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February 17, 2010

Mr. Bryan M. Cavan, President
State Bar of Georgia
Miller & Martin, PLLC
1170 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309-7649

Re: Legislative Proposal of the Fiduciary Law Section

Dear Mr. Cavan:

On behalf of the Fiduciary Law Section of the State Bar of Georgia, I would like to submit for consideration by the Executive Committee of the Board of Governors of the State Bar of Georgia the following proposal for legislation to be brought before the 2010 session of the Georgia General Assembly.

1. **Proposed Legislation.** Specific legislation has been prepared and is attached to this letter. The proposed legislation amends Title 53 of the Official Code of Georgia Annotated by adding a new section 53-4-74 so as to provide for the construction of wills and trust instruments referring to federal estate and generation-skipping transfer tax laws for testators and settlors dying after December 31, 2009, and to provide for judicial construction of such wills and trust instruments.

2. **Summary of Proposed Legislation.** Under the federal Economic Growth and Tax Relief Reconciliation Act of 2001, the federal estate and generation-skipping transfer (GST) taxes (Chapters 11 and 13 of the Internal Revenue Code of 1986) do not apply to decedents dying and GST transfers after December 31, 2009, and before January 1, 2011. The "repeal" of the federal estate and GST taxes, which was generally unanticipated by estate planners and their clients, will have a serious adverse effect on many wills and trust instruments executed by Georgia testators and settlors that contain provisions referring to federal estate and GST tax provisions of the Internal Revenue Code of 1986.

For example, the following is a typical description of the amount of a bequest in a Georgia will: "That amount, if any, needed to increase my taxable estate to the largest amount which, after allowing for the unified credit, will result in no federal estate tax." This formula would have resulted in a bequest of \$3.5 million if the testator died on December 31, 2009. The same formula might be construed to result in a bequest of the testator's entire estate if he died on

January 1, 2010, and might leave nothing in the testator's residuary estate for the residuary beneficiaries, perhaps including the testator's surviving spouse. Another typical provision in a Georgia will is a bequest to the testator's children of the testator's "applicable exclusion amount." This formula would have resulted in a bequest to the children of \$3.5 million if the testator died on December 31, 2009. The same formula might be construed to result in no bequest to the children if he died on January 1, 2010.

Similarly, a typical provision in a Georgia will is a bequest to the testator's grandchildren of the amount of the testator's remaining "GST exemption." This formula would have resulted in a bequest to the grandchildren of \$3.5 million if the testator died on December 31, 2009. The same formula might be construed to result in no bequest to the grandchildren if he died on January 1, 2010.

None of these results reflects the probable intention of the testator or settlor. However, in the absence of any evidence of the testator's intention to the contrary, a Georgia court construing wills and trusts with these problematic provisions may be compelled to give effect to their literal language. The United States Congress might retroactively reinstate the federal estate and gift taxes, but this is far from certain and legal challenges to the constitutionality of such a reinstatement of the taxes will take many years to resolve.

The proposed legislation provides a statutory rule of construction for wills and trusts of testators and settlors dying after December 31, 2009, and before January 1, 2011 (or, if earlier, the effective date of a reinstatement of the federal estate and GST taxes). It provides that a provision of a will or trust that refers to a provision of federal estate or GST tax laws, or that provides for determining the amount of a bequest, distribution, allocation, or division of property of an estate or trust based on the amount that is exempt from or can pass free of federal estate tax or federal GST tax, shall be "deemed to refer to the federal estate and generation-skipping transfer tax laws as they applied to estates of decedents dying on December 31, 2009, and to generation-skipping transfers on December 31, 2009." The statutory rule will not apply to a provision of a will or trust instrument that is executed or amended after December 31, 2009, or to a provision of a will or trust instrument (whenever executed or amended) that manifests an intention that the provision should be construed in a manner other than provided in the statutory rule. The legislation allows the personal representative, beneficiary, or trustee, to commence an action in court within one year of death to determine whether the statutory rule applies to a provision of a will or trust instrument or whether the will or trust instrument manifests an intention that such provision should be construed in a manner other than as provided in the statutory rules.

3. **Summary of Existing Law.** Existing law does not adequately provide for the construction of wills and trust instruments referring to federal estate and generation-skipping transfer tax laws for testators and settlors dying after December 31, 2009.

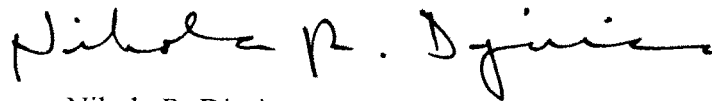
4. **Proponents/Opponents.** The proposed legislation was drafted by the Legislation Committee of the Fiduciary Law Section of the State Bar of Georgia and is supported by the

Fiduciary Law Section and many estate planning attorneys in Georgia. Some estate planning lawyers have expressed a view that legislation is unnecessary, but there are no known opponents to the legislation.

5. **Other sections that may have an interest in the legislation.** None.

6. **Recommendation.** The Fiduciary Law Section recommends that this proposal be adopted by the State Bar of Georgia.

Very truly yours,



Nikola R. Djuric

cc: Mr. Richard E. Barnes (by e-mail)

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[FIDUCIARY LAW SECTION LEGISLATION COMMITTEE DRAFT—2/17/10]

A BILL TO BE ENTITLED

AN ACT

To amend Title 53 of the Official Code of Georgia Annotated, relating to wills, trusts, and estates, so as to provide for the construction of wills and trust instruments referring to federal estate and generation-skipping transfer tax laws for testators and settlors dying after December 31, 2009, and to provide for judicial construction of such wills and trust instruments; to provide for related matters; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Title 53 of the Official Code of Georgia Annotated, relating to wills, trusts, and estates, is amended by adding a new Code section to read as follows:

“53-4-74.

(a) A provision of a will or trust instrument of a testator or settlor dying after December 31, 2009, and before the effective date for federal estate and generation-skipping transfer taxes, that refers to the “unified credit,” “estate tax exemption,” “applicable exemption amount,” “applicable credit amount,” “applicable exclusion amount,” “generation-skipping transfer tax exemption,” “GST exemption,” “marital deduction,” “maximum marital deduction,” “unlimited marital deduction,” or any similar term, or that refers to any similar provision of federal estate or generation-skipping transfer tax laws, or that provides for determining the amount of a

bequest, distribution, allocation, or division of property of an estate or trust based on the amount that is exempt from or can pass free of federal estate tax or federal generation-skipping transfer tax, shall be deemed to refer to the federal estate and generation-skipping transfer tax laws as they applied to estates of decedents dying on December 31, 2009, and to generation-skipping transfers on December 31, 2009.

(b) For purposes of subsection (a) of this Code section, the “effective date for federal estate and generation-skipping transfer taxes” means the earlier of January 1, 2011, or the first date (including a date before the date on which this Code section became effective) on which the federal estate tax and generation-skipping transfer tax laws apply to estates of decedents dying on such date and to generation-skipping transfers on such date.

(c) Subsection (a) of this Code section shall not apply to (1) a provision of a will or trust instrument that is executed or amended after December 31, 2009, or (2) a provision of a will or trust instrument (whenever executed or amended) that manifests an intention that such provision should be construed in a manner other than as provided in subsection (a) of this Code section.

(d) The court may construe a will or trust instrument to determine whether subsection (a) of this Code section applies to a provision of a will or trust instrument or whether the will or trust instrument manifests an intention that such provision should be construed in a manner other than as provided in subsection (a) of this Code section. A petition for construction of a will or trust instrument under this subsection may be filed by the personal representative, beneficiary, or trustee, and shall be commenced within one year of the death of the testator or settlor.

SECTION 2.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

SECTION 3.

All laws and parts of laws in conflict with this Act are repealed.