ESTATE AND TRUSTS CONTESTS, DISPUTES & CHALLENGES

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Justin O'Dell

O'DELL & O'NEAL
ATTORNEYS

506 Roswell Street | Suite 210 | Marietta, GA 30060
TEL: 770.405.0164 | WWW.ODELLONEAL.COM

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 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. BENEFICIARY CONFLICTS

Estate and trusts litigation is rife with opportunities for conflicts of interest. Generally speaking, a probate or trust dispute will commence with the establishment and taking of "sides." The Executor or Personal Representative of the Estate may be in the lawyer's office under attack from all the beneficiaries who are all represented by another lawyer. Alternatively, the situation may be that one or more beneficiary is aligned with the Executor or Personal Representative and other beneficiaries are not. No matter the situation, it is imperative that the professional undertaking the matter understand two truths:

These are people who are willing to fight with their own family.

These are people who will turn on you.

1. If More Than One Person Is In Your Office, You Have a Conflict

Once these maxims are understood, it becomes readily apparent that the lawyer in the situation must immediately and correctly identify his or her client and make the scope of that representation clear. To start the process, a review of the rules of professional conduct concerning conflicts of interest is paramount.

RULE 1.7. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

(b) If client informed consent is permissible a lawyer may represent a client a significant risk of material and adverse effect if each affected client or former client gives informed consent confirmed in writing to the representation after:

(1) consultation with the lawyer pursuant to Rule 1.0(c);

(2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation; and

(3) having been given the opportunity to consult with independent counsel.

(c) Client informed consent is not permissible if the representation:

(1) is prohibited by law or these Rules;

(2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or a substantially related proceeding; or

(3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients. The maximum penalty for a violation of this Rule is disbarment.

Every lawyer in an estate or trust dispute who has more than one individual in his or her office is best advised to automatically assume that they find themselves in the situation described in (a) of Rule 1.7. It is near impossible in a trust or estate dispute to

find a situation wherein even the interests of two beneficiaries are 100% completely aligned in terms of motivation, information, outcome and approach. Therefore, any individual undertaking to represent more than one party in an estate or trust dispute is best advised to follow the conflict waiver process described in Rule 1.7 before proceeding.

The conflict of interest described in subparagraph (c) of the Rule is best understood when reduced to two concepts: information and outcome. In the first sense, a lawyer has a conflict which cannot be waived in instances wherein the lawyer possesses information from one client, which must be kept confidential, but which information is necessary to the interests of the other client and must be disclosed in order to adequately provide representation. In this situation, the lawyers competing duties mandate that the lawyer withdraw from representing either party. The second situation is the more commonly understood, that is where the goals and outcomes sought by one client are in opposition to the goals and outcomes sought by the other client. Again, the competing obligation of the lawyer to provide zealous representation and advocacy cannot be fulfilled.

Returning to the maxim above, the individuals engaged in this fight are in your office because they have a willingness and desire to engage in a dispute with other members of their family. Once that concept is understood, it is not difficult to envision the situation wherein the two family members who came in your office aligned against their sibling or step-parent have now turned on one another. If the lawyer has not adequately prepared and documented this possibility, the second maxim manifests itself and the clients turn on the lawyer.

2. Get Out When You Must and When You Can

Rule 1.16 of the Georgia Rules of Professional Conduct mandates that a lawyer decline or terminate any representation of a client when the representation would be in violation of the Rules. In the situations described above wherein the actual conflict which cannot be waived emerges, it is mandatory that the lawyer withdraw from

representation of both parties. Failure to do so likely subjects the lawyer to disciplinary action by the State Bar and raises the potential of a claim for legal malpractice. Paul v. Smith, Gambrell & Russell, 267 Ga. App. 107, 599 S.E.2d 206 (2004) (Genuine issues of material fact, whether law firm had conflict of interest in underlying commercial litigation, on basis that it had, at various times, represented both clients and business partner who was suing clients, precluded summary judgment in clients' legal malpractice action against law firm). The failure to withdraw may even cause the lawyer to lose the protection of certain defenses available in a malpractice case. Id. (When conflicts of interest are raised and when judgmental immunity is also raised as a defense in legal malpractice action, a jury question as to judgmental immunity arises, because proof of the existence of a conflict also gives rise to the reasonable inference that such conflict influenced the exercise of discretion, requiring denial of motion for summary judgment and allowing the jury to resolve such issues.).

Realizing that the individuals in a trust or estate dispute are willing to turn on their own family should cause the lawyer to firmly and fully understand that, given the opportunity, the clients will turn on the lawyer. The highest and best mechanism for avoiding the situation is to get out of the case when required and get out of the case when you can. Too often, lawyers will try and coddle the parties back into a harmonious synchronicity in order to keep things moving and keep a client. Unfortunately, when the discord arises (as it inevitably will), the good work of the lawyer in trying to maintain peace will suddenly become the crux of the accusation.

3. Approval of Representation

One incredibly effective and underutilized mechanism for avoiding conflict of interest scenarios is to file and obtain permission from the Probate Court for representation. By following this procedure, the lawyer is forced to specifically and correctly identify their client(s) and the terms and scope of the relationship. This procedure is essential and to some degree mandatory in instances wherein the lawyer is representing a fiduciary and could be compensated used estate/trust/ward funds.

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.

4. Approval of Settlement Agreements

A last and final mechanism to assist in the avoidance of conflict of interest issues is to seek Probate Court approval concerning any settlement of a case. In instances Court approval is mandatory (and should not be taken for granted). In other cases, even if not mandatory, having the Probate Court conduct a hearing wherein all parties attend, are placed under oath and attest to the Court that they have entered into a settlement agreement, freely and voluntarily, with the advice of counsel and that they are satisfied with the role of counsel creates an additional barrier to a subsequent situation of "buyers remore" and claims related to violations of the lawyer's ethical responsibilities..

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.").

B. EXECUTOR & TRUSTEE DISPUTES

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. *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 Powell v. Thorsen, 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).

3. 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).

4. *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.*

C. 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.

D. CONCEALMENT ACTION & TOLLING PROVISIONS

Concealment is a portion of a broader concept of tolling provisions related to causes of action involving estates. Lawyers engaged in Probate litigation must be aware of the rules related to the tolling of statutes of limitation.

1. General Tolling Provisions

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).

2. Tolling Due to Concealment

In addition to the general tolling provisions that operate without any (or minimal) factual burden, Georgia law allows for the statute of limitations to be extended in fiduciary situations upon a showing of a confidential relationship and circumstances of fraud. O.C.G.A. § 9-3-96 (“If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud.”).

The most common situation arises in trusts and estates litigation wherein property or funds are allegedly misappropriated, but the wrongdoing is not discovered by the

beneficiaries for a length of time because the beneficiaries are not in receipt of the necessary information from which to determine that misconduct has occurred. The existence of the fiduciary relationship absolves in the beneficiaries the obligation to "anticipate" or "watch" for fraud. Dunaway v. Clark, 536 F. Supp. 664, 672 (S.D. Ga. 1982), *citing* Hogg v. Hogg, 206 Ga. 691, 58 S.E.2d 403 (1950). Therefore, if the beneficiaries show a confidence placed in the fiduciary by which they were prevented from discovering the fraud, the failure to use reasonable diligence is excusable. Id.

An important distinction regarding the fraud exists. The fraud utilized to toll the statute of limitations must be fraud designed to conceal the conduct. This may be separate and apart from the alleged fraudulent conduct creating a breach of fiduciary duty. Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 41, 766 S.E.2d 497, 506 (2014) *citing* Hendry v. Wells, 286 Ga.App. 774, 779(1), 650 S.E.2d 338 (2007) ("[u]nder Georgia law, fraud that gives rise to a cause of action does not necessarily establish the fraud necessary to toll the statute of limitation."). Because the statute of limitation in instances of breach of fiduciary duty can be up to six years and because each transaction is a separate and distinct breach and new period of limitation, the addition of tolling periods due to concealment can render a fiduciary subject to liability for decades.

E. OBJECTIONS TO FINAL ACCOUNTS

In many instances, the executor, administrator or trustee is relieved of any obligation to provide an accounting. Some trust and will boilerplate entitles a vested beneficiary to an annual statement of income and expenses. The language of the relevant instrument may prove essential in determining whether such rights exist and under what circumstances. Even assuming a right exists, in many instances prevailing on an objection to a final accounting will prove difficult.

1. Rights to An Accounting

O.C.G.A. § 53-12-243 sets for the rights, requirements and abilities to waive or forego an accounting.

> (a) On reasonable request by any qualified beneficiary or the guardian or conservator of a qualified beneficiary who is not sui juris, the trustee shall provide the qualified beneficiary with a report of information, to the extent relevant to that beneficiary's interest, about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust, including the trust provisions that describe or affect such beneficiary's interest.
> (b)(1) A trustee shall account at least annually, at the termination of the trust, and upon a change of trustees to each qualified beneficiary of an irrevocable trust to whom income is required or authorized in the trustee's discretion to be distributed currently, and to any person who may revoke the trust. At the termination of the trust, the trustee shall also account to each remainder beneficiary. Upon a change of trustees, the trustee shall also account to the successor trustee. In full satisfaction of this obligation, the trustee may deliver the accounting to the guardian or conservator of any qualified beneficiary who is not sui juris.
> (2) An accounting furnished to a qualified beneficiary pursuant to paragraph (1) of this subsection shall contain a statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust or since the last accounting to that beneficiary and a statement of the assets and liabilities of the trust as of the end of the accounting period.
> (c) A trustee shall not be required to report information or account to a qualified beneficiary who has waived in writing the right to a report or accounting and has not withdrawn that waiver.
> (d) Subsections (a) and (b) of this Code section shall not apply to the extent that the terms of the trust provide otherwise or the settlor of the trust directs otherwise in a writing delivered to the trustee.
> (e) Nothing in this Code section shall affect the power of a court to require or excuse an accounting.

The statutory scheme suggests that a right exists in a beneficiary to request an accounting. However, in the neverending *Rollins* dispute, the Georgia Supreme Court provided that the decision to order an accounting (in instances wherein it is waived by the trust/estate documents) is not an absolute right, but in the nature of an equitable remedy and subject to the discretion of the trial court. Rollins v. Rollins, 294 Ga. 711, 755

S.E.2d 727 (2014) (*applying in part aspects of N.Y. Law).* Thus, it would appear that a beneficiary has no right to make an absolute demand for an accounting when the rights described in § 53-12-243 have been waived and that any request for a judicial accounting must be supported by a factual and legal basis.

2. Objections to Accountings/Discharge

An objection to an accounting is typically a dispute over the inclusion/exclusion of a certain asset or debt in the estate or a dispute over the proposed payment of expenses (including commissions and fees) and distribution of estate property. Once again, in most instances, the operative will or trust document is likely to give the executor or trustee great discretion (often times sole and absolute discretion) in making these determinations. Even in instances wherein the discretion is not absolute, "[t]he courts will not ordinarily interpose to restrain the execution of a power, except where abuse of discretion, bad faith, or fraud is shown, or where the power is attempted to be exercised in a manner different from that authorized by the donor." In re Estate of Helms, 328 Ga. App. 179, 184, 761 S.E.2d 579, 584 (2014). The best and surest way to prevail is to show some aspect of self-dealing and/or conflict of interest. *See Part B(2)(a) above.*

F. DETERRENCE PROVISIONS: SELECTION, TRUST PROTECTIONS & NO CONTEST CLAUSES

The phrase "an ounce of prevention is worth a pound of cure" has never been truer in than in the area of trusts and estates litigation. As shown in these materials, prevention provisions apply not just for the benefit of the client, but also to benefit the attorney involved in the situation. In the drafting process, there are some common sense provisions and processes that can help avoid subsequent family disputes.

1. Trustee Selection

The selection of the individual responsible for serving as Trustee, Executor or Personal Representative can have a dramatic influence upon the likelihood of a dispute.

In the writer's experience, the following choices carry a substantial likelihood of arousing suspicion:

- Choosing multiple persons (particularly some, but not all children);
- Choosing a child who is the subject of extraordinary amounts of interfamily loans, gifts or the like;
- Choosing a child who is receiving a disproportionate share;
- Changing the selection of a fiduciary to the individual with whom the decedent was most recently residing (or in their care);
- Choosing various children for different roles (i.e. executor v. trustee);
- Choosing a new spouse over children;
- Choosing a child when the documents make provision for a new spouse;
- Choosing the lawyer (or accountant) responsible for preparing the document (note ethical rules and issues associated with this option).

To the contrary, the following choices seem to cause less frequent issues:

- Choosing the oldest child;
- Choosing the child residing closest or in the same state;
- Choosing a long-standing friend or relative senior in age to the children;
- Choosing a child with a suitable skill set (CPA, attorney)
- Choosing an institution without an exorbitant fee structure

2. Trust Protection Provisions

The greatest protection the draftsman can provide for the fiduciary is adequate discretionary decision-making rights and responsibilities. Georgia Courts have reaffirmed that when a trust provision vests the fiduciary with "absolute discretion" then the Courts will only interfere when "the exercise of discretion by the trustee is infected with fraud or bad faith, misbehavior, or misconduct, arbitrariness, abuse of authority or perversion of the trust, oppression of the beneficiary, or want of ordinary skill or

judgment." Reliance Trust Co. v. Candler, 294 Ga. 15, 17, 751 S.E.2d 47, 49 (2013). Further, the Courts "will not ordinarily interpose to restrain the execution of a power, except where abuse of discretion, bad faith, or fraud is shown, or where the power is attempted to be exercised in a manner different from that authorized by the donor." Id.

It is also important that the draftsman provide that the exercise of the fiduciaries discretion can include a decision not to exercise the powers at all. A trustee or fiduciary can be found to have acted in bad faith in instances wherein discretionary authority was granted, but for arbitrary reasons, not exercised. McPherson v. McPherson, 307 Ga. App. 548, 551, 705 S.E.2d 314, 318 (2011). For example, in a paragraph providing the trustee the discretion to make payments to income beneficiaries in amounts in the sole discretion of the trustee creates even greater immunity for the fiduciary if the paragraph includes language providing that the discretion includes the right to make payments "if any" or "including none at all."

Finally, the protection provisions in instances wherein the fiduciary is also a beneficiary are essential. This is particularly true if the fiduciary or particular beneficiary holds a vested right which is greater, separate and apart from the other beneficiaries. The most common example is a new spouse situation wherein the decedent/grantor provides an income support trust to the spouse for life with the remainder of the property for the children (who are not the children of the new spouse). In this situation, language about whether the spouse is allowed to serve as her own trustee, language about whether her separate assets and estate are or are not to be considered in making distributions, language about whether her rights include income, principal or both, language about whether her rights are paramount to the remainder, language about her standard of living to be enjoyed, etc… are essential.

3. No-Contest Provisions

Georgia law allows for the enforcement of in terrorem clauses, however, deems the same as contrary to public policy and subject to strict scrutiny.

O.C.G.A. § 53-4-68 provides that:

> (a) Conditions in a will that are impossible, illegal, or against public policy shall be void.
> (b) A condition in terrorem shall be void unless there is a direction in the will as to the disposition of the property if the condition in terrorem is violated, in which event the direction in the will shall be carried out.

An in terrorem clause cannot make an executor unanswerable for any violations of the will or of the laws governing personal representatives in Georgia. Sinclair v. Sinclair, 284 Ga. 500, 503, 670 S.E.2d 59, 61 (2008). Moreover, a beneficiary has a right to bring an action for declaratory relief in determining whether or not a proceeding would constitute a violation of an in terrorem clause. Id.

For the foregoing reasons, it may be that the use of no contest provisions in a will actually become litigation breeding. An astute, but aggrieved beneficiary, unable to challenge the will itself, may challenge the actions of the fiduciary and use the declaratory process to litigate with the estate. *But see*, Norman v. Gober, 292 Ga. 351, 354, 737 S.E.2d 309, 311 (2013), holding that the initiation of legal proceedings through a third party (11 year old child) who was not entitled to challenge a will might be attributable to the mother and sufficient to trigger the in terrorem clause.

4. Communication is Key

More often than not, estate disputes and challenges arise from a lack of communication. The first breakdown in communication occurs when the testator/grantor does not adequately communicate the basis or reasons for a choice which is not readily apparent or expected. If the selection of a fiduciary is going to be a new spouse, particular child or children or some other party, that decision and the reasons therefore would be best disclosed and explained to all parties well in advance of death. Likewise, if the trust or will is going to make a unique, disproportionate or unexpected distribution of assets, that decision is best disclosed and explained to all parties well in advance of death. If the grantor/testator is worried about the reaction to a decision, it is probably a

decision which is going to lead to a dispute. The grantor/trustor then must ask themselves whether they wish that dispute to play out during his/her life or after his/her death and be comfortable with the answer.

As the trust or estate moves forward and begins operation, communication and information will most often avoid disputes. The fact that a fiduciary is relieved of filing returns does not always mean that it is a good idea to keep information from the beneficiaries. To the contrary, if the fiduciary will transmit information and the basis for decisions to those affected, the likelihood of a dispute is reduced. If the fiduciary is apprehensive about sending information about a decision or transaction to beneficiaries, the fiduciary should examine whether that decision or transaction is in good faith.

Lastly, as the situation unwinds and estates or trusts are brought to a close, it is important to recognize that each family member is different and may process grief and loss in a different way. Very often a trust or estate dispute is merely the vessel through which unresolved sibling rivalries, step-parent issues, divorced parent issues and other forms of old wounds are manifested. In some cases, a forum or process whereby the aggrieved family member can simply "unload" is essential and can actually move the matter to resolution.

END