Georgia Probate Notes

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Publisher's Message

Once again, *Georgia Probate Notes* has collaborated with the Fiduciary Law Section of the State Bar to produce a joint issue. We feel that we benefit both judges and fiduciary practitioners when each group has this access to the writings of the other.

In this issue, the editors of *Georgia Probate Notes* have concentrated primarily on probate court-related matters and issues while the Fiduciary Section's editors have concentrated on practitioner issues. Our hope is that this parallel focus will lead to stronger understanding and co-operation between bench and bar, which will in turn benefit the citizens of Georgia.

The editors of *Georgia Probate Notes* particularly want to congratulate the Fiduciary Law Section on winning the Georgia Bar's Section of the Year award. It is a tribute to the hard work and dedication of the Fiduciary Section's members and leaders. All probate court judges should take note and all members across the state should take pride in this accomplishment.

Marion Guess, Publisher

GEORGIA PROBATE NOTES
MARION GUESS, PUBLISHER AND EDITOR

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Default Judgment in Probate Court

In Estate of Ehlers, 2007 GACA A07A1632-121407, decided December 14, 2007, the Georgia Court of Appeals held that the Civil Practice Act (CPA) provisions found at O.C.G.A. §9-11-55(a), dealing with opening a default judgment as a matter of right within fifteen days of default, are applicable in the probate court.

Without addressing any of the many issues raised by the very complicated facts of this case, the Court reversed the probate court and allowed a petition for an amended year's support to be re-opened as a matter of right pursuant to the CPA. The executor had failed to file a timely objection after being properly served and the probate court had entered an order granting the petition. The Court of Appeals held that the executor had complied with O.C.G.A. §9-11-55(a) by paying court costs and filing defenses objecting to the amended year's support within fifteen days of the default. In reaching its conclusion, the Court quoted Greene v. Woodard, 198 Ga. App. 427 (1991):

> "CPA [provisions] apply in probate court proceedings, unless there are special rules of practice or procedure which are conflicting and which have been expressly prescribed by law." Greene, 198 Ga. App. at 428; O.C.G.A. §§9-11-81; 15-9-122. As Greene held in 1991, nothing in Rule 13 of the Uniform Probate Court Rules relating to default judgments conflicts with O.C.G.A. §9-11-55(a). Similarly, we find nothing in the 1992 enactment of O.C.G.A. §15-9-47 relating to default judgments in probate court that conflicts with the provisions of O.C.G.A. §9-11-55(a) providing for the opening of default as a matter of right within 15 days of the default.

The Greene case caused quite a stir in the probate courts in 1991. Two separate issues of *Georgia Probate Notes* devoted several pages to the problems raised by the case. Volume VIII Number 7 (March 1991) of *Georgia Probate Notes* included a memo from Judge Floyd Propst to the Fulton County Probate Court Clerks saying that uncontested orders would not be signed on the first Monday in each term, or when they became eligible for signing, as had been the case previously. They would be signed 15 days after the citation date to comply with the Greene case.

In 1992, when O.C.G.A. §15-9-47 was enacted, it was assumed that the problem no longer existed. The statute gave discretion to the probate judge to allow opening of default for "providential cause preventing the filing of required pleadings or for excusable neglect, or where the judge, from all the facts, shall determine that a proper case has been made for

the default to open." In *Georgia Probate Notes* Vol. IX Number 5 January 1992, the editors interviewed the author of H.B. 1238, which became O.C.G.A. §15-9-47, who opined that the imposition of the default provisions of the CPA caused an unnecessary burden on the probate court and its litigants and that the bill would eliminate the default provisions required by the Greene case.

Now, in light of the Ehlers case, courts and attorneys again have to be concerned with the finality of uncontested year's support orders and perhaps other uncontested orders in the probate court.

The 1991 Fulton County solution to the problem was published in *Georgia Probate Notes*, Volume VIII No 7 (March 1991):

Learning from the Past: Reacting to *Greene* in 1991

[In March of 1991, Judge Floyd Propst sent the following memo regarding new default judgment procedures to the Fulton County Probate Clerks.]

MEMORANDUM

A recent case of the Court of Appeals of Georgia (Greene, et al. v. Woodard, Case No. A90A2116, decided January 31, 1991), has held that the default judgment provisions of the Civil Practice Act are applicable to year's support proceedings in the probate courts. A case is "in default" if an answer or response is not filed within the time period allowed by law. The default may be opened as a matter of right by filing an answer or response within 15 days of the day of default, upon the payment of costs. Furthermore, I cannot distinguish the other types of probate court proceedings from year's support proceedings. Therefore, effective April 1, 1991, Uniform Probate Court Rule 13 (Default Judgments) will apply to all cases as explained below.

Rule 13 reads as follows:

> The party seeking entry of a default judgment in any action shall certify to the court the date and type of service effected as shown by court records and that there has been no defensive pleading from the party against whom the judgment is sought. This certificate shall be in writing and must be attached to the proposed default judgment when presented to the judge for signature.

Obviously, the default judgment procedure does not apply where all parties have consented that the petition be granted. It also does not apply where there is an objection. It does apply where notice has been given as required by law and no responsive pleadings have been filed. In such a case, instead of having the order signed immediately after the deadline stated in the citation, the court must wait 15 more days, and if no responsive pleadings are filed, then a certificate must be filed in accordance with Rule 13 quoted above.

A form certificate is attached. *[Editor's note: See page 5.]* It should be completed and filed by the attorney for the petitioner, if any, on the 16th day after the citation date or later. If there is no attorney for petitioner, a clerk should complete the certificate to be reviewed, signed and filed by the petitioner on the 16th day or later....

[Judge Propst also prepared this notice to be given to all petitioners, unless all interested parties consented that the petition be granted.]

Notice of Additional 15-day Waiting Period Before Petition Can be Granted
Where no Response is Filed

On January 31, 1991, the Georgia Court of Appeals decided the case of Greene, et al. v. Woodard, case number A90A2116. In this case, the court found that the rules regarding default judgments contained in the Civil Practice Act apply to proceedings in the probate court. Specifically, the court found that when no objections are filed by the deadline stated in the citation, the parties at interest are entitled to open their default as a matter of right under O.C.G.A. §9-11-55(a) within 15 days after the default.

In everyday practice this will mean that orders on uncontested petitions will not be signed on the first Monday of the term, or other date stated in the citation, as they have in the past. These orders will be signed on the 16th day after the default or later, whenever the certificate of default, as required by Rule 13 of the Uniform Probate Court Rules, has been filed. A sample certificate is attached.

This ruling is presently in effect and will be applied to uncontested matters set for signature on April 1, 1991 or later.

The default judgment procedure will apply to applications for: letters of dismission of all types, solemn form probate, order declaring no administration necessary, petition for leave to sell at private sale, administration, minor guardianship, etc. It does not apply where all parties have consented that the petition be granted. It also does not apply where there is an objection.

In cases of necessity, interim relief which does not involve notice to interested parties may be available, such as temporary administration or common form probate.

[The certificate which follows was attached to the notice.]

PROBATE COURT OF _____ COUNTY

STATE OF GEORGIA

IN THE MATTER OF:	)	ESTATE NO. _____
	)	
_____	)	RE (TYPE OF PETITION): _____
_____	)	_____
_____	)	_____

CERTIFICATE

I hereby certify that according to court records all interested parties have been served in the above-referenced matter, as required by law. Such parties were served as follows:

NAME OF PARTY	TYPE OF SERVICE	DATE OF SERVICE
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

I further certify that no objection or other defensive pleading has been filed by any interested party in this matter.

This _____ day of _____, _____.

_____
(Signature)

_____
(Printed Name)

Georgia Council of Probate Court Judges Holds Annual Awards Banquet

On April 16, 2008 the Georgia Probate Courts held their annual awards banquet at the State Botanical Gardens in Athens. The banquet is held in conjunction with the Spring Educational Seminar.

New President Judge Lillis Brown addresses group.

Judge Walter J. Clark, outgoing President of The Georgia Council of Probate Judges accepts thanks.

Emory Schwall, Esq., keynote speaker.

Attorney Probate Judges

The following is a list of the 22 attorney probate court judges in Georgia compiled by the Administrative Office of the Courts. Judges in the 15 counties with a population of over 94,000 in the 2000 census have expanded jurisdiction. Judges in these counties have jurisdiction over certain aspects of trusts and construction of wills and the authority to hold jury trials. Instead of *de novo* Superior Court review, there is direct appeal to the appellate courts.

Judge Jimmy Brazier of Stewart County
Judge Quillian Bryant of Jefferson County
Judge Walter Clarke of Gwinnett County, Expanded Jurisdiction
Judge Patti Cornett of Hall County, Expanded Jurisdiction
Judge David Dodd of Cobb County, Expanded Jurisdiction
Judge Pamela Ferguson of Clayton County, Expanded Jurisdiction
Judge Martha Hartley of Harris County
Judge Patrice Howard of Putnam County
Judge Eddie Hulsey of Haralson County
Judge Isaac Jolles Richmond County, Expanded Jurisdiction
Judge Lynwood Jordan of Forsyth County, Expanded Jurisdiction
Judge Harris Lewis of Chatham County, Expanded Jurisdiction
Judge Preston Lewis, III of Burke County
Judge Julia Lumpkin of Muscogee County, Expanded Jurisdiction
Judge Kipling McVay of Cherokee County, Expanded Jurisdiction
Judge Kelley Powell of Henry County, Expanded Jurisdiction
Judge Jeryl Rosh of DeKalb County, Expanded Jurisdiction
Judge William Self, II of Bibb County, Expanded Jurisdiction
Judge Martha Stephenson of Fayette County
Judge Nancy Stephenson of Dougherty County, Expanded Jurisdiction
Judge Susan Tate of Clarke County, Expanded Jurisdiction
Judge Pinkie Toomer of Fulton County, Expanded Jurisdiction

Uncommon Issues Resolved in Adult Guardianship Proceeding

The order on the following page was entered in the Probate Court of Bibb County by Judge William Self. *Georgia Probate Notes* is grateful for Judge Self's continued support and contributions to this publication.

IN THE PROBATE COURT OF BIBB COUNTY

STATE OF GEORGIA

IN RE:	:	
CB,	:	DOCKET NO. 06PV34518
Proposed Ward	:	

ORDER ON MOTION FOR COURT REPORTER
AND MOTION FOR SECOND EVALUATION

CB, proposed ward, through her attorney, filed a Motion for Court Reporter and Motion for Second Evaluation. The said Motion was heard by the Court on March 30, 2006.

Movant has failed to show a statutory or other civil right to the services of an official court reporter to report the trial of this adult guardianship proceeding. Although she pleads her indigence in seeking the services of an official court reporter for the trial, she has shown no entitlement by law to such services at the expense of the county. Pursuant to O.C.G.A. §§29-4-12(d)(2) and 29-5-12(d)(2), the Court will record the hearing by use of a sound recording device, which recording shall be maintained for not less than 45 days after the date of the entry of any order issued by the Court, thereby preserving her right to review of the record on appeal.

Movant also seeks a second evaluation by an independent physician or psychologist. It being shown to the Court that the proposed ward has been evaluated and perhaps treated by the evaluating physician at Central State Hospital in the past, the Court finds that an independent evaluation should be ordered in this case.

WHEREUPON, IT IS ORDERED that the Motion for Court Reporting Services be, and the same is hereby, DENIED by the Court, and that the Motion for Second Evaluation be, and the same is hereby, GRANTED by the Court. The Clerk shall schedule an evaluation of the proposed ward by R. Alan Williams, Ph.D., and an Order for Second Evaluation shall be issued.

SO ORDERED on _____.

_____
WILLIAM J. SELF, II, JUDGE
PROBATE COURT OF BIBB COUNTY

STATE BAR OF GEORGIA
FIDUCIARY LAW SECTION

A Message from the Chair of the Fiduciary Law Section

Adam Gaslowitz
Gaslowitz Frankel LLC

The Fiduciary Law Section of the Georgia Bar is pleased to once again co-sponsor this issue of *Georgia Probate Notes*. We hope you find the articles related to Georgia's Probate Courts and those authored by some of our section members to be both interesting and helpful in your practice. We also want to share with Section members and the Georgia probate judges the activities, projects, seminars and concerns of the Fiduciary Law Section. We continue to believe that by working together and sharing information, we can all better serve both the profession and the public.

Before I recap some of the past year's activities, I wanted to let everyone know that the Fiduciary Law Section has been named 2007-2008 Section of the Year by the Georgia Bar! We all know this section as the hardest working, most active and collegial bar section. However, once in awhile it's nice to see that hard work formally recognized by our colleagues. I think we owe this recognition to all the dedicated and sustained hard work of countless section members without whom the great work we do would be nothing more than aspirational. Congratulations to all of you!

As my term as Chair of the section draws to a close, I wanted to mention some of the highlights. It has been a busy year for the Section, particularly in the legislative arena:

- The Section's rewrite of the Uniform Management of Institutional Funds Act was completed in the fall, approved by the Executive Committee of the Section, and adopted by the Board of Governors of the State Bar of Georgia. The legislation was introduced as HB 972 by Rep. Steve Tumlin. Nick Djuric and Marshall Sanders presented the bill to the House Judiciary Committee and Senate Banking Committee, and HB 972 was passed in the House by a 161-1 vote on February 22 and by the Senate by a 42-0 vote on April 2. The governor is expected to sign the bill into law, and UPMIFA should become effective on July 1, 2008.

- The five year effort to rewrite the Georgia Trust Code is finally coming to a conclusion. A proposed redraft of the code was circulated to the entire Section last summer (as well as other sections of the bar, such as the tax section and the elder law section) for comment and proposed revisions. Since that time, open forums have been

held around the state to solicit comments and address questions and concerns about the draft. The revision committee then met regularly to address all the issues that were raised to finalize the proposed Code. A final draft should be completed shortly. We plan to hold one more forum during the Fiduciary Law Institute in July after which the proposed code will be submitted to the Georgia Bar Board of Governors in the fall and ultimately to the next session of the Georgia legislature for approval.

- In addition to these legislative efforts, the section has formed investigative/study committees to:

  - consider adoption of some version of the Uniform Power of Attorney Act;

  - consider adoption of the Uniform Estate Tax Apportionment Act;

  - consider proposals for the reform of Georgia's Rule Against Perpetuities;

  - research the growing trend across the country to adopt laws which address the protection of vulnerable adults by providing for mandatory notification of "DFACS" type agencies whenever a lawyer is approached to engage in estate planning for adults whose competence is questionable;

  - investigate the viability and advisability of switching from a "years support" state to one which provides for some sort of "forced spousal share" similar to the other 49 states; and

  - investigate the pros and cons of recent efforts by other non-community property states to adopt some of the benefits of community property state laws and analyze the laws of other states that have made the decision to make such a transition.

    *If you have always wanted to get involved in the sausage-making process that is legislation in Georgia, these last three committees are still in the formation stages. Anyone interested in getting involved should e-mail me as soon as possible.

During the year, section members have also: worked with Probate Court Judge Susan Tate (Clarke County) who has been instrumental in spearheading the Statutory Review workgroup of the Chief Justice Led Task Force to Promote Criminal Justice/Mental Health Collaboration; worked with Probate Court Judge Pam Ferguson in revising the Probate Court Standard Forms; and generally worked closely with the Council of Probate Court Judges to address issues of specific concern to the efficient operation of the probate court system in Georgia.

Planning for the 2008 Fiduciary Law Institute at the King and Prince in July has been completed under the leadership of Chair-Elect Mark Williamson and it looks to be an exciting and varied program with fabulous speakers. I look forward to seeing many of you at St. Simons this summer. As always, we hope our colleagues in the Probate Courts will attend this and the section's other annual conferences as their schedules permit.

It has been an honor and a privilege to serve as your Chairman this past year. If you have any suggestions on how we can better serve your needs, or if you would like to become more involved in section activities, please feel free to contact me or the other section officers.

Who Protects a Decedent's Wishes Regarding Disposition of Remains?

Mollie M. Smith
Hatcher, Stubbs, Land, Hollis & Rothschild, LLP

Courts of law have historically been hesitant to intrude into private affairs concerning the disposition of a decedent's remains. As Justice Lumpkin stated in 1905, "A corpse in some respects is the strangest thing on earth. ….[T]he law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron." Louisville & N.R. Co. v. Wilson, 51 S.E. 24 (Ga. 1905). Despite these concerns, there being no ecclesiastical courts in the United States to address matters concerning decedents' remains, courts have been forced to furnish rules when problems arose.

Though both the courts and General Assembly have provided rules and guidance regarding the disposition of decedent's remains, how they work together in the event of conflict is still unclear. As technological advances provide a multitude of new choices for handling a decedent's body and as the number of blended families increases, the potential for conflict among family members is heightened. Who decides when such conflict arises?

At common law, no property right was held to exist in a dead body; a dead body was not property to be owned but rather property to be taken care of. Today, the rule in Georgia is that the duty to show respect for the dead gives the surviving spouse or, if none, the next of kin a personal, "quasi-property" right, protected by the courts, to ensure a corpse's proper handling. Pollard v. Phelps, 193 S.E. 102, 106 (Ga. Ct. App. 1937); Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985). Thus, a decedent's surviving spouse, children, parents, and siblings, in that order, have priority to determine the time, manner and place of burial for their family members. Pollard, 193 S.E. at 106; Habersham Memorial Park, Inc. v. Moore, 297 S.E.2d 315, 318 (Ga. Ct. App. 1982).

The existence of this right given to the next of kin does not settle matters, however. It may be trumped if an individual takes certain action during his or her lifetime. First, the quasi-property right will not arise where a testamentary disposition is provided. Pollard, 193 S.E. at 106. Where a decedent's will includes a statement regarding the disposition of his or her body at death, the executor has the duty to ensure that it be followed. Thus, to the extent a will includes preferences regarding disposition of a decedent's body, the executor's or administrator CTA's priority is ahead of the family's. See Northside Hospital, Inc. v. Ruotanen, 541 S.E.2d 66, 68 (Ga. Ct. App. 2000). However, using the will for giving

instructions poses two problems: first, an individual's will might not be found or reviewed until after his or her burial, and second, the executor's power terminates after final disposition of the body. Thereafter, the next of kin has the right to control the remains. Welch v. Welch, 505 S.E.2d 470, 472 (Ga. 1998).

The temporary nature of the executor's power allows for strange results. For example, the Supreme Court of Georgia has held "if an executor has any duty or authority relating to burial or disposition of a body, that duty or authority terminates after initially discharging any such obligation in accordance with the testamentary direction. *Thereafter, disinterment and reburial may be sought by the surviving spouse, or by the next of kin in the absence of a surviving spouse, under the provisions of O.C.G.A. §31-10-20(f).*" Id. (emphasis added) (disallowing a second disinterment and reburial). Thus, while the executor's power intervenes to prevent the next of kin's rights from vesting, it does so only temporarily. Although the burden is high for disinterment and reburial, requiring a determination of necessity or "laudable purposes", the very possibility of a decedent's stated preferences being avoided seems less than desirable.

The right of the next of kin may also be trumped if an individual designates an agent to have power over the disposition of his or her body at death. To the extent an instrument empowers an agent to direct the final disposition of the declarant's body, the decisions of the agent shall be deemed to be the decisions of the declarant. O.C.G.A. §§ 31-32-5(b), 31-32-8(4). Thus, if a health care power of attorney, advance directive for health care, or similar document designates an agent for decision-making about the disposition of the declarant's remains after death, that agent should have the power to make all decisions on such matters—whether he or she is buried or cremated, all funeral or memorial arrangements, how the headstone reads, what happens with the remains after cremation, etc. If an agent stands in the shoes of the declarant, the agent's power should trump the decision-making power of the next of kin as well as an executor or administrator CTA. However, it is suggested by the statement of facts in an intentional infliction of emotional distress case that the rights of an executor supersede the rights of agent. Northside Hospital, 541 S.E.2d at 68. These issues have not been specifically addressed by courts or statute to provide any level of certainty.

The lack of certainty about how the judicial opinions and legislative statutes work together when family members and fiduciaries cannot agree makes it difficult for planners working to ensure client's wishes are followed. Since no single approach is above challenge, if clients have strong opinions about these issues, it is essential that they execute documents that consistently and expressly state their instructions. Planners must then ensure that copies of such documents are distributed to and understood by family members, agents and fiduciaries, so that they are followed.

Allowance of Claims against Estate Planning Attorneys by Intended Beneficiaries of the Estate

Letitia McDonald
King and Spalding LLP
Jennifer Odom
Powell Goldstein LLP

Last year, the Georgia Court of Appeals held that an intended beneficiary of a will has standing to bring a malpractice claim against the attorney who drafted the will when the attorney accidentally excluded the beneficiary from an intended bequest.

In Young v. Williams, 285 Ga. App. 208 (2007), the attorney who drafted a will for his client, James Williams, failed to include language requested by Mr. Williams that the marital residence be left to his surviving spouse, Betsy Williams. After the death of Mr. Williams and subsequent admission of his will to probate, Mrs. Williams sued the drafting attorney for malpractice in Lumpkin County Superior Court. Remarkably, in his deposition, the drafting attorney admitted that he had made a mistake that violated his standard of care. He also admitted that he owed the intended beneficiaries a duty similar to the duty he owed the testator in ensuring that the testator's wishes are carried out. Yet, likely at the insistence of the attorney's insurance carrier, he argued that as a beneficiary and non-client, Mrs. Williams did not have standing to sue him.

Presumably the attorney based his argument on that fact that historically, liability against an attorney was predicated on privity between an attorney and client; third parties could not bring an action against the attorney. In the Young case, the Lumpkin County Superior Court entered summary judgment in favor of Mrs. Williams -- impliedly rejecting the privity argument that Mrs. Williams lacked standing to bring the suit against her husband's estate planning attorney since she had no attorney-client relationship with the attorney. A panel of the Court of Appeals affirmed. The Court of Appeals found that a contract with a lawyer to draft a will was, like any other contract under Georgia law, subject to the rights of third-party beneficiaries. Generally, in order for a third party to have standing to enforce an agreement, it must clearly appear from the agreement that it was intended for his benefit. It is still an open question after Young as to whether strict proof of the third party beneficiary status is required -- after all, the attorney admitted all the material facts required to establish Mrs. Williams' status as a third-party beneficiary of the agreement between her husband and the attorney.

The Georgia courts are starting to fall in line behind the majority rule with the decision in Young; most state courts no longer consider lack of privity a bar to a party who has suffered the effects of an attorney's malpractice. Unfortunately for the Georgia estate planning bar, Young might encourage the development of a market for legal malpractice claims against estate planners, although a fair defense to Young is that its holding should be limited to the "bad facts" contained in that opinion. The Young opinion does not give much

guidance on what conduct by an estate planner constitutes malpractice affecting third parties -- in fact, the standard of liability is not defined at all in the case and the privity concept is not addressed. Yet given the general erosion of the privity rule in malpractice actions against estate planning attorneys, coupled with the Young decision, Georgia estate planning lawyers should be careful to ensure that their clients' wishes are precisely fulfilled.

Survival of the Lucid Interval Doctrine After *Mosely v. Warnock*

LeAnne M. Gilbert
Gaslowitz Frankel LLC

Is evidence of a lucid interval at the time a will is signed enough to overcome evidence of a testator's general incapacity before and after the will is executed? Beginning in at least 1942, the Supreme Court of Georgia said it was.[1] In the recent case of Mosley v. Warnock[2], however, the Supreme Court arrived at a different result; but whether the cause of this result is a desire to reverse the "lucid interval" doctrine or is simply a matter of a standard of review creating an anomalous result remains to be seen.

In Mosley, the sisters of testator Mildred Hilton offered her 2004 Last Will and Testament for probate. Hilton's granddaughter, Jamie Mosley, filed a caveat to the will challenging Hilton's testamentary capacity.[3]

In support of her claim, Mosley brought forth evidence that Hilton was 95 years old at the time the will was executed and was slowing both mentally and physically. During the spring of the year the will was executed, Hilton sometimes appeared dizzy or confused and she slept more often. On two occasions, Hilton became confused as to the identity of people close to her, referring to her granddaughter's husband as her own deceased son and claiming that her deceased husband was working in the yard. Finally, Mosley introduced the testimony of a physician who, after listening to the testimony and reviewing Hilton's medical records, opined that Hilton "would have suffered from some degree of dementia" on the date the will was executed.[4]

Conversely, the propounders offered the testimony of Hilton's drafting attorney who stated that he believed that Hilton was mentally competent both prior to and on the day that the will was executed.[5] Specifically, the attorney stated that when Hilton first came to his office to discuss her will, she brought with her both her prior will and a list of property to be included in the estate, which list described the manner in which she wished to dispose of her

1 See Scott v. Gibson, 194 Ga. 503 (1942).
2 ____ S.E.2d ____, 2007 WL 2914643 (Supreme Court of Georgia October 9, 2007).
3 Id. at endnote 1.
4 Id.
5 Id. at *2.

property and provided information regarding the location of certain items of personal property. The attorney further testified that he and Hilton had a lengthy discussion regarding the details of a trust that Hilton wished to establish for the benefit of her disabled grandson. On the date that the will was executed, the attorney testified that Hilton was frail but able to identify her property and her family, and that she was capable of expressing a rational scheme for the disposition of her estate.[6]

The jury found that Hilton lacked the requisite testamentary capacity. The trial court thereafter granted propounders' motion for judgment notwithstanding the verdict and conditionally granted propounders' motion for a new trial in the event that the JNOV was overturned.[7]

The general rule in Georgia and most other states is that even an insane person may make a will during a "lucid interval."[8] "The weak have the same rights as the strong-minded to dispose of their property by will, and anything less than a total absence of mind does not destroy that capacity. If the testator has sufficient intellect to enable him to have a rational desire as to the disposition of his property, this is sufficient. And the condition of the testator's mind at the time of the execution of the will determines whether he can make a valid will."[9] Generally speaking, evidence of a testator's mental capacity before and after a will is executed may be introduced, but such evidence will not controvert the "positive testimony of the subscribing witnesses unless it would also be proof of testamentary incapacity *at the time the will was signed*."[10]

Despite this precedent, the Supreme Court in Mosley overturned the trial court's order granting JNOV, citing the appellate standard of review for such motions. On review, the question is whether the evidence "demanded" a verdict contrary to that returned by the jury.[11] If there is any evidence to support the jury's verdict, it is error to grant a motion for JNOV. The Supreme Court ruled that because the expert testimony, along with the evidence of lay witnesses, offered some evidence in support of the jury's verdict, it was error to grant the motion for judgment notwithstanding the verdict.

On the issue of the motion for new trial, however, the Court reached a different result. On such motions, "where the evidence is conflicting and the jury would have been authorized to issue a verdict for the movants, a first grant of a new trial will not be reversed." In this case, the Court found that the record contained sufficient evidence for a jury to find that Hilton did, on the day the will was executed, possess the requisite testamentary capacity, and upheld the trial court's grant of new trial, thereby also sustaining

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6 Id.
7 Id. at *1.
8 O.C.G.A. § 53-4-11.
9 Griffin v. Barrett, 183 Ga. 152, 164 (1936).
10 Fehn v. Shaw, 199 Ga. 747, 754 (1945); Anderson v. Anderson, 210 Ga. 464, 472 (1954) (emphasis added).
11 Blockum v. Fieldale Farms Corp., 271 Ga. App. 591, 594 (2005).

the notion of a lucid interval in cases where a will has been executed by a person of otherwise questionable capacity.

Although, at first blush, Mosley appears to be in conflict with Scott v. Gibson[12] and its progeny, the ruling is more indicative of the standard of review applicable to motions for judgment notwithstanding the verdict and motions for new trial than with the ultimate survival of the doctrine of lucid interval. It is the role of the factfinder to determine issues of fact and weigh the evidence in any given case. Accordingly, a motion for judgment notwithstanding the jury's verdict cannot be granted unless the evidence "demanded" a verdict contrary to that returned by the factfinder, i.e., in any case where the evidence is in conflict.[13] Conversely, a grant of motion for new trial, at least in the first instance, will only be reversed if the evidence absolutely demanded the verdict issued by the factfinder.[14] Thus, the fact that the Supreme Court reversed the grant of JNOV in Mosley, where there was at least some evidence of the testator's lack of capacity on the date the will was executed (based in part on the physician's testimony that Hilton would have been suffering from "some degree" of dementia on the date in question) is not the reversal of the lucid interval doctrine that it appears to be. The testimony presented by Hilton's drafting attorney and the caveators' expert witness is in conflict with regard to the testator's capacity to execute the will on the date in question. This conclusion is supported by the fact that the Supreme Court upheld the trial court's grant of new trial, as is acceptable in cases where the evidence is conflicting. Thus, the doctrine of lucid intervals survives, for the time being, but its application continues to rest largely in the judgment of the trial court.

Practice Note (by Francis M. Bird, Jr.): Those of us who confer with and counsel a client, and who are personally present for, and supervise, the execution of his or her will (which we have prepared at their direction), cannot advise with absolute confidence that a petition to probate the will shall be granted on our testimony (and that of the subscribing witnesses) that a client, to all appearances, possessed testamentary capacity at the moment of signing his or her will where there is a caveat, and evidence is received that on other occasions near in time to the time of execution, he or she had been showing signs of dementia or other indications of mental failure. In the recent case of Mosley v. Warnock, a solid presentation of facts plus an expert opinion was sufficient to survive judgment n.o.v. on appeal.

Editor's Note: Ms. Gilbert's article will also appear in a forthcoming issue of the *MortMain*, published by the Estate Planning and Probate Section of the Atlanta Bar Association.

12 194 Ga. 503 (1942).
13 Blockum, 271 Ga. App. at 594.
14 State v. Lamb, 651 S.E.2d 504, 505 (Ga. Ct. App. 2007).

"Health, Education, Maintenance and Support" Georgia's Interpretation of the Section 2041 Ascertainable Standard

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A trust limited by the Section 2041 ascertainable standard is central to most planners' estate tax reduction repertoire. Such a trust can give a beneficiary access to trust property while preventing its inclusion in her estate. If the beneficiary is also a trustee, a lax standard may be deemed a general power of appointment, causing inclusion of the trust property in the beneficiary's estate. 26 U.S.C. §2041. The power to invade principal is not a general power of appointment if limited by an ascertainable standard relating to the health, education, maintenance or support ("HEMS") of the decedent. *Id*. The standard is common in marital trusts as well, where avoiding inclusion is not the goal.

Ubiquitous though this standard may be, little Georgia case law examines its parameters.

In Griffith v. First Nat'l Bank & Trust Co., 249 Ga. 143 (1982) the court contemplated whether distributions for the beneficiary's health care needs ought to have been made from a trust permitting encroachment for "support in reasonable comfort" versus a trust that permitted encroachment for the same and also "for the maintenance of the health [of the beneficiary]". The court held the Trustee could allocate to either trust at its discretion, because the reasonable comfort of the beneficiary "certainly" included her health.

Warner v. Trust Co. Bank, 250 Ga. 204 (1982) was initially brought as a declaratory judgment action for the construction of a testamentary trust. The court considered the intention of the testatrix when interpreting the following language: "to provide comfortably for [beneficiary's] wants according to the style of living which we have enjoyed…my Trustees [is authorized to encroach] as may be necessary." Both the superior court and the Georgia Supreme Court read the "necessary" as limiting the "wants" and concluded that distributions were permissible only for purposes of health, support and maintenance. In a TAM issued nine months later, the I.R.S. disagreed, and found that case law did not support limiting the Warner distributions to a HEMS standard. TAM 8339004 (June 14, 1983).

In 1990 the Supreme Court of Georgia ruled that a trust authorizing encroachment "to meet any reasonable need of any kind or character" did not permit a distribution for the purchase of the remaining interest in real property jointly owned by the beneficiary and her husband, because that expense was an investment. Wright v. Trust Co. Bank of Northwest

Georgia, 260 Ga. 414 (1990). The court further held that "need" refers to the health, maintenance and support of the beneficiary.

Effective July 1, 2002, the Georgia General Assembly passed a statute that imposes a default HEMS standard where a beneficiary is also a trustee. See O.C.G.A. §53-12-265. Given the dearth of case law on the subject, and the context of the earlier cases, beneficiaries and trustees lack guidance as to what distributions are permissible under Georgia's interpretation of HEMS. Presumably a distribution for health care is authorized under "reasonable comfort," but a real estate investment is neither support nor maintenance.

Earlier cases stand for the proposition that strict construction is favored, particularly where to rule otherwise would cause adverse tax consequences. See, *e.g.*, Williams v. Bullock, 231 Ga. 179 (1979); Springer v. Cox, 221 Ga. 673 (1966) and Strickland v. Trust Co. of Georgia, 230 Ga. 714 (1973). Query whether this permits distributions from a HEMS marital trust for tax planning by a surviving spouse.

Georgia Probate Notes

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