# Georgia Probate Notes

**VOLUME XXIII NUMBER 1** **July-August 2005**


**In This Issue:**



## Introduction


**Marion Guess, Publisher and Editor**


I am pleased to present to our readers a second joint issue of *Georgia Probate Notes* and the Fiduciary Law Section's newsletter. The response of the fiduciary bar to requests for submissions has been so enthusiastic that a third joint issue is planned for September/October. Our hope is that these joint issues will bring our Probate Judge subscribers, members of the Fiduciary Section, and other readers to recognize and understand our mutual problems and lead to greater co-operation between the courts and the bar in serving the citizens of Georgia.

With this issue, *Georgia Probate Notes* begins its twenty-third year of publication. Two-thirds of the state's probate court judges subscribe. Many attorneys, trust officers, accountants and law libraries are also subscribers. *Georgia Probate Notes'* mission is to provide the readers information about current developments in fiduciary law through reporting and analysis of statutes, case law, and legislative proposals. Each issue may contain probate articles by leading members of the Georgia fiduciary bar, 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 courts, a Getting to Know the Judges section and other interesting articles.

Our readers are urged to comment on various issues confronting the fiduciary bar and courts through submitting letters to the Editor. Contact information and subscription information is contained in the masthead appearing on the following page.

**GEORGIA PROBATE NOTES**
**MARION GUESS, PUBLISHER AND EDITOR**

***Publisher's Statement:***

*Georgia Probate Notes* is published eight times per year (January, February, March, April, May/June, July/August, September/October, November/December) by *Georgia Probate Notes*, P.O. Box 3242, Decatur, Georgia 30031. Phone: 404-723-2396, wmguess@comcast.net.

Subscription cost is $250.00 per year. Opinions and conclusions expressed in the articles herein are those of the authors and not necessarily those of the publisher and editor of *Georgia Probate Notes*. Advertising rates will be furnished upon request. Publishing and advertisement does not imply an endorsement of any product or service offered.

## Making the Transition to the New Guardianship Code

As all readers of this newsletter will be aware, the new Guardianship Code, Title 29 of the Official Code of Georgia, went into effect on July 1, 2005. To help us all in the transition, *Georgia Probate Notes* will be printing excerpts from Professor Mary F. Radford's new book, Guardianships and Conservatorships in Georgia, to be published this fall by Chattahoochee Legal Press.

Probate Courts across the state are working the implement the law. Judge Walter J. Clarke of Gwinnett County and his committee have produced the new forms. These are now available online at www.gaprobate.org.

With school starting, the changes in the Guardianship Code relating to temporary guardianships are of immediate importance. Judge Kipling L. McVay and her Chief Clerk/ Hearing Officer Bryan Keith Wood of the Cherokee County Probate Court has prepared the following form letter for use in notifying the school system and others of a pending temporary guardianship. *Georgia Probate Notes* thanks Judge McVay for this contribution

---

<Date>

RE: <Minor>

To whom it may concern:

Under O.C.G.A. §29-9-18, all records of guardianship and conservatorship are sealed to the public and only available upon petition and hearing before the Probate Court. However, said statute does allow the following information to be available to the public: the names and addresses of the ward and guardian and/or conservator and their counsel of record, and the date of filing, granting and terminating the guardianship and/or conservatorship.

Given the above restrictions, this Court gives notice that on <date>, <petitioner> filed for Temporary Guardianship of <minor> with the Probate Court of Cherokee County. This application is currently pending before this Court.

The status of this petition may be verified through this Court.

Should you have any questions regarding this matter, please do not hesitate to contact the undersigned at the above number.

Bryan K. Wood, Chief Clerk
Probate Court of Cherokee County

---

Judge William Self of Bibb County has prepared this helpful Temporary Guardianship flow chart. *Georgia Probate Notes* is grateful to Judge Self for permission to print this, and to all the other Probate Judges and attorneys who are sharing their efforts to make the transition go smoothly.

# TEMPORARY GUARDIANSHIP OF MINORS
# UNDER NEW GUARDIANSHIP CODE

**Petition**
Filed by person having physical custody of child
Filed in county of Petitioner's domicile[1]

[1]It is unclear where a petition would be filed by a non-resident petitioner, but there is nothing which prohibits a non-resident from being appointed.

**With Consent**
Sole living parent consents, or
Both parents consent

- Refer to Juvenile Court
- Grant Petition without hearing; issue Letters

**Notice**
Notice to each PARENT[2] who does not consent
- Personal service on Georgia residents
- First-class mail to non-residents
- Publication (2 times) to unknown parent or address

Objections to be filed
- W/in 10 days of personal service or 2nd publication
- 14 days of mailing

[2] Unless a death certificate or an order terminating his parental rights is presented to the Court, due process will require that notice be given to the biological father of the child; do not accept the simple allegation of the petitioner that the father is not a "parent" as defined by the new law.

Objection by Natural Guardian
- Deny Petition
- Refer to Juvenile Court

No objection after notice
- Grant Petition without hearing; issue Letters

Objection by Parent who is Not a Natural Guardian

**Hearing**
Determine if parent has standing to object
- Legitimated child
- Parental rights terminated

Determine best interest of minor

- Deny Petition
- Grant Petition after hearing; issue Letters
- Refer to Juvenile Court

# PETITION TO TERMINATE

**Petition**
Filed by NATURAL GUARDIAN

With consent of TG to termination → Order Termination

Notice to TG - PS/Mail/Pub

No objection w/in ten days → Order Termination

Objection timely filed by TG

**Hearing** - Determine whether termination or continuation is in best interest of minor
- Order Termination
- Order Continuation

Refer to Juvenile Court

## Removal of Administrator C.T.A., Appeal, Supersedeas and Writ of Prohibition

In a Richmond County Probate Court case involving a large estate, Judge Isaac S. Jolles removed the Administrator C.T.A. and later appointed a temporary administrator to hold the estate while the appeal from the order of removal was pending.

The petition for removal was brought by a creditor of the estate holding a judgment for almost $30,000,000. In his order of removal, the judge found that the Administrator C.T.A. had wrongfully taken commissions, distributed personal property without court approval, transferred stock from the estate without court approval, made an unauthorized loan from the estate, and had acted in a manner which conflicted with his fiduciary duties.

The order of removal was appealed to the Court of Appeals where it awaits decision. The later order appointing a temporary administrator was also appealed. This appeal was dismissed because, as the Court of Appeals said, "it is not a final appealable judgment within the meaning of O.C.G.A. §5-6-34(a)" and because the appellant's "failure to comply with the interlocutory appeal requirements deprives this court of jurisdiction to consider this appeal." O.C.G.A. §5-6-34(b), Pruett v. Commercial Bank of Georgia, 211 Ga. App. 692, 694 (440 SE2d 85) (1994).

In addition to the dismissed appeal, the Administrator C.T.A. filed an application for a Writ of Prohibition in the Superior Court of Richmond County against Judge Jolles and the temporary administrator. The application, which is still pending, was filed under O.C.G.A. §9-6-40. It requests that the Superior Court, in its duty to see that all inferior courts not exceed their jurisdiction, issue a Writ of Prohibition prohibiting the Probate Court and the temporary administrator from further action until the appeal is decided. The basis of the request is that the appointment of a temporary administrator violated the supersedeas which was in effect by virtue of the appeal of the order of removal and that the probate court lost all subject matter jurisdiction over the matters contained in the appeal.

*Georgia Probate Notes* will follow this case through the Superior Court and the appeals courts in future issues.

Publisher's note: as this issue went to press, a Superior Court order denying the writ was received by *Georgia Probate Notes*. The complete order will appear in the next issue.

---

## Order and Decree Removing Administrator

The following order of removal entered by Judge Isaac S. Jolles gave rise to the series of events described in the foregoing article.

PROBATE COURT OF RICHMOND COUNTY
STATE OF GEORGIA

| | | |
|---|---|---|
| IN RE: THE ESTATE OF | ) | |
| THELMA R. ALLGOOD, | ) | ESTATE NO. 2000-889 |
| Deceased. | ) | |

ORDER AND DECREE REMOVING CLYDE RAY AS ADMNISTRATOR OF THE ESTATE OF THELMA R. ALLGOOD, ORDERING AN ACCOUNTING, DENYING PAYMENT OF ATTORNEY FEES FROM THE ESTATE AND GRANTING OTHER RELIEF

The Petition of National Health Investors, Inc. ("Petitioner"), to remove Clyde Ray ("Ray") as Administrator C.T.A. of the Estate of Thelma R. Allgood ("Estate") was tried before the Court on March 30 and 31, 2004, at which time the Court heard testimony from witnesses, received documentary evidence, and heard argument of counsel, following which the Court requested and received post-trial briefs from both parties, and the Court having fully considered all evidence, arguments of counsel and briefs, the Court finds and rules as follows:

FINDINGS OF FACT[1]

1.

*When Clyde Ray became the Administrator C.T.A., he was aware of NHI's debt and testified he had heard of a big debt and heard Mr. Hudson testify in Court about the debt. The Administrator asserted in his testimony that the only creditor he knew of was NHI. Sufficient notice from Petitioner was given by correspondence to the Administrator's predecessor, David Hudson.*

2.

*Petitioner is a creditor of the Estate of Thelma R. Allgood, and has a valid claim in the amount of $29,796,003.91, as adjudicated by a Consent Order in the United States District Court for the Southern District of Georgia, Augusta Division, in Civil Action No. CV 103-206.*

[1] Findings of Fact are set out in italics. Other typed matters reflect the reasons for said Findings of Fact.

3.

*Clyde Ray was named as Administrator C.T.A. of the Estate of Thelma R. Allgood on December 5, 2001*

*.*

4.

*Ray paid himself and his spouse a total sum of $42,462.50 within two months of the date of qualifying as the Administrator C.T.A. of said Estate. Said compensation was at a rate of $125 an hour for the Administrator, and $25 per hour for the services rendered by his spouse. Clyde Ray testified that at the time he was appointed the Administrator, he had not worked since 1996, at any job where he was paid anything. The Court finds that Ray took unauthorized and unreasonable compensation from the Estate which was not authorized by the Will nor was it approved by the Court.*

Respondent attempts to justify the payment of this sum of money because of the directions in the Will of Thelma Allgood that the named alternate Executor, Aubrey C. Rhodes, Jr. would be paid an hourly rate equal to his regular hourly rate; and even asserts that "this method of compensation for the Administrator is not elected – it is mandatory." (Page 4 of Respondent's Closing Memorandum.) The Court rejects such an argument. It is inconceivable that such an amount would be appropriate in this case. It is inconceivable that the Testatrix intended to pay $42,462.50 compensation to the Administrator during the first two months of his service as an Administrator.

5.

*That Clyde Ray, in his capacity as Administrator C.T.A. of the Estate, distributed furniture of the deceased with consent of his other siblings and Testatrix's mother. Such distribution of property was without consideration and without the approval of this Court.*

6.

*That Clyde Ray, in his capacity as Administrator C.T.A. of the Estate, did also transfer all of the stock of Orangeburg Nursing Home, Inc. to himself, his siblings, and his mother, without any consideration or approval of this Court.*

7.

*That Clyde Ray in his capacity as Administrator C.T.A. of said Estate did make an unsecured loan to Orangeburg Nursing Home, Inc. in the amount of $375,000. The promissory note given in connection with said loan appears to be a secured note but no description is made of any property that was conveyed as collateral to secure the payment of said Note. Clyde Ray signed this note not only as Administrator C.T.A. of the Estate of Thelma Allgood but also as President of Orangeburg Nursing Home, Inc. Although the Note required*

*a three percent (3%) payment of interest, Mr. Ray testified at the hearing that no interest was paid on this note.*

This document itself clearly establishes the dual capacity in which Clyde Ray was acting without the approval of the Court.

8.

*In 1999, Thelma Allgood and her sister, Barbara Dyches, jointly owned a condominium at Conifer Square. This property was sold in 1999 and the proceeds of the sale were placed in a joint bank account of Thelma Allgood and Tom Allgood at NationsBank. Thereafter, in July 2000, Thelma Allgood purchased a condominium in her name at 1401 Riverplace in Port Royal, using funds from an IJL Wachovia checking account. After the death of Thelma Allgood the Administrator and Barbara Dyches asserted that 1401 Port Royal should have been owned jointly by Barbara Dyches and Thelma Allgood because Thelma Allgood had sold the Conifer Square property and retained all the proceeds. Barbara Dyches had moved out of the 1401 Port Royal property because of fear that David Hudson, the then Administrator, was going to sell this condominium, in that the same was purchased in the name of Thelma Allgood. In order to prevent the sale of the condominium, Mr. McCallar, with the assistance of Clyde Ray, prepared a claim against the Estate on behalf of Barbara Dyches, in order to prevent the sale by David Hudson. In May of 2002, after Ray had become the Administrator C.T.A., he sold 1401 Port Royal and issued from the proceeds a check from an Estate bank account the sum of $241,159.45 payable to Barbara Dyches. At the time, Mr. Ray held a power of attorney for Barbara Dyches, was the Administrator of the Estate and was the brother of Barbara Dyches.*

These facts clearly placed him in a conflict of interest and constituted a breach of his fiduciary duty to the Estate.

9.

*Clyde Ray testified he lived on a lot of land known as Lot 176 in Modoc Subdivision, McCormick, South Carolina in the year 1984. This lot was purchased by Thelma Allgood, who conveyed a one-half interest to Tom Allgood, and later Tom Allgood conveyed his interest back to Thelma Allgood so she could borrow money. Tom Allgood borrowed $50,000. David Hudson, as Administrator of the Estate sold this property for the sum of $120,000. Subsequent to the sale of this property, Clyde Ray qualified as Administrator C.T.A. of the Estate. While David Hudson was the Administrator, there was a dispute as to the ownership of this lot because of the way the record title appeared and the contention Ray made that there was a quitclaim deed held in Tom Allgood's office which was a conveyance to Ray. The original quitclaim deed cannot be found. The claim in this matter was presented by Ray as a creditor in this matter at a time when he was the Administrator. There was no date as to the date it was prepared or presented to the Court. (Respondent's Exhibit 13.) The Court finds there is a legitimate dispute as to who was the owner of this property. The Court concludes that David Hudson did not believe Clyde Ray to be the lawful owner and therefore placed the money from*

*the sale in the Estate of Thelma Allgood. Clyde Ray, after becoming the Administrator, and while still claiming the property to be his, issued himself a check in the amount of $120,149.10 on May 24, 2002.*

In this instance, Clyde Ray was clearly in a conflict of interest with his fiduciary duties. On one hand, he was the Administrator charged with representing the interest of the Estate, all creditors, and beneficiaries; and on the other hand, being the claimant himself. This matter certainly should have been presented to a Court for determination rather than the claimant deciding whether his claim was valid or not.

Counsel for Ray has asserted, as a defense in all of the above transactions and inappropriate actions taken by Ray, that none could be considered wrongful or inappropriate because these actions of Ray preceded any demand for payment in full of the indebtedness due NHI; that the debt due NHI was current; and no action had been taken to accelerate the balance owned NHI by the Testatrix. This argument is rejected by the Court under authority of O.C.G.A. §53-7-44, which provides:

> "Except as otherwise provided by the will, any debt not due by its terms at the time for payment of debts of equal priority shall be satisfied and the estate shall be discharged with respect to such debt in such manner as the personal representative deems to be in the best interest of the estate in accordance with the following rules:
>
> (1) The debt may be prepaid in accordance with the terms of any right to repay:
>
> (2) By agreement with the creditor, the debt may be satisfied before it is due by the payment of an amount representing the agreed present value of the debt;
>
> (3) By agreement with the creditor, the debt may be assumed by one or more heirs or beneficiaries or by any other person; and
>
> (4) By agreement with the creditor, or by order of the probate court after notice to the creditor and a hearing, arrangement for future payment may be made by creating a trust, giving a deed to secure debt or security interest, obtaining a bond or other security from one or more heirs or beneficiaries or otherwise."

None of the alternatives provided for in this Code Section occurred in this case.

> "After making inventory of the assets of the estate, the personal representative must obtain knowledge of the debts outstanding, as the personal representative <u>is bound to administer the estate according to law by paying the debts before making distribution to heirs or beneficiaries</u>. (emphasis added) …a personal representative is precluded from administering to himself as against the rights of creditors of whose claims the representative has notice."

(Redfern, Wills and Administration in Georgia, 6th Edition, pages 390-391.)

Counsel for the Administrator also urges that the Petitioner failed to give notice of a claim within the time provided by law. Although much ado is urged by counsel for the Petitioner on this theory, the question is covered clearly and simply by O.C.G.A. §53-7-41, which provides that notwithstanding the lateness of giving notice, if there are assets in the hands of the personal representative sufficient to pay such debts, and if no claims of greater priority are unpaid, the assets shall be thus appropriated, notwithstanding failure to give notice.

## CONCLUSIONS OF LAW

Based on the evidence and the law, it is the Order, Decree and Judgment of this Court that:

1.

Ray is hereby removed as Administrator C.T.A. of the Estate of Thelma R. Allgood and directed and ordered not to disburse any funds of the Estate absent order of this Court.

2.

Petitioner and Ray have ten (10) days from the date of the entry of this Decree in which to suggest a proposed successor administrator for the Court's consideration, after which time the Court will designate a successor personal representative to wind up the Estate.

3.

Ray is ORDERED to provide this Court within thirty (30) days of the entry of this Decree with an accounting of all assets received and distributed from the date of taking office forward, including an accounting of all monies received and disbursed from the Estate from the date of his taking office until the date of the accounting.

4.

As a conflicted transaction improperly handled, Ray is ORDERED to reimburse the Estate the sum of $120,149.10, representing sales proceeds of Lot 176, Clark Hill, South Carolina within thirty (30) days of the entry of this Order, plus interest from May 24, 2002, at the rate of seven percent (7%) per annum. The Court finds and rules that Ray is and was not entitled to such sums and rejects his claim to such proceeds. Such sum is an estate asset.

5.

The transfer of the stock in Orangeburg Nursing Home, Inc. to Ray and his family for no consideration was void as conflicted, and was not approved by this Court. Ray is

ORDERED to reconvey his stock in such corporation to the Estate, and the Personal Representative shall take legal action to procure from Ray's siblings and mother the stock distributed to Ray's siblings and mother through Ray's efforts. Said action shall be taken within thirty (30) days of the entry of this Order.

6.

The gratuitous $375,000 loan to Orangeburg Nursing Home, Inc. was improper, unauthorized, and a breach of duty. Such loan has been repaid, but repaid without interest. Ray is ORDERED to reimburse the Estate for the interest for such loan at the rate of seven percent (7%) for such period of time as the loan was outstanding, within thirty (30) days of the entry of this Order.

7.

Ray is ORDERED to reimburse the Estate the sum of $241,159.45 within ten (10) days of the entry of this Order for the proceeds disbursed to his sister, Barbara Dyches, on May 24, 2002, plus seven percent (7%) interest on such sum. The payment of monies to his sister involving the sale proceeds of 1401 Riverplace was conflicted and should have been approved by this Court. The Court finds Ms. Dyches' claim to such sum not supported by the evidence and such claim is rejected and the sum of $241,159.45 is an Estate asset.

8.

Ray is ORDERED to reimburse the estate a sum of money equal to the fair market value of the personal property belonging to the estate which was improperly distributed by Ray to himself and his family prior to payment of debts to creditors. Said reimbursement shall be made within thirty (30) day of the entry of this order, plus interest at the rate of seven percent (7%) from March 5, 2002. In the event that the Personal Representative and Ray cannot agree on the fair market value of said property, the Personal Representative shall institute legal action to establish the value of said personal property and secure judgment in the amount of its market value plus interest. Ray's contention that Petitioner's debt was not due because it was current is contrary to O.C.G.A. §53-7-44, and is rejected. Ray breached his duty by not addressing Petitioner's claim prior to making distributions of assets under the Will.

9.

In accepting his position as Administrator C.T.A. of the Estate, Ray was interested in favorably settling a claim against an insurance company. Ray sought to place himself in the position of controlling the Estate as part of such settlement, and in so doing placed himself in a position where his personal interests conflicted with creditors who had an interest in the Estate. Such actions are specifically prohibited by O.C.G.A. §§53-7-1(a) and 53-7-54(a)-(c) and a breach of duty. At this time the Court makes no ruling with respect to the proceeds of such insurance settlement as such issue is not before this Court for resolution.

10,

Clyde Ray is ORDERED to reimburse the Estate the sum of $42,462.50 within thirty (30) days of the entry of this Order, for personal representative compensation improperly taken on or before February 5, 2002, and prior to the entry of this Order. Ray's method to taking compensation was without court approval and is not authorized by the Decedent's will.

It is the further Order of this Court that Clyde Ray reimburse the Estate for all other monies that he has received from the Estate as compensation for services rendered as Administrator of the Estate, which the court finds to have been taken improperly. Ray is ordered to reimburse the Estate said sum within thirty (30) days from the entry of this Order. If the parties cannot agree on said amount, the Personal Representative is directed to file the appropriate action against Ray to determine the amount of compensation Ray has received from the Estate in addition to the said $42,462.50 and take all legal action necessary to secure the return of said money to the Estate.

Ray is entitled to commissions as provided by O.C.G.A. §53-6-60(b), but not compensation at an hourly rate. Even if Ray was entitled to compensation at an hourly rate, the rate and time charged by Ray for his services is excessive in light of his experience, qualifications and past income stream. Ray is granted leave to make application for fees on a commission basis as approved by law within thirty (30) days of the entry of this Order.

In conclusion, Ray has moved the Court to permit the Estate to pay his attorneys' fees incurred in defending the Petition to Removed Clyde Ray as Administrator, and in connection with other litigation. Such motion and application is DENIED as such fees were caused and incurred as the result of Ray's personal acts, omissions and breaches of duty and are a personal expense not chargeable to the Estate or payable by the Estate. In Re Estate of Garmon, 254 Ga. App. 84, 87, 561 S.E. 2nd 216 (2002). As to attorneys' fees incurred in defending other lawsuits against the Estate, Ray is directed to file a separate pleading with this Court within ten (10) days of the entry of this order, attaching actual but redacted copies of invoices and stating reasons why such attorneys' fees and invoices should not be determined by the courts in which said lawsuits were heard and why such attorneys' fees and invoices are Estate expenses and not expenses incurred due to Ray's failure to properly administer the Estate or to settle and pay just claims. The Petitioner will have ten (10) days from receipt of such pleading to reply and the Court will thereafter rule on such application for fees based on the pleadings.

SO DECREED, ORDERED AND ADJUDGED this 7th day of October, 2004.

/s/_____
ISAAC S. JOLLES
JUDGE OF THE PROBATE COURT
RICHMOND COUNTY, GEORGIA

## 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 Isaac S. Jolles of Richmond County

1. *I have been the Probate Judge of* Richmond *County since* September 14, 1998.

2. *Before I was Probate Judge, I* was in the United States Army from September 17, 1953 until January 30, 1957. I practiced law with the Sanders Law Firm from February 1957 until I opened by own office. Subsequently, I entered in a partnership with Richard Slaby in 1970 and remained in practice with him until he was appointed State Court Judge. I was Recorder Court's Judge in August 1970 to 1980. I continued in private practice until 1998, when I ran successfully for Probate Judge of Richmond County.

3. *My family* consists of my wife Myra, my son Scott, my daughter Marcy, and my son Jonathan.

4. *My pet peeve (on the job) is* lack of proof-reading in society.

5. *My pet peeve (in general) is* poor handwriting.

6. *When I have time, I love to* work with my hands repairing antique motorcycles (Cushmans).

7. *The thing I enjoy most about my job is* conducting hearings in Court.

8. *Two things I am a stickler for in Court are* decorum; that each witness answer the question being asked; and keeping the flow of testimony on the issues before the Court.

9. *If someone wants to get a case set to be heard in my Court, her or she should* be sure the pleadings and the case are ready for trial and then request a hearing date.

10. *The question most often asked about my Court's procedure (and the answer) is* "How do I get a case tried?" (see response above) and "Do I need a lawyer?" The answer is "No but it is a good idea."

11. *If I could have dinner with any three people, living or dead, they would be* my Dad and Mother, my brother, and Dilly.

12. *Tech or Georgia?* Georgia.

---

STATE BAR OF GEORGIA
FIDUCIARY LAW SECTION

---

**Message from the Chairman of the Fiduciary Law Section**

By Faryl S. Moss
Faryl S. Moss & Associates
Atlanta, Georgia

This is the second combined issue of *Georgia Probate Notes* and the Fiduciary Law Section Newsletter. It is our intention to make Section members aware of the resource that *Georgia Probate Notes* provides for those of us who do estate planning or work with trust and estate administration issues. Similarly, we want to share with section members and the Georgia probate judges the activities, projects, seminars and concerns of the Fiduciary Law Section. We believe that by working together and sharing information, we can all better serve Georgians.

First, I want to thank Melissa Walker for her insightful and dynamic leadership of the section during this past year. Melissa spearheaded several initiatives, including joint publication of *Georgia Probate Notes* and the Fiduciary Law Section Newsletter. Her vision and hard work represent an invaluable contribution to both the State Bar and the public. Thanks, Melissa, for a great job as Section Chair.

As you all know, the new Guardianship Code became law on July 1, 2005. As with any new law, redoing the forms is a major task. We are especially grateful to Jorgia Northrup, Clerk of the Gwinnett County Probate Court and Ann Salo for their hard work in developing the new guardianship forms. Speaking of the new Guardianship Code, if you encounter any issues with the new Code that need to be addressed, please e-mail Professor Mary Radford at *mradford@gsu.edu.*

We will be adding to our website and will be putting information on that site that is both timely and helpful to our section members. We would like to be able to notify you of important information via e-mail, so if you have not included your e-mail information in the Georgia State Bar directory, we hope that you will do so. Also, volunteers for this and other section projects are needed.

We hope that you will find this joint publication of *Georgia Probate Notes* and the Fiduciary Law Section Newsletter to be of interest and helpful to you. If you have any suggestions of how we can better serve your needs, please let us know.

---

## Report of the Fiduciary Law Section Legislation Committee

By Benjamin H. Pruett
King & Spalding LLP
Atlanta, Georgia

The Fiduciary Law Section Legislation Committee, chaired by Mark Williamson of Alston & Bird LLP, met on July 14, 2005, during the Fiduciary Law Institute held at St. Simons Island. The following is a summary of the issues addressed at that meeting.

*Definition of Insurable Interest*

The Committee approved proposed legislation that would amend Georgia's insurable interest statute for life insurance, O.C.G.A. § 33-24-3, to provide that the trustee of an irrevocable life insurance trust (ILIT) has the requisite insurable interest to purchase a policy on the life of the insured, where the settlor and/or the beneficiaries of the trust have such an insurable interest. The proposed legislation also enumerates several other situations in which a person may have an insurable interest in the life of another, such as the funding of a redemption or cross-purchase buy-sell agreement.

The insurance statutes of all states provide that the purchaser of any life insurance policy must have some economic or other interest in the life of an insured, such that the death of the insured would cause the purchaser to suffer some economic or other loss. Without such a requirement, a life insurance policy could be purchased for no purpose other than merely "wagering" on the life of another. If a policy is issued to a purchaser who is found to be

without insurable interest, the insurer's liability on the policy may be limited to premiums paid or, in some cases, the policy proceeds will be paid to the insured's legal heirs, rather than the owner or designated beneficiary of the policy, irrespective of the person who paid the premiums.

The insurable interest of the Trustee of an ILIT in the typical family situation has never been questioned in Georgia and, indeed, has always been presumed, but the insurable interest statute does not *expressly* state that such insurable interest exists. The proposed amendments are intended to address concerns raised by the case of *Chawla v. Transamerica Occidental Life Ins. Co.*, 2005 WL 405405 (E.D. Va. Feb. 3, 2005), in which a federal district court in Virginia, construing the insurable interest statute of the state of Maryland, determined that a trust lacked an insurable interest in the life of the settlor, essentially because the applicable insurable interest statute did not *expressly* provide that a trust or a trustee could have any such insurable interest. The *Chawla* decision has been widely criticized as taking an unreasonably restrictive view of the law, especially since the insurable interest ruling was unnecessary to the resolution of the case (significant fraud in the procurement of the policy was amply proven). Nevertheless, to eliminate any doubt as to insurable interest in the case of a typical ILIT and in certain other common situations, the proposed legislation specifically sets forth a non-exclusive list of insurable interests. Moreover, the proposed legislation states that it is not intended to *create* any *new* insurable interests that did not exist previously, but is intended only codify insurable interests which already exist at common law, so that the amendments to the statute will apply to existing policies, as well as new policies.

The proposed legislation has been forwarded to the Executive Committee of the Section for further action.

*Fiduciary Representations and Warranties in Purchase and Sale Agreements*

The Committee discussed whether certain provisions of the Georgia Trust Act, and perhaps the Probate Code, should be revised to permit fiduciaries to give certain contractual "representations and warranties" in agreements for the sale of property, closely held business interests, etc., where the representations and warranties are binding upon the other property of the estate or trust.

O.C.G.A. § 53-8-14 prohibits the personal representative of an estate from binding the estate with *any* warranty in any conveyance or contract. Based upon this provision, the Georgia Supreme Court held in *Moss v. Twiggs,* 260 Ga. 561, 397 S.E.2d 707 (1990), that a warranty of title by the trustee of a testamentary trust was invalid. Current O.C.G.A. § 53-12-259 essentially provides that sales by trustees of *inter vivos* trusts are governed by the same rules as sales by personal representatives of decedents' estates. The comments to O.C.G.A. § 53-8-14 suggest that the restriction on fiduciary warranties only applies where the fiduciary is not granted certain broad powers in the governing instrument, such as those powers

contained in O.C.G.A. § 53-12-232, but the comment is not part of the statute and is therefore not binding.

Certain members of the Section have expressed concern that the foregoing statutes and case law create uncertainty as to whether a fiduciary can ever give the kinds of representations and warranties that are commonly necessary in a commercial transaction, thus rendering fiduciary property either unmarketable or requiring the estate or trust to accept a significantly discounted price, to the detriment of the beneficiaries.

The Committee is still studying this issue and has also referred the issue to the Trust Code Revision Committee for study and comment.

*Non-Probate Transfers to Testamentary Trusts*

The Committee discussed whether to amend the Testamentary Additions to Trusts Act, O.C.G.A. § 53-12-70 et seq., to provide that the designation of a testamentary trust as beneficiary of a qualified retirement plan or individual retirement account (QRP/IRA) or life insurance policy is valid.

Treasury Regulation § 1.401(a)(9)-4, A-5(b)(1), part of the "Final Regulations" on distributions from QRP/IRAs, provides that the designation of a testamentary trust as beneficiary will not be deemed the designation of the owner's *estate* as beneficiary. Where an estate is designated as beneficiary, the QRP/IRA must be paid out completely within five years of the decedent's death, but if a trust meeting certain requirements is designated as beneficiary, the QRP/IRA may be paid out over the oldest beneficiary's life expectancy, thus maximizing the tax deferred buildup potential of the account. However, the Final Regulations also require that for a trust to be a designated beneficiary, it must be valid under state law but for the fact that the trust has no other corpus at the time of the designation. While an unfunded *inter vivos* trust can easily meet this requirement, it is not entirely clear whether a *testamentary* trust meets the requirement, since an express trust must be in writing, and a will, being the writing that creates the trust, is not considered to spring into existence prior to the death of the testator.

The Committee is not aware of any instance where the validity of a beneficiary designation in favor of a testamentary trust has been challenged in Georgia, but amending the statute could offer the advantage of removing any doubt. The Committee is still studying this issue and has also referred the issue to the Trust Code Revision Committee for study and comment.

*Permitting Trusts to Hold Title to Property*

Georgia title law currently provides that a conveyance of property to a trust, rather than to the trustee, in its capacity as such, is improper, presumably because a trust is a *relationship*

under Georgia law, and not an *entity* recognized as having a separate existence (such as a corporation, partnership, or limited liability company). This rule draws into question numerous recorded conveyances of property to trusts, in their own right, rather than to the trustees of those trusts. Moreover, this rule raises the question of whether it is necessary, upon a change of trustees, for the prior trustee to convey title to property to the successor trustee. Finally, this rule raises issues for foreign "statutory" or "business" trusts that are permitted to hold title to property in their own right in their states of organization, but are not permitted to do so in Georgia.

At the request of the Real Property Law Section, the Committee considered whether the Trust Act should be amended to specifically permit trusts to hold title in their own names. The Committee determined that this issue is probably one that implicates real property title law more than it does trust law, but is still studying the issue and has also referred the issue to the Trust Code Revision Committee for study and comment.

*Revised Uniform Power of Attorney Act*

The Committee is studying the Revised Uniform Power of Attorney Act, currently being finalized by the Conference of Commissioners on Uniform State Laws, to determine whether some version of the act should be enacted in Georgia.

Georgia currently has a non-exclusive statutory financial power of attorney form, but there are no provisions in the law that expressly require third parties to comply with directions of an agent under such a document. As a result, many third parties, including some financial institutions, either refuse to accept any power of attorney, or require the principal to execute the institution's own form of power of attorney. The result is that a court-ordered conservatorship for the property of an incapacitated adult may become necessary, notwithstanding the individual's efforts (prior to incapacity) to plan for incapacity, and avoid a conservatorship, through the use of a power of attorney.

The Revised Uniform Power of Attorney Act provides, among other things, that where a principal has executed a legally valid power of attorney, a third party may not require the execution of any other form of power of attorney, and may be liable in damages for unreasonably refusing to accept the authority of an agent, at least where the third party is relieved of liability for relying upon the document.

The Committee expects to recommend legislation on this issue for introduction either in 2006 or in 2007.

## E-mail and Fax Transmissions - Footers

Those of you who attended the Fiduciary Law Seminar in St. Simons in July will recall that J. Randolph Evans of McKenna, Long & Aldridge in his lecture entitled "Professional Liability Insurance: Are You Covered As Well As You Think?" alluded to a paragraph which should be included as a footer on e-mail and FAX transmissions. With Randy's permission we have printed the paragraph below.

Suggested for use by small firms:

NOTICE: This email and all attachments are CONFIDENTIAL and intended SOLELY for the recipients as identified in the "To", "Cc" and "Bcc" lines of this email. If you are not an intended recipient, your receipt of this email and its attachments is the result of an inadvertent disclosure or unauthorized transmittal. Sender reserves and asserts all rights to confidentiality, including all privileges which may apply. Pursuant to those rights and privileges, immediately DELETE and DESTROY all copies of the email and its attachments, in whatever form, and immediately NOTIFY the sender of your receipt of this email. DO NOT review, copy, or rely on in any way the contents of this email and its attachments. All rights of the sender for violations of the confidentiality and privileges applicable to this email and any attachments are expressly reserved.

Suggested for use by medium and large firms:

CONFIDENTIALITY NOTICE: This e-mail and any attachments contain information from the law firm of McKenna Long & Aldridge LLP, and are intended solely for the use of the named recipient or recipients. This e-mail may contain privileged attorney/client communications or work product. Any dissemination of this e-mail by anyone other than an intended recipient is strictly prohibited. If you are not a named recipient, you are prohibited from any further viewing of the e-mail or any attachments or from making any use of the e-mail or attachments. If you believe you have received this e-mail in error, notify the sender immediately and permanently delete the e-mail, any attachments, and all copies thereof from any drives or storage media and destroy any printouts of the e-mail or attachments.

---

## Elder Law and Fiduciary Law Bar Activities and Cooperation

By Kelli L. Wolk
Moore Ingram Johnson & Steele, LLP
Marietta, Georgia

The State Bar of Georgia has three separate sub-groups that work either with the members of the Bar, with the community, or both, to assist in education and provide information. The Younger Lawyers' Division of the Bar has an Elder Law Committee (referred to as the Committee) that has a primary goal of active outreach to the community. The Elder Law Section (which is known as the Section) has a focus of educating members of the Bar who practice in the areas related to elder law. The Fiduciary Law Section has a focus on both educating members of the Bar and in improving the system of law within the state of Georgia relating to elder law and fiduciary law. The Fiduciary Law Section is the driving force behind the rewrite of the Probate and Guardianship Codes and is currently working to revise the Trust Code of Georgia in much the same fashion.

***Elder Law Committee***

The Committee has a number of projects that it handles on an annual basis. Each year the Committee conducts Advanced Directives Day at facilities throughout the state. This year, for the first time, the Committee worked with WSB to expand the number of facilities and provide information to a greater number of people throughout the state. Members of the Committee volunteer to go to a selected facility on a specific day to help people in the community execute advanced directives (such as health care powers and living wills). Typically, it is not an advisory situation but is an effort to provide people with the opportunity to execute the documents.

The other major project for the Committee is the Senior Handbook. The Handbook is published each year and is distributed to probate courts and libraries throughout the state. It is designed to be an entry level overview of pertinent information for seniors on topics ranging from funeral procedures, to tax laws, to probate, and Medicaid. The Handbook is revised as circumstances changes (tax law revisions, guardianship and probate changes, etc.) This is a significant revision year for the Committee, given all of the changes in applicable law.

***Elder Law Section***

The Section is primarily dedicated to educating members of the Bar on elder law developments. This is not an insignificant undertaking this year. The Section currently has a CLE planned for September 16 at the new State Bar Headquarters in downtown Atlanta to deal with the new law on guardianships and conservatorships for adults and children.

***Fiduciary Law Section***

The Fiduciary Law Section just finished its annual Fiduciary Law Institute held at the King & Prince on St. Simons Island. It was an impressive three-day conference focused on developments in guardianship/conservatorship law, procreation science and its effect on inheritance rights, ethical issues particular to fiduciary representation, as well as tax and planning tools. The Fiduciary Law Section is also preparing for the annual Estate Planning Institute to be held in Athens. This is a three-day conference held in February that is directed more toward those fiduciary attorneys with an estate planning focus with information in other areas related to fiduciary representation.

The Fiduciary Law Section is also working with practitioners, judges, and legislators to work out the kinks in the new Guardianship Code that became effective on July 1. The Section has a committee that has been working to perfect the forms to be used under the new Code. They are also beginning the revision of the Trust Code for Georgia. In addition to rewriting those titles of the Code, there is a committee dedicated to examining proposed legislation and evaluating the potential effect of such legislation on fiduciary/elder law practitioners and their clients. This is an overwhelmingly large undertaking given the number of bills proposed each session, but the committee has made every effort to identify potentially problematic bills and work with legislators on positive bills.

Finally, the Fiduciary Section is actively involved in making publications available to the public, both attorneys and non-attorneys, in areas related to this area of practice. There is a

committee dedicated to writing, revising, and producing such publications for dissemination through the Bar's office. Sarah Bartleson is the publications contact at the Bar and can give anyone interested in these pamphlets information on how to get copies.

***Cooperation***

The three groups have intertwined but distinct areas of focus and goals. However, the three are working toward cooperating where appropriate and practical and communicating about projects, CLEs, and publications to better serve the lawyer and non-lawyer public. The Fiduciary Section and the Committee are working together to potentially take advantage of an ABA project related to Elder Law month in October to create two Advanced Directive Days each year with expanded areas of service and have begun working together on the publications to enhance those pamphlets and identify areas of concern or lack of information.

The groups are looking for areas of commonality to benefit their target market in terms of training, education, outreach, and information as well as maximizing resources in order to better serve the community at large. As the groups better coordinate, the benefits to lawyers and the non-legal community will increase and hopefully everyone will see the rewards.

---

**Note from the Editor of the Fiduciary Law Section Newsletter**

By Nikola R. Djuric
Sutherland Asbill & Brennan LLP
Atlanta, Georgia

If you have an item to submit to the Fiduciary Law Section 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.

---

# Georgia Probate Notes

P.O. Box 3242
Decatur, Georgia 30031