PROBATE LITIGATION BASICS

August 19, 2015

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Justin O'Dell has been actively practicing law in Georgia since his admission to the bar in 2002. He founded O'Dell & O'Neal Attorneys in January 2013 based on a commitment to clients and community. Mr. O'Dell has litigated bench and jury cases in the U.S. District Court, Northern District of Georgia, and in the various Superior, State, Probate and Juvenile Courts of Metro Atlanta, Georgia. He has also appeared before the Cherokee and Cobb County Board of Commissioners as well as the Marietta City Council on various client matters related to licensing and zoning.

Mr. O'Dell has a broad range of practice areas, including but not limited to business and civil litigation disputes, family law matters, probate litigation and property litigation. Justin has also litigated consumer cases involving personal injury, wrongful foreclosure, wrongful eviction, breach of fiduciary duty and defective construction. He has also successfully represented residential and commercial property owners facing claims of eminent domain. Mr. O'Dell has successfully handled each of the last three election disputes in Cobb County.

Since coming to Marietta, Mr. O'Dell has become ingrained in the local community through civic and nonprofit service. He serves on various civic and non-profit boards. Mr. O'Dell is an active member of the Cobb Chamber of Commerce and completed the Leadership Cobb program in 2007. Mr. O'Dell's work has been recognized in a variety of ways. In 2010, he was named one of the 20 Rising Stars Under 40 in Cobb County, Georgia. Also in 2010, Justin was recognized by the State Bar of Georgia with the Robert Benham Award for Community Service. In 2012, Georgia Power awarded him their annual Citizen Wherever We Serve Award. Super Lawyers selected him for the past three years as a Georgia Rising Star. He has received recognition for outstanding service by the Marietta Kiwanis club and the Cobb Collaborative. In 2015, he was given the Chairman's Award by the Cobb Chamber of Commerce in recognition for his work in Co-Chairing the 2014 Countywide SPLOST referendum.

REPORTED CASES:

- *Vatacs Group, Inc. v. Homeside Lending, Inc.*, 281 Ga. 50, 635 S.E.2d 758 (2006);
- *In re Fennell*, 300 Ga. App. 878 (2009);
- *Wills v. Arnett*, 306 Ga. App. 503 (2010)
- *In Re: Kauffman,* 327 Ga. App. 900 (2014)
- *Amah v. Whitefield,* 331 Ga. App. 258 (2015)

NOTABLE JURY RESULTS:

- *Buckner v. Complete Wrecker Service, Eviction Services, Inc., Morris, Schneider and Prior*, State Court of Dekalb County, (2007). Plaintiff's verdict for wrongful eviction in excess of $200,000.00.
- *Burleigh v. Shackelford*, State Court of Cobb County (2006). Defendant verdict of only $65,451.17 against a Plaintiff's request of in excess of $800,000.00.
- *Weeks v. Huck*, Superior Court of Cobb County (2011). Plaintiff's verdict establishing a property line and award of $20,000.00 attorney's fees.
- *Lincoln v. Beaumont Tax Service*, Superior Court of Cobb County (2011). Plaintiff's verdict in excess of $150,000.00, plus award of punitive damages for breach of fiduciary duty and fraud and attorney's fees arising from negligent tax services.
- *Perry, Sexton v. Amah*, Superior Court of Cobb County (2015). Verdict in excess of $140,000.00, including substantial attorney's fees, for claims arising from trespass and nuisance over disputed easement rights.

NOTABLE NON-JURY RESULTS:

- *In RE: Mrs. B,* Probate Court of Gilmer County (2007). Successful defense and prosecution involving Guardianship and Conservatorship of incapacitated Mother.
- *Mr. B. v. Debt Collector*, Settlement for bad faith and harassment in violation of Fair Debt Collection Practices Act.
- *Church v. Board of Elections*, Superior Court of Cobb County (2008). Successfully obtained new election in race for Mayor of City of Kennesaw.
- *PMC v. CII Global*, Superior Court of Cobb County (2008). Defense of individual partner and prosecution of claims against other partners. Successful enforcement of settlement of dissolution of partnership in favor of client.
- *Godwin v. Pearlberg*, Superior Court of Cobb County (2009). Successful defense to a legal challenge to the eligibility of incumbent City Councilman for reelection before the County Board of Elections and appeal to the Superior Court.
- *Cardoza v. Wells Fargo*, et. al. Superior Court of Cobb County (2010). Successfully set aside foreclosure and returned home to homeowner. Confidential settlement.
- *Martin v. Board of Elections,* Superior Court of Cobb County (2012). Successfully set aside 2012 election referendum regarding Sunday Sales due to failure to comply with legislation and disenfranchisement of City voters.
- *Bejdic v. Smitherman*, Cobb County, Georgia (2013). Six figure settlement of automobile wreck involving compound fracture of spine against liability insurance and uninsured motorist insurance carriers.
- *Cobb County School District v. Crawford*, Cobb County, Georgia (2013). Successfully defended Principal against false allegation of failure to report. Following the case, the Head of Professional Standards and Ethics was non-renewed and the Lead Investigator resigned. The Cobb County School Board later proposed revised standards for conducting investigations.
- *Ms. H. v. Fitness International*, U.S. District Court, N.D. Georgia (2014). Successful settlement of claims involving sexual harassment.

PRESENTATIONS & WRITING

- Technology in the Law Office: Helping Small Firms Compete, Digital Strategies to Keep up with the Big Boys (Georgia Association of Paralegals, October 29, 2010)
- Election Challenges in Georgia (2011)
- The Court System & You: A Primer for Clergy, Non-Profit Organizations and Churches (February 22, 2011, Cobb County Clergy)
- Facebook Meets Voir Dire: The Good, The Bad & The Ugly of Mining the Internet During Litigation (National Association of Legal Secretaries, May 17, 2011; Cobb County Legal Secretaries Association, October 26, 2012; Cobb County Bar Association Family Law Section, December 14, 2012, National Association of Legal Secretaries, July 17, 2014)
- Ethics for Litigators, National Business Institute (July 25, 2012)
- Dirty Litigation Tactics: Ethics & Professional Conduct, National Business Institute (February 13, 2013)

INTRODUCTION

The purpose of these materials is to provide a basic understanding of common litigation issues arising in the area of Probate law. The materials are designed to aid the general litigator, perhaps comfortable in the Superior, State and even Federal Courts, with information about common pitfalls and traps for the unwary associated with Probate litigation. Likewise, the materials should aid the Probate & Estates lawyer, perhaps comfortable with the drafting of estate documents and more administrative aspects of trust and estates filing in Probate Court, with information about litigation basics should an unforeseen dispute surface.

A. THE ABILITY OF THE ESTATE TO SUE OR BE SUED

1. Don't Lose Credibility Before You Even Start

A fundamental aspect of Georgia jurisprudence is that in "every suit brought in this State there must be a real plaintiff and a real defendant." *Western, etc., R. Co. v. Dalton Marble Works,* 122 Ga. 774, 775 (1, 2), 50 S.E. 978 (1905). A real person means a person natural or artificial (e.g. a corporation) or quasi-artificial (e.g. a partnership). *Id.* Any other suit has been declared a nullity. *Id.* Older jurisprudence went so far as to hold that this requirement was "no mere technicality." *Knight's Pharmacy Co. v. McCall,* 181 Ga. 617, 618(2), 183 S.E. 497 (1936). *See also*, *Estate of Norton v. Hinds*, 182 Ga. App. 35, 35, 354 S.E.2d 663, 664 (1987).

In the Probate context, this doctrine has been interpreted to mean that a case brought against a designated estate is not a suit with a real defendant as required by the rule. Essentially, a dead man cannot be sued because his estate is mere inanimate property. Thus, suits to bind the estate of a dead man should be brought in the name of a personal representative-an executor, administrator, etc. *Knox v. Greenfield Estate,* 7 Ga.App. 305, 66 S.E. 805 (1910); *Estate of Norton v. Hinds*, 182 Ga. App. 35, 35, 354 S.E.2d 663, 664 (1987). There have been noted exceptions to the rule wherein the estate was the trade or firm name of disclosed individuals operating under that name, *Farmers,*

etc., Bank v. Farkas, 27 Ga.App. 153, 155, 107 S.E. 610 (1921); or where the actual parties at interest were involved in the litigation of the suit, such as the personal representative of the estate (*Block v. Voyager Life Ins. Co.,* 251 Ga. 162(1), 303 S.E.2d 742 (1983)) or the executor and guardian (*Tingle v. Cate,* 142 Ga.App. 467, 470, 236 S.E.2d 127 (1977)).

For the lawyer filing a litigation matter, particularly in the Superior Court, this nuance is important. First, despite the case law developments noted in the following section, one always faces the possibility of an intemperate Judge eager to find a basis upon which to dismiss a case. Second, and equally important, the failure to caption the case correctly, even if later amended, communicates a message to opposing counsel and to one's own client that the lawyer does not know what he or she is doing.

2. All Is Not Lost if You Blow It

The harsh rule which held that a dismissal was warranted for an improvidently filed matter has softened in recent holdings of the appellate courts. In Memar v. Styblo, 293 Ga. App. 528, 528-29, 667 S.E.2d 388, 389-90 (2008), the Court of Appeals considered the grant of a dismissal based upon the case having been brought by the Estate as Plaintiff rather than its legal representative. Most noteworthy to the decision was brought with the legal backdrop of the dismissal coming against the backdrop of the five year statute of repose. OCGA § 9-3-71(b). The decedent died intestate in August 2001 and the son filed the complaint for the Estate in June 2002. *Id.* at 389. In March 2003, the son was formally appointed as administrator, but was never substituted as the Plaintiff. *Id.* The son resigned and in July 20, 2006, Memar was substituted as administrator. *Id.* Five days later, Memar amended the complaint to substitute himself as the proper party Plaintiff. *Id.* Thus, if the matter were dismissed and the amendment disallowed, the statute of repose would bar refiling of the complaint.

The Court of Appeals recited the relevant legal authority and correctly noted that the matter was improperly filed. However, perhaps noting the draconian consequences of a dismissal, the Court of Appeals stated "the substance of the complaint rather than the

caption controls." *Id.* at 390. The Court further held that the Civil Practice Act allows for an amendment to substitute a real party in interest where inproperly named. *Id., citing, Block v. Voyager Life Ins. Co.,* 251 Ga. 162, 163, 303 S.E.2d 742 (1983); *Franklyn Gesner Fine Paintings v. Ketcham,* 252 Ga. 537, 540, 314 S.E.2d 903 (1984); OCGA §§ 9-11-9(a); 9-11-15(a); 9-11-17(a); *Youmans v. Riley Properties,* 180 Ga.App. 176, 177, 349 S.E.2d 1 (1986); *Adams v. Cato,* 175 Ga.App. 28-29, 332 S.E.2d 355 (1985). Therefore, the Court pronounced that even if the Plaintiff initially filing the Complaint is not a legal entity, where the Plaintiff is "reasonably recognizable as a misnomer for a legal entity which is the real party plaintiff" than the matter may be corrected by filing an amendment. *Id.*

B. CAUSES OF ACTION

1. *Determining Whether the Claim is by or against the Estate, through its Executor/Administrator or by or against the Executor/Administrator, Individually*

Litigation in Probate matters also requires strict attention to the nature of the claim being presented. Claims can generally be categorized as either belonging to or against the Estate, by and through its Executor/Administrator or claims which are charged against the Executor/Administrator in his/her individual capacity. Claims in the first category can run the gamut of claims available to natural persons and corporations (breach of contract, tort, property matters, etc…) In these settings, the Estate essentially becomes the owner of the claim or the body against whom the claim is going to be recovered. The Executor/Administrator can be thought of as the "stand-in" for the deceased. Claims in the second category are more limited in nature and scope. These for the deceased.

The general rule holds that claims against the Executor/Administrator is not liable for acts committed in his representative capacity, but only is liable in such circumstance

in his individual capacity. *Ernest G. Beaudry, Inc. v. Freeman*, 73 Ga. App. 736, 744-45, 38 S.E.2d 40, 46 (1946). However, in Carr v. Tate, 107 Ga. 237, 33 S.E. 48 (1899), the Supreme Court extended the liability to the property of the estate in instances wherein the estate "received the fruits of the tortious act." Therefore, the test to identify the proper party defendant becomes to first determine whether the tortious act was committed by the decedent or by the Executor/Administrator during the administration of the estate. In the latter instance, the lawyer must then determine whether the estate received a pecuniary benefit. *Ernest G. Beaudry, Inc. v. Freeman*, 73 Ga. App. 736, 744-45, 38 S.E.2d 40, 46 (1946), *noting* that the cause of action is essentially based upon the equitable notion of money had and received.

2. *Issues Related to Claims By or Against Estate By and Through the Executor/Administrator*

a. Tolling Provisions

Lawyers engaged in Probate litigation must be aware of the rules related to the tolling of statutes of limitation. The relevant code section provides that "[t]he operation of the statutes of limitation is also suspended for the time an estate is unrepresented after the death of the owner, provided that time does not exceed five years. The suspension operates not only in favor of a plaintiff against the estate as a defendant, but also in favor of the estate as a plaintiff. O.C.G.A. § 9-3-92. There is a similar provision contained at O.C.G.A. § 44-5-173 which tolls the running of prescriptive title against estates.

First, it should be noted that the tolling provision relates to periods in which the estate is "unrepresented." This has been interpreted as including the period between the death of the person and the commencement of representation and also as periods between the termination of an administrator/executor and the appointment of the successor. *Smith v. Turner*, 112 Ga. 533, 536, 37 S.E. 705 (1900); *Morgan v. Woods*, 69 Ga. 599, 1882 WL 3358 (1882). Essentially, the period cannot extend beyond five years. The failure to appoint an administrator or executor within that time will cause the statute of limitations

to run. Likewise, a transition between administrators totaling that period will have the same effect. However, it has been held that the appointment of a mere temporary administrator does not constitute sufficient "representation" to start the clock. *Baumgartner v. McKinnon*, 137 Ga. 165, 73 S.E. 518 (1911); *Collins v. Henry*, 155 Ga. 886, 118 S.E. 729 (1923).

Second, lawyers should also note that the tolling provision does not work just in favor of those claims to be asserted by the Executor/Administrator of the Estate as Plaintiff, but that the same corresponding right is afforded the creditors of the estate. O.C.G.A. § 9-3-93; Jefferson Pilot Fire & Cas. Co. v. Burger, 176 Ga. App. 471, 336 S.E.2d 591 (1985).

Lastly, there are some notable areas where specific tort laws override the tolling provision or are unaffected by it. A wrongful death action must be brought by the decedent's spouse and children who are living at the time the action accrues. O.C.G.A. § 51-4-2 and the wrongful death action of a child brought by his or her parents or guardians. O.C.G.A. § 51-4-4. However, where no such person exists to bring the claim, the personal representative is authorized to bring the claim on behalf of next of kin. O.C.G.A. § 51-4-5.

This creates a unique twist. No tolling provision exists during the administration of the estate of the spouse or parent for the two year statute of limitation for the claim of the other spouse or child. However, if a decedent's spouse or child has the original claim in a wrongful death action and then, and only then, that spouse or child dies during the pendency of that claim would the descendants of the child or spouse enjoy the tolling provision and receive any recovery. *Tolbert v. Maner*, 271 Ga. 207, 518 S.E.2d 423 (1999). This unique dichotomy has been noted and the tolling provision upheld under these circumstances. *Walden v. John D. Archbold Memorial Hosp., Inc.*, 197 Ga. App. 275, 398 S.E.2d 271 (1990), disapproved on other grounds, *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).*Metropolitan Atlanta Rapid Transit Authority v. Maloof*, 304 Ga. App. 824, 698 S.E.2d 1 (2010).

The tolling provision for estates is limited to statutes of limitation. Statutes of repose (for example medical malpractice under OCGA § 9-3-71) are not tolled. *Simmons v. Sonyika*, 279 Ga. 378, 380, 614 S.E.2d 27, 30 (2005).

3. *Causes of Action Against Executor/Administrator*

a. Breach of Fiduciary Duty

The most common and frequent claim against an Executor/Administrator is for breach of fiduciary duty. Bringing such a claim requires the existence of three elements: "(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." *Bloodworth v. Bloodworth,* 260 Ga. App. 466, 579 S.E.2d 858 (2003). The establishment of the existence of the duty is seldom at issue given the fiduciary duties which are inherently part of the role of an Executor/Administrator. The most frequently cited duties in litigation related to Executors/Administrators is the duty to act in the utmost good faith in protecting and maximizing the assets of the estates and the duty to avoid potential conflicts of interest. *Jonas v. Jonas*, 280 Ga. App. 155, 160-61, 633 S.E.2d 544, 549-50 (2006).

Conflicts of interest (actual or potential) present the most difficult area of probate litigation. The stringent standard to which Executors/Administrators are held related to conflicts of interest was summarized in *Home Ins. Co. v. Wynn*, 229 Ga. App. 220, 222, 493 S.E.2d 622, 626 (1997):

> An agent cannot place herself in a position in which her duty and interests conflict with those of her principal. *Franco v. Stein Steel, etc., Co.,* 227 Ga. 92, 95(1), 179 S.E.2d 88 (1970). The agent is not permitted to acquire rights in the settlement antagonistic to the principal's interests. See OCGA § 23–2–59. "It is generally, if not always, humanly impossible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction. Consciously or unconsciously [s]he will favor one side as against the other, where there is or may be a conflict of interest. If one of the interests involved is that of the trustee personally, selfishness is apt to lead [her] to give [her]self an advantage. If

> permitted to represent antagonistic interests the trustee is placed under temptation and is apt in many cases to yield to the natural prompting to give [her]self the benefit of all doubts." (Citations and punctuation omitted.) *Ringer v. Lockhart,* 240 Ga. 82, 84, 239 S.E.2d 349 (1977). Note that it is not necessary for the beneficiaries to show that the trustee acted in bad faith, gained an advantage, or that they were harmed. *Id*. The trustee must avoid being placed in such a position, and if she cannot avoid it, she may resign, may fully inform the beneficiaries of the conflict, or may request the court to appoint a guardian ad litem to protect the unprotected interests. If she fails to do any of these things, she proceeds at her own peril. *Id*. at 85, 239 S.E.2d 349.

The seeming negation of the "damage" element of the breach of fiduciary duty claim was also affirmed by the Supreme Court in <u>Powell v. Thorsen</u>, 253 Ga. 572, 574, 322 S.E.2d 261, 263-64 (1984) wherein the Court stated:

> Because of these principles, the beneficiary need only show that the fiduciary allowed himself to be placed in a position where his personal interests might conflict with the interests of the beneficiary. It is unnecessary to show that the fiduciary actually succumbed to temptation or that the beneficiary was harmed. *Ringer v. Lockhart,* 240 Ga. 82, 239 S.E.2d 349 (1977); *Clark v. Clark,* 167 Ga. 1, 144 S.E. 787 (1928); *Lowery v. Idleson,* 117 Ga. 778, 45 S.E. 51 (1903); *McCullough Co. v. National Bank,* 111 Ga. 132, 36 S.E. 465 (1900). The executor's sale of the property to himself was " 'not in the ordinary mode and under circumstances to command the best **264 price.' " *Goldin v. Smith,* 207 Ga. 734(1), 64 S.E.2d 57 (1951). To the contrary, the sales were private and at very low prices. But matters of price are wholly immaterial. "It matters not how fair the contract may be; public policy will not uphold it. This principle is iterated and reiterated everywhere in the books." *Mayor of Macon v. Huff,* 60 Ga. 221, 226 (1878).

Since an Executor/Administrator is most often also a beneficiary (whether a spouse or one of multiple children) it becomes almost impossible for a conflict or potential conflict to be avoided when a dispute arises related to the disposition of estate property. Even in the simplest of scenarios, a conflict readily presents itself whereby the

Executor/Administrator takes the ordinary action of selling estate property rather than distributing the same in kind. The sale generates a total commission of 5% (2.5% in and 2.5% out) whereas transfer in kind generates only 3%. This issue alone can be considered potential conflict enough to warrant removal.

b. Failure to File Will

Confusion persists (despite clear case law) on the issue of filing a will and offering a will for probate. The law mandates that a person with possession of a will must file it for probate. O.C.G.A. § 53-5-5 ("A person having possession of a will shall file it with reasonable promptness with the probate court of the county having jurisdiction. The probate court may attach for contempt and may fine and imprison a person withholding a will until the will is delivered."). This duty (and corresponding liability) attaches only to file will with probate court and does not require offering a will for probate. *Horn v. Gilley*, 263 Ga. 104, 428 S.E.2d 568 (1993).

In contrast, the initial right (but not duty) to offer a will for probate belongs to the Executor, if one is named. O.C.G.A. § 53-5-2. However, should the Executor decline to exercise the right for any reason (or if no Executor is named), any interested person is able to offer the will for probate. *Id.* In this context, interested persons means legatees and devisees under the will. *Ray v. Stevens*, 295 Ga. 895, 897, 764 S.E.2d 809, 810-11 (2014).

4. Executor De Son Tort

A rarely used, but important legal distinction exists for claims related to someone who takes action or interferes with the property of a decedent, but does so without any legal authority. Liability in this instance is charged based on one being an executor de son tort. To render one an executor de son tort, it must appear that the person intermeddled with the property of the decedent without authority to do so or that he converted the same to his own use. *Wilson v. Hall*, 67 Ga. 53, 53 (1881). The claim does

not attach to actions or transfers made during the decedent's lifetime. *Mathews v. De Foor*, 172 Ga. 318, 158 S.E. 7, 8 (1931)

Liability under this cause of action is also enhanced. Georgia law provides that an executor *de son tort* is liable to the creditors and beneficiaries of the estate in an amount double the value of the property possessed and converted. Moreover, the executor *de son tort* is also barred from claiming a credit or set off for funds paid out in good faith on behalf of the estate. O.C.G.A. § 53-6-2.

If a person acts as executor *de son tort*, but later qualifies and is sworn as Executor/Administrator of the estate, the person can no longer be charged as executor *de son tort.* However, a claim can proceed against the Executor/Administrator for breach of fiduciary duty. *Shirley v. Sailors*, 329 Ga. App. 850, 851, 766 S.E.2d 201, 203 (2014).

5. Settlement of Accounts

An underutilized provision of the trusts and estates code provides a broad mechanism for the presentation of claims by or against an Executor/Administrator of an Estate. O.C.G.A. § 53-7-62 provides that:

> a) Any person interested as an heir or beneficiary of an estate or the probate court may, after the expiration of six months from the granting of letters, cite the personal representative to appear before the probate court for a settlement of accounts. Alternatively, if the personal representative chooses, the personal representative may cite all the heirs or beneficiaries and all persons who claim to be creditors whose claims the personal representative disputes or cannot pay in full to be present at the settlement of the personal representative's accounts by the court. The settlement shall be conclusive upon the personal representative and upon all the heirs or beneficiaries and all remaining persons who claim to be creditors who receive notice of the hearing. The court may, in the court's discretion, give the personal representative additional time to settle the estate.

Furthermore, the code allows for some forum and venue shopping on the part of the party initiating the claim by providing that jurisdiction over settlement of accounts in concurrent between the probate and superior courts. O.C.G.A. § 53-7-63.

C. PROCEDURAL RULES & EVIDENTIARY PROVISIONS

Litigating in the Probate Court requires knowledge of and adherence to a number of unique procedural rules and evidentiary provisions. The rules are often revised and republished. Any lawyer is well advised to revisit and review the rules prior to initiating a legal matter.

1. Use of Standard Probate Forms.

The Uniform Probate Court Rules require the use of the Standard Probate Court Forms. U.P.C.R. 21. The forms are incorporated and adopted into the rules. The first form actually consists of a set of general instructions. Therefore, the general instructions have the force and weight of a Probate Court Rule and should be treated accordingly. For review and reference, the current instructions are as follows:

General Instructions for Probate Forms

1. *To the extent practical, all material presented for filing in any probate court shall be typed, legibly written, or printed in black ink suitable for reproduction on opaque white paper, measuring 8½" x 11", of a good quality, grade, and weight, on only one side of the paper. The format and sequence of the forms shall be preserved as far as practical.*

2. *Please complete all portions of the form. Check with your Probate Court to determine its policies in regard to the level of completion which is required of you with respect to the "Court's portion" of the form. The Court's portion includes the Court's signatures and dates, name and answer of any guardian ad litem, evaluator, or other person appointed by the Court, and other information which is not reasonably within the petitioner's knowledge.*

3. *Whenever an instruction within the form indicates that the petitioner should check a blank if applicable, any clear mark is acceptable. If the form indicates that initials are required, then only handwritten initials by the party will be accepted. Typed initials are not acceptable.*

4. *If the space provided in the form is not adequate to provide a full answer, then additional sheets may be attached so long as the name of the decedent, proposed ward, ward, or minor; caption of the case; and appropriate paragraph number(s) are shown on each additional sheet.*

5. *If you make material changes to the form, then you must identify those changes by formatting them in all capital letters, in bold, and underlined or by other clear indication.*

   • *"Material changes" do NOT include changes that are grammatical, changes in gender, changes from singular to plural, omission of optional or alternative language, and the inclusion of information such as names and addresses.*

   • *For words with Latin endings, such as "executor," "administrator," "testator," and "caveator," include the plural and/or feminine if the context so implies.*

6. *If there is language in the standard form that is considered inapplicable, then it should be stricken with a single strikethrough (strikethrough), or otherwise clearly indicated.*

   • *Words in parentheses should be left in the form, if applicable, or stricken through if not applicable. However, where the letter "s" appears in parentheses to denote the plural, it is not necessary to strike the "s" when the singular applies if otherwise clear from the context.*

   • *If a blank or paragraph is not applicable, then it should be marked "N/A."*

   • *If an entire is page is not applicable, the page may be omitted and beside the number of the next applicable page there should be placed a similar notation to the following: "Page(s) ______ not applicable."*

7. *Additional paragraphs or interlineations may be added if they are necessary, but they must be clearly identified.*

8. *Any change to a form that might be appropriate due to a change in law which occurred after the form was adopted by the Probate Court Judges Council of Georgia may be added but should be clearly identified.*

9. *If a standard form is available, but not used, then the content of the substituted pleading or document must conform to the standard form. Such pleading or document should indicate all changes from the standard form. Any material deletions must be shown with a single strikethrough, or otherwise clearly indicated.*

• At the end of any such substituted pleading or document, the attorney must sign the following statement: "I certify that the content of the foregoing is identical in all material respects with the Georgia Probate Court Standard Form entitled ________________________________ but for the additions and/or deletions indicated therein, as required by the Uniform Probate Court Rules."

• In any proceeding for which a standard form has been adopted but not used, the Court may, in its discretion, decline to process the pleading or document not on said standard form that does not possess the above statement and signature.

10. *All pleadings and other documents shall be signed by the responsible attorney or party who prepared the documents with his or her name, proper address, and telephone number typed or printed beneath said signature. If a party is represented in the matter by an attorney of record, that attorney must sign the pleading or document for it to be eligible for filing.*

11. *Prior to letters issuing in any case appointing an Administrator, Executor, Personal Representative, Conservator, or Guardian, an oath of office must be administered. The oath must be administered to the petitioning party by a Probate Judge or Clerk (the oath cannot be administered by a notary public). The oath of office may not be included as part of the form petition. Standard form 53, "Commission to Administer Oath," may be used if the oath is to be administered to a petitioning party by a court outside the State of Georgia.*

12. *Whenever any petition is filed in Probate Court, proper jurisdiction must be established. In the event that jurisdiction is through the ownership of property rather than the domicile of a particular individual, those facts should be set out in the paragraph for "Additional Data: where full particulars are lacking," which is usually the last paragraph of any Georgia Probate Court Standard Form.*

13. *Some forms have symbols, usually brackets {brackets}, to provide find and replace commands in word processing versions. The words inside the brackets identify the information required. Commonly used information, such as {PETITIONER'S NAME}, can be inserted throughout the entire form with use of find and replace. "{INFO}" is used when the information is either long or narrative in nature or is only required once. When a computer is not being used to complete the*

Georgia Probate Court Standard Forms, the PDF version should be used rather than the Word or WordPerfect versions.

14. *If you need additional assistance preparing the pleading or document, it may be appropriate to consult the Civil Practice Act, the Official Code of Georgia, the Georgia Uniform Probate Court Rules, or an attorney.*

2. *Background Checks*

Many lawyers fail to caution their clients about the procedural requirement authorizing the Probate Court to conduct background checks on the individuals involved in legal proceedings. Other lawyers fail to utilize the provision to request of the Court in a disputed proceeding. Several rules of the Probate Court authorize background checks in certain circumstances. The background checks cannot be disclosed to the opposing party, but can be reviewed by the Court.

U.P.C.R. 5.5.1 Limited background check.

> Any person requesting appointment by a probate court in this State as temporary administrator or personal representative of an estate of a decedent or as guardian or conservator of an incapacitated adult or a minor may be required to submit to a criminal background check by allowing the probate court in which the petition seeking such appointment is pending to access the criminal records information maintained by the Georgia Crime Information Center (GCIC) with reference to such person. The actual performance of a background check shall be in the discretion of the judge before whom the proceedings are pending, and there shall be no requirement that a criminal history be obtained for every such person. In order to allow access to the GCIC records, any person requesting such appointment shall, upon request by the probate court, sign a form consenting to the release of such information by the GCIC to the probate court.

U.P.C.R. 5.5.2 National background check.

> If the person requesting appointment, or nominated for appointment, is being considered for appointment as a guardian or conservator, the probate court may require the expanded background check as authorized by O.C.G.A § 29-9-19. The use

> and disposition of the report shall be governed by the provisions of this Rule.

U.P.C.R. 5.5.3 Use of information. Other household members.

> All information received by a probate court pursuant to this Rule shall be considered confidential and shall be disclosed by the probate court or its staff only as authorized by GCIC rules and regulations. Any records so obtained by a probate court shall be destroyed within thirty (30) days after the expiration of the time for filing of an appeal of the order of the probate court granting or denying such appointment; if an appeal is filed, such records shall be destroyed within thirty (30) days after the appeal is dismissed, withdrawn, or the remittitur is returned to the probate court. If deemed necessary by the probate court, all adult persons living in the household of the proposed ward may be required to undergo a criminal background check under Rule 5.5.1.

3. *Approval of Settlement Agreements*

Lawyers in Probate Court fail to understand that the Probate Court has far broader responsibility and oversight over matters when compared to the State or Superior Courts. The authority includes the ability to approve (and also reject or modify) settlement agreements between the parties. Uniform Probate Court Rule 5.7 and O.C.G.A § 53-5-25 confirm the power of the Court and requirement for approval of settlement agreements under which probate is granted or denied or agreements providing for a disposition of the property contrary to the terms of the will.

The Probate Court also has an even greater power in the area of guardianships and conservatorships due to the considerations for the best interests of the Ward. This power has recently been interpreted as including the ability to reject the settlement agreement of the parties and the resignation of a Guardian and the reappointment of the Guardian seeking to resign. *In re Estate of Kaufmann*, 327 Ga. App. 900, 903, 761 S.E.2d 418, 421 (2014), cert. denied (Sept. 22, 2014). ("The trial court had certain statutory requirements that would trump the selections of the parties and recommendation of the GAL. This is

further supported by the Guardianship Code with regard to accepting the resignation of current guardians. OCGA § 29–4–50(a) requires the probate court to satisfy itself of certain criteria prior to accepting the guardian's petition for resignation.")

4. Jury Demands

Lawyers in the State and Superior Courts operate with the understanding that a jury trial is presumed until waived. O.C.G.A. §9-11-39. In other words, the jury demand can be made at any point in the case until the case has been called for trial or the pre-trial order is entered. *Raintree Farms, Inc. v. Stripping Ctr., Ltd.*, 166 Ga. App. 848, 848, 305 S.E.2d 660, 662 (1983) (local rules requiring a jury demand be waived by a deadline would be in conflict and thus, unconstitutional). This general holding is only limited by certain statutory circumstances setting a deadline for a jury demand (e.g. O.C.G.A. § 23—3-66 requiring jury demand in quiet title cases before special master proceeding commences).

However, in Probate Court, the time in which a jury demand must be made is limited. O.C.G.A. § 15-9-121 and Uniform Probate Rule 10.11 provide:

> (a) A party to a civil case in the probate court shall have the right to a jury trial if such right is asserted by a written demand for jury trial within 30 days after the filing of the first pleading of the party or within 15 days after the filing of the first pleading of an opposing party, whichever is later, except that with respect to a petition pursuant to Code Sections 29-4-10 and 29-5-10, relating to guardianship of an incapacitated adult, if any interested party desires a trial by jury, such party must make such request for a jury within ten days after the date of mailing of the notice provided for by subsection (c) of Code Section 29-4-12 and subsection (c) of Code Section 29-5-12. If a party fails to assert the right to a jury trial, the right shall be deemed waived and may not thereafter be asserted.

This restriction on a general right to a jury trial has been upheld and enforced. *In re Estate of Sands-Kadel*, 292 Ga. App. 343, 345, 665 S.E.2d 46, 49 (2008). It should be noted that in non-Article 6 Probate Courts (counties less than 90,000 people) where a jury

trial is not available, the right to a jury trial is protected on the de novo appeal to Superior Court pursuant to O.C.G.A. §§ 5-3-2; 5-3-29. *Montgomery v. Montgomery*, 287 Ga. App. 77, 80, 650 S.E.2d 754, 757 (2007). This is contrary to the rule for de novo appeals from Magistrate Court where the jury demand must be made prior to the trial in the Magistrate Court. *Id.*

5. Matters in the File and Matters in Evidence

As a proceeding develops in Probate Court, a variety of pleadings, motions and other documents invariably get filed with the Court. Since most proceedings are non-jury and the Judge has the opportunity to review the file, it is easy to erroneously assume that these matters are "in evidence" or part of the "record" upon which the Court can rely in making a decision. As a general rule, matters which are admitted in pleadings may be relied upon by the party, without tending the same into evidence. O.C.G.A. § 24-8-821. However, other matters filed with the Court must be tendered and admitted into evidence in order to be considered by the Court. *In re Hudson*, 300 Ga. App. 340, 685 S.E.2d 323 (2009). Even if the documents are referenced in Court and no objection is made, the documents may still be inadmissible hearsay and not subject to consideration. *Id.*

D. LOST & CONTESTED WILLS

1. Lost Wills

The disappearance of a Will or the emergence of competing Wills creates a host of claims and matters subject to litigation. O.C.G.A. § 53-4-46 creates a presumption that when an original Will cannot be located, the Will was revoked. The presumption is rebuttable by a preponderance of the evidence. O.C.G.A. § 53-4-46. *King v. Bennett*, 215 Ga. 345, 110 S.E.2d 772 (1959). It should be noted that even in instances wherein there is no caveat or dispute filed, the evidentiary requirements to overcome the presumption must still be met. *Tudor v. Bradford*, 289 Ga. 28, 32, 709 S.E.2d 235, 238 (2011).

The highest and best evidence to overcome the presumption of revocation is generally found from the attorney of the decedent. If the attorney can testify that he or she maintained contact with the decedent and that no mention of changing or revoking the Will occurred, this evidence would suffice to authorize a trier of fact to admit the copy of the Will to probate. *Smith v. Srinivasa*, 269 Ga. 736, 737, 506 S.E.2d 111, 113 (1998); *Westmoreland v. Tallent*, 274 Ga. 172, 175, 549 S.E.2d 113, 116 (2001) *Thomas v. Sands*, 284 Ga. 529, 530, 668 S.E.2d 731, 732 (2008).

2. Undue Influence

Disputes involving claims of undue influence are much more nuanced in litigation. Like fraud, undue influence is inherently subtle. Thus, like fraud the evidentiary burden is factually intense. Undue influence may be proven by circumstantial or be direct evidence. Slight evidence may be sufficient to authorize the trier of fact to grant relief. *Mathis v. Hammond*, 268 Ga. 158, 160, 486 S.E.2d 356, 358 (1997). Facts supporting a claim of undue influence may include evidence of a confidential relationship between the grantor and the grantees; the reasonableness or unreasonableness of the disposition of the testator's estate; disease affecting the strength of the mind; the advanced age of the grantor; the grantor's terminally ill physical condition; the grantor's living arrangement; and evidence of the grantor's reliance on the grantees, especially the daughter with whom she was residing, for care, shelter and transportation was sufficient to present the issue of undue influence to the jury. *Skelton v. Skelton*, 251 Ga. 631, 634, 308 S.E.2d 838, 842 (1983).

In cases of claims related to undue influence, estate planning attorneys (unfamiliar with litigation techniques) may unknowingly create evidence necessary to create an issue of fact. Any experienced litigator will readily confirm that the toughest case for undue influence related to the execution of a Will would be one in which the Will was signed in the lawyer's office, witnessed by two members of the lawyer's staff (who remember nothing particular about the occasion) with a self-proving affidavit attached. However,

because ethics standards in Georgia require the estate planning attorney to take action to protect the interests of a client with diminished capacity (G.R.P.C. 1.14) it can be understood that the estate planning attorney would have some obligation to verify the mental capacity of the client before preparing and executing estate documents. As with any situation where a lawyer fears liability, many estate planners engage in conduct designed to provide coverage for themselves in the event of a subsequent dispute involving capacity.

In proceedings involving claims of capacity or undue influence, it is therefore prudent to request of the estate planning attorney:

- Videotapes of conferences or the execution of Estate documents (subject to privilege);
- Referrals to outside sources such as psychiatrists, psychologists or neurologists;
- Names and records of individuals attending client meetings;
- The estate planning attorney's own observations about the client (not generally privileged. *S. Ry. Co. v. Lawson*, 256 Ga. 798, 801, 353 S.E.2d 491, 495 (1987); and,
- Communications to and from the estate planner.

Most importantly, counsel should examine the estate planning attorney to contrast the level and frequency of these occurrences with other estate planning situations.

E. DEED CONTESTS (HEIR PROPERTY)

It is occasionally an unfortunate discovery in a probate proceeding to discover that the estate cannot deliver clear title of real property. There are instances wherein property has been owned and possessed by a family for multiple generations without the estates of ancestors being submitted to the probate process. A spouse may simply assume possession of the property or an eldest child may move into the family home place (with or without the consent of siblings). If a deed is provided to the property and all of the heirs have knowledge of the deed and the transfer, it is possible to use the prescriptive title process (adverse possession) as a means to clear title. *Gigger v. White*, 277 Ga. 68,

71, 586 S.E.2d 242, 246 (2003). However, where no deed is made or where the claim of adverse possession cannot provide adequate clarity, the only remaining proceeding is the process for registration of heir's title.

O.C.G.A. § 44-2-131 provides the statutory process for petitioning to determine heir's title:

> a) Where the owner of registered land dies intestate and there is no administration upon the estate within 12 months from the date of his death or in the event administration shall terminate without the land being disposed of, the heirs at law of the intestate or any one or more of the persons who claim to be heirs at law of the intestate may petition the superior court of the county to have their title by descent declared as to the registered land.
> (b) The petition:
> (1) Shall set forth the names of all persons who are alleged to be the heirs at law and, if all are not joined, process or notice shall be served upon all those not joined;
> (2) Shall be verified by the affidavit of one of the petitioners;
> (3) Shall set forth in detail the name and last known address of the decedent;
> (4) Shall include a statement whether he was married, single, or a widower and, if married more than once, the names of all of his wives;
> (5) Shall include the names of all children and descendants of children, if any, showing in detail whether the parents of such children are living or dead;
> (6) Shall show in detail how and whether the persons who are alleged to be the heirs at law are in fact the heirs at law of such decedent under the rules of inheritance;
> (7) Shall give the date of the death of the decedent;
> (8) Shall set forth that the decedent died leaving no will; and
> (9) Shall state that in the judgment of the applicant there is no need for administration upon the estate.
> (c) Upon the petition being filed, the judge shall grant an order setting the petition down to be heard at the courthouse in the county where the land is located, on some day not less than 30 days from the date of the petition, and calling on all persons to show cause before the court on that day why the persons named as heirs at law in the petition should not be so declared to be by the judgment and decree of the court. A copy of the petition and the order of the court thereon shall be published in the newspaper in

which the sheriff's sales of the county are advertised in like manner as sheriff's sales are advertised.

(d) On the day named for the hearing, unless the matter is continued by order or orders of the judge to some future time, the court shall proceed to hear and determine the question together with any objections which may be filed and to adjudge and decree that the alleged decedent is dead, that there is no administration on his estate, that he left no will, and who are his heirs at law; provided, however, if it appears that either the alleged decedent is not dead, or that there is administration upon the estate, or that an application for administration is pending, or that the decedent left a will, the petition shall be dismissed.

(e) Upon granting an order of heirship, the court shall order a transfer of the registered title from the decedent to the heirs at law; and, upon production of the owner's certificate of the decedent and the judge's order for a transfer, the clerk shall register the transfer, cancel the certificate registered in the name of the decedent, cancel the owner's certificate, and issue a new owner's certificate in the name of the persons declared to be the heirs at law.

(f) In the petition if the alleged heirs at law are of full age and under no disabilities and the same so appears to the court and if it further appears that they have voluntarily partitioned the land in kind among themselves, the court may, in connection with the order of transfer, direct that the certificate standing in the name of the decedent be canceled and that new certificates be registered and issued to each of the heirs for the particular parcel of land coming to each under the voluntary partition set forth in the petition.

(g) If the decedent has left a widow, she shall be a party to the proceedings. The court shall specifically provide what interest or estate she shall take under the decree of heirship; and, except where in the decree the land is partitioned into separate tracts, the court shall, in the decree of heirship and in the order of transfer, specifically set forth, except where the widow is the sole heir, what undivided interest each heir shall take.

(h) If the decedent is a female, the procedure shall be similar except insofar as the difference between the rights of the husband and wife upon the death of the spouse shall make changes necessary.

(i) Where the wife claims to be entitled to take possession of the estate without administration under former Code Section 53-4-2 as such existed on December 31, 1997, if applicable, or Code Sections 53-1-7 and 53-2-1, the procedure shall be substantially in the same manner.

In these proceedings, it is possible that multiple layers of the same exist, affecting generations of descendants. The Executor/Administrator may be both claimant in one context and respondent to the claims of another.

Because of the complexity and uniqueness in determining the rights and claims of the various parties, the participants and the Court will often utilize a special master. The special master can conduct a less formal hearing and accommodate the needs of generations of family members who may live in a variety of states and who may be represented by guardian ad litem. O.C.G.A. § 9-7-1 outlines the process for the appointment and procedures of a special master.

F. FIDUCIARY MISCONDUCT, LIABILITY, DISPUTES WITH BENEFICIARIES

As outlined above, probate litigation can take a variety of forms and present a host of different issues and claims. In instances wherein the dispute is between the Executor/Administrator of an estate and the beneficiaries or between the Conservator of a Ward and other family members, a few interlocutory procedures are vital to the presentation of the case.

1. Approval of Representation

In the instance of a conservatorship or guardianship matter wherein the lawyer is being called upon to represent the Ward, the lawyer must remember that the Ward has been declared incompetent or is in the process of being declared competent. If the lawyer wishes to proceed on behalf of the Ward, the lawyer should first file a petition with the court for the approval of the representation and for the approval of the terms of the representation. If the lawyer fails to do so, the lawyer may find his compensation limited to a determination of the value provided to the Ward. Levenson v. Oliver, 202 Ga. App. 157, 413 S.E.2d 501 (1991). Likewise, the lawyer engaged on behalf of the Conservator

or Guardian in a disputed proceeding related to the Ward would be well advised to submit the terms of representation to approval by the Probate Court (the Guardian should also seek the consent of the Conservator). The scope of the representation is likely outside of the budget and asset management plan typically filed with the Court and it is better, in this instance, to seek permission in advance.

In the case of representation of the Executor/Administrator of an Estate, the fiduciary is often granted the authority to retain counsel pursuant to O.C.G.A. § 53-7-6. However, that statute provides that the probate court does maintain the right to approve the amount of the fees and expenses. For this reason, it is also advisable to submit the terms and conditions of the representation to the probate court at the outset, rather than the conclusion, of litigation.

Fees and expenses can also be awarded to the beneficiaries of an estate in the event they are able to prevail on all or part of a claim. O.C.G.A. § 53-12-302 (former 53-12-193) provides that the liability of the fiduciary for breach of trust can include:

> (1) Any loss or depreciation in value of the trust property as a result of such breach of trust, with interest;
> (2) Any profit made by the trustee through such breach of trust, with interest;
> (3) Any amount that would reasonably have accrued to the trust or beneficiary if there had been no breach of trust, with interest; and
> (4) In the discretion of the court, expenses of litigation, including reasonable attorney's fees incurred in bringing an action on such breach or threat to commit such breach.
> (b) If the trustee is liable for interest, then the amount of the liability for interest shall be the greater of:
> (1) The amount of interest that accrues at the legal rate on judgments; or
> (2) The amount of interest actually received.

If a beneficiary intends to utilize this provision to seek reimbursement of attorney’s fees and expenses at the conclusion of a proceeding, counsel would be wise to place the court and the opposing party on notice of the terms and conditions of the representation from the outset.

2. Proper Parties & Recovery

Probate litigation can, at times, be analogous to derivative shareholder litigation. There are actions wherein the harm alleged was incurred by the Estate, rather than individual beneficiaries. As a result, the right of action generally vests in the administrator of the estate, and not in its beneficiaries. *Peden v. Peden*, 293 Ga.App. 483, 667 S.E.2d 650 (2008). However, the exception to this rule allows that an heir may sue in his/her own name where he/she can show that, "by reason of insolvency, fraud, collusion or other special circumstances, the administrator is unwilling to bring the suit." *Peden v. Peden*, 293 Ga.App. 483, 483-484, 667 S.E.2d 650, 651 (2008); *Bell v. Liberty Mut. Ins. Co.*, 108 Ga.App. 173, 176, 132 S.E.2d 538 (1963); *Life & Cas. Ins. Co. of Tennessee v. Marks*, 72 Ga.App. 640, 642, 34 S.E.2d 633 (1945). The "special circumstances" language has been interpreted to include situations wherein an executor has refused or been unwilling to collect any claims on behalf of the estate. *Peden v. Peden*, 293 Ga.App. 483, 483-484, 667 S.E.2d 650, 651 (2008). Even in circumstances where a beneficiary prevails in asserting the right to bring a claim, the recovery remains the property of the Estate. In the case of a sibling suing another sibling for misconduct as a fiduciary, the odd result manifests whereby the latter inherits back one-half of the funds misappropriated.

3. Interlocutory Proceedings for Removal

Any attorney experienced in the area of probate litigation will attest that, in most instances, the case is one or lost in the interlocutory removal phase. From the perspective of the beneficiary suing the Administrator/Executor, failure to obtain removal at an early point results in the Administrator/Executor using up estate funds in his or her defense. The result winds up being fruitless litigation. For example, in the situation of two sister beneficiaries suing the third sister beneficiary-Executor, the two sisters are funding 100% of their prosecution of the case and 66% of the defense. The situation can quickly become futile. For the opposite reason, it is essential in the defense of a probate matter to maintain the Administrator/Executor's role and right to use of estate funds in his or her

defense. Probate law allows a personal representative [t]o provide competent legal counsel for the estate according to the needs of the estate. O.C.G.A. § 53-12-261(24). This power does not allow the personal representative to obligate the estate for fees in litigation brought on by the personal representative's fault or misconduct. *Ray v. Nat'l Health Investors, Inc.*, 280 Ga. App. 44, 50, 633 S.E.2d 388, 393 (2006). The outcome of the proceeding is determinative of whether the estate is or is not responsible for the legal fees incurred. *Id.* In considering whether removal is warranted, the legal standard is simply "good cause." *Ray v. Nat'l Health Investors, Inc.*, 280 Ga. App. 44, 50, 633 S.E.2d 388, 393 (2006). Sufficient cause would include where the personal interests of the representative of an estate conflict, or *might* conflict, with the interest of the estate or the beneficiaries. *Id.*

END