RECENT DEVELOPMENTS
IN
GEORGIA FIDUCIARY LAW

(June 1, 2005 – December 31, 2006)

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I. GEORGIA CASES

June 1, 2005 through December 31, 2006

A. INTESTACY

1. Determination of Heirs

a) Blackstone v. Blackstone, ___ Ga. App. ___, 2006 WL 3361431 (Nov. 2006)

The question raised in this case was whether a father who had abused and neglected his child during the child's lifetime could still recover as an heir of the child's estate. The Court of Appeals ruled that, absent a statute to the contrary, the father could recover. The case involved the sad situation of Corey Blackstone, who was killed by a drunk driver at age 24. He had no spouse or children and his mother had predeceased him, so Corey's father stood to inherit his entire estate. The assets at issue were the potential recovery by Corey's estate in legal actions against the driver who had caused his death. Corey was one of eight children of Cal Blackstone. Cal had an extensive criminal record and had been incarcerated throughout most of Corey's life. Cal had abused his wife and his children. Corey and his twin brother went to live with Cal when they were age 15, but DFCS stepped in within a few months and took custody of the children. The juvenile court adjudicated Corey as "deprived" and found that his father had abused him. They placed Corey into his older brother's custody. Cal, the father, never appealed these orders. Importantly, however, even though the court deprived Cal of his parental power, his parental rights were never formally terminated. Georgia law, in OCGA Sec. 15-11-93, expressly provides that an order terminating parental rights terminates permanently all of a parent's rights relating to the child, including the right of inheritance. In Taylor v. Taylor, 280 Ga. 88, 623 S.E.2d 477 (2005), the Georgia Supreme Court had confirmed that the loss of parental power is not the equivalent of a termination of parental rights. The trial court granted summary judgment against the father, relying on a North Carolina case that interpreted a North Carolina statute that specifically provided that a parent would lose inheritance rights in such a situation.

In the month prior to the issuance of the Court of Appeals decision in Blackstone, the Court of Appeals had held that a father who had never supported or attempted to establish a relationship with his child lacked standing to pursue a wrongful death action after the death of the child. See Baker v. Sweat, ___ Ga. App. ___, 2006 WL 2928799 (2006). The difference between the holdings seems to revolve around an interplay between the wrongful death statute and the loss of parental power statute, an interplay that is not replicated in the inheritance statutes. OCGA Sec. 51-4-4 provides that the right to recover for the wrongful death of a child "shall be as provided in Sec. 19-7-1." OCGA Sec. 19-7-1, although it deals with loss of parental power and wrongful death recovery rights, does not provide expressly that a parent who has abandoned a child loses the right to pursue a wrongful death action. The section does provide that a parent who abandons the child loses parental power. The Court of Appeals seemed to think that this was enough to conclude that abandonment of a child and the loss of wrongful death recovery rights were closely intertwined. However, in Blackstone, the court found no such cross reference in the inheritance statutes. Furthermore, the court pointed to its holding in a previous case that Section 19-7-1 must be strictly construed and thus the court refused to expand the reasoning of that statute to cover inheritance situations. In a concurring opinion, Judge Barnes pointed out that the holding in Blackstone applied only to the proceeds that the estate may recover for Corey's pain and suffering.

b) Walden v. Burke, ___ Ga. App. ___, 2006 WL 30702090 (2006)

This case is consistent with a long line of Georgia cases (see, e.g., Hulsey v. Carter, 277 Ga. 321, 588 S.E.2d 717 (2003); O'Neal v. Wilkes, 263 Ga. 850, 439 S.E.2d 490 (1994)) in which the Georgia courts have held that a child can claim to have been virtually adopted for inheritance purposes only if there had been an unperformed agreement between the child's parents and the claimed "adoptive parents" to adopt the child. In this case, Rhonda was taken in at age 1 ½ years by her aunt. The aunt and her husband (the Lockharts) raised Rhonda, provided her with love and support, treated her as their own daughter, and even helped her financially when she was in college. When Mrs. Lockhart died intestate, Rhonda claimed to be her heir. The trial court granted summary judgment against Rhonda and the Court of Appeals affirmed. Rhonda's father had submitted an affidavit in which he claimed that he had never agreed that the Lockharts would adopt Rhonda. All parties agreed that Rhonda's mother had lacked the mental capacity to enter into such an agreement. The holdings in past Georgia virtual adoption cases have made it clear that, despite substantial evidence that the "adoptive parents" raised the child and treated her as their own, the courts will not recognize a virtual adoption unless there is evidence of a specific contract to adopt. This case was no exception.

B. YEAR'S SUPPORT

In re Estate of Avery, ___ Ga. App. ___, 2006 WL 2959681 (2006)

When Larry Avery died, his spouse Kathy filed a petition for Year's Support. The son of the decedent filed a letter, *pro se*, with the probate court in which he stated only: "I feel that Kathy Avery is not compotent [sic] nor responsible enough to handle such dealings." The probate court told the son that any objection he filed would have to be verified and served on opposing counsel. The son did not respond and, 60 days later, Kathy filed a motion to dismiss his caveat, which the probate court granted. The probate court also granted her petition for Year's Support. The son appealed to superior court. Kathy moved for summary judgment, which was granted, so the son appealed to the Court of Appeals. The son's argued that he should have been granted a *de novo* hearing in the superior court. The Court of Appeals found that the son had never presented any evidence, never raised arguments that contested the amount to be awarded Kathy, and never urged the superior court to grant him a hearing, despite having been given ample opportunity to do so. The Court of Appeals affirmed the holding of the superior court.

C. WILLS

1. EFFECT OF SUBSEQUENT MARRIAGE

English v. Ricart, 280 Ga. 215, 626 S.E.2d 475 (2006)

After divorcing his first wife, Mr. English wrote a will leaving his entire estate to his two sons. Mr. English married Ms. Ricart in 2001. He died in 2004 without changing his will. His executor filed a petition to probate the will and named Ricart as one of English's heirs. The citation included the standard language requiring any objection to be filed within ten days of service of the petition. Ricart signed an Acknowledgment of Service and Assent to Probate Instanter. The sons asked for a hearing because they contested Ricart's status as their father's spouse. Later, before the will was admitted to probate, Ricart filed a motion for clarification of her status as an heir. She relied upon OCGA § 53-4-48. This Code section, as amended in 2002, provides that a marriage subsequent to the making of a will "shall result in a revocation of the will to the extent provided in the remainder of this Code section." The section then goes on to explain that, assuming the will was not made in contemplation of marriage, the subsequent spouse is to receive the share of the decedent's estate that he or she would have received if the decedent had died intestate. Consequently, under this statute, Ricart was due to receive 1/3 of English's estate. The sons, however, claimed that she had waived her right to this statutory share when she assented to the probate, acknowledged service, and failed to object within ten days of the service of the petition. They also said that the court should have admitted the will to probate immediately after receiving the sons' proposed order. The probate court and the Supreme Court held that Ricart had not waived her right and that she had a right to make a claim because the will had not yet been admitted to probate. The courts pointed out that the Georgia Code gives the probate judge the discretion to extend the time for filing any objections and for holding any required hearing. The probate judge thus had the right to extend Ricart's time for filing a response and had done so by not admitting the will to probate. The Supreme

Court noted that it expressly did not reach the issue of whether she could have claimed her statutory share as a matter of law even after the will had been admitted to probate. In his concurring opinion, Justice Carley (joined by Justice Thompson) took his colleagues to task for not addressing the latter issue. He proceeded then to outline the derivation of the rights under OCGA §53-4-48. He noted that the pre-1998 Probate Code had called for a complete revocation of the will upon the testator's subsequent marriage. Therefore, under the former statute, a subsequent spouse would be required to file a caveat in order to claim her right as an intestate heir. Justice Carley then pointed out that the new statute, although it also uses the term "revocation," did not intend for the will to be revoked but rather that the will would remain intact except for the share that was mandated for the subsequent spouse. Consequently, he found it to be the "clear and unambiguous intent of the General Assembly . . . to prevent a complete revocation of a will by creating, as a matter of law, an inheritance right in survivors that in no way affects the validity of the will." Using this logic, he concluded that the issue of whether the spouse could take that statutory share was not one that needed to be raised prior to probate and that the spouse retained that right as a matter of law regardless of whether the will had been admitted to probate.

2. JOINT WILLS (AND OTHER CONTRACTS RELATING TO SUCCESSION)

a) Hodges v. Callaway, 279 Ga. 789, 621 S.E.2d 428 (Oct. 2005)

Mr. and Mrs. Jones executed a will in 1974 which was called the "Mutual Last Will and Testament of P.H. Jones and Mrs. Lucille C. Jones." The will provided that the survivor of the two of them would serve as executor of the other's estate, would receive all personal property of the other, and would receive a life estate in all real property with the right to sell the property "if necessary for their (his or her) maintenance and support, without any limitations or restrictions." Upon the death of the life tenant, the remainder of the real property would be divided between Mr. And Mrs. Jones' families. When Mr. Jones died in 1986, the will was not submitted for probate. At that time, however, Mrs. Jones did sign a codicil to the will to name a new executor, Hodges, for her estate. In 1999, Mrs. Jones conveyed by gift to her second cousin a tract of land that had been owned (apparently as tenants in common) by the two testators when Mr. Jones died. At the same time, she appointed the cousin, Callaway, as her attorney in fact. Both the deed and the power of attorney document were witnessed by a state court judge and a probate court judge. Mrs. Jones died in 2001 and Hodges, the executor, submitted the will for probate. Hodges then filed an action against Callaway seeking to void the deed of gift. Hodges claimed that the gift was null and void for several reasons: 1) the will precluded Mrs. Jones from making the gift; 2) She did not have the appropriate capacity to execute the deed of gift; 3) Callaway exercised undue influence over her; and 4) Callaway breached his fiduciary duty as attorney in fact when he accepted the gift. Callaway counterclaimed, alleging fraud and a breach of a warranty covenant that was contained in the deed. He sought compensatory and punitive damages of $1,000,000. The Supreme Court held that: a) the will did not preclude Mrs.

Jones from making the gift; b) She did not lack capacity to sign either the deed of gift or the power of attorney document; c) Callaway did not breach a fiduciary duty when he accepted the gift; d) the trial court was not precluded from considering whether Mrs. Jones had breached the warranty of title; and e) Mrs. Jones had in fact breached the warranty.

Joint Will: The first question raised on the issue of whether the will precluded Mrs. Jones from conveying the real property was whether the pre-1998 Probate Code or the 1998 Probate Code applied. The Supreme Court determined that the answer would be the same under either version of the law, but carried forward from the former Code the confusing use of the term "mutual will." The will was most definitely a "joint will" - that is, one document signed by two individuals that contains the dispositions of both of their estates. Under cases decided pursuant to the pre-1998 Code, the term "mutual will" was a term of law as well as a term of description and was used to refer to a will that contains reciprocal provisions and that also contains an agreement that the survivor is bound by contract to abide by the terms of the mutual will. Thus, if the Jones's will was determined to be a "mutual will" under the pre-1998 law, Mrs. Jones was bound by contract to retain the testamentary scheme contained in the will and thus (at least according to one case cited by the Court), not dispose of the property in any manner other than that set forth in the will. The revised 1998 Code attempted to clear up some of the confusion caused by the terminology by defining both "joint" and "mutual" wills. Under OCGA §53-4-31, a "joint will" is "one will signed by two or more testators that deals with the distribution of the property of each testator" and "mutual wills" are “separate wills of two or more testators that make reciprocal dispositions of each testator´s property.” Neither term is meant to convey the legal notion that the survivor is bound by contract to keep the testamentary scheme intact. (OCGA § 53-4-32.) Under the 1998 Code, such a contract, if entered in on or after January 1, 1998, would have to be express and in writing. (OCGA § 53-4-30.) The Supreme Court cited all of these 1998 Code sections but then persisted in using the term “mutual will” as a legal term when it stated that “the will at issue here is joint, but not mutual, and was revocable by Mrs. Jones....” In any event, the Court determined that the will in question contained no express or definite statement of a contract agreement nor did it contain “a clear and definite agreement” such as would allow equity to intervene to prevent fraud. Thus, Mrs. Jones was within her rights in conveying the property to Callaway.

Deed of Gift and Power of Attorney: The Supreme Court upheld the grant of summary judgment to Callaway on the issue of whether Mrs. Jones was competent to gift the property to him and to appoint him as her attorney-in-fact. Both of the judges gave detailed affidavits describing how they had met with Mrs. Jones separately in order to satisfy themselves both that she understood both the irrevocable effect of the deed and the effect of the power of attorney. The only evidence offered to refute the judges’ conclusions as to her competency was an affidavit by a niece that indicated some forgetfulness on Mrs. Jones’ part. The Supreme Court dismissed this as it did not offer any ground for finding that Mrs. Jones was “non compos mentis, that is, entirely without understanding...” The Court applied to both actions the competency standard for entering into a valid contract.

Violation of Fiduciary Duty: The Supreme Court cited cases that indicated that an agent under a power of attorney, although bound by a duty of loyalty, is not precluded from accepting transfers from the principal absent a showing of fraud. The Court again looked to the judges’ affidavits to show that Mrs. Jones had executed the deed of gift and the power of attorney freely and voluntarily.

Breach of Covenant of Warranty of Title: Having found that the conveyance to Callaway was proper, the Court then went on to determine whether the trial court had properly granted summary judgment for Callaway on the issue of breach of warranty of title. In the deed to him, Mrs. Jones had expressly covenanted that she had fee simple interest in the property. At best, the Court concluded, she only had the one-half vested interest that she had originally owned and a life estate in the other one-half that had passed to her via her husband’s will. Thus, she had breached the covenant and her estate would be liable for the remaining interest to which Callaway was entitled.

b) <u>Jackson v. Neese</u>, 276 Ga. App. 724, 624 S.E.2d 139 (Oct. 2005)

Jackson claimed that his father-in-law had promised orally to convey certain property to him and his wife at his death. In 1994, Jackson claimed the father-in-law promised the couple he would convey to them in his will 22 acres of land. In 2001, Jackson claimed that the father-in-law additionally promised to convey to them the house and six acres that he lived on at that time. When the promise related to the 22 acres was made, the couple put a trailer on the land and lived in it and maintained the land and paid the taxes. When the 2001 promise was made, the couple moved into the house. They divorced in 2004. Jackson moved out but then moved back in when his ex-wife became ill. He said they had planned to re-marry. Before she died, she executed a will leaving everything to Jackson. Her father died one week before she died. Jackson claimed that the property passed to them and eventually to him from the father-in-law in accordance with the father-in-law's promise to convey. The wife's family members had him ejected from the property and changed the locks. The family members agreed that the wife's father had initially intended to devise the property to the couple but had changed his mind after they had had an argument. At trial, a jury found that Jackson did not have any ownership rights in the property. On appeal, the Court of Appeals affirmed the judgment. Jackson's particular enumeration of error stated that the trial court improperly cited OCGA § 53-4-30 in its jury instruction. (Jackson did not object to this instruction when it was given.) This section, which became effective on July 1, 1998, provides that any promise to convey land at death must be in writing. The family members claimed this was the applicable law under the theory that the promise at issue had not been entered into until the time in 2001 that the couple moved into the house on the six acres. Jackson claimed that, under OCGA § 23-2-131(a), a court may decree a parol contract to convey land if "the contract has been so far executed by the party seeking relief and at the instance or by the inducement of the other party that if the contract were abandoned, he could not be restored to his former position." Also, under OCGA § 23-2-132, specific performance of an oral contract to convey land may be ordered if "possession of lands has been given under such an agreement, upon meritorious consideration, and valuable improvements have been made." The Court of Appeals, in addition to affirming that Jackson could not on appeal object to an instruction to which he had not objected at trial, found that it was appropriate to apply the 1998 law relating to contracts concerning succession and that it was within the power of the jury to resolve any conflicting theories of law that may exist by virtue of these other Code sections. The Court of Appeals found that the jury's verdict "although not demanded, was supported by some evidence."

3. EFFECT OF PRENUPTIAL AGREEMENTS

Hiers v. Estate of Hiers, 278 Ga. App. 242, 628 S.E.2d 653 (2006)

Prior to her marriage, Mindy Hiers signed a prenuptial agreement in which she agreed that she would only inherit $5000 from the estate of her spouse-to-be. When she filed for Year's Support after his death, the superior court granted summary judgment against her, finding the prenuptial agreement to be valid, binding, and enforceable. The Court of Appeals affirmed. In deposition, Ms. Hiers stated that she knew that her husband-to-be would not marry her if she did not sign the agreement. She had not actually read the agreement itself before signing it although she understood its terms and the agreement had been offered to her for her perusal before she signed it. She also apparently had not inquired into her fiance's financial condition, even though financial statements were attached to the agreement. She stated that she trusted her husband-to-be and relied upon his promise to take care of her and that she had "nothing to worry about." She made no attempt to contest the prenuptial agreement throughout the course of their nine-year marriage. The husband left the bulk of his $6 million estate to his son. Ms. Hiers received the expected $5000 from his estate and about $95,000 in cash from jointly-held bank accounts.

The Court of Appeals determined that the prenuptial agreement met the requirements for a valid agreement that were set out in 1982 in Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662. The first of these factors is that the agreement not be obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material facts. The Court found that the fact that the husband had demanded the agreement as a precondition to the marriage did not amount to the type of coercion that would have overcome the wife's free will. The Court also found that, although the financial disclosures may have neglected to mention a lake house which the husband may have owned, the fact that Ms. Hiers never even read the disclosures negated the possibility that she would have relied on them. The Court found that Mr. Hiers' promise to "take care" of his wife did not constitute a misrepresentation or fraud. The second Scherer factor is whether the agreement was unconscionable. Ms. Hiers based this allegation on the facts of the disparity in both the financial situation and the business expertise of her and her husband and her claim that, after nine years of marriage, he had left her "no visible means of support. The Court of Appeals pointed out that Ms. Hiers had entered the marriage with only $2500 and had left with over $100,000 and had been able to live in the marital home and drive their cars for months after her husband's death. The Court noted that "the fact that a prenuptial agreement perpetuates an existing disparity of wealth between the parties does not render it unconscionable." The third Scherer factor – changed circumstances such that enforcement of the agreement would be unfair and unreasonable – was not supported by any facts in the record. The Court thus refused to engage in what it referred to as a "judicial repudiation" of the prenuptial agreement.

4. CAVEAT: IMPROPER EXECUTION, LACK OF CAPACITY, UNDUE INFLUENCE

a) McCormick v. Jeffers, ___ Ga. ___, 637 S.E.2d 666 (2006)

This case involves charges that Ms. McCormick's will was not properly executed and that it was signed while she was under the undue influence of her daughter, Ms. Jeffers. A deed that had been signed at the same time was also contested on grounds of undue influence. A jury found that the will was properly executed and that neither the will nor the deed were the products of undue influence. The Supreme Court found that the will had not been properly executed and thus should not have been admitted to probate. However, the Supreme Court affirmed the jury's finding of lack of undue influence as it pertained to the deed.

The execution issue stemmed from Georgia's statutory requirement that the witnesses to a will must sign the will in the "presence" of the testator. OCGA Sec. 53-4-20(b). The witnesses, Ayers and Goldman, were present when Ms. McCormick signed her will. She was sitting in a chair in her bedroom. Because there was no place in the bedroom for the witnesses to sign, the will was moved to the dining room table. The table was about 15 feet from the bedroom and the evidence showed that Ms. McCormick could not see the table from her chair in the bedroom. Ms. Jeffers testified that Ms. McCormick had gotten up once to go to the bathroom, but that she still was not able to see the dining room table from where she stood. The witnesses and the notary public signed the will at the dining room table. The Supreme Court stated that Georgia case law had long held that “presence” was tested in Georgia by a “line of vision” test. This test requires that the testator must have been able to see the witnesses sign the will if she had desired to do so. The court noted that other jurisdictions had adopted a looser “conscious presence” test, which recognizes that people may sense that they are in each other’s “presence” through means other than sight – e.g, when they are within earshot of each other. The court did not adopt this newer test. The court felt that the fact that the Georgia Probate Code in 1998 had retained the same “presence” language as the previous Code dictated that the court could not change former case law and adopt a new test for “presence.” Justice Hunstein wrote a dissent as to this portion of the court’s holding. She did not urge the adoption of the “conscious presence” test. Instead, she focused on the fact that the will contained a proper attestation clause, which raised the presumption that the will had been properly executed and that this presumption had not been rebutted by “clear proof to the contrary.” Justice Hunstein pointed out that Ms. Jeffers had wavered in her testimony and had at one point said that she had seen the testator standing in her bedroom doorway with her walker and that from that position the testator could have seen into the dining room. Justice Hunstein noted that the credibility of a witness’s testimony is the province of the jury. Justice Hunstein also disagreed with the majority's interpretation of the "line of vision" test. She pointed out that some jurisdictions that had adopted that test had broadened the test so that a testator could in fact see a witness signing a will if she "sees or *had it in her power to see*" what the witness is signing. Justice Hunstein quoted an earlier Georgia case, Glenn v. Mann, 234 Ga. 194, 214 S.E.2d 911 (1975), in which the court noted that "[t]here is no unvarying and universal rule which can be laid down; each case must be determined under its own circumstances...."

On the issue of whether the deed was the product of undue influence, the court found that there was "some evidence" to sustain the jury's verdict. Several witnesses had testified as to Ms. McCormick's clarity of mind and to the fact that she was a "strong, powerful, opinionated woman" who had "absolutely not" been influenced by Jeffers.

b) King v. Brown, 280 Ga. 747, 632 S.E.2d 638 (2006)

In this case, a jury found that a decedent's will was invalid after a caveat was filed on grounds of lack of testamentary capacity and undue influence. The Supreme Court affirmed. The decedent had signed a will in 2002 in which he had divided his estate between two of his six children. A month later, these two daughters, King and Brown, were appointed guardians of the decedent. They quarreled over how much care the decedent needed and one daughter, King, took over his care after a house fire destroyed the other daughter's home. In February, 2003, the decedent wrote a new will in which he disinherited Brown and left most of his estate to King. The jury was allowed to view a videotape of the execution of this will. At trial, the witnesses to the will testified that the decedent was lucid during the execution, although medical and psychiatric evidence showed that he had suffered from dementia, was unable to recognize family members, and was likely confused when he signed the will. The evidence also showed that King knew that her father had disinherited another family member in a previous will and may have told him that Brown was stealing money from him. She also believed that Brown had abandoned their father and had expressed this belief in front of their father. The evidence indicated that the decedent, in his weakened state, had become dependent on King for his care. In their finding that the will was invalid, the jury did not specify whether it was invalid due to lack of capacity or undue influence or both. The Supreme Court reviewed the charges that had been given to the jury, found them appropriate, found there was ample evidence on which they could have based their verdict invalidating the will, and affirmed.

c) Smith v. Liney, 280 Ga. 600, 631 S.E.2d 648 (2006)

This case involved the will of a mother who bequeathed to her son only a few personal items and left the rest of her estate to her daughter. The son filed a caveat stating that his mother had lack testamentary capacity and that the will was the product of undue influence by the daughter. A jury was unable to reach a verdict so the judge granted a j.n.o.v. to the daughter on both issues. The son appealled the ruling on the issue of undue influence. The Supreme Court affirmed the judgment that the will was not the product of undue influence. The Supreme Court examined the circumstances surrounding the execution of the will. They found that the daughter had not participated in any of the discussions between her mother and her mother's attorney and had not been present when the will was executed. They found also that the daughter had not isolated her mother after her mother had come to live with her and that family members had visited the mother often. The court noted that although the daughter had had the opportunity to influence her mother and had taken a substantial benefit under the will, these factors alone were insufficient to establish undue influence. Furthermore, the court found that no presumption of undue influence arose in this case because: 1) the daughter was a natural object of the mother's bounty and 2) she had not actively participated in the preparation of her mother's will.

d) Pope v. McWilliams, 280 Ga. 741, 632 S.E.2d 640 (2006)

This case involves a *pro se* caveat to a will filed by Pope, who was the nephew of a testator who had left his real estate to his sister, McWilliams (whom he also named as executor), and the rest of his estate to his brother, his niece, and to Pope. The caveat claimed lack of testamentary capacity and undue influence. The probate court and the superior court granted summary judgment against Pope. The Supreme Court affirmed. The court examined all of Pope's arguments relating to both capacity and influence. As to the undue influence claim, Pope had contended first that Pope's sister had sworn in an affidavit that she had heard McWilliams say to the testator, "We've got to go make that will." The court found that this statement did not show in any way that McWilliams had forced the testator to make a will and, furthermore, that the reason to make the will was to give more specific directions as to what he wanted done with his property. Second, Pope argued that the will was "secretly" made in that it was executed without notice to him. The court pointed out that the law contains no requirement that a testator notify anyone of the contents of his or her will. Third, Pope argued that a confidential relationship existed between McWilliams and the testator and thus that a presumption of undue influence arose. The court pointed out that McWilliams was a natural object of the testator's bounty and that the evidence showed that their relationship was one of mutual trust, not one in which she exerted power over him. Fourth, Pope argued that the will was unreasonable. The court found this claim without merit, pointing out that McWilliams' sons had farmed the land that the testator had bequeathed to McWilliams. The court noted that the circumstances that Pope had laid out might raise a "suspicion" of undue influence but that there was no issue of fact as to whether McWilliams was exerting force or duress so as to destroy the testator's free will.

The court also examined Pope's argument that the testator had lacked testamentary capacity. The only substantive evidence that Pope had offered on this issue was that a hospital discharge order on the testator stated that the doctors could "not exclude some early dementia." In contrast, the witnesses to the will and the notary public testified unequivocally that the testator had been of sound mind and knew what he was doing when he executed the will.

e) Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396 (2006)

Testator wrote a will in 2003 leaving the bulk of his estate to his daughter. Subsequently he was diagnosed with lung and brain cancer. Price and Palleson, whom the testator had met at church, were hired to care for him and he was also visited frequently and baptized by Edmundson, who was on the staff of the church. In 2004, testator executed a new will, leaving bequests to the church, Price, Palleson, and Edmundson, and devising 75% of the residue to his sister and 25% to his daughter. Edmundson was named as successor executor in this will. When testator died, his daughter filed his 2003 will for probate and Edmundson submitted the 2004 will. The daughter filed a caveat to the 2004 will and asked for a jury trial. Her caveat was based on several grounds but the jury returned a verdict in her favor on the sole ground of undue influence by Price, Palleson, and Edmundson. After the verdict was returned, Edmundson renewed a motion for directed verdict, which the judge granted. The Supreme Court reversed, finding that the evidence was sufficient to submit the issue of undue influence to the jury. The Supreme Court noted that "a rebuttable presumption of undue influence arises when a beneficiary under a will occupies a confidential relationship with the testator, is not the natural object of his bounty, and takes an active part in the planning, preparation, or execution of the will." The Court found that the caregivers were actively involved in every aspect of the preparation and execution of the 2004 will. The Court also found that there was "some evidence" of a confidential relationship. Even though the attorney who prepared the 2004 will and the two witnesses saw no sign of mental impairment, the Court cited the following evidence:

> The oncologist who treated the Testator testified by deposition that his medication could cause altered mental status and occasional psychosis. (T. V, 302) Other testimony showed that, although Testator had a strong personality, during the summer of 2004 he suffered from severe physical inabilities, memory impairment, and mental confusion. The evidence presented by Ms. Bailey [the daughter] also showed that Testator, in the hope of helping himself go to heaven, made gifts and loans to Ms. Price, Palleson, and Edmundson; that Testator was dependent on his care givers for personal and medical care; that he was afraid that they would quit and that his daughter would put him into a nursing home; and, that because of them he stopped permitting her to visit him.

The Court also noted “Testator's short-term relationship with [the caregivers], his sporadic contact with and lack of trust towards [the sister to whom he devised 75% of his estate], and his long-standing expressions of testamentary intent to leave all of his property to [his daughter], which he repeated the day after execution.” The Court stated that this evidence was sufficient to trigger the presumption of undue influence. The Court went on to note that, even if there had not been a confidential relationship, the evidence of undue influence authorized sending the case to the jury. The Court considered a few other matters on appeal. First, it held that the daughter had the right to open and conclude argument because she had admitted that a prima facie case in favor of the propounder of the will. Second, the Court considered whether certain evidence should have been admitted. It found that a medical narrative by the oncologist that said that the drugs the testator was taking “can cause” medical impairment was relevant and thus admissible expert testimony even though it alone was not sufficient to sustain a burden of proof. The Court confirmed that written telephone messages from the oncologist's staff that described conversations with the testator and the daughter were hearsay and did not fall under the "business records" exception to the hearsay rule. The Court found admissible the expert testimony of a geriatric psychiatrist and affirmed that Edmundson should have objected to the testimony no later than the final pre-trial conference. Finally, the Court addressed Edmundson's contention that he should have been allowed to cross-examine the daughter about her financial interest in the case and specifically about the amount of attorney fees she owed. The Court confirmed that such cross-examination was properly disallowed as the evidence of a party's wealth or financial need is rarely relevant in civil cases.

f) <u>Wilson v. Lane</u>, 279 Ga. 492, 614 S.E.2d 88 (2005)

In this case, the Supreme Court of Georgia reversed a jury's finding that the testator had lacked testamentary capacity, holding that there was no evidence to support the jury's verdict. The will of the testator divided her property equally among seventeen individuals, sixteen of whom were blood relatives. The seventeenth beneficiary had been the testator's caretaker. Testimony by the drafting attorney indicated that the testator had "emphatically selected" all of the beneficiaries. Others who knew the testator also testified that she had been of clear mind. The Court found that the propounders had thus raised a presumption of capacity and that the caveators never presented any evidence to rebut that presumption. The caveators had shown that the testator was "eccentric and peculiar in the last years of her life." She had a fear of flooding. She refused to get into the bathtub and would not allow visitors to run water or flush the toilets when visiting her home. Testimony showed that she did not know which month it was, did not know her Social Security number, could not recall the last names of people, and called the fire department one time when there had been no fire. An expert testified based not on any observation of her but on an examination of her medical files. The files showed that she "appear[ed]" to be suffering from some form of Alzheimer's type dementia. (Chief Justice Fletcher, writing for the majority, noted: "Regardless of the stigma associated with the term 'Alzheimer's,' however, that testimony did not show how Greer would have been unable to form a rational desire regarding the disposition of her assets.") The testator's physician had written a letter saying that she was legally blind and suffering from "senile dementia," but the physician said that he only wrote the letter to assist her in obtaining help with her telephone bill. A petition to have a guardian appointed for the testator had been filed after the will was executed, but the Court found that the petition had been filed to allay concerns that DFACS had about her ability to continue living alone at home. The Court also noted that her inability to live alone had existed at the time the will was executed and had no relation to whether she had testamentary capacity. The Court found that "at most there was evidence that [the testator] was an eccentric woman whose mental health declined towards the end of her life." In making its ruling, the Supreme Court stressed that the right to make a will is a "valuable right." Justice Carley, joined in dissent by Justices Sears and Hines, agreed that the testimony might have authorized a finding that the testator had had the appropriate capacity but focused on the fact that a jury had found that she did not. The dissent felt that the totality of the evidence supported the jury's verdict in favor of the caveators.

g) Trotman v. Forester, 279 Ga. 844, 621 S.E.2d 724 (2005)

In this case, the Supreme Court found that the evidence supported the trial court's (bench trial) finding of undue influence by one of the testator's sons who was named as beneficiary under the will. The Court focused both on the finding that the testator was of weakened mind and that a confidential relationship existed between the testator and her son. The Court found "ample evidence" that the testator's mental capacity was diminished at the time the will was executed and had been so since almost two years before, when the testator's husband had died. A psychiatrist examined the testator the month after her husband died and a psychologist examined her three months before she executed her will. Both testified that she was suffering from mild "Alzheimer's type" dementia and that there was not much likelihood that her condition would improve. A niece and nephew also believed that she was suffering from Alzheimer's disease based on the fact that the testator's brother had had the disease and that both observers had seen the testator in situations in which she was extremely disoriented. The nephew told the attorney who drafted the testator's will that he would not serve as executor because he thought that his aunt was not competent to make a will. Several factors supported the finding of undue influence. The testator had employed the services of two attorneys, one who put together her overall estate plan and a second who actually drafted her will. The attorney who drafted her will did not believe that the testator's son, Cliff, had unduly influenced her, even though the attorney said that Cliff had tried to influence both the testator and that attorney. The other attorney admitted that he had only spoken with the testator twice (once in person and once by phone) while he had spoken with Cliff at least nine times without his mother being present. Cliff had participated in both of the conversations the attorney had had with the testator. Many of the items that ended up in the will resembled items that Cliff had suggested to the attorney. Other witnesses testified that Cliff had isolated the testator from her relatives and friends after her husband's death and had been with her constantly around the time that the will was executed. Glenda, a niece of the testator, said that Cliff had not isolated the testator but other witnesses testified that Glenda had "taken sides" with Cliff, had followed the testator whenever she was with other people, and had attended the will execution, during which time she either stood behind or sat beside the testator. The Court found that the evidence supported the trial judge's finding that the testator, in her weakened mental state, had been the victim of undue influence by Cliff with the aid of Glenda.

5. WILL CONSTRUCTION

a) Rayburn v. Allen, 280 Ga. 41, 622 S.E.2d 618 (Nov. 2005)

The testator had shared his home with his spouse and his son from a former marriage. His will directed the executor (his wife) to sell the home and divide the proceeds between herself and the son. The will also contained a "Special Request" that directed the two to share the monthly payments and taxes until the home was sold; provided, however, that the wife was to make these payments if the son vacated the home. The son moved out and the wife refused to pay. When foreclosure was threatened, she paid the arrearages but continued to contend that the son was responsible for one-half of the payments she had made. She contended that the "special request" was "of doubtful meaning and unenforceable as a limitation on a preceding devise of the property." The superior court concluded that the wife had sole responsibility for the payments and the Supreme Court agreed. The Supreme Court stated that the "special request" was a "charge upon the bequest" of the proceeds of the home. The court found unambiguous the language that directed the wife to make the payments if the son did not live in the home "at or at any time after the time" of the testator's death. The Court found that the language imposed a "mandatory duty" on the wife. Also , the Court found this duty consistent with the testator's overall testamentary plan in that the wife, as executor, controlled the timing of the sale of the home and would have no incentive to consummate that sale if she was the only resident. Thus, the Court construed the will by gleaning from the four corners of the will what it found to be the testator's intent.

b) <u>Bandy v. Elmo</u>, 280 Ga. 221, 626 S.E.2d 505 (2006)

During the course of an accounting proceeding on the estate of the administrator's mother, the Probate Court of Catoosa County found that there appeared to be a conflict in the mother's will that required construction. The conflict related to property devised to Mr. Elmo, the administrator's stepfather. The probate court ordered the case removed to the superior court to resolve the construction issue per OCGA §53-7-75. Three months later, Mr. Elmo filed a declaratory judgment action seeking construction of the same will and referencing the statutory removal proceeding. The administrator then filed a petition that sought resolution of claims in addition to the declaratory judgment issues. Mr. Elmo objected, claiming that the superior court was limited to the construction issue. The superior court construed the will and then ordered the case returned to the probate court. The administrator filed an appeal seeking review of the merits of the superior court's ruling. The Supreme Court dismissed the appeal, holding that the superior court order returning the case to the probate court after resolving the construction issue was not a final judgment from which the administrator could take a direct appeal. The Court cited OCGA §53-5-75, which provides that, after the construction question is decided, "the probate court shall proceed with the accounting." The Court found that the administrator should have but failed to comply with the procedure for the appeal of a non-final interlocutory judgement, as set forth in OCGA §5-6-34(b).

D. ADMINISTRATION OF ESTATES

1. COLLECTION OF ESTATE ASSETS

a) <u>Field v. Mednikow</u>, 279 Ga. App. 380, 631 S.E.2d 395 (2006)

In 1999 and 2000, the decedent had signed quitclaim deeds transferring certain property to Field. The first deed was not witnessed or recorded and the second did not contain a sufficient description of the property. The decedent died in 2001 with a will leaving his property to Field and two heirs and naming Field and one of the heirs as co-executors. The two heirs petitioned to have the two deeds set aside on the ground that the decedent lacked the capacity to execute them. Field claimed that they were not parties in interest because the estate was still open and thus, all actions for the estate should be brought by the co-executors. Although the Court of Appeals agreed that generally the executors have the exclusive right to bring actions on behalf of an estate, if the executors refuse to pursue an action, the beneficiaries may do so. Because Field was one of the co-executors and co-executors must act unanimously, it could be presumed that Field would not want to bring an action against herself. The Court noted also that even though the heirs had brought the action as "heirs at law," they had standing as beneficiaries under the will and an obvious interest in the property to maintain the suit to cancel the deeds. Field contended also that the estate, through its co-executors, had abandoned the claim because the co-executors had filed an estate tax return in which they listed Field as the donee of the property. The Court of Appeals found that the estate tax return had been timely filed and the lawsuit had not commenced at that time. The court noted that "the estate tax law does not change the law of property." Finally, the Court determined that the trial court had properly granted summary judgment on the invalidity of the 2000 deed due to the insufficiency of its description of the property.

b) Zaglin v. Atlanta Army Navy Store, Inc., 275 Ga. App. 855, 622 S.E.2d 73 (2005)

The executor of Zaglin's estate (who was Zaglin's widow) sued his nephew and others when she failed after repeated attempts to obtain documents and information about her husband's business from the nephew and another party to a joint venture agreement. She also sued them for converting cash that her husband had told her he had left in his office. The nephew turned over some cash but then counterclaimed and also sought to enforce a "sale-on-death" clause in the joint venture agreement that allowed the nephew to purchase two pieces of real property from the testator's estate for specified amounts. The executor testified by affidavit that the testator had told her that the agreement had been amended to say that the properties were to be purchased for "fair market value." She included with her affidavit a handwritten note on which the testator had listed the properties and said they were to be valued at fair market value. The trial court would not admit the statements upon finding them to be unnecessary hearsay. The Court of Appeals affirmed that ruling, stating the rule that an unambiguous contract cannot be amended by parole evidence. The executor also claimed that the nephew had unclean hands because he had not fulfilled other duties to her as executor to which he had agreed in the same joint venture agreement (e.g., his failure to produce an accounting of the business and to allow her to audit the books.) But the court refused to apply the unclean hands doctrine because it found that none of the allegations of the nephew's misconduct related directly to the sale-on-death provisions of the joint venture agreement.

2. SALE OF ESTATE ASSETS

a) Travis v. Travis, 279 Ga. 847, 621 S.E.2d 721 (Nov. 2005)

The testator named one of her three children as the executor of her estate. The other two children asked the probate court to cite the executor for contempt for failure to deed to each a one-third undivided interest in each of three parcels of land. The will specifically devised certain personal property to these two siblings and gave the executor the right to continue leasing certain specified realty. The will devised the residue of the estate to the three children equally. The siblings claimed that the executor did not have the right to sell the real property owned by the estate and distribute the proceeds to them but rather was required to deed interests in the property to them. The siblings cited OCGA § 53-8-15(d) (the Code section that deals with the vesting of title to property). The probate court disagreed, citing OCGA §53-8-10 as the source of the executor's authority to sell the property and distribute the proceeds. (Apparently the will also gave her the authority to sell estate property.) The Supreme Court agreed with the probate court, finding the residuary gift to be a "general testamentary gift" that does not require the delivery of any specific property.

b) In re Estate of Bell, 274 Ga. App. 581, 618 S.E.2d 194 (July, 2005)

James Dalton II, the temporary administrator of the estate of Palmer Bell, petitioned the probate court for permission to sell a 3.2 acre tract of land owned by the estate at private sale. He attached a contract that showed that the potential purchaser had offered to pay $300,000 for the land. The contract contained a lengthy section entitled "Environmental Hazards" that detailed a laundry list of probable hazards connected with the property. In the contract, the purchaser agreed to assume all liability connected with these hazards. Dalton explained to the probate court that he wished to sell the property at private sale because he did not think he would be able to garner such a high price at a public sale, due to these hazards. No testimony was presented at the probate court hearing other than statements by Dalton's attorney and an attorney for one of the heirs, who agreed with the terms of the proposed sale. Another heir objected to the petition for sale. Her attorney did not dispute the facts underlying the contract and its terms but asserted that a private sale was beyond the authority granted to temporary administrators. The probate court allowed the sale and the Court of Appeals affirmed. The Court of Appeals examined the statutes covering the powers of temporary administrators. For reasons that were not made clear in the opinion, the Court said that a temporary administrator had the power to sell estate property at private sale if the judge determines that such sale is "fair and in the best interests of the estate," citing former OCGA § 53-8-34(a). (This Code section was replaced in 1998 with OCGA § 53-8-10, which allows a temporary administrator to petition for leave to sell upon a showing of good cause.) The Court also held that the objecting daughter had not objected at the hearing to the sufficiency of the evidence presented and thus could not do so on appeal. The Court found that witness testimony or documentation were not needed, particularly in light of the statements of fact made by the attorneys during the hearing.

c) Williams v. Screven Wood Company, 279 Ga. 609, 619 S.E.2d 641 (Sept. 2005)

This suit to quiet title relates to 56 acres of land that were first purchased in 1876 by Franklin Johnson. When he died, he devised the property to his children Jack Johnson, Ben Johnson, and Emma Johnson Jackson. In 1918, Jack purchased 33 adjacent acres. Ben died intestate in 1936, "leaving no heirs" (as stated by the court). Jack died in 1961. Emma died intestate in 1966. Beginning in 1918, Jack had claimed ownership in the entire 89 acres. In 1954, he deeded the land to his children for their lives, remainder to their children. Jack and his descendants paid the taxes on the land, farmed the land, and leased portions of it. In 2002, Screven Wood purchased the timber on all 89 acres, but when they began to harvest it, a descendant of Emma claimed an interest in the land. He said that he knew that Jack Johnson and his descendants treated the land "like it was their own." He said that Emma had visited a lawyer to discuss how she could restore her rights to her portion of the land. The descendants of Jack claimed ownership by adverse possession. The Supreme Court noted first that the descendants of Jack were tenants in common with the descendants of Emma as to the original 56 acres. The Court then went on to state that a co-tenant who claims title by adverse possession against another co-tenant must show not only the traditional elements but also, under OCGA § 44-6-123, an actual ouster, the retention of exclusive possession after demand, or the giving to the co-tenant of express notice of adverse possession. The Court held that the descendants of Jack Johnson had acquired title through adverse possession. Even though no actual ouster had occurred, the Court found that the Jack Johnson family "committed such open and public acts as to put Emma Jackson and defendants on notice...." Furthermore, the evidence indicated that both Emma and her descendants in fact had notice of the Johnson family's adverse possession of the land.

3. REMOVAL OF PERSONAL REPRESENTATIVE

a) In re Estate of Sieg, 277 Ga. App. 361, 626 S.E.2d 577 (2006)

The decedent's sister moved to remove the decedent's widow as the administrator of her husband's estate on the ground of conflict of interest. The probate court denied her motion. The Court of Appeals affirmed and also granted the widow's motion for frivolous appeal sanctions. The probate court had ruled that the sister lacked standing to petition for the removal of the widow and thus had not addressed the conflict of interest question. On appeal, the sister asserted that the probate court should have addressed the merits of her claim. However, she made no argument on appeal as to why the probate court's ruling on lack of standing was error. The Court of Appeals noted that this was the fourth appearance of the claimants to the Sieg estate in the state's probate courts in the sister's quest "to obtain an ever-increasing portion of the decedent's assets." The Court pointed out that the sister had already negotiated a settlement in which the widow had given up one-half of the estate's assets) and had obtained a ruling in her favor regarding the decedent's retirement benefits. The Court concluded as follows: "We strongly advise [the sister] and her appellate counsel to carefully review whether there is a reasonable basis to bring any further appeals to this Court in connection with [the sister's] claims to her brother's estate and assets."

b) Ray v. National Health Investors, Inc., 280 Ga. App. 44, 633 S.E.2d 388 (2006)

A creditor of an estate petitioned for the removal of the estate administrator on the ground that the administrator had engaged in transactions that constituted a conflict of interest as well as a breach of his fiduciary duty. The creditor was owed $22,750,000, which it had loaned to a husband and wife to refinance nursing homes they operated. They were both killed in a plane crash. Two attorneys had served successively as executors of the wife's estate. The second attorney had settled a dispute over the proceeds of an insurance policy and, as part of the settlement agreement, Ray, the wife's brother, was appointed administrator CTA of his sister's estate. The second attorney had received notice from the creditor of its claim against the estate and had made monthly payments to the creditor. When the brother was appointed, he and the administrator of the husband's estate claimed that the creditor had failed to give timely notice of its claim. That action was removed to federal court but the creditor also filed in the probate court a petition seeking the removal of Ray. The probate court removed him as administrator, ordered an accounting, denied the administrator attorney fees incurred in defending the removal, and ordered the administrator to repay the estate for lost money. The Court of Appeals affirmed all aspects of the probate court's order. The Court of Appeals pointed out that Ray had acknowledged at the hearing that he was aware that his predecessor had received notice of the creditor's claim, yet he had engaged in several dubious distributions during the time he had been administrator. As administrator (and president) of one of the nursing homes that was owned by the estate, Ray had distributed all of the stock of the nursing home to himself and his mother and siblings. He claimed that the stock at that point was worthless. A few months later, he had the estate loan the nursing home $375,000, which the nursing home repaid without interest. He also settled in his own favor a disputed claim over a lake lot that the former executor had asserted was property of the estate. Ray paid out money to his sister on a claim that the former executor had disputed. He distributed various other items of estate property to various members of his family. Ray also acknowledged that he had paid himself $147, 650 in compensation in the 18 months he had served as administrator, including $62,462.50 during his first two months as administrator. The probate court found the latter payment to be an "inconceivable" amount. The probate court determined that Ray had a conflict of interest upon appointment, as he was a beneficiary of the estate, a claimant against the estate, and he held a power of attorney for two of the other beneficiaries. The Court of Appeals rejected Ray's contention that the probate court had adjudicated conflicting claims of title to property. In fact, the Court of Appeals found that the probate court had merely ordered Ray to return property of the estate that had been distributed prematurely and with the appearance of impropriety. The Court of Appeals addressed other arguments raised on appeal, including Ray's contention that he had not been cited to appear before the court for a settlement of accounts. The Court of Appeals found no merit in this argument in that the creditor had demanded a citation and such citation had been issued. Ray was personally served with a copy of the petition and the citation. The Court of Appeals also determined that Ray's decision to compensate himself on an hourly basis (as had his two predecessors) was improper. The executors had compensated themselves in accordance with language in the decedent's will. The Court of Appeals agreed with the probate court's finding that the rate and time charged by Ray were excessive. The Court of Appeals rejected Ray's contention that the will granted him broad discretionary powers and thus that he should not have been removed for exercising those powers. The Court of Appeals pointed out that its mandate in reviewing a removal is to determine whether the trial court had "good cause" for the removal. The Court of Appeals also noted that Ray himself had suggested to the probate judge at one point that removal would be welcome. Finally, the Court of Appeals noted that the mere fact that Ray had placed himself in a conflict of interest ended the inquiry as to whether he should be removed.

4. BREACH OF FIDUCIARY DUTY: PERSONAL REPRESENTATIVE

a) Greenway v. Hamilton, 280 Ga. 652, 631 S.E.2d 689 (2006)

In this case, the Georgia Supreme Court affirmed the finding of the probate court that an executor had breached his fiduciary duty. The Supreme Court agreed that the executor, Greenway, who was the testator's son, had improperly handled bank accounts that belonged to the estate and had sold estate property to his wife for less than fair market value. As to the bank accounts, the court found that, when his mother was alive, the executor had used a power of attorney to add his name to two bank accounts and a certificate of deposit that were owned by his mother. He then created a payable-on-death account in his mother's name, with his name as the designated payee. This account was created the day his mother died and he proceeded over the next few weeks to transfer the money from the other accounts to the POD account. He did not list any of these funds as estate assets. When an heir filed a petition for an accounting, Greenway contended first that the probate court did not have jurisdiction to determine the ownership of the accounts but the Supreme Court pointed out the OCGA Sec. 53-7-63 gives the probate court authority in a settlement of accounts to hear evidence on all contested matters and make a final settlement between the personal representative and the heirs or beneficiaries. Greenway next argued that, as he was not yet the executor when he transferred the account funds to himself, he could not have breached his fiduciary duty. The Supreme Court said that, once he became executor, he knew he held money that was in fact an estate asset and that he breached his duty by failing to recover the estate's money. The Supreme Court also examined Greenway's sale of two lots from the estate to his wife for below-market value. Greenway contended that the probate court did not have authority to order an appraisal of the property. The Supreme Court, noting that a probate court has "exclusive, original subject matter jurisdiction" over the probate of wills and matters relating to decedent's estates, found that the probate court could use the appraisal and other adequate means to remedy this executor's breach of fiduciary duty. The Supreme Court refused to reverse the probate court's award of attorney fees and costs to the appellee, finding that, in alleging that Greenway had acted for his own self interest and with a conflict of interest, the appellee had asserted adequate grounds for showing the type of bad faith that can result in such an award. The Supreme Court affirmed the probate court's award of damages against Greenway, noting that Greenway was a party defendant in that he personally had been called to account. Finally, the Supreme Court affirmed the probate court's disallowance of

Greenway's commissions and fees. The court found that, in selling the lots at below market value to his wife, he had breached his duty to sell the property at a reasonable value. In addition, his mishandling of the bank accounts authorized the probate court to demand that he forfeit his commissions.

b) Jonas v. Jonas, 280 Ga. App. 155, 633 S.E.2d 544 (2006)

Regan Jonas' father, mother, and brother were killed in a car accident. Her uncle, Edward Jonas, offered to administer the three estates. Regan agreed based on her uncle's promise to look out for her best interests. The uncle was appointed administrator. Later, Regan brought an action against him to recover damages for his fraud and breach of fiduciary duty. She also sought to impose a constructive trust on certain life insurance proceeds in her grandmother's hands and to impose damages on her grandmother. A jury awarded Regan $650,000 in compensatory damages and $150,000 in punitive damages. The trial court entered judgment on the jury verdict and the uncle and grandmother appealed. The Court of Appeals reversed the trial court's order and remanded the case for a new trial.

The primary assets at issue in this case were the proceeds of two life insurance policies on the lives of Regan's parents. The $500,000 policy on her father's life named her mother as primary beneficiary and his father (Regan's paternal grandfather) as secondary beneficiary. The $160,000 policy on her mother's life named the father as primary beneficiary and the same grandfather as secondary beneficiary. Thus, the order of deaths was crucial. If the father died first, his policy would be paid to the mother's estate and would go to Regan. In that same situation, the $160,000 proceeds on the mother's policy would go to the grandfather, under the theory that the father did not survive the mother. If the mother died first, Regan would get the $160,000 payable to her father's estate but her grandfather would get the $500,000 under the policy on her father's life. If it could not be determined who died first, Georgia's Simultaneous Death Act provisions would apply and cause each insured to be deemed to have outlived the primary beneficiary as to his or her own policy and thus all of the proceeds would go to the grandfather, who was the secondary beneficiary on both policies. OCGA Sec. 33-24-42. Three witnesses, including Regan (who had been in the accident) stated that the father had died first and one witness stated that the mother had died first. Despite these numbers, the uncle determined that the evidence "clearly indicated" that the mother had died first. The insurance company, on the other hand, concluded that it could not be determined who died first and said that it would pay the proceeds from both policies to the grandfather. The Court of Appeals noted that the grandfather was elderly and ailing and that the uncle was an eventual heir of both his and the grandmother's estate. The grandfather did die a few months later and his estate distributed the $600,000 in insurance proceeds to the grandmother. The uncle served as administrator of the grandfather's estate. Regan contended that her uncle had committed fraud and breached his fiduciary duty to her as the sole beneficiary of the three estates he was administering. She also sued the grandmother to have a constructive trust imposed on the proceeds.

The Court of Appeals based its reversal and remand on the improper instructions given to the jury. The judge had apparently instructed the jury that it could award Regan the proceeds of the insurance policies in accordance with whatever finding it made about the order of the two deaths. The Court of Appeals found the jury instructions to be misleading. The Court of Appeals noted that the proceeds had already been distributed and were not "sitting in the court registry as the result of an interpleader action." Thus, an award of the proceeds would translate into an award of damages against the uncle and the grandmother. An award of damages could not be made without finding that the uncle had breached his fiduciary duty or committed fraud. Also, a constructive trust could not be imposed without a finding that principles of equity were violated if the grandmother retained the proceeds. Even though its ruling on the jury instructions determined its disposition of the case, the Court of Appeals went on to discuss whether the evidence would support a finding of fraud or breach of fiduciary duty and thus whether such issues could be retried. As to the fraud claim, Regan had argued that her uncle had induced her into letting him take over her family members' estates by way of a promise that he had no present intention of keeping – that is, his promise to look out for her best interests. She pointed to the fact that he had concluded that her mother had died first, despite evidence to the contrary and, worse still, had not objected when the insurance company paid the proceeds to the grandfather. The Court of Appeals found that Regan had failed to present any evidence of the crucial issue – that is, whether, *at the time he had made the promise,* the uncle had no *present* intention of following through on it. A mere broken promise does not result in actionable fraud. Thus, the fraud issue could not be considered in the retrial. The Court of Appeals next addressed the breach of fiduciary duty issue. Regan argued that her uncle had breached his duty by letting the insurance proceeds be paid to an estate of which he would eventually be a beneficiary. The Court of Appeals reviewed current law on conflict of interest and noted that a fiduciary who finds himself in such a position must resign or fully inform the beneficiaries of the conflict or request the court to appoint a guardian ad litem to protect their interests. The Court of Appeals noted that the jury had determined that the father had died first, thus establishing that the uncle could have reaped great benefits for the estates he represented had he not acquiesced in a course of action that would eventually benefit himself. The breach o fiduciary duty claim, thus, could be retried. As to the constructive trust, the Court of Appeals examined whether such a trust could be imposed on the insurance proceeds in the hands of the grandmother. The Court of Appeals found that the evidence showed that the grandmother was unjustly enriched in receiving money that was paid out to her due to the uncle's breach of fiduciary duty and thus that the issue of whether a constructive trust should be imposed could be retried. Finally, in examining the damages that the jury had awarded, the Court of Appeals concluded that punitive damages could not be awarded against the grandmother as she was only an "innocent recipient" of the insurance proceeds. The issue of punitive damages could only be retried against Regan's uncle.

5. **APPOINTMENT OF TEMPORARY ADMINISTRATOR**

c) Ray v. Jolles, 280 Ga. 452, 629 S.E.2d 250 (2006)

After Ray was appointed administrator of the estate of his sister, a major creditor of the estate petitioned to have him removed. The probate court entered an order removing him for breach of fiduciary duty and Ray appealed. The probate court ordered him to post a supersedeas bond, but he failed to do so. While the appeal was pending, the probate court appointed a temporary administrator for the estate. Ray sought unsuccessfully to appeal this appointment to the Court of Appeals. Having failed in that route, he then applied to the superior court for a writ of prohibition against the probate judge and the temporary administrator, asking the superior court to command the probate judge and the temporary administrator to "cease and desist" administering the estate pending the outcome of his appeal of the order removing him. The superior court found that Ray lacked standing to apply for a writ of prohibition, that the acts he sought to restrain had already occurred, that the probate court was not an inferior court that could be subject to such a writ from the superior court, and that Ray had an adequate remedy at law. The Court of Appeals affirmed that Ray's application "failed for the most basic of reasons." The Court stated that the writ is available only when a tribunal is acting outside of its cognizance and that the probate court clearly had subject matter jurisdiction and did not exceed its authority in appointing the temporary administrator. The Court noted that the estate became unrepresented and essentially unprotected when Ray was removed as administrator and that OCGA Sec. 53-6-30 allows the probate court at any time to appoint a temporary administrator for an estate that is unrepresented.

6. AWARD OF ESTATE ASSETS AS ALIMONY

a) Searcy v. Searcy, 280 Ga. 311, 627 S.E.2d 572 (2006)

Ms. Searcy filed a divorce action and sought to reach her husband's share of his parents' estates as alimony. She also sought to join as defendants the personal representatives of the parents' estates. The Supreme Court affirmed that a portion of the estates could be awarded as alimony but did not allow the wife to join the personal representatives as defendants. The Court examined cases in which inheritances of spouses had or had not been awarded as alimony. The court noted that evidence of a pending inheritance can be considered for alimony purposes but that a mere expectancy could not be awarded as alimony. The Court noted that in the present case, the husband's parents were dead and their wills awarded him a portion of their estates, so his inheritance was more than a mere expectancy. The Court concluded that this inheritance, like a chose in action, could be awarded as alimony. On the other hand, the Court found that there was no marital property in either of the parents' estates and thus that the personal representatives of the estates were not proper parties to the divorce action.

b) Findley v. Findley, 280 Ga. 454, 629 S.E.2d 222 (2006)

In this case, the Supreme Court confirmed that Georgia law provides that the estate of an ex-spouse is not required to continue to pay alimony unless the agreement that provides for the payment of the alimony specifically states that the obligation will continue beyond the death of the payor. The Court found no such expression in the alimony agreement at issue even though the agreement provided that the ex-spouse was to pay alimony to the ex-wife "until she dies or remarries."

7. AWARD OF PRE-JUDGMENT INTEREST

In re Estate of Barr, 278 Ga. App. 837, 630 S.E.2d 135 (2006)

After reconsideration *en banc*, the Court of Appeals affirmed the probate court's award of pre-judgment interest to a beneficiary. The co-executors of the estate, who were the testator's sons, had refused to pay a $100,000 bequest to their step-brother on the ground that he owed the estate $2500 and had not given them an itemized list of certain property that he had taken from the testator's home without permission. Two years later, after the step-brother sued for an accounting, the probate court found the delay in making the distribution to be "without authority." The probate court ordered the co-executors to pay the bequest plus pre-judgment interest. The co-executors appealed the grant of the pre-judgment interest and the Court of Appeals affirmed. The Court found the issue to be controlled by the "plain statutory language" of OCGA Sec. 53-4-61. This statute requires the payment of interest on a general testamentary gift at the legal rate beginning 12 months after the decedent's death. The dissent argued that OCGA Sec. 7-4-15, which deals generally with interest on liquidated demands, to be the controlling statute. The majority found that it was more appropriate to apply the specific probate statute. The Court also looked to see if the case met the two exceptions under that statute. Under OCGA Sec. 53-4-61(b), the requirement of payment of interest "yields to the equity and necessity of a particular case if the condition of the estate as to the payment of debts and testamentary gifts is doubtful or if the fund out of which the testamentary gift is to be paid is unavailable for all the charges made upon it or if any other equitable circumstance intervenes." The Court found that the probate court had properly exercised its equitable discretion in awarding the interest.

E. PROCEDURAL MATTERS

1. PROBATE COURT JURISDICTION

a) Johns v. Morgan, 281 Ga. 51, 635 S.E.2d 753 (Oct. 2006), reversing Morgan v. Johns, 276 Ga. App. 366, 623 S.E.2d 219 (Nov. 2005) (vacated by Morgan v. Johns, ___ Ga. App. ___, 2006 WL 3490954 (Dec. 2006)

The testator disinherited his two daughters in favor of the caretaker who had provided care for him in the three years prior to his death. Two months before he died and one month before he executed his will, the testator had named Morgan as his agent under a power of attorney. On the day he died, the testator closed on a sale of real property, with Morgan's assistance and received a check for $734.250. According to Morgan, the testator then endorsed the check over to her and gave it to her as a gift. She deposited it that afternoon in an account in her name. The testator died two hours later. Morgan, who was also named as sole executor, filed a petition to probate the will in solemn form.

The daughters filed a caveat on the grounds of undue influence and an objection to the naming of Morgan as executor. They also filed a complaint in the superior court alleging fraud, conversion, breach of fiduciary duty and asked that court to set aside the gift and enjoin Morgan from transferring or using the money she had received from the testator. Morgan claimed that the daughters did not have standing to pursue that action. The superior court denied Morgan's motion to dismiss and granted an interlocutory injunction preventing Morgan from using the proceeds of the sale. On appeal, the Court of Appeals reversed, holding that the daughters had no standing to file their action in superior court while the probate proceeding was pending. The daughters claimed that under OCGA § 23-2-91(2) they, as persons "interested in the estate," were applying to the court of equity because there was a "danger of los or other injury to [their] interests." Their claim was that they had an "interest" in the estate until the will that excluded them was proved to be valid. The Court of Appeals called upon Supreme Court precedent to justify its finding that the daughters had no interest in the estate "unless and until a probate court finds the decedent's will is invalid and the decedent died intestate." The Court characterized the daughters' interest as a mere "expected inheritance." The daughters claimed that their case differed from the cases decided by the Supreme Court because it involved fraud. The Court of Appeals pointed out, however, that the fraud did not make their case indistinguishable in that a finding of fraud, while invalidating the gift, would merely put the gift back into the testator's estate which was slated to go to Morgan anyway.

The Supreme Court of Georgia reversed the Court of Appeals' decision in October, 2006. The Supreme Court concluded that the heirs did in fact have a statutory "interest in the estate." The Supreme Court distinguished its earlier cases that had been relied upon by the Court of Appeals as precedent. The court found that the rights and interest of the heirs in the estate had not been "severed" by a valid probate and thus that they retained the right to seek equitable relief.

b) Benefield v. Martin, 276 Ga. App. 130, 622 S.E.2d 469 (Oct. 2005)

A beneficiary filed an action in superior court against her brothers, who were the executors of their father's and mother's wills. The father had died in 1972 and the mother had died in 1987. The beneficiary claimed that both executors had failed to distribute the assets of each estate, to which she was entitled a 1/5 and 1/4 share respectively. The beneficiary asserted claims of breach of fiduciary duty and claims for damages for fraud, breach of contract, and negligence, and sought an equitable accounting, an equitable administration, appointment of a receiver and an order requiring the brothers to perform their duties. The Court of Appeals affirmed the superior court's granting of a motion to dismiss for lack of subject matter jurisdiction. On the breach of fiduciary duty claim, the Court noted that the claims were related to the administration of the parents' estate, a matter over which the probate court has "original, exclusive, and general jurisdiction" under OCGA § 15-9-30. The beneficiary claimed that the superior court had jurisdiction over her fraud claim and concurrent jurisdiction with the probate court over her claim for an accounting. The Court of

Appeals noted that superior courts are "reluctant to interfere with the administration of estates" and may only do so when there is no adequate remedy at law. The Court found that the beneficiary had failed to show that her remedies at law were inadequate. The Court pointed out that she could not seek an equitable accounting if an accounting at law is sufficient. They also noted that she had not shown any pending danger to her interests in the estates and thus could not ask the superior court to intervene. (OCGA § 29-2-91 allows equity to intervene in the administration of an estate upon application by a "any person interested in the estate where there is danger of loss or other injury to his interests.") The Court of Appeals stated, on her fraud claim, that a court that does not have equitable jurisdiction can nonetheless award damages for fraud. The Court of Appeals concluded that the superior court was correct in not exercising its concurrent jurisdiction because the probate court had jurisdiction over all of the beneficiary's claims.

On the issue of a probate court's jurisdiction over estate matters, see also, Greenway v. Hamilton, 280 Ga. 652, 631 S.E.2d 689 (2006), which is discussed elsewhere in this outline.

2. STANDING

a) Hilliard v. SunTrust Bank, 277 Ga. App. 544, 627 S.E.2d 77 (2006)

Testator wrote a will in 1991 in which he left all of his property in trust for his daughter. In 1997, he wrote a codicil in which he provided that all of his interest in drive-in restaurants he owned should be divided among his siblings. He died in 2002 and the daughter sought to have the bequest in the codicil held invalid. Her argument was that the bequest contravened he terms of a limited partnership agreement that the testator and his siblings had executed in connection with their operation of the restaurants. The partnership agreement required the purchase of the partnership interest of a deceased limited partner by the general partner. The trial court found that the testator's codicil was not barred by the agreement. The Supreme Court, however, stated that it did not need to reach that issue for the simple reason that the daughter lacked standing to enforce the agreement. The agreement was not intended for her benefit and consequently she did not fall into that small category of third parties who can enforce contracts.

b) AutoDoors, Inc. of Georgia v. Zivoluba, 277 Ga. App. 288, 626 S.E.2d 256 (2006)

The parents of a decedent sued his employer for wrongful death after the garage door he was cleaning fell on him and killed him. The trial court dismissed the parents' action on the ground that the parents were nonresident aliens. The Court of Appeals subsequently reversed that dismissal based on a 2005 Supreme Court case which had held that nonresident aliens do have standing in such cases. The administrator of the estate also sued for wrongful death under the theory that there was no other person to bring the lawsuit. OCGA Sec. 51-4-5 allows a personal representative to bring the suit if there is no surviving spouse, child, or parent of the decedent. The Court of Appeals affirmed the dismissal of the suit brought by the administrator for lack of standing. The

Court of Appeals based is conclusion on the fact that, now that it had been determined that the parents did have standing, they and not the administrator were the ones who were authorized by statute to bring the action.

3. ATTORNEY FEES

Bloodworth v. Bloodworth, 277 Ga. App. 387, 626 S.E.2d 589 (2006)

Two siblings, Jerome and Claud sued two other siblings, Henry and Eva Roy, claiming that their sale as co-executors of a farm to a fifth sibling was a breach of their fiduciary duty. The jury returned a verdict in favor of Jerome and Claud and the trial court rescinded the sale. Jerome and Claud were granted about $57,000 in attorney fees. The Court of Appeals reversed the grant of attorney fees. The trial court had granted the fees under OCGA Sec. 53-12-193(a)(4), which allows fees to be assessed against a "trustee who commits a breach of trust." However, the verdict form on which the jury had reported its verdict did not ask specifically whether the fiduciaries had breached their fiduciary duty. The plaintiffs had charged breach of duty, fraud, and tortious interference. The Court pointed out that at least one of these (fraud) could coincide with an arm's length transaction, and thus that the court could not on its own make findings that were not expressed on the verdict form. While the Court held that the defendants could not claim error based on the form because they had failed to object to it, the Court did find that the lack of specificity on the form precluded the award of attorney fees. The Court noted: "The better practice here would have been to draft a verdict form distinguishing between the causes of action presented to the jury."

4. TENDER REQUIREMENT IN RESCISSION CASES

Daly v. Mueller, 279 Ga. App. 168, 630 S.E.2d 799 (2006)

Daly sought to rescind the execution of a release on certain claims she had filed against Mueller individually and as executor of the estate of Daly's father. Daly claimed that Mueller had not disclosed information to her about the total value of the estate and of *inter vivos* gifts that the father had given Mueller and thus had fraudulently induced her into signing the release. Daly had received $22,500 in settlement of her claim. She refused to tender that amount back to the executor when she commenced the action to rescind her release on the ground that she would be entitled to more than that amount when the release was rescinded. Mueller filed a motion to dismiss based on the requirement of OCGA §13-4-60 that a party who seeks rescission of a contract must tender back any amount the party has received by virtue of the contract. The Court of Appeals affirmed the superior court's granting of Mueller's motion to dismiss. The court found that Daly's situation did not meet any of the exceptions to the tender requirement. The Court found that the $22,500 represented money paid for unliquidated claims of which liability and amount remained open questions. The Court said that it remained in dispute whether Daly would recover anything from these claims, let alone more than $22,500. Daly also contended that the fact that Mueller had closed the estate made a tender impossible. The Court disagreed, finding that Daly had three alternatives: 1) tender the money to Mueller individually; 2) tender the money to the probate court registry or to Mueller in her capacity as former executor; or 3) tender the money to the registry of the trial court.

5. REQUIREMENT TO FILE TRANSCRIPT ON APPEAL

a) LaFavor v. LaFavor, ___ Ga. App. ___, 2006 WL 3513634 (2006)

Devisees under a decedent's will filed actions to force the co-executors to make distributions as required by the will. In a hearing that was not transcribed, the probate court ordered one of the co-executors to distribute funds that he had withheld to satisfy a judgment that he had obtained in his individual capacity against one of the devisees. After another un-transcribed hearing, the court held him in contempt for not making the required distribution. The co-executor appealed but the Court of Appeals found that he had not carried his burden of showing error from the record. The co-executor claimed that the probate court should have ordered a transcript to be made. The Court of Appeals disagreed, pointing out that, under OCGA Sec. 5-6-41, a trial judge "may" order a transcript but that, in any event, it is the duty of the appellant to have a transcript prepared for purposes of appeal. The Court of Appeals also pointed out that the co-executor's argument that he should be allowed to satisfy his individual judgment against the devisee was without merit in that OCGA Sec. 53-7-40 provides that estate property shall be liable for claims against the estate, not for claims against devisees of the estate.

b) Adams v. Hebert, 279 Ga. App. 158, 630 S.E.2d 652 (2006)

In an appeal of a suit between an individual and the administrator of an estate, the individual did not file the transcript of the trial proceedings for over 150 days beyond the time the appeal was filed. The administrator moved to dismiss the appeal on this ground and the Court of Appeals affirmed the dismissal. The Court found the delay to be unreasonable and inexcusable. The appellant's attorney placed the blame on his office staff but the Court found that he had had the transcript in his possession at the time the appeal was filed. Further, the Court found the delay to be prejudicial in that it delayed the administrator's ability to administer the estate, including paying the heirs and the creditors in a timely fashion.

On this issue, see also Yetman v. Walsh, ___ Ga. App. ___, 2006 WL 3361949, which is discussed elsewhere in this outline.

6. FAILURE TO RE-INITIATE ACTION TO PROBATE WILL

Ward v. Morgan, 280 Ga. 569, 629 S.E.2d 230 (2006)

Co-tenants brought an action against another co-tenant, Johnny, seeking an accounting following the sale of timber. Johnny stated that he was the sole owner of the property by virtue of adverse possession. The land had been left to him by his mother in her will. She died in 1988. Johnny petitioned in 1989 to have her will admitted to probate but the probate court granted a continuance to allow the perfection of service on the mother's other heirs. In 2003, the co-tenants brought the case at bar, claiming that the mother had died intestate and that they, as heirs, were thus tenants in common with

Johnny. The Court found the following statute applicable to the action for the probate of the mother's will:

> **OCGA Sec. 9-11-41(e)** *Dismissal for want of prosecution; recommencement.* Any action in which no written order is taken for a period of five years shall automatically stand dismissed, with costs to be taxed against the party plaintiff. For the purposes of this Code section, an order of continuance will be deemed an order. When an action is dismissed under this subsection, if the plaintiff recommences the action within six months following the dismissal then the renewed action shall stand upon the same footing, as to limitation, with the original action.

The Court pointed out that Johnny could have renewed the action to probate his mother's will if he had done so within six months of the grant of the continuance. He failed to bring any further action and, in 2004, the petition was dismissed under the five-year rule. The Court concluded, thus, that the mother's will "has no validity whatsoever" in that a will is not effective to transfer property unless it has been admitted to probate. The Court found that the parties were tenants in common who were entitled to an accounting and that no questions of fact as to adverse possession remained open.

7. VENUE OF LAWSUIT AGAINST ESTATE

Banks v. City of Hampton, 280 Ga. App. 432, 634 S.E.2d 192 (2006)

Dixon and Banks were both killed in a car accident that resulted when Dixon tried to evade a traffic stop set up by a police officer in Hampton, which is located in

Henry County. Banks' administrator sued the city of Hampton and Dixon's estate as joint tortfeasors. Dixon's estate was insolvent. The suit was filed in Clayton County, which was the residence of the administrator of Dixon's estate. The City claimed that the fact of Dixon's estate's insolvency made that estate a "nominal party" only and succeeded in having the case moved to Henry County. A jury trial resulted in a hung jury. The administrator of Banks' estate renewed her motion to have the case transferred back to Clayton County, but her motion was denied. She filed an interlocutory appeal and the Court of Appeals agreed with her and reversed and remanded the case. The Court of Appeals, after examining both state and federal law, determined that a transfer of venue based solely upon the comparative wealth of the joint tortfeasors was not proper. The Court held further that a joint tortfeasor is not a "nominal party" for venue purposes merely because of insolvency.

8. SETTLEMENT AGREEMENTS

a) Oldham v. Self, 279 Ga. App. 703, 632 S.E.2d 446 (2006)

Two men who were best friends and business partners each owned $150,000 life insurance policies on the other's life. The business was dissolved informally after one of them twice attempted suicide. The third time, he succeeded in killing himself and the other partner, Oldham, collected the proceeds of the insurance policy. The decedent's girlfriend claimed that there was a buy/sell agreement between the parties and she contacted an attorney who then contacted Oldham. At a meeting, the girlfriend and her attorney discovered that no such document existed. At that same meeting, Oldham mentioned that he was considering setting aside $20,000 of the insurance proceeds in trust for the decedent's daughter (who was also the daughter of the girlfriend). The next day, the girlfriend's attorney told Oldham's attorney that she would not pursue any claims against the business if Oldham would in fact set aside the proceeds for the child. Later, the girlfriend's attorney sent Oldham a proposed revocable trust. Oldham objected to the girlfriend being named as a co-trustee but registered no other objections to the proposed trust. A month later, the attorney sent Oldham a second proposed trust with Oldham named as one of the co-trustees. This trust was irrevocable. Although the attorney believed that the trust was about to be signed, Oldham never signed it and the attorney was later informed that he had changed his mind about setting up the trust. The attorney wrote Oldham a strong letter. Eventually, after more wrangling between the attorneys, Oldham's attorney sent to the girlfriend's attorney a signed revocable trust that named Oldham as trustee. The girlfriend then filed an action alleging that Oldham had breached a legally enforceable agreement. After a mistrial, the second jury found in her favor. Oldham was denied a directed verdict and the Court of Appeals reversed that denial. The court found that no agreement had been reached between the parties as to whether the trust would be revocable or irrevocable. This was an essential term of the trust and, as there was no evidence of a meeting of the minds as to this term, there was no agreement to be enforced by the jury.

b) Freeman v. Covington, ___ Ga. App. ___, 637 S.E.2d 815 (2006)

The eight children of the decedent had litigated for several years over the management of the mother's estate. The mother had executed two purported wills, one in 1992 and one in 1996. The 1992 will named her mentally disabled daughter, Betty Jean King, as the sole beneficiary of her estate, which was to be held in trust for King by Covington, one of the other siblings. At King's death, the property was to be distributed among the siblings. The 1996 will bequeathed most of the mother's estate in fee simple to King (with a gift of $175 to be divided equally among the other children). The will also directed that King would be allowed to live on a trailer on the mother's property, which was not to be sold without King's express permission. If any of the mother's assets were sold, the first $200,000 was to go to King and any remaining proceeds were to be split among the other children. This will named other siblings, Freeman and DeFoor, as co-executors. At the mother's death, Covington (the son who had been named trustee in the 1992 will) sought to have that will admitted to probate. A group of the other siblings caveated the will. The caveat named King as a caveator. On the day of the trial, the feuding factions told the court that the parties had reached a settlement. The settlement provided that the money would be placed in a trust for King's benefit with Covington and Freeman to serve as co-trustees. The court held a hearing and approved the settlement, pursuant to OCGA Sec. 53-5-25. A few weeks later, Freeman sought to recover expenses incurred in connection with the preparation of estate assets for sale. The parties could not agree on a reimbursement amount, so the court conducted another hearing and issued a final order. The order stated that Freeman's claim for reimbursement had been waived by the settlement agreement. The Court of Appeals zeroed in on an issue that had been raised only briefly by the appellants. The issue was whether the agreement should be set aside because King and another sibling were not parties to the agreement and because no inquiry had been made by the court below as to whether King should have been represented by a guardian. King was not a named party to the settlement agreement. The attorney who represented the faction that had originally named King as a party to the caveat said that King had not been represented during the negotiations. The record contained no evidence that an inquiry had been made as to whether King required the appointment of an independent guardian to represent her interests in the proceedings. The Court of Appeals found the settlement agreement to be unenforceable. The court vacated the order below, remanded the case to the probate court, and ordered that an assessment be made as to whether King needed a guardian to represent her interests. (Note that the "guardian" that is being discussed in this case is not a "guardian" who is appointed under Title 29 for an incapacitated adult, but rather a type of guardian ad litem who must be appointed to represent the interests of persons who are unable to represent themselves, pursuant to OCGA Sec. 53-11-2.)

F. TRUSTS

1) WHO MAY SERVE AS TRUSTEE

<u>Chattowah Open Land Trust, Inc. v. Jones</u>, 281 Ga. 97, 636 S.E.2d 523 (2006)

The testator's will devised her residence and surrounding property "to the Chattowah Open Land Trust, Inc., for qualified conservation purposes, as defined in Section 170(h) of the Internal Revenue Code. ...." The will stated also that the testator intended "to bequeath [her] homeplace and the surrounding acreage to an organization which will maintain the property in perpetuity exclusively for conservation purposes within the meaning of Section 170(h) of the Code." She also left gardening equipment to the Land Trust for the purpose of maintaining the property. The Land Trust refused to accept an executor's deed that tracked the wording of the will and deeded the property to the Land Trust as trustee of a charitable trust for conservation purposes. The Land Trust instead wanted to receive the property outright. It argued that the conservation provisions would cloud the title. The Land Trust also argued that it was entitled to sell the property and retain a conservation easement rather than hold the property in trust in perpetuity. The co-executors petitioned for direction. The county district attorney (acting in place of the Attorney General, as allowed by OCGA Sec. 53-12-115) petitioned to have a successor trustee named to carry out the charitable purposes of the will. The Land Trust's attorney asked for and received two extensions of time to file briefs but still failed to respond. The day before the hearing, the attorney requested a continuance in a handwritten note to the court. He was fired that day by the Land Trust but was not replaced before the hearing. In the hearing the director of the Land Trust attempted to address the probate court on behalf of her organization, but the court did not allow her to as she was not a licensed attorney. The court refused to continue the hearing. The court ruled that a charitable trust had been unambiguously created by the testator's will and thus that there was no need to consider extrinsic evidence. The court determined that the Land Trust's rejection of the executor's deed amounted to a renunciation of the trusteeship. The court appointed the Board of Commissioners of Cobb County as trustee. The Land Trust appealed. The Supreme Court affirmed the holdings of the probate court. The Supreme Court found that the probate court had not erred in refusing to postpone the hearing. The only petition for a continuance had been filed by the attorney who was fired and it did not contain any of the representations required by OCGA Sec. 9-10-155 (e.g., the illness or absence of counsel from "providential cause"). The Supreme Court agreed with the probate court that the will contained unambiguous language establishing a charitable trust. The Supreme Court pointed out that the bequest of the gardening equipment served as additional evidence that the testator wanted the Land Trust to retain and maintain the property. The fact that the terms "trust" and "trustee" were not used was irrelevant. (OCGA Sec. 53-12-21, which was not cited by the Supreme Court, provides: "No formal words are necessary to create an express trust.") The clarity of the language precluded the admission of extrinsic evidence. The Supreme Court disagreed with the Land Trust's contention that its rejection of the proffered deed did not amount to a renunciation of the trust. The Supreme Court found that the Land Trust's contentions ran counter to its own statements in the pleadings it had filed. The Supreme Court then went on to examine whether the Land Trust even had the "capacity" to serve as a trustee in Georgia in that it may have lacked the power to act as a trustee in this state. The Supreme Court cited OCGA Sec. 53-12-24(a), which states that a corporation that wishes to act as trustee "must have the power to act as a trustee in Georgia." OCGA Sec. 7-1-242 provides that only certain corporations or business entities may act as a fiduciary in Georgia. These are basically banks, trust companies, and other financial institutions. The Supreme Court pointed out that the Land Trust had never received approval to act as a bank or trust company, as set forth in OCGA Sec. 7-1-392 et. seq. The Supreme Court did not mention another important provision of the Georgia Code, OCGA Sec. 14-3-302(9). This provision allows a non-profit corporation "[t]o be a promoter, *fiduciary*, shareholder, partner, member, associate, or manager of any partnership, joint venture, *trust*, or other entity ...." Finally, the Land Trust argued that the Board of Commissioners should not have been appointed successor trustee because at some point in the future the Board might find itself in a conflict of interest position. The Land Trust speculated that the Board might at some point decide to widen parts of a road that abuts the property. The Supreme Court found this speculation over future events to be irrelevant to the Board's appointment as trustee.

2) WHO HAS STANDING TO SUE FOR REMOVAL OF TRUSTEE

Richards v. Richards, ___ Ga. ___, 637 S.E.2d 762 (2006)

James Richards established a trust for his three minor children in 1994. His then-wife, Janet, was a co-trustee. The trust provided that the children were to receive all the income and that the trustee could encroach on the principal in amounts that the trustee should deem "necessary to provide for [their] support and education." James and Janet divorced in 2000. The spouses' divorce agreement set a monthly child support amount that was based on their anticipation that the trust funds would be "sufficient to cover any expenses of the children incurred above and beyond the child support...." Janet ceased to be a trustee of the trust and, when Richards remarried, his new wife became a trustee. Janet filed suit against Richards and his new wife, claiming on behalf of herself and her children that they had breached the trust agreement. She asked that they be removed as trustees and a receiver be appointed. The court appointed a guardian ad litem to represent the children. The Richards moved for summary judgment against Janet on the ground that she was not an "interested person" and thus lacked standing to maintain the suit in her individual capacity. The trial court granted the motion and the Supreme Court affirmed. The Supreme Court looked to OCGA Sec. 53-12-2 to determine who constituted an "interested person" and thus had standing to petition for the removal of a trustee under OCGA Sec. 53-12-176. OCGA Sec. 53-12-2(4) provides in part that an "interested person" means "a trustee, beneficiary, or any other person having an interest in or claim against the trust...." Obviously Janet was not a trustee or beneficiary. She asserted that she had a "claim against the trust" because she had provided funds to support her children in lieu of the trust funds. She framed her claim as one for reimbursement from the trust based on the agreements made by the parties in the divorce settlement. The Supreme Court focused its opinion first on the right to child support. The court noted that that right belongs to the children rather than the parent. The Supreme Court also pointed out that Janet could seek a modification of the child support amount if she found that the specified amount, when combined with whatever monies were distributed from the trust, was inadequate to meet the children's needs. The Supreme Court also observed that the trustees had not neglected their obligation to pay all of the income to the children. The court finally engaged in a "floodgates" explanation of why it had prohibited Janet from suing for the trustees' removal. The court explained:

> Under [Janet's] interpretation, anyone could attain the status of an "interested person" and, consequently, obtain standing to maintain an action for removal of the trustee simply by expending sums for the support of a trust beneficiary.

The Court cited a Minnesota case and a Texas case for its conclusion that "an interested person is more accurately defined as a person or entity with a specific financial stake in or a specific claim against a trust."

Justice Hunstein wrote a special concurring opinion. She noted first that the trust was a non-discretionary trust (at least as it related to the income payments) in which the children had vested interests. Citing Henderson v. Collins, 245 Ga. 776, 26 S.E.2d 202 (1980), she pointed out that the creditor of a trust beneficiary can proceed against that beneficiary's interest if the interest is vested and non-discretionary. She added that the law also allows a creditor who has provided necessaries to a minor to obtain reimbursement in some circumstances (citing OCGA Sec. 13-3-20). She concluded that a person can in fact be an "interested person" by virtue of having expended sums for a beneficiary. Justice Hunstein also registered her disagreement with the majority's interpretation of the OCGA Sec. 53-12-2(4) definition of "interested person." She emphasized the second segment of that statute, which provides that the statutory "meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." She chastised the majority for using cases from foreign jurisdictions that ignored the "guiding principles found in our statute." Justice Hunstein disagreed with the majority finding that Janet could not be an interested party if her contention was based on her claim against the trust for expenses she had paid on behalf of her children. However, Justice Hunstein voted with the majority because she found that Janet herself had precluded her recovery by framing her claim as one that was founded in the divorce settlement agreement rather than in the trust agreement. Had she framed her claim as one that was based on her interest in receiving the income payments on behalf of the children, it is clear that Justice Hunstein would have indeed found her to be an "interested person."

3) IMPLIED TRUSTS

In re Estate of Thornton, 275 Ga. App. 202, 620 S.E.2d 410 (Aug. 2005)

In 1980, Wilburn Thornton bought a home and titled it in the name of his wife, Barbara. The couple sold that house and in 1996 purchased another home, again putting title in Barbara's name. Barbara Thornton died in 1998 and Wilburn Thornton was appointed administrator of her estate by agreement of her two children from a previous marriage and the guardian ad litem of a child from her marriage with Wilburn. Wilburn Thornton subsequently transferred title in the home to his own name and the children from Barbara Thornton's first marriage sued him in probate court for mismanagement of their mother's estate. Mr. Thornton died in 2002 and one of the children replaced him as executor of their mother's estate. The probate court found that he had mismanaged the estate but said that the superior court had jurisdiction to award damages. The superior court held that Mr. Thornton had mismanaged the estate but that *his* heirs had the right to a one-half interest in the home pursuant to a "purchase money resulting trust." A purchase money resulting trust is "a resulting trust implied for the benefit of the person paying consideration for the transfer to another person of legal title to real or personal property." (OCGA §53-12-92.) Apparently, the superior court thought that such a trust arose when Mr. Thornton paid for the house but put title in Mrs. Thornton's name, such that Mrs. Thornton was holding the house only as a "trustee" for him. Mrs. Thornton's children appealed, claiming that the superior court exceeded its jurisdiction in imposing the trust and that it was improper to impose such a trust. The Court of Appeals found that the superior court had not exceeded its jurisdiction but agreed with Mrs. Thornton's children that a purchase money resulting trust should not have been imposed. The Court cited Brock v. Brock, 279 Ga. 119, 610 S.E.2d 29 (2005) and OCGA § 53-12-92(c) for the proposition that a payment of consideration by one spouse, with title being placed in the name of the other spouse, creates a presumption that the purchasing spouse made a gift to the other spouse. This presumption may be overcome only by clear and convincing evidence. The Court pointed out that there was no evidence to rebut the presumption of gift, and particularly that there was no evidence that there was some understanding contemplated by the two spouses that Barbara Thornton would hold the property in a resulting trust. The Court noted that, under the Georgia intestacy laws, Mr. Thornton was entitled to 1/3 of Mrs.

Thornton's estate and her children were entitled to the other 2/3 of her estate. The Court remanded the case to the superior court for a determination of damages.

4. BREACH OF FIDUCIARY DUTY: TRUSTEE

a) Wachovia Bank v. Namik, 275 Ga. App. 229, 620 S.E.2d 470 (2005); Namik v. Wachovia Bank of Georgia, 279 Ga. 250, 612 S.E.2d 270, (2005), reversing Wachovia Bank of Georgia v. Namik, 265 Ga. App. 80, 593 SE2d 35 (2003) (cert. granted, May, 2004)

First Court of Appeals Opinion: 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. The trial court awarded Namik damages in the amount of $1,118, 710.

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 nonresident 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.

Vacated Supreme Court Opinion: The Supreme Court reversed the judgment of the Court of Appeals and remanded the case. In that original opinion of the Court, issued in February, 2005, it had apparently escaped the notice of the Supreme Court that the trust instrument incorporated the Georgia trustee powers by reference. The original opinion said that the trust was "silent" and "ambiguous" as to the investment vehicles and then proceeded to state that this "incomplete provision" may 'helpfully be contrasted to that in *Thomas v. Wood*, 228 Ga. 206, 209 (184 SE2d 561) (1971),where a trustee 'was empowered to sell, exchange or otherwise dispose of the trust property at public or private sale for cash or on terms; to retain, sell, invest and reinvest in any stocks, bonds, securities or other property, real or personal, which he deemed proper, necessary or expedient, without any responsibility for the exercise of his discretion except that of using ordinary care and without being confined to legal investments.'" The language the Court quoted bore a striking resemblance to the language in O.C.G.A. § 53-12-232(3). The Supreme Court issued its first opinion in February, 2005 but then granted a motion for reconsideration.

Second Supreme Court Opinion: 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.

Court of Appeals' Opinion on Remand: On remand and in light of the Supreme Court's decision, the Court of Appeals examined whether Namik should have been awarded damages in an amount greater than the $1,118,710 that had been awarded at trial. The Court of Appeals determined that the damages awarded at trial were appropriate, after considering the following:

a) Namik reasserted that the bank should have invested all of his father's funds in long-term government securities (over 183 days) and thus have avoided paying any estate taxes, as all of these investments would have been considered non-U.S.-situs assets for estate tax purposes. The Court of Appeals refused to accept this argument and reiterated the trial court's findings that the bank was liable only for one-half of the estate taxes incurred. The Court of Appeals supported the trial court's determination that 1) due to legitimate liquidity concerns, the bank never would have invested all of the trust funds in long-term treasury bills, even if it had been aware of the IRS regulation; and 2) the IRS had not issued its later-released Technical Advice Memorandum clarifying the 183-day rule until after 1989, the year in which General Ali died.

b) Namik also challenged the trial court's finding that he, as beneficiary, had a duty to mitigate the damages that resulted from the bank's breach of fiduciary duty and contract. The Court of Appeals agreed with the trial court that Namik had failed in his duty to mitigate damages by 1) delaying for two years to report his father's death to the bank; and 2) failing to follow the bank's advice to probate his father's will in a timely matter. (The will was not actually probated until 1996.) These delays had, among other things, caused the estate to incur an additional $500,000 in interest for overdue estate taxes.

> I) As to the action for breach of fiduciary duty, the Court of Appeals affirmed the trial court's statement that, in Georgia, such actions lie in tort and thus carry with them the requirement for mitigating damages unless the tort is "positive and continuous". The Court of Appeals agreed with the trial court that the bank's breach was not a "positive" tort because it was neither fraud nor an ongoing violation of property rights nor an

intentional tort. In addition, Georgia courts have held that the duty to mitigate applies even in the case of "reckless" acts.

ii) As to the action for breach of contract, the Court of Appeals noted that Georgia statutory and case law require the injured party to mitigate damages by the use of "ordinary care and diligence." Again, the Court noted that Namik met none of the three exceptions to the duty to mitigate damages in contract claims. The three exceptions are: fraud; breach of an express warranty; and an "absolute promise to pay."

c) Namik finally challenged the trial court's failure to award him attorney's fees and to require the bank to disgorge all of the trustee fees it had earned. (The trial court had required a disgorgement of only one-half of the trustee fees.) The Court of Appeals discussed the fees issue even though it found that Namik had abandoned the issue by failing to provide any argument or authority for his theory in his enumerations of error. The Court of Appeals tied this issue back to the finding that the bank had breached its duty only as to one-half of the trust assets. The Court noted that a trial court may award either full compensation or any reduced level of compensation for a breach of fiduciary duty and found that the trial court had properly exercised its discretion. As to the attorney's fees, the Court of Appeals disagreed that a breach of fiduciary duty was synonymous with the type of "bad faith" that merits an award of attorney's fees. The Court of Appeals agreed with the trial court's finding that the bank "did not act in bad faith, was not stubbornly litigious, and did not cause Plaintiffs unnecessary trouble and expense." The Court of Appeals also noted that OCGA §53-12-193 does not mandate an award of attorney's fees when a fiduciary duty is breached but merely lists that as one possible remedy.

In addition to the question of the sufficiency of the damages, Namik on remand asked the Court of Appeals to re-examine the trial court's finding that there exists in Georgia a cause of action in tort for a bank's failure to follow a customer's instructions. Namik cited to this effect *Wachovia Bank of Georgia v. Reynolds*, 244 Ga. App. 1, 533 S.E.2d 743 (2000). The Court of Appeals agreed with the trial court that the facts and issues in the *Reynolds* case were distinguishable from those in the instant case and did not give rise to such a tort cause of action.

G. GIFTS

Hayes v. Hayes, 279 Ga. 741, 620 S.E.2d 806 (2005)

During his divorce proceedings, Mr. Hayes tried to declare certain property as separate rather than marital property. At issue were cash gifts that were given to the couple to help them make a down payment on and improve the marital home. The cash was given them by the parents of Mr. Hayes. Each parent gave a check for $10,000 to each member of the couple. The gifts were structured to take advantage of the $10,000 per person per year annual exclusion for federal tax purposes. During the divorce, Mr.

Hayes tried to characterize the $20,000 checks given to his wife as his own separate property. The trial court allowed this characterization but the Supreme Court reversed. The Supreme Court said that the testimony of the husband and his father indicated that the parents had engaged in a "sham transaction" by giving the money to the wife in order to "camouflage the actual tax situation." The Court refused to apply equitable principles to relieve the parties from the chosen structure of their gifts.

H. NON-PROBATE ASSETS

a) Gray v. Benton, 280 Ga. App. 339, 634 S.E.2d 86 (2006)

The decedent in this case had his two daughters, who were half-sisters, added to his checking account. Initially he had added only one daughter, Gray, for the purpose of allowing her to take over his finances. Later, he added Benton also. The purpose of this addition, according to testimony about a meeting the three had had, was to allow both the daughters to "help with his finances." When he died, one of the daughters, Gray, was appointed executor of the decedent's estate. Two weeks after his death, the other daughter, Benton, withdrew half of the money in the account. Gray sued her, on behalf of the estate, for conversion of the estate's assets. The trial court granted summary judgment in favor of Benton. The Court of Appeals reversed the grant of summary judgment, stating that a jury could, based on the evidence, find that Benton had been added to the account solely for his convenience. The court cited OCGA Sec. 7-1-813(a), which states that sums remaining when one party to a joint account dies belong to the other parties "unless there is clear and convincing evidence of a different intention at the time the account is created." The court found that a jury should determine whether the father had intended to make a gift of the remaining sums to his daughters or had set up the account as a joint account solely in order to allow them to handle his finances.

b) Jenkins v. Jenkins, 281 Ga. App. 756, 637 S.E.2d 56 (2006)

In this case, the Court of Appeals was called upon to examine joint accounts set up by a mother who had eight children. She had set up separate accounts jointly with her daughters Sarah and Miriam. A checking account on which Sarah was named had been opened after the children's father had died and when Sarah was still living with her mother. The reason the account was opened, according to Sarah, was so that Sarah could pay her mother's bills should her mother be unable to do so. Sarah did not contest the fact that this had been the purpose of the account and the Court of Appeals found that evidence supported a jury's finding that the sums remaining in this account ($1700) belonged to the mother's estate. The other accounts, however, were more complicated. In 1999, the DOT condemned the house in which Sarah and her mother lived so they moved in with Miriam. The DOT apparently would only issue the condemnation payments to one person, so the children signed quitclaim deeds or affidavits releasing to their mother their portion of the proceeds. Two of the sons also signed a document indicating that the proceeds were to be used only to build a house for their mother and that the house was to be deeded to their father's estate upon her death. However, the evidence did not indicate that the mother had agreed to this arrangement. The condemnation proceeds were deposited in a certificate of deposit and a money market account, both set up as joint tenants with right of survivorship with Sarah. The application form for the CD had contained the option "Joint Account – No Survivorship" but the option "Joint Account – With Survivorship" had been checked. The bank employee who had set up the accounts was certain that the mother had told her exactly what she wanted. As to the account with Miriam (which was set up with money received by the mother from her mother's estate), the bank employee at Wachovia was equally certain that he had discussed the options with the mother and that she had made it clear that she wanted Miriam to be on the account with her. That application also contained options for "survivorship" or "no survivorship."

When the mother died, five of her children sought to have constructive trust simposed on the remaining deposits in all of the joint accounts. The jury decided that constructive trusts should be imposed on all of the joint accounts. As noted above, the Court of Appeals found that the evidence supported the imposition of a constructive trust on the checking account that was set up with Sarah for her mother's convenience. As to the accounts that held the condemnation proceeds, the court found that there was no evidence to support the imposition of a constructive trust. The court cited Georgia statutory law, OCGA Sec. 53-12-93, to the effect that a constructive trust can be imposed when "the person holding legal title to the property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." The court pointed out that, with regard to real property, the Statute of Frauds demands that all agreements relating to that property be in writing and that a constructive trust cannot be imposed based solely on an oral promise to hold or transfer the property to another that is later broken. On the other hand, a trust can be imposed if the promise from the outset was fraudulently made with the intent of obtaining title to the land. The court found that, despite any oral agreements that may have been made between the children and their mother about the condemnation proceeds and the quitclaim deeds, the documents revealed no evidence that the mother had made any promise to them with the intent to deprive them fraudulently of their rights to the property and its proceeds. In addition, the court found no evidence to indicate that, when the mother deposited the proceeds in joint accounts with Sarah, "she meant to do anything other than that." The same approach was used in determining that the joint account that the mother had set up with Miriam was meant to be a joint account with survivorship. The court noted that the fact that Miriam herself had at one time made statements that the funds in the account belonged only to the mother was irrelevant; the intent of the mother, not Miriam, was the determinative issue.

See also, Greenway v. Hamilton, 280 Ga. 652, 631 S.E.2d 689 (2006), which is discussed elsewhere in this outline.

I. GUARDIANSHIPS AND CONSERVATORSHIPS

Yetman v. Walsh, ___ Ga. App. ___, 2006 WL 3361949

Yetman's daughter and son-in-law petitioned to be appointed conservators of her estate. The probate court held a hearing and found that clear and convincing evidence existed that Yetman was in need of a conservator because she lacked the capacity to make significant, responsible decisions as to the management of her property. The evidence included discrepancies in Yetman's own testimony, evidence of her impaired judgment, impaired vision, and other physical frailty. The evidence also indicated that Yetman was vulnerable to a new person who had moved into her household. Yetman challenged the sufficiency of this evidence. However, she neglected to include a transcript of the hearing in the appellate record so the Court of Appeals was forced to conclude that the evidence was sufficient to support the judgment. In her appeal, Yetman also complained that the probate court had erred when it had concluded in a pre-trial order that there was probable cause to believe that Yetman was in need of a conservator. In order to avoid unnecessary and meritless hearings on such matters, the Georgia Code requires the probate judge, upon the filing of a petition for conservatorship, to make an initial assessment of the petition and any accompanying evaluation in order to determine whether there is probable cause for continuing the process. OCGA Sec. 29-5-23(a). Yetman claimed on appeal that the petition and evaluation in her case had not shown probable cause. The Court of Appeals, however, found that her contention was not reviewable once a trial had occurred which had in fact shown that the evidence supported the imposition of the conservatorship. The Court of Appeals found that any error in the pre-trial ruling was "harmless if not moot."

J. ATTORNEY MATTERS

<u>Rolleston v. Estate of Sims</u>, 280 Ga. 32, 622 S.E.2d 849 (Nov. 2005)

This case follows a series of cases involving the Moreton Rolleston Living Trust and suits levied against it by the Estate of Randolph Cherry Sims. This case is an appeal from a judgment in the estate's favor in which the Trust was unsuccessful in asserting that claims against real property were not subject to levy because the title to the property was held by the Trust rather than by Moreton Rolleston individually. The Supreme Court found that all the issues raised in the appeal had been conclusively resolved against the Trust in previous actions. The Court levied a $2500 frivolous appeal penalty against the Trust and the Trust's attorney. In addition, Chief Justice Sears wrote a stinging special concurrence in which she called Mr. Rolleston's conduct "frivolous and reprehensible." She added: "In my opinion, however, Mr. Rolleston has also disgraced the legal profession generally and has thereby forfeited the privilege of practicing law in this State. Accordingly, this Court should utilize its inherent authority to order that he be disbarred."

K. ANNA NICOLE SMITH

In Marshall v. Marshall, 126 S. Ct. 1735 (May 1, 2006), the Supreme Court of the United States held that the Bankruptcy Court had jurisdiction to decide a widow's claim against her stepson for tortious interference with a promised gift, despite the so-called "probate exception" to federal jurisdiction. This exception, which is neither Constitutional nor statutory but rather a judicial creation, provides that the federal courts will generally not take jurisdiction over matters involving the probate and administration of estates or property that is under the control of a state probate court.

In this case, the widow, Vickie Lynn Marshall (aka Anna Nicole Smith) claimed that, although her husband did not provide for her in his will, he had intended to provide for her a substantial gift in the form of a "catch-all" trust. She claimed that her stepson had tortiously interfered with this gift. While proceedings on the decedent's estate were pending in the Texas probate court (which were later decided in the son's favor), the widow filed for bankruptcy. About the same time, the stepson claimed that she had defamed him by charging him publicly with fraud and forgery and he sought to have the Bankruptcy Court declare that his defamation claim was not dischargeable in bankruptcy. The widow claimed truth as her defense and filed a counter-claim and thus it fell to the Bankruptcy Court to decide whether she had a valid claim for tortious interference. The Bankruptcy Court ruled in her favor and awarded her $44.3 million in compensatory damages and an equal amount in punitive damages. The son filed a post-trial motion for lack of subject matter jurisdiction. The Bankruptcy Court denied his motion, noting that the so-called "probate exception" did not apply if the federal court's ruling would not interfere with proceedings in the state probate court. The Ninth Circuit construed the probate exception expansively and held that it applied in this case. The Supreme Court disagreed and stated that the Bankruptcy Court had properly exercised jurisdiction. Justice Ginsberg, writing for a unanimous court, stated that the probate exception is an extremely narrow one of distinctly limited scope. She noted that the widow's claim did not involve an estate administration matter or the probate or annulment of a will. Justice Ginsberg addressed the fact that the Texas courts had ruled that Texas probate courts have "exclusive jurisdiction" over claims relating to tortious interference with an inheritance at the same time that these courts recognized this type of cause of action. Justice Ginsberg said that a state court cannot create a "transitory cause of action" and declare that the state court has exclusive jurisdiction because long-established federal precedent provides that a state, while it can establish jurisdiction within its own court system, cannot declare exclusive jurisdiction and thus rob a federal court of jurisdiction, whether by legislation or judicial action. Justice Stevens, in a concurring opinion, wrote that he disagreed completely with the notion that a "probate exception" even existed and said that he would like to have provided that exception with a "decent burial."

II. GEORGIA LEGISLATION - 2006

1) Guardianship "Technical Corrections" Bill (SB 534)

As passed, 2006 (Section references are to sections of SB 534)

The proposed legislation is designed primarily to correct typographical and similar errors to the revised Guardianship Code of 2005 (Title 29), which was enacted by the General Assembly in 2004 and became effective July 1, 2005. The proposed legislation also includes substantive amendments to the Georgia Code that relate to guardianship law.

The proposed legislation contains substantive amendments to Titles 10, 29 and 53 of the Georgia Code. The substantive amendments are as follows:

a) Change the language of the statutes in Title 10 that relate to financial powers of attorney to reflect the new terminology of the Guardianship Code of 2005; (Sections 1 & 2)

b) Reinstate provisions that appeared in Title 29 prior to the 2005 revision of the Guardianship Code that relate to the court in which a temporary guardianship petition can be filed, so that the petition can be filed in the county in which the minor is found if the petitioner is not a domiciliary of a Georgia county; (Section 3)

c) Reinstate provisions that make the conservator of a minor or ward who dies intestate the *ex officio* administrator of the minor's or ward's estate, but only if the county administrator or guardian is serving as the administrator. (Under the former law, this would apply no matter who was serving as guardian of the property). (Sections 9, 15)

d) Reinstate provisions that appeared in Title 29 prior to the 2005 revision of the Guardianship Code that relate to the allocation of expenses of hearings on adult guardianship and conservatorship petitions; (Sections 11, 14)

e) Raise the amount of funds that a probate judges can hold as custodian for minors and incapacitated adults (under Title 29),and missing heirs or beneficiaries (under Title 53) from $2500 to $15,000 (under Title 29) and to an unlimited amount under Title 53; (Sections, 16, 17, 22)

f) Delete the provision relating to bonds of public guardians that allowed "any person aggrieved by the misconduct" to bring an action on the public guardian's bond; (Section 21)

g) Change the reference in Title 53 to the compensation of trustees so that it reflects the compensation of "conservators" rather than guardians. (Section 23)

2) **Insurable Interest Legislation**

In response to questions raised by the federal district court in *Chawla v. Transamerica Occidental Life Insurance Company*, 2005 Wl 405405 (E.D. Va., 2005), the Fiduciary Law Section recommended the following bill to clarify that a trustee or corporation has an insurable interest in certain individuals. The district court in *Chawla* held, among other things, that a life insurance trust did not have an insurable interest in the life of the settlor. (In *Chawla v. Transamerica Occidental Life Insurance Company*, 440 F.3d

639 (4th Cir. 2006), the Court of Appeals for the Fourth Circuit affirmed the district court's finding on other grounds and thus did not reach the insurable interest issue.) The relevant portions of the new law are as follows:

HB 1484 (as passed) Effective July 1, 2006

SECTION 1.

Title 33 of the Official Code of Georgia Annotated, relating to insurance, is amended by striking Code Section 33-24-3, relating to insurable interest of personal insurance, and inserting in its place the following:

"33-24-3.

(a) An insurable interest, with reference to personal insurance, is an interest based upon a reasonable expectation of pecuniary advantage through the continued life, health, or bodily safety of another person and consequent loss by reason of such person´s death or disability or a substantial interest engendered by love and affection in the case of individuals closely related by blood or by law.

(b) An individual has an unlimited insurable interest in his or her own life, health, and bodily safety and may lawfully take out a policy of insurance on his or her own life, health, or bodily safety and have the policy made payable to whomsoever such individual pleases, regardless of whether the beneficiary designated has an insurable interest.

(c) The trustee of a trust established by an individual settlor has an insurable interest in the life of that individual settlor and has the same insurable interest in the life of any other individual as does such individual settlor. The trustee of a trust has the same insurable interest in the life of any other individual as does any beneficiary of the trust with respect to proceeds of insurance on the life of such individual or any portion of such proceeds that are allocable to such beneficiary´s interest in such trust. If multiple beneficiaries of a trust have an insurable interest in the life of the same individual, the trustee of such trust has the same aggregate insurable interest in such individual´s life as such beneficiaries with respect to proceeds of insurance on the life of such individual or any portion of such proceeds that is allocable in the aggregate to such beneficiaries´ interest in the trust.

(d) A corporation, foreign or domestic, has an insurable interest in the life of any individual:

(1) Holding at least 10 percent of the issued and outstanding shares of such corporation; or

(2) In whom the shareholders holding a majority of the issued and outstanding shares have an insurable interest, whether arising out of their status as shareholders of the corporation or otherwise,

and in the life or physical or mental ability of any of its directors, officers, or employees or the directors, officers, or employees of any of its subsidiaries or any other person whose death or physical or mental disability might cause financial loss to the corporation; or, pursuant to any contractual arrangement with any shareholder concerning the reacquisition of shares owned by him or her at the time of his or her death or disability, on the life or physical or mental ability of that shareholder for the purpose of carrying out such contractual arrangement; or, pursuant to any contract obligating the corporation as part of compensation arrangements or pursuant to a contract obligating the corporation as guarantor or surety, on the life of the principal obligor. The trustee of a trust established by a corporation for the sole benefit of the corporation has the same insurable interest in the life or physical or mental ability of any person as does the corporation. The trustee of a trust established by a corporation providing life, health, disability, retirement, or similar benefits to employees of the corporation or its affiliates and acting in a fiduciary capacity with respect to such employees, retired employees, or their dependents or beneficiaries has an insurable interest in the lives of employees for whom such benefits are to be provided. As used in this subsection, the term 'employee' shall include any and all directors, officers, employees, or retired employees. The term 'employee' shall include any former employee, but only for the purpose of replacing existing life insurance that will be surrendered in exchange for new life insurance in an amount not exceeding the insurance being surrendered.

(e) The insurable interest of a corporation or trustee which has been established pursuant to subsection (d) of this Code section shall be conveyed automatically to another corporation or to the trustee of a trust established by such other corporation for its sole benefit which has acquired by purchase, merger, or otherwise all or part of the first corporation’s business. A corporation or the trustee of a trust established by such corporation for its sole benefit may exchange any policy of insurance issued to itself or to another corporation or the trustee of a trust established by such other corporation for its sole benefit from which the exchanging corporation has acquired by purchase, merger, or otherwise all or part of such other corporation´s business for a new policy of insurance issued to itself without establishing a new insurable interest at the time of such exchange.

(f) A shareholder in a corporation has an insurable interest in the life of any other shareholder pursuant to any contractual arrangement between or among such shareholders concerning the purchase by surviving shareholders of shares owned by a deceased or disabled shareholder, for the purpose of carrying out such contractual arrangement.

(g) A partnership, limited liability company, business trust, or other business entity established under the laws of any state or of the United States shall have the same insurable interests as a corporation, as set forth in subsections (d) and (e) of this Code section, including, without limitation, insurable interests in such entity´s partners, members, or holders of other equity ownership interests and in officers, directors, employees, and those of any subsidiaries of any such entity. The partners of a partnership, the owners of a limited liability company, and the owners of equity interests in any form of business entity have the same insurable interest in the lives of the other partners, members, or equity interest owners as do shareholders of corporations.

(h) An insurable interest must exist at the time the contract of personal insurance becomes effective but need not exist at the time the loss occurs.

(i) Any personal insurance contract procured or caused to be procured upon another individual is void unless the benefits under the contract are payable to the individual insured or such individual´s personal representative or to a person having, at the time when the contract was made, an insurable interest in the individual insured. In the case of a void contract, the insurer shall not be liable on the contract but shall be liable to repay to the person or persons who have paid the premiums all premium payments without interest.

(j) A charitable institution as defined under Sections 501(c)(3), 501(c)(6), 501(c)(8), and 501(c)(9) of the Internal Revenue Code of 1986 shall have an insurable interest in the life of any donor.

<u>(k) The insurable interests set forth in this Code section are not exclusive but are cumulative of and not in lieu of insurable interests existing in common law and not expressly set forth in this Code section. No part of this Code section specifically recognizing any insurable interest shall create any presumption or implication that such insurable interest did not exist prior to July 1, 2006. To the contrary, an insurable interest shall be presumed with respect to any life insurance policy issued prior to July 1, 2006, to any person whose insurable interest is recognized in this Code section."</u>

3) **Bill Relating To Living Wills**

Attempts were made during the session to revise the statutory form of the living will to make it easier for users of the form to make a choice relating to the provision of nutrition and hydration at the end of life. These amendments made through many last minute changes with the result that the bill that was passed inadvertently restricted the uses to which a living will could be put. At the request of the sponsors, the bill was vetoed by the Governor. A committee convened at the request of Representative Steve ("Thunder") Tumlin convened a committee of academics, lawyers, nurses, doctors, hospice nurses, and representatives of a variety of interest groups to put together a new Georgia Advance Directive for Health Care form. A description of the proposed revisions, which appear in HB 24 (2007), is attached at the end of this outline.

4) **Emancipation Statute** (HB 847) (effective July 1, 2006)

An extensive statute relating to the conditions under which a minor is emancipated was enacted in 2006. Among other things, the new law prohibits minors who are age 16 or under to marry under any circumstances. Individuals age 16 or 17 may marry only with parental consent even if the female is pregnant or the male is the father of an unborn child. The new bill is relevant to Chapters 2 & 3 of Title 29 of the Georgia Guardianship and Conservatorship Code, which defines a "minor" as an individual who is under the age of 18 and is not emancipated.

5) **Medicaid Estate Recovery** (SB 572) (effective May 3, 2006)

This amendment to the Medicaid Estate Recovery rules:

1) delays Medicaid estate recovery to cover only payments made by Medicaid after the effective date of the new law;

2) allows heirs to repay Medicaid payments in installments;

3) allowed the state to waive recovery against the first $100,000 of an estate to "prevent substantial and unreasonable hardship."

The waiver of the first $100,000 was rejected by the Centers for Medicare and Medicaid Services in July, 2006. Georgia's former rule (that estates of $25,000 or less are exempt from recovery) will govern these situations.

III. PROPOSED LEGISLATION - 2007

Georgia Advance Directive for Health Care Act

HB 24 Rep. Steve Tumlin (38^{th}); Keown, Mike (173^{rd}); Freeman, Allen (140^{th}); Oliver, Mary Margaret (83^{rd}); Dempsey, Katie (13^{th})

(Prefiled 12/13/06)

To amend Title 31 of the Official Code of Georgia Annotated, relating to health, so as to provide for an advance directive for health care which combines provisions of a living will and a durable power of attorney for health care; to provide for legislative findings; to provide for a short title; to provide for definitions; to provide for a savings clause for a living will and a durable power of attorney for health care; to provide for a form; to provide for execution, use of a form or other forms, amendment, and witness requirements; to provide for revocation, the effect of marriage, and guardianship; to provide for duties and responsibilities of health care agents and health care providers; to provide for conditions precedent to carrying out health care treatment preferences and a physician´s responsibilities; to provide for immunity; to provide for the effect of an advance directive for health care on criminal and insurance laws; to provide for penalties; to provide for the effect of Chapter 32 of Title 31 on other legal rights and duties; to repeal and reserve Chapter 36 of Title 31, relating to a durable power of attorney for health care; to correct cross-references; to provide for related matters; to provide for an effective date; to repeal conflicting laws; and for other purposes.