RECENT DEVELOPMENTS

IN

GEORGIA FIDUCIARY LAW

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I. GEORGIA CASE LAW

A. YEAR'S SUPPORT

1) Davis v. Hawkins, 238 Ga. App. 749, 521 S.E. 2d 10 (1999): After the decedent died testate, his widow filed a petition for year's support. The executor of his estate and one of the testator's children filed a caveat to the petition, claiming the amount requested was excessive. The child also filed a second caveat, along with his sister, requesting that the petition be denied. The probate judge dismissed the petition and the widow appealed. When the appeal was pending, the executor and the widow reached an agreement settling the widow's claim. The superior court approved the settlement agreement. Two of the testator's children (who were beneficiaries under the will) asserted that the executor lacked the authority to compromise the year's support claim over their objections. They spoke of the executor's lack of authority to settle "their" caveat. The Court of Appeals affirmed the trial court's approval of the settlement. The court noted that the year's support claim was a claim against the estate and that the executor clearly has the authority to compromise claims in favor of or against the estate. (OCGA § 53-7-45).

2) In re L.C. Reece, 243 Ga. App. 173, 532 S.E. 2d 726 (2000): A widow

filed for year's support on behalf of herself and her minor child one year after the date of her husband's death. In her application, she included a prayer that citation issue and that all interested persons be given notice by mail. The court signed an Order for Citation directing that the notice be mailed. However, the notice was never mailed to the interested persons. The probate court continued a hearing on the application because a specific description of the decedent's property had not been provided. The widow did not provide the description for over two years, at which time she filed an amended application. At the hearing on the amended application, the court explained that the original notice had not been mailed because the original application had not included the appropriate description of the property. The court reissued the citation and service was accomplished. However, the decedent's adult daughter objected to the amended application on (among other grounds) the ground that the statue of limitations (three years under the then-applicable law) had run. (Also, by the time the amended application was filed, the minor son had reached the age of majority.) The court dismissed the amended application with prejudice.

The Court of Appeals affirmed the probate court's dismissal. The Court stated that the "critical fact" was that the interested parties were not served with notice until after the statue of limitations had run. The widow claimed that the fact

that she had filed the petition within the three-year limitation was adequate, but the Court of Appeals stated that "the mere filing of an action without service does not toll the statute of limitations." The Court of Appeals dismissed as irrelevant the fact that there was some disagreement as to whether the original application had in fact contained all of the information required by law because the widow did not exercise diligence after the court told her that it required further information. The Court of Appeals found that the widow was "guilty of laches in failing to exercise due diligence to ensure that the interested parties were served." Although the former Code provisions stated that the court would mail the required notice, the Court emphasized that "it is always the burden of the applicant to ensure that service is timely made."

B. INTESTACY

1. Heirs of Child Born Out of Wedlock

1) In re Estate of Garrett, 244 Ga. App. 65, ___ S.E. 2d ___ (5/00): The decedent died intestate in 1997. The administrator of his estate, who had learned that Phillips claimed to be the decedent's father, filed a Petition to Determine Heirs. The probate court found that Phillips was the decedent's father and thus one of his heirs. The Court of Appeals reversed. The Court of Appeals pointed out

that Phillips had not signed the decedent's birth certificate or a sworn affidavit of paternity, that there was no genetic evidence of paternity and, most importantly, that there had been no adjudication of paternity during the decedent's lifetime. Phillips cited current OCGA Sec. 53-2-4(b)(1), which allows the putative father of a child born out of wedlock to inherit from the child if (among other things) a court has entered an order declaring a child to be legitimate or "[a] court of competent jurisdiction has otherwise entered a court order establishing paternity." Phillips contended that the finding by the probate court that he was the decedent's father constituted a court order establishing paternity. But the Court of Appeals, citing *Dunlap v. Moody*, 224 Ga. App. 38, 479 S.E. 2d 456 (1996) and *Rainey v. Cheever*, 270 Ga. 519, 510 S.E. 2d 823 (1999), pointed out that a putative father loses his right to inherit if the requirements of this Code section are not met during the child's lifetime. In *Dunlap v. Moody*, the Court had given the rationale for this requirement: "to rule otherwise . . . would not permit an illegitimate child, who is now dead, to dispute paternity."

2) Campbell v. Moody, 242 Ga. App. 643, 529 S.E. 2d 923 (2000): In 1996, in *Dunlap v. Moody*, 224 Ga. App. 38, 479 S.E. 2d 456 (1996), the Court of Appeals affirmed the probate court's finding that William Dunlap, the decedent's

putative father, was not an heir of the decedent. In 1997, two petitioners, Moody and Stapleton, filed a petition for declaration of heirs in the superior court. One of the respondents in this case was Zella Campbell. However, Campbell's counsel (who had acknowledged service for Campbell) entitled the response "William C. Dunlap's Response to Petition for Declaration of Heirs" and signed the answer as "Attorney for William C. Dunlap." Almost two years later, the counsel sought to amend the answer by substituting Campbell's name for Dunlap's name and petitioned to open default. The superior court found that Campbell did not timely answer, that Dunlap had no standing in the case, and that the petitioners had actually already settled the matter between themselves. The Court of Appeals denied Campbell's appeal of this ruling.

C. PROBATE OF WILLS

In Harvey v. Sullivan, 272 Ga. 392, 529 S.E. 2d 889 (2000), the Supreme Court affirmed the probate court's admission of a contested will to probate. The caveator, Harvey, and another relative filed the caveat *pro se*. Harvey filed a demand for jury trial four years after he filed his first caveat. Although conceding that OCGA Sec. 15-9-121 requires that such demands be filed within 30 days of the initial filing, Harvey contended that this "unrealistic" time requirement was

unconstitutional when applied to *pro se* parties. The Supreme Court found no error in the trial court's denial of the demand for jury trial.

Harvey next contended that the propounder had failed to produce the required number of witnesses. One of the witnesses was dead. The second witness, who had moved out of Georgia, filled out and signed the appropriate interrogatories, but they were improperly dated by the notary with a date that preceded the testator's death. A new set of interrogatories was mailed to the witness but never returned, so the propounder proved the testator's signature by a series of witnesses who were familiar with her handwriting, as provided in OCGA Sec. 53-5-24. Harvey claimed that Sec 53-5-24 was not applicable as the living witness had not been shown to be "inaccessible" but the Supreme Court agreed with the trial court that the witness had been shown to be inaccessible at the time of trial. Harvey's third contention was that there was "unrefuted" evidence of forgery. He testified that, when he first examined the will, there had been no signature on the first page but that there was a signature when he later looked at it. The court stated that there were several copies of the will in the record but that the original "and an onionskin copy" both had the testator's signature on the first page. Harvey's final contention, that of undue influence, was based only on evidence that the propounder of the will and the testator had a close relationship. No evidence

that the propounder had exerted undue influence was produced.

D. WILL CONTESTS

1. Fraud & Undue Influence

In several cases in the second half of 1999 and the first half of 2000, the Supreme Court of Georgia affirmed its insistence on a "stringent standard" of evidence before finding a lack of testamentary capacity or undue influence and thus depriving a testator of the right to make a will.

In Crumbley v. McCart, 271 Ga. 274, 517 S.E. 2d 786 (1999), the Supreme Court of Georgia examined the circumstances under which a relationship between brothers would rise to the level of a "confidential relationship" and thus result in a rebuttable presumption of undue influence by the surviving brother. The brothers in this case were business partners and tenants in common as to certain farm land. The evidence showed that the testator had a weaker personality than his brother. The testator's brother had made the appointment with the attorney who drew up the testator's will and was present when the will was executed. However, the brother's presence was explained by the fact that he was simultaneously executing his own will. The attorney did not observe any indication of undue influence by the brother over the testator and testified that the testator was "alert and well-oriented" when

he signed his will. The brother was the sole beneficiary of the testator's will and the testator's other siblings claimed that the brothers had shared a confidential relationship and that, as result, a rebuttable presumption arose that the testator had been unduly influenced by his brother. The probate court found in the caveators' favor but the superior court and the Supreme Court ruled in favor of the brother.

The Supreme Court stated in this case that the mere fact that the testator and the sole beneficiary were brothers did not demonstrate the existence of a confidential relationship. The Court noted also that the evidence of the beneficiary's more dominant personality did not, in and of itself, demand a finding that the brothers operated other than as equals.

In Estate of Diaz, 271 Ga. 742, 524 S.E. 2d 219 (1999), the testator disinherited her children after they tried to have her involuntarily committed. After her release from the hospital, the testator told the sheriff's deputies that she did not want to see her children again. She later resumed telephone communications with them but told them that although she might forgive them, she would never forget. About four months later, the testator was diagnosed with cancer. She asked her brother to have her attorney draw up a will that left her personal effects to the brother and the rest of the property to her grandchildren. A week after signing the will she signed a codicil that stated that, due to recent events, her children and

estranged husband were to take nothing under her will. She died a few months later and the children caveated the will and codicil, claiming undue influence by the brother and lack of testamentary capacity. The probate court overruled their objections and the Supreme Court affirmed. The Supreme Court noted that although the testator was suffering from cancer when she executed her will, her doctor and the witnesses to the will had found her to be lucid and coherent. As to the claim of undue influence, the court pointed out that the mere fact that the evidence showed that the brother had the opportunity to exercise the influence was not the requisite clear and convincing evidence that the will had actually been procured by undue influence.

In Brooks v. Julian, , 271 Ga. 766 , 523 S.E. 2d 862 (1999), a mother disinherited two of her four daughters when she became suspicious that one of them had abused her authorization to take things from the mother's safe deposit box and the second daughter had "sympathized" with her. A jury found that the other two daughters had exerted undue influence on their mother but the Supreme Court found insufficient evidence to support that finding. The Supreme Court cited the testimony given by the attorney and the attorney's assistant (both of whom had known the testator for some time) that the testator appeared to know exactly what she was doing when she changed her will, and that she did not appear

to be acting other than freely and voluntarily. Although the record contained evidence of suspicious circumstances, the Court stated strongly that suspicion cannot be allowed to supplant direct evidence on the issue.

In Kendrick-Owens v. Clanton, 271 Ga. 731, 524 S.E. 2d 237 (1999), the testator disinherited her other children in favor of her youngest child. A jury verdict set the will aside on the ground of undue influence but the Supreme Court reversed, finding insufficient evidence to sustain the verdict. The evidence showed that the youngest daughter had a domineering personality and that she had driven the testator to the attorney's office on the two occasions on which the testator discussed and executed her will. However, the attorney, the other witness, the notary, and the testator's long-time physician all testified that the testator was lucid and of sound mind when she executed her will. The Supreme Court reiterated its emphasis on the circumstances surrounding the time the will was executed, rather than prior or subsequent times, and that the mere opportunity to exercise undue influence is insufficient to support a finding thereof.

In Dyer v. Souther, 272 Ga. 263, 528 S.E. 2d 242 (2000), a jury trial was held on the issues of testamentary capacity, whether the will was properly executed, and whether the will was the product of undue influence. At the close of

the evidence, the superior court directed verdicts in favor of the propounder of the will on the latter two issues and the jury decided in the propounder's favor on the issue of testamentary capacity. The caveator appealed the directed verdict and the Supreme Court reversed the direct verdict on the undue influence issue, finding that there was "circumstantial evidence sufficient to raise the issue of undue influence." This case contained many of the familiar elements of the previously-discussed undue influence cases. The testator, the last survivor of 11 children, bequeathed all of her property to a great-nephew to the exclusion of over 70 nieces and nephews. In the event he had not survived the testator, the property was to go to his mother, who was not a blood relative of the testator. The great-nephew, Souther, was regularly at the testator's home, rented property from her, and made the appointment for the testator with her attorney. The testator lived with Souther's mother prior to entering a nursing home and executed a power of attorney in his favor. She opened certificates of deposits jointly in their two names and, prior to his death, he cashed them all. The testator exhibited a degree of mental impairment and dementia around the time the will was executed. She could not read or write or fill out a check. A relative testified that the testator had complained to her about Souther and said that Souther would not be getting anything from her when she died. The Supreme Court found that this evidence

"belies the finding that the evidence demanded a verdict in favor of the propounder...." The Court also stated that the lower court had erred when it excluded evidence of the source and value of the testator's home (in which she had been born and which she had inherited when her last sibling died).

2. Time for Filing Caveat

Rice v. Higginbotham, 271 Ga. 262, 517 S.E. 2d 784 (1999): The named executor of the will of Sarah Hale filed a petition to probate the will and notified the heirs at law. Rice, one of the heirs, was served by publication because she was not a resident of Georgia. Additionally, a copy of the published notice was mailed to her. Rice admitted that she had received the notice about 13 days prior to the time set for the hearing. (The court found no problem with the manner in which Rice had been served.) The notice indicated that the hearing was set for November 3, 1997 and stated: "All objections to the petition must be in writing, setting forth the grounds of any such objections, and must be filed before the time stated in the citation." A caveat was filed by a different heir on October 30, 1997 and the court issued an order of continuance on November 3, 1997. On November 25, 1997, Rice filed with the probate court a copy of a letter to other heirs in which she stated that she would be filing a caveat. She filed the caveat on December 31, 1997. The

probate court struck her caveat due to its untimely filing. The Court of Appeals reversed this order, 235 Ga. App. 378, 508 S.E.2d 736 (Nov. 2, 1998). The Court of Appeals found that the notice was insufficient to inform Rice that her objection must be filed by November 3, 1997 (the hearing date, as stated in the notice). The Court of Appeals said that the notice "could be read as notice that written objections were required to be filed no later than the date and time at which the hearing occurs."

The Supreme Court found that the citation served on the heir was sufficient to inform her that November 3 was the deadline for appearing in probate court or filing a written objection. The controlling statute in this case was former OCGA § 53-3-14. This statute provided that the notice sent to known parties residing outside Georgia "shall command all parties to... appear before the court at the time specified, to then and there show cause, if there is any, why the probate in solemn form of the will should not be had." The new statute, § 53-11-9, requires a citation to "state that any objection must be made in writing and shall designate the date on or before which objections must be filed in the probate court."

E. WILL CONSTRUCTION

1) Crisp Area YMCA v. Nationsbank, N.A., 272 Ga. 182, 526 S.E. 2d 63 (2000): The testator had been a founding director of the Cordele YMCA and was also an active member of the Albany YMCA, whose facility he used several times a week. He made financial contributions to both organizations. The Cordele YMCA had become inactive in May, 1992 and had performed no functions since that time other than liquidating its assets and paying its debts. (Apparently the Cordele YMCA also lost its tax-exempt status.) The directors of that YMCA had invited the Albany YMCA to take control of activities in Crisp County, which it had done.

On May 14, 1992 (six days after the Cordele YMCA ceased operation), the testator executed a will in which he bequeathed $100,000 to the Cordele YMCA. In 1994, he twice instructed his attorney to draft a codicil changing the beneficiary to the Albany YMCA, but he never executed those codicils. He died on June 21, 1995. The executor sought declaratory judgment and the trial court, applying the doctrine of cy pres, ordered that money be paid to the Albany YMCA.

The Supreme Court reversed the trial court, finding that cy pres can be applied only when there is a "legal or practical impossibility of carrying into effect" the decedent's intent. Although the Cordele YMCA was no longer active, the Court noted that it was not defunct and that the testator had been aware of its

status. In dissent, Justices Sears and Benham found that the testator's will evidenced an intent to bequeath a charitable gift to "a Crisp County regional YMCA organization."

2) The issue addressed in Emmertz v. Cherry, 271 Ga. 458, 520 S.E. 2d 219 (1999) was whether a testator's will indicated an intent that the executor not seek reimbursement from a life insurance beneficiary for the taxes incurred as a result of the inclusion of the life insurance proceeds in the testator's gross estate. The testator died with incidents of ownership in three life insurance policies, all of which were payable to his daughter. The daughter and the testator's two sons were the beneficiaries of the residue of the testator's estate. The will directed that all taxes be paid from the residue of the estate. Another item in the will directed the executor to recover from the recipients of any QTIP property or property distributed to them under a power of appointment the share of the estate taxes attributable to the inclusion of the value of that property in the testator's gross estate. This clause did not mention life insurance proceeds. Section 2206 of the Internal Revenue Code entitles the executor to recover taxes attributable to life insurance proceeds from the life insurance beneficiary "[u]nless the decedent

directs otherwise in his will." The probate court found that the direction to pay all taxes from the residue combined with the clause that directed the executor to recover taxes from the recipients of certain non-probate assets and the omission of a similar clause related to life insurance beneficiaries illustrated that testator's awareness of the possibility that tax would be generated by non-probate assets and constituted a direction in the will that the executor not recover taxes from the life insurance beneficiary. The Supreme Court affirmed.

Because this was a case of first impression in Georgia, the probate court turned to cases from other states for direction. The Supreme Court agreed with the probate court's citation of an Arizona case, Estate of Torres v. Nolan, 173 Ariz. 568, 845 P.2d 494 (App. 1992), as an apt comparison.

F. ADMINISTRATION OF ESTATES

1. Appointment of Personal Representative

1) In re Estate of Bagley, 239 Ga. App. 877, 522 S.E. 2d 281 (1999): A deceased mother was survived by three children. Her will appointed one child, Robertson, as executor and named Bagley as successor executor. Robertson was appointed and Bagley petitioned twice to have her removed. He was successful with a jury trial on his second petition. Bagley then petitioned to be appointed

executor. The probate court denied the petition on the ground of "irreconcilable differences" and "animosity" between Bagley and Robertson and appointed the county administrator. Bagley did not appeal that order nor did he seek to have that individual removed. Instead, two years later, he petitioned once again to be appointed executor. This time the court denied his petition on the basis that the estate was not in need of an executor because it was being properly represented by the county administrator. The court also found that Bagley's failure to appeal the court's appointment of the county administrator acted as res judicata. The Supreme Court identified the prerequisites that must be satisfied, under OCGA Sec. 9-12-40 and case law, in order for res judicata to apply: 1) identity of the cause of action; 2) identity of the parties; 3) a previous adjudication on the merits by a court of competent jurisdiction; 4) opportunity by party against whom the doctrine is raised to have had a full and fair opportunity to litigate the issues; and 5) the prior judgment must be a final judgment. The court found that these prerequisites had been satisfied. The court pointed out that its holding in this case was not meant to imply that, once a personal representative is appointed, the beneficiaries under the will would be precluded from seeking removal of that person. The court pointed out, however, that the removal of the first personal representative did not automatically entitle a named successor, such as Bagley, to be appointed.

2) Goolsby v. Estate of Williams, 243 Ga. App.890, 534 S.E. 2d 559 (2000): Lester claimed to be the common law husband of an intestate decedent and applied to be the administrator of her estate. Decedent's mother, who was the guardian of her minor children, objected and subpoenaed Goolsby, the Director of the Income Tax Division of the Georgia Department of Revenue to produce copies of the decedent's income tax returns in order to show that the decedent had filed returns as a single person. Goolsby claimed the information was confidential and protected from disclosure under OCGA Sec. 48-7-60(a). The probate court required the production of the returns, but the Court of Appeals reversed this order. The Court of Appeals relied on the Supreme Court's "clear policy favoring non-disclosure," as evidenced in cases in which disclosure was required only when the integrity of the returns themselves was directly in issue.

3)In re Estate of Farquharson, 244 Ga. App. 632, ___ S.E. 2d ___ (6/00): In her will, the testator named her son-in-law and a bank as co-executors. A codicil to the will gave an income interest in a trust to her husband, Farquharson. After she died, the bank declined to serve and the son-in-law offered the will for probate. Farquharson objected to his appointment as executor on the ground that he was

"unfit" to serve. Farquharson claimed that the son-in-law was biased against him and that there were numerous conflicts of interest, including the son-in-law's approval of inappropriate payments to the son-in-law's law firm and to his wife. Farquharson also claimed that the son-in-law had improperly persuaded the bank not to serve as co-executor. The son-in-law orally moved to dismiss the caveat, stating that the issue on the petition to probate the will was simply whether there was a proper will, a conclusion to which Farquharson had not objected. The probate court appointed the son-in-law as executor, partially because it found that "no legal or factual basis appeared..." for not doing so and partially because it reasoned that, in order to consider Farquharson's caveat, it should first appoint the son-in-law as executor and then entertain a removal petition. The Court of Appeals disagreed with the probate court's approach. The Court found that the "qualification and fitness of an executor to serve is a proper subject of inquiry in a caveat in the probate court" and the fact that the will was admitted to probate should not preclude the court from refusing to appoint the propounder as executor. The Court pointed out, however, that this procedural error did not require a reversal of the appointment of the son-in-law. The Court of Appeals also noted that "[i]rreconcilable differences and animosity, between a nominated executor on the one hand and the beneficiaries on the other, authorize but do not require the

probate court's refusal to appoint the person nominated in the will as executor." The Court thus affirmed the appointment of the son-in-law but remanded the case for a hearing on the merits of the caveat.

2. Removal of Personal Representative

1) In re Estate of Jackson, 241 Ga. App. 392, 526 S.E. 2d 884 (1999): In 1998, ten years after the estate had been opened, Willie Jackson filed a petition to remove Ira Jackson as administrator of his father's estate. When the petition was filed, Ira was an inmate in the federal penitentiary in Montgomery, Alabama. The probate court granted the petition to remove Ira and also ordered him to re-deed to the estate property he had previously deeded to himself. Ira appealed and the Court of Appeals affirmed his removal. Ira contended that the probate court had abused its discretion in that it had not made any finding of waste, mismanagement, or that he was unfit to serve as administrator. The Court of Appeals addressed this issue even though it found that Ira had failed to support or address the issue in his brief. The Court of Appeals noted that Ira had filed no annual returns and thus that the probate court had not abused its discretion in removing him. Ira also argued that the court should have granted his requested continuance until his projected release from prison so that he could present his case in person. The Court of

Appeals found that the trial court had not abused its discretion in denying the continuance, which had been requested only a week before the scheduled hearing and which contained no showing that he would actually be released from prison on the projected date.

2) Crump v. McDonald, 239 Ga. App. 647, 520 S.E. 2d 283 (1999): Gussie Butler named her son (McDonald) and H.P. Butler as co-executors of her estate. H.P. Butler disclaimed his share of her estate. His daughter (Crump) filed an action to have both of them removed as co-executors. Butler died before Crump's petition was ruled upon, so Crump proceeded against McDonald. Her petition was denied in the probate court, so she appealed to the superior court, where a jury returned a verdict against her. She moved for a judgment notwithstanding the verdict and was denied. She appealed to the Court of Appeals with the argument that the requested order (an order for a directed verdict, which she had requested early on in the trial and an order j.n.o.v.) was proper whenever a fiduciary has admitted facts that show a breach of fiduciary duty. The Court of Appeals affirmed the denial of the j.n.o.v. The standard applied by the Court of Appeals was whether there was "any evidence" to support the jury verdict.

The evidence presented by Crump at trial indicated that there had been some

mismanagement of the estate. McDonald had never inventoried the estate; he had filed the estate income tax return late, thus incurring a penalty; he had withheld information necessary for a valuation of the estate assets from the accountant for five years; he had deeded the testator's house to his mother but renovated it for his personal use while paying for utilities and maintenance from the estate funds; he had maintained the estate's cash in low-interest accounts in a bank of which he was an officer, shareholder, and director; and he had failed to respond to Crump's numerous requests for an accounting. While McDonald admitted these allegations, he also offered various explanations as mitigating circumstances. For example, he said he had not had the estate valued because he believed it was under $600,000; he did not think the will required him to give accountings to the beneficiaries; he filed the income tax returns late because H.P. Butler would not sign them, etc. He also introduced evidence showing a printout of all the estate's receipts and expenses. The Court of Appeals concluded that there was "some evidence" to support the jury's verdict. The court went on to point out that, even if the jury had found that McDonald had breached his fiduciary duty, it had discretion to determine that he should not be removed as executor.

Crump also enumerated as error the fact that the trial judge had refused to charge the jury that "[t]he failure of an executor to make [an] inventory is an

omission of duty and puts on him the burden of proving to the jury that he has discharged the duty of his trust with fidelity." The Court of Appeals pointed out that the will relieved the executor from "making any reason *[sic]* or accounting to the Court." The Court noted that the requested charge would have left the impression with the jury that the executor was required to make an inventory, which he in fact was not required to do.

3) In re Estate of Williams, 241 Ga. App. 17,525 S.E. 2d 742 (1999): Collis and Arthur Williams were divorced in 1996 and Collis subsequently filed a contempt action against him for failing to pay child support. The next month, Collis died, as did a daughter of Arthur from a prior relationship. Arthur was appointed administrator of his former wife's estate and used money from her estate to pay for the funeral of his daughter. Collis's sister petitioned to have Arthur removed as administrator and the probate court granted her petition, both because Arthur had misused the estate funds and because he had a conflict of interest due to his past due child support. The Court of Appeals found that Arthur had failed to carry his burden of appeal of affirmatively proving that he no longer owed any child support. The Court went on to point out that, even if Arthur did not owe child support, the use of the estate funds to pay his daughter's funeral expenses alone justified his removal as administrator.

4) In re Estate of Davis, 243 Ga. App. 58, 532 S.E. 2d 169 (2000): The decedent committed suicide after being accused of molesting two children of his brother. The decedent's will named his father, Davis (who was an attorney and the drafter of the will) as executor and sole residuary beneficiary. Davis arrived on the scene shortly after his son's death and was told by police that they had found some sexually explicit material. Davis later searched the house and found videotapes, magazines and pornographic material that had been printed off the Internet. Davis claimed that none of these materials would constitute "child pornography." He placed the materials in a rented storage facility and ultimately arranged to have them disposed of by a trash collector. (He claimed that the police detective had told him that this was legal.) Davis also testified that he had searched his son's computer and had deleted numerous pornographic files. He explained that he had previously attended an attorney general's seminar on pedophilia and thus knew what types of pornography would be relevant in the molestation case. He intimated that he had discovered no such pornography, although later testimony by computer experts showed that a large amount of the material that had been "deleted" consisted of sexual pictures and stories involving underage boys. The

parents of the decedent informed Davis that they were pursuing a cause of action against the estate based on the molestation allegations. When he received notice of the claims, he paid himself $200,000 in fees and then, six months later, told the parents that he could not fund trusts established under the will for their children because of the pending action. The parents then filed a petition to have Davis removed as executor, which was granted by the probate court. The Court of Appeals affirmed. Citing current OCGA Sec. 53-7-55, and cases construing its predecessor statute, the Court of Appeals stated that the probate court has broad discretion to remove an executor and that this probate court had properly found the "good cause" required by the current statute in that Davis had destroyed evidence that would have had value in the molestation suit. The Court of Appeals declined Davis's request that it issue an advisory opinion as to how the probate court should go about appointing a successor personal representative.

3. Claims in Favor of & Against the Estate

1) In re Estate of Gordon, 239 Ga. App. 306, 521 S.E. 2d 223 (1999): The decedent's widow and his children entered into a settlement agreement in which she agreed to give the children the estate's "Victorian Living Room furniture." The children then had to file an action seeking to enforce the agreement. The probate

court directed the widow to turn over two end tables, two lamps, and a coffee table to the children. The widow appealed the probate court's order and sought to supplement the record on appeal by the inclusion of a transcript of the probate court hearing. She stated that the hearing was recorded but not transcribed. The Court of Appeals denied her appeal, pointing out that the burden is on the complaining party to have the record completed in the trial court. The widow also contended that the trial court inappropriately expanded the terms of the settlement agreement to include the items at issue. The Court of Appeals stated, absent a transcript, that it must assume the evidence authorized the court's order.

2) Yoo v. Parker, 241 Ga. App. 46, 526 S.E. 2d 85 (1999): The decedent died while domiciled in California. The administrator of his estate filed a petition in the Los Angeles County Superior Court for recovery of personal property that she alleged her husband had been induced to part with due to fraudulent misrepresentation. The defendants were a Georgia resident and his Colorado company. The defendants were served by mail. The owner of the company sent a letter in which he denied the allegations and stated that he could "be of no help in the matter." No one appeared for the defendants at the hearing. The California court entered a judgment in the administrator's favor and she then sought to have

the judgment domesticated in Georgia. The Court of Appeals affirmed the trial court in its refusal to domesticate the California judgment because the California court did not have jurisdiction over the Georgia defendants. The Court found that the notice the Georgia defendants had received of the California case did not direct the defendant to appear nor did it inform the defendant that a default judgment could be entered. Thus, the Court of Appeals found that the defendant's letter did not constitute an "answer" through which the defendants would have submitted themselves to the California court's jurisdiction. The administrator also had asked for a relitigation of the issues raised in the California trial. The trial court had granted the defendants summary judgment, stating (among other things) that the administrator had failed to set forth a triable claim for fraud. The Court of Appeals reversed the grant of summary judgment, pointing out that the record contained evidence that necessitated a jury resolution of the fraud issue. The evidence included a letter from the defendant in which he informed prospective investors of a special opportunity to earn "astronomically high short-term returns with little apparent risk" and evidence that the decedent had transferred funds to the defendant's Georgia bank account, and that the funds were then transferred to a Swiss bank account.

3) Rowland v. Clarke County School District, (272 Ga. 471, 532 S.E. 2d 91 (2000): The decedent had loaned a valuable painting to her local school district prior to her death in 1968. Her children and husband, as executors of her estate, were aware that the school district had control of the painting. In 1998, the sole surviving executor learned that the school district was claiming ownership of the painting and demanded its return. The Supreme Court of Georgia affirmed the trial court's grant of summary judgment on the theory that the executor was barred by the four-year statute of limitations (OCGA Sec. 9-3-32, actions for the recovery of personal property). The executor had claimed that the painting had been on a "continued loan" to the school district and that his cause of action did not accrue until he made his demands in 1998. The Court pointed out that the executors did not have the power to make a loan of the painting either under the will or Georgia law. Furthermore, under OCGA Sec. 44-12-120, the death of a lender terminates all such loans. Thus, the cause of action accrued upon the appointment of the executors in 1968.

4. Breach of Fiduciary Duty

1) Heath v. Sims, 242 Ga. App. 691, 531 S.E. 2d 115 (2000): A beneficiary under the decedent's will petitioned in the Fulton County Probate Court for the

removal of the executors. The probate court did not remove the executors although it indicated that there may have been conflict of interest problems that would be addressed at a later date, either as a continuation of the petition for removal or in a proceeding for a final accounting. The beneficiary did not appeal the probate court's order but instead filed suit in the Superior Court seeking damages for breach of fiduciary duty and requesting an "equitable accounting" of the estate. The court dismissed the complaint for lack of jurisdiction and the Court of Appeals affirmed. The Court of Appeals noted that the probate court was the "proper forum" for the breach of fiduciary duty claim, citing the statutory grant to the probate courts (in OCGA Sec. 15-9-30(a)(10)) of "original, exclusive, and general jurisdiction" over "all... matters and things as appertain or relate to estates of deceased persons." The Court of Appeals also noted that the Supreme Court had found the authority of the probate court to be "broad." The Court of Appeals refused to allow a beneficiary to pursue a separate action in the superior court merely because the beneficiary is seeking damages. The Court of Appeals also noted that a litigant is not always entitled to seek an equitable accounting, particularly when adequate legal remedies were available. Because the probate court could provide the beneficiary with adequate relief, the Court of Appeals said that the superior court did not err when it dismissed the petition for an equitable

accounting.

2) Glisson v. Freeman, 243 Ga. App. 92, 532 S.E. 2d 442 (2000): A decedent's widow sued a brokerage firm and the executor of her husband's estate for the improper transfer of funds from a joint brokerage account set up by her and her husband to an account maintained by the estate. The trial court granted summary judgment to the defendants. The Court of Appeals reversed the grant of summary judgment, noting that many of the facts in the case were "hotly disputed." These included the facts that the decedent and his wife had set up a joint tenancy with right of survivorship account that clearly vested the interest in the survivor, that the decedent had a will that poured all of his assets into a testamentary trust from which the widow was entitled to support, that the decedent had told the broker that he intended to create a trust and put everything into it, that the executor may have told the broker that the widow had indicated an intent to transfer the joint account assets into the estate account, that the widow may or may not have signed blank letters authorizing the transfer, that the executor may or may not have explained the effect of the transfer to the widow, that the broker never contacted the widow directly, that the executor did not really understand the effect of a joint tenancy account and that there was some evidence that the widow's "signature" on

some documents was forged.

The widow sued the brokerage firm, Merrill Lynch, for negligence and breach of fiduciary duty and sued the executor for fraud, theft by deception, breach of fiduciary duty, and negligent misrepresentation. The Court, in reversing the grant of summary judgement to Merrill Lynch, noted that the brokerage firm may have failed to take the proper steps to ensure that it had the widow's permission to transfer the funds. The Court stated that, because the brokerage firm admitted that the joint account became the widow's property upon her husband's death, it was not justified in relying on statements made by the executor of the decedent's estate. The Court also faulted the brokerage firm for relying on a blank form, purportedly signed by the account holder, which the firm then proceeded to fill out.

As to the widow's claim against the executor, the trial court had held that the executor's actions could not have been the proximate cause of any damage to the widow and that there was no evidence of misrepresentation by the executor. The Court of Appeals pointed out, among other things, that a jury could find that the executor either forged or wrongfully procured the widow's signature and that she misled the brokerage firm.

3) Fowler v. Smith, 243 Ga. App. 469, 533 S.E. 2d 739 (2000): The heirs of

an intestate decedent unsuccessfully sued the administrator and the bonding company for mismanagement of the estate. The trial court found that, pursuant to an indemnity clause in the bond application, the litigation costs incurred by the bonding company would be paid from the estate. The heirs appealed this order, contending that (despite the fact that the probate court had approved the bond itself) the fact that the probate court had not approved the bond application resulted in its terms being void. The Court of Appeals disagreed. The Court pointed out that former OCGA Sec. 53-7-30(a) did not require the probate court to approve an administrator's bond application. Furthermore, the Court of Appeals found that the probate court had implicitly approved the terms of the application when it found the indemnity provision to be enforceable. The Court also noted that former OCGA Sec. 53-6-61 allows a personal representative the reasonable expenses of administration which included, in this case, "the expenses related to the bond, namely [the bonding company's] litigation costs...." The heirs claimed in the alternative that the expenses incurred by the bonding company were unnecessary in that the company could have relied on the administrator's attorney to protect its interests. The Court of Appeals pointed out that this position overlooks an attorney's ethical responsibility to pursue only the interests of the attorney's client. The Court also noted that, because the administrator and the bonding company are

joint and several obligors, the heirs could have proceeded directly against the bonding company, and thus that the company was entitled to retain counsel to protect its interests. Finally, the Court stated that to deny the expenses of the bonding company would violate public policy in that an administrator wrongly sued would be personally liable to a bonding company that was also wrongly sued by the heirs. The Court noted that this would result in fewer persons agreeing to serve as administrators or to issue bonds.

G. GUARDIANSHIPS

1) Hayes v. Clark, 242 Ga. App. 411, 530 S.E. 2d 38 (2000): The Court of Appeals affirmed a directed verdict ordering Ms. Clark's mother, Ms. Hayes, to pay $12, 139.94 to Clark as settlement of an express trust created in Clark's favor. Clark was in a car accident in New Jersey when she was a minor. In the subsequent personal injury lawsuit, the New Jersey court entered judgment in Clark's favor and directed that $5,887.50 be handled as follows:

> be disbursed to the guardian and mother of [Clark] to be held by [the mother] in trust for her daughter until her daughter's 18th birthday and any bond of said guardian is hereby waived."

Hayes deposited the money in her own account. When her daughter reached age

18, Hayes said that she herself had been unable to support Clark financially, so she had used the daughter's funds to support her.

The Georgia Court of Appeals applied Georgia law as it had no proof of the law of the state of New Jersey. Hayes claimed first that the New Jersey court order had not created a valid express trust in that the trustee had not been given active duties to perform. The Court disagreed, noting that the trustee's duties "may be specified in the writing [that creates the express trust] or may be implied by law." (OCGA § 53-12-20(b)). Hayes then claimed that the New Jersey court could not be the settlor of a trust. The Court of Appeals disagreed with this claim also, stating: "Because the court had legal capacity to transfer title to the property, it could direct the guardian to hold the money in trust for the child."

Hayes then tried to defend her actions by citing *Pettigrew v. Williams*, 63 Ga. App. 576, 16 S.E. 2d 120 (1941), a Georgia case in which a mother, as guardian for her minor children, had spent property received by them after their father's death to support them during their minority. The mother had filed annual returns. The *Pettigrew* court had held that the annual returns did not bar a child from suing the guardian upon reaching majority, but noted also that, when a parent is unable to support a child, an allowance for the child's support may be made from the guardianship estate. The Court of Appeals relied not on *Pettigrew* but on *Shipp*

v. McCowen, 147 Ga. 711, 95 S.E. 2d 251 (1918). The *Shipp* case also involved a mother who had spent the property of her children (inherited from their father) to support them during minority. The *Shipp* court held that, if the use of that property was necessary, a guardian should have been appointed who then should have made application to the probate court to encroach on the corpus. The *Shipp* court justified its "harsh and stern rule" as "the only rule that will safeguard the estate of minors."

The Court of Appeals, in applying the *Shipp* reasoning to Hayes's actions, seems to have blurred the line between a trusteeship and a guardianship. The Court ruled against Hayes because she did not seek court permission to encroach on the trust corpus. The Court noted again that "[t]his rule may be harsh but it is necessary to safeguard trust estates."

2) In re Roscoe, 242 Ga. App. 440, 529 S.E. 2d 897 (2000): Roscoe lived with A.T.P., a minor, and A.T.P.'s mother. Roscoe applied to become the temporary guardian of the child and the child's mother agreed and temporarily relinquished her parental rights, as provided in OCGA § 29-4-4.1. Roscoe stated in court that the reason she had applied to be the child's guardian was to make the child eligible to be covered under her health insurance policy. The probate court

held that this alone was not sufficient to make the child "in need of a guardian" and thus denied the guardianship. Roscoe appealed, first to the superior court, then to the Court of Appeals, contending that the court did not have the discretion to deny a temporary guardianship if the child's parent consented. The superior court and the Court of Appeals upheld the probate court's ruling. OCGA § 29-4-4.1 requires a court to honor the parent's preference in the *choice* of a temporary guardian and requires the court to dissolve a temporary guardianship at the parent's request. The statute gives the probate court the power to appoint a temporary guardian "when the minor is alleged by the person having actual physical of such minor to be in need of a guardian...." The Court of Appeals said that this language gives the probate court discretion to decide whether to appoint a temporary guardian. The Court of Appeals went on to examine whether the probate court had abused its discretion by refusing to grant a temporary guardianship in this case and determined that it had not. The Court of Appeals noted: "Health insurance is an important benefit for a child, but we can find no precedent for the proposition that a child who lacks health insurance is in need of a guardian for that reason alone."

3) In re Vincent, 240 Ga. App. 876, 525 S.E. 2d 409 (1999): Guardians of the person and property were appointed in 1992 for Vincent, an adult who had

received a head injury and suffered permanent brain damage. In 1997, Vincent petitioned to have the court terminate the guardianships. The court granted his petition but then set aside its order 11 days later after two neighbors of Vincent contacted the court to express concern. After hearing more evidence, the court denied the petition and appointed a county guardian. Vincent appealed to the superior court and received a jury verdict terminating the guardianship of the person but continuing the guardianship of the property. Vincent argued on appeal that the probate court erred in setting aside its own order terminating the guardianship, as the court had at that point lost jurisdiction over him. The Court of Appeals disagreed, pointing out that the probate court retains jurisdiction over a guardianship until the guardians make an accounting and letters of dismission are issued. The Court also noted that a court has the authority to vacate any judgment during the term in which it was rendered, except as a judgment founded upon a verdict. Vincent next argued that the doctor who examined him in the original guardianship proceedings should not have been allowed to testify in the termination proceeding. The Court pointed out that the doctor had reexamined Vincent and was testifying about his new findings, not about his original findings. Vincent argued that the doctor's testimony should not have been admitted because Vincent's attorneys were not allowed to be present during the evaluation. The

Court of Appeals noted that the ward has the right to have his attorney present during an evaluation but that Vincent had failed to show how their absence had harmed him. Finally, Vincent argued that the testimony of another doctor with whom he had consulted should have been excluded under the psychiatrist-patient privilege. The Court found the admission of this testimony harmless in that the doctor's opinion that Vincent still needed a guardian of the property was confirmed by at least one other doctor and that this doctor's testimony was merely cumulative of other testimony that was properly admitted.

H. TRUSTS

1. Express Trusts

Ovrevik v. Ovrevik, 242 Ga. App. 95, 527 S.E. 2d 586 (2000): Settlors, a married couple, set up a revocable trust to benefit themselves for their lives and then divide the property remaining at their deaths among their three named children and their grandchildren. After the settlors died, the successor trustee (one of the settlors' sons) filed a declaratory judgment seeking direction regarding the discharge of his duties and a beneficiary (the other son) filed a motion for partial summary judgment asking, among other things, that the trust be terminated and that certain trust property be distributed to him. One of the other beneficiaries (the

settlors' daughter) contested the motion on the grounds that the settlor's intent was that she receive a certain percentage of the trust property that was requested by the first beneficiary. The partial summary judgment was granted and the Court of Appeals affirmed the judgment in part and vacated and remanded in part.

The Court's judgment involved a construction of the trust's terms. The first clauses examined by the court were ones that directed distributions of real estate to the settlors' sons subject to liens in favor of their daughter. The daughter argued that the settlors intended her to receive a certain percentage of the fair market value of the realty but the Court of Appeals found that the terms of the trust unambiguously set forth the settlors' intent that she only receive liens on the realty.

One son argued that the settlors had intended to create a "business trust," thus bringing the trust under the Georgia statutes, O.C.G.A. §§ 53-12-50 et seq., that govern this type of trust. The Court found that the trust was not a business trust in that it had not been set up for the improvement, development, and management of property. The son also argued that the trust purposes had not been fulfilled and thus that the trial court erred in terminating the trust. The Court of Appeals agreed with the trial court that the sole purpose of the trust was for the use and benefit of the settlors during their lives and thus that the purpose had been

fulfilled upon the death of the last surviving settlor.

The Court of Appeals remanded to the trial court the construction of two other clauses of the trust that appeared to be ambiguous. The first clause dealt with the distribution of one of the parcels of real estate after the lien was paid off. The second clause provided for "[j]oint responsibility [of one son and the daughter] for the equal adjustment of one-half each of any surplus or shortage of funds in the final closing of the [Trust]." The trial court had interpreted this clause to require the son and daughter to share responsibility for any debts or expenses in excess of the remaining trust funds. The Court of Appeals stated that it knew of no authority by which a settlor can distribute the debts incurred by a trust to the beneficiary. It noted that neither a trustee nor a beneficiary is personally liable on a judgment entered against a trust.

2. Implied Trusts

Burt v. Skryniarz, 272 Ga.35, 526 S.E. 2d 848 (2000): Burt and Skryniarz began dating in 1990 and in 1997 took possession of a home as tenants in common. The sales contract and warranty deed named them both as grantees and the parties

took joint possession of the property. When they separated, Burt claimed that he in fact had a 99% interest in the property under the "purchase money resulting trust" theory, which provides that if one party pays consideration for property the title of which is transferred to another, the second party is presumed to hold the property in trust for the purchaser. The Supreme Court affirmed the trial court's finding that the parties held the property in equal shares as tenants in common.

The Court first noted that a presumption exists that parties who take property as tenants in common take in equal shares and that such presumption can only be rebutted by clear and convincing evidence. The Court called this axiom "a fundamental precept of the law [that] should not be easily subjected to uncertainty or undoing." The Court then addressed Burt's contention that the trial court's instruction regarding the tenancy in common was incompatible with its instruction regarding whether a purchase money resulting trust existed. The Court pointed out that, in order for a purchase money resulting trust to be established, it must be shown that such a trust was contemplated by both parties. The agreement between the parties may either appear in an express agreement or be implied by the surrounding circumstances. The agreement must have existed at the time the purchase took place. Most importantly, the parties cannot intend simultaneously to create a tenancy in common and a purchase money resulting trust. Thus, insofar as

Burt had conceded that a tenancy in common was created, the purchase money resulting trust could not exist simultaneously.

3. Breach of Fiduciary Duty by Trustees

Allen v. Columbus Bank & Trust Company, (244 Ga. App. 271, ___ S.E. 2d ___ (5/00): A trust beneficiary sued the trustee for breach of trust ten years and two months after the trust terminated. The beneficiary alleged that mismanagement of the trust by the trustee caused a loss of $1 million to $2 million. The trustee was granted summary judgment on its claim that the suit was barred by the statute of limitations. The Court of Appeals affirmed. The Court applied the pre-1991 ten-year statute of limitations that appears in OCGA Sec. 9-3-27. (In July, 1991, the new Georgia Trust Code established a six-year statute of limitations for suits against trustees.) The beneficiary first claimed that the mismanagement of the trust funds was a "continuing tort" and thus that the statute of limitations did not begin to run until the trust was actually disbursed (approximately one year after it was terminated). The Court of Appeals pointed out that the "continuing tort" theory is applicable only to cases involving personal injury, citing Georgia Supreme Court cases. The Court instead applied the rule that the statute of limitations for a cause

of action against a trustee begins to run at the time of occurrence of the wrongful act accompanied by any appreciable damage. The beneficiary then attempted to prove that the statute of limitations had been tolled by the trustee's fraud in intentionally concealing information about the trust. The Court pointed out that the beneficiary admitted that she had received statements describing the very activities that she said the trustee had attempted to conceal, but that she had never read the statements. The beneficiary also claimed that the trustee took 16 "active steps" to conceal information from her. The Court of Appeals first pointed out that fraud that gives rise to a cause of action may not amount to the type of fraud necessary to toll the statute of limitations. The Court then examined each of the 16 "active steps" and in each case found either that the allegations were not supported by the evidence or that, even if true, the "steps" were not of such a magnitude as to toll the statute of limitations. Finally, the beneficiary appealed the trial court's striking of certain opinions given in a letter from her forensic accountant. The Court of Appeals affirmed the trial court's ruling, noting that the opinions at issue were legal conclusions and that no expert may state a legal conclusion as to the ultimate issue.

I. MISCELLANEOUS

1. Power of Attorney

1) Stewart v. Stewart. 240 Ga. App. 573, 524 S.E. 2d 267 (1999): Following a stroke, Mrs. Core gave a power of attorney to her stepmother, Mrs. Stewart. Mrs. Stewart sold certain property that she owned jointly with Core and invested the proceeds in subordinated debentures issued by the defendant's wholly-owned company, Stewart Finance Co., Inc. She designated the defendant as co-owner of the debentures with right of survivorship. Four months later, Mrs. Stewart and Mrs. Core both executed general powers of attorney in favor of the defendant. Mrs. Core died the next year and Mrs. Stewart entered a nursing home. The defendant, using the power of attorney, opened a joint Merrill Lynch account in the name of himself and Mrs. Stewart. He deposited in the account stock owned individually by Mrs. Stewart, then sold the stock and made personal investments with the proceeds. Later that same year, the defendant "cancelled" the subordinated debentures he held jointly with Mrs. Stewart and credited them to the capital account of his company. When Mrs. Stewart died, the plaintiffs brought an action against the defendant, both individually and as assignees of the estates of Mrs. Stewart and Mrs. Core. They sought to recover the funds held in the survivorship account and alleged fraud, conversion, and breach of fiduciary duty. The actions on behalf of Mrs. Core's estate were dismissed, as the plaintiffs were

not beneficiaries under her will, but the action on behalf of Mrs. Stewart's estate proceeded to a jury trial. The jury found that the asset transfers made by the defendant to himself were proper in that Mrs. Stewart intended the actions of her attorney-in-fact. The Court of Appeals affirmed.

The Court of Appeals cited first O.C.G.A. § 7-1-813 for the proposition that sums remaining on deposit at the death of a party to a joint account belong to the surviving party. The Court went on to examine whether the duty of loyalty that is implicit in a power of attorney prohibits the agent from making gifts to himself. The court noted that gifts are not foreclosed if: 1) there was no fraud in obtaining the power of attorney; 2) the power of attorney expressly confers the power to transfer stocks; and 3) the evidence shows that principal indicated the principal indicated the intent that the transfer should occur. On the third point, the court cited evidence that Mrs. Stewart had been fully rational and alert during some of her days in the nursing home. The evidence also showed that, when she created the power of attorney, Mrs. Stewart had put no restrictions on the use of their jointly owned funds other than the support of herself and her stepdaughter during their lives and that she intended that the defendant should have whatever remained at her death. The court concluded from this that "there is evidence that Mrs. Stewart intended that the defendant should receive the gifts which resulted from the

defendant's transfer of their subordinated debentures and the stock she owned individually."

2)Allen v. Dominy, 272 Ga. 399, 529 S.E. 2d 363 (2000): During his last illness, Mr. Dominy gave a general power of attorney to his sister, Ms. Allen. His wife also gave his sister a limited power of attorney. In conversations with Mr. Dominy, Ms. Allen agreed that she would take title to his real property in order to ensure that his wife would be taken care of. Ms. Allen then had her attorney draw up a deed conveying fee simple to her. She obtained her brother's signature on the deed but did not record it until after he died. Ms. Allen was named as executor of her brother's will. After her husband died, Ms. Dominy revoked the power of attorney she had given Ms. Allen upon discovering that Ms. Allen had moved her certificates of deposit and her checking account to the bank where she worked. Ms. Dominy then applied for year's support (apparently in the form of her husband's real property) from her husband's estate but Ms. Allen, as executor, opposed the application. Ms. Dominy then filed an action to set aside the deed to Ms. Allen. The trial court found that Ms. Allen had breached a fiduciary duty she owed to both parties as their agent. Her actions in procuring the deed for herself and then opposing the year's support award violated her promise to her brother to

use the property for his wife's benefit. The Supreme Court affirmed the judgment and pointed out that, even if Ms. Allen had not used the limited power given her by Ms. Dominy to procure the deed, Ms. Dominy was arguably a third-party beneficiary of the agreement between Mr. Dominy and Ms. Allen, and even if the evidence did not support a finding of her as a third-party beneficiary, she still was authorized to have the deed set aside in her representative capacity as Mr. Dominy's widow.

2. Joint Tenancy Accounts

Parker v. Kennon, 242 Ga. App. 627, 530 S.E. 2d 527 (2000): The guardian of the person and property of a stroke victim sued her three daughters for converting funds of their mother. Prior to her stroke, the mother had purchased two certificates of deposit with her individual funds. The CDs were styled as joint accounts with the mother and a daughter. The daughters cashed in the CDs and opened accounts in their own names.

The Court of Appeals affirmed the trial court's judgment that the daughters had wrongfully converted the certificates of deposit. The court cited OCGA § 7-1-812(a), which provides that a joint account belongs, *during the lifetime of the parties*, to each party in proportion to her net contributions, absent clear and

convincing evidence to the contrary. This statute creates a presumption that an individual who funds a joint account does not intend to make a gift of the funds during her lifetime. The court noted that it was "absolutely undisputed" that the daughters had the right to withdraw the funds from the CDs - "that is the very essence of a joint account." However, the daughters had no authority to use the funds for their personal benefit.

3. Gifts

Sharp v. Sumner, 272 Ga. 338, 528 S.E. 2d 791(2000): Mr. Sexton purchased a house six months before his death. Ms. Sumner, an employee of Sexton, moved into the house with her children and made improvements on the house. Ms. Sumner worked in Sexton's shop and was the caretaker of his mother. When Sexton died, his executor instituted a dispossessory action against Ms. Sumner, which Ms. Sumner successfully defended on the ground that the house had been given to her by Sexton. However, no deed had ever been delivered to Ms. Sumner, so the executor refused to transfer the property to her. A jury returned a verdict in Sumner's favor when she brought an action against the executor for specific performance. The Supreme Court affirmed, pointing out the OCGA Sec. 23-2-132 contains "an equitable exception to the Statute of Frauds."

The equity statute requires that possession of the land be taken based upon an agreement that is supported by meritorious consideration and that valuable improvements have been made to the land. The Supreme Court found that the evidence supported a finding that these elements of the statute had been satisfied.

4. Life Insurance

Dunn v. Royal Maccabees Life Insurance Company, 242 Ga. App. 903, 531 S.E. 2d 761 (2000): Dunn and Erhardt each owned 50% of a partnership. Life insurance policies on the life of each partner "were purchased" so that the surviving partner would have the means to buy the partnership interest from the deceased partner's estate. Dunn died and Erhardt purchased his interest in the partnership with the proceeds of the policy on Dunn's life. The insurance policy on Erhardt lapsed after Dunn's death but was subsequently reinstated with Erhardt as the owner. The Erhardts took over payment of the premiums. Erhardt then transferred ownership of the policy to his wife, as trustee of an irrevocable trust. The trustee was also the named beneficiary of the policy. When Erhardt died, Ms. Dunn claimed that Mr. Dunn had been the original owner of the policy on Erhardt's life. The trial court granted summary judgment to Ms. Erhardt and the Court of Appeals affirmed. The Court of Appeals recited the familiar rules of contract construction.

It determined that the contract itself was ambiguous (for example, Mr. Dunn had signed as "Dennis J. Dunn, President" in the "Applicant/Owner" box), so the Court went on to discern the intent of the parties to the contract. The Court noted that the clear intent of the two life insurance policies was to allow the surviving partner to buy out the estate of the first partner to die. After that, it was not the parties' intent that the surviving spouse additionally be entitled to the proceeds of the policy on the surviving partner's life. The Court said, "This, by definition, would have resulted in a windfall, exceeding the intent of the parties by a factor of two."

5. Attorney Malpractice

Bowen v. Hunter, Maclean, Exley & Dunn, 241 Ga. App. 204, 525 S.E. 2d 744 (1999): The decedent's mother and sister sued an attorney and his law firm for professional malpractice, breach of fiduciary duty, negligence, conspiracy, fraud, and conversion. The attorney and his firm had represented the decedent's widow in her administration of his estate. The plaintiffs asserted that the attorney should have given them a copy of the decedent's prenuptial agreement, which they stated barred the decedent's widow from inheriting from him, thus leaving them as the sole heirs of his estate. At the very least, they claimed that the attorney should have notified them of their potential interest in the estate. (The mother and sister

had become aware of the prenuptial agreement before the estate was closed but waited for six months before asking the attorney about it.) The attorney responded that he was aware of the contract but could not deliver it without his client's permission. The mother and sister eventually sued the widow and they settled by dividing the estate one-half to the widow and one-half to the mother and sister. Nine months after the settlement the mother and sister sued the attorney and his firm.

The trial court bifurcated the issues under the theory that a jury had to determine whether the antenuptial agreement was valid before the plaintiffs could make a claim against the attorneys. The jury found the agreement was not valid so the trial court entered summary judgment for the attorneys on the malpractice and breach of duty claims because the plaintiffs had never been the attorneys' clients and thus no duty was owed by the attorneys to them. The mother and sister did not appeal the trial court's finding that no attorney-client relationship existed between them and the attorney. However, they argued that the attorney, as attorney for the administrator of the estate, had a fiduciary duty to them as "potential or possible heirs" even if they did not turn out to be actual heirs. The Court of Appeals examined the facts to determine whether a fiduciary or confidential relationship had existed even though none had been created by law or by contract. The mother

and sister said they had "trusted" the attorney when he originally told them they "had no interest in the prenuptial" and thus he owed them a fiduciary duty. The Court pointed out, however, that the mere existence of a close personal advisory relationship does not establish a confidential relationship unless "one party is so situated as to exercise a controlling influence over" the other (citing OCGA § 23-2-58). The Court found no such controlling influence.

After sustaining various evidentiary rulings made by the trial court, the Court of Appeals examined whether the trial court erred in denying the mother's and sister's motion for directed verdict on the ground that the widow failed to rescind the prenuptial agreement once she became aware that it was invalid. The Court of Appeals noted that, first, the widow could not "rescind" her only benefit under the contract, which was marriage to her husband.

II. GEORGIA LEGISLATION 2000

1. Title to Intestate Decedent's Property: OCGA § 53-2-7 (HB 1204)

NOTE: ***Italicized language*** has been deleted . **Underlined, bold language** has been added

OCGA 53-2-7.

(a) *Upon the appointment of an administrator of the estate of an intestate decedent, the title to all property owned by the decedent, both real and personal, shall vest in the administrator for the benefit of the heirs and creditors of the decedent, and title to such property shall not vest in the heirs until the administrator assents to such vesting. For purposes of this Code section, the assent of the administrator shall be proved in the manner set out in Code Section 53-8-15.*

Upon the death of an intestate decedent who is the owner of any interest in real property, the title to any such interest which survives the intestate decedent shall vest immediately in the decedent's heirs at law, subject to divestment by the appointment of an administrator of the estate.

(b) *If no administrator is appointed within three years after the death of an intestate, the title to all property owned by the decedent, both real and personal, shall vest in the decedent's heirs and shall be deemed to have become vested in*

them as of the date of the decedent's death.

The title to all other property owned by an intestate decedent shall vest in the administrator of the estate for the benefit of the decedent's heirs and creditors.

(c) *If an order is entered pursuant to Code Section 53-2-41 that no administration is necessary on the estate of a decedent, the title to all property owned by the decedent, both real and personal, shall vest in the decedent's heirs and shall be deemed to have become vested in them in a manner that is consistent with the terms of the order as of the date of the decedent's death.*

Upon the appointment of an administrator, the title to any interest in real property which survives the intestate decedent shall vest in the administrator for the benefit of the heirs and creditors of the decedent, and title to such property shall not revest in the heirs until the administrator assents to such revesting. For purposes of this Code section, the assent of the administrator shall be proved in the manner set out in Code Section 53-8-15.

(d) Upon the appointment of an administrator, the right to the possession of the whole estate is in the administrator, and, as long as administration continues, the

right to recover possession of the estate from all other persons is solely in the administrator. **The administrator may recover possession of any part of the estate from the heirs at law or purchasers from them; but, in order to recover real property, it is necessary for the administrator to show, upon the trial, either that the property which is the subject of the action has been in the administrator's possession and without the administrator's consent is held by the defendant at the time of bringing the action or that it is necessary for the administrator to have possession for the purpose of paying the debts, making a proper distribution, or for other purposes provided for by law. An order for sale or distribution, granted by the judge of the probate court after notice to the defendant, shall be conclusive evidence of either fact.**

(e) If an order has been entered under Code Section 53-2-41 that no administration is necessary, or if the administrator has assented to the vesting of title in the heirs, the heirs may take possession of the property or may sue for possession of the property in their own right."

2. Temporary Guardians: § 29-4-4.1

When a natural guardian desires to dissolve a temporary guardianship, notice must be filed with the temporary guardian and the temporary guardian must be given the opportunity to object.