

Wills, Trusts, Guardianships, and Fiduciary Administration

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This Article examines the major cases decided and legislation enacted during the period from June 1, 2002 through May 31, 2003. The cases and statutes discussed cover the substantive law relating to decedents' estates, trusts, and guardianships, and to the fiduciaries who administer these entities. The cases also explore procedural rules that apply in litigation arising from the creation and ongoing administration of these legal relationships.

I. RECENT CASES OF NOTE

A. *Year's Support*

Year's support is the financial protection offered by Georgia law to the surviving spouse and minor children of a decedent.¹ The petitioner for year's support asks to be awarded specified property from the decedent's

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1. O.C.G.A. § 53-3-7 (1997). Year's support is available whether a decedent dies testate or intestate. *Id.* Eligibility for an award of year's support is a matter of status; that is, the surviving spouse or minor child is eligible to receive the award regardless of whether that individual was in fact being supported by the decedent. However, the degree of dependency on the decedent for support is a factor that may be determined in calculating the amount necessary for the support. See *Richards v. Wadsworth*, 230 Ga. App. 421, 423-24, 496 S.E.2d 535, 537 (1997). For a general discussion of the status and dependency theories of year's support, see MARY F. RADFORD, *REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA* § 10-1 (6th ed. 2000).

estate,² and if no objection is filed, the petitioner is awarded whatever he requests in the petition.³ If an objection is filed, the probate judge must determine and set aside as year's support "an amount sufficient to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the decedent"⁴ after considering other available means of support, the solvency of the estate, and "[s]uch other . . . criteria as the court deems equitable and proper."⁵ In recent years, the Georgia Court of Appeals has issued somewhat confusing pronouncements as to what amount constitutes an appropriate award of year's support. In *Richards v. Wadsworth*,⁶ the court of appeals upheld the probate court's decision to reduce the amount awarded to a widower by the jury, holding that the widower had ample resources of his own.⁷ The court of appeals pointed out that "[y]ear's support is not intended to pay the surviving spouse for loss of the relationship or for personal sacrifices made during the marriage."⁸ In *Driskell v. Crisler*,⁹ when determining the appropriateness of an award of year's support, the court of appeals looked not only to the couple's income in the year prior to the death of the husband, but also to the standard of living the couple enjoyed throughout their marriage and to the fact that the decedent's illness had caused their standard of living to decline substantially in the years prior to his death.¹⁰ The financial and personal sacrifices made by his wife were considered by the court of appeals in its determination of the appropriateness of the award.¹¹

In 2002 in *Hunter v. Hunter*,¹² the court of appeals reversed the probate court's grant of the marital home¹³ to a seventy-four year old widow.¹⁴ The court of appeals held that the grant of the home, valued at over \$91,000, bore no "reasonable relationship to the amount the

2. O.C.G.A. § 53-3-5(b) (Supp. 2002). The award of year's support takes precedence over other debts of the estate, except certain secured debts. O.C.G.A. §§ 53-3-1(b), -16, -17, -18 (1997).

3. O.C.G.A. § 53-3-7(a) (2003).

4. *Id.* § 53-3-7(c).

5. *Id.* § 53-3-7(c)(3).

6. 230 Ga. App. 421, 496 S.E.2d 535 (1997).

7. *Id.* at 426, 496 S.E.2d at 539.

8. *Id.* at 425, 496 S.E.2d at 538.

9. 237 Ga. App. 408, 515 S.E.2d 416 (1999).

10. *Id.* at 410-12, 515 S.E.2d at 419-21.

11. *Id.* at 410-14, 515 S.E.2d at 419-22.

12. 256 Ga. App. 898, 569 S.E.2d 919 (2002).

13. The decedent's will left the widow a life estate in the home, with the remainder to go to the decedent's sons from another marriage. The widow petitioned to have the entire interest in the home granted to her as year's support. *Id.* at 898-900, 569 S.E.2d at 919-21.

14. *Id.* at 900, 569 S.E.2d at 921.

surviving spouse need[ed] for a period of 12 months . . . to maintain the standard of living she had prior to the decedent's death."¹⁵ In this case, the court of appeals refused to consider the personal sacrifices the widow made during the marriage.¹⁶ Instead, the court looked only to the couple's style of living in the year prior to the decedent's death and to whether the surviving spouse's needs increased in the year after the decedent's death.¹⁷ In doing so, the court seemingly ignored its discussion in *Driskell v. Crisler*¹⁸ but reiterated its assertion in the 1997 case *Richards v. Wadsworth*.¹⁹ In *Richards* the court ruled that year's support is designed to support a surviving spouse rather than to compensate him for sacrifices and contributions made during the marriage.²⁰ In *Hunter* the court of appeals noted that the latter type of claim was "in essence [a claim] for equitable division of the property, [which] cannot be maintained apart from divorce proceedings."²¹

B. Wills

1. Probate of Wills in Common Form

In *In re Lyons*,²² the court of appeals added the finishing touch to its evolving doctrine concerning the disallowance of appeals from proceed-

15. *Id.* at 898, 569 S.E.2d at 920.

16. *Id.* at 900, 569 S.E.2d at 921.

17. *Id.* at 899, 900, 569 S.E.2d at 920, 921. In *Driskell* the court of appeals had previously expanded its assessment to include the style of living enjoyed by the couple throughout the marriage. 237 Ga. App. at 410, 515 S.E.2d at 420. In *Hunter* the court examined only the couple's income and needs in the year prior to the decedent's death, and it held that these varied little from the widow's income and needs in the year after his death. 256 Ga. App. at 899, 569 S.E.2d at 920. The Georgia year's support statute allows a surviving spouse to wait up to twenty-four months following the decedent's death before filing the petition. O.C.G.A. § 53-3-5(c). In *Hunter* the widow did not file her petition until a year after her husband's death, so the court had a record of her income and expenses during that year. 256 Ga. App. at 899, 569 S.E.2d at 920. The widow's evidence also indicated that she would need to retire soon due to her age, thus cutting her income appreciably, but the court of appeals noted that, even without that income, an award of the house to her would have been excessive. *Id.* at 900, 569 S.E.2d at 921.

18. 237 Ga. App. at 410-14, 515 S.E.2d at 419-22; *see supra* text accompanying notes 9-11.

19. 230 Ga. App. at 425-26, 496 S.E.2d at 538-39; *see supra* text accompanying notes 6-8.

20. 230 Ga. App. at 425, 496 S.E.2d at 538; *see also Hunter*, 256 Ga. App. at 900, 569 S.E.2d at 921.

21. 256 Ga. App. at 900, 569 S.E.2d at 921.

22. 259 Ga. App. 563, 578 S.E.2d 241 (2003).

ings to probate a will in common form.²³ In 1994 in *Freeman v. Mobley*,²⁴ the court held that there can be no appeal from the probate of a will in common form.²⁵ In 1998 in *Henderson v. McVay*,²⁶ the court determined that no one has a right to file a caveat to a petition to probate a will in common form.²⁷ In *Lyons* the court held “there is no right to appeal a probate court’s decision”²⁸ to deny the probate of a will in common form.

2. Will Construction

a. Lapse. In *Bridges v. Taylor*,²⁹ the Georgia Supreme Court construed a will that left the residue of the testator’s estate to three relatives in equal shares.³⁰ The will also provided that if any of these relatives should die before the testator, that person’s share “[would] lapse and . . . augment proportionally the remaining shares.”³¹ As fate would have it, all three of the relatives predeceased the testator. The surviving descendants of the last relative to die claimed that they should take the residue by virtue of the application of Georgia’s anti-lapse statute.³² The supreme court disagreed, noting that the anti-lapse statute applies only if a gift in a will is “absolute and without remainder

23. *Id.* at 563, 578 S.E.2d at 241. In Georgia a will may be probated in common form or in solemn form. O.C.G.A. § 53-5-15 (1997). Probate in common form requires no notice to anyone, but it is not conclusive upon the parties in interest for four years from the date the will is admitted to probate. O.C.G.A. § 53-5-16(a) (1997); O.C.G.A. § 53-5-17 (1997 & Supp. 2003); O.C.G.A. § 53-5-19 (1997). Probate in solemn form requires notice to the heirs of the testator and other parties in interest. O.C.G.A. § 53-5-22 (1997 & Supp. 2003). Although the notice takes time, once the will is admitted to probate in solemn form, it is immediately conclusive upon the parties in interest. O.C.G.A. § 53-5-20 (1997).

24. 213 Ga. App. 240, 444 S.E.2d 155 (1994).

25. *Id.* at 241, 444 S.E.2d at 156.

26. 269 Ga. 7, 494 S.E.2d 653 (1998).

27. *Id.* at 8, 494 S.E.2d at 655. A “caveat” is a contest to the validity of a will. *See* RADFORD, *supra* note 1, § 6-16. A person who desires to challenge a petition to probate a will in common form should petition the probate judge to cite the propounder of the will to probate it in solemn form and then file a caveat to that petition. *Id.* § 6-8.

28. 259 Ga. App. at 563, 578 S.E.2d at 241. The probate judge dismissed the petitions to probate two wills in common form because she noticed discrepancies in the facts presented in the petitions from earlier petitions that had been filed to probate the wills in solemn form. *Id.*, 578 S.E.2d at 241-42.

29. 276 Ga. 530, 579 S.E.2d 740 (2003).

30. *Id.* at 530, 579 S.E.2d at 741.

31. *Id.*

32. *Id.* at 530-31, 579 S.E.2d at 741. O.C.G.A. section 53-4-64, the “anti-lapse statute,” provides that, in certain cases, if a beneficiary who is named in the will dies before the testator, the testamentary gift to that beneficiary shall pass to the living descendants of the beneficiary. O.C.G.A. § 53-4-64(a) (1997).

or limitation.”³³ The court noted that the plain language of the will was conditional and expressly called for a lapse to occur if any beneficiary failed to survive the testator.³⁴ Consequently, the court held that the gift of the residue had lapsed, and thus, the residuary estate should pass to the testator’s intestate heirs.³⁵

b. In Terrorem Clause. An *in terrorem* (“no contest”) clause is a clause in a will by which the testator voids a testamentary gift to any beneficiary who attacks the validity of the will or any of its provisions.³⁶ Although recognized by Georgia law, *in terrorem* clauses are strictly construed by the courts.³⁷ This strict method of construction was applied by the Georgia Supreme Court in *Preuss v. Stokes-Preuss*.³⁸ The clause in *Preuss* called for the forfeiture of the interest of any “beneficiary” who contested the will.³⁹ One of the beneficiaries under the will was also a coexecutor who wished to bring an action to remove the other coexecutor. Prior to doing so, the beneficiary/coexecutor filed a declaratory judgment action to determine whether bringing the action against the coexecutor would cause her to forfeit her beneficial interest under the will.⁴⁰ The supreme court affirmed the probate court’s finding that the clause applied only when a “beneficiary” brought an action,⁴¹ and, as the coexecutor was bringing the action in her fiduciary capacity for the sole purpose of removing the other coexecutor, the *in terrorem* clause did not apply to forfeit her interest.⁴²

33. 276 Ga. at 531 n.1, 579 S.E.2d at 741 n.1 (citing O.C.G.A. § 53-4-64(a)).

34. *Id.* at 531, 579 S.E.2d at 741-42.

35. *Id.* If a residuary gift lapses and the anti-lapse statute is not applicable, Georgia law requires that residuary gift to be shared proportionally among the other residuary beneficiaries. O.C.G.A. § 53-4-65(b) (1997). However, if there are no other surviving beneficiaries, the gift of the residue passes by intestacy to the heirs of the testator. *Id.*

36. For a discussion of no contest clauses see RADFORD, *supra* note 1, § 8-7.

37. O.C.G.A. § 53-4-68(b) (1997). These clauses are accepted by Georgia law, provided that the will includes an alternative disposition of the testamentary gift if the clause is violated. *Id.* Because *in terrorem* clauses result in a forfeiture, they are not generally favored by the courts and are strictly construed. *Linkous v. First Nat’l Bank of Atlanta*, 247 Ga. 274, 274 S.E.2d 469 (1981).

38. 275 Ga. 437, 569 S.E.2d 857 (2002).

39. *Id.* at 437, 569 S.E.2d at 857.

40. *Id.* at 437-38, 569 S.E.2d at 857-58.

41. *Id.* at 438, 569 S.E.2d at 858.

42. *Id.*

3. Will Contests

During the 2001-2002 reporting period, in three separate will contest cases, the Georgia Supreme Court discussed the ramifications on an undue influence claim⁴³ when the testator and the alleged “influencer” are in a confidential relationship.⁴⁴ In these cases, the supreme court called into question whether the sheer existence of a confidential relationship is enough to raise the presumption that undue influence was exerted, or whether the individual accused of exerting the influence must also have played an active role in procuring the execution of the will.⁴⁵ In the two will contest cases decided during the 2002-2003 reporting period, *Duncan v. Moore*⁴⁶ and *Ashford v. Van Horne*,⁴⁷ the court made only a passing reference to this issue and shed no further light on the debate. Both cases were decided in favor of the propounders of the wills and against those who alleged undue influence.⁴⁸ In *Duncan*⁴⁹ the caveators alleged that the principal beneficiary under the will and the testator were in a confidential relationship and the “presumption of undue influence that accompanies” such a relationship

43. The validity of a will can be destroyed by “undue influence whereby the will of another is substituted for the wishes of the testator.” O.C.G.A. § 53-4-12 (1997).

44. The three cases were *Harper v. Harper*, 274 Ga. 542, 554 S.E.2d 454 (2001), *White v. Regions Bank*, 275 Ga. 38, 561 S.E.2d 806 (2002), and *Jones v. Sperau*, 275 Ga. 213, 563 S.E.2d 863 (2002) discussed in Mary F. Radford, *Wills, Trusts, and Administration of Estates*, 54 MERCER L. REV. 583, 588-93 (2002).

A relationship:

shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc.

O.C.G.A. § 23-2-58 (1982). The O.C.G.A. also provides as follows:

Where, by the act or consent of parties or the act of a third person or of the law, one person is placed in such relation to another that he becomes interested for him or with him in any subject or property, he is prohibited from acquiring rights in that subject or property which are antagonistic to the person with whose interest he has become associated.

O.C.G.A. § 23-2-59 (1982).

45. See Radford, *supra* note 44, at 588-93.

46. 275 Ga. 656, 571 S.E.2d 771 (2002).

47. 276 Ga. 636, 580 S.E.2d 201 (2003).

48. *Duncan*, 275 Ga. at 656, 571 S.E.2d at 771; *Ashford*, 276 Ga. at 636, 580 S.E.2d at 201.

49. In this case, the testator left her home and the surrounding land to a couple who were not related to her but who had taken care of her. Her nearest surviving relatives (nieces and nephews) caveated the will. 275 Ga. at 656, 571 S.E.2d at 772.

had not been rebutted.⁵⁰ The supreme court cited a few cases that defined confidential relationships and undue influence,⁵¹ but then concluded that the finding of undue influence was one for the fact-finder and evidence that the testator was a strong-willed woman who was “sharp as a tack”⁵² supported the jury’s verdict against the caveators.⁵³ In *Ashford* the individual accused of exerting undue influence drove the testator to his attorney’s office for his first consultation concerning his will.⁵⁴ However, without mentioning the concept of confidential relationship, the court pointed out the propounder had neither actually been present with the testator in the lawyer’s office nor otherwise participated in the will’s execution.⁵⁵

C. Personal Representatives

Two cases decided during the reporting period explore the circumstances under which an executor, exercising discretionary powers spelled out in the will, may violate the rule against engaging in conflicts of interest. In *Harp v. Pryor*,⁵⁶ one of the testator’s three sons was appointed the executor of her estate. The principal assets of the estate were cash and shares of stock in a family company. The residuary beneficiaries of the estate were the three sons, who were to take the residue in equal shares. The will granted the executor the power to make distributions of the estate in cash or in kind, and all in-kind distributions were to be made at the discretion of the executor. The son, who was the executor, knew that if he made equal distributions of the shares of stock, one of his brothers, who already owned a substantial number of shares, would become the controlling shareholder of the company. Consequently, the son petitioned the probate court for permission to make unequal distributions of the shares (resulting in equal ownership of the company by the three brothers) and to make up for the unequal distribution of stock by distributing cash to the brother who already owned a substantial number of shares. The probate court found that such an action on the part of the executor would be proper

50. *Id.* at 657, 571 S.E.2d at 773.

51. *Id.* at 658, 571 S.E.2d at 773-74.

52. *Id.*

53. *Id.*

54. 276 Ga. at 636, 580 S.E.2d at 201. The caveator in this case was the estranged wife of the testator. The propounder of the will was the testator’s sister. The supreme court affirmed summary judgment granted in favor of the propounder, noting that there was nothing unreasonable about a testator who was facing a divorce excluding his wife from his will. *Id.* at 638, 580 S.E.2d at 204.

55. *Id.* at 638, 580 S.E.2d at 204.

56. 276 Ga. 478, 578 S.E.2d 424 (2003).

because the wording of the will was unambiguous, and the distribution would not violate any term of the will.⁵⁷ The supreme court reversed, holding that the “peculiar facts” of this situation indicated a conflict of interest on the part of the executor.⁵⁸ The court pointed out that an executor’s discretion is “not unfettered” and that an executor is bound by the general duty of fiduciaries to avoid conflicts of interest.⁵⁹ The dissenting justices⁶⁰ argued that the majority’s holding amounted to a rewriting by the court of an unambiguous will and pointed out that the testator easily could have provided in her will for an equal distribution of the stock if that was what she wanted to occur.⁶¹

The second conflict of interest case also involved siblings suing siblings. In *Bloodworth v. Bloodworth*,⁶² two siblings were named as coexecutors under their mother’s will. The estate included real property, and a codicil to the will provided that the property should be appraised and sold with the net proceeds to be divided among the children.⁶³ The codicil included the following provision: “The sales price, time of sale, method of sale, and all other decisions concerning the sale, shall be in the absolute discretion of my Co-Executors.”⁶⁴ The coexecutors apparently believed that this clause granted them unfettered discretion because, at a family meeting, they told the other siblings that this meant they “could do whatever they wanted to do.”⁶⁵ The coexecutors ignored one brother’s bid to buy the property (made at a value close to the value later assigned by the board of tax assessors) and, without his knowledge, sold the property to another brother at appreciably below market value.⁶⁶ The trial court found the coexecutors’ actions to be appropriate

57. *Id.* at 478, 578 S.E.2d at 425.

58. *Id.* at 479, 578 S.E.2d at 425.

59. *Id.* at 478, 578 S.E.2d at 425. The court looked to O.C.G.A. section 53-7-1(a) and stated that “[t]he applicable statute does not declare the executor to be a fiduciary, but the executor is bound by the ‘rules generally applicable to fiduciaries to act in the best interests of all persons who are interested in the estate and with due regard for their respective rights.’” *Id.* (quoting O.C.G.A. § 53-7-1(a) (Supp. 2002)). The court in fact was quoting the last sentence in subsection (a) of this statute, but failed to note that the fourth sentence of the same subsection states expressly that “[a] personal representative is a fiduciary.” O.C.G.A. § 53-7-1(a) (2003).

60. Justices Sears, Hunstein, and Carley joined in the dissenting opinion. 276 Ga. at 479, 578 S.E.2d at 425-26 (Carley, J., dissenting).

61. *Id.*

62. 260 Ga. App. 466, 579 S.E.2d 858 (2003).

63. *Id.* at 470, 579 S.E.2d at 861.

64. *Id.*

65. *Id.* at 467, 579 S.E.2d at 859.

66. *Id.* at 467-68, 579 S.E.2d at 859-60. The first brother bid approximately \$429,000 for the property. An appraisal made at about the same time valued the property at

and granted summary judgment in their favor.⁶⁷ The court of appeals reversed, pointing out that the acts of coexecutors “are not beyond the reach of judicial inquiry”⁶⁸ and that their overwhelming duty was to act in the “utmost good faith.”⁶⁹

D. Settlement Agreements

It is only in recent years that the use of alternative forms of dispute resolution,⁷⁰ particularly mediation,⁷¹ have become common in probate and estate matters.⁷² Mediations and other settlement negotiations

\$525,500. A month after the sale, the board of tax appraisers valued the land at \$476,300. The second brother actually bought the land for \$315,000. *Id.* at 467-69, 578 S.E.2d at 859-60. The first brother’s lawyer entered into an agreement that no action would be taken on the sale of the property for at least a week, but the coexecutors immediately sold the property during that week to the second brother without notifying the first brother. *Id.* at 468-69, 578 S.E.2d at 860-61.

67. *Id.* at 466, 578 S.E.2d at 859.

68. *Id.* at 471, 578 S.E.2d at 861.

69. *Id.* (quoting *Liner v. North*, 188 Ga. App. 677, 678, 373 S.E.2d 846, 848 (1988)).

70. The term “alternative dispute resolution” is defined as follows:

Catchall generic term referring to ways in which a society with a formal, state-sponsored [adjudicative process] attempts to resolve disputes without using that process. It is a class of [dispute resolution] mechanisms and is commonly understood to include alternatives to the formal adversary method of trial or [litigation], as that process is understood in Western, particularly [common law], systems. Thus it includes [negotiation, mediation, arbitration,] and their variations.

DICTIONARY OF CONFLICT RESOLUTION 17 (Douglas H. Yarn ed., Jossey-Bass Books 1999). The “alternative dispute resolution movement” emerged in the United States in the 1960s. *Id.* at 20. See also Bridget Genteman Hoy, *The Draft Uniform Mediation Act in Context: Can it Clear Up the Clutter?*, 44 ST. LOUIS U. L.J. 1121, 1126 (2000). Court sponsored mediation programs began to proliferate in the mid-1970s. *Id.* at 1127.

71. For purposes of this Article, the term “mediation” will be defined as follows:

Mediation is a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or “self-determination”) by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement.

This definition is the one used in the *Model Standards of Conduct for Mediators* developed in 1992-1994 by a joint committee of the American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution, available at <http://www.abanet.org/ftp/pub/dispute/modstan.txt>.

72. As recently as six years ago, one commentator noted that the use of mediation in probate and guardianship cases was “in its infancy.” Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 434 (1997). See also Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601 (2000). Yet, more recently,

often result in binding settlement agreements entered into by the parties. Four cases handed down during the reporting period were appeals challenging the enforceability of such agreements.⁷³

The most significant of these cases is *Leone Hall Price Foundation v. Baker*.⁷⁴ In this case, the supreme court invoked wills law, trust law, and contract law in holding that trustees of a charitable testamentary trust, which would have dissolved as a result of a settlement agreement, were “beneficiaries” who would be affected by the agreement and thus were necessary parties to the agreement.⁷⁵ The testator executed a will and a trust agreement shortly before she died. The will directed the bulk of her estate to the trust. The trust established the Leone Hall Price Foundation (“the Foundation”), whose general purpose was to fund activities related to education, historic preservation, and environmental projects in seven named Georgia counties. The attorney who drafted the documents was named as cotrustee of the trust (along with his spouse) and executor under the will. Some of the testator’s heirs caveated the will, and the probate court ordered the parties to try to settle the case. The attorney general and the state revenue commissioner represented the ultimate beneficiaries of the charitable trust in the settlement negotiations and consented to the settlement agreement.⁷⁶ Under the agreement the Foundation would be dissolved and the funds disbursed to fund projects in one of the counties. The parties to the settlement sought to have the settlement approved by the probate court as allowed

courts and practitioners have begun to recognize the value of alternative dispute resolution, particularly mediation, in resolving estate disputes. See Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 164 n.13 (2002), in which Professor Madoff notes that court sponsored mediation programs have been established in courts in Georgia, Washington, and Texas, among other jurisdictions.

73. The settlement agreements in these cases either arose or were invoked in the context of litigation on estate matters. In addition to *Leone Hall Price Foundation v. Baker*, 276 Ga. 318, 517 S.E.2d 779 (2003), discussed at *infra* text accompanying notes 74-84, the other three cases are: *Guthrie v. Guthrie*, 259 Ga. App. 751, 577 S.E.2d 832 (2003) (discussing the enforceability of a settlement agreement made in the course of divorce proceedings); *Griffin v. Wallace*, 260 Ga. App. 857, 581 S.E.2d 375 (2003) (discussing whether an offer made during a mediation session remained open and could still be accepted after the session concluded); and *Adcock v. Adcock*, 259 Ga. App. 514, 577 S.E.2d 842 (2003) (discussing whether a settlement agreement entered into while a couple was separated was enforceable after the wife moved back in with and lived with the husband in the month before his death).

74. 276 Ga. 318, 577 S.E.2d 779 (2003).

75. *Id.* at 319-20, 577 S.E.2d at 781-82.

76. *Id.* at 318, 577 S.E.2d at 781. O.C.G.A. section 53-12-115 provides that the attorney general or the county district attorney “in which the major portion of [the] trust . . . lies” are to represent the interests of the beneficiaries of charitable trusts. O.C.G.A. § 53-12-115 (1997).

by Official Code of Georgia Annotated (“O.C.G.A.”) section 53-5-25.⁷⁷ The trustees objected to the settlement agreement, but the probate court approved the agreement over their objection. The trustees appealed, contending that O.C.G.A. section 53-5-25(b) requires the consent of all “beneficiaries” to a will for the court to approve a settlement agreement and that the Foundation was in fact a “beneficiary” whose consent was required.⁷⁸ The probate court found that the trustees did not have a true “beneficial interest” in the trust property and thus their consent was not required.⁷⁹ The supreme court held that the trustees were “beneficiaries” as contemplated by O.C.G.A. section 53-5-25(b) because the Foundation was “affected” by the settlement agreement, and the trustees were bound by their fiduciary duty to defend the trust as a separate legal entity that had been established in accordance with the settlor’s express intent.⁸⁰ The court, noting that compliance with the settlement statute was not mandatory,⁸¹ also examined trust law and contract law to determine whether the trustees’ consent was required.⁸² Basic trust law indicates that a trust cannot be terminated, even if all of the beneficiaries consent, if the termination is not in accord with the settlor’s intent.⁸³ Under basic contract law, the court held that the trustees were required to be parties to any agreement that purported to bind them.⁸⁴

E. Miscellaneous Fiduciary Litigation Issues

Five cases in the reporting period were appealed on procedural, rather than substantive, grounds. This subsection includes a brief synopsis of the procedural “lessons” that fiduciary lawyers can take from the decisions in these cases.

77. 276 Ga. at 320, 577 S.E.2d at 782. O.C.G.A. section 53-5-25 allows, but does not require, parties to a settlement to have that settlement approved by the court. The statute authorizes “[a]ll individuals who are *sui juris* and affected by such a settlement agreement . . . to enter into such an agreement” and requires the agreement to be signed by “all the heirs of the testator and . . . [the] beneficiaries [who are] affected by such settlement.” O.C.G.A. § 53-5-25(b) (1997).

78. 276 Ga. at 318-19, 577 S.E.2d at 781.

79. *Id.*

80. *Id.* at 319, 577 S.E.2d at 781-82.

81. *Id.* at 320, 577 S.E.2d at 782.

82. *Id.* at 319, 577 S.E.2d at 781.

83. *Id.* at 319-20, 577 S.E.2d at 781-82.

84. *Id.* at 320, 577 S.E.2d at 782.

1. Lesson 1—File on Time

In two cases the question at issue was whether the appeals had been timely filed. In *In re Estate of Dasher*,⁸⁵ although neither party raised the issue on appeal, the court of appeals determined that the notice of appeal was not timely filed.⁸⁶ O.C.G.A. section 5-6-38(a) requires appeals to be filed within thirty days of the date of the decision being appealed.⁸⁷ The executor's appeal was filed thirty-three days after the date of the probate court's order. The thirtieth day after the decision was rendered was Good Friday, which was then followed by the weekend.⁸⁸ O.C.G.A. section 1-3-1(d)(3) allows a filing to be deferred to the next business day if the prescribed date for filing falls on a "public and legal holiday."⁸⁹ Good Friday was declared a county holiday by Cobb County.⁹⁰ The court of appeals noted that even when a courthouse is closed, provision is often made for an alternative means of filing documents.⁹¹ The record did not reveal whether the executor had even tried to file the notice on Good Friday or had just assumed that the courthouse would be closed and he would be unable to file.⁹² The court of appeals also noted that a party may request an extension of time to file a notice of appeal under O.C.G.A. section 5-6-39(a)(1).⁹³ There was no evidence that the executor requested an extension. The court of appeals held that it was not "free to disregard" the untimeliness of the filing and described several cases with far more compelling circumstances in which the time period had nevertheless been stringently applied.⁹⁴

85. 259 Ga. App. 201, 576 S.E.2d 559 (2002). In this case, an attorney who was the nephew of the decedent's widow was appointed executor of the decedent's estate. Pursuant to an action brought by the decedent's children from a prior marriage, the executor was ordered by the Cobb County Probate Court to pay back money erroneously distributed to him as commissions and to restore certain items that were missing from the estate. The executor appealed to the court of appeals. *Id.* at 201, 576 S.E.2d at 560.

86. *Id.* at 206, 576 S.E.2d at 562-63.

87. O.C.G.A. § 5-6-38(a) (1995).

88. 259 Ga. App. at 202-03, 576 S.E.2d at 560-61.

89. O.C.G.A. section 1-4-1 (1997) lists the "public and legal holidays," but does not include Good Friday. In fact, O.C.G.A. section 1-4-2 (1997) limits religious holidays to Sundays.

90. 259 Ga. App. at 203, 576 S.E.2d at 560.

91. *Id.*, 576 S.E.2d at 561.

92. *Id.*

93. *Id.* at 203-04, 576 S.E.2d at 561; see O.C.G.A. § 5-6-39(a)(1) (1995).

94. 259 Ga. App. at 204, 576 S.E.2d at 561-62.

In *Wilson v. Hinely*,⁹⁵ the father of the decedent filed a complaint for abusive litigation against the alleged common law husband of the decedent, who had sought to be appointed the administrator of her estate.⁹⁶ However, the court of appeals confirmed the trial court's finding that the complaint was not timely filed because it was filed one day later than the expiration of the one year statute of limitations.⁹⁷ The father argued that the statute of limitations did not begin to run until the court of appeals issued the remittitur following its decision.⁹⁸ The court of appeals disagreed, holding that the "final termination" of the proceedings (referenced in the abusive litigation statute, O.C.G.A. section 51-7-84) occurred when the court of appeals issued its unchallenged opinion affirming the order of the probate court.⁹⁹

2. Lesson 2—Don't Attempt to Expand a Hearing Beyond the Scope of the Notice Given

In *In re Estate of Zeigler*,¹⁰⁰ a beneficiary under Ms. Zeigler's will filed a petition requesting the probate court to order the executor to provide her with information about certain property of the estate.¹⁰¹ The probate court issued a rule nisi order instructing the executor to appear to show cause why "the relief prayed for should not be granted."¹⁰² The executor did not appear at the hearing, although her attorney did appear on her behalf. The probate court removed the

95. 259 Ga. App. 615, 578 S.E.2d 254 (2003).

96. *Id.* at 615, 578 S.E.2d at 255. The decedent was survived by her father and a man who claimed to be her common law husband. The alleged husband petitioned to be appointed administrator, but the probate court denied his petition on the ground that no common law marriage existed. He appealed and the court of appeals affirmed the denial. *Id.*

97. *Id.* at 616, 578 S.E.2d at 256. O.C.G.A. section 51-7-84(b) provides as follows: "An action or claim under this article requires the final termination of the proceeding in which the alleged abusive litigation occurred and must be brought within one year of the date of final termination." O.C.G.A. § 53-7-84(b) (1997). The court of appeals decision on the appointment of the administrator was issued on February 17, 1999, and no petition for reconsideration or for certiorari was filed. On February 18, 2000, the father filed a complaint for abusive litigation against the alleged husband. Summary judgment was granted on the ground that the complaint was filed later than the one-year statute of limitations. 259 Ga. App. at 615, 578 S.E.2d at 255.

98. 259 Ga. App. at 615, 578 S.E.2d at 255.

99. *Id.* at 616, 578 S.E.2d at 255.

100. 259 Ga. App. 807, 578 S.E.2d 519 (2003).

101. *Id.* at 807, 578 S.E.2d at 520.

102. *Id.*, 578 S.E.2d at 521.

executor for failure to appear, and the executor appealed.¹⁰³ The court of appeals held the removal improper because the executor had not received proper notice that the revocation of her letters was at issue.¹⁰⁴

3. Lesson 3—Remember the Limits on Punitive Damages

The case of *Sims v. Heath*¹⁰⁵ concerned a sister's lawsuit against her two brothers for breach of fiduciary duty in their administration of the estate of the children's father. The jury awarded compensatory damages (around \$1 million) and punitive damages (\$404,633) to the sister, and the brothers were removed as executors of the estate.¹⁰⁶ The court of appeals examined some thirteen alleged procedural errors on appeal.¹⁰⁷ Although the court of appeals decided most of these claims in favor of the sister,¹⁰⁸ the court did reduce the punitive damages award to \$250,000.¹⁰⁹ In reviewing an award for punitive damages, the appellate court must determine whether the award is grossly excessive on due process grounds and whether it is within the bounds set forth by Georgia statutory law.¹¹⁰ The court of appeals held that the award was not grossly excessive,¹¹¹ but determined that the award in question fell

103. *Id.* at 808, 578 S.E.2d at 521. At the same time that the executor appealed, the probate court vacated its order and issued a second rule nisi order, this time ordering the executor to appear to show cause as to why her letters testamentary should not be revoked. The executor again did not appear, but her attorney did appear on her behalf. The probate court removed her and appointed a new executor. The court of appeals dealt only with the first probate court order because it noted that the appeal of that order had acted as a supersedeas, thus preventing the probate court from vacating its order and from all of its subsequent actions. *Id.*

104. *Id.* at 809, 578 S.E.2d at 522. The court of appeals noted that the executor had failed to respond to numerous requests for information made by the beneficiary and that such failure could constitute "good cause" for removal (as required by O.C.G.A. section 53-7-55(1)). *Id.* However, the lack of notice to the executor caused the court of appeals to reverse the case and remand it to the probate court. *Id.*

105. 258 Ga. App. 681, 577 S.E.2d 789 (2002).

106. *Id.* at 681, 577 S.E.2d at 791.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 688 n.26, 577 S.E.2d at 795 n.26 (citing *Time Warner Entm't Co. v. Six Flags Over Ga., LLC*, 254 Ga. App. 598, 563 S.E.2d 178 (2002)).

111. *Id.* at 688, 577 S.E.2d at 795. The court noted that "the compensatory damages exceeded the punitive damages by a ratio of over two to one, and sanctions for comparable misconduct are sufficiently similar to satisfy due process." *Id.*

within the confines of O.C.G.A. section 51-12-5.1(g), which limits the award of punitive damages in most tort actions to \$250,000.¹¹²

4. Lesson 4—Service that Meets the Statutory Requirements Constitutes Proper Service Regardless of Whether it is Actually Received

*Adams v. Adams*¹¹³ was another family dispute in which one sibling, as personal representative of his mother's estate, sued his brother Thomas, and Thomas's wife Joann, to recover a house that he claimed they had inappropriately obtained from the mother when she was suffering from Alzheimer's related dementia. Thomas and his wife were represented by the same attorney. Thomas was personally served at his home, and a copy of the complaint and summons was also left for Joann.¹¹⁴ Georgia law allows service to be accomplished "by leaving copies [of the complaint and summons] at [the defendant's] dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."¹¹⁵ Joann never responded to the summons. It was later discovered that she and Thomas had been estranged and both had been living in the home but in a state of separation. Also, at some point, Thomas informed the executor that he would settle with him and assist him in the litigation against Joann. Joann claimed first that she had not been validly served with process.¹¹⁶ The court of appeals held that the service had been made in accordance with the statutory process and that it was immaterial that the two had become hostile towards each other and estranged.¹¹⁷ Joann also disputed that she had been validly served with discovery requests (to which she had never responded) because they were put in the same envelope and addressed to both Thomas and Joann.¹¹⁸ The court of appeals again held that the requests were properly served.¹¹⁹

112. *Id.* Subsections (f) and (g) of O.C.G.A. section 51-12-5.1 (2000) limit the award of punitive damages in cases that do not involve product liability to \$250,000 unless it can be shown that the defendant acted with "the specific intent to cause harm." The court of appeals did not find such intent in the actions of the two brothers. *Id.* at 688, 577 S.E.2d at 795-96.

113. 260 Ga. App. 597, 580 S.E.2d 261 (2003).

114. *Id.* at 598, 580 S.E.2d at 263.

115. O.C.G.A. § 9-11-4(e)(7) (1997 & Supp. 2002).

116. 260 Ga. App. at 600, 580 S.E.2d at 265.

117. *Id.* at 600-01, 580 S.E.2d at 265.

118. *Id.*

119. *Id.* at 601-02, 580 S.E.2d at 265.

F. Trusts

In the two cases involving trusts that were decided during the reporting period, the predominant question was whether the statute of limitations for filing actions against the trustee had run. The applicable statute of limitations for a breach of trust claim depends upon when the claim arises. For claims that arise on or after July 1, 1991, the action must be brought within six years of the date the beneficiary received a written report that adequately disclosed that a claim existed or, if there is no report, within six years of the date the beneficiary discovered or reasonably should have discovered the subject of the claim.¹²⁰ If the claim arose prior to July 1, 1991, the applicable date on which the claim is barred by the statute of limitations is the earlier of ten years from the date the cause of action accrued, or six years from July 1, 1991.¹²¹

In *Snuggs v. Snuggs*,¹²² both statutes of limitations were used because some of the trustee's activities that were arguably a breach of trust occurred before July 1, 1991, and others occurred after that date.¹²³ The case involved an "oral, implied trust"¹²⁴ for the "advanced educations" of the settlors' grandchildren.¹²⁵ The trustees were the parents of plaintiff and other grandchildren of the settlors. Plaintiff's action was dismissed because the trial court found he had not filed it within the time prescribed by the appropriate statute of limitations.¹²⁶ The supreme court reversed the trial court's judgment and remanded the case.¹²⁷ The court examined three incidents in the life of the trust to determine the date on which the statute of limitations

120. O.C.G.A. § 53-12-198(a) (1997). The statute provides in part as follows:

A report adequately discloses existence of a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into the existence of the claim. If the beneficiary has not received a report which adequately discloses the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within six years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim.

Id.

121. O.C.G.A. § 9-3-27 (1993 & Supp. 2002); O.C.G.A. § 53-12-198(d) (1997).

122. 275 Ga. 647, 571 S.E.2d 800 (2002).

123. *Id.* at 647, 571 S.E.2d at 800.

124. *Id.* The existence of such a trust is questionable because Georgia law requires all express trusts to be in writing. O.C.G.A. § 53-12-20 (1997). However, neither of the parties in the case seemed to raise this issue. 275 Ga. at 647, 571 S.E.2d at 801.

125. 275 Ga. at 647, 571 S.E.2d at 801.

126. *Id.*

127. *Id.*

began to run.¹²⁸ In the first incident, which occurred in 1986, plaintiff's parents denied his request for funds for his undergraduate education.¹²⁹ The court held that this denial was not a violation of the trust because the trust had not been established to fund the undergraduate educations of the grandchildren.¹³⁰ The second incident was a request by the son in 1991 for an accounting and disbursement from the trust. At that time, the parents explained to him that he was the owner of twenty-five percent of the trust, but all assets were to remain in the trust until the last beneficiary finished his advanced education. Also at this time, the parents truthfully claimed that they were not using the trust for their personal expenses.¹³¹ The court determined consequently that a cause of action did not arise at this point because there was still no breach of the trustees' fiduciary duty.¹³² The third incident occurred in 1997, when plaintiff's mother declared that she intended to use the trust assets for her own benefit and in fact did so.¹³³ At this point the court found that a breach had occurred and that plaintiff had timely filed his action on that violation of the trust.¹³⁴

In *Goldston v. Bank of America Corp.*,¹³⁵ the court of appeals reversed the trial court's decision to dismiss a plaintiff's complaint as time-barred.¹³⁶ The statute of limitations at issue in this case was a ten-year statute of limitations.¹³⁷ The trustee was a predecessor of the Bank of America ("the Bank"). The trust had been set up by a father in conjunction with his divorce from the beneficiaries' mother. The major asset of the trust was undeveloped land in Atlanta, Georgia.¹³⁸ The father/settlor expressed his desire that the property be held, if possible, until it "ha[d] reached maximum enhancement in value."¹³⁹ One half of the trust property was to be distributed to each child when that child reached age twenty-one. The trust required the trustee to make full annual reports to the children and to honor a child's request for full information as to the condition of the trust estate.¹⁴⁰ For purposes of

128. *Id.* at 648-49, 571 S.E.2d at 801-02.

129. *Id.* at 648, 571 S.E.2d at 802.

130. *Id.*, 571 S.E.2d at 801-02.

131. *Id.* at 649, 571 S.E.2d at 802.

132. *Id.*, 571 S.E.2d at 801-02.

133. *Id.*, 571 S.E.2d at 802.

134. *Id.*

135. 259 Ga. App. 690, 577 S.E.2d 864 (2003).

136. *Id.* at 690, 577 S.E.2d at 866.

137. *See supra* text accompanying notes 120-21.

138. 259 Ga. App. at 690, 577 S.E.2d at 866.

139. *Id.* at 691-92, 577 S.E.2d at 867.

140. *Id.* at 691, 577 S.E.2d at 867.

the motion to dismiss, the Bank conceded as “true” allegations that the Bank had never disbursed the assets to anyone for the children’s support nor had it made annual reports or turned over to each child that child’s one half interest when the child reached age twenty-one.¹⁴¹ The beneficiaries did not even discover that the trust existed until their mother was found to be incapacitated and one of them took over her financial affairs. Five years after discovering the existence of the trust, one of the children filed a suit for breach of fiduciary duty and fraud. The Bank argued, and the trial court agreed, that the suit was time barred because the last breach of fiduciary duty occurred in 1970, when the Bank failed to distribute the trust assets after the second child reached age twenty-one.¹⁴² The court, however, agreed with the beneficiaries that the statute of limitations was tolled by the fraud engaged in by the Bank when it failed to disclose the existence of the trust and failed to comply with any of its provisions.¹⁴³

G. Guardianships

In *Cross v. Stokes*,¹⁴⁴ the Georgia Supreme Court examined the constitutionality and applicability of a Georgia statute that applies exclusively to guardianships that are instigated by the Department of Veterans Affairs.¹⁴⁵ Title 29 of the O.C.G.A. contains a chapter devoted to guardians of “mentally incompetent wards”¹⁴⁶ and minors who are due moneys from the United States Department of Veterans Affairs.¹⁴⁷ These guardianships are governed by the provisions of the Uniform Veterans Guardianship Act, which is incorporated in Chapter 6 of Title 29.¹⁴⁸ The statute at issue in this case, O.C.G.A. section 29-6-11(c), provides as follows:

Unless a guardian under this chapter is the next of kin under the laws of descent and distribution of the State of Georgia, no such guardian shall be named as a beneficiary under the last will and testament of

141. *Id.* at 694, 577 S.E.2d at 869. Undisputed evidence also indicated that the Bank had in fact sold the land back to the father (through his second wife) less than two years after the trust was created. The Bank had held the proceeds in trust. *Id.* at 692, 577 S.E.2d at 867.

142. *Id.* at 692-93, 696, 577 S.E.2d at 868, 870.

143. *Id.* at 696, 577 S.E.2d at 870. The court of appeals noted that “[t]he sun never sets on fraud.” *Id.* at 693, 577 S.E.2d at 868.

144. 275 Ga. 872, 572 S.E.2d 538 (2002).

145. *Id.* at 872, 572 S.E.2d at 538.

146. A “mentally incompetent ward” is an adult who has been rated as “incompetent” by the Department of Veterans Affairs. O.C.G.A. §§ 29-6-1, -3 (2001).

147. O.C.G.A. §§ 29-6-1 to 29-6-18 (2003).

148. *See id.*

his or her ward under any will executed while the guardian is serving as such. Any provision in any such will to the contrary shall be null and void.¹⁴⁹

The testator in *Cross* had a will that bequeathed one half of his estate to his cousin and one half to Cross, the family attorney, who also was serving as the testator's guardian at the time he wrote his will. The testator had originally been declared incompetent by the Department of Veterans Affairs in 1952, and his father was appointed his guardian.¹⁵⁰ When his father died, his mother was appointed as his guardian. When his mother died, the family attorney was appointed guardian.¹⁵¹ When the testator died, "the probate court, citing 'somewhat unusual' circumstances,"¹⁵² appointed a guardian ad litem for unknown heirs.¹⁵³ The guardian ad litem brought to the court's attention the provisions of O.C.G.A. section 29-6-11(c). The other beneficiary under the will petitioned to serve as administrator with the will annexed, and the probate court granted her petition on the condition that she file a petition for declaratory judgment to determine the effect of that statute on the will's provisions. The attorney filed his own petition for declaratory judgment, claiming the statute was unconstitutional. The probate court found the statute to be constitutional and held that it applied to preclude the attorney from taking any of the testator's estate.¹⁵⁴

The Georgia Supreme Court affirmed the finding of the probate court.¹⁵⁵ The court first determined that the appeal was timely filed¹⁵⁶ and then examined whether the probate court had jurisdiction to issue a declaratory judgment in the case.¹⁵⁷ Citing O.C.G.A. section 9-2-4 (which gives the superior courts the right to issue declaratory judgments) and O.C.G.A. section 15-9-127 (which gives certain probate courts concurrent jurisdiction with the superior courts in proceedings for declaratory judgment regarding fiduciaries), the court concluded that the probate court had properly exercised declaratory judgment jurisdiction.¹⁵⁸ Next, after a brief discussion of the history of the guardianship, the court dismissed the attorney's technical argument that he was

149. O.C.G.A. § 29-6-11(c) (2003).

150. 275 Ga. at 872, 876, 572 S.E.2d at 540-41, 543.

151. *Id.* at 876, 572 S.E.2d at 543.

152. *Id.* at 872, 572 S.E.2d at 541.

153. *Id.*

154. *Id.* at 872-73, 572 S.E.2d at 541.

155. *Id.* at 878, 572 S.E.2d at 544-45.

156. *Id.* at 874, 572 S.E.2d at 542.

157. *Id.* at 874-75, 572 S.E.2d at 542.

158. *Id.* at 875, 572 S.E.2d at 542.

not serving as a Veterans Affairs (“VA”) guardian.¹⁵⁹ Then, the Georgia Supreme Court addressed whether the statute was unconstitutional under the Georgia and federal constitutions.¹⁶⁰ First, the court determined that the title to the bill, which became the statute, contained an appropriate reference to the subject matter of the bill.¹⁶¹ Second, the court addressed the attorney’s contention that the statute violated the equal protection clauses of the United States and Georgia Constitutions because it applied more restrictive rules for wards who had been found incompetent by the Department of Veterans Affairs than other wards.¹⁶² The court applied the “rational basis” standard to test the statute because no fundamental right or suspect classification was involved.¹⁶³ The court concluded that the State has a legitimate interest in protecting VA wards and that the statute was rationally related to that interest.¹⁶⁴ Finally, the court addressed the attorney’s

159. *Id.* at 875-76, 572 S.E.2d at 542-43. Due to an error in the probate court proceeding, the attorney was originally appointed as the testator’s “general guardian” rather than as his “VA guardian.” At the request of the Department of Veterans Affairs, the initial letters of guardianship were revoked and replaced with letters indicating that the attorney was serving as a “VA guardian.” *Id.* at 876, 572 S.E.2d at 543.

160. *Id.* at 876-77, 572 S.E.2d at 543-44.

161. *Id.* at 876, 572 S.E.2d at 543. The Georgia Constitution prohibits the passage of a bill “which . . . contains matter different from what is expressed in the title thereof.” GA. CONST. art. III, § 5, para. 3. The court noted that “[t]he 1996 legislation that contained what has been codified as § 29-6-11(c) was entitled, ‘Guardian and Ward—Guardians’ Compensation and Expenses; Guardianship of Beneficiaries of United States Department of Veterans Affairs.’” 259 Ga. App. at 876, 572 S.E.2d at 543 (citing 1996 Ga. Laws 1174). Among the legislation’s stated purposes was “to provide for a comprehensive change in the guardianship of beneficiaries of the United States Department of Veterans Affairs . . . and for other purposes.” *Id.*

162. 259 Ga. App. at 877, 572 S.E.2d at 544.

163. *Id.*

164. *Id.* at 878, 572 S.E.2d at 544. The court applies the “rational basis test” when no fundamental right or suspect classification is involved. *Id.* The court quoted from *Craven v. Lowndes County Hospital Authority*, 263 Ga. 657, 659, 437 S.E.2d 308, 310 (1993):

Under [the rational basis] test, the court will uphold the statute if, under any conceivable set of facts, the classification bears a rational relationship to a legitimate end of government not prohibited by the Constitution. Those challenging the statute bear the responsibility to “convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”

263 Ga. at 659, 437 S.E.2d at 310. The Georgia Supreme Court held that the state had a legitimate interest in protecting VA wards and that the prohibition of a VA guardian from taking under the will of a VA ward was a legitimate means by which Georgia could accomplish this protection. 275 Ga. at 878, 572 S.E.2d at 538. Further, the court concluded that the statute’s underinclusiveness in not protecting all wards in the same way (in other words, because non-VA wards do not have the same protection under Georgia’s general guardianship law) would not cause the statute to fail under the rational basis test.

argument that the statute should be limited only to moneys received by the guardian from the Department of Veterans Affairs over which the guardian had control.¹⁶⁵ The supreme court looked to the wording of the statute and, finding that wording unambiguous, refused to read any limitation into the reach of the statute.¹⁶⁶

II. 2003 LEGISLATION

In 2003 the Georgia General Assembly enacted only two laws that are relevant to decedents' estates and trusts.

A. *Presumption of Death*

Prior to the 2003 amendment, Georgia law provided two circumstances under which an individual who was missing could be deemed dead so that his estate could be administered. Under O.C.G.A. section 53-9-1(a), an individual who has been missing for four or more years is presumed to be dead.¹⁶⁷ This presumption is rebuttable.¹⁶⁸ Under subsection (b) of this same Code section, an individual can be proved dead by a preponderance of the evidence if that individual has been missing for twelve months or more.¹⁶⁹ After the tragedy of the World Trade Center on September 11, 2001, it became evident that there are circumstances in which an individual's death is virtually certain. In such circumstances, the requirement that the administration of the individual's estate be suspended for at least one year seems both unnecessarily harsh and unrealistic. The State of New York responded to this tragedy by suspending or modifying a number of its rules relating to the presumption of death and the issuance of death certificates.¹⁷⁰ With the 2003 amendment, Georgia law now allows the death of an individual to be proven "at any time" with "clear and convincing evidence" if the individual "has been exposed to a specific peril or tragedy resulting in probable death."¹⁷¹

Id. at 877-78, 572 S.E.2d at 544.

165. 275 Ga. at 878, 572 S.E.2d at 544.

166. *Id.*

167. O.C.G.A. § 53-9-1(a) (1997 & Supp. 2003).

168. *Id.*

169. *Id.* § 53-9-1(b).

170. See Wallace L. Leinhardt, *How to Help When Mass Disaster Strikes: The New York 9/11 Experience*, 16 PROB. & PROP. 19 (Sept./Oct. 2002).

171. O.C.G.A. § 53-9-1(d) (2003). Interestingly, New York already had a similar statute in place at the time of the World Trade Center tragedy. N.Y. Estates, Powers, and Trust Law § 2-1.7 (McKinney 1998). This statute was applied to a victim of the tragedy in *In re LaFuente*, 743 N.Y.S.2d 678 (2002).

B. Oral Trusts for Life Insurance

The O.C.G.A. requires all express trusts to be in writing.¹⁷² However, a statute enacted in 2003 allows a limited exception to this rule for trusts for which the initial corpus is a life insurance policy.¹⁷³ New O.C.G.A. section 53-12-22.1 provides that such a trust can be created “by [an] oral agreement” between the settlor and the trustee that “is evidenced by one or more contemporaneous . . . documents.”¹⁷⁴ The written evidence must include the identities of the settlor, trustee, and beneficiaries, the nature of the insurance policy, and “[w]hether the trust is revocable or irrevocable.”¹⁷⁵ The trust will terminate within six months “unless sooner terminated by the settlor.”¹⁷⁶ The purpose of this limited oral trust is to cover situations in which the settlor has purchased a life insurance policy and named a trust as beneficiary but has not yet had the opportunity to reduce the trust to writing.¹⁷⁷ Under the statute, the settlor must reduce the trust to writing within six months or lose the protection of the statute.¹⁷⁸

172. O.C.G.A. § 53-12-20(a) (1997).

173. O.C.G.A. § 53-12-22.1 (2003).

174. *Id.* § 53-12-22.1(b).

175. *Id.* § 53-12-22.1(c).

176. *Id.*

177. E-mail correspondence dated 5/28/03 and 6/1/03, between author and Rep. Jerry Keen (R-SH 146), a cosponsor of the bill that resulted in this new statute. On file with author.

178. O.C.G.A. § 53-12-22.1(c).