



Fall 2002

CHAIRMAN'S REPORT

The Fiduciary Law Section's tradition of excellence continues. As I take over from Jack Sawyer, the Section has 741 members and is in good financial shape. The Section continues to provide legislative leadership—three bills we sponsored passed the General Assembly and were signed into law in 2002. Our three major seminars provided top-quality continuing legal education to more than 600 attendees this year. Congratulations to Jack, the officers, committee chairs and members, and to all of you for an outstanding year.

Challenge to Service

In addition to demonstrating an extraordinary collegiality, members of the Section are known for their willingness to share their expertise and experience. I want to encourage and challenge each of us to find at least one new way to give back to our communities this coming year.

Firefighters need our help. They have a dangerous and important job, as the World Trade Center tragedy so vividly reminded us. Salary and benefits are not commensurate with risk. According to a recent article in *Atlanta* magazine, a firefighter in the City of Decatur earns \$22,000 a year. Members of the Fiduciary Law Section should strive to assure that every firefighter in the State of Georgia does not have to answer the call of duty without the comfort of a well-drawn, properly executed basic will, free of charge. Section member Ben Pruett of Atlanta has worked to establish a pro bono will project through the Atlanta Volunteer Lawyers Foundation. I am sure Ben would be more than willing to share his experience with you, as he

did with me. Whether you choose to approach this project through your local bar association, your estate planning council or lunch group, through your firm, or on your own, this is an opportunity for us to make a real difference in our own communities and, ultimately, throughout the state. Let this be the year you pledge to help our home town heroes!

Participation in National Health Care Decisions Week (October 20-26, 2002) is another opportunity for service. This project of the ABA Real Property, Probate and Trust Section is designed to promote the gifts of life and hope by encouraging organ donation. Information on materials and basic funding is available from the ABA's website at www.abanet.org (click on Member Entities, then Sections, then Real Property, Probate & Trust Law).

The Georgia Mock Trial Competition has been sponsored annually by the Younger Lawyers Division of the State Bar for the past fifteen years. High school students compete in thirteen regions throughout the state, with the regional champions meeting for a statewide competition in the spring. The Georgia championship team then competes nationally with teams from other states. This year, the team from Jonesboro High School in Clayton County won its second state championship and placed tenth out of 44 teams at the national championship in St. Louis. Teams from Georgia won national championships in 1995 and 1999. Georgia hopes to host the National Mock Trial Competition in 2008. The Mock Trial

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Competition offers myriad opportunities for involvement—from coaching a team (call by December 3, 2002), to sponsoring a team, to serving on a committee or helping with travel and expenses. For more information, call (800) 334-6865 ext. 779 or check www.gabar.org/mocktrial.asp.

Section Projects

Of course, the Fiduciary Law Section offers many opportunities to work on meaningful projects with lawyers from all over the state. I encourage you to get involved in your Section!

The Guardianship Code Revision Committee chaired by Bill Linkous of Atlanta made its report in July. The full text of the proposed revision was printed and distributed in the seminar materials for the Fiduciary Law Institute at St. Simons. The Executive Committee voted unanimously to recommend the Committee's revision of Title 29 to the State Bar. The proposal was presented to the Advisory Committee on Legislation of the State Bar September 10, 2002. The ACL has tabled the matter until its December meeting. I understand that the probate judges' legislation committee has favorably reported the proposal to the Council of Probate Judges for consideration at its next meeting in November. Thanks to Bill, the members of the Guardianship Code Revision Committee, and especially to Professor Mary Radford, the committee's reporter, for the years of work that have gone into this project. This is a major legislative effort for the Section and your support is important.

The Flexible Income Trust Committee formed last year and chaired by Donna Barwick of Atlanta has completed its work and has proposed a revision and addition to the Georgia Trust Act, which has been recommended by the Section's Legislation Committee. The Executive Committee is currently considering the report, which has been posted on the Section website. Since the committee's report was received after this year's unusually early deadline for submitting bills to the ACL for its September meeting, there is time for study. Your comments are invited on this important proposal. Thanks to

Donna and her committee for their hard work and for a scholarly and well-presented report.

Be sure to visit the Section website at www.gabar.org/fiduciary.asp. Nick Djuric of Atlanta, editor of the newsletter, has been working with the State Bar staff to improve our website. Major improvements are already obvious, and I understand that more information and links are in the works. I want to especially thank Nick for his unfailing efforts on behalf of the Section.

The Section will be publishing a directory this year. In addition to alphabetical listing of Section members (which is already available at the Section web site) with addresses, the directory will list our members by town and law school. We also expect to include other useful information, such as the results of the 2000 decennial census for the purposes of O.C.G.A. § 15-9-120(2). Thanks to Alan Rothschild Jr. of Columbus for heading up this project.

Important Dates

January 10, 2003. The annual business meeting of the Section will be held in conjunction with the State Bar Mid-Year Meeting at the Swissôtel in Atlanta. This will be a breakfast meeting on Friday morning. Officers for 2003-04 will be elected and all officers and committee chairs will report.

February 14-15, 2003. The 48th Annual Estate Planning Institute will be held at the Georgia Center for Continuing Education in Athens.

March 14, 2003. The Basic Fiduciary Practice seminar will be held.

July 17-19, 2003. The Fiduciary Law Institute will be held at the King & Prince Beach & Golf Resort on St. Simons Island.

Please note these dates on your calendars and plan to attend.

Conclusion

It is a great honor for me to serve as chairman of the Fiduciary Law Section for 2002-03. The Section has been an invaluable part of my professional life and the source of many wonderful friendships. I hope your experience will be the same.

Please feel free to contact me at any time with your comments, questions, or suggestions. You are the Section. Let's have a great year!

Cordially,

John Spears
Section Chairman

SECTION NOTES

Section Website

The Section has a new website! Go directly to www.gabar.org/fiduciary.asp, or go to the State Bar's main website at www.gabar.org and click on Member Resources, then Sections, then Section Web Pages, and then choose Fiduciary Law Section.

The website has four major areas:

Section Information. Includes a copy of the Section bylaws, a list of officers, committees, and a calendar of events.

Fiduciary Law Resources. Includes Professor Mary Radford's annual summaries of recent developments in Georgia fiduciary law and links to dozens of websites of interest to fiduciary lawyers.

Section News. Provides current news about the Section and its members.

Section Newsletter. Copies of the current and past newsletters.

If you have any comments on the new website, please contact Nikola R. Djuric by e-mail at nrdjuric@sablaw.com.

Annual Meeting

The Section's annual meeting will be held on January 10, 2003, in conjunction with the State Bar Mid-Year Meeting at the Swissôtel in Atlanta.

Verner F. Chaffin Career Service Award

On July 18, 2002, during the Fiduciary Law Institute on St. Simons Island, the Verner F. Chaffin Career Service Award was presented to Judge Floyd E. Propst, who has retired as judge of the Fulton County Probate Court.

The Award, which is named for Professor Verner F. Chaffin of the University of Georgia (the first recipient of the Award in 2000), is to be presented occasionally "in recognition of a distinguished career of outstanding, unselfish and dedicated service to the Fiduciary Law Section of the State Bar of Georgia, its members and the citizens of Georgia."

Continuing Legal Education

The 48th Annual Estate Planning Institute will be held at the Georgia Center for Continuing Education in Athens on February 14-15, 2003 (Friday and Saturday).

The annual Fiduciary Law Institute will be held at The King & Prince Beach & Golf Resort on St. Simons Island on July 17-19, 2003 (Thursday, Friday, and Saturday).

Legislation

The following were among the bills amending the Georgia Trust Act that were passed by the General Assembly during the 2002 session and signed by the governor.

House Bill 1135 AN ACT

To amend Article 13 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trust investments, so as to provide for the delegation of certain fiduciary functions; 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.

Article 13 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trust investments, is amended by inserting at the end thereof a new Code Section 53-12-290 to read as follows:

“53-12-290.

(a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation consistent with the purposes and terms of the trust; and

(3) Reviewing periodically the agent’s actions in order to monitor the agent’s performance and compliance with the terms of the delegation.

(b) In performing a delegation function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with the requirements of subsection (a) of this Code section is not liable to the beneficiaries of the

trust or to the trust for the decisions or actions of the agent to whom the function was delegated.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the laws of this state, an agent submits to the jurisdiction of this state.”

SECTION 2.

This Act shall become effective on July 1, 2002.

SECTION 3.

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

Senate Bill 517 AN ACT

To amend Article 12 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to the powers of trustees, so as to impose certain restrictions on the extent to which a trustee who is also a beneficiary of a trust may exercise discretionary powers of distribution over income or principal for his or her own benefit; to provide for the application to amendable trusts or trusts executed after enactment unless the terms of the trust expressly provide otherwise and to trusts executed before enactment unless all interested parties elect otherwise within three years; to provide for the appointment of an independent trustee to exercise any otherwise proscribed powers; to provide for definitions; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 12 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to the powers of trustees, is amended by adding a new Code section immediately following Code Section 53-12-264, to be designated Code Section 53-12-265, to read as follows:

“53-12-265.

(a) Due to the inherent conflict of interest that exists between a trustee who is a beneficiary and other beneficiaries of the trust, unless the terms of a trust refer specifically to this Code section and provide expressly to the contrary, a trustee shall not exercise any of the following powers conferred upon such trustee in his or her capacity as trustee (provided that these restrictions shall not apply to a trustee who is the settlor of a trust that is revocable or amendable by such settlor at the time the power is exercised or to a decedent's or settlor's spouse who is the trustee of a testamentary or an inter vivos trust designed to qualify for the federal estate or gift tax marital deduction under the Internal Revenue Code or any subsequent statute of similar import):

(1) The power to make discretionary distributions of either principal or income to or for the benefit of such trustee, except to provide for such trustee's health, education, maintenance, or support as described under Sections 2041 and 2514 of the Internal Revenue Code or any subsequent statute of similar import;

(2) The power to make discretionary allocations of receipts or expenses as between principal and income, unless such trustee acts in a fiduciary capacity whereby such trustee has no power to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of such trustee's fiduciary duties;

(3) The power to make discretionary distributions of either principal or income to satisfy any legal support obligation of such trustee; or

(4) Any other power, including the right to remove or to replace any trustee, so as to cause any of the powers enumerated in paragraphs (1), (2), or (3) of this subsection to be exercised on behalf of, or for the benefit of, such trustee.

Any of the foregoing proscribed powers that is conferred upon two or more trustees may be exercised by the trustee or trustees other than the restricted trustee, as defined in subsection (d) of this Code section. If there is no trustee who is not a restricted trustee, any party in interest, as defined in subsection (c) of this Code section, may apply to a court of competent jurisdiction to

appoint a cotrustee who is an independent trustee, as defined in subsection (d) of this Code section, with respect to the restricted trustee, for the purpose of exercising such power, and such power may be exercised by the independent trustee appointed by the court.

(b) This Code section applies to:

(1) Any trust created under a governing instrument (will or trust) executed after June 30, 2002;

(2) Any trust created under a governing instrument (will or trust) executed before July 1, 2002, unless:

(A) At any time while the terms of the trust are revocable or amendable, the trust is revoked or amended to refer specifically to this Code section and expressly provide otherwise; or

(B) After the trust becomes irrevocable and unamendable, all parties in interest, as defined in subsection (c) of this Code section, elect affirmatively, by written declaration executed in the manner prescribed for the recordation of deeds in this state and delivered to the trustee, not to be subject to the application of this Code section. Such election must be made on or before the later of July 1, 2005, or the date that is three years after the date on which the trust becomes irrevocable and unamendable. Prior to the effectiveness of any timely election by the parties in interest of a trust not to be subject to the provisions of this Code section, the provisions of this Code section, to the extent otherwise applicable, shall apply to such trust.

However, the provisions of this Code section neither create a new cause of action nor impair any existing cause of action which, in either case, relates to any power proscribed by this Code section that was exercised before July 1, 2002.

(c) For the purposes of subsection (a) or (b) of this Code section:

(1) If the trust is revocable or amendable, the parties in interest are the person or persons holding the power of revocation or amendment; or

(2) If the trust is not revocable or amendable, the parties in interest are all of the following:

(A) Each trustee then serving;

(B) Each income beneficiary, as defined in subsection (d) of this Code section, then in

existence or, if any such income beneficiary has not attained majority or is otherwise incapacitated, the person or persons, if any, empowered under applicable law to act on behalf of such income beneficiary; and

(C) Each remainder beneficiary, as defined in subsection (d) of this Code section, then in existence or, if any such remainder beneficiary has not attained majority or is otherwise incapacitated, the person or persons, if any, empowered under applicable law to act on behalf of such remainder beneficiary.

(d) As used in this Code section, the term:

(1) 'Income beneficiary' means any person to whom distribution of income is to any extent required or permitted at the time the provision using such term is applied.

(2) 'Independent trustee' means, with respect to any restricted trustee, any person who would not be a related or subordinate party as to such restricted trustee, within the meaning of Section 672 of the Internal Revenue Code or any subsequent statute of similar import, determined as if such restricted trustee were the grantor of a trust.

(3) 'Remainder beneficiary' means any person to whom any portion of a trust would be distributable if the trust were to terminate at the time the provision using such term is applied.

(4) 'Restricted trustee' means any trustee whose exercise of any power is proscribed by this Code section."

SECTION 2.

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

Those interested in tracking new legislation are encouraged to access the Georgia General Assembly's official website at www.legis.state.ga.us (click on Legislation) for the full text and up-to-date status of all bills.

Guardianship Code Revision

The Guardianship Code Revision Committee has completed its draft of a revised Title 29 of the Official Code of Georgia Annotated. See the Chairman's Report in this newsletter for a full report.

Flexible Income Trust

The Fiduciary Law Section created a committee chaired by Donna Barwick, of The Arden Group, Inc., Atlanta, to study whether Georgia should adopt one of the legislative approaches to total return or flexible income trusts that other states have been adopting. The Committee has completed a report and has drafted a bill. These materials are available on the Section website at www.gabar.org/fiduciary.asp. If you have any questions or comments, please contact Donna Barwick at (404) 231-2340.

Military Will Project

Ben Pruett, an attorney with King & Spalding, was presented with a letter of commendation and a medallion from Brig. Gen. William Kane, Commander of the 94th Airlift Wing based at Dobbins Air Reserve Base in Marietta, for his work in founding the Military Will Project last September. Ben and the other attorneys participating in this project prepared wills and advance directives for many of the U.S. Air Force reservists activated in the wake of the September 11, 2001 attacks. The award was presented on General Kane's behalf by Maj. Timothy Ritzka (USAFR) in a ceremony at King & Spalding. David Friedman, an attorney at Lawler, Tanner & Zitron, also received a similar award from General Kane for his work in helping to coordinate the project.

National Health Care Decisions Week

Funded by the Health Resources and Services Administration of the U.S. Department of Health and Human Services, National Health Care Decisions Week was initiated by the American Bar Association Section of Real Property, Probate and Trust Law, and is co-sponsored by the American Medical Association. It is designed to raise public awareness of the need to plan for health care decisions at the end of life through the use of advance directives.

Currently, only a small percentage of the adult population makes known their wishes about end-of-life health care decisions, and few potential organ and tissue donors ever inform anyone of their desire to donate. One of the principal goals of National Health Care Decisions Week is to increase the low percentages of Americans who have engaged in advance health care planning.

For more information, go to the website for National Health Care Decisions Week at www.abanet.org.

Newsletter

The Fiduciary Law Section Newsletter welcomes the submission of publication notices, press releases, and other announcements that would be of interest to the members of the Section.

Please send all material to Nikola R. Djuric, Editor, by fax to (404) 853-8486 or by e-mail to nrdjuric@sablaw.com.

Current news items will be posted to the Section website in advance of publication in the newsletter.

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