RECENT DEVELOPMENTS

IN

GEORGIA FIDUCIARY LAW

(June 1, 2012 through May 31, 2013)

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> ***REDFEARN: WILLS & ADMINISTRATION IN GEORGIA*** *(2007)*
> ***GEORGIA TRUSTS & TRUSTEES*** *(2012-13)(2013-14 ed. In Dec. 2013)*
> ***GEORGIA GUARDIANSHIPS & CONSERVATORSHIPS*** *(2012-13)(2013-14 ed. In Dec. 2013)*

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A. INTESTACY

[No cases during the reporting period]

B. YEAR'S SUPPORT

a) Garren v. Garren, 316 Ga. App. 646, 730 S.E.2d 123 (July 2012).

In 2007, Ralph Garren died testate, survived by his wife, Dorothy Garren, and several adult children, including Rick Garren. Rick was the sole beneficiary of Ralph's will. Dorothy filed a petition for a year's support in probate court. Rick did not file an objection with the probate court, although he later testified he sent a letter signed by both himself and his mother to the court to withdraw the petition. This letter was not filed in the record. Dorothy was awarded the six acres of property sought in the petition pursuant to O.C.G.A. § 53-3-7, which provides for the setting aside of the property requested if no objection is made to the amount or nature of the petition following publication of notice. Rick appealed the award to the superior court. The superior court determined the letter had not been properly filed with the probate court, but then set aside Dorothy's award of a year's support, saying she did not present evidence as to the necessary amount. Dorothy appealed alleging she should not have been required to present that evidence. The Court of Appeals reversed the decision, noting the only issue before the superior court was the validity of Rick's objection to Dorothy's petition. The court found that, since the superior court had determined Rick had not properly objected, the burden to prove sufficiency of the award did not pass to Dorothy under O.C.G.A. § 53-3-7, as no proper objection was made to the amount or nature of the

award. The case also includes two discussions relevant to appeals from a probate court to the superior court. First, Dorothy filed a motion for summary judgment in the superior court. The superior court denied the motion because an issue of material fact existed as to whether Rick's letter constituted a proper objection to her petition. In her appeal to the Court of Appeals, Dorothy asked the court to review the denial of her motion. The Court of Appeals refused, pointing out that a request for summary judgment becomes moot once the court decides to proceed to trial on the evidence. Second, Dorothy filed a motion to dismiss on the ground that Rick lacked standing to appeal because he had not filed a pleading in the probate court. The Court of Appeals noted that the year's support statute required Rick to be served with notice of Dorothy's petition (as he was the sole beneficiary under Ralph's will) and that such notice made him a party to the proceeding.

b) Goodell v. Oliver, ___ Ga. ___, 740 S.E.2d 170 (March 2013).

Michael and Kelly Goodell married in 1999. Both had children from previous marriages, but did not have any children together. The couple divorced in August, 2006. In the Final Judgment and Decree, Michael was required to pay alimony until Kelly remarried. He also voluntarily agreed to pay $1,200 per child per month for the benefit of Kelly's two children after Kelly's remarriage, with the payments to end on August 1, 2012 and August 1, 2015, respectively, based on the children's high school and post-secondary school statuses. Kelly remarried in October, 2008, and Michael began making payments. He continued to pay until Kelly's death in December, 2009. The administrator of Kelly's estate filed a contempt action against Michael for non-payment, asserting the payments constituted a division of property. Michael responded that the

payments constituted periodic alimony that would not extend past Kelly's death. The Court found neither argument on point. First, the Court held this was not alimony because the payments started when Kelly remarried -- a time when alimony would traditionally end. Further, these payments went to the support and schooling of Kelly's children, not Kelly herself. Second, the payments were contingent on the children's school statuses and lacked a guarantee whether they would ever be required. Thus, the Court held the payments would not constitute a division of property. Finally, the Court concluded Michael's promises actually constituted a voluntary contract. Therefore, his contractual obligations survived Kelly's death.

C. WILLS

1. Proper Execution

Foster v. Weitzel, 291 Ga. 305, 728 S.E.2d 684 (June 2012).

Nancy Anne Gilbert executed a will the same day that she died in November, 2009. In January, 2010, Arnold Weitzel, the decedent's brother, and Pamela McIlvaine, the decedent's only child, filed a petition, to which no caveats were filed, to probate the will. Two months later, Louise Foster petitioned to probate a will purportedly executed by the decedent in September, 2008. A hearing was held on the 2009 will, and the probate court found that the will was the last will and testament of the decedent, that it revoked all past wills, and that Foster had not shown the 2009 will was invalid. The probate court issued letters of administration to Weitzel and McIlvaine. Foster appealed, contending the hearing did not support the conclusion that "the will was executed with the formality required of a will." The Supreme Court noted that the will that appeared

in the record contained what purported to be the signatures of the testatrix and two witnesses. Since the probate court hearing was not transcribed, the Court concluded that in the absence of a transcript, it "must assume that the evidence presented was sufficient to support the probate court's finding," and affirmed the ruling.

2. What Constitutes a Will

Lee v. Swain, 291 Ga. 799, 733 S.E.2d 726 (October 2012).

(*Swain II)*: The first time this case appeared in the Georgia Supreme Court was in 2010. In *Swain v. Lee*, 287 Ga. 825, 700 S.E.2d 541 (October 2010) (*Swain I*), the question was whether the documents at issue could possibly constitute a valid will. The "testator," Collins, in 1999 wrote a letter in which she said that Swain was to have "everything that's in my name." The letter was not witnessed. In 2005, Collins took a blank will form and wrote in language that named Swain as the executor of her estate. She wrote nothing else on this form. Collins signed the form and it was witnessed by three witnesses. Collins kept both of these documents together in an envelope and showed both documents to the witnesses when she signed the form. When Collins died, Swain attempted to probate the two documents as Collins' will. Lee and other cousins of Ms. Collins ("Lee") filed a caveat. The probate court found that the documents did not constitute a valid will, so Swain appealed to the superior court. The administrator filed a motion for judgment on the pleadings, which was granted. The Supreme Court reversed the grant of the order, finding that Swain had a "potentially viable claim" that the documents could be read together to create a valid will. The Supreme Court emphasized that the intention of the maker, to be gathered from the whole instrument and the surrounding circumstances, would be determinative. The Court noted that there

is no required form for a will nor does a will need to be written on one continuous sheet of paper or on sheets that are attached together. The Court pointed out that Swain had argued that the letter and the will form were presented to the witnesses as an integrated document. This alone created an issue of fact as to the validity of the will. The case was remanded for trial and a jury found the two instruments considered together were in fact Collins' last will and testament. Lee appealed the denial of summary judgment and of a directed verdict. In *Swain II*, the Supreme Court noted that once a case has been submitted to a jury and a judgment has been rendered, denial of summary judgment is not of concern. Further, the Court found there was evidence supporting the jury's verdict in affirming the denial of a directed verdict, namely the trial testimony of both Swain and the attesting witnesses and the fact that both documents were presented together for attestation. Lee also claimed that the trial court's jury instructions regarding the law relating to codicils was misleading since there was no evidence of a codicil at trial. However the Supreme Court found the instruction, which constituted a minimal amount of information within the general charge on the construction of wills, was harmless. Next, Lee complained that the trial court refused his requested charges. First, he requested a charge that a codicil must refer to the will by date and mention certain provisions, in compliance with *Honeycutt v. Honeycutt*, 284 Ga. 42, 663 S.E.2d 232 (2008). The Supreme Court affirmed the trial court's refusal to give the charge and held that these references are instead used to support the proposition that the testator knew the contents of the original will. This was an uncontested issue in this case. Second, Lee requested a charge that a will must necessarily include the disposition of property in order to be valid. The Supreme Court affirmed the trial court's refusal to

give the instruction, even though it was a correct and accurate representation of the law, because the point was substantially covered by the general charges given, for example, that "the document is testamentary in nature if it gives instructions about how property is to be distributed." Finally, Lee requested instructions regarding the requirements for incorporation by reference in a will without citing any authority that this doctrine has been embraced in Georgia law relating to wills. The Supreme Court found, therefore, that there was no error in refusing to give such instructions. Lastly, the Supreme Court denied Swain's motion asking for sanctions against Lee for filing a frivolous appeal.

3. Lack of Capacity and Undue Influence

a) Davison v. Hines, 291 Ga. 434, 729 S.E.2d 330 (July 2012).

Steve and Deborah Davison, executors of the estate of Thomas Hines, appealed a jury verdict declaring the Will and Revocable Trust executed by Thomas Hines the product of undue influence and therefore invalid. On October 30, 2001, Mr. Hines executed a will leaving most of his estate to his wife for life, then equally to his sons Thomas and Frank Hines. Shortly after executing the will, Steve and Deborah Davison moved the elderly Mr. Hines into their home, against his wishes not to move, and took over his care. The Davisons isolated him from his family from all but very controlled contact and prevented his sons from speaking to their father more than once. Further, upon moving Mr. Hines into their home, the Davisons immediately enlisted a lawyer to draft and oversee Mr. Hines' power of attorney, granting the Davisons control over his affairs and property, which Steve Davison later used to issue himself a check for $100,000 and another for $150,000. Less than a month later, and following Deborah Davison's

expressed displeasure with Mr. Hines' will, Steve Davison arranged for a lawyer to create a new will and revocable trust based solely on input from Steve Davison. When Mr. Hines met with the Davisons' attorney, he stated he wanted to provide for his wife but would do "whatever Deborah and Steve agree[d] on," including "anything about the two boys . . . even if they want[ed] to cut them out [of the will]." On January 5, 2002, Mr. Hines executed the new will and trust, which: (1) made no mention of Mr. Hines' wife; (2) included the possibility that his two sons could receive nothing from a testamentary trust created under the will; and (3) gave the Davisons complete control over the distribution of Mr. Hines' estate. Mr. Hines died four months later in June, 2002. In September, 2004, Mr. Hines' sons, Frank and Thomas Hines, sued the Davisons in superior court for conversion. They amended their complaint in December, 2007 to assert that the 2002 will and trust were invalid due to undue influence and also added fraud and intentional infliction of emotional distress claims. The superior court ordered the Davisons to probate Mr. Hines' will in probate court, staying the sons' action until the will could be resolved. Following a January, 2009 hearing, the probate court determined the will was not the product of undue influence and admitted it for probate. The sons appealed the ruling to the superior court, and the appeal was consolidated with the stayed action. From this, the superior court found: (1) Mr. Hines had testamentary capacity to execute the will; (2) there was no fraud relating to the will and trust; and (3) the sons would not recover on their intentional infliction of emotional distress claim. The remaining counts proceeded to a jury trial, where the jury found the will and trust were the product of undue influence. The Davisons appealed, contending error: (1) in not allowing them to tell the jury they had previously been granted

summary judgment as to Mr. Hines' testamentary capacity and lack of fraud; (2) in the admission of the two checks into evidence; (3) in denying a motion for a directed verdict because the evidence did not support the jury's finding of undue influence; and (4) because, since the probate court lacked jurisdiction over any claims relating to trust, the superior court was without authority to find the trust invalid on appeal. As to their first claim, the Court disagreed because fraud and testamentary capacity were not at issue in the trial and informing the jury that the Judge had come to certain conclusions about the will would be reversible error. Regarding the second claim, the Court ruled the checks were relevant to the testator's state of mind at the time before and after the execution of the will. As to the third claim, the Supreme Court affirmed the jury verdict, finding there was sufficient evidence for the jury's conclusion that the will was a product of undue influence. The court focused on evidence of: (a) a confidential relationship between the Davisons and Mr. Hines; (b) the unreasonableness of the disposition of Mr. Hines' estate in not mentioning his wife; (c) his willingness to sign anything the Davisons wanted; and (d) the fact that the Davisons "took an active role in planning, preparation, and execution of the will and trust." The Court found that the evidence supported the finding that the Davison's "will was being substituted for that of Mr. Hines in the creation of the documents." Finally, addressing the procedural issue of the Davisons' fourth claim, the Court noted that trusts are subjects of equity jurisdiction, which is vested in the superior courts. Thus, the Court found the trust issue never was considered by the probate court as it always remained pending in superior court along with the sons' other claims. Therefore, the Court found that the trust issue was properly tried before the jury in the superior court.

b) Patterson-Fowlkes v. Chancey, 291 Ga. 601, 732 S.E.2d 252 (October 2012). Ruth Chancey Wright executed her will on November 1, 2005 when she was 90 years old. Ruth died on December 26, 2008. Her grandson and a beneficiary under the will, Bobby Chancy, petitioned to have the will admitted to probate, but Lisa Patterson-Fowlkes, her granddaughter and a beneficiary under the will, filed a caveat. Lisa alleged Ruth did not possess testamentary capacity when she executed her 2005 will, notably that there was no reason for Ruth to so unequally devise her property between Bobby and herself. The probate court denied the caveat and admitted the will into probate. Lisa appealed to the superior court, where a jury upheld the will. Lisa then appealed to the Supreme Court for a review of the superior court's denial of her motion for judgment notwithstanding the verdict and, alternatively, her motion for a new trial. "[A] testatrix possesses the capacity to make a will if . . . she understands that a will is intended to dispose of her property after death [and] is capable of remembering generally what property and persons related to her are subject to the will's disposition." The execution of Ruth's will was videotaped, which revealed Ruth was able to name her family members, including her siblings, their children, both Lisa and Bobby, and her great-grandchildren, although she incorrectly stated the great-grandchildren's ages. Next, Ruth incorrectly claimed she owned 200 acres, but actually lived on 6.92 acres adjacent to the 60-acre family farm. Finally, she misstated that she owned two 100-acre tracts to be given to Lisa and Bobby. Even with these misstatements, the Court found Ruth did generally remember the persons related to her and the property subject to her will. While the Court recognized that Ruth had been diagnosed with mild dementia in

February, 2004 and experienced temporary delirium during a hospitalization in December, 2004, the Court found Ruth was an active, independent woman up until the time of her death, owning several bank accounts and extensive real and personal property, managing her family farm, and dealing with her rental tenants. Further, both subscribing witnesses testified that Ruth was competent at the time she executed her will and several witnesses, including her bankers, testified that she was competent throughout 2005. Finally, the court found two possible motivations to justify Ruth's unequal devise. First, the Court noted there might have been a rift between Lisa and Ruth after Lisa attempted a forced guardianship of Ruth in 2004. Second, Lisa was a physician with significant other assets, while her brother, Bobby, assumed the primary responsibility for operating Ruth's family farm following the death of his father. Therefore, the Supreme Court held there was evidence to sustain the jury's verdict upholding the will.

c) Amerson v. Pahl, 292 Ga. 79, 734 S.E.2d 399 (November 2012).

Testator Dunaway's will left his entire estate to his sister, Virginia Pahl. Reva Amerson, a long-time friend of the testator, filed a caveat on the grounds of lack of testamentary capacity and undue influence. The probate court admitted the will to probate and the Supreme Court, using the "any evidence" standard of review, affirmed. The witnesses at the bench trial included the drafting attorney, one of the witnesses to the will, and the attorney who notarized the will. All testified that, although he was suffering from some dementia, the testator at the time he signed the will understood that he was making a will that would dispose of his goat farm and other property and that he intended the

property to go to his only living sister, who was living on the farm at the time. Although the opinion does not indicate the specific circumstances, the sister had apparently "facilitated" the making of the will. The appellant had tried to use this fact to assert undue influence. The Supreme Court responded that the sister's involvement in and of itself did not establish undue influence. The Court noted also that the involvement of the testator's pastor did not give rise to a presumption of undue influence as the pastor did not benefit under the will.

D. ADMINISTRATION OF THE ESTATE

1. Attorney's Lien

In re Estate of Estes, 317 Ga. App. 241, 731 S.E.2d 73 (July 2012).

Richard Estes died intestate, and Ashley Fusco, who claimed to be decedent's daughter, qualified to serve as administrator of his estate. In 2008 Shawn Estes, the decedent's son, filed a Petition to Determine Heirs in probate court, alleging that Fusco was not a legitimate heir and that, therefore, he was the sole heir. Laurene Cuvillier, an attorney, represented Shawn until January, 2010 when she filed a motion to withdraw as counsel due to a conflict of interest. The court granted the motion. Cuvillier also filed an attorney's lien for $18,708.12 for services rendered, pursuant to O.C.G.A. § 15-19-14, which provides in relevant part, "[u]pon actions, judgments, and decrees of money, attorneys at law shall have a lien superior to all liens . . . ." The court later found Fusco was a legitimate heir, that Fusco and Shawn were entitled to equal shares, but that Fusco had committed malfeasance while serving as administrator and owed the estate $9,031.83. Shawn's expected distribution from the estate was $14,000. The new

administrator of the estate filed a Petition for Direction because he did not know whether the money should be distributed directly to Shawn or to Cuvillier to satisfy the lien. The probate court determined Cuvillier's lien was not valid and directed Shawn's share to be distributed directly to Shawn. The Court of Appeals reversed. The probate court relied on *Outlaw v. Rye*, 312 Ga. App. 579, 718 S.E.2d 905, in ruling the lien invalid. However, the Court of Appeals distinguished the present case from *Outlaw* in that the attorney in *Outlaw* placed a lien on real property for unrelated services in a custody dispute. While the court in *Outlaw* held O.C.G.A. § 15-19-14(c) did not authorize a lien in proceedings where no real or personal property was recovered, it was undisputed that Cuvillier participated in the underlying judicial proceeding resulting in this distribution of money. Further, it was undisputed that Shawn entered a contingent fee agreement with Cuvillier, with the condition that, if the attorney-client relationship ended prior to a verdict or award, he would pay the specified hourly rate for the services thus rendered. In *Woods v. Jones*, 305 Ga. App. 349, 699 S.E.2d 567 (2010), the court held that an attorney's lien for services under O.C.G.A. § 15-19-14 was not defeated when the attorney-client relationship ended before a [verdict or] settlement. Finally, there was no evidence in the record that Shawn ever contested the amount asserted in the lien. Accordingly, the Court of Appeals determined the lien was valid and found that the administrator was not authorized to distribute money from Shawn's share until Cuvillier's lien was fully satisfied.

2. Debts of the Estate

In re Estate of Johnston, 318 Ga. App. 324, 733 S.E.2d 856 (November 2012). Kathryn Johnston was shot and killed in her home by an undercover Atlanta Police Department officer on November 21, 2006. In October, 2007, Sarah Charles Dozier, Kathryn's niece, was appointed as administrator of Kathryn's estate. Sarah, as administrator, brought suit against the City of Atlanta, ultimately settling the wrongful death case for $4.9 million. The settlement did not allocate any proceeds to pain and suffering as Kathryn had died instantly. On September 29, 2010, Sarah filed a petition to determine heirs to receive the proceeds from the settlement. The probate court was advised that the proceeds would not pass through the estate but rather straight to the heirs determined by the court. On December 21, 2010, the probate court named Sarah, two grandnieces and a grandnephew as Kathryn's heirs. On April 20, 2011, Reverend Markel Hutchins (who was not an attorney) sent a letter to Sarah's attorney claiming he provided "consulting and other professional services that made the significant settlement . . . possible." He included an invoice for up to $490,000. On May 20, 2011, Sarah filed an inventory, final return, and petition for discharge as personal representative in the probate court, reporting there were no probate assets or unpaid claims. She published notice in *The Fulton County Daily Report*, but did not serve Hutchins with notice of the petition. Hutchins filed a claim against the estate on August 11, 2011 for the services noted in his letter, but on August 18, 2011, the probate court discharged Sarah as administrator "from office and all liability." Hutchins then filed in superior court for injunctive relief and damages against Sarah, individually and as administrator, and against her attorneys in the suit against the City, alleging he was

entitled to compensation for his services in the suit pursuant to an oral agreement that he would receive ten percent of any recovery or for the reasonable value of his services. Further, Hutchins filed a motion in probate court on August 26, 2011 to set aside Sarah's discharge as administrator under to O.C.G.A. § 53-7-53. O.C.G.A. § 53-7-53 provides that "[a] discharge obtained by the personal representative by means of any fraud is void and may be set aside on motion and proof of fraud." On September 22, 2011, Hutchins petitioned for an accounting of the estate, a return of estate funds, and an emergency hearing on the motions. However, on October 24, 2011, the probate court denied all three motions. The probate court noted Sarah, as administrator of the estate, "had the authority to evaluate the validity of claims made against the estate," and that Hutchins had not provided evidence of an agreement between himself and Sarah. The probate court further rejected the claim that the proceeds of the settlement belonged to the estate, because the wrongful death settlement was solely for Kathryn's next-of-kin. Finally, the probate court determined Hutchins was not a legitimate creditor and lacked standing to seek an accounting. Hutchins appealed. O.C.G.A. § 53-7-50(a) provides that "[t]he petition [for discharge] shall state that the personal representative has paid all claims against the estate or shall enumerate which claims of the estate have not been paid and the reason for such nonpayment. Further, O.C.G.A. § 53-7-50(b)(1) provides that "[a]ny creditors whose claims are disputed or who have not been paid in full due to insolvency of the estate shall be served in accordance with Chapter 11 of this title." Finally, "[i]f any party in interest files objection to the discharge, a hearing shall be held." O.C.G.A. § 53-7-50(c). The Court of Appeals found that Sarah neither listed Hutchins as a creditor nor served him with notice of her petition for discharge, even

though she had received his letter asserting a claim against the estate. Moreover, the Court noted Hutchins filed notice of his claim, specifically seeking a hearing, before the probate court granted Sarah's discharge. Therefore, the Court concluded Sarah failed to comply with notice requirements and that the probate court erred in not holding a hearing before concluding Hutchins was not a creditor of the estate and discharging Sarah as administrator. The Court of Appeals vacated the court's orders denying Hutchins motions and ordered the court to hold hearings on the motions.

3. No Contest Clause

Norman v. Gober, 292 Ga. 351, 737 S.E.2d 309 (January 2013).

(*Norman II)*: The first time this case appeared in the Georgia Supreme Court was in 2011. In *Norman v. Gober*, 288 Ga. 754, 707 S.E.2d 98 (2011) (*Norman I*), the question was whether the Caveator, who was not an heir, had standing to challenge his grandmother's will. Margaret Susan Scheer died in February, 2010. The Co-Executors of her estate filed petitions to probate Scheer's will in common form and in solemn form. The will devised to Caveator's mother, who was one of the testator's daughters, a specific bequest of money and a residuary interest in the principal of a trust that provided a life interest for another of the testator's daughters, Stacy. The will provided that if any of the testator's children were to predecease her, then that child's descendants would receive the child's share. Finally, the will contained an *in terrorem* clause which stated:

> Should any beneficiary contest or initiate legal proceedings to contest the validity of this Will or any provision herein or to prevent any provision from being carried out in accordance with its terms (whether or not in good faith and with probable cause), then all the benefits provided for such

> contesting beneficiary, and any such beneficiary's descendants, in this Will are revoked and annulled.

The probate court granted the petition to probate the will in common form on February 23, 2010. On May 7, 2010, Mr. Norman, the Caveator's father, filed a caveat on behalf of his minor son, who was age 11 at the time. The Co-Executors filed a motion to dismiss the caveat, which the probate court granted in June, 2010 due to lack of standing. Further, the probate court granted the petition to probate the will in solemn form. On appeal, the Supreme Court found the Caveator was merely a contingent residuary beneficiary under the will, and, because his mother was alive when the testator died, Caveator was not an heir of the testator and thus would not take a share of the testator's estate if the testator had died intestate. The Supreme Court affirmed the probate court's dismissal of the caveat due to the Caveator's lack of standing. Further, the Court noted that the Caveator was "not 'a person who [would] be injured by probate of [the] will.'" Rather, probate of the will was the only way Caveator would have any chance to take part of his grandmother's estate, and thus his complaint would only harm him.

Norman II: Following the Supreme Court's opinion, the Co-Executors filed a Petition for Declaratory Judgment and served discovery requests on the beneficiaries of the will, including Caveator's mother. The Co-Executors sought to determine who was actually behind the original caveat, because that party might be prevented from taking under the will due to the *in terrorem* clause. The Co-Executors sought information about communications and agreements made about the estate before the caveat was filed. Caveator's mother and two other beneficiaries filed a motion to dismiss the Co-Executor's petition for failure to state a claim. First they argued that the original caveat

was not an actual will contest and, thus, could not violate the *in terrorem* clause no matter who was responsible for the caveat. Second they argued that the rights of the parties had already accrued so no direction from the court was required. The probate court denied the motion to dismiss and the subsequent motion for reconsideration. The Supreme Court granted Appellants' application for interlocutory appeal, where they affirmed the ruling. The Court distinguished this case from *Sinclair v. Sinclair*, 284 Ga. 500, 670 S.E.2d 59 (2008) (holding that a petition for accounting and the removal of an executor does not constitute a will contest because it affirms the validity of a will) in that the original caveat in this case was intended to destroy the will altogether. Further, the Court noted that the *in terrorem* clause ("Should any beneficiary contest *or initiate legal proceedings to contest the validity of the will...*") was triggered by the proceedings initiated by Caveator and that the Caveator's action may be attributed to another party if the information sought is uncovered. Second, while the Court noted that generally Co-Executors may not seek clarification "on imaginary difficulties or from excessive caution" (O.C.G.A. § 23-2-92), the Court held it was not too speculative to look into the beneficiaries' communications and finances, as it was highly probable that someone other than the eleven-year-old Caveator was responsible for the original caveat. Accordingly, the Court held that the Co-Executors were properly within their rights to seek clarification from the probate court regarding the application of the *in terrorem* clause to unnamed parties.

4. Claims Against the Estate

a) Haney v. Camp, ___ Ga. App. ___, 739 S.E.2d 399 (March 2013).

Brenda Haney and Ronald Womack were co-executors of an estate. Litigation ensued

between Carolyn Camp and Haney, both personally and as executor. That litigation was resolved in December, 2009 in a consent order in which Camp dismissed her claims against the estate and the executors with prejudice and the estate conveyed certain real property to Camp. In October, 2010, Camp filed a claim against the executors alleging that the executors breached their fiduciary duty to preserve the property conveyed to her in the consent order by allowing waste and removal of fixtures from the property. The executors moved for summary judgment, filed a counter claim to enforce the consent order, and requested an award of attorney's fees pursuant to the consent order which contained a provision requiring the court to award attorney fees incurred by a party seeking to enforce the consent order. Camp then filed an affidavit directly contradicting her earlier deposition testimony regarding her knowledge of the value of the property prior to entering the settlement, prompting the executors to file a motion for sanctions and attorney's fees under O.C.G.A. § 9-15-14. The trial court granted the executor's motion for summary judgment, because in the consent order Camp "waived and released any and all claims against the Executors and took the property 'as is.'" Further, the court found Camp's fraud claim failed because Camp "made no effort to inspect the property or determine its value until after the consent order was entered." However, the court denied the executors' motion for sanctions and an award of attorney's fees. On appeal, the Court remanded the case because the trial court acted inconsistently regarding the consent order and incorrectly applied a "bad faith" standard in assessing the O.C.G.A. § 9-15-14 claims for attorney's fees.

b) Hogsett v. Parkwood Nursing & Rehabilitation Center, Inc., ___ F. Supp. ___ (N.D. Ga. March 2013).

This case examines the enforceability of an arbitration agreement signed by a patient's daughter when the patient was admitted to a nursing home. Ms. Joyner, age 63, was admitted to the nursing home for recovery after her leg had been amputated. A doctor who was attending her recommended certain treatments for her but they were not performed at the nursing home. She died 15 days after being admitted. When she was admitted, her daughter, Ms. Hogsett, signed both the admissions agreement and a separate arbitration agreement. Both forms had a place for the patient's signature as well as for the patient's "legal representative/caretaker." Ms. Hogsett signed and printed her name on the lines for the "legal representative/caretaker." There is no evidence that Ms. Joyner was not lucid or unable to sign on her own behalf. Ms. Hogsett did not hold a power of attorney from her mother nor was she her mother's guardian, so the court concluded that she was not her mother's legal representative. After her mother's death, Ms. Hogsett brought actions against the nursing home both in her capacity as personal representative of her mother's estate and individually, in conjunction with her mother's husband, Gary Joyner. The action brought on behalf of the estate was dismissed because she had not included with her petition the required affidavit of medical malpractice. Nevertheless, when the nursing home insisted that all remaining claims be arbitrated, the court chose to discuss whether Ms. Hogsett would be forced to arbitrate the claims of the estate as well as whether Ms. Hogsett and Mr. Joyner would be forced to arbitrate their own individual claims. The court noted that there was pending in the Georgia legislature a law that would allow "any adult child for his or her parent" to execute an arbitration agreement for that parent when the parent

was being admitted to a long-term care facility. The court stated that, had the statute already been in place, then Ms. Hogsett's signature would have served to bind her mother and her mother's estate. However, as the statute was not in place, the court looked to general agency theory to see whether Ms. Hogsett's signature would be binding. The court found no express authority for Ms. Hogsett to sign for her mother as there was no evidence that her mother had asked her to do so. The court also found no implied authority for her to sign as she had signed outside the presence of her mother and no one on the staff had inquired as to whether she had authority to sign. Additionally, the arbitration agreement was not a prerequisite to admission. The court noted that even if Ms. Hogsett had implied authority to sign the admissions agreement, as her mother must have known that she could not be admitted without such an agreement, "one cannot assume that Joyner [the mother] would have had the sophistication to understand that, included among the standard medical forms, would be a separate agreement to give up her right to a jury trial should the rehabilitation center be guilty of negligence." Further, the court pointed out that the nursing home's own written policy stated that a patient's incapacity to sign the admissions agreement or a delegation of the authority to do so had to be documented in the nursing home's records. No such documentation existed. Thus the court concluded that Ms. Hogsett's signature on the arbitration agreement did not bind her mother or her mother's estate. The court turned next to whether the signature bound Ms. Hogsett individually under principles of equity. However, the court did not see the need to pursue this question as it was not at all clear whether Ms. Hogsett in fact had any individual claim against the nursing home. To the degree the individual claims were based on the wrongful death

statute, the court pointed out that that statute gave the claim to the decedent's surviving spouse. The claim existed in surviving adult children only if there was no surviving spouse. The court noted that earlier Georgia rulings relating to arbitration agreements were consistent with its holding in the instant case.

E. PROCEDURAL AND JURISDICTIONAL MATTERS

1. Appeals

Mays v. Rancine-Kinchen, 291 Ga. 283, 729 S.E.2d 321 (June 2012).

A.R. Mays was executor of the estate of Gilbert Henry Kinchen. Mays filed a petition to probate Kinchen's will. Kinchen's widow, Katherine Rancine-Kinchen, filed a caveat raising five counts. Mays moved to dismiss the caveat. The probate court granted the motion to dismiss for two of the five counts, but determined it did not have jurisdiction to resolve the underlying issues of the remaining three counts which involved a non-testamentary trust agreement referenced in the will. The probate court transferred the trust agreement issues to the superior court and reserved admitting the will to probate until those issues were resolved. Mays instituted a direct appeal of the probate court's order. Rancine-Kinchen moved to dismiss the direct appeal, contending the correct procedure had not been followed. O.C.G.A. § 5-6-34(a)(9) provides for a direct appeal from "[a]ll judgments or orders *sustaining* motions to dismiss a caveat to the probate of a will." (Emphasis added.) The Supreme Court concluded that the partial grant of the motion to dismiss the caveat did not resolve the central issue of whether Kinchen's will would be admitted to probate and left issues pending in probate court. As such, the Court found May's direct appeal was from an interlocutory order, and, therefore, he was

required to seek review of the order according to the procedures set forth in O.C.G.A. § 5-6-34(b). O.C.G.A. § 5-6-34(b) requires the appellant to: (1) obtain a certificate of immediate review from the trial court, which certifies that the order "is of such importance to the case that immediate review should be had," within ten days of entry of the order he seeks to appeal; (2) file the certificate with the lower court's clerk's office; and (3) file the application for immediate review with the appeals court within ten days of filing the certificate. The Court found Mays had not followed these procedures. Therefore, the Court granted the motion to dismiss the appeal.

2. Statute of Limitations

a) Evans v. Dunkley, 316 Ga. App. 204, 728 S.E.2d 832 (June 2012).

In this case, the beneficiaries of an estate first sued the executor of their father's estate for an accounting of his actions both as executor and later as an individual after he had been discharged. The superior court found that they could not pursue the lawsuit on his actions as executor as they had discharged the executor from liability in 1999. The court held a bench trial on his actions as an individual and found that he had adequately accounted to the beneficiaries. The beneficiaries later sued other family members for the cancelation of deeds fraudulently made by the executor. The superior court summarily dismissed this suit because it had not been filed within the four-year statute of limitations for actions for trespass or damage to realty contained in O.C.G.A. § 9-3-30. The Court of Appeals reversed the trial court's grant of summary judgment because the beneficiaries had claimed that the deeds were fraudulent and that the executor's fraud had prevented them from timely filing suit. The period of limitations for this equitable claim is seven years, and the superior court had not examined whether fraud

had prevented the beneficiaries from timely filing within this period. The superior court also had dismissed the lawsuit under the doctrine of res judicata. The Court of Appeals held that, although the earlier suit for an accounting was "factually linked" to the current suit for cancellation of the deeds, they were different causes of action and thus res judicata did not apply.

b) Mayfield v. Heiman, 317 Ga. App. 322, 730 S.E.2d 685 (July 2012).

The beneficiaries of a family trust sued the trustee, the trustee's company, and others for mismanagement of the trust, breach of fiduciary duty, and breach of trust and self-dealing. The beneficiaries had a contingent interest in the family trust, created by their father Curtis Mayfield, Jr., who had died in 1999. Marvin Heiman served as co-trustee with Mayfield's widow, Altheida Mayfield, from 1999-2003. Heiman was also the president of Sussex, the entity that performed investment services for the trust. In May, 2000, Heiman entered into a $5.41 million loan transaction on behalf of the trust, in which the trust (through a corporate entity) received proceeds from a loan that was to be repaid by the royalty stream of copyright interests purchased by the trust from the beneficiaries and then pledged for the loan. Heiman received a $541,000 commission for the transaction and each of the signing beneficiaries, notably the appellants, received $65,000 each for their individual copyright interests pursuant to a Renewal Term Acquisition Agreement which each selling beneficiary signed. The beneficiaries claimed Heiman was responsible for the "disastrous tax consequences" faced by the trust because of the loan. The appellants filed suit against Heiman in January, 2007. Both sides filed motions for summary judgment. Heiman's motion was granted while the beneficiaries' motion was denied. On appeal, the Court of Appeals affirmed the trial

court's findings. The court first looked at the relevant statute of limitation, O.C.G.A. § 53-12-198(a) (now O.C.G.A. § 53-12-307), which allows six years to bring a claim. The beneficiaries contended that the harm to them, and thus their claim, did not accrue until 2004 when the loan payments began to exceed the proceeds. The Court rejected this argument and found the statute began running when the transaction that allegedly harmed the trust was entered into. The loan was closed in 2000, seven years prior to the suit, thus the Court found the claim was time-barred. The Court noted fraud could potentially toll the statute, but that the type of "fraud that gives rise to a cause of action, [such as when a fiduciary fails to disclose a material fact,] does not necessarily establish the fraud necessary to toll the statute of limitation." Rather, fraud sufficient to toll the statute requires: (1) actual fraud and moral turpitude by the defendant; (2) that the defendant affirmatively concealed the cause of action from the plaintiff; and (3) that the plaintiff exercised reasonable diligence to discover the cause of action. The Court found the statute was not tolled because the beneficiaries did not prove the fraud necessary to toll the statute. First, the beneficiaries presented no evidence that Heiman intentionally withheld information from them, that they asked his opinion of the future proceeds of the loan, that Heiman kept them from hiring a professional to discuss it with, or that Heiman took any action to prevent them from filing their suit. In contrast, the court noted the beneficiaries had information about the loan beforehand and could have sought advice. Second, the court found the beneficiaries failed to raise an issue of material fact that they exercised diligence to discover fraud. The beneficiaries further claimed the trial court erred in finding there was no basis for damages resulting from Heiman's discretion with a chosen tax strategy. However, the Court of Appeals held that

since the damages arose by being a "foreseeable consequence" of the underlying loan transaction, the claim for tax damages was barred since the underlying transaction was time-barred. Additionally, the beneficiaries claimed the trial court erred in opening a default judgment against the accounting firm Heiman hired because the firm had not set up a meritorious defense. The Court of Appeals found the beneficiaries failed to comply with the statutory filing requirements regarding the out-of-state professional corporation, and thus held the firm did set forth a meritorious defense. Finally, the beneficiaries offered a procedural contention, that the trial court erred in transferring the case to "Business Court," since they did not consent and their case included a personal injury component, an intentional infliction of emotional distress (IIED) claim. The Court of Appeals rejected this contention by noting that the beneficiaries did not allege IIED in their complaint nor alleged several of the elements required to form an IIED claim, therefore, it was proper to transfer the case to "Business Court" without consent of all of the parties. The Supreme Court denied a petition for writ of certiorari on January 7, 2013.

F. TRUSTS

1. Trustees' Discretion

a) Reliance Trust Co. v. Candler, 315 Ga. App. 495, 726 S.E.2d 636 (March 2012).
In this case, the Court of Appeals affirmed a jury verdict of over $1,000,000 against the trustee and in favor of the remainder beneficiaries. The trust was a "revocable marital trust" set up by Claire Candler in the year before she died. The trust gave the income to

Claire's husband, Buddy, for life and provided that the remainder would be distributed among their children and grandchildren as appointed by Buddy in his will. The trust also included the following provision:

> Whenever in the sole judgment of the [t]rustee the income being paid to [Buddy], together with any other income or periodic payments known to the [t]rustee that are being received by [Buddy] shall be insufficient for his proper support, maintenance, or to enable him to meet any difficulty produced by sickness, accident, or similar cause, such portion of the corpus of this trust estate as in the discretion of the [t]rustee is deemed appropriate shall be paid to him or for his benefit.

The trust was funded when Claire died, and Buddy then became the co-trustee, along with another individual. A few years later, Wachovia replaced that individual as co-trustee and then Reliance replaced Wachovia. The trust originally contained $2.1 million in assets when Reliance became co-trustee. While Reliance was acting as co-trustee, the trust distributed over $1 million to Buddy. In his will Buddy named his grandchildren as the appointees of the remainder interest under the limited power of appointment. They received $838, 762 from the trust when Buddy died. They brought suit against Reliance for the total amount of the distributions made to Buddy (plus interest from the time each distribution was made) and the jury rendered a verdict in their favor. The Court of Appeals affirmed. The Court of Appeals first affirmed the trial court's denial of Reliance's motion for summary judgment, stating that the question was moot because the case had proceeded to trial and that there was evidence that supported the verdict. The Court of Appeals began its discussion of the substantive argument by noting the three elements of a breach of fiduciary duty claim: 1) the existence of the duty; 2) a breach of the duty; and 3) damages proximately caused by that breach. The Court noted the trustee's duty to balance the interests of the income and remainder

beneficiaries. The Court addressed whether the trustee had abused the discretion granted it by the trust instrument, pointing out that a trustee's discretion is subject to judicial control only if such control is needed to prevent an abuse of that discretion. The Court of Appeals quoted former case law (and said that the 2010 Trust Code was in agreement) for the following proposition:

> a court may interfere with an exercise of discretion by a trustee only if that discretion is infected with fraud or bad faith, misbehavior, or misconduct, arbitrariness, abuse of authority or perversion of the trust, oppression of the beneficiary, or want of ordinary skill or judgment.

The Court focused on the "arbitrariness" facet of this list of possible abuses. The Court found that the trustee's actions were "infected with arbitrariness... as well as 'oppression' of the beneficiary grandchildren." The Court pointed to evidence that Reliance had treated Buddy's encroachment requests inconsistently, sometimes asking for documentation to support the request, sometimes not asking. Reliance sometimes asked for a budget from him, and sometimes did not, and even granted requests that were outside of the submitted budget. Reliance sometimes approved mortgage and upkeep payments on Buddy's vacation homes, and at other times it did not. The Court said that "Reliance offered no consistent explanation for these disparities." The Court concluded that the grandchildren showed they had been damaged by the fact that the encroachments had depleted the value of their remainder interest. The Court of Appeals also found no merit to Reliance's contention that the trial court should have allowed evidence about previous litigation involving Buddy and his competence to serve as trustee of other trusts, nor did it discern error in the trial court's statement to the jury that they were not bound to define "income" in the way it is defined in the Georgia Code but should instead look to the intent of the settlor.

2. Construction of Trust Terms

a) Rose v. Waldrip, 316 Ga. App. 812, 730 S.E.2d 529 (July 2012).

Lee Waldrip died testate in March, 2008, survived by his daughter, Linda Rose, his granddaughter, Joy Garcia, and his wife, Colleen, who was unrelated to either Linda or Joy. Linda and Joy were named beneficiaries in Waldrip's will, executed January, 2008, which excused Joy's debt to her grandfather and provided funding for a trust that would pay a lifetime annuity to Linda. Earlier, Waldrip had established a Revocable Living Trust, later amending it to make Colleen the primary beneficiary upon his death. In April, 2002, Waldrip executed the Trust Agreement, creating the trust and naming himself as trustee and primary beneficiary. The trust included all of Waldrip's assets: "all bank accounts, all stocks, all bonds, all accounts receivable, all business assets, all real estate, all motor vehicles, all personal property, and all assets of any kind whatever located." Additionally, the trust agreement included the following provisions: (1) ". . . any and all properties of all kinds, whether owned or *hereafter acquired* . . . ;" and (2) "[t]his declaration shall apply even though record ownership or title, in some instances, may, presently *or in the future*, be registered in my individual name, in which event such record ownership shall hereafter be deemed held in trust . . . ."

Contemporaneously, Waldrip executed a "Comprehensive Transfer Document" (CTD) containing similar language about after-acquired property and the same language stating assets held in his name individually are deemed to be held in trust. Finally, on the same day Waldrip executed a Bill of Sale granting to himself as trustee his interest "in all tangible property . . . which he presently own[ed] or *hereafter acquire*[*d*]

(regardless of the . . . record title in which held)." After executing the Trust, Waldrip formally transferred some property to the trust, but not all of his property had been so transferred upon his death. Linda and Joy contended the property not transferred should be used to fund the bequests in the will, based on O.C.G.A. § 53-12-25, which clarifies that "[t]ransfer of property to a trust shall require a [formal] transfer of legal title to the trustee." Colleen filed this action seeking a declaratory judgment as to which assets were in Waldrip's estate, if any, according to the "after-acquired property" language in the Trust documents. The trial court found: (1) Waldrip intended that all of the property he acquired would be a part of the Trust; and (2) the "after-acquired property" provision was enforceable under Georgia law. The Court of Appeals affirmed the declaratory judgment as to the first finding and reversed as to the second finding. The Court of Appeals found that the Trust documents executed by Waldrip contemplated that all of his property would become a part of the Trust. Further, while some of the will provisions conflicted with the trust, the court presumed that Waldrip was aware of the contents of the Trust documents that he had executed six years earlier. The Court of Appeals noted O.C.G.A. § 53-12-25 was enacted in the 2010 Revised Georgia Trust Code, eight years after the creation of the Trust and one year after Waldrip's death. The Court of Appeals determined Colleen's rights to the Trust assets vested upon Waldrip's death in 2008, and thus decided the Revised Code would not apply retroactively as the Georgia Constitution and O.C.G.A. § 53-12-1 (b) provide that a subsequent law will not be applied if the result is to impair vested rights. The Court of Appeals found no prior Georgia authority on the necessity of a formal transfer of property to a trust or on the effect of an "after-acquired property" clause. Thus, to

determine if, prior to the enactment of the Revised Code, a settlor was required to engage in an actual transfer of property to a trust or, alternatively, whether the mere declaration by a settlor that he holds property in a trust would suffice to make the property trust property, the Court looked to a Kentucky case on the issue (*Ladd v. Ladd*, 323 S.W.3d 772 (Ky. App. 2010)) and the Second and Third Restatements of Trusts. As to property in the settlor's possession, the Court concluded that, before the Revised Code, "a settlor who declared a trust naming himself as trustee was not required to separately and formally transfer the designated property into the trust." Regarding after-acquired property, the Court again looked to the Restatement and found "[a]n expectation or hope of receiving property in the future, *or an interest that has not come into existence* or has ceased to exist, cannot be held in trust." Further, the Court determined that, in order for after-acquired property to become property of the trust, the settlor would need to transfer that property to the trust formally or otherwise confirm his prior intent to hold such property in trust after the property was acquired or came into existence. In the present case, the Court found that where formal transfers of after-acquired property occurred, intent was manifested. The Court of Appeals remanded the case to address the circumstances surrounding the after-acquired property where no formal transfer had occurred and make determinations of intent regarding it. One of the judges filed a brief (and relatively inconsequential) concurrence in this case which renders the decision "physical precedent only." "[A] judgment in which all three judges fully concur is a binding precedent; . . . an opinion is *physical precedent only* . . . [where] there is a concurrence in the judgment only or a special concurrence without a statement of agreement with all that is said." Ga. App. Ct. R.

33(a) (emphasis added).

b) White v. Call, 292 Ga. 565, 738 S.E.2d 617 (February 2013).

In *Scotter v. Stephens*, 291 Ga. 79, 727 S.E.2d 484 (2012) the Georgia Supreme Court determined that Robert Emory White and Myron White, children of the settlor, were entitled to a writ of mandamus requiring the trial court to allow them to file notices of appeal regarding the administration of Robert and Florence White's (their parents') estates. This case made its second appearance before the Supreme Court to determine whether the trial court correctly found that the proceeds from the sale of real property held by a trust created by Robert White should be distributed wholly to Marvin Terry White. In December, 1947, Robert White executed and delivered a deed of trust naming his wife, Florence, as trustee. The trust provided that at a certain point Florence was to sell the property and "distribute the proceeds equally among herself and the surviving children of the donee or trustee, PROVIDED that the [trustee] shall not have remarried." If she remarried, Florence, as trustee, was to divide the proceeds equally between the surviving children of the donor and herself. Of the four children of the donor and trustee, Robert Emory, Maria, and Myron White were all born at the time the deed of trust was delivered. Marvin was born after the deed of trust was delivered. Robert and Florence separated, and Florence remarried in July, 1967. Robert died in 1969. In March, 1979, Robert Emory, Maria and Myron White executed a joint affidavit stating that Florence had settled the trust and that they had no further claims against her as trustee. Marvin did not sign the affidavit. Florence died intestate in January, 1999. Cynthia Call was appointed administrator of Florence's estate and filed a suit to be appointed successor trustee of Robert's trust in order to sell the real property

remaining in the trust free of all claims. The trial court approved both Call's appointment and the sale of the real property. Call then filed a motion to determine that the trust had been fulfilled and to determine to whom the proceeds should be distributed. The trial court determined all of the proceeds should be distributed to Marvin, because the other three children had previously waived any further interest in the trust. Robert Emory and Myron challenged the trial court's ruling saying that: (1) Call had violated her fiduciary duty by asking the trial court to ratify her distribution to Marvin; and (2) the trial court misinterpreted the trust by ratifying the distribution, because the trust refers only to the three named children in some parts and to the "surviving children" in other parts, signifying Robert's intentions to leave it only to his three oldest children. On appeal, the Supreme Court found the trial court did not err—Florence had remarried, and Marvin was left as the sole remaining child of Florence and Robert who had not waived any interest in the trust. The Court addressed the testator's intentions in creating a class gift to his surviving children. The Court held the differences in naming the three children in some parts and saying surviving children in other parts, at best, created an ambiguity. Further, the Court noted that usual practice dictated ascertaining the class members upon the death of the settlor, thus including Marvin even if Robert did not intend to have any more children at the time he created the trust. Finally, the Court affirmed the distribution of all of the proceeds from the sale of the real property to Marvin. On a side note, another claim brought on appeal involved the propriety of the equitable remedy of a bill of peace. However, the Court did not address this claim as the issue presented here was the only issue that triggered the Supreme Court's jurisdiction.

3. Breach of Fiduciary Duty

a) Nalley v. Langdale, 319 Ga. App. 354, 734 S.E.2d 908 (November 2012).

The appeal in this case revolved around whether summary judgment and partial summary judgment orders were properly granted by the trial court. In his concurring opinion (which was "dubitante"), Judge Dillard illustrated the complexity of the litigation by observing that the appellate record was "staggering," consisting of "eighty parts (and thousands upon thousands of pages), six transcripts and numerous lengthy and detailed briefs." The case involved a trust established in 1959 by Judge Harley Langdale, Sr. The trust corpus was stock in TLC, a family-owned business founded by Judge Langdale in 1947. The initial owners of TLC (in equal shares) were the judge and his three sons. He also had a daughter, Virginia, who did not have an ownership interest, but over time served as a director of the company. A disagreement among the family members resulted in the formation of two factions. The first faction included the judge's son Bill and his sons. The other faction included sons Harley, Jr., and John, Sr. and Johnny, who was the son of John, Sr. There were several shareholder agreements, which basically prohibited the shareholders from selling their interests to a third party without first offering them to the other shareholders. The value at which the shares were to be offered was a value computed by the "Stanley methodology," which had been developed by a business law professor at Valdosta State College who was a paid consultant of TLC. Judge Langdale set up the irrevocable trust to provide for Virginia and her three children, Dale, Jimmy and Virginia Ruth. The trust, which was funded with the Judge's shares in TLC, was to pay the income to Virginia and her children and their lineal descendants throughout their lives. The original trust document provided

that the trust was to terminate 21 years from the death of the last surviving named beneficiary (Virginia, Dale, Jimmy and Virginia Ruth) and, at that point, the remaining trust property was to be distributed among the beneficiaries in the same proportions in which they were entitled to the income. (The court referred to this document as the "generation skipping trust".) John, Sr. and Harley, Jr. were named as c0-trustees and were given broad discretion to manage and sell the trust property. The trust was signed on December 9, 1959. On December 15, 1959, John, Sr. sent a conformed copy to Virginia and her accountant. The judge apparently changed his mind soon after he signed the trust and wrote what he referred to as the "1999 trust terminating agreement." (The court referred to this as the "1999 terminating trust.") The terms of this trust were identical to the terms of the generation skipping trust, except that this trust was to terminate on December 31, 1999 and the property was to be distributed to those beneficiaries who were entitled at that time to the income. John, Sr. resigned in 1993 and was succeeded as co-trustee by his son, Johnny. Johnny resigned as co-trustee in 1999 with the consent of the beneficiaries. Harley, Jr. continued to serve as co-trustee until 2010, when he was replaced by Billy's son, Bob. In 1997, Virginia's estate planning attorney wrote Harley, Jr. to inquire about the trust and about the fact that Harley, Jr. had indicated to Virginia that there was to be "some change" in the trust in 1999. When Harley, Jr. wrote back that the trust was to terminate in 1999, the attorney responded that the trust instrument of which he had a copy did not indicate that. Harley, Jr. discussed the matter with John, Sr. and wrote back that apparently the judge had replaced the generation skipping trust document with the 1999 terminating trust document, and the conformed copy that had been sent to Virginia was a mistake. He

added that he and John, Sr. were "certain there is no signed instrument" other than the 1999 terminating trust. In 1998-99, TLC and Virginia, Dale, and Jimmy began discussions of having TLC redeem the trust stock at the value arrived at using the Stanley methodology. At this point, Harley, Jr. and Johnny were both co-trustees and the owners of more than ½ of TLC. Johnny insisted that they keep the deal quiet lest Billy's faction should try to make trouble or even try to purchase the stock for themselves. The beneficiaries, co-trustees, and TLC agreed that the trust would distribute the trust property to Virginia, Dale and Jimmy in 1999 and that TLC would redeem those shares in 2000. Virginia, Dale, and Jimmy were each paid $2.4 million for their shares of TLC. In 2007, a cousin convinced Dale that the TLC stock had been worth substantially more ($100 million more) than they had been paid for it. In 2009, Virginia, Dale and the executor of Jimmy's estate sued Harley, Jr., Johnny individually and Johnny as executor of John, Sr.'s estate for breach of trust, breach of fiduciary duty, fraud and other related counts. TLC was later added as a defendant. The plaintiffs filed that lawsuit under the assumption that the 1999 terminating trust was the operative document. Later that year, the attorneys for Harley, Jr. and Johnny found the original signed generation skipping trust agreement in John, Sr.'s office and filed their answer and a counterclaim seeking the return of the stock redemption proceeds. In 2009, Virginia et al. amended their complaint to add Virginia's six grandchildren. After hearings, the trial court granted summary judgment in favor of Johnny, individually, in favor of Johnny as executor of John Sr.'s estate, and in favor of TLC. The trial court also granted partial summary judgment in favor of Harley, Jr. The trial court denied Harley, Jr.'s motion for summary judgment on the issue of whether he committed a breach of

trust in disbursing the trust assets. The trial court denied the plaintiff's motion for summary judgment on Harley's counterclaim. On appeal, the Court of Appeals affirmed the summary judgment in favor of John Sr.'s estate but reversed the summary judgments in favor of the other defendants. As to John's estate, the Court of Appeals noted that John had died in 1998 and thus had not been involved in any of the actions that reportedly had caused damages to the plaintiffs. As to Johnny and Harley, Jr., the Court of Appeals found that issues of material fact existed as to whether Johnny and Harley, Jr. had known of the existence of the generation skipping trust, had "duped" Virginia and his children into redeeming their stock by misrepresenting the date the trust would terminate, had conspired with others to suppress the true value of the stock, and had used the redemption to increase their own control of TLC. The Court of Appeals noted that any complaint against the co-trustees that sounded in fraud was also a complaint for breach of trust. To Harley, Jr.'s contention that the beneficiaries had ratified any fraud that had occurred, the Court of Appeals responded that the parties had the option to affirm the contract and sue for damages for the fraud. Also, the plaintiffs had not ratified the breach of trust because they had not acted with full knowledge of the existence of the generation skipping trust. In addition, the plaintiffs all agreed to restructure any damage recovery to include the beneficiaries of the generation skipping trust. The Court of Appeals also pointed out that Harley, Jr. could not pursue his counterclaim for return of the redemption proceeds because he was no longer the trustee of the trust when he filed that counterclaim "as trustee." The Court of Appeals addressed indemnification agreements that had been signed by the plaintiffs during the stock redemption. They noted that if, at trial, Harley was found to have acted

in good faith and within his discretion, he would be able to invoke those agreements as a defense. Finally, the Court of Appeals turned to the summary judgment that had been granted in favor of TLC on the plaintiffs' claim of "tortious inference with a fiduciary relationship," which it characterized as "aiding and abetting a breach of fiduciary duty." The Court of Appeals found that there was some evidence that could lead a jury to find that the officers and directors of TLC had conspired with the co-trustees to induce the beneficiaries to sell their stock and to be secretive about the proposed sale in order to discourage other prospective buyers (specifically, the Billy faction).

b) Rollins v. Rollins, ___ Ga. App. ___, ___ S.E.2d ___ (Mar. 2013).

The Court of Appeals in this case reversed the trial court's denial of a request to order an accounting and its grant of summary judgment in favor of the trustees and remanded the case for further proceedings. The settlor of the trusts at issue was O. Wayne Rollins, who was also the founder of several business enterprises with a net worth of billions of dollars. The Trustees of the trusts are Wayne's two sons, Gary and Randall, and Mr. Tippee, a family friend. The trusts at issue are the Rollins Children's Trust (RCT, of which all three of the gentlemen are trustees) and four Subchapter S Trusts (the "S-Trusts"), of which Gary is the sole trustee. The beneficiaries who are the plaintiffs (the "Beneficiaries") are the four children of Gary. (The five children of Randall, who are the beneficiaries of the RCT and of their own Subchapter S trusts, are not parties to the case.) The RCT was established in 1968 by the Settlor for the benefit of his children and grandchildren (and the Beneficiaries are four of his nine grandchildren). Per its terms, the RCT distributed a portion of the principal to each of the nine grandchildren when each reached the ages of 25 and 30. According to the Court of Appeals, "In the 1970s

and 1980s, primarily to reduce tax liability, the Settlor [of the RCT] created several family entities to hold assets within the trust: ROL, Inc., LOR, Inc., the Rollins Grandchildren's Partnership ("RGP"), and the Rollins Holding Company ("RHC") (collectively, the "Family Entities")." The four S-Trusts were established in 1986 for each of the Beneficiaries individually. The S-Trusts were designed to distribute any remaining principal to each Beneficiary when that Beneficiary turned age 45. Only one of the four Beneficiaries had already turned age 45 at the time of this lawsuit. Again, in the words of the Court of Appeals, "The original assets in the S–Trusts were interests in LOR, Inc. The same year that the S–Trusts were created, the trustee purchased the S–Trusts' LOR, Inc. stock from RGP and RHC with promissory notes, thereby using debt to acquire the LOR, Inc. stock. Further, in 1988, the Settlor created another family entity called the Rollins Investment Fund ("RIF"), held within the S–Trusts. One of the purposes of RIF was to minimize tax liability."

The Beneficiaries claimed that the following actions constituted breaches of trust and fiduciary duty by the Trustees: 1) changes made by the Trustees to the structures, leadership, and distributions of the Family Entities in which the trusts hold an interest; a shifting of power in the Family Entities from the Beneficiaries to the Trustees; changing the nature of the Beneficiaries' interests from liquid and marketable interests to illiquid and nonmarketable interests; and the establishment of non pro rata distribution schemes. When the Beneficiaries originally moved for partial summary judgment on the breach of fiduciary duty issue, the Beneficiaries had not demanded an accounting. However, the trial court found that the Trustees had breached their fiduciary duty by not providing an accounting of the trust assets and ordered them to do

so. An accounting prepared by Ernst & Young was presented to the Beneficiaries and the trial court thereafter granted summary judgment to the Trustees and denied all further relief to the Beneficiaries. The second amended complaint by the Beneficiaries demanded that a receiver be appointed who would provide an accounting not only of the trust assets but also of LOR, Inc. and RIF, interests in which were held by the trusts. The trial court refused to order such an accounting. The Court of Appeals cited O.C.G.A. § 53-12-243(a) and (b), which set forth the beneficiaries' right to receive accountings annually and upon reasonable request. The Court noted also that the terms of the RCT required the beneficiaries to receive "statements disclosing the condition of the trust estate" not more often than every six months. Citing a series of New York cases, the Trustees contended that they were not required to supply an accounting of the Family Entities that were owned in part by the trusts because the trusts only owned minority, non-controlling interests in these Entities. The Court of Appeals noted that "in the ordinary case" a trustee is not required to provide an accounting of an entity owned in part by the trust because it may be "impossible" for the trustees to do so. The Court went on to point out, however, that the instant case was not an "ordinary case" because the Trustees, by virtue of the controlling interest in the Family Entities held by themselves in conjunction with the trusts, the Trustees had access to the information requested by the Beneficiaries. Although it found no Georgia authority to that effect, the Court of Appeals extrapolated from cases from other jurisdictions the "general principle" that a trustee "is obligated as a fiduciary to provide information that is within his control." This principle and the mandates of Georgia law relating to accountings to beneficiaries led the Court of Appeals to conclude that the trial court had erred when it

refused to order an accounting of the Family Entities. The Court of Appeals went on to state that the question of whether the information requested in the accounting was "appropriate" was not one that could be answered until the accounting itself had been made: "Whether the facts revealed by an accounting in behalf of the corporation activities are or are not important can only be known after they are exhibited. As a practical matter therefore in every case where the court can require disclosure of corporate affairs on an accounting by estate fiduciaries it will exercise its power in favor of disclosure" (quoting In re Witkind's Estate, 167 Misc. 885, 4 N.Y.S.2d 933, 946 (N.Y.Sur.Ct.1938)).

4. Transfer of Property to Trust

Ford v. Reddick, 319 Ga. App. 482, 735 S.E.2d 809 (December 2012).

While she was alive, Gloster had executed a power of attorney appointing Ford as her agent. Ford immediately transferred by warranty deed two parcels of Gloster's land. The deeds transferred the land to "Morison Outreach, a Trust." While she was alive, Gloster filed an action to have the deeds set aside. When Gloster died, the court substituted Reddick, the executor of her estate, as the plaintiff. The superior court granted summary judgment to the executor and the Court of Appeals affirmed. The very basic theory underlying this case is that property cannot be transferred to a trust, but in fact must be transferred to the trustee. The Court of Appeals cited O.C.G.A. § 53-12-25(a), which provides that a "transfer of property to a trust shall require a transfer of legal title to the trustee." Both courts noted that a deed that does not contain the name of a proper grantee does not transfer title. A side issue in the case concerned who had standing to appeal the trial court's ruling. The brief on appeal listed as a parties

"Morison Outreach, a Trust/Co-Trustee" and "Tanenankhaha Andrews/Co-Trustee" as parties. Andrews had signed the brief on his own behalf and on behalf of the trust, and Ford had signed on his own behalf. The Court of Appeals pointed out that Andrews had never been made a party to the case and thus had no standing to appeal. The Court of Appeals also noted that neither Ford nor Andrews were attorneys and, thus, could not represent the trust before the court.

5. Implied Trusts

Reinhardt University v. Castleberry, 318 Ga. App. 416, 734 S.E.2d 117 (November 2012). The issue addressed in this interlocutory appeal was the denial of a motion to dismiss for failure to state a cause of action. The original action was one seeking the imposition of a constructive trust on funds held by a university that had not engaged in fraud in obtaining the funds. The funds had been transferred to the university by the trustee of a trust set up by the trustee's father. The trust was established for the benefit of the settlor's wife for her life, with the remainder to be divided among the settlor's three children. The trustee was a son of the settlor and also a trustee of Reinhardt College (now Reinhardt University). While the settlor's wife was alive, the trustee pledged $1.5 million to the school and actually transferred approximately $1 million from the trust to the school. When the wife died, another child of the settlor filed two actions: one against the trustee for breach of fiduciary duty and breach of trust and the other against the university seeking the imposition of a constructive trust on the funds. The trial court denied the university's motion to dismiss and the Court of Appeals affirmed the denial. (The Court of Appeals tried to transfer the case to the Supreme Court but the Supreme Court returned it to the Court of Appeals stating that the case did not invoke

its equity jurisdiction.) O.C.G.A. § 53-12-132 allows for the imposition of a constructive trust when "the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." The university pointed out that it was the trustee rather than the university that had engaged in wrongdoing. The university stated that the only action against the university was one for the imposition of a constructive trust but that such an imposition is a remedy, not a cause of action. The Court of Appeals cited *Kelly v. Johnston*, 258 Ga. 660, 373 S.E.2d 7 (1988) as illustrative of its finding that a suit for the imposition of a constructive trust is allowed even when it is a third party, rather than the party that is being sued, that has engaged in wrongdoing. The Court noted that the fact that the funds had passed to the hands of an innocent third party does not preclude the court from enforcing the constructive trust in equity. As to the argument that a constructive trust is a remedy and not a cause of action, the Court of Appeals pointed out that the beneficiary's action in seeking the constructive trust was predicated upon her allegations of wrongdoing against the trustee. The Court of Appeals distinguished the instant case from a case relied upon by the university, *St. Paul Mercury Insurance Co. v. Meeks*, 270 Ga. 136, 508 S.E.2d 646 (1998)). The Court of Appeals said that in the *St. Paul Mercury Insurance Co.* case, the plaintiff had failed to prove its underlying allegations of unjust enrichment and thus could not independently seek the imposition of a constructive trust. The university also argued in the alternative that it should be allowed to keep the money because, like many charitable institutions, it relies heavily on donations and allowing the investigation of the source of donated funds would discourage charitable giving. The Court of Appeals found no merit in that assertion.

6. No Contest Clause

Callaway v. Willard, ___ Ga. App. ___, 739 S.E.2d 533 (March 2013).

Marjorie Durham executed an inter vivos trust in 2000, which contained an in terrorem clause. She named herself as beneficiary, her four children (Bryant, Lee, Lucinda, and Lawrence) as residual beneficiaries, and William Callaway as Trustee. On May 17, 2001, Bryant, Lee, and Lucinda filed a petition for guardianship of their mother in the Tattnall County Probate Court, claiming she was incapacitated by Alzheimer's disease. The court-ordered medical examiner opined that Marjorie did not meet the standard for guardianship, and the petition was dismissed. On appeal to the Tattnall County superior court, a jury found Marjorie was not incapacitated, and the court entered a verdict denying the guardianship petition on January 10, 2002. Meanwhile, in the Evans County superior court, Bryant and Lee made a number of claims against Callaway, individually and in his capacity as Trustee, asking the court to set aside the Trust, Marjorie's later ratification of the Trust, and the warranty deed transferring property to the Trust, to remove Callaway as Trustee, and for an award of damages against Callaway. Bryant and Lee alleged undue influence, duress, and coercion by Lawrence, that Callaway had a conflict of interest because he was Lawrence's personal lawyer, that Callaway drafted the Trust to favor Lawrence, and that Callaway set up the Trust such that he would receive $35,000 per year whether he did work for the Trust or not. Further, in June 2001, Bryant and Lee filed a motion in the Evans County action for injunctive relief, seeking to prevent Callaway from liquidating or encumbering Trust assets without the court's permission. The Evans County action was stayed pending the outcome of the guardianship proceeding, but after guardianship was denied, Bryant and

Lee voluntarily dismissed the Evans County action in April, 2002. Marjorie died in 2009, and, in 2010, Callaway filed an action for declaratory relief against the four children. Callaway sought a declaration that three of the children, Bryant, Lee, and Lucinda, violated the in terrorem clause by filing the Evans and Tattnall Counties lawsuits and, thus, forfeited their interests in the Trust estate, leaving the entire estate to the fourth child, Lawrence. In response, Lucinda filed a motion for summary judgment that she remained a valid beneficiary and did not violate the in terrorem clause. Further, Lawrence filed a counter claim and cross-claim that he was the sole beneficiary of the Trust estate because he was the only child who had not violated the in terrorem clause. The trial court granted Lucinda's motion and denied Lawrence's motion. Lawrence filed an application for interlocutory appeal to the Court of Appeals. Callaway directly appealed in the Court of Appeals. Both cases were transferred to the Supreme Court in *Durham v. Durham*, 291 Ga. 231, 728 S.E.2d 627 (2012) to determine whether the Supreme Court had subject matter jurisdiction over the appeals. The Supreme Court determined the appeal involved a "straightforward legal question," not requiring an evaluation of equitable considerations, which was not enough to bring the appeals under the Supreme Court's equity jurisdiction. The appeals were then transferred back to the Court of Appeals to be determined in the instant case. The Court began by noting that in terrorem clauses are to be strictly construed, as they are not favored in the law. Here, the Trust's in terrorem clause provided that "a beneficiary violate[ed] that clause only if two conditions [were] met. First, the beneficiary must "seek or file" an action that challenges either: (i) 'the management decisions made or proposed by [the] Trustee *during the administration of th[e] Trust;*' (ii) 'the

management of the Trust Estate;' or (iii) 'the final distribution of the Trust Estate.' (Emphasis supplied.) Second, the beneficiary must be unsuccessful in his or her challenge . . . ." The Court first held the guardianship action did not violate the in terrorem clause. The guardianship proceeding sought control over all of Marjorie's property and did not mention the Trust, thus, by its terms it was not seeking control of any of the property held by the Trust. While Callaway argued the guardianship action was linked to the Evans County action and, thus, should be viewed together, the Court disagreed and deemed the guardianship action an ancillary action not directly challenging the management decisions of the Trustee, the management of the Trust estate, or the final distribution of the Trust estate required to trigger the in terrorem clause. Further, Callaway asked that Lucinda be deemed a de facto party to the Evans County action; however, in construing the in terrorem clause narrowly, the Court held Lucinda would have had to have been an actual, named party to an action before she would be deemed to have forfeited her right to inherit. The Court next held that Bryant's and Lee's filing of their claims in Evans County did not violate the in terrorem clause. The Evans County claim challenged the validity of the Trust, centered on Marjorie's incompetency, and did not challenge the management of the Trust, management decisions of the Trustee, or the final distribution of the Trust estate. Further, the Evans County claims challenged Callaway's ethical and fiduciary conduct in setting up the Trust and his appointment as Trustee, not his conduct in administering, managing, or distributing the Trust after he became the Trustee. The Court did not address whether Bryant and Lee's voluntary dismissal of the Evans County claims would qualify as "unsuccessful." Finally, the Court held Bryant and Lee's motion for injunctive

relief did not violate the in terrorem clause. The motion's purpose was to maintain the status quo of the property in the Trust pending the Evans County and guardianship actions, not to challenge a decision of Callaway in administering the Trust or in managing Trust assets.

7. Equity Jurisdiction

Durham v. Durham, 291 Ga. 231, 728 S.E.2d 627 (June 2012).

This case addresses whether appeals that involve the proper interpretation of a trust provision fall under the Supreme Court of Georgia's general appellate jurisdiction over "equity cases," because resolving the issue would affect the administration of the trust. The Supreme Court noted that "'equity cases' are those in which a substantive issue on appeal involves the legality or propriety of equitable relief sought in the superior court – whether that relief was granted or denied." In the present case, Marjorie Durham executed an *inter vivos* trust in 2000, which contained an *in terrorem* clause. She named herself as beneficiary and her four children as residual beneficiaries. Marjorie died in 2009, and, in 2010, William Callaway, trustee, filed an action for declaratory relief against the four children. Callaway sought a declaration that three of the children, Bryant, Lee, and Lucinda, violated the *in terrorem* clause by filing lawsuits in Evans and Tattnall Counties and, thus, forfeited their interests in the trust estate, leaving the entire estate to the fourth child, Lawrence. In response, Lucinda filed a motion for summary judgment that she remained a valid beneficiary and did not violate the *in terrorem* clause. Further, Lawrence filed a counter claim and cross-claim that he was the sole beneficiary of the trust estate because he was the only child who had not violated the *in*

terrorem clause. The trial court granted Lucinda's motion and denied Lawrence's motion. Lawrence filed an application for interlocutory appeal to the Court of Appeals. Callaway directly appealed in the Court of Appeals. Both cases were transferred to the Supreme Court to determine whether the Supreme Court had subject matter jurisdiction over the appeals as "equity cases," because the resolution of the cases would affect the administration of Marjorie's trust by controlling how the trustee distributed the trust. The majority opinion stated that there is only one line of authority on this jurisdictional issue. While the parties cited O.C.G.A. § 53-12-6, which states that "[t]rusts are peculiarly subjects of equity jurisdiction," the Court rejected the argument that "'cases involving the administration of trusts are always considered equitable' for purposes of *appellate* jurisdiction." (Emphasis supplied). The Court further established that the Supreme Court's equity jurisdiction is invoked only when the lower court rendered a judgment based upon equitable principles and that decision is the primary issue on appeal, even if a trust is involved. The Court said that any appeal not presenting a substantive issue of equitable relief would be transferred to the Court of Appeals. Thus, in the present cases, the Court stated that it was ancillary that Callaway sought a declaration from the superior court and that the relief sought was equitable in nature. Rather, looking at the sole issue on appeal -- how to interpret a specific provision of a legal document (the in terrorem clause of Marjorie's trust) -- the Court held it is a "straightforward legal question," not requiring an evaluation of equitable considerations. Therefore, even though the answer would eventually affect the administration of the trust, that was not enough to bring the appeals under the Supreme Court's equity jurisdiction, and the appeals were transferred back to the Court of

Appeals. In Justice Hunstein's dissent, she argued that there are two competing lines of authority to determine the correct appellate court for appeals concerning express trusts. The first, followed by the majority, looks to the issue on appeal and transfers the appeal to the Court of Appeals when the equitable relief sought is ancillary to the legal relief sought. Justice Hunstein responded that, as a practical matter, every "equity case" would be heard by the Court of Appeals "because the underlying question of equity is a question of law." Justice Hunstein, however, discussed a second line. She noted that the Supreme Court has historically reviewed and retained appeals involving the administration of an express trust under its equity jurisdiction because the appeals involved the internal affairs of the trust, including cases where trustees sought a declaration of the beneficiaries' rights under specific clauses of the trust. Further, she pointed out that both O.C.G.A. § 53-12-6 and the Restatements of Trusts find that remedies for trust beneficiaries are exclusively equitable. Finally, she concluded by noting the construction of the in terrorem clause cannot be separated from the trustee's request for direction on how to distribute the trust property among the children. Rather than transfer every case that involves the propriety of the trustee's actions, which would be based on the interpretation of an underlying trust provision and therefore a question of law, Hunstein held the Supreme Court should retain jurisdiction because "express trusts are a creature of equity and by their nature involve equitable remedies."

G. GUARDIANSHIPS AND CONSERVATORSHIPS

1. Guardianship of Adults

In re Farr, ___ Ga. App. ___, ___ S.E.2d ___ (May 2013).

In this case, the Court of Appeals affirmed the probate court's dismissal of a petition for emergency guardianship for Claudine Tapley Farr. The petition had been filed by a hospital, St. Joseph's/Candler Health System, in Savannah. (In a footnote, the Court of Appeals alluded to the fact that other petitions had been filed by the hospital, Farr, and/or Farr's family.) The petition was supported by affidavits from various employees of the hospital, including physicians. The petition alleged that Ms. Farr was incapacitated due to several illnesses, infections, etc. such that she "lacked sufficient capacity to make or communicate significant responsible decisions concerning her health or safety" (which is the criterion set forth in the Revised Guardianship Code for the appointment of a guardian) and that there was "an immediate, clear and substantial risk of death or serious physical injury, illness, or disease unless an emergency guardian is appointed" (which is the criterion set forth in O.C.G.A. 29-4-14(b)(4) for the appointment of an emergency guardian). Ms. Farr's son filed an objection to the petition. He did not object to his mother's need for a guardian but stated that she was not in need of an *emergency* guardian. According to the Court of Appeals, the only "emergency" allegation that appeared in the hospital's petition was its desire to discharge Ms. Farr from its acute-care facility and transfer her to a nursing facility

where a more appropriate, lower level of care would be provided. The probate court at the outset dismissed the portion of the hospital's petition that requested the appointment of an emergency guardian who would be required to discharge Ms. Farr from the hospital. Finding no other reason in the petition why an emergency guardianship was needed, the probate court declined to hold an evidentiary proceeding and dismissed the petition. The Court of Appeals agreed with the probate court that there was nothing in the hospital's petition to indicate that Ms. Farr was in immediate danger of death, serious physical injury, illness or disease tf she were not immediately discharged from the hospital; thus, there was no need for an emergency guardianship. The Court of Appeals affirmed the probate court's dismissal of the petition for lack of probable cause. In an interesting footnote, the Court of Appeals admonished the attorneys for the hospital because they had sought in their brief to compare the facts in the instant case to another case decided by the Court of Appeals in 2004. However, the Court pointed out that the facts cited by the attorneys did not appear in the Court's opinion in the case but rather only in the appellate briefs that were filed. The Court said, "Suffice it to say, statements of fact in prior appellate briefs are not binding authority on this Court." The Court of Appeals also noted that the issues in the earlier case were not at all the same as those in the instant case.

2. Guardianship of Minors

a) McFalls v. Onsager, 316 Ga. App. 190, 728 S.E.2d 820 (June 2012).

This case affirms the "best-interest" rule for determining custody of a minor established in *Stills v. Johnson*, 272 Ga. 645, 533 S.E.2d 695 (2000). The parents of two-month old

A. C. asked the minor's paternal great uncle, McFalls, to care for A. C. until they could get a better job, a better place to live, and could provide for her. The Department of Family and Children Services consented to McFalls' temporary guardianship of A. C., and a probate judge signed the temporary letters of guardianship. Prior to A. C.'s birth, A. C.'s maternal great aunt and uncle, the Onsagers, had adopted A. C.'s older brother because the parents couldn't afford to take care of him. When they became aware of A. C.'s mother's incarceration, they discovered A. C. was with McFalls and filed a petition for custody of her, which would allow her to have a mother figure and "keep her with her sibling." McFalls filed a cross-claim for custody. A guardian ad litem appointed for A. C. found both McFalls and the Onsagers were "fit, willing, and appropriate" to care for A. C., but recommended custody be transferred to the Onsagers because of the life-long benefits of being raised with a sibling and mother figure. At a hearing on the issue, A. C.'s parents, who were both incarcerated, told the court they ultimately wanted A. C. returned to their custody. However, they desired McFalls to have custody in the meantime. The superior court noted it gave "substantial weight to the desire of the parents," but that it followed the *Stills* rule, which states "where neither party seeking custody is a parent as defined by Georgia law, a determination of custody is to be made according to the best interest of the child." Here, the court felt the best interest of the child would be met by the Onsagers, and did not follow the parents' expressed wishes. The Onsagers were granted custody. The Court of Appeals affirmed the decision, noting there was ample evidence in the record that even with substantial weight given to the wishes of the parents, A. C.'s best interest was met by granting custody to the Onsagers.

b) Stone-Crosby v. Mickens-Cook, 318 Ga. App. 313, 733 S.E.2d 842 (November 2012). This case illustrates the confusing overlapping jurisdiction of the superior, juvenile, and probate courts on matters relating to the guardianship and custody of minors. Following the murder-suicide of their parents, Katherine Stone-Crosby brought an action in superior court for custody of her now orphaned niece and nephew. Twelve days later, the paternal grandmother, Odessa Mickens-Cook, moved to dismiss the action for lack of jurisdiction, which motion was denied, and moved to intervene, which motion was granted. On the same day Odessa also filed a deprivation petition in juvenile court. At some point after the superior court action was filed, the maternal grandparents filed a petition for permanent guardianship of the children in the probate court. Social services investigated, a hearing was held at which both parties testified, and the superior court awarded custody to Odessa. Katherine filed motions for reconsideration, to set aside, and for new trial. All three motions were denied, and Katherine appealed. The Court of Appeals affirmed. In her appeal, Katherine first claimed the superior court lacked jurisdiction to hear the custody matter. The Court of Appeals noted that "[t]he superior court ha[s] original jurisdiction over contests for permanent child custody in the nature of a habeas corpus between parents, parents and third parties, or between parties who are not parents." *Dunbar v. Ertter*, 312 Ga. App. 440, 718 S.E.2d 350 (2011). Further, while the jurisdiction can be concurrent with the juvenile court over some issues, these did not include disguised custody matters or when a court with concurrent jurisdiction has already taken jurisdiction. The superior court had already taken jurisdiction before Odessa filed in the juvenile court. Katherine argued the probate court should have had jurisdiction because of its statutory authority

to order a guardian for the children. The Court noted first, both parents died without a will so no testamentary guardian had been named, and second, the maternal grandparents' petition was not filed until after the custody action was pending in superior court. Again, "[w]here a probate court and a superior court have concurrent jurisdiction over an action, the general rule is that the court first taking jurisdiction will retain it unless some good reason is shown for equitable interference." *Morris v. Mullis*, 264 Ga. App. 428, 590 S.E.2d 823 (2003). The Court of Appeals found that the superior court was the first court to take jurisdiction, retained it, and, therefore, did not err in denying Odessa's motion to dismiss for lack of jurisdiction. Katherine's second complaint was that the trial court weighed the fact that she was separated from her husband "heavily" against her and failed to explain how the separation would affect the welfare of the children. She accused the court of applying a bright-line test. The Court of Appeals found the trial court did not follow a rigid policy but expressly considered the best interest of the children. The trial court first pointed out the difficulty of Katherine being a divorced single parent and going through the process of a divorce where there were issues not yet resolved. Further, the trial court noted Katherine's financial situation was precarious. Katherine had a child of her own, she held only a commission-based, part-time job, her husband provided no financial support, and she already had had to borrow substantial amounts to cover her expenses. Finally, the trial court noted Katherine had made some decisions that the court found were not necessarily in the children's best interests, including representing to the children that they would be living with her permanently even though the custody issue was not resolved. Because there was evidence to support the trial court's ruling, the Court of Appeals affirmed the denial

of the motion for new trial.

c) In re L.B., 319 Ga. App. 173, 735 S.E.2d 162 (November 2012).

This case involves an order for the permanent guardianship of a deprived child for a minor whose mother is still living. In 2009, L.B.'s mother asked her great-aunt to take care of her child while she looked for a job and an apartment. The great-aunt became the child's temporary guardian by order of the probate court. Some months later, L.B.'s mother sought to terminate the temporary guardianship and remove L.B. from the great-aunt's home. The great-aunt notified the probate court of the danger of the child being removed from her home, and the probate court transferred the case to the juvenile court. In the juvenile court, the great-aunt filed a deprivation action. The juvenile court held a hearing on September 1, and a final order was entered finding that L.B. was deprived. On September 16, the great-aunt filed for permanent guardianship of the child in the juvenile court and another hearing was held. At the hearing, L.B.'s mother testified that she had very little contact with her child, had not followed a plan set out for her by DFCS, had not undergone required drug tests, and was living in a family member's home. The guardian ad litem expressed great concern about the mother's conduct. The juvenile court found that it would be in the child's best interest to award permanent guardianship to the great-aunt. L.B.'s mother appealed. She alleged first that the required finding that her child was a "deprived child" had not been made prior to the award of the permanent guardianship, as specified in O.C.G.A. § 15-11-30.1. The Court of Appeals disagreed, pointing to the September 1 hearing and final order. The mother also argued that a permanent guardianship could not be awarded unless DFCS

had previously taken custody of the child. The Court of Appeals examined the statute that requires the making of "reasonable efforts to reunify a child with his or her family" prior to the appointment of a permanent guardian (O.C.G.A. § 15-11-30.1(a)(2)(A)(i)). The Court of Appeals held that although that statute cross-referenced the "reunification services" provided if a child is in DFCS custody, the statute itself did not require that the child be in DFCS custody before a permanent guardianship could be ordered.

d) Ertter v. Dunbar, 292 Ga. 103, 734 S.E.2d 403 (November 2012).

The Georgia Supreme Court has also chimed in recently on the issue of jurisdiction between the superior court and the juvenile court. In this case, when the child's parents died, the juvenile court found the child to be deprived and placed her in the temporary custody (until age 18) of her grandmother, who was a "willing and qualified relative," as required by the statute governing temporary custody of a deprived child. A couple of months later, the child's aunt and uncle (who were not parties to the custody hearing) filed in superior court for permanent custody of the child. The superior court found that their custody would be in the child's best interest and awarded custody to them. The grandmother appealed to the Court of Appeals, who reversed the custody order under the theory of "priority jurisdiction." The Court of Appeals stated that both courts had the jurisdiction to enter the orders they entered and the fact that the juvenile court had taken jurisdiction first prevented the superior court from entering its order. The Supreme Court reversed the Court of Appeals holding. The Supreme Court distinguished "concurrent" jurisdiction from the type of jurisdiction that was at issue in this case. The Supreme Court noted that the juvenile court simply did not have

jurisdiction to grant permanent custody absent a transfer of the case from the superior court. No such transfer had occurred so the superior court properly exercised its jurisdiction in the granting of the permanent custody order.

H. NON-PROBATE ASSETS

1. Retirement Plan Assets

a) Public School Retirement Systems of Georgia v. Ayers, 319 Ga. App. 234, 734 S.E.2d 461 (November 2012).

When Ayers' mother, Esther, retired from the Rome Public School system in 1982, she was given a number of options as to the payout of her retirement benefit. She chose the option that would pay a benefit to herself while alive and then a specified portion of her retirement income to her "*primary* beneficiary, if living, for the remainder of his or her life." She listed her husband, Grover, as her "First" beneficiary and chose to have the payout to him be 100% of the amount of the payout to her. She listed Ayers and his brother as her "Second" beneficiaries. Grover died in 1991, Ayers' brother died in 1995, and Esther died in 1999. For three months following Esther's death, the System mistakenly continued to make payments into her account. Ayers withdrew these payments and claimed further that he was Esther's "sole surviving beneficiary" and thus that the System should continue to make payments to him for the rest of his life. The System moved for summary judgment and for a directed verdict. A jury found in Ayers' favor and the System appealed. The Court of Appeals reversed and remanded the case for a judgment in favor of the System. The Court of Appeals equated the term "primary" with the term "first" and found that, under the plain language of the contract, Grover was the only person who would have been entitled to receive benefits after Esther died.

I. DEEDS

a) Slaick v. Arnold, 316 Ga. App. 141, 728 S.E2d 782 (June 2012).

(Slaick II): This case involves a deed made by a grantor to a grantee prior to her death. The administrator of the estate brought a declaratory judgment action to determine whether the deed was valid. The claim was originally filed in the probate court but the court transferred the case to the superior court. The superior court declared the deed void. The case was appealed to the Supreme Court, who transferred the case to the Court of Appeals. The Supreme Court had determined that the case revolved around title to land and thus was not a case "involving wills" such as would vest the jurisdiction in the Supreme Court, pursuant to the Georgia Constitution. In *Slaick v. Arnold*, 307 Ga. App. 410, 705 S.E.2d 206 (2010), the Court of Appeals reversed the holding of the superior court. The deed in question was purportedly one of two reciprocal deeds in which two relatives of a testator had sought to ensure that property left to them by "Aunt Belle" would eventually end up in the hands of the survivor. The deed that was at issue reserved a life estate in the grantor (Day) and deeded the remainder interest to Slaick "for and in consideration of love and affection and other good and valuable consideration." If there was in fact a reciprocal deed from Slaick to Day, it was never recorded and could not be found. The superior court found that the deed from Day to Slaick was void because it was not supported by valid and valuable consideration. The superior court said that deeds supported only by "love and affection" are "voluntary" and thus not binding. The Court of Appeals pointed out that, absent fraud or some other equitable ground, a court will generally not void a voluntary deed on the ground of

lack of consideration. The Court noted that the administrator had argued that the reciprocal deed was the actual consideration and that because that deed could not be found, there was no consideration actually given. The Court of Appeals said that failure to pay the consideration promised does not render a conveyance void for lack of consideration. The Court remanded the case for the superior court to rule regarding the issues of fraud raised by the administrator in his complaint. On remand, the superior court ruled that the legal title to the property did not pass to Slaick because "the deed had been procured by inceptive fraud." The Court of Appeals reversed, noting "the mere failure to comply with a promise is insufficient to establish an inceptive fraudulent intent." However, while fraud may not be presumed, the court pointed out that a deed may be set aside in equity upon proof of both (1) great inadequacy of consideration and (2) great disparity of mental ability in contracting a bargain. The great inadequacy of consideration was undisputed as there was no proof of the existence of the reciprocal deed from Slaick to Day. However, the court found no evidence of any mental disparity between Day and Slaick. *Strong v. Holden*, 287 Ga. 482, 697 S.E.2d 189 (2010), points out that a testator does not lack the requisite mental capacity "simply because she was elderly, hospitalized, physically weak, vomiting and taking prescribed medications." Here, Slaick's uncontested deposition testimony noted that the elderly Day was in "excellent health" around the time she executed the deed. The Court found no evidence of a great disparity between Slaick and Day in terms of education, literacy, or business experience. Therefore, without the great disparity of mental ability, the Court of Appeals found the evidence insufficient to establish inceptive fraud and reversed the ruling.

b) Ehlers v. Upper West Side, LLC, 292 Ga. 151, 733 S.E.2d 723 (October 2012). Albert Ehlers, Sr. died August 11, 1993, naming his wife, Dora, and their two sons, James and Albert as his co-executors. In August, 1994, Dora filed a petition for year's support for all of her husband's property, which was contested. On September 5, 1995, during the litigation for year's support, Dora and her sons executed two deeds of assent, one to Albert and one to James. Albert's deed described a strip of real property 25 feet by 200 feet, identified as "Parcel Two" and located at 2220 Bernard Road. In 1996, Albert brought an action seeking declaratory judgment that his deed of assent was not subject to Dora's year's support claim. Albert died and his son Allen was substituted as a party. In December, 1998, the superior court ruled the two deeds contained all of the property in their father's estate and that the deeds superseded Dora's claim. In 2003, Allen contracted to sell 2220 Bernard Road to Darlene Palmer. Then, on February 27, 2004, Allen contracted to sell 2220 Bernard Road to Upper West Side. Palmer sued Allen seeking specific performance of the 2003 contract, adding James, the only remaining executor of Albert Ehlers, Sr.'s estate, as a party. Palmer claimed she was entitled to all of Parcel Two, which included the 25-foot by 200-foot strip of land listed in the deed plus an additional seven acres. On November 2, 2005, the superior court found Parcel Two did consist of eight acres, but that Allen only received title to a 25 x 200 foot strip of land due to a "scrivener's error," even though title to the entire eight acres had passed to his father, Albert. Therefore, the superior court determined Palmer was not entitled to specific performance. After settling, Palmer dismissed her case, and Allen deeded the property in the deed to Upper West Side on November 11, 2008. On

April 30, 2008, Upper West Side filed an action to reform the deed of assent to include all eight acres of Parcel Two. James asserted Upper West Side's claim was barred by the seven-year statute of limitations to reform a written document and res judicata and estoppel from the 2005 suit, but the trial court ruled in favor of reform for Upper West Side. James appealed to the Supreme Court. "[T]he statute of limitations does not commence to run . . . until the mistake or fraud . . . by the exercise of reasonable diligence should have been discovered." *Haffner v. Davis,* 290 Ga. 753, 725 S.E.2d 286 (2012). While the court noted that it appeared neither Albert or Allen exercised reasonable diligence to discover the "scrivener's error" and the statute would have run as of September, 2002, equitable relief was available for contract reformation in cases of negligence "when the other party has not been prejudiced." *Id*. The Court noted that the superior court held in its unappealed, and binding on James, 2005 order that while all eight acres passed to Albert as intended by Albert, Sr., only the 25' x 200' strip was included in the deed because of "scrivener's error." Further, the Court said it was James' duty to administer the estate as directed, which in this case obligated him to reform the deed to reflect Albert, Sr.'s wish to convey the entire eight acres. Therefore, the Court found James suffered no prejudice by the deed being reformed. Finding no prejudice, the Court affirmed that the reformation would not be barred by the running of the statute of limitations. Following the same rationale, the Court also affirmed the trial court's ruling regarding res judicata and collateral estoppel.

J. POWERS OF ATTORNEY

a) Harris v. Peterson, 318 Ga. App. 382, 734 S.E.2d 93 (November 2012).

Williams and Peterson were brothers who inherited land from their mother's estate. Peterson, the administrator of the mother's estate, executed administrator's deeds that passed title to the mother's real property to the two brothers. In 2005, Williams executed a power of attorney appointing Anita Peterson, his sister-in-law, as his agent. Among other things, the power of attorney authorized Anita to sell the property of the principal. Two years later, Williams entered into contracts to sell his property to Harris. When she learned of these contracts, Anita presented a quitclaim deed to Williams and asked him to deed his property to her husband, Peterson (Williams' brother). When Williams refused to do so, Anita filed the power of attorney in the superior court along with the same quitclaim deed which now had been signed by her as Williams' agent. A couple of months later, Williams signed a quitclaim deed deeding the same property to Harris. When Peterson filed a trespass complaint against Harris, Harris filed a third-party complaint against Anita, claiming that she had committed fraud in her use of the power of attorney to transfer the property to Peterson. The trial court granted summary judgment in Anita's favor under the theory that she had acted with the authority of the power of attorney. The Court of Appeals reversed, finding that material issues of fact existed as to whether the transfer was fraudulent. The Court of Appeals explained that even though a principal has signed a power of attorney he has not given up the power to act in his own name. The Court of Appeals also pointed out that an agent under a power of attorney is prohibited from acting to benefit her own position to the detriment of the principal. Anita had cited as controlling *LeCraw v. LeCraw*, 261 Ga. 98 (1991), a case in

which the court had confirmed the validity of gifts made by an agent under a power of attorney. The Court of Appeals noted that this case was distinguishable in that the principal had known of the actions of her agent and had not objected.

K. ATTORNEY DISCIPLINE AND MALPRACTICE

In re Field, ___ Ga. ___, ___ S.E.2d ___ (April 2013).

In this disciplinary case, the Supreme Court of Georgia accepted the attorney's voluntary surrender of his license to practice law in Georgia. The attorney was hired by a client, whose daughter had recently died, to represent her in becoming her grandson's guardian, in becoming her grandson's conservator in order for him to receive his mother's estate, and to pursue arrearages in child support payments against the grandson's father. The attorney told the client that she could pay his fee ($12,000) from the conservatorship estate but failed to tell her that she first had to obtain court permission to do so. The client paid his fee from the conservatorship estate but he failed to perform any further services. The client was forced to resign as conservator when the probate court discovered her actions and a judgment was entered against her for the amount of the fees plus interest. The client was awarded $11,000 when she filed a fee arbitration petition against the attorney. The attorney, who was living in an assisted living facility on Social Security, was unable to pay the judgment. He admitted to having violated Rules 1.3, 1.4 (duty to communicate) and 1.5 (duty not to charge unreasonable fees) of the Georgia Rules of Professional Conduct. The maximum penalty for violation of Rule 1.3 is disbarment while the maximum penalty for disbarment of the other two rules is public reprimand. Rule 1.3 provides as follows:

A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this Rule means that a lawyer shall not without just cause to the detriment of the client in effect wilfully abandon or wilfully disregard a legal matter entrusted to the lawyer.

II. GEORGIA LEGISLATION – 2013

A. Official Code of Georgia Technical Corrections Act (2011 & 2012 & 2013)

Laws 2011, Act 245 (H.B. 142): a thorough grammatical and punctuation clean-up of the entire Georgia Code, effective May 13, 2011. A bill with additional changes was passed by both Houses in 2012 and sent to the Governor for signature on April 5, 2012. A third bill was passed by both Houses in 2013.

Changes to the Georgia Guardianship and Conservatorship Code (2011 Act): §§ 29-2-16, 29-2-17, 29-2-22, 29-2-40, 29-2-41, 29-2-51, 29-3-7, 29-3-8, 29-3-22, 29-3-80, 29-3-81, 29-3-91, 29-4-3, 29-4-23, 29-5-3, 29-5-23, 29-8-1, 29-8-2

(2012 Act): §§ 29-3-32, 29-9-13.1

(2013 Act): §§ 29-3-32, 29-5-32: The following was removed as a permissible investment for guardians and conservators because the statutory provision to which is refers has been repealed: "(9) Bonds issued by the Georgia Building Authority (Hospital), pursuant to Article 2 of Chapter 7 of Title 31, as authorized by Code Section 31-7-27." Subparagraph (9) is now marked "Reserved."

Changes to Georgia Probate Code (2011 Act): §§ 53-1-1, 53-1-20, 53-9-2

No changes to Probate Code in 2012 Act.

No changes to Probate Code in 2013 Act.

Changes to Georgia Trust Code: §§ 53-12-5, 53-12-45, 53-12-80, 53-12-190, 53-12-210, 53-12-261, 53-12-263, 53-12-280, 53-12-304, 53-12-320, 53-12-344, 53-12-361, 53-12-362, 53-12-363, 53-12-401, 53-12-420, 53-12-425, 53-12-431

No changes to Trust Code in 2012 Act.

No changes to Trust Code in 2013 Act.

B. Georgia Evidence Code (effective January 1, 2013)

Current O.C.G.A. § 24-7-24 provides the method for authenticating the acts, records, and judicial proceedings of states, territories and possessions other than the state of Georgia. Under the pre-2013 Evidence Code, a certification with seal is required for all such documents.

The 2013 Georgia Evidence Code replaces O.C.G.A. § 24-7-24 with O.C.G.A. § 24-7-922, which grants full faith and credits to such acts, records, etc. "if properly authenticated." New O.C.G.A. §§ 24-9-901 and 24-9-902 set forth a variety of options for certifying public records under seal and without seal.

The cross reference to O.C.G.A. § 24-7-24 is changed to O.C.G.A. § 24-7-922 in the following sections of the Georgia Probate Code:

O.C.G.A. §§ 53-5-33 (Ancillary Probate), 53-5-35 (Wills as Muniments of Title), 53-5-43 (Evidence of Authority, 53-11-11 (Authentication of Documents)

C. JUVENILE COURTS (2013): The Juvenile Court system was completely revised by the 2013 General Assembly.

1) The revised Juvenile Code, in O.C.G.A. § 15-11-14(d), clarifies the procedure

that must take place when a temporary guardianship petition is transferred from the Probate Court to the Juvenile Court. When the probate court transfers a temporary guardianship matter to the Juvenile Court, the Juvenile Court may refer the case to the Division of Family and Children's Services (DFCS) for further investigation. The juvenile court is required to hold a hearing within 30 days of the date the matter is transferred from the probate court. After notice and the hearing, the Juvenile Court may determine that the establishment of the temporary guardianship is in the best interests of the child. Alternatively, the Juvenile Court may determine that the establishment of the temporary guardianship is not in the best interests of the child. In this case, if the juvenile court perceives that there is probable cause to believe that the child will be exposed to abuse, neglect, or abandonment while in the custody of his or her parent, the juvenile court must proceed to treat the matter as a "dependency matter."

2) The revised Code clarifies the procedure when a parent seeks to terminate the temporary guardianship and the Probate Court transfers the case to the Juvenile Court: As described above, the Juvenile Court must hold a hearing to determine whether the termination of the temporary guardianship is in the best interests of the child.

3) The revised Code describes the Juvenile Court's authority to order a permanent guardianship for a "dependent child." O.C.G.A. § 15-11-10 vests in the Juvenile Court exclusive original jurisdiction over any child who "is alleged to be a dependent child." A child is a "dependent child" if the child

"(A) Has been abused or neglected and is in need of the protection of the court:

(B) Has been placed for care or adoption in violation of law; or

(C) Is without his or her parent, guardian, or legal custodian."

(O.C.G.A. § 53-11-2(22)). If the Juvenile Court determines that a child is a "dependent child" the Court may take steps that result in a "permanent placement" of the child. A permanent place would be either: "A) return of the legal custody of a child to his or her parent; B) placement of a child with an adoptive parent pursuant to a final order of adoption; or C) placement of a child with a permanent guardian." If the Juvenile Court judge places the child with a permanent guardian, the judge will enter a "guardianship order," which is defined as "the court judgment that establishes a permanent guardianship and enumerates a permanent guardian's rights and responsibilities concerning the care, custody, and control of a child." A finding of dependency need not include a termination of parental rights. Thus (unlike the 2005 Revised Guardianship Code), the Juvenile Code contemplates that the Juvenile Court may place a child with a permanent guardian even if the child has one or more living parents.

Part 13 of Article 3 of the Juvenile Code sets out the procedure for the appointment of a permanent guardian of a dependent child. O.C.G.A. § 15-11-241 sets forth the required content of the petition for this type of guardianship. The required contents of this petition resemble strongly the requirements for a petition for the appointment of a guardian of a minor child under the Revised Guardianship Code. The petition filed in the juvenile court must state:

"(1) The facts upon which the court's jurisdiction is based;

(2) The name and date of birth of the child adjudicated as a dependent child;

(3) The name, address, and county of domicile of the petitioner and the petitioner's relationship to such child, if any, and, if different from the petitioner, the name,

address, and county of domicile of the individual nominated by the petitioner to serve as guardian and that individual's relationship to such child, if any;

(4) A statement that:

(A) Reasonable efforts to reunify such child with his or her parents would be detrimental to such child;

(B) Termination of parental rights and adoption is not in the best interests of such child;

(C) The proposed guardian can provide a safe and permanent home for such child;

(D) The appointment of a permanent guardian for such child is in the best interests of such child and that the individual chosen as such child's guardian is the individual most appropriate to be such child's permanent guardian taking into consideration the best interests of the child; and

(E) If such child is 14 years of age or older, that the appointment of a permanent guardian for such child is in the best interests of the child and that the individual chosen by such child as the child's permanent guardian is the most appropriate individual to be such child's permanent guardian taking into consideration the best interests of the child;

(5) Whether such child was born out of wedlock and, if so, the name and address of the biological father, if known;

(6) Whether, to the petitioner's knowledge, there exists any notarized or witnessed document made by a parent of such child that deals with the guardianship of such child and the name and address of any designee named in the document;

(7) In addition to the petitioner and the nominated guardian and, if the parent of such child has not consented to the permanent guardianship, the names and addresses of the following relatives of such child whose parents' whereabouts are known:

(A) The adult siblings of such child; provided, however, that not more than three adult siblings need to be listed;

(B) If there is no adult sibling of such child, the grandparents of such child; provided, however, that not more than three grandparents need to be listed; or

(C) If there is no grandparent of such child, any three of the nearest adult relatives of such child determined according to Code Section 53-2-1;

(8) Whether a temporary guardian has been appointed for such child or a petition for the appointment of a temporary guardian has been filed or is being filed; and

(9) The reason for any omission in the petition for appointment of a permanent guardian for such child in the event full particulars are lacking."

Items (4) and (7) are the two major differences between the petition for the appointment of a permanent guardian under the Revised Guardianship Code and the same petition under the Juvenile Code. As noted earlier, the Juvenile Code contemplates that the child may have one or more living parents whereas the Revised Guardianship Code petition must state that "the minor has no natural guardian, testamentary guardian or permanent guardian." A guardianship order issued under the Juvenile Code must include "a reasonable visitation schedule which allows the child adjudicated as a dependent child to maintain meaningful contact with his or her parents

through personal visits, telephone calls, letters, or other forms of communication or specifically include any restriction on a parent's right to visitation." Notice of a petition filed under the Juvenile Code need not be given to the child's relatives if the parents of the child consent to the petition. A hearing will be held to determine whether the guardianship is in the best interests of the child. The permanent guardianship established by the juvenile court will remain in effect until the child reaches age 18. However, the guardianship order may be modified, vacated or revoked if it is shown by clear and convincing evidence that a material change in the circumstances of the dependent child or the guardian dictates that the modification, vacation or revocation of the order would be in the best interests of the child. A guardian who is appointed by the Juvenile Court will have the same rights and duties and shall take the same oath as a guardian who has been appointed by the probate court under the Revised Guardianship Code.

D. PUBLIC RETIREMENT SYSTEM TRUSTEES (2013): New O.C.G.A. § 47-20-5 is added to provide that the duties of the trustees of public retirement systems and pension plans that are spelled out in Title 47 are "in addition to the common law duties of the trustee found in Title 53 . . . ."

E. PROBATE COURT PROSECUTING ATTORNEY (2013): New O.C.G.A. §§ 15-9-150 - 158 (Article 8 of Chapter 9 of Title 15) authorizes the appointment of a "probate court prosecuting attorney" in those counties that have no state court. The probate court prosecuting attorney will be a member of the district attorney's staff. The probate

court prosecuting attorney will handle the prosecution of the violation of any laws over which the probate court has jurisdiction, including (but not limited to) traffic cases; passing a school bus; fish and game laws; and any weapons carry license revocation or denial.

F. GUARDIANS and CONSERVATORS OF DISABLED ADULTS: H.B. 446, which revises O.C.G.A. §§ 29-4-10(b), 29-5-10(b) and 29-9-7, purports to provide enhanced notice provisions if the proposed ward was "physically present, including any period of temporary absence," in a state other than Georgia "for at least six consecutive months immediately preceding the filing of the petition or ending within the six months prior to the filing of the petition." In that case, the same notice is to be given to the people in that state who are the individuals listed in O.C.G.A. §§ 29-4-10 and 29-5-10. The individuals to whom notice is to be given are:

(A) The spouse of the proposed ward; and

(B) All children of the proposed ward; or

(C) If there are no adult children, then at least two adults in the following order of priority:

(i) Lineal descendants of the proposed ward;

(ii) Parents and siblings of the proposed ward; and

(iii) Friends of the proposed ward;

If known, the name and address of any person nominated to serve as conservator [guardian] by the proposed ward,

If known, the name and address of any person nominated to serve as conservator

by the proposed ward's spouse, adult child, or parent,

Notice may be given in any manner directed by the judge and may include notice by publication.

G. 2013: BILLS INTRODUCED BUT NOT ACTED UPON:

1) Change period under the Rule against Perpetuities from 90 years to 360 years;

2) Require that siblings, grandparents or other adult relatives of a minor be given notice and the opportunity to object to the testamentary guardian named in the will of the last parent to die;

3) Allow real property to be transferred to a trust, rather than requiring transfer to the trustee;

4) Facilitate the enforcement of an arbitration agreement that is signed upon admission to a nursing home; expand persons who can sign on behalf of the patient, including agent under an advance directive for health care or the adult children or siblings or grandchildren of the patient.