

**RECENT DEVELOPMENTS**  
**IN**  
**GEORGIA FIDUCIARY LAW**

**Mary F. Radford**  
**Professor of Law**  
**Georgia State University College of Law**  
**Atlanta, GA**

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## I. GEORGIA CASES - July, 2001 through June 15, 2002

### A. INTESTACY

#### 1. Child Born Out of Wedlock

*Rodriguez v. Nunez*, 252 Ga. App. 56, 555 S.E.2d 514 (2001): The decedent was killed in an automobile accident. He died intestate. A priest petitioned to be appointed administrator of his estate and stated that the only heirs of the decedent were his mother and two sisters. A year later, Nunez petitioned the probate court to have the letters of administration revoked, claiming that her daughter was the child of the decedent. Then Nunez filed a “Complaint for Determination of Paternity” in the superior court and claimed that the superior court had exclusive jurisdiction over the matter under OCGA Sec. 19-7-46. The Court of Appeals held that it was the probate court that had exclusive jurisdiction over the determination of heirs, including the determination of whether a child is the child of a decedent for purposes of inheritance.

#### 2. Definition of “next of kin”

*Stewart v. Bourne*, 250 Ga. App. 755, 552 S.E. 2d 450 (2001): This case was a wrongful death case in which the decedent’s closest surviving relatives were her four siblings and the three children of two deceased siblings. One of these children was the son of one deceased sibling and the other two children were the daughters of the other deceased sibling. The wrongful death statute, OCGA Sec. 51-4-5(a), provides that when a decedent is not survived by a spouse or child or parent, “the administrator or executor of the decedent may bring an action for and may recover and hold the amount recovered for the benefit of the *next of kin*.” The executor sought

direction as to whether to deliver shares of the wrongful death award only to the surviving siblings or to also distribute shares to the descendants of the predeceased siblings. The court interpreted the term by looking to the intestacy statute, and thus directed distribution of one share to each sibling, one share to the son of the deceased sibling and the final share to be divided equally between the two daughters of the other sibling. The court cited *Butts v. Trust Co. of Ga.*, 209 Ga. 787, 75 S.E.2d 745 (1953), for the proposition that courts, when construing such language in a will, should look to the intestacy statute to determine who are the testator's "next of kin." The court gave a good explanation of the origin of the wrongful death statute in question and noted an earlier directive from the Georgia Supreme Court that, because the wrongful death statute was in derogation of common law, its language should be strictly construed and not extended beyond its plain and ordinary meaning.

## **B. WILLS**

### **1. Will Caveats**

#### **a. Generally**

1) *Strong v. O'Neal*, 274 Ga. 464, 554 S.E.2d 152 (2001): The testator's will left "100%" of his estate to his mother and "100%" of his estate to a woman who had taken care of his mother or to the survivor of them. The testator's mother had died five years prior to the execution of the will. The testator's daughter caveated and the probate court denied the caveat. The Supreme Court affirmed the probate court's order. The caveator's issues on appeal related to the sufficiency of the evidence. At trial, the witnesses to the will testified that they knew the testator, had seen him sign the will, and, on the day the will was executed, had been told by him of his desire to leave

his estate to the propounder. The caveator had not raised the issue of testamentary capacity and the probate court concluded that the explanation for why his deceased mother was named in the testator's will was that the will had actually been drafted while the mother was alive. The court also found that the use of the term "100%" twice by the testator indicated an intent to divide the estate equally between the two beneficiaries if both survived him. The caveator also had claimed that the will was forged. The Supreme Court stated that "the probate court was authorized to believe propounder's witnesses rather than" the caveator's evidence.

2) *Mullins v. Thompson*, 274 Ga. 366, 553 S.E.2d 154 (2001): The caveator in this case claimed that the will was a forgery. One of the witnesses to the will was a lawyer who had been suspended from the bar for six months after having made false statements to a client. The caveator sought to impeach him, but the trial court would not allow that. The Supreme Court agreed with the trial court, citing case law to the effect that a witness may be impeached only if it is proved that the witness "was convicted of a crime of moral turpitude." The Court pointed out that the lawyer's suspension was not the equivalent of the "conviction of a crime." (Justices Fletcher and Hunstein dissented, noting that other jurisdictions allowed a lawyer's credibility to be challenged if the lawyer had ever been suspended or disbarred.) The Supreme Court also upheld the trial court's ruling that the caveator's objection to the representation made in the closing argument about the lawyer's 20 years of bar membership was not timely. The caveator had not objected until after the argument was over and the jury had retired.

3) *Taylor v. Young*, 253 Ga. App. 585, 560 S.E. 2d 40 (2002): The purported common law

husband of a decedent filed a caveat to the petition for letters of administration filed by the decedent's daughter. The probate judge appointed his chief clerk, who was also an attorney, to hear the case. OCGA Sec. 15-9-13(a) allows a probate judge who is unable to hear a case to appoint an attorney to exercise the probate court's jurisdiction. However, in the order dismissing the husband's caveat, the clerk incorrectly stated that she was exercising jurisdiction under OCGA Sec. 15-9-36(c), which allows the chief clerk of the probate court to exercise jurisdiction, but only in "uncontested matters". In the order in which she denied the purported common law husband's motion for new trial, the clerk corrected the statutory reference, calling it a "typographical error." On appeal, the purported common law husband claimed that the clerk's exercise of jurisdiction was unauthorized because neither of the orders contained words required by Uniform Probate Court Rule 3 that named the probate judge who had appointed the attorney to act. The Court of Appeals found that the omission of the language did not invalidate the exercise of jurisdiction. The Court of Appeals also found no merit in the purported common law husband's claim that the orders appointing the clerk were not entered before the hearing on the caveat. The Court found that the certified record of the court showed otherwise. Finally, the purported common law husband claimed that the court had erred in finding that he was not the common law husband of the decedent. The Court of Appeals found that it was precluded from considering this issue because the appellant had not included a transcript of the evidentiary hearing "or an acceptable substitute for a transcript" and had not offered any legal authority in support of his claim of error.

**b. Undue Influence and Fraud**

(1) *White v. Regions Bank*, 275 Ga. 38, 561 S.E.2d 806 (2002): The testator's daughter filed a caveat to his will on the grounds of lack of testamentary capacity and undue influence by the testator's grandson and primary beneficiary. The daughter also filed a complaint in superior court in which she sought to have a trust, a deed, and a bill of sale invalidated on the same grounds. The two cases were consolidated in the superior court. The jury was instructed that it could "infer" undue influence if it found that the "gift was a gift of realty and that the grantor was in a weakened mentality and feeble-minded." The jury returned a verdict in favor of the grandson. The Supreme Court reversed and remanded.

On appeal, the Supreme Court agreed with the daughter that the jury instruction was improper in that it did not tell the jury that they could "presume" (not just "infer") undue influence, thus shifting the burden of proving the absence of undue influence to the grandson. The grandson, on appeal, contended that the jury instruction was not reversible error because the daughter had not presented any evidence of a confidential relationship between him and the testator. The Supreme Court disagreed, citing evidence to the effect that the grandson was a signator on the testator's bank accounts, stayed with the testator and cared for him, drove the testator to doctor's appointments and to the attorney's office for preparation of the will and other documents. The evidence also showed that the grandson had stayed in the attorney's office when the contents of the documents were discussed. As to the testator himself, evidence showed that he was on medication, was confused and delusional (despite the attorney's and witnesses' testimony that he did not seem to be impaired when he signed the documents). The court concluded that there was enough evidence to justify giving the charge requested by the daughter. Interestingly, without focusing on the fact, the court applied a rule that has been prevalent in the

case law on gifts and deeds, but has been articulated differently in will cases in which undue influence is alleged. The discrepancy revolves around whether the mere existence of a confidential relationship - without more - is sufficient to give rise to a presumption of undue influence. Georgia statutory law on gifts (OCGA Sec. 44-5-86) and case law on contracts and deeds indicate that, for purposes of voiding gifts or contracts or canceling deeds, a presumption of undue influence arises if the parties had a confidential relationship and the party granting the benefit was of weak mentality while the party receiving the benefit occupied a dominant position. On the other hand, in the context of will contests, the courts seemed to have demanded more than a mere showing of the existence of the confidential relationship. In *Bryan v. Norton*, 245 Ga. 347, 265 S.E. 2d 282 (1980), the Supreme Court stated that the presumption of undue influence arises only if the beneficiary occupied a confidential relationship with the testator *and* actively participated in the execution of the will.

Although the grandson in this case arguably "actively participated" in the execution of the will, that fact was not highlighted by the Supreme Court, nor did the court give any indication that it should be mentioned in the instruction. The court articulated its stance as follows: "[A] presumption of undue influence arises where a confidential relationship existed between testator and beneficiary, with testator being of weak mentality and the beneficiary occupying a dominant position."

The daughter also raised evidentiary issues. The Supreme

Court stated that the trial court had not erred in refusing to admit: 1) "day in the life" detailed evidence of the state of health and care needed by the testator's other child, and 2) a telephone message written by a nurse that referenced conferences with the daughter; and that the court had properly admitted testimony by the testator's former attorney. The daughter had argued that the attorney could not testify because his former client had not waived the attorney-client privilege. However, the court found that the daughter was a stranger to the attorney-client relationship between her father and his attorney and thus could not invoke the attorney-client privilege for her own benefit.

2) *Harper v. Harper*, 274 Ga. 542, 554 S.E. 2d 454 (2001): The testator left most of his estate to one son. One of the other two sons caveated the will on the grounds of fraud and undue influence. The caveator claimed that the favored son's son had fraudulently led his grandfather to believe that the caveator had stolen money that the grandfather had buried in his yard. The evidence showed only that the grandson had told his grandfather that the caveator had two new tractor-trailer trucks. The grandson had said: "I don't know how he paid for them." The caveator claimed that this led the testator to conclude that the caveator had stolen the testator's money. The trial court granted summary judgment for the propounder of the will. On appeal, the Supreme Court affirmed the summary judgment after addressing several issues raised by the caveator. The first issue was the trial court's finding that, in order to invalidate a will, the fraud or undue influence must have been exercised by the person who was the principal beneficiary under the will (in this case, the propounder). The Supreme Court stated that there was no requirement that the influence be personally exerted by the beneficiary but that a will could be

invalidated by any showing of fraud or undue influence, even if the beneficiary had no knowledge that it was being exerted. However, the Supreme Court went on to say that the evidence relating to the grandson's statements to the testator did not raise any question that fraudulent misrepresentations had been made. The caveator based his argument of undue influence on the testator's relationship with both the grandson and the propounder. As to the propounder, the Court noted first that the mere fact that he had been favored was not evidence of undue influence. The caveator claimed that the propounder had a confidential relationship with the testator "so that a presumption of undue influence arises." (The Court's citation after this sentence was to a case involving a warranty deed, not a will.) The Court stated that the testator "did place a general trust and confidence in the propounder but that is not sufficient to trigger the rebuttable presumption that undue influence was exercised." (After this sentence, the Court cited a case involving a will.) The Court then said that there was no evidence that the propounder played a part in the testator's decision to change his will. From there, the Court concluded that "a jury would not be authorized to find the existence of a confidential relationship wherein propounder was 'so situated as to exercise a controlling influence over the will' of testator." (Here the Court cited OCGA Sec. 23-2-58, which defines a confidential relationship.) The Court went on to state that, even if there was an issue as to whether a confidential relationship existed, the evidence did not support a finding that the propounder had exerted undue influence. The Court then added the following quotation, which has appeared in several will caveat cases over the years:

It is insufficient to show merely that the persons receiving substantial benefits under the instrument sought to be propounded occupied a confidential relationship to the testator

and had an opportunity to exert undue influence. The indulgence of mere suspicion of undue influence over the mind and will of the testator at another time will not invalidate a will.

The Court also found that there was no evidence that the grandson had exercised undue influence over the testator. Although the testator was elderly and in failing health, he seemed to be of sound mind. Although the grandson had driven the testator to the lawyer's office to execute the will, the Court found no evidence that the grandson had ever encouraged the testator to make this will or arranged for its execution.

(3) *Jones v. Sperau*, \_\_\_ Ga. \_\_\_ (No. S02A0418, May 28, 2002): The testator's first will left everything to his niece. Two months after executing this will, he "met" James Jones in an Internet chat room and, one month after that, Jones moved into the testator's condo. The following month, the testator executed a new will leaving his entire estate to Jones. The testator died three months later. During the time Jones lived in the testator's home, the testator was ill and Jones helped administer his medications. Testimony at trial indicated that the testator's illness and his medications made him susceptible to outside influence. The testator had executed a financial power of attorney in which he named Jones as his agent and had added Jones' name to an investment account. Jones had arranged to have the attorney come to the hospital to prepare the testator's new will. A jury found that a confidential relationship had existed between Jones and the testator and that the will was the product of undue influence. Jones' motion for a directed verdict was denied by the probate judge and the Supreme Court affirmed. The Supreme Court pointed out that, although the evidence did not demand a finding of undue influence, it

was sufficient evidence to submit the issue to the jury. Furthermore, the evidence did not demand a verdict for Jones, which is the standard under which a directed verdict is issued. The Supreme Court also agreed that the probate court properly instructed the jury on the subject of a confidential relationship in that there was evidence which could support the finding that such a relationship existed.

4) *Cook v. Huff*, 274 Ga. 186, 552 S.E.2d 83 (2001): The testator had a stroke that kept him hospitalized for six months. He returned home in July, executed a new will in August, and died a few months after that. He named his wife of 53 years as executor and she received a substantial portion of the estate under the new will. He had four children from his marriage to her and three children from a former marriage. Those three children caveated the will on the ground of undue influence and the jury returned a verdict in their favor. The widow claimed that the trial court had erred in refusing to grant her motions for directed verdict, judgment j.n.o.v. and for a new trial. The court applied the “any evidence” standard to see if there was support for the jury verdict. The court found that the evidence showed that the testator was elderly and impaired by the stroke and medication (thus making him more susceptible to being influenced), that the widow had attempted to alienate him from other family members, that she had actively encouraged him to make the new will, had made the arrangements for him to meet with the drafting attorney, and had been present when the will was executed. The court also noted that the new will had more generous provisions for the widow and less generous provisions for the caveators than had the testator’s former will. The court concluded that the evidence was sufficient to authorize the submission of the question to the jury and to support the jury’s verdict.

The court also examined procedural claims raised by the widow, including a claim that evidence of the testator's other dealings was improperly admitted. The court found that the evidence was admissible given the broad range of circumstantial evidence that is admissible in undue influence cases.

Justice Sears wrote a dissenting opinion in which she was joined by Justices Fletcher and Hunstein. Justice Sears elaborated on the testimony that showed the testator to have been “a very strong-willed, independent, and sometimes overbearing individual.” She noted that the stroke and the anti-depressant medication the testator was taking did not (according to the testimony of his personal physician) impair his mental acuity. Justice Sears also pointed out that both of the witnesses to the will had known the testator for a long time (one for 40 years) and that they had found him to be clearly of sound mind when he executed the will. The attorney who drafted the will (and also had known the testator for 40 years) testified as to the testator's soundness of mind. Justice Sears stressed the high standards that must be applied when depriving a testator of the right to make his will. She noted that there were several past cases in which the court had recognized that spouses have a strong influence on each other and can use that influence to persuade the other spouse to grant him or her favorable treatment under a will. Justice Sears stated that she felt the majority had erred by failing to view the case in the context of the spousal relationship. She quoted the 1849 case of *Potts v. House*, 6 Ga. 324 (1849) (which itself was quoting an older English opinion) for this proposition:

If a wife [by her virtues] has gained such an ascendancy over her husband, and so rivaled his affections that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the residue of his

family. Nor would it be safe to set aside a will, on the ground of [undue] influence ...[or] advantage taken of the testator by his wife, although it should be proved that she possessed a powerful influence over his mind and conduct in the general concerns of life.

## **2. Will Construction**

1) *Fleming v. First Union National Bank*, 274 Ga. 527, 555 S.E.2d 728 (2001): The testator's 1939 will set up a trust which included a remainder interest "to the children of the children of Nell R. Legwen, share and share alike, a child or children to take the place of his or her children, deceased." Nell had four children. Only two of these children had children. Nell's oldest daughter had three children. Nell's oldest son had one child. When the last surviving child of Nell died, the bank, as trustee, attempted to distribute the remainder interest in two halves - one-half would go to the three children of the daughter and the other half would go to the child of the son. The children of the daughter claimed that the "share and share alike" language indicated that the remainder was to be distributed equally among the great-grandchildren, rather than in the per stirpes manner chosen by the bank. The children cited *Lewis v. Lewis*, 263 Ga. 349, 434 S.E. 2d 472 (1993), in which similar language had been interpreted to mean a per capita rather than a per stirpes distribution. The Supreme Court determined that the *Fleming* case was distinguishable from the *Lewis* case in that the will in the *Lewis* case had contained other language that indicated that a per capita distribution was intended. The Court pointed out that the presumption used in such cases is that the language of the will follows the structure of the intestacy statute, unless there is other language in the will that indicates a different intent on the part of the testator. Finding no such language in this will, and finding a pattern in the will that

indicated that a per stirpes distribution was contemplated by the testator, the Court held that the property would be divided in the manner suggested by the bank.

2) *Usry v. Farr*, 274 Ga. 438, 553 S.E.2d 789 (2001): The testator's will set up a life estate for the testator's wife, and included the following language:

... and at her death same is to go to my children who may survive my wife, and to my grandchildren with restrictions as follows: Any of my children taking land under this Item shall have a life interest therein, share and share alike, with any grandchildren who take hereunder taking the part which their father or mother would have taken. Upon the death of my last surviving child, title in fee simple to said lands shall vest in my grandchildren per stirpes and not per capita.

When the testator died in 1967, he was survived by his wife, three children, and five grandchildren. (Apparently, no more grandchildren were born after the testator died.) One of the grandchildren died in 1970 and was survived by three children. The last of the testator's children died in 2000. At that point, the four surviving grandchildren claimed that they should divide the remainder equally as they were the only grandchildren who had survived the life tenants. On the other side, the three great-grandchildren (the children of the grandchild who had died in 1970) claimed that the property should be divided into five equal shares and that they should take their deceased father's share. The Supreme Court approached the issue as one of vesting: did the title vest in the grandchildren at the time of the testator's death or at the time of the death of the last life tenant? The Court determined that the title vested in the five grandchildren at the time of the testator's death and thus that the three great-grandchildren were

entitled to a share in the remainder interest. (The Court noted that the “possessory interest” did not vest until the last life tenant died.) The Court based its decision on what it deemed was the testator’s intent, as gleaned from the language in the will. The Court pointed out that the gift to the testator’s children clearly required them to survive the testator’s wife but that the gift to the grandchildren contained no survival requirement. The Court also cited another clause in the testator’s will in which he stated that it was his intent to “provide for the welfare of my loved ones who survive me.” The Court found that this clause was “fatal to the claim of [the grandchildren] who would defer vesting well beyond the death of [the testator] until the conclusion of the life estates.” The Court also pointed out that OCGA Sec. 44-6-66 provides a statutory rule of construction that dictates that words of survivorship in a will refer to those surviving at the testator’s death unless the will contains a “manifest intention to the contrary.” The Court noted that, even though the last line of the item at issue spoke of “vesting,” the reference was to vesting in possession rather than vesting in title. Citing Georgia’s “strong preference” for early vesting, the Court stated that language in a will would be construed to make a remainder contingent upon the death of life tenants only if that language was “clear and unambiguous.”

Justice Carley wrote a dissent in this case, in which he was joined by Justices Benham and Hines. Justice Carley stressed that the language at the end of the item spoke clearly of vesting in *title* rather than merely of vesting in possession. He criticized the majority for interpreting the absence of an express survivorship requirement as conclusive evidence that the testator intended to create vested, as opposed to contingent remainders. He stated: “A postponement of the vesting of title can be the functional equivalent of a survivorship

requirement.”

3) *Delbello v. Bilyeu*, 274 Ga. 776, 560 S.E.2d 3 (2002): The testator’s will left certain real property to be divided among the testator’s mother, brother, and domestic partner, and devised the testator’s “personal property” to the partner. The partner filed a petition for declaratory judgment on two issues: 1) whether the mortgage on the real property and the expenses incurred in the sale of that property should be paid from the proceeds of the sale of the property or from the estate assets as a whole; and 2) whether certain brokerage and bank accounts of the decedent were to be characterized as his “personal property.” On the first issue, the probate court concluded that the expenses and indebtedness on the real property should borne by the entire estate. The probate court noted that there was no specific language to indicate that the costs and indebtedness should be paid only by the beneficiaries of that property. This issue was not appealed. On the second issue, the probate court heard testimony from the scrivener of the will to the effect that the only property that testator wished to have divided among the three beneficiaries was the real property. The probate court determined that the accounts were to be distributed as the testator’s “personal property.” The Supreme Court affirmed the probate court’s ruling. The Court applied the “clearly erroneous” standard because the appeal involved a finding of fact in a non-jury trial. The Court noted that the scrivener’s testimony provided evidentiary support for the probate court’s finding. The Supreme Court also rejected the appellants’ argument that they had been deprived of a jury trial as they had apparently not made a timely request for one. Finally, the Court determined that the declaratory judgment action was not premature. The Court cited OCGA Sec. 9-4-4, which allows a legatee to seek a declaratory

judgment when a question arises in the administration of the estate. The Court noted that the executor in this case had expressed uncertainty as to how to pay off the debts and distribute the estate assets.

### **3. Contract to Make a Will**

1) *Hobby v. Smith*, 250 Ga. App. 669, 550 S.E.2d 718 (2001): Smith brought an action against her aunt's estate, seeking the enforcement of her aunt's agreement to leave her half of her estate in exchange for her services or, alternatively, seeking payment of the reasonable value of those services. The jury awarded her \$47,000. The Court of Appeals reversed. The Court noted that the jury had concluded that no express contract had existed between the niece and her aunt. In order to find an implied promise to pay between family members, the Court stated that it must be clearly shown that compensation was intended by both parties at the time the services were rendered and that the services were not "performed merely because of that natural sense of duty, love, and affection arising out of [the] relation." The Court of Appeals could find no evidence that the payment was contemplated by the parties. The Court pointed out that the aunt had entrusted her financial arrangements to both of her nieces and had originally written a will in 1977 in which she divided the estate among them and a grand-niece and grand-nephew. In 1983, she wrote a will dividing her estate equally between the two nieces. She didn't discuss either of these wills with Smith until after they had been executed. After the aunt moved to an assisted living facility, she revoked the power of attorney she had given to the nieces and wrote a new will leaving her entire estate to her brother. The Court of Appeals found that no agreement existed between the aunt and niece at the time of execution of either of her first two wills. The Court of Appeals thus reversed, finding that there was insufficient evidence to overcome the

presumption that Smith had helped her aunt out of natural love and affection rather than in contemplation of compensation.

2) *Ford v. White*, \_\_\_ Ga. App. \_\_\_ (No. A02A0301, May 3, 2002): Ford sought specific performance of an oral agreement between him and his great uncle whereby the uncle promised to leave him his entire estate if he would care for and look after the uncle for the rest of the uncle's life. The trial judge granted a directed verdict for the beneficiary of the uncle's will and the Court of Appeals affirmed. The oral agreement was entered into in 1997 and, in 1998, the decedent had written a will in which he left nothing to Ford. Ford did not caveat the will but instead brought an action for specific performance on the oral contract. He testified at trial about the various services that he had performed for the uncle. The trial court found that he had failed to prove the value of the services he had rendered, had failed to prove the value of the estate, and thus had failed to prove that the contract was fair. The Court of Appeals examined the circumstances under which an oral contract to make a will could be enforced by an order for specific performance. (The Court of Appeals did not mention that, after January 1, 1998, all such contracts must be in writing, per OCGA Sec. 53-4-30.) The Court noted first that the contract must be "clear, distinct, and definite." Second, because specific performance is an equitable remedy, the Court stated that the contract must be shown to be "equitable and just." In this second context, the Court pointed out that the value of the estate and of the services must be proved unless the contract was "one requiring him to give such personal, affectionate, and considerate attention as could not be procured elsewhere and the value of such services could not

be readily computed in money.” The trial court had found that the contract was not of such a personal nature in that the services required could easily be procured elsewhere. The trial court noted that the nephew had not moved in with his great uncle but rather had performed services (such as mowing the lawn and checking on him) that his uncle could have hired others to perform. The Court of Appeals agreed with the trial court’s characterization of the contract. The nephew complained that the trial court or the defendants should have raised the point that he would need to offer additional proof. The Court of Appeals noted that the defendant had raised the issue in a motion for summary judgment that the trial court had denied.

3) *Long v. Waggoner*, 274 Ga. 682, 558 S.E.2d 380 (2002): Virgil and Vera, husband and wife, executed a single will 1993. Each left his and her property to the survivor in trust for life, with their son as trustee and remainderman. Virgil died shortly thereafter. Some months after Virgil’s death (but before his will was probated), Vera instructed her attorney that she intended to transfer her interest in an 80-acre tract of land that owned by her and the trust to her granddaughter, Waggoner (the son’s daughter). She also told her attorney that she wanted to “void” her will and prepare a new will leaving everything she owned at death to her three granddaughters. She executed her new will a year later. When Virgil’s will was admitted to probate, the son declined to serve as executor or trustee and Waggoner was appointed to those positions. Waggoner then sought to partition the 80 acres (which were now owned by herself and the trust) on the theory that her grandmother’s needs, as trust beneficiary, would best be served by selling the land. Waggoner then amended the petition to seek authorization to sell the entire 80 acres. The son (Waggoner’s father) opposed the partition, sought to set aside the deed

by which Vera had transferred her interest in the land on the grounds that it was the product of undue influence and that it conflicted with the “mutual will” made by Virgil and Vera. The trial court granted summary judgment for Waggoner and the Supreme Court affirmed. In discussing the “mutual will” issue, the Court applied the pre-1998 Probate Code provisions of OCGA Sec. 53-2-51(b) and 53-2-70. Former OCGA Sec. 53-2-51 referred to a “mutual will” as one in which the parties agree that the survivor will not revoke his or her will. The former Code section did not characterize a will as a “mutual will” unless there was an express contract or an express statement in the will that it was a mutual will. (The new Code, in Sections 53-4-30 through -32 does not give any legal meaning to the term “mutual will” and requires any contract not to revoke entered into after 1/1/1998 to be in writing.) The Supreme Court agreed that the will of Virgil and Vera contained no express statement as to its revocability and there was no other evidence of an express contract, so the will was not found to be a “mutual will.” In other words, Vera was free to revoke her will at any time. The Court also pointed out that, when Virgil’s will was probated, the son had signed a sworn statement in which he conceded that the will was not a mutual will.

The Court also addressed whether the deed given by Vera to her granddaughter was the product of undue influence. The Court examined the evidence to determine whether a confidential relationship existed between Vera and Waggoner. They were neighbors and saw each other on a daily basis. Waggoner drove Vera on various errands and to appointments, as Vera suffered from glaucoma. Waggoner also helped Vera to conduct her business by writing out her monthly checks and giving them to Vera to sign. The Court said that this evidence showed “a very close familial relationship..., one typical of the relationships often found between

independent aging persons and the family members who assist them in routine matters.”

However, the Court said that the evidence did not show that they were in the type of confidential relationship that would give rise to the presumption of undue influence that arises “where the grantee of a gift of real property stands in a confidential relationship with the grantor of real property **and** [emphasis added by the Court] the grantor is of weak mentality.” The Court noted that “weak mentality” included “not only feeble-mindedness but ... also the domination of the grantor by the grantee, exemplified by the grantee’s provision of shelter and care.” The Court said that evidence showed that Vera was a “strong-willed and independent woman, capable of providing for her own shelter and care, and responsible for her own affairs....” Thus, the Court concluded, there was no genuine issue of material fact and the grant of summary judgment was proper.

#### **4. Will Revocation**

*Evans v. Palmour*, 274 Ga. 283, 553 S.E.2d 585 (2001): The testator executed a will in 1990. He had eleven children, but his will devised his entire estate to one daughter. His will also stated: “I make this will in contemplation of my marriage and in such event it is my intention that this will be valid and not be revoked by operation of law.” Seven years after making the will, the testator married a woman whom he had not known at the time he executed the will. They were divorced a year later. When the testator died in 2000, the other children claimed that the will had been revoked by operation of law upon the testator’s marriage because the testator had not specifically identified the woman whom he planned to marry when he wrote the “contemplation clause” in his will. The Court affirmed the probate court’s holding that the statute that allows an individual

to override the revocation that would occur when the testator marries does not require the testator to identify a particular future spouse. The statute speaks in terms of contemplation of the “event” of marriage, not in terms of whether the testator plans to marry a specific person. The Court pointed out that the same statute speaks of the contemplation of the birth or adoption of future children and stated: “Appellants do not (and I believe, cannot seriously) argue that future children must be identified by name in order for a will made in contemplation of a child’s birth or adoption to be valid.”

## **C. ADMINISTRATION OF ESTATES**

### **1. Appointment of Personal Representative**

*Sherard v. Aldridge*, 251 Ga. App. 445, 554 S.E.2d 59 (2001): The testator’s will named co-executors, one of whom predeceased her and the other of whom took no action to be appointed. The will did not name successor executors. The testator’s brother, who had served as the guardian of her person and property, petitioned to be appointed administrator with the will annexed. The testator’s daughter also sought to be appointed administrator with the will annexed. Both the brother and the daughter were named as beneficiaries under the testator’s will. After a hearing (that was not transcribed), the daughter was appointed by the probate court and the brother appealed. The brother claimed that evidence had been introduced at the hearing that indicated that the appointment of the daughter might not be in the best interest of the estate, including evidence that the testator had not wanted her daughter to handle any part of her estate.

The Court of Appeals affirmed the probate court’s appointment of the daughter. The Court of Appeals noted first that the applicable statute (OCGA Sec. 53-6-14(b)) was not particularly

helpful in that, as beneficiaries under the will, the brother and daughter were both entitled to be given a preference when the court was considering who should be appointed as personal representative. The Court then pointed out that the appellant had not proffered a transcript of the hearing, even though the hearing had been continued at one point to accommodate his request for a recording. Without a transcript or some other agreed statement of what took place at trial, the Court of Appeals noted that it was required to presume that the evidence authorized the judgment. The brother also claimed that the testator's car and household furniture should not have been sold, but rather should have been given to him as his sister wanted him to have them. The Court of Appeals pointed out that the "controlling document is her last will and testament which fails to mention giving this property to him."

## **2. Drafting Attorney as Executor**

*In re Estate of Peterson*, \_\_\_ Ga. App. \_\_\_ (No. A02A0239, May 9, 2002): The testator's will named his wife as executor and, if she was unable to serve, named the attorney who had drafted the will. The wife died before the testator and the attorney filed to have the will admitted to probate and to be appointed executor. The heirs objected on the ground that the attorney had a conflict of interest. The will had been executed when Standard 30 of Georgia Bar Rule 4-102(d) had been in effect. Standard 30 required full disclosure and written consent of the client if an attorney's representation of the client could be affected by the attorney's own interests. FAO 91-1 (Ga. Supreme Court, Sept. 1991) had applied this rule to lawyers who drafted wills in which they were named as executors. FAO 91-1 stressed that full disclosure and the client's written consent was imperative if the attorney were to be named executor or trustee. FAO 91-1 also

required that the attorney not have “promoted himself or herself or consciously influence the client in the decision.” The trial court, while noting that the lawyer had not promoted himself and had fully disclosed any potential conflict orally to the testator, found that he had failed to get the testator’s written consent or to provide the testator with written notice. The Court of Appeals agreed and also reiterated the trial court’s conclusion that the execution of the will itself did not constitute written consent.

The new Georgia Rules of Professional Conduct speak to a potential conflict of interest for estate planners both in Rule 1.7 and Rule 1.8. Rule 1.7, the general conflicts of interest rule, requires a client to consent “preferably in writing” after receiving “in writing reasonable and adequate information about the material risks of the representation.” (Comment 13 of this rule also cautions estate planning lawyers who prepare wills for several family members to be aware of the potential for a conflict to arise and, in estate administration, to make clear whether the lawyer is representing the fiduciary or the estate and its beneficiaries.) Rule 1.8, “Conflicts of Interest: Prohibited Transactions” prohibits a lawyer from preparing an instrument that gives the lawyer “a substantial gift, including a testamentary gift” except in cases where the lawyer and the client are related.

### **3. Sale of Property of the Estate**

*Georgia 20 Properties, LLC v. Tanner*, \_\_\_ Ga. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. A01A2541, March 27, 2002): This case involves the sale of property of a testator who died in 1958. Her will devised her estate to her nieces and nephews and required that certain real property be kept intact until the last niece or nephew died, at which time the property was “to be sold and divided

equally” among their children. In 1996, Tanner was granted letters of administration. In January, 1997, he entered into a contract to sell the property, subject to receiving approval from the probate court. Several days later, he petitioned the probate court for permission to sell timber rights to the property. The probate court denied permission, holding that the nieces’ and nephews’ interest in the property had already passed in essence to them and thus that the administrator should distribute the property to them outright. Tanner never sought permission from the probate court to sell the land itself. (Evidence indicated that his sister had complained to him soon after the contract was signed that the price he had agreed to was too low.) In May, 1997, the last survivor of the testator’s nieces and nephews died. In May, 1998, Tanner refused to go through with the sale and claimed that, given the probate court’s decision in the timber rights case, he was not authorized to do so. The buyer sued for specific performance. The Court of Appeals found that the probate court’s decision was not res judicata and that Tanner was required to seek probate court permission to sell the property. The court noted that interested parties would have the opportunity to object to the fairness of the transaction in the probate court proceeding but cautioned the probate court that it must consider whether the price was fair as of the date the contract was entered into rather than in light of the current fair market value of the property. The court also held that the superior court should have found specifically that the property was property of the estate because the estate was still open, the will had instructed that the property be held until the last niece or nephew died, and the property had not yet been sold or distributed.

#### 4. Exercise of Stock Options

*Sams v. Video Display Corporation*, \_\_\_ Ga. App. \_\_\_ (No. A02A0504, May 8, 2002): Prior to his death, the decedent had entered into a stock option agreement with his employer. After he died, the company's Chief Executive Officer incorrectly informed the widow that she had a year in which to exercise the option. In fact, the agreement allowed only 90 days for exercise upon the death of the employee. The decedent had died intestate and his heirs could not agree as to who should be appointed administrator. They finally agreed to have an independent administrator appointed. At this point, almost 11 months had elapsed since the decedent's date of death. The administrator attempted to exercise the option within a year of the decedent's death but was informed that the time for exercise had expired 90 days after the decedent's death. The administrator then filed suit but summary judgment was granted to the company. The Court of Appeals affirmed the grant of summary judgment. The administrator's first claim was that the 90-day exercise period was tolled during the time before an administrator was appointed. The administrator cited *Buffalo Insurance Co. v. Steinberg*, 105 Ga. App. 366, 124 S.E.2d 681 (1962), in which the Court of Appeals had held that the period for filing a proof of loss on an insurance claim by a missing person was tolled until a conservator of the insured's estate was appointed because, prior to that appointment, there was no one competent to file the proof of loss on behalf of the missing person. The Court of Appeals distinguished that case as one designed to help "innocent and helpless victims." In the case at bar, the Court pointed out that the heirs had access to the stock agreement (and that the widow was also an optionee under the same agreement) and could easily have had a temporary administrator appointed to exercise the option. The administrator's second argument was that he had standing as administrator to bring

an action against the company's CEO for the incorrect information he had given to the widow and son. The Court of Appeals concluded that, since the misrepresentations had not been made directly to the administrator, the administrator lacked standing to bring the claim. (The Court of Appeals pointed out that the heirs may still have a right to bring such an action.) The administrator's third contention was that the estate was entitled to attorney's fees in the action. The Court of Appeals disagreed that the company had been acting in bad faith or had been stubbornly litigious.

## **5. Suits against Personal Representative**

### **a. Discovery Abuses**

*Sheppard v. Johnson*, \_\_\_ Ga. App. \_\_\_ (No. A02A0336, Mar. 13, 2002): Plaintiff filed suit against the executors of an estate. The Court of Appeals stated that the plaintiff had "delayed the course of litigation four times" in the original suit by refusing to answer questions during the deposition and by not filing a pre-trial brief. Defendants moved to dismiss and then the plaintiff voluntarily dismissed the suit. She then refiled and this time failed to answer interrogatories fully and timely. The trial court was forced to order the plaintiff to comply with discovery and warned her that failure to comply with its order would result in a dismissal of her suit with prejudice. The plaintiff once again failed to comply and, after a hearing in which she was ordered to supplement her interrogatory responses, offered answers that the court found to be deficient. The trial court found that she had "willfully and intentionally" violated its orders and dismissed her suit with prejudice. The Court of Appeals affirmed.

**b. Reimbursement of Attorneys Fees**

*In re Estate of Garmon*, \_\_\_ Ga. App. \_\_\_, 561 S.E. 2d 216 (2002): A beneficiary under a will sued the executor for failure to conduct an accounting, breach of fiduciary duty, and self-dealing.

The beneficiary requested that she be awarded attorney's fees under OCGA Sec. 13-6-11. This Code section provides:

The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

The trial court granted a consent order that resolved most of the issues and provided that the dispute over attorney's fees would be resolved after a hearing at which the parties would present evidence. The beneficiary then filed a motion seeking attorney's fees from the executor personally, under Sec. 13-6-11, or alternatively from the estate, under former OCGA 53-7-104.

Former OCGA Sec. 53-7-104 provided as follows:

If the administrator or executor, for any cause, shall decline to litigate any claim, he may assign the claim to a distributee or creditor, who may at his own expense prosecute the same. After the payment of expenses, any proceeds recovered shall be distributed by the administrator or executor.

The beneficiary also moved that the executor be denied reimbursement of his attorney's fees from the estate. The beneficiary attached numerous exhibits to her motion. In response, the

executor simply challenged the reasonableness of her attorney's fees "[r]ather than set forth a lengthy recitation of facts." The trial court granted both of the beneficiary's motions and stated specifically that she be awarded attorney's fees from the *estate*. The Court of Appeals affirmed.

The court noted that the granting of attorney's fees from the estate indicated that the fees were granted pursuant to OCGA Sec. 53-7-104 rather than OCGA Sec. 13-11-6. (In a footnote, the court pointed out that OCGA Sec. 53-7-104 had been repealed effective in 1998, but that the executor had not argued that point.) The Court of Appeals cited its 1954 opinion in *Estes v. Collum*, 91 Ga. App. 186, 85 S.E. 2d 561 (1954), in which it had affirmed that attorney's fees could be awarded from the estate to an heir who had sued the personal representative for the purpose of reinstating property wrongfully taken from the estate by that personal representative.

The court noted that the executor in the case at bar had engaged in a variety of activities in which he had essentially treated estate assets as his own and had neglected to list as an asset of the estate a substantial debt that he owed the estate. Because the executor's actions had necessitated the suit by the beneficiary, the executor was not entitled to have his attorney's fees paid by the estate.

## **D. TRUSTS**

### **1. Construction of Trust Terms**

*Ovrevik v. Ovrevik*, \_\_\_ Ga. App. \_\_\_ (No. A01A2372, A01A2373, Mar. 8, 2002): The trust at issue in this case was drafted by one of the settlors. Ambiguities in the language caused the beneficiaries to appear before the Court of Appeals three times. In *Ovrevik v. Ovrevik*, 242 Ga. App. 95, 527 S.E. 2d 586 (2000) (*Ovrevik I*), the following facts were laid out: The settlors, a

married couple, set up a revocable trust to benefit themselves for their lives and then divide the property remaining at their deaths among their three named children and their grandchildren. After the settlors died, the successor trustee (one of the settlors' sons) filed a declaratory judgment seeking direction regarding the discharge of his duties and a beneficiary (the other son) filed a motion for partial summary judgment asking, among other things, that the trust be terminated and that certain trust property be distributed to him. Another one of the beneficiaries (the settlors' daughter) contested the motion on the grounds that the settlor's intent was that she receive a certain percentage of the trust property that was requested by the first beneficiary. The partial summary judgment was granted and the Court of Appeals affirmed the judgment in part and vacated and remanded in part.

The Court's judgment in *Ovrevik I* involved a construction of the trust's terms. The first clauses examined by the Court were ones that directed distributions of real estate to the settlors' sons subject to liens in favor of their daughter. The daughter argued that the settlors intended her to receive a certain percentage of the fair market value of the realty but the Court of Appeals found that the terms of the trust unambiguously set forth the settlors' intent that she only receive liens on the realty.

In *Ovrevik I*, the Court of Appeals remanded to the trial court the construction of two other clauses of the trust that appeared to be ambiguous. The first clause dealt with the distribution of one of the parcels of real estate after the lien was paid off. The clause directed that the property be distributed to Russell Ovrevik subject to a lien in favor of Alice Ovrevik. If the property was not sold within four years of the death of the last surviving settlor, the lien was to be paid off and "the remaining value of the property shall be divided either physically or if

sold in dollar values among Russell’s three children and Russell, as determined by Russell.” The ambiguity revolved around whether Russell had discretion whether to decide to divide the property or sell it, or whether to decide which of his children would receive the property, or both.

The trial court heard parol evidence on the matter and determined that Russell had discretion as to both form of the distribution and as to who the beneficiaries would be. The second clause provided for “[j]oint responsibility [of one son and the daughter] for the equal adjustment of one-half each of any surplus or shortage of funds in the final closing of the [Trust].” The trial court had originally interpreted this clause to require the son and daughter to share responsibility for any debts or expenses in excess of the remaining trust funds. The Court of Appeals in *Ovrevik I* had stated that it knew of no authority by which a settlor can distribute the debts incurred by a trust to the beneficiary. It noted that neither a trustee nor a beneficiary is personally liable on a judgment entered against a trust. The trial court, although admitting that the evidence on this issue was “scant,” came to the same conclusion as to the testator’s intent that it had reached in *Ovrevik I*. Alice and Glenn (the trustee) both appealed these findings by the trial court. The Court of Appeals affirmed the trial court’s findings. The Court of Appeals first noted that the standard of review that it would apply on appeal would not be the standard by which a summary judgment would be reviewed. The Court pointed out that summary judgment became inappropriate in the case once the trial court decided it needed to hear parol evidence to resolve the ambiguities. Consequently, the Court of Appeals applied the standard of review for bench trials, the “clearly erroneous” or “any evidence” rule.

Alice enumerated several purported errors of the trial court. The Court of Appeals refused to consider some of the claims as they had not been ones on which the case had been

remanded. The Court noted that Alice's claim that an accounting filed after the trial court's original order changed the evidentiary posture of the case was not viable. The Court pointed out that the facts that were later evidenced by the formal accounting had been available to the trial court. One of Alice's claims concerned the trial court's interpretation of the trust terms that resulted in the abatement of the trust interests of her and Glenn. The Court of Appeals found that evidence supporting the trial court's construction had been given. Testimony indicated that the parents wanted to limit the abatement of a shortage of trust funds, as well as the distribution of any surplus, to the two children who had received the bulk of the estate. As to the distribution of the property on which the lien had been placed, the Court of Appeals cited evidence that the property at issue was "old farm land" that Russell had expressed an interest in buying from his father. As his children were not interested in farming, it was logical to conclude that the father intended to give Russell discretion to decide whether to sell the property and whether to distribute the property or the proceeds to his children

Glenn's pro-se appeal brief was, according to the Court of Appeals, "not a model of clarity." He complained that the trial court had too closely conformed its conclusions to the parameters set out by the Court of Appeals in *Ovrevik I*. The Court of Appeals noted that the trial court's interpretation had been solidly based in Georgia law as well as the direction provided by the Court of Appeals. Glenn also claimed that the trial court had not given appropriate weight to his evidence that the parents had intended to completely disinherit Russell. The Court of Appeals, citing its earlier conclusion about the standard of review, refused to disturb the trial court's finding.

The Court of Appeals concluded by noting that the case "has generated extreme

animosity among family members, as well as some \$50,000 in fees charged to the trust at the time of the hearing almost a year ago.” The Court quoted Chief Justice Bleckley’s comment on an earlier bitterly disputed case: “Thrice this unquiet case has materialized at the sittings of this tribunal. We hope its perturbed spirit will now enter into unbroken rest.”

## **2. Settlement Agreement**

*Turner v. Bynum*, \_\_\_ Ga. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. A02A1010, April 25, 2002): After their mother’s death in 1998, Turner and his sisters were the sole surviving beneficiaries of a testamentary trust set up by their father. The sisters petitioned to be appointed successor trustees and Turner objected. The parties discussed a resolution to the controversy and then appeared in court, where the attorney for the sisters explained the agreement they had reached. The agreement was transcribed and both parties’ attorneys agreed on the record that the transcript would reflect their agreement until they could submit it to the court in writing. Turner did not cooperate in preparing a written memorialization, so the sisters moved to have the agreement, as transcribed, enforced. At a hearing on their motion, Turner complained that the agreement was too vague and undefined and that it had not been the parties’ intent that it be final. The court entered an “Order of Settlement” in which it restated the agreement as earlier transcribed. The Court of Appeals disagreed with Turner that there was any evidence (other than his own testimony at the hearing on the motion to enforce the agreement) that the agreement was vague or undefined or not meant to be final. The court also pointed out that Turner had made no effort to specify which parts of the agreement were undefined.

## **E. GUARDIANSHIPS**

1) *SunTrust Bank Middle Georgia v. Harper*, 250 Ga. App. 300, 551 SE2d 419 (2001): Mr. Harper had been declared legally incapacitated and his son had been appointed the guardian of his person and property. Among the powers that were removed from Mr. Harper in the guardianship order were the power to make contracts, the power to buy or sell property, and the power to enter into any other business or commercial transaction. Three months prior to filing the petition for guardianship, the son had taken his father to the bank and had him change his savings account to a joint account with right of survivorship in the names of father and son. After the guardianship was established, the son took his father to the bank and had him change his IRA designation so that the account was payable solely to the son. After Mr. Harper died, the bank (as custodian of the IRA and issuer of the joint savings account) filed a complaint for interpleader and declaratory judgment. The trial court found that the IRA designation was appropriate but the bank account change was not. The Court of Appeals determined that the changes *both* to Mr. Harper's IRA designation and bank account were void in that Mr. Harper had lack the legal capacity to make them and the guardian had breached his fiduciary duty to his father.

The trial court found a breach of fiduciary duty in that, at the time he was appointed guardian, the son had neither disclosed his joint bank account interest to the probate judge nor relinquished this interest. Throughout the guardianship, the son had spent almost \$150,000 from his father's other bank accounts to care for his father, but had never touched the assets in the joint account. The Court of Appeals discussed at length the conflict of interest rules as they apply to guardians. The Court, citing its earlier opinions in *Dowdy v. Jordan*, 128 Ga. App. 200, 196 S.E.2d 160 (1973) and *Moore v. Self*, 222 Ga. App. 71, 473 S.E.2d 507 (1996), stated that

the son should never have applied to be his father's guardian if he intended eventually to claim title to the bank account. By accepting the appointment, he had breached his duty of undivided loyalty to his ward. The Court then mitigated this stance slightly when it stated:

A guardian like a trustee must avoid being placed in a conflict of interest position. If he cannot do so, he may resign, may fully inform the probate court of the conflict, or may request that the court appoint a different guardian. By not doing so, Harper proceeded at his own peril. Having violated the loyalty rule, Harper became estopped under the principles of fiduciary law from asserting any claim to the property adverse to the interest of the estate.

The Court of Appeals called this a "rule of deterrence" and reiterated at the end of the opinion that Harper "at a minimum, should have timely disclosed his purported interest in that CD to the probate court." The evidence at trial indicated that the son had listed the account as one of his father's assets and had made a notation that the account was a "joint account for convenience." The probate judge testified that this listing and the accompanying notation indicated to him that the son had not asserted any claim to the joint account funds at the time the guardianship was set up.

The trial court's conclusion that the change in the IRA had been appropriate was based on its interpretation of such a change as "testamentary rather than contractual" and noted that, in the guardianship proceeding, the probate judge had not "removed" the father's power to make a will. In fact, the probate judge had not made any independent assessment of Mr. Harper's testamentary capacity, but he had ordered that Mr. Harper's will was to be filed with the clerk of the court for safekeeping. The Court of Appeals reversed the trial court's holding, finding that

the IRA was governed by general principles of contract law and banking law. The Court of Appeals pointed out that Mr. Harper “plainly, in light of the explicit terms of the probate court order governing the guardianship,” could neither have created a new IRA nor have made a partial withdrawal from an existing IRA. The Court of Appeals also pointed out that, “as has been the law for more than a century,” an individual who is mentally incompetent cannot change the beneficiary on a life insurance policy. Finally, the Court of Appeals noted that its holding “squarely comports with state banking law” in that the state banking statutes governing POD accounts and joint accounts specifically provide that such accounts cannot be changed by will, but rather solely by a change in the contract. Likewise, as Mr. Harper could not have changed the beneficiary of his IRA with his will, such a change was contractual rather than testamentary in nature. In response to the son’s argument that his father had been in a “lucid interval” when he changed the IRA designation, the Court of Appeals again denied that the action was “testamentary in nature” and discussed at length the different degree of capacity required for making a will as opposed to making a contract. The Court pointed out that the age at which one can make a will is lower than the age at which one can enter into contracts. The Court also quoted OCGA Sec. 53-4-11(b), which states that “an incapacity to contract may co-exist with the capacity to make a will.”

2) *In Re Copelan*, 250 Ga. App.856, 553 S.E. 2d 278 (2001): After Mr. Copelan died in 1992, Mrs. Copelan participated in the daily operation of the substantial dairy farm that he had left her. Two of her four children assisted at the farm and the other two worked elsewhere. Two years after Mr. Copelan’s death, the farm began to fall into debt and a herd of cows was sold. The sale

sparked a great deal of controversy among the family members. One of the two children who worked on the farm felt the farm was theirs and that Mrs. Copelan would never have sold the cows unless “something was wrong with her.” In 1995, her daughter Uyvonna (who had not previously worked on the farm) moved in with her. In 1997, two of her sons petitioned for the appointment of a guardian of Mrs. Copelan’s person and property. They identified “mental illness” and “advanced age” as grounds for the petition. The probate court reviewed the petition and the psychological evaluation but found no probable cause to support the petition. The evaluation had found that Mrs. Copelan was clinically depressed but not so incapacitated as to be in need of a guardian.

The sons appealed to the superior court and a jury trial was held. Mrs. Copelan did not appear at the trial. One of the petitioners explained that she was not present due to the “embarrassment” and that she was a “sweet, genteel, epitome of a southern lady” who “never liked to discuss the family business in the community.” The testimony presented included testimony by the psychiatrist who had examined Mrs. Copelan and who had diagnosed her depression. After a few weeks on an anti-depressant, Mrs. Copelan’s condition (according to the psychiatrist) improved, but then deteriorated. But during all visits, Mrs. Copelan indicated that she was capable of handling her own affairs. Testimony by an attorney who had known Mrs. Copelan for 50 years indicated that she seemed to be “in touch with reality” and that there was “no evidence of duress or undue influence.” One of the sons who had filed the petition testified that his mother was becoming forgetful as she aged and that Mrs. Copelan’s sale of the cows may have been caused by the undue influence of the two children who were not working on the farm. The second petitioner/son also testified as to her mental state and said that he and his

brother had had little contact with Mrs. Copelan due to the “brainwashing” of her by her two other children. The ex-wife of one of the petitioners/sons, a psychologist, testified even though she was not offered as an expert witness. She testified about incidents in which Mrs. Copelan had seemed confused and disoriented. The ex-wife also testified that she had watched a videotaped deposition of Mrs. Copelan and had “diagnosed” her as suffering from dementia. Other testimony indicated that the two other children had isolated Mrs. Copelan from the petitioners/sons and the rest of her family and had put a “block” on her phone. The jury found that Mrs. Copelan was an incapacitated adult. Mrs. Copelan appealed.

The Court of Appeals determined that, as the standard for imposing a guardianship was “clear and convincing evidence,” they should review the verdict to see if there was any “substantial evidence” to support the jury verdict. The Court of Appeals found that the evidence was not clear and convincing enough to support the jury verdict. The Court pointed first to the psychiatrist’s evidence, which indicated no more than that Mrs. Copelan was depressed. They also discounted the ex-wife’s testimony because, as a lay witness, she was required to support her opinion by facts and circumstances, which she had not done. They noted that the conversations described by the ex-wife with Mrs. Copelan included conversations about dividing up real property and tax consequences, which evidenced Mrs. Copelan’s mental competency. The Court of Appeals characterized the lawyer’s testimony as “the fatal blow to appellees’ argument.”

Finally, the Court examined the undue influence claim. The petitioners/sons had claimed that undue influence was a sufficient ground for imposing a guardianship because OCGA Sec. 29-5-1 allows the appointment of a guardian for adults who “are incapacitated by reason of

mental illness, mental retardation, ... *or other cause.*” First, the Court found that this reading of the statute was too broad and that the “other cause” language was limited by the specific physically or mentally incapacitating conditions listed prior to it. Despite this finding, the Court went on to examine the undue influence charge because “undue influence coupled with clear and convincing evidence of mental incapacity could warrant a finding of guardianship over person and property.” Because there are no cases in Georgia that discuss undue influence in the context of a guardianship, the Court looked to the testamentary capacity/freedom of volition cases and found that, while the evidence showed that Mrs. Copelan might have been susceptible to undue influence, that alone was not sufficient to support a finding of mental incapacity.

3) *In re Holloway*, 251 Ga. App. 892, 555 S.E.2d 228 (2001): Two sisters instituted an action to have themselves appointed as guardians of the person and property of their mother. The mother’s two sons intervened and sought to have themselves appointed as their mother’s guardians. The probate court found that none of them were suitable to serve as guardians and appointed the DFACS director and the county guardian as her guardians. The Court of Appeals affirmed. The Court looked at the family history with regard to the care of the mother. The mother was receiving Social Security and interest on a CD. One of the sons was named as her attorney in fact. He cashed in the CD, transferred the proceeds to an irrevocable trust, named himself as trustee, and put the money into a stock brokerage account. The daughters moved the mother from Cordele to Macon without telling the sons. They filed a petition for guardianship in Macon, but the petition was transferred back to Crisp County. While in a nursing home, the mother fell and broke her hip and an emergency guardian had to be appointed because the

children could not agree on her medical treatment. The probate court passed over all of the children when appointing a guardian, pursuant to OCGA Sec. 29-5-2, which allows the court to do so “for good cause shown.” The children claimed that OCGA Sec. 29-4-8, which applies to guardianship of minors, should be applied in this case. That statute states that the minor’s next of kin “shall be preferred” as guardians “if otherwise unobjectionable.” The Court of Appeals found that that statute was not relevant in the instant case, as that statute applied to minors and the case was one of an alleged incapacitated adult. The Court then noted that the probate court had passed over the children because all of them had shown by their recent actions that they might not act in her best interests. The mother’s court-appointed attorney had urged that they not be appointed. The Court of Appeals found that the probate court had “good cause” to refuse to appoint the children.

4) *Tidwell v. Tidwell*, 251 Ga. App. 863, 554 S.E.2d 822 (2001): Tidwell’s grandmother had become the guardian of his person and property when his father died. She had purchased a car with Tidwell’s funds and had listed it in her final return as an asset of his estate. However, she refused to transfer title to him. Four year after reaching the age of 18, he had filed a petition in the probate court for a final accounting, but the petition had been dismissed. In 2000, he filed a “complaint in equity” in the superior court. The superior court granted summary judgment to the grandmother on the ground that the action was one for conversion and that the four-year statute of limitations had run. Tidwell appealed, complaining that the statute of limitations issue had not been raised in the trial court and thus that the court had no right to grant the summary judgment sua sponte. The grandmother claimed that the issue had been raised at the hearing. No

transcript of the hearing had been made, so the Court of Appeals assumed that the trial court's ruling was proper. The Court of Appeals also agreed with the trial court's finding that the action was one of conversion and thus that the four-year statute of limitations applied.

## **G. JOINT ACCOUNTS**

*Buice v. Buice*, \_\_\_ Ga. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2002): Mrs. Buice executed a will in 1991.

In 1994, Mrs. Buice moved in with one of her sons and his wife after her husband died. She gave the daughter-in-law a limited power of attorney and put her name on several bank accounts.

When that son died in 1996, Mrs. Buice moved in with her other son, Allen. Soon after moving in with him, Mrs. Buice closed out her accounts with the daughter-in-law and opened joint checking and money market accounts and CDs with Allen. A bank manager testified that it provided its customers with a "Deposit Agreement and Disclosures" pamphlet that "stated that joint accounts were owned by the parties listed on said accounts as joint tenants with right of survivorship and not as tenants in common and upon the death of either party listed on the accounts, the remaining deposits were payable to the surviving party." (This is not entirely accurate. While either party to a joint account may *withdraw* the sums on deposit, OCGA Sec. 7-1-812 clearly provides that, while both parties are alive, the money in the account belongs to the party who deposited it.) When Mrs. Buice died, Allen claimed the funds in the account as his own and the executor of her estate filed an action against him for conversion. The trial court denied his motion for summary judgment, but the Court of Appeals reversed, stating that Allen was entitled to summary judgement. The Court of Appeals quoted OCGA Sec. 7-1-813, which addresses the status of joint accounts upon the death of one of the parties, and correctly pointed

out that, when one party dies, any sums remaining belong to the other party “unless there is clear and convincing evidence of a different intention at the time the account is created.” The executor attempted to rely on statements made by Mrs. Buice in 1997 (several months *after* she opened the accounts) to the effect that she wanted her property to pass under her 1991 will. The Court of Appeals found these statements to be hearsay, and also to be irrelevant as they did not show Mrs. Buice’s intent at the time the accounts were opened. The Court also pointed out that the 1991 will had been executed long before the accounts were open and obviously made no mention of them. Finally, the Court of Appeals rejected as irrelevant the executor’s evidence that the accounts that Mrs. Buice had earlier opened with her daughter-in-law had been for convenience only.

## **H. GIFTS**

*Hall v. Lofton*, \_\_\_ Ga. \_\_\_, 563 S.E.2d 128 (2002): In 1951, Mr. Hall executed a deed that conveyed a remainder interest in his farm to three of his seven children. He retained a life estate for himself. He died in 1964 with a will that devised all of his estate “including any real estate that I may own” to his seven children in equal shares. Thirty-six years after he died (and 49 years after the execution of the deed), the heirs of the four children who had not received an interest in the farm sought to have the deed set aside and a declaration that the farm passed to all seven children in equal shares under the will. The trial court, after a jury trial, directed a verdict in favor of the defendants and the Supreme Court affirmed. The Supreme Court refuted the plaintiffs’ claim that the seven-year statute of limitations for setting aside a deed did not begin to run until the plaintiffs actually found out about the 1951 conveyance (in 1996). The court noted

that, during Mr. Hall's life, parcels of the property had been sold to third parties, with deeds signed by Mr. Hall and the remaindermen. After Mr. Hall died, the three remaindermen farmed the property and gave no accounting to their siblings. To the plaintiffs' claim that factual questions were raised as to whether there had been delivery and acceptance of the deed, the Supreme Court noted that the recordation of a deed that purports on its face to have been delivered is prima facie or presumptive evidence of delivery and that the plaintiffs had offered no competent evidence to rebut that presumption. Furthermore, the evidence showed that one of the three children's surviving spouses knew that her husband had been aware of the 1951 transfer. (Under OCGA Sec. 44-5-80, an inter vivos gift is valid only if there is the intent to make the gift, acceptance by the donee, and delivery.)

## **I. RELEVANT PROPERTY LAW CASES**

### **1. Rights of Life Tenant**

*Robinson v. Hunter*, 254 Ga. App. 290, 562 S.E.2d 189 (2002): A life tenant of a farm arranged for the harvest and sale of the farm's merchantable timber pine to a lumber company. The remainderman claimed that the proceeds from the sale of the timber belonged to her. The trial court granted summary judgment for the life tenant and the Court of Appeals affirmed. The Court found that "good forestry practice dictated that the trees be cut and the area reforested to replace the harvested timber." While pointing out that a life tenant cannot sell timber solely for profit, the Court noted that a life tenant is authorized to cut timber when such cutting is necessary to preserve and protect the land. As such action does not constitute waste, the life tenant is entitled to keep the proceeds. The Court of Appeals also pointed out that the sale of

timber was the only source of income to be expected from the farm and that the life tenant had helped the donor to tend the trees while she was alive.

## **2. Rule Against Perpetuities**

*Scott v. SouthTrust Asset Management Company*, 274 Ga. 523, 555 S.E.2d 732 (2001): The trustee of a trust that everyone agreed violated the Rule against Perpetuities petitioned for direction. OCGA Sec. 44-6-205(b) (adopted in 1990 when Georgia adopted the Uniform Statutory Rule against Perpetuities) allows the reformation of a trust created before May 1, 1990 that violates the Rule. The reformation should be made “in a manner that most closely approximates the transferor’s manifested plan of distribution.” The trial court reformed the trust in question so that the lineal descendants of the testator’s son would receive the income from the trust for the greater of 21 years or the until the death of the last lineal descendant. Upon the expiration of that time, the trust would be distributed to the then-surviving lineal descendants and, if none, to two charities named in the testator’s will. The Supreme Court affirmed this reformation. The Court cited Professor Verner Chaffin’s 2000 article in which he noted that “perpetuities litigation has been non-existent in Georgia since the enactment” of the Uniform Statutory Rule.

## **J. PROPOSED FORMAL ADVISORY OPINION: REQUEST No. 01-R5**

The State Bar of Georgia published for comment a proposed opinion that is of special interest to estate planning attorneys. The question presented is this:

Does the obligation of confidentiality in *Rule 1.6, Confidentiality of Information*, apply as

between two jointly represented clients?

The answer is that it does. This means that the attorney cannot ignore one client's request that information be kept confidential from the other client. The opinion notes that "[h]onoring the client's request will, in most circumstances, require the attorney to withdraw from the joint representation." The opinion points out that the mere fact of joint representation does not result in an implied consent that confidences shared with the attorney will be passed on to the other jointly-represented client. (Rule 1.6 provides that an attorney cannot share a client's information unless the client consents after consultation.) The attorney who is asked to keep information confidential must then decide whether continuing joint representation of the client will be inconsistent with two other ethical duties: 1) the duty under Rule 1.4 (Communication) to keep the other client informed; and 2) the duty under Rule 1.7 to avoid conflicts of interest. If either of these rules would be violated, the attorney then must withdraw from representation (while still keeping the client's confidence). The opinion recommends the following approach before entering into joint representation of clients:

... [A] prudent attorney will always discuss with clients wishing to be jointly represented the need for sharing confidences between them, their consent to such sharing, and inform them of the consequences of either client's nevertheless insisting on confidentiality as to the other client and, in effect, revoking the request.

The opinion is not targeted specifically at estate planning attorneys. However, at the end of the opinion, the writer states that:

" ... [T]here is no doubt that the application of these requirements to the joint representation of spouses in estate planning will sometimes place attorneys in the awkward position of having to withdraw from a joint because of a request to keep relevant information confidential from the other and, by withdrawing, not only end the trusted lawyer-client relationships but also essentially notifying the other client that an issue of confidentiality has arisen.

The opinion cites two law review articles that might be helpful to attorneys in the specific area of estate planning: Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 Fordham Law Rev. 1253 (1994) and Collett, *And the Two Shall Become as One...Until the Lawyers are Done*, 7 Notre Dame J. L. Ethics & Public Policy 101 (1993).

## II. GEORGIA LEGISLATION - 2002

### A. Significant Amendments to the Probate Code

**1. Acceleration of remainders upon disclaimer:** OCGA Sec. 53-1-20 was amended to clarify that, even if a remainder or other future interest set forth in a will is made contingent upon survival, that alone will not be sufficient to prevent the remainder from immediately accelerating into possession if the holder of the preceding interest disclaims his or her interest.

*Example:* Testator bequeaths his estate "to my nieces for their lives, then to their surviving children." All the nieces disclaim their life estates. Their children's remainders become possessory immediately (that is, without waiting until the *actual* deaths of the nieces) unless the governing instrument expressly or by implication provides otherwise. The word "surviving" is not enough to prevent the acceleration.

## **2. Inheritance by Fathers of Children Born Out of Wedlock:**

a) OCGA Sec. 53-2-4, which deals with inheritance by the putative father from the child, was amended:

i) to require the father to sign a sworn affidavit of paternity or the child's birth certificate during the lifetime of the child; and

ii) to delete the provision that stated that the father could not inherit from the child if he had failed or refused to support the child to openly treat the child as his own.

b) New 53-2-27 was added to allow the disinterment of the remains of a putative father or " any party in interest whose kinship to the decedent is in controversy" for purposes of obtaining the DNA samples needed for paternity testing. The disinterment may be ordered by the superior court or the probate court, if the probate court is one with " expanded" jurisdiction. The moving party must show a factual basis for a reasonable belief that there is the purported kinship and that there is no other way reasonably to obtain DNA samples. The moving party will pay the costs.

**3. Revocation by subsequent marriage or the birth or adoption of a child:** OCGA Sec. 53-4-48, which provided for the automatic and total revocation of a will upon the subsequent marriage of the testator or the birth or adoption of a child if the will did not contemplate the event, was amended to provide that the will was revoked only to the extent necessary to give the subsequent spouse or child the share he or she would receive if the testator had died intestate. This would leave the rest of the will intact. Any amount bequeathed under the will to the subsequent spouse or child would be counted in computing the intestate share, but if the bequest was greater than the intestate share, the spouse or child would receive that bequest.

*Example 1:* Testator has 11 children. He writes a will in which he leaves his entire estate to one child. He later marries but does not write a new will. His surviving spouse would receive 1/3 of the estate (her intestate share) and the child named in the will would receive the rest of the estate.

*Example 2:* Testator has 11 children. He writes a will leaving 1/2 of his estate to one child and 1/2 to his girlfriend. He later marries his girlfriend but does not write a new will. She would take the 1/2 bequeathed to her by the will, even though that would be greater than her 1/3 intestate share.

**4. Petitions for discharge and settlement of accounts:** OCGA Sec. 53-7-50, dealing with petitions for discharge, and OCGA Sec. 53-7-62, dealing with settlement of accounts, were amended to require service (or allow citation) not only on “creditors who claims are disputed” but also on creditors who have not been paid in full due to the insolvency of the estate.

**5. Service by publication:** OCGA Sec. 53-11-4 is amended to delete the reference to persons who are “unknown” under the theory that a guardian ad litem will be appointed to represent such persons and thus to receive service.

## **B. Significant Amendments to the Trust Code**

### **1. Restrictions on Exercise of Discretionary Power by Trustee who is also**

**Beneficiary:** New OCGA Sec. 53-12-265 is added for the purpose of restricting a trustee who is also a beneficiary from exercising certain discretionary powers in his or her favor. This addresses the “inherent conflict of interest that exists between a trustee who is also a beneficiary and other

beneficiaries of the trust.” The trustee may not exercise powers such as the power to make discretionary distributions, except those limited to the trustee’s health, education, maintenance, or support, and the power to make discretionary distributions that satisfy any support obligations of the trustee. If there is more than one trustee, the power can be exercised by one of the other trustees. If not, a court may appoint an independent trustee to exercise these powers. The new section contains detailed provisions for phasing in this new law.

**2. Delegation of Fiduciary Duties:** New OCGA Sec. 53-12-290 allows a trustee to delegate certain “investment and management functions” provided the trustee uses “reasonable care, skill, and caution” in selecting the agent, setting out the scope and terms of the delegation and reviewing the agent’s actions. The trustee also must take “reasonable steps to compel an agent to whom the function has been delegated to redress a breach of duty to the trust.” If the trustee meets these requirements, the trustee is not liable to the beneficiaries for the actions of the agent. The agent owes a duty to exercise “reasonable care.”

**3. Expansion of Definition of “Foreign Corporations” who can serve as Trustees in Georgia:** OCGA Sec. 53-12-390 was amended to expand the definition of “foreign corporation” to include any “financial institution whose deposits are federally insured which is organized or existing under the laws of any state in the United States” (as opposed to only those organized under the laws of our neighbor states).

### **C. Amendments to the Guardianship Code**

**1. Standby Guardianship Statute:** New OCGA Secs. 29-50 through 29-4-55 allow a parent to appoint a “standby guardian” who will take over guardianship of the person of the

parent's minor child when it is determined that the parent is not able to continue to care for the minor due to the parent's deteriorating physical or mental condition. The standby guardian can serve without being officially appointed by the court for 120 days from the time that a health care professional determines that the parent cannot continue to care for the child. The standby guardian can continue to serve beyond that time only if he or she petitions the court for letters of guardianship.

#### **D. Miscellaneous Amendments**

**1. Higher Education Savings Plan:** Refinements continue to be made to the provisions in the statutes (OCGA Secs. 20-3-630 et seq.) that create the Georgia Higher Education Savings Plan. (This legislation creates a Georgia plan that allows contributors to take advantage of Section 529 of the Internal Revenue Code). The amendments raise the limit on the total amount that can be accrued in an account for a beneficiary from \$120,000 to \$235,000 and eliminate the restriction on total annual contributions (formerly \$8000 per year for children under ten and \$16,000 for children age 10 or over). The amendments repeal the mandatory 10% penalty on unqualified withdrawals and replace it with whatever penalty the Board determines should be charged. The amendments change the period at which qualified withdrawals can be made from three years to one year from the date the account is established.

**2. Viatical Settlements:** Viatical settlements are agreements by which the insured under a life insurance policy sells the policy to another in return for an immediate cash payment. Often the buyer then resells the policy, thus making a secondary market in these policies. There has been a growing concern about abuses not only in that the insured is often suffering from a

terminal illness or otherwise vulnerable but also in that the purchasers are selling the policies to uninformed investors. States have addressed this concern in a variety of ways. The amendments to the Georgia Code (OCGA Sec. 10-5-2 and 10-5-8) address the concern about uninformed investors by making a viatical settlement a “security” and thus requiring the seller on the secondary market to register with the state securities commissioner and be subject to various disclosure and reporting requirements.

### **3. GRITS:**

#### **SECTION 1**

The General Assembly finds and determines that:(1) Grits are bits of ground corn or hominy which constitute a uniquely indigenous Southern food first produced by Native Americans many centuries ago; and(2) Grammatically, the word "grits" enjoys the notable distinction of being a rare noun which is always plural but which may properly be used as either singular or plural in writing and speaking; and(3) According to the October, 1999, issue of *Smithsonian Magazine*, it can even be argued that grits are America’s first food, as evidenced by the Powhatan Indians’ serving of cracked maize porridge to the country’s first European settlers; and(4) This prepared food is well known to all Georgians, both those who are citizens of our state by birth and those who are Georgians by choice, but may initially be a source of confusion to newly arrived visitors, especially those who have been told that they grow on grits trees; and(5) Inasmuch as corn is a preeminent Georgia crop grown

throughout the state, the use and consumption of grits promote Georgia's vital agricultural economy; and(6) Grits can be a pure and simple breakfast dish or can be incorporated into gourmet cooking through countless recipes; and

(7) The preparation of grits has been praised and memorialized in many literary endeavors and cookbooks, including, among others, *Gone With the Grits* by Diane Pfeiffer, *True Grits* by Joni Miller, and the *Good Old Grits Cookbook* by Bill Neal et al.; and(8) It has been said of grits with literal truth that no one can eat just one; and(9) The importance of grits has been evidenced through the denomination of the Atlanta Falcons' Grits Blitz; and(10) The role of grits in our culture has been best and most recently recognized by the National Grits Festival held in Warwick, Georgia, on April 21, 2001; and(11) People throughout the nation and world think of the South in association with grits; and appropriate Georgia recognition of grits will help promote tourism in the state. **SECTION 2.**

Article 3 of Chapter 3 of Title 50 of the Official Code of Georgia Annotated, relating to state symbols, is amended by adding a new Code Section 50-3-78 to read as follows:"50-3-78: Grits are recognized as the official prepared food of the State of Georgia."