THE COURT SYSTEM & YOU

A PRIMER FOR NON-PROFIT ORGANIZATIONS & CHURCHES

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The primary purpose of this publication and seminar is to provide a basic understanding of the organization and structure of the legal system and judiciary in the State of Georgia, specifically Cobb County. As a secondary function, the presentation will demonstrate the fundamental applications of domestic relations and family law which are likely to be encountered by non-profit social service organizations and churches. Finally, an overview of the probate system and procedures is provided.

This presentation will review the following areas:

1) Organization and Functions of Different Areas of the Judiciary (State and County Level)
2) Introduction to Civil and Criminal Proceedings
3) Domestic Relations & Family Law Basics
    a. Marriage
    b. Legal Separation
    c. Temporary Protective Orders
    d. Divorce
    e. Post-Divorce Modification Actions
4) Probate Law

This presentation is designed to allow leaders and members of the social service sector to more adequately counsel and advise and direct those with whom they come in contact. This presentation is not designed to constitute case-specific legal advice, nor should any member of a social service or church organization undertake to provide case specific legal advice. The materials presented and the seminar do not constitute the formation of an attorney-client relationship.

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STATEWIDE ORGANIZATION AND FUNCTIONS OF JUDICIARY

The Judicial Branch of State of Georgia is organized by region into 49 "circuits." Larger counties (Cobb, Fulton, Gwinnett) are a circuit by themselves. Other rural counties are collected into geographic circuits and named accordingly. Each county, regardless of size, has a Superior Court, a Juvenile Court and a Probate Court. Larger counties, including Cobb, have a State Court and a Magistrate Court. The specific types of cases each is authorized to hear (generally jurisdiction) is provided in more detail below. The number of Judges in the Superior Court and Juvenile Court is determined by the size of the circuit. In areas of less population, the Judges are shared by each court and "ride the circuit". Each County has its own Probate Judge. Counties and municipalities also maintain traffic courts which are not discussed herein.

From the Superior Court, Georgia provides generally for appeals to the Court of Appeals and Supreme Court. Although there are exceptions as noted below, the Court of Appeals is generally a Court of first appeal wherein a party is entitled to review and the Supreme Court is a court of discretionary appeal wherein a party is entitled to review of cases of public importance.

Understanding the organization and designated functions of each Court will enable guidance and direction regarding the operations of the judicial system. In many instances, jurisdiction is overlapping causes similar types of cases to be handled by different courts. Also, many circuits (including Cobb County) utilize lower tier judges (Magistrate and Juvenile) and retired Senior Judges as assisting Superior Court Judges. In these situations a Judge may be an appointed Juvenile Court Judge, but is hearing a case wearing a Superior Court Judge "hat". In order to ease confusion, we will focus here on the different Courts rather than Judges. The following outline provides the general role of each of the aforementioned Courts (working from the top downward).[1] Afterward, the operation of the Cobb County Judiciary is provided.

[1] Background information courtesy of the Administrative Office of the Courts. www.georgiacourts.gov

The Supreme Court of Georgia

The Supreme Court of Georgia is primarily a Court of discretionary review. In other words, a losing party does not have a right to appeal the matter to the Supreme Court, but must ask permission of that Court in order to present an appeal. In these instances, the Supreme Court does not consider appeals involving the weight of and sufficiency of the evidence below. Instead, the Court grants appeals only when clear reversible error exists, the establishment of precedent is desirable, development of the common law (particularly in divorce cases) is desirable or the matter is of great concern, gravity or importance to the public.

As a basic rule, most matters reach the Supreme Court by grant of permission to review a decision from the Court of Appeals. There are exceptions to this rule which include most notably, appeals from the trial court in equity cases, divorce cases, cases involving title to land and death penalty criminal cases.

There are 7 members of the Georgia Supreme Court, although the Georgia Constitution allows for up to nine. All cases heard by the Georgia Supreme Court are heard "en banc" or as a full panel. In addition, all matters considered by the Georgia Supreme Court are decided following an oral argument by the parties. Cases are resolved by a majority opinion. The author of the opinion is determined by the Chief Justice, however, each Justice may submit his or her own concurring or dissenting opinion.

The current members of the Supreme Court of Georgia are (by seniority):

Carol Hunstein, Chief Justice
Robert Benham, Justice
Hugh Thompson, Justice
P. Harris Hines, Justice
Harold Melton, Justice
David Nahmias, Justice
Keith Blackwell, Justice

The Court of Appeals of Georgia

The Georgia Court of Appeals is often referred to as the "working" appellate court. This is not to imply that the members of the Supreme Court do not work, but rather is a reference to the dramatic contrast in the way the caseload is presented. Unlike the Supreme Court, the Court of Appeals has only limited ability to control the number and type of cases presented.

As a general matter, the Georgia Court of Appeals reviews cases decided at the trial court level. A party at the trial court level has the right to appeal the case to the Court of Appeals to review for legal error and the sufficiency of the evidence.

Due to the increased workload, the Court of Appeals is divided into four panels of three members. The entire court sits "en banc" only when reversing prior decisions or by agreement of the Judges. The three member panels each hear oral argument only on the cases where they allow it. The majority of cases are decided on written briefs submitted by the parties.

The current members of the Court of Appeals are:

Chief Judge John Ellington	Judge A. Harris Adams
Presiding Judge Anne E. Barnes	Judge William Ray
Presiding Judge M. Yvette Miller	Judge Elizabeth Branch
Presiding Judge Herbert Phipps	Judge Michael Boggs
Presiding Judge Sarah Doyle	Judge Stephen Dillard
Judge Gary Andrews	Judge Chris McFadden

The Superior Courts of Georgia

Each of the 159 Counties of Georgia has a Superior Court with 205 total Superior Court Judges. The Superior Court is a court of "general" jurisdiction, meaning that, but for a few exceptions, the Superior Court is authorized to hear virtually any kind of proceeding. In some smaller, rural counties and circuits, the Superior Court does in fact hear virtually every type of case, from small claims, warrants, misdemeanors, evictions through divorces, land matters and felony criminal matters.

The Superior Court is also a designated appellate court for certain matters. Tax appeals, zoning and licensing matters and appeals from the magistrate court, municipal courts and, in smaller counties, the probate court are all heard in the Superior Court. The Superior Court also serves as the host Court for the Grand Jury. The Grand Jury is handled by the local District Attorney. Each regular Grand Jury is charged with indictments of criminal offenses and also with regular audits of County facilities and operations. The Superior Court also administers special Grand Juries convened by the District Attorney to investigate a single matter.

The State Courts of Georgia

Unlike the Superior Court, every County does not have a State Court. There are 70 State Courts and 122 State Court judges. This Court operates as a Court of "limited" jurisdiction and exists to take pressure and caseload away from the Superior Court for the larger counties. The State Court is authorized to hear all kinds of civil cases except divorce and family law matters, equity cases, land cases and cases involving injunctions. The State Court can and does handle criminal cases, but is not authorized to hear any felony criminal cases.

In those counties with a State Court, the general operation is to have the State Court hear and consider most criminal misdemeanor and traffic offenses. On the civil side, the State Court considers contract cases and landlord/tenant cases, but the majority of the civil cases are tort cases

involving personally injury. Since the State Court is generally able to move faster, the lawyers handling these types of cases prefer to file there.

The Probate Courts of Georgia

Much like the Superior Court, there is a Probate Court in each of the 159 Counties of Georgia. Each County has one Probate Judge. The Probate Court is dedicated largely to the administration of guardianships, conservatorships (formerly known as guardians of property) and estates of the deceased. The Probate Court is also the administrative court for marriage licenses and gun licenses.

In larger Counties, the Probate Court functions as a full trial court wherein the participants can have a trial by jury on designated issues. In smaller Counties, no right to a jury trial exists, however, the parties may appeal to the Superior Court in those counties and have a jury trial there. Interestingly, in smaller counties, the Probate Court Judge is not even required to be a lawyer.

The Juvenile Courts of Georgia

A Juvenile Court also exists in each of the 159 Counties, although each County does not have its own Juvenile Court Judge. There are 120 Juvenile Court Judges in total. Unlike all of the Courts above, Juvenile Court Judges are not elected by the citizens of the County, but are appointed by the Superior Court.

The Juvenile Court has exclusive jurisdiction over delinquent minor children (those under 17) and deprived/unruly children under the age of 18. Juvenile Courts also assist Superior Courts in felony matters, domestic relations matters, adoption and cases wherein parental rights are being terminated. The Juvenile Court also has jurisdiction over traffic offenses involving minors, minors wish to consent to marry and minors desiring to enlist in the military.

The Magjstrate Courts of Georgia

Each county has a Magistrate Court, however, the operation of the Court differs by County. Each County has a Chief Magistrate who is generally an elected judge (though not required to be elected). Other magistrate judges are appointed by the Chief Magistrate. The Chief Magistrate Judge is a full time position, but all other magistrate Judges may be part-time. As with Probate Judges, in smaller counties Magistrate Judges are not required to be lawyers.

The Magistrate Court is often called "small claims" court since the civil docket of the Magistrate Court includes only matters wherein the claim does not exceed $15,000.00. Jury trials are not permitted. The Magistrate Court also considers landlord/tenant matters, bad check cases and some county ordinance violations. In criminal matters, the Magistrate Court Judges perform a vital role. These Judges (at least one of whom is on call 24 hours per day) handle the issuance of arrest and search warrants, determine and set bail bonds and provide newly arrested individuals with the Constitutionally guaranteed first appearance hearing.

The Municipal and Traffic Courts of Georgia

There are 370 Municipal Courts functioning in Georgia in various incorporated cities throughout the State. Each municipal court varies in terms of the scope and operation. These courts hear and consider traffic offenses and other minor criminal matters occurring within the local jurisdiction. These courts may also hear and issue criminal warrants within the incorporated municipality.

Cobb County Organization and Functions of The Judiciary

Based on the number of Judges, Cobb County is the third largest judicial operation in the State (trailing Fulton and Dekalb). Cobb County has all of the Courts discussed above in full operation.

The Superior Court of Cobb County

The Superior Court Judges

The Superior Court, including the offices of the Clerk and the District Attorney, are now all located in the new Courthouse on Haynes Street. The Superior Court of Cobb County consists of 10 elected judges and four assisting Senior Judges. The ten elected Judges are:

Chief Judge Adele Grubbs	
Judge Gregory Poole Judge Robert Leonard Judge Mary E. Staley Judge James G. Bodiford Judge S. Lark Ingram	Judge Robert Flournoy Judge J. Stephen Schuster Judge C. LaTain Kell Judge Reuben Green

The four assisting Senior Judges are: Judge Conley Ingram, Judge Grant Brantley, Judge George Kreeger and Judge Michael Stoddard. Each Senior Judge assists on a one-week rotating basis. The Senior Judges administer the jury oaths, call the daily uncontested divorce calendar, hear and consider temporary protective orders and hear and consider emergency matters.

In addition to the Senior Judges, the Cobb Superior Court Judges also designate one of the four Cobb Juvenile Court Judges as an assisting Superior Court Judge on a one-week rotating basis. Each Judge receives the assistance of a Juvenile Court Judge once every ten weeks. The Superior Court Judge is able to delegate any matters to that Judge for hearing. Most of the Superior

Court Judges use this time to delegate the regular criminal and domestic calendars while they are presiding over a lengthy criminal or civil jury trial.

Various officials, elected and appointed, operate within the Superior Court. These officials each serve different roles in the administration and operation of the Court. Depending upon your interaction with the Court and the type of matter presented, you could come into contact with any of the following.

The District Attorney (Vic Reynolds)

The District Attorney is elected county-wide and is charged with the prosecution of felony cases in the Superior Court and the administration of the Grand Jury. The Cobb County District Attorney's office includes divisions and Assistant District Attorneys for the prosecution of different types of crimes, including specialized areas such as white-collar crime and sex offenses. In addition, the Cobb County District Attorney's office includes staff advocates for the coordination and representation of victims of crimes. Victims in Georgia have certain statutory rights concerning restitution, testifying and sentencing of criminal defenders. The Cobb District Attorney's office is charged with ensuring that those rights are respected.

The Clerk of Superior Court (Rebecca Keaton)

The Clerk of Superior Court is elected county-wide and is charged with the keeping of all of the real estate records for the County and also with all of the civil and criminal case files of the Cobb Superior Court. If someone is filing a new case in the Superior Court or wishes to review the files of an existing or closed case, the Clerk's office is the place. In addition, the Clerk oversees the application of notaries and also the registry of the Court. Individuals who receive money from or are required to pay money into the registry of the Court do so through the Clerk's office.

The Cobb County Sheriff (Neil Warren)

The Cobb County Sheriff is elected county-wide. The Cobb County Sheriff maintains a division for the investigation and arrest of crimes. However, for purposes related to the Judiciary, the Sheriff is charged with the administration of the jail, courthouse security and additional tasks such as service of process and ensuring peaceful evictions, repossessions and asset levies and seizures.

The Office of Superior Court Administration (Tom Charon)

The Superior Court Judges appoint and hire a Superior Court Administrator. This individual is in charge of the internal operation and administration of the Superior Court. In short, the Superior Court Administrator is tasked with making sure that the Judges have who they need and what they need to do their jobs. The Superior Court Administrator is also charged with the process of jury summons, selection and administration.

Superior Court Judges' Staff

Each Superior Court Judge has a staff of professionals to assist in the maintaining of files, records, calendars and to aid in the decision making process. These individuals are often the out of court contact between the public and the Judge. In many instances, anyone needing information concerning a case or calendar will interact with the Judge's staff (note below a discussion regarding ethical issues to be concerned with in these situations). Each Judge maintains an administrative assistant who keeps the Judge's schedule, the courtroom calendar and serves as a receptionist for the office. The Judge also has a courtroom clerk who is charged with maintaining all of the case files assigned to the Judge. Judges also have a court reporter who takes a stenographic record of all desired judicial proceedings in the event that a transcript is later required. Finally, Judges have a Staff Attorney (formerly Law Clerk) who is a lawyer, frequently just out of law school, who provides research and writing assistance to the decision making process.

The State Court of Cobb County

The State Court Judges

The State Court of Cobb County operates much in the same fashion as the Superior Court. The State Court is located on East Park Square in the Northern-most building. The State Court Judges are divided into two divisions. Division I is the trial court of the State Court, hearing misdemeanors and civil cases in which a jury trial is possible. Division II, or traffic court, hears and considers County traffic offenses and other minor offenses in which a jury trial is not permitted.

The Judges of the State Court, by division are:

Division I	Division II
Judge Carl Bowers	Judge Eric Brewton
Judge Melodie Clayton	Judge Bridgette Campbell
Judge David Darden	Judge Marsha Lake
Judge Maria Golick	Judge Jason Fincher
Judge Irma Glover	
Judge Toby Prodgers	
Judge Kathryn Tanksley	

The Solicitor General (Barry Morgan)

The Solicitor General is to the State Court what the District Attorney is to the Superior Court, without the additional assignments related to the Grand Jury. The Solicitor General is elected county-wide. He, together with a staff of assistant solicitors and other staff, are charged with the prosecution of misdemeanor offenses in the State Court.

The Clerk of the State Court (Diane Webb)

The State Court Clerk is elected county-wide. The duties mirror that of the Superior Court Clerk, with the notable exception of the responsibility related to maintenance of the real estate records and indexes.

The Office of State Court Administration (Frank Baker)

The State Court Administrator and his staff have duties mirroring the operation of the Office of Superior Court Administration.

State Court Judges' Staff

The Staff of a State Court Judge mirrors that of a Superior Court Judge, with the exception of the Division II State Court Judges who do not have assigned court reporters or Staff Attorneys.

The Probate Court of Cobb County

The current Judge of the Probate Court of Cobb County is a county wide elected position currently held by Kelli Wolk. The Probate Court is located on the ground floor of the Courthouse building on Waddell Street. Judge Wolk has an appointed Clerk of the Probate Court (Ophelia Chan) whose duties are similar to that of the Clerk of State Court. Judge Wolk also has a support staff including a Staff Attorney and Court Reporter.

The Juvenile Court of Cobb County

The Juvenile Court Judgeships are currently held by Judge James Whitfield, Judge Juanita Stedman, Judge Joanne Elsey and Judge Jeff Hamby. The Juvenile Court is currently located at 1738 County Services Parkway (formerly County Farm Road) across from the jail. The Judges share two administrative assistants, but do not have Staff Attorneys.

Due to the unique nature of their operation, the Juvenile Court has a wide range of support and administrative personnel designed to protect and

advocate for the rights of individuals, particularly the minor children, in the Court. These agencies and advocates are an important intermediary between the public and the Judge throughout the proceedings.

For the prosecution, two assistant District Attorneys are assigned by DA Pat Head to prosecute the delinquency and unruly cases in the Juvenile Court. A trial investigator is assigned to assist the ADAs in prosecution by investigating cases and preparing witnesses and victims. A victim-witness coordinator also assists in this role.

Child Advocate Attorneys are assigned to represent children whose families are indigent and who are either status offenders or have delinquent charges. Child Advocates Attorneys also represent a party in a child deprivation case or may act as the guardian ad litem for a child in such cases.

The Judicial Citizens Review Panel (5 specifically trained volunteers) meets monthly to review the welfare of children in Department of Family and Children Services (DFACS) custody. The Panel's ultimate task is to see that the child is in a permanent home as soon as safely possible. The permanent home may be back with parents or guardians who have improved their parenting practices, with a relative, with an adoptive family, or with another permanent home approved by the Court.

A Court Appointed Special Advocate (CASA) is a specially trained volunteer appointed by a judge to speak up for the best interest of an abused or neglected child involved in a juvenile court child deprivation proceeding. CASA volunteers serve as the eyes and ears of the court. They interview anyone who may be able to shed light on the child's needs and personally relate to the child so the child has a knowledgeable friend in the system. The CASA goes to court and makes recommendations to the judge, based on their independent assessment, about what is in the child's best interests. The CASA remains involved to keep the focus on the child until the case is permanently resolved. If a child is ordered to foster care or is returned to a family under certain restrictions, the CASA continues to work with the child to ensure that the court order is effective and is being adhered to.

The Juvenile Court also has Youth Diversion and Community Service

Programs to deal with juvenile offenders. These programs are designed to give non-violent offenders a reasonable opportunity to do good works and follow a path of restitution and restoration to society.

The Court also maintains probation officers and supervisors, therapists and intake coordinators. All of these professionals are designed and trained specifically to deal with the issues presented to the Juvenile Court involving children of all ages.

The Magistrate Court of Cobb County

The Magistrate Court of Cobb County is located in the courthouse building on Waddell Street. The Cobb County Magistrate Court is a 24 Hour Court and is one of the only courts (of any kind) in the State of Georgia which allows for E-Filing of new cases and answers and maintains an E-Calendar system. The elected Chief Magistrate is currently Frank Cox. He is assisted by one full time magistrate Judge, Judge Joan Bloom. As a 24 hour court operation, there are 12 additional lawyers who serve as part-time magistrate court judges, one of whom is always on call.

Although these claims do not necessarily have to be heard in the Magistrate Court, as a general rule most all of the residential landlord/tenant matters, bad check cases, abandoned vehicle cases, county ordinance cases and garnishments are handled in the Magistrate Court. In addition, the Magistrate Court is the Court which performs weddings, even though the Probate Court issues licenses and any Judge is authorized to legally perform a marriage. Ceremonies are held weekly at 6 p.m. or on weekends at noon and 6 p.m. or by appointment.

The Magistrate Court operates under a very relaxed standard regarding the rules of evidence and presentation of the case. This Court is one of the few remaining forums wherein litigants can, and often do, appear without a lawyer. The Judges do have an understanding that the participants may not present the case in the precisely proper fashion, however, anyone appearing in Magistrate Court must still remember that the Judge is impartial and the decider of the facts. The Judge cannot and will not help either side to present evidence or argument.

Specialty Accountability Courts in Cobb County

Accountability Courts are newly created function of the Judiciary designed to target specific offenders tied to drugs and alcohol. The design of the Court is to foster personal responsibility in conjunction with Judicial oversight and punishment. The Court and Court staff have a team oriented approach which is designed to work together to restore a willing participant back to society without long term incarceration.

The Adult Felony Drug Court (Judge George Kreeger) is intended to change offender behavior through the Superior Court and District Attorney's Office. Participants in Drug Courts are persons who have committed non-violent drug related crimes who have no history of drug sales offenses. The length of the program is usually 24 – 30 months.

The DUI Court (Judge Melodie Clayton) is intended to address repeat DUI offenders though the State Court and Solicitor General's Office. Participants in DUI Court are persons who have had at least 2 DUI arrests in 5 years or 3 DUI arrests in a lifetime. The length of the program is usually 12 – 24 months.

The Juvenile Drug Court (Judge Juanita Stedman) focuses on the juvenile while at the same time addressing the needs of the family through the Juvenile Court and District Attorney's Office. Participants in Juvenile Drug Courts are juveniles that have been arrested for drugs and or alcohol related offenses. The length of the program is usually 12 – 24 months.

The Family Dependency Treatment Court (Judge Juanita Stedman) works with the adult parents who have lost custody or are in danger of losing custody of their children due to abuse of drugs or alcohol through coordination with the Juvenile Court, the District Attorney's Office and DFACS. While the participant is involved, the family goes through counseling with a focus on prevention for the children and a design to change offender behavior and reunite families. The length of the program is usually 24 – 30 months.

FUNDAMENTAL CIVIL AND CRIMINAL PROCEDURE

There are some fundamental procedures and guidelines which warrant understanding and discussion for those who are parties, victims or witnesses in a civil or criminal case. The following provides a brief overview of the procedures which are followed in most civil and criminal cases. Included within each section are certain legal and ethical matters which anyone involved with litigation should be aware.

A CIVIL CASE

Initiation & Response

With only a limited number of exceptions, a civil case is initiated by filing the same with the Clerk of the proper court and service of process. In order to file a case, the individual must complete the required case initiation forms and submit a complaint. In certain matters (most notably domestic matters), the Complaint must be verified. In other matters, such as fraud, the Complaint must be specific regarding the conduct alleged. Finally, matters such as malpractice cases require the contemporaneous submission of certain affidavits.

Along with the Complaint, a domestic litigant is required to submit the Georgia required parenting plan, domestic relations financial affidavit and child support worksheets. Currently, the Cobb County Superior Court Clerk is not strictly enforcing this rule, but surrounding counties are not as lenient. If these documents are not filed with the Complaint, they are required to be submitted within a specified number of days prior to any hearing. In Fulton County, the Family Law Division of the Superior Court has another complete list of documents and records which are required to be submitted within 30 days of the Complaint.

Service of process is one of the most misunderstood aspects of initiating litigation. Proper service of process exists and is strictly enforced due to the due process guarantees afforded under the United States and

Georgia Constitutions. Quite often, litigants without counsel appear in Court for a hearing attempting to inform the Judge that the documents had been mailed to the opposing party. Not only is service improper, but the Judge cannot hear or consider anything related to the case and, most importantly, the Judge cannot give the litigant guidance or direction on what is wrong or how to serve the matter correctly.

In almost all cases, service must be personal. Personal service is most generally effectuated by having the Sheriff or private process server deliver the documents in person. Corporations are served personally by delivery to their registered agents, as recorded in the Office of the Georgia Secretary of State. Georgia law does allow for substituted, non-personal service is some instances. However, the circumstances are limited and technical motions must usually be filed and granted in advance.

Once proper service has been effectuated, the responding party has a period of time, usually 30 days in the State system and 20 days in the Federal system, in which to answer and file responsive pleadings. The party answering a case must admit or deny the allegations of the Complaint, raise any legal defenses and, if one exists, file a Counterclaim or Cross-claim against any additional, necessary parties. There are certain defenses and claims which must be raised in this first answer or they are lost.

After the submission of the Answer, it is incumbent upon the parties (particularly the filing party – "plaintiff" or "petitioner") to move the case along. Many parties mistakenly believe that the Judge's office will set hearings, rule on motions or consider other matters. In a domestic case, the parties can have a temporary hearing or status quo hearing. In non-domestic cases, the parties may have an early court date to resolve preliminary motions.

Prosecution

In most cases, The parties each have the right to conduct discovery of the other party for a period of six months from the date of the Answer. Discovery can include written questions, written requests for documents, request for documents to third parties, inspection of property and things and

also depositions. Depositions are most often a face to face question and answer session which is recorded by a court reporter. Parties are completely on their own in the process of sending and responding to discovery. The Court does not assist or handle discovery for either party. The Court will only intervene in the event a dispute arises over discovery.

During or after the discovery phase, most cases are ordered or referred to mandatory mediation. Mediation is a very different process than arbitration, though the two are frequently confused. Arbitration can be agreed upon by both parties either by contract before any action arises or at any point during litigation. Arbitration involves the parties submitting the case to an "arbitrator" who decides the case. Arbitration is usually considered in instances where the subject matter is specialized and the parties wish to try the case to a specialist in the industry and in instances in which the parties want a speedy or non-public resolution. Arbitration clauses are also buried in many consumer contracts (most notably credit card agreements) in an effort to force consumers out of their home states and into a more predictable and friendlier forum for the card issuers. The ability of a party to appeal from an arbitration decision is severely limited.

Mediation, on the other hand, is non-binding. Mediation is also confidential. Mediation involves the parties each coming together with a trained third party mediator in an effort to settle the case. The parties are free to cease mediation at any time and pursue a trial. A party gives up nothing by attending mediation.

During and following the discovery/mediation phase, the parties may also submit motions to the Court to resolve non-final issues such as discovery problems, witness and evidentiary issues or temporary matters related to the case. The parties can also submit motions for summary judgment, which are motions designed to resolve the all or part of case finally and favorably to one side or the other. These motions are generally filed by the Defense.

Following mediation and pre-trial motions, the case proceeds into a trial status phase. The parties must prepare and submit documents to the Court announcing that they are ready for trial. In non-domestic cases, this document is a Pre-Trial Order. At this point, the case is placed on a trial calendar and the parties are reached in turn.

Court Calendars

Whether the case involves a small matter taking only a few hours or minutes or a complex matter consuming weeks of trial, the civil calendaring process is generally the same and merits introduction. Each Judge handles the calendar process differently; however the fundamentals are the same. The calendar process is also substantially similar whether the matter is on for its initial hearing or the final one.

Cases are set on calendars by the parties. The only instance wherein a Judge will set a case on a calendar and call the matter to court is on a special calendar known as a peremptory calendar. Peremptory calendars are used by Judges to call old, stale cases and see whether or not they can be dismissed for lack of prosecution. When a party sets the case on a calendar, the party will receive a hearing date. It is important to understand that that hearing date is likely given to dozens of other litigants. Parties expecting to appear and have the entire day are almost always disappointed.

The Judge will commence at the time given with a "call of the calendar." The litigants are expected to stand, announce that they are present and provide the Judge with 1) the type of matter involved (i.e. "temporary hearing on child support") 2) the approximate time estimate for the hearing and 3) whether or not they wish to have a court reporter present. If the parties do wish to have a court reporter take their case down, the court reporter must be paid that day for her work.

The Judges then take all of the time announcements and recast the calendar from shortest matters to longest. Some Judges only use one day calendars and other Judges spread the cases over an entire week. If the parties' announcement is such that the case will consume an entire day or more, the Judge may specially set that case for a certain day and time when the parties may have the entire day(s) just for their case.

In Cobb County, the parties, family, friends and witnesses may be somewhat surprised at a certain air of informality which exists during calendar announcements where most or all of the matters involve lawyers. The Cobb County Bar Association is very social and close knit. Lawyers often

use these appearances to talk socially, talk about matters in other files and even to discuss the matter at hand. Very often the Judges will ask or demand that the lawyers be excused to talk and to try and resolve all or parts of the case in order to reduce the matters for the Judge to consider. Some of the Judges also host private conferences with the lawyers (without the parties) to hear a synopsis of the case. In these moments, the Judges are trying (without having to have the entire public hear the private facts) to determine what the case is generally about. The Judge may hear a brief statement of the facts and issues from each attorney and give some preliminary thoughts and conclusions for the purpose of aiding the parties and lawyers in coming to a consent resolution. These conferences are becoming increasingly common in domestic cases.

Legal, Ethical and Practical Problems

There are hosts of procedural traps and ethical and legal problems which present throughout the prosecution of a civil case. Many of the pitfalls are ingrained into lawyers, Judges and others associated with the Judiciary that they are never brought to the attention of the public.

The most frequently encountered ethical issue relates to ex-parte communications with the Court. The Rules of Professional Responsibility prohibit lawyers from engaging in ex-parte communications with the Court except in limited and controlled circumstances. An ex-parte communication is one-sided, that is only one of the parties is present for the conversation. The Code of Judicial Conduct extends this rule to Judges and their staff. The issue arises when witnesses, pro se parties and others not subject to or aware of the prohibition initiate the communication.

The usual example comes when a witness or party contacts the Judge's office by phone or email to discuss the case. The general rule allows communications for the purpose of non-substantive matters such as calendaring, scheduling, ordering transcripts, etc... In fact, all litigants (including non-lawyers) are well-advised to contact a Judge's office in advance of a calendar to find out about the length of the calendar and other procedures and processes expected of the parties upon arrival in the Courtroom. The problem arises when a litigant or witness begins to discuss

the matter in substance. This communication is improper. Interestingly, the party should know that such communication might have the exact opposite effect of what was desired. When someone contacts the Judge in an attempt to persuade the Judge outside of Court, they might actually force the Judge to recuse himself or herself from the case.

An additional example comes in the form of casual conversation. Parties might see a Judge or member of the Judge's staff at a social function, restaurant or similar setting and feel compelled to share an opinion with the Judge or thought about the case. These conversations are equally problematic. The Judge or member of his staff may gain insight or information which was not presented in evidence. If the Judge did engage in the conversation and share information, it could be misconstrued as an extra-judicial statement on a pending matter and be problematic. The safest bet is to discuss anything with Judges and/or their staff other than what he or she did at work that day.

A final example of improper ex parte communication comes in the form of letters written and mailed to the Court without copy to the other party. Surprisingly, one of the most frequently asked questions of the lawyers in this firm is whether a party, witness, parent, relative or some other person should send the Judge a letter. This conduct is in violation of the ex parte communication and should not occur.

Other procedural and ethical traps involve communications with opposing lawyers. Members of the public forget that lawyers are bound with a duty of almost unyielding loyalty to their clients along with a duty of confidentiality. In this arena, there are two frequent issues that arise. First, the Rules of Professional Conduct prohibit a lawyer from speaking to someone who is represented by Counsel. Often, the litigants (either to save money or make sure the message got delivered) will contact the opposing lawyer directly. This conduct creates an ethical problem for the lawyer and should be avoided. Secondly, witnesses and other involved individuals want to make comments to the lawyer "off the record." The lawyer cannot keep information from his or her client. The best bet is to assume that anything said to the lawyer will be repeated to the client.

A Criminal Case

The process for initiation of a criminal case depends on whether the matter is brought in the State Court (misdemeanor) or in the Superior Court (felony). Misdemeanor cases in the State Court are initiated by a citation or by an arrest pursuant to a warrant. The case is then brought to an accusation by the Solicitor's office.

In the Superior Court, most felony cases are reviewed and indicted by a grand jury. Matters can reach the grand jury either before or after an arrest warrant has issued. The grand jury reviews and weighs the evidence presented by the police and the District Attorney to determine if the grand jury believes that probable cause exists for the crime, the matter proceeds. Since the grand jury process is entirely one sided and there is no defense to present evidence or argument, very few cases which are presented do not get indicted. There are certain felonies (largely drug and firearm cases) which can be accused by the District Attorney without the requirement of the grand jury.

Following the indictment or accusation, the individual has the right to a formal reading and presentation of the charges ("arraignment"), the right to be represented by appointed counsel if indigent and the right to enter a plea of guilty or not guilty.

The criminal process does not have the formal discovery process that the civil process carries. The District Attorney is required to open its file and share all of the information (including potentially exculpatory information) in the case with the defense. The defense has no such burden. The calendaring and trial process for criminal trials is similar to that for civil trials.

All of the ethical, legal and procedural problems regarding improper communications covered above apply equally, if not more so, in criminal cases. In serious criminal cases, such as death penalty murder cases, juries may even be sequestered and given little to no contact with the outside world during the trial in order to ensure that no improper information is passed.

Criminal cases also present an additional legal problem for non-parties involved. State and Federal laws criminalize the obstruction of justice.

Witnesses, family members and others with knowledge about criminal activity can be guilty of obstruction of justice by failing to disclose the activity to a law enforcement officer during an investigation, misleading or lying to a law enforcement officer during an investigation, assisting in concealing a crime and/or failing to appear pursuant to a lawful subpoena for a criminal matter. As a general rule, no one is obligated to report a crime or turn someone in, however, the lines in this regard are blurry and often lawyers can and do reasonably disagree. In addition, the lines and obligations change as an investigation and crime proceeds. By way of example, if you witness someone exit a bank from a bank robbery and speed past you, the failure to phone it in is not a crime. However, if contacted by the police and asked if you saw anything and you say "no", you have committed obstruction of justice.

Domestic Relations & Family Law Basics

Marriage

A marriage license is issued in any county, if one of the parties is a resident of Georgia, the license can be issued in any county. If neither party is a resident of Georgia, the license must be issued in the county in which the marriage ceremony is to be performed. The applicants must designate on the application the last name that will be used after the marriage. The fee for the marriage license is waived if the parties have a certificate of completion of a qualifying premarital education program. The premarital education shall include at least six hours of instruction (completed together) involving marital issues, which may include but not be limited to conflict management, communication skills, financial responsibilities, child and parenting responsibilities, and extended family roles. The premarital education shall be completed within 12 months prior to the application and can only be administered by a licensed professional counselor, social worker or therapist, a psychiatrist who is licensed as a physician, a psychologist or an active member of the clergy who is trained and skilled in premarital education.

Premarital blood tests are no longer required, although the State still recommends that each applicant applying for a marriage license obtain a blood test for sickle cell disease. Parties must be of sound mind, must have no living spouse from an undissolved prior marriage and must be at least 18 years of age without parental consent. If either or both parties are less than 18 years of age, but at least 16 years of age, the parties may apply only with parental consent of both parents. Persons related by blood or marriage, falling within the following relationships may not be married in Georgia: (1) father and daughter or stepdaughter, (2) mother and son or stepson, (3) brother and sister of the whole blood or half blood, (4) grandparent and grandchild, (5) aunt and nephew, and (6) uncle and niece. Georgia no longer recognizes common law marriages and does not recognize same sex marriages, even if performed in another state.

There is not a waiting period between applying for your license and receiving your license. Georgia law allows you to get married Immediately after officially receiving your marriage license. There is no required ceremony as long as the performing official is authorized to do it. The official can be a

judge, magistrate, speaker of the Georgia House of Representatives or a minister. The marriage is consummated by the cohabitation of the two parties and compliance with all the formalities.

As a general rule, Georgia law recognizes that property owned prior to the marriage or property acquired during the marriage which is acquired by inheritance or direct gift is separate property, not subject to division in a divorce case (although it is subject to an alimony claim). By becoming a married couple, a Husband and Wife each have a right to consortium with the other. The loss of this consortium is recoverable as damages if a spouse is injured or killed. Georgia law no longer recognizes causes of action for alienation of affection arising out of an adulterous relationship.

Husbands and wives also have legal protections. With very narrow exception, a Husband and Wife cannot sue each other for torts. However, Husbands and wives are not immune from prosecution for sexual battery or rape from unwanted sexual contact. Confidential communications between a Husband and Wife are privileged and not subject to disclosure. Furthermore, one spouse can prevent the other spouse from testifying against him or her in Court (even if the other spouse is volunteering to do so).

Temporary Protective Orders and Domestic Violence

A Temporary Protective Order (TPO) is designed to protect against abuse, harassment and stalking. A TPO can enter a variety of protections and prohibitions which almost always include contact between the individuals and removal from a place of residence.

A TPO in Cobb County is processed by a dedicated office and staff and reviewed and issued by the Senior Judges of the Superior Court. A TPO is authorized only when a recent (within 30 days) act of violence or threat of violence exists. The applicant completes the petition and then is called before a Judge. There are no fees for the application. The Judge determines if sufficient evidence and legal basis for the TPO exists. If so, a temporary, ex-parte TPO is entered.

In order to be legally proper, the TPO must be entered in the County in which the alleged perpetrator resides. If he/she resides out of Georgia, it is entered in the County wherein the abuse occurred. In addition, a TPO for acts of violence (as opposed to stalking) can only be entered between individuals who are current or former spouses, parents of the same children, parents and

children (including stepparents and stepchildren and foster parents and foster children) or persons living in the same household.

The TPO is then served upon the Defendant and a hearing is set within 10 days. Continuances can be granted in order to get the Defendant served or for the parties to retain counsel. Generally, a TPO which is not served within 30 days will be dismissed.

The TPO hearing must conform to the rules of evidence and U.S. Constitution. The parties may cross-examine each other and present witnesses and other documentary evidence. In Cobb County, the Y.W.C.A., the Office of Legal Aid and the Cobb County/Marietta Police Departments all maintain staff and personnel to assist victims of domestic violence through the process. The Cobb County Police Department goes so far as to assign each victim with an advocate who is trained to access financial and therapeutic resources and to appear at the hearing as a comforter and supporter. The Y.W.C.A. provides shelter, food, clothes, transportation and housing to victims and their children. The Office of Legal Aid provides legal representation to those that qualify as indigent.

If the TPO is entered, the Judge can take any or all of the following actions:

- Direct a party to refrain from family violence acts.
- Grant a spouse possession of the residence or household of the parties and exclude the other spouse.
- Require a party to provide suitable alternate housing for a spouse and his/her children.
- Award temporary custody of minor children and establish temporary visitation rights.
- Order the eviction of a party from the residence or household and order assistance to the victim in returning to it, or order assistance in retrieving personal property of the victim if the respondent's eviction has not been ordered.
- Order either party to make payments for the support of a spouse as required by law.
- Order either party to make payments for the minor children as required by law.
- Provide for possession of personal property of the parties.
- Order a party to refrain from harassing, interfering with, or contacting the other.

- Award costs and attorney's fees to either party.
- Order either or all parties to receive appropriate psychiatric or psychological services as further measure to prevent the recurrence of family violence.

The TPO may be made effective for a period of either six months or twelve months. At the date of expiration, a party can seek an extension or seek to make the order permanent. If the victim wishes to dissolve the order, it requires a hearing and approval by the Court.

A Defendant who violates a TPO is subject not only to incarceration for contempt or court, but may also have committed a felony criminal violation. Any individual protected by a TPO should ensure that copies are on file at their place of business, their children's school and/or day care and at any other place frequented. In addition, the victim should keep a copy on his/her person at all times.

Divorce

Initiation and Process

In order to file for divorce in Georgia, one of the spouses must be a resident of Georgia and must have resided here six months prior to filing. The divorce is usually filed in the County wherein the Defendant resides. If the Defendant has only recently moved out, the County of the marital residence is often used. The parties must be legally separated, though they do not have to actually be separated. They simply cannot be "cohabiting as man and wife."

The party initiating the divorce files a Complaint and serves the other party. The responding party files an Answer and Counterclaim for Divorce. Uncontested divorces are settled first, then filed. Contested divorces are filed, then settled or tried. In either event, a party cannot complete the divorce until at least 30 days have passed from the date of filing. In addition, most counties, including Cobb, require attendance at a divorcing parents' seminar when children are involved.

The process of a divorce tracks that of a civil case as outlined previous. The parties first appear for a temporary hearing or status quo hearing. In Cobb County, this hearing is usually within 20 – 45 days of filing. This hearing establishes temporary custody and visitation, support, use of certain property and payment of expenses. The parties move through discovery and to

mediation. If the case is not resolved, it is set for a final trial. Georgia is one of two states wherein the parties can have a jury trial on the issues of alimony and division of property. A judge always determines custody, visitation and the amount of child support.

Most divorces are sought and granted on the no-fault ground for divorce, that is that the marriage is irretrievably broken with no hope of reconciliation. In Georgia, fault grounds for divorce can be alleged and include:

- Mental incapacity or impotency at the time of the marriage - Adultery - Desertion (one year) - Conviction of either spouse of a offense involving moral turpitude - Habitual intoxication or drug addiction	- Cruel treatment that endangers the life or safety of the spouse - Incurable mental illness - Force, menace, duress or fraud in obtaining the marriage - Unknown pregnancy by another man at the time of the marriage - Incest.

Division of Property

The Judge (or jury) is ordered to make an "equitable" division of property. Equitable does not mean equal or 50/50 and Judges do not have to divide every asset. Judges can award all of one account or asset to one spouse and all of another to the other spouse. Dividing property is based on any number of factors, including, but not limited to the conduct of the parties, each party's separate assets and financial status, each party's income and earning capacity and each party's debts and future needs. Only property which is acquired during the marriage (other than by gift or inheritance) is subject to division. Property owned prior to the marriage (which still exists or can be traced) and property inherited or received by separate gift belongs to that spouse.

Alimony and Child Support

Alimony is designed to provide for the support and maintenance of the other spouse. The purpose of alimony is to provide for the spouse and/or to rehabilitate the earning capacity of the spouse. Alimony is awarded based on

the ability of one spouse to pay, the needs of the other spouse, the conduct of the parties, the provision made in a division of assets, the earning capacity of each party and is awarded at the Judge's discretion. Alimony also allows for a provision of temporary and permanent attorney's fees so as to insure that both spouses are able to secure and utilize legal representation.

Child support in Georgia is determined by a complex set of statutes and tables designed to approximate the total household income of the family (as if it were still intact), the additional expenses of the child(ren) and then allocate those expenses between the parties pro rate based on their income. The statutes have been transformed into an Excel based system of worksheets for ease of use and understanding.

The parties complete standard sections of the worksheet with background information such as their names and the names and number of their children. The parties then include their incomes and items that the State of Georgia has deemed standard expenses of child rearing (child care expenses and health insurance costs). The worksheet then applies these figures to the statutory formula and generates a presumptive child support amount. The parties can then complete additional, more complicated portions of the worksheet to reflect additional costs of the children (private school tuition, extraordinary medical or extracurricular costs) or of the parties (alimony and visitation related travel). These portions of the worksheet provide deviations from the presumptive number. Ultimately, the worksheet assigns the total household child support obligation to each party based on their income. The non-custodial parent pays this sum to the custodial parent.

The obligation of child support continues for each child until that child turns 18, marries, dies or becomes emancipated, whichever occurs first. However, if the child has not graduated from high school prior to reaching age 18, then the obligation to support that child continues until the child graduates from high school provided the child remains a full-time student, but not beyond the age of 20. No parent can be ordered to pay for college, however, the parties can agree to this obligation. If the obligation is agreed upon and included in a Settlement Agreement and Final Decree of Divorce, it is enforceable by a Court.

Custody and Visitation

Custody and visitation decisions are made using the "best interests of the children" standard. There is no presumptive parent entitled to custody. Judges consider countless factors in determining custody. Often, a Judge will appoint an attorney known as a Guardian Ad Litem to do an investigation and make a non-binding custody recommendation. Judges can also order the parents to undergo psychotherapeutic custody evaluations to aid in their decision making. A child over the age of 11 has the right to file an affidavit stating a preference regarding custody. A child over the age of 14 has the right to express an election as to which parent he or she wishes to have custody. In either instance, the Judge can reject the preference if he/she determines the decision of the child not to be in the child's best interest.

In most cases, the parents will be awarded joint legal custody. This gives parents equal decision making authority and responsibility over major issues concerning the health, welfare, education and religious upbringing of the children. One parent, usually the primary physical custodian, will be given tie breaking authority in these areas in the event the parties do not agree.

The party who does not have primary physical custody has visitation rights. Georgia law requires the Judge to enter a plan which dictates with which parent the child will be throughout the entire year. A form parenting plan has been created to aid in this process.

As a general rule, the non-custodial parent is given visitation on two weekends per month and for dinner one night per week. The parties alternate turns on one day or weekend holidays such as Labor Day and the 4th of July. Longer holidays such as Christmas and Thanksgiving are split. The parents alternate school breaks and the non-custodial parent is usually allowed anywhere from two to four weeks of time during the summer.

This "standard' visitation is becoming obsolete. Most non-custodial parents enjoy increasing visitation time such as extended weekends, overnight weekday visitation and extended holiday time. Other parents are electing joint physical custody where the children are swapped week on/week off or on a schedule of 4 days 3 days, followed by 3 days 4 days. Courts are still very loathe of these arrangements. Most scholars and professionals still

believe that children perform better in school and develop better if operating from a home base.

Post-Divorce Litigation

For many parents, life changes post divorce. As individuals remarry, gain or lose employment, move and endure other life circumstances, the provisions for alimony, child support, custody and visitation may no longer be workable. In these cases, the parties must file an action to modify their rights. Parties should not attempt to modify agreements on their own and without court approval. Agreements made outside of Court are not enforceable. As a general rule, modification actions may be brought not more often than only two years. This rule does not apply to the initial divorce. A party could theoretically apply for a modification the day after the divorce was final.

Unfortunately, parties do not always receive the support provided in the divorce or parties do not live up to the custodial and visitation parameters outlined. In these instances, the parties file an action for Contempt of Court and ask the Judge to force compliance by awards of restitution, attorney's fees and incarceration.

Modifications of Support

Post-divorce modification actions require that the party demonstrate a change in financial circumstances either of themselves or the other spouse. Awards of division of property or lump sum alimony (either a flat sum of money or money paid over time, without limitation) are not-modifiable. In addition, a party who did not receive alimony in the divorce cannot generally come back for alimony later.

Modifications of alimony upon a showing of a material change of financial circumstances of the parties. This change can be a material increase in the financial position of the either party, a material decrease in the financial position of either party or a material increase or decrease in the needs and financial expenses of the receiving party. The burden is on the party seeking modification to prove the case.

Modifications of child support are similar to modifications of alimony. The moving party must show any of the aforementioned changes in financial

circumstances. A moving party can also successfully modify child support by showing a change in the financial needs of the child or children. A change in custody creates a presumptive right to modify child support.

Modifications of Custody

A custody modification action requires a two-step analysis. The moving party must get past the first test before the Court considers the second. The first prong of the test requires that the party show a material change in circumstances effecting the welfare of the child. The Supreme Court has declared a few facts to automatically meet the test. The remarriage of the custodial parent, the custodial parent moving outside of the State of Georgia, and a change in custody of the siblings all have been deemed facts which meet the first prong of the test. If a party can demonstrate a change in circumstances affecting the welfare of the child, the Court then reconsiders the "best interests of the child" standard to determine whether custody should change. On paper, the first prong of test ought to be a high hurdle. In reality, Court's often blur the lines improperly. In these instances, the decision to change custody is seemingly used to demonstrate the facts necessary to show a change in circumstances. As a result, getting the change of custody case to a decision-making phase is not difficult. Even so, ultimately effectuating a change of custody is still a steep task.

Children over the age of 11 and 14 also have the same rights to be heard on modification actions as in custody cases in divorce. The election of a child is also a prima facie change in circumstances sufficient to state a custody case.

The two part test does not apply to modifications to visitation schedules which do not change legal or physical custody. The Court is authorized to modify visitation at any time, whether at the urging of one party, both parties or on its own discretion. The two year limit does not apply to visitation changes.

Contempt

Contempt actions may be filed to enforce any provision of a Court's Order which requires or compels a party to do or not to do some act. Contempt actions are used to enforce orders which divide property and to enforce compliance with the times and parameters of custody and visitation. The most frequent use of contempt proceedings is to enforce court orders to pay support.

Contempt actions are either civil or criminal in nature. Criminal contempt actions are designed to punish the offender and, in some instances, secure obedience in the future by threat of punishment. Criminal contempt actions can be immediate (direct criminal contempt) as in the case of an individual who lies under oath in Court or tells a Judge in open Court to "jump in a lake." These actions require no Court filing or process. Criminal contempt actions can also be done by initiation of a contempt action and process upon the offending party. In these cases, the Court cannot remediate or fix the offense, but merely punish the person for being disobedient. An example of this type of contempt would be a Husband who is ordered not to consume alcoholic beverages in the presence of the children as a condition of visitation, but does so anyway. Criminal contempt actions in either instances may be punished by fine or by incarceration for up to 20 days.

Civil contempt actions are designed to remediate behavior and secure compliance with a current obligation. These actions are initiated by filing a contempt action and service upon the opposite party. Failures to pay alimony and/or child support are both in the nature of civil contempt actions. In these cases, the Judge can use contempt powers to force the offender to do what they ought to have already done. Judges can order the party to pay the money by a date certain, award attorney's fees and can also incarcerate individuals until the money is paid. A Judge cannot incarcerate any individual that does not have the ability to pay the money ordered. A person held in civil contempt must always have the "key" to the jail or the means to get out of contempt.

PROBATE LAW BASICS

The various matters considered by the Probate Courts would warrant several volumes of material. For purposes of this document, the focus is upon the two areas in which most people encounter the Probate Court, estate probate and guardianships/conservatorships of incapacitated adults.

In all probate matters, the State of Georgia has adopted the Uniform Probate Code. This Code was designed to create a user friendly probate system with similarities from State to State. About 25 States have adopted all or part of the Uniform Code. In most Probate matters, nothing is contested. In the context of an estate, the heirs generally agree upon the division and disposition of assets. In the context of a guardianship/conservatorship, a family has usually reached a consensus about the need for the declaration of incapacity. In these instances, particularly when large sums of money or complex issues are not involved, lawyers may not even be necessary. The Probate process and the Probate Court staff are designed and able to assist as they are allowed to ensure that everything is filed properly and done correctly.

Probate planning is a completely opposite matter. Preparation of Wills, Trusts, Advanced Directives and other documents designed to facilitate and dictate the probate process should only be done by attorneys. Although some of the documents are not overly complex, the procedures and requirements for proper execution and documentation are exact.

PROBATE OF WILLS AND ADMINISTRATION OF ESTATES

The Probate Court is the administrative Court for the property, debts and possessions of a deceased person. Probate proceedings are filed in the County wherein the person resided at the time of their death, where the person actual died or in any County in which the person owned property. If a person dies with a Last Will and Testament, the person is considered “testate” and the Will and estate are “probated.” If a person dies without a valid Last Will and Testament, the person is considered “intestate” and the estate is “administered.”

In either circumstance, the initial process is the same. The proper person (an heir of an intestate estate or named executor of a Will) files the required forms and documents with the Probate Court. All of the heirs of the deceased receive notice and an opportunity to object or sign a document waiving that right and consenting to the process. In either event, an Executor is appointed to carry out a Will and an Administrator is appointed to carry out an intestate Estate. The Executor/Administrator, through the Probate Court, publishes a legal notice to all the world of the death of the individual and requires that anyone having a claim or debt against the Estate make it known. This notice process is a invaluable for the heirs in that it provides a certain mechanism to close off claims and creditors.

Once appointed, an Executor/Administrator is charged to gather the assets of the Estate, pay the creditors and then make a distribution. Executors are usually given discretion and freedom in this process to sell assets and dispose of claims as they see fit. Administrators require approval by the Court for almost every activity and make annual reports to the Court concerning the Estate.

Distribution by an Executor is controlled by the terms and conditions set forth in a Will. Distribution by an Administrator is controlled by the Georgia laws of intestacy. These rules are mildly complex beyond a traditional family. In the standard situation, the intestate estate is divided equally between the spouse and children, with the spouse taking not less than one-third.

The Probate Court hears and considers any challenges to the validity of the Will, including the competency of the deceased at the time it was executed. The Probate Court also hears and considers any challenges to the actions of the Executor/Administrator in gathering assets, paying claims or making a distribution.

Once concluded and paid, the Estate can be discharged. Some Estates are never discharged, but left open indefinitely. The reasons for doing so vary from sheer lack of getting around to it through instances where the deceased held the rights to season tickets to great seats at Sanford Stadium and the family wanted to keep renewing without letting UGA know that Dad had died.

Guardianships and Conservatorships

Guardianships and conservatorships are established in order to appoint an individual to make decisions for a person who is not able to make decisions themselves. Guardianships and conservatorships are also used to provide for the rights and responsibilities of minor children, however, these procedures are not covered here.

A guardianship is the right of another individual to make decisions regarding the health and welfare, including medical treatment, of another. A conservatorship is the right of another individual to make decisions regarding the finances and property of another. The standard for appointing each is slightly different, with the standard for guardianship being stricter (since certain civil rights are lost).

Guardianships

A guardianship is ordered when a person can no longer make or communicate significant responsible decisions concerning her welfare or safety. In order to commence a guardianship, the petition requires either the signature and sworn statement of facts by two relatives or the signature and sworn statement of facts by a treating physician or psychologist or licensed clinical social worker who has seen the patient within the immediately preceding 30 days.

Upon a proper petition, all relatives within the first degree (spouses and children) are notified and given a right to object or waive these rights and consent. A guardian ad litem is appointed to represent the interests of the proposed ward. A Court appointed evaluator then visits the proposed ward and speaks with the family members. The evaluator and guardian ad litem then make a recommendation back to the Court.

In the event guardianship is recommended, the Court determines if the Petitioner is a proper guardian, whether some other family member is a proper guardian or appoints an independent guardian. During any period in which the person has the capacity, an individual can execute an Advanced

Directives form which includes a statement of preference for a guardian should one ever be necessary. This document (which also provides for treatment preferences in end of life situations) should be completed and executed by every adult in Georgia. If a preference has been indicated, the preference will be considered by the Court, but is not binding.

Conservatorships

Conservatorships are ordered when a person lacks the ability to understand decisions concerning their property or lacks the ability to make or communicate decisions concerning their property. The procedure for a conservatorship follows the procedure above for a guardianship. During life, a person can execute a Durable Power of Attorney which does not terminate simply because of incapacity. This document is in effect automatically and without Order of the Probate Court. In fact, other than death of the ward, only an order from a Probate Court or Superior Court can terminate the Durable Power of Attorney once the Ward is incapacitated. Although it would seem like this would be a powerful reason for most individuals to have a Durable Power of Attorney relating to property and finances, the opposite is true. Due to the great powers and difficulty in undoing a Durable Power of Attorney, one should only be executed after consulting with an attorney.