Georgia Probate Notes

VOLUME XXV NUMBER 2 **September-October 2007**

In This Issue:

Introduction to Joint Issue with the Fiduciary Section

As we have for the past several years, *Georgia Probate Notes* and the Fiduciary Law Section of the State Bar of Georgia have joined forces to publish a joint newsletter. We believe that this newsletter will be of interest to both probate court judges and fiduciary practitioners. By exposing each group to the writings and ideas of the other group we hope to make both judges and lawyers aware of mutual problems and potential solutions.

Georgia Probate Notes wishes to express its appreciation to the lawyers and judges who have contributed to this issue.

Marion Guess, Publisher and Editor

Georgia Probate Courts Give Consideration to Legislative Change

Georgia Probate Notes contacted Gwinnett County Probate Court Judge and President of the Georgia Council of Probate Court Judges Walter S. Clarke regarding the legislative proposals discussed at the Council's Strategic Planning meeting September 24 to 26, 2007. Judge Clarke furnished us with the following list of proposals.

1. Amend O.C.G.A. §44-4-1 concerning the appointment of processioners to survey boundary lines, to eliminate the need for probate court judges to appoint processioners.

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GEORGIA PROBATE NOTES
MARION GUESS, PUBLISHER AND EDITOR

Publisher's Statement:

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2. Amend O.C.G.A. §15-9-127 to add additional concurrent jurisdiction with the superior courts to expanded jurisdiction probate courts (Article Six Courts) to construe wills pursuant to O.C.G.A. §23-2-92.

3. Amend O.C.G.A. §15-9-120(2) to define "Probate Court" to mean "a probate court of a county having a judge who has been admitted to practice law for at least seven years." This would eliminate the need for a county population reaching a minimum size before the probate judge would have enhanced jurisdiction.

4. Amend O.C.G.A. §53-2-40, dealing with proceedings for no administration necessary, to create a certificate, similar to the certificate of award of a year's support, to be recorded in the Clerk of Superior Court's office which would put title examiners on notice that a change in ownership of real property had occurred.

5. Eliminate O.C.G.A. §53-5-3(2) which triggers the prohibition of the probate of a decedent's will five years after a petition for year's support has been filed on the estate of the decedent.

6. Propose legislation which would increase the qualifications of individuals seeking to run for probate court judge in counties with a population between 50,000 and 96,000 to require one of the following: a four year college degree, four years experience as a paralegal, or four years experience working in the probate court. Sitting probate court judges in these counties would be grandfathered in and would not have to meet the additional requirement.

7. Amend O.C.G.A. §29-2-8 to address situations where the temporary guardian files a petition to terminate the temporary guardianship and where DFCS has custody and files a motion to terminate the temporary guardianship.

8. Propose legislation to allow probate judges in counties with a population of 500,000 or more to appoint an associate judge.

Breach of Fiduciary Duty and Subsequent Damages

The following order was entered in the Dougherty County Probate Court by Judge Nancy Stephenson. The order illustrates that the probate court has the authority not only to remove a fiduciary but to make the estate whole by surcharging the fiduciary for loss to the estate and for attorney fees incurred. The article from *Georgia Probate Notes* Volume XVIII March 2001 which follows Judge Stephenson's order is included to provide case law

to support the probate court's power. Heath v. Sims, which is the subject of the article, has been cited more recently in Benefield v. Martin, 276 Ga. App. 130 (2005).

IN THE PROBATE COURT FOR THE COUNTY OF
DOUGHERTY, STATE OF GEORGIA

IN RE: ESTATE OF ANNIE LEE MCCARTHERN,
Deceased.

File 06-PRO-002

Petition of Maggie Gardner for Removal of Executor Ocie Robinson, and Counterclaim Against Ocie Robinson, Individually and as Executor.

JUDGMENT

The above-styled matter came on for hearing on August 30, 2007, both parties appearing with counsel, and the Court upon due consideration of the testimony and evidence presented, makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1.

Annie McCarthern ("Decedent") died on January 4, 2006, having executed a Last Will and Testament on October 1, 1999 and a Codicil thereto on October 25, 2005. While the original Will nominated her daughters, OCIE ROBINSON and MAGGIE GARDNER as Co-Executors, the Codicil omitted MAGGIE GARDNER, listing OCIE ROBINSON as sole Executor. Letters Testamentary issued to OCIE ROBINSON on March 1, 2006.

2.

Prior to her death, Decedent had established two bank accounts, both jointly owned by herself, Ocie Robinson and Maggie Gardner. The certain account at SunTrust Bank contained approximately $3,000.00. After some initial expenses were paid from this account, Maggie Gardner withdrew the remaining funds, about $2,000.00, and closed the account. The other joint account, at Regions Bank, contained approximately $11,000.00, which sum was reduced to approximately $5,000.00 by Executor after payment of burial expenses, attorneys fees, court costs, and debts of the estate. Apart from these accounts, which technically did not constitute estate assets, the estate's sole asset was a 129-acre tract of real estate in Dougherty County.

3.

At the time of the hearing, all of the property in question had been deeded to the various devisees by instrument dated June 29, 2007. However, Maggie Gardner claimed the 16-month period between the Executor's appointment and the property distribution constituted a deliberate and unreasonable delay, resulting in damages to her (Maggie Gardner), as she would have been able to lease her share of the property for farm usage had

it been titled in her name. Although she stated that Executor Ocie Robinson "dragged her feet" in the distribution with full knowledge that Maggie Gardner was suffering from cancer, she also stated that she never notified Executor of her illness, and "if I had wanted her to know, I would've told her."

4.

Portions of estate property were devised as follows: two 10-acre tracts to Johnny Vicks and Herbert Griffin; one acre to Marilyn Cutliff Fields; Decedent's home and 52 acres surrounding said home ("as determined by my Executrix") to Ocie Robinson, and 52 acres of property ("as determined by my Executrix") to Maggie Gardner. The 10-acre tract devised to Johnny Vicks was particularly described, and the tract to Herbert Griffin was described as the "ten acres adjoining on the east a tract of land devised to Johnny Vicks, of approximately the same shape, to be specifically identified in a survey to be obtained by my Co-Executrixes."

5.

Approximately five years before Decedent's death, Quincy Robinson, son of Ocie Robinson ("Executor"), had retained civil engineer and surveyor Ritchie Marbury, apparently without Decedent's knowledge or approval, to obtain a boundary and topographical survey and plan for subdivision of the estate property, to be known as "McCarthern Pines Subdivision." Quincy Robinson, owner of Majestic Construction Company in Cincinnati, Ohio, planned to build houses on the property. Executor and Quincy Robinson asked Marbury to assist in obtaining a change in the property's zoning from Agricultural Use to Single-Family Residential Use. Marbury met with Executor and Quincy Robinson several times, and was contacted by them again after Decedent's death. Marbury stated the division of the realty was complicated by the fact that some tracts lacked access to a dedicated road, and several easements would be required to ensure such access. Further, the devise of a one-acre tract was not practical, he said, as the county's building code required a minimum of one and one-half acre for a home to be constructed on the tract. He assisted with the preparation of an application in April 2007 to the Zoning Commission of Dougherty County. However, upon being informed by the Commission that some of the devisees of the property were opposed to the rezoning, and denial was certain, Marbury advised Executor to withdraw the application to avoid the resulting two-year mandatory period such a denial would require before an application could be refiled.

6.

On May 18, 2007, said Executor filed in Probate Court a "Request for Clarification of the Executor's Powers and Duties Regarding the Estate of Annie Lee McCarthern." Based on her understanding of the Zoning Commission's actions, Executor apparently believed their refusal was due to her lack of authority as Executor to file such an application. Her Request sought a ruling on whether or not she possessed this legal authority. A hearing was never scheduled by the Court and a ruling was not made on the issue.

7.

In addition to the problems associated with the property division, Executor stated she was delayed in the distribution due to the claims of two creditors, credit card companies whose claims she disputed. Executor's attorney requested documentation of signed credit applications by the Decedent (who was 94 at the time of her death), as well as copies of the charges in question, but these copies were never received. In a February 26, 2007 letter, Maggie Gardner's attorney demanded immediate distribution of the property due to the fact his client was suffering from liver cancer. The disputed claims were paid a short time later. In addition to the dispute with these companies, Executor cited as reasons for her delay the fact that she is legally blind, depending on others for transportation, and her husband had been unable to drive for six weeks due to knee surgery.

8.

Maggie Gardner had been opposed to subdividing her mother's land from the beginning, she said, and did not want her share of the property rezoned at all. Her initial attorney wrote to Executor's attorney in July 2006, inquiring about the progress of estate of distribution, and her subsequent attorney wrote on several occasions with increasing urgency, demanding a distribution of the property. A June 19, 2007 letter stated a lawsuit for Executor's removal would be filed during the following week, unless a transfer of the property was completed. Ms. Gardner's attorney said his client needed to be able to transfer the property out of her name and into her daughters' names, so that she would meet the three-year eligibility requirement for Medicare/Medicaid benefits. A Deed of Assent transferring ownership of Maggie Gardner's share of the estate was signed on June 29, 2007.

Conclusions of Law

9.

Jurisdiction and venue are properly within this court, and all legal requirements for notice have been met.

10.

The Decedent's devise of property "to be specifically identified in a survey to be obtained by my Co-Executrixes" indicates she anticipated the necessity of a survey of the property after her death. The lack of public access to at least two of the tracts to be distributed, which required obtaining easements from adjoining land-owners, justifies some delay in property distribution, as does the dispute of the two credit card claims. Further, the pending petition of Executor in the probate court, asking for clarification of her authority, shows she was actively seeking to finalize the rezoning process. No evidence indicated the Executor knew of her sister's terminal illness prior to the February 26, 2007 letter.

11.

However, the Executor's insistence on proceeding with the survey and planned subdivision in disregard of her sister's wishes was deliberate and self-serving, as her son

Quincy stood to profit from building homes in the proposed subdivision. The testimony of the surveyor that rezoning the property might double its value does not change the fact that Maggie Gardner had been clear on wanting her property distributed to her immediately, and had no interest in the subdivision process. As she was the devisee of the largest tract of property, next to Executor's, her opposition to the rezoning effort should have convinced Executor that further subdivision efforts were not in the best interests of the estate.

12.

Maggie Gardner's liquidation of the joint bank account was justifiable, in light of the fact that Executor continued to pay Decedent's household expenses from this account, while at the same time claiming personal ownership of Decedent's home. Nonetheless, one-half of the $2,000.00 so obtained by Maggie Gardner should be credited against any amount awarded to her by Executor, co-owner of the account.

13.

Transferring the real estate devised by Decedent Annie Lee McCarthern was not a simple matter, but the surveyor testified it could have been accomplished within a few weeks, rather than 16 months. As the transfer has now been accomplished, there is no real need to remove Executor from her fiduciary position; however, her knowledge of her sister's opposition to the rezoning, coupled with the fact she (or her son) stood to profit monetarily from the rezoning, would ordinarily warrant such a finding. Even in light of her physical impairment, this Executor's delay was unreasonable, and her actions exceeded her fiduciary authority.

14.

Counsel for Executor stipulated as to the amount and reasonableness of attorney's fees as presented by Maggie Gardner's counsel.

WHEREFORE, IT IS HEREBY ADJUDGED that the Petition for Removal of Executor should be granted in part, in that Executor should be required to pay Maggie Gardner's attorney's fees and costs of this action, a sum which amounts to $5,500.00. Reduced by the one-half interest in the bank account Ms. Gardner liquidated, the sum of $4,500.00 shall be paid directly to Maggie Gardner within 45 days of this Order.

SO ORDERED, this 7th day of September, 2007.

_____

NANCY S. STEPHENSON, JUDGE
Dougherty County Probate Court

Probate Court Jurisdiction

In Heath v. Sims et al, 242 Ga. App. 691 (2000), the Georgia Court of Appeals affirmed the probate court's jurisdiction to hear a beneficiary's claim against an executor of

an estate for breach of fiduciary duty even though the beneficiary sought to recover damages pursuant to the claim.

Sustaining a Superior Court order finding that the probate court had jurisdiction to hear a claim for damages for breach of fiduciary duty, the Court said,

> 1. On appeal, Heath argues that the probate court lacks jurisdiction over the breach of fiduciary duty claim and, thus, the trial court erred in dismissing it. Without citing any authority for the proposition, she asserts that "the subject matter jurisdiction conferred upon the Probate Court does not include tort actions nor is breach of [a] fiduciary duty a "general class of cases" which the Probate Court is empowered to hear."
>
> O.C.G.A. §15-9-30(a)(10) provides that probate courts have "original, exclusive, and general jurisdiction" of "[a]ll...matters and things as appertain or relate to estates of deceased persons." Thus, although a probate court clearly does not have jurisdiction over a general breach of duty claim, it appears from the express language of the statute that the probate court does have jurisdiction over a claim that an estate's executors have breached their fiduciary duty.[1]
>
> The Supreme Court recently addressed the extent of a probate court's jurisdiction. In Gnann v. Woodall[2], the Supreme Court was asked to consider whether a probate court, in refusing to approve the settlement of a malpractice case brought on behalf of an incapacitated ward, had the authority to require attorneys to pay into the court registry the settlement funds the attorneys had disbursed to themselves and then hold them in contempt for failing to do so. In concluding that a probate court does have such authority, the Supreme Court noted that
>
> > probate courts have "original, exclusive, and general jurisdiction" over appointment and removal of guardians, controversies as to the right of guardianship, and "(a)ll other matters and things as appertain or relate...to persons who are [mentally] incompetent..." O.C.G.A. §15-9-30(a)(5)(6)(10).[3]
>
> Although Gnann involved a probate court's jurisdiction over persons who are mentally incompetent, it serves to remind us that, with respect to areas in which the probate court has been given exclusive, original subject matter jurisdiction, its authority is broad. Likewise, with matters relating to estates, the probate court has exclusive, original jurisdiction. It follows that a claim that an executor has breached a fiduciary duty would not fall outside the jurisdiction of the probate court simply because the plaintiff sought

[1] See Gary v. Weiner 233 Ga. App. 284, 284-285(1) (503 S.E.2d 898) (1998) (probate court removed guardian for breach of fiduciary duty.)
[2] 270 Ga. 516 (511 S.E.2d 188) (1999).
[3] Id. at 517.

> damages.[4] To hold otherwise would allow disgruntled beneficiaries to remove a case from the probate court, the forum best suited to adjudicating such disputes, simply by alleging a claim for damages. For these reasons, we agree with the superior court that the proper forum for Heath's grievance is the probate court. Accordingly, the superior court did not err in dismissing the complaint.[5]

Case Note: Request for Jury Trial after de novo Appeal to the Superior Court

In Montgomery v. Montgomery, 2007 GACA A07A0881-080107, the Georgia Court of Appeals eliminated the confusion over requesting a jury trial after appeal to the Superior Court from a non-expanded jurisdiction probate court.

Appellant Betty Montgomery was denied a jury trial by the superior court because her demand was made more than 30 days after the filing of a de novo appeal from the probate court. The basis of the denial was O.C.G.A. §5-3-30, which, before July 1, 1998, provided**,**

> [a]ll appeals to the superior court or state court shall be tried by a jury at the first term after the appeal has been entered unless good cause is shown for continuance; provided, however, that trial by jury may be waived by the consent of both parties to trial by the court without a jury as provided in Code Section 9-11-39.

Effective July 1, 1998, the foregoing provision was struck and amended to provide:

> Upon the filing of an appeal from magistrate court to superior court or state court, the appeal shall be placed upon the court's next calendar for nonjury trial. Such appeals from the magistrate court to superior court or state court shall be tried by the superior court or state court without a jury unless either party files a demand for a jury trial within 30 days of the filing of the appeal or the court orders a jury trial.

Noting that Professor Mary Radford, in Wills and Administration in Georgia (6th Ed. 2000) 2007 pocket part, had opined that "it is unclear what effect this amendment has on appeals from a probate court" the court examined the intent of the legislature in amending the statute and reversed the Superior Court concluding that, section 5-3-30 does not apply to probate courts and, "…the longstanding rule remains that de novo appeals to the superior court from the probate court are to be tried by jury unless the right to a jury trial is waived."

Betty Montgomery had not waived her right to a jury trial but had in fact requested one and thus was entitled to a jury trial.

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[4] See Brady v. Smith, 211 Ga. 192, 193-194(2) (84 S.E. 2d 449) (1954).

[5] Empire Fire & Marine Ins. Co. v. Metro Courier, 234 Ga. App. 670, 671-673(1) (507 S.E.2d 525) (1998).

STATE BAR OF GEORGIA
FIDUCIARY LAW SECTION

A Message from the Chair of the Fiduciary Law Section

The Fiduciary Law Section of the Georgia Bar is pleased to once again co-sponsor this issue of *Georgia Probate Notes*. We hope you find the articles related to Georgia's Probate Courts and those authored by our Section volunteers to be both interesting and helpful in your practice. We also want to share with section members and the Georgia probate judges the activities, projects, seminars and concerns of the Fiduciary Law Section. We continue to believe that by working together and sharing information, we can all better serve the public.

A good example of this cooperation is the just completed rewrite of the "Handbook for Personal Representatives" given out to PR's by the probate courts. This was a joint project of the Council of Probate Court Judges and the Fiduciary Law Section. Special thanks to Mary Galardi, John Sheftall and Judges William Self and Lynwood Jordan for their hard work. I anticipate many more such joint efforts involving proposed legislation in the coming year.

Richard Barnes, Secretary/Treasurer of the Section, is hard at work on the 2008 Estate Planning Institute in Athens in February. Planning for the 2008 Fiduciary Law Institute at the King and Prince next July has also begun under the leadership of Chair-Elect Mark Williamson. I hope everyone will put these seminars on your calendar and would encourage Probate Court Judges to attend some of these annual conferences as their schedules permit.

As most of you know, the section has been busy drafting two pieces of proposed legislation. One is a complete rewrite of the Trust Code that Bill Linkous' committee has been working on for nearly four years. The other is a rewrite of the Uniform Management of Institutional Funds Act at which Marshall Sanders' subcommittee has been toiling away. Drafts of both have been posted on the Section's web site since the summer and I would strongly recommend that everyone review them as soon as possible and forward any comments, concerns or ideas you might have to me as soon as possible so they can be finalized and sent on to the legislature.

Finally, I want to thank Nick Djuric for his many hours of work not only in chairing our Section's legislative committee, but also in chairing the subcommittee that prepared the new Advanced Directives legislation that went into effect this summer. His article summarizing the statute appears in this newsletter.

As always, if you have any suggestions on how we can better serve your needs, or if you would like to become more involved in section activities, please feel free to contact me, Mark or Richard.

Adam R. Gaslowitz, Chair
Gaslowitz Frankel LLC

Is Ancillary Probate in Georgia Required for the Estate of a Decedent Domiciled in Another State?

Robert E. Turner
Turner Law P.C.

Is it necessary to file a probate proceeding in the State of Georgia for a decedent owning property in Georgia but domiciled outside the state? The Official Code of Georgia provides that an ancillary probate is not generally necessary, but the devil is in the details.

The will of a nondomiciliary decedent can be probated in this state directly, or there can be ancillary probate of the decedent's will where it is filed for original probate in the nondomiciliary's state. The will can be offered for probate by a personal representative named in the will specifically for Georgia or by the personal representative in the domiciliary state of the decedent. O.C.G.A. §53-5-37.

The will of a nondomiciliary can be probated originally in the state of Georgia provided it is not offered for probate in the domiciliary state or, if offered, no timely objections were filed. O.C.G.A. §53-5-30 et seq.

A will can be admitted to ancillary probate in this state where there is an authenticated (exemplified) copy of the decedent's probated will meeting the requirements of O.C.G.A. §24-7-24 submitted to the Georgia probate court. O.C.G.A. §53-5-33.

The filing of an ancillary probate or administration in the State of Georgia will result in a suspension of all authority of the nondomiciliary's personal representative. However the personal representative's authority will be reinstated if the petition for ancillary probate is dismissed or otherwise terminated.

A personal representative who has qualified in the nondomiciliary's state of domicile does not have to file an ancillary probate in the state of Georgia in order to transfer the property of the decedent. When an individual dies domiciled outside of Georgia possessed of real or personal property or a cause of action in Georgia, then a personal representative

duly qualified and serving under the laws of the domiciliary jurisdiction may 1) take possession of personal property and collect accounts, 2) sell and convey property of the decedent located in the state, 3) transfer any stock or withdraw funds from a bank, 4) sue in any court in the state to enforce any cause of action or recover property, 5) settle and compromise debts, causes, claims, and give releases and receipts, 6) exercise in this state any and all rights, powers, or privileges possessed by the decedent and 7) give deeds of assent or otherwise transfer real or personal property. O.C.G.A. §53-5-42.

The most common concern for a nondomiciliary decedent's representative is the transfer of the real property located in Georgia. In order to accomplish the transfer, the personal representative must file an executor's or administrator's deed in the County where the real property is located. In addition, the personal representative must attach a copy of the letters or like documentation evidencing the qualification of the personal representative in the decedent's state of domicile at death, authenticated in accordance with O.C.G.A. §24-7-24. This is prima facie evidence of the personal representative's authority to act in the state of Georgia. O.C.G.A. §53-5-43.

Despite this, in certain instances, title companies or other entities have insisted on an ancillary probate in the state of Georgia. In addition, when there is a legal action taken by the estate, some attorneys have felt more comfortable with an ancillary administration. However, O.C.G.A. §53-5-42 provides that the nondomiciliary's personal representative can file and defend an action in Georgia.

O.C.G.A. §53-5-42 makes it relatively painless to transfer Georgia property of a nondomiciliary decedent. However, questions remain whether this code section protects the rights of Georgia individuals and entities that are interested in the estate of the nondomiciliary, such as heirs, beneficiaries, and creditors. Does the interest in an expedient probate of the estate outweigh any concerns for protecting these rights?

Favorable Developments for Bona Fide Conservation Use Property Will Complement Estate Planning

W. Ralph Rodgers, Jr.
Allen H. Olson

In estate planning, the manner in which property is titled is constantly a concern. For example, estate planners balance the title to property between a husband and wife in order to utilize each spouse's respective applicable exclusion amount. Title to property is often conveyed to family limited partnerships and family limited liability companies as part of a family's estate plan. Estate planners working with families in the farming community must also be cognizant that the manner in which agricultural real estate is titled may affect a family's bona fide conservation use assessment with regard to ad valorem taxes. Two recent developments extending the benefit of preferential ad valorem tax treatment under the

conservation use assessment rules will complement many estate plans for families owning agricultural real estate.

For ad valorem tax purposes, tangible property is generally assessed at 40 percent of its fair market value.[6] However, real estate which is devoted to bona fide conservation use is assessed for ad valorem tax purposes at 40 percent of its current use value, which is significantly less than the fair market value of that real estate.[7] Thus, the ad valorem tax liability imposed on bona fide conservation use property is significantly less than that of land not qualifying as bona fide conservation use property. Generally, "bona fide conservation use property" is land devoted to the production of agricultural products and timber or land used for environmental purposes.[8] Each person is limited to 2,000 acres of land that may qualify for bona fide conservation use assessment. The 2,000 acre limitation has been liberalized by a recent court decision and a new statute.

In Effingham County Board of Tax Assessors v. Samwilka, Inc., 278 Ga. App. 521, 629 S.E. 2d 501 (2006), the Georgia Court of Appeals held that in applying the 2,000 acre limitation, a person's benefit in property owned through a tenancy in common should be determined on a pro rata basis. The Effingham County Board of Tax Assessors argued that each tenant in common derived a benefit from the preferential tax status afforded to every acre owned jointly as tenants in common. Therefore, ownership of an undivided interest in an acre of bona fide conservation use property utilized a full acre of the 2,000 acre limitation. The Effingham court disagreed with this argument, stating:

> "We conclude that the legislature intended that in determining whether a beneficial owner has received 'any benefit of current use assessment as to more than 2,000 acres,' that the acreage be calculated proportionately to the owner's beneficial interest in the underlying property."

Under the Effingham County Board of Tax Assessors' argument, if a husband and wife each owned a one-half undivided interest in a 4,000 acre tract of farmland, the couple collectively would be able to qualify only 2,000 acres for bona fide conservation use assessment. On the other hand, under the Effingham holding, the husband and wife would be able to qualify the entire 4,000 acres.

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[6] O.C.G.A. §48-5-7(a).

[7] O.C.G.A. §48-5-7(c.2). The Commissioner for the Georgia Department of Revenue issues a table of values for the current use value of bona fide conservation use property. O.C.G.A. §48-5-269; Ga. Comp. R. & Regs. §560-11-6-.07. These tables are developed through a combination of sales data from bona fide sales comparables and from per acre property values determined by the capitalization of net income before property taxes. Under this methodology, the sales data is weighted 35% and the income capitalization value is weighted 65%. O.C.G.A. §48-5-269(b)(1).

[8] O.C.G.A. §48-5-7.4(a)(1) and (2).

In 2007, the Georgia General Assembly passed House Bill 321, codified in O.C.G.A. §48-5-7.4(a)(1)(A.1), which further expanded the 2,000-acre limitation.[9] The amendment pertains to an interest in a family owned farm entity. A family owned farm entity includes "a family corporation, a family partnership, a family general partnership, a family limited partnership, a family limited corporation, or a family limited liability company, all of the interest of which is owned by one or more natural or naturalized citizens related to each other by blood or marriage within the fourth degree of civil reckoning ... ."[10] The amendment provides that a person who owns an interest in a family owned farm entity will be considered to own only the percent of the bona fide conservation use property held by that family owned farm entity that is equal to the percent interest owned by such person in the family owned farm entity. Further, a person owning an interest in a family owned farm entity may elect to allocate to the entity the lesser of (i) any unused portion of that person's 2,000 acre limitation, or (ii) the product of such person's percent interest in the family owned farm entity times the total number of acres owned by that family owned farm entity thereby allowing the family owned farm entity to receive bona fide conservation use assessment on more than 2,000 acres.

The amended statute expands significantly the acreage of a family's property that may be taxed at current use value. For example, suppose a husband and wife, along with their three children, form a family limited liability company. The family conveys 10,000 acres of farmland into the family limited liability company, and each family member holds a 20% limited liability company interest. If none of those family members have used any portion of their respective 2,000-acre limitations, the family limited liability company may receive bona fide conservation use assessment on the entire 10,000 acres of farmland, resulting in a substantial ad valorem tax savings to the family.

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Allen H. Olson is "of counsel" with Moore, Clarke, DuVall & Rodgers, P.C. and specializes in agricultural law.

Georgia Advance Directive for Health Care Act

Nikola R. Djuric
Sutherland Asbill & Brennan LLP

On May 17, 2007, Governor Perdue signed into law HB 24, which became effective on July 1, 2007. The Act replaces Chapter 32 of Title 31 of the Official Code of Georgia Annotated with the Georgia Advance Directive for Health Care Act, which provides for a new *advance directive for health care* to replace the living will provided for under the former Chapter 32 and the durable power of attorney for health care provided for under Chapter 36, which has also been repealed.

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[9] Ga. L. 2007, p. 608, § 1/HB 321, effective July 1, 2007.

[10] O.C.G.A. §48-5-7.4(a)(1)(C)(iv).

This article provides some of the history of HB 24 and some comments on the new Georgia Advance Directive for Health Care Act. These comments reflect my personal comments on the new law and form as a participant in the roundtable process that drafted HB 24. These comments do not necessarily reflect the views of other members of the roundtable or the sponsors of HB 24, and they should not be treated as any kind of official commentary.

History of HB 24

During the 2006 session of the Georgia General Assembly, there were a few legislative efforts to revise the statutory form living will, primarily to fix the confusing language relating to nutrition and hydration. One bill passed, but it had a technical flaw and was vetoed by Governor Perdue at the request of its sponsor. After the session, our Section's Legislation Committee agreed to work with Georgia State Representative R. Steve "Thunder" Tumlin, Jr., to review the statutory form living will and durable power of attorney for health care and draft revised forms for introduction in the 2007 session of the General Assembly.

On June 5, 2006, Rep. Tumlin convened a roundtable of persons interested in Georgia's law on advance directives for health care. The roundtable was co-chaired by Kathy Kinlaw, M.Div., Acting Director, Center of Ethics, Emory University, and me (in my capacity as chairman of the Legislation Committee). We were hosted by Professors Charity Scott and Mary Radford at Georgia State University.

The membership of the roundtable was expanded throughout the summer and met nearly every week from June 5 to September 12. Among the participants were lawyers who practice in the fields of fiduciary, elder, and health care law, physicians, academics, and representatives (often the leaders) of the following organizations: State Bar of Georgia Health Law Section; Georgia State University College of Law Health Law Partnership; Emory University Office of the General Counsel; Georgia Right to Life; Georgia Academy of Healthcare Attorneys; Memorial Society of Georgia; Compassion & Choices; Georgia State Long Term Care Ombudsman; Medical Association of Georgia; Georgia Council on Aging; Georgia Catholic Conference; Georgia Advocacy Office; Georgia State University College of Law Center for Law, Health & Society; Piedmont Hospital Palliative Care Service; Georgia Hospice and Palliative Care Organization; Georgia Hospital Association; Georgia Health Decisions; Georgia Health Policy Center; Hospice of Northeast Georgia Medical Center. In addition, Jill A. Travis, Georgia General Assembly Deputy Legislative Counsel, provided invaluable service as the roundtable's secretary and drafted the new form and HB 24 based on the roundtable's decisions.

The members of the roundtable discussed how Georgia's current statutes and statutory forms are viewed by patients, physicians, nurses, patient advocates, hospital lawyers, estate planning lawyers, and the general public, and discussed a whole range of medical, legal, religious, ethical, and practical issues relating to the forms and end-of-life

decisions. It is impossible to exaggerate how important it has been for us to hear the views of so many individuals whose perspectives on the current statutory forms are so different. There are significant problems being confronted every day by patient advocates and hospital lawyers, for example, that would never occur to a lawyer who drafts and supervises the execution of these forms as part of the estate planning process. We also examined forms produced by private groups (especially the Critical Conditions Planning Guide from Georgia Health Decisions), the Uniform Health-Care Decisions Act, recent legislation in New Jersey and Maryland, and many other sources.

One of the roundtable's earliest decisions was to combine the living will and the power of attorney for health care into a single form that we have called the Georgia Advance Directive for Health Care. We quickly realized how difficult it would be to create a statutory form that was suitable in every situation. Nevertheless, that is what many expect a statutory form to be. Throughout the process, the roundtable participants tried to balance the often competing requirements of clarity, technical correctness, simplicity, comprehensiveness, and brevity. In addition, the roundtable was also very sensitive to the potential political consequences of making changes to the substantive provisions of current law that reflect a decision by the Georgia General Assembly on difficult questions of public policy.

Work on a draft advance directive for health care form was completed in mid-September, and the draft legislation was completed in November. Although the bill had the support of the Fiduciary Law Section, the Bar's Advisory Committee on Legislation voted 11 to 10 against recommending the bill for support by the State Bar of Georgia on the grounds that it had political implications.

HB 24 was introduced in the General Assembly on January 11, 2007, and was sponsored in the House of Representatives by Rep. Tumlin (the author of the bill), Rep. Keown, Rep. Oliver, and Rep. Dempsey. The bill was favorably reported by the House Judiciary Committee with amendments on February 8, and was adopted by the full House by a vote of 170 to 0. The bill was sponsored in the Senate by Sen. Seth Harp. A substitute for the bill was favorably reported by the Senate Judiciary Committee on March 27, and the substitute was adopted by the full Senate by a vote of 51 to 0 on March 30. Because the Senate passed a different version of HB24, the bill returned to the House, where it was caught up in the late-session fight between the House and Senate. The bill was finally passed by the full House on the evening of the last day of the session (April 20) by a vote of 156 to 0. Governor Perdue signed the bill into law on May 16.

The passage of HB 24 without a single dissenting vote (and very little opposition at the committee hearings) is testimony to the effectiveness of the roundtable process, which gave interested members of the community an opportunity to be heard and to shape the legislation before it ever reached the General Assembly.

Comments on the Georgia Advance Directive for Health Care Act

Section 1 of HB 24 gives the General Assembly's findings that support the passage of the Georgia Advance Directive for Health Care Act, which is enacted by Section 2 as a complete revision to Chapter 32 of Title 31 of the Official Code of Georgia Annotated. Section 3 repeals Chapter 36 of Title 31, and Sections 4 to 19 makes other consequential amendments to other sections of the Official Code of Georgia Annotated. Section 20 provides the effective date of July 1, 2007, and Section 21 repeals conflicting laws.

The following are some comments to the sections of new Chapter 32 of Title 31:

31-32-2(1). The "advance directive for health care" ("ADHC") is a new document recognized by Georgia law. Any writing that meets the requirements of 31-32-5 is treated as an ADHC.

31-32-2(3). "Declarant" is the name used in the new law to refer to the principal or patient who executes an ADHC. This person was called the "principal" under former Chapter 36 (durable power of attorney for health care) or the "declarant" under former Chapter 32 (living will).

31-32-2(4). "Durable power of attorney for health care" is a defined term because the new law provides for the continued validity of health care agencies executed under former Chapter 36.

31-32-2(5). "Health care" was intentionally defined very broadly.

31-32-2(6). "Health care agent"—the agent under an ADHC—is a term used throughout the new law; it includes any successor agent appointed by the declarant in an ADHC.

31-32-2(9). "Life-sustaining procedures" is the term used for the kind of treatment that the law authorizes a declarant to direct be withheld or withdrawn if the declarant is in a terminal condition or a state of permanent unconsciousness. Under the old law, "life-sustaining procedures" were procedures or interventions that "would serve only to prolong the dying process"; under the new law, they are procedures or interventions that "could in reasonable medical judgment keep the declarant alive but cannot cure the declarant." Under both laws, two physicians must also determine that death will occur without such procedures or interventions. Under the old law, the definition of the term "life-sustaining procedures" could also include the provision of nutrition and hydration, but only if the declarant opted to define the term that way in the declarant's living will. This method of defining a defined term in the statute caused not only confusion when interpreting the statute, it was also the source of the notorious "double negative" in the living will form, which called on the declarant to define the term "life-sustaining procedures" (which were to be withdrawn) as including or not including the provision of nutrition and hydration. There were, however, good policy reasons for defining "life-sustaining procedures" in this manner in the old law.

There is a significant ethical and religious tradition that views the provision of nutrition and hydration as part of the ordinary care that should be provided to any individual (including an individual who is dying or permanently unconscious) and not as the kind of extraordinary medical treatment that a dying or permanently unconscious individual should be permitted to have withheld or withdrawn. In light of that tradition, the General Assembly chose to leave it up to the declarant to decide the question of whether the provision of nutrition and hydration are included in the category of procedures that the declarant can direct to be withheld or withdrawn. The roundtable chose not to disturb this policy decision, but fixed the problem of the optional definition by providing that the defined term "life-sustaining procedures" does not include the provision of nutrition or hydration, but that a declarant may direct the withholding or withdrawal of nutrition or hydration in an ADHC. Most of the provisions of the former law that applied to life-sustaining procedures—including or excluding the provision of nutrition and/or hydration at the option of the declarant—are carried over into the new law as applying to life-sustaining procedures *and* the provision of nutrition and hydration. For purposes of drafting the statute, it would have easier to define "life-sustaining procedures" to include the provision of nutrition and hydration (but leaving to the declarant the choice of whether to actually direct the withholding or withdrawal of nutrition and hydration in an ADHC), but that seemed to go against the spirit of the ethical and religious tradition that the General Assembly seemed to acknowledge in the old law.

31-32-2(10). "Living will" is a defined term because the new law provides for the continued validity of living wills executed under former Chapter 32.

31-32-2(13). "State of permanent unconsciousness" replaces the old terms "coma" and "persistent vegetative state." The intention was to capture all incurable or irreversible conditions of unconsciousness.

31-32-2(14). "Terminal condition" is a very difficult term to define. The old law contained no time frame in which death was expected. Some state laws have very specific time frames (periods of days or months). "Relatively short period of time" was intended to indicate conditions in which the declarant was in the process of dying and death would occur soon. The old law referred to a condition in which death would occur "regardless of the application of life-sustaining procedures." In the view of some, this provision caused the living will to be inapplicable in many situations in which the declarant would have intended life-sustaining procedures to be withdrawn since the application of these procedures do delay the occurrence of death (even if they cannot prevent death).

31-32-3. The new law does not affect the validity of living wills and durable powers of attorney for health care executed before July 1, 2007, which continue to be governed by the provisions of former Chapter 32 and former Chapter 36, respectively.

31-32-4. Comments on the Georgia ADHC form appear below.

31-32-5(a). An AHDC is any document that (1) is executed by an adult or emancipated minor; and that (2) appoints a *health care agent* (defined term) or (3) directs the withholding

or withdrawal of *life-sustaining procedures* (defined term) or the withholding or withdrawal of the *provision of nourishment or hydration* (defined term) when the declarant is in a *terminal condition* (defined term) or *state of permanent unconsciousness* (defined term) or (4) does both (2) and (3); and that (5) is in writing, (6) is signed by the declarant or some other person at the declarant's direction, and (7) is witnessed in accordance with the provisions of 31-32-5(c). Only a document that meets these requirements is treated as an ADHC and governed by the provisions in the new law relating to powers, obligations, rights, and protections of declarants, health care agents, health care providers, and third parties.

31-32-5(b). A document "substantially complying" with the form provided in 31-32-4 that is executed in accordance with 31-32-5 is treated as an ADHC complying with 31-32-5, but a declarant may use any other form of ADHC that complies with the requirements for an ADHC described above. However, a document covering the matters covered by an ADHC that *was executed in another state* and that is valid under the laws of the state where executed is treated as an ADHC complying with 31-32-5. This is intended as a liberalization of the treatment of out-of-state advance directives for health care.

31-32-5(c). The somewhat complicated (and different) witnessing requirements for living wills and durable powers of attorney for health care under the old law are replaced with new rules that require two independent witnesses but that do allow one of the witnesses to be an employee, agent, or medical staff member of the health care facility in which the declarant is receiving health care. This provision was intended to ease the burdensome witnessing requirements for patients in health care facilities while retaining the benefits of independent witnesses. Note that the declarant must sign in the presence of each witness or acknowledge his signature to each witness, but the witnesses do not need to be together.

31-32-6. The revocation requirements are mostly carried over from the old laws. But a new ADHC that has provisions inconsistent with the provisions of a previously executed ADHC, living will, or durable power of attorney for health care revokes the prior document only to the extent of the inconsistency. The form ADHC expressly revokes all prior ADHCs, living wills, and durable powers of attorney for health care.

31-32-7(b). When exercising powers granted to a health care agent under an ADHC, the health care agent is required to use due care to act for the benefit of the declarant in accordance with the terms of the ADHC. The health care agent is required to exercise granted powers in such manner as the health care agent deems consistent with the intentions and desires of the declarant, and if the intentions and desires are unclear, the health care agent shall act in the declarant's best interest considering the benefits, burdens, and risks of the declarant's circumstances and treatment options. These standards are consistent with the standards that applied to agents under the old law, although the old standards were scattered among the statute and the capitalized language at the beginning of the statutory form durable power of attorney for health care.

31-32-7(e). The powers granted to the health care agent under the form ADHC are explained in greater detail in this subsection.

31-32-9. This section contains the procedures for effecting a withholding or withdrawal of life-sustaining procedures or the withholding or withdrawal of the provision of nourishment or hydration and are consistent with the procedures under the old law.

31-32-9(a)(1). The roundtable decided not to disturb the policy choice made by the General Assembly under the old law with respect to the effecting of the directions of women who are pregnant. This provision is the basis for Section 9 in the form ADHC.

31-32-14(d). The new law provides that—unless the ADHC provides otherwise—a declarant's directions in an ADHC regarding the withholding or withdrawal of life-sustaining procedures or the withholding or withdrawal of the provision of nourishment or hydration are ineffective as long as there is a health care agent available and willing to make decisions for the declarant regarding the withholding or withdrawal of life-sustaining procedures or the withholding or withdrawal of the provision of nourishment or hydration when the declarant is in a terminal condition or a state of permanent unconsciousness. This is consistent with old law under which a living will was rendered ineffective when there was an agent under a durable power of attorney for health care who could make decisions covered by the living will. However, the new law does make this provision "subject to the health care agent's duty to exercise granted powers in such manner as the health care agent deems consistent with the intention and desires of the declarant" under 31-32-7(b). This means that the health care agent should take into account the directions of the declarant in the ADHC (if any) regarding the withholding or withdrawal of life-sustaining procedures or the withholding or withdrawal of the provision of nourishment or hydration when the health care agent makes decisions for the declarant regarding these matters. But the health care agent is not bound to follow the declarant's directions. This standard is the basis for the instructions in Section 4 of the form ADHC.

Comments on the Georgia Advance Directive for Health Care Form

The following are some comments to the sections of the new Georgia Advance Directive for Health Care Form that appears in section 31-32-4 of the Georgia Advance Directive for Health Care Act.

Part One/Section 1. Multiple (joint) agents are not prohibited by the law, but the form ADHC did not provide for them in an effort to encourage the use of single agents. The form can be modified to provide for joint agents.

Section 3. The form does not incorporate powers by reference, so the language in Section 3 is operative language. However, the use of the form ADHC means the health care agent has the powers provided for in 31-32-7(e).

Section 4. The instructions in this section are based on 31-32-7(b) and 31-32-14(d).

Section 5. The statutory form durable power of attorney for health care automatically granted the agent the powers listed in Section 5. The form ADHC allows for the declarant

to deny some or all of these powers to the health care agent. The burial/cremation instructions were added for the convenience of the declarant.

Part Two/Section 6. Unlike the living will, the form ADHC does not incorporate the statutory definitions by reference, so the language in Section 6 is operative language, although it must be read against a backdrop of the requirements for an ADHC in 31-32-5(a). The definitions of terminal condition and state of permanent unconsciousness are the same as the statutory definitions and presumably will be interpreted identically if the declarant uses the form ADHC in 31-32-4.

Section 7. Three choices are given for treatment preferences if the declarant is in a terminal condition or a state of permanent unconsciousness. Note that the form ADHC does not used the statutory term "life-sustaining procedures," but what is directed to be withdrawn or withheld in choices (B) and (C) matches the statutory definition of life-sustaining procedures, and presumably will be interpreted as a direction with withdraw or withhold life-sustaining procedures if the declarant uses the form ADHC in 31-32-4. If the declarant chooses choice (C), there are four additional choices regarding tube feeding, fluids by tube, ventilator, and CPR. This gives a declarant who considers nourishment and hydration to be ordinary care (or at least not extraordinary treatment) the choice of directing that these not be withheld or withdrawn. (Although phrased as exceptions to the direction to withhold "medications, machines, or other medical procedures …", choice (C) should not be interpreted as implying that the provision of nourishment or hydration comes within the definition of "medications, machines, or other medical procedures …". Note that in choice (B), the direction to withhold the provision of nourishment and hydration is separate from the direction to withhold "medications, machines, or other medical procedures …".)

Section 8. This section provides a space for additional instructions, including especially any instructions regarding pain relief for declarants in a terminal condition or state of permanent unconsciousness.

Section 9. Under Georgia law, a woman's directions regarding the withholding or withdrawal of life-sustaining procedures or the withholding or withdrawal of the provision of nourishment or hydration have no force and effect if she is pregnant. However, if the woman is pregnant *and her fetus is not viable,* her directions will be given force and effect if she has initialed in Section 9 that she wants those directions to be carried out in that circumstance. This provision and 31-32-9(a)(1) are not intended to affect a health care agent's powers to make decisions for a pregnant woman regarding the withholding or withdrawal of life-sustaining procedures or the withholding or withdrawal of the provision of nourishment or hydration.

Part Three/Section 10. The nomination of a guardian in an ADHC is authorized under 29-4-3(c). This provision does not nominate a conservator for the declarant.

Expanding Causes of Action Over Inter Vivos Transfers[11]

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Estate planners and the clients they counsel have long-standing familiarity with will contests and will–related disputes. The day is long past, however, when an estate planner's readiness for potential conflict could stop at a knowledge of will-related disputes. These days, more and more assets are being transferred outside of probate. These inter vivos transfers take the form of gifts, joint tenancies with rights of survivorships (for bank accounts, brokerage accounts, real property conveyances, etc.), limited partnerships, limited liability companies, trusts, and powers of attorney over assets. These inter vivos vehicles of transfer are used in large part because of their flexibility. They can be set up and executed in advance of the transferor's death, they can be crafted to fit within larger tax planning strategy, and they allow the transferor to achieve the often-desired (and, in my view, overrated) goal of avoiding probate. But the flexibility that makes them so attractive to transferors also leads to a number of different traditional and emerging claims that can be brought to bear by an aggrieved party.

The traditional claims are borrowed from will contests, such as joint account statutes (e.g., O.C.G.A. § 7-1-813), breach of trust statutes (e.g., O.C.G.A. § 53-12-192), conversion, undue influence, lack of capacity, fraud, breach of fiduciary duties, and constructive trusts (O.C.G.A. § 53-12-93).

There are now several emerging or expanding claims about which estate planners need to be aware:

First, courts are more receptive to constructive trust claims, often using this approach as a "catch-all" remedy to "correct" perceived inequities. Concurrently with this development is a similar receptiveness to an expanded definition of "confidential relationships," which may bolster constructive trust claims as well as more traditional claims such as fraud and undue influence.

Second, courts are beginning to recognize a cause of action for injunctions to preserve estate assets. In Johns v. Morgan, 281 Ga. 51 (2006), for example, the Georgia Supreme Court upheld an injunction requested by the decedent's children relating to transfers made by the decedent to a caregiver prior to the decedent's death.

Third, the newly recognized tort of aiding and abetting a breach of fiduciary duty has tremendous potential for application in fiduciary litigation. See Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19 (2006). Perhaps most troubling, *attorneys and financial advisors likely will be included as defendants*.

[11] This article is based upon a paper presented at the 2007 Fiduciary Law Institute.

Fourth, courts in Georgia and other states increasingly have recognized claims for tortious interference with expectancy of inheritance, though such claims in Georgia (at least as they relate to will contests) may not be brought prior to the decedent's death. See Mitchell v. Langley, 85 S.E. 1050 (Ga. 1915), Davison v. Feuerherd, 391 So. 2d 799, 802 (Fla. App. 1980); Copelan v. Copelan, 261 Ga. App. 726, 727 (2003).

Finally, the Georgia Court of Appeals recently confirmed that the third party beneficiary doctrine applies to malpractice claims against lawyers. See Young v. Williams, 285 Ga. App. 208 (2007). Although Young was a will case, the rationale applies equally well to malpractice claims involving inter vivos transfers.

Georgia Probate Notes

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