Weaver*, 68 So. 3d 814, 821 (Ala. 2011)). *See also Ex parte Smith*, 619 So. 2d 1374, 1376 (Ala. 1993) ("[T]he mere filing of a petition for the administration of an estate does not in itself begin the administration; rather, the probate court must act upon the petition and thereby activate the proceedings . . . .").

27 In re Eldridge, 348 B.R. 834, 845-46 (Bankr. N.D. Ala. 2006) (citing Jones v. Blanton, 644 So. 2d 882, 887 (Ala. 1994)).

28 See Ala. Code § 43-2-250:

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.

29 Mitchell v. Thornley, 98 So. 3d 556, 559 (Ala. Civ. App. 2012).

30 *Ex parte Smith*, 619 So. 2d at 1376 (citing Ala. Code § 12-13-1; *Ex parte Pettus,* 17 So. 2d 409, 411-12 (Ala. 1944)).

31 *Golden Gate Nat'l Senior Care, LLC v. Roser*, 94 So. 3d 365, 370 (Ala. 2012) (Bolin, J., concurring specially) (emphasis in original).

32 *Id*. (emphasis added).

33 Ala. Op. Att'y Gen. No. 2012-004, at *2 (emphasis added).

34 *See* Ala. Op. Att'y Gen. No. 2012-004 ("An administrator and an administrator *ad litem* serve in different fiduciary capacities and are separate and distinct parties." (citing *Affinity Hosp.*, 21 So. 3d at 716)). *See also Great Am. Ins. Co. v. Am. Owens, Inc.,* 425 F. Supp. 2d 1278, 1280 (M.D. Ala. 2006) ("Great American has confused the role of Administrator *Ad Litem* under *Ala. Code* § 43-2-250 with that of a general Administrator appointed by a state Probate Court under *Ala. Code* § 43-2-42.").

35 *Ala. Code* § 43-2-843(18).

36 *Affinity Hosp.*, 21 So. 3d at 716 ("The administrator *ad litem* is appointed for a special and limited purpose and is solely responsible to the estate for that portion of its affairs entrusted to him or her by the court."). *See also* Ala. Op. Att'y Gen. No. 2012-004, at *2 ("Because an administrator *ad litem* and an administrator are distinct parties that may simultaneously exist/operate, it is the opinion of this Office that the requirements applicable to an administrator are not applicable to an administrator *ad litem*."); *Ex parte Baker*, No. 1130810, 2015 WL 643759, at *4 (Ala. Feb. 13, 2015) ("[A] special administrator *ad colligendum* is appointed at the discretion of the probate court. . . . The special administrator *ad colligendum* is not a personal representative of an estate and has only limited authority . . . .").

37 *Roser*, 94 So. 3d at 369 (Bolin, J., concurring specially). *See also Great Am. Ins. Co.,* 425 F. Supp. 2d at 1280 ("[T]he Administrator *Ad Litem* was appointed only for the limited purpose of representing the Estate . . ., pursuant to *Ala. Code* § 43-2-250. She was not appointed a general Administrator by a Probate Court. Her duties were limited to those set out in the statute under which she was appointed.").

38 *See* Ala. Op. Att'y Gen. No. 2012-004, at *2 ("[A]n administrator *ad litem* is not authorized to receive assets of the estate. As such, there is no liability on the part of an administrator *ad litem* with regard to filing notice of administration, resolving debts of the estate, or contacting heirs of the estate." This is "supported by the fact that an administrator *ad litem* is not required to file a bond.").

39 *Affinity Hosp.*, 21 So. 3d at 718 n.4. *See also Roser*, 94 So. 3d at 368 (Bolin, J., concurring specially) (stating that the failure "to cite any previous decision on the issue and the absence of express language in [Section] 43–2–250 forbidding an administrator *ad litem* from taking such action do not necessarily mean that the law does in fact empower an administrator *ad litem* to prosecute a wrongful-death action").

40 *Id*. at 716. *See also Kirksey v. Johnson*, 166 So. 3d 633, 653 (Ala. 2014) (Shaw, J., concurring specially) ("*Affinity Hospital* cannot be read to speak to whether an administrator *ad litem* can be properly appointed under [Section] 43–2–250 . . . to pursue a wrongful-death action in the first place . . . ." The case did not address whether the criteria of Section 43-2-250 were satisfied, "including issues as to whether an 'existing' proceeding was required and whether the estate needed representation . . . .").

41 Brief for Appellee, *Affinity Hosp., L.L.C. v Williford*, 21 So. 3d 712 (Ala. 2009) (No. 1071405), 2008 WL 6486822, at *18 (emphasis added) ("Appellee does not assert that this would be the general rule in all cases, but that it was clearly proper under the facts and laws giving rise to this appeal.").

42 *Kirksey v. Johnson*, 166 So. 3d at 649 (Bolin, J., concurring specially). *See also id.* (Justice Bolin further stated "that *Affinity Hospital* . . . blurred the distinction between the probate court's role and the circuit court's role in wrongful-death actions, because it is the probate court that generally monitors the actions of its own appointees.").

43 94 So. 3d at 368 (Bolin, J., concurring specially).

44 139 So. 3d 161, 162 (Ala. 2013) (Bolin, J., concurring specially). *But see* Ala. R. App. P. 53(d) ("An order of affirmance issued by the Supreme Court or the Court of Civil Appeals by which a judgment or order is affirmed without an opinion . . . shall have no precedential value and shall not be cited in arguments or briefs . . . .").

45 *See Johnson v. Brunswick Riverview Club, Inc.*, 39 So. 3d 132, 138 (Ala. 2009) (citations and quotations omitted).

46 *Roser*, 94 So. 3d at 369 (Bolin, J., concurring specially).

47 *Wood v. Wayman*, 47 So. 3d 1212, 1216 (Ala. 2010). *See also Steele v. Steele*, 623 So. 2d 1140, 1141 (Ala. 1993) (damages awarded pursuant to a claim for wrongful death are not part of the decedent's estate). *Compare Ex parte Rodgers*, 141 So. 3d 1038, 1043 (Ala. 2013) (holding that the personal representative was not entitled "to any fee from the wrongful-death proceeds because the recovery in the wrongful-death action was not *for the estate*"), *with* Ala. Code § 43-2-256 (allowing an administrator *ad litem* to receive payment for services "out of the estate represented by him").

48 Ala. Code § 43-2-250 (emphasis added).

49 *Roser*, 94 So. 3d at 370 (Bolin, J., concurring specially) (emphasis removed).

50 *See Wayman*, 47 So. 3d at 1219 (holding the trial court erred in denying defendant-physicians' motion to dismiss where the plaintiff "was not a personal representative appointed by the probate court when she filed the action or at the expiration of the statutory two-year period for filing a wrongful-death action"); *Ellis v. Hilburn*, 688 So. 2d 236, 239 (Ala. 1997) ("Because the two-year recovery period did not expire before [the plaintiff] was 'duly appointed' as administratrix, she established her capacity within the limitations period and thereby ratified her claim."); *Holyfield v. Moates*, 565 So. 2d 186, 187 (Ala. 1990) ("[I]f the two-year period prescribed by the statute has expired before the representative is 'duly appointed,' the heirs of the decedent are barred from recovery."); *Brown v. Mounger*, 541 So. 2d 463, 464 (Ala. 1989) (holding that because the plaintiffs "did not receive letters of administration within two years of [the decedent's] death, they [were] prohibited from bringing a wrongful death action").

51 375 So. 2d at 466.

52 Black's Law Dictionary (10th ed. 2014).

53 600 So. 2d 981, 982 (Ala. 1992).

54 *Id.* (citing *Pool*, 375 So. 2d at 466).

55 *Strickland v. Mobile Towing & Wrecking Co., Inc.*, 303 So. 2d 98, 102 (Ala. 1974) (emphasis added) (quoting *Glenn v. E. I. DuPont De Nemours & Co.*, 174 S.E.2d 155, 157 (S.C. 1970)), *partially overruled by Ogle v. Gordon*, 706 So. 2d 707 (Ala. 1997).

56 706 So. 2d at 708.

57 *Id*.

58 *Id*.

59 *Id*.

60 *Id*. at 711.

61 *Id*. at 707.

62 Ala. Code § 43-2-831.

63 706 So. 2d at 707.

64 47 So. 3d at 1213.

65 *Id*. at 1219.

66 *Id*.

67 *Id*. at 1217.

68 *Id*.

69 *Id*. at 1218.

70 *Id*. at 1219.

71 *Id*.

72 *See, e.g., Hankook Tire Am. Corp.*, 2013 WL 5874774, at *2 ("Defendants' arguments in support of Justice Bolin's position would be better addressed to the [Alabama] Supreme Court. Until the Supreme Court changes its mind, this court must adhere to [*Affinity Hospital*].").