Wills, Trusts, Guardianships, and Fiduciary Administration

Mary F. Radford

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Estates and Trusts Commons

Recommended Citation

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article describes the significant Georgia cases and legislation from the period of June 1, 2005 through May 31, 2006 that pertain to Georgia fiduciary law. Specifically, the Article covers cases and legislation on matters relating to wills, trusts, the administration of decedents' estates, and the guardianship and conservatorship of minors and incapacitated adults.

I. SIGNIFICANT GEORGIA CASES

A. The Effect of a Testator's Marriage Subsequent to the Making of a Will

Under Official Code of Georgia Annotated ("O.C.G.A.") section 53-4-48, as amended in 2002, a marriage subsequent to the making of a will "shall result in a revocation of the will only to the extent provided in the remainder of this Code section." The section then goes on to explain that, assuming the will was not made in contemplation of marriage, the

---

* Professor of Law, Georgia State University College of Law. Newcomb College of Tulane University (B.A., 1974); Emory University (J.D., 1981). Member, State Bar of Georgia. Reporter, Probate Code Revision Committee, Guardianship Code Revision Committee, and Trust Code Revision Committee of the Fiduciary Law Section of the State Bar of Georgia. Academic Fellow and Member of Board of Regents, American College of Trust & Estate Counsel. Author, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA (6th ed. 2000) and GUARDIANSHIPS AND CONSERVATORSHIPS IN GEORGIA (2005). The Author expresses her appreciation to Margaret Louttit for her assistance in the preparation of this Article. The Author is also grateful to Atlanta attorney Jeffrey M. Zitron for the insight he offered on the life insurance statutes that are discussed at the end of this Article.

The subsequent spouse is to receive the share of the decedent’s estate that he or she would have received if the decedent had died intestate.\(^2\) The question that arose in \textit{English v. Ricart}\(^3\) was whether the subsequent spouse’s right to her intestate share was one that existed automatically by virtue of the statute or one that would be granted only if the subsequent spouse filed a timely caveat to the will.\(^4\) The Georgia Supreme Court gave a limited answer to this question.\(^5\)

After divorcing his first wife, Mr. English executed a 1994 will leaving his entire estate to his two sons. Mr. English married Ms. Ricart in 2001. He died in 2004 without changing his will. His executor filed a petition to probate the will and named Ricart as one of English’s heirs. The citation included the standard language requiring any objection to be filed within ten days of service of the petition. Ricart signed an Acknowledgment of Service and Assent to Probate Instant. The sons requested a hearing to contest Ricart’s status as their father’s spouse. Later, before the will was admitted to probate, Ricart filed a motion for clarification of her status as an heir.\(^6\) She relied upon O.C.G.A. section 53-4-48.\(^7\) If O.C.G.A. section 53-4-48 applied, then Ricart would have been due one-third of English’s estate under O.C.G.A. section 53-2-1(b)(1).\(^8\) The sons, however, claimed that she had waived her right to this statutory share when she assented to the probate, acknowledged service, and failed to object within ten days of the service of the petition. The sons also said that the court should have admitted the will to probate immediately after receiving the sons’ proposed order.\(^9\) The probate court held that Ricart had a right to make a claim because the will had not yet been admitted to probate at the time her claim was filed.\(^10\) The Georgia Supreme Court affirmed.\(^11\)

The court stated that the O.C.G.A. gives the probate judge the discretion to extend the time for filing any objections and for holding any

---

\(^2\) O.C.G.A. § 53-4-48(c) (Supp. 2006).  
\(^3\) 280 Ga. 215, 626 S.E.2d 475 (2006).  
\(^4\) \textit{Id.} at 215, 626 S.E.2d at 476.  
\(^5\) \textit{Id.} at 215-17, 626 S.E.2d at 477-78.  
\(^6\) \textit{Id.} at 215, 626 S.E.2d at 476-77.  
\(^7\) \textit{Id.; see O.C.G.A. § 53-4-48.}  
\(^8\) \textit{See O.C.G.A. § 53-2-1(b)(1) (1997 & Supp. 2006).} Under O.C.G.A. section 53-2-1(b)(1), an intestate decedent’s estate is divided equally among the decedent’s surviving spouse and children, but the surviving spouse’s share is never less than one-third of the estate. \textit{Id.}  
\(^9\) \textit{English,} 280 Ga. at 216, 626 S.E.2d at 477.  
\(^10\) \textit{Id.}  
\(^11\) \textit{Id.} at 217, 626 S.E.2d at 478.
required hearing. Thus, the probate judge had the right to extend Ricart's time for filing a response and had done so by not admitting the will to probate. The supreme court noted that it expressly did not reach the issue of whether Ricart could have claimed her statutory share as a matter of law even after the will had been admitted to probate.

The more interesting legal discussion in this case appears in a concurring opinion written by Justice Carley and joined by Justice Thompson. In his opinion, Justice Carley took his colleagues to task for refusing to address the statutory issue. Justice Carley stated that Ricart's right to take her intestate share existed as a matter of right regardless of whether she filed a claim after the will had been admitted to probate. Citing the probate court, Justice Carley explained that while a caveat to a will alleges facts that show why the will should not be probated, the spouse's claim in this case was not based on disputed facts but was one that arose by operation of law. Justice Carley outlined the derivation of the rights under O.C.G.A. section 53-4-48 of a spouse who marries a testator after the testator has made a will that does not contemplate a subsequent marriage. He noted that the pre-2002 version of the statute had called for a complete revocation of the will upon the testator's subsequent marriage if the will did not contemplate such an event. However, under the 2002 amendment, the will would remain intact, and a limited revocation would occur only to the extent needed to give the spouse her intestate share. Justice Carley thus stated that the "clear and obvious intent of the General Assembly ... was to uphold the validity of a will, and thereby dispense with the procedural applicability of a caveat" in this type of situation. Using this logic, he concluded that Ricart's assent to the probate of the will

12. Id. at 216, 626 S.E.2d at 477. This authorization appears in O.C.G.A. section 53-11-5 (1997).
14. Id. at 217 n.5, 626 S.E.2d at 478 n.5.
15. Id. at 217, 626 S.E.2d at 478 (Carley, J., concurring).
16. Id. at 217-18, 220, 626 S.E.2d at 478, 480.
17. Id. at 218, 626 S.E.2d at 478.
18. Id.
19. Id. O.C.G.A. section 53-4-48(a) (Supp. 2006) states that the provisions of that Code section apply only if the will does not contemplate the subsequent marriage. In other words, if the will contains language that indicates the will was made in contemplation of a marriage by the testator, the presumption is that the testator intended that the will remain intact as written and that the estate be distributed under the terms of the will even if the testator later married. O.C.G.A. § 53-4-48(a).
20. English, 280 Ga. at 219, 626 S.E.2d at 479 (Carley, J., concurring).
21. Id.
22. Id. at 218, 626 S.E.2d at 478.
will was “completely consistent with her statutory claim to an intestate share.” The issue of whether the spouse could take that statutory share was not one that needed to be raised prior to probate because the spouse retained that right as a matter of law, regardless of whether the will had been admitted to probate.

B. Joint Wills, Mutual Wills, and Other Miscellaneous Issues

The Georgia Supreme Court addressed a variety of issues in the case of Hodges v. Callaway. The testators in this case, Mr. and Mrs. Jones, executed a will in 1974 that was called the “Mutual Last Will and Testament of P. H. Jones and Mrs. Lucille C. Jones.” The will provided that the survivor of the two would serve as executor of the other’s estate, would receive all personal property of the other, and would receive a life estate in all real property with the right to sell the property “if necessary for their (his or her) maintenance and support, without any limitations or restrictions.” Upon the death of the life tenant, the remainder of the real property would be divided between the spouses’ families. When Mr. Jones died in 1986, the will was not submitted for probate. At that time, however, Mrs. Jones did sign a codicil to the will to name a new executor, Linton Hodges, for her estate. In 1999 Mrs. Jones conveyed by gift to her second cousin, William Callaway, a tract of land that had been owned by the two testators when Mr. Jones died. At the same time, she appointed Callaway as her attorney-in-fact. Both the deed and the power of attorney document were witnessed by a state court judge and a probate court judge.

Mrs. Jones died in 2001, and Hodges, the executor, submitted the will for probate. Hodges then filed an action against Callaway seeking to void the deed of gift. Hodges claimed that the gift was null and void for several reasons including: (1) the will precluded Mrs. Jones from making the gift; (2) Mrs. Jones did not have the appropriate capacity to execute

23. Id.
24. Id. at 220, 626 S.E.2d at 480.
26. Id. at 789, 621 S.E.2d at 430.
27. Id.
28. Id.
30. Hodges, 279 Ga. at 790, 621 S.E.2d at 430. An attorney-in-fact or agent is a person who is appointed by a principal to perform acts that the principal otherwise has the power to perform. See O.C.G.A. § 10-6-141 (2000).
31. Hodges, 279 Ga. at 790, 621 S.E.2d at 430.
the deed of gift; (3) Callaway exercised undue influence over her; and (4) Callaway breached his fiduciary duty as attorney-in-fact when he accepted the gift. Callaway counterclaimed, alleging fraud and a breach of a warranty covenant that was contained in the deed.\textsuperscript{32} He sought compensatory and punitive damages of $1,000,000.\textsuperscript{33} The Georgia Supreme Court held as follows: (1) the will did not preclude Mrs. Jones from making the gift; (2) Mrs. Jones did not lack the capacity to sign either the deed of gift or the power of attorney document; (3) Callaway did not breach a fiduciary duty when he accepted the gift; (4) the trial court was not precluded from considering whether Mrs. Jones had breached the warranty of title; and (5) Mrs. Jones had in fact breached the warranty.\textsuperscript{34}

1. The Joint Will.\textsuperscript{35} The first question raised in deciding if the will precluded Mrs. Jones from conveying the real property was whether the pre-1998 Probate Code (the “former Code”) or the Revised Probate Code of 1998 (the “Revised Code”) applied.\textsuperscript{36} The Georgia Supreme Court determined that the answer would be the same under either version but carried forward from the former Code the confusing term “mutual will.”\textsuperscript{37} The will was definitely a “joint will,” which is one document signed by two individuals that contains the dispositions of both of their estates.\textsuperscript{38} Under older case law, the term “mutual will” was a term of law as well as a term of description and was used to refer to a will that contains reciprocal provisions and an agreement that the survivor is bound by contract to abide by the terms of the mutual will.\textsuperscript{39} Thus, if the Joneses’ will was determined to be a “mutual will” under this old case law, Mrs. Jones was bound by contract to retain the testamentary scheme contained in the will and thus bound not to dispose of the property in any manner other than that set forth in the will.

\textsuperscript{32} Id., 621 S.E.2d at 430-31.
\textsuperscript{33} Id. at 790 n.2, 621 S.E.2d at 431 n.2.
\textsuperscript{34} Id. at 790-95, 621 S.E.2d at 431-34.
\textsuperscript{35} See RADFORD, WILLS & ADMINISTRATION, supra note 1, at §§ 2-9, 5-19 for a discussion of joint wills and mutual wills.
\textsuperscript{36} Hodges, 279 Ga. at 790, 621 S.E.2d at 431. The Georgia Probate Code (Chapters 1-11 of Title 53) was revised effective January 1, 1998. O.C.G.A. § 53-1-1 (1997 & Supp. 2006). The Revised Probate Code applies as of that date except that “no vested rights of title, year's support, succession, or inheritance shall be impaired.” Id.
\textsuperscript{37} Hodges, 279 Ga. at 790, 621 S.E.2d at 431.
\textsuperscript{38} Id. at 791-92, 621 S.E.2d at 431-32; see O.C.G.A. § 53-4-31(a) (1997).
\textsuperscript{39} Hodges, 279 Ga. at 791, 621 S.E.2d at 431 (citing Webb v. Smith, 220 Ga. 809, 811-12, 141 S.E.2d 899, 901 (1965)).
By defining both "joint" and "mutual" wills, the Revised Code attempted to clear up some of the confusion caused by that terminology. Under O.C.G.A. section 53-4-31, a "joint will is one will signed by two or more testators that deals with the distribution of the property of each testator." Mutual wills are separate wills of two or more testators that make reciprocal dispositions of each testator's property.

Neither term is meant to convey the legal notion that the survivor is bound by contract to keep the testamentary scheme intact. Under the Revised Code, such contracts, if entered into on or after January 1, 1998, must be express and in writing. The supreme court cited all of these Revised Code sections but then persisted in using the term "mutual will" as a legal term when it stated that "the will in issue here is joint, but not mutual, and was revocable by Mrs. Jones ...."

In any event, the court determined that the will in question did not contain the requisite express or definite statement of a contractual agreement, and it also did not contain "a clear and definite agreement," which would have allowed equity to intervene to prevent fraud. Thus, Mrs. Jones was within her rights in conveying the property to Callaway.

2. Deed of Gift and Power of Attorney. The Georgia Supreme Court upheld the grant of summary judgment to Callaway on the issue of whether Mrs. Jones was competent to give the property to him and to appoint him as her attorney-in-fact. Both of the judges who witnessed the deed and power of attorney document had given detailed affidavits describing how they had met separately with Mrs. Jones to satisfy themselves that she understood both the irrevocable effect of the deed and the effect of the power of attorney. The only evidence offered to refute the judges' conclusions as to her competency was an affidavit by a niece that indicated some forgetfulness on Mrs. Jones's part. The supreme court gave little weight to this evidence because the affidavit did not offer any grounds for finding that Mrs. Jones was...
Applying the competency standard for entering into a valid contract, the supreme court held that the trial court properly granted summary judgment to Callaway on these issues.52

3. Violation of Fiduciary Duty. In holding that Callaway had not breached his fiduciary duty in accepting the gifts, the supreme court cited cases that indicated that an agent under a power of attorney, although bound by a duty of loyalty, is not precluded from accepting transfers from the principal absent a showing of fraud.53 The court again pointed to the judges’ affidavits to show that Mrs. Jones had executed the deed of gift and the power of attorney freely and voluntarily.54

4. Breach of Covenant of Warranty of Title. Having found that the conveyance to Callaway was proper, the court then determined whether the trial court had properly granted summary judgment to Callaway on the issue of breach of warranty of title.55 In the deed to Callaway, Mrs. Jones expressly covenanted that she had a fee simple interest in the property.56 At best, the trial court concluded, she only had the one-half vested interest she had originally owned and a life estate in the other one-half that had passed to her through her husband’s will.57 Thus, the supreme court held that she had breached the covenant and her estate would be liable for the remaining interest to which Callaway was entitled.58

C. Effect of Prenuptial Agreement on Transfers at Death

Sometimes attorneys who deal with decedents’ estates are faced with the question of whether the decedent’s prenuptial agreement will govern the way in which the decedent’s property will be transferred at death. The Georgia Court of Appeals addressed this issue in *Hiers v. Estate of Hiers*.59 Prior to her marriage, Mindy Hiers signed a prenuptial

---

51. *Id.* (quoting Jones v. Smith, 206 Ga. 162, 165, 56 S.E.2d 462, 466 (1949)).
52. *Id.*
54. *Id.*
55. *Id.* at 794-95, 621 S.E.2d at 433-34.
56. *Id.* at 795, 621 S.E.2d at 433.
57. *Id.* at 794-95, 621 S.E.2d at 433-34.
58. *Id.* at 795, 621 S.E.2d at 434.
agreement in which she agreed that she would only inherit $5000 from the estate of her spouse-to-be. When Mr. Hiers died, Mrs. Hiers filed for year's support.\textsuperscript{60} The trial court granted summary judgment against Mrs. Hiers, finding the prenuptial agreement to be valid, binding, and enforceable, and thus precluding her from petitioning for year's support.\textsuperscript{61} The court of appeals affirmed.\textsuperscript{62}

In her deposition, Mrs. Hiers stated that she knew that her husband-to-be would not marry her if she did not sign the agreement. Though she stated that she understood the agreement's terms, she also admitted that she had not actually read the agreement before signing it, even though it had been offered for her perusal before she signed it. She also apparently had not inquired into her fiance's financial condition, even though financial statements were attached to the agreement.\textsuperscript{63} She stated that she trusted her husband-to-be and relied upon "his promise to take care of her financially, that she had 'nothing to worry about.'"\textsuperscript{64} She made no attempt to contest the prenuptial agreement throughout the course of their nine-year marriage. The husband left the bulk of his $6 million estate to his son. Mrs. Hiers received the expected $5000 from his estate and approximately $95,000 in cash from jointly-held bank accounts.\textsuperscript{65}

The Georgia Court of Appeals determined that the prenuptial agreement met the requirements for a valid agreement set out in 1982 by the Georgia Supreme Court in \textit{Scherer v. Scherer}.\textsuperscript{66} The first

\textsuperscript{60} \textit{Id.} at 243-44, 628 S.E.2d at 656. The spouse and minor children of a decedent are entitled to file to receive a year's support from the decedent's estate. O.C.G.A. § 53-3-1(c). They are awarded whatever property they request in their petition, unless an objection to the petition is filed. \textit{Id.} § 53-3-7(a) (1997). In the case of an objection, the probate judge will hold a hearing to determine what amount the spouse and children need to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the decedent, taking into consideration the following:

(1) The support available to the individual for whom the property is to be set apart from sources other than year's support, including but not limited to the principal of any separate estate and the income and earning capacity of that individual;

(2) The solvency of the estate; and

(3) Such other relevant criteria as the court deems equitable and proper.

\textit{Id.} § 53-3-7(c). See \textit{RADFORD, WILLS & ADMINISTRATION, supra} note 1, at § 10 for a discussion of year's support.

\textsuperscript{61} \textit{Hiers}, 278 Ga. App. at 242, 628 S.E.2d at 655.

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{Id.} at 243, 628 S.E.2d at 655.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.} at 244, 628 S.E.2d at 656.

\textsuperscript{66} \textit{Id.} at 247, 628 S.E.2d at 658; \textit{Scherer v. Scherer}, 249 Ga. 635, 292 S.E.2d 662 (1982).
requirement is that the agreement may not be obtained through fraud, duress, mistake, misrepresentation, or nondisclosure of material facts. The court of appeals ruled that although the husband had demanded the agreement as a precondition to the marriage, it did not amount to the type of coercion that would have overcome the wife's free will. The court also concluded that although the financial disclosures may have neglected to mention a lake house that the husband may have owned, the fact that Mrs. Hiers never even read the disclosures negated the possibility that she would have relied on them. The court further concluded that Mr. Hiers's promise to “take care of” his wife did not constitute a misrepresentation or fraud.

The second Scherer factor is whether the agreement was unconscionable. Mrs. Hiers based her allegation of unconscionability on the disparity between her and her husband in both their financial situations and their business expertise and the fact that after nine years of marriage, he had left her “no visible means of support.” The court of appeals pointed out that Mrs. Hiers had entered the marriage with only $2500 and had left with over $100,000 and had been able to live in the marital home and drive their cars for months after her husband's death. The court noted that “the fact that a prenuptial agreement perpetuates an existing disparity of wealth between the parties does not render it unconscionable.”

The third and final Scherer factor, changed circumstances such that enforcement of the agreement would be unfair and unreasonable, was not supported by any facts in the record. Thus, the court refused to engage in what it referred to as a “judicial repudiation” of the prenuptial agreement.

68. *Id.* at 245-46, 628 S.E.2d at 657.
69. *Id.* at 246, 628 S.E.2d at 657.
70. *Id.*
71. *Id.* at 245, 628 S.E.2d at 657 (citing Scherer, 249 Ga. at 641, 292 S.E.2d at 666).
72. *Id.* at 246, 628 S.E.2d at 657-58.
73. *Id.*, 628 S.E.2d at 658.
74. *Id.* at 246-47, 628 S.E.2d at 658.
75. *Id.* at 245, 628 S.E.2d at 657 (citing Scherer, 249 Ga. at 641, 292 S.E.2d at 666).
76. *Id.* at 247, 628 S.E.2d at 658.
77. *Id.*
D. Lack of Testamentary Capacity & Undue Influence

When the Georgia Supreme Court reviews jury decisions that would void a testator's will due to lack of testamentary capacity or undue influence, it is faced with two competing interests. On the one hand is the recognition that the right to make a will is considered to be a "valuable right [that] was recognized in the elemental dawn of recorded history." Thus, courts should be extremely reluctant to invalidate a testator's will. On the other hand is the recognition that a jury's verdict should be upheld if there is any evidence to support the jury's finding. This tension was exhibited once again in 2005 by a 4-3 decision in Wilson v. Lane.

In Wilson the Georgia Supreme Court reversed a jury's verdict that the testator had lacked testamentary capacity after concluding that there was no evidence to support the jury's verdict. The will of the testator divided her property equally among seventeen individuals, sixteen of whom were blood relatives. The seventeenth beneficiary had been the testator's caretaker. The drafting attorney's testimony indicated that the testator had "emphatically selected" all of the beneficiaries. Others who knew the testator also testified that she had been of clear mind. Thus, the court held that the propounders had raised a presumption of capacity and that the caveators never presented any evidence to rebut that presumption.

The caveators had shown that the testator was "eccentric, aged, and peculiar in the last years of her life." Additionally, she had a fear of flooding, she refused to get into the bathtub, and she would not allow visitors to run water or flush the toilets when visiting her home. Testimony showed that she did not know which month it was, did not know her Social Security number, could not recall the last names of people, and called the fire department one time when there had been no

78. See RADFORD, WILLS & ADMINISTRATION, supra note 1, at §§ 4-2 to 4-5 for a discussion of testamentary capacity.
79. See RADFORD, WILLS & ADMINISTRATION, supra note 1, at § 4-8 for a discussion of undue influence.
82. Id. at 492, 614 S.E.2d at 88.
83. Id., 614 S.E.2d at 88-89.
84. Id., 614 S.E.2d at 89.
85. Id.
86. Id.
87. Id.
An expert testified based on an examination of her medical files, not on any observation of the testator. The files showed that the testator appeared to be suffering from some form of Alzheimer’s-type dementia. The testator’s physician wrote a letter saying that she was legally blind and suffering from “senile dementia,” but the physician said that he only wrote the letter to assist her in obtaining help with her telephone bill. A petition to have a guardian appointed for the testator had been filed after the will was executed, but the court concluded that the petition had been filed to allay concerns from the Department of Family and Children’s Services about her ability to continue living alone at home. The court also noted that her inability to live alone had existed at the time the will was executed and had no relation to whether she had testamentary capacity. The court concluded that “[a]t most there was evidence that [the testator] was an eccentric woman whose mental health declined towards the end of her life.” In making its ruling, the supreme court stressed that the right to make a will is a “valuable right.”

Justice Carley, joined in dissent by Justices Sears and Hines, agreed that the testimony might have authorized a finding that the testator had the appropriate capacity but focused on the fact that a jury had found that she did not. The dissenting judges believed that the totality of the evidence supported the jury’s verdict in favor of the caveators.

The Georgia Supreme Court also reviewed two undue influence cases in the 2005-06 reporting period. In the first of these cases, Trotman v. Forester, the supreme court held that the evidence supported the trial court’s finding of undue influence by one of the testator’s sons who was named as a beneficiary under the will. The court focused both on the findings that the testator was of weakened mind and that a confidential relationship existed between the testator and her son.

---

88. Id. at 496-97, 614 S.E.2d at 91 (Carley, J., dissenting).
89. Wilson, 279 Ga. at 493, 614 S.E.2d at 89. Chief Justice Fletcher, writing for the majority, noted: "Regardless of the stigma associated with the term 'Alzheimer's,' however, that testimony does not show how Greer would have been unable to form a rational desire regarding the disposition of her assets." Id.
90. Id.
91. Id., 614 S.E.2d at 89-90.
92. Id. at 493-94, 614 S.E.2d at 90.
93. Id. at 494, 614 S.E.2d at 90.
94. Id. (quoting Brumbelow v. Hopkins, 197 Ga. 247, 256, 29 S.E.2d 42, 48 (1944)).
95. Id. at 494, 614 S.E.2d at 90 (Carley, J., dissenting).
96. Id. at 494-95, 614 S.E.2d at 90.
98. Id. at 844, 621 S.E.2d at 725.
99. Id. at 845-47, 621 S.E.2d at 725-26.
The court determined that there was "ample evidence" that the testator's mental capacity was diminished at the time the will was executed and had been for almost two years since the testator's husband died. A psychiatrist examined the testator the month after her husband died, and a psychologist examined her three months before she executed her will. Both testified that she was suffering from mild "Alzheimer's type" dementia and that there was not much likelihood that her condition would improve. A niece and nephew also believed that she was suffering from Alzheimer's disease because the testator's brother had the disease, and both observers had seen the testator in situations in which she was extremely disoriented. The nephew told the attorney who drafted the testator's will that he would not serve as executor because he thought that his aunt was not competent to make a will.

Furthermore, the testator had employed the services of two attorneys, one who put together her overall estate plan and a second who actually drafted her will. The attorney who drafted her will did not believe that the testator's son, Cliff, had unduly influenced her, even though the attorney said that Cliff had tried to influence both the testator and that attorney. The other attorney admitted that he had only spoken with the testator twice, once in person and once by phone, but that he had spoken with Cliff at least nine times without his mother being present. Cliff participated in both of the conversations the drafting attorney had with the testator. Many of the items that ended up in the will resembled items that Cliff had suggested to the attorney. Other witnesses testified that Cliff had isolated the testator from her relatives and friends after her husband's death and had been with her constantly around the time that the will was executed. Accordingly, the court held that the evidence supported the trial judge's finding that the testator, in her weakened mental state, had been the victim of undue influence by Cliff.

The second undue influence case, Bailey v. Edmundson, was a bit unusual in that the individuals who were asserted to have exercised the
undue influence did not take a substantial portion of the testator's estate under the testator's new will. The testator had written a will in 2003, which left the bulk of his estate to his daughter. Subsequently, he was diagnosed with lung and brain cancer. Price and Palleson, whom the testator had met at church, were hired to care for him. Also, Edmundson, who was on the staff of the church, baptized and frequently visited the testator. In 2004 the testator executed a new will, leaving bequests to the church, Price, Palleson, and Edmundson, and devising seventy-five percent of the residue of his estate to his sister and the other twenty-five percent to his daughter. Edmundson was named as successor executor in this will.  

When the testator died, his daughter filed his 2003 will for probate and Edmundson submitted the 2004 will. The daughter filed a caveat to the 2004 will and asked for a jury trial. Her caveat was based on several grounds, but the jury returned a verdict in her favor on the sole ground of undue influence by Price, Palleson, and Edmundson. After the verdict was returned, Edmundson renewed a motion for directed verdict, which the judge granted. The Georgia Supreme Court reversed, holding that the evidence was sufficient to submit the issue of undue influence to the jury.

The supreme court noted that "[a] rebuttable presumption of undue influence arises when a beneficiary under a will occupies a confidential relationship with the testator, is not the natural object of his bounty, and takes an active part in the planning, preparation, or execution of the will." The court determined that the caregivers were "actively involved" in every aspect of the preparation and execution of the 2004 will. The court also concluded that there was "some evidence" of a confidential relationship. Even though the attorney who prepared the 2004 will and the two witnesses saw no sign of mental impairment, the court cited the following evidence:

The oncologist who treated the Testator testified by deposition that his medication could cause altered mental status and occasional psychosis. Other testimony showed that, although Testator had a strong personality, during the summer of 2004 he suffered from severe physical inabilities, memory impairment, and mental confusion. The

107. Id. at 528, 630 S.E.2d at 398.
108. Id.
109. Id. at 531, 630 S.E.2d at 400.
110. Id. at 529, 630 S.E.2d at 398 (citing McConnell v. Moore, 267 Ga. 839, 840, 483 S.E.2d 578, 579 (1997)).
111. Id., 630 S.E.2d at 399.
112. Id. (citing Trotman, 279 Ga. at 845, 621 S.E.2d at 725).
evidence presented by Ms. Bailey [the daughter] also showed that Testator, in the hope of helping himself go to heaven, made gifts and loans to Ms. Price, Palleson, and Edmundson; that Testator was dependent on his caregivers for personal and medical care; that he was afraid that they would quit and that his daughter would put him into a nursing home; and, that because of them he stopped permitting her to visit him.\textsuperscript{13}

The court also noted the "[t]estator's short-term relationship with [the caregivers], his sporadic contact with and lack of trust towards [the sister to whom he devised seventy-five percent of his estate], and his long-standing expressions of testamentary intent to leave all of his property to [his daughter], which he repeated the day after execution."\textsuperscript{14} The court stated that this evidence was sufficient to trigger the presumption of undue influence.\textsuperscript{15} The court held that even if there had not been a confidential relationship, the evidence of undue influence authorized sending the case to the jury.\textsuperscript{16}

\textbf{E. Equity and the Administration of Estates}

The Georgia probate courts are courts of limited jurisdiction and have only that jurisdiction that is granted to them by law.\textsuperscript{17} The probate courts do not have jurisdiction in equity cases, as the Georgia Constitution reserves exclusive jurisdiction in equity cases to the superior courts.\textsuperscript{18} Under O.C.G.A. section 23-2-91, equity will interfere in the administration of an estate only upon application of the personal representative\textsuperscript{19} or "of any person interested in the estate where there is danger of loss or other injury to his interests."\textsuperscript{20}

In \textit{Morgan v. Johns},\textsuperscript{21} the heirs of a testator sought an injunction\textsuperscript{22} from the superior court as "person[s] interested in the es-

\begin{itemize}
\item \textsuperscript{113} \textit{Id.} at 529-30, 630 S.E.2d at 399 (citation omitted).
\item \textsuperscript{114} \textit{Id.} at 531, 630 S.E.2d at 400.
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.} at 530, 630 S.E.2d at 399.
\item \textsuperscript{117} GA. CONST. art. VI, § 1, para. 1; GA. CONST. art. VI, § 3, para. 1. \textit{See} RADFORD, WILLS & ADMINISTRATION, supra note 1, at § 6-1.
\item \textsuperscript{118} GA. CONST. art. VI, § 4, para. 1.
\item \textsuperscript{119} The application of the personal representative must be an application for construction and direction or an application for marshaling the assets. O.C.G.A. § 23-2-91(1) (1981).
\item \textsuperscript{120} \textit{Id.} § 23-2-91(2).
\item \textsuperscript{122} An injunction is an equitable remedy. O.C.G.A. section 9-5-1 provides as follows:
\begin{quote}
Equity, by a writ of injunction, may restrain proceedings in another or the same court, a threatened or existing tort, or any other act of a private individual or
\end{quote}
In this case, the testator had disinherited his three children, two daughters and a son, in favor of the caretaker, Morgan, who had provided care for him in the three years prior to his death. Two months before he died and one month before he executed his will, the testator had named Morgan as his agent under a power of attorney. On the day he died, the testator closed on a sale of real property, with Morgan’s assistance, and received a check for $734,250. According to Morgan, the testator then endorsed the check over to her and gave it to her as a gift. She deposited it that afternoon in an account in her name. The testator died two hours later.

Morgan, who was also named as sole executor, filed a petition to probate the will. The daughters filed a caveat on the grounds of undue influence and an objection to the naming of Morgan as executor. They also filed a complaint in the superior court alleging fraud, conversion, and breach of fiduciary duty and asked that the court set aside the gift and enjoin Morgan from transferring or using the money she had received from the testator. Morgan claimed that the daughters did not have standing to pursue that action. The superior court denied Morgan’s motion to dismiss and granted an interlocutory injunction preventing Morgan from using the proceeds of the sale, and Morgan appealed.

The court of appeals reversed, holding that the daughters had no standing to file their action in superior court while the probate proceeding was pending. The daughters had claimed that under O.C.G.A. section 23-2-91(2), they, as persons “interest[ed] in the estate,” were applying to the court of equity because there was a “danger of loss or other injury to [their] interests.” Their claim was that they had an “interest” in the estate until the will that excluded them was proved to be valid. The court of appeals rejected this argument and held that the daughters had no interest in the estate “unless and until a probate court finds the decedent’s will is invalid and the decedent died intestate.” The court characterized the daughters’ interest as a mere “expected inheritance.” The court noted that the daughters’...
claim of fraud did not make their case indistinguishable because a finding of fraud, while invalidating the gift, would merely put the gift back into the testator's estate, which was slated to go to Morgan anyway.  

F. Breach of Fiduciary Duty

The case of Wachovia Bank v. Namik made its third appearance in the Georgia appellate courts in the 2005-06 reporting period. A brief review of the two previous decisions is necessary to give context to this latest appellate decision. The background facts are as follows.

A retired Iraqi army officer, General Ali, while visiting his son in Atlanta, deposited $2.65 million at the bank in a certificate of deposit, which was scheduled to mature in six months. The next day, he and a bank trust officer discussed placing this property in trust. General Ali signed the bank's form revocable living trust agreement and then left the bank. He returned to Iraq, and some years later his son revealed to the bank that Ali had been arrested upon his return and executed. When the six-month certificate of deposit matured, the trust officer, Tom Slaughter, wrote a memorandum (referred to as the "Slaughter memorandum" by the Georgia Supreme Court) which indicated that Ali wanted to fund the trust with the money from the matured certificate. The memorandum also indicated that Ali had mentioned orally to the trust officer that he wanted "no market risks" and that he would like to have the funds invested "only in U.S. Government issues." Neither of these instructions were embodied in the written trust agreement, which authorized the trustee to "hold, manage, invest, and reinvest the said property in its discretion." The agreement

131. Id. at 369, 623 S.E.2d at 221.
135. Id. at 81, 593 S.E.2d at 37.
137. Wachovia Bank, 265 Ga. App. at 81, 593 S.E.2d at 37.
138. Id. at 83, 593 S.E.2d at 38. The trust agreement also incorporated by reference the trustee powers that appear in O.C.G.A. section 53-12-232 (1997). Id. O.C.G.A.
directed that the funds were to be used for the benefit of the settlor during his life and then, at his death, be paid over to the personal representative of his estate.99

At the time the trust was established, the bank officers made several unsuccessful attempts to contact Ali. Not knowing for sure what Ali's tax status was (that is, whether he was a citizen, non-resident alien, among others), the bank invested the trust funds in tax-free municipal bonds. When it was discovered that Ali was dead, the funds were paid over to the bank as administrator of Ali's estate. The estate tax law and regulations that were in effect at the time of Ali's death caused the entire value of the trust fund to be included in his estate as U.S. situs property, and the estate paid tax in the amount of $933,248.49.140 Ali's son, Namik, sued, claiming the bank was responsible for the fact that the estate of his father had been subjected to those taxes.141 He pointed out that the Internal Revenue Code lists certain types of property that are not considered to be "situated in the United States" when calculating what is included in the gross estate of a non-resident alien.142 These types of property include proceeds of life insurance policies and certain bank deposits and other debt obligations, including U.S. debt obligations.143 However, as noted by the court of appeals, prior to an amendment in 1997, this law was "obscure: it was 'not perspicuous, not clearly expressed, vague, hard to understand.'"144 The obscure rule that was in effect in 1990 would only have excluded from the nonresident alien's gross estate investments in U.S. government issues with a maturity of over 183 days.145 The court of appeals concluded that the bank could not be held liable for not knowing this obscure rule.146 The Georgia Supreme Court, on the other hand, held that the bank was liable.147

section 53-12-231(a) (1997) provides that a settlor may incorporate by reference into a trust agreement any or all of the extensive trustee powers that are listed in O.C.G.A. section 53-12-232 (1997). O.C.G.A. § 53-12-231(a) (1997).

140. Id. at 81, 593 S.E.2d at 37.
141. Id.
142. Id. at 83, 593 S.E.2d at 38; see 26 U.S.C. §§ 871(a)(1), (h), (l); 26 U.S.C. §§ 1441(a), (c)(9) (2000).
144. Wachovia Bank, 265 Ga. App. at 84, 593 S.E.2d at 39 (quoting BLACK'S LAW DICTIONARY 971 (5th ed. 1979)).
145. Id.
146. Id. at 83-84, 593 S.E.2d at 38-39.
147. Namik, 279 Ga. at 253, 612 S.E.2d at 274.
The key factor that differentiated the court of appeals decision in the bank's favor from the supreme court's holding against the bank was the admissibility of the Slaughter memorandum as evidence of the settlor's intent. If the memorandum was admissible and thus incorporated into the trust agreement, then the theory was that the bank should have followed Ali's instructions to invest only in "U.S. Government issues." Originally, the court of appeals ruled that the Slaughter memorandum was admissible for the purpose of showing how the trust was to be funded but inadmissible for the purpose of showing Ali's intent as to the investment of the funds. The supreme court held that the Slaughter memorandum was admissible to explain General Ali's investment desires because it had been admitted to show the source of the trust funds, which indicated that the written trust agreement did not constitute the entire agreement between Ali and the bank. The supreme court reinstated the trial court's findings that the bank had violated its fiduciary duty and was in breach of contract and remanded the case to the court of appeals for review of the question of damages.

On remand, the court of appeals, in light of the supreme court's decision, examined whether Namik should have been awarded damages in an amount greater than the $1,118,710 that had been awarded at trial. The court of appeals determined that the damages awarded at the trial level were appropriate after considering several issues.

First, Namik reasserted that the bank should have invested all of his father's funds in long-term government securities—that is, securities with maturity over 183 days. Namik argued that had the bank done so, all estate taxes would have been avoided because all of these investments would have been considered non-U.S. situs assets for estate tax

148. See id. at 251-53, 612 S.E.2d at 272-74.
149. Wachovia Bank, 265 Ga. App. at 84, 593 S.E.2d at 39. The court of appeals noted that even if the bank had invested in U.S. government securities, there was still no evidence that the bank would have chosen to invest in securities with a maturity of over 183 days. Id.
150. Id. at 85-86, 593 S.E.2d at 40.
151. Namik, 279 Ga. at 252, 612 S.E.2d at 273. The Georgia Supreme Court also held that it was inappropriate for the court of appeals to conclude that the Slaughter memorandum was inadmissible on the basis that it represented an agreement arrived at subsequent to the writing. Id. The supreme court held that the memorandum and the agreement were contemporaneous. Id.
152. Id. at 253, 612 S.E.2d at 274. The court of appeals had not addressed the damages issue because it concluded that there was no breach of fiduciary or contractual duty by the Bank. Id.
154. Id. at 230-35, 620 S.E.2d at 472-75.
purposes. The court of appeals refused to accept this argument and reiterated the trial court's findings that the bank was liable only for one-half of the estate taxes incurred. The court of appeals supported the trial court's determination that (1) due to legitimate liquidity concerns, the bank never would have invested all of the trust funds in long-term treasury bills, even if it had been aware of the IRS regulation and (2) the IRS had not issued its later-released Technical Advice Memorandum clarifying the 183-day rule until after 1989, the year General Ali died.

Second, Namik also challenged the trial court's finding that he, as the beneficiary, had a duty to mitigate the damages that resulted from the bank's breach of fiduciary duty and contract. The court of appeals agreed with the trial court that Namik had failed in his duty to mitigate damages by (1) delaying to report his father's death to the bank for two years, and (2) failing to follow the bank's advice to probate his father's will in a timely manner. These delays had, among other things, caused the estate to incur an additional $500,000 in interest for overdue estate taxes.

As to the action for breach of fiduciary duty, the court of appeals affirmed the trial court's statement that, in Georgia, such actions lie in tort and thus carry with them the requirement for mitigating damages unless the tort is "'positive and continuous.'" The court of appeals agreed with the trial court that the bank's breach was not a "positive" tort because it was not fraud, an ongoing violation of property rights, or an intentional tort. In addition, Georgia courts have held that the duty to mitigate applies even in the case of "reckless" acts.

As to the action for breach of contract, the court of appeals noted that Georgia statutory and case law require the injured party to mitigate damages by the use of "'ordinary care and diligence.'" The three exceptions to this requirement are: (1) fraud; (2) breach of an express warranty; and (3) an "'absolute promise to pay.'" Again, the court

155. Id. at 230, 620 S.E.2d at 472.
156. Id. at 230-31, 620 S.E.2d at 472-73.
157. Id., 620 S.E.2d at 472.
158. Id. at 231, 620 S.E.2d at 473.
159. Id. The will was not actually probated until 1996. Id.
160. Id. at 231-32, 620 S.E.2d at 473.
161. Id. at 232, 620 S.E.2d at 473 (quoting O.C.G.A. § 51-12-11 (2000)).
162. Id., 620 S.E.2d at 474.
163. Id.
164. Id. at 233, 620 S.E.2d at 474 (quoting O.C.G.A. § 13-6-5 (2003 & Supp. 2005)).
noted that Namik met none of the three exceptions to the duty to mitigate damages in contract claims.\textsuperscript{166}

Finally, Namik challenged the trial court’s failure to award him attorney fees and to require the bank to disgorge all of the trustee fees it had earned.\textsuperscript{167} The court of appeals discussed the fees issue even though it determined that Namik had abandoned the issue by failing to provide any argument or authority for his theory in his enumerations of error.\textsuperscript{168} The court tied this issue back to the finding that the bank had breached its duty only as to one-half of the trust assets.\textsuperscript{169} The court noted that a trial court may award either full compensation or any reduced level of compensation for a breach of fiduciary duty and concluded that the trial court had properly exercised its discretion.\textsuperscript{170} As to the attorney fees, the court disagreed that a breach of fiduciary duty was synonymous with the type of "bad faith" that merits an award of attorney fees.\textsuperscript{171} The court agreed with the trial court’s finding that the bank “‘did not act in bad faith, was not stubbornly litigious, and did not cause Plaintiff’s unnecessary trouble and expense.”\textsuperscript{172} The court of appeals also noted that O.C.G.A. section 53-12-193 does not mandate an award of attorney fees when a fiduciary duty is breached but merely lists it as one possible remedy.\textsuperscript{173}

In addition to the question of the sufficiency of the damages, on remand, Namik asked the court of appeals to reexamine the trial court’s finding that in Georgia no cause of action exists in tort for a bank’s failure to follow a customer’s instructions.\textsuperscript{174} In support of his position, Namik cited \textit{Wachovia Bank of Georgia v. Reynolds}.\textsuperscript{175} The court of appeals agreed with the trial court that the facts and issues in \textit{Reynolds} were distinguishable from those in the instant case and thus did not give rise to such a tort cause of action.\textsuperscript{176}

\begin{itemize}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.} The trial court had required a disgorge of only one-half of the trustee fees.
\item \textsuperscript{168} \textit{Id.} at 233-34, 620 S.E.2d at 474.
\item \textsuperscript{169} \textit{Id.} at 234, 620 S.E.2d at 474-75.
\item \textsuperscript{170} \textit{Id.}, 620 S.E.2d at 475.
\item \textsuperscript{171} \textit{Id.} at 234-35, 620 S.E.2d at 475.
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{Id.} at 235, 620 S.E.2d at 475 (citing O.C.G.A. § 53-12-193 (1997 & Supp. 2006)).
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} \textit{Id.; Wachovia Bank of Ga. v. Reynolds}, 244 Ga. App. 1, 533 S.E.2d 743 (2000).
\item \textsuperscript{176} \textit{Wachovia Bank}, 275 Ga. App. at 235, 620 S.E.2d at 475.
\end{itemize}
II. GEORGIA LEGISLATION - 2006

A. Guardianship “Technical Corrections” Bill

The Revised Guardianship and Conservatorship Code of 2005 (the “Revised Guardianship Code”) was enacted by the Georgia General Assembly in 2004 and became effective July 1, 2005. The 2006 legislation is designed primarily to correct typographical and similar errors to the Revised Guardianship Code. The proposed legislation also includes substantive amendments to the Official Code of Georgia Annotated (“O.C.G.A.”) that relate to guardianship law. The substantive amendments are as follows.

1. Change of Terminology. The Revised Guardianship Code changed the terminology used to describe those who are appointed to serve as guardians of a minor’s or an adult’s person or property. The person who was formerly referred to as the “guardian of the person” is referred to in the Revised Guardianship Code simply as the “guardian.” The person who was formerly referred to as the “guardian of the property” is now referred to as the “conservator.” The 2006 legislation extended the use of this new terminology to other sections of the O.C.G.A. that used the old terminology. Specifically, the language of the statutes in Title 10 that relate to financial powers of attorney were revised to change the term “guardian” to “conservator.” Also, O.C.G.A. section 53-12-173(b) which formerly described the compensation paid to trustees as equivalent to that paid to “guardians,” was changed to reflect that a trustee’s compensation is the same as that paid to “conservators.”

2. Place of Filing Petition for Temporary Guardianship. The Revised Guardianship Code includes provisions that allow an individual

---

178. Id. The new Code was summarized in Mary F. Radford, Wills, Trusts, Guardianships, and Fiduciary Administration, 56 MERCER L. REV. 457, 477-78 (2004). The Revised Code is discussed in depth in MARY F. RADFORD, GUARDIANSHIPS AND CONSERVATORSHIPS IN GEORGIA (2005).
180. Id. (amending O.C.G.A. §§ 29-1-1 to 29-10-11).
181. Id.; see RADFORD, GUARDIANSHIPS & CONSERVATORSHIPS, supra note 178, at § 1-2.
183. O.C.G.A. § 53-12-173(b) (1997).
184. Id.
185. Ga. S.B. 534, § 23 (amending O.C.G.A. § 53-12-173(b)).
to petition to serve as the “temporary guardian” of a minor when the minor’s parents cannot serve in the role. The Revised Guardianship Code provided that the petition would be filed in the county in which the petitioner is domiciled. In recognition of the fact that some of these petitioners may not be domiciled in Georgia, the 2006 amendment adds that if the petitioner is not domiciled in Georgia, the petition may be filed “in the probate court of the county where the minor is found.”

3. Conservator as Administrator of Ward’s Estate. The Georgia Probate Code (the “Probate Code”) does not mandate a list of those persons who shall serve as the administrator of the estate of an individual who dies intestate. Instead, the Probate Code gives the probate court the authority to choose from a suggested group of persons the person who will best serve the interest of the estate. However, the 2006 legislation does add one mandate for the choice of administrator. This mandate applies when a minor or ward who was under a conservatorship dies intestate, and the conservator who had been appointed for the decedent was the “county administrator” or “county guardian.” In that situation, the 2006 amendment provides that the conservator of the deceased minor or ward shall administer that minor’s or ward’s estate, or, as stated in the statute, the conservator shall “proceed to distribute the minor ward’s [or adult ward’s] estate in the same manner as if the conservator had been appointed administrator of the estate.” In addition, the 2006 amendment states: “The sureties on the conservator’s bond shall be responsible for the conservator’s faithful administration and distribution of the estate.”

---

190. Id. § 53-6-20 (1997 & Supp. 2006). This Code section also allows the heirs of the intestate decedent to choose the administrator by unanimous consent. Id.
192. Id. “County administrators” and “county guardians” are individuals who are appointed in each county by the probate court to protect the property of wards and to represent decedents’ estates when no other appropriate person is available to do so. RADFORD, GUARDIANSHIPS & CONSERVATORSHIPS, supra note 178, at § 8.
194. Id. See RADFORD, GUARDIANSHIPS & CONSERVATORSHIPS, supra note 178, at §§ 3-5, 5-8 for a discussion of conservator’s bonds.
4. Expenses of Hearing. Neither the Revised Guardianship Code nor the former code allowed a guardian or conservator to be appointed for an adult unless there has been a hearing in which it has been determined that the adult is in need of a guardian or conservator. The 2006 amendment adds provisions that direct who will pay the expenses of any such hearing. The 2006 amendment concerning guardianships provides:

The amounts actually necessary or requisite to defray the expenses of any hearing held under this article shall be paid:

(1) From the estate of the ward if a guardianship is ordered;
(2) By the petitioner if no guardianship is ordered; or
(3) By the county in which the proposed ward is domiciled or by the county in which the hearing was held only if the person who actually presided over the hearing executes an affidavit or includes a statement in the order that the party against whom costs are cast pursuant to paragraph (1) or (2) of this Code section appears to lack sufficient assets to defray the expenses.

The 2006 amendment concerning conservatorships provides:

The amounts actually necessary or requisite to defray the expenses of any hearing held under this article shall be paid:

(1) From the estate of the ward if a conservatorship is ordered;
(2) By the petitioner if no conservatorship is ordered; or
(3) By the county in which the proposed ward is domiciled or by the county in which the hearing is held if the proposed ward is not a domiciliary of the state. The amounts shall be paid by the appropriate county upon the warrant of the court of the county where the hearing was held. Payment by the county shall be required, however, only if the person who actually presides over the hearing executes an affidavit or includes a statement in the order that the party against whom costs are cast pursuant to paragraph (1) or (2) of this Code section appears to lack sufficient assets to defray the expenses.

5. Judges as Custodians of Funds. Under the former O.C.G.A. section 29-8-1:

(a) The judges of the probate courts are, in their discretion, made the legal custodians and distributors of all moneys due and owing to any minor or incapacitated adult who has no legal and qualified guardian of the property . . . .

---

197. Id. § 14 (amending O.C.G.A. § 29-5-17 (Supp. 2006)).
The judges, in their discretion, shall also be the depositories for and custodians of all moneys of any heir of any estate who cannot be located by the executor or administrator. 198

The 2005 Revised Guardianship Code capped the amount that a probate judge could hold for such minor or adult ward at $2500. 199 The 2006 amendment raised the cap on the amount of funds that a probate judge can hold as custodian for minors and incapacitated adults who have no conservator to $15,000. 200 Also, the 2006 amendment added a provision to Title 53 of the Probate Code allowing probate judges to serve as custodians for sums in unlimited amounts for missing heirs or will beneficiaries. 201

6. Bond of Public Guardians. The Revised Guardianship Code allowed a probate judge to appoint a “public guardian” to serve as the guardian of an adult for whom no one else is available to serve as guardian. 202 The public guardianship legislation requires the public guardian to give bond of at least $10,000. 203 The final sentence of this statute, O.C.G.A. section 29-10-5, also allowed “any person aggrieved by the misconduct of the public guardian” to bring an action on the public guardian’s bond. 204 The 2006 legislation repealed this final sentence. 205

B. Life Insurance

The Georgia General Assembly enacted two sets of statutes related to life insurance in the 2006 session. Life insurance is a common component of many clients’ overall estate and financial plans, and thus these new laws are relevant to anyone who practices in the area of estate planning.

The first bill, H.B. 1484, 206 was a response to questions raised by a federal district court in a case that was decided in 2005. The case,

---

201. Id. § 22 (enacting new O.C.G.A. § 53-9-8 (Supp. 2006)).
Chawla ex rel. Giesinger v. Transamerica Occidental Life Insurance Co.,\textsuperscript{207} involved a life insurance trust's ownership of a life insurance policy for Mr. Giesinger.\textsuperscript{208} The trust originally purchased a policy with a face value of $1 million. The policy was later increased to a face value of $2.45 million. At the time the policy was originally issued and when it was re-issued, the insured signed statements to the effect that he had undergone physical examinations and was basically in good health.\textsuperscript{209} After the insured died, it was discovered that prior to the issuance of the policy he had undergone brain surgery, from which various complications had ensued. It was also discovered the insured had been suffering from the effects of chronic alcohol poisoning. When the insured died, the insurance company refused to pay out the policy proceeds on the ground that the insured had misrepresented his medical condition.\textsuperscript{210} The federal district court upheld the defendant insurance company's denial of the claim.\textsuperscript{211}

The court based its decision not only on the ground that the insured had lied to the insurance company, but also on the fact that the trust had no insurable interest in the life of the insured.\textsuperscript{212} The district court focused on the fact that the trust had no interest in the continued life of the insured because, in fact, "the Trust promised to gain more assets upon the decedent's death, i.e. death benefits under the policy, than it would have in the event that decedent had lived. Further, the Trust suffered no detriment, pecuniary or otherwise, upon the death of the decedent."\textsuperscript{213} The Fourth Circuit Court of Appeals affirmed the district court's finding that the insurance company would not be required

---

\textsuperscript{208} Id. at *1. A life insurance trust is designed to receive the proceeds payable on a life insurance policy when the insured dies and then distribute those proceeds in accordance with the terms of the trust. The trust will often be listed as the owner of the life insurance policy, by reason of the fact that the settlor of the trust transferred a policy she already owned to the trust or the fact that the trustee purchased the policy for the trust with assets that were transferred to the trust by the settlor. This type of trust will often be established as an:

irrevocable insurance trust—funded or unfunded—established during the life of the insured in such a way as to shift the income tax burden, which may accrue by virtue of the insurance trust. This trust also takes advantage of annual gift tax exclusions and insures that the life insurance policy is not included in the insured's estate at the time of the death.

\textsuperscript{209} Chawla, 2005 WL 405405, at *1.
\textsuperscript{210} Id. at *2.
\textsuperscript{211} Id. at *7.
\textsuperscript{212} Id. at *3, *6.
\textsuperscript{213} Id. at *7.
to pay the claim, but the court did not reach the insurable interest issue because it found ample ground for upholding the lower court on the basis of the insured's misrepresentation.\textsuperscript{214}

In 2006 the Georgia General Assembly codified the concept that a life insurance trust has an insurable interest in the settlor of the trust.\textsuperscript{215} In fact, the legislature went further and provided:

The trustee of a trust has the same insurable interest in the life of any other individual as does any beneficiary of the trust with respect to proceeds of insurance on the life of such individual or any portion of such proceeds that are allocable to such beneficiary's interest in such trust. If multiple beneficiaries of a trust have an insurable interest in the life of the same individual, the trustee of such trust has the same aggregate insurable interest in such individual's life as such beneficiaries with respect to proceeds of insurance on the life of such individual or any portion of such proceeds that is allocable in the aggregate to such beneficiaries' interest in the trust.\textsuperscript{216}

The General Assembly also clarified the following with respect to corporations:

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

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

(2) In whom the shareholders holding a majority of the issued and outstanding shares have an insurable interest, whether arising out of their status as shareholders of the corporation or otherwise.\textsuperscript{217}

Finally, the General Assembly provided that a shareholder in a corporation has an insurable interest in the life of any other shareholder if, pursuant to an arrangement among them, the shareholders are bound to purchase the shares of a deceased or disabled shareholder.\textsuperscript{218}

The second set of 2006 statutes that relate to life insurance\textsuperscript{219} are

\textsuperscript{214} Chawla \textit{ex rel.} Giesinger v. Transamerica Occidental Life Ins. Co., 440 F.3d 639, 648 (4th Cir. 2006).
\textsuperscript{215} Ga. H.B. 1484 § 1.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id. This type of arrangement, sometimes referred to as a "buy-sell agreement," is common among shareholders in a closely held corporation who want to ensure that the corporation remains in the hands of the original shareholders. See 1 FREDERICK K. HOOPS \textit{ET AL.}, FAMILY ESTATE PLANNING GUIDE § 2:7 (4th ed. 1995).
\textsuperscript{219} The Author is grateful to Atlanta attorney Jeffrey M. Zitron for the numerous insights he offered as to the enactment of this set of statutes. Many of those insights are
statutes that protect the cash surrender value of a life insurance policy from the reach of the creditors of the insured and the proceeds of annuity, reversionary annuity, and pure endowment contracts from the reach of the creditors of the person who is a beneficiary of the contract. Neither of these protections apply if the insurance policy or annuity contract was purchased with intent to defraud creditors.

These new statutes introduce a significant asset protection mechanism for Georgia citizens and residents. The state of Florida has a similar protection. A recent Florida case, Faro v. Porchester Holdings, Inc., reflects the extent to which this exemption will reach. In Faro an insured withdrew $30,000 of the cash surrender value of two life insurance policies he owned and deposited those funds in a certificate of deposit. The insured’s creditor tried to garnish the funds in the bank account, but the court held that the funds could not be reached because Florida’s statute, which uses the same words as the Georgia statute, exempted the cash value of a life insurance policy “upon whatever form.”

incorporated into this description of the statutes.


221. Ga. H.B. 1304, § 2 (amending O.C.G.A. § 33-28-7 (2005 & Supp. 2006)). The new law does not seem to exempt an annuity from the creditors of the owner of the annuity, although the owner is often a beneficiary under an annuity contract. Georgia bankruptcy law exempts the debtor’s right to receive “[a] payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.” O.C.G.A. § 44-13-100(a)(2)(E). Both new statutes protect against the “attachment, garnishment, or legal process in favor of any creditor.” Ga. H.B. 1304 §§ 1, 2.

222. Ga. H.B. 1304, §§1, 2.

223. The protection applies only if the policy or annuity contract is purchased by a Georgia citizen or resident. Id.


225. 792 So. 2d 1262 (Fla. 4th Dist. Ct. App. 2001).

226. Id. at 1262.

227. Id. at 1262-63, 1264 (quoting FLA. STAT. § 222.14).
C. Medicaid Estate Recovery

In 1993, as part of the Omnibus Budget Reconciliation Act, Congress required states to develop and implement a Medicaid "estate recovery program." The purpose of such a program is to recover from the estate of a decedent the amount of Medicaid assistance that the decedent received during life for nursing home or other long-term care, such as home or community-based services. As a result of this mandate, the Georgia legislature enacted O.C.G.A. section 49-4-147.1, which authorized the Department of Human Resources to engage in Medicaid estate recovery. This statute contained no details about the estate recovery system, and Georgia did not finalize regulations that implemented estate recovery until 2004. Among other things, the regulations stated that estate recovery would not proceed against an estate of $25,000 or less.

In 2006 the Georgia General Assembly replaced O.C.G.A. section 49-4-147.1 in its entirety with a new statute that relaxed some of the restrictions that were set forth in the regulations. Most importantly, the new law raises the value of estates that are exempt from Medicaid estate recovery to $100,000 "to prevent substantial and unreasonable hardship." This amount will be adjusted annually based on changes in the consumer price index. In addition, the new statute provides that recovery will not be allowed unless the recipient of the Medicaid assistance received notice of the potential for estate recovery at the time the recipient applied for the assistance and signed a written acknowledgment of the requisite notice. The new statute also provides that the estate recovery rules will not apply to the estate of anyone who received Medicaid assistance prior to the effective date of the new statute. Finally, the new statute allows for delay of

---

229. Id.
231. The Regulations can be found at the Georgia Department of Community Health website: http://www.communityhealth.state.ga.us/.
234. Id.
235. Id. The statute also provides that "[t]he value of the estate shall not include year's support, funeral expenses not to exceed $5,000.00, necessary expenses of administration, or reasonable expenses of the recipient's last illness." Id.
236. Id.
237. Id.
enforcement of the recovery against the decedent's estate when the heirs or dependants of the decedent agree to repay the recovery amount in reasonable installments.\textsuperscript{238}