

**RECENT DEVELOPMENTS
IN
GEORGIA FIDUCIARY LAW**

(June 1, 2006 – May 31, 2007)

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GEORGIA CASES: June 1, 2006 through May 31, 2007

A. INTESTACY

1. Determination of Heirs

a) Blackstone v. Blackstone, 282 Ga. App. 515, 639 S.E.2d 369 (2006)

The question raised in this case was whether a father who had abused and neglected his child during the child's lifetime could still recover as an heir of the child's estate. The Court of Appeals ruled that, absent a statute to the contrary, the father could recover. The case involved the sad situation of Corey Blackstone, who was killed by a drunk driver at age 24. He had no spouse or children and his mother had predeceased him, so Corey's father stood to inherit his entire estate. The assets at issue were the potential recovery by Corey's estate in legal actions against the driver who had caused his death. Corey was one of eight children of Cal Blackstone. Cal had an extensive criminal record and had been incarcerated throughout most of Corey's life. Cal had abused his wife and his children. Corey and his twin brother went to live with Cal when they were age 15, but DFCS stepped in within a few months and took custody of the children. The juvenile court adjudicated Corey as "deprived" and found that his father had abused him. They placed Corey into his older brother's custody. Cal, the father, never appealed these orders. Importantly, however, even though the court deprived Cal of his parental power, his parental rights were never formally terminated. Georgia law, in OCGA Sec. 15-11-93, expressly provides that an order terminating parental rights terminates permanently all of a parent's rights relating to the child, including the right of inheritance. In Taylor v. Taylor, 280 Ga. 88, 623 S.E.2d 477 (2005), the Georgia Supreme Court had confirmed that the loss of parental power is not the equivalent of a

termination of parental rights. The trial court granted summary judgment against the father, relying on a North Carolina case that interpreted a North Carolina statute that specifically provided that a parent would lose inheritance rights in such a situation.

In the month prior to the issuance of the Court of Appeals decision in Blackstone, the Court of Appeals had held that a father who had never supported or attempted to establish a relationship with his child lacked standing to pursue a wrongful death action after the death of the child. See Baker v. Sweat, 281 Ga. App. 863, 637 S.E.2d 474 (2006). The difference between the holdings seems to revolve around an interplay between the wrongful death statute and the loss of parental power statute, an interplay that is not replicated in the inheritance statutes. OCGA Sec. 51-4-4 provides that the right to recover for the wrongful death of a child “shall be as provided in Sec. 19-7-1.” OCGA Sec. 19-7-1, although it deals with loss of parental power and wrongful death recovery rights, does not provide expressly that a parent who has abandoned a child loses the right to pursue a wrongful death action. The section does provide that a parent who abandons the child loses parental power. The Court of Appeals seemed to think that this was enough to conclude that abandonment of a child and the loss of wrongful death recovery rights were closely intertwined. However, in Blackstone, the court found no such cross reference in the inheritance statutes. Furthermore, the court pointed to its holding in a previous case that Section 19-7-1 must be strictly construed and thus the court refused to expand the reasoning of that statute to cover inheritance situations. In a concurring opinion, Judge Barnes pointed out that the holding in Blackstone applied only to the proceeds that the estate may recover for Corey’s pain and suffering.

b) Walden v. Burke, 282 Ga. App. 154, 637 S.E.2d 859 (2006)

This case is consistent with a long line of Georgia cases (see, e.g., Hulsey v. Carter, 277 Ga. 321, 588 S.E.2d 717 (2003); O'Neal v. Wilkes, 263 Ga. 850, 439 S.E.2d 490 (1994)) in which the Georgia courts have held that a child can claim to have been virtually adopted for inheritance purposes only if there had been an unperformed agreement between the child's parents and the claimed "adoptive parents" to adopt the child. In this case, Rhonda was taken in at age 1 ½ years by her aunt. The aunt and her husband (the Lockharts) raised Rhonda, provided her with love and support, treated her as their own daughter, and even helped her financially when she was in college. When Mrs. Lockhart died intestate, Rhonda claimed to be her heir. The trial court granted summary judgment against Rhonda and the Court of Appeals affirmed. Rhonda's father had submitted an affidavit in which he claimed that he had never agreed that the Lockharts would adopt Rhonda. All parties agreed that Rhonda's mother had lacked the mental capacity to enter into such an agreement. The holdings in past Georgia virtual adoption cases have made it clear that, despite substantial evidence that the "adoptive parents" raised the child and treated her as their own, the courts will not recognize a virtual adoption unless there is evidence of a specific contract to adopt. This case was no exception.

B. YEAR'S SUPPORT

a) In re Estate of Avery, 281 Ga. App. 904, 637 S.E.2d 504 (2006)

When Larry Avery died, his spouse Kathy filed a petition for Year's Support. The son of the decedent filed a letter, *pro se*, with the probate court in which he stated only:

“I feel that Kathy Avery is not competent [sic] nor responsible enough to handle such dealings.” The probate court told the son that any objection he filed would have to be verified and served on opposing counsel. The son did not respond and, 60 days later, Kathy filed a motion to dismiss his caveat, which the probate court granted. The probate court also granted her petition for Year’s Support. The son appealed to superior court. Kathy moved for summary judgment, which was granted, so the son appealed to the Court of Appeals. The son argued that he should have been granted a *de novo* hearing in the superior court. The Court of Appeals found that the son had never presented any evidence, never raised arguments that contested the amount to be awarded Kathy, and never urged the superior court to grant him a hearing, despite having been given ample opportunity to do so. The Court of Appeals affirmed the holding of the superior court.

b) In re Estate of Wallace, ____ Ga. App. ____, ____ S.E.2d ____ (Ga. App. 2007): This case arose from a year’s support award that was made in 1951. Alice’s husband died that year and, in accordance with the law at that time, three appraisers were appointed to set aside a portion of the estate for year’s support for Alice and their minor children. The law at that time provided that the appraisers were to set aside property for the support of the “spouse and children, or children only”. (Former Ga. Code Ann. Sec. 113-1002, 113-1006). However, the award of these appraisers set aside certain personal property and household effects “for the support and maintenance of [Alice], widow, and said children” and the assets of a business “to [Alice].” The latter award did not mention the minor children. The court of the ordinary set aside the personal property to Alice and

the children and the business to Alice alone. Alice incorporated the business and ran the company until 1994. By 1999, she was too ill to run the company but she owned 214 shares of the common stock and her son Walter, who also worked for the company, owned the remaining 46 outstanding shares. There apparently arose some dispute over title to the shares because a settlement agreement was drafted in 2003 under which the voting shares would have been distributed to Walter and most of the nonvoting shares to Alice for life, with remainder to her children at her death. It was unclear whether the settlement agreement was final and whether Alice had signed it. Walter died before Alice and Alice died in 2005. Her daughter, Barbara, who was the executor of her estate, filed a declaratory judgment action for determination of the title to the shares. Walter's children claimed that, despite the wording of the year's support award, the law at the time of the award required that the award should benefit jointly the spouse and the children. The trial court granted summary judgment to the effect that the 1951 appraisers' award and the subsequent court order had given title to the company to Alice and not jointly to Alice and her children. The Court of Appeals affirmed this ruling and remanded to the trial court the question of the ultimate effect of the purported settlement agreement.

C. WILLS

1. CAVEAT: IMPROPER EXECUTION, LACK OF CAPACITY, UNDUE INFLUENCE

a) McCormick v. Jeffers, 281 Ga. 264, 637 S.E.2d 666 (2006)

This case involves charges that Ms. McCormick's will was not properly executed and that it was signed while she was under the undue influence of her daughter, Ms. Jeffers. A deed that had been signed at the same time was also contested on grounds of undue influence. A jury found that the will was properly executed and that neither the will nor the deed were the products of undue influence. The Supreme Court found that the will had not been properly executed and thus should not have been admitted to probate. However, the Supreme Court affirmed the jury's finding of lack of undue influence as it pertained to the deed.

The execution issue stemmed from Georgia's statutory requirement that the witnesses to a will must sign the will in the "presence" of the testator. OCGA Sec. 53-4-20(b). The witnesses, Ayers and Goldman, were present when Ms. McCormick signed her will. She was sitting in a chair in her bedroom. Because there was no place in the bedroom for the witnesses to sign, the will was moved to the dining room table. The table was about 15 feet from the bedroom and the evidence showed that Ms. McCormick could not see the table from her chair in the bedroom. Ms. Jeffers testified that Ms. McCormick had gotten up once to go to the bathroom, but that she still was not able to see the dining room table from where she stood. The witnesses and the notary public signed the will at the dining room table. The Supreme Court stated that Georgia case law had long held that "presence" was tested in Georgia by a "line of vision" test. This

test requires that the testator must have been able to see the witnesses sign the will if she had desired to do so. The court noted that other jurisdictions had adopted a looser “conscious presence” test, which recognizes that people may sense that they are in each other’s “presence” through means other than sight – e.g, when they are within earshot of each other. The court did not adopt this newer test. The court felt that the fact that the Georgia Probate Code in 1998 had retained the same “presence” language as the previous Code dictated that the court could not change former case law and adopt a new test for “presence.” Justice Hunstein wrote a dissent as to this portion of the court’s holding. She did not urge the adoption of the “conscious presence” test. Instead, she focused on the fact that the will contained a proper attestation clause, which raised the presumption that the will had been properly executed and that this presumption had not been rebutted by “clear proof to the contrary.” Justice Hunstein pointed out that Ms. Jeffers had wavered in her testimony and had at one point said that she had seen the testator standing in her bedroom doorway with her walker and that from that position the testator could have seen into the dining room. Justice Hunstein noted that the credibility of a witness’s testimony is the province of the jury. Justice Hunstein also disagreed with the majority’s interpretation of the “line of vision” test. She pointed out that some jurisdictions that had adopted that test had broadened the test so that a testator could in fact see a witness signing a will if she “sees or *had it in her power to see*” what the witness is signing. Justice Hunstein quoted an earlier Georgia case, Glenn v. Mann, 234 Ga. 194, 214 S.E.2d 911 (1975), in which the court noted that “[t]here is no unvarying and universal rule which can be laid down; each case must be determined under its own circumstances....”

On the issue of whether the deed was the product of undue influence, the court found that there was “some evidence” to sustain the jury’s verdict. Several witnesses had testified as to Ms. McCormick’s clarity of mind and to the fact that she was a “strong, powerful, opinionated woman” who had “absolutely not” been influenced by Jeffers.

b) King v. Brown, 280 Ga. 747, 632 S.E.2d 638 (2006)

In this case, a jury found that a decedent’s will was invalid after a caveat was filed on grounds of lack of testamentary capacity and undue influence. The Supreme Court affirmed. The decedent had signed a will in 2002 in which he had divided his estate between two of his six children. A month later, these two daughters, King and Brown, were appointed guardians of the decedent. They quarreled over how much care the decedent needed and one daughter, King, took over his care after a house fire destroyed the other daughter’s home. In February, 2003, the decedent wrote a new will in which he disinherited Brown and left most of his estate to King. The jury was allowed to view a videotape of the execution of this will. At trial, the witnesses to the will testified that the decedent was lucid during the execution, although medical and psychiatric evidence showed that he had suffered from dementia, was unable to recognize family members, and was likely confused when he signed the will. The evidence also showed that King knew that her father had disinherited another family member in a previous will and may have told him that Brown was stealing money from him. She also believed that Brown had abandoned their father and had expressed this belief in front of their father. The evidence indicated that the decedent, in his weakened state, had become dependent on

King for his care. In their finding that the will was invalid, the jury did not specify whether it was invalid due to lack of capacity or undue influence or both. The Supreme Court reviewed the charges that had been given to the jury, found them appropriate, found there was ample evidence on which they could have based their verdict invalidating the will, and affirmed.

c) Smith v. Liney, 280 Ga. 600, 631 S.E.2d 648 (2006)

This case involved the will of a mother who bequeathed to her son only a few personal items and left the rest of her estate to her daughter. The son filed a caveat stating that his mother had lack testamentary capacity and that the will was the product of undue influence by the daughter. A jury was unable to reach a verdict so the judge granted a j.n.o.v. to the daughter on both issues. The son appealed the ruling on the issue of undue influence. The Supreme Court affirmed the judgment that the will was not the product of undue influence. The Supreme Court examined the circumstances surrounding the execution of the will. They found that the daughter had not participated in any of the discussions between her mother and her mother's attorney and had not been present when the will was executed. They found also that the daughter had not isolated her mother after her mother had come to live with her and that family members had visited the mother often. The court noted that although the daughter had had the opportunity to influence her mother and had taken a substantial benefit under the will, these factors alone were insufficient to establish undue influence. Furthermore, the court found that no presumption of undue influence arose in this case

because: 1) the daughter was a natural object of the mother's bounty and 2) she had not actively participated in the preparation of her mother's will.

d) Pope v. McWilliams, 280 Ga. 741, 632 S.E.2d 640 (2006)

This case involves a *pro se* caveat to a will filed by Pope, who was the nephew of a testator who had left his real estate to his sister, McWilliams (whom he also named as executor), and the rest of his estate to his brother, his niece, and to Pope. The caveat claimed lack of testamentary capacity and undue influence. The probate court and the superior court granted summary judgment against Pope. The Supreme Court affirmed. The court examined all of Pope's arguments relating to both capacity and influence. As to the undue influence claim, Pope had contended first that Pope's sister had sworn in an affidavit that she had heard McWilliams say to the testator, "We've got to go make that will." The court found that this statement did not show in any way that McWilliams had forced the testator to make a will and, furthermore, that the reason to make the will was to give more specific directions as to what he wanted done with his property. Second, Pope argued that the will was "secretly" made in that it was executed without notice to him. The court pointed out that the law contains no requirement that a testator notify anyone of the contents of his or her will. Third, Pope argued that a confidential relationship existed between McWilliams and the testator and thus that a presumption of undue influence arose. The court pointed out that McWilliams was a natural object of the testator's bounty and that the evidence showed that their relationship was one of mutual trust, not one in which she exerted power over him. Fourth, Pope argued that the will was unreasonable. The court found this claim without

merit, pointing out that McWilliams' sons had farmed the land that the testator had bequeathed to McWilliams. The court noted that the circumstances that Pope had laid out might raise a "suspicion" of undue influence but that there was no issue of fact as to whether McWilliams was exerting force or duress so as to destroy the testator's free will.

The court also examined Pope's argument that the testator had lacked testamentary capacity. The only substantive evidence that Pope had offered on this issue was that a hospital discharge order on the testator stated that the doctors could "not exclude some early dementia." In contrast, the witnesses to the will and the notary public testified unequivocally that the testator had been of sound mind and knew what he was doing when he executed the will.

e) Lillard v. Owens, 281 Ga. 619, 641 S.E.2d 511 (2007): The testator had two sets of "children": those who had been born or adopted during his first marriage (the "Lillard children") and his stepchildren from his 27-year-marriage to his second wife (the "Owens children"). The Lillard children submitted for probate a will that Lillard had executed in his bedroom 12 days before he died. That will devised most of his property to the Lillard children. The Owens children filed a caveat on the grounds of lack of testamentary capacity and undue influence. They submitted for probate a will executed by Lillard nine months before he died (when he first learned of his diagnosis of terminal cancer) that divided the property fairly evenly among all of his children. Lillard had torn each page of this will in half when he executed the second will. After a six-day jury trial, the jury found that the second will was not valid, that Lillard had not revoked the earlier will, and that that earlier will was valid. The Lillard children moved for a j.n.o.v.

but were denied. The Supreme Court affirmed the trial court's order admitting the earlier will and denying the motion for j.n.o.v. The Supreme Court used the "any evidence" standard in reviewing the jury's verdict. The testimony of the witnesses to the second will indicated that Lillard had been lucid when he signed it. However, other evidence indicated that he had been taking numerous narcotic drugs and an anti-depressant and was wearing a duragesic patch, all of which (according to a pharmacology expert) would cause him to be disoriented and confused, perhaps to hallucinate, and "not be rationally sane." A hospice worker who saw him two days before the will was executed had noted in her records that he "had difficulty completing his sentences, was somewhat forgetful, and denied having siblings, despite the existence of his sister." Another witness who had seen him the day the will was executed said he was "morphined up" and that one of the Lillard children had been administering medicine to him with an eye-dropper. This same child had asked a neighbor and two cousins to witness the will. The Lillard children had been with the testator 24 hours a day during his last illness and the Owens children said they were "uncomfortable" when visiting him. Two of the Lillard children had gone to an attorney's office and had asked him to draft a new will for Lillard that reflected an estate distribution scheme that one of the children claimed that Lillard had related to her. Other witnesses claimed that the terms of this new will were inconsistent with wishes he had expressed to them that his children were to get equal portions of his estate. The Supreme Court noted that Lillard's weakened physical condition and medicated state indicated that a "lesser degree of influence would be required to overcome his free will." The Supreme Court dismissed claims of purported irregularities in the trial and concluded that the trial court had not

erred in denying the motion for j.n.o.v.

See Chesser v. Chesser, ___ Ga. App. ___, 643 S.E.2d 764 (2007) (under “Guardianships & Conservatorships of Adults”) for a discussion of undue influence in the context of an inter vivos transfer of property & Smith v. Smith, 281 Ga. 380, 637 S.E.2d 632 (2006) (under “Deeds) for a discussion of the capacity to execute a deed.

2. WILL CONSTRUCTION

Folsom v. Rowell, 281 Ga. 494, 640 S.E.2d 5 (2007): When the testator died in 1960, he was survived by six adult children, the youngest of whom was mentally disabled. He devised the remainder of his estate to:

“my children, or those of my children, who shall take care of [the youngest child] during her lifetime, taking her into his or her home or their homes, and providing the necessities of life to her. Should none of my children provide for [the child], then said property to go to the person who does look after [the child], even though he or she may be an outsider.”

Between 1960 and 1973, the disabled youngest daughter of the testator lived with one of the testator’s other daughters, Lillian, and Lillian’s children. From 1973-94, she lived with the widow of one of the testator’s sons. The disabled daughter had a stroke in 1994 and from then until she died in 2001, she lived with a granddaughter of the testator and the widow of the testator’s son. Other of the testator’s grandchildren did not provide her with personal care but they did maintain the home in which the disabled daughter lived. When the disabled daughter died, the administrator de bonis non with the will annexed of the original testator’s estate filed a motion for construction of the testator’s

devise. Some of the grandchildren entered into a settlement agreement but those grandchildren who had helped in the care of the disabled daughter during the later years of her life filed their own motion for construction. The trial court determined that the interest in the remainder of the testator's estate had vested in the testator's daughter Lillian when she took the testator's disabled daughter into her home but that this remainder was subject to being divested if another child of the testator provided care to the daughter. Further, the fact that Lillian, a child of the testator, had provided care for the disabled daughter permanently foreclosed any "outsider" (including a grandchild of the testator) from taking any share of the remainder. Lillian's vested remainder (subject to divestment) was inherited by Lillian's children when Lillian died. The grandchildren who had provided care during the disabled daughter's later life insisted that the remainder was contingent throughout the life of the disabled daughter because it remained subject to a condition precedent throughout that time. They claimed that they had provided substantial care for the disabled daughter and thus qualified as "outsiders" who could take under the last clause of the testator's will. Alternatively, they argued that grandchildren were included within the term "children" and thus that they were not "outsiders." The Supreme Court affirmed the decision of the trial court.

The Supreme Court focused on a logical analysis of the "plain language" of the terms of the will. They noted that, if the remainder were to be contingent throughout the life of the disabled daughter, the last clause would be meaningless because it would not preclude anyone from taking some of the remainder. They noted that the terms of the will indicated an intention on the testator's part to motivate his children to care for their disabled sister. Although realizing that their ruling might seem unfair towards

those grandchildren who had provided care, the Court noted that it had no authority to rewrite an unambiguous will. They concluded that the intent of the bequest was “too plain to be challenged.” The Court also noted that the term “children” typically is not deemed to include grandchildren and that the term “outsiders” in the testator’s will applied to any persons who were not the testator’s children.

D. ADMINISTRATION OF ESTATES

1. BREACH OF FIDUCIARY DUTY: PERSONAL REPRESENTATIVE

a) Greenway v. Hamilton, 280 Ga. 652, 631 S.E.2d 689 (2006)

In this case, the Georgia Supreme Court affirmed the finding of the probate court that an executor had breached his fiduciary duty. The Supreme Court agreed that the executor, Greenway, who was the testator’s son, had improperly handled bank accounts that belonged to the estate and had sold estate property to his wife for less than fair market value. As to the bank accounts, the court found that, when his mother was alive, the executor had used a power of attorney to add his name to two bank accounts and a certificate of deposit that were owned by his mother. He then created a payable-on-death account in his mother’s name, with his name as the designated payee. This account was created the day his mother died and he proceeded over the next few weeks to transfer the money from the other accounts to the POD account. He did not list any of these funds as estate assets. When an heir filed a petition for an accounting, Greenway contended first that the probate court did not have jurisdiction to determine the ownership of the accounts but the Supreme Court pointed out the OCGA Sec. 53-7-

63 gives the probate court authority in a settlement of accounts to hear evidence on all contested matters and make a final settlement between the personal representative and the heirs or beneficiaries. Greenway next argued that, as he was not yet the executor when he transferred the account funds to himself, he could not have breached his fiduciary duty. The Supreme Court said that, once he became executor, he knew he held money that was in fact an estate asset and that he breached his duty by failing to recover the estate's money. The Supreme Court also examined Greenway's sale of two lots from the estate to his wife for below-market value. Greenway contended that the probate court did not have authority to order an appraisal of the property. The Supreme Court, noting that a probate court has "exclusive, original subject matter jurisdiction" over the probate of wills and matters relating to decedent's estates, found that the probate court could use the appraisal and other adequate means to remedy this executor's breach of fiduciary duty. The Supreme Court refused to reverse the probate court's award of attorney fees and costs to the appellee, finding that, in alleging that Greenway had acted for his own self interest and with a conflict of interest, the appellee had asserted adequate grounds for showing the type of bad faith that can result in such an award. The Supreme Court affirmed the probate court's award of damages against Greenway, noting that Greenway was a party defendant in that he personally had been called to account. Finally, the Supreme Court affirmed the probate court's disallowance of Greenway's commissions and fees. The court found that, in selling the lots at below market value to his wife, he had breached his duty to sell the property at a reasonable value. In addition, his mishandling of the bank accounts authorized the probate court to demand that he forfeit his commissions.

b) Jonas v. Jonas, 280 Ga. App. 155, 633 S.E.2d 544 (2006)

Regan Jonas' father, mother, and brother were killed in a car accident. Her uncle, Edward Jonas, offered to administer the three estates. Regan agreed based on her uncle's promise to look out for her best interests. The uncle was appointed administrator. Later, Regan brought an action against him to recover damages for his fraud and breach of fiduciary duty. She also sought to impose a constructive trust on certain life insurance proceeds in her grandmother's hands and to impose damages on her grandmother. A jury awarded Regan \$650,000 in compensatory damages and \$150,000 in punitive damages. The trial court entered judgment on the jury verdict and the uncle and grandmother appealed. The Court of Appeals reversed the trial court's order and remanded the case for a new trial.

The primary assets at issue in this case were the proceeds of two life insurance policies on the lives of Regan's parents. The \$500,000 policy on her father's life named her mother as primary beneficiary and his father (Regan's paternal grandfather) as secondary beneficiary. The \$160,000 policy on her mother's life named the father as primary beneficiary and the same grandfather as secondary beneficiary. Thus, the order of deaths was crucial. If the father died first, his policy would be paid to the mother's estate and would go to Regan. In that same situation, the \$160,000 proceeds on the mother's policy would go to the grandfather, under the theory that the father did not survive the mother. If the mother died first, Regan would get the \$160,000 payable to her father's estate but her grandfather would get the \$500,000 under the policy on her father's life. If it could not be determined who died first, Georgia's Simultaneous Death

Act provisions would apply and cause each insured to be deemed to have outlived the primary beneficiary as to his or her own policy and thus all of the proceeds would go to the grandfather, who was the secondary beneficiary on both policies. OCGA Sec. 33-24-42. Three witnesses, including Regan (who had been in the accident) stated that the father had died first and one witness stated that the mother had died first. Despite these numbers, the uncle determined that the evidence “clearly indicated” that the mother had died first. The insurance company, on the other hand, concluded that it could not be determined who died first and said that it would pay the proceeds from both policies to the grandfather. The Court of Appeals noted that the grandfather was elderly and ailing and that the uncle was an eventual heir of both his and the grandmother’s estate. The grandfather did die a few months later and his estate distributed the \$600,000 in insurance proceeds to the grandmother. The uncle served as administrator of the grandfather’s estate. Regan contended that her uncle had committed fraud and breached his fiduciary duty to her as the sole beneficiary of the three estates he was administering. She also sued the grandmother to have a constructive trust imposed on the proceeds.

The Court of Appeals based its reversal and remand on the improper instructions given to the jury. The judge had apparently instructed the jury that it could award Regan the proceeds of the insurance policies in accordance with whatever finding it made about the order of the two deaths. The Court of Appeals found the jury instructions to be misleading. The Court of Appeals noted that the proceeds had already been distributed and were not “sitting in the court registry as the result of an interpleader action.” Thus, an award of the proceeds would translate into an award of

damages against the uncle and the grandmother. An award of damages could not be made without finding that the uncle had breached his fiduciary duty or committed fraud. Also, a constructive trust could not be imposed without a finding that principles of equity were violated if the grandmother retained the proceeds. Even though its ruling on the jury instructions determined its disposition of the case, the Court of Appeals went on to discuss whether the evidence would support a finding of fraud or breach of fiduciary duty and thus whether such issues could be retried. As to the fraud claim, Regan had argued that her uncle had induced her into letting him take over her family members' estates by way of a promise that he had no present intention of keeping – that is, his promise to look out for her best interests. She pointed to the fact that he had concluded that her mother had died first, despite evidence to the contrary and, worse still, had not objected when the insurance company paid the proceeds to the grandfather. The Court of Appeals found that Regan had failed to present any evidence of the crucial issue – that is, whether, *at the time he had made the promise*, the uncle had no *present* intention of following through on it. A mere broken promise does not result in actionable fraud. Thus, the fraud issue could not be considered in the retrial. The Court of Appeals next addressed the breach of fiduciary duty issue. Regan argued that her uncle had breached his duty by letting the insurance proceeds be paid to an estate of which he would eventually be a beneficiary. The Court of Appeals reviewed current law on conflict of interest and noted that a fiduciary who finds himself in such a position must resign or fully inform the beneficiaries of the conflict or request the court to appoint a guardian ad litem to protect their interests. The Court of Appeals noted that the jury had determined that the father had died first, thus establishing that the

uncle could have reaped great benefits for the estates he represented had he not acquiesced in a course of action that would eventually benefit himself. The breach of fiduciary duty claim, thus, could be retried. As to the constructive trust, the Court of Appeals examined whether such a trust could be imposed on the insurance proceeds in the hands of the grandmother. The Court of Appeals found that the evidence showed that the grandmother was unjustly enriched in receiving money that was paid out to her due to the uncle's breach of fiduciary duty and thus that the issue of whether a constructive trust should be imposed could be retried. Finally, in examining the damages that the jury had awarded, the Court of Appeals concluded that punitive damages could not be awarded against the grandmother as she was only an "innocent recipient" of the insurance proceeds. The issue of punitive damages could only be retried against Regan's uncle.

E. PROCEDURAL MATTERS

1. PROBATE COURT JURISDICTION

Johns v. Morgan, 281 Ga. 51, 635 S.E.2d 753 (Oct. 2006), reversing Morgan v. Johns, 276 Ga. App. 366, 623 S.E.2d 219 (Nov. 2005) (vacated by Morgan v. Johns, 282 Ga. App. 724, 639 S.E.2d 419 (2006))

The testator disinherited his two daughters in favor of the caretaker who had provided care for him in the three years prior to his death. Two months before he died and one month before he executed his will, the testator had named Morgan as his agent under a power of attorney. On the day he died, the testator closed on a sale of real property, with Morgan's assistance and received a check for \$734,250. According to Morgan, the

testator then endorsed the check over to her and gave it to her as a gift. She deposited it that afternoon in an account in her name. The testator died two hours later. Morgan, who was also named as sole executor, filed a petition to probate the will in solemn form. The daughters filed a caveat on the grounds of undue influence and an objection to the naming of Morgan as executor. They also filed a complaint in the superior court alleging fraud, conversion, and breach of fiduciary duty and asked that court to set aside the gift and enjoin Morgan from transferring or using the money she had received from the testator. Morgan claimed that the daughters did not have standing to pursue that action. The superior court denied Morgan's motion to dismiss and granted an interlocutory injunction preventing Morgan from using the proceeds of the sale. On appeal, the Court of Appeals reversed, holding that the daughters had no standing to file their action in superior court while the probate proceeding was pending. The daughters claimed that under OCGA § 23-2-91(2) they, as persons "interested in the estate," were applying to the court of equity because there was a "danger of loss or other injury to [their] interests." Their claim was that they had an "interest" in the estate until the will that excluded them was proved to be valid. The Court of Appeals called upon Supreme Court precedent to justify its finding that the daughters had no interest in the estate "unless and until a probate court finds the decedent's will is invalid and the decedent died intestate." The Court characterized the daughters' interest as a mere "expected inheritance." The daughters claimed that their case differed from the cases decided by the Supreme Court because it involved fraud. The Court of Appeals pointed out, however, that the fraud did not make their case indistinguishable in that a finding of

fraud, while invalidating the gift, would merely put the gift back into the testator's estate which was slated to go to Morgan anyway.

The Supreme Court of Georgia reversed the Court of Appeals' decision in October, 2006. The Supreme Court concluded that the heirs did in fact have a statutory "interest in the estate." The Supreme Court distinguished its earlier cases that had been relied upon by the Court of Appeals as precedent. The court found that the rights and interest of the heirs in the estate had not been "severed" by a valid probate and thus that they retained the right to seek equitable relief.

2. REQUIREMENT TO FILE TRANSCRIPT ON APPEAL

LaFavor v. LaFavor, 282 Ga. App. 753, 639 S.E.2d 633 (2006)

Devises under a decedent's will filed actions to force the co-executors to make distributions as required by the will. In a hearing that was not transcribed, the probate court ordered one of the co-executors to distribute funds that he had withheld to satisfy a judgment that he had obtained in his individual capacity against one of the devisees. After another un-transcribed hearing, the court held him in contempt for not making the required distribution. The co-executor appealed but the Court of Appeals found that he had not carried his burden of showing error from the record. The co-executor claimed that the probate court should have ordered a transcript to be made. The Court of Appeals disagreed, pointing out that, under OCGA Sec. 5-6-41, a trial judge "may" order a transcript but that, in any event, it is the duty of the appellant to have a transcript prepared for purposes of appeal. The Court of Appeals also pointed out that the co-executor's argument that he should be allowed to satisfy his individual judgment

against the devisee was without merit in that OCGA Sec. 53-7-40 provides that estate property shall be liable for claims against the estate, not for claims against devisees of the estate.

3. VENUE OF LAWSUIT AGAINST ESTATE

Banks v. City of Hampton, 280 Ga. App. 432, 634 S.E.2d 192 (2006)

Dixon and Banks were both killed in a car accident that resulted when Dixon tried to evade a traffic stop set up by a police officer in Hampton, which is located in Henry County. Banks' administrator sued the city of Hampton and Dixon's estate as joint tortfeasors. Dixon's estate was insolvent. The suit was filed in Clayton County, which was the residence of the administrator of Dixon's estate. The City claimed that the fact of Dixon's estate's insolvency made that estate a "nominal party" only and succeeded in having the case moved to Henry County. A jury trial resulted in a hung jury. The administrator of Banks' estate renewed her motion to have the case transferred back to Clayton County, but her motion was denied. She filed an interlocutory appeal and the Court of Appeals agreed with her and reversed and remanded the case. The Court of Appeals, after examining both state and federal law, determined that a transfer of venue based solely upon the comparative wealth of the joint tortfeasors was not proper. The Court held further that a joint tortfeasor is not a "nominal party" for venue purposes merely because of insolvency.

4. SETTLEMENT AGREEMENTS

a) Oldham v. Self, 279 Ga. App. 703, 632 S.E.2d 446 (2006)

Two men who were best friends and business partners each owned \$150,000 life insurance policies on the other's life. The business was dissolved informally after one of them twice attempted suicide. The third time, he succeeded in killing himself and the other partner, Oldham, collected the proceeds of the insurance policy. The decedent's girlfriend claimed that there was a buy/sell agreement between the parties and she contacted an attorney who then contacted Oldham. At a meeting, the girlfriend and her attorney discovered that no such document existed. At that same meeting, Oldham mentioned that he was considering setting aside \$20,000 of the insurance proceeds in trust for the decedent's daughter (who was also the daughter of the girlfriend). The next day, the girlfriend's attorney told Oldham's attorney that she would not pursue any claims against the business if Oldham would in fact set aside the proceeds for the child. Later, the girlfriend's attorney sent Oldham a proposed revocable trust. Oldham objected to the girlfriend being named as a co-trustee but registered no other objections to the proposed trust. A month later, the attorney sent Oldham a second proposed trust with Oldham named as one of the co-trustees. This trust was irrevocable. Although the attorney believed that the trust was about to be signed, Oldham never signed it and the attorney was later informed that he had changed his mind about setting up the trust. The attorney wrote Oldham a strong letter. Eventually, after more wrangling between the attorneys, Oldham's attorney sent to the girlfriend's attorney a signed revocable trust that named Oldham as trustee. The girlfriend then filed an action alleging that Oldham had breached a legally enforceable agreement. After a mistrial, the second jury

found in her favor. Oldham was denied a directed verdict and the Court of Appeals reversed that denial. The court found that no agreement had been reached between the parties as to whether the trust would be revocable or irrevocable. This was an essential term of the trust and, as there was no evidence of a meeting of the minds as to this term, there was no agreement to be enforced by the jury.

b) Freeman v. Covington, 282 Ga. App. 113, 637 S.E.2d 815 (2006)

The eight children of the decedent had litigated for several years over the management of the mother's estate. The mother had executed two purported wills, one in 1992 and one in 1996. The 1992 will named her mentally disabled daughter, Betty Jean King, as the sole beneficiary of her estate, which was to be held in trust for King by Covington, one of the other siblings. At King's death, the property was to be distributed among the siblings. The 1996 will bequeathed most of the mother's estate in fee simple to King (with a gift of \$175 to be divided equally among the other children). The will also directed that King would be allowed to live on a trailer on the mother's property, which was not to be sold without King's express permission. If any of the mother's assets were sold, the first \$200,000 was to go to King and any remaining proceeds were to be split among the other children. This will named other siblings, Freeman and DeFoor, as co-executors. At the mother's death, Covington (the son who had been named trustee in the 1992 will) sought to have that will admitted to probate. A group of the other siblings caveated the will. The caveat named King as a caveator. On the day of the trial, the feuding factions told the court that the parties had reached a settlement. The settlement provided that the money would be placed in a trust for King's benefit

with Covington and Freeman to serve as co-trustees. The court held a hearing and approved the settlement, pursuant to OCGA Sec. 53-5-25. A few weeks later, Freeman sought to recover expenses incurred in connection with the preparation of estate assets for sale. The parties could not agree on a reimbursement amount, so the court conducted another hearing and issued a final order. The order stated that Freeman's claim for reimbursement had been waived by the settlement agreement. The Court of Appeals zeroed in on an issue that had been raised only briefly by the appellants. The issue was whether the agreement should be set aside because King and another sibling were not parties to the agreement and because no inquiry had been made by the court below as to whether King should have been represented by a guardian. King was not a named party to the settlement agreement. The attorney who represented the faction that had originally named King as a party to the caveat said that King had not been represented during the negotiations. The record contained no evidence that an inquiry had been made as to whether King required the appointment of an independent guardian to represent her interests in the proceedings. The Court of Appeals found the settlement agreement to be unenforceable. The court vacated the order below, remanded the case to the probate court, and ordered that an assessment be made as to whether King needed a guardian to represent her interests. (Note that the "guardian" that is being discussed in this case is not a "guardian" who is appointed under Title 29 for an incapacitated adult, but rather a type of guardian ad litem who must be appointed to represent the interests of persons who are unable to represent themselves, pursuant to OCGA Sec. 53-11-2.)

F. TRUSTS

1) WHO MAY SERVE AS TRUSTEE

Chattowah Open Land Trust, Inc. v. Jones, 281 Ga. 97, 636 S.E.2d 523 (2006)

The testator's will devised her residence and surrounding property "to the Chattowah Open Land Trust, Inc., for qualified conservation purposes, as defined in Section 170(h) of the Internal Revenue Code." The will stated also that the testator intended "to bequeath [her] homeplace and the surrounding acreage to an organization which will maintain the property in perpetuity exclusively for conservation purposes within the meaning of Section 170(h) of the Code." She also left gardening equipment to the Land Trust for the purpose of maintaining the property. The Land Trust refused to accept an executor's deed that tracked the wording of the will and deeded the property to the Land Trust as trustee of a charitable trust for conservation purposes. The Land Trust instead wanted to receive the property outright. It argued that the conservation provisions would cloud the title. The Land Trust also argued that it was entitled to sell the property and retain a conservation easement rather than hold the property in trust in perpetuity. The co-executors petitioned for direction. The county district attorney (acting in place of the Attorney General, as allowed by OCGA Sec. 53-12-115) petitioned to have a successor trustee named to carry out the charitable purposes of the will. The Land Trust's attorney asked for and received two extensions of time to file briefs but still failed to respond. The day before the hearing, the attorney requested a continuance in a handwritten note to the court. He was fired that day by the Land Trust but was not replaced before the hearing. In the hearing the director of the Land Trust attempted to address the probate court on behalf of her organization, but the court did not allow her

to as she was not a licensed attorney. The court refused to continue the hearing. The court ruled that a charitable trust had been unambiguously created by the testator's will and thus that there was no need to consider extrinsic evidence. The court determined that the Land Trust's rejection of the executor's deed amounted to a renunciation of the trusteeship. The court appointed the Board of Commissioners of Cobb County as trustee. The Land Trust appealed. The Supreme Court affirmed the holdings of the probate court. The Supreme Court found that the probate court had not erred in refusing to postpone the hearing. The only petition for a continuance had been filed by the attorney who was fired and it did not contain any of the representations required by OCGA Sec. 9-10-155 (e.g., the illness or absence of counsel from "providential cause"). The Supreme Court agreed with the probate court that the will contained unambiguous language establishing a charitable trust. The Supreme Court pointed out that the bequest of the gardening equipment served as additional evidence that the testator wanted the Land Trust to retain and maintain the property. The fact that the terms "trust" and "trustee" were not used was irrelevant. (OCGA Sec. 53-12-21, which was not cited by the Supreme Court, provides: "No formal words are necessary to create an express trust.") The clarity of the language precluded the admission of extrinsic evidence. The Supreme Court disagreed with the Land Trust's contention that its rejection of the proffered deed did not amount to a renunciation of the trust. The Supreme Court found that the Land Trust's contentions ran counter to its own statements in the pleadings it had filed. The Supreme Court then went on to examine whether the Land Trust even had the "capacity" to serve as a trustee in Georgia in that it may have lacked the power to act as a trustee in this state. The Supreme Court cited

OCGA Sec. 53-12-24(a), which states that a corporation that wishes to act as trustee “must have the power to act as a trustee in Georgia.” OCGA Sec. 7-1-242 provides that only certain corporations or business entities may act as a fiduciary in Georgia. These are basically banks, trust companies, and other financial institutions. The Supreme Court pointed out that the Land Trust had never received approval to act as a bank or trust company, as set forth in OCGA Sec. 7-1-392 et. seq. The Supreme Court did not mention another important provision of the Georgia Code, OCGA Sec. 14-3-302(9). This provision allows a non-profit corporation “[t]o be a promoter, *fiduciary*, shareholder, partner, member, associate, or manager of any partnership, joint venture, *trust*, or other entity” Finally, the Land Trust argued that the Board of Commissioners should not have been appointed successor trustee because at some point in the future the Board might find itself in a conflict of interest position. The Land Trust speculated that the Board might at some point decide to widen parts of a road that abuts the property. The Supreme Court found this speculation over future events to be irrelevant to the Board’s appointment as trustee.

2) WHO HAS STANDING TO SUE FOR REMOVAL OF TRUSTEE

Richards v. Richards, 281 Ga. 285, 637 S.E.2d 762 (2006)

James Richards established a trust for his three minor children in 1994. His then-wife, Janet, was a co-trustee. The trust provided that the children were to receive all the income and that the trustee could encroach on the principal in amounts that the trustee should deem “necessary to provide for [their] support and education.” James and Janet divorced in 2000. The spouses’ divorce agreement set a monthly child

support amount that was based on their anticipation that the trust funds would be “sufficient to cover any expenses of the children incurred above and beyond the child support....” Janet ceased to be a trustee of the trust and, when Richards remarried, his new wife became a trustee. Janet filed suit against Richards and his new wife, claiming on behalf of herself and her children that they had breached the trust agreement. She asked that they be removed as trustees and a receiver be appointed. The court appointed a guardian ad litem to represent the children. The Richards moved for summary judgment against Janet on the ground that she was not an “interested person” and thus lacked standing to maintain the suit in her individual capacity. The trial court granted the motion and the Supreme Court affirmed. The Supreme Court looked to OCGA Sec. 53-12-2 to determine who constituted an “interested person” and thus had standing to petition for the removal of a trustee under OCGA Sec. 53-12-176. OCGA Sec. 53-12-2(4) provides in part that an “interested person” means “a trustee, beneficiary, or any other person having an interest in or claim against the trust....” Obviously Janet was not a trustee or beneficiary. She asserted that she had a “claim against the trust” because she had provided funds to support her children in lieu of the trust funds. She framed her claim as one for reimbursement from the trust based on the agreements made by the parties in the divorce settlement. The Supreme Court focused its opinion first on the right to child support. The court noted that that right belongs to the children rather than the parent. The Supreme Court also pointed out that Janet could seek a modification of the child support amount if she found that the specified amount, when combined with whatever monies were distributed from the trust, was inadequate to meet the children’s needs. The Supreme Court also observed that the trustees had not

neglected their obligation to pay all of the income to the children. The court finally engaged in a “floodgates” explanation of why it had prohibited Janet from suing for the trustees’ removal. The court explained:

Under [Janet’s] interpretation, anyone could attain the status of an “interested person” and, consequently, obtain standing to maintain an action for removal of the trustee simply by expending sums for the support of a trust beneficiary.

The Court cited a Minnesota case and a Texas case for its conclusion that “an interested person is more accurately defined as a person or entity with a specific financial stake in or a specific claim against a trust.”

Justice Hunstein wrote a special concurring opinion. She noted first that the trust was a non-discretionary trust (at least as it related to the income payments) in which the children had vested interests. Citing Henderson v. Collins, 245 Ga. 776, 26 S.E.2d 202 (1980), she pointed out that the creditor of a trust beneficiary can proceed against that beneficiary’s interest if the interest is vested and non-discretionary. She added that the law also allows a creditor who has provided necessities to a minor to obtain reimbursement in some circumstances (citing OCGA Sec. 13-3-20). She concluded that a person can in fact be an “interested person” by virtue of having expended sums for a beneficiary. Justice Hunstein also registered her disagreement with the majority’s interpretation of the OCGA Sec. 53-12-2(4) definition of “interested person.” She emphasized the second segment of that statute, which provides that the statutory “meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.” She chastised the majority for using cases from foreign jurisdictions that

ignored the “guiding principles found in our statute.” Justice Hunstein disagreed with the majority finding that Janet could not be an interested party if her contention was based on her claim against the trust for expenses she had paid on behalf of her children. However, Justice Hunstein voted with the majority because she found that Janet herself had precluded her recovery by framing her claim as one that was founded in the divorce settlement agreement rather than in the trust agreement. Had she framed her claim as one that was based on her interest in receiving the income payments on behalf of the children, it is clear that Justice Hunstein would have indeed found her to be an “interested person.”

3. MODIFICATION OF TRUSTS

Briden v. Clements, 283 Ga. App. 626, 642 S.E.2d 317 (2007): Clement created a trust in 1985 that was governed by Florida law. The trust was due to pay income for life to his wife and then to his daughter, Gretchen, for her life, with the remainder to go to her children. Clement also had a son, Gordon. However, the only mention of Gordon in the trust was that he was named as the successor trustee. Clement died the year after the trust was established. Two months after Clement died, Gretchen and her children and Gordon entered into a settlement agreement in which it was stated that the omission of Gordon from the trust was a “clerical error” and in which all agreed that he, when the mother died, one-half of the trust would be distributed to Gordon “per stirpes.” (It is unclear from the decision whether Gordon would receive a remainder interest outright at his mother’s death or a life interest with remainder to his children. Later in the opinion, the Court of Appeals refers to Clement’s “intent to make Gordon and Gretchen

equal beneficiaries of the remainder of his trust....” It is also unclear whether the mother was a party to the settlement agreement.) Clement’s wife died almost 20 years after the settlement agreement was executed. Soon after she died, Gretchen tried to have the agreement declared void ab initio on the ground that no guardian ad litem had been in place to represent the interests of any unborn or contingent beneficiaries when the agreement was entered into. Gordon asserted waiver, estoppel, and laches as defenses. A guardian ad litem was appointed by the trial court. The court heard the testimony of the Florida attorney who had prepared the document, whose notes indicated that Gordon was to share in the trust. Gretchen’s deposition indicated that she had admitted that a drafting error had been made at the time she signed the settlement agreement. Furthermore, she had sought the advice of a non-Florida attorney who had told her not to sign the settlement agreement, but she had chosen to do so anyway. Her “plan,” according to her deposition, was to sign the agreement but then challenge it after her mother had died. She said that she had signed the instrument to get Gordon and her mother “off her back.” The GAL joined Gretchen’s motion for summary judgment on the ground that the non-sui juris beneficiaries had not been represented during the settlement negotiations. The trial court granted summary judgment instead to Gordon, stating that the reformation of the trust reflected Clement’s intent. The trial court noted that the reformation was allowed under Florida law. The Court of Appeals affirmed the grant of summary judgment to Gordon, noting that reformation of a scrivener’s error “is consistent with general principles well-established in Florida and other states.” The Court cited Florida cases and one Illinois case as its sources for this proposition. The Court was satisfied that the reformation of

the trust was not contrary to Clement's intent. As an aside, the Court of Appeals agreed with the trial court's determination that Gordon could not use laches and unclean hands as defenses because they are equitable defenses and Gretchen's petition for declaratory judgment was an action at law.

4. TERMINATION OF TRUSTS

Wachovia Bank v. The Moody Bible Institute of Chicago, Inc., 283 Ga. App. 488, 642 S.E.2d 118 (2007): The "Moody Trust," a revocable inter vivos trust, was executed in 1999 by Ms. Ferris. The Moody Bible Institute of Chicago, Inc. was named both as trustee and as the ultimate beneficiary. In 2000, Ms. Ferris sent a letter to an investment advisor at Moody in which she requested "cancellation" of the trust and asked the trustee to sell the securities in the trust and remit a check to her. At that time, the trust assets were valued at approximately \$550,000. The investment advisor called Ms. Ferris the next day and the advisor's notes of the conversation revealed that Ms. Ferris changed her mind about revoking the trust. A little over a month after that, the advisor's notes indicated that Ms. Ferris had called her again and requested the return of her trust funds but the advisor refused, telling Ms. Ferris that this was the "wrong decision." Four months later, the investment advisor wrote Ms. Ferris a letter in which she explained that Moody's Assistant General Counsel had told her (the advisor) that they could not terminate the trust until Ms. Ferris had a new will or trust agreement in effect. Less than a week after receiving this letter, Ms. Ferris sent the advisor a handwritten note in which she told the advisor to "leave things as they are." Within weeks, Ms. Ferris and her mother met with Wachovia representatives about her estate

plan and Ms. Ferris told them that she did not want Moody to be a beneficiary of her estate. Nine months later, Ms. Ferris executed a new will and a written revocation of the Moody Trust. Her lawyer gave these documents to Wachovia's trust department on October 21, 2001 for "internal processing and approval." On November 9, after the documents were approved, Wachovia sent them via UPS to Moody. In an unexpected turn of events, Ms. Ferris died on November 10. Moody received the documents on November 12 and, on November 14, responded that the trust had become irrevocable when Ms. Ferris died, at which point Moody had not yet received the purported written revocation. The trust agreement required any revocation to be "in writing and delivered to the Trustee." The trust agreement stated that the trust was to be governed in accordance with Illinois law.

The trial court granted summary judgment for Moody. The Court of Appeals reversed. The Court of Appeals agreed with Wachovia and the Ferris estate that the letter Ms. Ferris wrote in 2000 (her "first revocation") was effective when Moody received it and that her conduct after that time did not reinstate the trust nor did it create a new, oral trust for Moody. The Court of Appeals cited Illinois law for the premise that trusts must be in writing and thus that any reinstatement of a trust must also be in writing. The Court of Appeals said that Ms. Ferris's letter telling the advisor to "leave things as they are" was not a reinstatement and, in fact, was induced by the factual misrepresentation of the trustee as to the conditions required for revocation of the trust. The Court referred to this as Moody's "attempted fraud" and pointed out that, if Moody had honored Ms. Ferris's first revocation in the first place, the subsequent letter would not have come into existence. The Court of Appeals went on to examine

whether an oral trust existed due to Ms. Ferris's oral statements following the initial revocation. The Court applied Georgia law to this matter and noted that the Georgia statute requires all trusts to be in writing. Finally, the Court of Appeals discussed whether the Estate Tax Return filed by the Ferris estate, which referred to the Moody Trust as still being in effect, judicially estopped the estate from later asserting that the trust had been revoked. The Court of Appeals held that the Estate Tax Return was not a sworn statement by Ms. Ferris herself nor was its filing a "legal proceeding" that would result in estoppel.

5. Breach of Fiduciary Duty: Trustee

Ludwig v. Ludwig, 281 Ga. 724, 642 S.E.2d 638 (2007): A trust was established in 1981 by a mother for the benefit of her three sons, their spouses, and their children. The sons were named as trustees but one of the sons "primarily managed" the trust until he died in 1997. In 2004, the children of the ex-wife of one of the two remaining trustees sued the trustees for abuse of discretion and breach of fiduciary duty. The court dismissed some of the claims as being barred due to the six-year statute of limitations. On the remaining claims, the trial court granted summary judgment in favor of the trustees and the Supreme Court affirmed. The discretionary clause in the trust allowed the trustees to pay income or principal in "amounts, whether equal or unequal ... as may be needed for the support, maintenance, education, and medical needs, consistent with a high standard of living, of the [beneficiaries]." The grandchildren who brought the suit claimed that the trustees had failed to consider their needs, "specifically, [their] need for money in response to debts they have accumulated." In fact, one of these grandchildren

had received more money from the trust than all of the other eight grandchildren and the second grandchild had received more than two of the other grandchildren. The Court found that the complaining grandchildren showed no “fraud or bad faith, misbehavior, or misconduct, arbitrariness, abuse of authority or perversion of the trust, oppression of the beneficiary, or want of ordinary skill or judgment.” The Supreme Court concluded that the trustees had simply determined that the grandchildren’s “needs” were not of the sort that would warrant payments from the trust. As to the breach of fiduciary duty, the grandchildren alleged that the trustees had mismanaged the trust, apparently because they had not diversified the trust assets and had retained certain stock in the trust. The Supreme Court pointed out that the trial court record showed that the trustees had gotten professional advice regarding the retention of the assets and had retained the stock for tax reasons. The Court also noted that the trust allowed the trustees to employ professionals to aid them with their administration of the trust. The Court concluded that while the trustees “have not performed perfectly all of their administrative obligations,” the complaining grandchildren were not damaged by the trustees’ actions.

G. NON-PROBATE ASSETS

1. JOINT ACCOUNTS

Jenkins v. Jenkins, 281 Ga. App. 756, 637 S.E.2d 56 (2006): In this case, the Court of Appeals was called upon to examine joint accounts set up by a mother who had eight children. She had set up separate accounts jointly with her daughters Sarah and Miriam. A checking account on which Sarah was named had been opened after the

children's father had died and when Sarah was still living with her mother. The reason the account was opened, according to Sarah, was so that Sarah could pay her mother's bills should her mother be unable to do so. Sarah did not contest the fact that this had been the purpose of the account and the Court of Appeals found that evidence supported a jury's finding that the sums remaining in this account (\$1700) belonged to the mother's estate. The other accounts, however, were more complicated. In 1999, the DOT condemned the house in which Sarah and her mother lived so they moved in with Miriam. The DOT apparently would only issue the condemnation payments to one person, so the children signed quitclaim deeds or affidavits releasing to their mother their portion of the proceeds. Two of the sons also signed a document indicating that the proceeds were to be used only to build a house for their mother and that the house was to be deeded to their father's estate upon her death. However, the evidence did not indicate that the mother had agreed to this arrangement. The condemnation proceeds were deposited in a certificate of deposit and a money market account, both set up as joint tenants with right of survivorship with Sarah. The application form for the CD had contained the option "Joint Account – No Survivorship" but the option "Joint Account – With Survivorship" had been checked. The bank employee who had set up the accounts was certain that the mother had told her exactly what she wanted. As to the account with Miriam (which was set up with money received by the mother from her mother's estate), the bank employee at Wachovia was equally certain that he had discussed the options with the mother and that she had made it clear that she wanted Miriam to be on the account with her. That application also contained options for "survivorship" or "no survivorship."

When the mother died, five of her children sought to have constructive trust imposed on the remaining deposits in all of the joint accounts. The jury decided that constructive trusts should be imposed on all of the joint accounts. As noted above, the Court of Appeals found that the evidence supported the imposition of a constructive trust on the checking account that was set up with Sarah for her mother's convenience. As to the accounts that held the condemnation proceeds, the court found that there was no evidence to support the imposition of a constructive trust. The court cited Georgia statutory law, OCGA Sec. 53-12-93, to the effect that a constructive trust can be imposed when "the person holding legal title to the property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." The court pointed out that, with regard to real property, the Statute of Frauds demands that all agreements relating to that property be in writing and that a constructive trust cannot be imposed based solely on an oral promise to hold or transfer the property to another that is later broken. On the other hand, a trust can be imposed if the promise from the outset was fraudulently made with the intent of obtaining title to the land. The court found that, despite any oral agreements that may have been made between the children and their mother about the condemnation proceeds and the quitclaim deeds, the documents revealed no evidence that the mother had made any promise to them with the intent to deprive them fraudulently of their rights to the property and its proceeds. In addition, the court found no evidence to indicate that, when the mother deposited the proceeds in joint accounts with Sarah, "she meant to do anything other than that." The same approach was used in determining that the joint account that the mother had set up with Miriam was meant to be a joint account with

survivorship. The court noted that the fact that Miriam herself had at one time made statements that the funds in the account belonged only to the mother was irrelevant; the intent of the mother, not Miriam, was the determinative issue.

See also, Greenway v. Hamilton, 280 Ga. 652, 631 S.E.2d 689 (2006), which is discussed elsewhere in this outline.

H. DEEDS

1. DEED VS. WILL

Matthews v. Crowder, 281 Ga. 842, 642 S.E.2d 852 (2007): In 1964, Crowder executed a “deed” which provided as follows: “This deed shall not take effect until the death of the grantor. At that time, it shall have full force and effect.” The deed conveyed an 80-acre tract of land to Crowder’s daughter, Ethel. Crowder died intestate two years later, survived by Ethel and three other children. Two years after that, Ethel conveyed the property to three of her children, who later deeded their shares or portions of their shares to other Crowder family members. In 2004, when they learned that the Crowders were planning to sell the property to buyers who were not family members, the heirs of Crowder’s other three children (the “Matthews heirs”) sought a declaratory judgment to clarify their rights as cotenants of the property. The Matthews heirs claimed that the document executed by Crowder in 1964 was not a valid deed. The Crowders counterclaimed and sought a declaration that the property was owned solely by them under the theory of adverse possession. The trial court granted summary judgment to the Crowders and the Supreme Court affirmed. The Court agreed with the Matthews heirs that the document executed by Crowder was not intended to convey a

present interest in property and thus was not a valid deed. Consequently, Crowder still owned the property when she died intestate and the property was inherited by all of her children in 1966. The Court noted, however, that although the document was not a valid deed, it did operate as “color of title” for purposes of adverse possession. Thus, the Crowders had taken possession of the entire estate under color of title. Ethel lived on the property throughout her life and one of her sons continued to live there after she died. The Matthews heirs admitted that their understanding had been that Crowder had “given” the property to Ethel with the intention that it “remain in the family.” The Court pointed out that the Matthews heirs thus had not believed that they had an ownership interest in the property during the time that the Crowders occupied the property. They had not claimed to own the property in 1995 when the Department of Transportation had taken a portion of the land. One Matthews heir had even attempted to purchase part of the property from one of the Crowders. Because the Crowders held the property under color of title for at least seven years (the statutory period for adverse possession) and because the Matthews had made no claim of ownership during that time, the Court agreed that the Crowders were the sole owners of the property by virtue of adverse possession. Justice Carley wrote a concurring opinion in which he stated that the original “deed,” which he agreed was invalid due to its testamentary nature, did not convey color of title. However, because he agreed that the 1968 deed from Ethel to her children had accomplished this purpose, he found there was sufficient color of title to reduce the prescriptive period of possession from 20 years to seven years.

2. CAPACITY TO EXECUTE A DEED

Smith v. Smith, 281 Ga. 380, 637 S.E.2d 632 (2006): A father and his two sons operated a farming business for many years. The father entered a nursing home after he developed Alzheimer's disease. While he was in the nursing home, he and his wife conveyed their interest in the farmland to the wife of one of the sons. The other son sued his brother and the wife to set aside the conveyance on the ground that their father had not had the requisite capacity to execute the deed. The trial court set aside the conveyance and the Supreme Court affirmed. The Supreme Court pointed out that the question of capacity was a question of fact and that the superior court's finding of fact could not be set aside if there was any evidence to support it. Four witnesses had appeared at trial to testify as to the father's incapacity. Each was a present or former registered nurse. Each had provided care for the father. One ground of the appeal was that these witnesses were not physicians and had not been qualified as medical experts. The Supreme Court pointed out, first, that a nurse can testify as to matters within her expertise, and, second, even a lay witness can testify on the question of capacity provided the testimony is accompanied by facts that are sufficient to form the basis of her opinion. The nurses had provided a number of facts in their testimony, including that the father had not recognized his own sister, he could not sign his own name, he was "chronically disoriented" and suffered from "Alzheimer's dementia," he had to be prompted to use the bathroom and to eat and sometimes had to be fed, and he at times exhibited "psychotic features" and was "delusional." The fact that the nurses had not been present at the time the deed was executed was outweighed by their testimony as to incapacity before the deed was executed and continuing incapacity afterwards. The

Court also affirmed the trial court's finding that the doctrine of "after-acquired property" set forth in OCGA Sec. 44-5-44 was inapplicable and could not cure the lack of capacity problem.

See Lillard v. Owens, 281 Ga. 619, 641 S.E.2d 511 (2007) (under "Testamentary Capacity & Undue Influence") for a discussion of capacity in the context of the execution of a will & Chesser v. Chesser, ___ Ga. App. ___, 643 S.E.2d 764 (2007) (under "Guardianships & Conservatorships of Adults") for a discussion of undue influence in the context of an inter vivos transfer of property.

I. GUARDIANSHIPS AND CONSERVATORSHIPS

1. GUARDIANSHIPS & CONSERVATORSHIPS OF MINORS

In the Interest of J.R.R. et al., Children, 281 Ga. 662, 641 S.E.2d 546 (2007): The maternal grandmother of two minors filed a petition for appointment as temporary guardian in the Probate Court of Cherokee County. The parents of the minors had signed a temporary relinquishment of rights, which was attached to the grandmother's petition. The letters of temporary guardianship were issued but the parents later moved to terminate the temporary guardianship. The grandmother objected to the termination. The probate court granted the parents' petition but in the process declared unconstitutional two provisions of Georgia's 2005 Guardianship and Conservatorship Code. The probate court found unconstitutional the provision that required the probate court to terminate a temporary guardianship if the natural guardian of the minors so requested. The statute in question gives the parents of minors basically an unfettered right to terminate a temporary guardianship. O.C.G.A. §29-2-8(b) provides as follows:

(b) Either natural guardian of the minor may at any time petition the court to terminate a temporary guardianship; provided, however, that notice of such petition shall be provided to the temporary guardian. If no objection to the termination is filed by the temporary guardian within ten days of the notice, the court shall order the termination of the temporary guardianship. If the temporary guardian objects to the termination of the temporary guardianship within ten days of the notice, the court shall have the option to hear the objection or transfer the records relating to the temporary guardianship to the juvenile court, which shall determine, after notice and hearing, whether a continuation or termination of the temporary guardianship is in the best interest of the minor.

The Supreme Court found that the constitutional question had not been raised in the pleadings or in any other portion of the record. Even if that question had been raised in oral argument in the probate court (and there was not transcript of the hearing to prove that it was), a constitutional attack cannot be properly raised by oral argument alone. The Court specifically did not rule on the question of whether the provisions in question were unconstitutional.

2. GUARDIANSHIPS & CONSERVATORSHIPS OF ADULTS

a) Yetman v. Walsh, 282 Ga. App. 499, 639 S.E.2d 491 (2006): Yetman's daughter and son-in-law petitioned to be appointed conservators of her estate. The probate court held a hearing and found that clear and convincing evidence existed that Yetman was in need of a conservator because she lacked the capacity to make significant, responsible decisions as to the management of her property. The evidence included discrepancies in

Yetman's own testimony, evidence of her impaired judgment, impaired vision, and other physical frailty. The evidence also indicated that Yetman was vulnerable to a new person who had moved into her household. Yetman challenged the sufficiency of this evidence. However, she neglected to include a transcript of the hearing in the appellate record so the Court of Appeals was forced to conclude that the evidence was sufficient to support the judgment. In her appeal, Yetman also complained that the probate court had erred when it had concluded in a pre-trial order that there was probable cause to believe that Yetman was in need of a conservator. In order to avoid unnecessary and meritless hearings on such matters, the Georgia Code requires the probate judge, upon the filing of a petition for conservatorship, to make an initial assessment of the petition and any accompanying evaluation in order to determine whether there is probable cause for continuing the process. OCGA Sec. 29-5-23(a). Yetman claimed on appeal that the petition and evaluation in her case had not shown probable cause. The Court of Appeals, however, found that her contention was not reviewable once a trial had occurred which had in fact shown that the evidence supported the imposition of the conservatorship. The Court of Appeals found that any error in the pre-trial ruling was "harmless if not moot."

b) In re Longino, 281 Ga. App. 599, 636 S.E.2d 683 (2006): Longino was appointed guardian and conservator of his aged mother. Within less than two months of his appointment, the probate court cited Longino on its own motion to answer a charge that his letters should be revoked. The court appointed a guardian ad litem who conducted an investigation. The investigation showed that, even though the ward had assets of

approximately \$2 million, she was being denied needed care because the assets were wrapped up in litigation that Longino had initiated. The litigation was an attempt by Longino to void a trust which held most of the ward's assets. The trustee of that trust was Longino's brother and Longino claimed that the trust had been "illegally created by his brother." In the alternative, Longino sought to move management of the trust's assets from Smith Barney to another firm. Longino had filed a "Petition to Invalidate Documents" with the probate court. Apparently, Longino and his brother and the third of the ward's children had attempted to settle the matter. Longino also filed with the court an "Agreement" and "Agreed Order" under which the assets in the trust would have been returned to the ward but Longino's brother would become the conservator of those assets. Longino would remain the conservator of the rest of the ward's assets and would stay on as the ward's guardian. The Agreement also purported to invalidate a codicil to the ward's will and to divide some of her personal property among her children, which they were to hold in the event she recovered capacity. The court's citation of Longino stated that it had reviewed the documents and concluded that the Agreement and Order appeared to be an attempt to settle the Petition to Invalidate Documents. The citation indicated that Longino's accession to the terms of the Agreement might be cause to revoke his letters on the grounds of both actual and apparent conflict of interest. The probate court revoked Longino's letters of conservatorship but allowed him to remain his mother's guardian. In its order revoking his letters the court stated, among other things, that the other two children of the ward had repudiated the Agreement and opposed the Petition to invalidate the trust. The court found that Longino had been attempting to make himself the sole trustee of the

trust should the trust remain in place. The court also noted that Longino had informed the court that he considered his brother to be untrustworthy so the court concluded that Longino was not acting in his mother's best interest when he agreed that his brother should be appointed as conservator of some of his mother's property. Longino appealed the revocation of his letters of conservatorship on the ground that the citation did not give him sufficient notice of the charges against him so that he could defend himself against those charges. The Court of Appeals found that the citation contained sufficient notice and that, furthermore, the guardian ad litem whom the court had appointed when it issued the citation had interviewed Longino about the charges and filed a written answer with the court discussing the charges. At the hearing, Longino testified specifically as to the charges and the answer of the GAL. The Court of Appeals also discussed Longino's contention that the probate judge should have recused herself because the citation stated that Longino would have to cover personally the costs of the proceeding. The Court of Appeals found that the source of the judge's alleged bias was not extra-judicial but had come solely from what the judge had learned from participation in the case. In addition, the Court of Appeals found that a reasonable person would not conclude that the judge harbored a personal bias against Longino that was of such an intensity as to prevent her from acting impartially. Finally, the Court of Appeals agreed with the probate court that it did not have jurisdiction to rule on the voiding of the trust as trusts are creatures of equity and equity jurisdiction lies in the superior courts. Additionally, probate courts have no jurisdiction to determine title to property.

c) Chesser v. Chesser, ___ Ga. App. ___, 643 S.E.2d 764 (2007): A mother was found by the probate court to be incapable of managing her financial affairs and one of her sons, Charles, was appointed her conservator (but not her guardian). Charles then sued his brother, Curtis, to set aside transfers of the mother's real and personal property that she had made to Curtis in the month before the conservatorship had been imposed. Charles alleged that the transfers were invalid because of the undue influence that Curtis had exerted on his mother. The trial court ruled that the transfers were not the product of undue influence and the Court of Appeals affirmed. The Court of Appeals applied the "any evidence" ("clearly erroneous") standard of review to the trial judge's finding of fact. The facts showed that the mother had executed a power of attorney in 2002 naming both of her sons as her agents but within a month had revoked that power of attorney and replaced it with one naming only Curtis as her agent. In 2003, Curtis had taken over his mother's care and had moved in with her. In October, 2003, the mother had transferred two \$5000 certificates of deposit to Curtis. On November 18, 2003, Charles had filed a petition for the appointment of a guardian of her property (conservator). The probate judge found sufficient evidence to proceed with the petition and, on November 20, had appointed a psychologist to evaluate the mother. On November 24, the mother had conveyed her home by quitclaim deed to Curtis. Two days after that, her doctor had declared in writing that she was "mentally competent to manage her own affairs." On December 10, however, the court-appointed psychologist found that the mother was "incapacitated due to dementia." Charles was named as her conservator on January 12, 2004. Charles appealed on the ground that undue influence had been established as a matter of law due to what he termed the "confidential

relationship” between Curtis and his mother. The Court of Appeals noted that undue influence can be established as a matter of law if “the grantee of a gift of real property stands in a confidential relationship with the grantor of real property and the grantor is of weak mentality.” However, the Court of Appeals rejected Charles’ assertion that the mere fact that Curtis lived with their mother established a confidential relationship. Moreover, the Court stated that there was no evidence that the mother was of a “weak mentality” at the time she transferred the property; in fact, the written opinion of her physician had indicated exactly the opposite. The Court of Appeals also addressed the fact that the probate court had found “sufficient evidence” to proceed with the guardianship proceeding four days before the quitclaim deed was executed. The Court of Appeals, citing the former Guardianship statute, pointed out that at this early stage of a guardianship proceeding, “the incapacity of the ward remains an unproven proposition, not a proven fact.” The Court of Appeals emphasized that because there was “some evidence” to support the trial court’s finding of fact as to the mother’s mentality at the time the deed was executed, there was evidence to support the trial court’s finding of fact that undue influence had not been asserted.

See Lillard v. Owens, 281 Ga. 619, 641 S.E.2d 511 (2007) (under “Testamentary Capacity & Undue Influence”) for a discussion of capacity in the context of the execution of a will and Smith v. Smith, 281 Ga. 380, 637 S.E.2d 632 (2006) (under “Deeds) for a discussion of the capacity to execute a deed.

J. ATTORNEY MATTERS

Young v. Williams, ___ Ga. App. ___, ___ S.E.2d ___, 2007 WL 1121740 (April 17, 2007): Williams hired Young to draft his will. After conversations with Williams, Young drafted a will that left \$250,000 and other personal property to Betsy, Williams' second wife. The will contained no residuary clause and apparently no clause relating to real property. When they were reviewing the will together, Young commented to Williams that he was surprised that Betsy was not getting more from his estate, to which Williams responded that she was getting "a million dollar house free and clear." When Williams died, his real property passed by intestacy, 1/3 to Betsy and the remaining 2/3 to his children by a previous marriage. Young did not deny that Williams had made it clear that he intended for Betsy to have his residence at his death. Young also testified that he had violated his own standard of care in omitting a residuary clause. However, he asserted that Betsy could not sue him for malpractice because no attorney-client relationship had existed between him and Betsy. The trial court granted partial summary judgment for Betsy on this issue and the Court of Appeals affirmed. The Court of Appeals cited Georgia cases dealing with the transfer of real property for its conclusion that, although generally a malpractice suit is inappropriate if there is no attorney-client relationship, there can be situations in which a non-client can sue as a third-party beneficiary of the contract between the attorney and his actual client. This will only be allowed if the contract was clearly intended for the non-client's benefit. The Court of Appeals found that to be the case in this situation. The Court of Appeals also discussed the tort theory of negligence and addressed Young's assertion that Betsy had not proved that his negligence was the proximate cause of any damage to her. The Court

of Appeals found that his negligence clearly resulted in her losing the 2/3 interest in the home. The Court also pointed out that the fact that Williams had read the will before signing it did not insulate Young from liability for his negligence.

II. GEORGIA LEGISLATION – 2007

1) Parent Prohibited from Inheriting from Child

H.B. 139 amended OCGA Sec. 53-2-1 by adding new subsections (a) and (d) that prohibit a parent from inheriting from a minor child if the parent has “willfully abandoned” the child. This will cause the parent’s share of the minor’s estate to be distributed as if the parent had predeceased the minor child. In such a case, the parent also is prohibited from acting as the personal representative of the child’s estate. A parent “abandons” a child if the parent “without justifiable cause, fails to communicate with the minor child, care for the minor child, and provide for the minor child’s support as required by law or judicial degree for a period of at least one year immediately prior to the date of death of the minor.” The abandonment must be proved by the person asserting it by clear and convincing evidence at a hearing conducted for that purpose. If a parent has lost custody due to a court order but has complied with any support requirements of that order, the parent may inherit from the minor. This Code section does not apply to recovery by a parent in a wrongful death suit. That situation is dealt with separately in OCGA Sec. 51-4-4.

2) Georgia Advance Directive for Health Care Act

Chapters 32 and 36 of Title 31 of the Georgia Code have been amended. The major purpose of this amendment is to provide individuals with one document, called an “advance directive for health care,” in which the individual can appoint an agent for health care decisions, declare his or her preferences regarding end-of-life procedures, and name his or her choice to serve as guardian should one be needed. The Act is the

culmination of the work of an ad hoc committee convened by Representative Steve {"Thunder"} Tumlin in the summer of 2006. The committee was ably co-chaired by Nick Djuric and Kathy Kinlaw. The committee included other interested legislators, two law professors, attorneys who represent hospitals and other health care providers, doctors, nurses, hospice care practitioners, and representatives from a variety of religious and non-religious groups.

The Act is effective July 1, 2007 and will not affect or invalidate living wills, durable health care powers of attorney or other similar documents executed before that time.

The new Advance Directive document is set forth in the statute. There are four parts to the document. Part 1 allows the declarant to appoint a health care agent. Part 2 allows the declarant to express his or her treatment preferences in end-of-life situations. Part 3 allows the declarant to name an individual to serve as his or her guardian should the need for one arise. Part 4 is the signature section. A declarant need not complete all four parts. For example, Part 1 will be effective even if Parts 2 or 3 are not completed and vice versa.

The new Advance Directive form is contained in OCGA Sec. 31-32-4. It may be executed by anyone who is age 18 or over or emancipated.

Part 1: Health Care Agent: Part 1 adds options that did not exist in the statutory health care power of attorney prior to the enactment of this Act.

This Part makes it clear that a physician or other health care provider who is directly involved in the declarant's health care may not serve as the agent, nor may an ex-spouse. Marriage after the directive has been signed will revoke the appointment of

the agent unless the agent is the declarant's new spouse.

Part 1 allows for the appointment of one or more back-up agents

Part 1 lists the powers of the health care agent and includes the appointment of the agent as the declarant's representative for laws relating to medical privacy including HIPAA. This Part also makes it clear that the agent cannot make health care decisions regarding psychosurgery, sterilization, and treatment or involuntary hospitalization for mental illness, mental retardation, or addiction. The form specifically states that the agent may accompany the declarant in an ambulance or air ambulance and visit the declarant in a hospital or other health care facility if the protocol of that facility permits visitation.

Part 1 directs the health care agent to look to Part 2 (Treatment Preferences) for guidance in making decisions and additionally to consider the declarant's previous statements and health care actions and religious and other beliefs and values. If after this consideration it remains unclear what the declarant would do in a particular situation, the agent then is to make a decision that is in the declarant's best interest, "considering the benefits, burdens, and risks of [the declarant's] current circumstances and treatment options."

Part 1 allows the declarant to give the agent the authority to make post-death decisions about autopsies and disposition of the declarant's organs or entire body, including organ donations.

Part 2: Treatment Preferences

This Part, which replaces the traditional "living will," is optional. If completed, it

is effective only if the declarant is unable to communicate his or her own wishes. The introduction makes clear that if a health care agent has been appointed, the agent may be guided by the preferences stated in Part 2 but retains the ultimate authority to make all health care decisions.

Part 2 applies only if the declarant is in a terminal condition (“an incurable or irreversible condition that will result in ... death in a relatively short period of time”) or a state of permanent unconsciousness (“an incurable or irreversible condition in which I am not aware of myself or my environment and I show no behavioral responses to my environment”).

Part 2 gives the declarant three clear options for treatment:

1) Extension of life as long as possible using medications, machines, and other medical procedures. This option makes it clear that nutrition and fluids by tube or other means are to be continued.

2) Allowing a natural death without medications, machines, and procedures whose purpose is only to prolong life. This option makes it clear that nutrition and hydration by tube or other means are not to be continued unless as needed to provide pain medication.

3) Allowing the declarant to choose which procedures should be continued. The choices on this list (any or all of which may be chosen) are: nutrition; fluids; ventilator; and CPR.

Part 2 also allows the declarant the option to make additional statements to provide guidance as to his or her treatment preferences.

Part 2 provides that it will be effective if the declarant is pregnant only if the

declarant initials a statement that says: "I want PART TWO to be carried out if my fetus is not viable."

Part 3: Appointment of Guardian

Part 3, which is also optional, allows the declarant to nominate an individual to serve as his or her guardian. Under OCGA Sec. 29-4-3, The probate court may not override that designation in a guardianship proceeding without good cause. This Part allows the declarant to choose the health care agent or any other individual as guardian.

Part 4: Signatures and Effectiveness

Part 4 must be completed in order for the document to be valid.

Part 4 clarifies that this document revokes any other advance directive, health care power of attorney, or living will made by the declarant.

Part 4 makes the directive effective on the date of execution unless the declarant provides an alternative effective date or event.

Part 4 requires the document to be signed or acknowledged in the presence of two witnesses who are age 18 or over. The witnesses do not have to be in each other's presence when they sign.

Part 4 states that the following cannot serve as witnesses: a) the health care agent; b) a person who will inherit from or gain any other financial benefit due to the declarant's death; c) a person who is directly involved in the declarant's health care. Also, only one of the witnesses may be an employee, agent, or medical staff member of the facility if the declarant is receiving health care from a facility at the time of the

execution of the document.

Revocation (OCGA Sec. 31-32-6): The Advance Directive may be revoked by a new form that revokes the older document expressly or by inconsistency; by being destroyed (burned, torn, obliterated); by a written revocation; by an oral or other clear expression. As noted above, marriage revokes the designation of anyone as health care agent other than the individual who becomes the declarant's spouse. The appointment of a guardian or receiver does not revoke the Advance Directive and the agent's authority will supersede that of the guardian on all matters covered by the Advance Directive.