Rel: 01/29/2016

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2015-2016

1140706

Roger Alvarado, M.D., et al.

v.

The Estate of Madeline Kidd, deceased, by and through its personal representative James O. Kidd, Sr.

1140752

Mobile Infirmary Association, d/b/a Mobile Infirmary Medical Center, et al.

v.

The Estate of Madeline Kidd, deceased, by and through its personal representative James O. Kidd, Sr.

Appeals from Mobile Circuit Court
(CV-14-903164)

PER CURIAM.

This case concerns the application of the relation-back doctrine to wrongful-death claims. The trial court allowed James O. Kidd, Sr., the personal representative of the estate of Madeline Kidd, deceased, to use relation back to sustain his claims against various health-care providers. Some of those providers -- Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center, Dr. Roger Alvarado, Dr. Barbara Mitchell, and IMC-Diagnostic and Medical Clinic, P.C. (hereinafter referred to collectively as "the defendants") -- sought review of the trial court's order by filing separate petitions for permissive appeals, which we are granting today by separate order. We reverse and remand.

While she was a patient at Mobile Infirmary Medical Center, Madeline underwent a discectomy and fusion of her cervical spine. On November 16, 2012, Madeline died while still a patient at the medical center; she died intestate. Almost two years later, on November 10, 2014, James, Madeline's husband, petitioned the probate court for letters of administration. On November 11, 2014, one day after James

had petitioned for letters of administration, he sued the defendants, alleging wrongful death and medical malpractice. The personal representative of Madeline's estate is the proper person to bring a wrongful-death action in this case. See § 6-5-410(a), Ala. Code 1975. Despite alleging in the complaint that he was the personal representative of Madeline's estate, James had not been appointed to that position when he filed the wrongful-death action. On November 26, 2014, 10 days after the expiration of the 2-year limitations period for filing a wrongful-death action, the probate court granted James's petition and issued letters of administration, making him the personal representative of the estate. See § 6-5-410(d), Ala. Code 1975 ("The action must be commenced within two years from and after the death of the testator or intestate.").[1]

[1]Because the wrongful-death act is a "statute of creation," Ogle v. Gordon, 706 So. 2d 707, 708 (Ala. 1997), the limitations period in the act is not a statute of limitations. "'The statute requires suit brought within two years after death. This is not a statute of limitations, but of the essence of the cause of action, to be disclosed by averment and proof.'" Wood v. Wayman, 47 So. 3d 1212, 1218 (Ala. 2010) (quoting Parker v. Fies & Sons, 243 Ala. 348, 350, 10 So. 2d 13, 15 (1942) (overruled on other grounds by King v. National Spa & Pool Inst., Inc., 607 So. 2d 1241 (Ala. 1992))). In a statute of creation, the "'limitation [period] is so inextricably bound up in the statute creating the right

In December 2014, the defendants filed motions to dismiss or, alternatively, for a summary judgment; because matters outside the pleadings were presented to and considered by the trial court, those motions were summary-judgment motions. See Rule 12(b), Ala. R. Civ. P. In pertinent part, the defendants argued in their motions that the two-year limitations period for a wrongful-death action barred James's action. The defendants noted that only the personal representative could bring the wrongful-death action and that James was not appointed personal representative until after the expiration of the two-year limitations period. In response, James argued that the relation-back doctrine could be used to prevent his claim from being time-barred. The trial court agreed with James and denied the summary-judgment motions. The defendants sought certifications for permissive appeals under Rule 5, Ala. R. App. P. The trial court certified the following question for permissive appeal:

> "Whether a Plaintiff in a medical malpractice wrongful death action has the capacity to file suit, when that Plaintiff applies for Letters of

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that it is deemed a portion of the substantive right itself.'" Etheredge v. Genie Indus., Inc., 632 So. 2d 1324, 1326 (Ala. 1994) (quoting Cofer v. Ensor, 473 So. 2d 984, 987 (Ala. 1985)).

> Administration and files an action for wrongful death before the expiration of the applicable time for suit limitation, but is not appointed personal representative of the estate until 10 days after the time limitation expires."

The defendants subsequently filed in this Court petitions for permission to appeal, which we are granting today by separate order.

We must determine whether the trial court properly allowed James to relate his appointment as personal representative, which occurred after the two-year limitations period had expired, back to his filing of the petition for letters of administration, which occurred before the limitations period expired. There are two key cases to consider in making that determination: Ogle v. Gordon, 706 So. 2d 707 (Ala. 1997), and Wood v. Wayman, 47 So. 3d 1212 (Ala. 2010).

In Ogle, Ogle petitioned the probate court for letters of administration about four months after his wife's death. Ogle filed a wrongful-death action on the same day he filed the petition for letters of administration. For unexplained reasons, there was a long delay in issuing the letters of administration. The probate court did not appoint Ogle as

personal representative until about 27 and one-half months after the petition was filed and about 8 months after the 2-year limitations period had expired. The trial court entered a summary judgment in favor of the defendants, concluding that Ogle's action was time-barred.

This Court reversed the trial court's judgment, concluding that Ogle's appointment as personal representative related back to the date he filed his petition, which was within the two-year limitations period. 706 So. 2d at 711. The Court stated that "we must determine whether the doctrine of relation back applies to our wrongful death limitations provision." 706 So. 2d at 708-09. We then observed that the "doctrine of relation back with respect to the powers of a personal representative has been in existence for approximately 500 years" and quoted extensively from a 1927 Alabama case discussing relation back in that context, McAleer v. Cawthon, 215 Ala. 674, 112 So. 251 (1927). 706 So. 2d at 709 (emphasis added). The Court then noted that, "in 1993, the Alabama Legislature codified this doctrine by adopting ... § 43-2-831, Ala. Code 1975." 706 So. 2d at 710. Section 43-2-831, Ala. Code 1975, provides, in part, that "[t]he powers

of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter." (Emphasis added.) The Court in Ogle overruled the holding in Strickland v. Mobile Towing & Wrecking Co., 293 Ala. 348, 303 So. 2d 98 (1974), "regarding the application of the doctrine of relation back, insofar as it [was] inconsistent with" what the Court held in Ogle. 706 So. 2d at 710. Strickland was a wrongful-death case in which relation back had not been allowed. In overruling Strickland, the Court in Ogle noted that the opinion in Strickland was released long before the enactment of § 43-2-831. Id.

Following the above analysis, the Court in Ogle also noted that the relation-back doctrine was "especially applicable" in that case because "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. The probate court had no right to delay the issuance of the letters for 27 1/2 months." 706 So. 2d at 710. The Court stated that the "probate court, through inadvertence, did not issue the letters of administration

until [after the two-year limitations period had expired].... That dereliction should not bar [Ogle's] action." 706 So. 2d at 711.

The second key case is Wood, decided in 2010, 13 years after Ogle was decided. In Wood, Wayman filed a wrongful-death action shortly before the expiration of the limitations period. Although the opinion does not specifically state when Wayman petitioned for letters testamentary, the appellate record in that case indicates that she filed her petition after the two-year limitations period had expired. The probate court appointed Wayman personal representative of her deceased husband's estate several months after the limitations period had expired. The defendants argued that the wrongful-death claim was time-barred, but the trial court concluded that Wayman's appointment as personal representative related back either to the date of her husband's death or the date the wrongful-death action was filed. We granted the defendants' petition for a permissive appeal. The certified question asked whether the appointment of Wayman as personal representative in that case "can relate back to the filing of

the lawsuit." 47 So. 3d at 1213. We answered that question in the negative, concluding that the action was time-barred.

In concluding that relation back did not apply in Wood, the Court distanced itself from some of the analysis in Ogle. The Court in Ogle stated that § 43-2-831 codified the relation-back doctrine with respect to actions maintained by a personal representative. Wood, however, noted caselaw stating that a wrongful-death action, although brought by the personal representative, is not derivative of the decedent's rights and that damages awarded in a wrongful-death action are not part of the decedent's estate (damages are distributed to the heirs according to the laws of intestate succession). Thus, the Court in Wood determined that a wrongful-death action would not be "beneficial to the estate," a condition to allowing a personal representative to use relation back under § 43-2-831. Therefore, the Court in Wood concluded that "the relation-back provision in § 43-2-831 does not apply to a wrongful-death action brought under § 6-5-410." 47 So. 3d at 1217. Thus, the Court in Wood, distancing itself from certain language in Ogle, removed § 43-2-831 as a foundation for

applying relation back to personal representatives in wrongful-death cases.

With § 43-2-831 no longer a permissible basis to support relation back in a wrongful-death case, Wood characterized Ogle as having "allowed relation back in that wrongful death case solely because of the 'inadvertence' of the probate court, which caused the long delay after Ogle timely filed both his petition and his complaint within four months of the decedent's death." 47 So. 3d at 1218. The Court in Wood further stated:

> "Because there must be something to which the appointment as a personal representative may relate back, the [Ogle] Court related the appointment back to the filing of the petition for such appointment. Although Ogle's appointment was permitted to relate back to the date he filed his petition for that appointment, nothing in Ogle supports Wayman's argument that her appointment as personal representative of Charles's estate relates back to the date of the filing of the wrongful-death action."

47 So. 3d at 1218-19. Thus, in Wood the Court concluded that Wayman's claim was barred by the two-year limitations period for wrongful-death actions.

In this case, James relies heavily on Ogle in arguing that his action is not time-barred, and the defendants rely

heavily on Wood in arguing that it is. Wood did not purport to overrule Ogle. However, Wood, by reading Ogle as having allowed relation back solely because of the "inadvertence" of the probate court, construed Ogle in a way that narrows the application of relation back in wrongful-death cases. Wood indicates that relation back generally cannot be used to prevent a wrongful-death claim from being time-barred where the personal representative is appointed after the two-year limitations period has expired. However, Wood also indicates that an exception to that general rule exists: A personal representative appointed after the limitations period has expired may relate the appointment back to the filing of the petition within the limitations period if the delay in appointment is due to inadvertence by the probate court, as in Ogle. We must determine whether the general rule in Wood or the limited Ogle exception applies in this case.

We conclude that the general rule in Wood applies here. Unlike Ogle, the probate court's failure to issue the letters of administration within the two-year limitations period cannot be attributed to the probate court's inattentiveness. In Ogle, the probate court waited about 27 and one-half months

before issuing the letters of administration. In this case, James filed his petition for letters of administration six days before the two-year limitations period ended. Nothing before us shows what efforts, if any, James made to bring the impending expiration of the two-year limitations period to the attention of the Mobile County Probate Judge. The probate court issued the letters of administration only 16 days after the petition was filed, 10 days after the two-year limitations period had ended. The probate court's delay in this case was significantly shorter than the delay in Ogle. Unlike Ogle, we cannot rightly blame the probate court for "inadvertence" or "dereliction." Ogle, 706 So. 2d at 711. Thus, James cannot use relation back in this case.

Accordingly, we reverse the trial court's order denying the defendants' summary-judgment motions, and we remand the case for proceedings consistent with this opinion.

1140706 -- REVERSED AND REMANDED.

1140752 -- REVERSED AND REMANDED.

Stuart, Parker, Shaw, and Main, JJ., concur.

Bolin, J., concurs specially.

Moore, C.J., and Murdock, Wise, and Bryan, JJ., dissent.

BOLIN, Justice (concurring specially).

I concur with the main opinion and the result reached in it. I write specially to reemphasize that a wrongful-death action in Alabama brought pursuant to § 6-5-410, Ala. Code 1975, a cause of action unknown at common law, is purely statutory and that this Court's role is to strictly enforce the wrongful-death statute as written, and intended, by the legislature. Golden Gate Nat'l Sr. Care, LLC v. Roser, 94 So. 3d 365, 369 (Ala. 2012). In other words, "[w]here a statute enumerates certain things on which it is to operate, the statute is to be construed as excluding from its effect all things not expressly mentioned." Geohagan v. General Motors Corp., 291 Ala. 167, 171, 279 So. 2d 436, 439 (1973).

In the present case, there are two specific conditional elements of the wrongful-death statute that I deem worthy of discussion. First, § 6-5-410 grants to only a legally appointed personal representative, i.e., an administrator or an executor, the right to bring a wrongful-death action for the benefit of, and on behalf of, the decedent's heirs at law based on the death of the decedent by a wrongful act. See Steele v. Steele, 623 So. 2d 1140, 1141 (Ala. 1993)("The

Wrongful Death Act, § 6-5-410, creates the right in the personal representative of the decedent to act as agent by legislative appointment for the effectuation of a legislative policy of the prevention of homicides through the deterrent value of the infliction of punitive damages." (emphasis added)). To effectuate the purpose of the wrongful-death statute, the legislature had to empower some individual or entity to act as the plaintiff to initiate the proceeding to punish the wrongdoer and thereby to collect punitive damages to distribute to the decedent's heirs at law. The legislature chose a personal representative to fill that role. Acting in this capacity, the personal representative, whether in a testate or intestate probate proceeding, prosecutes the wrongful-death action as a fiduciary for the heirs at law. This is true even in a testate estate, when the terms of the decedent's will may well provide for an entirely different dispositive testamentary scheme than that embodied in the statute of distributions, and, again, this is true because the wrongful-death statute so provides. Accordingly, one who files a wrongful-death action pursuant to § 6-5-410 without being properly appointed, i.e., without becoming a personal

representative, has not complied with the provisions of the wrongful-death statute and therefore does not qualify to bring the wrongful-death action.

Secondly, § 6-5-410(d) requires that the wrongful-death action be filed "within two years from and after the death of the testator or intestate." This Court has consistently held that "the wrongful death statute, which provides a two-year limitations period, is a statute of creation, otherwise known as a nonclaim bar to recovery, and that it is not subject to tolling provisions." Ogle v. Gordon, 706 So. 2d 707, 708 (Ala. 1997)(emphasis added); Ex parte FMC Corp., 599 So. 2d 592, 594 (Ala. 1992)("It is well settled that the time limitation set out in § 6-5-410(d) is part of the substantive cause of action and that it is not subject to any provision intended to temporarily suspend the running of the limitations period. The two-year period is not a limitation against the remedy only, because after two years the cause of action expires."); see also Cofer v. Ensor, 473 So. 2d 984, 991 (Ala. 1985)(discussing the differences between a statute of creation and a statute of limitations for tolling purposes). The distinction between these types of limitations was explained

at length in 34 Am. Jur. Limitation of Actions § 7 (1941), as follows:

> "A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought. The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. Whether an enactment is of this nature, or whether it is a statute of limitations, should be determined from a proper construction of its terms. Generally, the limitation clause is found in the same statute, if not in the same section, as the one creating the new liability, but the fact that this is the case is material only as bearing on questions of construction; it is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion may be reached if the limitation is in a different statute, provided it is directed to the newly created liability so specifically as to warrant saying that it qualifies the right. On the other hand, as the result of differences in the statutory provisions under consideration, enactments requiring notice of claim prior to the commencement

> of suit variously have been held to impose conditions upon the existence of a right of action, to impose upon the jurisdiction of the court, or to constitute statutes of limitation merely affecting the remedy."

See also, e.g., In re Paternity of M.G.S., 756 N.E.2d 990, 997 (Ind. Ct. App. 2001)("While equitable principles may extend the time for commencing an action under statutes of limitations, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions."); Negron v. Llarena, 156 N.J. 296, 300, 716 A.2d 1158, 1160 (1998)("The running of a procedural statute of limitations bars only the remedy, not the right. ... In contrast, substantive statutes of limitations restrict statutory causes of action that did not exist at common law. ... A substantive statute of limitations, as a condition precedent to bringing suit, bars not only the remedy, but also the right itself. 22A Am. Jur. 2d Death at §§ 57, 76 (1988)."); General Motors Corp. v. Arnett, 418 N.E.2d 546, 548 (Ind. Ct. App. 1981)("It was a condition precedent that the action against G.M. be brought by someone in the capacity of the personal representative. Mrs. Arnett failed to meet that condition, because she did not have that capacity within two

years of her husband's death. She lost her statutorily conferred right to bring a wrongful death action under I.C. 34-1-1-2 and thus cannot maintain her action against G.M."); Fowler v. Matheny, 184 So. 2d 676, 677 (Fla. Dist. Ct. App. 1966)("F.S.A. § 517.21 created an entirely new right of action that did not exist at common law and expressly attached thereto, without any exception, the proviso that the action must be brought within two years from the date of sale. Such a limitation of time is not like an ordinary statute of limitation affecting merely the remedy, but it enters into and becomes a part of the right of action itself, and if allowed to elapse without the institution of the action, such right of action becomes extinguished and is gone forever."); Simon v. United States, 244 F.2d 703, 705 (5th Cir. 1957)("The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability."); and Bowery v. Babbit, 99 Fla. 1151, 128 So. 801 (1930)("[W]here a statute confers a right and expressly fixes

the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and ... the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided."). Accordingly, the two-year limitations period in § 6-5-410(d) was created by the legislature as part of the statutory right to bring the wrongful-death action, and, in strictly construing the statute, I conclude that nothing therein allows a plaintiff in a wrongful-death action to toll the limitations period so that his or her appointment subsequent to the expiration of the limitations period can relate back. I note that neither Rule 9(h) nor Rule 15(c), Ala. R. Civ. P., is applicable to this case insofar as this case does not implicate fictitious-party pleading. See, e.g., Ex parte FMC Corp., supra, concerning relation back in the context of Rules 9(h) and 15(c):

> "Rules 9(h) and 15(c) do not combine to provide a mechanism whereby the running of any limitations period -- whether the limitations provision is characterized as a statute of limitations or as part of a statute of creation -- is temporarily suspended. Instead, these rules combine to provide a mechanism whereby a statute of limitations, or a time limitation provision such as the one found in § 6-5-410, can be satisfied in a case where the plaintiff has been unable through due diligence to

> identify by name the person or entity responsible for his injury."

599 So. 2d at 594.

I reiterate, as correctly concluded in Wood v. Wayman, 47 So. 3d 1212 (Ala. 2010), that the relation-back provision in § 43-2-831, Ala. Code 1975, by its own specific language, does not apply to a wrongful-death action filed pursuant to § 6-5-410 insofar as § 43-2-831 specifically provides that "[t]he powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter." (Emphasis added.) As fully and adequately explained in Wood, a wrongful-death action filed pursuant to § 6-5-410 is not, and can never be, "beneficial to the estate" because

> "[a]ny damages awarded as the result of a wrongful-death action are not a part of the decedent's estate, and the action, therefore, cannot benefit the estate. '[D]amages awarded pursuant to [§ 6-5-410, Ala. Code 1975,] are distributed according to the statute of distribution and are not part of the decedent's estate. The damages from a wrongful death award pass as though the decedent had died without a will.' Steele v. Steele, 623 So. 2d 1140, 1141 (Ala. 1993)."

47 So. 3d at 1216. Put another way, a wrongful-death action must be brought by the personal representative, not any individual who may become a personal representative in the future, on behalf of the decedent's next of kin, and any damages recovered pass outside the estate and are not subject to the payment of the debts and/or liabilities of the decedent; thus, the portion of § 43-2-831 allowing a personal representative to use relation back in certain instances, by its own terms, is not applicable to actions brought pursuant to § 6-5-410, such actions not accomplishing anything for the benefit of the estate.

The case of Ogle v. Gordon, supra, relying on the fact that § 43-2-831 became effective 20 years after Strickland v. Mobile Towing & Wrecking Co., 293 Ala. 348, 303 So. 2d 98 (1974), was decided, embraced § 43-2-831 as a relation-back savior and expressly overruled Strickland regarding its holding concerning the inapplicability of the doctrine of relation back in wrongful-death/personal-representative issues. Stating a correct principle of law that "[t]he doctrine of relation back with respect to the powers of a personal representative has been in existence for

approximately 500 years," 706 So. 2d at 709, Ogle then made an awkward leap from that principle to a discussion of the relation-back doctrine by the Florida Supreme Court in Griffin v. Workman, 73 So. 2d 844, 846 (Fla. 1954)(quoting 21 Am. Jur. Exec. & Admin. § 211, and 2 Schouler on Wills, Executors and Administrators p. 1176 (5th ed.), stating that, "'[u]nder this [relation-back] doctrine "all previous acts of the [personal] representative which were beneficial in their nature to the estate ..., are validated."'" 706 So. 2d at 709 (emphasis added). From here, Ogle made its final unexplainable leap to the Alabama probate-procedures provision bearing a similarity to the above but having no relevance to the issue actually before the Court. That section, § 43-2-831, effective January 1, 1994, had absolutely nothing to do with relation back for any purpose other than acts performed prior to appointment by the personal representative, or others, that are beneficial to the estate. In my judgment, Ogle is a decision that arrived at an equitable result but that otherwise stands alone and was decided, as stated therein, "[b]ased on these facts," i.e., that a probate court improperly failed to act on a petition for letters of administration and appointment of a personal

representative for an unexplained 27 ½ months. Rather than calling it what it was, Ogle simply made a double leap to nowhere, pulling in an inapposite statute to justify relation back to remedy a clear judicial wrong that had occurred. Accordingly, as the main opinion notes, § 43-2-831 should never have been and now is "no longer a permissible basis to support relation back." ___ So. 3d at ___.

I further note that §§ 43-2-45 and 43-2-80, Ala. Code 1975, set out the only substantive and procedural limitations upon the granting of a petition for letters of administration immediately upon filing. Therefore, if James O. Kidd, Sr., had a good and sufficient fiduciary bond pursuant to § 43-2-80, there were no limitations in § 43-2-45 that would have prevented him from having his petition granted and letters of administration issued immediately upon filing, which occurred six days before the two-year limitations period expired. As the main opinion notes, "[n]othing before us shows what efforts, if any, James made to bring the impending expiration of the two-year limitations period to the attention of the Mobile County Probate Judge." ___ So. 3d at ___. Rather than bringing to the attention of the Mobile County Probate Judge,

or to the attention of his office, the fact that the 2-year limitation on his filing a wrongful-death action would expire in 6 days unless a personal representative was appointed (as a former probate judge, I submit that if this had been done in any of the 67 counties in Alabama, the great likelihood is that there would have been no need for any relation-back argument, because the petition would have been addressed by the probate court and granted), for all the record shows the petition was simply left to be considered in the due course of the probate court's operations, which occurred 16 days later.

In summary, in wrongful-death actions, unless and until the Alabama Legislature amends § 6-5-410, it is a duly appointed and lettered personal representative that may "commence an action [for wrongful death]" and the action "must be commenced within two years from and after the death of the testator or intestate." § 6-5-410. In the present case, in order to have the legal capacity to file a wrongful-death action, James had a condition precedent to obtain from the probate court his appointment as personal representative and the attendant letters of administration and, thereafter, to file the civil wrongful-death action before the expiration of

the two-year limitations period expressed in § 6-5-410(d). Because James waited almost two years to become appointed and to file a wrongful-death action and was not appointed personal representative of Madeline Kidd's estate until after the two-year limitations period had expired, James lacked the legal capacity to institute the wrongful-death action on behalf of Madeline's heirs, and his subsequent appointment after the two-year period was too late and to no avail. Although I recognize that the result here may be unfair and/or inequitable, I emphasize that any revision of the wrongful-death statute, § 6-5-410, to provide for the possibility of the invocation of the relation-back doctrine, or any other savings provision, is within the wisdom and responsibility of the legislature and not a task for this Court. See, e.g., Thomas v. Grayson, 318 S.C. 82, 86, 456 S.E.2d 377, 379 (1995)("The rule prohibiting an amendment to relate back was established when the period of limitation was a part of the wrongful death act. The limitation period has been moved from the wrongful death act to the general statute for limitation of civil actions. § 15-3-530(6). This change indicates a legislative intent to no longer consider it a condition

precedent to a wrongful death action, but rather a statute of limitations that would allow the relation back of an amendment.").

MOORE, Chief Justice (dissenting).

I respectfully dissent for the reasons expressed in my dissent in Richards v. Baptist Health, Inc., 176 So. 3d 179, 179-83 (Ala. 2014)(Moore, C.J., dissenting). I believe that, in the case before us, the application for letters of administration naming James O. Kidd, Sr., the personal representative of the Estate of Madeline Kidd, deceased ("the estate"), relates back to the timely filing of a wrongful-death action against Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center, Dr. Roger Alvarado, Dr. Barbara Mitchell, and IMC-Diagnostic and Medical Clinic, P.C. (hereinafter referred to collectively as "the defendants").

Section 43-2-831, Ala. Code 1975, states, in part: "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 the appointment the same effect as those occurring thereafter." In Wood v. Wayman, 47 So. 3d 1212, 1216 (Ala. 2010), this Court addressed the issue whether, under § 43-2-831, the appointment of a personal representative occurring after the expiration of the limitations period for a wrongful-death claim relates back to

the filing of that claim. This Court held that proceeds awarded in a wrongful-death action are not part of the estate and, hence, cannot benefit the estate. Wood, 47 So. 3d at 1216. Therefore, this Court determined, in Wood, that the issuance of letters of administration did not relate back to the filing of a wrongful-death action by the personal representative, even though, under § 6-5-410, Ala. Code 1975, only the personal representative of an estate is authorized to bring a wrongful-death action. Wood, 47 So. 3d at 1216.

I question whether the conclusion that wrongful-death proceeds do not benefit the estate necessitates a prohibition on the relation-back doctrine in wrongful-death actions. It is true that proceeds collected as a result of a wrongful-death action are not part of the estate because they are distributed according to the statute of distributions. See Ex parte Rogers, 141 So. 3d 1038, 1042 (Ala. 2013); Golden Gate Nat'l Sr. Care, LLC v. Roser, 94 So. 3d 365, 365 (Ala. 2012); Ex parte Taylor, 93 So. 3d 118, 118 (Ala. 2012)(Murdock, J., concurring specially); and Steele v. Steele, 623 So. 2d 1140, 1141 (Ala. 1993). That does not mean, however, that the estate does not benefit from the acts of the personal representative

who brings a wrongful-death action. Strictly speaking, wrongful-death proceeds are not "for the benefit of the estate, but of the widow, children, or next of kin of the deceased." Hicks v. Barrett, 40 Ala. 291, 293 (1866)(discussing Ala. Code of 1852, § 1938). However, the appointment of a personal representative and all the fiduciary duties, actions, and responsibilities that attach to that position do benefit the estate; accordingly, I do not believe we must extrapolate from Rogers, Roser, Taylor, Steele, and other like cases a bright-line rule abrogating the application of the ancient relation-back doctrine[2] under which it is immaterial whether wrongful-death proceeds are poured into the estate or are distributed to statutory beneficiaries.[3]

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[2]"The doctrine that whenever letters of administration or testamentary are granted they relate back to the intestate's or testator's death is an ancient one. It is fully 500 years old." J.B.G., Annotation, Relation Back of Letters Testamentary or of Administration, 26 A.L.R. 1359, 1360 (1923)(cited in Ogle v. Gordon, 706 So. 2d 707, 709 n. 1 (Ala. 1977)). This principle is recognized in Blackwell v. Blackwell, 33 Ala. 57 (1858); McAleer v. Crawthon, 215 Ala. 674, 112 So. 251 (1927); and Nance v. Gray, 143 Ala. 234, 38 So. 916 (1905).

[3]In this case, Madeline Kidd died intestate, so there is no "estate" -- all is distributed to the statutory beneficiaries. In my view, this fact makes the case for the relation-back doctrine even stronger because it reveals that there are instances when the estate may "benefit" from acts of

A case quoted in Ogle v. Gordon, 706 So. 2d 707 (Ala. 1977), which held that the issuance of letters of administration did relate back to the time the petition for letters of administration was filed, opines:

> "We think it idle to urge that the rule [of relation back] cannot apply in this case because the proceeds of any judgment obtained would go to next of kin only, and not in the usual course of administration. There is no valid reason for sustaining the rule in one case and disregarding it in the other."

Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 107, 81 N.E. 152, 154 (1907). The court then reasoned that the appointment of the personal representative was "an act done ... which was for the benefit of the estate." Archdeacon, 76 Ohio St. at 107, 81 N.E. at 154.[4] According to this rationale, if the appointment of James as the personal representative of the estate in this case benefited the estate, as I believe it did, then James's appointment relates back to the timely filing of the wrongful-death action. Generally the good-faith act of the personal representative of

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a personal representative even if it does not stand to gain monetary proceeds.

[4]This holding harmonizes with the statutory mandate that the "duties and powers of a personal representative commence upon appointment." § 43-2-831, Ala. Code 1975.

an estate in bringing a wrongful-death action for the decedent's next of kin does benefit the estate, in part because the personal representative has no existence or interest apart from the estate. This does not mean, of course, that creditors may assert claims against the wrongful-death proceeds.[5]

The Court in Wood adopted the narrow view that an estate does not "benefit" from a wrongful-death action simply because any proceeds awarded as a result of that action are

[5]One purpose of wrongful-death statutes is to allow certain beneficiaries to obtain wrongful-death proceeds without having to undergo the lengthy administration of the estate, which is subject to the claims of creditors. The following cases, from a period of our nation's history when the terms of wrongful-death statutes varied from state to state and courts were tasked with deciphering the application of those diverse statutes, distinguish actions for the benefit of individual beneficiaries from those that benefit the estate: Hatas v. Partin, 278 Ala. 65, 68, 175 So. 2d 759, 761-62 (1965); Elliot v. Day, 218 F. Supp. 90, 92 (D. Or. 1962); Bradshaw v. Moyers, 152 F. Supp. 249, 251 (S.D. Ind. 1957); Smith v. Bevins, 57 F. Supp. 760, 763-64 (D. Md. 1944); Rose v. Phillips Packing Co., 21 F. Supp. 485, 488 (D. Md. 1937); Gross v. Hocker, 243 Iowa 291, 295, 51 N.W.2d 466, 468 (1952); Howard v. Pulver, 329 Mich. 415, 420, 45 N.W.2d 530, 533-34 (1951); Ghilain v. Couture, 84 N.H. 48, 53, 146 A. 395, 398 (1929); and Wiener v. Specific Pharm., Inc., 298 N.Y. 346, 349, 83 N.E. 2d 673, 674 (1949). These cases collectively reveal the manner in which the phrase "benefit the estate" became associated with the narrow view that estates benefit only if they receive assets, rather than with the more general view that an estate may benefit for reasons besides the direct receipt of assets.

distributed directly to the next of kin and do not pass through the estate. Wood, 47 So. 3d at 1216. But because wrongful-death statutes allow an estate, on behalf of other beneficiaries, to litigate claims that accrued before the death of the decedent, wrongful-death proceeds may be considered assets of the estate even if they do not pass to the beneficiaries through the estate. "[I]t has been held generally under [wrongful-death] statutes that a right of action had accrued in favor of the decedent before his death, and that it became an asset of the estate upon his death, with the result that the personal representative, and not the beneficiary, should bring the action." 105 A.L.R. 834 (originally published in 1936).[6] The narrow view adopted in Wood focuses on the method of distribution and the identity of the distributees rather than on the role and function of the

[6]See Gross v. Hocker, 243 Iowa 291, 295, 51 N.W.2d 466, 468 (1952), for the competing view that a wrongful-death action "is not an asset of the estate in the ordinary sense" (emphasis added); the distinction here is made not because the estate does or does not receive assets but because "resident creditors of [the] decedent are in no way prejudiced." Gross, 243 Iowa at 295, 51 N.W.2d at 468. See also Ghilain v. Couture, 84 N.H. 48, 53, 146 A. 395, 398 (1929) (holding that damages recovered by wrongful-death actions "are not assets of the estate within the ordinary meaning of the word" (emphasis added)).

personal representative of the estate, the only individual authorized to bring a wrongful-death action under § 6-5-410. In fact, however, the estate, through its personal representative, seeks the wrongful-death benefits on behalf of the next of kin. Accordingly, the interests of the next of kin and the estate, through its personal representative, are the same in wrongful-death actions, particularly here, where the next of kin and the "estate" are, for all practical purposes, the same.

Although the personal representative who brings a wrongful-death action "does not act strictly in his capacity as administrator of the estate of his decedent, because he is not proceeding to reduce to possession the estate of his decedent," Hatas v. Partin, 278 Ala. 65, 68, 175 So. 2d 759, 761 (1965)(emphasis added)(interpreting a predecessor statute to § 6-5-410), he does act "'as a quasi trustee for those [distributees] who are entitled [to the wrongful-death proceeds] under the statute of distribution.'" Ex parte Rodgers, 141 So. 3d 1038, 1042 (Ala. 2013)(quoting United States Fid. & Guar. Co. v. Birmingham Oxygen Serv., Inc., 290 Ala. 149, 155, 274 So. 2d 615, 621 (1973)).

As a practical matter, the statutory distributees who receive wrongful-death proceeds are often also the beneficiaries of the estate. That fact led this Court to conclude that the recently enacted wrongful-death statute was designed "for the benefit of the next of kin entitled to take as distributees of his estate." Bruce v. Collier, 221 Ala. 22, 23, 127 So. 553, 554 (1930)(emphasis added)(overruled on other grounds by King v. National Spa & Pool Inst., Inc., 607 So. 2d 1241, 1246 (Ala. 1992)). A more accurate statement is that the personal representative acts as "a quasi trustee for those who stand in the relation of distributees to the estate strictly so called." Holt v. Stollenwerck, 174 Ala. 213, 216, 56 So. 912, 912-13 (1911)(emphasis added). Regardless, the estate benefits from the good-faith acts of its personal representative in bringing a wrongful-death action. To suggest otherwise is to imply that the estate, through its personal representative, has no business or interest in bringing a wrongful-death action at all, even though no other entity besides the estate, through its personal representative, may bring such an action under § 6-5-410. The estate is the only

plaintiff in a wrongful-death action that may receive a favorable judgment.

Finally, I do not believe that a party must ask this Court to overrule prior cases in order for us to overrule them.[7] Therefore, I would overrule Wood, which makes satisfaction of the limitations period found in § 6-5-410(d), Ala. Code 1975, contingent on the punctuality or promptness of the probate judge who issues the letters testamentary. Under Wood, the limitations period may lapse though the plaintiff has been nothing but diligent and timely in asserting his or her rights. In my view, the trial court properly determined that James's appointment as the personal representative, which occurred after the expiration of the two-year limitations period under § 6-5-410(d), related back to James's filing of the wrongful-death complaint, which occurred within the two-year limitations period.

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[7]See Travelers Indem. Co. of Connecticut v. Miller, 86 So. 3d 338, 347 (Ala. 2011)(overruling a prior decision while noting that the parties had not asked the Court to overrule a prior decision); Ex parte J.E. Estes Wood Co., 42 So. 3d 104, 112 (Ala. 2010)(Lyons, J., concurring specially and noting that this Court may overrule a prior case without being asked to do so); and Ex parte Carter, 889 So. 2d 528, 533 (Ala. 2004)(overruling cases the parties did not ask the Court to overrule).

MURDOCK, Justice (dissenting).

Consistent with the view I have expressed in previous cases, see Wood v. Wayman, 47 So. 3d 1212, 1220 (Ala. 2010) (Murdock, J., dissenting), and Richards v. Baptist Health System, Inc., 176 So. 3d 179, 179 (Ala. 2014) (Murdock, J., dissenting), I believe this Court should return to the holding in Ogle v. Gordon, 706 So. 2d 707 (Ala. 1997), and to a straightforward, simple rule that the subsequent appointment of a person as the personal representative relates back so as to validate a timely filing of a wrongful-death action by that person. This Court held otherwise in Wood, embracing a rule that can lead to disparate results in similar cases. Furthermore, today's decision construes this Court's opinion in Wood in a way that, I believe, injects an additional layer of uncertainty into this area of the law.

Simultaneously with the release today of the decision in the present case, this Court releases a no-opinion affirmance in Marvin v. Healthcare Authority for Baptist Health, [Ms. 1140581, January 29, 2016] ___ So. 3d ___ (Ala. 2015), a case involving the same relation-back issue presented here. The trial court's order in Marvin reflects some of the

above-stated concerns. In an order in which the trial court ultimately concluded that it was bound by this Court's opinion in Wood v. Wayman, it nevertheless took the opportunity to state:

> "The Court is left to decipher the Ogle [v. Gordon, 706 So. 2d 707 (Ala. 1997)], and [Wood] decisions which are seemingly contradictory. In Ogle, the Court explicitly held that the issuance of the letters related back to the time of the filing of the petition in probate court. [Wood] concluded that Ogle had nothing to do with relation back despite all evidence to the contrary including: the express statement of the issue, the holding, and fourteen references to 'relation back' or a derivative thereof. Ultimately, [Wood] decided that there was no relation back ....
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> "....
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> "Accordingly, this court has no choice but to follow the most recent pronouncement and to dismiss this action .... The bar should be forewarned that the two year statute of limitations in a wrongful death case is no more -- the time limit is actually two years less whatever time it will take for a probate judge to issue letters. Better hope the judge is not on vacation, that the heirs are easily located, etc."

As I have previously noted, the purpose of a statute of limitations is to provide a "bright-line" time limit that provides uniformity and certainty. Moreover, it is a time limit for one thing and one thing only: the filing of a complaint to commence a legal action. (I am unfamiliar with

any line of thought that satisfaction of a statute of limitations depends upon both the filing of a complaint and the filing of other documents, or put differently, that a statute of limitations is intended as a deadline for filing a petition for letters testamentary.)

Further, and of even more fundamental import to the manner in which statutes of limitations are intended to function, whether a plaintiff meets the statute-of-limitations deadline should be within that plaintiff's control and not the control of a third party, e.g., a probate court acting on a petition for letters testamentary or of administration. When meeting a statute of limitations depends upon the acts of a third party, two plaintiffs who take exactly the same actions at the same time to pursue their claims face the distinct possibility of different outcomes.

The bottom line for me -- and, I think, a rule that is the most logical, simple, and just -- is the common-law rule. It is a rule that is not dependent upon the precise wording of § 43-2-831, Ala. Code 1975 (that affirmatively provides for relation back for acts by the personal representative that benefit an estate). It is a well established rule that this

Court acknowledged with approval in Ogle (authored by Justice Maddox and joined by Chief Justice Hooper, and Justices Kennedy, Butts, and See, with a "concurring in the result" vote from Justice Cook and no dissents) as one that treats the eventual appointment of a personal representative as relating back as far as the date of death so as to give validity to interim acts by the person so appointed that align with the powers granted personal representatives. It is a rule that operates on the court's issuance of letters testamentary or of administration whenever that occurs, and it amounts to nothing more than an ab initio formal ratification of the role played by the recipient of those letters in the weeks or months before they are ultimately issued:

> "The doctrine of relation back with respect to the powers of a personal representative has been in existence for approximately 500 years, and this Court first recognized it in Blackwell v. Blackwell, 33 Ala. 57 (1858). See also, McAleer v. Cawthon, 215 Ala. 674, 112 So. 251 (1927), and Nance v. Gray, 143 Ala. 234, 38 So. 916 (1905). In McAleer v. Cawthon, this Court stated:
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> "'[I]t is a rule of practically universal recognition that:
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> "'"When letters testamentary or of administration are issued, they relate back so as to vest the property in the

> representative as of the time of death and validate the acts of the representative done in the interim; but such validation or ratification applies only to acts which might properly have been done by a personal representative, and the estate ought not to be prejudiced by wrongful or injurious acts performed before one's appointment." 23 Corp. Jur. 1180, § 400.'

"215 Ala. at 675-76, 112 So. at 251. In Griffin v. Workman, 73 So. 2d 844 (Fla. 1954), the Florida Supreme Court, citing this Court's opinion in McAleer, supra, discussed the doctrine and stated:

> "'We think, therefore, that the issue is ruled by the ancient doctrine "that whenever letters of administration or testamentary are granted they relate back to the intestate's or testator's death.... The doctrine has been accepted with virtual unanimity, since it was promulgated, in a long line of cases." Annotation, 26 A.L.R. 1360. Under this doctrine "all previous acts of the representative which were beneficial in their nature to the estate and ... which are in their nature such that he could have performed, had he been duly qualified, as personal representative at the time, are validated." 21 Am. Jur., Exec. & Admin., section 211; Schouler on Wills, Executors and Administrators, 5th ed., Vol. 2, p. 1176.
>
> "'A wide variety of acts and conduct by a party acting in behalf of an estate when he was not properly qualified have been held to be validated or ratified by

> his subsequent qualification as administrator. A few of the many examples that might be cited are: an advancement to a distributee, McAleer v. Cawthon, 215 Ala. 674, 112 So. 251; the sale of estate property, Shawnee Nat. Bank v. Van Zant, 84 Okl. 107, 202 P. 285, 26 A.L.R. 1349 [(1921)]; the execution of a deed, Wilson v. Wilson, 54 Mo. 213 [(1873)].
>
> "'More specifically in point, it has been held that where a wrongful death action was instituted by a party "as administrator," his subsequent appointment as such validated the proceeding on the theory of relation back. Archdeacon v. Cincinnati Gas & Electric Co., 76 Ohio St. 97, 81 N.E. 152 [(1907)]. In the opinion the court pointed out that the institution of suit "was not a void performance, being an act done during the interim which was for the benefit of the estate. It could not be otherwise, for it was an attempt to enforce a claim which was the only asset of the estate. This rule is sustained by a large number of authorities, and ... appears, also, to be just and equitable.... [T]he proceeding was not a nullity. It was, on the other hand, a cause pending in which, by the liberal principles of our Code, the party plaintiff, though lame in one particular, might be allowed to cure that defect and proceed to a determination of the merits." Archdeacon v. Cincinnati Gas & Electric Co., supra....[8] Followed

[8]In addition to noting that the rule in question was supported by "a large number of authorities" and was "just and equitable," the court in Archdeacon noted that the delay in the formal issuance of notice had no prejudicial effect and that the rule in question was applicable even if the proceeds from the wrongful-death action inured to heirs at law who were

> in Anderson v. Union Pac. R. Co., 76 Utah 324, 289 P. 146 [(1930)].
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> "'Upon the same theory, it was held in Clinchfield Coal Corp. v. Osborne's Adm'r, 114 Va. 13, 75 S.E. 750 [(1912)], that a wrongful death action instituted by a party prior to the time he was appointed administrator may be deemed validated and ratified upon subsequent qualification of the personal representative; and in Bellheimer v. Rerucha, 124 Neb. 399, 246 N.W. 867 [(1933)], that an amended petition was properly filed to show appointment of a plaintiff widow as administratrix after commencement of suit but before answer.'

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not beneficiaries of the estate:

> "The plaintiff having fully qualified as administrator before the case was reached for trial, every right of the defendants upon the merits of the case was fully preserved, and in no possible aspect could the delay in perfecting the bond and receiving the letters of administration prejudice the defense of the fendants upon the real meritorious question involved in the controversy, which was whether or not the defendants' negligence was the cause of the death.
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> "....
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> "... We think it idle to urge that the rule [of relation back] cannot apply in this case because the proceeds of any judgment obtained would go to next of kin only, and not in the usual course of administration. There is no valid reason for sustaining the rule in one case and disregarding it in the other."

Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 103-07, 81 N.E. 152, 152-54 (1907).

"73 So. 2d at 846-47."[9]

Ogle, 706 So. 2d at 709-10 (footnote omitted; emphasis added).

I recognize that the common-law cases sometimes speak of acts of the eventually appointed personal representative that are beneficial "to the estate"; that, however, appears to be true simply because the estate is historically the entity on whose behalf the personal representative acted, and was acting, in those cases. When a special statute, like Alabama's wrongful-death statute, imparts to the personal representative authority and responsibility to act on behalf of the heirs directly, the same relation-back principle applies with equal reason. After all, under Alabama's statutory scheme, such acts are in fact "acts which might properly have been done by a personal representative." And, indeed, that was the holding of this Court in Ogle when it applied this relation-back principle to an Alabama wrongful-death action brought, not on behalf of an estate, but on

[9]In dicta in Griffin v. Workman, 73 So. 2d 844 (Fla. 1954), the Florida Supreme Court noted that a different result had been reached in some cases where a statute of limitations had expired in the interim, but cited Douglas v. Daniels Bros. Coal Co., 135 Ohio St. 641, 22 N.E.2d 195, 198 (1939), in support of its position that this should make no difference. 73 at So. 2d at 847-48.

behalf of the heirs, by one who, at the time he filed the action, had not been appointed personal representative and who was not appointed as such until two years after the statute of limitations had run.[10]

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[10]Both the main opinion and the special concurrence make the point that the limitations period for the commencement of a wrongful-death action is a "statute of creation," or a "substantive statute of limitations." This difference did not alter the force of reasoning and result reached in Ogle or the application of the common-law principle employed therein. And, indeed, Alabama cases commonly refer simply to the "statute of limitations" in reference to the timeliness of the filing of wrongful-death claims under Alabama law. See, e.g., Ex parte Tyson Foods, Inc., 146 So. 3d 1041, 1045 (Ala. 2013); Ex parte Noland Hosp. Montgomery, LLC, 127 So. 3d 1160, 1169 (Ala. 2012); Precise v. Edwards, 60 So. 3d 228, 229 (Ala. 2010); Henderson v. MeadWestvaco Corp., 23 So. 3d 625, 628 (Ala. 2009); Okeke v. Craig, 782 So. 2d 281, 283 (Ala. 2000); Hall v. Chi, 782 So. 2d 218, 220 (Ala. 2000); Hogland v. Celotex Corp., 620 So. 2d 621, 622 (Ala. 1993); Dukes v. Jowers, 584 So. 2d 524, 526 (Ala. 1991); Liberty Mut. Ins. Co. v. Lockwood Greene Eng'rs, Inc., 273 Ala. 403, 406, 140 So. 2d 821, 823 (1962).

Whether considered substantive or remedial, there is less difference in the operative effect of the two concepts than at first might be supposed. In Dorsey v. United States Pipe & Foundry Co., 353 So. 2d 800, 802 (Ala. 1977), this Court observed:

> "Where a statute creates a cause of action which did not theretofore exist, and where it provides that such cause of action must be brought within the time specified in the statute, the general rule is that fraud does not toll the statute of limitations unless the statute in question expressly so provides. See, e.g., Central of Georgia Railway Company v. Ramsey, 275 Ala. 7, 151 So. 2d 725

> (1962). This rule has met with widespread dissatisfaction, however, and is replete with exceptions. See, e.g., [H.D. Warren, Annotation,] Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action. 15 A.L.R.2d 500, at 519-526 [(1951)]. See also, 3 Larson, Workmen's Compensation Law, § 78.45."

Among the authorities noted by the Court was Central of Georgia Ry. v. Ramsey, 275 Ala. 7, 151 So. 2d 725 (1962), which in turn quoted from a case decided by the United States Court of Appeals for the Fourth Circuit:

> "'[T]he distinction between a remedial statute of limitations and a substantive statute of limitations is by no means so rockribbed or so hard and fast as many writers and judges would have us believe. Each type of statute, after all, still falls into the category of a statute of limitations. And this is none the less true even though we call a remedial statute a pure statute of limitations and then designate the substantive type as a condition of the very right of recovery. There is no inherent magic in these words.'"

275 Ala. at 14-15, 151 So. 2d at 731 (quoting Scarborough v. Atlantic Coast Line Ry., 178 F.2d 253, 259 (4th Cir. 1949)).

In this same vein, I note that Rule 9(h), Ala. R. Civ. P., which deals with an amendment changing the name of an "opposing party," would not appear by its terms to be apposite to this discussion. Nonetheless, it is instructive to note that, even if the issue here were the naming of an "opposing party," this Court stated in Ex parte FMC Corp., 599 So. 2d 592, 594-95 (Ala. 1992):

> "When this Court stated in [Columbia Engineering International, Ltd. v.] Espey[, 429 So. 2d 955, 959 (Ala. 1983),] that the purpose of Rule 9(h) is to 'toll' the statute of limitations in emergency

I disagree with the Wood Court's reading of Ogle as recounted in the main opinion and, in turn, with the construction of Wood in the main opinion. In my view, neither Ogle nor Wood held that the reason a plaintiff is not appointed as personal representative before the filing of a

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> cases, it did not mean that the running of the statutory period would be temporarily suspended, only to recommence upon the happening of some future event. Therefore, it makes no difference that § 6-5-410 is a statute of creation. If the plaintiffs complied with the requirements of Rule 9(h), their action was timely filed within two years of Garry Spence's death and the subsequent amendment correctly designating FMC as one of the fictitiously named defendants related back to the date on which the complaint was filed."

Compare Ex parte Tyson Foods, Inc., 146 So. 3d 1041, 1045 n.5 (Ala. 2013):

> "The Tyson petitioners also argue that the wrongful-death statute contains its own limitations period and thus is a 'statute of creation' not subject to tolling. See § 6-5-410(d), Ala. Code 1975; Cofer v. Ensor, 473 So. 2d 984, 991 (Ala. 1985). This fact, however, does not affect the capacity analysis. Rule 17(a) does not toll the statute of limitations. '[A]pplication of relation back does not extend the limitation period' but merely allows substitution of a party in a suit otherwise timely filed."

(Emphasis added.) In other words, the relation-back doctrine does not "toll" a statute of limitations; it simply recognizes and clarifies what has already occurred.

wrongful-death complaint or the expiration of the statute of limitations matters. In Wood, the Court held simply that, "[b]ecause Wayman 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, ... Wayman's appointment as a personal representative ... could not relate back to the date of [the decedent's] death or to the date of the filing of the wrongful-death action." 47 So. 3d at 1219.

As for Ogle, it is true that the Court stated in that case that "[t]he probate court, through inadvertence did not issue the letters of administration" in a timely manner and that "[t]hat dereliction should not bar [Ogle's] action." 706 So. 2d at 711. That fact of "inadvertence" or "dereliction" on the part of the probate court, however, was not the ratio decidendi for the Court's holding. Instead, the Ogle Court embraced a clear, bright-line rule of relation back and, in the quoted passages, was simply making the point that the rule it adopted would avoid the undesirable outcome described.

I must add that I am not sure what circumstance would qualify as "inadvertence" or "dereliction" such that it would

affect the inquiry at issue (or what would constitute sufficient "efforts [by a plaintiff] to bring the impending expiration of the ... limitations period to the attention of the [probate court]"). ___ So. 3d at ___. Nor am I sure by what judicial mechanism we are to take the measure of the probate court's acts or omissions, or even its state of mind, in this regard. To my way of thinking, the stated condition is not one that bespeaks of the type of bright-line rule necessary for uniform and certain results.

Based on the foregoing and on my previously expressed position, I respectfully dissent. I would return to the holding in Ogle, which I see as producing just results within the context of a straightforward, bright-line rule that allows for certainty and uniformity of results.

WISE, Justice (dissenting).

I respectfully dissent based on my writing in Marvin v. Healthcare Authority for Baptist Health, [Ms. 1140581, January 29, 2016] ___ So. 3d ___, ___ (Ala. 2016).

BRYAN, Justice (dissenting).

I respectfully dissent. I find Wood v. Wayman, 47 So. 3d 1212 (Ala. 2010), to be problematic, and I would consider overruling it. However, that request is not before us. Regardless, I do not believe Wood precludes the application of the relation-back doctrine in this case. It appears that Wood, as the main opinion notes, indicates that the appointment of a personal representative after the limitations period has expired may relate back to the filing of the petition within the limitations period if the delay in the appointment is the result of the probate court's "inadvertence" or "dereliction." That was the situation in Ogle v. Gordon, 706 So. 2d 707 (Ala. 1997), and that is why the Court in Wood said that relation back had been allowed in Ogle. At its heart, it appears that this standard is based on a concept of fairness -- whether it would be fair to allow relation back in a particular case.

I think the fairer solution here would be to allow the claim to proceed by applying the doctrine of relation back. James O. Kidd, Sr., filed both his petition for letters of administration and his complaint six days before the end of

the two-year limitations period. The probate court appointed James administrator 16 days later -- 10 days after the limitations period had expired. Like Ogle, this case involves a straightforward petition for letters of administration. It is quite plausible that the probate court could have appointed James administrator within the limitations period, and he should not be penalized because the probate court did not. I conducted an electronic-database search of relatively recent Alabama cases in which I could determine the length of the delay between the filing of a petition for letters of administration and the granting of the petition. Of the first 12 such cases found, an administrator was appointed on the same day as the petition in 5 cases. In the other 7 cases, the delays ranged from 3 to 31 days, and the average delay for all 12 cases was approximately 7.3 days.[11]

[11]I say "approximately" because in one case the exact number of days is unclear but is no more than five; I used five days for purposes of averaging the days. The 12 cases are: Diversicare Leasing Corp. v. Hubbard, [Ms. 1131027, Sept. 30, 2015] ___ So. 3d ___ (Ala. 2015) (6 days); Richards v. Baptist Health Sys., 176 So. 3d 179 (Ala. 2014) (22 days); Ex parte Grant, 170 So. 3d 652, 654 (Ala. 2014) (no more than 5 days); Ingram v. Van Dall, 70 So. 3d 1191, 1193 (Ala. 2011) (same day); Allen v. Estate of Juddine, 60 So. 3d 852, 853 (Ala. 2010) (same day); Affinity Hosp., L.L.C. v. Williford, 21 So. 3d 712, 713 (Ala. 2009) (same day); Bolte v. Robertson, 941 So. 2d 920, 921 (Ala. 2006) (same day); Boyd v. Franklin,

Had the probate court appointed James as administrator within six days of his filing the petition, his claim would have been safe. See Ellis v. Hilburn, 688 So. 2d 236 (Ala. 1997) (stating that, in a wrongful-death action, when a complaint is timely filed and letters of administration are later granted to the plaintiff within the limitations period, the plaintiff may use relation back under Rule 17(a), Ala. R. Civ. P., to amend the complaint). It would not have been unusual for a probate court to have acted that promptly. Of course, the relation-back exception in Ogle for the "inadvertence" or "dereliction" of the probate court involved a long delay by the probate court, which is absent in our case. However, because, under Wood's characterization of Ogle, we will allow relation back based on a probate court's mere delay, I think even a short delay should fairly permit the application of the doctrine to avoid a plaintiff's claim hinging on the luck of the draw. An overworked probate court may take longer to resolve cases than a neighboring probate

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919 So. 2d 1166, 1167 (Ala. 2005) (12 days); Douglas v. King, 889 So. 2d 534, 535 (Ala. 2004) (same day); Flannigan v. Jordan, 871 So. 2d 767, 768 (Ala. 2003) (9 days); Smith v. N.C., 98 So. 3d 546, 547 (Ala. Civ. App. 2012) (31 days); and Eustace v. Browning, 30 So. 3d 445, 447 (Ala. Civ. App. 2009) (3 days).

court with a smaller workload. A claim should not depend on whether the probate court processes a petition quickly enough; the law should be more certain and equitable than that.

Thus, I believe the trial court properly allowed the appointment to relate back to the filing of the petition for the letters of administration, which was filed within the two-year period.