RECENT DEVELOPMENTS
IN
GEORGIA FIDUCIARY LAW

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I. GEORGIA CASES

A. WILLS

1. ADEMPTION

Fletcher v. Ellenburg, 279 Ga. 52, 609 S.E.2d 337 (2005)

The testator built a house on property on DeFoors Ferry Road in Atlanta, but continued to live with her mother in the family home. She rented out the DeFoors Ferry house. In 1975, she wrote a will in which she devised the DeFoors Ferry home to her niece. In 1993, she signed a contract to sell the DeFoors Ferry home, but the sale did not actually take place until 1995. The sales price was $92,000. Three weeks after she signed the contract, she bought a home in Smyrna, Georgia for $90,000. She moved into that home in 1995, upon the consummation of the sale of the DeFoors Ferry house. In 1996, she conveyed her interest in real property in Butts County to the niece. (Her 1975 will actually devised that property interest to the niece's mother for life, with the remainder to her niece and the niece's siblings.) The testator amended her will in 2002 to name a new co-executor and to delete her deceased siblings from the residuary clause and to add a provision that would give the residue of her estate to the niece and a nephew should her two then-surviving sisters predecease her. The testator died in 2003 and the executor of her estate petitioned for a declaratory judgment as to whether the Smyrna property was "property of like character" to the DeFoors Ferry property so that it could be used as a substitute testamentary gift for the niece. Under O.C.G.A. §§ 53-4-66 and 53-4-67, a specific testamentary gift is adeemed if the subject of the gift is not owned at death by the testator unless the testator has "exchange[d]" that property for "other property of like character." The probate court found that the DeFoors Ferry property

was adeemed and that the Smyrna property was not substitute property. The Supreme Court agreed. The Court found that the two pieces of property were indeed of like character. The Court focused on the fact that the statute uses the word "exchange" rather than "sell". The Court found no evidence of an "exchange" in that the purchase of the new property took place over a year before the devised property was sold and the funds from the sale of the one were not used to purchase the other. The Court noted that the devised property was investment property while the new property was used by the testator as a residence. Finally, the Court found persuasive the fact that the testator's 2002 codicil did not make any attempt to amend the will as to the property that she had sold. In addition, the 2002 codicil had amended the residuary clause to specifically include "real property." The Court pointed out that the codicil was silent as to any of the specific pieces of property and also clearly contemplated that real property would be in the residue. As a finding of ademption would cause the Smyrna property to be part of the residue, the Court found that the probate court's factual findings were not clearly erroneous.

2. ADVANCEMENT

Stewart v. Walters, 278 Ga. 374, 602 S.E.2d 642 (2004)

The conflict of interest question in this case is whether an executor who may have received an advancement from the testator is obliged to acknowledge that advancement by virtue of his status as a fiduciary. The facts are as follows:

> 1972 - Father writes a will in which he leaves his estate to his wife or, if she is not surviving, to be divided equally between Stewart, his son, and Walters, his daughter. Stewart is named as Executor.

1995 - Father transfers five checks of $10,000 each to Stewart, his then-wife and his three children. The other four transferees endorsed their checks over to Stewart.

1998 - The 1998 Probate Code becomes effective.

April, 2001 - Father dies. His wife has predeceased him. Stewart qualifies as Executor. Stewart notifies Walters that he will not treat the $50,000 as an advancement to him.

December, 2001 - Walters sues Stewart both individually and in his fiduciary capacity in superior court. She asks for a declaratory judgment that the transfer was an advancement, asks that Stewart be forced to recognize the advancement to remedy his alleged breach of fiduciary duty, and also makes a claim for quantum meruit related to care she had given Father in the last months of his life.

In 1995, at the time of the transfer, the Georgia Code, in former OCGA Sec. 53-4-50, provided that an inter vivos payment from a parent to a child would be treated as an advancement unless it was intended to be a "donation from affection." This Code section was replaced in 1998 with OCGA Sec. 53-1-10, which provides that a transfer will be treated as an advancement only "if the will provides for the deduction of the lifetime transfer or its value or if the satisfaction or advancement is declared in a writing signed by the transferor within 30 days of making the transfer or acknowledged in a writing signed by the recipient at any time." The trial court granted summary judgment for the son after determining that the 1998 Code Section applied to the transfer and, because no writing was in existence, the transfer was not an advancement. (The trial court apparently agreed with the daughter that the money was intended to be an advancement

and said that its ruling created "an unintended windfall" for the son.) The daughter appealed, claiming 1) that the revised Code should not apply because the transfer took place before 1998; and 2) a jury should decide whether the son had breached his fiduciary duty as administrator of his father's estate by not acknowledging the advancement.

In Walters v. Stewart, 263 Ga. App. 475, 588 S.E.2d 248 (2003), the Court of Appeals agreed with the trial court that the 1998 Code section should apply, but reversed the summary judgment on the fiduciary duty claim. The Court of Appeals pointed out that the 1998 Probate Code by its terms became effective on January 1, 1998 and was applicable from that point on "provided, however, that no vested rights of title, year´s support, succession, or inheritance shall be impaired" (quoting OCGA Sec. 53-1-1). The Court of Appeals said that the transfer to the son vested title to the proceeds in him when it was made, but that the daughter's rights to recover the advancement did not vest until her father's death. Consequently, no vested rights of hers were impaired by the application of the 1998 Code section. However, the Court then went on to focus on the fact that, under the new law, the son could acknowledge the transfer "at any time" even though his father had not done so in the required writing. The Court said that the son "has the authority under the statute and the sacred duty as executor to acknowledge the transfer as an advancement, if that was in fact his father's intention." Consequently, a genuine issue of material fact existed and summary judgment was improper.

In February, 2004, the Supreme Court of Georgia granted writ of certiorari. The Court stated that it was "particularly concerned with the following issue...: Whether the executor of an estate who is also a beneficiary of the estate and who received funds from

the testator during the testator's life is required in the exercise of the executor's fiduciary duty to acknowledge the receipt of funds in writing."

The Supreme Court reversed the Court of Appeals and held that an individual who received a transfer of money or property from the testator prior to being qualified as executor of the testator's estate is not subject to any of the fiduciary duties imposed on executors as they relate to that transfer. The imposition of such a requirement on a transferee "unduly penalizes the transferee who assumes this service [service as executor], with the consequence that nominated executors may be forced to decline the position, thereby thwarting the expressed desires of the testator." The Supreme Court agreed that the 1998 Probate Code, which requires a writing in order for a transfer to be an advancement, is the appropriate applicable law. Justices Hines and Thompson, in dissent, accused the majority of "focus[ing] upon the wrong question at the wrong time." They would have the court focus on whether Stewart, in his current role as executor, was required to reveal the "truth" about whether the transfer was an advancement. The dissent noted that a jury should be allowed to examine this issue and, if the transfer were indeed found to be an advancement, the only "penalty" would be forcing the executor to return the property to the estate.

(The remainder of this analysis appeared in an article published by Professor Radford in GEORGIA PROBATE NOTES, Vol. 22, No. 5 (Feb. 2005)). It is this author's opinion that the decision of the trial court, as affirmed by the Supreme Court, is the correct one. However, this author would justify that decision in a manner different from that expressed by the Supreme Court. The basic summary judgment question is this: if all the evidence is viewed in a light most favorable to the nonmovant and all reasonable

doubts and inferences are resolved against the movant, is the movant still entitled to judgment as a matter of law? If that methodology is applied to the evidence presented in this case, the court must assume that Father's intent had been clearly expressed orally to a number of people, including to Stewart himself. So, even if Stewart knew beyond any doubt that Father intended the transfer to be an advancement, is he required then to carry out that intent by signing an acknowledgment? The question actually has two components: 1) Is an individual who receives a transfer he believes to be an advancement required by law to recognize it as such? 2) Does the fact that that individual also is the Executor of the estate add a duty to acknowledge that may not exist if the individual is not serving as a fiduciary?

Is an individual required to acknowledge? The Stewart case is complicated somewhat by the fact that the law does allow a transferee to acknowledge an advancement at any time. However, the mere fact that a transferee is *allowed* by law to acknowledge an advancement is substantively different from saying that the law *requires* an individual to do so. While acknowledgment or lack thereof may be a matter of conscience for the transferee, the bright line rule contains no requirement that the transferee sign a written acknowledgment. The option of a written acknowledgment by the transferee is included in the statute so that a transferee who wants to insure that a transfer will be treated as an advancement can do so in a way that will be respected by the courts and, among others, the taxing authorities. Should a transferee not have this legal option, and then try to claim at the transferor's death that the transfer should be charged off against his share of the estate, the transferee is in danger of being treated by the IRS as having made a taxable gift to the other beneficiaries.

Is an Executor required to acknowledge? The other obvious complication in Stewart is the fact that Stewart was the Executor of Father's estate. Walters claimed, and the Court of Appeals agreed, that Stewart's fiduciary duty to the other beneficiaries compelled him to sign the acknowledgment if he indeed thought that was Father's intent. A somewhat analogous situation may help illustrate why he is not required to do so. Georgia law is replete with bright line rules surrounding the execution and attestation of written wills. Suppose that Father had told Walters and Stewart and 100 other people that he intended for Walters to receive 2/3 of his estate rather than ½ , but Father never got around to amending his will to do so. Even if Stewart is absolutely convinced this was Father's intent, the lack of a written document precludes him from carrying out that intent as Executor and a court would not require him to do so. (Of course, he could always choose in his individual capacity to give Walters some of the money he inherits.) It would not be a breach of his fiduciary duty to abide by the terms of the will. The fact that abiding by the will would better serve his interest to the detriment of Walters would not be grounds for finding a breach of fiduciary duty and forcing him carry out Father's intent. It is interesting to note that Walters did not attempt to remove Stewart as Executor. The Court of Appeals' recent decision in In re Estate of Moriarty, 262 Ga. App. 241, 585 S.E.2d 182 (2003) indicates that the court may have been open to the argument that Stewart could not serve because he was seeking to claim money from the estate in opposition to another beneficiary. But removing Stewart would not have accomplished anything for Walters, as he then would have been merely another beneficiary who, as noted above, is not required to acknowledge an advancement.

It is important to note that Stewart is not alleged to have engaged in any fraud or misrepresentation that could in fact demand corrective action by a court of equity. The court opinions and briefs do not contain any allegation that Stewart fraudulently induced Father to make the transfer by assuring him that he would account for it at the time of the disposition of Father's estate. Such action at the time of the transfer, particularly if Stewart had then been in a fiduciary or confidential relationship with Father, might justify the imposition of a constructive trust. Although Walters speaks of "fraud" in her brief to the Supreme Court, she says that Stewart's fraud is his failure to disclose whether he knew what Father's intent was. The bottom line is that it does not matter whether he knew any more than it matters whether he knew Father intended to change his will but never got around to doing so.

3. REVOCATION

a) REVOCATION OF WILL UPON DIVORCE: WHICH LAW CONTROLS?

Colella v. Coutu, 278 Ga. 440, 603 S.E.2d 296 (2004)

Testator executed a will in 1980. The will divided his property unequally among his children. Under that will, four children were to receive legacies of $500 each and his other three children were to receive equal shares of the residue of the estate. The testator and his wife divorced in 1994. At that time, under the former Probate Code, a divorce caused the complete revocation of a will by operation of law. Testator died in 2000 and his children caveated the probate of the will on the ground that it had been revoked by operation of law. The executor argued that the Revised Probate Code of 1998 was the applicable law. Under the revised Code, OCGA Sec. 53-4-49 does not cause a total

revocation of a will upon divorce but merely causes the former spouse to be treated as if she had predeceased the testator. In this case, as the will made no provision for the former spouse, application of the new statute would result in the will remaining intact as written. The Supreme Court agreed with the probate and superior courts that the law in effect at the time of the testator's death controlled and thus allowed the admission of the will to probate. The caveators had argued that the 1994 divorce had revoked the will so there "was simply no will to which the 1998 law could be applied...." The Court said instead that, as the will had no operative effect until the testator died, there was nothing upon which the statutory rules of revocation could operate. The Court's decision was unanimous.

b) IMPLIED REVOCATION OF WILL

Mitchell v. Mitchell, ___ Ga. ___, ___ S.E.2d ___, 2005 WL 949213 (April 2005) Testator's first will (1991) contained several specific devises to his second wife and his two youngest children. The residuary estate was devised to his wife, and, if she predeceased him, was to be divided among his four children. Testator divorced that wife in 2000 and married a third wife in 2001. He then wrote a will leaving $100 apiece to his two youngest children and dividing the residuary into thirds, with his third wife and his two oldest children receiving equal shares. The 2001 will did not expressly revoke the 1991 will. The question at issue was whether the provisions of the 2001 will were so inconsistent with those of the 1991 will that they resulted in a revocation of the earlier will by implication. The Supreme Court affirmed the trial court's finding that the 1991 will was revoked. The Court found the terms of the two wills to be completely inconsistent. The youngest children apparently had argued that the $100 bequests to

them in the second will were meant to be supplements to the bequests to them in the first will. The Court noted that the testator had devised almost his entire estate to those two children in his earlier will and that it was thus unreasonable that the $100 bequests were meant to be a supplement rather than an indication of a complete change of mind on the testator's part.

c) PROBATE OF COPY OF WILL

Tanksley v. Parker, 278 Ga. 877, 608 S.E.2d 596 (2005)

Parker petitioned to probate a copy of his mother's will because he could not find the original. His sister objected, alleging that "recent acrimony" between the testator's two children had caused the testator to revoke the will. The sister and her son were the only ones to give testimony as to the revocation and the trial court found them "somewhat lacking in credibility." There was other evidence that the will had actually been stolen. According to the trial court, the copy was proved to be a true copy by the interrogatories of the two witnesses. The Supreme Court upheld the trial court's finding that Parker had met his two-fold burden of rebutting by a preponderance of the evidence the presumption of revocation and proving that the proffered copy was a true copy. See OCGA Sec. 53-4-46. A brief discussion of this case and a copy of the Order issued by The Honorable Susan Tate, Probate Judge of Clarke County, appears at "Rebutting the Presumption of Revocation," GEORGIA PROBATE NOTES. Vol. 22, No. 9, pp. 8-12 (May/June, 2005).

4. CAVEAT: EXECUTION, CAPACITY, UNDUE INFLUENCE

Glaze v. LeMaster, ___ Ga. ___, ___ S.E.2d ___ (May 23, 2005)

Glaze filed a caveat to the admission of the will of Lillie Payne to probate. Glaze claimed: 1) improper execution; 2) lack of testamentary capacity; and 3) undue influence. The probate court admitted the will to probate after a bench trial. The Supreme Court affirmed.

1) Improper Execution: Glaze's claim of improper execution was based on testimony that indicated that the witnesses had not signed in the presence of each other, as was alleged in the attestation clause. The Court found that the deviation from the terms of the attestation clause did not invalidate the will so long as the testator showed clear testamentary intent.

2) Lack of Testamentary Capacity: Grave based this claim on the fact that, within weeks of the date she signed the will, Payne was hospitalized for mental confusion and eventually a guardian was appointed for her. The Court focused on the time of the will execution , at which time testimony indicated that Payne's condition was normal. The fact that she underwent a dramatic change later after she had hit her head in a fall was not relevant to her testamentary capacity. Grave also proffered evidence that indicated that the testator had made disparaging comments about the primary beneficiary's mother after her fall, but the Court found that that had no bearing on whether the testator knew and understood the contents of her will at the time she signed it.

3) Undue Influence: Grave claimed that the primary beneficiary's mother had exercised undue influence over the testator. Grave said the two women were in a confidential relationship in that the testator thought of the other woman as her sister

and that woman visited her and took care of her regularly. The Court pointed to evidence that showed that the testator lived alone, was still driving and handled her own financial affairs, including the rental of a storage facility when she was having new carpeting installed. The Court found no evidence that the beneficiary's mother had substituted her free will for that of the testator.

5. NO CONTEST CLAUSE

Cox v. Fowler, ___ Ga. ___, ___ S.E.2d ___ (June, 2005)

Two daughters litigated their respective claims to their father's estate (Fowler v. Cox, 264 Ga. App. 880, 592 S.E.2d 510 (2003)). The father's will contained a no contest clause that provided as follows:

> Should any beneficiaries hereunder contest or initiate legal proceedings to contest the validity of this Will or any provision herein or to prevent any provision herein from being carried out in accordance with its terms (whether or not in good faith and with probable cause), then all the benefits provided in this Will for such contesting beneficiary, and any of such beneficiary's descendants, are revoked and annulled. Such benefits, if not a part of the residue, shall go over to and become a part of the residue of the estate. If such contesting beneficiary is a beneficiary under any Item of this Will that disposes of the residue of my estate, such contesting beneficiary, and his or her descendants, shall cease to be a member of the class of beneficiaries to whom distributions are required or permitted to be made under such Item and, upon final division and distribution of the property passing under such Item, the share to which such contesting beneficiary and his or her descendants would otherwise have been entitled shall go over and be distributed to my daughter, JANICE ELOISE FOWLER, if then living, but if she is not then living, then to her then living descendants, per stirpes, provided that JANICE ELOISE FOWLER and her descendants are not contesting beneficiaries.

The question at issue was whether the no contest clause was valid. The trial court found the clause void because it failed to give direction as to the disposition of the property in the event the no contest provision was violated. The Supreme Court reversed, finding that the no contest clause met the requirement of Code Section 53-4-68(b) (effective January 1, 1998), which requires "a direction in the will as to the disposition of the property if the condition in terrorem is violated...." The Supreme Court pointed out that the pre-1998 version of this statute had required that an *individual* be named as the alternate beneficiary in the event of a violation of the no contest clause, while the current Probate Code requires only a direction as to how the property should be distributed. The Court found that the new statute "broaden[ed] the scope of the previous law." The Court interpreted the no contest clause to say that "if any beneficiary other than Ms. Fowler contested his will, the forfeited share would pass to her through the residuary clause. If, on the other hand, Ms. Fowler was the contesting beneficiary, then his direction was that her forfeited share pass to the non-contesting beneficiaries of the residuary estate." Chief Justice Fletcher, joined by Justice Benham, filed a dissent because he did not believe that the no contest clause gave direction as to the disposition of the property in the event Fowler violated the clause.

B. ADMINISTRATION OF ESTATES

1. EXECUTOR'S COMMISSION

Baggett v. Baggett, 270 Ga. App. 619, 608 S.E.2d 688 (2004)

When the executor, Jimmy Bob Baggett, petitioned for executor's commissions, the probate court denied his petition. He appealed to the superior court, which heard the

case *de novo* and granted summary judgment against Jimmy Bob and in favor of the will beneficiaries and their descendants. The Court of Appeals affirmed the grant of summary judgment. The problem with Jimmy Bob's request, according to the Court, was that it came 16 years after the estate had been closed and after the real property that Jimmy Bob claimed to have been managing had been transferred to the five beneficiaries of the will. The transfer had taken place through a superior court consent order that had been entered in settlement of a claim for year's support that had been made by the decedent's spouse. On appeal, Jimmy Bob stated that there was a question of fact as to whether he as executor had assented to the transfer. The Court of Appeals applied former OCGA Sec. 53-2-109 (the law that was in effect when the decedent died), which provided that an executor's assent may be express or implied. (Current OCGA Sec. 53-8-15 contains a similar provision.) The Court of Appeals found that Jimmy Bob had participated in the settlement in his individual capacity as a beneficiary under the will. Furthermore, years later, he and his siblings had sold of the property by warranty deed. The facts also showed that Jimmy Bob had used his personal funds to pay rent on the property to his other siblings. In short, the Court of Appeals determined that as a matter of law Jimmy Bob as executor had assented to the transfer of title to the real property.

2. SALE OF STOCK BY EXECUTOR

Reynolds v. Harrison, 278 Ga.495, 604 S.E.2d 184 (2004)

The testator's two daughters and his surviving spouse were the co-executors of his estate. The will stated that the co-executors were to act by majority vote. The daughters brought a declaratory judgment action to determine whether they, as a majority of co-

executors, could sell the stock of a non-publicly held corporation even though the estate did not require such a sale to meet its financial obligations. The superior court granted summary judgement to the spouse but the Supreme Court reversed and found that the co-executors did have that authority. For generation skipping transfer tax purposes, the will created two marital trusts. The will also ordered distribution of part of the residue to a private foundation. The latter distribution was to be funded "to the extent possible... with marketable securities." The will also allowed the co-executors to "select the assets" that would fund the marital trusts, providing that the assets were ones for which the marital deduction was available. The trustees of the trusts, according to the terms of the will, were to "vote all stock of any non-publicly traded corporation" held by the trust. The wife wanted the stock in the family corporation to be used to fund the marital trust. She claimed that the direction to the trustees, combined with the direction to distribute only marketable securities to the foundation, implied that the trusts were to be funded with the family corporation stock. On cross motions for summary judgment, the trial court examined an affidavit submitted by the attorney who drafted the will in which the attorney stated that the testator had intended that the stock in the family corporation be used to fund the marital trust unless the sale of the stock was necessary to pay off indebtedness of the estate. The Supreme Court found that affidavit inadmissable in that the intent of the testator could be discerned from the four corners of the will. The Court found that the will was silent as to the funding of the marital trust specifically, but that it did grant the executors the broad powers of sale set forth in OCGA Sec. 53-12-232. The Court noted: "If the testator wanted to require the executor to fund the marital trust with [the family corporation] stock, he could have so

specified."

3. REMOVAL OF EXECUTOR

a) In re Estate of Zeigler, ___ Ga. App. ___, ___ S.E.2d ___ , 2005 Westlaw 957275 (April 2005)

This case originally came before the Court of Appeals in 2003 in In re Estate of Zeigler, 259 Ga. App. 807, 578 S.E.2d 519 (2003). A beneficiary under Ms. Zeigler's will filed a petition requesting the probate court to order the executor to provide her with information about certain property of the estate. The probate court issued a rule nisi order instructing the executor to appear to show cause "why the relief prayed for should not be granted." The executor did not appear at the hearing (although her attorney did appear on her behalf) and the beneficiary apparently made an oral motion at the hearing to remove the executor. The probate court granted the motion and removed the executor for her failure to appear. The executor appealed but at the same time the probate court vacated its order and issued a second rule nisi order, this time ordering the executor to appear to show cause as to why her Letters Testamentary should not be revoked. The executor again did not appear but her attorney did appear on her behalf. The probate court removed her and appointed a new executor. The Court of Appeals dealt only with the first appeal because it noted that that appeal had acted as a supersedeas, thus preventing the probate court from vacating its order and from all of its subsequent actions. The Court of Appeals found the first removal improper because the executor had not received proper notice that the revocation of her letters was at issue. The Court of Appeals noted that the executor had failed to respond to numerous requests for information made by the beneficiary and that such failure could constitute

"good cause" for removal (as required by O.C.G.A. §53-7-55(1)). However, the lack of notice to the executor caused the Court of Appeals to reverse the case and remand it to the probate court.

On remand, the probate court gave the executor appropriate notice and, after a hearing, removed her as executor and ordered her to post a supersedeas bond in the amount of $95,500. At the hearing, the executor admitted that she had not made an inventory of the contents of the decedent's home and that the decedent's adopted son had put these items in storage. The executor did not know the location of the storage unit and did even know where to contact the son. The executor admitted that she had not taken steps to recover other property of the decedent, including a diamond ring (which the decedent had been wearing when she died) and the decedent's van. Finally, the executor admitted that she had sold the decedent's house without first getting it appraised and had deposited the proceeds of the sale in her personal account. The Court of Appeals found that the probate court had good cause for removing the executor. The Court also held that the probate court did not abuse its discretion in fixing the amount of the supersedeas bond, given the uncertainty of the value of the mismanaged assets in the decedent's estate.

b) In re Estate of Arnsdorff, ___ Ga. App. ___, ___ S.E.2d ___, 2005 WL 1077347 (2005)

Clark drafted the testator's will and then served both as executor and as attorney for the estate. A year after the testator's death, the major beneficiary of the estate petitioned first to have Clark make an accounting and then eventually to remove him as executor.

The probate court ordered Clark to file an accounting. Clark submitted some six inches of disorganized paper that had been prepared by his staff and that had barely been reviewed by him and was not verified or attested by him. The probate court dismissed Clark as executor and ordered him to forfeit over $79,000 in fees and commissions. The Court of Appeals affirmed. The Court of Appeals found that the probate court had not abused its discretion in removing Clark and ordering him to return the fees. The Court found that the probate court had ample evidence to show the "good cause" for removal that is required by OCGA Sec. 53-7-55. The Court focused on the deplorable state of the "accounting," including the fact that it contained errors in excess of $267,000 and had required hours of review by two CPAs who were attempting to ascertain the condition of the estate. Further evidence showed that Clark had knowingly filed an erroneous tax return for the estate and, when questioned about it by the beneficiary, had suggested that they just wait for the statute of limitations to run. The Court of Appeals held also that the probate court had the authority to force Clark to forfeit the commissions. The Court noted that OCGA Sec. 53-7-54(a) gave the probate court the authority to deny compensation to an executor who had breached his fiduciary duty and also that an executor cannot be reimbursed from the estate for the costs and expenses of litigation that is caused by his own misconduct. Among other things, the Court cited as examples of his breach of fiduciary duty the tax return problems, the fact that he delayed distribution to the beneficiary because he wanted it (a church) to set up a trust even though the will did not require it, and the disorganized accounting.

4. EXECUTOR HELD IN CONTEMPT

Black v. Mealor, 268 Ga. App.612, 602 S.E.2d 325 (2004)

The heirs of the testator requested that the executor file an accounting of the estate assets. (The Court of Appeals referred to the petitioners as the testator's "heirs". Presumably they were also the sole beneficiaries of the estate.) The probate court, after a hearing, ordered the executor to file an inventory and make an accounting. The executor filed an inventory in which he stated that he had already distributed the estate assets in the manner provided in the will. The heirs then filed a "petition" for contempt and to remove the executor. The petition and notice of the hearing date were served on the executor over a month prior to the hearing date. About 30 minutes before the hearing was to begin, the executor informed the court that he was out of town and unable to attend. The court noted the "past conduct and contemptuous manner of the executor at past court hearings," found his absence "deliberate and willful," and proceeded to hold the hearing without him. The probate court found the executor in contempt, removed him, appointed a successor, and ordered him to turn over all the estate assets to the new executor. The court also ordered him to cease harassing the heirs and their families. The sole ground of the executor's appeal was that the probate court had failed to make findings of fact and conclusions of law as required by OCGA Sec. 9-11-52(a). The Court of Appeals affirmed the probate court's orders. The Court of Appeals noted first that OCGA Sec. 9-11-52 does not apply to motions and that an application for contempt is a motion, not a pleading. The Court also said that, even if OCGA Sec. 9-11-52 had been applicable, that statute requires a party to a non-jury trial to request findings of fact and conclusions of law and that the executor had made no such request.

5. EXECUTOR'S RIGHT TO DECLARATORY JUDGMENT

Cochran v. White, 269 Ga. App. 182, 603 S.E.2d 509 (2004):

Cochran was appointed the executor of her adoptive father's (Duke's) estate. She filed a petition for a "declaration of rights" in superior court claiming that she was unable to marshal the estate assets due to previous actions by White. She claimed that White (who was Duke's cousin by marriage) had converted funds while Duke was suffering from Alzheimer's disease by causing Duke to deposit funds and direct his retirement benefits into accounts held jointly with White. White counterclaimed that Cochran was in fact the wrong-doer and that she had diverted "substantial portions" of Duke's money through her power of attorney. White also moved to dismiss Cochran's claim under OCGA Sec. 9-11-12(b)(6) (failure to state a claim on which relief can be granted). Cochran then amended her petition to add a tort claim for compensatory and punitive damages. The Court of Appeals agreed with the superior court that Cochran's petition for declaratory judgment should be dismissed. The Court noted that OCGA Sec. 9-4-4(a) allows a fiduciary to petition for a declaration of rights and declaratory judgment in these three situations:

> (1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;
>
> (2) To direct the executor, administrator, or trustee to do or abstain from doing any particular act in his fiduciary capacity; or
>
> (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

The Court pointed out that this right was reserved for situations in which a fiduciary

sought guidance because there was some uncertainty with respect to the fiduciary's future actions. However, the Court said, there was no uncertainty in Cochran's case in that the actions of which Cochran was complaining had already occurred. The Court of Appeals affirmed the dismissal of the claim for declaratory judgment but reversed the dismissal of the added tort claim. The Court noted that Cochran had the right to amend her petition because no pre-trial order had been entered at the time she did so. (OCGA Sec. 9-11-15(a)).

6. STATUTES OF REPOSE AND LIMITATIONS

Simmons v. Sonyika, ___ Ga. ___, ___ S.E.2d ___ (May, 2005)

The decedent allegedly died as a result of medical malpractice. After her death, her estate remained unrepresented for 344 days before Simmons was appointed administrator. Due to a series of confusions regarding the identification of the proper party and the proper court (state or federal), Simmons did not file the malpractice action until after five years had elapsed from the date of the acts that were the grounds for the action. The Court of Appeals for the Eleventh Circuit certified to the Georgia Supreme Court the question of whether Georgia's medical malpractice five-year statute of repose is tolled during the time in which an estate is unrepresented. The Supreme Court held that the period is not tolled during the time the estate is unrepresented. The Supreme Court recognized that Georgia has had a code section for almost 150 years that provides that the time between a decedent's death and the representation of the estate is not counted "in calculating any limitation applicable to the bringing of an action" (OCGA Sec. 9-3-92). The Court pointed out, however, that this statute applies only to statutes of limitation and not to statutes of repose. In fact, the Court noted that Georgia

had no statutes of repose when the unrepresented estate statute was enacted. The Court explained the distinction between a statute of limitations ("a procedural rule limiting the time in which a party may bring an action for a right which has already accrued") and a statute of ultimate repose (which "delineates a time period in which a right may accrue"). The Court found that a statute of repose was "an unyielding bar to a plaintiff's right of action" that "destroys the previously existing rights so that, on the expiration of the statutory period, the cause of action no longer exists." The Court pointed out that the medical malpractice statutes (OCGA Sec. 9-3-71 and 9-3-73) refer specifically both to a statute of limitations (two years) and a statute of repose (five years). The Court noted that a statute of repose "by definition ... cannot be tolled." The Court also expressed certainty that the Georgia legislature, when it enacted the medical malpractice statute of repose, had knowledge of currently existing laws (including the statute of limitations law for unrepresented estates) and intended the statute of repose to "carry greater weight" than the unrepresented estate statute.

C. PROBATE COURT JURISDICTION

1. PROBATE COURT JURISDICTION OVER ESTATE OF NON-RESIDENT

In re Estate of Adriance, 269 Ga. App. 157, 603 S.E.2d 521 (2004)

The decedent died at her daughter's home in Glynn County. The daughter sought and was issued Letters of Temporary Administration. She then sought appointment as Administrator. The second daughter objected to her sister's appointment and filed a motion alleging that the probate court lacked jurisdiction because the decedent had not been a resident of Glynn County when she died. The probate court found that the

decedent had been a resident but appointed a third party as Administrator. On appeal, the superior court dismissed the probate court's order for lack of jurisdiction upon its finding that the decedent had not been a resident of Glynn County. The second daughter then appealed to the Court of Appeals, stating that the superior court should have "ruled in her favor" rather than merely dismissing the probate court's order. Specifically, she asked for a favorable ruling on her requests for award of litigation fees and for an investigation into who had opened the estate in Georgia and caused a document that contained "vicious statements" about her to be placed in the probate court file. The Court of Appeals held that she had been granted the relief she sought and that she was not entitled to an award of litigation expenses.

2. INTERVENTION OF EQUITY IN PROBATE PROCEEDINGS

Dawson v. Dawson, 277 Ga. 850, 597 S.E.2d 114 (2004)

The testator left 78 acres of land in Oconee County to be divided equally among his eight children. He died in 1998 and two of this children were appointed executors. In 2002, four of the other children joined in a petition seeking an equitable partition of the property and the appointment of a special master to sell the real estate and distribute the proceeds. After their petition was filed, the executors contracted to sell the property for $1.3 million, accepting the highest of three bids on the property. The superior court denied the children's petition. On appeal, the children claimed that the superior court had mistakenly thought that their action was one for the removal of the executors and thus should have been filed in probate court. But the Supreme Court pointed out that the action had been dismissed on the merits, not for lack of jurisdiction. The Supreme Court held that there had been no abuse of discretion by the superior court judge and

affirmed the dismissal. The Court found that the executors had delayed the sale of the property because they were waiting for the expiration of a conservation tax easement, for which the estate would have incurred financial penalties for early termination. The Court also said that past attempts to divide the property in a way that was satisfactory to all the children had proved fruitless. The Court noted that the children's major complaint was that the executors' commission if they sold the property would be 5% while it would be only 3% if they distributed it in kind. But the Court pointed out that the petitioners had not factored in any potential cost of a special master. In summary, the Court said that the trial court had correctly concluded that the petitioners had not shown any "strong reason" for the superior court to intervene and that the intervention of equity was not warranted as the petitioners' interests were adequately protected by potential probate court procedures (including an action for removal of the executors). Justices Carley and Thompson dissented, stating that the executors had not performed their "duty" under former OCGA Sec. 53-2-30 to assent to a distribution of the land within an appropriate time period and thus that equity could intervene to compel their assent.

D. TRUSTS

1. EXPRESS TRUSTS

Adams v. Gay, 270 Ga. App. 65, 606 S.E.2d 26 (2004)

Adams created an irrevocable trust in 1998. At its creation, he assigned to the trust his interest in two other trusts. The beneficiaries of the irrevocable trust were Adams and his children. Three years later, Adams signed a "Revocation of Assignment" in which he

stated that he revoked the assignment and wanted the funds from the two assigned trusts to be paid to him directly. He then sued the trustee of the irrevocable trust, the trustees of the two assigned trusts and his two children. The trustee of the irrevocable trust sought and was granted summary judgment in his favor on the theory that the assignment was not subject to revocation and the irrevocable trust was a valid trust. The trial court found that an assignment that is made for good and valuable consideration cannot be revoked "without the consent of the assignee." The Court of Appeals affirmed the summary judgment. On appeal, Adams argued that there were open issues of fact such that summary judgment was not appropriate. Adams argued that the assignment was not valid because his attorney had told him that the money in the trust would always be available to him. The Court of Appeals pointed out that not only was this merely "self-serving hearsay," but also that the attorney's statements had no relevance to the question of whether Adams had been given valuable consideration for the assignment. Adams next argued that he had signed the trust agreement based on a mistake. The mistake he cited was that the attorney had told him the trust was "merely a formality" that was designed to ensure that the money did not go to his ex-wife. The Court of Appeals held that that only showed a motive for establishing the trust and that a unilateral mistake alone would not justify setting aside a trust. Rather, the Court said, the record must show fraud or inequitable conduct by the opposing party. Finally Adams argued that the trust property should be distributed to him under OCGA Sec. 53-12-152(a)(3). This Code section allows a court to terminate a trust and distribute the property if it finds that the continuation of the trust "would defeat or substantially impair the accomplishment of the purpose of the trust." The Court of Appeals would not

consider this argument because it was different from the argument Adams had raised at trial. At trial, he had cited OCGA Sec. 53-12-152(a)(1), which allows a court to terminate a trust if the costs of administration would defeat or impair the trust's purpose.

2. IMPLIED TRUSTS

a) McFarley v. State, 268 Ga. App. 621, 602 S.E.2d 341 (2004):

In the course of a prosecution for controlled substances act violations, the State filed a civil *in rem* complaint for forfeiture of two cars that were titled in the name of Eva McFarley's son. She claimed to be an "owner" of the cars by virtue of an implied trust. She had paid for the cars but purchased them in his name in order to facilitate the purchase of insurance. He had never used the cars and both mother and son intended for the cars to belong to her. The trial court dismissed her attempt to contest the forfeiture on the ground that she was not an "owner" and thus did not have standing. The Court of Appeals affirmed. The Court of Appeals recognized the general validity of ownership interests in the beneficiaries of implied trusts (citing case law but none of Georgia's implied trust statutes) but found that this type of ownership did not constitute the "owner" or "interest holder" requirements of the forfeiture statute. The Court said that that statute, OCGA Sec. 16-13-49(a)(6) & (7), must be strictly construed as a forfeiture action is an *in rem* proceeding. The forfeiture statute requires an "owner" to be in strict compliance with any statute that requires the recordation in the public records of the ownership interest. Because the cars were titled in her son's name, the Court noted that there could be nothing in the public records showing the mother's ownership.

b) Burnett v. Holroyd, 278 Ga. 470, 604 S.E.2d 137 (2004)

Testator devised all of her real and personal property to the children of her first marriage. One year after her death, her estranged husband brought a suit to quiet title to certain of the real estate and asked the court to impose a resulting trust on the land. The testator's children and executor argued that the imposition of this equitable remedy was barred by the fact that the husband had "unclean hands." A jury decided in the husband's favor as to the largest parcel of land. However, the trial court granted the children's motion for judgment notwithstanding the verdict. The trial court focused on the fact that the husband had deeded an undivided one-half interest in the parcel to his wife for title insurance purposes and had then transferred the egg-producing business that was run on that parcel to his wife's name. He purportedly did this to obtain income tax benefits and to avoid a diminution in his own pension benefits that would have occurred if the income from the business had been reported in his name. The trial court found that, while it is permissible for a spouse to transfer property to the other spouse to obtain tax benefits, it is improper for the transferor spouse then to claim that the transferee spouse does not hold actual title but merely is a trustee for the transferor spouse. The Supreme Court affirmed the trial court's order, but not for the reason set forth by the trial court. The Supreme Court basically said that the husband had not presented appropriate proof to support the imposition of an implied trust. The Supreme Court cited the Georgia statutes relating to resulting and constructive trusts (OCGA Secs. 53-12-90 through 53-12-93). The Court noted the circumstances under which a resulting trust will arise:

> A resulting trust is a trust implied for the benefit of the settlor or the settlor´s

successors in interest when it is determined that the settlor did not intend that the holder of the legal title to the trust property also should have the beneficial interest in the property, under any of the following circumstances:

(1) A trust is created but fails, in whole or in part, for any reason;

(2) A trust is fully performed without exhausting all the trust property; or

(3) A purchase money resulting trust as defined in subsection (a) of Code Section 53-12-92 is established. (OCGA Sec. 53-12-91.)

The Court found that the husband had met the first criterion by testifying that he did not intend for his wife to have a beneficial interest in the ½ interest even though he had transferred title to her. But the Court pointed out that none of the three circumstances listed in the statute had occurred in that there had been no express trust that had either failed or been fully performed. A purchase money resulting trust had not been created because the husband had not paid for the property but merely had transferred property he already owned to his wife's name. The Court noted that the issue of whether a constructive trust should be imposed had not been raised at the trial level.

c) Brock v. Brock, 279 Ga. 119, 610 S.E.2d 29 (2005)

The resulting trust issue in this case arose in the context of a divorce. At some point during the marriage the husband had conveyed the family home to his wife for the purpose of protecting it from his potential future creditors. In the divorce action he claimed, and the trial court agreed, that she was holding the property in an "implied resulting trust" for him. The Supreme Court reversed this finding. The Supreme Court found that the husband had presented no evidence of the first two statutory

circumstances. for recognizing a resulting trust. (See the case description immediately above.) The Court then looked to the statutes pertaining to purchase money resulting trusts to determine whether this type of implied trust had arisen. The Court noted that O.C.G.A. Sec. 53-12-92 (c) provides that if the transfer in question is between spouses, the transfer is presumed to be a gift, although such presumption can be overcome by clear and convincing evidence. The Court extrapolated from case law the concept that the husband could overcome the presumption by proving that "a resulting trust was contemplated by both parties by way of an understanding or agreement." The Court then found that the record was "devoid of any evidence of mutual intent to create a trust" and thus that the marital home should not have been awarded to the husband.

The wife also challenged the trial court's award of $400,000 to the husband on the theory that it had been a "gift" to him from his father. The $400,000 was paid to the husband when he was employed by a company that was solely owned and operated by his father. The company had taken a deduction for the payment and the son had reported it as compensation on his income tax return. The father had paid not gift taxes on the gift. The Court found that the "overwhelming evidence" showed that there was no intent that the payment be a gift from father to son.

3. BREACH OF FIDUCIARY DUTY

a) Namik v. Wachovia Bank of Georgia, ___ Ga. ___, ___ S.E.2d ___, 2005 WL 852713 (April, 2005), reversing Wachovia Bank of Georgia v. Namik, 265 Ga. App. 80, 593 SE2d 35 (2003) (cert. granted, May, 2004)

General Ali, a retired Iraqi general, visited his son, Namik, in Atlanta in 1989. While there, he and his son made three trips to the Bank. On the first trip, after

transferring money from a Swiss bank account, Ali purchased a certificate of deposit for $350,000. On the second trip, he purchased another $350,000 CD and a CD for $2,650,000 (referred to as the "Jumbo CD") which would mature in six months. The next day, Ali conferred with a trust officer named Tom Slaughter. At that meeting, General Ali signed the Bank's form Revocable Living Trust Agreement, but no funds were transferred to the trust. Six months later, a memorandum from the same trust officer (the "Slaughter memo") indicated that Ali wanted to fund the trust with the money from the matured "Jumbo CD." The memo also indicated that Ali had mentioned orally to the trust officer that he wanted "no market risks" and that he would like to have the funds invested "only in U.S. Government issues." Neither of these instructions were embodied in the written trust agreement, which authorized the trustee to "hold, manage, invest, and reinvest said property in its discretion." The agreement directed that the funds were to be used for the benefit of the settlor during his life and then, at his death, be paid over to the personal representative of his estate. When the trust was established in September, 1989, another trust officer attempted to contact Ali at the addresses he had given the bank and through the son in order to discuss the investment of the trust assets. The attempts were unsuccessful. Over a year later, Namik told the Bank that his father had been imprisoned and, in 1994, he informed them that his father had been executed in May, 1990. The Bank officers, being unable to contact Ali and not even knowing for sure what his tax status was (that is, whether he was a citizen, non-resident alien, etc.) put the funds in tax-free municipal bonds. When it was discovered that Ali was dead, the funds were paid over to the Bank as administrator of Ali's estate. The estate tax law and regulations that were in effect at the

time of Ali's death caused the entire value of the trust fund to be included in his estate as U.S. situs property and the estate paid tax in the amount of $933,248,49. Namik sued, claiming that the Bank was responsible for the fact that the estate of his father had been subjected to those taxes.

Namik's first theory was that the Bank, as part of its fiduciary duty to Ali, should have engaged in estate planning for Ali in that it should have invested the trust funds in assets that would not have been included in his gross estate for U.S. estate tax purposes. Sec. 2105 of the Internal Revenue Code lists certain types of property that are not considered to be "situated in the United States" when calculating the estates of non-resident aliens. These include proceeds of life insurance policies and certain bank deposits and other debt obligations, including U.S. debt obligations. However, (as noted by the Court of Appeals), prior to an amendment in 1997, this law was "obscure...'not perspicuous, not clearly expressed, vague, hard to understand' (quoting Black's Law Dictionary)." The "obscure" rule that was in effect in 1990 would only have excluded from the nonresident alien's gross estate investments in U.S. government issues with a maturity of over 183 days. The Bank's theory (which the Court of Appeals found to be "correct under Georgia law") was that the trustee of a revocable living trust is not under any obligation to engage in estate planning for the settlor/beneficiary or to consider the estate tax consequences of the investments it makes. The Court of Appeals stated that a trustee, while it may invest in accordance with the terms of the trust agreement, is also bound to exercise the standard of care that is set out in OCGA Sec. 53-12-287. This Code section focuses on the knowledge the trustee has or should have had at the time the investments are made. The Court said: "The test is not whether, in hindsight, a more

lucrative investment could have been made measured from the standpoint of safety, value, income, tax consequences." The Court also pointed out that the Bank was acting as trustee under a revocable living trust and that these "trusts are vehicles for investment purposes; they are not vehicles for estate-planning purposes and generally, as in this case, have no testamentary provisions." The Court realized that OCGA Sec. 53-12-287 indicates that a trustee, in making investment decisions, "may consider [among other things] the anticipated tax consequences of the investments," but said that this statute does not mandate that a trustee look into potential estate tax consequences. The Court said: "No Georgia law requires a trustee of a revocable living trust to consider estate tax consequences of investments or to invest trust funds to minimize estate taxes." Finally, on this issue, the Court of Appeals noted that Supreme Court of Georgia (in Robbins v. Nat. Bank of Ga., 241 Ga. 538 (1978)) has held that there is no duty on the part of a fiduciary "to inform itself and advise its beneficiaries of obscure tax laws."

Namik's second theory was that the Bank breached its fiduciary and contractual duty by not following Ali's oral instructions to invest the trust funds in U.S. government issues. The Court of Appeals noted that, even if the bank had invested in U.S. government securities, there was still no evidence that the Bank would have chosen to invest in securities with a maturity of over 183 days. The Court of Appeals engaged in a general discussion of the maxim that the "cardinal rule is that the trustor-settlor's intention be followed." That intent is to be found in the language of the trust agreement and resort will be made to oral evidence only if the agreement is ambiguous. The Court of Appeals agreed that the Slaughter memo was admissible to explain the source of the trust funds because the trust agreement was silent on that point. However, the Court of

Appeals found neither silence nor ambiguity in the investment directions that appeared in Ali's trust agreement. The Court noted that Ali easily could have inserted his own investment directives if he had desired to do so. The Court held that the Slaughter memo "should not have been admitted to vary the terms of the Trust Agreement because it constitutes parol evidence inadmissible under Georgia law" (citing OCGA Secs. 13-2-2, 24-6-1). The Slaughter memo did not explain any ambiguities in the agreement and, instead, "would completely change the discretion provided in the Trust Agreement." The Court of Appeals also held that the Slaughter memo did not constitute a contract between Ali and the Bank.

Namik appealed also, claiming that the trial court had awarded insufficient damages. The trial court had calculated damages by 1) assuming that the trust fund, if properly invested, should have been invested 50% in estate taxable investments and 50% in estate tax exempt investments; 2) holding Namik to a duty to mitigate damages once he knew of his father's death; 3) having each party pay its own attorney fees; and 4) having the Bank disgorge half of the fees it had charged. The Court of Appeals, after finding no liability on the part of the Bank, found the issues raised by Namik to be moot. Namik also claimed that the actions of the Bank gave rise to a tort action against it based on its failure to follow Ali's instructions, citing Wachovia Bank of Georgia v. Reynolds, 244 Ga. App. 1 (2000). The Court of Appeals agreed with the trial court that the case cited by Namik did not create a new tort action in Georgia.

The Supreme Court reversed the judgment of the Court of Appeals and remanded the case. The Supreme Court issued its first opinion in February, 2005 but then granted a motion for reconsideration. On reconsideration, the Court did not change its ultimate

finding but it did vacate its first opinion and replace it with a new one. The first issue addressed by the Supreme Court was whether the Slaughter memo was admissible at trial. Unlike the Court of Appeals, the Supreme Court found the Slaughter memo admissible to explain General Ali's investment desires because the fact that it had been admitted to show the source of the trust funds indicated that the written trust agreement did not constitute the entire agreement between Ali and the bank. The Supreme Court went on to say that "[o]ne topic on which the trust agreement was silent was Ali's instructions regarding the specific types of investment vehicles in which he wanted his money invested." The Court said that the clause that granted the trustee complete discretion in investing the funds was "not a statement of investment preferences" nor was the incorporation by reference of the statutory trustee powers. The Court went on to characterize the trust agreement as containing "ambiguity ... regarding the types of funds in which Ali's funds could be invested...." The Court also found inappropriate the Court of Appeals' holding that the Slaughter memo was not admissible because it represented an agreement arrived at subsequent to the writing.

The Supreme Court next addressed the Court of Appeals' holding that Wachovia had not breached its fiduciary or contractual duties to General Ali. The Supreme Court disagreed with the Court of Appeals that the question at issue was whether Wachovia owed Ali the duty to engage in estate planning on his behalf. The Supreme Court said instead that the issue was whether Wachovia had acted as a prudent trustee in accordance with the requirements of OCGA Sec. 53-12-287(b) ("a prudent person acting in a like capacity and familiar with such matters...."). The Supreme Court, using the "any evidence" rule in reviewing the trial court's opinion, found that there was evidence

to support the trial court's finding that Wachovia should have been aware of the tax regulation in question and the effect of not investing in accordance with General Ali's instructions. The Supreme Court said that the trial court's findings were entitled to the same deference as would be given a jury verdict.

b) SunTrust Bank v. Merritt, ___ Ga. App. ___, ___ S.E.2d ___, 2005 WL 678542 (Mar. 2005)

The remainder beneficiaries of a trust sued SunTrust Bank, which was the co-trustee of the trust along with the income beneficiary (Merritt). The trust was one of three trusts set up in the will of Martha Bradford Hynds for her three children. Each trust provided that the child would receive income for life and the remainder would pass on to that child's issue. The trust also provided a limited encroachment power:

> "If at any time [the income beneficiary] is in actual need of support and has no other adequate means of support, including the income from this trust and any other means of support, then the Trustees shall be authorized to encroach on the corpus of the property in such amounts as in the judgment of the corporate Trustee is absolutely necessary to provide for his actual and essential support. I do not intend that the Trustees encroach on the corpus to provide a standard of living equal to that to which he may he may have been accustomed, but I intend the power of encroachment to be exercised only in case of absolute necessity. "

Each child was a co-trustee of his or her trust along with the bank. Merritt insisted that the funds in his trust be invested in tax-free bonds. Testimony from a trust officer indicated that Merritt had been urged to consider diversifying the investments, but he

resisted that suggestion. The corpus of his trust was worth $650,000 at the initiation of the trust and $732,000 when he died in 2000. The other two trusts, on the other hand, were invested primarily in stocks and had trebled in value over the same time period. The descendants of Merritt argued that SunTrust had breached its fiduciary duty because the investments had failed to keep up with inflation and the bank did not balance their interests against those of Merritt, the income beneficiary. The trial court granted summary judgment for the bank on the issue of whether it had violated any duty imposed by the trusts and whether it had violated the "prudent investor rule" by relying solely on the factors laid out in O.C.G.A. Sec. 53-12-287. The trial court found that the interest of the remainder beneficiaries was secondary to that of Merritt. The trial court would not grant summary judgement on the inflation issue, holding that there remained a material issue of fact as to whether the bank had breached its fiduciary duty by failing to preserve the "real value" of the trust corpus. The Court of Appeals upheld the trial court's summary judgment order and also found that the trial court had erred in concluding that an issue of fact existed on whether the bank had breached its fiduciary duty by failing to keep up with inflation. The Court of Appeals stated that it rested its holdings on the terms of the trust instrument which "makes clear that William Merritt is entitled to the income and the Merritts, as remainder beneficiaries, are entitled to the corpus." The Court said that these terms obviously indicated that the duty of the trustee as to the remainder beneficiaries was to "preserve and protect - - not increase – the corpus of the trust." The Court of Appeals found the inflation issue to be one of first impression in Georgia, but found that the question had been raised and rejected in Arizona and Nebraska. The Court of Appeals quoted extensively from the Arizona case

of Tovrea v. Nolan, 178 Ariz. 485, 875 P.2d 144 (1993), which the Court characterized as a case with "virtually identical facts." The trust in the Tovrea case provided income for Jeanne for life and allowed the trustees to invade the principal ""at such times and in such amounts as they shall determine, in their sole and absolute discretion, that she may benefit from additional funds to maintain her health, education and general welfare." Th court concluded: "Clearly, Tovrea intended that the trust provide for Jeanne, even at the expense of principal."

The Merritt case is discussed in detail in an article by Donna Barwick in "House Bill 406: Georgia Flexible Income Trust Legislation," GEORGIA PROBATE NOTES. Vol. 22, No. 9, pp. 1-5 (May/June, 2005).

E. POWER OF APPOINTMENT

Hargrove v. Rich, 278 Ga.561, 604 S.E.2d 475 (2004)

The testator granted to her daughter a power of appointment over 1/4 of her estate. The power could be exercised during the daughter's life or "at death by her Last Will and Testament, making express reference to this power...." The power was the power to "direct the Trustees to turn over any part or all of the property... to [the daughter's] brothers or sisters or her nieces and nephews, or descendants of deceased nieces and nephews, and in such manner, in Trust or otherwise, as [she] may in such instrument direct or appoint." The power was also a special power for tax purposes in that it prohibited the daughter from appointing to herself, her estate, her creditors or the creditors of her estate. The daughter exercised the power in her will in favor of one niece (to the exclusion of other nieces, nephews, etc.) and made an express reference to

the fact that it was her intent to exercise the power granted to her in her mother's will. The brother of the holder of the power challenged both the method by which the power was exercised and his sister's ability to exercise the power solely in favor of one niece. He was granted a declaratory judgment in the trial court. The Supreme Court found that the daughter had followed the testator's direction in her method of exercising the power by her express reference to it in the will. The Supreme Court disagreed with the trial court's finding that the language allowing the daughter to "direct the Trustee" required a different or more formal method than the daughter had used. The Supreme Court agreed with the trial court on the question of whether a power of this type could be exercised in favor of only one of the nieces. The Court looked closely at the language of the testator and noted specifically that the power was one to appoint to "her nieces *and* nephews." The Court found that the use of the word "and" prevented the holder of the power from excluding other nieces and nephews. The Court also pointed out that the testator had granted a similar power to her son but in that grant had used the term "*to or among* such of his children...."

F. GUARDIANSHIPS AND CONSERVATORSHIPS

a) Averette v. Browning-Erneston, 270 Ga. App. 674, 607 S.E.2d 264 (2004)

The decedent's daughter had served as her guardian for the two months that preceded the decedent's death. The decedent's son was appointed executor of her estate. The guardian filed a petition for final accounting and the executor filed a caveat. The probate court held a hearing and entered an order that approved the accounting and also required that the funds from a certain bank account should be taken out of the

guardianship account into which the guardian had placed them and restored to the status of a joint account between the executor and his mother. Two years later, the executor filed a suit claiming that the guardian had wrongfully taken possession of the bank account and other property of the decedent. The trial court granted summary judgment in favor of the guardian and the executor appealed, arguing that the trial court's summary judgment failed to give effect to the probate court's judgment that the funds be returned to him. The executor argued further that res judicata did not apply to the question raised in the instant case as to whether the guardian was entitled to certain personal property that had been in a residence that was devised to the executor by his mother's will. The Court of Appeals agreed with the executor that res judicata did not apply because there was no identity of the parties in the two actions. The Court pointed out that the son had sued the guardian in probate court in her capacity as guardian and in the instant case was suing her in her individual capacity. The Court noted further that there was no identity between the issues.

b) In Re Hodgman, 269 Ga. App. 34, 602 S.E.2d 925 (2004)

The ward was incapacitated in a car wreck. Prior to the wreck, she had signed a general financial power of attorney and a healthcare power of attorney naming her son as agent under both. A few months after the wreck, the son moved her into his home in Cherokee County. He refused to allow his sister to participate in her care. Fearing that the son was mismanaging their mother's assets, the sister filed petitions for emergency guardianship and permanent guardianship of the mother's person and property. The court appointed a lawyer to represent the mother and ordered the son to discontinue

using the power of attorney until a hearing had been held. The son then filed a petition for guardianship and a motion to intervene in his sister's action. He also challenged the court's jurisdiction over the mother on the ground that she was a resident of Fulton County. At the hearing, the mother's attorney waived venue and "explicitly stipulated the Ward's need for guardians to be appointed by that tribunal." The court appointed the County Administrator as guardian of the property and the son, the daughter, and the daughter's husband as joint guardians of the person. The son appealed. The Court of Appeals first addressed the venue issue. The Court found that the ward had been a resident of Fulton County at the time of the wreck but that her injuries had left her so incapacitated that she did not have the mental capacity to change her domicile. But, as the Court pointed out, venue had been waived by her attorney and even the son had "waived venue" in that he had filed his own guardianship petition in Cherokee County. The Court next addressed whether the son, as his mother's sole agent under the two powers of attorney, was to be given a preference as the appointment of a guardian for her. The son had cited OCGA Sec. 29-5-2(c)(1), which grants preference to "an individual nominated by the incapacitated adult prior to the filing of the petition...." (Query whether the mere appointment of him as agent meant that she had nominated him to be her guardian.) The Court of Appeals noted that the same statute allows a court "for good cause shown" to pass over someone on the preference list. The probate court had stated expressly that, due to the "exigencies of the situation," the County Guardian's appointment as guardian of the property and the joint appointments of the children and son-in-law as guardians of the person best suited the interest of the ward.

c) In re Estate of Taylor, 270 Ga. App. 807, 608 S.E.2d 299 (2004)

When the guardian of the property of an incapacitated adult resigned, the adult's mother, who was already the guardian of his person, sought to be appointed guardian of the property. When the first guardian resigned, the probate court issued an order requiring "any party interested in serving as guardian" to petition to do so. The court also set the date for a hearing on the matter five weeks from the date of the order. The clerk of the court served a copy of the court's order on the ward's mother. At the hearing, she told the court that she wished to be appointed guardian of his property and that she was confident that she could provide a bond to the court. The day after the hearing, the court ordered her to tender the bond within the next three days. The order also stated that if she did not do so, the County Guardian would be appointed. On the third day, the mother told the court that the surety company was unable to process her bond request in such a short period of time and asked for additional time to finish the process. Four days after that, the County Guardian filed proof of a bond and was appointed guardian of the ward's property. The following day, the mother notified the court that she had been approved for a bond and filed a motion for a hearing. The probate court denied this motion. The mother appealed on the ground that the probate court had abused its discretion in that she had not been given a reasonable amount of time in which to secure a bond. The Court of Appeals reversed the appointment of the County Guardian and remanded the case. The Court referred to the preference list for the appointment of guardians that appears at OCGA Sec. 29-5-2 and noted that parents of an incapacitated ward are fourth in line and ahead of county guardians. The Court pointed out also that the statute provides that the County Guardian is to be appointed

only "if no other person is available to be the guardian of the property...." (In a footnote, the Court also recognized that the court is allowed to pass over persons having preference for good cause shown.) The Court said that the appointment of the County Guardian constituted an implicit finding by the probate judge that the mother was not "available" to serve. The Court of Appeals found that the only rationale for passing over the mother was the fact that she had not been able to secure a bond in the unreasonable amount of time allowed by the probate court. The Court of Appeals found this to be an abuse of the trial court's discretion.

d) In re Estate of Robertson, ___ Ga. App. ___, ___ S.E.2d ___ , 2005 WL 434803 (2005)

This case first reached the Georgia appellate courts in 2002 under the name Cross v. Stokes, 275 Ga. 872, 572 S.E.2d 538 (2002). The facts are as follows: The will of George Guess Robertson left ½ of his estate to his cousin Stokes and ½ to Cross, the family attorney who also was serving as the testator's guardian at the time he wrote his will. The testator had originally been declared incompetent by the Department of Veterans Affairs in 1952 and his father had been appointed his guardian. When his father died, his mother was appointed as his guardian. When his mother died, the family attorney was appointed guardian. However, due to an error in the probate court proceeding, the attorney was appointed the testator's "general guardian" rather than as his "VA guardian." (One chapter of Title 29 deals exclusively with guardians who are appointed pursuant to a request by the Department of Veterans Affairs.) At the request of the Department, the initial letters of guardianship were revoked and replaced with

letters that indicated that the attorney was serving as a "VA guardian." When the testator died, the probate court, citing "somewhat unusual circumstances," appointed a guardian ad litem for unknown heirs. The GAL brought to the court's attention the provisions of OCGA §29-6-11(c), which reads as follows:

> (c) Unless a guardian under this chapter is the next of kin under the laws of descent and distribution of the State of Georgia, no such guardian shall be named as a beneficiary under the last will and testament of his or her ward under any will executed while the guardian is serving as such. Any provision in any such will to the contrary shall be null and void.

The other beneficiary under the will petitioned to serve as administrator with the will annexed and the probate court granted her petition on the condition that she file a petition for declaratory judgment to determine the effect of that statute on the will provisions. The attorney filed his own petition for declaratory judgment, claiming that the statute was unconstitutional. The probate court found the statute to be constitutional and held that it applied to preclude the attorney from taking any of the testator's estate. The Supreme Court of Georgia affirmed. The Supreme Court first determined that the appeal was timely filed and then examined whether the probate court had had jurisdiction to issue a declaratory judgment in the case. Citing OCGA §9-2-4 (which gives the superior courts the right to issue declaratory judgments) and OCGA §15-9-127 (which gives certain probate courts concurrent jurisdiction with the superior courts in proceedings for declaratory judgment regarding fiduciaries), the Supreme Court concluded that the probate court had properly exercised declaratory judgment jurisdiction. The Court next dismissed the attorney's technical arguments that he was

not serving as a VA guardian after a brief discussion of the history of the guardianship. Then the Georgia Supreme Court addressed whether the statute was unconstitutional. The Court determined first that the title to the bill that became the statute contained an appropriate reference to the subject matter of the bill. Second, the Court addressed the attorney's contention that the statute violated the equal protection clauses of the U.S. and Georgia constitutions. The Court applied the "rational basis" test because no fundamental right or suspect classification was involved. The Court concluded that the State has a legitimate interest in protecting VA wards and that the statute was rationally related to that interest. Third, the Court concluded that the statute was not underinclusive simply because it does not protect all wards (in other words, because non-VA wards do not have the same protection under Georgia's general guardianship law). Finally, the Court addressed the attorney's argument that the statute should be limited only to moneys received by the guardian from the Department of Veterans Affairs over which the guardian had control. The Supreme Court looked to the wording of the statute and, finding that wording unambiguous, refused to read any limitation into the reach of the statute.

When the case was returned tot the probate court, the guardian filed a motion to recuse the probate judge who had been presiding over the proceedings of Robertson's estate. The probate judge referred the recusal request to a state court judge who denied the request after a hearing on the matter. The probate court than issued a rule nisi ordering the guardian to show cause as to why he should not be compelled to turn the estate assets over to Stokes (the other beneficiary who had been appointed administrator with the will annexed). The order also required Cross to make an

accounting, which he did not produce. The probate court determined that Cross had in his possession over $225,000 in assets that belonged to the estate and ordered them turned over to Stokes. Cross appealed to the Court of Appeals and the Court affirmed the order of the probate court. Cross raised a number of issues on appeal. First, he argued that Stokes' appointment was void because she had failed to serve him as a named beneficiary. The Court pointed out that by the time of her appointment, the probate court had already determined that he could not be a beneficiary under Robertson's will. The Court of Appeals held further that the probate court's ruling on the declaratory judgment had directly addressed his status as beneficiary. Cross next argued that the probate judge and Stokes and the appointed GAL had fraudulently "conspired" to have him disqualified. The Court of Appeals pointed out that Cross had been disqualified as a matter of law. Cross argued that the probate court's reappointment of the GAL after the will was admitted to probate was improper but the Court of Appeals pointed out that the original order appointing the GAL provided that the court could extend the appointment beyond the probate of the will. Cross argued that the state court judge should have recused the probate judge. His contention, viewed by the Court of Appeals as "rather amorphous," was that there had been an "appearance of impropriety" in that the judge and his staff had engaged in ex parte communications and independently investigated the facts of the case and had shown bias in allowing the GAL to have counsel appointed and have the GAL and counsel fees paid by the estate. The Court of Appeals found that none of the "evidence" offered by Cross proved any of his allegations and that none of the probate judge's actions would cause a fair-minded individual to question his impartiality. Cross argued that the state

court's ruling was not supported by written findings of facts and conclusions of law. The Court of Appeals noted that the Uniform Probate Court Rules have no requirement of such written findings and conclusions. Cross argued that the probate court should have let him pursue his contention that Stokes had violated the wills' in terrorem clause but the Court of Appeals pointed out that he had no standing to challenge her right to take under the will. Cross also made several procedural and substantive arguments about the probate court's ruling that he hand over the estate assets to Stokes. The Court of Appeals dismissed these arguments. Finally, Cross complained that the amount set by the probate court was "speculative and improper." The Court of Appeals examined the probate court's method of calculating this amount and found it to be proper.

G. ARBITRATION

1) Harris v. SAL Financial Services, Inc., 270 Ga. App. 230, 606 S.E 2d 293 (2004)

A settlor hired an attorney to set up and serve as trustee of a charitable remainder trust. The lawyer/trustee opened an account with the predecessor of SAL Financial Services and signed an account application and an account agreement. The agreement allowed the trustee/lawyer, who also was a stock broker, to act as broker for and buy and sell securities for the trust. The agreement also contained this language in bold type:

> I/we understand that the customer agreement on the reverse of this application contains in numbered paragraph 19 a pre-dispute arbitration clause requiring all disputes under this agreement to be settled by binding arbitration. By signing below customer acknowledges receiving a copy of this agreement.

The settlor's family were not happy with the way the trustee/lawyer/broker was

handling the trust, so they replaced him as trustee. The new trustees and a representative of the settlor sued the former trustee and his law firm for breach of fiduciary duty, fraud, and wanton and deliberate damage to the trust. They later amended the complaint to include SAL Financial as a defendant on the ground that SAL Financial did not supervise the trustee properly, and failed to act in accordance with its fiduciary obligation by not ensuring that the trustee/lawyer/broker did not have a conflict of interest with the trust. SAL Financial asked the court to compel arbitration as mandated by the account agreement. The trustees objected on the ground that the trustee/lawyer/broker had impermissibly executed the agreement while he was acting as agent both for the trust and for SAL Financial. The trial court compelled arbitration under the Federal Arbitration Act. On appeal, the Court of Appeals applied a standard similar to the one it applies when reviewing summary judgments: whether the trial court was correct as a matter of law. The question at issue was whether the action was arbitrable. The Court of Appeals noted that this question is to be answered by the arbitrator if the attack is an attack on the entire contract based on allegations of fraud or breach of fiduciary duty. On the other hand, when the attack is limited to a specific attack on the validity of the arbitration agreement, the question of arbitration must be decided by the court. The Court of Appeals found that although the plaintiffs had sued SAL for negligence and breach of fiduciary duty, when SAL moved to compel arbitration, the attack made by the plaintiffs was specifically on whether the trustee/lawyer/broker could bind the trust to the arbitration agreement. This attack on the enforceability of the arbitration agreement led the Court of Appeals to conclude that the question should be decided by the court rather than the arbitrator. The Court of Appeals also reversed

the trial court's finding that the plaintiff's challenge could only be a challenge to the entire contract because the contract did not contain a severability clause. The Court of Appeals found that a contract is severable if it contains multiple promises to do or refrain from doing several things and that this contract did so. The Court of Appeals remanded the case to the trial court to decide the issues relating to the validity and enforceability of the arbitration clause.

2) Joyner v. Raymond James Financial Services, Inc., 268 Ga. App. 835, 602 S.E.2d 871 (2004)

Joyner, the guardian of the property of an incapacitated adult, received a favorable award in an arbitration proceeding against Raymond James. The arbitration panel found Raymond James and two individual brokers liable on claims of negligence, breach of fiduciary duty, breach of contract, and violation of the NASD rules. The panel also required the firm to pay Joyner's attorney fees. Raymond James appealed to the superior court and that court vacated the award of attorney fees. Raymond James argued successfully at the trial level that Joyner should not have been granted attorney fees under OCGA § 13-6-11 because he did not specifically cite that section, instead asking for "reasonable attorney fees." The Court of Appeals determined that federal substantive law (the Federal Arbitration Act) governed the arbitration as the transactions at issue involved interstate commerce. On appeal, Joyner argued that Raymond James had failed to show any of the statutory or non-statutory grands for vacatur. Raymond James argued that the award was "arbitrary and capricious" (one of the non-statutory grounds for vacatur). The Court of Appeals stated that when an

arbitration award did not state a rationale, the party seeking to have the award vacated must refute every rational basis on which the arbitrators could have relied. The Court of Appeals found that the arbitrators could have found that the pleading requirements for the award of attorney fees were met in that, although he did not specifically cite OCGA § 13-6-11, Joyner's claim referenced the criteria for an award of fees that are set forth in that statute. The Court of Appeals concluded that "[b]ecause a legal ground for the arbitrators' award of fees can be inferred from the facts of the case submitted to the trial court, it cannot be said that the award of fees was arbitrary and capricious."

H, MEDICAID RECOVERY

Richards v. Georgia Department of Community Health, 278 Ga. 757, 604 S.E.2d 815 (2004)

A class action lawsuit was filed against the Georgia Department of Community Health (GDCH) by Medicaid recipients whose need for government assistance had been precipitated by injuries caused by third-party tortfeasors. The plaintiffs challenged OCGA Sec. 49-4-149, which allows the state to

> ...have a lien for the charges for medical care and treatment provided a medical assistance recipient upon any moneys or other property accruing to the recipient to whom such care was furnished or to his legal representatives as a result of sickness, injury, disease, disability, or death, due to the liability of a third party, which necessitated the medical care.

Subsection (d) of this statute provides as follows:

> A recipient of medical assistance who receives medical care for which the

> department may be obligated to pay shall be deemed to have made assignment to the department of any rights of such person to any payments for such medical care from a third party, up to the amount of medical assistance actually paid by the department; ....

The plaintiffs claimed first that the wording of the assignment provision in subsection (d) indicated that the recipient must assign only that portion of any recovery that was denominated specifically for medical expenses while the GDCH insisted that the *entire* amount of the proceeds recovered must be assigned. The Supreme Court found the plaintiffs' interpretation of the statute to be too narrow in that the statute began by saying the lien would be on "any moneys or other property accruing to the recipient." The Court found that the broader reading also complied more closely with the federal mandate that states recoup fully the medical expenditures they have made. The Court also noted that the narrow reading would make room for negotiated settlements that purposely allocated little or no money to medical expenses with the aim of avoiding Medicaid recovery.

The plaintiffs also challenged the recovery liens on the ground that, pursuant to 42 USCA Sec. 1396p, a lien cannot be imposed on "the property of an individual prior to his death." The Georgia Supreme Court once again found the plaintiffs' statutory interpretation to be too narrow. The Court noted that a Medicaid recipient assigns his right to recovery before actually receiving any proceeds. Thus, the ownership of the tort recovery having already been transferred to GDCH, the lien is not put on any property that belongs to the individual.

The plaintiffs also challenged application of the provision of 42 USCA Sec. 1396a

(25)(B) relating to the state's enforcement authority in the event the amount the state can expect to recover exceeds the prospective cost of the recovery process. The plaintiffs claimed that this federal statute contemplated that the state would pay part of the cost of collecting from the tortfeasors (e.g., attorney fees). The Supreme Court disagreed, finding that the federal statute only addressed the use of public funds in making tort recoveries. The Court noted that "what is cost-effective for GDCH and what is cost-effective for a Medicaid recipient are two entirely different things."

The plaintiffs argued further that the imposition of the lien is a taking of private property without just compensation and due process of law. The Supreme Court dismissed this argument by referring back to its theory that there is no "property" that is taken due to the earlier assignment. To the plaintiffs' claim that they are compelled to purchase their own legal services in order to effect recovery for GDCH, the Court responded that no one is compelled to undertake recovery.

Finally, the Court expounded upon its underlying theory of the case. It noted that the plaintiffs' had received significant public funds before the tort recovery process had even begun, that they had paid nothing in return for these funds, that they had known about the recovery requirement before undertaking the court action, and that in many case GDCH would not recoup as much as it had paid out for the recipient's medical expenses. The statutes, said the Court, merely set out the conditions under which the recipients will receive Medicaid assistance.

I. SUIT TO QUIET TITLE

Newcomer v. Newcomer, 278 Ga. 776, 606 S.E.2d 238 (2004)

Testator left her home and the surrounding land in a trust, with an interest in her husband for his life, remainder to a trust for their two children. Although a bank was named as trustee, the bank never assumed control of the trust property. The testator's husband took control of the property and as "sole acting trustee" executed an option to allow his new wife to purchase a life estate in the property. The option was to last for five years, with a potential extension for another five years. The wife extended the option prior to her husband's death. When he died, the testator's son and daughter were appointed co-trustees and they refused to honor the option. They filed suit to remove the cloud on the title, for declaratory judgment, ejectment, and enforcement of a purported settlement agreement between the testator's son and the testator's wife. The trial court dismissed their complaint for failure to state a claim upon which relief could be granted. The Supreme Court held first that the purported settlement agreement could not be enforced. The agreement as laid forth was "in principal only" and contingent upon the daughter also signing it and performing certain actions within a stated time period. She had in fact signed the agreement on the last day but it had been amended at that point, so the Court said that the amended document constituted a counter-offer that had not been accepted. The Court also affirmed the dismissal as it pertained to the cloud on the title because the plaintiff son had not alleged that he had possession, as is required for such suits. Nor, said the Court, did the plaintiff son properly pursue an ejectment action (which does not require possession) in that he had failed to attach a title abstract to his complaint. The trial court had given him 30 days in

which to do so but he had not complied. The Court affirmed the dismissal of the request for declaratory judgment in that there was no question presented as to the uncertainty or propriety of future actions by the trustee. The Court also affirmed the dismissal of plaintiff's motion to strike certain "offensive and immaterial" comments made in defendant's brief because the motion was not timely filed. Finally, the Court affirmed the dismissal of plaintiff's motion that the trial court disqualify the wife's counsel from the litigation on the ground that he had prepared the option and thus was a potential witness. The Court noted that the lawyer was not competent to testify as to that matter, pursuant to OCGA Sec. 24-9-25. That Code section provides as follows:

> No attorney shall be competent or compellable to testify for or against his client to any matter or thing, the knowledge of which he may have acquired from his client by virtue of his employment as attorney or by reason of the anticipated employment of him as attorney. However, an attorney shall be both competent and compellable to testify for or against his client as to any matter or thing, the knowledge of which he may have acquired in any other manner.

J. ATTORNEYS

1. ESTATE ATTORNEY'S DUTY TO THIRD PARTIES

Rhone v. Bolden. 270 Ga. App. 712, 608 S.E.2d 22 (2004)

The decedent died intestate and was survived by his mother, his half-brother, and his father. His half-brother was named administrator of his estate. The mother and half-brother brought and settled a medical malpractice action. They settled for $1.9 million, which was disbursed to the decedent's estate. The father then sued the mother, the half-

brother and his wife, the attorneys who represented the estate in general estate matters, and the attorneys who handled the wrongful death claim. The trial court entered a consent interlocutory injunction, but the half-brother and his wife proceeded to refinance a mortgage on property that had been purchased with estate assets, and also failed to pay the mortgage and the insurance on the property. The trial court found them in "criminal contempt" but indicated that they could "purge themselves of the contempt" by paying $48,244.04 into the court registry and $1000 of the father's attorney fees. The trial court also ordered them to deed the property back to the estate. The Court of Appeals pointed out first that "acts of contempt are neither civil nor criminal" but rather that the action the court takes with respect to the contempt is what determines its characterization. The Court of Appeals found that the trial court in the instant case had actually held the parties in civil contempt, but nevertheless upheld the trial court's order, except for the grant of attorney fees. The Court of Appeals said that the trial court must articulate express legal authority for ordering the payment of the fees.

The father also claimed that he should have been granted summary judgment on the mother's equitable defense of laches. The Court found that material issues of fact existed as to whether the father had received and ignored communications by the attorneys about the wrongful death action. Next, the father claimed he should have been granted summary judgment on the mother's defense of "advice of counsel." The Court noted that advice of counsel is not a complete protection for defendants but that the mother should be allowed to present evidence on the issue. The father also appealed the denial of summary judgment in his favor on the issue of the mother's

breach of fiduciary duty to him. He claimed that she had proceeded on behalf of both of them in the wrongful death claim but then had failed to divide or petition for apportionment of the proceeds. The mother responded that she was a stroke victim and unable to communicate with anyone but her son and that her son and the attorneys had proceeded without input from her. She also pointed out that, under the wrongful death apportionment statute, the father would have received nothing as he had no meaningful relationship with the son, had vehemently denied his paternity, and had given the son no financial support. The Court of Appeals found that questions of fact remained on this issue and thus that summary judgment was inappropriate. Finally, the Court of Appeals found admissible the evidence that the father had been a "poor parent," evidence that the father had sought to exclude.

The trial court granted the father summary judgment against both sets of attorneys in his claims against them for legal malpractice, fraud, breach of fiduciary duty, disgorgement of their fees, and punitive damages. The Court of Appeals reversed the trial court's grant of summary judgment. On the malpractice claim against the attorneys who had handled the wrongful death lawsuit, the Court noted first that there was no attorney-client relationship between the father and either set of attorneys, nor was the father an intended third-party beneficiary of the relationship between the medical malpractice attorneys and the mother and half-brother. The Court described examples of where such a third-party interest may exist, but found that the father's interest did not arise to that level. The Court of Appeals cited Georgia's wrongful death statutes which give both parents the right to share in the recovery if the decedent is not survived by a spouse or children. One parent may contract on behalf of both for

representation in the suit, but the Court said it was clear that the mother had not contracted on behalf of the father. The Court said that the "duty" to share equally in the award "lies with the parent... not the lawyer representing the parent." The Court noted that the interests of the attorneys' client (the mother) were "antagonistic" to those of the father. Finally, the Court pointed out that if the attorney representing the mother had not protected her interests, the mother might have a cause of action against the attorney.

The Court of Appeals applied a different analysis to the malpractice issue as it related to the attorneys who represented the administrator, because the administrator's interest and the father's interest were not "antagonistic". The Court pointed out that the administrator clearly has a duty to the heirs "but the existence of a duty by the administrator to the heirs does not translate into a duty by the administrator's lawyers to the heirs." The Court emphasized that, even if the estate pays the lawyer's fees, "the lawyer's client is the administrator, not the estate." The Court went further and stated that the heirs are not third-party beneficiaries of the attorney-client relationship between the administrator and the administrator's lawyer. The Court, noting that there are no Georgia cases on point, looked to case law from other jurisdictions, specifically Maryland and California. The Maryland court had found that the heirs were only "incidental beneficiaries" of the estate. The California court had "apprehended great dangers in finding stray duties in favor of beneficiaries."

As to the fraud claim, the Court found that the father had not produced any evidence showing that the attorneys had made fraudulent representations on which he

had relied. The Court also found that the attorneys had not fraudulently concealed information from the father, pointing out that he had been to his son's funeral and could have hired his own attorney. As to the breach of fiduciary duty claim, the Court again found no Georgia cases on point but held that the father had not carried his burden of establishing the existence of a fiduciary duty toward him. As to the disgorgement of fees, the father had claimed that the fee amount, which had been approved by the trial court in the wrongful death suit, should also have been approved by the probate court. The Court of Appeals found that probate court approval was not required as the funds were being disbursed to a *sui juris* individual and the estate, not to a minor or incapacitated adult. Finally, as the father had shown no entitlement to compensatory damages, the Court concluded that the attorney defendants should have been granted summary judgment on the issue of punitive damages.

2. ATTORNEY FEES

Rowen v. Estate of Hughley, ___ Ga. App. ___, ___ S.E.2d ___, 2205 WL 527388 (Mar. 2005)

An attorney was engaged by a mother to represent her and her children in an uncontested petition to determine the heirs of decedent Hughley. The mother and the attorney agreed on a contingency fee of 40% of any recovery both of amounts due the children from the decedent's estate and also of amounts that they would receive from the estate of the decedent's mother when she died. The attorney sought probate court approval of the contingency fee agreement. The probate court appointed a guardian ad litem for the children. The fee was contested by the administrator of the decedent's

estate, who also served as the guardian of the property of the decedent's mother. At trial it was revealed that the children would receive $150,000 due to their father's death and also were slated to receive a portion of the decedent's mother's $1.7 million estate. After the hearing, the attorney and the mother re-negotiated the contingency fee so that the attorney would receive 15% of the amount from the father's annuity and 10% of his mother's estate. The probate court found that the fee agreement had to be submitted to the court to determine whether it was reasonable. The probate court applied the factors set forth in Georgia Rule of Professional Conduct 1.5 and determined that the fee, which as renegotiated would be $79,000, was unreasonable in light of the services performed by the attorney. The court invited the attorney to submit evidence as to the work performed so that the court could determine a reasonable fee. The only evidence submitted by the attorney was the testimony of an expert witness who testified that the contingency fee arrangement was reasonable when viewed in light of common practice in the Atlanta metropolitan area. The judge, noting the lack of evidence as to the services performed, set the fee at $15,000. On appeal the attorney argued that the fee should have been evaluated by looking at the circumstances at the time the agreement was made and taking into account the risks the attorney incurred in undertaking the representation. The Court of Appeals affirmed the probate court's authority to set the fee at $15,000. In its opinion, the Court of Appeals discussed at length its rationale for applying an abuse of discretion standard of review rather than a "plain legal error" standard. The Court noted the unique context of the case - that is, the payment of the fees out of the estates of minors. The Court acknowledged that contingency fees are an important mechanism for insuring that people can secure representation, but the Court

noted that the probate court's special charge of protecting minors justified its close scrutiny of the fee. The Court found that the probate court's application of the factors set out in Rule 1.5 was appropriate. Finally, the Court pointed out that the portion of the contingency fee that was based on their possible recovery from the grandmother's estate was a bit unusual in that the fee was based only on an expectancy. The Court reiterated throughout the opinion that the attorney had had the opportunity to submit proof that the services she had performed merited the contingency fee but she had neglected to do so. The Court held that the probate court did not abuse its discretion when it determined that the value of her services did not equal the value she would receive under the contingency arrangement. This case is discussed in more detail in article by Derrick Alexander Pope that appears in Vol. XXII, No. 7, of the GEORGIA PROBATE NOTES (April 2005).

3. ATTORNEY DISCIPLINE

In the Matter of William S. Shelter, 278 Ga. 55, 597 S.E.2ed 365 (2004)

Attorney drafted a will for a client in which he was named as executor. After being appointed executor, he opened a bank account for the estate but then used funds in the account for his own benefit. The amount of funds he used exceeded any amount to which he would have been entitled as executor's fees. The attorney also did not provide annual accountings or other requested information to the will beneficiary. In this disciplinary proceeding, the Court concluded that a two-year suspension from practice was appropriate in light of certain mitigating circumstances. These circumstances included that fact that the attorney had made complete restitution, had

no prior disciplinary record over the 35 years he had practiced law, and was completely cooperative with the disciplinary board. The court also cited his character and reputation, his personal and emotional problems, his physical and mental disability, his interim rehabilitation, and his remorse. In dissent Justice Thompson stated that he felt that the aggravating factors outweighed the mitigating factors and that the attorney should have been disbarred.

In re Gignilliat, ___ Ga. ___, ___ S.E.2d ___ (May 23, 2005)

The Supreme Court affirmed the disbarment of an attorney due to the attorney's mishandling of a client's estate. In 1999, the attorney had qualified as executor and trustee of a trust created for the client's two children. He failed to make distributions to the children, failed to communicate with them, failed to account to them for the proceeds of the sale of two parcels of land, commingled the estate funds with his own, and converted estate assets to his own use. He did not respond to the various notices he received about the bar proceedings against him. The Supreme Court found no mitigating circumstances and some aggravating ones, including his failure to acknowledge his wrongful conduct and his indifference to making any sort of restitution.

II. GEORGIA LEGISLATION

1) HIGHLIGHTS OF REVISIONS TO GEORGIA'S GUARDIANSHIP CODE

(H.B. 229)

Signed by Governor: May 5, 2004; Effective July 1, 2005

The proposed revision to the Georgia Guardianship Code (Title 29) is a reorganization, modernization, and clarification of the Georgia laws that relate to the guardianship of the person and property of minors and adults.

A. IN GENERAL

1. New Terminology: The proposed revision adopts terminology that is used in the majority of states, replacing the term "*guardian of the person*" with "*guardian*" and the term "*guardian of the property*" with "*conservator*."

2. Reorganization of Title 29: The proposed revision reorganizes the current law by separating into distinct chapters the provisions that relate to minors and those that relate to adults and the provisions that relate to guardianship of the person ("guardianship") and guardianship of the property ("conservatorship").

3. Incorporates Recent Legislative Changes and Appellate Court Decisions: The proposed revision incorporates recent legislative amendments to Title 29 ("Stand-By Guardianship"), clarifies the current law by reflecting recent decisions of the Georgia appellate courts on guardianship issues, and updates the chapter governing Veteran's Administration Guardianships so that it complies with the most recent version of the Uniform Veterans' Guardianship Act.

4. Incorporates National College of Probate Judges' Suggested Statutes: The proposed revision adopts statutes prepared by the National College of Probate Judges to facilitate the transfer of guardianships or conservatorships from one state to another.

Detailed Summary of Revisions

CHAPTER 1: GENERAL PROVISIONS
CHAPTER 2: GUARDIANS OF MINORS
CHAPTER 3: CONSERVATORS OF MINORS

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EFFECTIVE DATE (Section 16 of HB 229):

> The effective date was delayed to JULY 1, 2005 in order to allow time for the probate courts to issue new forms and for education of the bar and judges about the changes.

> All guardianships and conservatorships established prior to the effective date shall remain in effect and shall be governed by the provisions of the revised Guardianship Code.

1. CHAPTER ONE: General Provisions

> Chapter One (*§ 29-1-1*) includes a list of definitions. Such a list does not appear in the current Code.

2. CHAPTER TWO: Guardians of Minors

A. Parents as Natural Guardians: (Clarifies current law)

29-2-3: **Divorced Parents:** If parents are divorced the "natural guardian" is whoever has custody. (If the parents have joint custody, both are the "natural guardians"). If a parent who has sole custody dies, the other parent becomes the natural guardian.

29-2-3: **Child Born Out of Wedlock:** For a child born out of wedlock, the mother is the natural guardian unless the father is granted a court order that legitimates the parent-child relationship. (See also Code Sec. 29-1-1(13), definition of "parent")

B. Testamentary Guardians (Clarifies current law)

29-2-4: **Testamentary guardians** may be nominated by a parent in a will; if the other parent is already dead, the nominated individual will be appointed *without notice or hearing* "provided that individual is willing to serve."

C. Temporary Guardians (Clarifies current law and adds new provisions regarding: (1) who may serve as temporary guardian; and (2) notice to parents, including biological father)

29-2-5 thru -8:

> Individual who petitions to become a temporary guardian must have "physical custody" of minor

> Procedure: must give NOTICE of petition to both parents

If parent who is *natural guardian* objects, petition is dismissed

If parent who is *not the natural guardian* objects, hearing will be held

> NOTE: The proposed revision incorporates provisions from the Georgia adoption statutes to clarify the rights of a biological father of a child born out of wedlock to object to the appointment of a *permanent* guardian for his minor child. The biological father is not entitled to receive notice of a petition for *temporary* guardianship.

> Termination of Temporary Guardianship:

If *natural guardian* petitions to terminate, NOTICE given to temporary

guardian; if temporary guardian objects, court may hear the case or transfer to juvenile court

> Resignation: Parents will receive notice if temporary guardian resigns

D. Stand-By Guardians: (incorporates 2002 law)

Secs. 29-2-9 through 29-2-13: The proposed revision incorporates the newly enacted Stand-By Guardianship Act (2002), which provides a procedure whereby a parent of a minor may choose an individual who will serve as the minor's guardian if the parent becomes *incapacitated*. This stand-by guardian may serve for *120 days without court appointment* and thereafter may petition for formal appointment as the minor's guardian.

E. Who may serve as Permanent Guardian (or conservator) of a minor who has no living parent: (Clarifies current law and adopts decisions by Georgia appellate courts)*:*

29-2-16 & 29-3-7: The proposed revision includes *a list of preferences* for the person who will be appointed as the child's guardian or conservator, but clarifies that no person on that list is entitled to such appointment and that the probate court has *discretion* to choose *whoever serves the minor's best interest.* (Retains the right of a minor who is age 14 or over to express a preference.)

F. Permanent Guardians: Appointment: (Clarifies current law and revises notice provisions)

Secs. 29-2-14 through 29-2-19:

> Clarifies the difference between a petition for Temporary Guardianship and a Petition for Permanent Guardianship of a minor

> Adds provisions similar to those in the adoption statutes that reflect the rights of a biological father who has not legitimated the child to have the opportunity to object to the guardianship petition and to proceed with legitimation proceedings

> Notice of petition will be given to adult siblings (up to three); if none, grandparents (up to three); if none, up to three nearest adult relatives

G. Status Report: (new)

29-2-21: Guardian must file a status report every year describing the condition of the minor and any needed modifications of the guardianship order. This report may be waived by the probate judge for temporary guardians. (Same rules for conservators.)

H. Powers of Guardian: (new)

§ *29-2-22:*

(a) The appointment of a guardian shall vest in the guardian the exclusive power, without court order, to:

(1) Take custody of the person of the minor and establish the minor ´s place of dwelling within this state;

(2) Subject to Chapters 9, 20, and 36 of Title 31 and any other pertinent law, give any consent or approval that may be necessary for medical or other professional care, counsel, treatment, or services for the minor;

(3) Bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the minor in the name of or on behalf of the minor;

(4) Execute a surrender of rights to enable the adoption of the minor pursuant to the provisions of Chapter 8 of Title 19 or the adoption laws of any other state; and

(5) Exercise those other powers reasonably necessary to provide adequately for the

support, care, education, health, and welfare of the minor.

(b) At the time of the appointment of the guardian or at any time thereafter, any of the following powers may be specifically granted by the court to the guardian upon such notice, if any, as the court shall determine, provided that no disposition of the minor ´s property shall be made without the involvement of a conservator, if any:

(1) To establish the minor ´s place of dwelling outside this state;

(2) To change the jurisdiction of the guardianship to another county in this state that is the county of the minor ´s place of dwelling, pursuant to Code Section 29-2-60;

(3) To change the domicile of the minor to the minor ´s or the guardian ´s place of dwelling, in the determination of which the court shall consider the tax ramifications and the succession and inheritance rights of the minor and other parties;

(4) To consent to the marriage of the minor;

(5) To receive reasonable compensation from the estate of the minor for services rendered to the minor; and

(6) If there is no conservator, to disclaim or renounce any property or interest in property of the minor in accordance with the provisions of Code Section 53-1-20 of the Revised Probate Code of 1998.

(c) Before granting any of the powers described in subsection (b) of this Code section, the court shall appoint a guardian ad litem for the minor and shall give notice to any natural guardian of the minor.

(d) In granting any of the powers described in subsection (b) of this Code section, the court shall consider the property rights of the minor and the views of the conservator, if available, or, if there is no conservator, of others who have custody of the minor ´s property.

(e) In performing any of the acts described in this Code section, the guardian shall act in coordination and cooperation with the conservator or, if there is no conservator, with others who have custody of the minor ´s property.

I. Termination of Guardianship; Dismission from Office; Death or

Resignation of Guardian; Appointment of Successor Guardian (Clarifies current law):

29-2-30 through 29-2-44; 29-2-51 through 29-2-52: These provisions clarify the process by which a guardianship is terminated, a guardian is dismissed from office, and a successor guardian is appointed if the guardian dies, resigns or is removed. (Same rules for conservators of minors and guardians and conservators of adults)

J. Removal of Guardian and Sanctions (adds new law, clarifies current statutory law and codifies case law) (same for conservators of minors and guardians and conservators of adults)

Secs. 29-2-42, 29-2-43: These sections adopt provisions from the Probate Code that spell out the conditions under which a guardian can be removed and the causes of action that can be brought against a guardian for breach of fiduciary duty.

K. Temporary Substitute Guardian (new)

29-2-50: This new section allows the probate court to suspend the authority of the current guardian and appoint a temporary substitute guardian for 120 days in the event that some immediate action is required. (Same for conservators of minors and guardians and conservators of adults)

L. Transition of Guardianship for a Minor Who Will Most Likely Be In Need of a Guardian as an Adult: (new)

Sec. 29-2-30: Within the 6 months prior to the minor reaching age 18, an interested person may bring a proceeding for guardianship for the minor when the minor becomes an adult. (Same provisions for conservatorships of minors).

M. Transfers of Guardianship to and from Foreign Jurisdiction:(new)

Sec. 29-2-65 through 29-2-74: These provisions are based on National College of Probate Judges' recommendations for transferring guardianships to other jurisdictions and for accepting guardianships that were originally set up in other jurisdictions. These provisions appear also in Chapters 3, 4, & 5 (Conservators of Minors, Guardians of Minors, Conservators of Adults).

3. CHAPTER THREE: Conservators of Minors:

A. When Natural Guardian may receive property without being appointed conservator: (Modifies current law)

*Sec. 29-3-1***:** raises amount that natural guardian can receive from $5000 to $15,000

B. Power to compromise debts and claims:

§ 29-3-2.

The natural guardian of a minor who has no conservator may release the debtor and compromise a debt when the collection the debt is doubtful without becoming the conservator of the minor and without such action being approved by the court if the amount of the debt is $15,000.00 or less.

§ 29-3-3.

(a) For purposes of this Code section, the term 'gross settlement' means the present value of all amounts paid or to be paid in settlement of the claim, including cash, medical expenses, expenses of litigation, attorney´s fees, and any amounts paid to purchase an annuity or other similar financial arrangement.

(b) If the minor has a conservator, the only person who can compromise a minor´s claim is the conservator.

(c) Whether or not legal action has been initiated, if the proposed gross settlement of a minor´s claim is $15,000.00 or less, the natural guardian of the minor may compromise the claim without becoming the conservator of the minor and without court approval. The natural guardian must qualify as the conservator of the minor in order to receive payment of the settlement if necessary to comply with Code Section 29-3-1.

(d) If no legal action has been initiated and the proposed gross settlement of a minor´s claim is more than $15,000.00, the settlement must be submitted for approval to the court.

(e) If legal action has been initiated and the proposed gross settlement of a minor´s claim is more than $15,000.00, the settlement must be submitted for approval to the court in which the action is pending. The natural guardian or conservator shall not be permitted to dismiss the action and present the settlement to the court for approval without the approval of the court in which the action is pending.

(f) If the proposed gross settlement of a minor´s claim is more than $15,000.00, but the gross settlement reduced by:

(1) Attorney´s fees, expenses of litigation, and medical expenses which shall be paid from the settlement proceeds; and

(2) The present value of amounts to be received by the minor after reaching the age of majority

is $15,000.00 or less, the natural guardian may seek approval of the proposed settlement from the appropriate court without becoming the conservator of the minor. The natural guardian must qualify as the conservator of the minor in order to receive payment of the settlement if necessary to comply with Code Section 29-3-1.

(g) If the proposed gross settlement of a minor´s claim is more than $15,000.00, but such gross settlement reduced by:

(1) Attorney´s fees, expenses of litigation, and medical expenses which shall be paid from the settlement proceeds; and

(2) The present value of amounts to be received by the minor after reaching the age of majority is more than $15,000.00, the natural guardian may not seek approval of the proposed settlement from the appropriate court without becoming the conservator of the minor.

(h) If an order of approval is obtained from the judge of the probate court ***[the court]*** *based upon the best interest of the minor, the guardian* ***[conservator]*** *is authorized to compromise any contested or doubtful claim in favor of the minor without receiving consideration for such compromise as a lump sum. Without limiting the foregoing, the compromise may be in exchange for an arrangement that defers receipt of part or all of the consideration for the compromise until after the minor reaches the age of majority and may involve a structured settlement or creation of a trust on terms which the court approves.*

(I) Any settlement entered consistent with the provisions of this Code section shall be final and binding upon all parties, including the minor.

C. Testamentary Conservators: (Clarifies current law):

Sec. 29-3-5: Testamentary conservator (conservator who is appointed by parent in parent's will) may serve without bond *only* as to property that passes under the parent's will. Probate court may order bond if there is a danger of waste.

D. Powers of Conservators (new)

Sec. 29-3-22: (Same provisions for Guardians of Minors and for Guardians and Conservators of Adults): The proposed revision makes a significant change as to the powers of Guardians and Conservators. Under the current statute, these powers are rigidly fixed and are very restrictive. For example, a Conservator is limited to a "legal list" of investments and may not divert from that list. The revision provides that each Guardian or Conservator is automatically granted

certain powers, but that Guardian/Conservator may petition the court, upon a showing of good cause, for an expansion of those powers (e.g., for authority to make investments that are not on the "legal list"). The expanded powers may be requested on a case-by-case basis (e.g., to sell certain real estate without court order) or on a continuing basis (e.g., to sell all the minor's or adult ward's property without court order). The expanded powers will be granted only if the court determines that such expansion would be in the minor's or ward's best interest.

> *29-3-30:* The proposed revision also allows a conservator to submit an annual plan or budget to the court that would allow the conservator to spend amounts other than the actual income from the ward's property.

> *29-3-36:* This new provision describes the circumstances under which a conservator may engage in estate planning (with court authorization) for a minor who most likely will be in need of a conservator throughout his or her lifetime.

E. Conflict of Interest: (revises and clarifies current statutory law and incorporates developments in case law)

Sec. 29-3-23: *(Same provisions for Guardians of Minors and for Guardians and Conservators of Adults):* The proposed revision requires a guardian or conservator, in the petition for appointment or at any time thereafter, to *report to the court* any perceived conflict of interest and allows the court to determine whether the conflict is substantial or insubstantial and thus whether the ward's best interest would be better served by removal or retention of that individual as guardian or conservator.

F. Use of Minor's Resources: (new):

Sec. 29-2-30: Conservator must file a *plan* for administering minor's property:

I) based on "actual needs of minor"

ii) includes projections for use of the minor's resources

iii) can get a "budget" approved for spending more than the income

G. Bond (clarifies current law and conforms it to the bond requirements of the Probate Code) (same rules for conservators of adults)

29-3-40 through 29-3-49

> All conservators must give bond, except financial institutions with combined capital, surplus, and undivided profits of $3 million or more (current law: $400,000 or more)

> Amount of bond is double the value of personal property (or the value of the personal property if secured by a commercial surety licensed to do business in Georgia)

> Bond amount must be increased if real property is converted to personal property or if ward acquires additional property

> Bond premiums are payable from the estate of the ward

> Conservator and surety are joint and several obligors. If conservator removes himself from the state, party in interest can bring an action against the surety

> Execution of judgments against a conservator are levied first on property of surety

> Surety can petition the court at any time to take action on misconduct of conservator

H. Compensation (clarifies current law)

29-3-50: This provision revises current law so that the wording reflects the Probate Code's provisions relating to the compensation of personal representatives. The provision retains the additional annual ½ of 1% commission for conservators and clarifies that that amount is to be pro-rated if the conservator has not served throughout the entire year.

I. Returns and Interim and Final Settlements of Accounts (clarifies current law and reinstates opportunity for interim settlement of accounts) (Same for conservators of adults)

> **Annual Returns:** *Sec. 29-3-60:* Conservator must file annual return consisting of "a statement of the receipts and expenditures of the conservatorship during the year preceding the anniversary date of qualification, an updated inventory consisting of a statement of the assets and liabilities of the estate as of the anniversary date of qualification, an updated plan for managing, expending, and distributing the minor´s property, a note or memorandum of any other fact necessary to show the true condition of the estate, and a statement of the current amount of the bond"

> Court must examine return and hear any objections filed within 30 days. Also, court may hold a hearing on its own motion. The court then records the return. A recorded return is prima facie evidence of its correctness

> **Intermediate Settlement of Accounts:** *Sec. 29-3-61:* Not more frequently

than every 24 months, conservator may file a petition for an interim settlement of accounts. Court will issue notice and hear any objections or hold a hearing on its own motion.

> **Dismission from Office & Final Settlement of Accounts:** *Secs. 29-3-70 through 29-3-71:* At the termination of the conservatorship, the conservator may petition simply for dismission of office (which does not discharge the conservator from liability). Alternatively or in addition, the conservator or the ward, persons representing the conservator or the ward (including the personal representative of a deceased conservator or ward), a successor conservator or other interested person may petition for a final settlement of accounts. Notice will be issued and objections will be heard. "If the court is satisfied that the conservator has faithfully and honestly discharged the office, an order shall be entered releasing and discharging the conservator from all liability."

4. CHAPTER FOUR: Guardians of Adults

A. Basis for finding that the adult is in need of a guardian:

Sec. 29-4-1 (modifies current law):

> Guardian may be appointed "*only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety*." Deletes reference to medical/psychological disability.

a) Focus is on *decision-making ability*, not on the actual decisions made and only on those decisions that, if made badly, could harm the individual's *health or safety*

> Consideration of alternatives to guardianship: (Strengthens current law) (Same rule for conservators of adults):

> The proposed revision requires the probate court to consider whether

other mechanisms (such as a power of attorney or revocable trust) may be used to avoid the need for a guardianship and requires that any agent or trustee who has already been appointed under one of these alternative mechanisms receive notice that the guardianship petition is pending.

B. Who May Serve as Guardian (clarifies current law) (same rule for conservators of adults)

29-4-3: Although the statute contains a list of preferences that must be considered by the court, the court must choose the person who best serves the interest of the incapacitated adult. The Code section includes a new provision explaining the method by which an adult can nominate in advance his or her own guardian. The court cannot pass over this choice without good cause

C. Procedure for Appointment of Guardian: (clarifies & revises current law) (same rules for appointment of conservator)

Secs. 29-4-10 through 29-4-13

I) **Petition** filed by 2 petitioners or one petitioner with the affidavit of a physician/ psychologist or licensed clinical social worker

> Note: Current law does not list "licensed clinical social workers" as possible evaluators

ii) **Notice** to proposed ward must state that ward may lose substantial rights if a guardianship is imposed (new)

iii) **Spouse and all children** of proposed ward will receive notice (current law requires notice only to adult children); clarifies who will receive notice if there are no spouse/children

iv) **Right to Counsel:** Retains current law requirement that proposed ward will have counsel and retains probate court's discretion to appoint a guardian ad litem

v) **Evaluation**: retains current law requirement of evaluation within 5 days and report within 7 days of evaluation

*Addition to §*29-4-11(d)(3):

The evaluation may include, but not be limited to:

(A) A self-report from the proposed ward, if possible;

(B) Questions and observations of the proposed ward to assess the functional abilities of the proposed ward;

(C) A review of the records for the proposed ward including, but not limited to, medical records, medication charts, and other available records;

(D) An assessment of cultural factors and language barriers that may impact the proposed ward´s abilities and living environment; and

(E) All other factors the evaluator determines to be appropriate to the evaluation.

vi) **Hearing:** Retains current law requirements that: hearing be set not less than 10 days from date of notice of hearing; ward may refuse to attend hearing without explaining why; burden of proof is on petitioner and standard is clear and convincing evidence

D. Emergency Guardian (clarifies current law) (same rules for conservators of adults)

Secs. 29-4-14 through 29-4-16:

> Retains right of petitioner to ask for an emergency guardian if there is an

immediate threat of harm

> A hearing on the emergency guardianship petition will be held within 3-5 days of the filing of the petition. If the petitioner and the proposed ward consent, the hearing may be continued for 30 days.

> The court may also appoint a guardian to serve until the hearing "if the threatened risk is so immediate and the potential harm so irreparable that any delay is unreasonable."

> This petition may be filed simultaneously with a petition for a guardian.

> However, an emergency guardianship will not *automatically* become a permanent guardianship as the standards for imposing each type of guardianship are different.

> An emergency guardianship will terminate at the end of 60 days unless sooner terminated by the court upon the appointment of a permanent guardian or for any other reason. (Current law provides for termination within 45 days or 55 days if a petition for permanent guardianship has been filed.)

E. Petition for Protection of Rights; Modification; Termination of Guardianship (clarifies current law) (same rules for conservators of adults)

Secs. 29-4-40 through 29-4-42: Clarifies the methods by which a ward or other interested person petitions (1) to have the court conduct a judicial inquiry into whether the ward is being denied rights or privileges; (2) to have the terms of the guardianship modified; (3) to terminate the guardianship when the need for the guardianship is ended. Specifies that legal counsel must be appointed for the ward if the petition is one for termination or one for a modification that would expand the guardian's powers or restrict the ward's rights.

5. CHAPTER FIVE: Conservators of Adults

A. Basis for finding that the adult is in need of a conservator:

Sec. 29-5-1 (modifies current law):

> Conservator may be appointed "*only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property.*" Deletes reference to medical/psychological disability.

> Focus is not on the wisdom of the decisions but rather on whether the adult has decision-making capacity

B. Powers and Duties of Conservators; Compensation (Same as provisions for conservators of minors. See Parts 3(D) & 3(H) above.)

> *Sec. 29-5-36*: **Estate Planning for Ward:** Allows the probate court to authorize the conservator to engage in estate planning for the ward. Current law gives jurisdiction over such authorization to the superior court (rather than the probate court) and limits the planning to "tax-motivated" estate planning.

6. CHAPTER SIX: Judge as Custodian of Certain Funds

Carries forward Chapter 8 of current law but limits the amount that may be help by the judge to $2500.00 Adds discretion in probate judge to appoint a conservator where appropriate and to increase the judge's bond as necessary.

7. CHAPTER SEVEN: Guardians of Beneficiaries of U.S. Department of Veterans Affairs

This chapter updates Georgia law so that it complies with the most recent version

of the Uniform Veterans' Guardianship Act.

8. CHAPTER EIGHT: County Guardians

This chapter does not make substantive changes to the rules governing county guardians but does conform the language of the Code sections so that it reflects the provisions of the Probate Code that govern county administrators.

9. CHAPTER NINE: General Provisions Relating to Probate Court Proceedings Regarding Guardianships and Conservatorships (new)

This new chapter consolidates the general procedural provisions in one chapter rather than having them scattered throughout Title 29. General provisions include provisions relating to:

Guardians ad litem *(Secs. 29-9-2, 29-9-3)*

> Appointment of same person as the proposed ward's counsel and guardian ad litem is prohibited, as in current law

Service *(Secs. 29-9-4 through 29-9-8)*

Effect of Oath Made before Notary Public of Another State *(Sec. 29-9-9)*

Form and Verification of Petitions and Returns (*Sec. 29-9-10)*

Issuance of Citations (*Sec. 29-9-12)*

Objections and Hearings (*Secs. 29-9-13, 29-9-14)*

Fees of Legal Counsel and Guardians ad Litem *(Sec. 29-9-15)*

> Carries forward from current law (and expands to include counsel) the requirement that counsel and guardians ad litem receive "reasonable fees" rather than a flat fee

Evaluation Fees *(Sec. 29-9-16)*

> Changes the evaluation fee from a flat fee of $75 to a "reasonable fee". Retains $75 flat fee for appearance at the hearing.

Instruction of Guardians and Conservators *(Sec. 29-9-17)*

> New section that authorizes probate judge to order appropriate instruction before a person can serve as a guardian or conservator

Confidentiality of Records (new) *(Sec. 29-9-18)*

All of the records relating to any guardianship or conservatorship that is granted under this title shall be kept sealed, except for a record of the names and addresses of the ward and guardian or conservator and their legal counsel of record and the date of filing, granting, and terminating the guardianship or conservatorship. The sealed records may be examined by the ward and the ward´s legal counsel and by the guardian or conservator and the guardian or conservator´s legal counsel at any time. A request by other interested parties to examine the sealed records shall be by petition to the court and the ward and guardian or conservator shall have at least 30 days´ prior written notice of a hearing on the petition. The matter shall come before the court in chambers. The order allowing access shall be granted upon a finding that the public interest in granting access to the sealed records clearly outweighs the harm otherwise resulting to the privacy of the person in interest.

10. CHAPTER TEN PUBLIC GUARDIANS

This chapter, which was added in 2004, creates the position of "public guardian." A public guardian is an individual or entity that will serve as the guardian of last resort for an incapacitated adult. The public guardians will be screened and trained by the Division of Aging Services of the Department of Human Resources.

2) HB 406: "FLEXIBLE INCOME" TRUST LEGISLATION

This legislation amends OCGA Secs. 15-9-127, 53-12-192, 53-12-193, 53-12-218, adds new sections 53-12-220 through -222, and completely rewrites section 53-12-211. The following is an Executive Summary written by Donna Barwick who is the principal drafter of the bill and who chaired the Fiduciary Law Section committee that put the bill

together.

"This is Georgia's version of what has been referred to in many states as "total return" legislation. That name, however, more appropriately refers to the standard for investments by trustees. The Restatement (Third) of Trusts (1992) and the Uniform Prudent Investor Act (UPIA) (1994) have adopted concepts of Modern Portfolio Theory that require trustees to invest trust assets for the best "total return," given its risk profile and other factors – regardless of whether that return comes from dividends and interest (that would ordinarily be considered trust accounting income) or capital appreciation (principal). While Georgia has not adopted the UPIA, many of the same concepts have been incorporated into O.C.G.A. Section 53-12-287.

It is generally well recognized that trustees also owe a duty of impartiality towards both the income and remainder beneficiaries. The income beneficiary will want the assets invested for high yield, while the remaindermen will want the trust assets invested for growth. Structuring the investments in an attempt to satisfy both sets of beneficiaries will undoubtedly disappoint one or the other and will rarely result in optimum portfolio construction.

Recognizing the conflicting duties placed on trustees, most states have adopted legislation that allows for income to be defined in a more flexible way. One form of legislation is based on the Revised Uniform Principal and Income Act (UPAIA) (1997) and allows trustees, after the fact, to make adjustments from income to principal or vice versa, depending on what would be required to treat the beneficiaries equitably. The other form of legislation allows trustees to convert a trust to a unitrust format, where the income is defined as a percentage of the fair market value of the trust assets each year. Both forms of legislation have good and bad aspects and neither is perfect for every trust. Recognizing this, a number of states have adopted a dual approach that allows the trustee to choose the best format for any trust. This proposed Georgia statute would adopt the dual format and is primarily based on the Pennsylvania model.

For tax purposes, income is defined by state law as long as it does not depart fundamentally from traditional trust accounting concepts. The U.S. Treasury has

recognized this wave of state legislation and issued final regulations in December of 2003 under I.R.C. Section 643 providing that if a state has adopted one of these two specific types of legislation defining "income," it will be recognized for tax purposes. But the state MUST have adopted one of these statutes (or the dual approach) in order for the regulations to apply. Without the certainty of the tax results of their actions, trustees will not be willing to do anything even if the same results could be achieved by court action or otherwise.

The following excerpt from an article by Donna Barwick that appeared in "House Bill 406: Georgia Flexible Income Trust Legislation," GEORGIA PROBATE NOTES. Vol. 22, No. 9, pp. 1-5 (May/June, 2005) explains the substantive provisions of the new bill:

"The Bill adds three main new Code Sections: Section 53-12-220 contains the power to adjust between income and principal; Section 53-12-221 adds the power to convert to a unitrust, and Section 53-12-222 provides for the remedy for a breach of either provision. The power to adjust is the default provision and applies to existing trusts. Of course the governing instrument controls in all cases and can override the state statute. Assuming that the trustee is investing for the best total return, and if the trust describes what is to be distributed as "income," and the trustee determines that distributing what would ordinarily be trust accounting income would not be fair to both the income and remainder beneficiaries, then the trustee may allocate an amount of income to principal or vice versa. The factors to be considered by the trustee in making such an adjustment are set out in the new code section.

The power to adjust may be released by a trustee and the trust converted to a unitrust. This can be done by simply giving the beneficiaries written notice of the intent to convert, the effective date of the conversion, the frequency of unitrust distributions, and when the trust assets will be valued, all of which are determined by the trustee. This can be done with no court involvement as long as there is at least one *sui juris* beneficiary currently eligible to receive income and one who would receive a principal distribution if the trust were to terminate, and none of the beneficiaries object. The trustee can petition the Superior Court to approve a conversion, but a beneficiary must request a conversion and be refused by the trustee before petitioning the court to require the trustee to

convert. Once there is a conversion, the word “income” in the instrument means an annual distribution equal to 4 percent of the fair market value of the trust assets, unless a court determines a different percentage payout. There is a “smoothing rule” that averages the fair market value over three years so that the income distribution will not fluctuate wildly with changes in the market. For residential property held in trust, the right to occupy the property is deemed to be the income from that property and for other property the trustee can determine the fair market value by appraisal or “other reasonable method.”

For federal tax purposes, “income” is defined by state law as long as that state law does not depart fundamentally from traditional trust accounting concepts. The U.S. Treasury has recognized this recent wave of state “total return” legislation and issued final regulations in December of 2003 under I.R.C. Section 643 providing that if a state has adopted one of these two specific types of legislation, it will be recognized for tax purposes. But the state must have adopted one of these statutes (or the dual approach) in order for the regulations to apply. Without the certainty of the tax results of their actions, trustees were not willing to do anything even if the same results could be achieved by court action or otherwise. The Georgia bill still includes some prohibitions on certain adjustments between income and principal or certain unitrust conversions that would have resulted in negative tax consequences, partly because it was drafted prior to the final tax regulations and partly out of an abundance of caution. Under the regulations, a trustee can decide whether to pass capital gains out through Distributable Net Income (DNI), but after the first year must be consistent. In the Georgia statute, there is an “ordering rule” that says that the unitrust payment comes first from net income, then from net realized short term gains, then long term gains, and finally from principal.”

3) SB 53 - LEGITIMATION

OCGA Sec. 53-2-3 allows a child who was born out of wedlock to inherit from the child’s father if, among other things, an order legitimating the relationship has been entered by the superior court pursuant to OCGA Sec. 19-7-22 or if “[t]he father has executed a sworn

statement signed by him attesting to the parent-child relationship." Under OCGA Sec. 53-2-4. a father can inherit from a child if an order of legitimation has been entered or if the sworn statement has been signed and attested *during the lifetime of the child.* Senate Bill 53 has added another method for legitimating a child. Under OCGA Sec. 19-7-22(g)(2), as amended, the mother and father of a child born out of wedlock can legitimate the child by both signing a voluntary acknowledgment of paternity that also includes a statement of legitimation. It is unclear whether this method of legitimation is sufficient to establish inheritance rights between a father and child. The portion of OCGA Sec. 19-7-22 that deals with a formal court order of legitimation specifically states that the order will result in inheritance rights between the father and the child., but subsection (g)(2) does not reference inheritance rights and does not contemplate a court order. Also, if the voluntary acknowledgment is not a sworn statement, it does not meet the requirements of OCGA Sec. 53-2-3 and 53-2-4.