RECENT DEVELOPMENTS

IN

GEORGIA FIDUCIARY LAW

AND

HIGHLIGHTS OF THE WEALTH TRANSFER TAX PROVISIONS

OF THE

ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT

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A. YEAR'S SUPPORT

1) Brown v. Estate of Brown, 246 Ga. App. 332, 539 S.E.2d 824 (2000): Mr. Brown's will included a provision that required his spouse to elect to take under the will or to take year's support. When he died, his wife took two parcels of real property that were devised to her under his will and then applied for year's support. The executor and "the Browns' minor children" objected, saying that Mrs. Brown had already elected to take under his will. The probate court granted summary judgment against the wife. The Court of Appeals reversed the grant of summary judgment. The Court pointed out that the wife, who was 76 years old when the will was probated, had only six years of formal education and had submitted an affidavit stating that she was unaware of her year's support right at the time of the purported election. The Court, citing case law that indicates that a spouse is entitled to full disclosure before any election becomes final, reversed the grant of summary judgment on this count. The estate had also argued that the Browns had been separated for 21 years and the husband had not supported her financially during that time, so she was not entitled to year's support. The Court of Appeals responded that eligibility for year's support is a matter of status, although the amount is not. (The Court also noted that, since the pre-1998 Probate Code applied in this case, the wife was entitled to a minimum of $1600.) On reconsideration, the Court examined the estate's claim that the wife had not tendered back rental income or the deeds on the two parcels of real property that were devised to her. The Court found that her acceptance of the rental income was consistent with her property interest prior to her husband's death and that the deeds had not been solicited. The Court found that these actions did not constitute a clear election on her part,

particularly since the properties could eventually be awarded to her as year's support.

2) Burkett v. Estate of Burkett, 248 Ga. App. 719, ___ S.E. 2d ___ (2001 WL 274814) (2001): When the decedent's wife filed for year's support and asked for the entire estate, one of the decedent's children objected. As required by law, the probate court held a hearing and awarded the wife a life estate in the home and the household furnishings and appliances. The wife appealed. The Court of Appeals noted that the parties clearly had offered to the probate court different assessments of whether the wife had other means of support available and what had been her standard of living prior to her husband's death. However, no transcript of the probate court's hearing was included in the record on appeal. Thus, the Court of Appeals held that it could not find, based merely on the record, that the probate court had abused its discretion.

B. INTESTATE SUCCESSION

1. Child Born Out of Wedlock

In re Estate of Slaughter, 246 Ga. App. 314, ___ S.E. 2d ___ (2000): Cynthia Boggs was born to Mary Boggs while Mary was married to Franklin Boggs. However, when Moses Slaughter died, Cynthia claimed to be his child and thus his sole intestate heir. At trial, Cynthia showed that her mother and Franklin had been separated for two years before Cynthia was conceived and had had no sexual relations during that time. Mary testified at trial that, even though she had put Franklin's name on Cynthia's birth certificate and school registration, Moses was in fact Cynthia's father. Cynthia also presented evidence that Moses Slaughter had held her

out as his own child, had provided money for her and her mother, had helped pay for her schooling, and had spoken of her son as his grandson. The Court of Appeals held that Cynthia had: 1) overcome the presumption that her mother's husband was her father, and 2) established by clear and convincing evidence that she was the child of the decedent, Moses Slaughter.

C. WILLS

1. Parties to Probate of Wills

McCarley v. McCarley, 246 Ga. App. 171, 539 S.E.2d 871 (2000): Earl McCarley's second wife was named the executor of his estate. When she sought to probate his will, three of his children from his first marriage filed a caveat. The probate court denied the caveat, and the superior court dismissed the appeal. The executor died, and the successor co-executors who were named in the will filed a motion for an award of attorney's fees and litigation expenses against the caveators and their attorney, under O.C.G.A. § 9-15-14. The caveators and counsel filed a motion to dismiss because the co-executors had never been substituted as parties in the litigation. The superior court denied the motion on the grounds that there was a substitution by operation of law. The question on appeal was whether substitution of parties occurs by operation of law when the first named executor dies and the successor co-executors take over during the pendency of litigation. The Court of Appeals answered that it does not. O.C.G.A. § 9-11-25 governs substitution of parties, and it requires notice to the parties and a hearing. Therefore, substitution of parties does not occur by operation of law. Until a proper substitution is made in compliance with the statute, the proceedings are void as to the deceased party. Thus, the superior court erred in denying the motion to dismiss.

2. Forgery

Heard v. Lovett, 273 Ga. 111, 538 S.E. 2d 434 (2000): When Heard filed a petition to probate a document that was allegedly Lovett's will, Lovett's brother caveated on the ground that the signature on the will was forged. The probate judge did not require the caveator to disprove affirmatively the genuineness of the signature but rather only to offer evidence to rebut the propounder's prima facie case. The Supreme Court affirmed this approach, noting that the propounder had, among other burdens, the burden of persuasion that the signature was genuine. The Court spoke briefly of the difference between the overall, non-shifting burden of persuasion (which remains at all times with the propounder) and the burden of proof on certain issues (e.g., the defendant carries the burden of proving an affirmative defense). However, the Supreme Court still reversed the probate court's denial of probate because the Supreme Court found that the probate court had improperly excluded evidence of the decedent's declarations. The evidence that was offered consisted of testimony by individuals who were named as beneficiaries in the purported will and who would state that the decedent had told them that the provisions in the will represented his wishes. The probate court had found the testimony to be inadmissible hearsay. The Supreme Court acknowledged that the evidence did not fall specifically under one of the statutory exceptions to the exclusion of hearsay (listed in OCGA Sec. 24-3-2 et seq.). However, the Court stated that this list was not exhaustive. The Court noted that the admission of parol evidence on the issue of probate is given "greater latitude" than the admission of such evidence in a will construction case. The Court pointed out that the proffered testimony could have corroborated the testimony of the witnesses to the will (who had testified that signature was not forged) and thus was relevant to whether the propounder had carried his burden of

persuasion.

3. Lack of Testamentary Capacity and Undue Influence

Pope v. Fields. 273 Ga. 6, 536 S.E.2d 740 (2000): Pope, who was Mrs. New's brother, moved into her home and took over her financial affairs following her surgery. His daughter's family later also moved in with them Pope called an attorney and had him prepare a revocable living trust, durable power of attorney, health care power of attorney, and quit-claim deed. An insurance agent brought the documents over to Mrs. New's house and she signed them. However, no one explained to her that she had transferred all of her property to the "Royce O. Pope Revocable Trust" and she didn't discover anything was amiss until she called her banks to ask why she didn't have any money left. She hired an attorney to sue Pope, but then decided to drop the matter. Pope and his daughter physically and verbally abused Mrs. New and then the daughter took her to a personal care home, dumped her clothes in the yard and said "she's never coming back to my house." Mrs. New immediately asked Joyce Fields to act as her guardian and Ms. Fields qualified as her emergency guardian. She filed an action on Mrs. New's behalf. In connection with this trial, Mrs. New gave a videotaped deposition. The deposition was attended by Pope's attorney, who cross-examined Mrs. New. When Mrs. New died two years later, Ms. Fields submitted for probate a will that Mrs. New had executed after Ms. Field had been appointed her emergency guardian. The will let her entire estate to Ms. Fields and her husband. Testimony as to Mrs. New's testamentary capacity was given by the two witnesses to the will, the notary public, other witnesses and her personal physician. Pope contended that she could not have had testamentary capacity because a guardian had been appointed for her. The trial court and the Supreme Court cited OCGA Sec. 29-5-7(f), which provides that an individual's capacity

to make a will is adjudicated independently of any guardianship proceeding. The Supreme Court also affirmed the trial court's decision to admit the videotaped deposition. The Court pointed out that OCGA Sec. 24-3-10 permits such depositions if the declarant is not available for the current trial, if the testimony was given under oath, and if the parties and issues were substantially similar. The Court noted that the "substantial similarity" requirement insures that the party against whom the testimony is being used had the opportunity to cross-examine the witness.

2) Sullivan v. Sullivan, 273 Ga. 130, 539 S.E.2d 120 (2000): The testator married Sarah one year prior to his death, after he had been diagnosed with cancer. The couple had entered into a prenuptial agreement prior to marriage. As his death became more imminent, the testator was confined to his bed and was under the influence of strong pain-killing drugs. His attorney went to his house with two drafts of wills that she had prepared, which had slightly different dispositive schemes. She asked to meet with the testator alone and found him to be confused about obvious facts (such as the identity of his current wife) and to be vacillating among various dispositions of his property. Some of the requests he articulated did not match the devises that were spelled out in the documents. The attorney spoke to Sarah about the problems she detected. Sarah went into the bedroom and returned minutes later with the testator in a wheelchair. She announced that, regardless of whether the will was to be contested, it had to be signed that day - it was "now or never." The attorney again expressed her concerns but then the testator executed the will. The will had not been read to him prior to the execution nor had he read the drafts. The attorney memorialized the events in a "Memo to File in Anticipation of Litigation." Later that

day, Sarah had him sign three more documents, including one that amended the prenuptial agreement to allow her to receive 75% of his individual retirement account. She had already filled out and had him sign a change of beneficiary form for the IRA. When the will was offered for probate, the jury found that the testator had lacked testamentary capacity and that the will was the product of undue influence by Sarah. Sarah appealed and the Supreme Court found there was sufficient evidence to sustain the jury's verdict. On the issue of testamentary capacity, Sarah argued that the attorney had found the testator to be competent. The Court pointed out that the attorney even admitted that the testator's capacity fell into a "gray area" and that she had made her assessment quickly on the basis of what she observed that day. The Court also noted that the attorney was not the final arbiter of whether he had had testamentary capacity. Sarah argued that the jury charge should have stated that lack of testamentary capacity can be shown only by a "total absence of mind." The Supreme Court found that the trial judge's charge, which included reiteration of the statutory standard of having a "decided and rational desire" as well as a reference to the former Probate Code requirement that the desire not be "the ravings of a madman... or the childish whims of imbecility," was proper. The Supreme Court also found that there was sufficient evidence to submit the undue influence claim to the jury. Sarah emphasized that the trial judge had told counsel that he would not find undue influence were he the finder of fact. But, as the Supreme Court pointed out, the trial judge also properly recognized that he was not the finder of fact and his only responsibility was to determine whether the evidence justified allowing the jury to consider the issue.

3) Dyer v. Souther, ___ Ga. ___, ___ S.E. 2d ___ . 2001 WL 472982 (May 7, 2001):

This case reached the Georgia Supreme Court for the second time in 2001. In 2000, in Dyer v. Souther, 272 Ga. 263, 528 S.E. 2d 242 (2000), a jury trial was held on the issues of testamentary capacity, whether the will was properly executed, and whether the will was the product of undue influence. At the close of the evidence, the superior court directed verdicts in favor of the propounder of the will on the latter two issues and the jury decided in the propounder's favor on the issue of testamentary capacity. The caveator appealed the directed verdicts and the Supreme Court reversed the directed verdict on the undue influence issue, finding that there was "circumstantial evidence sufficient to raise the issue of undue influence." On retrial, the jury found that the will was not the product of undue influence. This time the caveators appealed the jury verdict on the ground that the jury instructions were faulty and that they should have been entitled to certain documents as demonstrative evidence. The challenged jury instructions dealt with the definition of the standard of proof. The court charged:

> "To satisfy the burden of proof by preponderance of the evidence, the scales must tilt or incline to one way or one side, not all the way, but there must be a definite tilt. In other words, it doesn't bounce back and forth. That's even. But if it's a definite tilt, then that's it."

These words were taken from the 1991 edition of SUGGESTED PATTERN JURY INSTRUCTIONS: CIVIL CASES. Justice Fletcher noted that the use of the phrase "definite tilt" was "problematic because it could be construed as referring to the weight of the evidence, rather than its direction, and requiring a substantial tilt towards one side." He said that the Supreme Court "disapproved" of the phrase and that they recommended that it be deleted from the suggested instructions. However, the Court also found that this was not reversible error in the instant case in that the

charge as a whole adequately explained the burden. The Court also noted that the evidence of undue influence (the evidence on which it had earlier refused to uphold a directed verdict) was "extremely weak."

The Court also rejected the caveators' argument that the court erred in excluding their evidence of the history of the family home place, a family tree and a title search report letter. (The case revolved around the will of a testator, the last survivor of 11 children, who bequeathed all of her property to a great-nephew to the exclusion of nieces and nephews and over 70 other great-nieces and great-nephews.) The Court found that the evidence was properly excluded because the propounder and several family members had offered direct evidence on the issues that were addressed by these documents.

4. Contract to Make a Will

Howard v. Estate of Howard, ___ Ga. App. ___, ___ S.E. 2d ___ (2001 WL 392560) (2001): Mrs. Howard was married to Truman Howard for almost 40 years, until his death. After he died, she married his brother, Hilton Howard. Both she and Hilton had children from their previous marriages. Before they married, Hilton promised to look after her and to provide for her if he should be the first of them to die. The day after they married, he changed a bank account (which then had $33,000.00 in it) to a joint account in both their names. Five years after their marriage, he executed a will in which he left her a life estate in their residence and all the funds in "the joint bank account." He left the residue of his estate to his daughters. He later withdrew $5000 from the joint account and bought an annuity which he had issued in his wife's name as sole beneficiary. Hilton's daughter, Annie Phillips, was appointed his guardian three

years after his will was executed. The day after she was issued letters of guardianship, Phillips closed the joint account (then consisting of $41,500.00) and transferred the funds to a guardianship account in her name. After determining that Mrs. Howard had contributed $400 to the account, Phillips wrote her a check for that amount. The next year, Phillips discovered the annuity and, with court permission, liquidated that and put the funds into the guardianship account. Phillips filed annual returns for every year she served as guardian. When Hilton died in 1996, Mrs. Howard sued in superior court, arguing that Phillips had acted improperly as guardian and had "converted" Hilton's funds in that she was a residuary legatee of his estate. (Phillips' uncontradicted claim was that she did not know the contents of Hilton's will until he died.)

Mrs. Howard was unsuccessful in her argument that Hilton had breached a contract between them. The court found that this was a contract in consideration of marriage which, under the Statute of Frauds, is required to be in writing. The later will did not constitute a sufficient writing. (Current OCGA Sec. 53-4-30 also requires that any contract to make a will entered into after January 1, 1998 must be in a writing that is signed by the obligor.)

Mrs. Howard also was not able to convince the court that Phillips had acted improperly as guardian. The Court of Appeals pointed out that all of her actions had either been performed with prior court approval or had been ratified when the court had approved the annual returns.

Mrs. Howard was able to convince the Court of Appeals to remand the case on the issue of whether Hilton had intended to make a gift of the joint account to his wife. The Court was impressed by the fact that the joint account was specifically mentioned in the will and that Hilton had not changed his will before a guardian was appointed. The Court said:

> A guardian stands in the ward's shoes in many respects and is empowered to act for the ward. But a guardian is not authorized to change the ward's will. A will may be changed at any time up to the testator's death. But Hilton William Howard lost the capacity to change his will when he was declared incompetent.

(The Court's last sentence is not an accurate statement of the law. OCGA Sec. 29-5-7 provides that the issue of testamentary capacity shall be "independently determined.") The Court of Appeals also looked to the joint bank account statute, OCGA Sec. 7-1-812, which provides that the funds in a joint account, during the lifetime of all parties, are owned by the parties in proportion to their contribution "unless there is clear and convincing evidence of a different intent." The Court of Appeals instructed the trial court to consider whether Hilton's reference in the will to the joint account constituted clear and convincing evidence "that Hilton William Howard fully intended to make a testamentary gift to his wife of the funds in the joint account."

5. Ownership of Property

Foster v. Ramsey, 245 Ga. App. 118, 536 S.E.2d 550 (2000): Sara Foster's will bequeathed any money in her checking accounts to her husband and the residue of her estate to her daughters. The will also included bequests of her personal property and the money in her savings accounts to her daughters. Sara's husband filed claims for certain accounts and items of jewelry. The superior court granted summary judgment for the estate on all counts. The Court of Appeals affirmed in part and reversed in part, as described below.

1) Sara's husband claimed that he should be paid the funds from a certain NationsBank savings account because the account was a joint account. The signature card could not be

located, but the bank records showed that the account was not a joint account. The husband submitted an affidavit that he and his wife had opened a joint account, but the court found the affidavit to be self-serving and conclusory. Apparently the husband had been allowed to draw checks on the account, but the court said that the "undisputed evidence" indicated that the decedent was the sole owner of the account. Summary judgment on this issue was affirmed.

2) After Sara died, her husband withdrew all the money from her other savings accounts and a joint account was opened in his name and that of the executor. The executor withdrew $10,000 from the account and put it into another account on behalf of the estate. The husband claimed that he should be reimbursed for that $10,000, but the court found that the estate owned the savings account. Summary judgment on this issue was also affirmed.

3) The husband claimed that certain items of jewelry were owned by him rather than the estate. The estate submitted an affidavit of the probate judge who had conducted the probate proceedings on Sara's will. The judge's affidavit stated that the husband said he had given the jewelry to his wife on special occasions but he had not intended her to own it. The judge also stated that the husband said that he had never told his wife that the jewelry was not hers to keep. The husband submitted his responses to interrogatories in the superior court case, in which he said that his wife knew that the jewelry was not hers to keep but was only for her use. The Court of Appeals noted that the husband could not testify about any conversations between himself and his wife that took place prior to July 1, 1979, the date of the repeal of the Dead Man's Statute. However, he could testify as to conversations after that time. The Court noted that these conversations raised a genuine issue of fact, so summary judgment on this count was reversed.

6. Revocation and Revival

1) Lovell v. Anderson, 272 Ga. 675, 533 S.E. 2d 64 (2000): In this case, the Supreme Court of Georgia reversed a grant of summary judgment to an executor who claimed that the testator's will had not been revoked. The testator had executed his will in 1983. He left his estate to be divided equally among the four children of his nephew. He named each child in the will. When the testator died in 1997, his will was found in his pick-up truck. The names of two of the four beneficiaries had been struck through with ink. Georgia law contains a presumption, in OCGA Sec. 53-4-44, that the testator intended to revoke the will if there is an "obliteration or cancellation of a material portion of the will." This presumption must be overcome by a preponderance of the evidence in order for the will to be admitted to probate. There is also a Georgia common law presumption that obliterations on a will were in fact made by the testator if the will is found among the testator's "personal effects." The Court concluded that the obliteration of the two names was indeed an obliteration of a "material portion" of the will. The Court also opined that a pick-up truck may the repository for a testator's personal effects and that the mere fact that others may have had access to the truck was not enough to overcome the presumption that the testator had made the obliterations on the will. The Court found that the facts of the case precluded granting summary judgment that the will had not been revoked.

The holding in this case is clearly limited to whether summary judgment was appropriate. However, the dissenting Justices focused on the majority's finding that the will had been found among the testator's personal effects. The dissenting Justices expanded the presumption adopted by the majority to include the requirement that the will had been in the exclusive control, custody, and possession of the testator. Because the caveator had not shown that the testator had

retained control of the will, thus precluding the opportunity for third parties to alter the will, the dissenters believed that the grant of summary judgement in favor of the propounder had been appropriate.

2) Warner v. Reynolds, ___ Ga. ___, ___ S.E.2d ___, 2001 WL 472981 (May 7, 2001): The testator died on October 20, 1998. The decedent's sister, who was named as her executor, petitioned to probate the decedent's 1990 and the testator's only child caveated. At mediation the parties agreed that the 1990 will had not been properly signed or attested. The executor then petitioned to probate a copy of the testator's 1984 will and the child again caveated. This time the caveator claimed that the 1984 will had been revoked. The probate court found in favor of the executor/propounder. The court applied OCGA Sec. 53-4-46(b) (amended effective July 1, 1998), which allows a copy of a lost will to be probated if the propounder can rebut, by a preponderance of the evidence, the intent to revoke that arises when the will cannot be found. (The statute also requires the propounder to prove by a preponderance of the evidence that the copy is a true copy of the will.) The Supreme Court noted that the testator's disposition in the 1984 will was consistent with two earlier wills of the decedent and with the 1990 instrument in her intent not to leave the son her entire estate. She had expressed this wish to others and stated that she believed her son to be "primarily the responsibility of her former husband." She also had brought either the original or a copy of the 1984 will with her to the office of the attorney who drafted the 1990 will. The son argued that the court should have used instead a "clear and convincing evidence" standard because the case was one that involved the doctrine of dependent relative revocation. That equitable doctrine is articulated in the Georgia case law as follows:

> "[I]f it is clear that the cancellation and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will be not made, or if made is invalid, the old will, though canceled, should be given effect, if its contents can be ascertained in any legal way."

The son claimed that the language "if it is clear" indicated that the higher standard of proof was required.

The Supreme Court expressed doubt as to whether the doctrine of dependent relative revocation had ever required a clear and convincing level of evidence. In any event, the Court noted that the 1998 changes to the Probate Code had amended the "lost wills" statute by requiring that the presumption of revocation be rebutted by a preponderance of the evidence rather than by clear and convincing evidence. So, even though the Court retained the DRR doctrine as "one way in which a propounder satisfies the statutory burden of rebutting the presumption of revocation," the Court made clear that the General Assembly had established that a preponderance of the evidence is the appropriate standard of proof in such cases.

3) Westmoreland v. Tallent, ___ Ga. ___, ___ S.E.2d ___, 2001 WL 643540 (June, 2001): The testator had executed a will in 1960 that included among the beneficiaries her niece, Moreland. In 1992, the testator signed a new will that also included Westmoreland's daughter as a beneficiary and that named Westmoreland as executor. When the testator died in 1997, the 1992 document could not be found so Westmoreland was granted letters of administration on the 1960 will. Tallent sought to probate a copy of the 1992 will. The probate court declared the

1992 will valid and in superior court a jury found that Tallent had overcome the presumption that the 1992 will had been revoked. The Supreme Court affirmed that the evidence was sufficient to sustain the jury verdict. The case was decided under the pre-1998 Probate Code, which provided that the presumption of revocation which arises when a will is lost must be overcome by clear and convincing evidence. (Current OCGA Sec. 53-4-46 allows the presumption to be rebutted by a preponderance of the evidence.) The Court cited the following as evidence that rebutted the presumption: Tallent had a close relationship with the testator and the testator had given her property during her life; the testator's long-time attorney supervised the signing of the 1992 will and kept in contact with the testator, who never mentioned revoking or changing that will; the attorney testified that the copy in his files was an exact copy of the will that the testator had signed in 1992; the notary public testified as to the proper execution of the 1992 will; and when the testator became incapacitated in 1994, she told her the guardian ad litem about her desires for the distribution of the property and these desires reflected the provisions in the 1992 copy.

D. ADMINISTRATION OF ESTATES

1. Recusal of Probate Judge

White v. Suntrust Bank, 245 Ga. App. 828, 538 S.E. 2d 889 (2000): White, the grandson of a testator, brought an action against the executor of his grandmother's estate, Suntrust Bank. White moved to have the probate judge recuse herself on the ground that she owned stock in the Bank. The probate judge dismissed his motion as untimely filed. White had initially filed a motion to have the judge reveal whether she owned stock in the bank and the judge had

dismissed the motion with a "boilerplate order" in which she had stated that "recusal would not be warranted." On July 1, 1999, she filed an annual financial disclosure form, as required by Georgia law, that showed that she did own $20,000 worth of bank stock. White then filed a second motion for recusal on July 12. The judge dismissed the motion on July 19 on the ground that it had not been filed within five days of the date on which White "knew or should have known" of the grounds he would be using for her disqualification. (Uniform Probate Court Rule 19.1 states that motions for recusal must be filed within five days "after the affiant first learned of the alleged grounds for disqualification.") White filed a third motion for recusal on July 19, which was dismissed. The Court of Appeals found, first, that the motion was not untimely filed. The Court pointed out that White had made many efforts to establish whether the judge owned Suntrust stock and that it would be "an injustice" for the probate court to refuse disclosure and then dismiss the petition as untimely filed. The Court of Appeals also pointed out that there was no requirement that the five-day period begin to run when the movant "should have known" of the disqualification grounds. The Court then went on to examine whether the motion for recusal should have been granted. The Court said that the judge had "a direct pecuniary or property interest in the subject matter of the litigation," which is prohibited by OCGA Sec. 15-1-8(a)(1). Judicial Qualifying Commission Op. 76 (1985) clarifies that a judge who holds stock in a corporation that is a party should recuse himself or herself. The Bank argued that it had no financial interest in the outcome of the proceedings, but the Court of Appeals noted that the bank would lose the executor's fees if it was replaced by another executor. The Court went further to state that judge probably should have disqualified herself voluntarily even if White had not made the motion. Citing the Code of Judicial Conduct, the Court noted that judges are required not

just to avoid impropriety but rather to avoid the very appearance of impropriety and to disqualify themselves in any case in which their impartiality might reasonably be questioned. At the very least, the Court said that the judge should have informed the parties of her ownership of the bank stock and ask them if they wanted to waive the disqualification.

2. Appointment of Personal Representative

Dickerson v. Dickerson, 247 Ga. App. 812, ___ S.E. 2d ___ (2001): Richard Dickerson was killed in an accident. He died intestate. Barbara Fuller, a/k/a/ Barbara Dickerson, claimed to be his common law wife. His brother was granted letters of administration of his estate by the Probate Court of Lumpkin County and Barbara petitioned to set aside his appointment. The brother also filed wrongful death and pain and suffering actions in Rockdale County. The jury in this case found that no marriage existed between Barbara and Richard. The brother then moved for summary judgment in the Lumpkin County case (the case objecting to his appointment). The Court of Appeals affirmed that Barbara was collaterally estopped from relitigating the question of her common marriage.

3. Personal Representative's Bond

Hobbs v. Western Surety Company, 247 Ga. App. 658, ___ S.E.2d ___ (2001): Pursuant to his appointment as administrator of an intestate's estate, Hobbs obtained an $80,000 bond from Western Surety Company. He agreed in the bond application to indemnify the surety company for liability it incurred in the course of his administration of the estate. During the administration, Hobbs did not pay substantial taxes owed by a nightclub that the estate owned

and he also ignored a court order that required him to turn over certain estate property to the decedent's son. Western Surety was sued by the federal government for the taxes and by the son for the value of the personal property. The company paid out a total of $50,000 to settle the two claims and moved for summary judgment against Hobbs to recover that amount. The summary judgment motion was granted. Hobbs appealed, stating that there were material issues of fact both as to how much tax was actually owed and as to whether the son had already received a settlement for the personal property. Hobbs claimed that Western Surety had acted in bad faith in paying on the bond. The Court of Appeals affirmed the grant of summary judgement, finding no evidence that the company had acted in bad faith.

4. Liability of Personal Representative

1) Welch v. Welch, 244 Ga. App. 685, 536 S.E.2d 583 (2000): This case is a sequel to Welch v. Welch, 269 Ga. 742, 505 SE 2d 470 (1998). Ms. Welch died in 1994. Her will directed that she have "a decent and Christian-like burial...at the direction of my Executor." Her son John was appointed executor of her estate. Ms. Welch was buried in a Baptist Church cemetery in Mountain City, Georgia. Two years later, her husband was granted permission to move her remains to land that was dedicated as the Welch family cemetery in Mountain City, Georgia. The husband died soon after and was buried beside his wife. The son then decided that he was not happy with his mother's burial site, so he sought permission to disinter her remains and rebury her in Virginia. The other children of Ms. Welch objected. In 1998, the Supreme Court upheld the lower court's decision that the son be enjoined permanently from removing his mother's remains.

The 2000 case involves a suit by the six other children of Ms. Welch against their brother, the executor, for trespass, deprivation of property rights, wounded feelings, costs, and attorneys fees. New facts emerged in this Court of Appeals decision. The reason that the executor wanted to move his mother from the family plot was that she had been buried in "a watery grave." He wanted to move her to a perpetual care cemetery because he deemed that the family cemetery was not "a decent and Christian-like" burial site. The family cemetery was owned by one of the other siblings and was adjacent to the "family homeplace." The funeral home employees had already started the disinterment when the other family members discovered what was going on. The siblings sued the executor for $500,000 in damages. A jury verdict was returned in favor of the executor. The appeal enumerated 11 errors, mostly pertaining to the jury charges and motions. They also contended that the Supreme Court's finding in the 1998 case "established the defendant's liability in the first appeal." The Court of Appeals was not persuaded by this, pointing out that the Supreme Court's holding dealt only with whether the trial court had abused its discretion when it enjoined the disinterment.

2) In re Estate of Sims, 246 Ga. App. 451, 540 S.E.2d 650 (2000): This is the third appearance of this case in the Court of Appeals. Earlier in 2000, in Heath v. Sims, 242 Ga. App. 691, 531 S.E. 2d 115 (2000), a beneficiary under a decedent's will had petitioned in the Fulton County Probate Court for the removal of the executors. The probate court did not remove the executors although it indicated that there may have been conflict of interest problems that would be addressed at a later date, either as a continuation of the petition for removal or in a proceeding for a final accounting. The beneficiary did not appeal the probate court's order but instead filed

suit in the Superior Court seeking damages for breach of fiduciary duty and requesting an "equitable accounting" of the estate. The court dismissed the complaint for lack of jurisdiction and the Court of Appeals affirmed. The current case involves a motion that was ruled on prior

to the Court of Appeals decision in the earlier case. The beneficiary filed a motion in the probate court to prohibit the co-executors from using any estate funds to defend against her allegations of maladministration. The probate court granted the motion and reserved until the litigation was concluded the issue of whether the co-executors would be entitled to seek reimbursement of attorney fees. The co-executors filed a direct appeal from this order. The Court of Appeals dismissed the appeal for lack of jurisdiction. The Court noted that there had as yet been no final accounting of the estate, so the order of the probate court was not a final order. As no certificate of intermediate review had been obtained, the Court found that it had no jurisdiction.

E. TRUSTS

1. Liability of Trusts and Trustees

Testamentary Trust of Moseley v. Barnes, 245 Ga. App. 817, 538 S.E.2d 873 (2000): Barnes, an invitee, went to the farm owned by the trust and was knocked down by a bull named Bullwinkle. He (Barnes) sued the trust and the trustees. The trustees claimed that they had no knowledge of Bullwinkle having any dangerous propensities. Summary judgment was granted for the trust and trustees and the Court of Appeals affirmed. The bull's owner had raised Bullwinkle from the time he was a calf. His (the owner's) whole family testified that Bullwinkle was treated like a family pet and was always very gentle. When Bullwinkle knocked down

Barnes, Moseley's immediate response was : '[Bullwinkle's] never done that before." The Court of Appeals noted that bulls are not considered by the law to be statutorily dangerous animals. The Court quoted from a 1993 case:

> ...[I]t cannot be said as a matter of law, nor that it is judicially known, that bulls, as a class, are dangerous... Bulls are more dangerous than cows and steers; stallions are more dangerous than mares or geldings; rams are more dangerous than ewes or lambs. However, these animals have been kept for stud purposes from time immemorial so that the particular danger involved in their dangerous tendencies has become a normal incident of civilized life. The virility which makes them dangerous is necessary for their usefulness in performing their function in the socially essential breeding of livestock, and justifies the risk involved in their keeping."

2. Trust Assets Subject to Claims for Alimony and Child Support

McGinn v. McGinn, 273 Ga. 292, 540 S.E.2d 604 (2001), was a divorce action in which the wife filed a motion to compel discovery of trust documents. The trial court denied the motion on the ground that the trust principal would not be subject to the wife's claims of alimony and child support. The sole asset of the trust was stock in a business owned by the husband's family. The husband was a beneficiary and a co-trustee. He also held a general power of appointment over the trust property. The wife claimed that the legal and beneficial interests in the trust had thus merged in the husband in that he was a beneficiary and had control in his capacity as trustee and holder of a power of appointment. However, the Supreme Court noted that husband was not the sole beneficiary nor was he the sole trustee. The Court

distinguished the case from Speed v. Speed, 263 Ga. 166, 430 S.E.2d 348 (1993), which involved a spendthrift trust of which the husband was both the settlor and the beneficiary. While essentially agreeing that the trust principal was not subject to the wife's claims, the Supreme Court reversed the trial court's denial of the wife's motion because the husband's interest in the trust was one of his assets and thus relevant to the determination of any property or support award in the divorce.

3. Constructive Trusts

1) Kephart v. Kephart, 273 Ga.9, 536 S.E.2d 504 (2000): A father and his ex-wife transferred property to their son by warranty deed. Father alleged that the transfer was pursuant to an oral understanding that Son would hold it only until Father completed an alcohol treatment program. Two witnesses offered by Father stated that Father told them that he had deeded the property only for Son "to hold." Father sued for return of the property under the theory that Son held it for him in a constructive trust. The superior court heard the case without a jury and entered judgment for Son. Father appealed pro se. The Supreme Court affirmed the trial court's judgment. Several of the Supreme Court's rulings dealt with trial procedure and evidence. Among other things, the Court examined Father's claim that the trial court should have given him the "benefit of the doubt" regarding whether Son or Father was responsible for satisfaction of a debt that had been secured by a security deed on the property. The Supreme Court affirmed that the debt was satisfied by efforts of the Son, and said the superior court was not required to give the Father the benefit of any doubt, but could make its own determination as to credibility. The Supreme Court also dismissed Father's contention that he was prejudiced by the trial court's

consideration of his use of alcohol. As the evidence of his alcohol use (which actually was offered by Father) was integral to the very trust that Father was trying to claim, the Court found the evidence relevant. Even though Father also argued on appeal that Son's testimony was "untruthful and contradictory," the Supreme Court applied the "any evidence" rule and affirmed the lower court's determination that the evidence had failed to establish a constructive trust.

2) Dodd v. Scott, ___ Ga. App. ___, ___ S.E.2d ___, 2001 WL 63083 (Ga. App.): In 1973, Dodd purchased ten acres and built a home on the property. He conveyed six of the acres back to the original seller, but then re-purchased them from that seller's successor in interest. Dodd then transferred title to the six acres to his daughter, Scott, and her husband. The daughter and husband did not pay any consideration. When Dodd died, his wife claimed that the Scotts had held the property in an implied trust for Dodd and thus that the property was in fact the property of the estate. The trial court granted summary judgment in the Scotts' favor. In doing so, the court did not admit evidence offered by the wife because the court found it to be inadmissible hearsay. The Court of Appeals examined the admissibility of the evidence. First, the Court of Appeals discussed whether the trust at issue would be a resulting trust (particularly a purchase money resulting trust) or a constructive trust. The court determined that it would not be a purchase money resulting trust because those trusts arise only when one individual pays the purchase price for property but the title to the property is transferred to someone else. The Court of Appeals determined that the type of implied trust at issue was a constructive trust - the type of trust that arises when an individual who receives title to property has agreed to hold it for the benefit of another.

The Court of Appeals then went on to determine whether the admissible evidence showed that the Scotts had agreed to hold the property in trust for Dodd when they received it from him. The trial court had decided that the wife's testimony about a deathbed statement made by Dodd that he wanted her to have "the acreage and the house, the whole ten acres" was hearsay that was not subject to any of the statutory exceptions and thus was not admissible except in "specified cases from necessity." The necessity exception required the court to find that the hearsay was necessary and that the statement was "surrounded by particularized guarantees of trustworthiness." The trial court did not reach the second inquiry (trustworthiness) because it found that the deathbed statement was not relevant to whether the Scotts had promised to hold the trust for Dodd's benefit. The Court of Appeals, however, noted that the test for relevancy is whether the evidence "renders the desired inference more probable than it would be without the evidence." In this context, the Court pointed out that Dodd's will, which had been read aloud to the wife and the daughter at about the same time as the alleged deathbed statement was made, had left his home to his wife and that, in financial statements, he had referred to the home and all ten acres as owned by him. Thus, the Court of Appeals found that the deathbed statement was relevant. Because the trial court had not discussed the trustworthiness issue, the Court of Appeals merely vacated the exclusion of the testimony and directed the lower court to reconsider the evidence in light of its holding. The Court of Appeals did point out "for the benefit of the trial court" that the mere fact that the wife, who stood to benefit, had offered the statement as evidence was not a factor to be considered when determining the trustworthiness of the evidence.

The Court of Appeals also examined the trial court's exclusion of affidavits by Dodd' s sister and sister-in-law that the Scotts held the six acres in trust with the understanding that they

would transfer the acreage to his estate when he died. The trial court had excluded these affidavits because they were "clearly self-serving" and thus that the trustworthiness of the evidence was compromised. The Court of Appeals affirmed this decision in that the statements made to the women by Dodd were clearly favorable to his own interests and thus of questionable reliability.

Finally, the Court of Appeals held that non-hearsay evidence had presented sufficient issues of fact so as to preclude the grant of summary judgment. The wife had offered evidence that Dodd had acquired the six acres in 1982 to keep anyone from living close to him, that she understood that the property was to be held in the Scotts' name to keep Dodd's ownership of it private, that Dodd paid property taxes on the six acres and showed them on his tax and financial statements, and that Dodd had treated the acreage as his own, planting fruit trees and then later collecting the insurance proceeds when the trees were damaged, keeping the property cleared, giving his neighbors permission to ride on the property, and even using the property as collateral for a loan. Thus the Court of Appeals reversed the grant of summary judgment.

F. LIFE INSURANCE

Hinkle v. Woolever, ___ Ga. App. ___, ___ S.E. 2d ___ (2001 WL 370523) (2001): Thelma Hinkle filed for divorce from Frank Hinkle in July, 1998. At the time, Frank knew that he was suffering from throat and skin cancer. During the divorce proceedings, Frank sent three letters to the insurer on his life insurance policy (in May, June, and July, 1998) seeking to remove Thelma as the beneficiary on the policy. The insurer responded that it could not honor

the request because, due to the divorce proceedings, there was a need to establish by court order the ownership of the policy. In January, 1999 (while the divorce proceedings were still underway), Frank wrote a will in which he declared that he was in the process of getting a divorce and thus was leaving his wife only certain pieces of personal property "in lieu of years support and any and all other claims she may have against my estate." In April, 1999, after the final hearing but before the divorce decree was issued, Frank again wrote the insurer, who responded that he must send a copy of the divorce decree. Frank died in July, 1999, before the final divorce decree was issued. One month later, the decree was issued and it named him as the owner of the policy. (The court order was entered *nunc pro tunc* and related back to the date of the hearing, at which time the court had ruled orally that Frank was the owner of the policy.) Both Frank's executor and Thelma claimed the proceeds of his insurance policy and the insurer requested an interpleader of the policy. The trial court ruled in favor of Frank's estate and the Court of Appeals affirmed. The Court of Appeals reiterated current law, which states that the beneficiary of a policy must be changed in accordance with the terms of the policy, even when a divorce decree has been issued. But the Court of Appeals noted case law that allows for a change when "the insured has done substantially all that is required of him, and all that he is able to do, to effect a change of beneficiary, and all that remains to be done is ministerial action of the insurer." To Thelma's argument that Frank had not filled out a change of beneficiary form, the Court responded that nothing in the record indicated that the insurer had required such a form but rather only a copy of the final decree and order.

G. JOINT ACCOUNTS

1) South v. Bank of America, ___ Ga. ___, ___ S.E. 2d ___ , 2001 WL 506786 (May 15, 2001): In 1993, a mother purchased a certificate of deposit in the name of herself and her son but did not tell her son she had done so. In 1994, she called the bank and requested that the CD, which had matured, be redeemed and used to purchase a second CD that was only in her name. When she died, the son found out about the CDs and sued the bank. He claimed that the bank had violated his "ownership rights" in the CD. He also claimed that the bank had converted the account and breached its contract. Finally, he sought an equitable reformation of the CD, along with attorney fees, litigation costs, and punitive damages. The bank moved for a judgment on the pleadings, citing OCGA Sec. 7-1-816, which provides in part that banks "may enter into multiple-party accounts to the same extent they may enter into single-party accounts" and that a "multiple party account may be paid, on request, to any one or more of the parties." The son opposed the motion on the following grounds:

1) The caption to OCGA Sec. 7-1-816 requires the signature of at least one party. The caption reads: "Financial institution protection - Multiple party accounts authorized; payment on signature of one party; inquiry as to deposits or withdrawals not required." The Code section itself does not contain a signature requirement.

2) Since OCGA Sec. 7-1-816 did thus not apply (that is, did not protect this transaction because there was no signature), the CD was governed by former OCGA Sec. 11-3-116, which governed negotiable instruments and which required the consent of all the parties to the negotiation of an instrument that was not "in the alternative" - that is, was not styled as "Mother *or* Son".

3) The bank had not paid the funds on the "request " of the mother, as OCGA Sec. 7-1-

810(12) defines a "request" as one that includes "special requirements concerning necessary signatures and regulations of the financial institution."

The trial court granted the bank's motion and determined the following:

a) OCGA Sec. 1-1-7 provides that captions "do not constitute part of the law and shall in no manner limit or expand the construction of any Code section."

b) OCGA Sec. 7-1-816, as the later legislation (enacted in 1976) would prevail in any conflict between that Code section and former Sec. 11-3-116.

c) The bank was justified in cashing in the CD on the mother's individual request.

The Court of Appeals agreed with the first two findings by the trial court but reversed the granting of the motion there was a genuine issue of material fact as to whether the bank had cashed in the CD upon a proper "request." The bank had argued that the son was merely a third-party beneficiary to its contract with the mother and therefore any error relating to the request was harmless error. The Court of Appeals pointed out that the son was not a third-party beneficiary but actually a party to the agreement. However, the Court of Appeals did state that OCGA Sec. 7-1-820 "discharges the financial institution from all claims for amounts [paid pursuant to OCGA Sec. 7-1-816]" so that no liability would attach to the bank on the son's breach of contract claim.

2) Nails v. Rebhan, 246 Ga. App. 19, 538 S.E.2d 843 (2000): Winecoff executed a will and a general power of attorney on the same day. The will left to Louise Nails, a neighbor and his caregiver, the sum of $25,000 and all of his real and personal property. The will also directed that Winecoff's sister was to receive the rest of his money. In the general power of

attorney Winecoff appointed Nails as his attorney-in-fact. About nine months later (and two days before Winecoff died), Nails attempted to add her name to a certificate of deposit, a checking account, and a safety deposit box at one of Winecoff's banks but a bank employee would not let her do so. Nails then went to another bank, where Winecoff had another CD, and succeeded in having her name added to that CD, with the assistance of her sister-in-law, an employee of the bank. Nails then took Winecoff to his attorney's office. The attorney's secretary notarized a letter signed by Winecoff in which he directed the first bank to add Nails' name to his accounts and safety deposit box. Three days after Winecoff died, Nails cashed in the $86,459 CD at the second bank and emptied and closed Winecoff's safety deposit box at the first bank. A few days later, she cashed a check for $10,000 on the checking account. A jury returned a verdict in favor of the sister and co-administrators of Winecoff's estate. Nails appealed and argued that the court should have directed a verdict in her favor. The Court of Appeals affirmed the jury verdict, using the "any evidence" rule (which "requires the appellant to show that there is no conflict in the evidence as to any material issue and that the evidence demands the verdict sought"). Nails' evidence had included her own testimony and that of Winecoff's attorney who said that Winecoff had called him to make sure that Nails' name was added to his bank accounts. But the Court of Appeals looked to the evidence provided by the wording of Winecoff's will, which, after the specific bequests, left all his money to his sister. The Court of Appeals noted that the will had not been revoked or amended to provide that Nails was to receive the money in his bank accounts. The Court of Appeals found that the jury was thus justified in believing that Winecoff's true intentions were those spelled out in his will. (The Court of Appeals made no mention of the Georgia statutes that deal with the ownership of joint

accounts during life at and at the death of a decedent.)

H. GUARDIANSHIP

1. Creation of Trust by Guardian

In re Sellers, 247 Ga. App. 811, 545 S.E.2d 385 (2001): Mrs. Sellers became incapacitated following an automobile accident. Her husband, as his wife's guardian, sought to settle her personal injury claim and asked the probate court to authorize him to create a trust out of the proceeds of the settlement. The probate court ruled that it was without authority to do so. The Court of Appeals reversed, pointing out that OCGA Sec. 29-1-16(b), which authorizes the compromise of claims on behalf of ward, specifically states that such compromise "may involve a structured settlement or creation of a trust on such terms as the court approves."

2. Choice of Guardian

1) Huval v. Jacobs, 248 Ga. App. 696, ___ S.E. 2d ___ (2001): Parents of child were killed in an accident when the child was seven years old. Huval, the child's grandmother, was appointed temporary guardian of the person. (The county administrator was appointed guardian of her property.) Her aunt and uncle objected to the appointment and tried to have themselves appointed as guardian. The juvenile court appointed them as the child's personal guardian. (The matter began in probate court but the aunt and uncle intervened and filed an action in superior

court, which transferred the matter to the juvenile court. The probate court designated the juvenile judge to hear the matter.) The grandmother claims that she had the right to be appointed guardian under OCGA Sec. 29-4-8, which provides that "the nearest of kin by blood, if otherwise unobjectionable, shall be preferred." Some Georgia cases have held that this statute gives the nearest of kin an "absolute" right to be appointed if not objectionable. The Court of Appeals surveyed cases for a definition of the term "unobjectionable." The cases showed that the court had "wide discretion" in deciding whether an applicant is "unobjectionable." (The standard is not the same as that of parental unfitness, which demands a strong showing before depriving a parent of a child's custody.) The court found that it may consider "the applicant's suitability, habits, responsibility, sense, and morality, as well as the financial interests of the child." The appellate court pointed out that the juvenile court had noted a series of flaws in Huval's ability to raise her own children, including a lack of parenting skills and leading "an inappropriate lifestyle in the presence of minors." (Huval apparently had had two long-term live-in relationships after divorcing her husband.) The juvenile court had also noted that "educational success [had] not been a priority for her or her children". Huval simply insisted that these findings were irrelevant in light of her "automatic preferment." Also, Huval did not dispute the court's finding that the appointment of the aunt and uncle would be in the children's best interest. The Court of Appeals concluded that Huval was not entitled to an automatic preference and affirmed the appointment of the aunt and uncle under the "best interest of the child" standard.. The Court of Appeals also discussed the application of the Supreme Court's recent *Stills v. Johnson*, 272 Ga. 64 5 (2000) decision. In that case, the Supreme Court addressed whether the voluntary transfer of "parental power" to a grandmother gave her a superior right to

custody that could only be overcome by showing that she was "unfit." The Supreme Court held that the best interest of the child must govern custody disputes between non-parents just as it does between parents. In *Huval*, the child's guardian ad litem had argued that this holding dictated that the guardianship statute be construed to mean that the nearest next of kin was "objectionable" *only* if the appointment of that person was found to be *contrary* to the best interest of the child. The Court of Appeals recognized the close relationship between custody and guardianship (in that a minor's guardian is entitled to the custody of the minor) but noted that the *Stills* reasoning did not extend to guardianship disputes. The Court of Appeals did point out, however, that the Supreme Court will probably be required to address this issue in the near future.

2) In re Ray, 248 Ga. App. 45, 545 S.E. 2d 617 (2001): The mother of a 16-year-old child objected to the appointment of the child's great-grandmother as guardian of the child's property. Originally, the great-grandmother filed to be guardian of both the person and property of the child. However, the mother objected, so the great-grandmother filed a second petition seeking only guardianship of the property. The child had chosen his great-grandmother to be the guardian of his property. (OCGA Sec. 29-4-4 allows a minor over age 14 to make a selection provided the selection is "judicious".) The child's only property was a pending personal injury action. The mother attacked the appointment on a number of grounds:

(1) The mother first contended that the petition had been a petition for temporary guardianship only, which cannot be granted over the objection of the child's natural guardian. The Court of Appeals noted, among other things, that the great-grandmother had used the form

for a permanent guardianship rather than a temporary guardianship. The Court then proceeded to analyze the case under OCGA Sec. 29-4-4, which deals with permanent guardianships, rather than OCGA Sec. 29-4-4.1, which deals with temporary guardianships.

(2) The mother objected that the court could not appoint a guardian for a minor if the minor's natural guardian's parental rights had not been terminated. The Court looked to the wording of OCGA Sec. 29-4-4(a), which allows the appointment of a guardian of the person or property for a minor "having no guardian." The Court noted that case law had interpreted "having no guardian" to mean having no guardian of the person. The Court pointed out that the mother, as natural guardian, was the guardian of the child's person, but that that did not mean that she was also guardian of his property. The Court said that he had no guardian of his property and thus that one could be appointed. The Court also stated that the "necessary implication" of the early cases that interpreted the phrase "having no guardian" to mean "having no guardian of the person" was that "the probate court is permitted to overrule the parent's objection and appoint as guardian of the property the person selected by the minor, provided the selection is judicious." The Court went on to state that a choice is "judicious if it is in the minor's best interest" (citing Judge Propst's *Handbook for Georgia Probate Judges*).

(3) The mother argued that the great-grandmother could not be appointed guardian of the minor's property as the only property was a personal injury action and she, the natural parent, was the only one who had a right to pursue such an action for her child. The Court agreed that a parent was the only one who had the right to sue for direct losses suffered by the parent as a result of the injury (e.g., loss of the child's services, medical expenses). However, the Court also pointed out that the right to recover for pain and suffering vested solely in the child. The

Court noted that even a parent could not bring such an action without first qualifying to the be the guardian of the child's property.

I. CAPACITY TO MAKE A DEED

Mullis v. Mullis, 245 Ga. App. 845, 539 S.E.2d 189 (2000): Doris Mullis (who was age 83 at the time of the trial) was married to her husband for 65 years. Less than two weeks after he died, her brother-in-law and his wife took her to her bank, where she put their names on her checking account and twice to a lawyer's office, where she deeded to them the 46 acres of land she had inherited from her husband, her car, a truck, and a riding lawnmower, and gave Mr. Mullis a general power of attorney. He bought a $22,000 car and a new air conditioner with her money. She later went back to the bank and had their names removed from her accounts. She sued them for the return of her property. At trial, the court charged the jury, under Sec. 23-2-2, as follows: "I charge you that great inadequacy of consideration joined with great disparity of mental ability in contracting a bargain may justify equity in setting aside a deed or conveyance." At trial, Mrs. Mullis testified that she didn't recall having gone to the lawyer's office or having given her other property to the defendants and that she did not know what a power of attorney was. The bank employee described her as upset and crying both times she dealt with her bank account. The lawyer said he "felt like" he had been getting his instructions from her but revealed that he had never met with her alone. The Court of Appeals affirmed the jury verdict in Mrs. Mullis's favor and approved of the use of the charge.

J. MARITAL DEDUCTION

Estate of Lassiter v. Commisssioner, T.C. Memo. 2000-234, 80 T.C.M. (CCH) 541, 2000 RIA TC Memo 2000-324, 2000 WL 1545062 (2000): Mr. Lassiter's estate was administered in Georgia. This case involves several interpretations by the Tax Court of Georgia disclaimer and trust law. A tax assessment of over $14 million was at stake.

Mr. Lassiter died in a car accident at the age of 48. He was survived by his wife and their four daughters. Based on statements he had made to his friends and business associates, his wife and others were convinced that Mr. Lassiter had written a recent will that was drafted with current tax law in mind. However, this will could not be found, so Mr. Lassiter's 1970 will was offered for probate. That will provided for two trusts. The first trust would have been funded with one-half of Mr. Lassiter's estate in compliance with the then-existing marital deduction rules. The second trust was a residuary trust which was designed to pay the income and principal not only to his wife but also to his children and other descendants. Additionally his wife could direct the payment of any of the trust property to his descendants or their spouses. Mrs. Lassiter (both in her individual capacity and in her capacity as trustee), the four daughters, and the spouse of the daughter who was married all executed disclaimers for the purpose of basically voiding the first trust and have all the estate flow into a second trust that would qualify as a QTIP trust. The IRS objected on a variety of grounds. The Tax Court resolved all issues in favor of the estate. Among the most interesting holdings were the following:

1) The Service contended that the relative certainty expressed by the parties that another will existed - a will which could not be found - would result in Mr. Lassiter having died intestate. The IRS claimed that the second will would have revoked the first will and the revocation would remain effective even though the second will could not be found. Since the

second will could not be found, the only possible conclusion was that Mr. Lassiter had died intestate. The Court held that the mere statements of the parties was not sufficient evidence that the second will had actually been executed, nor particularly that such will had contained an express revocation clause. The Court also noted that the parties had searched diligently for that will, because the probate of that will would have resolved all the estate tax problems.

2) The IRS contended that nay of the disclaimers that had been executed by a guardian ad litem were invalid in that the guardian ad litem had not protected the best interests of the party the guardian represented. The Tax Court noted that those who had been represented by guardians ad litem were the ultimate beneficiaries of an estate that would be depleted by over $14 million

if the disclaimers were not executed. The Court also refused to second-guess the probate judge's acceptance of the disclaimers.

3) The IRS contended that, even after the disclaimers, the trust did not meet the QTIP requirement that all the income be distributed to the spouse at least annually. The Tax Court noted that IRC Regulations under Sec. 2056 allow disclaimed property to be treated as property that passes to the surviving spouse. The Tax Court also pointed out that, even though the trust did not direct expressly that the income be distributed annually, Georgia law requires a trustee to do so, unless otherwise indicated in the trust instrument. The Court determined that the administrative rights reserved to the trustee by the trust instrument (e.g., the right to apportion receipts between income and principal) did not negate Mrs. Lassiter's income right.

3) The Court found that Mrs. Lassiter had appropriately disclaimed her power to appoint trust property to Mr. Lassiter's descendants and their spouses, thus meeting the QTIP

requirement that encroachments, if any, can only be made for the surviving spouse's benefit.

II. GEORGIA LEGISLATION - 2001

A. Probate Court Costs and Fees: The General Assembly enacted HB 541. This bill repealed the current fee schedule that appears in OCGA Sec. 15-9-60 and replaced it with a consolidated list of filing fees ranging from $10.00 to $90.00

B. Georgia Higher Education Plan Act: HB 417, amending OCGA Secs. 20-3-631 et seq., 48-7-27, and 50-13-2, effective for taxable years beginning on or after January 1, 2002, establishes the Georgia Higher Education Plan, for these purposes (according to new OCGA Sec. 20-3-631):

> "(1) Provide a program of savings trust agreements to apply distributions toward qualified higher education expenses at eligible educational institutions, as defined in Section 529 of the Internal Revenue Code or other applicable federal law;
>
> (2) Provide for the creation of the Georgia Higher Education Savings Plan, as an instrumentality of the State of Georgia, to assist qualified students in financing costs of attending institutions of higher education;
>
> (3) Encourage timely financial planning for higher education by the creation of savings trust accounts;
>
> (4) Provide a savings program for those persons who wish to save to meet postsecondary educational needs, including postgraduate educational needs; and
>
> (5) Attract students to institutions of higher education within the state."

Under this plan, trust agreements and a Trust Fund will be made available to the public. Contributors may use the agreement to set up a savings trust account in the Fund, the contributions to which may be used for the educational expenses of a designated beneficiary. The

plan will comply with the requirements of Internal Revenue Code Section 529 for a "qualified State tuition program" and thus appropriate distributions for educational expenses (distributions of both the original contributions and any interest earned on the funds) will be exempt from federal taxation. Contributions to the plan will be deemed to be a completed gift of a present interest for the purposes of federal gift taxation. The Georgia plan is available to both resident and nonresident beneficiaries and contributors. The minimum and maximum amount of allowable contributions will be in conformance with the amounts set forth in Internal Revenue Code Sec. 529. Additionally, the Georgia law puts a ceiling of $8000 on annual contributions to all accounts for a beneficiary and of $120,000 on total account contributions for a beneficiary. (An additional sum of $8000 can be contributed for beneficiaries age 10 years or older during the first three years the plan is available to the general public.) Annual contributions of up to $2000 made by a parent or guardian are deductible for Georgia income tax purposes and "qualified withdrawals" (those used solely for qualified higher education expenses) are not subject to state income tax.

III. HIGHLIGHTS OF THE WEALTH TRANSFER TAX PROVISIONS OF THE ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001

In May, 2001, Congress passed a $1.35 trillion tax cut bill. President George W. Bush signed the bill in early June. Some provisions of the bill are effective retroactively to January 1, 2001 and most will "sunset" after 2010. (The "sunset" clause was required by the Congressional Budget Act of 1974 because the bill sponsors could not garner 60 or more votes in the Senate.) The best-known features of the new Act are the reductions in the income tax brackets, the marriage penalty relief provisions, and the $300/$600 refund checks that the IRS plans to mail by October 1, 2001. This outline highlights the wealth transfer tax provisions and the so-called "repeal" of the estate tax and the generation-skipping transfer tax.

A. **Transition: 2001 to 2010**

1. **Increase in the Exemption Equivalent Amount:**

i. Estate Tax: The "exemption equivalent" for the estate tax increases as follows:

2001	$675,000
2002	$1 million
2003	$1 million
2004	$1.5 million
2005	$1.5 million
2006	$2 million
2007	$2 million
2008	$2 million

2009 $3.5 million

2010 (Estate tax repealed)

(If the repeal is "repealed" after 2010, the exemption equivalent would be $1 million.)

ii. Generation-Skipping Transfer Tax:

The exemption equivalent for the generation-skipping transfer tax, currently at $1,060,000, will continue to be adjusted for inflation in 2002 and 2003. In 2004, it will be tied to the estate tax exemption equivalent and increase in the same amounts through 2009. The GST tax will be repealed in 2010.

iii. Gift Tax

The exemption equivalent for the gift tax will increase to $1 million in 2002 and will remain at that amount throughout the transition period. The gift tax will not be repealed in 2010.

2. Decreased Estate, GST, and Gift Tax Rates: The highest rate of taxation for estates, gifts and generation-skipping transfers will decrease as follows:

2002 50%

2003 49%

2004 48%

2005 47%

2006 46%

2007 45%

2008	45%
2009	45%
2010	35% (gift tax only)

The 5% surcharge that eliminates the benefit of graduated estates for estates over $10 million will be eliminated after 2001.

3. Special Gift Tax Rules

- The gift tax will not be repealed in 2010. It will remain in effect at the rate of 35% (the highest individual income tax rate) for gifts exceeding $1 million. The gift tax was retained:

  i) to discourage transfers of income-producing assets to individuals in lower income tax brackets; and

  ii) to prevent the complete depletion of estates in 2010, when taxpayers are not certain whether the estate tax will be reinstated.

- Annual exclusion gifts are still permitted, both during the transition period and after repeal of the estate/GST tax.
- For gifts after 2009, a transfer in trust will be treated as a completed gift unless the transfer is made to a grantor trust for which income is attributable to the donor or donor's spouse.

4. State Death Tax Phase-Out

Georgia, like many states, imposes a "sponge tax" or "pick-up tax" on estates in that

Georgia charges as estate tax the maximum amount that the estate can receive as a credit under Sec. 2011 of the Internal Revenue Code. The new Act substantially reduces this credit as follows:

2002	25% reduction
2003	50% reduction
2004	75% reduction

In 2005, the credit is replaced with an unlimited deduction for state death taxes that are actually paid.

5. Qualified Family-Owned Business Interests:

Section 2057, which provides a deduction for certain qualified family-owned business interests, is repealed for the estates of decedents dying after 2003.

6. Conservation Easements

The rules pertaining to conservation easements are modified so that the land for which the easement is granted can be located anywhere, rather than within a certain distance from specified areas, such as national parks. This amendment is effective in 2001.

B. "Repeal": 2010 - 2011:

The estate tax and the generation-skipping transfer tax are repealed for decedents dying or generation-skipping transfers made after 2009. As noted above, the gift tax is not repealed.

1. Carry-Over Basis (new Sec. 1022)

Effective for the estates of decedents dying after December 31, 2009, property "acquired from a decedent" will no longer receive a basis that is "stepped up" to the fair market value of the property at death. Instead, the property will be treated as a gift and the decedent's basis in the property will be "carried over" to the recipient. Thus, the recipient's basis will be the *lower* of the decedent's basis in the asset at that time or the fair market value of the decedent's property at death. Property "acquired from a decedent" includes property acquired by bequest, devise or inheritance; property passing from the decedent, without consideration, by reason of death; and property transferred to the decedent to a qualified revocable trust or other trust over which the grantor retained the right to modify or terminate.

The carry-over basis is subject to certain adjustments.

i) Adjustment for Property that Passes to the Surviving Spouse: The basis of property of the decedent that passes to the surviving spouse may be increased by adding up to $3 million (although, of course, no asset's basis may be increased above its date of death value). The $3 million adjustment is indexed to inflation after 2011. The new law incorporates many of the terminable interest rules of the old law and allows for the equivalent of a Q-TIP trust (without the requirement that the executor make a Q-TIP election).

ii) An "aggregate basis increase" of $1.3 million (indexed for inflation beginning in 2011) is allowed in addition to the increase for spousal property. This basis adjustment is to be made by the executor. The executor can distribute the $1.3 million among the assets of the estate and the adjustment may be made in whole or in part on an asset-by-asset basis.

iii) In addition to the spousal property adjustment and the aggregate basis increase, an adjustment to basis may also be made for 1) the amount of any unused capital loss carryover under Sec. 1212 and the amount of any net operating loss carryover under Sec. 172 that, but for the decedent's death, would be carried over by the decedent to a later year; and 2) any losses that would have been allowable under Sec. 165 if the property had been sold at its fair market value immediately prior to death.

Other changes relating to basis are as follows:

a) the decedent's income tax exclusion of up to $250,000 of gain on the sale of the personal residence is extended to the decedent's estate or the decedent's heirs. The decedent and/or the heir must have used the property as a personal residence for at least two of the five years preceding the sale;

b) property over which the decedent held a general power of appointment is not treated as having been owned by the decedent for the purposes of the basis adjustment;

c) 50% of the value of property that is held jointly with the spouse is treated as owned by the decedent and thus eligible for the adjustment; for all other jointly-owned property, the decedent is treated as having owned that portion that represents the portion of the consideration contributed by the decedent;

d) a decedent is not treated as owning at death any property acquired by a gift or other transfer for less than full and adequate consideration within three years of death, except that, if the decedent acquired the property from the spouse, the property will be treated as owned by the decedent unless the spouse had acquired that property by gift or other transfer for less than full

and adequate consideration in the three years preceding the decedent's death;

e) no alternate valuation date is provided in the new law; and

f) the basis adjustment is not available for : (i) stock or securities of a foreign personal holding company, (ii) stock of a DISC or former DISC, (iii) stock of a foreign investment company, or (iv) stock of a passive foreign investment company unless such company is a qualified electing fund (as defined in section 1295) with respect to the decedent.