Georgia Probate Notes

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In This Issue:

Introduction by the Publisher and Editor, *Georgia Probate Notes*

Marion Guess, wmguess@comcast.net

I am privileged to announce that this month's issue is a collaboration between *Georgia Probate Notes* and the Fiduciary Law Section of the State Bar of Georgia and incorporates the Fiduciary Section's Newsletter, beginning on the following page. From my perspective, the purpose of this joint effort is to bring our Probate Judge subscribers and members of the Fiduciary Section to a greater understanding of our common problems, goals and aspirations, so that we will be better able to assist each other.

Georgia Probate Notes is entering its twenty-third year of publication. Two thirds of Georgia Probate Court Judges subscribe, as well as attorneys in fiduciary practice. Our aim has been to provide our readers information about current developments in fiduciary law through reporting and analysis of legislative proposals and articles on new statutes and current case law. Generally, each issue will contain probate articles, interesting orders from probate court judges across the state, briefs of new cases from the appellate courts, new forms developed for use in the probate court, and a Q & A feature, based on questions raised by our readers.

In the future it is our plan to devote a portion of each issue to articles and news submitted by members of the Fiduciary Section and to establish a forum for our lawyer and judge readers to express their views on various subjects. Subscription information is contained at the end of this issue.

STATE BAR OF GEORGIA
FIDUCIARY LAW SECTION

Note from the Editor of the Fiduciary Law Section Newsletter

Nikola R. Djuric
Sutherland Asbill & Brennan LLP

This issue of the Newsletter of the Fiduciary Law Section of the State Bar of Georgia is a joint production of the Section and *Georgia Probate Notes.* The purpose of this joint issue is to acquaint the members of the Fiduciary Law Section with this helpful periodical and to acquaint the subscribers of *Georgia Probate Notes*—principally Georgia's probate judges—with some of the work of the members of the bar who practice in the area of fiduciary law. On behalf of the Section, I would like to thank the editor of *Georgia Probate Notes* for this opportunity to reach this broader audience.

If you have an item to submit to the Newsletter, or if you would like to volunteer to write an article that would be of interest to the members of the Section, please send me an e-mail at *nick.djuric@sablaw.com* or call me at (404) 853-8486.

From the Chair of the Fiduciary Law Section to Members of the Section

Melissa P. Walker
Salo & Walker

Happy New Year!

I hope 2005 finds you and your family well. I am delighted that our Section's first newsletter in some time comes to you as part of *Georgia Probate Notes,* an excellent publication for anyone practicing in the areas of estate planning and estate administration, and hope to make this joint publication a regular occurrence. The Fiduciary Section is starting the year with a healthy membership and a large account balance, and I am not afraid to say that it has been my goal to find worthwhile ways to spend some of that money. Here are some of our ideas:

Our Section is in a unique position to offer real help and advice to the public on the often mysterious matters of trusts and estates. Richard Barnes of Valdosta has graciously agreed to chair a committee to revise our existing consumer-oriented publication on wills

and to write new ones dealing with such issues as powers of attorney and revocable trusts. Richard has assembled a stellar group of Section members from across the state and they are already hard at work. While the Internet (in particular, our Section website) is an ideal medium to provide these publications, we also will underwrite the cost of printing and distributing them to reach the widest possible group.

The Elder Law Section and the Elder Law Committee of the YLD collaborate on a public program explaining health care directives and helping attendees complete Durable Powers of Attorney for Health Care and Living Wills. We are looking for someone to work on this program (which takes place in May) as a liaison from the Fiduciary Section, so if you are interested please contact me. There is another opportunity in October, when the American Bar Association sponsors Health Care Decisions Month. The ABA has funds available to help defray the costs of public programs on health care directives, as does the Fiduciary Section. We are looking for someone to coordinate statewide programs in October 2005. The Atlanta Bar Association's Estate Planning and Probate Section worked on this a few years ago and I have forms and materials available to help start things off. Please call or e-mail me for more information.

Elsewhere in this newsletter you will read about the Military Wills project, which the Fiduciary Section will also support. I thank Margaret Scott of Atlanta for taking on this effort.

Our Section funds also support our great tradition of seminars and allow us to bring in nationally known speakers. Alan Rothschild Jr., the Section Secretary-Treasurer, has assembled a fabulous program for the Estate Planning Institute in February (at ICLE in Athens), and Faryl Moss, Vice-Chair, is doing the same for the Fiduciary Law Institute in July (again at the King & Prince resort on St. Simons Island). Check the ICLE website for more details.

Speaking of the Internet, I would like to encourage each Section member to add your e-mail address to your State Bar listing. Communications by e-mail, such as the interim Section newsletter that went out last fall, are a fast and cost-effective way to reach our members—leaving more funds for our other activities. The recent addition of Casemaker to the State Bar website is but an example of how the Bar's website, as well as our own Section page, can be a useful tool in our practices. The Section's website has become a little out of date and could use some help; the staff at the Bar is wonderful but we must supply the content. If you'd like to work on this project, let me know.

As always, feel free to call on me, Alan or Faryl with your comments, ideas or questions.

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Important Dates

50th Annual Estate Planning Institute **February 18-19, 2005**
Georgia Center for Continuing Education
Athens, Georgia

Fiduciary Law Institute **July 14-16, 2005**
King & Prince Beach and Golf Resort
St. Simons Island, Georgia

"The Magnanimous Guardian" Substituted Judgment: Tax Motivated Estate Planning by Guardians in Georgia

R. Mark Williamson and Margaret W. Scott
Alston & Bird LLP

Many estate planning attorneys have had occasion, years after the gifts in question were made, to examine the authority of a guardian to make tax-motivated dispositions of an adult ward's property. A particular guardian may have transferred assets to himself or herself, his or her spouse, other family members, friends and/or charities from the ward's assets. Such transfers can sometimes accomplish substantial tax savings, and accordingly, this kind of planning is attractive where the transfers are consistent with what the ward would have done if competent.

But, just how generous can a guardian be with his or her ward's property? As it turns out, Georgia law broadly supports magnanimous guardians in making tax-motivated gifts of the ward's property, provided, of course, that a few conditions are met. However, it is preferable to ensure that these conditions can be complied with *before* the guardian turns into Santa Claus. (This article discusses the law applicable to estate planning by guardians of the property of adult wards under current law. This law has been changed by the revision of the guardianship code that takes effect on July 1, 2005. See the note after this article for details.)

In general, the doctrine of substituted judgment is simply a body of law that allows the guardian of a ward's property to seek judicial authorization to do what the ward would do if competent. The doctrine is codified in O.C.G.A. § 29-5-5.1 and may be applied when the guardian seeks to do something which the guardian does not otherwise have the authority to do under general principles of guardianship law: i.e., use the ward's property for some purpose other than supporting the ward or the ward's legal dependents. The doctrine has never been applied to allow a guardian to write or change the ward's will. It has frequently been applied to authorize inter vivos gifts by the ward, usually for one of the following purposes: (1) to support a close relative who is not actually a legal dependent of

the ward, (2) to continue a pattern of charitable giving established by the ward prior to incompetence, or (3) most frequently, to achieve tax savings without significantly changing the most likely ultimate devolution of the ward's property. Application of the doctrine of substituted judgment always involves an effort to replicate or approximate what the ward would be likely to do if he or she were competent.

Although there is very little guidance on the proper interpretation and application of Section 29-5-5.1, the language of the statute is fairly specific and relatively clear. Section 29-5-5.1 authorizes the guardian of a ward's property, or any other interested party, to petition the court to authorize the guardian to apply such part of the ward's property which is not required for support of the ward or his or her dependents "toward the establishment of an estate plan for the purpose of minimizing income, estate, inheritance, or other taxes payable out of the ward's estate." Before the court does so, notice must be given to all interested persons and such other persons as the court may direct, and there must be a showing that the ward will probably remain incompetent during his or her lifetime. The court may authorize the guardian to make inter vivos gifts on the ward's behalf, outright or in trust, "upon a finding that a competent reasonable person in the ward's circumstances would make the transfers and that there is no evidence that the ward, if competent, would not make the transfers." The following factors are to be considered:

(1) The value of the ward's entire estate and other sources of support, and the income produced thereby.

(2) The probable expenses for support of the ward and the ward's dependents.

(3) The identity of the proposed transferees "and in particular whether they are natural objects of the ward's bounty by relationship or prior behavior of the ward."

(4) The purposes and estate planning benefit to be derived by the transfer as well as the possible harm to any interested party.

(5) Any previous history of or predisposition toward making similar transfers by the ward.

The following observations can be made about the Georgia statute:

1. **Transfers must be to natural objects of the ward's bounty.** Strictly speaking, this is only a factor to be considered, but the statute indicates that it is to be considered "in particular." Although a literal reading of the statute might indicate that a transfer to someone other than a natural object of bounty can be approved, this seems highly unlikely.

2. **Benefit must outweigh harm to interested person.** One factor calls for the court to weigh the estate planning benefit of the proposed transfers against the harm to any interested person. Accordingly, it will be necessary to show how the ward (or his or her estate) will be better off because of the proposed transfer, and why this justifies depriving the collateral relatives of an opportunity to share in the intestate estate.

3. **Tax benefits must be shown.** Under the Georgia statute, tax benefits are an absolute prerequisite to approval of proposed transfers. Section 29-5-5.1 authorizes substituted judgment transfers "for the purpose of minimizing income, estate, inheritance, or other taxes payable out of the ward's estate." This strict requirement that tax savings be shown was clearly intended since the heading of Section 29-5-5.1 is "tax motivated estate planning disposition of ward's property." Decisional law from other states indicates that where anticipated tax savings are the basis for application of the doctrine of substituted judgment, the tax savings must be "true" tax savings, i.e., the proposal must achieve tax savings without significantly altering the most likely ultimate devolution of the ward's property. Tax savings which result solely from diverting property away from the collateral relatives in favor of charity probably do not satisfy the requirement of the statute.

4. **An established prior history of gift-making is not essential.** Note that there is no *absolute* requirement that a ward must have a prior history of gift-making before the statute can be applied. If there is no evidence that the ward would *not* make the transfers, and if the court finds that a competent reasonable person in the ward's circumstances would make the proposed transfers, then the proposed transfers can be made. The ward's previous history of gift-making is only one factor to be considered, and previous history is a factor only "if any." Nonetheless, it is clear that the ward's previous history of gift-making is a very important factor. Not only is previous history a separate factor to be considered, but it is also relevant to the determination of the natural objects of the ward's bounty.

In summary, if a ward is likely to remain incompetent during his or her lifetime, has assets available far in excess of his or her needs, would very likely make the same gifts if competent, and the gifts would minimize the ward's taxes, the doctrine of substituted judgment is available to enable the guardian to give as generously as the ward would have if competent. By complying with the straightforward procedural requirements of the statute, the guardian can ensure that his or her generosity on behalf of the ward will be respected by the Internal Revenue Service.

Note on Changes to the Law on Estate Planning by Guardians in Georgia

The revision to the guardianship code that takes effect on July 1, 2005, makes several changes to the law applicable to estate planning by conservators (formerly guardians of the property) discussed in the previous article:

1. **Applicable to Both Minor and Adult Wards.** Section 29-5-5.1 has been replaced by two new sections: Section 29-3-36, which applies to conservators of minors, and Section 29-5-36, which applies to conservators of adults. The provisions of both sections are substantially identical.

2. **No Requirement of Tax Motivation.** New Sections 29-3-36 and 29-5-36 lack the requirement that the estate planning be for the purpose of minimizing income, estate, inheritance, or other taxes.

3. **Probate Court Has Jurisdiction.** The probate courts have jurisdiction to order the establishment of an estate plan for the ward under new Sections 29-3-36 and 29-5-36. Under current law, jurisdiction is restricted to the superior courts (or probate courts with Article 6 jurisdiction).

The following is the complete text of Section 29-5-36, effective July 1, 2005, which applies to conservators of adult wards:

29-5-36. Development of estate plan for ward; appointment of guardian ad litem prior to implementation of plan

(a) After notice to interested parties and other persons as the court may direct, and upon a showing that the ward will probably remain in need of a conservator throughout the ward's lifetime and that it is in the best interest of the ward, the court may order the conservator to apply such principal or income of the ward as is not required for the support, care, education, health, and welfare of the ward and such individuals who are entitled to support from the ward toward the establishment or continuation of an estate plan for the ward and make transfers of the ward's personal or real property, outright or in trust, provided that the court finds that a competent, reasonable person in the ward's circumstances would make such transfers and there is no evidence that the ward, if not in need of a conservator, would not adopt such an estate plan.

(b) Prior to authorizing such transfers, the court shall appoint a guardian ad litem for the ward and shall consider:

(1) The composition and value of the entire estate of the ward, other known sources of support available to the ward and individuals who are entitled to be supported by the ward, and the income produced thereby;

(2) The probable expenses for the support, care, education, health, or welfare of the ward and such individuals who are entitled to be supported by the ward for the remainder of the ward's lifetime in the standard of living to which the ward and the other individuals have become accustomed;

(3) The identity of the proposed transferees and, in particular, whether they are natural objects of the ward's bounty by relationship or prior behavior of the ward;

(4) The purpose and estate planning benefit to be derived by the transfer as well as the possible harm to any interested party;

(5) Any previous history or predisposition toward making similar transfers by the ward.

Volunteer Guardians and Trustees Needed

The State of Georgia terminated the Medically Needy Medicaid Nursing Home program last summer for over 1,700 elderly and disabled nursing home residents. Elder law attorneys, Georgia Legal Services (GLS) attorneys, and Atlanta Legal Aid lawyers were able to assist the majority of these residents in establishing Miller trusts to save their Medicaid. However, there are still 12 to 14 nursing home residents who are unable to find guardians or trustees to assist them with their trusts. They don't have families or friends to help. The nursing homes are unwilling to serve and there are no county guardians or adult protective services resources available in these cases.

GLS needs trustee/guardian volunteers in several areas in Georgia, including Macon, Augusta, Paulding County, Cobb County, and the Savannah area. In most cases, the guardianships are of limited duration and will expire at the establishment of the trust. The trustee responsibilities are to pay the monthly nursing home bill, a personal needs allowance to the resident, and any incurred medical expenses and to make a short report to DFCS every six months. Trustee fees and attorneys fees cannot be deducted from the trust. GLS is asking for volunteers to assist these remaining elderly nursing home residents to maintain their Medicaid eligibility.

You don't have to have any particular Medicaid or trust knowledge to serve as a guardian or trustee. However, GLS will provide Medicaid training materials, Miller trust forms, and guardianship training materials, if requested. For information, please contact Vicky Kimbrell, Georgia Legal Services, at (404) 462-1603 or *vkimbrell@glsp.org*.

Military Wills Programs

Benjamin H. Pruett
King & Spalding LLP

Many of you who are members of the Atlanta Bar Association may recall the Military Wills Project that we initiated back in 2001. When we asked for volunteers to help with that project, we were overwhelmed with the level of response we received from the Section. That program has been largely dormant for the last year or two, but we have been approached with a request for substantial additional assistance to soldiers and sailors in Georgia and to our colleagues in the JAG corps.

One of our initiatives will be the preparation of wills and other estate planning documents for military personnel. There are two ways this may be handled. First, JAG lawyers may refer clients to individual attorneys based upon the needs of the clients, especially where the client's planning needs may involve the need for trusts, special needs children, etc. We may also be asked to assist with the preparation of more basic wills, etc., on the spot, serving clients on a first come, first served basis.

An unfortunate reality of wartime is that there will be a certain number of casualties, and the survivors of the fallen service men and women will need assistance in negotiating the probate process and the administration of estates. This sometimes involves property guardianships for minors, where advance planning has not successfully avoided that necessity through UTMA accounts, trusts, etc.

In many cases, JAG lawyers would appreciate having access to specialists in estate planning and sub-specialties when the JAG lawyers encounter specific situations where they could use help. This often will not involve a client referral, but only a telephone call for advice on how to handle a particular situation.

Many JAG lawyers are interested in attending seminars to train them in the basics of estate planning. The Army offers a specialized course in estate planning, but that is taught in Virginia, and can be difficult to schedule. We can provide as good a training program here in Georgia, and at the same time teach the specifics of Georgia law. There may also be interest in other substantive areas of the law, such as family law, debtor/creditor, landlord/tenant, etc., where the JAG lawyers could use training in the Georgia substantive law. We will try to coordinate this effort with other sections of the Bar as well.

If you are interested in participating in any or all of these programs, please send a message to Margaret Scott at Alston & Bird LLP with your name, address, telephone numbers and e-mail, as well as the program(s), as described above, in which you are interested. As we get these initiatives put together, we will make contact. Margaret's e-mail is ***mscott@alston.com*.**

Please note that at the moment, we request that only persons with experience in estate planning participate in the wills programs, since training volunteer attorneys, summer associates, etc., is beyond the scope of what we are trying to accomplish in the short run. In many cases, service men and women need help on somewhat short notice. Many thanks, and we look forward to hearing from you.

Probate Council Legislative Agenda

A move to put a constitutional amendment on the ballot in 2006 making all probate court judgeships non-partisan, the reformation of House Bill EX 1, which provided for an increase in court costs, and a bill to increase the salary supplement received by those probate court judges who handle traffic cases and elections are all proposals which may translate into legislation sponsored by the Georgia Council of Probate Judges this year.

At a planning session for the probate courts held in September 2004 these proposals were identified as those to be sought in 2005. Prioritizing the proposals was postponed pending identifying the new leadership in the House and Senate.

An interview with both Judge Mike Bracewell, the chair of the Probate Court Legislative Committee, and Mark Middleton, lobbyist for the Georgia Council of Probate Court Judges, revealed that it is too early in the session to make a decision on whether all of the proposals should be pursued.

According to Middleton, there may be new life in the non-partisan proposal which has failed to gain approval for the past several years, because there are now many new players in the legislature and because of concern over the recent hotly contested appeals court election.

In regard to the reformation of House Bill EX 1, Middleton believes that there will be a general clean up bill for the legislation, which passed last June. Middleton said, "There may be an opportunity for the probate courts to get their proposal limiting the court cost add-on in the probate court to the initial filing, rather than every filing, added to the clean up bill."

House Bill EX 1, which was passed to fund a statewide indigent defense system, has drawn probate judge criticism because it requires the additional fee to be added to every filing in the probate court. Because of the nature of procedures in the probate court, this can lead to multiple charges against the same estate. For example, additional court costs are charged when an estate is opened, when a leave to sell is filed, each time a return is filed, and when a request to be dismissed is filed. In guardianship matters, an additional add-on fee is required when the guardianship is established, and again with the filing of each encroachment, inventory, and return. After talking with the Governor's Executive Counsel, Harold Melton, about House Bill EX 1, Middleton believes that the Governor's office might be receptive to such an amendment.

As to the third proposal, the increase in salary supplement for those probate judges handling traffic and elections, Middleton believes passage will depend on the cost of the proposal.

Mark Middleton will be providing updates for *Georgia Probate Notes* on probate court legislative matters during the session.

Late Breaking Legislative Development

Probate court hopes of legislative action making all probate court judgeship elections non-partisan gained renewed strength as it was announced that Senator Cecil Stanton of the 26th district has reintroduced Senate Bill 32 calling for the non-partisan election of all Georgia probate court judges.

Senator Stanton was made aware by Judge William Self of the Bibb County Probate Court of the potential problems created by a prior Legislative Counsel's opinion that any change in the manner of election on a statewide basis would have to come through a constitutional amendment since the Georgia constitution requires partisan election of probate court judges.

According to Judge Self, as a possible alternative a bill might be crafted which would provide for mass local legislation, either by declaring non-partisan elections in all counties below a certain population or by naming the individual counties. The constitution allows local legislation to change the manner of election of probate court judges and at this time more than half of Georgia's counties have opted through local legislation to provide for non-partisan election.

Supreme Court Reverses Court of Appeals in Advancement Case

(note: Walters v. Stewart, 263 Ga. App. 475 (2003)
was featured in the September-October 2003 issue of *Georgia Probate Notes*)

In 1995, Stewart's father gave him $50,000. After his father's death, Stewart became executor of the estate. His sister, Walters, sought a declaratory judgment that the $50,000 was an advancement against his inheritance. Although there was evidence that this was the decedent's intent, there was no writing memorializing this. The trial court granted summary judgment, relying on O.C.G.A. § 53-1-10(c), which states that "the intent to treat a lifetime transfer as…an advancement is shown only if the will provides for the deduction of the …transfer…or if the…advancement is declared in a writing signed by the transferor within 30 days of making the transfer or acknowledged in a writing signed by the recipient at any time."

The Court of Appeals agreed, but found that a jury question was presented as to whether Stewart had breached his fiduciary duty by failing to acknowledge the gift as an advancement.

In Stewart v. Walters, 278 Ga. 374 (2004), the Supreme Court reversed the Court of Appeals, holding that "[a]n individual who qualifies as the executor of the estate subsequent to a lifetime monetary transfer cannot be in breach of any fiduciary duty imposed upon an executor at the time of the monetary transfer."

Two justices dissented, Justice Hines stating that "the majority focuses upon the wrong question, at the wrong time." "The proper question concerns Stewart's current role as executor, and whether that role requires him to reveal, at *this* time, that which is considered, at least for purposes of a motion for summary judgment, to be the 'truth' concerning the 1995 transfer."

Getting to Know the Judges

The submissions, which are in italics, are designed to provide background information about the Judge and useful information regarding his or her preferences and procedures in Court, as well as revealing something about the Judge's personality. The non-italicized portion is in the Judge's words.

The Editor thanks this issue's participants and welcomes the participation of other Probate Judges.

Sargent's, insert photo here

The Honorable Tammy Brown of Barrow County

1. *I have been the Probate Judge of* Barrow *County since* January 1, 2001.

2. *Before I was Probate Judge, I* was Traffic Clerk in Probate Court for 15 years.

3. *My family* My husband Davy, two children, Ana (17 years old) and Joseph (13 years old)

4. *My pet peeve (on the job) is* contested estates on Administration when the estates consist of some pictures and a gun!

5. *My pet peeve (in general) is* people not taking responsibility for their actions. People who have an excuse for everything!

6. *When I have time, I love to* make cards, scrapbooking, stamping.

7. *The thing I enjoy most about my job is* helping others.

8. *Two things I am a stickler for in Court are* officers and attorneys being prepared; must have a good attitude

9. *If someone wants to get a case set to be heard in my Court, he or she should* contact my office to get it put on the calendar.

10. *The question most often asked about my Court's procedure (and the answer) is* Do you reduce speeding tickets? My answer – No.

11. *If I could have dinner with any three people, living or dead, they would be* my grandmother Smith, President Bush, J.R.R. Tolkien, author of Lord of the Rings.

12. *Tech or Georgia?* Georgia

Learning from the Past

The following article appeared in Volume XVII, Number 2, September, 1999 *Georgia Probate Notes*.

Year's Support – Settlement by Executor

Question: When a petition for year's support has been filed by a spouse, and the executor of the deceased's estate and a beneficiary under the deceased's will file separate caveats to the year's support petition, can the executor settle the claim without input from the beneficiary who filed a separate claim?

Answer: Yes. In Davis v. Hawkins, 238 Ga. App. 749 (1999), the Court of Appeals found the executor had statutory authority to settle the claim:

> "Pursuant to O.C.G.A. § 53-7-45, the executrix is 'authorized to compromise, adjust, arbitrate, assign, sue or defend, abandon or otherwise deal with or settle debts or claims in favor of or against the estate.' A claim for a year's support is a claim against the estate. O.C.G.A. § 53-5-1 *et seq*. Thus, the executrix clearly had the statutory authority to settle the claim. (footnotes omitted)"

The court further said,

> "According to the appellants, the executrix should not be allowed to settle their caveat without their approval. However, the executrix did not settle the *caveats*. She settled *the widow's claim for year's support* which rendered the caveats moot. *See* Shepherd v. Carlton's Nice Cars, 149 Ga. App. 749, 750-751 (2) (1979) (settlement rendered cross appeals moot).

> "To the extent that appellants imply that they had a right to have some input into the settlement, we disagree. There is no statutory provision nor any provision in the decedent's will that requires that the beneficiaries agree to such settlements. There is a requirement that, in settling the claim, the executrix act in good faith. *See* Home Insurance Co. v. Wynn, 229 Ga. App. 220, 222 (1) (1997) (executrix, as fiduciary, must act with good faith). Here, the appellants do not contend that the executrix acted in bad faith in settling the claim and, thus, we do not address this issue on appeal."

Court Approval of Settlement Agreements

Today, many will contests end in settlement, either facilitated through alternative dispute resolution or through negotiation of counsel. Must the settlement be sanctioned through a hearing in the Superior Court (or Probate Court in those counties with expanded jurisdiction based on population?)

O.C.G.A. § 53-5-25 provides as follows:

> (a) Upon petition of the interested parties, any superior court on appeal of any probate court which is so authorized by Article 6 of Chapter 9 of Title 15 may approve a settlement agreement under which probate is granted or denied, providing for a disposition of the property contrary to the terms of the will. Approval of any settlement agreement that provides for the sustaining of the caveat or the disposition of the property contrary to the terms of the will shall be after a hearing, notice of which shall be given as the court may direct, at which evidence is introduced and at which the court finds as a matter of fact that there is a bona fide contest or controversy.
>
> (b) All individuals who are sui juris and affected by such a settlement agreement shall be authorized to enter into such an agreement which shall be assented to in writing by all the heirs of the testator and by all sui juris beneficiaries affected by such a settlement.
>
> (c) All individuals who are not sui juris, or are unborn beneficiaries, heirs, or persons unknown shall be represented in such proceedings by an independent guardian ad litem. It shall be the duty of the guardian ad litem to investigate the proposed settlement and report to the court the guardian's findings and recommendations. The court shall take the recommendations into consideration but shall not be bound by such recommendations.
>
> (d) A judgment entered in the court and based upon the settlement agreement shall be binding on all parties including individuals not sui juris, unborn beneficiaries or heirs, and persons unknown who are represented before the court by the guardian ad litem appointed for that purpose.

This section, previously codified as O.C.G.A. § 53-3-22, was carried forward in the 1998 code revision but the former language requiring the court to find the caveat "meritorious" was changed to a requirement that the court find a *bona fide* controversy or contest. The former language had created some confusion as to the meaning of "meritorious" which seemed to mean "worthy of consideration" or "not frivolous." *Georgia Probate Notes*, Volume XII Number 4, p. 3 November-December 1994.

While O.C.G.A. § 53-5-25 provides a method for binding interested parties who are not *sui juris* to an agreement, it is possible to enter into a settlement agreement where all of the interested parties (heirs and beneficiaries) are *sui juris* without approval of any court. In Beckworth v. Beckworth, 255 Ga. 241 (1985), the Georgia Supreme Court held that where all the heirs and beneficiaries are *sui juris* and enter into an agreement settling a will controversy there is no need to seek court approval under the code section.

In a Fulton County Probate Court case citing both Beckworth and former O.C.G.A. § 53-3-22, the court allowed probate where the propounder of the will could not locate any of the attesting witnesses to the will and could not prove their signatures by other evidence as required by the statute, since all of the interested parties were *sui juris* and had entered into an agreement to probate the will. *Georgia Probate Notes*, Volume XIII Number 1, p. 6 July-August 1995.

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