Georgia Probate Notes

VOLUME XXIII NUMBER 4 **January 2006**

In This Issue:

Introduction

Marion Guess
Publisher and Editor
Georgia Probate Notes

Due to the favorable response received to the previous joint issues of *Georgia Probate Notes* and the Newsletter of the Fiduciary Law Section (January 2005 and July/August 2005), the Editors of each publication have again joined forces to produce this issue. Our hope is that these joint issues will bring about a greater understanding of mutual problems and a greater degree of co-operation between the courts and the bar which will in turn benefit the citizens of Georgia.

Georgia Probate Notes has been published continuously for the past twenty-three years. Two-thirds of the state's probate judges subscribe. Many attorneys, trust officers, accountants, and law libraries are also subscribers. Subscription information may be found on the masthead on the following page.

Readers are urged to comment on issues confronting the fiduciary bar and the courts through letters to the Editors.

GEORGIA PROBATE NOTES
MARION GUESS, PUBLISHER AND EDITOR

Publisher's Statement:

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

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

Mary Radford on Guardianships and Conservatorships in Georgia

Two excerpts from Professor Mary F. Radford's recently published book on Georgia's new Guardianship Code follow. These sections describe two features of the 2005 Code which did not appear in the prior Code: new procedures for transferring guardianships into and out of Georgia, and reporting requirements for conservators, including the new requirement of filing management plans with the Probate Court.

Guardianships and Conservatorships in Georgia was published by Chattahoochee Legal Press. Professor Radford teaches wills, trusts and estates, and probate law among other subjects at Georgia State University College of Law and was the Reporter for the Guardianship Code Revision Committee which drafted the new Code. *Georgia Probate Notes* thanks Professor Radford for permission to print these sections.

'2-9 Transfer of Guardianships Within Georgia and To and From Georgia; Foreign Guardians

A. Transfer of Guardianship Within Georgia: Under O.C.G.A. '29-2-60,[1] a guardian may petition to remove the jurisdiction of the guardianship to the county in Georgia in which the minor resides. When the petition is filed, the court will appoint a guardian ad litem for the minor. The court of the county in which the guardianship is located (prior to the removal) will grant the petition to remove only if the removal is in the minor=s best interest.[2] The guardian must file with the new county a certified copy of all the records relating to the guardianship before the removal can occur.[3] After removal, the probate court of the new county shall have jurisdiction over the guardianship[4] except if an action or proceeding is pending or an order has been issued for the settlement of accounts,

1. This section replaced former O.C.G.A. '29-2-70.

2. O.C.G.A. '29-2-60(b).

3. O.C.G.A. '29-2-60(c).

4. O.C.G.A. '29-2-60(d).

removal or sanction of the guardian. In that case, the court in which the action is pending or which issued the order shall retain jurisdiction over that matter.[5]

B. Transfer of Foreign Guardianship to Georgia: The Code contains detailed provisions that set out procedures whereby a guardianship that was set up in a jurisdiction outside Georgia can be transferred to Georgia and alternatively whereby a Georgia guardianship can be transferred to another jurisdiction. These provisions are modeled after uniform provisions adopted by the National College of Probate Judges Advisory Committee on Interstate Guardianships.[6]

The provisions in O.C.G.A. "29-2-65 through 29-2-68 deal with the receipt and acceptance in Georgia of a foreign guardianship.[7] A foreign guardian who wishes to transfer the guardianship to Georgia must file a petition to do so in the probate court in the county in which the minor currently resides or will reside when the minor moves to Georgia.[8] The petition must include the names and addresses of several individuals and entities who may have an interest in the guardianship or the welfare of the minor. These include: 1) the court that issued the guardianship order; the petitioner (including the petitioner=s county of domicile); the minor (including the minor=s age and current and new addresses); the minor=s adult siblings; any person besides the petitioner who is currently serving as guardian and any other person who is responsible for the minor=s care and custody; anyone currently acting as the minor=s legal representative (the petitioner, legal counsel, guardian ad litem, court visitor, etc.); and the conservator, if any. The petitioner will include with the petition an authenticated copy of the guardianship order issued by the foreign court.[9] The petition must also contain a statement as to why the transfer is in the minor=s best interest.[10]

Upon the filing of a petition for receipt and acceptance of a foreign guardianship, the Georgia court will serve personally on the minor a notice that informs the minor that the minor has a right to a hearing on the petition, that informs the minor of the procedure to exercise that right, and that states that the minor has the right to independent legal counsel. The court will appoint legal counsel for the minor if the minor has not retained counsel or counsel has not been appointed by the foreign court.[11] Notice and a copy of the petition

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5. O.C.G.A. '29-2-60(e).

6. Standard 3.5 of the National College of Probate Judges Standards contains provisions that apply to guardianships and conservatorships that cross state lines.

7. A Aguardianship@ is defined as any Alegal relationship in which a person is given responsibility by a foreign court for the care of a minor, thereby becoming a guardian.@ O.C.G.A. '29-2-65(a).

8. O.C.G.A. '29-2-65(b).

9. Included with the order must be all attachments describing the guardian=s duties and powers and any amendments or modifications to the order. O.C.G.A. '29-2-65(c). The provisions for authenticating the records and judicial proceedings of another state or territory appear at O.C.G.A. '24-7-24.

10. O.C.G.A. '29-2-65(c).

11. O.C.G.A. '29-2-66(a).

will also be mailed to the persons who are named in the petition.[12] The Georgia court may waive this notice and the notice to the foreign court described below if the court finds that a petition for transfer has been filed in the foreign jurisdiction in conjunction with which notice has been given to the minor and all interested persons and the minor is represented by legal counsel and the petitioner provides the court with an authenticated copy of the petition and proof that the minor has been served within 90 days.[13] This prevents an unnecessary duplication of effort and expense.

The Georgia court will provide the foreign court with a copy of the petition and will request the foreign court to certify that the guardian is in good standing[14] and to forward to the Georgia court copies of all documents that relate to the guardianship.[15] The court may hold a hearing on the receipt and acceptance on its own motion and is required to hold such a hearing upon the motion of the minor or an interested person.[16] If someone has challenged the validity of the foreign guardianship in the other jurisdiction, the Georgia court may stay its proceeding while the foreign court hears the challenge.[17] The Georgia court may grant the petition for receipt and acceptance of the foreign guardianship if the court finds the guardian to be in good standing with the foreign court and that the transfer is in the minor=s best interest.[18] From that point on, the laws of Georgia govern the guardianship.[19] Even if the receipt and acceptance petition is not granted, the guardian may still petition under the procedures described in '2-6 to be appointed guardian of the minor in Georgia.[20]

C. Transfer of Georgia Guardianship to Foreign Jurisdiction: The statutes relating to the transfer of a Georgia guardianship to another jurisdiction are found in O.C.G.A. "29-

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12. These persons will be informed that they have the opportunity to object to the petition. O.C.G.A. '29-2-66(c).

13. O.C.G.A. '29-2-66(e).

14. Under O.C.G.A. '29-2-66(b)(1), the Georgia court will ask the foreign court to certify whether:
    (A) The foreign court has any record that the guardian has engaged in malfeasance, misfeasance, or nonfeasance during the guardian's appointment;
    (B) Periodic status reports have been filed in a satisfactory manner; and
    (C) All bond or other security requirements imposed under the guardianship have been performed.

15. These documents include:
    (A) The initial petition for guardianship and other filings relevant to the appointment of the guardian;
    (B) Reports and recommendations of guardians ad litem, court visitors, or other individuals appointed by the foreign court to evaluate the appropriateness of the guardianship;
    (C) Reports of physical and mental health practitioners describing the condition of the minor;
    (D) Periodic status reports on the condition of the minor; and
    (E) The order to transfer the guardianship.
O.C.G.A. '29-2-66(b)(2).

16. The minor has 30 days from the date of service to request a hearing. The other persons named in the petition have 30 days from the date of mailing. O.C.G.A. '29-2-66(d).

17. O.C.G.A. '29-2-67(b).

18. O.C.G.A. '29-2-68(a).

19. O.C.G.A. '29-2-68(b).

20. O.C.G.A. '29-2-68(d).

2-69 through 29-2-73. These provisions essentially mirror the receipt and acceptance provisions. In this case, the Georgia guardian of a minor who has moved "permanently"[21] to another jurisdiction will file with the Georgia court that has jurisdiction over the guardianship a petition for permission to transfer the guardianship to that jurisdiction.[22] The Georgia court may order the Georgia guardian to file in the foreign jurisdiction a petition for receipt and acceptance of the guardianship in that jurisdiction.[23] It is hoped that eventually all states will adopt the uniform transfer provisions, but if the foreign jurisdiction has not done so and otherwise has no procedure for receiving a foreign guardianship, the Georgia court may order the guardian to file a petition to be appointed guardian in that jurisdiction.[24]

The guardian=s petition will include the same names and addresses and other information that are described above in a petition for receipt and acceptance. The petition will also include an authenticated copy of the petition for receipt and acceptance filed in the foreign court and a copy of any other petitions that are pending with relation to the guardianship in any jurisdictions.[25] The petition must state the reason for moving the minor as well as the reason the transfer is in the minor=s best interest.[26] The minor, the foreign court and the other persons named in the petition will receive notice in the same manner as with a petition for receipt and acceptance.[27] As with the petition for receipt and acceptance, the minor has the right to legal counsel and the Georgia court will appoint counsel for the minor if counsel has not already been retained or the foreign court has not appointed counsel.[28] The Georgia court is authorized to notify the foreign court if there have been any significant problems in the guardianship, including whether all accountings and reports have been filed and whether all bond requirements have been met.[29] After any appropriate hearing, the court may grant the order to transfer the guardianship upon making the same

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21. The minor=s move will be presumed to be permanent if
    (1) The minor has resided in the foreign jurisdiction for more than 12 consecutive months;
    (2) The guardian notifies the court that the minor will move or has moved permanently to the foreign jurisdiction; or
    (3) A foreign court of competent jurisdiction notifies the court of the filing of a petition for guardianship for the minor in the foreign jurisdiction.
O.C.G.A. '29-2-69(b).

22. O.C.G.A. '29-2-69(a).

23. O.C.G.A. '29-2-69(c).

24. O.C.G.A. '29-2-69(d).

25. O.C.G.A. '29-2-70.

26. O.C.G.A. '29-2-70.

27. O.C.G.A. '29-2-71.

28. O.C.G.A. '29-2-71(a).

29. O.C.G.A. '29-2-73(b).

findings of the guardian=s good standing and the minor=s best interest that apply in the case of a petition for receipt and acceptance.[30]

The new statutes are designed to coordinate the efforts between the Georgia court and the court of the jurisdiction from which or to which the guardianship is being transferred. To that effect, the Georgia court may delay the proceedings for a reasonable time, make the receipt and acceptance in Georgia contingent upon the transfer or termination of the guardianship in the foreign jurisdiction, make a transfer contingent upon the acceptance or appointment of the Georgia guardian in the foreign jurisdiction, recognize concurrent jurisdiction with the foreign court for a reasonable period of time, and make such other arrangements as are necessary to facilitate the transfer.[31]

D. Foreign Guardian Acting in Georgia: A foreign guardian[32] of a minor may transact business in Georgia on behalf of the minor without transferring the guardianship to Georgia. A foreign guardian who desires to sell or convey property of the minor that is located in Georgia must be authorized to sell and convey the minor=s property in the same way that conservators are authorized in Georgia to sell real estate of the minor.[33] At the time the petition for sale is filed, the foreign guardian must file with the court an authenticated copy of the guardian=s Letters of Guardianship and must file appropriate bond.[34]

A foreign guardian may also institute an action in Georgia to enforce a right or recover property of the minor.[35] Again, the guardian must file an authenticated copy of the guardian=s letters.[36] A foreign guardian submits to personal jurisdiction by the Georgia courts when the guardian receives money or personal property of the minor in Georgia or does any act that would have given Georgia jurisdiction over the guardian acting as an individual.[37]

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30. O.C.G.A. '29-2-73(a).

31. O.C.G.A. '29-2-68(c), 29-2-73(c).

32. For purposes of these provisions, a Aforeign guardian@ is defined as Aa guardian or other person who has been given responsibility by a court of competent jurisdiction in another state or territory governed by the Constitution of the United States for the care of a minor and whose guardianship has not been transferred to and accepted in this state pursuant to@ the provisions for transfer of a foreign guardianship that are described above. O.C.G.A. '29-2-74(a). This section replaces former O.C.G.A. '29-7-9.

33. See '3-4. The provisions of O.C.G.A. '29-3-119 that allow an interested person to have his or her interests protected before the sale will be applicable in this situation. See '3-10.

34. O.C.G.A. '29-2-74(b). The provisions for authenticating the records and judicial proceedings of another state or territory appear at O.C.G.A. '24-7-24.

35. O.C.G.A. '29-2-75. This section replaces former O.C.G.A. '29-7-6. Former O.C.G.A. "29-7-1 through 29-7-5 were repealed as unnecessary in that all fiduciaries are under a fiduciary duty to make appropriate investigation prior to delivering property to anyone else. For provisions relating to the payment of a minor=s debt or delivery of a minor=s property to a foreign conservator, see O.C.G.A. '29-3-120, discussed at '3-10.

36. O.C.G.A. "29-2-75, 29-2-76. This section replaces former O.C.G.A.'29-7-7.

37. O.C.G.A. '29-2-77. This provision is modeled after O.C.G.A. '53-5-45.

'5-10 Annual Filing Requirements: Inventory, Management Plan, and Annual Returns

A. Inventory: A conservator is required to file with the court and provide to the ward=s guardian an inventory of the ward=s property. The initial inventory must be filed within two months of the date the conservator is appointed.[1] The inventory must describe the ward=s assets and liabilities. The inventory should include a list of every item of personal and real property that the ward owns and describe how that property is titled.[2] The conservator must swear or affirm that the inventory is a true statement of all the ward=s assets and liabilities known to the conservator.[3] Each year the conservator must include an updated inventory with the annual return.[4]

B. Management Plan: At the same time the conservator files the inventory, the conservator must also file a plan for managing, expending, and distributing the ward=s assets over the course of the conservatorship.[5] The plan should be based on the ward=s actual needs and should be designed to serve the ward=s best interest. The conservator must include in the plan an estimate of the duration of the conservatorship and projections for future expenses and expected resources. If the conservator has any proposal to change the way in which any of the ward=s assets are titled, this proposal must be included in the plan. The plan may also include a budget for the forthcoming year. The budget may indicate simply that the ward=s income will be expended and show the projected expenditures. Alternatively, the budget may propose the expenditure of funds that are in excess of the projected annual income. The plan and any budget that proposes excess expenditures must be approved by the court. The conservator must provide an updated plan every year to the court and the ward=s guardian in conjunction with filing the annual return.[6]

C. Annual Returns: Within 60 days after the anniversary date of qualification, in each year, every conservator must file with the court a verified[7] return that consists of a statement of the receipts and expenditures of the conservatorship during the year preceding such anniversary date of qualification, together with a note or memorandum of any other fact necessary to show the true condition of the estate and a statement of the condition of the

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1. O.C.G.A. '29-5-22, 29-5-30. The provisions in the latter section relating to inventory modify former O.C.G.A. '29-2-24 and shorten the time for filing the initial inventory from four months to two months.

2. O.C.G.A. '29-5-30(b). Former O.C.G.A. '29-2-24 only required the conservator to list the ward=s personal property and the real property that was n the county in which the conservatorship was located. Also, the former Code section did not require the conservator to indicate how the property was titled.

3. O.C.G.A. '29-5-30(b).

4. O.C.G.A. '29-5-60. This requirement did not appear in the former Code.

5. O.C.G.A. '29-5-30(a), (c). The former code did not contain this requirement. The requirement for a management plan is modeled after UGPPA '418(c).

6. O.C.G.A. '29-5-30(c).

7. Every petition and return that is filed in the court must be verified by an oath sworn before the court or a notary public. O.C.G.A. '29-9-11.

bond.[8] In addition to filing the return with the court, the conservator must mail a copy of the return to the surety, the ward, and the ward=s guardian, if there is one.[9]

The reporting period can be changed upon petition of the conservator or upon the court=s own motion, with the court ordering a date other than the anniversary date of qualification as the basis of the reporting period. The court also may accept and approve a return that does not cover the appropriate reporting period, but such an acceptance does not automatically change the reporting period.[10]

The court must carefully examine each return.[11] Upon its own motion or the petition of any interest person, the court may require the conservator to produce the original documents that support the return.[12] If no objection is filed within 30 days of the time the return is filed, the court must record the return within 60 days of its filing.[13] The recorded return is prima-facie evidence of its correctness.[14] If an objection is timely filed or if the court determines on its motion that the conservator may have wasted the ward=s property or otherwise failed to comply with the law, the court is required to hold a hearing and take whatever action it deems appropriate.[15]

The court is to keep a docket of those conservators who are required to make annual returns and cite those who fails to file timely returns to appear and show cause for the delay. Conservators who fail to make annual returns shall forfeit all commissions and other compensation for transactions during the year within which no return is made unless the court orders otherwise.[16] A willful and continued failure to make required returns is good cause for removal of the conservator.[17]

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8. O.C.G.A. '29-5-60(a). As noted above, the conservator must also file an updated inventory and an updated management plan. This section replaces former O.C.G.A. '29-2-44. The former Code section did not require the updated inventory or management plan nor did it require the statement of the condition of the bond.

9. O.C.G.A. '2-95-60(a). Former O.C.G.A. '29-2-44 did not contain these mailing requirements. A somewhat similar requirement appears in the Georgia Probate Code at O.C.G.A. '53-7-68 (requiring the return of a personal representative to be mailed to heirs or beneficiaries of the estate).

10. O.C.G.A. '29-5-60(b). This subsection carries forward former O.C.G.A. '29-2-44(b).

11. O.C.G.A. '29-5-60(c).

12. Former O.C.G.A. '29-2-44(a) required the conservator to file with the return either the original vouchers or an affidavit by the conservator swearing that the vouchers match the information that is on the return.

13. The return is to be kept on file in the court. O.C.G.A. '29-5-60(c). Former O.C.G.A. '29-2-44(c) required objections to be filed within 30 days but set no time limit for the court to record the return.

14. O.C.G.A. '29-60(c). Former O.C.G.A. '29-2-44(c) provided that the court could allow the return and order it to be recorded. A return that was allowed and recorded was prima-facie proof of its correctness.

15. O.C.G.A. '29-5-60(c). Former O.C.G.A. '29-2-44(c) contained no provisions relating to hearing objections as it contained no requirement that the return be filed or mailed to anyone other than the court.

16. O.C.G.A. '29-5-60(d). This subsection carries forward former O.C.G.A. '29-2-44(d). See also O.C.G.A. '295-50(e). On compensation of conservators, see '5-9.

17. O.C.G.A. '29-5-60(d). A similar provision appears in the Probate Code at O.C.G.A. '53-7-72. Former O.C.G.A. '29-2-44(d) did not contain this provision. However, former O.C.G.A. '29-2-45 allowed a court to cite a conservator who failed to make annual returns and one of the possible sanctions listed in this statute was the revocation of the conservator=s letters. See Gary v. Weiner, 233 Ga. App. 284, 503 S.E.2d 898 (1998), in which the court removed a wife who had been appointed guardian of the property of her husband but who had failed to file annual returns for four years.

With regard to personal representatives, the Georgia appellate courts have held that while the failure to make returns as required by law may be cause for removing a personal representative, it is not a compulsory ground for so doing but one within the discretion of the court. Cosby v.

Getting to Know the NEW Judges

For the next several issues, this feature focuses on Georgia Probate Judges who have just completed their first year on the bench. The standard questionnaire has been modified accordingly. The submissions, which are in italics, are designed to provide background information about the Judge while revealing some of his or her personality. The non-italicized portion is in the Judge's words.

The Editor thanks this issue's participant and welcomes the participation of other Probate Judges.

1. *My name is* Mitzi Way.

2. *I was elected Probate Judge of* Schley *County*.

3. *Before I was elected I was (work or profession)* an insurance agent.

4. *I ran for probate court judge because* of an opportunity to come back "home" to work and for future benefits.

5. *My greatest hope for my first term is* to learn all I can! I want to bring more technology into the office.

6. *If I could have dinner with any three people, living or dead, they would be* Jesus Christ, my husband, my mother.

7. *Tech or Georgia?* Georgia

Weaver, 107 Ga. 761 (1), 33 S. E. 656 (1899); Hoffman v. Chester, 204 Ga. 296, 306, 49 S. E. 2d 760 (1948); Bruce v. Fogarty, 53 Ga. App. 443 (1), 186 S. E. 463 (1936); McLendon v. McLendon, 96 Ga. App. 197 (1), 99 S. E. 2d 489 (1957). See also Lokey v. Lokey, 82 Ga. App. 171, 60 S. E. 2d 569 (1950).

Learning from the Past

The following article is reprinted from *Georgia Probate Notes* Volume XX No. 33, November/December 2002. As all readers of this newsletter will be aware, all references to a "guardian of the property" would now be to a "conservator."

Commissions

[This memorandum was filed with the DeKalb Probate Court in a case where the guardian had not taken commissions for some years and then attempted to take these past commissions in a lump sum. An objection was filed to the sought-after commissions alleging that they were barred by the statute of limitations. The DeKalb Probate Court found that the commissions were not barred by the statute of limitations.]

MEMORANDUM OF LAW

The statute of limitations applicable to commissions of guardians of property of living incapacitated adults is 20 years for properly filed annual returns.

A property guardian's entitlement to commissions for services is established by statute in Georgia.[1] O.C.G.A. §29-2-42 grants the following commissions to property guardians without court order: 2 ½% of all sums of money received and paid out by the guardian, except on money loaned by and repaid to the guardian, and except on commissions paid to the guardian; 10% additional commission on interest earned on loans by the guardian; and 0.5% of the market value of property held in the estate on December 31 each year. A guardian who fails to file an annual return with the court is not entitled to commission for any service done during that year unless by special order of the probate court such guardian is exonerated from all fault. O.C.G.A. §29-2-44(d).[2]

While there is no statute of limitations specifically applicable to guardianship commissions according to its terms, O.C.G.A. §9-3-22 states in pertinent part: "All actions for the enforcement of rights accruing to individuals under statutes or acts of incorporation of by operation of law shall be brought within 20 years after the right of action has accrued…" Since the entitlement of a guardian to commission is created and governed by statute, O.C.G.A. §9-3-22 applies and the applicable period of limitations is 20 years.

O.C.G.A. §9-3-23, which sets a four year statute of limitations for actions to recover on open accounts, is not applicable. An open account is "[a]n account that is left open for ongoing debit and credit entries and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability." Black's Law Dictionary, 7th Ed., p. 19 (West 1999). A guardianship is not a commercial transaction in which goods or services are furnished, or in which credit is extended by one party to another. The guardian is a fiduciary appointed by the probate court. No extension of credit is involved. The guardian's actions and returns are supervised by the court. A guardianship is not an open account and O.C.G.A. §9-3-25 does not apply.

Nor does O.C.G.A. §9-3-24, which sets a six year statute of limitation for actions on promissory notes and other simple contracts, apply. There is no contract between the guardian and the ward; the ward by definition lacks the power to contract. The guardian's authority derives from the probate court's order removing certain rights from the ward and granting them to the guardian and from the guardian's oath, not from some contractual arrangement. A guardianship is not a contract and O.C.G.A. §9-3-24 does not apply.

The only period of limitations which can be applicable to a guardian's statutory right to certain commissions is the twenty year limitation imposed by O.C.G.A. §9-3-22. Since the guardian's entitlement to statutory commissions is based on properly filed annual returns, the guardian of a living ward would be barred from maintaining an action to collect commissions based on returns filed more than 20 years prior to the initiation of such action.

Respectfully submitted,

John W. Spears, Jr.

STATE BAR OF GEORGIA
FIDUCIARY LAW SECTION

From the Chair of the Fiduciary Law Section, Faryl S. Moss

It is our goal to provide section members with information that will be useful to their practices. Ed Manigault has been working hard to update our web site and to include useful information. Check out the web site at:

http://www.gabar.org/sections/section_web_pages/fiduciary_law/

and let us know if you have any other suggestions. We will also be communicating more regularly with our section members by e-mail. If we don't have your e-mail address, please make sure to add it to your information at the State Bar's web site.

Update on the Probate Information Center of the Fulton County Probate Court

Laurin M. McSwain
Lefkoff, Duncan, Grimes, Miller & McSwain, P.C.
Atlanta, Georgia

As estate planning attorneys, it is often difficult for us to find effective avenues through which to provide *pro bono* services to those needing our assistance. The Estate Planning and Probate Section of the Atlanta Bar has long considered such service a part of its mission. However, finding sustainable projects has proved difficult. An exploratory meeting of the section leadership with Judge Pinkie Toomer of the Fulton County Probate Court and members of her staff revealed that the Court could use assistance in addressing the needs of unrepresented individuals. These individuals often needed just a few minutes with an experienced attorney to resolve simple estate issues, or to understand the need for legal assistance to address more complex matters. Often lacking the time to properly address these needs, Court staff were also presented with issues beyond the scope of their responsibility, resulting in frustration to both the staff and public being served.

Using the concept refined by the Family Law Information Center (FLIC) as a guide and the organizational skills of its Director, Granvette Matthews, the Fulton Probate Court, the Estate Planning and Probate Section of the Atlanta Bar, the Atlanta Volunteer Lawyers Foundation (AVLF), the Atlanta Legal Aid Society and FLIC combined efforts to establish the Probate Information Center (PIC) in Fulton County. Initially established as a pilot program within the offices of the Family Law Information Center, PIC assisted its first

clients on March 7, 2005 with the able assistance of its first volunteer lawyer, Julie Childs. Martin Ellin and AVLF were key in providing the insurance umbrella for volunteers and the framework for engaging the clients.

With the success of this pilot program, Judge Toomer was able to secure funding for space and staffing for PIC within the Fulton Probate Court. After nine months in operation, PIC volunteers have assisted 150 clients. Clients contact the Fulton Probate Court initially. Information is collected and an initial screening is done to confirm that the matter is one that can be addressed through PIC. The information is then forwarded for further screening by AVLF. Note that clients must be residents of Fulton County with probate court issues. Clients are not screened based on income or ability to pay. Once AVLF approves the client, the information is returned to the Probate Court and Court staff contacts the client to schedule a 45 minute appointment with a volunteer attorney. It is required that the volunteer have at least three years active probate experience. Appointments are scheduled on Mondays from 12:30 to 4:30 in the office of the Fulton Probate Court. Volunteers are provided a private office with telephone, computer, book of probate forms, the Georgia Code and access to Court personnel for assistance. Currently, clients have been scheduled for appointments through January; so the need for these services is obviously there.

A primary goal of PIC is to relieve the pressure on the Probate Court in assisting unrepresented individuals with uncontested matters such as:

- Year's Support Petitions
- No Administration Necessary Petitions
- Probate of Simple Wills
- Administration of Estates (including duties of personal representatives, creditor issues, and title to real estate)
- Poverty Affidavits

Some issues can be resolved or properly directed in the initial 45 minutes allotted. However, it is often a matter of having the correct information. In these situations, clients are guided as to the information needed and are allowed to reschedule for subsequent appointments. With others, it is obvious that more assistance will be necessary and these clients are referred to private attorneys, AVLF or Atlanta Legal Aid. While referrals are directed from a list of volunteer attorneys, the attorney who sees a client initially through PIC cannot continue that representation past the initial conference (unless volunteering successively at PIC). Further, the clients being referred to private attorneys are not expected to be served on a *pro bono* basis.

Currently, 28 volunteer attorneys have participated in PIC, some more than once. Volunteer attorneys are now being scheduled for Monday afternoon appointments in March and beyond. Judge Toomer is very pleased with the success of the project and has stated: "The Probate Information Center adds another dimension to our mission of serving the public in the probate process, and both my staff and I appreciate the efforts of the volunteers." This is further evidenced by the handwritten notes that volunteers receive from

Judge Toomer. The benefit, however, is not one-sided. Volunteer attorneys report experiencing the satisfaction of using their expertise to solve immediate problems and being challenged with issues not seen in their everyday practices. Those involved in the project are not aware of any similar programs assisting probate courts and it is hoped that the success of this program will inspire efforts elsewhere.

To volunteer, please contact Connie White at Atlanta Volunteer Lawyers Foundation by calling (404) 521-0790.

Fiduciary Legislation Committee Report

Benjamin H. Pruett
Bessemer Trust Company
Washington, D.C.

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

Definition of Insurable Interest

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

The insurance statutes of all states provide that the purchaser of any life insurance policy must have some economic or other interest in the life of an insured, such that the death of the insured would cause the purchaser to suffer some economic or other loss. Without such a requirement, a life insurance policy could be purchased for no purpose other than merely "wagering" on the life of another. If a policy is issued to a purchaser who is found to be without insurable interest, the insurer's liability on the policy may be limited to premiums paid or, in some cases, the policy proceeds will be paid to the insured's legal heirs, rather than the owner or designated beneficiary of the policy, irrespective of the person who paid the premiums.

The insurable interest of the Trustee of an ILIT in the typical family situation has never been questioned in Georgia and, indeed, has always been presumed, but the insurable interest statute does not *expressly* state that such insurable interest exists. The proposed amendments are intended to address concerns raised by the case of Chawla v. Transamerica

Occidental Life Insurance Company, 2005 WL 405405 (E.D. Va. Feb. 3, 2005), in which a federal district court in Virginia, construing the insurable interest statute of the state of Maryland, determined that a trust lacked an insurable interest in the life of the settlor, essentially because the applicable insurable interest statute did not *expressly* provide that a trust or a trustee could have any such insurable interest. The Chawla decision has been widely criticized as taking an unreasonably restrictive view of the law, especially since the insurable interest ruling was unnecessary to the resolution of the case (significant fraud in the procurement of the policy was amply proven). Nevertheless, to eliminate any doubt as to insurable interest in the case of a typical ILIT and in certain other common situations, the proposed legislation specifically sets forth a non-exclusive list of insurable interests. Moreover, the proposed legislation states that it is not intended to *create* any *new* insurable interests that did not exist previously, but is intended only codify insurable interests which already exist at common law, so that the amendments to the statute will apply to existing policies, as well as new policies.

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

Fiduciary Representations and Warranties in Purchase and Sale Agreements

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

O.C.G.A. §53-8-14 prohibits the personal representative of an estate from binding the estate with *any* warranty in any conveyance or contract. Based upon this provision, the Georgia Supreme Court held in Moss v. Twiggs, 260 Ga. 561, 397 S.E.2d 707 (1990), that a warranty of title by the trustee of a testamentary trust was invalid. Current O.C.G.A. §53-12-259 essentially provides that sales by trustees of *inter vivos* trusts are governed by the same rules as sales by personal representatives of decedents' estates. The comments to O.C.G.A. §53-8-14 suggest that the restriction on fiduciary warranties only applies where the fiduciary is not granted certain broad powers in the governing instrument, such as those powers contained in O.C.G.A. §53-12-232, but the comment is not part of the statute and is therefore not binding.

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

The Committee is still studying this issue and has also referred the issue to the Trust

Code Revision Committee for study and comment.

Non-Probate Transfers to Testamentary Trusts

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

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

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

Permitting Trusts to Hold Title to Property

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

At the request of the Real Property Law Section, the Committee considered whether the Trust Act should be amended to specifically permit trusts to hold title in their own

names. The Committee determined that this issue is probably one that implicates real property title law more than it does trust law, but is still studying the issue and has also referred the issue to the Trust Code Revision Committee for study and comment.

Uniform Power of Attorney Act

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

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

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

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

New Fiduciary Law Section Committee on Consumer Publications

Richard E. Barnes
Elliott, Blackburn, Barnes & Gooding, P.C.
Valdosta, Georgia

The Fiduciary Law Section announces a new committee devoted to producing consumer publications. Melissa Walker, Section Chair, created the committee to provide easy-to-understand, unbiased information for Georgia residents who have questions about estate planning.

Walker said, "With the Terry Schiavo case receiving so much attention, Georgia consumers are taking a renewed interest in pre- and post-death planning. We want to provide consumers with a resource to help guide them through these difficult issues. Our

hope is that these publications will underscore the importance of advance planning and meeting with a qualified estate planning attorney to ensure their wishes are respected."

The information will be presented in a series of pamphlets produced with the generous assistance of the State Bar. Initial publication topics include living wills and health care powers of attorney, frequently asked questions about estate planning, general powers of attorney and revocable living trusts, and an update of the previously produced wills pamphlet. The committee also is adapting material supplied by the U.S. Department of Health and Human Services for a pamphlet promoting organ donation.

The goal of the committee is to have the publications available online at the Section website and the Governor's Office of Consumer Affairs, with hard copies available for purchase from the State Bar. Estate planning attorneys may wish to use them as a resource to educate clients. Committee members are Richard Bryson of Suwannee, Kel Long of Atlanta, Jeanna Fennell of Macon, Mary Galardi of Norcross and Chair Richard Barnes of Valdosta.

Look for the first pamphlets to be available soon!

Memorial to Lansing Lee

Long-time Augusta attorney Lansing Burrows Lee, Jr., passed away on Wednesday, November 2, 2005. Mr. Lee was 85 years old and practiced law in Augusta for 58 years. He actively practiced law until very recently. He was honored by the Augusta Bar Association in 1997 for 50 years of practice. Mr. Lee was a fifth generation Augusta lawyer. Mr. Lee is survived by his wife, Natalie, four children, and seven grandchildren.

Mr. Lee received his undergraduate degree from the University of Virginia, and graduated from Harvard Law School in 1947. His law school years were interrupted by four years of service in the Army Air Corps during World War II. Mr. Lee was an active member of St. Paul's Episcopal Church and was involved in many civic, service and charitable organizations in Augusta throughout his life.

Mr. Lee always had a kind word for everyone. He was a true gentleman and will be missed.

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