Georgia Probate Court Benchbook

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I. Preliminary Matters (Administer Oaths)

A. General Powers (Administer Oaths)

Every court has the power to:

a. Preserve and enforce order in its immediate presence, and as near thereto as is necessary, to prevent interruption, disturbance, or hindrance to its proceedings;

b. Enforce order before a person or body empowered to conduct a judicial investigation under its authority;

c. Compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding therein;

d. Control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto;

e. Administer oaths in an action or proceeding pending therein, and in all other cases, when it may be necessary in the exercise of its powers and duties;

f. Amend and control its processes and orders so as to make them conformable to law and justice; and to amend its own records so as to make them conform to

the truth; and

g. Correct its own proceedings before final judgment. {O.C.G.A. §15-1-3}.

Probate courts have the power to carry out the following duties as assigned by specific laws:

h. Perform duties relating to elections;

i. Fill vacancies in public offices by appointment;

j. Administer oaths to public officers pursuant to OCGA § 15-9-33 which (1) authorizes probate judges to administer oaths in all cases where the authority is not specifically delegated to some other officer, and (2) authorizes probate judges in counties having a population of 550,000 or more to administer the oath of office to any officer or official of such county or any municipality located within such county and to each judicial officer of the state whose jurisdiction extends to such county;

k. Accept, file, approve, and record bonds of public officers;

l. Register and permit certain enterprises;

m. Issue marriage licenses;

n. Hear traffic cases;

o. Receive pleas of guilty and impose sentences in cases of violations of game and fish laws;

p. Issue search warrants pursuant to OCGA §17-5-21(a) and §17-7-20. Also see subsection 8 under (B. Jurisdiction) below for more details.

q. Hold criminal commitment hearings; and

r. Perform such other judicial and ministerial functions as may be provided by law. {O.C.G.A. §15-9-30(b) }.

[NOTE: To assure proper administration of the court's duties, the judge of the probate court of each county must be furnished a copy of the Official Code of Georgia Annotated and annual supplements to the Code to keep it current. The costs of such Code and maintenance thereof must be paid by the governing authority of each such county from the county library fund, if sufficient, otherwise any additional amount required must be paid from the general funds of the county {OCGA §15-9-30 (c)}. In addition, the State is to provide every probate judge one copy of the Reports of the Supreme Court and the Court of Appeals, without costs to the county. The Reports are "property" of the probate judge during his/her term only, and all Reports are to be turned over to the successor in office; this effectively makes the Reports property of the court or the county and not the individual judge. O.C.G.A. §50-18-31(3)].

B. Jurisdiction

Jurisdiction and Venue distinguished

a. Jurisdiction is the "power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." {Black's Law Dictionary 853 (6th ed. 1990)}. Subject matter jurisdiction is the power of the court to hear the type of case that is before it. Personal jurisdiction is the power of the court over a particular

defendant.{Black's Law Dictionary 854 (6th ed. 1990)}. A court must have both types of jurisdiction before it can enter a valid and binding judgment.

b. Venue is not synonymous with jurisdiction. Venue refers to the location at which a court with jurisdiction may hear and determine a case. {Black's Law Dictionary 1557 (6th ed. 1990)}.

c. Subject to the provisions of subparagraph (2) of this paragraph, probate courts have the right and power to conduct trials, receive pleas of guilty, and impose sentence upon defendants for violating any law specified in Title 27 (relating to game and fish) which is punishable for its violation as a misdemeanor. Such jurisdiction is concurrent with other courts having jurisdiction over such violations; provided, however, that such courts do not have the right and power to conduct trials, receive pleas of guilty, and impose sentence upon defendants who are charged with:

i. Violations of any such laws which are specified as being of a high and aggravated nature; or

ii. A first violation of hunting deer at night with the aid of a light under Code §27-3-2.

d. A probate court does not have the power to dispose of misdemeanor cases as provided in subparagraph (1) of this paragraph unless the defendant first waives in writing a trial by jury. If the defendant does not waive a trial by jury, the defendant must notify the court and, if reasonable cause exists, the defendant must be immediately bound over to a court in the county having jurisdiction to try the offense wherein a jury may be impaneled. {O.C.G.A. §15-9-30.3}

Probate courts have authority, unless otherwise provided by law, to exercise original, exclusive, and general jurisdiction of the following subject matters:

e. Probate of wills;

f. Granting of letters testamentary and of administration and the repeal or revocation of the same;

g. All controversies in relation to the right of executorship or administration;

h. Sale and disposition of the property belonging to, and the distribution of, deceased persons' estates;

i. Appointment and removal of guardians of minors, conservators of minors, guardians of adults, conservators of adults, and persons who are incompetent because of mental illness or mental retardation;

j. All controversies as to the right of guardianship and conservatorship, except for actions under O.C.G.A §19-7-4 relating to loss of parental custody;

k. Auditing and passing returns of all executors, administrators, and guardians and conservators;

l. Discharge of former sureties and the requiring of new sureties from administrators, guardians, and conservators;

m. All matters as may be conferred on them by Chapter 3 of Title 37;

n. All other matters and things as appertain or relate to estates of deceased persons and to persons who are incompetent because of mental illness or mental retardation, including:

i. Jurisdiction over the entire amount of settlement funds in connection with the settlement of an incapacitated adult ward's claim for medical malpractice. Thus, when the probate court refused to approve the proposed distribution of settlement proceeds, it had the authority to require the attorneys to pay into the state court registry the settlement funds the attorneys had disbursed to themselves and then to hold them in contempt for failing to do so. Gnann v. Woodall, 270 Ga. 516 (1999).

ii. Jurisdiction over a claim against a personal representative of an estate in which the claimant seeks payment of damages for breach of a fiduciary duty. Heath v. Sims, 242 Ga. App. 691 (2000). This means that, with respect to a claim for money damages for a breach of fiduciary duty by a personal representative, guardian, or conservator, the probate court can hear a tort suit based upon Title 51 of our Code, and award punitive damages if it is found that the criteria set forth in O.C.G.A. §51-12-5.1 are met.

o. All matters as may be conferred on them by the Constitution and laws. {O.C.G.A. §15-9-30(a)}.

Grant of Administration

p. The probate judge may grant administration only upon the estate of a person who at the time of death was

i. A resident of the county where the application is made, or

ii. A nonresident of this state with property in the county where the application was made or with a bona fide cause of action against some person in the county. {O.C.G.A. §15-9-31}

q. When a nonresident decedent has property or a cause of action in more than one county, letters of administration may be granted in any county in which the property or cause of action is located. The probate judge first granting such letters acquires exclusive jurisdiction. {O.C.G.A. §15-9-32}.

Probate courts which have jurisdiction over misdemeanor traffic offenses have the power to conduct trials, receive pleas of guilty, and impose sentence upon defendants for possession of one ounce or less of marijuana, and simple misdemeanor possession of an alcoholic beverage by any person under 21, if the defendant first waives in writing a trial by jury. {O.C.G.A. §15-9-30.6}.

Probate courts have the right and power to conduct trials, receive pleas of guilty, and impose sentence for violations of Code Section 12-3-10, concerning prohibited conduct in state parks, historic sites, and recreational areas. Prosecutions of violations may be either through arrest or through issuance of a summons where the defendant waives in writing a trial by jury. This jurisdiction is concurrent with certain other courts. {O.C.G.A. §§12-3-10, 15-9-30.4}.

Concurrently with other courts having jurisdiction over such violations, probate courts have the right and power to conduct trials, receive pleas of guilty, and impose sentence upon defendants for violating any provision of Article 1 of Chapter 7 of Title 52 {O.C.G.A. §52-7-1, et seq.}, known as the "Georgia Boat Safety Act," which constitutes a misdemeanor, provided the defendant first waives in writing a trial by jury. {O.C.G.A. §15-9-30.5}.

Probate courts have concurrent jurisdiction with the superior, state, magistrate and certain municipal courts to hold a court of inquiry to examine into an accusation against a person legally arrested and brought before the court; i.e., preliminary "probable cause" hearings. {O.C.G.A. §17-7-20}.

Any judge of a superior or state court, judge of the probate court, magistrate, or officer of a municipality who has the criminal jurisdiction of a magistrate may hold a court of inquiry, see OCGA §17-7-20. Because a probate judge is authorized to hold a court of inquiry under the above statute, the probate judge is also authorized to issue a search warrant pursuant to OCGA §17-5-21(a). There is a question as to whether OCGA § 40-13-21(b) can be construed to divest a probate court of the authority to issue search warrants in misdemeanor traffic cases in counties where there is a state court. See Joyner v. The State, 347 Ga. App. 122, August 3, 2018 for a complete review of this issue.

In counties with a population over 90,000 where the judge has been a member of the State Bar for at least seven years, the probate court has concurrent jurisdiction with superior courts with regard to proceedings for:

r. Declaratory judgments involving fiduciaries pursuant to O.C.G.A. §§9-4-4, 9-4-5, 9-4-6;

s. Tax motivated estate planning dispositions of a minor or ward's property pursuant to O.C.G.A. §§29-3-36 or 29-5-36.

t. Approval of settlement agreements pursuant to O.C.G.A. §53-3-22;

u. Appointment of new trustee to replace trustee pursuant to O.C.G.A. §53-12-

[NOTE: These two code sections are not limited in Title 29 to expanded jurisdiction probate courts and do not reference the phrase "tax motivated"];

v. Acceptance of the resignation of a trustee upon written request of the beneficiaries pursuant to O.C.G.A. §53-12-175;

w. Acceptance of resignation of a trustee upon petition of the trustee pursuant to O.C.G.A. §§53-12-175 , 15-9-127 .

x. Motions seeking an order for disinterment and deoxyribonucleic acid (DNA) testing as provided in Code Section 53-2-27;

y. Conversion to a unitrust and related matters pursuant to Code Section 53-12-221; and

z. Adjudication of petitions for direction or construction of a will pursuant to Code Section 23-2-92. {O.C.G.A. §15-9-127 }

C. Rule Nisi

A rule nisi is generally defined as a rule which will become imperative and final unless cause is shown against it. The rule commands the party to show cause why he would not be compelled to do the act required or why the object of the rule should not be enforced.

Special Rules Involving Officers of the Court

a. Upon application the probate judge may grant a rule nisi against an officer of court, such as a deputy sheriff, subject to that court, in vacation or in term, or to the accused in a traffic offense.

b. Such rule nisi must contain a full statement of the case in which the officer is called upon to show cause or the case of the accused, and the time and place of the hearing. {See O.C.G.A. §15-13-4 }.

D. Scire Facias

When the accused fails to appear when a property bond has been used in a traffic offense, the court shall enter a rule nisi indicating the accused's failure of appearance and forfeiture of bond.

The court may then issue a writ of scire facias, returnable to the next term of court, against the accused or any sureties which have been served at least 20 days before the date of return.

If no cause to the contrary is shown on return, the judgment, on motion, shall be entered against the accused. Real property may then be sold by the sheriff at a court-ordered sale.

E. Fi. Fa. (Fieri Facias)

Fi. fa. is generally defined as "You cause to be made." In practice, it is a writ of execution commanding the sheriff to levy and make the amount of judgment from the goods and the chattels of the person owing.

In all cases where judgment has been entered, the clerk of a probate court is empowered to issue a fi. fa. for costs. {O.C.G.A. §15-9-37(a)(4) }.

Specific Issues

a. When costs are due the probate judge by executors, administrators, conservators, or guardians, or by any party where judgment has been entered, the probate judge may issue a fi. fa. at any regular term of court for the amount due for costs.

b. Each fi. fa. shall be directed "to all and singular the sheriffs of this state," and made returnable to the probate court.

c. Whenever any illegality or other defense is filed by the defendant in fi. fa., or a claim to the property levied on is filed, the sheriff shall return the fi. fa. to the superior court, where the defense or claim shall be tried as other cases in the superior court. {O.C.G.A. §15-9-62 }.

F. Nunc Pro Tunc

Nunc pro tunc judgment is to enter now a judgment which was rendered and should have been recorded at a previous time. The phrase signifies "now for then" and is granted to answer the purpose of justice, but never to do injustice.

The purpose of nunc pro tunc is to record some action that was taken or a judgment rendered previous to the making of the entry which is said to take effect as of the former date, but such entry cannot be made to serve the office of correcting a decision, however erroneous, or supplying nonaction on the part of the court {240 Ga. 417 (1977); 147 Ga. 10 (1917)}. The court must have actually made the decision on the earlier date in order to enter a judgment nunc pro tunc.

Based solely on the record, and without the necessity for the introduction of extrinsic evidence, the court may, on its own motion and without notice, enter such judgment and decree nunc pro tunc at a later date. Such entry simply perfects the record as between the parties; it relates back to the time when it should have been entered, although a different rule would apply to sureties, intervening bona fide purchases, or innocent third parties.

Clerical Errors

a. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. {O.C.G.A. §9-11-60(g) }. However, such authorization for a nunc pro tunc judgment refers only to clerical mistakes in judgments.

b. The nunc pro tunc order cannot be an entry of a new and different finding from that which was made and a different judgment from that rendered {Boockholdt v. Brown, 224 Ga. 737, 740 (1968)}.

G. Contempt

Contempt is generally defined as any act that is calculated to embarrass, hinder, or obstruct the court in the administration of its duties or which is calculated to lessen its authority or its dignity.

a. Before a person may be held in contempt for violating a court order, the order should inform him in definite terms as to the duties thereby imposed upon him, and the command must therefore be express rather than implied. {Affatato v. Considene, 305 Ga. App. 755 (2010)}

b. Inability to pay is a defense only where the contemnor demonstrates "that he has exhausted all resources and assets available …, has in good faith clearly exhausted all resources at his command and has made a diligent and bona fide effort to comply … and that he cannot borrow sufficient funds to comply." {See Affatato v. Considene above.}

The probate court may enforce obedience to all lawful orders of the court by attachment for contempt. {O.C.G.A. §15-9-34(a) }. The court may issue attachments for contempt only in the following cases:

c. Misbehavior of any person or persons in the presence of the court or so near as to obstruct justice,

d. Misbehavior of any of the officers of the court in their official transactions,

e. Disobedience or resistance by any officer of the court, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the court,

f. Violation of subsection (a) of Code Section 34-1-3, relating to prohibited conduct of employers with respect to employees who are required to attend judicial proceedings, and may not be used to enforce a money judgment entered against a fiduciary appointed by the probate court. {Backus v. Backus, 299 Ga. App. 122 (2009)}

g. Violation of a court order relating to the televising, videotaping, or motion picture filming of judicial proceedings. {O.C.G.A. §15-1-4(a) }.

Attachment for contempt is not the remedy for compelling the payment of a mere debt but would be proper where a representative held particular property in his possession that the court ordered delivered to a distributee or legatee and which he refused to deliver Paschal v. Melton, 174 Ga. 910 (1932) . {See also O.C.G.A. §15-1-4(b) }.

The probate court may issue rules and attachments for contempt offered the court or its process by an executor, administrator, guardian, or other person and may punish the same by a fine as high as $500.00, or imprisonment not exceeding 20 days, or both. {O.C.G.A. §15-9-34(b) }.

H. Citation

Citations
CASES
Distinction between direct and indirect contempt {Clark v. State of Georgia, 90 Ga. App. 330 (1954)}
Distinction between criminal and civil contempt {Hopkins v. Hopkins, 244 Ga. 66 (1979)}

Citation is a writ issued commanding a person, guardian, conservator, administrator, executor, or the surety named therein to appear on a day named and do something mentioned therein (make an accounting, settlement, or the like) or show cause why he or she should not.

Specific Service Rules

a. Where guardians, conservators, administrators, executors, sureties on their bonds, or other persons remove themselves beyond the limits of the state or abscond or conceal themselves, the probate court judge has the power to require these parties to appear before the court relative to the performance of their duties or any other matter related to the probate court pertaining to any such person. {O.C.G.A. §15-9-35(a) }.

b. Service may be had upon such guardian, conservator, administrator, executor, surety, or other person by publication in the following manner:

i. The order may be published in the newspaper of the county in which the

sheriff's advertisements are published once a week for four weeks immediately preceding the court day on which the person is cited to appear.

ii. The published order must be directed to the person cited, and must specify the date, time, and matter which will be heard.

iii. When the address of the person to be cited is known, a copy of the published order must be mailed to the named party and the probate judge must make an entry of his actions upon the court minutes. {O.C.G.A. §15-9-35(b) }.

For purposes of Chapter 11 of Title 53, the words "citation" and "notice" have the same meaning unless the context otherwise requires. {O.C.G.A. §53-11-9(b) }.

I. Appointment and Duties of Clerks; Appointment of Associate Judges

Probate judges, by virtue of their office, are clerks of their own court, but may appoint one or more clerks for whose conduct they are responsible and who hold their offices at the pleasure of the judge. Probate judges also have the authority to appoint one of their clerks as chief clerk of the probate judge unless otherwise provided by local law. {O.C.G.A. §15-9-36(a) }.

The appointed clerks, including the chief clerk of the probate judge, may do all acts the judges of the probate courts could do which are not judicial in their nature. {O.C.G.A. §15-9-36(b) }. {See Handbook for duties and responsibilities of clerks.}

Authority of Clerks of Article 6 Probate Courts

a. In addition to the other powers granted to appointed clerks, the chief clerk of the probate court or, if there is no chief clerk, a clerk designated by the judge, may exercise all the jurisdiction of the judge of the probate court concerning uncontested matters in the probate court. Such clerk may exercise such power regardless of whether the judge of the probate court is present. The powers granted by this subparagraph may be exercised only by a chief clerk or designated clerk who has been a member of the State Bar of Georgia for at least three years or has been a clerk in the probate court for at least five years.

Associate Judges: Appointment and Authority

[NOTE: This paragraph shall apply to each county of this state having a population of 90,000 or more persons according to the United States decennial census of 2010 or any future such census. {O.C.G.A. §15-9-36(c) ; Cf. O.C.G.A. §15-9-120 }]

b. As of July 1, 2009, associate judges may be appointed by the judge of the probate court of any county, subject to the approval of the governing authority of the county. Associate judges serve at the pleasure of the judge of the probate court; however, the term of an associate judge cannot extend beyond the term of the appointing judge. Compensation for associate judges is fixed by the judge of the probate court with the approval of the county governing authority, and the

salary and any employment benefits are to be paid from county funds. Associate judges must have the same qualifications of the elected judge (that is, be eligible to run for election to the office), excepting only the residency requirements. Every associate judge is required to take and subscribe the following oath:

i. "I do swear that I will well and faithfully discharge the duties of associate judge of the probate court for the County of _____ during my continuance in office, according to law, to the best of my knowledge and ability, without favor or affection to any party. So help me, God."

c. Associate judges may be appointed on a full-time or part-time basis. If appointed on a full-time basis, the associate judge will become an associate member of the Georgia Council of Probate Court Judges, without voting power or eligibility to hold office. In such cases, a certified copy of the Order of Appointment is to be sent to the Council. Associate judges are not eligible to participate in the Judges of the Probate Courts Retirement Fund of Georgia.

d. If the judge of the probate court also serves as chief magistrate for the county, an associate judge of the probate court may serve in the magistrate court without further oath, certificate or commission.

e. Full-time associate judges are required to complete all of the educational (training) requirements which apply to judges of the probate courts, and part-time associate judges are required to attend a minimum of nine hours of related training. [It is uncertain whether this was intended to be an annual requirement. The Code Section does not make an annual reference. Since full-time associate judges must meet all requirements which apply to probate judges, presumably, the annual requirements for the probate judges, as well as the initial training (the new judges' orientation course), apply to full-time associate judges.] The cost for the attendance of associate judges at training courses is to be paid from county funds. Full-time associate judges are prohibited from practicing law.

f. Associate judges are prohibited from practicing law in any case, proceeding or matter in the court in which serving or in any other court in any case, proceeding or matters of which the court in which serving has pending jurisdiction or had jurisdiction.

g. Associate judges are prohibited from giving legal advice or counsel on any matter of any kind which has arisen directly or indirectly in the court in which serving, except as may be incidental to such service. The limitations which are applicable to judges of the probate courts regarding fiduciary roles shall apply to all associate judges of the probate court. {OCGA § 15-9-2(b)}.

h. Whenever the judge of the probate court is unable to act in any case because of a conflict of interest, an unlawful act or the accusation of an unlawful act by such judge, or other disqualification of such judge, any associate judge of the probate court shall also be disqualified. {OCGA § 15-9-2.13}Civil Practice Act

O.C.G.A. §9-11-1 provides that the Civil Practice Act "governs the procedure in all courts of record of this state in all actions of a civil nature...with the exceptions stated in Code Section 9-11-81."

Since the probate court is a court of record {72 Ga. App. 623 (1945) }, the Civil Practice Act applies to the probate court. {Cochran v. McCollum et al., 233 Ga. 104 , 210 S.E.2d 13 (1974) }.

Specifically, the right of a party to open a default under O.C.G.A. §9-11-55(a) applies in the probate courts. {In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007)}

J. General Courtroom Practice

The court must exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

a. Promote the ascertainment of truth,

b. Avoid needless consumption of time,

c. Protect the witnesses from harassment or undue embarrassment, and

d. Protect the interest of any child or incapacitated adult.

No counsel is permitted to interrupt the other side while addressing the court, except for the purpose of correcting a misstatement of evidence or misrepresentation of the position of counsel, and under no circumstances will such interruption be permitted to be addressed to the opposing counsel, but only to the court. {*See A above*}.

K. Appeal Prior to Probate Court Hearing

Probate Courts have exclusive jurisdiction over the probate of wills. O.C.G.A. §53-5-1(a) . Superior Courts lack subject matter jurisdiction to hear the probate of a will. The parties cannot by consent confer jurisdiction to Superior Court. SunTrust Bank v Peterson, 263 Ga. App. 378, 587 SE 2d 849 (2003). The defendant in the above case tried to bypass the initial trial in the Probate Court by filing an action in the Superior Court and requesting a transfer of the case from the Probate Court to Superior Court. The Superior Court decision was reversed on appeal.

L. Dormancy

Under O.C.G.A. §9-2-60(b) , any action in which no written order has been entered for a period of five years is automatically dismissed. This automatic dismissal is mandatory and occurs by operation of law. A written order of dismissal is not required, and any allegation that the court's failure to sign an order is merely a "clerical mistake" fails. {Clark v. Clark 293 Ga. App. 309 (2008)}

M. Forma Pauperis or Affidavit of Indigence

OCGA §9-15-2 (a)(1) provides "[w]hen any party, plaintiff or defendant, in any action or proceeding held in any court in this state is unable to pay any deposit, fee, or other cost which is normally required in the court, if the party shall subscribe an affidavit to the effect that because of his indigence he is unable to pay the costs, the party shall be relieved from paying the costs and his right shall be the same as if he had paid the costs. However, any other party of interest or his agent or attorney may contest the truth of an affidavit of indigence by verifying affirmatively under oath that the same is untrue. In such a case, the question of the plaintiff's indigence "shall be heard and determined by the court." In the absence of a traverse affidavit contesting the truth of an affidavit of indigence, the court may inquire into the truth of the affidavit of indigence. After a hearing, the trial court may order the costs to be paid if it finds that the deposit, fee, or other costs can be paid and, if the costs are not paid with the time permitted in such order, may deny the relief sought. In the case of Lee v. Bachelor, A18A0273, April 25, 2018, the trial court denied an affidavit of indigence without a hearing on the applicant's indigence. The Court of Appeals reversed stating "there is nothing in the statute that allows a court inquiring on its own into the truth of a pauper's affidavit to order the payment of court costs without a hearing.

N. Motion to Intervene/Dismissal of an action

1. Dismissal of an action - The question of whether a trial court has jurisdiction to hear a motion following the dismissal of an action is fully addressed in the case of Barnes v. Cannon et al., A18A1139 (October 4, 2018). Citing various cases, the Court of Appeals ruled "the dismissal of a lawsuit [or other legal action] generally deprives the trial court of jurisdiction to take further action in a case." Trial courts lack jurisdiction to hold a party in contempt after dismissing the case; plaintiffs' voluntary dismissal deprived court of authority to enter judgment in case and a trial court has no power to order reinstatement of the action after it has been voluntarily dismissed. "Thus, [a dismissal] operates to divest the court of jurisdiction, after which the trial court has no authority to enter additional orders, with the possible exception of OCGA § 9-15-14 awards." The awards are for litigation costs assessed for frivolous actions and defenses.

II. Pretrial Considerations

A. Terms of Court

A new term of the probate court begins on the first Monday of January, April, July, and October month and continues in session from day to day as the business of the court may require. If the first Monday is a legal holiday, the new term begins on the following day. {O.C.G.A. §15-9-82 }.

Terms are now irrelevant to all proceedings under Title 53.

B. Parties who are not Sui Juris, Unborn or Unknown

Code section 53-11-2(a), relating to guardians, provides that the term "guardian" means the guardian ad litem appointed by the probate court. When a party to a proceeding in the probate court is not sui juris, is unborn, or is unknown, such party shall be represented in the proceeding by a guardian. Service upon or notice to a guardian shall constitute service upon or notice to the party represented, and except as provided in subsection (a) of code section 15-9-17, no additional service upon or notice to such party shall be required. The court may determine for the purpose of the particular proceeding that the natural guardian, if any, or the testamentary guardian, if any, or the conservator of property, if any, or the guardian of person, if any, has no conflict of interest, may represent such person. The authority of a guardian to act may be established by requirements in this code section.

C. Place and Time for Holding Court

The probate court must be held at the place prescribed for the superior court or in the office of the judge of the probate court in each county. {O.C.G.A. §15-9-82 }

The probate judge must keep his office and all things belonging thereto at the county site and at the courthouse unless impracticable from any cause, in which case the office may be kept at some other designated place not more than two miles away, of which public notice must be given. {O.C.G.A. §15-9-80 }.

Additional locations are authorized in certain counties over 400,000. {O.C.G.A. §15-9-81 }.

The office of the judge of the probate court shall be open to conduct business a minimum of 40 hours each week as determined by the judge of the probate court. This does not require any office of the judge of the probate court to be open on any public holiday, legal holiday, day of rest, or similar time that is recognized and designated as such by the laws of this state or by the governing authority of the county. The office of the judge of the probate court does not have to be open if other county offices are closed because of inclement weather or any other reason. {OCGA § 15-9-83}

D. Objections/Caveats

All objections or caveats must be in writing, setting forth the grounds of such caveat. {O.C.G.A. §15-9-88 }.

E. Pretrial Conference

A pretrial conference, though not essential, is usually preferred.

a. This conference, preferably held in chambers, provides an informal and more relaxed setting in which the opposing counsel can focus on the areas of contention.

b. By focusing on the areas of contention, it is possible to eliminate from the eventual hearing itself consideration of those matters which are not in contention.

c. Further, the judge will have an opportunity prior to the hearing to review

the law applicable to the issues posed.

d. A pretrial conference may result in a pretrial order. {See U.P.C.R. 7.} At least, the conference should result in a list of written stipulations including all matters, fact or law, as to which there is no dispute. A copy of the list should be signed by both counsel and retained by the judge.

e. In some situations, where there is no disagreement as to the relevant facts, but rather with regard to the law, it may be possible for the judge to rule without holding a full hearing. In this situation, each party may submit a memorandum of law, with each party setting forth what it believes to be the applicable law.

The pretrial conference may be initiated by motion of any party or by the court. Some courts may want to establish pretrial calendars as a matter of local rule.

Even if no pretrial conference is held, a few weeks prior to the hearing it is advisable to:

f. Require the parties to provide the information shown on the sample notice of hearing attached as Exhibit A.

g. Hold a pretrial conference in chambers immediately prior to the hearing. In this setting, opposing attorneys will often agree upon certain matters and suggest to the court how the hearing can be shortened. This also gives the court an opportunity to review with counsel the pretrial information submitted in accordance with *(1) above*.

F. Amendments

When no pretrial order has been entered, an amendment to any pleadings may be filed up to the time that evidence is taken. {Henderson v. Henderson, 281 Ga. 553 (2007)}

G. Continuances

All applications for continuances are addressed to the sound legal discretion of the court and, if not expressly provided for, must be granted or refused as the ends of justice may require. {See O.C.G.A. §9-10-167 }

The Code provides for continuances in the following situations:

a. When a party or counsel is absent or unable to respond due to attendance as a legislator or attorney general during the General Assembly. {O.C.G.A. §§17-8-26 ; 17-8-27 },

b. When a party or counsel is absent due to attendance of a regular session of the Board of Regents of the University System of Georgia as a member or of the State Board of Health as a member. {O.C.G.A. §9-10-151},

c. When a party or leading attorney is absent by reason of attendance on active duty as a member of the National Guard of Georgia. {O.C.G.A. §17-8-31 },

d. When a continuance is necessary to make amendments or to respond to amendments. {O.C.G.A. §§9-10-157 ; 9-10-158 },

e. When a subpoenaed witness is absent. What an application must show in

order for the judge to grant a continuance for absence of a witness. {O.C.G.A. §9-10-160 }, and

f. When a party or counsel is absent for a providential cause. {O.C.G.A. §§9-10-154, 9-10-155 }.

III. General Trial Procedures

A. Court Reporter

Better practice indicates that all hearings should be either stenographically or electronically recorded in order that there will be a complete record of the hearing.

Recording by a certified court reporter is highly advisable in counties with a population over 90,000 where the judge has been a member of the State Bar for at least seven years, since any appeal is solely on the record of the trial.

Right to Transcript - Each party's right to a transcript of a civil proceeding is not waived "unless the trial court makes a ruling at the commencement of the hearing that the party expressly refused, by "direct and appropriate language" to share in the costs of the takedown." Davenport v. Davenport, S16F0279, May 23, 2016 citing Kent v. Kent, 289 Ga. 821 (2011).

B. Calling A Case

At the time for which the hearing is set, the judge should open the case by declaring in open court: "It is now ____ o'clock on _____, 20___. I call for trial the case of (Identify Petitioner), petitioner for _____versus (Identify Caveator), caveator."

The judge should then inquire for the record as to whether the attorneys for both parties are ready for trial. If the case is reported, the court reporter should by this time have been provided with information as to parties, their counsel, and captions, etc.

Absent a properly served subpoena or court order requiring a party's presence, a party may choose not to be present and be represented solely by counsel. {In re Estate of Coutermarsh, 325 Ga. App. 288 (2013)}.

C. Motions and Stipulations

The judge should inquire whether either party has any motions or stipulations to present. If either party presents a motion to the court, it should be disposed of at this time, unless taken under advisement by the court for a later ruling. {*See Chapter 11.*}

D. Oath of Witnesses

At this point, the better practice is to call all witnesses who will be testifying in the hearing and swear them at one time.

Before testifying, every witness must be required to declare by oath or affirmation that he will testify truthfully, although no particular form of oath or affirmation is required. {O.C.G.A. §24-9-60}.

The following form is sufficient: "You do solemnly swear (or affirm) that the evidence you shall give the court on the issue pending shall be the truth, the whole truth, and nothing but the truth, so help you God."

The oath may be administered by the bailiff, clerk, judge, or attorney {67 Ga. 460 (1881); 105 Ga. 592 (1898)}.

If, by inadvertence, a witness is not sworn before testifying and this is discovered before the end of the hearing, he may be sworn and state that what he has previously testified is true {123 Ga. 614 (1905)}.

E. Sequestration of Witnesses

The judge should inquire whether either party requests sequestering the witnesses In all cases either party has the right to have the witnesses of the other party examined out of the hearing of each other {O.C.G.A. §24-9-61}, subject to the discretion of the trial judge, who may make exceptions {Welch et al. v. The State, 251 Ga. 197, 201 (1983) }.

Sequestration need not be invoked as to all witnesses; it may be invoked as to some, the actual parties having a right to remain. If sequestration is used, it usually should be applied to all witnesses on both sides other than the parties (who can be required to testify before their other witnesses if the court deems this necessary).

Violation of the sequestration rule does not disqualify an otherwise competent witness; rather, his knowledge of preceding testimony goes to the witness's credibility. The witness may be subject to a contempt citation {International Association of Bridge, Structural & Ornamental Iron-Workers, Local 387 et al. v. Moore, 49 Ga. App. 431, 435 (1979); Byrd v. Brand 140 Ga. App. 135, 136 (1976)}.

F. Opening Statements

The party with the burden of persuasion is entitled to make the first opening statement. The other party may then make his opening statement, or he may wait until just before he begins to present his own evidence.

The opening statement should be confined to matters each counsel expects to prove and to matters admissible under Georgia rules of evidence. {Smith v. Berry, 231 Ga. 39 (1973)}.

See also Chapter 10.

G. Presentation of Evidence.

The party with the burden of persuasion is entitled (and obligated) to begin the presentation of evidence. Usually this is the petitioner, but see specific chapters concerning burdens in particular proceedings.

See also Chapter 10.

H. Closing Arguments

The party with the burden of persuasion is entitled to open and conclude the closing arguments. Often he will waive the right to open and reserve the right to close, thus forcing his opponent to go first.

See Chapter 3.VII for special rules concerning will contests.

See also Chapter 10.

I. Drawing An Order

Findings of fact and conclusions of law

a. Upon request of any party made prior to the ruling, the court must find the facts specially and must state separately its conclusions of law. Otherwise, it is sufficient if the findings and conclusions appear in the opinion or decision without being separated out. {O.C.G.A. §9-11-52(a) } {See also Huggins v. Powell, 293 Ga. App. 436 (2008)}

b. The order should state the basis of the court's jurisdiction over the subject matter and the parties, refer to the method of notice, refer to any guardian's answer, rule upon any evidentiary issues still pending, make findings of fact and conclusions of law as stated above, and conclude with an order granting or denying the relief requested.

J. Power to Hold Jury Trial

The population at which probate courts must become Article 6 Probate Courts [O.C.G.A. §15-9-120(2) .] was lowered in the 2012 Session of the General Assembly from 96,000 to 90,000, and the referenced census was changed to the census of 2010 or any future such census. However, the Supreme Court has held that "when a statutory classification is based on a county having a specified population under a particular census or any future census, the use of the disjunctive 'or' creates the required elasticity (under the Georgia Constitution), setting a starting population but then permitting counties to move into or fall out of the class based on the latest census." Sumter County v. Allen, 193 Ga. 171 (1941). This was affirmed and clarified as to Article 6 Probate Courts in a recent challenge to whether the Dougherty County Probate Court continued to have expanded jurisdiction after its population fell below 96,000, the then existing threshold under O.C.G.A. §15-9-120(2) . Ellis v. Johnson, 291 Ga. 127 (2012).

IV. Setting Aside A Judgment/Motion to Set Aside

A. Judgments

Definition. The term "judgment," as used in this chapter, includes a decree and any order from which an appeal lies.

Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Relief granted.

a. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings; but the court shall not give the successful party relief, though he may be entitled to it, where the propriety of the relief was not litigated and the opposing party had no opportunity to assert defenses to such relief.

b. As used in this subsection, the term "action for medical malpractice" means any claim for damages resulting from the death of or injury to any person arising out of:

i. Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such services or by any person acting under the supervision and control of a lawfully authorized person; or

ii. Care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility, or institution, or by any officer, agent, or employee thereof acting within the scope of his employment.

c. Notwithstanding paragraph (1) of this subsection, where a claim in an action for medical malpractice does not exceed $10,000.00, a judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Where the claim exceeds $10,000.00, a judgment by default may be rendered for the amount determined upon a trial of the issue of damages, provided notice of the trial is served upon the defaulting party at least three days prior to that trial.

d. Costs. Except where express provision therefor is made in a statute, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs; but costs against this state and its officers, agencies, and political subdivisions shall be imposed only to the extent permitted by the law. O.C.G.A. §9-11-54.

B. Enforceability and Judgments Nunc Pro Tunc

Until an order is signed by the judge and is filed, it is ineffective for any purpose. But an exception to this general rule "may be made when an order is entered nunc pro tunc to the date of the court's oral ruling. State v. Sullivan, 237 Ga. App. 677 (1999).

A nunc pro tunc entry is an entry made now of something actually previously done to have effect of former date; office being not to supply omitted action, but to supply omission in the record of action really had but omitted through inadvertence or mistake." A judgment entered nunc pro tunc is one written, signed and filed after an oral pronouncement of judgment intended to take effect immediately. In the Interest of A.R. et al., children 315 Ga. App. 357 (2012). .

C. Default Judgment

When case in default; opening as matter of right; judgment.

a. Opening default

i. At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of required pleadings or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instanter, and shall announce ready to proceed with the trial. O.C.G.A. §9-11-55.

b. Default - [I]f in any case pending before the probate court an answer, caveat, or other responsive pleading has not been filed with the time required by law or by lawful order of the court, the case shall automatically become in default unless the time for filing the answer, caveat, or other responsive pleading has been extended as provided by law. {O.C.G.A. §15-9-47}. However, attorney fees may NOT be assessed against a person who was not served with a petition, who did not appear at the hearing or file an answer."{Carruthers v. Chan, A20A0167, April 2, 2020}.

c. Waiver of Default - A party can waive the right to seek a default judgment by "allowing the defaulting party to plead, extending the time to plead, joining issue upon the pleadings, going to trial on the merits, announcing ready for trial and introducing evidence on the merits, and failing to move for a default judgment or otherwise raise any issue of default before the appeal." Other conduct showing waiver includes: "conducting discovery, responding to motions with evidence in support of the merits of his case, announcing ready and requesting that the case be put on the trial calendar, and failing to move for default judgment before summary judgment was granted to the defendants."{IN RE Estate of: James Lynn Hill, A16A1948, December 30, 2016}.

D. Summary Judgment

SEE SECTION 6.6 Summary Judgment in Chapter two of the HANDBOOK for law on this topic.

For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Motion and proceedings thereon. The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. . O.C.G.A. §9-11-56 (c) However, in the case of Milbourne et al. v Milbourne, S17A0450 & S17X0451 , dated May 1, 2017, the Georgia Supreme Court Ruled, "[w]hile our summary judgment statute acts as a temporal limit on the parties' submission of affadavits, it does not divest the trial court of all discretion to consider evidence presented less than one day before a hearing." The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage. Both parties have a right to a hearing on a Motion for Summary Judgment and it is error for the court to deny one if either party requests one. Sunset Help, LLC v. Community & Southern Bank, 331 Ga. App. 57 (2015)

Case not fully adjudicated on motion. If on motion under this Code section judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in the evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. All affidavits shall be filed with the court and copies thereof shall be served on the opposing parties. When a motion for summary judgment is made and supported as provided in this Code section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

a. The Supreme Court has affirmed the granting of a summary judgment in the trial (superior court on appeal de novo), wherein the caveators had alleged that the proffered will was the subject of undue influence. The Motion and Response referred to depositions and attached affidavits, to which the Supreme Court looked in deciding that there was no genuine issue of fact on issue of undue influence. The proffered will was dated May 13, 2008, at which time a Power of Attorney and a Durable Power of Attorney for Health Care was given by testator to one son (the alleged influencer). On May 27, 2008, the agent changed POD beneficiaries on the testator's CDs from all four of testator's children to himself only. Using the DPOHC, the son/agent moved testator from south Georgia to north Georgia, where son/agent lived. The Supreme Court held: "However, even assuming that such evidence would support a finding of undue influence after the will was executed, they (sic) do not support a finding that the son/agent exercised undue influence regarding testator's making of the May 27, 2008, will." Simmons et al v. Norton et al, 290 Ga. 223 (2011).

When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Code section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party may be adjudged guilty of contempt. O.C.G.A. §9-11-56.

Use of Medical Records to oppose Summary Judgment

b. The Supreme Court upheld the grant of Summary Judgment on appeal to superior court on issues of testamentary capacity and undue influence. The Caveator relied on medical records and findings of a neurologist from an examination of Testator the day after will was signed. The Supreme Court held that the neurologist's "report" to Testator's treating physician did not meet the

hearsay exception in O.C.G.A. §24-3-18 of a "report in narrative form." Referring to Bell v. Austin, 278 Ga. 844 (2005), the Supreme Court re-affirmed that the exception applies only "to those reports which … set forth the relevant information in prose language that is more readily understandable to laymen" than unexplained medical terms and test results. The Court held that the neurologist's report was not in "narrative form," even though it had some sections that use plain language understandable to a juror, because it relies heavily on unexplained medical terms and abbreviations, includes lab results with minimal interpretation, and fails to set forth an assessment of the patient in story form. The "narrative" required in the statute should be prepared (or approved and signed) by the physician in response to a specific request "to prepare such a narrative for litigation." Prine v. Blanton, 290 Ga. 307 (2012).

Appeal. An order granting summary judgment on any issue or as to any party shall be subject to review by appeal. An order denying summary judgment shall be subject to review by direct appeal in accordance with subsection (b) of Code Section 5-6-34. O.C.G.A. §9-11-56 .

E. Recording of Judgments

Signing.

a. Except when otherwise specifically provided by statute, all judgments shall be signed by the judge and filed with the clerk. The signature of the judge shall be followed by the spelling of the judge's name and title legibly typed, printed, or stamped. The failure of the judgment to have the typed, printed, or stamped name of the judge shall not invalidate the judgment. O.C.G.A. §9-11-58(a) .

F. Motion for Directed Verdict

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 30 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or, if a verdict was not returned, such party, within 30 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. If the court grants the motion for new trial, motions for directed verdict and/or for judgment notwithstanding the verdict become moot. Brantley v. McMichael, 295 Ga. 42 (2014).

G. When Judgment Entered.

The filing with the clerk of a judgment, signed by the judge, with the fully completed civil case disposition form constitutes the entry of the judgment, and, unless the court otherwise directs, no judgment shall be effective for any purpose until the entry of the same. O.C.G.A. §9-11-58(b) .

H. Power to Set Aside

The probate judge has the power to set aside judgments under the following conditions:

a. Collateral attack. A judgment void on its face may be attacked in any court by any person. In all other instances, judgments are subject to attack only by a direct proceeding brought for that purpose by one of the following methods.

b. Methods of direct attack. A judgment may be attacked by motion for a new trial or motion to set aside. Judgments may be attacked by motion only in the court of rendition.

c. Motion for new trial. A motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings.

d. Motion to set aside. A motion to set aside may be brought to set aside a judgment based upon:

i. Lack of jurisdiction over the person or the subject matter;

ii. Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or

iii. A nonamendable defect which appears upon the face of the record or pleadings. Under this subparagraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.

iv. NOTE: In the case of IN RE: Estate of Jones, 346 Ga. App. 878, June 12, 2018, the Court of Appeals [Court] ruled in favor of a motion to set aside a previously probated will. The movant was a beneficiary of an earlier will executed by the testator. The beneficiary was not an heir of the testator and was not served notice regarding the petition to probate the latter will. In his petition, the beneficiary alleged the testator lacked testamentary capacity and that the testator had been unduly influenced to make the latter will. The Court cited OCGA § 53-5-50 and § 53-5-51 as justification for its ruling. OCGA § 53-5-50(a) provides; the probate court has jurisdiction over any action to vacate, set aside, or amend its order admitting a will to probate which alleges... [t]hat another will is entitled to be admitted to probate. Subsection (b) provides; [a]ny such action shall be combined with a petition to probate in solemn form the other will[.] The Court ruled the trial court erred in denying the petition to set-aside, which was denied for failing to meet the requirements of OCGA § 9-11-60, rather than ruling on the merits of the petition. The Court also cited Mary F. Radford's, Redfearn Wills and Administration in Georgia, § 6:20, pg. 358-359 (2017-2018 ed.) as a leading treatise on this issue.

e. Procedure; time of relief. Reasonable notice must be afforded the parties on all motions. Motions to set aside judgments may be served by any means by

which an original complaint may be legally served if it cannot be legally served as any other motion. A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time. Motions for new trial must be brought within the time prescribed by law. In all other instances, all motions to set aside judgments must be brought within three years from entry of the judgment complained of. {O.C.G.A. §9-11-60}.

f. Any judgment which is in the breast of the probate court (i.e., decisions made within the present term, *see Sec. II.A. above*) may be set aside, revoked, or modified at the judge's discretion. {Godby v. Hein, 107 Ga. App. 481, 483 (1963)}.

g. Clerical Errors. Clerical errors in judgments, orders, and other parts of the record may be corrected by the court at any time on the court's own motion or on motion by a party. {O.C.G.A. §9-11-60(g) ; Harwell v. Harwell, 292 Ga. App. 339 (2008)} The Supreme Court has held when a trial court (or clerk) failed to provide notice of his/her final order to a party as required by O.C.G.A. 15-6-21(c), [in order for a party to file an appeal within the time allowed by law], the trial court must hold a hearing to determine whether notice was given, and if not, a motion to vacate and set aside a final order should be granted. This does not apply when a losing party failed to file any responsive pleadings. Wright v. Young, S15A0896 (2015)

V. Appeals

A. Court to Which Appeal Is Directed

Except in counties over 90,000, an appeal lies to the superior court from any decision made by the probate court, except an order appointing a temporary administrator {O.C.G.A. §§5-3-2, 53-6-30} or granting probate in common form. {185 Ga. 728 (1938)}.

In counties with a population over 90,000 where the judge has been a member of the State Bar for at least seven years, the appeal will be to the same appellate court as an appeal from the superior court would have been. {O.C.G.A. §§5-3-2and 15-9-120}.

B. Time For Filing Appeal

Appeals to the superior court must be filed within 30 days of the date the judgment, order, or decision complained of was entered. {O.C.G.A. §5-3-20(a) }.

The date of entry of an order, judgment, or other decision is the date on which it was filed in the probate court, duly signed by the judge. {O.C.G.A. §5-3-20(b) }.

a. *A. and B. above* apply to all appeals to the superior court, any other law to the contrary notwithstanding. {O.C.G.A. §5-3-20(c) }.

When an appeal is directed to the Supreme Court or Court of Appeals, the notice of appeal must be filed in the trial court within 30 days after entry of the appealable decision.{O.C.G.A. §5-6-38(a). On January 1, 2017, O.C.G.A. § 15-3-3.1 becomes effective which provides that the Court of Appeals rather than the Supreme Court shall have jurisdiction over cases involving wills. }.

b. While extensions of time are permitted in certain circumstances under the

Civil Practice Act, the authority to grant such extensions does not apply to periods of time which are definitively set by other statutes. Duncan v. Moreland, 325 Ga. App. 364 (2013).

C. Standing to Appeal/Right to Trial by Jury

[NOTE: While there are provisions for requesting and granting extensions of time to file a notice of appeal to the appellate courts, this case holds that no extensions may be granted on appeals de novo to superior courts.]

The Court of Appeals has held that an appeal may be taken under O.C.G.A. §§5-3-2 or 5-6-37 only by a party plaintiff (petitioner) or a party defendant (caveator). {Booker v. Booker, 286 Ga. App. 6 (2007)} Presumably, unless otherwise provided by law, this would apply to appeals to the appellate courts from Article 6 Probate Court.

Appeals de novo to superior courts from probate courts are to be tried by a jury, unless specifically waived by the parties. {Montgomery v. Montgomery, 287 Ga. App 77 (2007)}

D. Transmittal of Appeal

Within 10 days of the filing of the notice of appeal, it is the duty of the judge or other official of the court to transmit the record in accordance with Uniform Probate Court Rule 9.3.{See O.C.G.A. §5-3-28(a) }.

E. Effect of Appeal - Supersedeas

The filing of a notice of appeal serves as supersedeas when all costs in the trial court are paid. This automatic supersedeas deprives the trial court of jurisdiction to modify or alter the judgment in the case pending the appeal. {O.C.G.A. §5-6-46(a) ; In re Estate of Zeigler, 259 Ga. App. 807 (2003).}Accordingly, any subsequent proceedings purporting to supplement, amend, alter or modify the judgment, whether pursuant to statutory or inherent power, are without effect. {Brown v. Wilson Chevrolet150 Ga. App. 525, 531 (2) (1979)}.

However, such divestiture of jurisdiction does not become effective during the period of time in which a motion for judgment notwithstanding the verdict may be filed. Wooten, et al. v. Williams, et al., 342 Ga. App. 511, August 8, 2017. If such motion is timely filed, the effectiveness of the divestiture of jurisdiction is delayed until the motion for judgment notwithstanding the verdict is ruled upon and a notice of appeal to the ruling has been filed or the period for appealing the ruling has expired.

In addition, the supersedeas doesn't not deprive the court of jurisdiction to rule on a completely separate issue which has no effect upon the judgment under appeal. For example, an appeal of the ruling in the probate court admitting a will to probate does not preclude the probate court from ruling on a motion for attorney's fees and costs; a ruling on the motion has no effect on the judgment granting probate. {Simmons et al. v. Harms, 287 Ga. 176 (2010)}

F. Dismissal of Appeal or Appeal Prior to Probate Court Hearing

Unreasonable Delay - In order for a trial court to dismiss an appeal for unreasonable delay in the filing of the transcript or in the transmission of the record, OCGA § 5-6-48(c) requires the trial court to determine the length of the delay, the reasons for the delay, whether the appealing party caused the delay, and whether the delay was inexcusable, and then to exercise discretion in deciding whether to dismiss the appeal. Therefore, a trial court has discretion to dismiss an appeal for failure to timely file a transcript only if (1) the delay in filing was unreasonable and (2) the failure to timely file was inexcusable in that it was caused by some act of the party responsible for filing the transcript. Hill v. Board of Regents of the University of Georgia et al., A18A0669, April 19, 2018. OCGA § 5-6-37 provides that a notice of appeal "shall state whether or not any transcript of evidence and proceedings is to be transmitted as a part of the record on appeal." However, if the appellant specifies that 'nothing' is to be omitted from the record, this would not infer that the transcript is to be included, since the appellant is required to state whether the transcript will be filed, in addition to designating any portion of the record to be omitted. A dismissal of the appeal by the trial court in this situation would be reversible error Hill v. Board of Regents of the University of Georgia et al., supra. Probate Courts have exclusive jurisdiction over the probate of wills. O.C.G.A. §53-5-1(a). Superior Courts lack subject matter jurisdiction to hear the probate of a will. The parties cannot by consent confer jurisdiction to Superior Court. SunTrust Bank v Peterson, 263 Ga. App. 378, 587 SE 2d 849 (2003). The defendant in the above case tried to bypass the initial trial in the Probate Court by filing an action in the Superior Court and requesting a transfer of the case from the Probate Court to Superior Court. The Superior Court decision was reversed on appeal. Also see section 9.2 in Chapter 2 regarding "Exclusive Jurisdiction of all Probate Courts.

VI. Assessment of Attorney's Fees

A. Mandatory Assessment

In any civil action in the probate court, reasonable and necessary attorney's fees and expenses of litigation must be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded must be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just. {O.C.G.A. §9-15-14(a) }

B. Discretionary Assessment

The judge of the probate court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Civil Practice Act. "Lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious. {O.C.G.A. §9-15-14(b) }

C. Limitations

No attorney or party may be assessed attorney's fees as to any claim or defense which the court determines was asserted by the attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority. {O.C.G.A. §9-15-14(c) }

Attorney's fees and expenses of litigation awarded under the above Code provisions may not exceed amounts which are reasonable and necessary. Attorney's fees and expenses of litigation incurred in obtaining an order of court pursuant to the above Code provisions may also be assessed by the court and included in its order. {O.C.G.A. §9-15-14(d) }.

D. Procedure

Attorney's fees and expenses under these Code provisions may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition of the action. {O.C.G.A. §9-15-14(e) }. The award of attorney's fees or expenses is determined by the court without a jury and is made by an order of court which is enforceable as a money judgment. {O.C.G.A. §9-15-14(f) }.

An attorney's lien for services an heir/beneficiary is not defeated when the attorney-client relationship ends prior to a verdict or settlement. A representative of an estate is not authorized to distribute money to an heir/beneficiary until the lien is satisfied. {In re Estate of Estes, 317 Ga. App. 241 731 S.E.2d 73 (2012)}

E. Effective Date of 1998 Probate Code

Several Chapters in this book concern proceedings under Title 53 of the Code. O.C.G.A. §53-1-1(b) of the Revised Probate Code of 1998 provides as follows:

a. "Except as otherwise provided by law, the provisions contained in this chapter and Chapters 2 through 11 of this title shall be effective on January 1, 1998; provided, however, that no vested rights of title, year's support, succession, or inheritance shall be impaired."

In order to determine whether to use the old or new version of Title 53, the court must carefully consider whether vested rights are at issue in a case.

Some issues, such as the size of an heir's intestate share, clearly involve vested rights.

Some issues may have an administrative aspect, but still involve vested rights.

b. Example: In connection with a petition for leave to sell estate property, a dispute arose over which law to apply. The statute in existence at the date of the death of the decedent (1955) stated that the title to real property in an intestate estate vested immediately in the heirs, "subject to be administered by the legal representative." The objecting heirs had asked the court to apply the 1996 version of this statute (part of the 1998 Code), which stated that the property vested completely in the heirs if no administrator was appointed within five years of the decedent's death (which was true in this case). The Court of Appeals applied the vesting statute in existence at the date of death to determine the nature of the interest that vested in the heirs. {Williams et al. v Williams, 259 Ga. App. 888 (2003)}.

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I. Checklist

☐ Does the court have jurisdiction? {*See II.A below*}

- Has notice by mail or publication been given to all heirs? {*See II. C*}
- Has a guardian been appointed for any party who is unknown, unborn, or not sui juris? {*See II.C. 3*}
- Are the proper pleadings before the court? {*See II. A*}
- Has a pretrial conference been held, if appropriate? If not, has pretrial information been submitted? {*See Chapter 1*}
- Has the case been called? {*See VII. A*}
- Does the caveator have standing? {*See IX. B*}
- Have any motions been disposed of ? {*See VII. B.*}
- If there are stipulations, have they been reduced to writing or stated for the record? {*See VII. B*}
- Have the witnesses been properly sworn? {*See VII. C*}
- Have the witnesses been sequestered if the attorneys have requested this? {*See VII. D*}
- Have both attorneys had an opportunity to present their opening statements? {*See VII. E*}
- Has the petitioner met his burden of proof? {*See VII. F*}
- Has the caveator met his burden of proof? {*See VII. G*}
- Have counsel presented closing arguments? {*See IX*}
- Has the order been properly drawn? {*See X*}
- If an appeal has been filed, has the record been transmitted to the proper court? {*See XI. and Chapter 1*}

II. Preliminary Matters

A. Jurisdiction

The judge of the probate court may grant administration only on the estate of a person who was:

a. A resident at the time of his death of the county where the application is filed; or

b. A nonresident of Georgia who owned property in the county where the application is filed or had a bona fide cause of action against some person therein {O.C.G.A. §15-9-31 }.

In this context, residence means domicile. See {O.C.G.A. §53-6-21(a) }.

The location of assets of a nonresident at the time of granting administration, in the absence of bad faith {132 Ga. 400, 64 S.E. 480 (1909)}, determines the jurisdiction. Where the nonresident leaves assets in two counties of this state, administration can be granted in either, and the judge of the probate court who first grants temporary or permanent letters of administration acquires exclusive jurisdiction {O.C.G.A. §15-9-32; 42 Ga. App. 505, 156 S.E. 466 (1931)}.

B. Standing to Caveat/Determination of Heirs

If the petitioner's or caveator's status as an heir is placed in issue, the procedures for determination of the heirs discussed in Chapter 5 should be followed. However, if a Petition for Letters of Administration has been filed, it is not necessary that a separate Petition to Determine Heirs be filed in order to bind the petitioner and caveator on the right of inheritance issue (but persons without notice would not be bound).

Any objection to the granting of letters of administration must show that the person filing the objection has an interest in the choice of the administrator, either as an heir or a creditor. Any objection must also show some interest in the assets and their distribution {113 Ga. 1006, 39 S.E. 474 (1901)}.

Those who have an interest in the estate of the decedent or an interest which could be enforced by a suit against the personal representative have standing to caveat the appointment of a particular person as personal representative {See Wansley v. Tull, 153 Ga. App. 92 (1980)}.

C. Notice/Service of Process

Notice to Heirs

a. Upon filing of the petition, the judge of the probate court issues a citation giving notice of the petition to the heirs of the decedent. The notice is mailed by first-class mail to each heir at least thirteen days prior to the date on which any objection must be filed. {O.C.G.A. §§53-6-22, 53-11-9}.

Service by Publication

b. If the address of a known heir is not known, such notice is published in the official newspaper of the county in which the petition is pending once a week for four weeks prior to the week which includes the date by which any objections must be filed. {O.C.G.A. §53-6-22}. Any heir who is unknown will be represented by a guardian (*see below*).

Representation by Guardian

c. All persons who are unborn, unknown, or not sui juris must be represented by a guardian. The guardian is either the person's natural guardian, testamentary guardian or guardian of the person or property, if the court determines that that guardian has no conflict of interest, or a guardian ad litem appointed by the court.

d. The guardian should be served instead of the party the guardian represents.

e. The guardian may execute waivers, acknowledgments, consents, answers, objections or other documents on behalf of the party represented. {O.C.G.A. §53-11-2}.

Acknowledgment

f. A sui juris heir or an heir's guardian may acknowledge service. Any such acknowledgment of service must be signed before a notary public or judge or clerk of the probate court. {O.C.G.A. §53-11-6}.

D. No Unanimous Consent

It is assumed for purposes of this Chapter that there is no unanimous selection of a person to serve as administrator and no unanimous consent to waive bond or grant certain powers, since this is a contested petition.

III. Pleadings

A. Petition Requirements

Every petition made to the judge of the probate court must be in writing, must state the grounds of such petition and the order sought {O.C.G.A. §15-9-86}, and must be verified {O.C.G.A. §53-11-8}.

a. Every petition for letters of administration must set forth the following:
   i. The full name of the decedent.
   ii. The legal domicile of the decedent.
   iii. The date of death.
   iv. The mailing address and place of domicile of the petitioner.
   v. Names, ages or majority status, and addresses of the heirs, stating their respective relationships to the decedent.

b. If any particulars are missing, the reasons for such omissions {O.C.G.A. §53-6-21(b) }.

[NOTE: See the standard form (GPCSF 3) for this type of petition.]

In the event there are multiple applications to be appointed as the administrator of an estate, the court, in setting a hearing, should order each petitioner to present evidence at the hearing that they can be bonded and each must file an inventory of the assets of the decedent.

B. Caveat

Any pleading which sets forth a claim for relief must contain: a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled. {O.C.G.A. §9-11-8(a)(2) }.

In all averments of fraud or mistake, the circumstance constituting fraud or mistake must be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally. {O.C.G.A. §9-11-9(b) }.

IV. Pretrial Conference

A. *See Chapter 1*.

V. Depositions

A. Depositions and Discovery Procedures

Depositions and discovery procedures are governed by the Georgia Civil Practice Act, {O.C.G.A. §§9-11-26 through 9-11-37 and §9-11-45.} {*see Chapter 12..IV.*}

VI. Court Reporter

A. *See Chapter 1*.

VII. Beginning Hearing

A. Case Called

See Chapter 1.

B. Motions and Stipulations

See Chapter 1.

C. Oath of Witnesses

See Chapter 1.

D. Sequestration of Witnesses

See Chapter 1.

E. Opening Statements

See Chapter 1.

F. Petitioner's Burden of Proof

The petition must address all of the following issues, which are covered in GPCSF 3. The petitioner has the burden of proving at trial any of these issues which are contested in the caveat.

a. Jurisdiction

i. Domicile of the decedent in county of petition or, in the case of a decedent who was not domiciled in that county, the presence of property in the county.

ii. The existence in a Georgia county of a cause of action by a nonresident is sufficient basis for the appointment of an administrator in that county even if the defendant is also a nonresident of Georgia {Escareno v. Carl Nolte Sohne GmbH, 270 Ga. 264 (1998)}.

b. Need

i. A reason exists for the appointment of an administrator in that there is an estate which requires administration, or that there is some other

legal ground for appointing an administrator.

c. Eligibility

i. As of January 1, 1998, any natural person who is sui juris is eligible to serve as an administrator, regardless of citizenship or residency {O.C.G.A. §53-6-1}.

ii. Any other "person" is eligible to serve if that person is otherwise qualified to act as a fiduciary in Georgia {O.C.G.A. §53-6-1}. Code Section 53-1-2(11) defines "person" as "an individual, corporation, business trust, unincorporated organization, limited liability company, or two or more persons having a joint or common interest, including an individual or a business entity acting as a personal representative or in any other fiduciary capacity." On the issue of the qualification of certain foreign persons to act as fiduciaries in Georgia, see O.C.G.A. §7-1-242 and Title 53, Ch. 12, Art. 16.

d. Preference

i. In making this appointment, the judge must consider, but is not bound by, the following order of preferences:

1.) The surviving spouse, unless an action for divorce or separate maintenance was pending between the decedent and the surviving spouse at the time of death. Although not addressed by the code, if the surviving spouse is the sole heir at law, the appointment of the surviving spouse would probably be appropriate.

2.) One or more other heirs of the decedent or the person selected by the majority in interest of the heirs.

3.) Any other eligible person.

4.) Any creditor of the estate.

5.) The county administrator {O.C.G.A. §53-6-20}.

NOTE: If the county administrator or county guardian was previously appointed as conservator for an intestate decedent, he has the authority to distribute his former ward's estate in the same manner as if the conservator had been appointed administrator of the estate, OCGA § 29-5-72 (g). This statute applies even if the decedent died a resident of a different county or over the objection of the heirs of the estate, In Re Estate of Leon Brown, A20A1976, November 20, 2020. Also, see Chapter 11, section 8.4 County Guardian Serving as Conservator… in the Handbook.

e. Entitlement

i. The petitioner is legally entitled to the appointment in that petitioner is the person who will best serve the interests of the estate {O.C.G.A. §53-6-20}.

f. Bond

i. The petition must allege the value of the personal property (tangible and intangible) of the estate in order for the court to set the proper bond amount. Since this is a contested case, it is assumed that bond will not be waived {O.C.G.A. §§53-6-50, 53-6-51(c)}.

Burden of Going Forward Shifts to Caveator

g. When the petitioner has made out a prima facie case concerning the foregoing issues, the burden of going forward shifts to the caveator {237 Ga. 250, 251 (1976)}.

G. Caveator's Burden of Proof

Generally

a. The caveator must either:

i. Satisfy the court, by cross-examination of the petitioner's witnesses, that a prima facie case has not been made out by the petitioner; or

ii. Rebut the petitioner's prima facie case by introducing evidence.

Cross-examination of Petitioner's Witnesses

b. If the caveator, after cross-examination of the petitioner's witnesses, feels that a prima facie case has not been made out, he may rest his case without introducing any evidence.

Introduction of Evidence; If the caveator introduces evidence:

c. He is not required to affirmatively disprove the petitioner's prima facie case {134 Ga. 125, 126-130 (1910)}.

d. He is required to rebut (neutralize) the petitioner's prima facie case {134 Ga. 125, 126-130 (1910)}.

Caveator's Burden of Affirmative Proof

e. The caveator has the burden of proving affirmatively all matters raised by him which are not matters for which the petitioner is required to make out a prima facie case {134 Ga. 125, 126-130 (1910); 59 Ga. 472, 475 (1877)}. This would include the last four grounds listed in *paragraph 5. below*.

Grounds of a Caveat: The following are proper grounds of a caveat:

f. The petitioner cannot prove one or more of the essential elements of his prima facie case {*See Section VII. F*}.

g. Caveator has a higher preference and is equally (or more) qualified than the petitioner {*See Section VII. G. 4(d)*}.

h. Caveator has a lower preference but would "best serve the interests of the estate" {O.C.G.A. §53-6-20}.

i. Petitioner has a conflict of interest.

i. For instance, a petitioner who owes money to the decedent.

ii. Where the personal interests of the representative of an estate conflict with the interests of the estate, such fact, in the discretion of the judge of the probate court, may be sufficient grounds for removal {Fountain v,

Cabe, 242 Ga. 787, 789 (1979)} or for denial of the original appointment {60 Ga. App. 327 (1939)}.

iii. The caveator 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 caveator. It is unnecessary to show that the fiduciary actually succumbed to temptation or that the caveator was harmed; the inquiry stops where such relation is disclosed {Powell et al. v. Thorsen et al, 253 Ga. 572, 574 (1984)}.

j. Petitioner is unfit.

i. It is no longer necessary for the caveator to prove that a person with a higher preference is "unfit," since the test is who would best serve the interests of the estate. On the other hand, proof that a person with a higher preference is unfit would guarantee that that person would not be appointed.

ii. The world "unfit," as used in this context, is not limited to physical, mental or moral conditions, but is sufficiently broad to include a legal disqualification {Mclendon v. McLendon et al., 96 Ga. App. 197 (1957); 53 Ga. App. 443 (1936)}.

k. An individual (such as a widow) who is otherwise entitled to the administration cannot, when that individual is of sound mind, be denied the appointment as being unfit upon the mere speculation that the individual will, on account of lack of business experience and want of capacity to manage the particular estate, mismanage it and prove unfit for the trust reposed. {44 Ga. App. 803 (1932)}.

Right to Jury Trial

l. The petitioner or the caveator is entitled to a trial by jury in superior court on a de novo appeal or in an Article 6 Probate Court on competition petitions for the appointment of an administrator. {Goodrich v. Goodrich, 302 Ga. App. 468 (2010)}

VIII. Evidence

A. Probate Proceedings

Probate proceedings are subject to the same general rules of evidence as other civil proceedings {96 Ga. 1 (1895)}, *See Chapter 11, Evidence*}.

IX. Closing Arguments

A. *See Chapter 1*.

X. Drawing An Order

A. *See Chapter 1*.

XI. Appeals

A. *See Chapter 1*.

Chapter 3. Contested Solemn Form Will Probate & Appointment of Nominated Executor

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I. Checklist

- ☐ Does the court have jurisdiction? {*See II.A*}
- ☐ Has notice, either personal or by mail or publication, been given to all heirs and to the propounders and beneficiaries under any other purported will of the testator as to which probate proceedings are pending in Georgia? {*See II.D*}
- ☐ Has a guardian been appointed for any party who is unknown, unborn, or not sui juris? {*See II.D*}
- ☐ Are the proper pleadings before the court? {*See II.E*}
- ☐ Have the parties been informed that it is the duty of the propounder to have all subscribing witnesses to the will present at the hearing? {*See II.D*; if the attorney for the propounder is a witness, *see Sec. VII. E below*.}
- ☐ Has a pretrial conference been held, if appropriate? If not, has pretrial information been submitted? {*See Chapter 1.*}
- ☐ Has the case been called? {*See III.A*}
- ☐ Have any motions been disposed of ? {*See III.B*}
- ☐ If there are stipulations, have they been reduced to writing or stated for the record? {*See III.C*}
- ☐ Have the witnesses been properly sworn? {*See III.C*}
- ☐ Have the witnesses been sequestered if the attorneys have requested this? {*See III.D*}
- ☐ Have both attorneys had an opportunity to present their opening statements? {*See III.E*}
- ☐ Has the propounder met his burden of proof? {*See IV.*}
- ☐ Has the caveator met his burden of proof? {*See V.*}
- ☐ Have counsel presented closing arguments? {*See VII.*}
- ☐ Has the order been properly drawn? {*See VIII.*}
- ☐ If an appeal has been filed, has the record been transmitted to the proper

- court? {*See 2.IX.*}

II. Preliminary Matters

A. Jurisdiction

The probate court has original, exclusive jurisdiction over the probate of wills. [O.C.G.A. §53-5-1(a)].

For a Georgia testator, the domicile of the testator at the time of death confers jurisdiction upon the probate court of that county. {O.C.G.A. §53-5-1(b)}.

For a testator who was not domiciled in Georgia at death, original or ancillary jurisdiction over that testator's will is in the probate court of any county in Georgia in which is located either property owned by the testator or any cause of action of which the testator was possessed at death. {O.C.G.A. §53-5-36}.

B. Standing to File Probate

A brother of the testator, not named as an executor, nor a named legatee, heir or devisee was not an "interested" person who had standing to offer a will for probate. Ray v. Stevens, 295 Ga. 895, 764 S.E. 2d 809 (2014).

C. Standing to Caveat

Standing to caveat a will is determined on a case by case basis {Lavender et al. v. Wilkins, 237 Ga. 510, 512 (1976)}. The general rule is that the probate of a will may be contested by any person interested in the estate of the decedent, but cannot be contested by a stranger {Lavender et al. v. Wilkins, 237 Ga. 510, 512 (1976)}. A person after proving they had been virtually adopted by the testator, has standing to caveat a will. Johnson v Rogers, 297 Ga. 413, S15A0395 (2015).

a. An heir who would benefit from the probate of a will and be harmed by the denial of probate does not have standing to caveat the probate of the will. Norman v. Gober, 288 Ga. 754 (2011) (guardian of minor heir and beneficiary sought to file, on behalf of the minor, a caveat to the probate of a will under which the heir was a contingent beneficiary but would not inherit in intestacy).

b. On the issue of standing to caveat a will, the Supreme Court recently held that a nephew who had been a grantee under a warranty deed executed by the testator two years prior to the date of the propounded Will did have standing to file a caveat since the propounded and challenged Will contained provisions intended to influence the grantees to deed back their interest in the property transferred. A provision in the Will gave whatever interest the testator might have in the property if the transfers back did not occur. The propounded Will left the testator's estate to the propounder, a daughter of the testator. The Supreme Court held that by this provision the propounder would succeed to a possible claim challenging the deed, an interest that would be adverse to the nephew and conferred standing on him. Odom v. Hughes, 293 Ga. 447 (2013).

Caveat re validity of will: An interest in the estate of the decedent, sufficient to provide the necessary standing to caveat the validity of a will, is shown where the person seeking to caveat:

c. Will be injured by the probate of a will, or

d. Will benefit by a will not being probated {Lavender et al. v. Wilkins, 237 Ga. 510, 512 (1976)}.

e. This may be a trustee under a trust created under another will or codicil to the will which might be adversely affected by the outcome of the case. {283 Ga. 253 (2008)}.

Caveat re who should manage estate: Those who would have an interest in the estate of the decedent after the will has been probated or an interest which could be enforced by a suit against the personal representative have standing to caveat the appointment of an executor or administrator with the will annexed, even in connection with a common form probate {See Wansley v. Tull, 153 Ga. App. 92 (1980); 262 Ga. App. 241 (2008)}. *See Chapter 2, Section II* concerning conflict of interest and unfitness, respectively. The following Sections of this Chapter relate to the type of caveats described above.

Time to file Caveat

f. *See 0*

Objection to appointment of nominated executor(s)

g. An objection to the appointment of a nominated executor may be filed on the basis that the nominated executor has a conflict of interest and should not be permitted to serve. In a recent case, the nominated alternate executor filed for probate of the will, seeking her appointment instead on the first nominated executor, alleging a conflict of interest. She alleged that the nominated executor was involved in several suits against the estate and owed the estate money. The probate court appointed the nominated alternate executor, finding that there were sufficient grounds to question the fitness of the nominated executor to so serve. The Court of Appeals affirmed, holding that, while a nominated executor has a right to serve unless adjudged unfit [O.C.G.A. §53-6-10(b)], probate courts are given broad discretion in disqualifying a named executor. There being no transcript of the hearing in probate court, the Court of Appeals held that it must presume that the evidence supporting the probate court's findings. In re Estate of Farkas, 325 Ga. App. 477, 753 S.E.2d 137 (2013).

D. No-Contest (In Terrorem) Clauses

Sometimes a will or trust contains a "no-contest" or "in terrorem" clause that provides that a beneficiary will forfeit the beneficiary's interest under the will or trust if the beneficiary contests the validity of the will or trust or any provision thereof, or institutes any proceedings for that purpose or to prevent any provision thereof from being carried out in accordance with its terms. Such provisions in trusts must be tried in Superior Court. In the case of Howell v. Bates, as Trustee of the Anne S. Florance Revocable Trust, 350 Ga. App. 708, June 21, 2019. the decedent executed an amendment to her will and trust, both of which contained "in terrorem" clauses which provided "[s]hould any person contest or initiate legal proceeding to contest the validity of this Trust or of the Grantor's Will or any provision herein or in the Grantor's Will, …. then such person shall be deemed to have predeceased the Grantor, and all the benefits provided for such person in this Trust and under the Grantor's Will are revoked and annulled, and any property to which such person would have been entitled shall be distributed in equal shares among [charities that will receive the residue of the Trust]. The "no contest" clause in the Trust was valid and enforceable, because it provided that, if any person violates the clause, his or her distribution becomes part of the residue of the Trust that will eventually be distributed to certain charitable organizations, as required of OCGA § 53-12-22(b). The Court also found the caveator challenged the validity of the decedent's Will by claiming the decedent (1) died intestate and by filing a "Caveat to Petition to Probate Will in Solemn Form," in which she claimed that the will was invalid.

NOTICE REQUIREMENT: In the case of Mcintyre v. Moss, 350 Ga. App 723, June 21, 2019, the Court of Appeals held that prior to the trial court's grant of summary judgment, the affected party did not have notice or a "full and final opportunity" to respond to any assertion that they had forfeited all their interest and rights under the Trust due to the "in terrorem" clause in the Trust. It would appear that this same fair notice and an opportunity to respond would be required in "in terrorem" clauses in Wills.Such a clause is void unless the will directs how the property will be disposed of if the clause is violated. {O.C.G.A. §53-4-68(b)}.

Because in terrorem clauses result in forfeitures, they must be strictly construed. {Linkous v. National Bank of Georgia, 247 Ga. 274, 274 S.E.2d 469 (1981)}. In the case of In Re Estate of Jewel H. Penland, Court of Appeals, A20A0998, October 26, 2020, the Court of Appeals upheld the trial courts order regarding an interrorem clause to disinherit one beneficiary, (Hadaway),but denied a second as to Ray (a co-executor). The trial court found Hadaway's failure to offer the will's codicil in connection with her petition to probate the will, coupled with Hadaway's motion to dismiss Ray's caveat that offered the codicil, triggered the in terrorem clause. Ray appealed the trial court's judgment disinheriting him arguing the trial court erred by disinheriting him because his challenge to the distribution of the bequest to specific beneficiaries was in his capacity as a fiduciary, rather than a beneficiary. The Court of Appeals agreed that Ray's challenge to the distribution of bequests to be paid to specific beneficiaries were in his capacity as co-executor and not as a beneficiary. The will in question provided that "should any beneficiary contest or initiate proceeding to contest the validity of the Will…"; it did not provide for the removal of an executor for such action.

In another case, Cynthia s. Barry v. Thomas S. Barry, III, Court of Appeals, A20A0839, October 30, 2020, the Court of Appeals upheld the trial court's determination that Cynthia, a daughter of the decedent, contested the validity of the Will's provisions and/or instituted a proceeding to prevent the Will from being carried out. Cynthia filed a lawsuit seeking enforcement of her father's will and an accounting of father's living Trust in which she was a beneficiary. However, the trial court determined that she was not actually seeking enforcement of the Will or an accounting of the Trust but instead engaged in vexatious litigation designed to contest the authority granted to her brother as representative of the estate and trustee of the trust.

If the clause only relates to forfeiture by a "beneficiary," then it would not apply to an action by one co-executor (who is also a beneficiary) to remove another co-executor. {Preuss v. Stokes-Preuss, 275 Ga. 437 (2002)}.

After probate of a will, an action by a beneficiary for an accounting and/or removal of the executor is not a contest to the validity of the will and will not invoke the standard in terrorem clause. {Sinclair v. Sinclair 284 Ga. 500 (2008)}

Some wills may specifically provide for a forfeiture of a devise or bequest if one unsuccessfully seeks the removal of an executor. See Myers v Myers, 297 Ga. 490 (2015) in which a beneficiary initially filed an action to remove the executor then subsequently withdrew that action [to preserve his bequest] requesting an accounting but maintaining that the executor breached his fiduciary duties and had mismanaged and wasted estate assets. The trial court's removal of the executor was upheld by the Supreme Court. Lack of notice on the executor of an action to remove him was a defense the executor used in defending himself.

In the Handbook, in Chapter 3, Section 5.7.2 - In Terrorem Clauses. There is additional law regarding in terrorem clauses and how they apply to wills and trusts.

OCGA § 9-4-4 (a) (3), provides that any person interested as a legatee, heir, or beneficiary of an estate, may file a declaratory judgment petition to determine any question arising in the administration of the estate, including questions of construction of wills, accountings and removal of an executor. The petition for declaratory judgment must contain copies of all proposed actions the petitioner(s) intend to file in the proposed subsequent actions. Thus, an interested party may seek a declaration concerning the validity of an interrorem clause without risking a bequest in a will. See In Re Estate of Louise Ray Burkhalter, 343 Ga. App. 417, March 10, 2020, for a comprehensive review of "in terrorem clauses".,

Notice/Service of Process

Notice to Heirs and Others:

a. Notice of a petition to probate a will in solemn form must be given to all heirs of the decedent. {O.C.G.A. §53-5-22(a)}.

b. The propounder of a will is required to exercise due diligence in ascertaining heirs and their addresses. {Oakley v. Anderson et al., 235 Ga. 607 (1975)}.

c. Notice must also be given to the propounders and beneficiaries of any other

purported will of the testator as to which probate proceedings are pending in Georgia. {O.C.G.A. §53-5-22(a)}.

d. Beneficiaries who are entitled to notice are those persons whose identity and whereabouts are known or reasonably ascertainable and who would have a present interest under their purported will, including those with a vested remainder. {O.C.G.A. §53-5-22(b)}.

e. Where a trust is a beneficiary under the will, in general notice may be given to the trustee rather than to each trust beneficiary. {O.C.G.A. §53-5-22(b)}.

f. All persons who are unborn, unknown, or not sui juris must be represented by a guardian. The guardian is either the person's natural guardian, testamentary guardian or guardian of the person or property, if the court determines that guardian has no conflict of interest, or a guardian ad litem appointed by the court. {O.C.G.A. §53-11-2}.

i. The guardian should be served instead of the party the guardian represents.

ii. The guardian may execute waivers, acknowledgments, consents, answers, objections or other documents on behalf of the party represented.

Personal Service and Service by Mail

g. Personal service must be made on all heirs and propounders and beneficiaries of other purported wills who are residents of Georgia, at least 10 days before probate is to be made, unless the ten-day requirement is waived in writing. {O.C.G.A. §53-5-22(a)}.

h. Unless otherwise directed by the court, notice to Georgia residents may be served instead by registered or certified mail or statutory overnight delivery, return receipt requested and delivery restricted to addressee only, if the petitioner so requests in the petition. {O.C.G.A. §53-11-3(e); §9-10-12(b)}.

i. If any such heir, propounder or beneficiary is not a resident of Georgia but has a known current residence address, service must be made on that person by registered or certified mail or statutory overnight delivery, return receipt requested. {O.C.G.A. §53-11-4(c); §9-10-12(b)}..

j. For persons within the continental United States who are served by registered or certified mail or statutory overnight delivery, return receipt requested, the date on or before any objection is required to be filed shall not be less than 13 days from the date of mailing; provided, however, that if a return receipt from any recipient is received by the court within 13 days from the date of mailing, the date on or before any objection is required to be filed by such recipient shall be ten days from the date of receipt shown on such return receipt. {IN RE Estate of: James Lynn Hill, A16A1948, December 20, 2016}, citing {O.C.G.A. §53-11-10(a)}.

k. Where service is made personally or by mail (or delivery), a copy of the will must be included along with a copy of the petition for probate. {O.C.G.A. §53-5-22(c)}.

Service by Publication

l. Service by publication must be made if the current resident address is not known of any known heir or propounder or beneficiary of another purported will. {O.C.G.A. §53-11-1}.

m. The notice must be published once a week for four weeks in the newspaper in which sheriff's advertisements are published in the county in which the petition for probate in solemn form has been made. {O.C.G.A. §53-11-4(b)}.

n. It is not necessary to publish notice to an interested person who is unknown, since that person will be represented by a guardian ad litem. {O.C.G.A. §53-11-2}.

Acknowledging Service

o. A sui juris heir, propounder, or beneficiary, or that person's guardian, may acknowledge service. Any such acknowledgment of service must be signed before a notary public or judge or clerk of the probate court. {O.C.G.A. §53-11-6}.

Caveats must be filed within 10 days from receipt of service. {O.C.G.A. §53-11-10} If a party resides outside the continental United States, the time is extended to 30 days. A party may file a motion to open default within 15 days as a matter of right under O.C.G.A. §9-11-55. Thereafter, the Court has discretion to open default for providential cause or excusable neglect. O.C.G.A. §15-9-47. See Ray v. Stevens, 295 Ga. 895, 764 S.E. 2d 809 (2014)

E. Caveats/Default

a. Caveats must be filed within 10 days from receipt of service. {O.C.G.A. §53-11-10} Also see "Personal Service and Service by Mail" section 2.(d) above. If a party resides outside the continental United States, the time is extended to 30 days. A party may file a motion to open default within 15 days as a matter of right under O.C.G.A. §9-11-55. Thereafter, the Court has discretion to open default for providential cause or excusable neglect. O.C.G.A. §15-9-47. See Ray v. Stevens, 295 Ga. 895, 764 S.E. 2d 809 (2014).

b. Default - [I]f in any case pending before the probate court an answer, caveat, or other responsive pleading has not been filed with the time required by law or by lawful order of the court, the case shall automatically become in default unless the time for filing the answer, caveat, or other responsive pleading has been extended as provided by law. {O.C.G.A. §15-9-47}.

c. Waiver of Default - A party can waive the right to seek a default judgment by "allowing the defaulting party to plead, extending the time to plead, joining issue upon the pleadings, going to trial on the merits, announcing ready for trial and introducing evidence on the merits, and failing to move for a default judgment or otherwise raise any issue of default before the appeal." Other conduct showing waiver includes: "conducting discovery, responding to motions with evidence in support of the merits of his case, announcing ready and requesting that the case be put on the trial calendar, and failing to move for default judgment before summary judgment was granted to the defendants."{ IN RE Estate of: James Lynn Hill, A16A1948, December 30, 2016}.

F. Pleadings

The petition to probate a will in solemn form must include the will. [GPCSF 5]

The petition to probate a will in solemn form must be verified by the oath of the petitioner and must set forth:

a. The full name of the testator;

b. The domicile of the testator at the time of his death;

c. The date of death of the testator;

d. The mailing address of the petitioner;

e. The names, ages or majority status, addresses, and relationship to the testator of all heirs;

f. If the petitioner has knowledge of any other probate proceeding in this state regarding any other purported will of the testator, the names and addresses of the propounders and the names, addresses, and ages or majority status of the beneficiaries under the other purported will; and

g. A request for the issuance of letters testamentary. (If the will has previously been probated in common form, the request should be that new letters testamentary in solemn form be issued if the petition is granted.).

h. If full particulars are lacking, the petition must state the reasons for any omission.

Petition must include the will or will copy

i. Whenever the original will cannot be found to probate, a copy of the will may be admitted to probate in lieu of the original. In all such cases, the presumption is that the will was revoked by the testator. This presumption must be overcome by a preponderance of the evidence, and the copy must be proved by a preponderance of the evidence to be a true copy of the original will. [O.C.G.A. §53-4-46]

j. The proponent must overcome the statutory presumption of revocation under O.C.G.A. §53-4-46and such a presumption exists even in the absence of a caveat filed to the will. Tudor v Bradford, 289 Ga. 28, 709 (2011).

k. No distinction is drawn among copies that are unsigned, signed only by the testator, or fully executed with the same formality as an original will; that is to say, that case law holds that there is but one original will; even a fully executed "duplicate original" is a copy. Horton v. Burch, 267 Ga. 1 (1996)

l. Nonetheless, there must be a written copy of the will in order to offer it for probate. Oral testimony as to the contents of a missing will is not acceptable in lieu of a copy. Harper v. Harper, 281 Ga. 25 (2006)

m. However, if the copy also includes a self-proving affidavit, the copy, as in the case of an original, can be presented as the prima facie case as to execution. Tanksley v. Parker, 287 Ga. 877 (2005)

Will copy/Presumption of revocation
In a recent case, the Supreme Court upheld the admission to probate of a copy of a will when the original could not be found after the testator's death. O.C.G.A. §53-4-46(a). The propounded will left bequests to a church cemetery fund and to the executor; the residue was left to a trust for the benefit of a foundation created by the testator. The heirs caveated the probate based on the presumption of revocation when the original cannot be found. The probate court had admitted the copy, as did the superior court on appeal when the jury found in favor of the propounded copy. Noting that the presumption of revocation could be overcome by a preponderance of the evidence [O.C.G.A. §53-4-46(b)], the Court held that the following evidence was sufficient to overcome the presumption: after the execution, the testator took actions with regard to the trust that showed his continuing intent to have the trust funded under the will; the testator told the pastor of the church about the bequest to the cemetery fund and stated that he did not want his relatives to get his money; and previous wills admitted by the trial court were held relevant to show the consistency of the testator's testamentary scheme. Johnson v. Fitzgerald, 294 Ga. 160 (2013).

n. A joint will may be probated as each testator's will. O.C.G.A. §53-4-31(a).

o. In the case of a joint will, a certified copy of the joint will would be used upon the death of the second testator to die.

p. Joint or mutual wills may be revoked by any testator in the same manner as any other will, and the revocation by one of the testators does not revoke the will of any other testator.

Caveat

q. Any pleading which sets forth a claim for relief must contain:

i. A short and plain statement of the claim showing that the pleader is entitled to relief, and

ii. A demand for judgment for the relief to which he deems himself entitled. {O.C.G.A. §9-11-8(a)(2)}.

r. In all averments of fraud or mistake, the circumstance constituting fraud or mistake must be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. {O.C.G.A. §9-11-9(b)}.

G. Pretrial Conference

See Chapter 1.

H. Doctrine of Dependent Revocation/Wills with Provisions Marked Out

A new will by a testator revokes prior wills O.C.G.A. 53-4-43. If the new will is found to be invalid, the former will remains revoked unless it appears from the circumstances that the testator intended the previous will to take effect {remain in effect}. O.C.G.A. 53-4-45 (a)(b). In the case of Mosley v Lancaster, 296 Ga. 862 (2015), the court found that the testatrix had marked through her earlier will so extensively, no one could determine what she intended. The doctrine of dependent revocation did not apply.

I. Depositions and Discovery

Depositions and discovery procedures are governed by the Georgia Civil Practice Act, O.C.G.A. §§9-11-26 through 9-11-37 and §9-11-45. {*See Chapter 12.IV below*

J. Court Reporter

See Chapter 1.

K. More Than One Purported Last Will

If the pleadings disclose that, between the various parties, there is more than one purported last will, the validity of the most recent purported will should be tried first. If this will is valid, the matter will be closed. If this will is not valid, then the next-to-last will would be tried next. Only one will may be propounded in a given trial, and any other purported will, at most, would be admissible into evidence as an exhibit if the admissibility requirements discussed in Chapter 10 are met.

III. Beginning Hearing

A. Case Called

See Chapter 1.

B. Motions and Stipulations

See Chapter 1.

C. Oath of Witnesses

See Chapter 1.

D. Sequestration of Witnesses

See Chapter 1.

E. Opening Statements

See Chapter 1.

IV. Prima Facie Case

A. Making a Prima Facie Case

A prima facie case includes showing the factum of the will (i.e., that it was properly executed), that at the time of its execution the testator apparently had sufficient mental capacity to make it, and that in making it, the testator acted freely and voluntarily. {Singelman v. Singelmann, 273 Ga. 894 (2001)}. If the will is self-proved, the self proving affidavit creates a presumption regarding a prima facie case. O.C.G.A. 53-4-24. See Reeves v Webb and Groenenboom v Webb, 297 Ga. 405 (2015).

Assuming that the caveator has not admitted a prima facie case in favor of the propounder, the propounder must make out a prima facie case in favor of probating the will, using the testimony (in person or by affidavit) of the subscribing witnesses. {*See D. Below*}

B. Formalities of Execution and Attestation

The will must have been executed and attested with the formalities required by law, in that:

a. The testator signed the will. {O.C.G.A. §53-4-20(a)}.

   i. A testator may sign by a mark or by any name that is intended to authenticate the document as his will. {O.C.G.A. §53-4-20(a)}.

   ii. Someone else may sign for the testator, provided this is done in the testator's presence and at the testator's express direction. {O.C.G.A. §53-4-20(a)}.

   iii. The fact that the testator needed assistance in signing does not, alone, give sufficient grounds to object to probate on the basis of it not being "signed by" the testator. [Strong v. Holden, 287 Ga. 482 (2010)]

   iv. If the testator does not sign in the presence of witnesses the testator's signature must be acknowledged by him to each witness at the time that witness signs {144 Ga. 801, 814 (1916)};

b. A declaration by the testator that the paper is the testator's will, coupled with a request that the witnesses sign it, is a sufficient acknowledgment {59 Ga. 472, 480-81 (1877)}.

   i. It is not required that a will be comprised by a single document. More than one document can, together, constitute a will if the documents were together at the time of execution and were presented together to the witnesses as a will. It is not necessary that separate pages or separate documents be bound together or even that the pages appear to be continuous. [Swain v. Lee, 287 Ga. 825 (2010)] After the Swain case (fn 117) was remanded for a trial by jury to determine the intent of the testator and whether the testator intended a 1999 written, unwitnessed, letter and a commercial form will executed in 2005 and duly witnessed, constituted, together the testator's will. The jury so found; Swain and the attesting witnesses testified that the two documents were presented for attestation. The caveators appealed on several grounds, including denial of a directed verdict and the court's given instructions and failure to give certain requested charges. The Supreme Court upheld the denial of the motion for directed verdict and the jury's finding that the documents were the testator's last will and testament. The Court found further that the trial court's instruction, as a whole, were sufficient to

the case, even though they could have been clearer and more precise. One of the charges not given was that "incorporation by reference of an extrinsic document requires that the document be described clearly, explicitly and unambiguously." Interestingly, given the specific incorporation by reference of powers under O.C.G.A. §53-12-263, the Supreme Court stated that the appellant had failed, "however, to cite any authority indicating that the doctrine of incorporation by reference has been embraced in the context of wills under Georgia law." Lee v. Swain, 291 Ga. 799 (2012).

c. Two witnesses attested and signed the will in the testator's presence. {O.C.G.A. §53-4-20(b)}.

i. A witness may attest by his mark, but another individual may not sign for the witness. {O.C.G.A. §53-4-20(b)}.

ii. The attesting witnesses need not have signed in the presence of each other {Thornton v. Hulme, 218 Ga. 480, 481 (1962)}.

iii. The requirement that the witnesses sign "in the presence of" the testator is met only if the witnesses, when signing, are in "the line of vision" of the testator. The testator must have been able to see the witnesses sign without changing the testator's location. If the testator could not actually see the witnesses from the testator's location or place without moving, the witnesses have not signed "in the testator's presence." {281 Ga. 264 (2006)}

iv. The Supreme Court has held that a propounder failed to meet his burden to prove the Will, when, with regard to the three witnesses, propounder proved death of one, alleged that the second could not be located, and produced only one to testify. The testifying witness stated that he had seen the testator a couple of times, did not remember witnessing the will, and did not think the signature was that of testator. The probate court had ruled that the propounder "failed to meet the requirements to produce the testimony of all subscribing witnesses and the one subscribing witness' testimony did not prove proper execution and attestation of the will." The Supreme Court affirmed the ruling of the probate court in that propounder failed to prove the signatures of the missing witnesses (O.C.G.A. §53-5-21) and failed to prove the signature of testator through two credible, disinterested witnesses identifying testator's signature (O.C.G.A. §53-5-24.). The Supreme Court held further that the record shows that propounder failed to prove by a preponderance of the evidence that the signature to the will was in the testator's handwriting. Mason v. Phillips, 290 Ga. 433 (2012).

d. It is no longer necessary that the testator be the first to sign; however, if the testator signed after one or more of the witnesses signed, all should have signed contemporaneously and in the presence of each other, even though there is no longer any priority as to the order of signatures {Waldrep v. Goodwin, 230 Ga.1, 6 (1973)}.

e. Where all of the signature pages are physically connected as part of the will, the fact that a testator's signature and the signatures of witnesses do not appear on the same page and are not in the appropriate locations does not in itself invalidate the execution of the will {Hickox v. Wilson, 269 Ga. 180, 181}.

f. The witnesses were competent witnesses. {O.C.G.A. §53-4-22}.

i. Any individual who is age 14 or over and who is competent to be a witness may witness a will. {O.C.G.A. §53-4-22(a)}.

ii. The witness must be competent only at the time the will is attested and the subsequent incompetence of a witness will not prevent the will from being probated. {O.C.G.A. §53-4-22(b)}.

iii. A subscribing witness who is also a beneficiary under the will is a competent witness, but the testamentary gift to that witness is void unless there are two other witnesses who are not beneficiaries. {O.C.G.A. §53-4-23(a)}.

iv. The spouse of a beneficiary under the will may be an attesting witness to the will without affecting the testamentary gift to the beneficiary. {O.C.G.A. §53-4-23(b); 204 Ga. 747 (1949)}.

g. The testator had knowledge of the contents of the will. {O.C.G.A. §53-4-21}.

i. Where a testator can read, the testator's signature, or an acknowledgment of the signature, will be sufficient to satisfy this requirement. {O.C.G.A. §53-4-21}.

ii. The fact that only a portion of the will was read aloud to the testator at the time of signing does not, alone, overcome this presumption. [Strong v. Holden, 287 Ga. 482 (2010)]

C. Testamentary Capacity

It must be shown that the testator, at the time of making the will, had sufficient mental capacity to make a will.

a. Mere speculation that the testator may have been affected mentally by certain drugs being taken at the time is not sufficient proof of lack of testamentary capacity. [Strong v. Holden, 287 Ga. 482 (2010)]

The fact finder (judge or jury) is not bound by the opinion of persons who were present at and witnessed the execution of the will. Evidence of incapacity at a reasonable time prior to and subsequent to a will's execution creates an issue of fact as to capacity at the time of execution ... [and a fact finder must] determine capacity where there is any genuine conflict of evidence regarding the testator's capacity." [Burchard v. Corrington, 287 Ga. 786 (2010); Sullivan v. Sullivan, 273 Ga. 130 (2000)]

b. Where a condition of incapacity is shown to exist prior to the execution of a will, and it is further shown that this condition continues for a period of time subsequent to the date of execution, such is evidence showing incapacity at the time of execution, and controverts the positive evidence of the subscribing witnesses, thus creating an issue of fact. Burchard.

c. The Supreme Court has stated that the mental capacity necessary to make a will is "modest" and that "anything less than a total absence of mind does not destroy (testamentary) capacity. Mental capacity is sufficient when the testatrix correctly identified all of her immediate family members and knew that she had "quite a bit" of land. Patterson-Fowlkes v. Chancy, 291 Ga. 601 (2012).

Testamentary capacity exists when the testator has a decided and rational desire as to the disposition of his property. {O.C.G.A. §53-4-11(a)}. One has testamentary capacity who:

d. Understands the testamentary nature of a will and that it is a disposition of property to take effect after death;

e. Is capable of generally remembering property subject to his disposition and persons related to him by ties of blood and affection. In Webb v. Reeves et al., 299 Ga. App. 760 (2016), capacity was found because the testator was informed that his estate consisted of "thousands" and was "large" or "sizeable" and he did not ask for more details; and

f. Is also capable of conceiving and expressing by written or spoken words, or by signs, any intelligible scheme of distribution {Northwestern University v. Crisp, 211 Ga. 636, 648 (1955)}.

Sanity is the normal condition of man. If, on an examination of the circumstances attending the execution of the will, nothing unusual appears, and if the testator appears to be aware of what he is doing and acts as sane men do, a prima facie case is made out that the testator is sane {202 Ga. 644, 650 (1947)}.

Testamentary capacity is to be determined by the condition of the testator's mind at the time of execution or acknowledgment of the will {Quarterman v. Quarterman, 493 S.E. 2d 146 (1997)}, but evidence of the condition of the testator's mind before and after execution of the will may be produced for the purpose of shedding light upon the state of the testator's mind when the will was made {181 Ga. 442, 444 (1935)}.

In making out a prima facie case for testamentary capacity, the propounder will normally rely on the attesting witnesses, although other witnesses may be used as well if a prima facie case is not made with the attesting witnesses.

g. If some or all of the subscribing witnesses cannot testify as to the testamentary capacity and mental condition of the testator, or they give testimony adverse to the propounder and favorable to the caveator, such failure of memory or hostility will not necessarily defeat the will. The propounder may make the proof required by law by other witnesses who can testify as to the essential facts, and upon sufficient proof being made, the will may be probated {202 Ga. 644, 649 (1947); *See D. below*}.

If caveators accept that a testator's will and codicil are "self-proved", as they contained affidavits complying with OCGA § 53-4-24, then the caveators admit that a presumption exists that the will and codicil were executed with the requisite testamentary formalities, including that they were executed by a person apparently with sufficient mental capacity to do so, and the caveators have a burden to rebut this presumption. Meadows v. Beam et al., 302 Ga. 494, October 30, 2017.

An insane delusion is defined as existing whenever a person conceives something extravagant to exist which has no existence whatever, and he is incapable of being permanently reasoned out of that conception. The subject-matter of the insane delusion must have no foundation in fact, and must spring from a diseased condition of mind. In the case of Meadows v. Beam et al., 302 Ga. 494, October 30, 2017, the decedent's false beliefs about employment offers or injuries had nothing to do with her will. Although her false belief that Caveators were stealing from her and mismanaging her finances angered Decedent and caused her to execute a new will, the evidence shows that Decedent came to this belief based on false information Martin (the propounder) provided. That Decedent may have been duped by Martin does not establish that her mind was unsound. The Meadows case, supra, is a comprehensive review of this area of law and should be read in its entirety.

D. Free and Voluntary Execution

The testator, in making the will, must have acted freely and voluntarily.

A will must be freely and voluntarily executed. Anything which destroys the testator's freedom of volition invalidates a will. {O.C.G.A. §53-4-12}.

Establishing a Prima Facie Case on This Issue

a. Since the propounder, on this point, is faced with establishing a negative, that is, the nonexistence of undue influence, the amount of proof necessary to establish a prima facie case is not great. {Bianchini v. Wilson, 220 Ga. 816 (1965); 187 Ga. 268 (1938)}.

b. For example, it was held that the propounder had met his burden of establishing a prima facie case as to free and voluntary action by the testatrix in making her will where two attesting witnesses both testified that they saw nothing to indicate that the testatrix was not acting of her own volition in executing the will, and the other attesting witness testified that he observed nothing to indicate coercion {Crews v. Crews, 219 Ga. 459 (1963)}.

E. Testimony of The Subscribing Witnesses

Presumption as to Prima Facie Case

a. In Singelman v. Singelmann, 273 Ga. 894 (2001), the Court held that if a will is self-proving {O.C.G.A. §53-4-24}, the self-proving affidavit itself creates a presumption that the propounder has made his prima facie case, subject to rebuttal by the caveator, and personal appearances by the attesting witnesses are not required to create this presumption at trial. The Court specifically stated that the same is true if the will is not self-proving but the witnesses are examined by written interrogatories or other discovery procedures. {See O.C.G.A. §53-5-23}. With respect to a will that contained a self-proving affidavit, one of the cases that has followed the holding of the Singelman case is Duncan v. Moore, 275 Ga. 656 (2002).

b. Conflict in witness testimony. In the event there is a conflict in a witnesses signed interrogatory and deposition, it is up to the finder of fact to resolve the issue. Ammons v. Clouds, 295 Ga. 225, 758 S.E. 2d 282 (May 2014)

Presence of Attesting Witnesses

c. Until Singelman, supra, in a contested matter the propounder was expected to have all of the attesting witnesses present in person at the hearing (provided they were within this state and accessible) {O.C.G.A. §53-5-21; 193 Ga. 53, 54 (1941)}and the propounder had to use all such testimony whether it was favorable to him or not {202 Ga. 644, 649 (1947)}.

d. Attendance of the witnesses may be compelled by subpoena, subject to the limitations in O.C.G.A. §§24-10-20 through 24-10-23. {*See Chapter 11*}.

e. A photocopy of the will may be exhibited to a witness in lieu of the original will for purposes of examining the witness and this has the same effect as if the original will had been exhibited to the witness. {O.C.G.A. §53-5-23(b)}. In a contested matter, it is good practice to exhibit the original will to the witness.

Witnesses Who Are Dead, Mentally or Physically Incapable of Testifying, or Otherwise Inaccessible

f. When it appears that the will cannot be proved because one or more of the witnesses are dead, mentally or physically incapable of testifying, or otherwise inaccessible, the court may admit the will to probate upon testimony of at least two other credible disinterested witnesses or other sufficient proof that the signature on the will is the testator's signature. {O.C.G.A. §53-5-24}.

g. In addition, where both witnesses had died but one witness had given prior testimony by interrogatory or deposition, under O.C.G.A. 53-5-23(a), this evidence created a jury question. Ammons v. Clouds, 295 Ga. 225 (2014).

h. The judge is not precluded from requiring, in addition to the testimony of the disinterested witnesses, the testimony of any available witness to the will and proof of such other pertinent facts and circumstances as are deemed necessary. {O.C.G.A. §53-5-24}.

i. Inaccessibility of Witnesses

   i. The proof necessary to establish that the witness is inaccessible is equivalent to the proof necessary to establish that the witness is dead or beyond the jurisdiction of the court {129 Ga. 92 (1907)}. In this regard, it would seem that the propounder must show a good faith and diligent effort to locate the witness.

   ii. The mere fact that a witness is a resident of another county in this state or is temporarily absent from this state does not make the witness "inaccessible" so as to excuse the production of his testimony {136 Ga. 859 (1911)}.

   iii. A witness has been found to be inaccessible when:

      1.) The witness is a nonresident and thus not subject to the court's jurisdiction {153 Ga. 618(6) (1922) }; or

      2.) The witness cannot be found, but it cannot be affirmatively established that the witness is dead or a non-resident {129 Ga. 92, 94 (1907)}.

      3.) In any of these situations, if the witness' testimony is necessary in order to make a prima facie case, the propounder should offer evidence establishing the reason for the absence of the witness and the efforts made to locate the witness.

j. At the time of its execution or at any subsequent time during the lifetime of the testator and the witnesses, a will or codicil may be made self-proved, that is, the testator and the witnesses execute a sworn affidavit before a notary public providing evidence of the due and proper execution and attestation of the will. The affidavit and notary's certificate must be substantially in form and content as the statutory form set forth in the Code and are the only prerequisites of a self-proved will. For purposes of self-proving a will and for all other purposes under Title 53, any oath or affirmation or affidavit that is required to be made before a notary public may be made before any notary public or other officer who is authorized to administer oaths under the laws of the state in which the affirmation is made. Self-proved wills or codicils may be contested, revoked, or amended by a codicil in the same manner as are wills which are not self-proved. {O.C.G.A. §53-4-24}

k. If a will was self-proved, the execution and attestation requirements are presumed to have been met (subject to rebuttal) without the necessity of testimony from any of the witnesses. Even in contested cases, offering a properly self-proved will is all that is initially necessary from the propounder(s) to make out a prima facie case. The propounder need not produce the witnesses, and the burden to call the witnesses for examination or to challenge the validity of the self-proving affidavit falls upon the caveator(s). [O.C.G.A. §53-5-17(a), O.C.G.A. §53-5-21(a)] [Duncan v. Moore, 275 Ga. 656 (2002); Singleman v. Singlemann, 273 Ga. 894 (2001)]

l. The failure to include witnesses' names in notary's certificate contained in self-proving affidavit does not invalidate the affidavit, and thus affidavit is sufficient to satisfy signature and attestation requirements for valid will if the affidavit substantially complies in form and content with statutory example of self-proving affidavit; by signing and sealing certificate, the notary has attested that "witnesses" had sworn and subscribed to statement of facts before notary, and unnamed witnesses to whom notary's certificate referred were easily identifiable, having signed the lines designated "witness" appearing below the statement of facts and just above the notary's certificate. [Auito v. Auito, 288 Ga. 443 (2011)]

m. The Supreme Court granted an interlocutory appeal from a ruling by a superior court on a de novo appeal from probate court that a "self-proving affidavit" was in substantial compliance with the requirements of the statute providing for same and sufficiently proved the will. The Supreme Court reversed the superior court's ruling for want of three essential elements required by the statute: the notary public did not affirm (1) that those signing were "known (to the notary) to be the testator and the witnesses, (2) the witnesses were signing at the testator's request, and (3) the witnesses were each at least 14 years of age. Citing General Elec. Credit Corp. v. Brooks, 242 Ga. 109 (1978), the Supreme reiterated that "the doctrine of substantial compliance, though tolerant of 'variations in mode of expression' used to satisfy statutory requisites, nonetheless, requires actual compliance as to all matters of substance. {Martina v. Elrod, 293 Ga. 538 (2013)}.

n. The most recent case regarding proof of a propounded will, an alleged will of a blind testator was offered for probate in solemn form. A caveat was filed alleging that the testator nor the witnesses had actually signed the alleged will. The probate court admitted the will to probate in solemn form, and the caveators

appealed to the superior court. A jury found the will to be valid, but the superior court granted a directed verdict on a motion by the caveators prior to the beginning of the trial. The court had reserved ruling on the motion for directed verdict. Even though the caveators filed a renewed motion for directed verdict, the court entered a judgment upon the findings of the jury, without mentioning in the motion for directed verdict. The caveators then filed a motion for judgment notwithstanding the verdict, and the superior court, several months later, granted the motion for directed verdict, and the caveators appealed. At the time of the trial both witnesses were deceased; however, prior to the death of the witnesses, one witness had executed the standard interrogatories confirming the due execution and witnessing of the will. However, in a deposition of that witness, he testified that he had no recollection of signing as a witness but acknowledged that it was his signature in the attestation clause; further, he testified that he did not see the testator sign the will, because he had turned away and was talking with someone. The attorney who drafted the will testified, but, when shown documents from 2010 and 2011 prepared by the attorney and signed by the testator, the attorney acknowledged that the two signatures were different from each other and from the 2007 will being propounded. The trial court disallowed (struck) the attorney's testimony, finding that it had not been established that he was familiar enough with the testator's signature to be able to identify it and that his testimony did not meet the requirements of O.C.G.A. §53-5-24 (proof of testator's signature by "at least two credible disinterested witnesses that the signature to the will is that" of the testator's). This, the Supreme Court affirmed, but, given the conflict in the evidence, it held that the granting of a directed verdict was improper and reversed the trial court. Ammons v. Cloud, 758 Ga. 225, 758 S.E.2nd 282 (2014). (The Georgia citation was not available at the time this was prepared. The case may be found on the Supreme Court's website: www.gasupreme.us.)

F. Burden Shifts to Caveator

When the propounder has made out a prima facie case {*see Section IV. above*} in favor of the will, the burden shifts to the caveator as follows:

a. It is then the caveator's, and not the propounder's, burden to affirmatively prove the testator's lack of capacity if that is the issue. {Singelman, supra; see Green, Ga. Law of Evidence (5 Ed.), §19 (p.50)}.

b. The same shift of the burden of proof would occur concerning undue influence. Adams v. Cooper, 148 Ga. 339(5) (1918).

If the issue is forgery, the burden of proof never shifts from the propounder to the caveator. Heard v. Lovett, 273 Ga. 111 (2000); Mobley v. Lyon, 134 Ga. 125 (1910).

c. However, after the propounder has made a prima facie case, the burden of going forward on the issue of forgery shifts to the caveator; that is, if the caveator does not rebut the prima facie case concerning proper execution, the propounder will win.

V. Caveator's Burden of Proof

A. Generally

If the caveator, after cross-examination of the propounder's witnesses, believes that a prima facie case has not been made out by propounder, caveator may move for dismissal of the petition, with prejudice. {*See Section Chapter 11.*}.

Unless a motion to dismiss is granted, the caveator must take the actions described in *Section IV. E.* above.

B. Caveator's Burden of Affirmative Proof on Other Issues

In addition to the above rules concerning propounder's prima facie case, the caveator has the burden of proving affirmatively all matters raised by him which are not matters for which the propounder is required to make out a prima facie case {134 Ga. 125, 126-130 (1910); 59 Ga. 472, 475 (1877)}. An example would be revocation, {*See C.10 below*}.

C. Grounds of a Caveat

A caveator may set forth as many grounds of caveat as he may see fit, but all grounds are subject to be dismissed except those which are properly pleaded and which, if sustained, would destroy the will or some part of it {English v. Shivers, 219 Ga. 515, 516 (1963) }.

A properly pleaded caveat must contain the ground(s) relied on, and in the case of fraud or mistake, must also allege the facts which constitute such fraud or mistake. {O.C.G.A. §9-11-9(b)}.

Post execution statements of the deceased offered for the purpose of invalidating a will are not admissible; however, declarations that tend to show that the will reflects the testator's wishes may be admitted. {282 Ga. 768 (2007)}

Mental Capacity

a. A will is not valid unless the testator had sufficient intellect to have a rational and decided desire as to the disposition of his property {O.C.G.A. §53-4-11}; understood the testamentary nature of the will; was capable of remembering the property subject to his disposition and the persons related to him by ties of blood and affection; and was also capable of conceiving and expressing by written or spoken words, or by signs, any intelligible scheme of distribution {Northwestern University v. Crisp, 211 Ga. 636, 648 (1955), *Sec. IV.B above*}.

b. Mere speculation that the testator may have been affected mentally by certain drugs being taken at the time is not sufficient proof of lack of testamentary capacity. [Strong v. Holden, 287 Ga. 482 (2010)]

Undue Influence

c. A will is not valid unless there was no undue influence amounting to fear, force, over-persuasion, or coercion to the extent of destroying the free willpower of the testator, which in effect makes the will the mental offspring of another {English v. Shivers et al., 219 Ga. 515, 521 (1963)}. There is no requirement that the influence be personally exerted by the beneficiary; a will can be invalidated by any showing of fraud or undue influence, even if the beneficiary had no

knowledge that it was being exerted. Harper v. Harper, 274 Ga. 542 (2001). However, mere suspicion of undue influence will not suffice to invalidate a will. {Kersey et al. v. Williamson, 284 Ga. 660 (2008)}

d. Proof of a confidential relationship between the testator and a beneficiary is insufficient, without additional evidence, to show undue influence {Morgan et al. v. Ivey, 222 Ga. 850 (1967); Crews v. Crews, 219 Ga. 459 (1963)}. However, a presumption of undue influence arises when it is shown that the will was made at the request of or drafted by a person who has such a relationship with the testator and is not a natural object of the testator's bounty and that person receives a substantial benefit under the will {Bryan et al. v. Norton, 245 Ga. 347, 348 (1980)}.

e. The Georgia Supreme Court in the case of Milbourne et al. v Milbourne, 301 Ga. 111, dated May 1, 2017, summarized the law on undue influence as follows: Undue influence to procure a will may take many forms and may operate through diverse channels and that the existence and effective power of undue influence can rarely be shown except by circumstantial evidence. An attack on a will as having been obtained by undue influence may be supported by a wide range of testimony, including evidence of a confidential relationship between the parties (one may be a guardian or conservator of the other), the reasonableness or unreasonableness of the disposition of the testator's estate, old age, or disease affecting the strength of the mind. When a beneficiary under a will occupies a confidential relationship with the testator, is not the natural object of the testator's bounty, and takes an active part in the planning, preparation, or execution of the will, a rebuttable presumption of undue influence arises.

f. The presumption is rebuttable and must be rebutted by satisfactory evidence that the will was not the object of undue influence. The presumption alone, if not rebutted, is sufficient to support a verdict finding undue influence. {Bean v. Wilson, 283 Ga. 511 (2008)} But, see Lipscomb et. al v. Young, 284 Ga. 835 (2009) when the primary beneficiary is a natural object of the testator's bounty. See also [McDaniel v. McDaniel, 288 Ga. 711 (2011)]

Fraud

RECENT CASES The Supreme Court recently upheld the granting of summary judgment in favor of the propounder against the caveator who alleged that the propounded Will was invalid on the grounds of undue influence. The caveators had alleged that they should have prevailed, i.e. given the right to a trial, because the presumption of undue influence that arises when someone with a confidential relationship with the testator who is not a natural object of the testator's bounty actively participates in the planning, preparation, and execution of the Will. The Supreme Court held that, even though the testator had an admitted confidential relationship with the beneficiary who was not a natural object of his bounty, the evidence showed that she did not actively participate in the planning, preparation, and execution of the Will. The Supreme Court also held that a confidential relationship alone is not sufficient to support a finding of undue influence. Johnson v. Burrell, 294 Ga. 301 (2013).
In another recent case, involving an allegation of undue influence, the Supreme Court upheld a jury's finding that the testator's will and a trust were invalid due to the undue influence of testator's granddaughter and her husband. After moving the testator into their residence, over the objections, of the testator, the granddaughter and husband enlisted, that very day, an attorney to prepare a power of attorney giving them full control of testator's property. Soon thereafter, the granddaughter and husband used their attorney to prepare a will and trust for the testator. The testator met with the attorney and stated that he wanted his wife taken care of but "whatever (the granddaughter and husband agree(d) on was what (he) wanted to do," even if they wanted to cut out the testator's sons from the will. In March and June of 2002, the granddaughter's husband wrote checks to himself totaling $250,000. The testator died in June, 2006. A jury found the will and trust both to be invalid because of undue influence. The Supreme Court affirmed the jury's verdict. Davison v. Hines, 291 Ga. 434 (2012) See also, Amerson v. Pahl, 292 Ga. 79 (2012).
Declarations of a testator are not admissible to prove the actual fact of improper influence by another or fraud. [Lawson v. Lawson, 288 Ga. 37, 791 S.E.2d 180, (2010) (appellant sought to present evidence of declarations of testator that she intended to provide for appellant)]
After the Supreme Court had affirmed the judgment above, a caveator filed suit in superior court seeking to enforce an alleged contract to make a will. The Court of Appeals affirmed the trial court's denial of the claim for want of proof of a valid and enforceable contract and for want of a written contract as required under O.C.G.A. §53-4-30 of the 1998 Probate Code. Newton v. Lawson, 313 Ga. App. 29 (2011).

g. A will procured by misrepresentation or fraudulent practices upon the testator's fears, affections, or sympathies is not valid. {O.C.G.A. §53-4-12}.

h. Fraud sufficient to invalidate a will exists only when it is shown that the testator relied on the misrepresentation and was deceived {Crawford v. Crawford, 218 Ga. 369, 370 (1962)}.

i. The showing of a fraudulent attempt would be insufficient to invalidate a will, if it could not be further shown that the attempt was successful {Crawford v. Crawford, 218 Ga. 369, 370 (1962)}.

Mistaken Belief That a Child Is Dead

j. If a testator omits a child from the will solely because the testator mistakenly believes the child to be dead, the child is entitled to receive a share of the estate as follows:

i. The omitted child receives the child's intestate share, if there were no other children living at the time the will was executed; provided,

however, that the child receives this amount only if any amount left in the will to the child's surviving parent is not reduced; or

ii. If the will contains a testamentary gift to the testator's other children, the omitted child will share in that gift proportionally with the other children. {O.C.G.A. §53-4-58}.

Forgery

k. If the caveator shows that the testator's name has been forged to the alleged will, or rebuts the propounder's prima facie case on this issue, the will is void {Heard v. Lovett, 273 Ga. 111 (2000), 170 Ga. 788 (1930)}.

Uncertainty

l. In order for uncertainty to be a valid ground of a caveat, the paper alleged to be the testator's will must be so uncertain in its terms, expressions, and appearance that it is impossible to determine whether or not it is a will {69 Ga. 466 (1882)}.

Injustice

m. Injustice or unreasonableness, standing alone as a distinct and separate ground, raises no valid issue and should be dismissed as a ground {130 Ga. 37, 39-40 (1908)}.

n. However, the reasonableness or unreasonableness of a testator's scheme of distribution may be considered in connection with a ground of a caveat which alleges lack of testamentary capacity, undue influence, mistake, fraud, or forgery {130 Ga. 37, 39-40 (1908)}.

Oral Contract to Make a Will

o. In order to specifically enforce a parol (oral) contract to make a will, or to make a specific gift by will, the contract must be proved beyond a reasonable doubt. {Clements v. Weaver, 301 Ga. App. 430 (2009)}

Revocation

p. An express revocation by a written instrument must be executed with the same formality, and attested by the same number of witnesses as are necessary for the execution of a will. {O.C.G.A. §53-4-43}.

q. An express revocation by destruction or obliteration of the original will must be:

i. Done by the testator or by another at his direction,

ii. Done with an intent to revoke the will, {O.C.G.A. §53-4-44} and

iii. Done to the original will.

iv. There is but one original will, even if duplicate were also signed; presumably, the first one signed by the testator will constitute the one original; all others are "copies" for the purpose of revocation by

destruction or obliteration. {Morrison v. Morrison, 282 Ga. 866 (2008)}

r. A will is presumed to be completely revoked if a material portion of the will is obliterated or canceled. {O.C.G.A. §53-4-44}.

i. This presumption may be overcome by a preponderance of the evidence. {O.C.G.A. §53-4-44}.

s. An implied revocation by the execution of a subsequent, inconsistent will takes effect only when the subsequent inconsistent will becomes effective. {O.C.G.A. §53-4-42(b)}.

i. Inconsistent provisions may be embodied in a codicil, which, if properly executed and probated, works as a partial revocation to the extent that it alters or is inconsistent with provisions of the will {192 Ga. 754, 765 (1941)}.

ii. If it is clear that the making of the new will and the revocation of the prior will were "part of one scheme," and the new will is found to be invalid, the revocation will also be invalid. This is known as the theory of "dependent relative revocation." However, if the revocation of the prior will is clearly independent of the making of the new will, the revocation will remain valid. {Mincey v. Deckle et al., 283 Ga. 579 (2008)}

t. Revocation, only to the extent set forth below, will occur if any of the following events happen after the making of a will which does not evidence contemplation of that event:

i. Marriage of testator,

ii. Birth or adoption of a child by testator. {O.C.G.A. §53-4-48(a) }.

iii. If the will provides for the class of the testator's "children" or some similar class, the will is deemed to contemplate the birth or adoption of future children and will not be revoked by such event, provided nothing else in the will indicates otherwise. {O.C.G.A. §53-4-48(b) }.

iv. The subsequent spouse or child will receive the share of the estate he or she would have received if the testator had died intestate. Such share must be paid from the net residuum remaining after all debts and expenses of administration, including taxes, have been paid. If the residuum proves to be insufficient, then testamentary gifts abate in the manner provided in paragraph (b) of Code Section 53-4-63. Any bequest in the will in favor of the subsequent spouse or child must be given effect and counts toward the intestate share. If the bequest equals or exceeds the intestate share, then the subsequent spouse or child receives the bequest in lieu of such intestate share. {O.C.G.A. §53-4-48(c) }.

v. Divorce or annulment of the testator's marriage after the will is executed results in the former spouse being treated as if he or she had predeceased the testator.

vi. If the testator and the former spouse remarry and the will has not been changed in the interim, the provisions relating to the former spouse are reinstated. {O.C.G.A. §53-4-49}.

u. If the original will cannot be found to probate, it is presumed that the will was revoked by the testator. {O.C.G.A. §53-4-46(a)}.Britt v. Sands 294 Ga. 426, 764 S.E. 2d 58 (2014)

i. A copy of the will may be offered for probate provided the copy is proved

by a preponderance of the evidence to be a true copy of the will, and the presumption that the will was revoked is rebutted by a preponderance of the evidence. {O.C.G.A. §53-4-46(b) }.

ii. Although sometimes a duplicate of the will is signed by the testator and the witnesses, there is only one original will and all copies of that will occupy the same legal status notwithstanding the manner in which they were executed or reproduced. A testator has only one original will, no matter how many copies of it may have been executed {Horton v. Burch, 267 Ga. 1, 2 (1996)}.

iii. Evidence that the testator's attorney continued to represent the testator and that the testator never indicated to the attorney a desire or intent to revoke the will, bolstered by testimony of relatives and friends that the will matches the statements of the testator about how his estate would be distributed, has been held sufficient to rebut the presumption of revocation. {Thomas v. Sands et al., 284 Ga. 529 (2008)}

v. There is no set time limit before and after the execution of a purported will when the actions and declarations of the testator may be considered when otherwise admissible. {Thomas v. Sands et al., 284 Ga. 529 (2008) }

Ademption is the extinction of a specific testamentary gift by transfer of the subject property by the testator during the testator's lifetime. {O.C.G.A. §53-4-66}.

w. If the testator has exchanged the property for property of like character or has merely changed investment of the fund, the beneficiary's gift is not adeemed. {O.C.G.A. §53-4-67(a) }.

x. If the property was lost, stolen, or destroyed within six months prior to the testator's death, the beneficiary is entitled to any insurance proceeds that cover the loss. {O.C.G.A. §53-4-67(b) }.

y. If the property was condemned within six months prior to the testator's death, the beneficiary is entitled to the condemnation award. {O.C.G.A. §53-4-67(c) }.

Other Grounds including the Slayer Statute

z. A will made by a minor under 14 years of age is void for want of testamentary capacity. {O.C.G.A. §53-4-10(b) }.

aa. The right to take by will or inheritance or other means is denied to any individual who feloniously and intentionally kills, conspires to kill or procures the killing of another individual. {O.C.G.A. §53-1-5(a) }.

i. For purposes of this statute, a felonious and intentional killing is one that would constitute murder, felony murder, or voluntary manslaughter under this state's criminal code. {O.C.G.A. §53-1-5(a) }.

ii. If the individual has been convicted of or pled guilty to murder, felony murder or voluntary manslaughter, this finding is conclusive. Otherwise, the fact and nature of the killing must be proved by clear and convincing evidence. {O.C.G.A. §53-1-5(d)}.

iii. The individual who performed the killing is treated as if he predeceased the deceased. The killer's descendants may take in place of the killer

only if they are also descendants of the victim. {O.C.G.A. §53-1-5(c)}.

iv. However, the forfeiture provision will not extend to recover from creditors of the estate who had received payment from the slayer while the slayer served as the personal representative before the determination that the provision applies. {Levenson v. Word et. al, 294 Ga. App. 104 (2008)}

VI. Evidence

A. In General

Probate proceedings are subject to the same general rules of evidence as other civil proceedings {96 Ga. 1 (1895)} {*See Ch. 10, Evidence*}.

B. Circumstantial Evidence

Circumstantial evidence may be used to prove the existence and effect of undue influence or monomania, since such factors are not always susceptible of direct proof {174 Ga. 128, 131 (1932)}.

C. Parol Evidence

Parol evidence is admissible to:

a. Explain ambiguities, whether latent or patent. {O.C.G.A. §53-4-56},

b. Show that the paper offered for probate constitutes a will,

c. Show the identity of the will with the paper propounded {72 Ga. 568, 623 (1884)}, and

d. Show what acts were done by the testator and what his intentions were when a question of revocation arises {King v. Bennett, 215 Ga. 345, 349 (1959)}.

It is inadmissible to prove the contents of the will as the will itself is the highest and best evidence of the bequests contained in it.{13 Ga. 253, 257-258 (1853)}.

D. Opinion Evidence - Sanity of Testator

Attesting witnesses' opinions as to testator's sanity are admissible without stating the facts on which they are based {205 Ga. 259, 271 (1949)}.

Expert opinions may not be based on generalized statistics. However, courts have broad discretion in ruling on the admissibility of expert opinions. {285 Ga. 279 (2009)}

Physicians may give opinions based on:

a. Symptoms or circumstances within their knowledge,

b. Hypothetical questions, and

c. Testimony of others as to symptoms and circumstances affecting the testator {189 Ga. 432, 437-38 (1939)}.

Other Witnesses

d. Any other witness may also state his opinion, provided that a proper foundation for the testimony is first laid.

e. With regard to the sanity of the testator, a proper foundation would require that such witness: demonstrate that he had an opportunity to observe the testator, and state the symptoms, habits, acts, or conduct of the testator on which such opinion is based. {175 Ga. 693 (1932)}.

E. Executor and Propounder's Attorney As Witnesses

The executor of the will and the propounder's attorney are competent witnesses, both to the will and in probate proceedings {79 Ga. 672, 673-74 (1887); 102 Ga. 490 (1897)}. However, where an attorney or executor is a beneficiary or legatee under the will as well as an attesting witness, *see IV. A above*.

Acting as Attorney and Witness in Same Case

a. "When a lawyer is a witness for his client, except as to merely formal matters such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel." {DR5-102, Georgia Code of Professional Responsibility}

b. "In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he is likely to be a witness on a contested issue, he may serve as advocate even though he may be a witness." {EC5-10, Georgia Code of Professional Responsibility}

Exception to Attorney-Client Privilege

c. An attorney can testify as to the communications between the attorney and his client regarding the preparation and execution of a will for the client which is the subject of a will contest. {102 Ga. 490 (1897); Howington et al. v. Howington, 242 Ga. 767 (1979)}. All documents relating to that testimony, in the possession of the attorney or his agent, are also admissible and would not be subject to the attorney/client privilege.

F. Certain Declarations of Testator

Declarations of a testator accompanying an act of revocation or attempted revocation are admissible but declarations that his will had been lost or stolen and that it was no longer his will, not accompanying any act which could be construed as an act of revocation or attempted revocation, are inadmissible on the issue of revocation. {94 Ga. 804 (1894)}.

Declarations of a testator shortly after execution of a will, such as "I have made my will, and did not make it as I wanted to," are admissible, not to prove the fact that fraud was practiced upon him or that undue influence was actually exercised, but as tending to show the state of testator's mind, and that he was in a condition to be easily influenced. {51 Ga. 25 (6) (1874)}.

a. There is no set period of time before and after the execution of a purported will to which evidence of the testator's state of mind and freedom from undue

influence is admissible. {Dorsey v. Kennedy, 284 Ga. 464 (2008)}

Evidence of a testator's previous declarations is admissible, not to explain, alter, or contradict the will, but simply to show, as presumptive evidence of testamentary capacity, long continued expressions of a purpose to dispose of his property in a particular way. {158 Ga. 297 (2) (1924)}.

G. Specific Bequests

Business assets/interests. Testator, sole proprietor of a business left each beneficiary a specified percentage of the "outstanding member certificates." Testator also listed this devise as "all of my business interests". Court held that the testator intended his business assets to go to the designated beneficiaries. {England v. Simmons, 295 Ga. 1, 757 S.E. 2d 111(2014)} Also, see {Simmons, et al. v. England, 323 Ga. App. 251, 746 S.E. 2d 862 (2013)}

H. Residuary Clause

The Supreme Court upheld the probate court's finding that a will that contained

RECENT CASES In an interesting recent case, certain beneficiaries filed a declaratory judgment action against the executor of an estate in superior court (that could have been filed in the probate court, since the case was in Clayton County), seeking a declaration whether they were entitled to certain property the decedent used in his business. The will devised "all of business interest, both tangible and intangible, real or personal, connected to the business known as Traditional Fine Art, Ltd." to four employees, two of whom filed the action. The trial court ruled that, since the decedent never created the contemplated limited partnership, the business was a sole proprietorship and all assets were owned by the decedent individually as personal (not business) property. Appeal was filed in the Supreme Court, which transferred the case to the Court of Appeals, finding that the case did not involve the validity or meaning of the will. The Court of Appeals noted that the sentence devising "member certificates" was without effect, but proceeding to apply will construction rules to determine that the sentence in the decedent's will was not limited to member certificates and that, to hold otherwise, would render the sentence meaningless. The Court of Appeals reversed the trial court, holding that the determination of what constitutes "business interests" is a question of fact for a jury to decide. [Simmons, et al. v. England, 323 Ga. App. 251, 746 S.E. 2d 862 (2013).]

no residuary clause was still valid, with the residuary passing under the laws of intestacy. The testator had three daughters. Expressing his extreme disappointment in two of them, he left them each $10.00 under the propounded will. He named the other daughter as executor but left her nothing. She contended that the testator intended to leave her the residuary, since the testator clearly intended to disinherit the other two (except for the $10.00 bequests). Nonetheless, the probate court held that the will was plain and unambiguous. The probate court disallowed testimony from the scrivener attorney that the testator intended to give the residue to the third daughter. The Supreme Court, citing Hungerford v. Trust Co. of Ga., 190 Ga. 387 (1940), reaffirmed that when a will does not contain an ambiguity, parol evidence cannot be introduced to contradict its terms. Banner v. Vanderford, 293 Ga. 654 (2013).

Effect of in terrorem clauses. The effect of in terrorem clauses is often raised in will contests. In a recent case, two daughters lost their undue influence challenge to the validity of a will, which was affirmed on appeal. [Simmons v. Norton, 290 Ga. 223 (2011)] They subsequently sought a declaratory judgment as to the effect of the in terrorem clause. The trial court granted summary judgment to the executor, finding that the in terrorem clause extinguished all gifts to the caveators under the will. The Supreme Court affirmed, holding that the language in the will that any taker who became an adverse party in probate "shall forfeit his or her entire interest hereunder and such interest shall pass as part of the residue of my estate, provided, however, that if such taker is one of the takers of the residue, his or her interest shall be divided among the takers of thee residue," was clear and that the forfeiture of a contestant's "entire interest" includes an interest under the residuary clause. Norton v. Norton, 293 Ga. 177 (2013).

Additional law regarding in terrorem clauses can be found in Chapter 3, Section II - Preliminary Matters, under Subsection D. No-Contest (In Terrorem) Clauses. In the Handbook, see Chapter 3, Section 5.7.2. - In Terrorem Clauses.

VII. Closing Arguments

A. Generally - *See Chapter 1*.

B. Caveator Presents Evidence

Subject to below, where the caveator has offered some evidence in the course of the hearing, the propounder is entitled to open and conclude the closing argument {McGee v. Loftin, 228 Ga. 142, 143 (1971)}.

However, If The Caveator Admits A Prima Facie Case In Favor of The Propounder, {Lavender v. Wilkins, 237 Ga. 510, 516-17 (1976)}, Or The Court Rules That A Prima Facie Case Has Been Made and The Dispute Does Not Concern Forgery Or Any Other Execution Formality, {See Singelman v. Singelmann, 273 Ga. 894 (2001), and *Section 2.4 Above*}, The Caveator Is Entitled to Open and Conclude The Closing Argument.

VIII. Drawing An Order

A. Generally

See Chapter 1 for general rules.

B. Will Admitted to Probate

If the will is admitted to probate, the following specifics should be covered:

a. Basis of jurisdiction - *See 2.21 B and C, above*;

b. That due notice was given to all interested parties, including any required guardians. {*See 2.23 A.3, above*}. The names of the persons notified and the nature of such notice, whether by acknowledgment and consent, personal service, mail, or publication, should be recited in the order or other documents which will be recorded. {O.C.G.A. §15-9-87};

c. That any necessary guardian filed an answer. Such answer should be recorded in the minutes along with the final order;

d. The nature of the proof presented as to capacity, proper execution and attestation, and absence of undue influence;

e. That it is ordered the will is hereby probated in solemn form and ordered to record; and

f. That letters testamentary or letters of administration with the will annexed be issued as requested after the oath has been taken and any required bond has been posted.

C. Will Refused Probate

If the will is refused probate, then the order should include the:

a. Ground(s) on which the caveat was sustained, and

b. Particular facts constituting that ground.

D. Attorneys' Fees

In awarding attorney's fees to a successful caveator, the court is not bound by a contingency contract with the attorney. Reasonable attorneys' fees are to be awarded and must be supported by proof that the fee requested is a valid indicator of the professional services rendered. (This does not preclude the attorney collecting any balance from the client in accordance with the contract.) {McNair v. McNair, 343 Ga. App. 41 (2017)}

An order awarding attorney fees against either party pursuant to OCGA §9-15-14 must specifically state whether the award is made under subsection (a) or (b) of that code section. A court must make express findings of fact and conclusions of law as to the statutory basis for any such award and the conduct which would authorize it. See Robert H. McNair, as co-executor of the estate of W.O. McNair v. Richard "Richie" McNair, et al., A17A0961, (September 29, 2017) for a comprehensive review of the above statute.

IX. Appeals

A. *See Chapter 1*.

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I. Checklist

- ☐ Has the petition for year's support [GPCSF 10] been properly completed? {*II.B below*}
- ☐ Is the petitioner a proper party to apply for year's support? {*See II.B*}
- ☐ Is the petition being made within 24 months of the death of the decedent if the decedent died on or after January 1, 1998? {*See II.B*}
- ☐ Has a guardian been appointed for minor children, if necessary? {*See II.B*}
- ☐ Has proper notice been mailed to all interested persons or the personal representative of the estate? {*See II.C*}

- Has a citation been issued and notice published in the proper newspaper in the county? {*See II.C*}
- Have any objections been made by interested persons? {*See II.D*}
- Has a pretrial conference been held between the judge and the attorneys? If not, has pretrial information been submitted? {*See II.F*}
- Have the motions and stipulations been recorded and disposed of after the opening but before the opening statements by the attorneys? {*See III.B*}
- Have the witnesses been properly sworn? {*See III.C*}
- Have the witnesses been sequestered if the attorneys have requested this? {*See III.D*}
- Have both attorneys had an opportunity to present their opening statements? {*See III.E*}
- Have both the petitioner and the caveator met their burdens of proof in presenting their cases? {*See III. E and F*}
- Have both attorneys presented closing arguments? {*See III.H*}
- Has the court made a judgment in the case? {*See III.I*}
- Has the judge used the proper criteria in determining the amount to be set aside for year's support? {*See III.I*}
- Has the certificate of order been properly drawn and filed? {*See III.J*}
- If the case is appealed, has the record of the case been transmitted to the court to which the appeal is directed? {*See IV*}

II. Preliminary Matters

A. Purpose of Year's Support

The purpose of year's support is to provide support for certain surviving family members during the period of readjustment following the death of the spouse and/or parent of a minor.

B. Petition For Year's Support [Gpcsf 10]

The petition for year's support must be made within 24 months of the death of the testator or intestate.

The petition may be made by the surviving spouse or by a guardian acting on behalf of the spouse or the minor children of the decedent. {O.C.G.A. §53-3-5(a) }.

If a petition for a minor child is brought by the child's guardian, no additional guardian ad litem is necessary unless the court so orders. {O.C.G.A. §53-3-5(a) }.

A surviving spouse who has remarried or a child who has reached the age of majority is barred from filing a petition for year's support. {O.C.G.A. §53-3-2}.

The petition must include a schedule of any property, including household furniture, that the petitioner proposes to have set aside and must describe fully and accurately any real property the petitioner proposes to have set aside with a legal description that is sufficient to pass title to real property under the laws of this state. {O.C.G.A. §53-3-5(c) }.

C. Notice/Service of Process

Upon the filing of a petition for year's support, the court shall issue a citation that sets forth the date by which any objections to the petition must be filed. {O.C.G.A. §53-3-6(b) }.

Notice to Interested Persons

a. Unless a personal representative other than the petitioner has been appointed, the citation must be mailed on each interested persons known to the petitioner or easily ascertainable. {O.C.G.A. §53-3-6(c) }. The Probate court shall serve by first-class mail a copy of the citation on each interested person shown on the affidavit not fewer than 30 days prior to the date and time for objections to be filed shown in the citation. In addition, the court shall serve by first-class mail a copy of the petition within five days of its filing on the tax commissioner or tax collector of any county in this state in which real property proposed to be set apart as year's support is located.

b. Notice solely by publication to these known persons is unconstitutional as it violates their due process rights. {Allan v. Allan, 236 Ga. 199 (1976)}.

c. Interested persons are the decedent's children, spouse, other heirs, beneficiaries, creditors and any others having a property right in or claim against the estate of the decedent which may be affected by the year's support proceeding. {O.C.G.A. §53-3-6(a) }.

d. The citation shall be served upon the personal representative of the estate in lieu of the interested persons unless the personal representative is both the sole personal representative and the petitioner or guardian of the petitioner. The personal representative shall be served not fewer than 30 days prior to the date and time for objections to be filed shown in the citation.{O.C.G.A. §53-3-6(c) }.

e. Unless the probate court specifically assumes the responsibility otherwise, the petitioner or the petitioner's attorney should furnish to the court properly stamped envelopes, addressed to each interested person who is to be served by mail. {Uniform Probate Court Rule 22(D)}.

Notice must be published upon the filing of the petition for year's support, citing all persons concerned to show cause why the petition should not be granted. Publication of such notice shall run once a week for four weeks in the official newspaper of the county in which the petition is made. {O.C.G.A. §53-3-6(b) }.

Within five days of the filing of the petition the court must mail a copy of the petition to the tax commissioner of any county in this state in which real property proposed to be set apart is located. {O.C.G.A. §53-3-7}.

D. Approval of Uncontested Petition

If, after notice has been properly given to all interested persons, there are no objections filed or the objections are disallowed (as not properly filed) or withdrawn, the judge must enter an order setting aside as year's support the property requested in the petition. {O.C.G.A. §53-3-7(a) }.

a. In Garren v. Garren, 316 Ga. App. 646 (2012), the Court of Appeals held that, once there was a determination that no caveat was properly filed, the petition should have been granted pursuant to O.C.G.A. §53-3-7(a) , and the petition should

not be required to provide evidence of the mount required.

This order has the binding force and effect of any other judgment of a court of competent jurisdiction. However, the order cannot enlarge the estate; property set aside must have belonged to the decedent at the time of death (except that if ad valorem taxes are due and owing on real property on which any equity of redemption was owned by decedent, the taxes and liens will be divested as if the entire title were included in the year's support). {O.C.G.A. §53-3-4}.

In the case of attempted fraud on the court (i.e., child over 18 years, wife remarried), no objection need be filed for the probate judge to exercise the judge's inherent authority to dismiss the petition.

E. Caveat Filed

If there is any properly-filed objection to the amount of money or the nature of property proposed to be set aside as year's support, the judge of the probate court must hold a hearing to determine the amount of money or property, or both, to be set aside. {O.C.G.A. §53-3-7(c) }.

a. In a recent case, the Court of Appeals held that a letter to the probate court that was not filed and made a part of the record is not a proper objection/caveat. Garren v. Garren, 316 Ga. App. 646 (2012).

It is through the filing of objections that the acts of the judge of the probate court are transformed from ministerial to judicial; "unless objections are filed, the ordinary's (judge of the probate court) duty is ministerial, but when objections are filed he discharges a judicial function in determining validity of objections". {130 Ga. 436, 440-41 (1908)}.

F. Waiver of Right to Year's Support

Pursuant to OCGA §53-3-1(c), a party could waive the right to a year's support. In the case of In Re: Estate of Emmett Taylor Boyd, 340 Ga. App. 744 (March 15, 2017), husband and wife entered into a post-nuptial agreement. After the husband died, wife filed a petition for year's support. The Court of Appeals determined the contract was valid but remanded the case back to the trial court because the Georgia Supreme Court has held that "in order for the relinquishment of a widow's right to claim a year's support to be binding on her, it must be made with knowledge of her rights and of the condition of the estate." This issue was not address by the trial court.

G. Pretrial Conference

See Chapter 1.

H. Recording

See Chapter 1.

III. Beginning Hearing

A. Case Called

See Chapter 1.

B. Motions and Stipulations

See Chapter 1.

C. Oath of Witnesses

See Chapter 1.

D. Sequestration of Witnesses

See Chapter 1.

E. Opening Statements

See Chapter 1.

F. Burdens of Proof of Petitioner and Caveator

Burden of Proof of Petitioner

[NOTE: *See Chapter 11* for the distinction between the burden of persuasion and the burden of going forward with the production of evidence.]

a. In a year's support hearing, two ultimate issues are involved:
   i. Does the petitioner have legal standing (as the surviving spouse or minor child of decedent)?
   ii. Is the amount proper?

b. Legal standing:
   i. This is often stipulated. However, if the caveat raises the issue of standing, the petitioner must make out a prima facie case to show that the petitioner is one of those persons who by law is entitled to year's support. {O.C.G.A. §53-3-1}.
   ii. Lawful Spouse:
      1.) A caveat may raise the issue of whether the petitioner is the lawful surviving spouse of the decedent. If so, the alleged surviving spouse must make out a prima facie case in order for the caveator to bear the burden of rebuttal. {108 Ga. 275 (1899)}.

2.) A ceremonial marriage is presumed valid even if there is evidence of a previous marriage which is undissolved, unless evidence is presented that the previous spouse is still living. When evidence is presented that a previous spouse is in life, the burden of the evidence is on the party alleging the validity of the ceremonial marriage to show dissolution of the prior marriage. {Kelly v. Kelly, 144 Ga. App. 43 (1978)}.

3.) As to an alleged common law marriage, where cohabitation is illicit in its initiation, there is a presumption of a continuing illicit relationship. This presumption of the illicit relationship may be overcome by direct or circumstantial evidence showing that the parties entered into an agreement to become husband and wife, and thereafter continued cohabitation in the new relationship. {Johnson v. Green, 251 Ga. 645, 646 (1983)}. See In re Estate of Sean Timothy O'Connell, A19A2254, for a recent case on the law regarding common law marriages. In this case, the probate court determined that there was conflicting evidence as to the on and off again relationship between the parties and denied the common law marriage. { A19A2254 (March 10, 2020)}

4.) Georgia does not recognize as a common law marriage any arrangement entered into on or after January 1, 1997. {O.C.G.A. §19-3-1.1}.

iii. Minor Child:

1.) A minor child who is entitled to year's support is any child who would be entitled to inherit if the parent died intestate. {O.C.G.A. §53-3-1(a) }.

2.) The proper basis for determining a minor child's right to year's support is not the child's legitimacy, but whether the child would have been entitled to inherit if the parent had died intestate. {*See Chapter 5* for inheritance rights of children born out of wedlock.}

3.) If genetic testing is ordered by the probate court, the testing does not necessarily have to meet the requirements of O.C.G.A. §19-7-45, relating to paternity testing. {Crowther v. Estate of Crowther, 258 Ga. App. 498 (2002)}.

c. Propriety of the amount:

i. In a contested case, the petitioner for year's support has the burden of persuasion concerning the amount necessary for a year's support. {O.C.G.A. §53-3-7(c) }.

ii. The amount set apart must be that amount determined by the court to be required to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the decedent. {O.C.G.A. §53-3-7(c) }. The relevant time period prior to the decedent's death is not necessarily limited to one year immediately prior to death, but depends upon the unique circumstances of each case {Driskell et al. v. Crisler, 237 Ga. App. 408 (1999)}. Considering the factors listed in *3. immediately below*, there must be some evidence that the amount of property awarded bears a reasonable relationship to the amount the surviving spouse needs for a period of 12 months from the decedent's death to maintain the standard of living she had prior to the decedent's death. {Hunter v. Hunter, 256 Ga. App. 898 (2002)}.

iii. In determining the amount to be set apart, the court must consider:

1.) The support available to the person for whom the property or

2.) Money is to be set apart from sources other than year's support, including but not limited to any separate estate of that person and the earning capacity and income of that person. {O.C.G.A. §53-3-7(c)(1) };

3.) The solvency of the estate; provided, however, that, if the decedent dies having a deposit in a financial institution that is applied to the payment of the funeral expenses and expenses of the last illness of the decedent under subsection (c) of Code Section 7-1-239, any effect such payment may have on the solvency of the estate shall not operate adversely to the surviving spouse or any minor child in the determination of the amount to be set apart as year's support. OCGA §53-3-7(c)(2)};

4.) The size, value, condition, and solvency of the estate are factors to be considered in determining the amount of year's support. However, these factors may not be dispositive as the year's support takes preference over other debts of the decedent (federal taxes excepted). {Smith v. Sanders, 208 Ga. 405 (1951)}.

5.) Such other relevant criteria as the court deems equitable and proper. {O.C.G.A. §53-3-7(c)(3) }, such as:

6.) Advanced age of surviving spouse. {Baulding v. Turner, 208 Ga. App. 548 (1993)};

7.) State of spouse's and children's health. {Baulding v. Turner, 208 Ga. App. 548 (1993)};

8.) Medical expenses of spouse and children. {Kittles et al. Kittles,187 Ga. App. 537 (1988)};

d. Educational expenses of children;

e. The rules pertaining to child support provide generally that minor children are entitled to support, maintenance, and education commensurate with their placement on the economic scale and the placement of their parents on the economic scale in the community in which they live. {McElrath v. C.S. National Bank 229 Ga. 20, 25 (1972)}.

f. The fact that the spouse had paid for substantial improvements on the real property to be set aside. {Byrd v. McKinnon, 189 Ga. App. 768 (1989)};

g. Fairness and equity factors are now germane. {Baker v. Baker, 194 Ga. App. 477(1990)}.

h. These may include factors such as dependency, length of marriage, testamentary intent, injury to adult children (especially of previous marriage), injury to creditors, etc.

i. There is neither a minimum nor a maximum amount which may be awarded as a year's support.

j. The year's support award is not meant to be a general damages award for loss of consortium, nor is it designed to pay the surviving spouse for the loss of the relationship or for personal sacrifices made during the marriage or for the changed societal status of the spouse in the community. {Richards v. Wadsworth et al., 230 Ga. App. 421 (1998)}. Nor do the contributions made by the surviving spouse during the marriage entitle her to claim year's support based on an equitable interest in the marital residence. {Hunter et al. v. Hunter, 256 Ga. App. 898

(2002)}.

k. The petitioner must provide sufficient evidence upon which the standard of living enjoyed before the decedent's death may be ascertained. {288 Ga. 334 (2007)}

i. Where the surviving spouse's income exceeds the expenses shown for the year after death, the petition for year's support must be denied. {Anderson v. Westmoreland, 286 Ga. App. 561 (2007)}

ii. A valid prenuptial agreement establishing an entire right of a spouse to the estate of a decedent will preclude an award of year's support contrary to the terms of the contractual agreement. {Heirs v. Estate of Heirs, 278 Ga. App. 242 (2006)}

G. Burden of Proof of Caveator

When the petitioner has made out a prima facie case, the burden of going forward with the production of evidence shifts to the caveator. The caveator may either

a. Move for dismissal and satisfy the court that a prima facie case has not been made out; or

b. Attempt to rebut the prima facie case by introducing evidence.

Grounds of a Caveat

c. If the caveator alleges that the amount requested by the petitioner is unreasonable and/or excessive and/or inequitable, the caveator should present evidence to rebut the petitioner's proof that the requested amount is appropriate.

d. If the caveat alleges any of the following grounds, then the burden of proof on the caveator is as follows:

i. Petitioner is not entitled to year's support: The caveator must rebut the petitioner's evidence that the petitioner is the lawful spouse or a minor child of the decedent.

ii. Fraud: If this is alleged, the caveator has the burden of persuasion to prove that the petition for year's support is fraudulent unless fraud is clear on its face.

iii. Inconsistent election: The caveator has the burden of persuasion to prove that the will expressly or implicitly forces the spouse to elect between taking under the will or taking year's support and that the spouse has chosen to take under the will.

1.) The general rule is that the will must expressly force the surviving spouse to make an election to take under the will or take year's support. {Young v. Ellis, 250 Ga. 838 (1983)}. If not, the spouse may do both.

2.) In the absence of an express provision, the intention of the testator to force the spouse to make the election may be deduced from a clear and manifest implication in the will, founded on the fact that the claim for year's support would be inconsistent with the will or so repugnant to its provisions as necessarily to defeat them. {63 Ga. App. 195 (1940)}. However, this implied intent is seldom recognized.

3.) Divorce Settlement: If a petition is filed on behalf of minor children and it appears that they are receiving support payments pursuant to a valid divorce decree, which support payments continue past the death of the parent as a charge on the parent's estate, the children may not be entitled to a year's support. The caveator has the burden of persuasion on this issue. {Chapman v. Commercial National Bank, 86 Ga. App. 178 (1952), Clavin v. Clavin, 238 Ga. 421 (1977)}.

4.) Indefinite description of year's support property: Vague and indefinite description of the property in the petition may be a ground of caveat, since a description that is too vague may not put interested parties on notice. The caveator would have the burden of persuasion on this issue.

5.) A valid prenuptial agreement establishing an entire right of a spouse to the estate of a decedent will preclude an award of year's support contrary to the terms of the contractual agreement. {Heirs v. Estate of Heirs, 278 Ga. App. 242 (2006)}

e. The expiration of the 24-month period for filing the petition or other technical grounds relating to the notice or citation. The burden of persuasion is upon the petitioner on these issues.

f. Consumption prior to year's support hearing: The petitioner for an award of year's support must be charged with the value of what the petitioner has consumed since the death of the decedent. {76 Ga. App. 713, 716 (1948)}. The caveator would have the burden of persuasion on this issue.

H. Evidence/Objections to Evidence

Proof of Lawful Marriage

a. Lawful marriage may be proved by a marriage certificate, a certified copy of a marriage certificate, or a marriage license, or by general repute in the family, genealogies, inscriptions, "family trees," and similar evidence. {O.C.G.A. §24-3-12}.

Will of Decedent:

b. If the surviving spouse has elected to accept a provision in the decedent's will which requires that the spouse elect to take under the will in lieu of a year's support, then this election may serve as a bar to year's support, in which case the will would be admissible as evidence {Russell et al. v. Hall et al., 245 Ga. 677 (1980)}, although the will alone would not show what election the spouse actually made.

Establishing Circumstances and Amount Necessary for Year's Support:

c. The petitioner must present evidence concerning the amount necessary for the twelve-months' maintenance, the circumstances and standing of the family, and the solvency of the estate. The separate estate, earning capacity, and income of the petitioner are also relevant.

d. In determining such amount, the court may consider evidence of:

i. Estate inventory,

ii. Schedule of cash needs,

iii. Private annuities,

iv. Income tax returns,

v. Checks and bank statements,

vi. Proof of the fair market value of real estate to be set aside, and

vii. Any other evidence necessary to determine the amount to be awarded {*see III.E.1(e) above*}.

e. Evidence of future facts and cost of living: Evidence of expenses beyond the period for which support is sought in the petition is generally inadmissible, except that factors that establish the fairness of the award may be germane.

Generally: Probate proceedings are subject to the same rules of evidence as other civil proceedings. {*See Chapter 11 below*}

I. Closing Arguments

Where the caveator has offered some evidence in the course of the hearing, the petitioner is entitled to open and conclude the closing argument {McGee v. Loftin et al., 228 Ga. 142, 143 (1971)}.

However, if the caveator admits a prima facie case in favor of the petitioner, the caveator is entitled to open and conclude the closing argument {Lavender et al. v. Wilkins, et al. 237 Ga. 510, 516-17 (1976)}.

J. Judgment of Court/Certificate of Order

Determination of Amount of Award:

a. The amount set aside for year's support must be the amount and property requested in the petition unless an objection is filed. {O.C.G.A. §53-3-7(a) }.

b. If an objection is properly filed, the court must determine the proper amount in accordance with *III.G above* .

c. The phrase in O.C.G.A. §53-3-1(c) [formerly O.C.G.A. §53-5-2] that the award be in the form of "property" means personal property, real property, money, or any combination thereof. {Howard et al. v. Howard, 150 Ga. App. 213, 215 (1979)}.

Separate Awards to Spouse and Children

d. If there are one or more minor children of the decedent who are not also children of the surviving spouse, the court must order separate awards to the spouse and the children. {O.C.G.A. §53-3-8(a) }.

e. Even if the surviving spouse is the parent of the decedent's minor children, the court may in its discretion order separate awards if the court deems this to be in the best interests of the parties. {O.C.G.A. §53-3-8(b) ; In re Estate of Wallace, 284 Ga. App. 772 (2007)}. In any case in which the probate court specifies separate portions under subsection (a) or (b) of Code Section 53-3-8, personal property in the portions so specified shall be delivered and received in compliance with Code Section 29-3-1.

Various Interest in Real Property that Can be Awarded

f. As year's support, the probate court may award any type of interest in real property located in the state ranging from a fee simple title, to a life estate or an estate for years. Considering the length of the decedent's last marriage and other factors, the court could, for example, award a fee simple interest in real property, if the marriage was lengthy; a life estate (if the surviving spouse is

COMMENTARY: The court could possibly place some conditions on the award such that if the surviving spouse failed to occupy a residence for a specific period of time, i.e., the spouse is permanently placed in a nursing home, then the remainder beneficiaries of the property could take possession or if that is contested, file a motion with the superior court and seek exclusive possession of the property based upon the condition set forth in the probate court's order.

elderly, the spouse gets to possess the property for the remainder of his/her life); or an estate for years (exclusive possession of the property for one or more years, if the marriage was short term).

K. Drawing and Filing a Certificate of Order

Whenever a judge of any probate court grants an order for year's support which awards any interest in real property situated in this state, the judge or clerk, within 30 days after granting such order, shall cause a certificate of the order to be filed with the clerk of the superior court in any county of this state where the real property is situated.

a. The certificate must:

i. Identify the person receiving the interest;

ii. Identify the interest received;

iii. Contain a legal description sufficient under the laws of this state to pass title to real property, but the words "Also land(s) in County(ies)" which accurately identifies such other counties within which the real property is situated shall be sufficient to describe real property situated outside the county to which the order or copy thereof was sent; and

iv. Contain a certification by the judge that the information in the certificate is correct.

b. The certificate shall be accompanied by the same fee required for the filing of deeds with the clerk of the superior court. The filing fee for the certificate shall be taxed to the estate.

c. The clerk of any superior court receiving the certificate must file and record the certificate upon the deed records of that county. The certificate must be indexed according to the name appearing thereon as follows:

i. Grantor: name of decedent.

ii. Grantee: individual(s) to whom the award is made.

d. Upon filing and recording, the certificate must be returned to the probate judge or clerk from whom it was received for inclusion in the probate court's permanent file. The probate court is not required to enter the certificate on the minutes of the court. {O.C.G.A. §53-3-11}.

IV. Title to Property Sought As Year's Support

A. Propriety of Amount and Title to Property Sought

An award of property in a year's support action does not and cannot adjudicate title to the property. Ansley v. Raczka-Long, 293 GA. 138 (2013).

An objection filed solely on the basis that the decedent did not own an interest in property sought to be set apart to petition is an improper objection lacking a legal basis, since the probate courts cannot determine title. Any such objection filed should be dismissed by the court. If there are no other objections filed, the case shall be treated as though it were an uncontested case. In re Mahmoodzadeh, 314 Ga. App. 383 (2012)

A widow sought an award of years support. Among the property requested were four money-market accounts and four parcels of real property. Caveats were filed by the bank and the patents of the decedent alleging that the decedent did not own or owned only a partial interest in the property sought. The probate court informed the parties that it did not have jurisdiction to determine title, then proceeded with a hearing on the petition. The probate court denied the petition, not on grounds of title, but because it found that the widow failed to meet the burden of proof as to the amount required for a year's support. The widow appealed. The Court of Appeals reversed and remanded, holding that the probate court erred in allowing objections based solely on the decedent's title to or interest in the requested property and erred by then denying the petition based on the widow's failure to meet the burden of proof. The Court of appeals held that, when an objection is filed against a petition for year's support, it simply calls into question the matter of whether the amount [requested] is in excess of that to which the [surviving spouse] and children are entitled under the law; or whether the applicants are in fact the [surviving spouse] and children of the deceased, for if they are not, no legal year's support could be set apart to them. The Court held further that "it is well settled that probate courts "do not have jurisdiction to adjudicate conflicting claims of title to real or personal property." Cunningham v. Estate of Cunningham, 304 Ga. App (2010).

Nevertheless, a probate court may award as year's support a decedent's interest in property subject to such a dispute. Indeed, a probate court's order of year's support sets aside no more than the interest the decedent held in the property at his or her death, without attempting to determine title to the property. Thereafter, it is the enforcement of such an award of year's support which requires "that a determination of ... interest and title be made by a court with jurisdiction of that issue." Brown v. Granite Holding Corp., 221 Ga. 560 (1965).

An objection filed solely on the basis that the decedent did not own an interest in property sought to be set apart to petition is an improper objection lacking a legal basis, since the probate courts cannot determine title. Any such objection filed should be dismissed by the court. If there are no other objections filed, the case shall be treated as though it were an uncontested case. In re Mahmoodzadeh, 314 Ga. App. 383 (2012).

V. Appeals

A. Parties Authorized to Appeal

An appeal of an award of year's support must be taken by a party to the underlying proceeding (the petitioner or a caveator). {Booker v. Booker 286 Ga. App. 6 (2007)}

B. *See Chapter 1*.

Chapter 5. Procedure for Determination of Heirs

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I. Checklist

- ☐ Does the court have jurisdiction? {*II.A*}
- ☐ Does the petitioner have standing? {*II.B*}
- ☐ Does the intervening party have standing? {*See II.B*}
- ☐ Has the petition for determination of heirs been properly completed? {*See II.C*}
- ☐ Has a guardian-ad-litem been appointed if appropriate? {*See II.D*}
- ☐ Has proper notice been served on all known parties? {*See II.E*}
- ☐ If unknown parties are suspected, has notice been published? {*See II.E*}
- ☐ Has a pretrial conference been held? If not, has pretrial information been submitted? {*See II.F*}
- ☐ Has the case been called? {*See III.A*}
- ☐ Have the witnesses been properly sworn? {*See III.C*}
- ☐ Have the witnesses been sequestered if appropriate? {*See III.D*}
- ☐ Have both the attorneys had an opportunity to present their opening statements? {*See III.E*}
- ☐ Have the persons claiming any interest met their burden of proof? {*See IV.*}
- ☐ Have the attorneys presented closing arguments? {*See V.E*}
- ☐ Has the judgment been properly drawn? {*See VI.*}
- ☐ If an appeal has been filed, has the record been transferred properly? {*See VII.*}

II. Preliminary Matters

A. Jurisdiction

Generally

a. A probate court has concurrent jurisdiction with the superior court to judicially resolve any question arising under the laws of intestacy (descent and distribution) of Georgia as to:

i. Who are entitled to take as heirs, and

ii. What quantity of interest heirs are entitled to take. {O.C.G.A. §53-2-20}.

Jurisdiction in a Particular Case

b. The probate court has jurisdiction in a particular case when it:

i. Has jurisdiction of a pending administration of the assets of the intestate, or

ii. Would have jurisdiction in the event of an administration of the estate

in the process of distribution. {O.C.G.A. §53-2-20}.

B. Standing

Standing to File a Petition for Determination of Heirship

a. Any person having a status which, by operation of law or by written instrument, requires him to distribute property to those entitled under the laws of intestacy may file a petition for determination of heirship. Such persons include, but are not limited to, personal representatives, guardians, conservators, trustees, and other fiduciaries. {O.C.G.A. §53-2-21}.

Heirs

b. Any person who believes that he is an heir, or otherwise has an interest as a distributee of an estate under the laws of intestacy, may petition to have his claim of heirship and the quantity of his interest established. {O.C.G.A. §53-2-22}.

c. Such person must bring the action against:

i. The person charged with the duty of distributing the estate, and

ii. All other known parties at interest, except creditors. {O.C.G.A. §§53-2-21, 53-2-22}.

Standing to File an Intervention

d. When a petition for determination of heirship is filed, any person who believes himself to have an interest as an heir or otherwise as a distributee and who is not named in the petition previously filed may file an intervention.

e. Such intervention must:

i. Set up the claim of such person to the right of participation in the distribution of the estate, and

ii. Allege the facts showing the basis of the claim. {O.C.G.A. §53-2-25}. 5.23 Petition for Determination of Heirship

C. Petition

A petition for determination of heirship must allege the following:

a. The names, addresses, ages, and relationships, so far as known to the petitioner, of all parties at interest (except creditors);

b. The nature and character of the interests of all such parties;

c. Which parties at interest are not sui juris; and

d. Whether the petitioner has reason to believe that there may be others entitled to participate in the distribution whose names are unknown to him. {O.C.G.A. §53-2-21}.

Where the petition is filed by an individual who deems himself or herself to be an heir or otherwise a distributee, the petition, in addition to all the requirements set forth above, shall name as a party the person charged with the duty of distributing the estate. {O.C.G.A. §53-2-22}.

D. Appointment of Guardian

All parties at interest who are unborn, unknown, or not sui juris must be represented by a guardian. It is mandatory in these cases to designate a guardian for unknown heirs.

The guardian is either the person's natural guardian, testamentary guardian, or guardian of the person or property, if the court determines that such pre-existing guardian has no conflict of interest, or a guardian ad litem appointed by the court. {O.C.G.A. §53-11-2}. See GPCSF 16.

a. In general, the guardian should be served instead of the party the guardian represents. However, if the guardian is appointed for a party who is unknown, it is good practice to also serve that party (or all unknown heirs) by publication. The guardian may execute waivers, acknowledgments, consents, answers, objections or other documents on behalf of the party represented. {O.C.G.A. §53-11-2}.

E. Notice/Service of Process

Notice

a. Upon the filing of a petition for determination of heirship in the probate court, the court must issue a citation calling upon all parties at interest to show cause by a designated date why the court should not proceed to a determination of the issues set forth in the petition. {O.C.G.A. §53-11-9}.

Service of Process

b. Personal Service and Service by Mail

i. Personal service must be made on all parties at interest who are residents of Georgia at least 10 days before the date by which objections must be filed, unless the ten-day requirement is waived in writing. {O.C.G.A. §53-11-3(b) }.

ii. Unless otherwise directed by the court, notice to Georgia residents may be served instead by registered or certified mail or statutory overnight delivery, return receipt requested and delivery restricted to addressee only, if the petitioner so requests in the petition. {O.C.G.A. §53-11-3(e) ; §9-10-12(b) }.

iii. If any party at interest is not a resident of Georgia but has a known current residence address, service must be made on that person by registered or certified mail or statutory overnight delivery, return receipt requested. {O.C.G.A. §53-11-4(c) ; §9-10-12(b) }.

iv. Where service is made personally or by mail (or delivery), a copy of the petition must be included along with a copy of the citation. {O.C.G.A. §53-11-3(a) }.

c. Service by Publication

i. Service by publication must be made if the current residence address of a party at interest is not known {O.C.G.A. §53-11-4}. With respect to unknown parties.

ii. The notice must be published once a week for four weeks in the newspaper in which sheriff's advertisements are published in the county in which the petition has been filed. {O.C.G.A. §53-11-4(b) }.

d. Acknowledgement of Service

i. A party at interest, or that person's guardian, may acknowledge service. Any such acknowledgment of service must be signed before a notary public or judge or clerk of the probate court. {O.C.G.A. §53-11-6}.

F. Pretrial Conference

See Chapter 1.

G. Recording

See Chapter 1.

H. Motion For Disinterment and DNA Testing

When the kinship of any party in interest to a decedent is in controversy in a proceeding for judicial determination of heirs, a superior court with enhanced jurisdiction may order the removal and testing of deoxyribonucleic acid (DNA) samples from the remains of the decedent and from any party in interest whose kinship to the decedent is in controversy for purposes of comparison and determination of the statistical likelihood of such kinship.

Such court may order the disinterment of the decedent's remains if reasonably necessary to obtain such samples.

If the heirship proceeding is pending in a probate court without enhanced jurisdiction, the motion must be transferred to the superior court. {O.C.G.A. §§15-9-127(7) , 53-2-27(a) }.

The order may be made only on motion for good cause shown and after notice to all parties in interest. The order must specify the time, place, manner, conditions, and scope of the removal and testing of samples, and the person or persons by whom that is to be done. Such motion, when made by a party in interest, must be supported by affidavit setting forth:

a. The factual basis for a reasonable belief that the party in interest whose kinship to the decedent is in controversy is or is not so related; and

b. If disinterment of the decedent's remains is sought, the factual basis for a reasonable belief that reliable DNA samples from the decedent are not otherwise reasonably available from any other source. {O.C.G.A. §53-2-27(b) }.

Upon request, the movant must deliver to all parties in interest a copy of a detailed written report of the tester and of any other expert involved in the determination of such statistical likelihood setting out his or her findings, including the results of all tests made and conclusions or opinions based thereon. {O.C.G.A. §53-2-27(c) }.

The costs of obtaining and testing of such samples, including the costs of disinterment and reinterment of the remains of the decedent, if necessary, as well as the costs of providing the report, must be paid by the moving party. {O.C.G.A. §53-2-27(d) }.

III. Rules of Inheritance

A. Heirs Determined at Moment of Decedent's Death

The heirs of a decedent are determined at the moment of his death, in accordance with the following rules:

a. The list of heirs never changes. It is as though a photograph of the heirs had been taken at the moment of the decedent's death. The identity of the relatives in the "photograph" never changes.

b. Occasionally a person who is an heir of a decedent will die after the decedent but before the court is asked to determine the heirs of the first decedent. This is irrelevant to the question of who are the heirs of the first decedent.

c. A child, once virtually adopted, cannot become unadopted by later developing a relationship with a biological parent. Sanders v. Riley, 296 Ga. 693 (2015). This case covers virtual adoption law extensively.

d. It is error for the court to proceed to determine the heirs of a "later-deceased" heir in a proceeding concerning the first decedent. {Hill v. Newman, 254 Ga. 57 (1985)}. With respect to the heir who dies after the first decedent, note that only the court in the county of his death can determine his heirs. This may be a different county from that of the first decedent. Also, proper legal notice would have to be given to the proper persons concerning the estate of the deceased heir if his heirs were to be determined.

B. Statutory Rules of Inheritance

The following rules are used to determine who are the heirs of a deceased person:

a. Upon the death of the husband or wife without lineal descendants, the surviving spouse is the sole heir. {O.C.G.A. §53-2-1(b)(1) }.

b. If the decedent is survived not only by a spouse but also by children or representatives of deceased children, the surviving spouse shares equally with the surviving children (with the descendants of any deceased child taking that child's share per stirpes), but the spouse's portion will never be less than one-third of the estate. {O.C.G.A. §53-2-1(b)(1) }.

i. In any case in which a surviving spouse or child is entitled to year's support under Chapter 3 of Title 53, the amount of such support does not affect the amount to which that heir is entitled under this paragraph. The heir is entitled as a matter of law to an intestate share unless that heir renounces such portion, in whole or in part, within nine months after the death of the decedent.

c. Children are in the first degree from the decedent and inherit equally, with the descendants of any deceased child taking that child's share per stirpes. {O.C.G.A. §53-2-1(b)(3) }.

i. The class of the decedent's "children" includes any child who was

conceived before the decedent's death, born within ten months of the death, and who survived birth by at least 120 hours. {O.C.G.A. §53-2-1(a)(1) }.

d. Parents of the decedent are in the second degree and those who survive the decedent share the estate equally if there is no surviving spouse, child, or other descendant. {O.C.G.A. §53-2-1(b)(4) }.

e. Brothers and sisters of the decedent are in the third degree and inherit equally if there is no surviving spouse, child, other descendant, or parent of the decedent. Brothers and sisters of the whole blood, brothers and sisters of the half blood, and brothers and sisters adopted by a mutual parent of the intestate stand in the same degree and inherit equally from each other if there is no survivor in a lower degree. The children or other descendants of deceased brothers and sisters shall represent and stand in the place of their deceased parents. {O.C.G.A. §§53-2-1(b)(5) , 53-2-1(a)(2) }.

f. If all the brothers and sisters are dead at the time of death of the decedent then the nephews and nieces who survive take the estate in equal shares, with the descendants of any deceased nephew or niece taking per stirpes the share that nephew or niece would have taken.

g. The grandfathers and grandmothers of the decedent are in the fourth degree and those surviving the decedent share the estate equally if there is no survivor in a lower degree. {O.C.G.A. §53-2-1(b)(6) }.

h. Uncles and aunts are in the fifth degree and those surviving share the estate equally, with the children of any deceased uncle or aunt inheriting in the place of the deceased uncle or aunt. {O.C.G.A. §53-2-1(b)(7) }.

i. If all the uncles and aunts are dead at the time of the decedent's death, then their surviving children (the decedent's first cousins) share the estate equally.

j. The more remote degrees of kinship are determined by counting the number of steps in the chain from the claimant to the closest common ancestor of the claimant and the decedent and from said ancestor to the decedent. The sum of the two chains is the degree of kinship. The surviving relatives who have the lowest sum are in the nearest degree and thus inherit the estate equally. {O.C.G.A. §53-2-1(b)(8) }.

C. Inheritance By and From Children Born Out of Wedlock

A child who is born out of wedlock may inherit in the same manner as though legitimate from and through the child's mother, the other children of the mother, and any other maternal kin. {O.C.G.A. §53-2-3(1) }. The mother, the other children of the mother, and other maternal kin may inherit from and through the child born out of wedlock in the same manner as though the child were legitimate. {O.C.G.A. §53-2-4(a) }.

A child who is born out of wedlock may not inherit from or through the father, the other children of the father, or any other paternal kin unless:

a. A court of competent jurisdiction has entered an order declaring the child to be legitimate or an order that otherwise establishes paternity;

b. The father has signed the birth certificate or executed a sworn affidavit attesting his paternity of the child;

c. There is other clear and convincing evidence that the child is the child of the father ("virtual legitimation"); or

d. Genetic tests have established at least a 97% probability of paternity and such evidence has not been rebutted by clear and convincing evidence. {O.C.G.A. §53-2-3(2) }.

The father, the other children of the father, and other paternal kin may inherit from and through the child born out of wedlock in the same manner as if the child were legitimate if any of the tests stated in *2. immediately above* are met (provided, that if 2.b) is relied upon, the signature of the father must be during the lifetime of the child). {O.C.G.A. §53-2-4(b) }.

D. Virtual Adoption

Unlike "virtual legitimation," which may be proved by evidence of the father treating the child as his child, the essential elements of virtual adoption are:

a. An actual agreement with the parent(s) to adopt the child, not fully carried out during the life of a decedent, and

b. Severance of the parenting relationship with the parent(s) agreeing to the adoption of the child by the decedent. {Morgan et al., v. Howard, 285 Ga. 512 (2009); Walden v. Burke et al., 82 Ga. App. 154 (2006)}

Once proven, a virtually adopted child is entitled to inherit from a parent's "intestate estate" or property "undisposed of by will". Virtual adoption will not revoke a parent's will or provide an intestate share for a child as a result of such finding. A virtually adopted child does have standing to contest the will of the adopting parent, but only on a proper ground such as mental incompetency or undue influence. Johnson v. Rogers, 297 Ga. 413 (2015)

E. Application of the Rules of Inheritance

Shares of Spouse and Children: O.C.G.A. §53-2-1(b)(1) .

a. Example 1. H dies intestate, leaving a widow (W), and one child (A). Under O.C.G.A. §53-2-1(b)(1) , W will take one-half of the estate and A will take one-half of the estate.

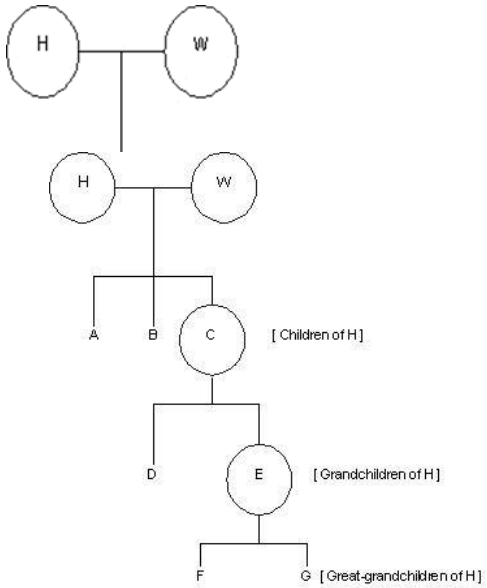
b. Example 2. H dies intestate, leaving a widow (W) and five children. W takes a one-third interest in H's estate, and each child takes one-fifth of the remaining two-thirds of H's estate (2/15 per child).

Shares of Children and Descendants: O.C.G.A. §53-2-1(b)(3) .

[NOTE: In the diagrams, a circle around a letter indicates that the person has predeceased the decedent. H is always circled, as H is the intestate decedent in all examples.)

c. Example 1. H dies intestate, with no surviving spouse, leaving two children (A, B) living. H's third child, C, predeceased H, but left two children (D, E) living:

i. Under O.C.G.A. §53-2-1(b)(3) , D and E stand in the place of C, and distribution is per stirpes, which means that here D and E will divide the share that C would have taken if living. A and B take a one-third share each, and D & E share C's one-third, with each taking one-sixth of H's estate.



d. Example 2. H dies intestate, his wife (W) having predeceased him, and leaves two children (A and B) living. H's third child, C, predeceased H, but left a child, D, living. A second child of C, E, predeceased H, but left two children (F and G) living:

i. Under O.C.G.A. §53-2-1(b)(3) , the distribution of H's estate is as follows:

1.) A and B take a one-third interest;

2.) The one-third interest that C would have taken, had she survived H, "drops down" to the next generation and is divided there, so that D takes a one-sixth interest in H's estate (1/2 of C's 1/3 interest); and

3.) The one-sixth interest that E would have taken, had he survived H, "drops down" to the next generation, and is divided there, so that F and G each take a one-twelfth interest.

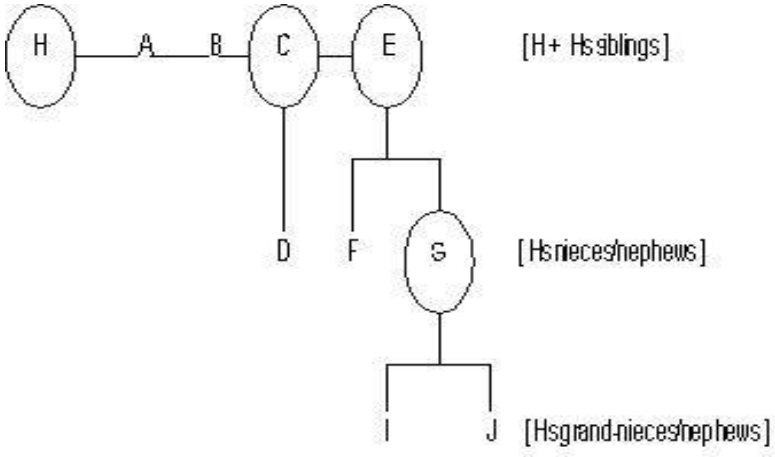
4.) The above example can easily be expanded to take account of more distant lineal descendants of H. In the above example, assume that G also predeceased H, but left two children, I and J, living. The distribution of H's estate with regard to A, B, D, and F would be the same as above, and I and J would each take 1/24 interest in H's estate (one-half of the interest that G would have taken).

Surviving Parents: O.C.G.A. §53-2-1(b)(4) .

e. Example 1: H dies and is not survived by a spouse, child or any other descendants. H is survived by his parents and his brother. His parents share the estate equally. The brother does not take anything because one or more of H's parents is alive. IF H's father had predeceased H, H's mother would take the entire estate.

Surviving Siblings and Descendants of Siblings: O.C.G.A. §53-2-1(b)(5) .

f. Example 1. H dies intestate, leaving no surviving spouse, children, other descendants, or parents. H is survived by two brothers, A and B. Another brother of H, C, predeceased H, but left a child D, living. E, a sister of H, also predeceased him, but left a child, F, living. G, the second child of E, also predeceased H, but left two children (I and J) living:



i. Under O.C.G.A. §53-2-1(b)(5) the distribution of H's estate would be as follows:

1.) A and B will each take a one-fourth interest;

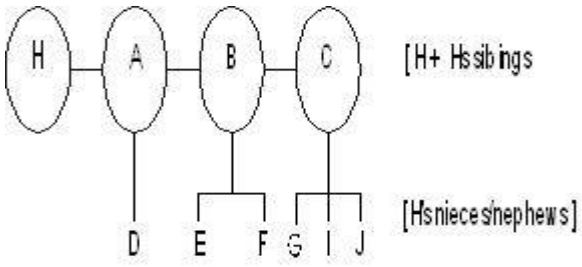
2.) D will also take a one-fourth interest, because he "stands in the place" of C, his deceased parent;

3.) F will take a one-eighth interest (one-half of the one-fourth interest that E would have taken, had she survived H); and

4.) I and J will each take a one-sixteenth interest (one-half of the one-eighth that G would have taken, had G survived H).

5.) In the example above, if J had predeceased H, but left two children living, the children would share equally (1/32 each) the one-sixteenth interest their parent would have taken.

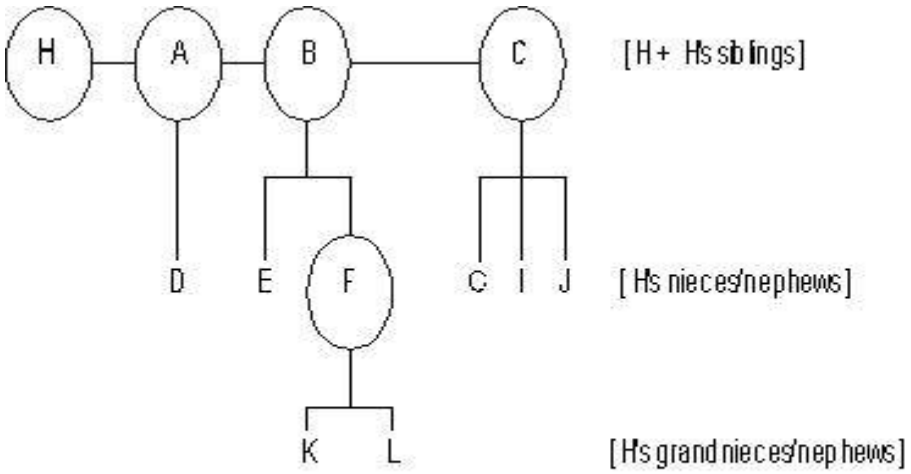
g. Example 2. H dies intestate, leaving no wife, children, other descendants, or parents. A, B, and C were sisters of H, but predeceased him. A left one child, D; B left two children, E and F; and C left three children, G, I, and J:



i. O.C.G.A. §53-2-1(b)(5) provides, in pertinent part, that if all the brothers and sisters are dead at the death of the decedent, then distribution is equal among the decedent's surviving nieces and nephews. Therefore, D, E, F, G, I, and J will each take a one-sixth interest in H's estate.

ii. Note that, in contrast, if A had survived H, the distribution would have been per stirpes and A would take a one-third interest; E and F would each take a one-sixth interest (sharing their parent B's one-third interest); and G, I, and J would each take one-ninth interest (sharing their parent C's one-third interest).

h. Example 3. The facts are the same as in Example 2, except that F also predeceased H, but left two children, K and L:



i. In this situation, O.C.G.A. §53-2-1(b)(5) provides that, if all of the decedent's siblings are dead, the distribution shall be made equally among the nieces and nephews, with the descendants of any predeceased niece or nephew taking that niece or nephew's share.

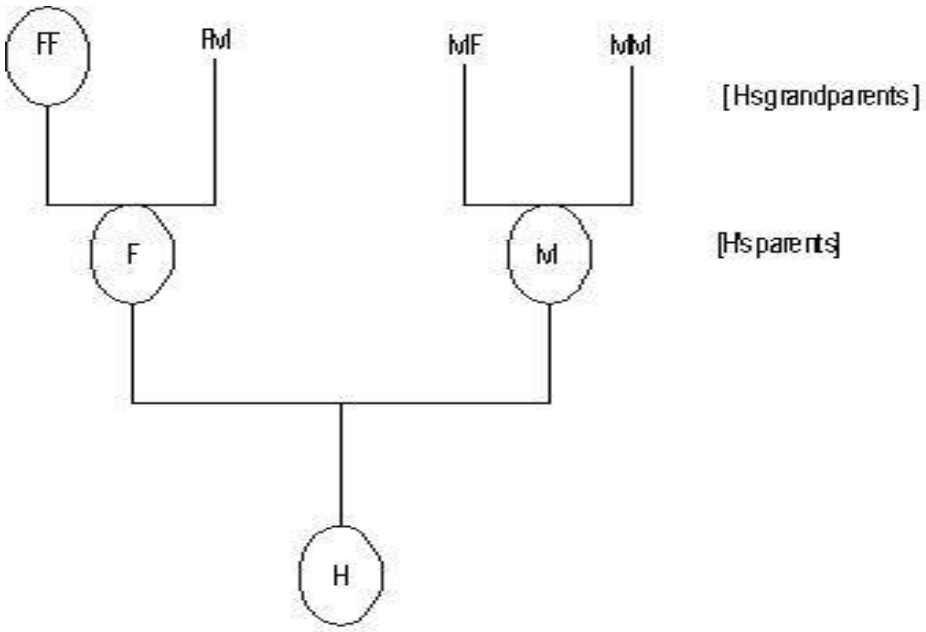
ii. Therefore, the distribution of H's estate is as follows:

1.) D, E, G, I and J each take a one-sixth interest; and

2.) K and L each take a one-twelfth interest (one-half of the one-sixth interest that F would have taken had F survived H.)

Surviving Grandparents: O.C.G.A. §53-2-1(b)(6) .

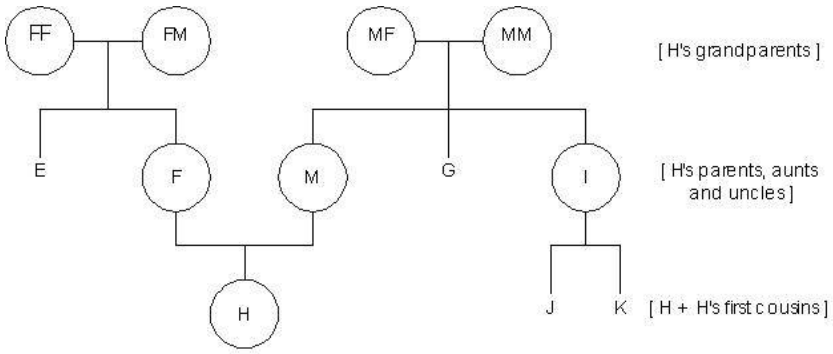
i. Example. H dies intestate, leaving no wife, children, other descendants, parents, brothers or sisters, or descendants of brothers or sisters. H's father's mother (FM) survived him, as did both of the parents of H's mother (MM and MF).



i. O.C.G.A. §53-2-1(b)(6) provides that, in this situation, H's surviving grandparents shall inherit equally. Therefore, FM, MM, and MF will each take a one-third interest in H's estate.

Uncles, Aunts, and First Cousins: O.C.G.A. §53-2-1(b)(7) .

j. Example 1: H dies intestate, leaving no wife, children, other descendants, parents, brothers or sisters, descendants of brothers or sisters, or grandparents surviving him. H is survived by E, his father's brother, and G, his mother's sister. Another sister of H's mother, I, predeceased H, but left two children, J and K:



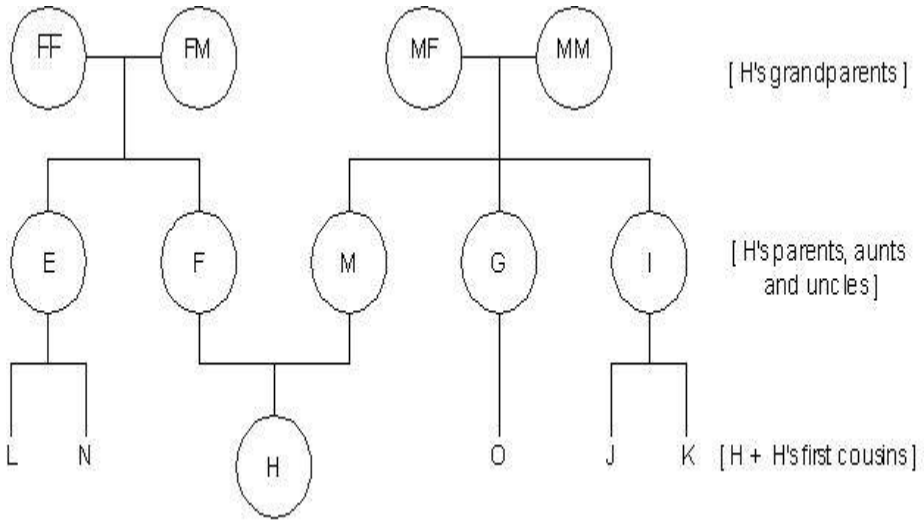
i. O.C.G.A. §53-2-1(b)(7) provides that, in this situation, the uncles and aunts inherit and the children of any deceased uncle or aunt stand in the place of their deceased parent.

ii. Therefore, the distribution of H's estate is as follows:

1.) E and G each take a one-third interest; and

2.) J and K each take a one-sixth interest (one-half of the one-third interest that I would have taken, had she survived H).

k. Example 2. The facts are the same as in Example 6.(1), above, except that E predeceased H, leaving two children, L and N, and G also predeceased H, leaving a child, 0:



i. In this situation, O.C.G.A. §53-2-1(b)(7) provides that the first cousins will inherit equally. Therefore, L, N, 0, J, and K will each take a one-fifth interest in H's estate.

Other Relatives: O.C.G.A. §53-2-1(b)(8) .

l. The more remote degrees of kinship are determined as follows:

i. Find the common ancestor between the decedent and the surviving relative.

ii. Count the number of steps between the relative and the common ancestor.

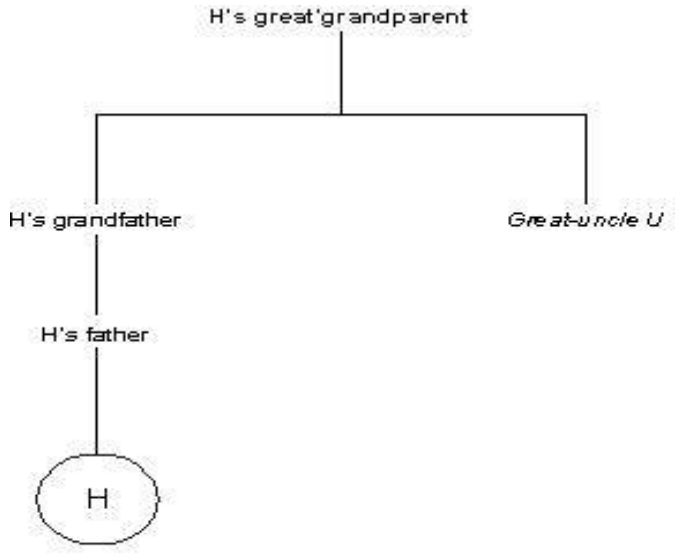
iii. Count the number of steps between the common ancestor and the decedent.

iv. Add these two numbers together and the sum is the degree of kinship.

v. Repeat this process for all other surviving relatives. The relative whose sum is the lowest is in the closest degree of kinship and thus takes the whole estate. If two or more relatives have the same sum, they share the estate equally.

m. Example 1: H is not survived by his spouse, children, other descendants, parents, siblings, descendants of siblings, grandparents, aunts or uncles, or first cousins. His only surviving relatives are his great-uncle U (the brother of his paternal grandfather) and X, the daughter of his first cousin.

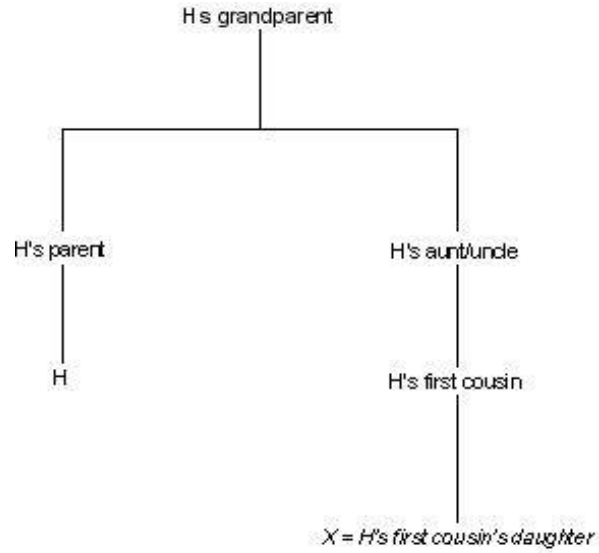
i. Great-Uncle U



1.) The common ancestor of H and his great-uncle is H's Great-Grandparent. The number of steps between Great-Grandparent and Great-Uncle U is one. The number of steps between Great-Grandparent and H is 3 (Great-Grandparent to Grandfather = 1st step, Grandfather to Father = 2 step, Father to H = 3 step).

2.) The sum of these two figures is 4.

ii. . First Cousin's Daughter



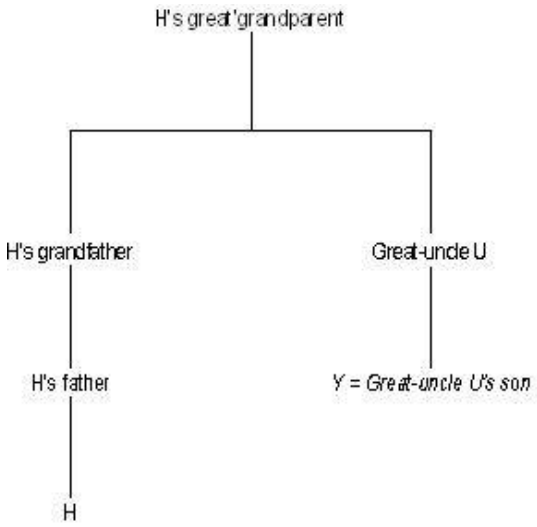
1.) The common ancestor between H and X is H's Grandparent. The number of steps between X and Grandparent is 3 (X to H's first cousin; First cousin to H's Uncle/Aunt, H's Uncle/Aunt to Grandparent). The number of steps between Grandparent and H is 2 (Grandparent to H's Father; H's Father to H). The sum of these two figures is 5.

2.) Result: Because the sum for U is lower than the sum for X, U takes the entire estate.

n. Example 2: Assume that H's only surviving relatives are X (H's first cousin's daughter) and Y. Y is the son of Great-Uncle U, who is now also dead.

i. We determined above that the sum to be assigned to X is 5.

ii. The sum to be assigned to Y is also 5:



iii. The common ancestor between H and Y is H's Great-Grandparent. The number of steps between the Great-Grandparent and Y is 2. The number of steps between the Great-Grandparent and H is 3. Therefore the sum to be assigned to Y is 5.

iv. Because both these surviving relatives are in the same degree of relationship from H, X and Y share H's estate equally.

IV. Beginning Hearing

A. Case Called

See Chapter 1.

B. Motions and Stipulations

See Chapter 1.

C. Oath of Witness

See Chapter 1.

D. Sequestration of Witnesses

See Chapter 1.

E. Opening Statements

See Chapter 1:.

F. Order of Presentation of Evidence

The petitioner should proceed first and offer evidence in support of the allegations in the petition. *See Chapter 1*.

Where an intervention has been filed, the intervenor, after the petitioner has presented his evidence, should offer evidence:

a. In support of the allegations in the intervention, and

b. In rebuttal of such evidence of the petitioner as may tend to undermine or contradict the allegations of the intervenor.

V. Burden of Proof

A. Generally

There is no presumption as to who are the heirs of a decedent. {Keen v. Thomas, 214 Ga. 362, 364 (1958)}. However, certain persons who claim as heirs must prove that they have the status that would entitle them to inherit from the decedent:

a. Common Law Spouse: When an alleged marriage is unlicensed and non-ceremonial, the burden is on the proponent to prove that the common law marriage existed. {219 Ga. App. 548 (1996)}.

b. Child Born Out of Wedlock: A child born out of wedlock may inherit from the child's mother in the same manner as if legitimate. In order to inherit from the

father, however, the child must prove those circumstances set out in the law that would allow the out of wedlock child to inherit. {*VIII.C below*}

Persons claiming an interest in the decedent's estate as heirs or distributees have the burden of proving:

c. Death of the alleged intestate,

i. The relationship of the intestate to the alleged heirs or distributees, and

ii. The nonexistence of persons whose degree of relationship to the intestate would be closer than that of the claimants. {53 Ga. App. 582, 585-86 (1936)}.

Further, where the claimants' rights to inherit depend upon the death of persons who, if living, would be the heirs, they have the burden of proving:

d. The deaths of such persons, or

e. Facts from which such persons' deaths may legally be inferred. {53 Ga. App. 582, 585-86 (1936)}.

B. Death

The fact of death may be proved by direct, indirect, or documentary evidence. {O.C.G.A. §24-3-12}.

There is a rebuttable presumption of death arising from either:

a. Age in excess of one hundred years {24 Ga. 494 (1958) }, or

b. Seven years of unexplained absence. {O.C.G.A. §24-4-21}.

[NOTE: The above rules are rules of evidence. The rules are different in a proceeding to declare that a missing person is dead. See O.C.G.A. §53-9-1 et seq.]

C. Intestacy

Unless it is proved that the decedent made a will, the distribution of his estate will proceed by intestate succession under the laws of intestacy. {61 Ga. 460 (1878)}.

One claiming an interest in a decedent's estate as an heir or distributee has no burden of proving the absence of a will or administration. {193 Ga. 4, 10 (1941)}.

D. Relationship of Claimants to Decedent

The degree of relationship between the decedent and persons claiming an interest in his estate as heirs or distributees may be proved by direct, indirect, or documentary evidence. {O.C.G.A. §24-3-12}.

E. Nonexistence of Persons More Closely Related to Decedent

As in *D. above*, this requirement may be satisfied by proof consisting of direct, indirect, or documentary evidence. {O.C.G.A. §24-3-12}.

VI. Evidence/Objections

A. Evidence Generally

The court should apply the rules of evidence applicable in all civil cases. {*See Chapter 11*}.

B. Pedigree

Pedigree, including descent, relationship, birth, marriage, and death, may be proved by:

a. The declarations of deceased persons related by blood or marriage to the family in question,

b. General repute in the family, or

c. Genealogies, inscriptions, "family trees", and similar evidence. {O.C.G.A. §24-3-12}.

One who is otherwise qualified to testify as to pedigree is not disqualified merely because he is a party in the case at hand. {Simeonides et al. v. Zervis, 127 Ga. App. 506, 510 (1972)}.

C. Birth, Death, Marriage, and Relationship

Direct Evidence

a. A witness may testify as to matters within his own knowledge or of general repute in his family without the necessity of first establishing by independent evidence his relationship to his family. {Crawley v. Selby et al. 208 Ga. 530, 536-37 (1951)}.

Hearsay Evidence

b. Testimony based on family repute alone is not admissible unless the witness is a member, by blood or marriage, of the family in question. {143 Ga. 565, 567-68 (1915)}. However, this evidence may be admissible if for some reason otherwise validated.

c. Declarations of deceased persons, related by blood or marriage to the family in question:

i. Foundation for admissibility: Declarations, and testimony based on declarations, of deceased persons related by blood or marriage to the family in question are admissible as proof of pedigree only after it is first established by independent evidence that:

1.) The deceased person was a family member. {144 Ga. 327, 333-34 (1915)},

2.) The declaration was made before the current controversy arose. {144 Ga. 327, 333 (1915)}, and

3.) The declaration was made under such circumstances that the person making it could have had no motive to misrepresent. {193 Ga. 783, 792 (1942)}.

d. Form of declarations

i. No particular form of statement is required to render a declaration as to pedigree admissible. It may be oral or written, such as a letter or a recital in a deed. {193 Ga. 783, 792 (1942)}.

e. Knowledge of declarant

i. Declarations concerning pedigree need not be upon the knowledge of the declarant to be admissible. Thus, evidence is admissible that a deceased member of the family said that he heard from others of his family the facts of family history which he stated. Furthermore, such declarations are admissible notwithstanding that the declarant failed to mention the source from which he derived his information. {193 Ga. 783, 792 (1942)}.

Documentary Evidence

f. The following are prima facie evidence of the facts contained therein. {O.C.G.A. §31-10-26(b) }:

g. Certified copies of birth records. {O.C.G.A. §31-10-9};

h. Certified copies of adoption records. {O.C.G.A. §31-10-13};

i. Certified copies of new certificates of birth following adoption, legitimation, or a paternity determination. {O.C.G.A. §31-10-14};

j. Certified copies of marriage records. {O.C.G.A. §31-10-21};

k. Certified copies of divorce or annulment records. {O.C.G.A. §31-10-22}; and

l. Certified copies of death records. {O.C.G.A. §31-10-15}.

m. Acknowledgment of Paternity and Legitimazation:

i. Document must be a sworn statement before a notary. Estate of Hawkins, 328 Ga. App. 436, 762 S.E. 2d 149 (2014)

ii. Requirement that father must sign is also referenced in the above case.

D. Objections

See Chapter 1.

E. Closing Arguments

Generally:

a. *See Chapter 1*.

b. After any intervenor has presented his evidence, the petitioner should close by:

i. Summarizing the evidence previously offered in support of the

allegations in his petition, and

ii. Responding to such evidence offered by the intervenor that may tend to undermine or contradict his allegations.

VII. Drawing An Order

A. Generally

See Chapter 1.

B. Specifically

The judgment must be a finding as to the heirs or distributees entitled to participate in the division of the estate and in what shares or quantity each is entitled to participate.

Findings of Fact and Conclusions of Law.

a. The relationships of the heirs to the intestate, as proved by evidence introduced at the hearing, should be included in the order as findings of fact.

b. The shares or quantity of interest to which each heir or distributee is entitled should be included in the order as conclusions of law.

VIII. Appeals

A. *See Chapter 1*

Chapter 6. Contested Guardianship and/or Conservatorship of Minor

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I. Checklist

- ☐ Does the court have jurisdiction? {*See II.A*}
- ☐ Does the petition contain all of the required information? {*See II.B*}
- ☐ Was proper notice given to all parties? {*See II.B*}
- ☐ Has the case been called? {*See III.A*}
- ☐ Have any motions been properly disposed of? {*See III.B*}
- ☐ Have the witnesses been properly sworn in? {*See III.C*}
- ☐ Have the witnesses been sequestered if the attorneys if appropriate? {*See III.D*}
- ☐ Have both attorneys had an opportunity to present their opening statements? {*See III.E*}
- ☐ Has the burden of proof been met showing the necessity for the guardianship and/or conservatorship? {*IV.A*}
- ☐ Has the court considered the order of preferences for appointment? {*See IV.B*}
- ☐ Have the burdens of proof been met? {*See IV.C*}
- ☐ Have all potential conflicts of interest been resolved? {*See V.A*}
- ☐ Have both attorneys had an opportunity to make closing arguments? {*V.D*}
- ☐ Has the order been properly drawn? {*See VI.*}
- ☐ Has the guardian and/or conservator taken the required oath before receiving letters of appointment? {*See V.D*}
- ☐ Has the guardian and/or conservator posted any required bond before receiving letters of appointment? {*See V.D*}

II. Preliminary Matters

A. Jurisdiction to Appoint "Permanent" Guardian and/or Conservator

Minor Having No Guardian

a. The probate court of the county in which a minor is found or in which the proposed permanent guardian is domiciled has the power to appoint a permanent guardian for a minor who has no natural guardian, testamentary guardian, or permanent guardian. In its discretion, the probate court of the county in which the petition for appointment of a permanent guardian is filed may transfer the case to the probate court of any other county in this state if such transfer would serve the best interest of the minor. {O.C.G.A. §29-2-14}.

b. Jurisdiction is concurrent with the juvenile court. {O.C.G.A. §15-11-30.1(a) }.

c. In a situation where the parents were divorced and have joint legal custody, both parents are the natural guardians of that minor. If one parent has sole custody, that parent is the sole natural guardian of that minor; however, if the parent that had sole custody dies, the surviving parent is the sole natural

guardian. {O.C.G.A. §29-2-3}.

Jurisdiction to Appoint "Permanent" Guardian of Minor Child with Living Parent

d. The probate court has no jurisdiction to appoint a "permanent" guardian of a minor who has a natural guardian, testamentary guardian, or a permanent guardian, or a permanent guardian who has been appointed and serving. O.C.G.A §29-2-14. "[W]here a probate court and superior court have concurrent jurisdiction over an action, the general rule is that the court first taking jurisdiction will retain it unless some good reason is shown for equitable interference. Stone-Crosby v. Mickens-Cook, 318 Ga. App. 313 (2012)..

e. See O.C.G.A. §29-2-15 concerning a biological father of a minor born out of wedlock.

f. The juvenile court, not the probate court, has exclusive jurisdiction to limit parental rights where deprivation (neglect or abuse) is alleged. {O.C.G.A. §15-11-28(a) }. Where custody is the subject of controversy, the superior and juvenile courts, not the probate court, have concurrent jurisdiction to hear and determine the issue of custody and support. {O.C.G.A. §15-11-28(c) }.

See O.C.G.A. §29-2-5 and *Section VIII. below* concerning the appointment of temporary guardians.

See O.C.G.A. §34-9-226 with respect to workers' compensation benefits.

Jurisdiction to Appoint Conservator

g. The court of the county in which a minor is found or in which the proposed conservator is domiciled has the power to appoint a conservator for the minor. {O.C.G.A. §29-3-6(a)} .

h. If a nonresident minor has property in this state, the judge of the court of the county in which the property is located may appoint a conservator who will have control only over such property. {O.C.G.A. §29-3-6(b) }.

B. Petition/Notice/Service of Process

Petition Requirements for a Permanent Guardianship

a. Any interested person may file a petition for the appointment of a permanent guardian of a minor. The petition must show a statement of the facts upon which the court's jurisdiction is based and contain the following information:

i. The name, address and date of birth of the minor;

ii. The name, address, and county of domicile of the petitioner and the petitioner's relationship to the minor, if any; if the individual nominated by the petitioner to serve as guardian is different from the petitioner, the name, address, county of domicile, and that individual's relationship to the minor, if any;

iii. A statement that the minor has no natural guardian, testamentary guardian, or permanent guardian;

iv. A statement of whether the child was born out of wedlock and, if so, the name and address of the biological father, if known

v. If there exists, to the petitioner's knowledge, any notarized or witnessed document made by a parent of the minor that deals with the guardianship of the minor, the name and address of any designee named in the document;

vi. The names and addresses of the following relatives whose whereabouts are known:

vii. The adult siblings of the minor; provided, however, that not more than three need be listed;

viii. If there is no adult sibling of the minor, the grandparents of the minor; provided, however, that not more than three need be listed, or;

ix. If there is no grandparent of the minor, any three of the nearest adult relatives of the minor determined according to Code Section 53-2-1 of the Revised Probate Code of 1998;

b. Whether or not a temporary guardian has been appointed for the minor, or if a petition for the appointment of a temporary guardian has been, or is being filed, and;

c. The reason for any omission in the petition for appointment of a permanent guardian for a minor in the event full particulars are lacking. {O.C.G.A. §29-2-17(a),(b) }.

Notice/Service of Process for Permanent Guardianship

d. Notice of the petition for appointment of a permanent guardian for a minor must be given to:

i. Any designee(s) named in a notarized or witnessed document made by a parent of the minor that deals with the guardianship of the minor, and;

ii. The relatives of the minor listed in the petition. {O.C.G.A. §29-2-17(c) }.

e. Notice should also be given to any individual nominated by a minor who is over 14 years of age, or if no such nominee then to the minor, since such a nominee has the first preference under O.C.G.A 29-2-16(a)(1) .

f. Notice of the petition to those entitled must be made by personal service if the individual resides in this state at a known address; by first-class mail if the individual resides outside this state at a known address; or by publication for two weeks in the official county legal organ for the county in which the petition is filed if no address is known. {O.C.G.A. §29-2-17(c) }.

g. The notice must state that the individual is entitled to object either to the establishment of a permanent guardianship or to the selection of the petitioner as permanent guardian, or both. The notice must require that any objection be filed in writing with the court within ten days of the personal service, within 14 days of the mailing of the notice, or within ten days of the date of the second publication of the notice. {O.C.G.A. §29-2-17(c) }.

The date on which the hearing is held will be the date by which any objection is required to be filed or such later date as the court may specify. When the matter is set for hearing on a date that was not specified in the citation, the court must send by first-class mail a notice of the time of the hearing to the petitioner and all parties who have served responses at the addresses given by each of them in their pleadings. {O.C.G.A. §29-9-13(b) }.

There are special rules for notice to a biological father of a minor born out of wedlock. See O.C.G.A. §29-2-15. {O.C.G.A. §29-2-17(c) }.

Petition Requirements for a Conservatorship of a Minor

h. Any person may file a petition for the appointment of a conservator of a minor. The petition must show a statement of the facts upon which the court's jurisdiction is based and contain the following information:

i. The name, address, and date of birth of the minor;

ii. The name, address, and county of domicile of the petitioner and the petitioner's relationship to the minor, if any, and, if different from the petitioner, the name, address, and county of domicile of the person nominated by the petitioner to serve as conservator and that person's relationship to the minor, if any;

iii. Whether to the petitioner's knowledge there exists any notarized or witnessed document made by a parent of the minor that deals with the conservatorship of the minor and the name and address of any designee named in the document;

i. In addition to the petitioner and the nominated conservator, the names and addresses of the following relatives of the minor whose whereabouts are known:

i. Any parent of the minor whose parental rights have not been terminated;

ii. If there is no parent of the minor whose parental rights have not been terminated, the adult siblings of the minor; provided, however, that not more than three adult siblings need be listed;

iii. If there is no adult sibling of the minor, the grandparents of the minor; provided, however, that not more than three grandparents need be listed; or

iv. If there is no grandparent of the minor, any three of the nearest adult relatives of the minor determined according to Code Section 53-2-1 of the Revised Probate Code of 1998;

j. A description of all known assets, income, other sources of funds, liabilities, and expenses of the minor;

k. A disclosure of any financial interest that would cause the proposed conservator to have a conflict of interest with the minor;

l. A specific listing of any of the additional powers, as described in subsections (b) and (c) of Code Section 29-3-22, that are requested by the conservator and a statement of the circumstances that would justify the granting of such powers; and

m. The reason for any omission in the petition for appointment of conservator of

a minor in the event full particulars are lacking. {O.C.G.A. §29-3-8 (a),(b) }.

Notice/Service of Process for Conservatorship

n. Notice of the petition for appointment of a conservator for a minor must be given to:

i. Any designee(s) named in a notarized or witnessed document made by a parent of the minor that deals with the guardianship of the minor, and;

ii. The relatives of the minor listed in the petition. {O.C.G.A. §29-3-8(c) }.

o. Notice should also be given to any individual nominated by a minor who is over 14 years of age, or if no such nominee then to the minor, since such a nominee has the first preference under O.C.G.A 29-3-7(a)(1) .

p. Notice of the petition to those entitled must be made by personal service if the individual resides in this state at a known address; by first-class mail if the individual resides outside this state at a known address; or by publication for two weeks in the official county legal organ for the county in which the petition is filed if no address is known. {O.C.G.A. §29-3-8(c) }

q. The notice must state that the individual is entitled to object either to the establishment of a conservatorship or to the selection of the petitioner as conservator, or both. The notice must require that any objection be filed in writing with the court within ten days of the personal service, within 14 days of the mailing of the notice, or within ten days of the date of the second publication of the notice. {O.C.G.A. §29-3-8(c) }.

r. The date on which the hearing is held will be the date by which any objection is required to be filed or such later date as the court may specify. When the matter is set for hearing on a date that was not specified in the citation, the court must send by first-class mail a notice of the time of the hearing to the petitioner and all parties who have served responses at the addresses given by each of them in their pleadings. {O.C.G.A. §29-9-13(b) }.

C. Guardian Ad Litem

The court in its discretion may at any time appoint a guardian ad litem to represent the interests of a minor. See O.C.G.A. §29-9-2.The guardian ad litem cannot act as both guardian ad litem and as an attorney for the minor. In re Estate of Thompson, A15A0558 (2015).

D. Child's Wishes

The probate judge may ascertain the wishes of the child (even if under age 14) by examination as to which of the contesting parties he prefers {91 Ga. 90 (1892)}.The judge may interview the minor in chambers before the hearing or during a recess if the parties consent to this; otherwise, the examination should be on the record.

III. Beginning Hearing

See Chapter 1 regarding General Courtroom Practice

A. Case Called

See Chapter 1.

B. Motions and Stipulations

See Chapter 1.

C. Oath of Witnesses

See Chapter 1.

D. Sequestration of Witnesses

See Chapter 1.

E. Opening Statements

See Chapter 1.

F. The Party With The Burden of Proof As Explained Below Will Proceed First.

IV. Issues and Burdens of Proof

A. Jurisdiction and Necessity of Guardianship and/or Conservatorship

The burden of proof is upon the applicant to show the necessity for a guardianship and/or conservatorship and that all jurisdictional requirements have been met. Necessity is seldom an issue since jurisdiction is based upon the fact that the minor has no guardian and/or conservator.

B. Level of Priority

If there is a dispute as to whether a party is entitled to occupy a certain level, that party would have the burden of proof to show that he is entitled to occupy the level of priority that he claims.

C. Who Should Be Guardian and/or Conservator

The standard for determining all matters at issue is what is in the best interest of the minor. {O.C.G.A. §§29-2-18, 29-3-9}.

Who May be Appointed Guardian and/or Conservator

a. Only an "individual" may serve as guardian of a minor. {O.C.G.A. §29-2-2(a) }.

b. No "individual" or "person" {See O.C.G.A. §53-12-2(5) for the definition of "person"} may be appointed as a guardian or conservator, respectively, of a minor who is:

i. A minor, a ward, or a protected person; or

ii. Has a conflict of interest with the minor unless the court determines that the conflict of interest is insubstantial or that the appointment

would be in the minor's best interest. {O.C.G.A. §§29-2-2(b) , 29-3-4}.

Order of Preference for Guardians

c. The court must appoint as guardian that individual who will best serve the interest of the minor considering the following order of preferences:

i. The adult who is the preference of the minor if the minor is 14 years of age or older;

ii. The nearest adult relative of the minor determined according to Code Section 53-2-1 of the Revised Probate Code of 1998;

iii. Other adult relatives of the minor;

iv. Other adults who are related to the minor by marriage;

v. An adult who was designated in writing by either of the minor's natural guardians in a notarized document or document witnessed by two or more persons; or

vi. An adult who has provided care or support for the minor or with whom the minor has lived. {O.C.G.A. §29-2-16(a) }.

d. The court may disregard an individual who has preference and appoint an individual who has a lower preference or no preference. In determining what is in the best interest of the minor, the court may take into account any facts and circumstances presented to it, including the statement of a minor who is under 14 years of age. {O.C.G.A. §29-2-16(b) }.

Order of Preference for Conservators

e. The court must appoint as conservator that person who will best serve the interest of the minor considering the following order of preferences:

i. The individual who is the preference of a minor who is 14 years of age or older;

ii. The nearest adult relative of the minor as set forth in Code Section 53-2-1 of the Revised Probate Code of 1998;

iii. Other adult relatives of the minor;

iv. Other adults who are related to the minor by marriage;

v. A person who was designated in writing by a minor's natural guardian in a notarized document or document witnessed by two or more persons;

vi. A person who has provided care or support for the minor or with whom the minor has lived; or

vii. The county guardian. {O.C.G.A. §29-3-7(a) }.

f. The court may disregard an individual who has preference and appoint a person who has a lower preference or no preference. In determining what is in the best interest of the minor, the court may take into account any facts and circumstances presented to it, including the statement of a minor who is under 14 years of age. {O.C.G.A. §29-3-7(b) }.

Who Has Burden of Proof

g. Where the only issue is who should be appointed guardian or conservator of a minor or his property, the best practice is to refer to the list of preferences and place the burden of proof on the party with the lower preference, to show by a preponderance of the evidence why it would be in the minor's best interest to appoint the party with a lower preference rather than the party with a higher preference. Note that either the petitioner or the caveator could be the party with the higher preference, placing the burden of proof on the other party. Note also that the party with the higher preference must introduce some evidence in order to support a finding that his appointment will serve the minor's best interest. If both parties occupy the same priority level, the caveator would have the burden to show that his appointment is more in the best interest of the minor than the appointment of the petitioner.

Meeting Burden of Proof

h. The party with the lower preference must satisfy the court that the letters of guardianship and/or conservatorship should not be issued to the party with the higher preference, by introducing evidence that appointment of that individual or person would not be in the best interest of the minor.

i. After the lower-preference party presents evidence, the higher-preference party may present his evidence.

j. In all cases where the burden is upon a party, he must carry that burden by a preponderance of the evidence. Two witnesses of equal credibility swearing opposite ways does not carry the burden. {68 Ga. 87, 90 (1881)}.

k. A party may meet his burden of proof by his own evidence and by cross-examination of the other party's witnesses.

l. When a party has the burden of proof (also called burden of persuasion) he must bring sufficient evidence to satisfy the court of what he affirms. When that is done, the burden of producing evidence is shifted and it devolves upon the other side to show that it is not the truth. {68 Ga. 87, 90-91 (1881); 130 Ga. App. 850, 855 (1974)}.

V. Evidence/Objections

A. Evidence

See Chapter 11, Evidence.

B. Special Admissibility Considerations

The probate judge may:

a. Ascertain the wishes of the child (even if under age 14) by examination as to which of the contesting parties he prefers. {91 Ga. 90 (1892)}. *See Sections II.D and IV.C above*.

b. Look to see if the pecuniary interest of the child will be promoted by giving the guardianship and/or conservatorship to the wealthier applicant. {91 Ga. 90(1892)};

c. Look to the affection the parties bear to the children and their present and future welfare. {91 Ga. 90 (1892)};

d. Ascertain the habits, temper, morality, sobriety, and sense of responsibility (or the contrary) of the applicant. {44 Ga. 485, 486 (1871)}.

Evidence tending to show the amount, character, and condition of the estate of a minor is pertinent and relevant as throwing light on the question of whether or not appointment of a party would serve the minor's best interest. {104 Ga. 579 (1898)}.

Evidence by the applicant as to the minor's property and income is not objectionable as irrelevant or immaterial. {Henderson v. Hale, 209 Ga. 307 (1952)}.

The financial condition of an applicant may be shown by evidence at the hearing. {132 Ga. 666 (1909)}.

Conflict of Interest

e. No individual or person may be appointed as guardian or conservator, respectively, of a minor who has a conflict of interest with the minor unless the court determines that the conflict of interest is insubstantial or that the appointment would be in the minor's best interest. {O.C.G.A. §§29-2-2(b)(2) , 29-3-4(2) }.

C. Objections

See Chapter 1.

D. Relaxed Rules Concerning Examination of Witnesses

The regular mode of conducting the hearing and examination of a witness will be for the person to be interrogated by the party calling him, then to be cross-examined by the other party (or parties), and then to allow the original party further questions in rebuttal. However, due to the nature of the hearing and the fact that the applicant or caveator may be present without counsel, the probate judge has broad discretion in controlling the examination.

E. Closing

Closing Arguments *See Chapter 1*.

Oath/Bond

a. Oath :Before entering upon the duties of the appointment, every guardian or conservator appointed pursuant to this chapter must take an oath or affirmation before the court to perform well and truly the duties required of a guardian or conservator, respectively, and to account faithfully for the estate. The oath or affirmation of a guardian and/or conservator may be subscribed before the judge or clerk of any probate court of this state. The judge of the probate court who appoints the guardian and/or conservator has the authority to grant a commission to a judge or clerk of any court of record of any other state to administer the oath or affirmation. {O.C.G.A. §§29-2-24, 29-3-24}.

b. Guardian's Bond: A guardian may be required to give bond with good and sufficient security in such amount as the court may determine from time to time.

{O.C.G.A. §29-2-25(a) }.

c. Conservator's Bond: A conservator must give a bond in an amount equal to the estimated value of the estate if secured by a licensed commercial surety authorized to transact business in this state. The value of the estate for purposes of the bond will be determined without regard to the value of any real property or improvements thereon but, upon conversion of the real property into personal property, a bond must be given based upon the value of the estate, including the value of the personal property into which the real property was converted. {O.C.G.A. §29-3-41(c) }.

i. A financial institution, trust company, national or state bank, savings bank, or savings and loan association described in Code Section 7-1-242 that seeks to qualify as a conservator is not required to give bond for the faithful performance of its duties unless its combined capital, surplus, and undivided profits are less than $3 million as reflected in its last statement filed with the Comptroller of the Currency of the United States or the commissioner of banking and finance. {O.C.G.A. §29-3-40(a),(b) }.

ii. The judge of the probate court has authority to permit a subsequent reduction in the amount of the bond when it appears that the value of the ward's estate has decreased, provided that the reduction in no way affects the liability of the surety for waste or misconduct of the conservator which occurred before the bond was reduced. {O.C.G.A. §29-3-42}.

iii. If, after the appointment, other property comes into the minor's estate, the judge may require the conservator to give an additional bond with security equal to the amount of such property. {O.C.G.A. §29-3-43}.

VI. Drawing An Order

A. Requirements For Order Granting Permanent Guardianship

An order granting permanent guardianship of a minor must specify:

a. The name of the permanent guardian and the basis for the selection of the guardian;

b. A specific listing of any of the additional powers which are granted to the permanent guardian as provided in subsection (b) of Code Section 29-2-22;

c. If only a guardian is appointed or if the guardian and the conservator appointed are not the same person, the reasonable sums of property to be provided the guardian to provide adequately for the minor's support, care, education, health, and welfare, subject to modification by subsequent order of the court; and

d. Such other and further provisions of the guardianship the court determines to be in the best interest of the minor. {O.C.G.A. §29-2-19}.

B. Requirements For Order Granting Conservatorship

An order granting a conservatorship of a minor must specify:

a. The name of the conservator and the basis for the selection;

b. A specific listing of any of the additional powers, as described in subsections (b) and (c) of Code Section 29-3-22 that are granted to the conservator;

c. If a guardian is also appointed and if the guardian and conservator are not the same person, the reasonable sums or property to be provided to the guardian to provide adequately for the minor's support, care, education, health, and welfare, subject to modification by subsequent order of the court;

d. If the minor has an interest in real property, the name of the county in which the real property is located; and

e. Such other and further provisions of the conservatorship the court determines to be in the best interest of the minor, stating the reasons therefor. {O.C.G.A. §29-3-10(a) }.

C. Filing In Superior Court

In any case involving the appointment of a conservator, if the minor has an interest in real property, the court must file, within 30 days of granting the petition for conservatorship, a certificate with the clerk of the superior court of each county in this state in which the minor owns real property, which must be recorded in the deed records of the county and indexed under the name of the minor in the grantor index. The certificate must set forth the name of the minor, the expiration date of the conservatorship, the date of the order granting the conservatorship, and the name of the conservator. The certificate must be accompanied by the same fee required for filing deeds with the clerk of the superior court. The filing fee and any fee for the certificate will be taxed as costs to the estate. {O.C.G.A. §29-3-10(b) }.

VII. Appeals

A. *See Chapter 1*.

VIII. Temporary Guardianships of Minors

A. Petition Requirements

Guardianship versus custody

[NOTE: See O.C.G.A. §§ 29-1-1 and 29-2-3 for definition of "Parent" and "Natural Guardian".]

a. Custody of a minor child is different from guardianship. The superior courts have original jurisdiction over contests for permanent child custody between parents and third parties. Therefore, if the minor has a living parent, the probate court cannot resolve the issue of custody in a temporary guardianship proceeding. {Barfield v.Butterworth, 323 Ga. App. 156 (2013)}.

A petition to be appointed temporary guardian of a minor may be filed by an individual who has physical custody of the minor. The petition must be filed in the probate court of the county of domicile of the petitioner; however, if the petitioner is not a domiciliary of this state, the petition may be filed in the probate court of the county where the minor is found. A petition for the appointment of a temporary guardian must include the following:

b. The name, address, and date of birth of the minor;

c. The name and address of the petitioner and the petitioner's relationship to the minor, if any;

d. A statement that the petitioner has physical custody of the minor and;

i. Is domiciled in the county in which the petition is being filed; or

ii. Is not a domiciliary of this state and the petition is being filed in the county where the minor is found;

e. The name, address, and county of domicile of any living parent of the minor and a statement of whether one or both of the parents is the minor's natural guardian;

f. A statement of whether one or both of the parents have consented in a notarized writing to the appointment of the petitioner as temporary guardian and, if so, that the consents are attached to the petition;

g. If the sole parent or both parents have not consented to the appointment of the temporary guardian, a statement of the circumstances that give rise to the need for the appointment of a temporary guardian; and

h. The reason for any omission in the petition for temporary guardianship in the event full particulars are lacking. {O.C.G.A. §29-2-5}.

Parental Consent/Notice Requirements

i. If the sole parent or both parents of the minor have consented to the appointment of the temporary guardian, as evidenced by notarized written consents attached to the petition, the court must grant the petition without further notice or hearing and issue letters of temporary guardianship to the petitioner. {O.C.G.A. §29-2-6(a) }.

j. If one or both of the parents of the minor have not consented to the appointment of the temporary guardian, notice of the petition must be given to any parent who has not consented. The notice must be by personal service if the parent resides in this state at a known address; by first-class mail if the parent resides outside this state at a known address; or by publication for two weeks in the official county legal organ for the county in which the petition is filed if no address is known. The notice must state that the parent is entitled to object either to the establishment of a temporary guardianship or to the selection of the petitioner as temporary guardian, or both. The notice must require that any objection be filed in writing with the court within ten days of the personal service, within 14 days of the mailing of the notice, or within ten days of the date of the second publication of the notice. {O.C.G.A. §29-2-6(b) }.

k. If a natural guardian of the minor files a timely objection to the establishment of the temporary guardianship, the court must dismiss the petition. If a natural guardian files a timely objection to the selection of the petitioner as temporary guardian, the court must hold a hearing to determine who will serve as temporary guardian. {O.C.G.A. §29-2-6(d) }.

l. If a parent who is not a natural guardian files a timely objection to the establishment of the temporary guardianship or to the selection of the petitioner as temporary guardian, the court must hold a hearing to determine all matters at issue. {O.C.G.A. §29-2-6(e) }.

In all hearings held pursuant to this Code section, the standard for determination for all matters at issue must be the best interest of the minor. As to the selection of the temporary guardian, the preference of the minor may be heard. In all proceedings under this Code section, the court has the option to refer the petition to the juvenile court which must, after notice and hearing, determine whether the temporary guardianship is in the best interest of the minor. {O.C.G.A. §29-2-6(f) }.

B. Termination

Either natural guardian of the minor may at any time petition the court to terminate a temporary guardianship; provided, however, that notice of such petition must be provided to the temporary guardian. If no objection to the termination is filed by the temporary guardian within ten days of the notice, the court must order the termination of the temporary guardianship. If the temporary guardian objects to the termination of the temporary guardianship within ten days of the notice, the court has the option to hear the objection or transfer the records relating to the temporary guardianship to the juvenile court, which must determine, after notice and hearing, whether a continuation or termination of the temporary guardianship is in the best interest of the minor. {O.C.G.A. §29-2-8(b) }.

a. If an objection is filed by the temporary guardian to a petition to terminate filed by a biological parent, the temporary guardian must prove (in juvenile court or probate court) by clear and convincing evidence that the child will suffer physical or emotional harm if the guardianship is terminated AND that continuation of the guardianship is in the child's "best interest." "Harm" means either physical harm or significant, long-term emotional harm, not merely social or economic disadvantages." [Boddie v. Daniels, 288 Ga. 143 (2010)]See Strickland v. Strickland, 298 Ga. 630, March 7, 2016. A Superior Court case granting permanent custody of minors over the objection of a parent. This is an extensive review of contested custody law which is similar to Probate law regarding contested Termination of Temporary Guardianships. The findings of the trial court were very important. In a more recent probate case; In the Interest of J.L., A19A1103, Court of Appeals (October 4, 2019) the court also ruled the temporary guardian must then show that continuation of the temporary guardianship will best promote the child's welfare and happiness.

b. In the case of, In The Interest of K.M., a child 344 Ga. App. 838, (March 1, 2018), the Court of Appeals provided a comprehensive review of the law regarding termination of custody in Juvenile court and termination of temporary guardianships in Probate Court. This case provides in part: Whenever a third party challenges a natural parent's right to custody of his or her child, that party must overcome three constitutionally based presumptions in favor of parental custody: "(1) the parent is a fit person entitled to custody, (2) a fit person acts in the best interest of his or her child, and (3) the child's best interest is to be in the custody of a parent." Citing Clark v. Wade, 273 Ga. 587 (2001). Also in Clark v. Wade, the Court of Appeals indicated in the above case "In the Interest of J.L." cited in section (a.) above, that in determining harm, a court must consider the following factors: (1) who are the past and present caretakers of the child; (2) with whom has the child formed psychological bonds and how strong are those bonds; (3) have the competing parties evidenced interest in, and contact with, the child over time; and (4) does the child have unique medical or psychological needs that one party is better able to meet.

If a motion is filed in probate court to set aside a temporary guardianship based upon an alleged defect in the appointment proceeding, such as an allegation that the person who signed a relinquishment was not the true natural father of the minor, this would be handled as a motion to set aside under O.C.G.A. §9-11-60(d) , discussed in Chapter 11.

If the judge deems it necessary, a temporary guardian may be appointed under the same rules that apply to the appointment of a temporary administrator. {O.C.G.A. §29-2-17(d)}. This code section is rarely used. In any event, there is no notice requirement, unless ordered by the court {See O.C.G.A. §53-6-30}, so normally there would be no contested hearing concerning this type of temporary guardian.

IX. Testamentary Guardians

A. Right to Appoint

Every parent, by will, may nominate a testamentary guardian for the parent's minor child. O.C.G.A. §29-2-4(a) .

Unless the minor has another living parent, upon probate of the minor's parent's will, letters of guardianship shall be issued to the individual nominated in the will who shall serve as testamentary guardian without a hearing provided that the individual is willing to serve and no objection is filed. If a timely objection is filed, letters of guardianship shall only be issued after a hearing held pursuant to subsection D. below. [Emphasis added.] O.C.G.A. §29-2-4(b)(1) .

B. Notice At Time of Probate of Will

At the time such will is offered for probate, notice of the testamentary guardianship shall be served by certified mail or statutory overnight delivery, return receipt requested, to the minor child's adult siblings and grandparents. If such child does not have adult siblings or grandparents, such notice shall be served on such child's great-grandparents, aunts, uncles, great aunts, or great uncles, insofar as any such relative exists. [Emphasis added.] O.C.G.A. §29-2-4(b)(2) .

C. Objection

Any person who receives a notice pursuant to this subsection and objects to the appointment of the nominated testamentary guardian shall file an objection with the court within ten days of being served with notice. Such objection shall include allegations and facts with reasonable specificity stating why the nominated testamentary guardian is unfit to serve. [Emphasis added.] O.C.G.A. §29-2-4(b)(3) .

D. Hearing On Objection/Burden of Proof

If a timely objection is filed, the court shall conduct an expedited hearing within 30 days of the date of the filing of the last objection. The hearing shall be conducted in accordance with Code Section 29-2-14. The court shall award the letters of guardianship to the nominated testamentary guardian unless the objecting party establishes by clear and convincing evidence that the nominated testamentary guardian is unfit to serve as testamentary guardian. [Emphasis added.] O.C.G.A. §29-2-4(b)(4)

a. If the hearing is held by the probate court, it should be treated as any other contested hearing. However, the caveator(s) bear(s) the burden of proof and would proceed with presentation of his/her case first. The nominated guardian(s) would present his/her/their case after the caveator(s) have rested. The caveators must prove, by clear and convincing evidence, that the nominated guardian(s) is/are to serve.

E. No Delay On Probate of Will

Any proceeding relating to the appointment of a testamentary guardian shall not affect or delay the probating of a will. O.C.G.A. §29-2-4(b)(5) .

F. Testamentary Guardian Not Required to Give Bond

A testamentary guardian shall not be required to give bond or security. In all other respects a testamentary guardian shall have the same rights, powers, and duties as a permanent guardian appointed by the court. O.C.G.A. §29-2-4(b)(1)

Chapter 7. Compromise of Claim of Minor or Ward

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I. Power to Compromise

A. General

Conservators and, in some cases natural guardians, are authorized to compromise doubtful and contested claims against their minors/wards, to arbitrate them, or to release a debtor, if in the interest of the minor/ward, subject to the rules set forth below.

B. Rules for Approval and Appointment of Conservator

Minors

a. The following applies to the compromise of all doubtful claims of minors (except wrongful death of a parent), not just those arising from personal injury. The provisions concerning compromise of claims by natural guardians are also

included below.

b. The term "gross settlement" means the present value of all amounts paid or to be paid in settlement of the claim, including cash, medical expenses, expenses of litigation, attorney's fees, and any amounts paid to purchase an annuity or other similar financial arrangement. {O.C.G.A. §29-3-3(a) }.

c. If the minor has a conservator, the only person who can compromise a minor's claim is the conservator. {O.C.G.A. §29-3-3(b) }. To determine whether the minor's claim exceeds $15,000, the court should include any lump sum settlement with all annuity payments received by the natural guardian prior to the minor's 18th birthday. In addition, the court may want to include in its final order a requirement that the natural guardian maintain the minor's funds in a separate custodial account and that the parent keep all receipts of expenditures for the minor until the minor's 18th birthday.

d. Whether or not legal action has been initiated, if the proposed gross settlement of a minor's claim is $15,000.00 or less, the natural guardian of the minor may compromise the claim without becoming the conservator of the minor and without court approval. The natural guardian must qualify as the conservator of the minor in order to receive payment of the settlement if the total of old and new property held for the minor will be over $15,000.00. {O.C.G.A. §§29-3-1, 29-3-3(c) }.

e. If no legal action has been initiated and the proposed gross settlement of a minor's claim is more than $15,000.00, the settlement must be submitted for approval to the court. {O.C.G.A. §29-3-3(d) }.

f. If legal action has been initiated and the proposed gross settlement of a minor's claim is more than $15,000.00, the settlement must be submitted for approval to the court in which the action is pending. The natural guardian or conservator will not be permitted to dismiss the action and present the settlement to the probate court for approval without the approval of the court in which the action is pending. {O.C.G.A. §29-3-3(e) }.

g. If the proposed gross settlement of a minor's claim is more than $15,000.00, but the gross settlement reduced by:

   i. Attorney's fees, expenses of litigation, and medical expenses which must be paid from the settlement proceeds; and

   ii. The present value of amounts to be received by the minor after reaching the age of majority is $15,000.00 or less, the natural guardian may seek approval of the proposed settlement from the appropriate court without becoming the conservator of the minor.

   iii. The natural guardian must qualify as the conservator of the minor in order to receive payment of the settlement if the total of old and new property held for the minor will be over $15,000.00. {O.C.G.A. §§29-3-1, 29-3-3(f)}.

h. If the proposed gross settlement of a minor's claim is more than $15,000.00, but such gross settlement reduced by:

   i. Attorney's fees, expenses of litigation, and medical expenses which must be paid from the settlement proceeds; and

   ii. The present value of amounts to be received by the minor after reaching the age of majority is more than $15,000.00, the natural guardian may not seek approval of the proposed settlement from the appropriate court

without becoming the conservator of the minor. {O.C.G.A. §29-3-3(g)}.

i. If an order of approval is obtained from the court based upon the best interest of the minor, the natural guardian or conservator is authorized to compromise any contested or doubtful claim in favor of the minor without receiving consideration for such compromise as a lump sum. Without limiting the foregoing, the compromise may be in exchange for an arrangement that defers receipt of part or all of the consideration for the compromise until after the minor reaches the age of majority and may involve a structured settlement or creation of a trust on terms which the court approves. {O.C.G.A. §29-3-3(h) }.

j. Any settlement entered consistent with the provisions of this Code section will be final and binding upon all parties, including the minor. {O.C.G.A. §29-3-3(i) }.

Ward

k. Unless inconsistent with the terms of any court order relating to the conservatorship, a conservator without court order may:

i. Compromise any contested or doubtful claim for or against the ward if the proposed gross settlement as defined in Code Section 29-3-3 is in the amount of $15,000.00 or less. {O.C.G.A. §29-5-23(a)(13) }.

ii. Release a debtor and compromise all debts in the amount of $15,000.00 or less when the collection of the debt is doubtful. {O.C.G.A. §29-5-23(a)(14) }.

l. At the time of the appointment of the conservator or at any time thereafter, and after appointment of a guardian ad litem for the ward and a hearing as the court deems appropriate, the following powers may be specifically granted to the conservator on a case-by-case basis, upon notice as the court determines:

m. To compromise a contested or doubtful claim for or against the ward if the proposed gross settlement as defined in Code Section 29-3-3, is more than $15,000.00. {O.C.G.A. §29-5-23(c)(5) }.

n. To release the debtor and compromise all debts for which the collection is doubtful when the amount of the debt is $15,000.00 or more. {O.C.G.A. §29-5-23(c)(6) }.

C. Claim For Personal Injuries

Considerations by Court

a. In determining whether the settlement should be approved, the following factors should be considered:

i. The probability that at a trial the alleged tortfeasor would be found to have been negligent.

ii. The relative negligence on the part of the minor or ward, if applicable.

iii. The extent of the injuries to the minor or ward, the minor or ward's medical expenses, and the degree of the minor or ward's recovery.

iv. The limits of any insurance policy. If the main limitation upon the amount of the settlement is the limits on the insurance policy, the judge should inquire whether the tortfeasor can respond in damages beyond

the policy limits.

b. At the hearing, there should be:

i. A statement of the facts connected with the accident.

ii. A statement from the attending physician to indicate the nature of the injuries and the extent of recovery or whether there will be some permanent disability.

iii. Personal observation of the minor or ward by the court if possible.

D. Minor's Claim Vs. Parent's Claim

Whenever a minor is injured by the negligent conduct of another, two legal causes of action arise:

a. A right of action in, or on behalf of, the minor for his personal injuries, pain and suffering, medical expenses other than those for which the parents are responsible, and any resulting physical handicap or disfigurement.

b. A right of action in the parent for loss of services, damages to property, necessary medical expenses, and other incidental expenses. The conservatorship and the Court are not concerned with the claim, except as it may relate to the fairness of the settlement. The petition for the approval of the settlement should not only show the amount being paid to the conservator, but should also show what amounts are being paid to any other parties, including the parents, as a result of the accident.

Covenant Not to Sue

c. If the facts of the accident indicate that the minor or ward might, by any chance, have a legal cause of action against some other party involved in the accident, the right of the minor or ward to pursue his legal rights against such other party should be preserved by authorizing the conservator, upon approval of the settlement by the judge of the probate court, to execute on behalf of the minor or ward a covenant not to sue or a very carefully drawn limited release, rather than a general release.

E. Child's Claim for Wrongful Death of Parent

Whenever a child (minor or adult) has a claim for wrongful death of a parent, there are usually two separate causes of action:

a. The child's claim for wrongful death of the parent, pursuant to O.C.G.A. §51-4-2, and

b. The deceased's estate's claim for any pain and suffering the deceased victim experienced prior to death, lost asset value (such as damage to a vehicle), and expenses such as medical or funeral expenses made necessary because of the accident.

c. The conservatorship is not directly concerned with this claim, although the probate court may be concerned with this claim if there is a separate petition, by the personal representative of the estate, for leave to compromise the estate's claim. In this situation, the court must consider the fairness of the amounts allocated to the wrongful death claim and the estate's claims, respectively.

The following persons are entitled to bring an action for wrongful death of a spouse or parent:

d. The surviving spouse or, if none, a child or children, either minor or sui juris, may recover the full value of the life of the decedent, as shown by the evidence, for the homicide of the spouse or parent.

e. The surviving spouse may release the alleged wrongdoer without the concurrence of the child or children or any representative of them and without any order of court; provided, that the spouse must hold the consideration for the release subject to *3 below*.

f. Any amount recovered must be equally divided, share and share alike, among the surviving spouse and the children per capita, and the descendants of children take per stirpes; provided, that the surviving spouse receives no less than one-third of the recovery. Any recovery to which a minor child is entitled and which equals less than $15,000.00 must be held by the natural guardian of the child, who holds and uses such money for the benefit of the child and is accountable for doing so. Any recovery to which a minor child is entitled which equals $15,000.00 or more must be held by a conservator for such child. {O.C.G.A. §51-4-2}.

F. Attorneys' Fees and Expenses

In Chapter 6 of the Benchbook, under section II - Preliminary Matters, go to subsection A on pg. 107 or 6-3. Just above subsection (g.) Jurisdiction to Appoint Conservator. Change this to - Jurisdiction to Appoint Guardian and Conservator. Then enter the following below this change in title:

(Effective January 1, 2020 code section OCGA 29-9-11 is modified to provide: If the petition for the appointment of a guardian or a conservator of a minor is originally filed in the court of the county in which the minor is found, on motion of either party, if found by such court to be appropriate, the case may be transferred to the court of the county of the minor's domicile.)

In considering a compromise petition, the court's jurisdiction and authority extend to a review of any attorney's fees and expenses proposed for deduction from the received funds or recovery. The court may determine the reasonableness of the total amount of fees as well as the hourly rate charged. If the attorney is cited to appear to justify and substantiate the fees and expenses, the attorney's bears the burden of proof to show the reasonableness of the fees and expenses. [In re Estate of Jackson, (2011)] [Gnann v. Woodall, 270 Ga. 516 (1999)]

II. Deferred Payment

A. Designated Beneficiary

If a structured settlement {*see below*} provides for guaranteed payments, the secondary beneficiary should be the minor's estate, not his parents or some other named individual. The minor may make a will at 14 years of age, but the preparation and execution of any such will should be handled by an attorney using proper safeguards.

III. Structured Settlements

A. What Are They?

Basically, a structured settlement combines the payment of a lump sum in cash at the time of the settlement with future periodic payments as specified in the settlement agreement.

If the settlement is in compensation for injuries to the person then all payments, whether at the time of settlement or in the future, are income tax free to the plaintiff/claimant if the settlement negotiations were conducted in the proper manner and the settlement documents contain the necessary language.

In the usual case, the defendant/tortfeasor's liability insurance carrier negotiates a structured settlement with the plaintiff/claimant's lawyer which provides for a cash payment at settlement together with monthly, annual, or lump sum payments in the future. In order to meet its obligation to make the future payments, the liability insurance carrier turns to a life insurance company in order to purchase an annuity contract whereby the life insurance company obligates itself to make the specified future payments to the plaintiff on behalf of the liability insurance carrier.

The judge should always inquire as to the present value of the annuity.

Absent a "qualified assignment," the liability insurance carrier remains obligated to make the future payments in the event the life insurance company fails to do so. It is common for the liability insurance carrier to assign its contingent liability to make the future payments to a third party (usually a corporation formed by the life insurance company offering the annuity). This allows the liability insurance carrier to remove the claim from its books. It also provides the plaintiff/claimant with a method for removing the annuity from the assets of the liability insurance carrier, thereby avoiding any adverse consequences upon the future insolvency of a liability insurance carrier.

A structured settlement is particularly attractive where there are special needs to be met, such as the replacement of regular income, future needs such as known medical expenses, and other concerns (education of children and providing for retirement income). In addition, structured settlements minimize the problem that lump sum settlements are frequently wasted by the recipient within a short time.

B. Income Tax Considerations

Damage awards for personal injury are excluded from ordinary income. Section 104(a)(2) of the Internal Revenue Code. This includes awards or settlements for medical expenses (except to the extent a deduction for same was taken), lost wages (past and future), and pain and suffering. See Rev. Rul. 75-45. The tax consequences are the same whether the claimant receives the award by settlement or by judgment. See Reg. Rul. 1.104-1(c). A physical injury must be sustained in order for the settlement proceeds to qualify as tax free under this code section.

The interest generated on the original investment is not treated as ordinary income to the plaintiff/claimant (hence all future payments are income tax free) so long as the plaintiff has neither actual nor constructive receipt of the sum used to fund the future payments. {USC § 26-104(a)(2) }.

The position of the IRS is that the plaintiff/claimant should be taxed on interest income where he or she actually (or constructively) receives a lump sum settlement, then makes an investment which generates income. See Rev. Rul. 76-133, 1976-1 C.B. 34. Constructive receipt is present where it is apparent that the plaintiff/claimant exercised so much control over the making of the investment that he is deemed to have made the investment himself. The key factors which need to be considered are as follows:

a. The plaintiff/claimant cannot be the owner of the annuity contract. Therefore, a third party (the defendant, the insurance carrier or some other entity) must purchase the contract, and be considered the owner thereof.

b. The plaintiff/claimant can have no right to receive the future payments at any time other than as specified in the settlement agreement. He or she cannot have the right to accelerate the future payments, change the amounts thereof, or use the future payments as collateral to secure a loan.

c. In order to avoid constructive receipt, the plaintiff/claimant must be deemed to be nothing more than a general creditor of the person or entity required to make the periodic payments; therefore, he or she can rely only on the general credit of that person or entity for collection of the monthly, annual or lump sum payments. See Rev. Rul. 79-220, 1979-2 C.B. 74.

d. It would be considered good legal practice to include in any settlement agreement used in structuring a settlement language sufficient to cover the three (3) points raised above: that the plaintiff/claimant is not the owner of the annuity contract, does not have any right to accelerate the payments, and is nothing more than a general creditor of the insurance company.

C. Some Advantages of Structured Settlements

The scheduled future payments insure that the plaintiff/claimant will have monies throughout his or her lifetime, and eliminate the possibility of bad investments or wasteful spending depleting the resources of a lump sum settlement. The advantage is magnified where the monetary value of the case is large.

Where the plaintiff/claimant has a shortened life expectancy, substandard rates can be obtained from the life insurance companies, which means more money can be paid out in future periodic payments for the same cost.

The settlement can be structured so as to provide lump sum payments at such time(s) in the future when amounts may be needed for anticipated future medical expenses, replacement of the lost income, or education expenses for children and retirement benefits for adults.

Where the plaintiff/claimant is a minor. Most or all of the sums due a minor can be deferred to the time the minor reaches the age of majority, thereby increasing significantly the amount paid out to the minor due to the buildup of the settlement proceeds between the time of settlement and payout to the minor after he reaches majority. In addition, a significant savings is accomplished because no fees are paid to the conservator during the claimant's minority, nor are there any charges for bonding or court fees. The conservator would not have to file an annual return for those monies which are deferred to majority, and the probate court is not burdened with supervision over the minor's estate.

D. Insuring That Obligor Will Be Able to Make Future Payments.

Though remote, there is the possibility that the life insurance company writing the annuity will not be able to meet its obligation to pay all the future payments when due. Therefore, it is important to:

a. Choose a solid, well established life insurance company to issue the annuity. There are industry rating services such as A.M. Best Co., Inc. which rate the stability of insurance companies. The court should require an A+ or A++ rated company which is Class X through XV {Class XV is the largest classification for insurance companies according to Best's). Standard & Poor's, Fitch Ratings and Moody's Investors Service also rate life insurance companies on their claims paying ability {AAA is the highest rating for S&P and Fitch; Aaa for Moody's}.

b. Set out specifically the dates and times on which future payments are to be made. For example, it is much better to state that a lump sum of $10,000.00 will be paid on July 28, 2017, rather than to say that the $10,000 will be paid "in ten (10) years".

IV. Subrogation

A. State Law

Under state law, a health benefit provider is not entitled to recovery of the amounts paid on behalf of the injured party, unless the party has been fully compensated for all economic and noneconomic losses incurred as a result of the injury. The benefit provider may seek a declaratory judgment; however, if the court determines that the injured party has not been fully and completely compensated, the benefit provider has no right of reimbursement. {O.C.G.A. §33-24-56.1(c) }.

B. Medicaid Exception

An exception to the above code section is when Medicaid has paid medical expenses. The Department of Community Health (a.k.a. The Department of Medical Assistance) is still entitled to be reimbursed for any benefits paid.

C. Erisa

A problem when addressing subrogation issues is the applicability of ERISA (Employee Retirement Income Security Act of 1974), which is a Federal law that can pre-empt State law. ERISA regulates (among other things) employer-based health insurance, which encompasses most health insurance. If the interaction between the above State law and ERISA becomes an issue, it is recommended that the court appoint as guardian ad litem an attorney who specializes in this area. The following cases are listed both to provide guidance and to show how technical this area can be.

The United States Supreme Court found that ERISA, while providing equitable relief to health insurers, does not allow legal relief, and thus they may not sue the insured for personal liability on a contractual obligation to pay money. Great-West Life & Annuity Insurance Co. v. Knudson, 122 S. Ct. 708 (2002).

The U.S. District Court for the Middle District of Georgia distinguished Knudson, and held that, unlike Knudson, the benefit provider was entitled to equitable relief under ERISA because the funds at issue in Brown, having been placed by Brown's attorney in his trust account, "are identified and clearly traceable to the award from third parties." As such, the Court held that the benefit provider was entitled to restitution with respect to the funds. Great-West Life & Annuity Ins. Co. v. Randall Brown, 192 F. Supp. 2d 1376 (M.D. Ga. 2002).

a. The Court in Knudson did not reject Great-West's suit out of hand because it alleged a breach of contract and sought money, but because Great-West did not seek to recover a particular fund from the defendant. Sereboff v. Mid Atlantic Medical Services, Inc., 126 S. Ct. 1869, 1874 (2006).

Georgia's anti-subrogation statute, O.C.G.A. §33-24-56.1, did not apply to prevent a welfare benefit plan from enforcing its reimbursement claim against an employee because the plan was exempt from the statute by virtue of the deemer clause in 29 U.S.C. § 1144(b)(2)(B) Summerlin v. Georgia-Pacific Corp. Life, Health and Accident Plan, 366 F. Supp. 2d 1203 (M.D. Ga. 2005).

ERISA did not preempt O.C.G.A. § 33-24-56.1 because the state statute was directed toward the insurance industry, and affects the risk pooling arrangement between the insurer and the insured. The plan administrator was prevented from off-setting a participant's monthly disability under Georgia's anti-subrogation statute, O.C.G.A. § 33-24-56.1. Smith v. Life Ins. Co. of N. Am., 466 F. Supp. 2d 1275 (N.D. Ga. 2006).

V. Special Needs Trusts

A. Description

A Special Needs Trust ("SNT") is a special kind of trust which holds title to property for the benefit of a child or adult who has a disability. The SNT can be used to provide for the needs of a disabled person to supplement benefits received from various governmental assistance programs including SSI.

B. Certain Rules

The vast majority of SNTs derive from the litigation (or settlement) of personal injury claims filed on behalf of a disabled beneficiary. Funds recovered for the beneficiary in this fashion are deemed to constitute the beneficiary's property, regardless of whether the funds become subject to the beneficiary's dominion and control, or pass directly to the SNT from the defendant (or the defendant's insurance company or other legal representative).

SNTs funded with assets belonging to (or otherwise attributable to) the beneficiary thereof are deemed to be "self-settled," and are subject to a stricter set of rules than are "third-party" SNTs funded with assets that do not constitute assets of the beneficiary.

A supplemental care SNT is a type of SNT that serves as a secondary source of benefits for the disabled beneficiary, while the beneficiary relies upon local, state or federal governments or agencies for basic support and services for which the beneficiary is eligible as a result of his or her disabilities. If drafted properly, a supplemental care SNT does not supplant such government benefits. Once the beneficiary's basic needs have been provided for, the supplemental care SNT can fund any needs of the beneficiary that are not satisfied by government programs, including quality of life expenditures.

C. "Self-Settled" Supplemental Care SNTs:

42 U.S.C. §1396p(d)(4)(A) authorizes the use of a supplemental care SNT that is funded with the beneficiary's assets, and yet will be disregarded as an asset or resource of the beneficiary for purposes of determining the beneficiary's eligibility for needs-based benefit programs, such as Supplemental Security Income and Medicaid.

There are strict legal requirements concerning SNTs and an attorney who specializes in the area should be consulted if this type of trust is contemplated for the minor or ward.

Chapter 8. Appoinment of Guardians and Conservators of Adults; Modification or Termination

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I. Checklist for Appointment of "Regular" Guardian and/or Conservator

- ☐ Is the proposed ward domiciled or present in the county in which the probate court sits? {*See IV.A.1*}
- ☐ Is the petition properly filled out? {*See IV.A.3*}
- ☐ Is the physician's, psychologist's, or licensed clinical social worker's supporting affidavit (if required) properly filled out? {*See IV.A.5*}
- ☐ Does the petition allege sufficient evidence? {*See IV.A.3*}
- ☐ Was the proposed ward notified immediately by personal service of the proceedings, of the time and place of the evaluation, and of the right to counsel? {*See IV.B*}
- ☐ Was the notice sent by first-class mail to the spouse and all adult children, adult next of kin, or adult friends of the proposed ward? {*See IV.B*}
- ☐ Was a guardian-ad-litem appointed if appropriate? {*See IV.C*}
- ☐ Was an evaluating physician, psychologist, or licensed clinical social worker appointed? {*See IV.A.7*}

- After reviewing the petition, the evaluation report, and any response to the report, does the court find probable cause to support a finding of lack of the relevant capacity? {*See IV.E*}
- Does the court find probable cause to require the appointment of a guardian and/or conservator? {*See IV.E*}
- Is the hearing scheduled for not less than 10 days after service of notice of the hearing? {*See IV.F*}
- Has the case been called? {*See V.A*}
- Have any motions been properly disposed of? {*See V.B*}
- Have the witnesses been properly sworn? {*See V.C*}
- If counsel requests, are the witnesses sequestered? {*See V.D*}
- Have both attorneys had an opportunity to give opening statements? {*See V.E*}
- Has each party met his burden of proof? {*See VI.*}
- If both parties are represented by counsel, have counsel had an opportunity to present their closing arguments? {*See IX.A*}
- If the court determines that a guardian and/or conservator is necessary, has the order of preference been followed in the selection of the guardian and/or conservator? {*See VII.C*}
- Has the bond been set as security for the ward's estate? {*See IX.B*}
- Has the order been properly drawn? {*See X.*}
- Has the guardian and/or conservator taken an oath before entering upon his duties? {*See IX.B*}
- If there is an appeal, have the records been transferred to the proper court? {*See XIII.*}

II. Checklist for Appointment of Emergency Guardian and/or Conservator

- After reviewing the petition and any affidavit, is there probable cause to believe that the appointment of an emergency guardian and/or conservator is necessary? {*See XI.B*}
- Was an evaluating physician, psychologist, or licensed clinical social worker appointed? {*See XI.C*}
- Has counsel been appointed for the proposed ward? {*See XI.C*}
- Has notice of hearing and the appointment of counsel bee personally served on the proposed ward? {*See XI.D*}
- Is the proposed ward in need of an emergency guardian and/or conservator before the emergency hearing? {*XI.D*}
- Has an emergency hearing been held not less than three, but no later than five, days after the filing of the petition? {*See XI.E*}
- Has an order been properly drawn setting forth the powers and authority given to the emergency guardian and/or conservator? {*XI.F*}

III. Checklist for Modification or Termination of an Order of Guardianship and/or Conservatorship

- Are there sufficient grounds to cause a guardianship and/or conservatorship to be modified or terminated? {*See XII.B*}
- Has notice been served upon the guardian and/or conservator, or both, the ward personally, and any legal counsel? {*See XII.C*}
- Has the petitioner carried his burden of proof? {*See XII.D*}

IV. Preliminary Matters

A. Petition for Appointment of A "Regular" Guardian and/or Conservator

The petition must be filed with the probate court in the county in which the proposed ward is domiciled, or is found, provided that the proposed ward was not placed in the county in which he is found solely in order to establish jurisdiction there. {O.C.G.A. §§29-4-10(a) , 29-5-10(a) }. If an objection to jurisdiction or a caveat is filed, the proposed ward is entitled to have the matter heard in the county of his domicile if he wishes. {247 Ga. 9 (1981)} In the Estate of Millton Theophilus Pond, II, 338 Ga. App. 696 (2016), in a jurisdiction dispute, the Court determined that the proposed ward was not so mentally incapacitated that he was incapable of changing his domicile to the residence of his father from that of his mother.

Any interested person may file a petition under oath for the appointment of a guardian and/or conservator. {O.C.G.A. §§29-4-10(a) , 29-5-10(a) }.

The guardian and/or conservator or any other interested person may file a petition for the appointment of a guardian and/or conservator for the minor when that minor becomes an adult, within six months prior to the date the minor reaches 18 years of age, in accordance with the provisions of Article 2 of Chapter 4 or 5 of Title 29, to take effect on the date the minor reaches 18 years of age. {O.C.G.A. §§29-2-30(b) , 29-3-64(b) }.

The petition for the appointment of a guardian and/or conservator should utilize the appropriate statewide standard form and include:

a. A statement of the facts upon which the court's jurisdiction is based;

b. The name, address, and county of domicile of the proposed ward, if known;

c. The name, address, and county of domicile of the petitioner or petitioners and the petitioner's relationship to the proposed ward, if any, and, if different from the petitioner, the name, address, and county of domicile of the person nominated by the petitioner to serve as guardian and/or conservator and that person's relationship to the proposed ward, if any;

d. A statement of the reasons the guardianship and/or conservatorship is sought, including the facts which support the claim of the need for a guardian and/or conservator;

e. Any foreseeable limitations on the guardianship and/or conservatorship;

f. Whether, to the petitioner's knowledge, there exists any living will, durable power of attorney for health care, order relating to cardiopulmonary resuscitation, or other instrument that deals with the management of the person of the proposed ward in the event of incapacity and the name and address of any fiduciary or agent named in the instrument;

g. In the case of a conservatorship: A description of all known assets, income, other sources of funds, liabilities, and expenses of the proposed ward, and

h. The name and address of any person nominated to serve as conservator by the petitioner;

i. The names and addresses of the following whose whereabouts are known:

   i. The spouse of the proposed ward; and

ii. All children of the proposed ward; or

iii. If there are no adult children, then at least two adults in the following order of priority:

iv. Lineal descendants of the proposed ward;

v. Parents and siblings of the proposed ward; and

vi. Friends of the proposed ward;

j. If known, the name and address of any individual nominated to serve as guardian and/or conservator by the proposed ward, as described in Code Section 29-4-3(b)(1) and/or 29-5-3(b)(1);

k. If known, the name and address of any individual nominated to serve as guardian and/or conservator by the proposed ward's spouse, adult child, or parent, as described in paragraph (2), (3), or (4) of subsection (b) of Code Sections 29-4-3 or 29-5-3;

l. Whether any nominated guardian and/or conservator has consented or will consent to serve as guardian and/or conservator;

m. If known, whether any nominated guardian and/or conservator is an owner, operator, or employee of a long term care or other caregiving institution or facility at which the proposed ward is receiving care, and, if so, whether the nominated guardian and/or conservator is related to the proposed ward by blood, marriage, or adoption;

n. Whether an emergency guardian and/or conservator has been appointed for the proposed ward or a petition for the appointment of an emergency guardian and/or conservator has been filed or is being filed;

o. If known, a disclosure of any ownership or other financial interest that would cause any nominated guardian and/or conservator to have a conflict of interest with the proposed ward;

p. A specific listing of any of the additional powers, as described in subsection (b) of Code Section 29-4-23 and/or subsections (b) and (c) of Code Section 29-5-23, that are requested by the guardian and/or conservator and a statement of the circumstances that would justify the granting of additional powers;

q. Whether a guardian and/or conservator has been appointed in another state or whether a petition for the appointment of a guardian and/or conservator is pending in another state;

r. That, to petitioner's knowledge, there has been no petition for guardianship and/or conservatorship denied or dismissed within two years by any court of this state or, if so, that there has been a significant change in the condition or circumstances of the individual, as shown by the accompanying affidavits or evaluation; and

s. The reason for any omission in the petition for appointment of a guardian and/or conservator in the event full particulars are lacking. {O.C.G.A. §§29-4-10(b) , 29-5-10(b) }.

The petition must be sworn to by two or more petitioners or be supported by an affidavit of a physician licensed to practice medicine under Chapter 34 of Title 43, a psychologist licensed to practice under Chapter 39 of Title 43, or a licensed clinical social worker, or, if the proposed ward is a patient in any federal medical facility in which such a physician, psychologist, or licensed clinical social worker is not available, a physician, psychologist, or licensed clinical social worker who is authorized to practice in that facility. {O.C.G.A. §§29-4-10(c)(1) , 29-5-10(c)(1) }.

t. Any affidavit must be based on personal knowledge and state that the affiant has examined the proposed ward within 15 days prior to the filing of the petition and that, based on the examination, the proposed ward was determined to lack sufficient capacity to make or communicate significant, responsible decisions concerning the proposed ward's health or safety, or in the case of a conservatorship, responsible decisions concerning the management of the proposed ward's property. {O.C.G.A. §§29-4-10(c)(2) , 29-5-10(c)(2) }.

In addition to stating the facts that support the claim of the need for a guardian and/or conservator, the affidavit must state the foreseeable duration of the guardianship and/or conservatorship and may set forth the affiant's opinion as to any other limitations on the guardianship and/or conservatorship {O.C.G.A. §§29-4-10(c)(3) , 29-5-10(c)(3) }.

After the petition has been filed, the court must review it and determine whether there is probable cause to believe that the proposed ward is in need of a guardian and/or conservator within the standard of O.C.G.A. §§29-4-1 and/or 29-5-1. {O.C.G.A. §§29-4-11(a) , 29-5-11(a) }.

u. If probable cause is not found, the court must dismiss the petition and provide the proposed ward with a copy of the petition, the affidavit, if any, and order of dismissal. {O.C.G.A. §§29-4-11(b) , 29-5-11(b) }.

v. If probable cause is found, the court must:

i. Immediately notify the proposed ward of the proceedings by service of all pleadings on the proposed ward. *See B. Noice/Service below for notice requirements.*{O.C.G.A. §§29-4-11(c)(1) , 29-5-11(c)(1) }.

ii. Appoint an evaluating physician who must be a physician licensed to practice medicine under Chapter 34 of Title 43, a psychologist licensed to practice under Chapter 39 of Title 43, or licensed clinical social worker or, if the proposed ward is a patient in any federal medical facility in which such a physician, psychologist, or licensed clinical social worker is not available, a physician, psychologist, or licensed clinical social worker authorized to practice in that federal facility, other than the physician, psychologist, or licensed clinical social worker who completed the affidavit, if any, attached to the petition pursuant to subsection (c) of Code Section 29-4-10 and/or 29-5-10. A written report must be filed with the court no later than seven days after the evaluation and the court must serve a copy of the report by first-class mail upon the proposed ward and the proposed ward's legal counsel and, if any, the guardian ad litem. The report must be signed under oath by the physician, psychologist, or licensed clinical social worker. {O.C.G.A. §§ 29-4-11(d) , 29-5-11(d) }.

B. Notice/Service of Process/Court-Appointed Attorney

Notice and Service of Process to Proposed Ward

a. Before any court-ordered evaluation, if the court finds that probable cause exists as explained above, notice of the proceeding with all the pleadings must immediately be served personally on the proposed ward by an officer of the court and must not be served by mail. The notice must:

i. Inform the proposed ward that a petition has been filed to have a guardian and/or conservator appointed, that the proposed ward has the right to attend any hearing that is held, and that, if a guardian and/or conservator is appointed, the proposed ward may lose important rights to control the management of the proposed ward's person and/or property.

ii. Inform the proposed ward of the place and time at which the proposed ward must submit to the evaluation; and

iii. Inform the proposed ward of his or her right to independent legal counsel and that the court must appoint counsel within two days of service unless the proposed ward indicates that he or she has retained counsel in that time frame. {O.C.G.A. §§29-4-11(c)(1) ; 29-5-11(c)(1) }.

iv. It is not the function of such counsel to advise the court as to what such counsel believes would be in the best interest of the ward; that would be the job of a guardian ad litem. *See 7.23*. Such counsel should insure that all required procedures have been followed and that any evidence or arguments which would tend to show that a guardian and/or conservator is not needed are presented to the court.

Notice and Service of Process to Others

b. The court must give notice of the petition by first-class mail to all adult individuals and other persons who are named in the petition pursuant to the requirements of paragraphs (7), (8), and (9) of Code Section 29-4-10(b) and/or paragraphs (8), (9), and (10) of Code Section 29-5-10(b). {O.C.G.A. §§29-4-11(c)(3) , 29-5-11(c)(3) }.

C. Guardian Ad Litem

On the motion of any interested person or on the court's own motion, the court must determine whether to appoint a guardian ad litem. {O.C.G.A. §§29-4-11(c)(4) , 29-5-11(c)(4) }. If a guardian ad litem is appointed, he or she should not be the court-appointed attorney or otherwise involved in the case. In re Estate of Thompson, 332 Ga. App. 774 (2015).

(Effective January 1, 2020, HB 70 modifies OCGA §29-2-2(b) to provide): A person who is appointed as counsel for a ward, proposed ward, or alleged incapacitated person is not eligible to be appointed as guardian ad litem for the same individual. Also, a guardian ad litem cannot be appointed as counsel in the same instances above.

D. Response to Evaluation Report

The proposed ward's legal counsel may file a written response to the evaluation, provided the response is filed no later than the date of the commencement of the hearing.

The response may include, but is not limited to, independent evaluations, affidavits of individuals with personal knowledge of the proposed ward, and a statement of applicable law. {O.C.G.A. §§29-4-11(d)(6) , 29-5-11(d)(6) }.

E. Review of Probable Cause

The court must review the pleadings and the evaluation report to determine if there is probable cause to support a finding that the proposed ward is in need of a guardian and/or conservator. {O.C.G.A. §§29-4-12, 29-5-12}.

a. In re Davis, 330 Ga. App. 97, 766 S.E. 2d 550, (2014). The Court stated that an evaluation report is a second probable cause determination after which the probate court may schedule a hearing or dismiss the petition. If the proposed ward refuses to be evaluated without the presence of his or attorney, the evaluation must be rescheduled. [Effective January 1, 2020, HB 70 adds the following: The court has recognized another state's determination of incapacity and the appointment of a guardian and/or conservator as provided in code section 29-11-21(g).]

If a finding of probable cause is made, the court must schedule a hearing on the petition. The date of the hearing must not be less than 10 days after the date the notice of the hearing is mailed. {O.C.G.A. §§29-4-12(c), 29-5-11(c) }.

F. Notice of Hearing

Notice of the hearing must be served by first-class mail upon the proposed ward, the proposed ward's legal counsel, and the proposed ward's guardian ad litem, if any; the petitioner or the petitioner's legal counsel, if any; and all adult individuals and other persons who are named in the petition pursuant to the requirements of paragraphs (7), (8) and (9) of OCGA §29-4-10(b) and/or paragraphs (8), (9) and (10) of OCGA §29-5-10(b). {O.C.G.A. §§29-4-12(c) , 29-5-12(c) }. In addition, a copy of the evaluation report shall be sent to the proposed ward, his or her attorney, and guardian ad litem, if any. The code does not provide for a copy of the evaluation report to be served on the petitioner or his/her attorney.

G. General Courtroom Practice

The hearing must be held in a courtroom or, for good cause shown, at any other place as the court may set. {O.C.G.A. §§29-4-12(d)(l) , 29-5-12(d)(1) }.

At the request of the proposed ward or the ward's legal counsel and for good cause shown, the court may exclude the public from the courtroom. The proposed ward or his or her legal counsel may waive the appearance of the proposed ward at the hearing. {O.C.G.A. §§29-4-12(d)(1) , 29-5-12(d)(1) }.

H. Visitation

Because a ward retains the right to communicate freely and privately with others, except as otherwise ordered by a court of competent jurisdiction, O.C.G.A. § 29-4-20(a)(4) , a Probate Court is authorized to grant visitation to a [non-guardian] divorced parent of the ward, if such visitation is in the best interest of the ward. The Court cannot, however, order the guardian parent to confer with the non-guardian parent on important matters regarding their child. In re Wertzer, 330 Ga. App. 294, 765 S.E. 2d 425 (2014).

I. Recording

The hearing must be recorded by either a certified court reporter or a sound-recording device. The recording must be retained for not less than 45 days from the date of the entry of the order described in Code Section 29-4-13 and/or 29-5-13. {O.C.G.A. §§ 29-4-12(d)(2) , 29-5-12(d)(2) }.

J. Registration of a Foreign Guardianship and/or Conservatorship

OCGA §29-11-30 relates to the registration of foreign guardianships and OCGA §29-11-31 relates to registration of foreign conservatorships. Subsection (a) of each above code section identifies the appropriate county in which the guardianship or conservatorship should be registered. As to guardianships, any appropriate county, is sufficient. As to conservatorships, in any county in which property belonging to the protected person is located. Both statutes require the petitioner to file certified copies of the order and letters of office. The conservator is also required to file a certified copy of his/her bond.

(Effective January 1, 2020) In subsection (b) of each code section, the probate court shall: (1) Record the certified copies of the order and letters of office in the book required to be kept by subparagraph (a)(8)(B) of OCGA §15-9-37; and if there is a bond, record the certified copy of any bond in the books required to be kept by subparagraph (a)(8)(C) of OCGA §15-9-37 and by subsection (c) of OCGA §29-5-40, and; treat the order as a filed foreign judgment as provided in OCGA §9-12-132. Both code sections shall apply only if the other state has adopted the "Uniform Adult Guardianship and Conservatorship Proceedings Jurisdiction Act" in substantially the same form as to the appropriate chapter and in substantially the same form as Article 6 of Chapter 12 of Title 9.

Code sections 29-11-32, 29-12-33, 29-12-133, 29-12-134, 29-12-135, 15-9-34, 15-9-35 and 15-9-37 dealing with foreign guardianships and conservatorships were also modified by HB 70 in 2019 and should be reviewed.

K. Jurisdiction to Appoint a Guardian and Conservator for an Out of State Resident

In the case of In Re Estate of Kevin Lee Hanson, A19A1494, Court of Appeals, October 17, 2019 , the trial court found that the proposed ward had a "significant connection to the Georgia county" due to receiving life altering treatment from a treatment facility in the trial court's county under OCGA § 29-11-12(2)(B) which requires: On the date the guardianship/conservatorship petition is filed, this state is a significant-connection state and (B) The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issue the order: (i) A petition for an appointment or order is not filed in the respondent's home state; (ii) An objection to the court's jurisdiction is not filed by a person required to be notified of the proceedings; and (iii) The trial court in this state concludes that it is an appropriate forum under the factors set forth in Code Section 29-11-15. The trial court was also required to address the factors in OCGA § 29-11-12 (2) (B) (i) through (iii).

In determining under Code Section 29-11-12 and subsection (e) of Code Section 29-11-20 whether a respondent has a significant connection with a particular state, the court shall consider:

(1) The location of the respondent's family and other persons required to be notified of the guardianship proceeding or conservatorship proceeding; (2) The length of time the respondent at any time was physically present in the state and the duration of any absence; (3) The location of the respondent's property; (4) The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services; and (5) The extent to which the respondent considers or, in the absence of an impairment of mental faculties, would consider himself or herself to have a significant connection with the state. OCGA § 29-11-10 requires the trial court to consider each of the statutory factors enumerated. Although this code section does not expressly require specific findings of fact on each factor, the Court of Appeals opinion that the trial court must set out upon the record the essential reasoning that forms the basis for its exercise of discretion.

In another case regarding jurisdiction over a possible ward, Steen-Jorgensen v. Huff, A19A0807, Court of Appeals, dated October 30, 2019 , the Court remanded the case back to the trial court which had declined jurisdiction regarding a former Georgia resident who had moved out of state. The Court concluded that although OCGA §29-11-15(c) does not expressly require specific findings on each factor regarding jurisdiction set forth in OCGA §29-11-12, the trial court must at a minimum set out the essential reasoning that forms the basis for its exercise of discretion. There are nine factors set forth in subsection (c) of OCGA §29-11-15 and the trial court must indicate which factors supported its decision, or state which factors (if any) it had disregarded as not relevant.

V. Beginning Hearing

A. Case Called

See Chapter 1.

B. Motions and Stipulations

See Chapter 1.

C. Oath of Witnesses

See Chapter 1.

D. Sequestration of Witnesses

See Chapter 1.

E. Opening Statements *See Chapter 1*.

The petitioner has the burden of proof, and therefore has the right to make the first opening statement. The proposed ward goes last, and may wait until it is his turn to present evidence before making his opening statement.

VI. Burden of Proof

A. Petitioner

The burden of proof is upon the party (or parties) seeking the guardianship and/or conservatorship of the proposed ward.

The standard of proof is clear and convincing evidence. {O.C.G.A. §§29-4-12(d)(4) , 29-5-12(d)(4) }

B. Proposed Ward

After the petitioner and others favoring the guardianship and/or conservatorship have presented their evidence, the proposed ward may introduce evidence showing that no guardian and/or conservator should be appointed or that a different person should be appointed guardian and/or conservator if one is needed.

VII. Who Should Be Guardian and/or Conservator

A. Proposed Ward May Suggest Guardian and/or Conservator

If the court determines that a guardianship and/or conservatorship is necessary and the proposed ward is present, the proposed ward may suggest any person as guardian and/or conservator. The court must select as guardian and/or conservator the person who will serve the best interest of the ward. {O.C.G.A. §§29-4-12(d)(6) , 29-5-12(d)(6) }. Estate of Milton Theophilus Pond, II., 299 Ga. 756 (2016) In many financial powers of attorney, a party designates his/her attorney-in-fact as conservator. In Anderson et al. v. Anderson et al. S16A1052, (2016), the Court found that an attorney-in-fact will not violate his fiduciary duty and is not prohibited from accepting a gift of property from his principal if the gift was made at the principal's direction.

B. Who May be Appointed Guardian and/or Conservator

Only an individual may serve as guardian of an adult.

No individual or person may be appointed as guardian and/or conservator of an adult who:

a. Is a minor, a ward, or a protected person;

Has a conflict of interest with the adult unless the court determines that the conflict of interest is insubstantial or that the appointment would be in the adult's best interest; or

Is an owner, operator, or employee of a long-term care or other caregiving institution or facility at which the adult is receiving care, unless related to the adult by blood, marriage, or adoption. {O.C.G.A. §§29-4-2, 29-5-2}.

C. Order of Preference

Individuals and persons who are eligible and not disqualified have preference in the following order:

a. The individual or person last nominated by the adult in accordance with the provisions of subsection (c) of OCGA §29-4-3 and/or 29-5-3;

b. The spouse of the adult or a person nominated by the adult's spouse in accordance with the provisions of subsection (d) of OCGA §29-4-3 and/or 29-5-3;

c. An adult child of the adult or a person nominated by an adult child of the adult in accordance with the provisions of subsection (d) of OCGA §29-4-3 and/or 29-5-3;

d. A parent of the adult or a person nominated by a parent of the adult in accordance with the provisions of subsection (d) of OCGA §29-4-3 and/or 29-5-3;

e. A guardian (re: guardianships) or a conservator (re: conservatorships) appointed during the minority of the adult;

f. A guardian (re: guardianships) or a conservator (re: conservatorships) previously appointed in Georgia or another state;

g. A friend, relative, or any other person; or

h. In the case of a guardianship, the county guardian or a public guardian pursuant to O.C.G.A. Chapter 29-10, or the Department of Human Services.

i. In the case of a conservatorship, the county guardian, as defined in O.C.G.A. §29-8-1. {O.C.G.A. §§29-4-3, 29-5-3}.

j. The court may pass over any of these priorities and appoint another person as guardian or conservator when found to be in the best interest of the proposed ward, except that, before declining to appoint a person nominated in writing by the proposed ward to serve as guardian or conservator, the court must find and express good cause. {O.C.G.A. §29-5-3(a) ; Cruver et al. v. Mitchell, 289 Ga. App. 145 (2008)} Even if the parties enter into a settlement agreement as to whom should be appointed guardian, the Probate Court may appoint a third party if it finds that such appointment is in the best interest of the ward. In re Kaufmann, 327 Ga. App. 900, 761 S.E. 2d 418 (2014)

VIII. Evidence, Objections, and Examination

A. Evidence

In general, the same system of evidence governs in trials before a jury of before a judge alone. However, the application of certain rules is less strict before a judge than in a jury trial. {*See Chapter 11 Evidence*}

Evaluation Report

a. At the final hearing, the judge may consider (accept as evidence) the evaluation report, with or without the evaluator's testimony and any response filed by the proposed ward. The better practice is to have the parties waive the testimony of the evaluator on the record when no one has subpoenaed the evaluator. {O.C.G.A. §§29-4-12(d)(4) and 29-5-12(d)(4) }

b. However, the court is not bound by the evaluator's findings, which usually result from one, fairly brief examination. If other evidence provides clear and convincing proof of the need, the court may appoint a guardian and/or conservator as appropriate. {In re Cash, 298 Ga. App. 110 (2009)}

Opinion Evidence

c. Sanity is essentially a matter of opinion, based either on the personal observations by the witness of the person in question or the hypothetical questions posed to an expert witness. {*See Chapter 11 Evidence*}

d. Non-expert witness

i. A non-expert witness is qualified to state an opinion as to sanity if a proper foundation is laid for the opinion. {McGee v. Loftin, 228 Ga. 142, 144 (1971)}.

ii. While the law is not clear, it appears that the witness should state the facts he has observed, upon which his opinion is based. {Agnor's Ga. Evid. (3d Ed.), § 9-12}.

iii. Statements made by a witness that a person was in good humor or looked mad or similar matters of emotion have been held to be matters of fact and admissible as such rather than conclusions or opinions. {Rooker v. The State, 211 Ga. 361 (1955)}.

Strictly Construed

e. This type of examination into a person's capacity to make or communicate decisions concerning his person and the management of his own estate contemplates taking away the person's cherished right of freedom of movement and the right to control the use of his worldly possessions as he sees fit. The court's jurisdiction is therefore limited and the proceedings are strictly construed. {Boockholdt v. Brown, 224 Ga. 737, 739 (1968); Trapnell et al. v. Smith, 131 Ga. App. 254, 255-56 (1974)}.

f. The court must make an independent determination of the need for guardianship and/or conservatorship based upon:

i. The evaluation report;

ii. Any response filed by the ward, and

iii. The evidence taken at the hearing. {O.C.G.A. §§29-4-12(d)(4) , 29-5-12(d)(4) }.

No guardian and/or conservator may be appointed for any adult unless such appointment is in the best interest of the adult. {O.C.G.A. §§29-4-1(c) , 29-5-1(c) }.

All guardianships and/or conservatorships ordered must be designed to encourage the development of maximum self-reliance and independence in the adult and may be ordered only to the extent necessitated by the adult's actual and adaptive limitations after a determination that less restrictive alternatives to the guardianship and/or conservatorship are not available or appropriate. {O.C.G.A. §§29-4-1(f) , 29-5-1(f) }.

B. Objections

See Chapter 1.

C. Examination of Witnesses

The regular mode of conducting the examination of witnesses is for them to be interrogated by the party calling them, then to be cross-examined by the other party (or parties), and then to allow the original party further questions by way of rebuttal. However, due to the nature of the hearing and the fact that the petitioner may be present without counsel, the probate judge has a broad discretion in controlling the examination.

The proposed ward has the right to subpoena and cross-examine witnesses, including the evaluating professional. {*See Chapter 11*}.

Testimony of a witness may be presented by deposition in accordance with the Civil Practice Act. {O.C.G.A. 9-11}

IX. Closing

A. Closing Arguments

See Chapter 1.

B. Oath/Bond

Oath of Guardian and/or Conservator

a. Before entering upon the duties of the appointment, every guardian and/or conservator appointed must take an oath or affirmation before the court to perform well and truly the duties required of a guardian and/or conservator and to account faithfully for the estate. The oath or affirmation of a guardian and/or conservator may be subscribed before the judge or clerk of any probate court of this state. The judge of the probate court who appoints the guardian and/or conservator has the authority to grant a commission to a judge or clerk of any court of record of any other state to administer the oath or affirmation.

{O.C.G.A. §§29-4-25, 29-5-25}.

Bond of Guardian

b. A guardian may be required to give bond with good and sufficient security in such amount as the court may determine from time to time. The clerk of the court must record bonds in books kept for that purpose and must retain custody of the bonds. If a guardian is required to give bond and has given as security one or more licensed commercial sureties authorized to transact business in this state the bond premium may be paid as part of the cost of administration. {O.C.G.A. §29-4-30}.(Effective January 1, 2020, HB 70 adds the following: When the guardian is required to give bond pursuant to Code Section 29-2-25, the conservator shall, upon request of the guardian, pay any bond premium from the estate.)

Bond of Conservator

c. A financial institution, trust company, national or state bank, savings bank, or savings and loan association described in Code Section 7-1-242 that seeks to qualify as a conservator is not required to give bond for the faithful performance of its duties unless its combined capital, surplus, and undivided profits are less than $3 million as reflected in its last statements signed by the Comptroller of the Currency of the United States or the commissioner of banking and finance. {O.C.G.A. §29-5-40(b)}.

d. A conservator appointed by the court must give bond that is good and sufficient security of the ward's estate. {O.C.G.A. §29-5-40(a)}.

e. The bond of a conservator must be:

i. Secured by an individual who is a domiciliary of this state or by a licensed commercial surety authorized to transact business in this state;

ii. Payable to the court for the benefit of the ward;

iii. Conditioned upon the faithful discharge of the conservator's duty, as such is required by law; and

iv. Attested by the judge or clerk of the court. {O.C.G.A. §29-5-41(a)}.

f. The court may order a conservator who is required to give bond to post bond for a period of time greater than one year, as may be appropriate in the circumstances. A surety on a bond posted pursuant to this subsection will not be relieved of liability merely because of the expiration of the term of the bond but will be subject to the provisions of law for the discharge of a surety applicable to other bonds. {O.C.G.A. §29-5-41(b)}.

g. The bond must be in a value equal to double the estimated value of the ward's estate; provided, however, that the bond must be in an amount equal to the estimated value of the estate if secured by a licensed commercial surety authorized to transact business in this state. The value of the estate for purposes of the bond must be determined without regard to the value of any real property or improvements thereon but upon conversion of the real property into personal property, a bond must be given based upon the value of the estate including the value of the personal property into which the real property was converted. {O.C.G.A. §29-5-41(c) }.

h. Substantial compliance with these requirements for the bond will be deemed

sufficient; and no bond will be declared invalid by reason of any variation from these requirements as to payee, amount, or condition, where the manifest intention was to give bond as conservator and a breach of the fiduciary's duty as such has been proved. {O.C.G.A. §29-5-41(d) }.

i. A conservator who is required to give bond, and who has given as security on the bond one or more licensed commercial sureties, may pay any bond premium from the estate. When a guardian is required to give bond pursuant to Code Section 29-4-30, the conservator must pay any bond premium from the estate. {O.C.G.A. §29-5-44}.

X. Drawing An Order

A. Generally

The order must reflect findings of fact and conclusions of law supporting the granting or denial of the petition. {O.C.G.A. §§29-4-13, 29-5-13}.

Petition Denied

a. The court must deny the petition if it determines that the evidence presented at the hearing does not establish, by a clear and convincing standard, that the criteria for the appointment of a guardian and/or conservator have been met.

Petition Granted - If the petition is granted, the order must show:

b. The name of the guardian and/or conservator and the basis for the selection;

c. Any powers retained by the ward pursuant to Code Section 29-4-21 and/or Code Section 29-5-21;

d. The limitations on the guardianship and/or conservatorship;

e. A specific listing of any of the additional powers, as described in Code Section 29-4-23(b) or Code Section 29-5-23 (b) and (c) , that are granted to the guardian and/or conservator;

f. If only a guardian is appointed or if the guardian and the conservator appointed are not the same person, the reasonable sums of property to be provided the guardian to provide adequately for the ward's support, care, education, health, and welfare, subject to modification by subsequent order of the court.

g. The type and frequency of any physical, mental, and social evaluations of the ward's condition which the court may require to supplement the reports submitted pursuant to Code Section 29-4-22(a)(9) ;

h. In any case involving the creation of a conservatorship where the proposed ward has an interest in real property, the name of the county in which such property is located; and

i. Such other and further provisions of the guardianship and/or conservatorship as the court may deem proper. {O.C.G.A. §§29-4-13(a) , 29-5-13(a) }.

Notice/Service of Order

j. Service of the court's order must be made by first-class mail upon the ward, the ward's legal counsel, the guardian ad litem, if any, the guardian and/or conservator, the petitioner, and other persons designated for service of the petition for guardianship and/or conservatorship. {O.C.G.A. §§29-4-13(b) , 29-5-13(b) }.

k. After service of an order granting guardianship and/or conservatorship, the ward's legal counsel must make reasonable efforts to explain to the ward the order of guardianship and/or conservatorship and the ward's rights under the order. {O.C.G.A. §§29-4-13(c) , 29-5-13(c) }.

In any case involving the appointment of a conservator, if the ward has an interest in real property, the court must file, within 30 days of granting the petition for conservatorship, a certificate with the clerk of the superior court of each county in this state in which the ward owns real property, to be recorded in the deed records of the county and indexed under the name of the ward in the grantor index. The certificate must set forth the name of the ward, the expiration date of the conservatorship, if limited by court order, the date of the order granting the conservatorship, and the name of the conservator. The certificate must be accompanied by the same fee required for filing deeds with the clerk of the superior court. The filing fee and any fee for the certificate must be taxed as costs to the estate. {O.C.G.A. §29-5-13(d)}.

XI. Emergency Guardians and/or Conservators

A. In General

The probate court may appoint an emergency guardian and/or conservator if it is determined that the proposed ward lacks sufficient capacity to make or communicate significant, responsible decisions concerning the proposed ward's health or safety and/or the management of the proposed ward's property and that there is an immediate and substantial risk of death or serious physical injury, illness, disease, and/or a substantial risk of irreparable waste or dissipation of the proposed ward's property unless an emergency guardian and/or emergency conservator is appointed. {O.C.G.A. §§29-4-14, 29-5-14}.

B. Review of Probable Cause

Upon the filing of a petition for an emergency guardianship, the court must review the petition and the affidavit, if any, to determine whether there is probable cause to believe that the proposed ward is in need of an emergency guardian within the meaning of Code Section 29-4-14(b)(4). {O.C.G.A. §29-4-15}.

a. A petition for the appointment of an Emergency Guardians was filed by a hospital where the patient/Proposed Ward was being treated. The petition specifically requested that the emergency guardian be ordered to assist the hospital in accomplishing the proposed ward's discharge from the hospital. The probate court determined at a preliminary hearing that the hospital's desire for a discharge of the proposed ward did not constitute an emergency as defined by the statute. The Court of Appeals affirmed. {In the Interest of Farr, 322 Ga. App. 55 (2013)}.

Upon the filing of a petition for an emergency conservatorship, the court must review the petition and the affidavit, if any, to determine whether there is probable cause to believe that the proposed ward is in need of an emergency conservator within the meaning of Code Section 29-5-14(b)(4) . {O.C.G.A. §29-5-15}.

If the court determines that there is no probable cause to believe that the proposed ward is in need of an emergency guardian and/or emergency conservator, the court must dismiss the petition and provide the proposed ward with a copy of the petition, the affidavit, if any, and the order dismissing the petition. {O.C.G.A. §§29-4-15(b), 29-5-15(b) }.

C. Appointment of Evaluator/Counsel

If the court determines that there is probable cause to believe that the proposed ward is in need of an emergency guardian, the court must:

a. Order an evaluation of the proposed ward by a physician who must be a physician licensed to practice medicine under Chapter 34 of Title 43, a psychologist licensed to practice under Chapter 39 of Title 43, or a licensed clinical social worker, other than the physician, psychologist, or licensed clinical social worker who completed the affidavit attached to the petition pursuant to Code Section 29-4-10(d)(1) and/or Code Section 29-5-10(d)(1) . The evaluation must be conducted within 72 hours of the time the order was issued and a written report must be furnished to the court and made available to the parties within this time frame, which evaluation and report is governed by the provisions of Code Section(s) 29-4-11(d) and/or 29-5-11(d) .

b. Immediately appoint legal counsel to represent the proposed ward at the emergency hearing, which counsel may be the same counsel who is appointed to represent the proposed ward in the hearing on the petition for guardianship or conservatorship, if any such petition has been filed, and must inform counsel of the appointment. {O.C.G.A. §§29-4-15(c) , 29-5-15(c) }

D. Notice/Service of Process

If the court finds probable cause as described above, the court must immediately notify the proposed ward of the proceedings by service of all pleadings on the proposed ward, which notice must:

a. Be served personally on the proposed ward by an officer of the court and not be served by mail;

b. Inform the proposed ward that a petition has been filed to have an emergency guardian and/or conservator appointed for the proposed ward, that the proposed ward has the right to attend any hearing that is held, and that, if an emergency guardian and/or conservator is appointed, the proposed ward may lose important rights to control the management of the proposed ward's person and/or property;

c. Inform the proposed ward of the place and time at which the proposed ward must submit to the evaluation;

d. Inform the proposed ward of the appointment of legal counsel; and

e. Inform the proposed ward of the date and time of the hearing on the emergency guardianship and/or emergency conservatorship. {O.C.G.A. §§29-4-

15(c)(4) , 29-5-15(c)(4) }.

E. Appointment of Emergency Guardian/Conservator Prior to Emergency Hearing

If the court determines that there is probable cause to believe that the proposed ward is in need of an emergency guardian and/or conservator and the threatened risk is so immediate and the potential harm so irreparable that any delay is unreasonable and the existence of the threatened risk and potential for irreparable harm is certified by the affidavit of a physician licensed to practice medicine under Chapter 34 of Title 43, a psychologist licensed to practice under Chapter 39 of Title 43, or a licensed clinical social worker, the probate court may appoint an emergency guardian and/or conservator to serve until the emergency hearing, with or without prior notice to the proposed ward. {O.C.G.A. §§29-4-15(c)(5) , 29-5-15(c)(5) }.

a. Any such emergency guardian appointed prior to the hearing will have only those powers and duties specifically enumerated in the letters of emergency guardianship and the powers and duties must not exceed those absolutely necessary to respond to the immediate threatened risk to the ward. Appointment of an emergency guardian under this paragraph is not a final determination of the proposed ward's need for a nonemergency guardian. {O.C.G.A. §29-4-15(c)(5) }.

b. If such an emergency conservator is appointed pending the emergency hearing, the court must order that no withdrawals may be made from any account on the authority of the proposed ward's signature without the court's prior approval and that the emergency conservator must not expend any funds of the proposed ward without prior court approval. Appointment of an emergency conservator under this paragraph is not a final determination of the proposed ward's need for a nonemergency conservator. {O.C.G.A. §29-5-15(c)(5) }.

F. Emergency Hearing

If the court finds probable cause as described above, the court must order an emergency hearing to be conducted not sooner than three days nor later than five days after the filing of the petition. {O.C.G.A. §§29-4-15(c)(2) , 29-5-15(c)(2) }.

The court must conduct an emergency hearing to determine whether the facts establish an immediate and substantial risk of death or serious physical injury, illness, or disease; and/or an immediate and substantial risk of irreparable waste or dissipation of the proposed ward's property.

The burden of proof is on the petitioner and the standard of proof is clear and convincing evidence.

In addition to the evidence at the hearing, the court may consider the evaluation report and any response filed by the proposed ward. {O.C.G.A. §§29-4-16(a) , 29-5-16(a) }.

G. Drawing an Order

Any emergency guardian and/or conservator shall have only those powers and duties specifically enumerated in the letters of emergency guardianship and/or conservatorship and the powers and duties must not exceed those absolutely necessary to respond to the immediate threatened risk to the ward. {O.C.G.A. §§29-4-16(b)(1) , 29-5-16(b)(1) }.

The court may order the emergency guardian to make any report the court requires. {O.C.G.A. §§29-4-16(b)(2) , 29-5-16(b)(2) }.

The emergency guardianship and/or conservatorship must terminate on the earliest of:

a. The court's removal of the emergency guardian and/or conservator, with or without cause;

b. The effective date of the appointment of a guardian and/or conservator;

c. Unless otherwise specified in the order of dismissal, the dismissal of a petition for appointment of a guardian and/or conservator;

d. The date specified for the termination in the order appointing the emergency guardian and/or conservator; or

e. Sixty days from the date of appointment of the emergency guardian and/or emergency conservator. However, HB 70 which becomes effective January 1, 2020 modifies the code as follows:{O.C.G.A. §§29-4-16(b)(3) , 29-5-16(b)(3) }.

f. Sixty days from the date of appointment of the emergency guardian, provided that the court had jurisdiction to issue such order under paragraph (1) of Code Section 29-11-12 (Ga. is home state); or

g. Ninety days from the date of appointment of the emergency guardian, provided that the court had jurisdiction to issue such order under paragraph (2) or (3) of Code Section 29-11-12 (Ga. is a significant-connection state or more appropriate state and other states declined).

XII. Modification or Termination of an Order of Guardianship and/or Conservatorship

A. Who May Petition For Modification or Termination

Any interested person, including the ward, or upon the court's own motion. {O.C.G.A. §§29-4-41(a) , 29-4-42(a) , 29-5-71(a) , 29-5-72(a) }.

B. Basis for Modification Or Termination

A guardianship and/or conservatorship may be modified to adjust the duties or powers of the guardian and/or conservator, or to make other appropriate adjustments to reflect the current capacity of the ward or other circumstances of the guardianship and/or conservatorship. {O.C.G.A. §§29-4-41(a) , 29-5-71(a) }.

A guardianship and/or conservatorship may be terminated if the need for it has ended. {O.C.G.A. §§29-4-42(a) , 29-5-72(a) }. It is reversible error for the court to deny a hearing for Restoration based on conflicting evidence in the petition and the guardian's and/or conservator's answer. {In re Loftus, 331 Ga. App 329 (2015)}

The petition must be supported either by the affidavits of two persons who have knowledge of the ward, one of whom may be the petitioner, or of a physician licensed to practice medicine under Chapter 34 of Title 43, a psychologist licensed to practice under Chapter 39 of Title 43, or a licensed clinical social worker, setting forth relevant facts and determinations. {O.C.G.A. §§29-4-41(b) , 29-4-42(b) , 29-5-71(b) , 29-5-72(b) }.

No petition for modification shall be allowed by the court within two years after the denial or dismissal on the merits of a petition for substantially the same modification unless the petitioner shows a significant change in the condition or circumstances of the ward. {O.C.G.A. §§29-4-41(e), 29-5-71(e) }.

C. Notice/Service of Process

In procedures involving the modification or termination of a guardianship and/or conservatorship, except for good cause shown, notice must be given, in whatever form the court deems appropriate, to the ward, the guardian and/or conservator, and the ward's legal counsel, if any. If the modification would expand or increase the powers of the guardian and/or conservator, or further restrict the rights of the ward, the court must appoint legal counsel for the ward. In other instances, the court has the discretion to appoint legal counsel or a guardian ad litem, or both. {O.C.G.A. §§29-4-41(a) , 29-4-42(a) , 29-5-71(a) , 29-5-72(a) }.

D. Burden of Proof

If the petition for modification would expand or increase the powers of the guardian and/or conservator, or further restrict the powers of the ward, the burden is on the petitioner to show by clear and convincing evidence that the modification is in the ward's best interest.

If the petition for modification would restrict the powers of the guardian and/or conservator or restore powers to the ward, or terminate the guardianship and/or conservatorship, the burden is on the petitioner to show by a preponderance of the evidence that the modification or termination is in the ward's best interest. {O.C.G.A. §§29-4-41(d) , 29-4-42(c) , 29-5-71(d) , 29-5-72(c) }.

In the case of In Re: Estate of Jimmy Curtis, 339 Ga. App. 363, November 9, 2016, the ward filed a petition to modify his conservatorship alleging his conservator failed to consider his expressed desires and personal values, failed to communicate with or be reasonably accessible to him and failed to uphold his dignity and respect. See OCGA §29-5-22 (b)(1)(2). As to these allegations, the Court of Appeals found the ward's burden of proof to be, clear and convincing evidence required by OCGA §29-5-110(a).

XIII. Appeals

A. Procedures Concerning Appeals

See O.C.G.A. §§29-4-70, 29-5-110.

B. Parties Who May Appeal an Adult Guardianship Proceeding

Although Twitty et. al. v. Akers, 218 Ga. App. 467 462 S.E.2d 418 (1995) was decided under the pre-2005 Title 29, the language of the above Sections in the current Code are essentially the same as the Sections under which the Akers decision was rendered. It would seem that requiring the filing of a complete petition involving the same proposed ward by someone wishing to intervene and seek appointment instead of the petitioner is a waste of resources and funds. It may be that a pleading which specifically seeks to intervene in the proceeding, accepts the allegations of the original petition with regard to the proposed ward's capacity and assets, income and expenses (or pleads differently concerning those subjects), and "petitions" the court for appointment might be held sufficient to carry with it the right to appeal. However, no appellate opinion since Akers has addressed such a proposition.

Note, however, that only the ward or the petitioner may file an appeal of an adult guardianship proceeding. {Twitty et. al. v. Akers, 218 Ga. App. 467 462 S.E.2d 418 (1995)}

XIV. Compensation and Expenses

A. Attorney and Guardian-Ad-Litem

Any legal counsel or guardian ad litem who is appointed by the court in a guardianship and/or conservatorship proceeding must be awarded reasonable fees commensurate with the tasks performed and time devoted to the proceeding, including any appeals. {O.C.G.A. §29-9-15}.

PRIVATELY RETAINED COUNSEL: In the case of In Re Estate of Mary Elizabeth Phillips, 350 Ga. App. 889, (June 25, 2019), the Court of Appeals held that pursuant to OCGA § 29-9-15 the Probate Court is not authorized to award attorney fees to privately retained counsel from the estate of a ward. In this case, the parties mediated and reached a settlement appointing a guardian and conservator for the proposed ward. Thereafter, counsel for both parties filed motions for attorney fees and expenses. The Court held that the Probate Court was correct in ruling that there is "no authority to award the payment of attorney fees from the estate of a ward, except for those fees incurred by court appointed counsel and a guardian ad litem." The Court's ruling specifically determined that it made no judgment with respect to whether the retained private counsel was entitled to fees from the ward's estate pursuant to a contractual agreement between the parties (the proposed ward and his/her privately retained counsel).

This also applies to subsequent hearings regarding the guardianship for which the court appoints legal counsel or a guardian ad litem (GAL) or both for the ward. OCGA §29-4-40(a). In such cases, guardian ad litem fees are costs of litigation. In Re Sierra Leigh Wertzer, 349 Ga. App. 303, March 8, 2019. In this case, the father of the ward was seeking a modification in the guardianship to remove the requirement of supervised visits with his son. The Court of Appeals found even though the guardian opposed the lifting of the restrictions, the guardian was not personally liable for the GAL's fees because the guardianship proceedings are not adversarial proceedings and there is no prevailing party. OCGA §29-4-22(b) limits the guardian's liability regarding the guardian-ward relationship.

(Effective January 1, 2020 the code is modified to provide that "All fees and expenses awarded under subsection (a) or (b) of code section 29-9-15 shall be assessed and paid in accordance with the provisions of Code Section 29-9-3.")

B. Evaluator

For the evaluation or examination required by Code Section 29-4-11(d) and/or 29-5-11(d) , the evaluating physician, psychologist, or licensed clinical social worker must receive a reasonable fee commensurate with the task performed, plus actual expenses. For the hearing under Code Section 29-4-12(d) and/or 29-5-12(d) , the evaluating physician, psychologist, or licensed clinical social worker must receive an amount not to exceed $75.00 plus actual expenses. {O.C.G.A. §29-9-16}.

For the evaluation or examination required by subsection (d) of OCGA §29-4-11 or, subsection (c) of OCGA §29-4-15, subsection (b) of OCGA §29-4-42, subsection (d) of OCGA §29-5-11, subsection (c) of OCGA §29-5-15, or subsection (b) of OCGA §29-5-71, the evaluating physician, psychologist, or licensed clinical social worker shall receive a reasonable fee commensurate with the task performed, plus actual expenses

In the event the attendance of the evaluating physician, psychologist, or licensed clinical social worker shall be required by the court for a hearing under subsection (d) of OCGA §29-4-12, subsection (a) of OCGA §29-4-16, subsection (b) of OCGA §29-4-42, subsection (d) of OCGA §29-5-12, subsection (a) of OCGA §29-5-16, or subsection (b) of OCGA §29-5-71, other than pursuant to a subpoena requested by a party to the proceeding, the above evaluator shall receive a reasonable fee commensurate with the task performed, plus actual expenses.

All fees and expenses payable under subsection (a) or (b) above shall be assessed by the court and paid in accordance with the provisions of OCGA §29-9-3.

C. Expenses

(Effective January 1, 2020, HB 70 extensively modifies Code Section 29-9-3 of the guardianship and conservatorship code to set forth factors the court can consider in determining allocation of fees and costs in proceedings concerning a minor's estate or when a guardian/conservator is appointed, not appointed, the conduct of any party or other person subject to the jurisdiction of the court. The court may assess fees, costs and expenses against the estate, the petitioners or movants; from a guardian or conservator or from the surety on the guardians or conservator's bond, subject to other applicable law governing the liability of sureties on such bond, if there is a violation of duty, breach of fiduciary duty, threat to commit a breach of fiduciary duty, a revocation or suspension of the fiduciary's letters or other misconduct by the guardian or conservator. This code section is quite extensive so it should be read in its entirety.

The amounts actually necessary or requisite to defray the expenses of any guardianship hearing held must be paid:

a. From the estate of the ward if a guardianship is ordered;

b. By the petitioner if no guardianship is ordered; or

c. By the county in which the proposed ward is domiciled or by the county in which the hearing was held only if the person who actually presided over the hearing executes an affidavit or includes a statement in the order that the party against whom costs are cast appears to lack sufficient assets to defray the expenses. {O.C.G.A. §29-4-17}.

The amounts actually necessary or requisite to defray the expenses of any conservatorship hearing must be paid:

d. From the estate of the ward if a conservatorship is ordered;

e. By the petitioner if no conservatorship is ordered; or

f. By the county in which the proposed ward is domiciled or by the county in which the hearing is held if the proposed ward is not a domiciliary of the state. The amounts must be paid by the appropriate county upon the warrant of the court of the county where the hearing was held. Payment by the county will be required, however, only if the person who actually presides over the hearing executes an affidavit or includes a statement in the order that the party against whom costs are cast appears to lack sufficient assets to defray the expenses. {O.C.G.A. §29-5-17}.

g. (Effective January 1, 2020, code section 29-9-18 is modified to provide: Except as otherwise provided in subsection (b) of Code Section 29-11-5 and in subsection (c) of this Code Section, a request by any other interested parties to examine the sealed records shall be by petition to the court, and the ward and guardian or conservator shall have at least 30 days' prior written notice of a hearing on the petition. The court, in its discretion, may assess and award costs, compensation, fees, and expenses for a proceeding under this subsection in accordance with the provisions of Code Section 29-9-3.

Chapter 9. Personal Representatives and Guardian/Conservators; Accountings; Discharge of Personal Representatives and Conservators; Dismissal of Guardians; Suit for Money Damages

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I. Checklist

- ☐ Does the court have jurisdiction over the parties and the subject matter? {*See II.A*}
- ☐ Has proper notice been served on all interested parties? {*See II.B*}
- ☐ Are the proper pleadings before the court? {*See II.C*}
- ☐ Is the action within the statute of limitations? {*See II.D*}
- ☐ If objections have been filed, has the date of hearing been set? {*See II.C*}
- ☐ Has a pretrial conference been held? If not, has pretrial information been submitted? {*See II.E*}
- ☐ Is the hearing being recorded? {*See II.F*}
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- ☐ Have attorneys had an opportunity to present their opening statements? {*See III.E*}
- ☐ Have the appropriate burdens of proof been met? {*See IV.A*}
- ☐ If a fiduciary is to be removed, have the proper grounds been laid? {*See IV.B*}
- ☐ In the case of an inventory filing, have the proper guidelines been followed? {*See IV.C*}
- ☐ If an annual return is to be filed, is it properly completed? {*See IV.D*}
- ☐ In the case of an intermediate report, is the petition properly completed? {*See IV.E*}
- ☐ Has the proper procedure for settlement of accounts been followed? {*See IV.F*}
- ☐ Has the proper procedure for obtaining a discharge from liability been followed? {*See IV.F and G*}

- Have attorneys presented closing arguments? {*See VII*.}
- Has an order been properly drawn? {*See VIII.*}
- If an appeal has been filed, has the record been transferred to the proper court? {*See IX*.}

II. Preliminary Matters

A. Jurisdiction

Probate courts have authority to exercise original, exclusive, and general jurisdiction over the following subject matters (among others; *see Chapter 1*):

a. The granting of letters testamentary and of administration, and the repeal or revocation of the same;

b. All controversies in relation to the right of executorship and administration;

c. The appointment and removal of guardians/conservators of minors and incapacitated adults;

d. All controversies as to the right of guardianship/conservatorships;

e. The auditing and passing upon returns of all personal representatives and guardians/conservators; and

f. The discharge of sureties and the requiring of new sureties from administrators and guardians/conservators. {O.C.G.A. §§15-9-30, 29-1-1(4) }.

g. All other matters and things as appertain or relate to estates of deceased persons and to persons who are incompetent because of mental illness or mental retardation. {O.C.G.A. §15-9-30(a)(10) }.

i. Based upon this provision, it has been held that the probate court does have jurisdiction over a claim against a personal representative of an estate in which the claimant seeks payment of damages for breach of a fiduciary duty. Heath v. Sims, 242 Ga. App. 691 (2000). This means that, with respect to a claim for money damages for a breach of fiduciary duty by a personal representative or guardian/conservator, the probate court can hear a tort suit based upon Title 51 of our Code, and award punitive damages if it is found that the criteria set forth in O.C.G.A. §51-12-5.1 are met. *See Section 4.6 below.*

B. Objection to Appointment and Removal Personal Representative

Executor de son tort

a. O.C.G.A. §53-6-2 provides that an executor de son tort is someone who wrongfully converts property from an unrepresented estate, and can be subject double liability for funds wrongfully converted. However, if that person is later appointed to be the personal representative, they become liable in that capacity and are not subject to double liability. Shirley v. Sailors, 329 Ga. App 850, 766 S.E. 2d 201 (2014)

C. Notice/Service of Process

All interested parties must be served with notice after the probate court receives a petition for the granting of an order. Generally, the sheriff serves a copy of the petition, together with a notice of the time of the hearing, upon parties who reside in the state at least 10 days before the hearing. Service on parties who reside outside the state but have a known address is made by registered or certified mail or statutory overnight delivery, return receipt requested, at least 13 days before the hearing. {O.C.G.A. §§15-9-86, 53-11-3, 53-11-4}.

In cases pertaining to guardians/conservators, instead of stating the time of the hearing, the notice may state that the parties must file their responses with the court within 10 days after personal service (13 days if mailed) and that, if no responses are filed, the petition will be granted without a hearing. If a citation is required to be published, the notice may state that objections must be filed by a date certain (which can be no earlier than the date on which a hearing could be set) and that if no objections are filed by that date, the petition may be granted without a hearing. {O.C.G.A. §15-9-86.1}.

In cases pertaining to personal representatives, the judge should issue a citation. The citation may state that all objections must be filed before a specified date and whether the hearing will be held on that date or a later date. The citation may also state that if no objections are filed, the petition may be granted without a hearing. {O.C.G.A. §53-11-9}.

The probate judge may issue a citation to any guardian, conservator, personal representative, sureties on their bonds, or any other persons who remove themselves beyond the limits of Georgia demanding that they appear before that court. Service may be had by publication. {O.C.G.A. §15-9-35}.

D. Pleadings

In order for heirs or beneficiaries or a personal representative of a decedent's estate to initiate a proceeding for settlement, they must file a petition in the probate court requesting issuance of a citation. {O.C.G.A. §53-7-62}.

A personal representative who has died, resigned or been removed may also be called to account by a petition filed by an heir or beneficiary, the personal representative's surety, or the successor personal representative. {O.C.G.A. §53-7-61}.

In the case of an intermediate report or a petition for discharge from liability, the personal representative is required to file a petition. {O.C.G.A. §53-7-73(b) }.

Upon the petition of any interested person or when it appears to the court that good cause may exist to revoke or suspend the letters of guardianship/conservatorship or to impose sanctions, the court must cite the guardian/conservator to answer the charge. {O.C.G.A. §§29-2-42(a) , 29-3-82(a) , 29-4-52(a) , 29-5-92(a) }.

If there is an objection to an annual return or if the court on its own motion determines that the conservator may have wasted the property of the minor/ward or failed in any manner to comply with applicable law, the court must hold a hearing or take such other action as the court deems appropriate. {O.C.G.A. §§29-3-60(c) , 29-5-60(c) }.

At any time after the six-month period following qualification, but not more frequently than once every 24 months, a conservator may petition the court for an interim settlement of accounts. The court must appoint a guardian ad litem for the minor/ward upon the filing of the petition for interim settlement. {O.C.G.A. §§29-3-61(a) , 29-5-61(a) }.

A minor who has reached majority, an incapacitated adult who has been restored to competency, the personal representative of a deceased minor or ward, a successor conservator or any interested person may petition the court for an order requiring a final settlement. {O.C.G.A. §§29-3-71(a) , 29-5-81(a) }.

E. Statute of Limitations

All actions against administrators, executors, and guardians (*but see below*), except on their bonds, must be brought within 10 years after the right of action accrues. {O.C.G.A. §9-3-27}.However, in the case of In re Estate of Wade, 331 Ga. App. 535 (2015), the Court of Appeals held that the Georgia Supreme Court has long refused to apply the ten year statute of limitation in the absence of evidence that the executor has held the estate's property adversely to a beneficiary.

All actions against a guardian/conservator, except on the guardian's/conservator's bond, must be brought within six years of the termination of the guardianship/conservatorship of the minor/ward, except as provided in Code Section 9-3-90. {O.C.G.A. §§29-2-44, 29-3-84, 29-4-54, 29-5-94}.

Minors and persons who are legally incompetent because of mental retardation or mental illness, who are such when the cause of action accrues, will be entitled to the same time after their disability is removed to bring an action. {O.C.G.A. §9-3-90(a) }.

No action to recover a debt due by the decedent may be commenced against the personal representative until the expiration of six months from the qualification of the first personal representative to serve. {O.C.G.A. §53-7-42(a) }.

F. Pretrial Conference

See Chapter 1.

G. Recording

See Chapter 1.

III. Beginning Hearing

A. Case Called

See Chapter 1.

B. Motions and Stipulations

See Chapter 1.

C. Oath of Witnesses

See Chapter 1.

D. Sequestration of Witnesses

See Chapter 1.

E. Opening Statements

See Chapter 1.

IV. Burden of Proof

A. Generally

An inventory, when returned to the judge of the probate court and sworn to by the fiduciary, is prima facie evidence of the property to be administered and the value thereof. {70 Ga. App. 195, 201 (1943)}.

An annual return properly made, filed, allowed, and recorded by the probate court is prima facie evidence of its correctness, and anyone seeking to impeach it must carry the burden of proving its incorrectness. {O.C.G.A. §§53-7-70, 29-3-60(c), 29-5-60(c) }.

Where an alleged return is not filed, allowed, and recorded, there is no presumption of its correctness, and the burden rests on the fiduciary to submit proof of its correctness. {70 Ga. App. 195, 202 (1943)}.

In a proceeding to require a personal representative to make a full accounting and settlement of the estate, the burden of proving the correctness of an account set up in response to the citation is upon such personal representative.{66 Ga. App. 472 (1941)}.

In a suit for an accounting, one who is liable to render an account has the burden of proving any allowances or credits which he may claim. {64 Ga. App. 850, 856 (1941)}.

The failure of a fiduciary to make returns as required by law is an omission of duty, and therefore a breach of trust, and throws on him the burden of proving to the satisfaction of the court that he has discharged the duty of his trust. {24 Ga. 558, 578 (1858); Allmond et al. v. Johnson et al. 153 Ga. App. 59, 62 (1980)}.

B. Removal / Revocation

Personal Representative - Grounds for citation by the probate judge:

a. The probate judge must cite the personal representative to answer the following charges whenever the judge knows or is informed of:

i. Willful and continued failure to make returns. {O.C.G.A. §53-7-72}.

ii. Failure to make correct inventory, if required. {O.C.G.A. §53-7-34}.

iii. Any other reason showing that good cause exists to revoke the personal representative's letters or impose other sanctions. {O.C.G.A. §53-7-55}.

Permissible actions by the probate judge:

[NOTE: The probate judge has discretion in determining a remedy for a personal representative who has wasted or mismanaged funds, and removal is not the only remedy. {Lokey et al. v. Lokey, 82 Ga. App. 171, 175 (1950)}.]

b. After the personal representative answers such charges, the judge may, in the judge's discretion, do any or all of the following:

i. Remove the personal representative from office by revocation of letters;

ii. Require additional security;

iii. Require the personal representative to appear and submit to a settlement of accounts following the procedure set forth in Article 6 of Chapter Seven of Title 53, whether or not the personal representative has first resigned or been removed and whether or not a successor fiduciary has been appointed; or

iv. Pass such other order as the judge deems appropriate under the circumstances of each case (which may include a forfeiture of commissions). {O.C.G.A. §53-7-55}.

c. Conflict of Interest:

i. Where the personal interests of the representative of an estate conflict with the interests of the estate, such fact, in the discretion of the judge of the probate court, may be sufficient grounds for removal {Fountain v. Cabe, 242 Ga. 787, 789 (1979)} or for denial of the original appointment. {60 Ga. App. 327 (1939)}.

ii. 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. {Harp v. Pryor, 276 Ga. 478 (2003)}. It is unnecessary to show that the fiduciary actually succumbed to temptation or that the beneficiary was harmed; the inquiry stops where such relation is disclosed. {Powell et al. v. Thorsen et al., 253 Ga. 572, 574 (1984); Bloodworth et al. v. Bloodworth et al. 260 Ga. App. 466 (2003)}.

Guardians/Conservators - Grounds For Citation By The Probate Judge:

d. Upon the petition of any interested person or whenever it appears to the court that good cause may exist to revoke or suspend the letters of

guardianship/conservatorship or to impose sanctions, the court must cite the guardian/conservator to answer the charge. The court must investigate the allegations and may require such accounting as the court deems appropriate. The court may appoint a temporary substitute guardian/conservator during the investigation. {O.C.G.A. §§29-2-42(a) , 29-3-82(a) , 29-4-52(a) , 29-5-92(a) ; In re Longino, 281 Ga. App. 599 (2006)}.

e. The court must keep a docket of conservators liable to file returns. Upon the failure of any conservator to file any return within the time frame required by law, the court must cite the conservator to appear and show reason for the delay. A conservator who fails to file an annual return as required by law must forfeit all commissions and other compensation for the year within which no return is filed unless otherwise ordered by the court. A willful and continued failure to file a return will be good cause for removal. {O.C.G.A. §§29-3-60(d) , 29-5-60(d) }.

f. Upon investigation the court may in its discretion:

   i. Revoke or suspend the letters of guardianship/conservatorship;

   ii. Require additional security;

   iii. Require the conservator to appear and submit to a settlement of accounts following the procedure as set forth in Code Section 29-3-71or 29-5-81, whether or not the conservator has first resigned or been removed and whether or not a successor conservator has been appointed;

   iv. Reduce or deny compensation to the guardian/conservator or impose such other sanction or sanctions as the court deems appropriate; and

   v. Issue such other orders which the court deems appropriate under the circumstances of the case. {O.C.G.A. §§29-2-42(b) , 29-3-82(b) , 29-4-52(b) , 29-5-92(b) }.

   vi. The revocation or suspension of letters of guardianship/conservatorship will not abate any action pending for or against the guardian/conservator. The successor guardian/conservator must be made a party to the action in the manner provided in Code Section 9-11-25. {O.C.G.A. §§29-2-42(c) , 29-3-82(c) , 29-4-52(c) , 29-5-92(c) }.

g. Conflict of Interest:

   i. A guardian must disclose promptly any conflict of interest between the guardian and the minor/ward when it arises or becomes known to the guardian and seek the court's determination as to whether the conflict is insubstantial or if it is in the best interest of the minor/ward for the guardian to continue to serve. {O.C.G.A. §§29-2-23, 29-4-24}.

   ii. A conservator must promptly disclose any conflict of interest between the conservator and the minor/ward when it arises or becomes known to the conservator and seek the court's determination as to whether the conflict is insubstantial or whether it is in the best interest of the minor for the conservator to continue to serve and not forfeit any property right. If the court finds that the conflict of interest is substantial or contrary to the best interest of the minor, the conservator may either resign or forfeit the property interest that is the source of the conflict. {O.C.G.A. §§29-3-23(b) , 29-5-24 (b) }.

h. Fitness:

   i. The law lays down no limitation on the scope of the inquiry into the

question of the fitness or suitability of a guardian/conservator. Where it is alleged that a guardianship/conservatorship is being exercised in a manner which produces a harmful effect on the physical and temperamental welfare of the minor/ward, the proof of facts in support of such allegations would authorize the probate judge to find that the guardian/conservator is "unfit" within the contemplation of the law. {55 Ga. App. 804, 805 (1937)}.

Conflicts of interests

i. Alleging a conflict of interest, a nominated successor executor filed a petition to remove the serving nominated and appointed executor. Arguing that it was the duty of the executor to investigate a pre-death purchase of real property by the executor, using the deceased power of attorney and funds, and titling the property in joint tenancy with right of survivorship in her and the deceased, the petition said a conflict of interest arose that disqualified the executor from continuing to serve. The probate court, granted the removal petition. {In re Estate of Coutermarsh, 325 Ga. App. 288 (2013)}.

Breach of duty

j. The probate court held that, on account of his many and continuing breaches of fiduciary duty and the damages suffered by the other beneficiaries, the, removed administrator of his mother's estate should forfeit his entire remaining interest in the estate of his father, the successor to his mother's estate. The Court of Appeals which reversed and held that, while the probate court has broad authority and discretion in awarding damages, including compensatory and punitive damages, in this case, the probate court's finding that the damages caused by the former administrator and the amount of such damages was not determined by the probate court actually to exceed the value of the administrator's interest, because the probate court indicated that certain amounts had not yet been determined. {In re Estate of Knapp, 326 Ga. App. 486 (2014)}.

C. Inventory

Who Must File Inventory

a. Unless relieved as explained below, the personal representative must make and file with the judge of the probate court an accurate and complete inventory of all the property the decedent owned at death. The personal representative must also deliver a copy of the inventory by first-class mail to the beneficiaries under the will or the heirs of an intestate estate (except those beneficiaries or heirs who are not sui juris). {O.C.G.A. §§53-7-30, 53-7-32}.

b. The conservator of a minor's/ward's estate must file with the probate court and provide to the minor's/ward's guardian, if any, an inventory of the property owned and possessed by the minor or ward and a plan for managing, expending, and distributing the property. The inventory must describe all the assets and liabilities and must include a list of all the personal and real property owned and how such property is titled. {O.C.G.A. §§29-3-30, 29-5-30}.

Time for Return of Inventory

c. An inventory must be returned to the judge of the probate court within six months after the qualification of a personal representative {O.C.G.A. §53-7-30}, and within two months after the qualification of a conservator. {O.C.G.A. §§29-3-30, 29-5-30}.

Failure to File Inventory

d. A testator may by will dispense with the necessity of the executor's filing an inventory with the probate court or the beneficiaries or both. The dispensation of the requirement for filing an inventory must not work any injury to creditors or persons other than beneficiaries under the will. Any will that provides relief from filing with the court automatically relieves the executor from sending a copy to the beneficiaries. If a will was executed in another state and the will is valid in this state, and under the laws of the state where the will was executed the executor would not have been required to file inventories and returns, or if the will otherwise expresses an intent to relieve the executor from all reporting requirements, such a will is to be construed as dispensing with the necessity of inventories and returns to Georgia. {O.C.G.A. §53-7-3}.

e. The beneficiaries under a will or the heirs of an intestate estate may relieve the personal representative from filing inventory by unanimous consent. {O.C.G.A. §§53-7-1(b) , 53-7-32(b) }. Also, any individual beneficiary or heir may waive the right to receive the inventory. {O.C.G.A. §53-7-32(a) }.

f. The neglect of a personal representative (unless relieved under the will or by unanimous consent) to return a correct inventory is sufficient grounds for removal. {O.C.G.A. §53-7-34}.

g. A conservator who fails to file an inventory and a plan for managing, expending, and distributing the property within two months of appointment is subject to being cited under Code Sections 29-3-82 or 29-5-92.

D. Annual Returns

Required Accounting

a. Unless relieved as explained below, within 60 days after the anniversary date of qualification, in each year, every personal representative and conservator must make a true and just accounting upon oath of his receipts and expenditures on behalf of the estate in the preceding year, together with a note or memorandum of any other fact necessary to the exhibition of the true condition of such estate. In the case of a conservatorship, an updated inventory consisting of a statement of the assets and liabilities of the estate as of the anniversary date of qualification, an updated plan for managing, expending and distributing the minor's or ward's property, and a statement of the current bond amount must also be filed. {O.C.G.A. §§53-7-67, 29-3-60, 29-5-60}.

b. In addition to filing the annual return with the probate court, a personal representative must deliver a copy of the return by first-class mail to all beneficiaries under a will or heirs of an intestate estate (except those beneficiaries or heirs who are not sui juris). {O.C.G.A. §53-7-68}.

c. The conservator of a minor must deliver a copy of the return by first-class mail to the surety on the conservator's bond and the minor's guardian, if any. If the minor has no guardian or if the guardian and the conservator are the same person, the conservator must mail a copy to the minor. {O.C.G.A. §29-3-60(a) }.

d. The conservator of a ward must deliver a copy of the return by first-class mail to the surety on the conservator's bond, the ward, and the ward's guardian, if any. {O.C.G.A. §29-5-60(a) }.

Docketing

e. To insure that annual returns are made, the judge of the probate court must keep a docket of all personal representatives and conservators who are liable to make returns and must cite all defaulters to show cause for their neglect. {O.C.G.A. §§53-7-72, 29-3-60(d) , 29-5-60(d) }.

Failure to Make a Return

f. A testator may by will dispense with the necessity of the executor's filing an annual return with the probate court or the beneficiaries or both. The dispensation of the requirement for filing annual returns must not work any injury to creditors or persons other than beneficiaries under the will. Any will that provides relief from filing with the court automatically relieves the executor from sending a copy to the beneficiaries. If a will was executed in another state and the will is valid in this state, and under the laws of the state where the will was executed the executor would not have been required to file inventories and returns, or if the will otherwise expresses an intent to relieve the executor from all reporting requirements, such a will must be construed as dispensing with the necessity of inventories and returns in Georgia. {O.C.G.A. §53-7-69}.

g. The beneficiaries under a will or the heirs of an intestate estate may relieve the personal representative from filing returns by unanimous consent. {O.C.G.A. §§53-7-1(b) , 53-7-68(b) }. Also, any individual beneficiary or heir may waive the right to receive the return. {O.C.G.A. §53-7-68(b) }.

h. A willful and continued failure to make returns as required by law is good cause for removal of a personal representative or conservator {O.C.G.A. §§53-7-72, 29-3-60(d) , 29-5-60(d) }.

i. Failure to make returns as required by law is not a compulsory ground for removal, but is one within the discretion of the judge of the probate court. {107 Ga. 761 (1899)}.

Order Where No Objection

j. Personal Representative

   i. The court must carefully examine each return of a personal representative and its vouchers; and if the court finds it correct and no objection is filed within 30 days of the time it is filed and mailed to the heirs or beneficiaries, the court must allow the return to be recorded, together with the original or copy vouchers attached. The return and copy vouchers must be kept on file in the probate court. If the original vouchers are filed without copies, they must when recorded be returned to the personal representative on demand. The return thus allowed and recorded will be prima-facie evidence in favor of the personal representative of its correctness. {O.C.G.A. §53-7-70}.

k. Conservator

   i. The court must carefully examine each return of a conservator and,

upon petition of any interested person or upon the court's own motion, may require the conservator to produce the original documents that support the return. Except as otherwise provided in this subsection, if no objection is filed within 30 days of the time the conservator's return is filed, the court must record the return within 60 days of its filing. The return must be kept on file in the court. The recorded return will be prima-facie evidence of its correctness. If there is an objection to the return or if the court on its own motion determines that the conservator may have wasted the property of the minor/ward or failed in any manner to comply with applicable law, the court must hold a hearing or take such other action as the court deems appropriate. {O.C.G.A. §§29-3-60(c) , 29-5-60(c) }.

E. Intermediate Report/Surcharge

Election to File by a Personal Representative

a. At any time after the six-month period following qualification, but not more frequently than once every twelve months, a personal representative may elect to file an intermediate report. Such reports may be filed even if the personal representative has been relieved of the duty to file annual reports. {O.C.G.A. §53-7-73(a) }.

b. A personal representative who elects to file this type of an accounting must file a petition and the report in the probate court of the county in which annual returns, if required, would be filed. {O.C.G.A. §53-7-73}.

c. The petition should include all the information required by law in annual returns and the following additional information, as set forth in O.C.G.A. §53-7-73(b) :

i. The period which the report covers;

ii. Identification of parties, including:

iii. The names and addresses of the living beneficiaries of a testate estate or heirs of an intestate estate known to the personal representative, with a statement as to those who require a guardian (and the names and addresses of the successors of any dead beneficiary or heir),

iv. A description of any possible unborn or unascertained beneficiaries or heirs, and

v. The name of the surety or sureties on the personal representative's bond, with the amount of the bond;

d. In a separate schedule:

i. The principal on hand at the beginning of the accounting period and the status at that time of its investment,

ii. Investments received from the decedent and still held,

iii. Additions to principal during the accounting period, with dates and sources of acquisition,

iv. Investments collected, sold, or charged off during the accounting period, with the consequent loss or gain and whether credited to principal or income,

v. Investments made during the accounting period, with the date, source and cost of each,

vi. Deductions from the principal during the accounting period, with the date and purpose of each, and

vii. Principal on hand at the end of the accounting period, how invested, and the estimated market value of each investment;

e. In a separate schedule:

i. The income on hand at the beginning of the accounting period and in what form held,

ii. Income received during the accounting period, when, and from what source,

iii. Income paid out during the accounting period, when, to whom, and for what purpose,

iv. Income on hand at the end of the accounting period, and how invested;

v. A statement of unpaid claims, with the reason for failure to pay them, including a statement as to whether any estate or inheritance taxes have become due, and, if due, whether paid;

vi. A brief summary of the account; and

vii. Such other facts as the court may require. {O.C.G.A. §53-7-73(b) }.

Objections and Continuances

f. At or before the time stated in the citation, any parties at interest may file objections to the personal representative's report, actions, and accounting, in which case the hearing will be held on the date set in the citation (or, if appropriate, at a later date). {O.C.G.A. §§53-7-74, 53-11-10(b) }.

Judgment Surcharging Personal Representative

g. Should it appear on the accounting that a personal representative is liable to the estate or any beneficiary or heir thereof, it is the duty of the judge of the probate court to enter a judgment surcharging the personal representative under the law and the evidence. {O.C.G.A. §53-7-76}.

Transfer to Superior Court for Construction of Will

h. Except as noted below, whenever it appears that a question of construction of the will is involved in the accounting, the probate court must enter an order transferring the accounting to the superior court. The superior court should be presented the questions in issue as if they were on appeal. After the superior court has determined the issues of construction, the probate court should proceed with the accounting, except that probate courts of expanded jurisdiction may, upon application for declaratory judgment, construe wills, thereby avoiding transfer for that purpose. {O.C.G.A. §53-7-75}.

i. A court of equity (the superior court) may assume jurisdiction over matters relating to the administration of estates in cases "where there is a danger of loss or other injury to a party's interest, or where equitable interference is necessary

for the full protection of the right of the parties in interest. In the case of Carin Braswell, as Administratrix of the Estate of Floyd Hughes Braswell et al. v. Benton et al., 351 Ga. App. 372, (June 21, 2019), the Court of Appeals ruled "because issues of conversion, ownership and construction of the will could only be fully determined in the superior court, superior court had concurrent jurisdiction over the claim for an accounting of the estate.

F. Settlement of Accounts of Representative/Discharge of Conservator

Personal Representatives

a. Procedure for Settlement

i. Settlement initiated by beneficiaries or heirs:

1.) Any beneficiary of a testate estate or heir of an intestate estate may, after the expiration of six months from the grant of letters, cite the personal representative to appear before the judge of the probate court for a settlement of his accounts. {O.C.G.A. §53-7-62}.

ii. One beneficiary or heir may institute a settlement without joining other beneficiaries or heirs as parties. However, the representative should join the other beneficiaries or heirs for his own protection. {Bracewell v. Bracewell et al., 117 Ga. App. 553, 555 (1968)}.

iii. If the personal representative fails or refuses to appear as cited, the court may proceed without the appearance of the personal representative. If the personal representative has been required to give bond, the surety on such bond will be bound by the settlement if the surety is given notice by personal service of the settlement proceeding in the probate court. If one or more unsuccessful attempts at service are made by the sheriff or his deputy upon the personal representative at the last address of the personal representative in the court records, and it appears to the judge of the probate court that further attempts are likely to be futile, then service will be sufficient upon the personal representative for purposes of this Code section if the citation is mailed by first-class mail to such address. {O.C.G.A. §53-7-62(b) }.

iv. Settlement initiated by a personal representative:

v. Alternatively, the personal representative may choose to cite all of the beneficiaries or heirs to be present at the settlement of his accounts by the probate judge. {O.C.G.A. §53-7-62}.

b. Basis of settlement

i. All statements for final settlement with personal representatives will be made upon the following basis:

1.) The personal representative will be charged only with the income actually earned for the first year after qualification.

2.) After the first year, the personal representative will be charged for the income that is actually earned on any property which the personal representative is authorized to hold or invest in by Georgia law, any court, or the testator's will.

3.) The rate of interest charged against personal representatives for all other property is the greater of the income actually earned or the income that would have been earned if the property had been invested at the legal rate of interest fixed by Georgia law and in effect during the time the property was held. {O.C.G.A. §53-7-64; see O.C.G.A. §7-4-2 for the legal rate of interest}.

4.) A personal representative, in the management of an estate, may retain a reasonable amount of money sufficient to pay anticipated expenses, upon which amount only the interest that is actually earned will be charged in final settlement. {O.C.G.A. §53-7-64}.

5.) At the hearing, the judge of the probate court may hear evidence upon any contested question and settle finally between the personal representative and the heirs or beneficiaries. {O.C.G.A. §53-7-63}. The court may decide any presented question which is necessary for the court to decide in order to determine whether the personal representative has properly discharged his duties. {184 Ga. 872, 876 (1937)}.

6.) Although it has been generally held that probate courts lack jurisdiction to determine title or ownership of property, the Supreme Court has held that, in connection with settlement proceedings under Code Section 53-7-62, the probate court may "hear evidence upon any contested question," including ownership of accounts which had been in the decedent's name. {Greenway v. Hamilton et al. 280 Ga. 652 (2006)}

c. Effect of settlement

i. The settlement will be conclusive upon the personal representative and upon all the beneficiaries or heirs who receive notice of the hearing. {O.C.G.A. §53-7-62(a) }.

ii. A settlement may be enforced by a judgment, writ of fieri facias, execution or attachment for contempt. {O.C.G.A. §53-7-63}. Attachment for contempt is not the remedy for compelling the payment of a mere debt. {174 Ga. 910, 913 (1932)}.

Conservators

d. Interim settlement of accounts

i. At any time after the six-month period following qualification, but not more frequently than once every 24 months, a conservator may petition the court for an interim settlement of accounts. The court must appoint a guardian ad litem for the minor/ward upon the filing of the petition for interim settlement.

ii. The petition for an interim settlement of accounts must be accompanied by a report which must set forth all of the information required by law in annual returns and, in addition thereto, must show:

1.) The period which the report covers;

2.) The name and address of the minor/ward, the name and address of the minor's/ward's guardian, if any, and the name of the surety on the conservator's bond, with the amount of the bond; and

3.) Such other facts as the court may require.

iii. The court, upon the petition for an interim settlement of accounts being filed, must issue a citation and require any objections to be filed in accordance with Chapter 9 of Title 29. The minor/ward and the guardian ad litem must be served personally, and the minor's guardian, if any, and the surety of the conservator's bond must be served by first-class mail. {O.C.G.A. §§29-3-61, 29-5-61}.

iv. Any interested person may file an objection to the conservator's interim settlement of accounts. Upon receipt of objections or on the court's own motion, the court must hold a hearing in which it must consider all objections, hear evidence, and determine whether the conservator shall be discharged from liability for the period covered by the interim settlement of accounts. {O.C.G.A. §§29-3-62, 29-5-62}.

v. If the court finds that the conservator is liable to the minor/ward, the court must enter a judgment against the conservator and any surety in the amount of such liability. {O.C.G.A. §§29-3-63, 29-5-63}.

e. Final settlement of accounts and discharge from liability

i. A minor who has reached the age of majority, a ward who has been restored to capacity, the personal representative of a deceased minor/ward, a successor conservator, or any interested person may petition the court for an order requiring the conservator or that conservator's personal representative to appear and submit to a settlement of the conservator's accounts.

ii. Alternatively, the court on its own motion may issue such an order. The settlement period will be the period of time from the commencement of the conservatorship or the end of the period covered by the last interim settlement of accounts. If the conservator fails or refuses to appear as cited, the court may proceed without the appearance of the conservator. If the conservator has been required to give bond, the surety on the bond is bound by the settlement if the surety is given notice by first-class mail of the settlement proceeding. {O.C.G.A. §§29-3-71(a), 29-5-81(a) }.

iii. A conservator, a former conservator, the conservator of a conservator, or the personal representative of a deceased conservator will be allowed to cite the minor/ward, the minor's/ward's personal representative, or a successor conservator to appear and be present at a final settlement of the conservator's accounts and discharge from liability. The settlement period will be the period of time from the commencement of the conservatorship or the end of the period covered by the last interim settlement of accounts.

f. Notice by first-class mail of the settlement proceeding must be given to the surety on the conservator's bond and to the minor's/ward's guardian, if any. If the minor has not reached 18 years of age, the ward has not been restored to capacity or if the conservator is the minor's/ward's personal representative, the court must appoint a guardian ad litem for the minor/ward who must be served personally. {O.C.G.A. §§29-3-71(b) , 29-5-81(b) }.

g. Upon the return of a notice referred to above, the court must proceed to examine all returns and accounts of the conservator during the settlement period and to hear any objection to the settlement and discharge. {O.C.G.A. §§29-3-71(c) , 29-5-81(c) }

h. Effect of settlement

i. The court must order any property in the hands of the conservator to be delivered to the minor/ward, the minor's/ward's personal representative, or to the successor conservator and must issue a judgment, writ of fieri facias, and execution thereon for any sums found to be due from the conservator. If the court is satisfied that the conservator has faithfully and honestly discharged the office, an order must be entered releasing and discharging the conservator from all liability. {O.C.G.A. §§29-3-71(d) , 29-5-81(d) }.

G. Discharge of Personal Representatives

A personal representative who has fully discharged all duties or who has been allowed to resign may elect to file a petition for an order that discharges the personal representative from all liability. {O.C.G.A. §53-7-50}.

A temporary administrator can petition for discharge from liability in the same manner as a personal representative. {O.C.G.A. §53-7-52}.

Contents of the Petition for Discharge from Liability:

a. The petition must state that the personal representative has fully administered the estate (or resigned) and include the following:

i. Names and addresses of all known heirs of an intestate estate or beneficiaries of a testate estate (including any person who has succeeded to the interest of a deceased heir or beneficiary) and state those who are in need of a guardian;

b. Statement that the personal representative has paid all claims against the estate or an enumeration of unpaid claims and the reason for nonpayment;

c. Statement that the personal representative has filed all necessary inventory and returns or been relieved of these filings. {O.C.G.A. §53-7-50}.

d. Upon the filing of the petition, the judge must issue a citation and serve notice to all heirs or beneficiaries and all creditors whose claims are disputed, or unpaid due to insolvency. {O.C.G.A. §53-7-50}.

e. The citation also must be published in the official newspaper of the county one time at least ten days prior to the date by which objections must be filed.

f. It is not necessary to notify any heir or beneficiary who has relieved the personal representative of all liability or with respect to whom the personal representative has been relieved of all liability in a binding proceeding for settlement of accounts (*see Section 4.46 above*) or an intermediate report {*see Section 4.45 above*). {O.C.G.A. §53-7-50}.

g. If no objections are filed, the judge must grant the order for discharge without further proceedings.

h. If objections are filed, the judge will hold a hearing at which the judge will examine closely the condition of the estate and the personal representative's conduct. If the judge is satisfied that the personal representative has honestly discharged his duty, the judge issues a formal order of discharge from liability. {O.C.G.A. §53-7-50}.

Effect of Discharge from Liability

i. Such an order relieves the personal representative from all further liability to persons interested in the estate, unless the judgment is set aside for fraud {O.C.G.A. §53-7-53}; by a former minor heir or beneficiary within two years of reaching majority {O.C.G.A. §53-7-50}; or as is otherwise provided by law concerning relief from judgments. {O.C.G.A. §9-11-60}.

H. Dismissal of Guardians/Conservators

Petition for Order Dismissing Guardian

a. Upon the termination of the guardianship or the resignation of the guardian, the guardian may petition the court for an order dismissing the guardian from office. The petition must include a final status report to the court which covers the period of time from the latest annual status report filed by the guardian. The final status report must contain the information required for annual status reports and must otherwise comply with the provisions of Code Sections 29-2-21 or 29-4-22. Notice must be published one time in the newspaper in which sheriff's advertisements are published in the county in which the petition is filed and must state that any objection must be made in writing and designate the date on or before which objections must be filed in the court, which must not be less than 30 days from the date of publication. The court must examine any objections filed. If no objection is filed or if, upon hearing any objection, the court is satisfied that the order dismissing the guardian from office is appropriate, the court must enter an order dismissing the guardian from office. Such order will not bar an action against the guardian. {O.C.G.A. §§29-2-31, 29-4-43}.

Petition for Order Dismissing Conservator

b. Upon the termination of the conservatorship or upon the resignation of the conservator, the conservator may petition the court for an order dismissing the conservator from office. The petition must include a final return to the court which covers the period from the last annual return filed by the conservator. The final return must contain the information required for annual returns and must otherwise comply with the provisions of Code Sections 29-3-60 or 29-5-60. Notice must be published one time in the newspaper in which sheriff's advertisements are published in the county in which the petition is filed and must state that any objection must be made in writing and designate the date on or before which objections must be filed in the court, which date must not be less than 30 days from the date of publication. The court must examine any objections filed. If no objection is filed or if, upon hearing any objection, the court is satisfied that the order dismissing the conservator from office is appropriate, the court must enter an order dismissing the conservator from office. Such order will not bar an action against the conservator or the conservator's surety. {O.C.G.A. §§29-3-70, 29-5-80}.

V. Evidence

A. Generally

In general, probate proceedings are subject to the same rules of evidence as other civil proceedings. {*See Chapter 11*}

B. Inventory

An inventory, when returned to the judge of the probate court and sworn to by the fiduciary, is prima facie evidence of the property to be administered and of the value thereof. {70 Ga. App. 195, 201 (1943)}.

C. Annual Return

An annual return properly made, filed, allowed, and recorded by the probate court is prima facie evidence of its correctness. {O.C.G.A. §§53-7-70, 29-3-60(c) , 29-5-60(c) }.

Where an alleged return is not filed, and allowed and recorded, there is no presumption of its correctness. {70 Ga. App. 195, 201 (1943)}.

The original return itself is not admissible into evidence as a judgment of the probate court. Rather a copy of the record of the probate court allowing the return, under the certificate and seal of the court, is the evidence which is admissible. {67 Ga. 466 (1881)}.

VI. Suit For Money Damages

A. In General

The probate court has jurisdiction over a tort suit for damages against an executor for breach of fiduciary duty. Heath v. Sims, 242 Ga. App. 691 (2000). The same logic would give the probate court jurisdiction over such a suit against an administrator or a conservator. The probate court does not have jurisdiction to enjoin a breach of duty or compel performance of a duty; these remedies would normally lie in superior court as a court of equity.

B. Right to Sue For Breach of Duty

A "tort" is a breach of duty imposed by law. {113 Ga. App. 874 (1966)}. A breach of fiduciary duty is a tort. {Nelson & Hill, P.A. v. Wood, 245 Ga. App. 60 (2000) "An action for breach of fiduciary duty lies in tort."}.

If a personal representative or temporary administrator commits a breach of fiduciary duty, a beneficiary or heir has a cause of action to "recover damages". {O.C.G.A. §53-7-54}.

If a conservator commits a breach of fiduciary duty, a minor or ward or an interested person on their behalf has a cause of action to "recover damages." {O.C.G.A. §§29-3-83, 29-5-93}.

When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damages thereby. {O.C.G.A. §51-1-6}.

In order for the petitioner to recover damages, petitioner must prove by a preponderance of the evidence that wrongful acts on the part of the defendant fiduciary proximately caused a loss to the petitioner.

C. Specific Breaches of Duty

Duty of Care:

a. Unless otherwise expressly provided in the will, a personal representative will be authorized to make those investments that are listed in Code Sections 53-8-2 and 53-8-3. In making any other investments and in acquiring and retaining those investments and managing the property of the estate, the personal representative must exercise the judgment and care, under the circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. {O.C.G.A. §53-8-1(a)(b) } .

b. As a general rule a fiduciary is relieved of responsibility for loss to the estate if he acts honestly, with ordinary care, and within his authority. An executor is not liable for losses or depreciation in the value of estate property unless there has also been a breach of trust which relates to such loss. {C & S National Bank v. Haskins and Mercer, 254 Ga. 131 (1985)}.A personal representative is a fiduciary who is under a general duty to settle the estate as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. {O.C.G.A. §53-7-1}.

c. General powers conferred to an executor under a will cannot be used to alter a testamentary scheme of distribution. {Powell, et al. v. Thorsen et al., 253 Ga. 572, 574 (1984)}.

d. A conservator must receive, collect, and make decisions regarding the minor's or ward's property, except as otherwise provided by law or by the court. A conservator must at all times act as a fiduciary in the minor's or ward's best interest and exercise reasonable care, diligence, and prudence. {O.C.G.A. §§29-3-21(a) , 29-5-22(a) }.

e. A conservator is authorized to invest in certain bonds and other items listed in O.C.G.A. §§ 29-3-32, 29-3-33, 29-5-32 and 29-5-33. After receiving court approval as required in subsection (b) or (c) of Code Sections 29-3-22 or 29-5-23, in making investments and in acquiring and retaining those investments and managing property of the minor or ward, the conservator must exercise the judgment and care, under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account. In making such investment decisions, a conservator may consider the general economic conditions, the anticipated tax consequences of the investments, the anticipated duration of the account, and the needs of the minor or ward and those entitled to support from the ward. {O.C.G.A. §§29-3-34(a) , 29-5-34(a) }.

Duty to Account:

f. It is the duty of administrators, guardians, conservators, and all other fiduciaries to keep their accounts in a regular manner and to be always ready with them supported by proper vouchers; neglect of this duty is grounds for

charging them with interest on balances on hand and with costs. {O.C.G.A. §10-6-30}.

g. Once it is shown that the fiduciary has taken possession of assets of the estate, the burden of proof is on the fiduciary to show either that he has accounted for those assets, or some other sufficient reason why he should not be held liable to the plaintiff for those assets. {118 Ga. 883 (1903)}.

Duty of Loyalty/Conflict of Interest:

h. A fiduciary owes an undivided duty of loyalty to the beneficiary and shall not put his interests above the interests of the beneficiary. {Dowdy v. Jordan, 128 Ga. App. 200 (1973)}.

i. If the executors find themselves in a position where their personal interests conflict with the interests of a beneficiary, they may resign, they may fully inform the affected beneficiary of the conflict or they may request that the court appoint a guardian ad litem to protect the beneficiary's interests. Where the executor fails to do any of these things he proceeds at his own peril. {230 Ga. 82 (1977)}.

j. As to conservators, *see Section B.3(d) above* regarding conflicts.

k. Recent Cases A son served as executor of his father's estate and as trustee of the marital trust created for the benefit of his mother. He used trust funds to make a charitable contribution to Reinhardt University, where he served on the Board of Trustees. After the mother's death, he became executor of her estate. A residual beneficiary, sued him, seeking damages for the mismanagement of the trust, breach of fiduciary duty in making the gift to Reinhardt, and for collecting excessive executor's fees. The trial court granted partial summary judgment to the daughter on the claim for breach of fiduciary duties. The Supreme Court upheld the granting of the summary judgment on the breach of fiduciary duty insofar as it was based on the son's having exceeded his authority when he encroached on the trust corpus to make the gift to Reinhardt Hasty v. Castleberry, 293 Ga. 727 (2013). In the case of In Re Estate of George Thomas Cornett, Jr., Court of Appeals, A20A0856, October 23, 2020, the Court upheld the trial court's removal of the executor for breaching her fiduciary duty because she refused to settle the Estate or produce the requested documentation regarding the management and administration of the Estate's assets pursuant to the trial courts' order. The executor paid a $100,000 debt on real property owned by her personally, she paid taxes with estate funds on all real estate owned by her personally and she could not explain why $92,000 in attorney fees was necessary for the estate.

D. Forfeiture of Compensation

If a personal representative is found to have committed a breach of fiduciary duty, among the remedies which may be sought (and granted) is the forfeiture of commissions and other compensation. {O.C.G.A. §53-7-54(a)(7) ; Cronic et al. v Baker, 284 Ga. 452 (2008)}

E. Measure of Damages

Damages are given as compensation for an injury done, and generally this is the measure when the damages are of a character to be estimated in money. What would be a proper amount of damages is a question for the fact finder to decide under all the facts and circumstances of the case. {O.C.G.A. §51-12-4}.

If an executor commits a breach of trust, he is responsible for the amount required to restore the value of the trust estate to what it would have been if the estate had been administered properly. {O.C.G.A. §53-12-193(1), (3) . But see O.C.G.A. §51-12-14 (the "Unliquidated Damages Interest Act" and cases annotated thereunder)}.

An executor may not make up for a loss caused by a breach of trust with a separate gain in the estate. For example, if the fact finder finds from the evidence that the defendants committed a breach of trust that caused damages to the estate, those damages would not be reduced or offset by any profits or gains the defendants obtained from those parts or aspects of the estate that were administered properly. { C & S National Bank v. Haskins and Mercer 254 Ga. 131 (1985)}.

The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculation of the judge or jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. {Lawson et al v. B. P. Construction, Inc. et al. 166 Ga. App. 754, 756 (1983); Port v. The State, 95 Ga. App. 156 (2008)}. Also see Estate of Knapp, 326 Ga. App. 486, 756 S.E. 2d 716 (2014); In re Estate of Helms, 328 Ga. App. 179, 761 S.E. 2d 679 (2014).

The income, profit, or increase of specific testamentary gifts, as a general rule, goes with the gift though the time of enjoyment or vesting may be postponed. {O.C.G.A. §53-4-60}.

When a payment is made upon any debt, the payment is applied first to the discharge of any interest due at the time, and the balance, if any, must be applied to the reduction of the principal. If the payment does not extinguish the interest then due, no interest may be calculated on such balance of interest, but interest may only be calculated on the principal amount up to the time of the next payment. {O.C.G.A. §7-4-17}.

F. Joint and Several Liability

With respect to actions taken prior to January 1, 1998, each executor is responsible for his own acts only, unless by his own act or gross negligence he enabled or permitted his coexecutor to waste the estate. {O.C.G.A. §53-7-5 (Pre-1998 Probate Code)}.

After January 1, 1998, if more than one personal representative is qualified and unless the will provides otherwise, a personal representative is liable for a breach committed by another personal representative:

a. By participating in a breach of fiduciary duty committed by the other personal representative;

b. By approving, knowingly acquiescing in, or concealing a breach of fiduciary duty committed by the other personal representative;

c. By negligently enabling the other personal representative to commit a breach of fiduciary duty; or

d. By neglecting to take reasonable steps to compel the other personal representative to redress a breach of fiduciary duty in a case where the personal representative knows or reasonably should have known of the breach of trust.{O.C.G.A. §53-7-5(b) }.

G. Award of Expenses of Litigation and Attorneys' Fees for Bad Faith

Expenses of litigation generally are not allowed as part of the damages awarded to a plaintiff. However, if the plaintiff proves that the conduct of the defendant in his dealings with the plaintiff out of which the suit arose was undertaken in bad faith, the fact finder may award her reasonable and necessary expenses of litigation, including attorneys' fees. {O.C.G.A. §13-6-11}.

The bad faith referred to has been consistently held by Georgia courts to refer to the conduct of the defendant in his dealings with the plaintiff out of which the suit arose, rather than the defendant's conduct in defending the suit. {504 F.2d 518 (1974)}.

In awarding attorney's fees and expenses of litigation, the fact finder is not limited only to the period of time between the filing of the Complaint and the end of trial. The fact finder may consider any reasonable and necessary fees and expenses that are part of the linear progression of the case from claim to judgment. {Thico Plan, Inc. v. Ashkouti et al. Standard Fire Insurance Company, 171 Ga. App. 536 (1984)}.

The term bad faith means the opposite of "good faith," generally referring to fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty not prompted by an honest mistake as to one's rights or duties, but by some self-interest or sinister motive. {Schaffer v.Wolbe.13 Ga. App. 448, 449 (1966)}.

Breach of a fiduciary duty may be either innocent or intentional. An intentional breach will be sufficient to constitute fraud. {Black & White Construction Company, Inc. et al. v. Bolden Contractors, Inc., 187 Ga. App. 805 (1988)}.

In an action for an accounting and removal of a personal representative, when the personal representative is found to have committed a significant breach of fiduciary duty (such as an inability to fully account and/or a failure to expeditiously administer and settle the estate), the reasonable attorneys' fees and expenses of litigation of the successful petitioner should be awarded against the personal representative personally and not against the estate. A petition for an accounting is against the personal representative. Likewise the attorneys' fees and expenses of a personal representative in unsuccessfully defending the action should not be paid by the estate. { In re ESTATE OF HOLTZCLAW.293 Ga. App. 577 (2008)}

H. Punitive Damages

Punitive damages may be awarded in tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. {O.C.G.A. §51-12-5.1}.

Clear and convincing evidence is defined as evidence that will cause the fact finder to firmly believe each essential element of the claim to a high degree of probability. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence, but less that beyond a reasonable doubt. {Clarke et al. v. Cotton, 263 GA. 861 (1994)}.

Punitive damages, when awarded, shall not be as compensation to a plaintiff but solely to punish, penalize, or deter a defendant. {O.C.G.A. §51-12-5.1}.

Conscious indifference to the consequences means an intentional disregard of the rights of another, knowingly or willfully disregarding such rights. {Associated Health Systems, Inc. v. Jones, 185 Ga. App. 798 (1988)}.

Punitive damages are limited to a maximum of $250,000 for any tort action, unless the trier of fact finds that the defendant acted, or failed to act, with the specific intent to cause harm. {O.C.G.A. §51-12-5.1(g) }.

I. Interest

A general testamentary gift "usually" bears interest at the legal rate after 12 months from the death of the decedent. However, the court may decline to award interest when the equitable circumstances of the particular estate require. The award of interest is left to the sound, equitable discretion of the court. {In re ESTATE OF BARR. O.C.G.A. §53-6-4; 278 Ga. 837 (2006) }

Even where damages are not liquidated, prejudgment interest may be awarded under O.C.G.A. §13-6-13 in tort or breach of contract actions, either separately or as part of the damages. {Sims et al. v. Heath, 258 Ga. App. 681 (2002)}. A trustee who commits a breach of trust is personally chargeable with any damages resulting from the breach of trust, including, but not limited to, "any amount that would reasonably have accrued to the trust or beneficiary if there had been no breach of trust with interest." {O.C.G.A. §53-12-193(a)(3) }; cited in {Sims et al. v. Heath, 258 Ga. App. 681 (2002)}, which case concerned co-executors.

VII. Closing Arguments

A. Generally

In general, a fiduciary who is required to account is entitled to open and conclude the argument. {66 Ga. App. 472, 476-77 (1941)}.

B. Suit for Damages

In a suit for damages, the plaintiff has the right to open and conclude the argument.

VIII. Drawing An Order

A. *See Chapter 1*.

IX. Appeals

A. *See Chapter 1*.

X. Discharge of Personal Representatives

A. Discharge from Liability

A personal representative who has fully discharged all duties or who has been allowed to resign may elect to file a petition for an order that discharges the personal representative from all liability. {O.C.G.A. §53-7-50}.

B. Filing of Creditor Claims

In a recent case, a purported creditor filed his notice of claim on or after the administrator had filed a petition for discharge but before the discharge had been granted. the probate court granted the petition for discharge. the court of appeals held that, since the notice was filed before the discharge had been granted and the administrator had not listed the alleged creditor as a creditor whose claim had not been paid, as required under O.C.G.A. §53-7-50(a) , the probate court erred in granting the discharge without a hearing, as required under O.C.G.A. §53-7-50(c) , at which time the creditor could have presented evidence of his claim. {Estate of Johnston, 318 Ga. App. 324 (2012)}. Presumably, therefore, a creditor may file a notice of claim at any time up until the personal representative has been discharged, although a discharge may be set aside for fraud. O.C.G.A. §53-7-53. in Johnston, the court of appeals points out that creditors whose claims have not been paid in full must be given notice in accordance with chapter 11 of title 53 (the alleged creditor had earlier written a letter to the administrator's attorney with an invoice for services rendered that, presumably, provided an address for the creditor). O.C.G.A. §53-7-50(B) .

Chapter 10. Involuntary Treatment Procedures for the Mentally Ill, and for Alcoholics, Drug Dependent Individuals, and Drug Abusers

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I. Checklist

- ☐ If the judge is unable to hear the case, has he appointed a qualified substitute? {*See II.A*}
- ☐ Have two patient representatives been appointed by (or for) the patient? {*See II.B*}
- ☐ Has the patient been provided with effective assistance of counsel? {*See II.C*}
- ☐ Have the patient's clinical records as well as probate court records and files been kept confidential? {*See II.D*}
- ☐ Has proper notice been served on the patient and his representatives? {*See II.E*}
- ☐ Has the proper application or petition been filed for the type of hearing that is to be held? {*See III.}*
- ☐ Has the case been called? {*See IV.A*}
- ☐ Have any motions been properly disposed of? {*See IV.B*}
- ☐ Have the witnesses been properly sworn in? {*See IV.C*}
- ☐ If counsel requests, have the witnesses been sequestered? {*See IV.D*}
- ☐ Have both attorneys had an opportunity to give opening statements? {*See IV.E*}
- ☐ Has each party met his burden of proof? {*See V.}*
- ☐ Have the parties had an opportunity to present their closing arguments? {*See VI.C*}
- ☐ Has the order been properly drawn? {*See VII.A*}
- ☐ Has a determination been made as to whether the patient is able to pay hearing expenses? {*See VII.C*}
- ☐ If there is an appeal, have the records been transferred to the superior court? {*See VIII.*}

II. Preliminary Matters

A. Judge Unable to Hear Case

If the judge of the probate court is unable to hear a case concerning hospitalization procedures for the mentally ill, the judge must appoint a substitute. {O.C.G.A. §37-3-1(4)(A) ; O.C.G.A. §37-7-1(7)(A) }.

In order for the appointed person to exercise the jurisdiction of the probate court, he must be:

a. A member of the State Bar of Georgia,

b. Qualified by training and experience, and

c. Appointed on a case-by-case or standing basis to serve at the pleasure of the judge making the appointment. {O.C.G.A. §37-3-1(4)(A) ; O.C.G.A. §37-7-1(7)(A) }.

B. Appointment of Patient Representatives

At the time a patient is admitted to any facility under O.C.G.A. 37-3 or 37-7, that facility must use diligent efforts to secure the names and addresses of at least two representatives whose names and addresses will be entered in the patient's clinical record. {O.C.G.A. §37-3-147(a) ; O.C.G.A. §37-7-147(a) }.

The patient may designate one representative. The facility may choose the other representative, or if the patient has no selection as to a representative, the facility may select both representatives. {O.C.G.A. §37-3-147(b) ; 37-7-147(b) }.

a. If the facility is unable to secure two representatives after a diligent search or if the facility is the guardian of the patient, that fact must be entered on the patient's clinical record. The facility should then apply to the court in the county of the patient's residence for the appointment of a guardian ad litem (the guardian ad litem should not be the Department of Human Resources). {O.C.G.A. §37-3-147(c) }.

On application of any person or on the court's own motion, a guardian ad litem may be appointed for a patient even though there are two representatives, whenever an appointment of a guardian ad litem is deemed necessary for protection of a patient's rights. {O.C.G.A. §37-3-147(c) ; O.C.G.A. §37-7-147(c) }.

C. Patient's Right to Counsel

The patient must be provided with effective assistance of counsel. If the patient cannot afford to hire an attorney, the court must appoint counsel for him. {O.C.G.A. §37-3-1(8) ; O.C.G.A. §37-7-1(12) }.

The court should inform the patient of his right to counsel. Unless the court has been notified that the patient has obtained counsel, the court should appoint an attorney. The patient has the right to refuse in writing the appointment of counsel, subject to the discretion of the court. {O.C.G.A. §37-3-1(8) ; O.C.G.A. §37-7-1(12) }.

If the patient is unable to pay for an attorney, the probate judge should execute an affidavit of indigence concerning the patient or include a statement in the final order, so that the county will have a record of the fact that the patient is to be supported at public expense. {O.C.G.A. §37-3-122(a) ; O.C.G.A. §37-7-122(a) }.

a. Notice should be given that there will be a fee for the court-appointed attorney which will be charged if the court determines the patient is able to pay.

b. The fee to be paid to an attorney appointed to represent a patient may not exceed an amount determined by utilizing the fee schedule followed by the county in appointed criminal cases, plus actual expenses which the attorney may incur and which have been approved by the court holding the hearing, except that the attorney may petition the superior court for reasonable extra fees. {O.C.G.A. §37-3-122(b)(1) ; O.C.G.A. §37-7-122(b)(1) }.

D. Confidentiality

Clinical Records

a. A clinical record must be maintained for each patient. The clinical record is not a public record and no part of it may be released, except under certain specific conditions which include the following:

b. A copy of the record may be released to any person or entity as designated in writing by the patient or, if appropriate, his parent, guardian, or legal custodian. {O.C.G.A. §37-3-166(a)(2) ; O.C.G.A. §37-7-166(a)(1) }.

c. A copy of the record must be released to the patient's attorney if the attorney so requests and the patient consents to the release. {O.C.G.A. §37-3-166(a)(5) ; O.C.G.A. §37-7-166(a)(4) }.

d. The record must be produced by the person or institution having custody thereof at any hearing held under O.C.G.A. 37-3 at the request of the patient, his guardian, or his attorney. {O.C.G.A. §37-3-166(a)(7) ; O.C.G.A. §37-7-166(a)(6) }.

e. A copy of the record must be produced in response to a valid subpoena or order of any court of competent jurisdiction, except for matters privileged under the laws of Georgia. {O.C.G.A. §37-3-166(a)(8) ; O.C.G.A. §37-7-166(a)(7) }.

f. Notwithstanding any other provision of law to the contrary, a law enforcement officer in the course of a criminal investigation may be informed whether a person is or has been a patient in a state facility as well as the patient's current address, if known. {O.C.G.A. §37-3-166(a)(9) ; O.C.G.A. §37-7-166(a)(10) }.

g. In connection with any hearing under O.C.G.A. §37-3 or 37-7, any physician who is treating or who has treated the patient is authorized to give evidence as to any matter concerning the patient including evidence as to communications otherwise privileged under O.C.G.A. §§24-9-21(5) or 24-9-40. {O.C.G.A. §37-3-166(b); O.C.G.A. §37-7-166(b) }.

h. Any authorized or unauthorized disclosure of confidential or privileged patient information or communications does not in any way destroy the confidential or privileged character, except for the purpose for which such authorized disclosure is made. {O.C.G.A. §37-3-166(c) ; O.C.G.A. §37-7-166(c) }.

Probate Court Records and Files

i. Notwithstanding the provisions of O.C.G.A. §15-9-37(7) and (8) (Record of Applications, etc.), all files and records of a court in a proceeding under O.C.G.A. §§37-3 or 37-7since September 1, 1978 must remain sealed and are open to inspection only upon order of the court. A court order is issued only after petition by or notice to the patient and subject to the provisions of O.C.G.A. §§37-3-166 and 37-7-166 pertaining to the medical portions of the record. {O.C.G.A. §37-3-167(d)(1) ; O.C.G.A. §37-7-167(d) }. There are special rules concerning records created prior to September 1, 1978. {O.C.G.A. §37-3-167(d)(2) ; O.C.G.A. §37-7-166(d)(2) }.

j. Upon a petition for access to such files or records referred to above, the court should allow inspection by the person who is the subject of a record unless there are compelling reasons why it should not, but should require anyone other than the person who is the subject of a court record to show compelling reasons why the record should be opened. If access is granted, the court order must restrict dissemination of the information to certain persons or for certain purposes or both. {O.C.G.A. §37-3-167(d)(3) ; O.C.G.A. §37-7-167(d)(3) }.

k. The court may refer to such files and records in any subsequent proceedings

held under O.C.G.A. §37-3 concerning the same patient. In that event the files and records of such subsequent proceedings must be sealed. {O.C.G.A. §37-3-167(d)(4) ; O.C.G.A. §37-7-167(d)(4) }.

l. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, but without personal identifying information and under whatever conditions for their use and distribution the court may deem proper. {O.C.G.A. §37-3-167(d)(4) ; O.C.G.A. §37-7-167(d)(4) }.

m. Better practice is to keep these records in a locked file cabinet.

E. Notice

[NOTE: The confidentiality of these records does not terminate with the patient's death. See O.C.G.A. §§37-3-166(a) and 37-7-166(a)]

Better practice is for the court to notify the hospital of the time, place, and date of the hearing.

Notice of right to court hearing/emergency.

Immediately upon arrival of a patient at an emergency receiving facility, the facility must give the patient written notice of his right to petition for a writ of habeas corpus or for a protective order. This written notice must also inform the patient that he has a right to legal counsel and that, if the patient is unable to afford counsel, the court will appoint counsel at the county's expense. {O.C.G.A. §37-3-44(a) ; O.C.G.A. §37-7-44(a) }.

Notice of the patient's hospitalization in an emergency receiving facility must be given to the patient's representatives. It must include a clear notification that the representatives may petition for a writ of habeas corpus or for a protective order. {O.C.G.A. §37-3-44(b) ; O.C.G.A. §37-7-44(b) }. Notice should also be given to the representatives by telephone or in person as soon as possible.

Notice of court-ordered evaluation

a. Within five days after the filing of the petition for court-ordered evaluation hearing, the court must serve notice upon the patient, his representatives, and the petitioner. {O.C.G.A. §37-3-62(a) ; O.C.G.A. §37-7-62(a) }.

b. Notice must contain:

c. Notice that a hearing will be held and the time and place of the hearing. { O.C.G.A. §37-3-62(a) ; O.C.G.A. §37-7-62(a) };

d. Notice that the patient has a right to counsel and that the patient or his representative may apply immediately to the court to have counsel appointed if the patient cannot afford counsel. {O.C.G.A. §§37-3-62(a) ; O.C.G.A. §37-7-62(a) };

e. Notice that the patient may waive (in writing) the hearing, after appointment of counsel. { O.C.G.A. §37-3-62(a) ; O.C.G.A. §37-7-62(a) }. (the code

provides that the court will appoint counsel for the patient unless the patient indicates in writing that he does not desire to be represented by counsel; however, better practice is to appoint counsel in all cases.); and

f. A copy of the petition must be attached to the notice. {O.C.G.A. §37-3-62(a) ; O.C.G.A. §37-7-62(a) }.

A filing of this type of petition by anyone other than a community mental health center would be rare, because any such petition would have to be accompanied by a certificate of a physician or psychologist. In such cases, the physician or psychologist would likely sign a form 1013, which would authorize a peace officer to take the patient to the nearest emergency receiving facility for evaluation without court order.

Notice of petition to determine need for involuntary treatment as an inpatient.

g. A copy of the petition, which includes copies of the certificate of the chief medical officer and the two physicians, or one physician and one psychologist, must be served on the patient and his representatives within five days after the certificate was filed. The service will include:

h. Notice that a hearing will be held and the date, time,

i. And place of the hearing. {O.C.G.A. §37-3-81(a)(1) ; O.C.G.A. §37-7-81(a)(1) };

j. Notice that the patient or his representatives may apply

k. Immediately to the court to have counsel appointed. {O.C.G.A. §37-3-81(a)(2) ; O.C.G.A. §37-7-81(a)(2) };

l. Notice that the patient has a right to counsel; and that

m. The court will appoint counsel for the patient unless the patient indicates in writing he does not desire counsel. {O.C.G.A. §37-3-81(a)(2) ; O.C.G.A. §37-7-81(a)(2) } (better practice is to provide counsel in all cases.);

n. Notice that the patient may waive in writing the hearing, but if the hearing is waived, the certificate will serve as authorization for the patient to begin treatment as an inpatient under the terms of the individualized service plan. {O.C.G.A. §37-3-81(b) ; O.C.G.A. §37-7-81(b) };

o. A copy of the individualized service plan developed by the facility. {O.C.G.A. §37-3-81(a)(3) ; O.C.G.A. §37-7-81(a)(3) }; and

p. Notice that the patient has a right to be examined by a physician of his choice at his own expense and to have the physician submit a suggested service plan. {O.C.G.A. §37-3-81(a)(4) ; O.C.G.A. §37-7-81(a)(4) }.

Notice of petition to determine need for involuntary treatment as an outpatient

q. A copy of the petition, which includes a copy of the examination report, the individualized service plan, and the address to which the patient was discharged by the referring facility, must be served upon the patient and the representatives at least ten days prior to the hearing. The documents served will include:

r. Notice that a hearing will be held and the date, time, and place of the hearing. {O.C.G.A. §37-3-81(a)(1) ; O.C.G.A. §37-7-81(a) };

s. Notice that the patient or his representative may apply immediately to the

court to have counsel appointed. {O.C.G.A. §37-3-81(a)(2) ; O.C.G.A. §37-7-81(a)(2) };

t. Notice that the patient has a right to counsel and that the court will appoint counsel for the patient unless the patient indicates in writing he does not desire counsel. {O.C.G.A. §37-3-81(a)(2) ; O.C.G.A. §37-7-81(a)(2) }. (better practice is to provide counsel in all cases);

u. Notice that the patient may waive in writing the hearing, but if the patient does not either attend or waive the hearing, the court may order the patient to be taken into custody, hospitalized, evaluated, and treated. {O.C.G.A. §37-3-92(a) ; O.C.G.A. §37-7-92(a) };

v. A copy of the individualized service plan developed by the referring facility. {O.C.G.A. §37-3-81(a)(3) ; O.C.G.A. §37-7-81(a)(3) };

w. Notice that the patient has a right to be examined by a physician of his choice at his own expense and to have the physician submit a suggested service plan. {O.C.G.A. §37-3-81(a)(4) ; O.C.G.A. §37-7-81(a)(4) }.

Orders

x. Any time the probate court enters an order pursuant to the provisions of O.C.G.A. §§37-3 and 37-7, the order and notice of the order must be served on the patient and his representatives.

F. Service

Patient

a. Any time notice is required to be given to the patient, better practice is to serve the patient personally. The date on which the service is given must be entered upon the patient's clinical record. If the patient is unable to read a written notice with understanding, a reasonable effort must be made to explain the notice to him. {O.C.G.A. §37-3-147(e) ; O.C.G.A. §37-7-147(e) }.

Representatives and petitioner

b. Any time O.C.G.A. §§37-3 or 37-7 requires notice to be given to a patient's representatives, the guardian ad litem, if any, should also be served.

c. The representatives, petitioner, and guardians ad litem may be served in person or by first class mail.

d. When notice is served by mail, a record must be made of the date of the mailing and must be placed in the patient's clinical record. Service is complete on mailing. {O.C.G.A. §37-3-147(d) ; O.C.G.A. §37-7-147(d) }.

G. Courtroom Practice and Hearings Generally

Recording

a. The hearing must be electronically recorded or recorded by a qualified court reporter. {O.C.G.A. §37-3-1(8) ; O.C.G.A. §37-7-1(12) }.

b. The court should retain a record of the hearing for at least 45 days. Because of the personal nature of the record, it should be kept in a locked file cabinet.

General Courtroom Practice

c. The court must exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

i. Make the hearing as informal as possible and in a setting that is not likely to have a harmful effect on the patient,

ii. Make interrogation and presentation effective for the ascertainment of truth,

iii. Avoid needless consumption of time, and

iv. Protect the witnesses from harassment or undue embarrassment.

d. In all hearings under O.C.G.A. §§37-3 or 37-7, the patient has the right to:

i. Subpoena witnesses and to require testimony in person or by deposition from any physician upon whose evaluation the decision of the court may rest,

ii. Obtain a continuance for a reasonable time when good cause is shown,

iii. Request that the public be excluded from the hearing,

iv. Confront and cross-examine the witness and offer evidence, and

v. Not be present at the hearing. {O.C.G.A. §37-3-1(8) ; O.C.G.A. §37-7-1(12) }.

e. Very few, if any, substance abuse treatment facilities seek involuntary treatment for substance abuse patients. Nonetheless, the involuntary emergency examination and evaluation procedures are utilized for the purpose of detoxification. Also, many patients who are committed under the mental health statute have dual diagnoses involving substance abuse as well as mental illness.

III. Types of Hearings

A. Court-Ordered Evaluation/Hearing

Petition Filed with Probate Court

a. Any person may file with the probate court a petition executed under oath alleging that a person within the county is a mentally ill person requiring involuntary treatment. The petition must be accompanied by the certificate of a physician stating that he has examined the patient within the preceding five days and has found that the patient may be a mentally ill person requiring involuntary treatment and that a full evaluation of the patient is necessary. {O.C.G.A. §37-3-61(2) ; O.C.G.A. §37-7-61(2) }.

b. The court must review the petition filed and if the court finds reasonable cause to believe that the patient may be a mentally ill person requiring involuntary treatment, the court must hold a full and fair hearing on the petition. {O.C.G.A. §37-3-62(a) ; O.C.G.A. §37-7-62(a) }.

Application Filed with Community Mental Health Center

c. Any person may file an application, executed under oath, with the community mental health center for a court-ordered evaluation of a person located within that county who is alleged to be a mentally ill person requiring

involuntary treatment. {O.C.G.A. §37-3-61(1) ; O.C.G.A. §37-7-61(1) }.

d. Upon the filing of such application, the community mental health center must make a preliminary investigation and, if the investigation shows that there is probable cause to believe that the allegation is true, the community mental health center must file a petition with the probate court in the county where the patient is located, seeking an involuntary admission for evaluation. {O.C.G.A. §37-3-61(1) ; O.C.G.A. §37-7-61(1) }.

[NOTE: The court-ordered evaluation hearing must be held no sooner that 10 days and no later than 15 days after the petition is filed. {O.C.G.A. §37-3-62(a) ; O.C.G.A. §37-7-62(a) }.]

For the drawing of an order of a court-ordered evaluation, *see VII*.

B. Emergency Admission Based On Physician's Certification or Court Order

Physician's Certification

a. Any physician within Georgia may execute a certificate stating that the physician has personally examined a person within the preceding 48 hours, and based on observations set forth in the certificate, the person appears to be a mentally ill person requiring involuntary treatment. {O.C.G.A. §37-3-41(a) ; O.C.G.A. §37-7-41(a) }.

b. A physician's certificate expires seven days after it is executed. {O.C.G.A. §37-3-41(a) ; O.C.G.A. §37-7-41(a) }.

c. Any peace officer, within 72 hours after receiving the certificate, must make diligent efforts to take into custody the person named in the certificate. The alleged mentally ill person should be taken to the nearest available emergency receiving facility serving the county in which the patient is found, where he will be received for examination. {O.C.G.A. §37-3-41(a) ; O.C.G.A. §37-7-41(a) }.

Court Order

d. The probate court of the county in which a person may be found may issue an order commanding any peace officer to take such person into custody and deliver him forthwith for examination, either to:

i. The nearest available emergency receiving facility serving the county in which the patient is found; or

ii. To a physician who has agreed to examine such patient and who will provide, where appropriate, a certificate pursuant to 8.32A1 to permit delivery of such patient to an emergency receiving facility. {O.C.G.A. §37-3-41(b) ; O.C.G.A. §37-7-41(b) }.

e. Such order may only be issued if based either upon:

i. An unexpired physician's certificate as provided for in *B.1. above*; or

ii. Affidavits of at least two persons who attest that, within the preceding 48 hours, they have seen the person to be taken into custody and that,

based upon observations contained in their affidavit they have reason to believe that such person is a mentally ill person requiring involuntary treatment. {O.C.G.A. §37-3-41(b) ; O.C.G.A. §37-7-41(b) }.

f. The court order expires seven days after it is executed. {O.C.G.A. §37-3-41(b) ; O.C.G.A. §37-7-41(b) }.

C. Emergency Admission of Persons Arrested For Penal Offenses

Arrested Person Taken to a Physician

a. A peace officer may take any person to a physician within the county or an adjoining county for emergency examination as provided in B.1. {O.C.G.A. §37-3-42(a) ; O.C.G.A. §37-7-42(a) }.

Arrested Person Taken to Emergency Receiving Facility

b. A peace officer may take the person directly to an emergency receiving facility if:

i. The person is committing a penal offense, and

ii. The peace officer has probable cause for believing that the person is a mentally ill person requiring involuntary treatment. {O.C.G.A. §37-3-42(a) ; O.C.G.A. §37-7-42(a) }.

D. Determination of Involuntary Treatment

In any case where a patient may be retained at a facility beyond the evaluation period, where voluntary hospitalization is not sought, the chief medical officer, supported with the opinions of two physicians (or a physician and a psychologist) who have personally examined the patient within the preceding five days, must file a petition with the court for a hearing to determine whether or not the patient is a mentally ill person requiring involuntary treatment as an inpatient. {O.C.G.A. §37-3-81(a) ; O.C.G.A. §37-7-81(a) }.

[NOTE: The hearing for determination of the need for involuntary treatment as an inpatient must be held no sooner than seven days and no later than twelve days after the petition was filed with the court [O.C.G.A. §37-3-81(c); O.C.G.A. §37-7-81(c)].

In any case where a patient is in the custody of a community mental health center, an emergency receiving facility, or an evaluating facility, and a physician or psychologist, at or on behalf of the facility, determines that the patient should receive involuntary outpatient treatment, an individualized service plan must be prepared by the facility having physical custody of the patient (the "referring" facility), in conjunction with the facility where the patient will receive the outpatient treatment (the "receiving" facility), within the time the referring facility may detain the patient (4 hours for a community mental center, 48 hours for an emergency receiving facility, and 5 days for an evaluating facility). Within three days after discharge of the patient, the referring facility must transmit to the receiving facility a copy of the referring facility's examination report, individualized service plan, and such other necessary clinical information the referring facility may have regarding the patient, and the receiving facility must file a petition for involuntary outpatient treatment within five days after it receives the report, plan and other information. The report and the plan must be filed with the petition and the petition must include the address to which the patient was discharged. {O.C.G.A. §37-3-92; O.C.G.A. §37-7-92}.

The hearing to determine the need for involuntary treatment as an outpatient cannot be held unless the patient and the representatives have been given at least ten days notice. {O.C.G.A. §37-3-92(a) ; O.C.G.A. §37-7-92(a) }.

For factors determining whether a mentally ill person should receive inpatient or outpatient treatment, *see VII.B*.

E. Writ of Habeas Corpus

Petition for Writ

a. At any time and without notice, a person detained by a facility or a relative or friend on behalf of such person may petition for a writ of habeas corpus to question the cause and legality of detention and to request that the court issue a writ of re-lease. {O.C.G.A. §37-3-148(a) ; O.C.G.A. §37-7-148(a) }.

b. The return date of the writ must be within 20 days after the presentation of the petition for habeas corpus. {O.C.G.A. §9-14-7}.

Grant/Dismissal of Petition

c. In a petition for a writ of habeas corpus, if the court is satisfied that there is no cause for detention, or that the patient is being illegally detained, the court must issue a writ for release. {O.C.G.A. §37-3-148(a) ; O.C.G.A. §37-7-148(a) }.

d. If the court is satisfied that there is cause and the patient is legally detained, the court must dismiss the petition.

F. Protective Order

Petition for Protective Order

a. A patient or his representatives may file a petition alleging that the patient is being unjustly denied a right or privilege granted by O.C.G.A. §§37-3 an 37-7 or that a procedure authorized by O.C.G.A. §§37-3 and 37-7 is being abused. {O.C.G.A. §37-3-148(b) ; O.C.G.A. §37-7-148(b) }.

b. Upon the filing of such a petition, the court has the authority to conduct a judicial inquiry and to issue appropriate orders to correct any abuse of the provisions thereof. {O.C.G.A. §37-3-148(b) ; O.C.G.A. §37-7-148(b) }.

Grant/Dismissal of Petition

c. If, upon the filing of a petition for a protective order and after a judicial inquiry into the alleged abuses, the court is satisfied that the patient is being unjustly denied a right or a privilege provided for in O.C.G.A. §37-3, the court may issue the appropriate order to correct the abuses. {O.C.G.A. §37-3-148(b) ; O.C.G.A. §37-7-148(b) }.

d. If the court is satisfied that the patient is not being denied any right or privilege, the court must dismiss the petition.

G. Patient's Rights Generally

Patients retain all rights and privileges granted other persons or citizens. Notwithstanding any other provision of law to the contrary, no person who is receiving or has received services for mental illness may be deprived of any civil, political, personal, or property rights or be considered legally incompetent for any purpose without due process of law. {O.C.G.A. §37-3-140; O.C.G.A. §37-7-140}.

The individual dignity of the patient must be respected at all times and upon all occasions. {O.C.G.A. §37-3-160; O.C.G.A. §37-7-160}.

Every patient has a right to refuse medication except in cases where a physician determines that refusal would be unsafe to the patient or others. {O.C.G.A. §37-3-163(b); O.C.G.A. §37-7-163(b) }.

The patient has the right to appear and testify in court as free from any side effects or adverse effects of medication as reasonably possible. {O.C.G.A. §37-3-163(b) ; O.C.G.A. §37-7-163(b) }.

The patient has the right to request a protective order. {O.C.G.A. §37-3-163(c) ; O.C.G.A. §37-7-163(c) }.

The patient has the right to petition for a writ of habeas corpus. {O.C.G.A. §37-3-148(a) ; O.C.G.A. §37-7-148(a) }.

Patient's Right to Communicate Freely

a. The patient has the right to communicate freely and privately with persons outside the facility and receive visitors inside the facility. {O.C.G.A. §37-3-142(a) ; O.C.G.A. §37-7-142(a) }.

b. The chief medical officer may apply to the court for a temporary order to restrict outgoing mail. If the court determines that probable cause exists that such mail is dangerous to the patient or others, the court may order such mail temporarily restricted, provided that a full and fair hearing must be held within five days after the issuance of such temporary order to determine whether or not an order of restriction for an extended time should issue. {O.C.G.A. §37-3-142(d) ; O.C.G.A. §37-7-142(d) }.

c. If an injunction against communication by a patient is issued by the court, the chief medical officer must restrict communications as provided by the order of the court. {O.C.G.A. §37-3-142(e) ; O.C.G.A. §37-7-142(e) }.

Patient's right to vote: See {O.C.G.A. §37-3-144; O.C.G.A. §37-7-144}.

Employment of patients outside facility: See {O.C.G.A. §37-3-145; O.C.G.A. §37-7-145}.

IV. Beginning Hearing

A. Case Called

See Chapter 1.

B. Motions and Stipulations

See Chapter 1.

C. Oath of Witnesses

See Chapter 1.

D. Sequestration of Witnesses

See Chapter 1.

E. Opening Statements

See Chapter 1.

V. Burden of Proof

A. Generally-*See Also Chapter 11*.

Where involuntary treatment is the issue, the burden of persuasion is upon the party seeking treatment of the patient. {O.C.G.A. §37-3-1(8) ; O.C.G.A. §37-7-1(12) }.

Carrying Burden of Persuasion

a. The party seeking treatment of the patient must carry his burden of persuasion by clear and convincing evidence. {O.C.G.A. §37-3-1(8) ; O.C.G.A. §37-7-1(12) }.

b. In all cases where the burden of persuasion is upon a party, he must carry the burden in order to prevail. Two witnesses of equal credibility swearing the opposite way does not carry the burden. {68 Ga. 87, 90 (1881)}.

B. Order of Proof

The order of proof is within the discretion of the court. However, generally, the party initiating the action must first offer all of his evidence. This applies to:

a. Petitioners for court-ordered evaluation,

b. Petitioners for involuntary treatment,

c. Petitioners for writ of habeas corpus, and

d. Petitioners for judicial inquiry into denial of privileges and rights.

e. The regular form of examination {*See Chapter 11*} may be altered at the discretion of the probate judge due to the nature of the hearing and because of the fact that the petitioner may be present without counsel.

After the petitioner has presented his case, the other party may then introduce evidence.

VI. Evidence/Objections

A. Evidence

Generally

a. The court must apply the rules of evidence applicable in all civil cases. {O.C.G.A. §37-3-1(8) ; O.C.G.A. §37-7-1(12) }. {*See Chapter 11*}.

Special Evidence Considerations - Insanity

b. Opinion testimony regarding the witness' sanity

i. A witness called to prove insanity may give his opinion after stating facts or giving reasons for such opinions. {6 Ga. 287 (1849)}.

ii. A non-expert witness is qualified to state an opinion as to sanity if a proper foundation is laid for his opinion. {157 Ga. App. 621, 622 (1981)}.

iii. An expert witness may testify as to his opinion of sanity either based on a hypothetical question or from his own observations. {*See Chapter 11*}

c. Any presumptions of continuing insanity after commitment of a patient to a mental institution are rebuttable rather than conclusive {223 Ga. 700, 701 (1967)}. If continued hospitalization is sought beyond the initial period, there is no presumption of continued insanity, since the burden is upon the petitioner by clear and convincing evidence. {O.C.G.A. §37-3-83(i) }.

The best evidence to prove mental illness is proof of facts and circumstances which demonstrate its existence.

B. Objections

See Chapter 1.

C. Closing Arguments

See Chapter 1.

VII. Drawing An Order

A. Generally

See Chapter 1.

B. Court-Ordered Evaluation

After a full and fair hearing or, if the hearing is waived, after a full review of the evidence, if the court is satisfied that immediate evaluation is necessary, the court must issue an order to any peace officer to deliver the patient to an evaluating facility. {O.C.G.A. §37-3-62(b) ; O.C.G.A. §37-7-62(b) }.

If the court is not satisfied that evaluation is necessary, the court must dismiss the petition.

C. Order For Involuntary Treatment

There must be an Individualized Service Plan ("I.S.P.") prepared pursuant to O.C.G.A. §§37-3-64(c) or 37-7-64(c) or §§37-3-91(b) or 37-7-91(b) . There may be an I.S.P. prepared by the patient's physician or psychologist, if he has employed one. {O.C.G.A. §37-3-81(a)(4) ; O.C.G.A. §37-7-81(a)(4) }.

a. See O.C.G.A. §§37-3-1(9) and 37-7-1(14) for the definition and contents of an I.S.P.

Discharge If Treatment Not Required – Mental Illness:

b. If the court determines that the patient is not a mentally ill (*see below*) person requiring involuntary treatment (*see below*), the court must enter an order that the patient be immediately discharged. {O.C.G.A. §37-3-81.1(a)(l) ; O.C.G.A. §37-7-81.1(a)(1) }.

c. Definitions

i. "Mentally ill" means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. {O.C.G.A. §37-3-1(11) }.

ii. "Treatment" means care, diagnostic and therapeutic services, including the administration of drugs, and any other service for the treatment of an individual. {O.C.G.A. §37-3-1(17) }.

Discharge If Treatment Not Required – Substance Abuse

d. If the court determines that the patient is not a substance abuser (*see below*) requiring involuntary treatment (*see below*), the court must enter an order that the patient be immediately discharged. {O.C.G.A. §37-7-81.1(a)(l) }.

i. "Substance Abuser" as used in this Chapter 9 means an alcoholic, drug dependent individual or drug abuser.

ii. "Alcoholic" means a person who habitually lacks self-control as to the use of alcoholic beverages or who uses alcoholic beverages to the extent

that his health is substantially impaired or endangered or his social or economic function is substantially disrupted. {O.C.G.A. §37-7-1(1) }.

iii. "Drug dependent individual" or "drug abuser" means a person who habitually lacks self-control as to the use of opium, heroin, morphine, or any derivative or synthetic drug of that group, barbiturates, other sedatives, tranquilizers, amphetamines, lysergic acid diethylamide or other hallucinogens, or any drug, dangerous drug, narcotic drug, marijuana, or controlled substance, as defined in Article 2 or Article 3 of Chapter 13 of Title 16 or Chapter 3 of Title 26; or a person who uses such drugs to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted; provided, however, that no person will be deemed a drug dependent individual or abuser solely by virtue of his taking, according to directions, any such drugs pursuant to a lawful prescription issued by a physician in the course of professional treatment for legitimate medical purposes. {O.C.G.A. §37-7-1(8) }.

iv. "Treatment" means the broad range of emergency, outpatient, intermediate, and inpatient services and care, including diagnostic evaluation, medical, psychiatric, psychological, and social service care, vocational rehabilitation, and career counseling, which may be extended to alcoholics, intoxicated persons, drug dependent individuals, and drug abusers. {O.C.G.A. §37-7-1(20) }.

Outpatient Treatment – Mental Illness

e. If the court finds that the patient is a mentally ill person requiring involuntary treatment, the court must further determine whether the patient is an "inpatient" or "outpatient". {O.C.G.A. §37-3-81.1(a) ; O.C.G.A. §37-7-81.1(a) }.

f. "Outpatient" means a person who is mentally ill (*see above*) and:

i. who is not an inpatient (*see below*) but who, based on the person's treatment history or current mental status, will require outpatient treatment in order to avoid predictably and imminently becoming an inpatient;

ii. who because of the person's current mental status, mental history, or nature of the person's mental illness is unable voluntarily to seek or comply with outpatient treatment (*see below*); and

iii. who is in need of involuntary treatment (*see above*) {O.C.G.A. §37-3-1(12.1) }.

g. "Outpatient treatment" means a program of treatment for mental illness outside a hospital facility setting which includes, without being limited to, medication and prescription monitoring, individual or group therapy, day or partial programming activities, case management services, and other services to alleviate or treat the patient's mental illness so as to maintain the patient's semi-independent functioning and to prevent the patient's becoming an inpatient. {O.C.G.A. §37-3-1(12.2) }.

h. After determining that the patient is an outpatient, the court must determine, based upon the I.S.P.,

i. Whether there is available outpatient treatment which meets the requirements of the I.S.P. {O.C.G.A. §37-3-81(a) ; O.C.G.A. §37-7-81(a) }; and

ii. Whether the patient will likely obtain that treatment so as to minimize the likelihood of the patient's becoming an inpatient. {O.C.G.A. §37-3-81.1(a)(2) ; O.C.G.A. §37-7-81.1(a)(2) }.

iii. If the patient meets these two requirements, the probate court may order outpatient treatment and conditional discharge. If the court determines that the patient is an outpatient but the above requirements are not met, the provisions of O.C.G.A. §§37-3-81.1(a)(3) or O.C.G.A. §37-7-81.1(a)(3) must be followed.

Outpatient Treatment – Substance Abuse:

i. If the court finds that the patient is a substance abuser requiring involuntary treatment, the court must further determine whether the patient is an "inpatient" or "outpatient". {O.C.G.A. §37-7-81.1(a) }.

i. "Outpatient" means a person who is an alcoholic, drug dependent individual, or drug abuser (*see above*) and:

ii. who is not an inpatient (*see below*) but who, based on the person's treatment history or recurrent lack of self-control regarding the use of alcoholic beverages, drugs, or any other substances listed in Code section 37-7-1(8) will require outpatient treatment in order to avoid predictably and imminently becoming an inpatient;

j. who because of the person's current mental state and recurrent lack of self-control regarding the use of alcoholic beverages, drugs, or any other substances listed in Code section 37-7-1(8) or nature of the person's alcoholic behavior or drug dependency or drug abuse is unable voluntarily to seek or comply with outpatient treatment (*see below*); and

k. who is in need of involuntary treatment {*see above*} {O.C.G.A. §37-7-1(15.1) }.

i. "Outpatient treatment" means a program of treatment for alcoholics, drug dependent individuals, or drug abusers outside a hospital facility setting which includes, without being limited to, medication and prescription monitoring, individual or group therapy, day or partial programming activities, case management services, and other services to alleviate or treat the patient's lack of self-control regarding the use of alcoholic beverages, drugs, or any other substances listed in Code section 37-7-1(8) so as to maintain the patient's semi-independent functioning and to prevent the patient's becoming an inpatient. {O.C.G.A. §37-7-1(15.2)}.

Inpatient Treatment – Mental Illness:

l. "Inpatient" means a person who is mentally ill and:

i. Who presents a substantial risk of imminent harm to that person or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to that person or other persons; or

ii. Who is so unable to care for that person's own physical health and safety as to create an imminently life-endangering crisis; and

iii. Who is in need of involuntary inpatient treatment. {O.C.G.A. §37-3-1(9.1)

}.

m. If the patient fails to meet the requirements of VII.C.4 and the court determines that the least restrictive alternative is hospitalization, then the patient is an inpatient.

n. If the court determines the mentally ill person to be an inpatient, then the court must order the patient to be transported as provided in O.C.G.A. §37-3-101 to a treatment facility where he must be admitted for care and treatment.

o. If the court finds, based upon the evidence, that the accomplishment of the treatment goals for the patient requires hospitalization for a limited period followed by available outpatient treatment (if there is such outpatient treatment which will meet the requirements of the patient's I.S.P. and the patient will likely obtain the treatment so as to minimize the likelihood of the patient's becoming an inpatient), the court may so order. {O.C.G.A. §37-3-81.1(a)(4) }.

Inpatient Treatment – Substance Abuse

p. "Inpatient" means a person who is a substance abuser and:

i. who presents a substantial risk of imminent harm to that person or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to that person or other persons; or

ii. who is incapacitated by alcoholic beverages, drugs, or any other substances listed in Code section 37-7-1(8) on a recurring basis; and

iii. who is in need of involuntary inpatient treatment. {O.C.G.A. §37-7-1(14.1) }.

q. If the patient fails to meet the requirements of 9.83C and the court determines that the least restrictive alternative is hospitalization, then the patient is an inpatient.

r. If the court determines the substance abuser to be an inpatient, then the court must order the patient to be transported as provided in O.C.G.A. §37-7-101 to a treatment facility where he must be admitted for care and treatment.

s. If the court finds, based upon the evidence, that the accomplishment of the treatment goals for the patient requires hospitalization for a limited period followed by available outpatient treatment (if there is such outpatient treatment which will meet the requirements of the patient's I.S.P. and the patient will likely obtain the treatment so as to minimize the likelihood of the patient's becoming an inpatient), the court may so order. {O.C.G.A. §37-7-81.1(a)(4) }

Length of Involuntary Treatment

t. The court may order inpatient treatment for any period not to exceed six months. {O.C.G.A. §37-3-81.1(c); O.C.G.A. §37-7-81.1(c) }. The court may also order the patient to obtain available outpatient treatment for any period not to exceed one year, but the total period of involuntary treatment, including inpatient treatment, may not exceed one year. {O.C.G.A. §37-3-93(a) ; O.C.G.A. §37-7-93(a) }.

D. Payment of Hearing Expenses

Patient Able to Pay

a. If the patient is able to pay the expenses of any hearing held under O.C.G.A. §§37-3 or 37-7, the judge should obtain, if possible, a form from the patient stating the patient will accept court costs.

Patient Unable to Pay

b. If the patient is unable to pay the expenses of any hearing held under O.C.G.A. §§37-3 or 37-7 (including attorney's fees), the county in which the patient is a resident will pay the expenses. {O.C.G.A. §37-3-122(a) ; O.C.G.A. §37-7-122(a) }.

c. In order for the county to pay the expenses connected with the hearing, the judge must execute an affidavit or include in the final order relating to the hearing that the assets of the patient, his estate, and any persons legally obligated to support the patient appear to be insufficient to defray such expenses. {O.C.G.A. §37-3-122(a) ; O.C.G.A. §37-7-122(a) }.

d. If the hearing is in a different county from the indigent patient's residence, the county holding the hearing may bill the other county for court costs. If the judge of the county being billed requests a copy of the affidavit or order, it should be sent to him.

VIII. Appeals

A. When Appeal Lies

The patient, his representatives, or his attorney may appeal any order of the probate court (including probate courts with enhanced jurisdiction) or hearing officer rendered in a proceeding under O.C.G.A. §§37-3 or 37-7 to the superior court of the county in which the proceeding was held. {O.C.G.A. §37-3-150; O.C.G.A. §37-7-150; 1986 Op. Att'y Gen. No. U86-18}.

a. It has been held that O.C.G.A. §37-3-150 (and, presumably O.C.G.A. §37-7-150) exclusively governs the right to appeal commitment decisions of a probate court and that only the patient or his agents have the right to appeal such decisions, and not the petitioner. { Ga. Mental Health Institute v Brady, 263 Ga. 591 (1993)}.

B. Patient's Right to Counsel On Appeal

The court must appoint counsel for the patient if the patient is unable to afford an attorney during any appeal. {O.C.G.A. §37-3-150; O.C.G.A. §37-7-150}.

C. Time For Entry of Appeals

See Chapter 1.

The appeal should be heard before the superior court sitting without a jury as soon as practical but not later than 30 days following the date on which the appeal is filed with the clerk of the superior court. {O.C.G.A. §37-3-150; O.C.G.A. §37-7-150}.

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I. General Provisions

A. Definitions

"Competent evidence" means evidence which is admissible.

"Cumulative evidence" means evidence which is additional to other evidence already obtained.

"Direct evidence" means evidence which immediately points to the question at issue.

"Indirect evidence" or "circumstantial evidence" means evidence which only tends to establish the issue by proof of various facts, sustaining by their consistency the hypothesis claimed.

"Preponderance of evidence" means that superior weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

"Presumptive evidence" means evidence which consists of inferences drawn by human experience from the connection of cause and effect and from observations of human conduct.

"Sufficient evidence" means evidence which is satisfactory for the purpose. Black's Law Dictionary, 4th Edition, Thomson West (2011).

B. Purpose and Applicability of Rules of Evidence

Purpose and construction of the rules of evidence.

a. The object of every trial in a civil matter is the discovery of the truth, and the rules of evidence are designed for that purpose. O.C.G.A. §24-1-1 (Effective January 1, 2013).

C. Applicability of The Rules of Evidence.

The rules of evidence shall apply in all trials by jury in any court in this state.

The rules of evidence shall apply generally to all nonjury trials and other fact-finding proceedings of any court in this state subject to the limitations set forth in subsections *(c) and (d) below*.

The rules of evidence, except those with respect to privileges, shall not apply in the following situations:

a. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Code Section 24-1-104;

b. Criminal proceedings before grand juries;

c. Proceedings for extradition or rendition;

d. Proceedings for revoking parole;

e. Proceedings for the issuance of warrants for arrest and search warrants except as provided by subsection (b) of Code Section 17-4-40;

f. Proceedings with respect to release on bond;

g. Dispositional hearings and custody hearings in juvenile court; or

h. Contempt proceedings in which the court, pursuant to subsection (a) of Code Section 15-1-4, may act summarily.

In criminal commitment or preliminary hearings in any court, the rules of evidence shall apply except that hearsay shall be admissible.

In in rem forfeiture proceedings, the rules of evidence shall apply except that hearsay shall be admissible in determining probable cause or reasonable cause.

In presentence hearings, the rules of evidence shall apply except that hearsay and character evidence shall be admissible.

In administrative hearings, the rules of evidence as applied in the trial of nonjury civil actions shall be followed, subject to special statutory rules or agency rules as authorized by law.

Except as modified by statute, the common law as expounded by Georgia courts shall continue to be applied to the admission and exclusion of evidence and to procedures at trial. O.C.G.A. §24-1-2 (Effective July 1, 2013).

D. Rulings on Evidence.

Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:

In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.

a. Once the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal.

b. The court shall accord the parties adequate opportunity to state grounds for objections and present offers of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer of proof in question and answer form.

c. Jury proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, including, but not limited to, making statements or offers of proof or asking questions in the hearing of the jury.

d. Nothing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the court. O.C.G.A. §24-1-104 Effective January 1, 2013).

E. Preliminary Questions.

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b) of this Code section. In making its determination, the court shall not be bound by the rules of evidence except those with respect to privileges. Preliminary questions shall be resolved by a preponderance of the evidence standard.

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be conducted out of the hearing of the jury when the interests of justice require or when an accused is a witness and requests a hearing outside the presence of the jury.

The accused shall not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the proceeding.

This Code section shall not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. O.C.G.A. §24-1-104 (Effective July 1, 2013).

F. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but which is not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. O.C.G.A. § 24-1-105 (Effective January 1, 2013).

G. Introduction of Remaining Portions of Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement. O.C.G.A. §24-1-106 (Effective January 1, 2013).

II. Proof

A. Burdens of Proof

In general, the petitioner has the burden of establishing a prima facie case, that is, to prove all of the essential elements necessary to show entitlement to the relief requested. O.C.G.A. §24-14-1 (Effective January 1, 2013).

a. However, there are certain proceedings in which a petitioner is required to prove the facts supporting the granting of the petition by clear and convincing evidence, e.g., adult guardianship proceedings and criminal proceedings.

b. Ordinarily, the petitioner is entitled to open and close the arguments. However, if the caveator has admitted the prima facie case or introduces no evidence, the caveator is entitled to open and conclude the arguments. Skelton v. Skelton, 251 Ga. 632 (1983).

B. Changing Burden of Proof.

What amount of evidence will change the onus or burden of proof shall be a question to be decided in each case by the sound discretion of the court. O.C.G.A. §24-14-2 (Effective January 1, 2013).

C. Amount of Mental Conviction; Preponderance of Evidence.

Moral and reasonable certainty is all that can be expected in legal investigation. Except as provided in Code Section 51-1-29.5 or Code Section 51-12-5.1, in all civil proceedings, a preponderance of evidence shall be considered sufficient to produce mental conviction. In criminal proceedings, a greater strength of mental conviction shall be held necessary to justify a verdict of guilty. O.C.G.A. §24-14-3 (Effective January 1, 2013).

D. Determination of Where Preponderance of Evidence Lies.

In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, the probability or improbability of their testimony, their interest or want of interest, and their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of the witnesses, though the preponderance is not necessarily with the greater number. O.C.G.A. §24-14-4 (Effective January 1, 2013).

E. Positive and Negative Testimony

The existence of a fact testified to by one positive witness is to be believed, rather than that such fact did not exist because many other witnesses who had the same opportunity of observation swear that they did not see or know of its having existed. This rule shall not apply when two parties have equal facilities for seeing or hearing a thing and one swears that it occurred while the other swears that it did not. O.C.G.A. §24-14-7 (Effective January 1, 2013).

F. Number of Witnesses Necessary

The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including prosecutions for treason, prosecutions for perjury, and felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason. O.C.G.A. §24-14-8 (Effective January 1, 2013).

G. Inference of Existence of Certain Facts.

In arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved. O.C.G.A. §24-14-9 (Effective January 1, 2013).

H. Presumptions of Law and Fact.

Presumptions are either of law or of fact. Presumptions of law are conclusions and inferences which the law draws from given facts. Presumptions of fact shall be exclusively questions for the jury, to be decided by the ordinary test of human experience. O.C.G.A. §24-14-20 (Effective January 1, 2013).

I. Prima Facie Presumptions.

Certain presumptions of law, such as the presumption of innocence, in some cases the presumption of guilt, the presumption of continuance of life for seven years, the presumption of a mental state once proved to exist, and all similar presumptions, may be rebutted by proof. O.C.G.A. §24-14-21 (Effective January 1, 2013).

J. Presumption Arising From Failure to Produce Evidence.

If a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded; but this presumption may be rebutted. O.C.G.A. §24-14-22 (Effective January 1, 2013).

K. Presumption Arising From Failure to Answer Letter.

In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving a letter from another to answer within a reasonable time. Otherwise, the party shall be presumed to admit the propriety of the acts mentioned in the letter of the party's correspondent and to adopt them. O.C.G.A. §24-14-23 (Effective January 1, 2013).

L. Presumption of Payment of Check.

As used in this Code section:

a. "Bank" means any person engaged in the business of banking and includes, in addition to a commercial bank, a savings and loan association, savings bank, or credit union.

b. "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank, even though it is described by another term, such as "share draft" or "negotiable order of withdrawal."

In any dispute concerning payment by means of a check, a duplicate of the check produced in accordance with OCGA §24-10-1003, together with the original bank statement that reflects payment of the check by the bank on which it was drawn or a duplicate thereof produced in the same manner, shall create a presumption that the check has been paid. O.C.G.A. §24-14-25 (Effective January 1, 2013).

M. Estoppels.

Conclusive presumptions of law are termed estoppels; averments to the contrary of such presumptions shall not be allowed. Estoppels are not generally favored.

a. The doctrine of collateral estoppel "precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies." Put another way, collateral estoppel attaches only when the same issue has been litigated and decided before. Waldroup v. Greene County Hosp. Auth., 265 Ga. 864 (1995). See also O.C.G.A. §9–12–40.

b. In a will contest, following a trial in probate court and a jury trial in superior court, an appeal was taken to the Supreme Court. The appellants argued that, on the issues of incapacity and undue influence, the doctrine of collateral of estoppel should have applied to preclude evidence on those issues in a will probate case, because the same issues had been tried in a guardianship case and in another suit between the appellants and the appellees over the validity of deeds executed by the decedent. The Supreme Court held that those issues in the will probate

case were not the same as in the prior to cases and affirmed the jury's decision that the will was invalid. The Court noted that a failure to prove something by a higher standard ("clear and convincing evidence") does not amount to a collateral estoppel in a subsequent case where the burden of proof is at a lower standard ("preponderance of the evidence"). Copelan et al. v. Copelan et al., 294 Ga. 840 (2014).

Estoppels include presumptions in favor of:

c. A record or judgment unreversed;

d. The proper conduct of courts and judicial officers acting within their legitimate spheres;

The proper conduct of other officers of the law after the lapse of time has rendered it dangerous to open the investigation of their acts in regard to mere formalities of the law;

Ancient deeds and other instruments more than 30 years old, when they come from proper custody and possession has been held in accordance with them;

Recitals in deeds, except payment of purchase money, as against a grantor, sui juris, acting in his or her own right, and his or her privies in estate, in blood, and in law;

A landlord's title as against his or her tenant in possession;

Solemn admissions made in judicio; or

Admissions upon which other parties have acted, either to their own injury or to the benefit of the persons making the admissions.

Estoppels also include all similar cases where it would be more unjust and productive of evil to hear the truth than to forbear investigation. O.C.G.A. §24-14-26 (Effective January 1, 2013).

N. Equitable Estoppel.

In order for an equitable estoppel to arise, there shall generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his or her injury. O.C.G.A. §24-14-29 (Effective January 1, 2013).

O. Proof of Identity.

Concordance of name alone is some evidence of identity. Residence, vocation, ownership of property, and other like facts may be proved. Reasonable certainty shall be all that is be required.

In civil proceedings, parties shall generally be relieved from the onus of proving identity, as it is a fact generally more easily disproved than established. O.C.G.A. §24-14-40 (Effective January 1, 2013).

P. Admissibility and Effect of Judgment as Evidence.

A judgment shall be admissible between any parties to show the fact of the rendition thereof; between parties and privies it is conclusive as to the matter directly in issue, until reversed or set aside. O.C.G.A. §24-14-42 (Effective January 1, 2013).

Q. American Experience Mortality Tables Admissible to Show Life Expectancy.

In all civil proceedings where the life expectancy of a person shall be an issue, the American Experience Mortality Tables shall be admissible as evidence of the life expectancy of such person. O.C.G.A. §24-14-44 (Effective January 1, 2013).

R. Written Findings Evidence of Facts Stated.

A written finding of presumed death made by officers or employees of the United States authorized to make such findings pursuant to any law of the United States or a duly certified copy of such finding shall be received in any court, office, or other place in this state as evidence of the death of the person therein found to be dead and the date, circumstances, and place of his or her disappearance.

An official written report, record, or duly certified copy thereof that a person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead or alive, made by an officer or employee of the United States authorized by any law of the United States to make the same shall be received in any court, office, or other place in this state as evidence that such person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead or alive, as the case may be.

For the purposes of subsections (a) and (b) of this Code section, any finding, report, record, or duly certified copy thereof purporting to have been signed by an officer or employee of the United States as is described in this Code section shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his or her authority. O.C.G.A. §24-14-47 (Effective January 1, 2013).

III. Judicial Notice.

A. Judicial Notice of Adjudicative Facts:

This Code section governs only judicial notice of adjudicative facts.

A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

a. Generally known within the territorial jurisdiction of the court; or

b. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

A court may take judicial notice, whether or not requested by a party.

A court shall take judicial notice if requested by a party and provided with the necessary information.

A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.

Judicial notice may be taken at any stage of the proceeding.

c. In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.

d. In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. O.C.G.A. §24-2-201 (Effective January 1, 2013).

B. Matters Judicially Recognized

The existence and territorial extent of states and their forms of government;

All symbols of nationality;

The laws of nations;

All laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority;

The laws of the United States and of the several states thereof as published by authority;

The uniform rules of the courts;

The administrative rules and regulations filed with the Secretary of State pursuant to Code Section 50-13-6;

The general customs of merchants;

The admiralty and maritime courts of the world and their seals;

The political makeup and history of this state and the federal government as well as the local divisions of this state;

The seals of the several departments of the government of the United States and of the several states of the union; and

All similar matters of legislative fact shall be judicially recognized without the introduction of proof. Judicial notice of adjudicative facts shall be governed by Code Section 24-2-201. O.C.G.A. §24-2-220 (Effective January 1, 2013).

C. Authentication of Ordinances and Resolutions of Counties and Municipal Corporations

When certified by a public officer, clerk, or keeper of county or municipal records in this state in a manner as specified for county records in Code Section 24-9-920 or in a manner as specified for municipal records in paragraph (1) or (2) of OCGA §24-9-902 and in the absence of contrary evidence, judicial notice may be taken of a certified copy of any ordinance or resolution included within a general codification required by paragraph (1) of subsection (b) of OCGA §36-80-19 as representing an ordinance or resolution duly approved by the governing authority and currently in force as presented. Any such certified copy shall be self-authenticating and shall be admissible as prima-facie proof of any such ordinance or resolution before any court or administrative body. O.C.G.A. §24-2-221 (Effective January 1, 2013).

a. Case law under current Title holds that the party wishing the court to take judicial notice must make a request for it.

b. This might be made in a pleading, when it relates to a matter being pled, or might be raised at trial, especially if the issue is first raised at trial. If a judge intends to take judicial notice of a fact, the judge must announce the intention and afford the parties an opportunity to show why it should not be taken. Graves v. State, 269 Ga. 772 (1998).

IV. Witnesses Generally

A. Rule of Competency

Except as otherwise provided in this chapter, every person is competent to be a witness. O.C.G.A. §24-6-601 (Effective January 1, 2013).

B. Personal Knowledge of Witness

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. The provisions of this Code section are subject to Code Section 24-7-703 and shall not apply to party admissions. O.C.G.A. §24-6-602 (Effective January 1, 2013).

C. Oath or Affirmation

Before testifying, every witness shall be required to declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

Notwithstanding the provisions of subsection (a) of this Code section, in all proceedings involving dependency as defined by OCGA §15-11-2 and in all criminal proceedings in which a child was a victim of or witness to any crime, the child shall be competent to testify, and the child's credibility shall be determined as provided in this chapter. O.C.G.A. §24-6-603 (Effective January 1, 2013).

D. Interpreters

Except as provided in Code Sections 24-6-656 and 24-6-657 or by the rules promulgated by the Supreme Court of Georgia pursuant to OCGA §15-1-14, an interpreter shall be subject to the provisions of OCGA §24-7-702. Interpreters shall be required to take an oath or affirmation to make a true translation. O.C.G.A. §24-6-604 (Effective January 1, 2013).

E. Judge as Witness

The judge presiding at the trial shall not testify in that trial as a witness. No objection need be made in order to preserve this issue. O.C.G.A. §24-6-605 (Effective January 1, 2013).

F. Juror as Witness

A member of the jury shall not testify as a witness before that jury in the trial of the case in which the juror is sitting. If a juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify by affidavit or otherwise nor shall a juror's statements be received in evidence as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the jury deliberations or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form. O.C.G.A. §24-6-606 (Effective January 1, 2013).

G. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness. O.C.G.A. §24-6-607 (Effective January 1, 2013).

H. Character and Conduct of Witness

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations:

The evidence may refer only to character for truthfulness or untruthfulness; and

Evidence of truthful character shall be admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

a. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's

bias toward a party may not be proved by extrinsic evidence. Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

b. Concerning the witness's character for truthfulness or untruthfulness; or

c. Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, shall not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness. O.C.G.A. §24-6-608 (Effective January 1, 2013).

I. Impeachment by Evidence of Conviction of Crime

General rule. For the purpose of attacking the character for truthfulness of a witness:

a. Evidence that a witness other than an accused has been convicted of a crime shall be admitted subject to the provisions of OCGA §24-4-403 if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused; or

b. Evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of such crime required proof or admission of an act of dishonesty or making a false statement.

Time limit. Evidence of a conviction under this Code section shall not be admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for such conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old, as calculated in this subsection, shall not be admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Effect of pardon, annulment, certificate of rehabilitation, or discharge from a first offender program. Evidence of a final adjudication of guilt and subsequent discharge under any first offender statute shall not be used to impeach any witness and evidence of a conviction shall not be admissible under this Code section if:

c. The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year; or

d. The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

A conviction based on a plea of nolo contendere shall not be admissible to impeach any witness under this Code section. Evidence of juvenile adjudications shall not generally be admissible under this Code section. The court may, however, in a criminal proceeding allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence of the accused.

Pendency of appeal. The pendency of an appeal shall not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal shall be admissible. O.C.G.A. §24-6-609 (Effective January 1, 2013).

J. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion shall not be admissible for the purpose of proving that by reason of the nature of the beliefs or opinions the witness's credibility is impaired or enhanced. O.C.G.A. §24-6-610 (Effective January 1, 2013).

K. Mode and Order of Interrogation and Presentation

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

a. Make the interrogation and presentation effective for the ascertainment of the truth;

b. Avoid needless consumption of time; and

c. Protect witnesses from harassment or undue embarrassment.

A witness may be cross-examined on any matter relevant to any issue in the proceeding. The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against the party. If several parties to the same proceeding have distinct interests, each party may exercise the right to cross-examination.

Leading questions shall not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions shall be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. O.C.G.A. §24-6-611 (Effective January 1, 2013).

L. Writing Used to Refresh Memory

> If a witness uses a writing to refresh his or her memory while testifying, an adverse party shall be entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness.

If a witness uses a writing to refresh his or her memory before testifying at trial and the court in its discretion determines it is necessary in the interests of justice, an adverse party shall be entitled to have the writing produced at the trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness. If the writing used is protected by the attorney-client privilege or as attorney work product under OCGA §9-11-26, use of the writing to refresh recollection prior to testifying shall not constitute a waiver of that privilege or protection. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions of such writing not so related, and order delivery of the remainder of such writing to the party entitled to such writing. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to an order under this Code section, the court shall make any order justice requires; provided, however, that in criminal proceedings, when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial. O.C.G.A. §24-6-612 (Effective January 1, 2013).

M. Prior Statement of Witness

> In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time; provided, however, upon request the same shall be shown or disclosed to opposing counsel.
>
> Except as provided in Code Section 24-8-806, extrinsic evidence of a prior inconsistent statement by a witness shall not be admissible unless the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require. This subsection shall not apply to admissions of a party-opponent as set forth in paragraph (2) of subsection (d) of Code Section 24-8-801.
>
> A prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility. A general attack on a witness's credibility with evidence offered under Code Section 24-6-608 or 24-6-609 shall not permit rehabilitation under this subsection. If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the prior consistent statement shall have been made before the alleged recent fabrication or improper influence or motive arose. O.C.G.A. §24-6-613 (Effective January 1, 2013).
>
> Prior consistent statements are generally inadmissible as being cumulative and repetitive. Parker v. State, 162 Ga. App. 271 (2012); Boyt v. State, 286 Ga. App. 460 (2007).

N. Calling and Interrogation of Witnesses by Court

The court may, on its own motion, call a court appointed expert, call a witness regarding the competency of any party, or call a child witness or, at the suggestion of a party, call such witnesses, and all parties shall be entitled to cross-examine such witnesses. In all other situations, the court may only call witnesses when there is an agreement of all of the parties for the court to call such witnesses and all parties shall be entitled to cross-examine such witnesses.

The court may interrogate witnesses whether called by itself pursuant to subsection (a) of this Code section or by a party.

Objections to the calling of witnesses by the court or to interrogation by the court may be made at the time or at the next available opportunity when the jury is not present. O.C.G.A. §24-6-614 (Effective January 1, 2013).

O. Exclusion of Witnesses

Except as otherwise provided in Code Section 24-6-616, at the request of a party the court shall order witnesses excluded so that each witness cannot hear the testimony of other witnesses, and it may make the order on its own motion. This Code section shall not authorize exclusion of:

a. A party who is a natural person;

b. An officer or employee of a party which is not a natural person designated as its representative by its attorney; or

c. A person whose presence is shown by a party to be essential to the presentation of the party's cause. O.C.G.A. §24-6-615 (Effective January 1, 2013).

V. Expert Witnesses

A. Layperson Testimony; Market Value Testimony

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences shall be limited to those opinions or inferences which are:

a. Rationally based on the perception of the witness;

b. Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and

c. Not based on scientific, technical, or other specialized knowledge within the scope of Code Section 24-7-702.

Direct testimony as to market value is in the nature of opinion evidence. A witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned opinion. O.C.G.A. §24-7-701 (Effective January 1, 2013).

B. Expert Testimony; Qualifications as Expert.

Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all civil proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

a. The testimony is based upon sufficient facts or data;

b. The testimony is the product of reliable principles and methods; and

c. The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

d. In Scapa Dryer Fabrics, Inc. v. Knight et al., 299 Ga. 286 (July 5, 2016), the Supreme Court provides an extensive review of the trial court's obligation as a "gate Keeper" to ensure the relevance and reliability of expert testimony. As the `gate keeper`, the trial court must assess three aspects of the proposed expert testimony; (1) the qualifications of the expert, that is, the trial court must examine the credentials of the expert to ensure the expert is "qualified to testify competently regarding the matters he intends to address"; (2) the reliability of the testimony, that is, whether the conclusions of the expert "[are] based upon sufficient facts or data," and (3) the relevance of the testimony, the trial court must consider the "fit" between the expert testimony and the issues in dispute. To be properly admissible, expert testimony must "assist the trier of fact…to understand the evidence or to determine a fact in issue".

Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

e. Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

f. In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

i. The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

ii. The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient

frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

iii. Except as provided in subparagraph (D) of this paragraph:

1.) Is a member of the same profession;

2.) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

3.) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

iv. Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.

An affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ; General Electric Co. v. Joiner, 522 U.S. 136 (1997) ; Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999) ; and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34 or in administrative proceedings conducted pursuant to Chapter 13 of Title 50. O.C.G.A. §24-7-702 (Effective January 1, 2013).

C. Bases of Opinion Testimony by Experts.

The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. O.C.G.A. §24-7-703 (Effective January 1, 2013).

D. Disclosure of Underlying Facts or Data to Expert Opinion.

An expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. An expert may in any event be required to disclose the underlying facts or data on cross-examination. O.C.G.A. §24-7-705 (Effective January 1, 2013).

E. Court Appointed Experts.

Except as provided in Chapter 7 of Title 9 or Code Section 17-7-130.1, 17-10-66, 29-4-11, 29-5-11, 31-14-3, 31-20-3, 44-6-166.1, 44-6-184, or 44-6-187, the following procedures shall govern the appointment, compensation, and presentation of testimony of court appointed experts:

a. The court on its own motion or on the motion of any party may enter an order to show cause why any expert witness should not be appointed and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. Each appointed expert witness shall be informed of his or her duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. Each appointed expert witness shall advise the parties of his or her findings, if any. Except as provided in Article 3 of Chapter 12 or Article 6 of Chapter 13 of this title, such witness's deposition may be taken by any party. Such witness may be called to testify by the court or any party. Each expert witness shall be subject to cross-examination by each party, including a party calling the witness;

b. Appointed expert witnesses shall be entitled to reasonable compensation in whatever sum the court allows. The compensation fixed shall be payable from funds which may be provided by law in criminal proceedings and civil proceedings involving just compensation for the taking of property. In other civil proceedings, the compensation shall be paid by the parties in such proportion and at such time as the court directs and thereafter charged in like manner as other costs;

c. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness; and

d. Nothing in this Code section shall limit a party in calling expert witnesses of the party's own selection. O.C.G.A. §24-7-706 (Effective January 1, 2013).

VI. Privileges

A. Confidential Communications Excluded On Grounds of Public Policy.

There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:

a. Communications between husband and wife;

b. Communications between attorney and client;

c. Communications among grand jurors;

d. Secrets of state;

e. Communications between psychiatrist and patient;

f. Communications between licensed psychologist and patient as provided in OCGA §43-39-16;

g. Communications between a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor and patient;

h. Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this subsection; and

i. Communications between accountant and client as provided by OCGA §43-3-29.

As used in this Code section, the term:

j. "Psychotherapy" means the employment of psychotherapeutic techniques.

k. "Psychotherapeutic techniques" shall have the same meaning as provided in OCGA §43-10A-3. O.C.G.A. §24-5-501 (Effective January 1, 2013).

B. Communications to Ministers, Priests and Rabbis.

Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or any Christian or Jewish minister or similar functionary, by whatever name called, shall be deemed privileged. No such minister, priest, rabbi, or similar functionary shall disclose any communications made to him or her by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, rabbi, or similar functionary be competent or compellable to testify with reference to any such communication in any court. O.C.G.A. §24-5-502 (Effective January 1, 2013).

C. Privilege of Party or Witness.

No party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate such party or witness or which shall tend to bring infamy, disgrace, or public contempt upon such party or witness or any member of such party or witness's family.

Except in proceedings in which a judgment creditor or judgment creditor's successor in interest seeks post judgment discovery involving a judgment debtor pursuant to O.C.G.A. §9-11-69, no party or witness shall be required to testify as to any matter which shall tend to work a forfeiture of his or her estate.

No official persons shall be called on to disclose any state matters of which the policy of the state and the interest of the community require concealment. O.C.G.A. §24-5-505 (Effective January 1, 2013).

D. Qualified Privileges for Parties Engaged in News Gathering Or Dissemination.

Any person, company, or other entity engaged in the gathering and dissemination of news for the public through any newspaper, book, magazine, radio or television broadcast, or electronic means shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

a. Is material and relevant;

b. Cannot be reasonably obtained by alternative means; and

c. Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item. O.C.G.A. §24-5-508 (Effective January 1, 2013).

E. Definitions; Privilege For Agent.

As used in this Code section, the term:

a. "Agent" means a current or former employee or volunteer of a program who has successfully completed a minimum of 20 hours of training in family violence and sexual assault intervention and prevention at a Criminal Justice Coordinating Council certified victim assistance program.

b. "Family violence" shall have the same meaning as provided in OCGA §19-13-1.

c. "Family violence shelter" means a program whose primary purpose is to provide services to family violence victims and their families that is not under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency.

d. "Family violence victim" means a person who consults a family violence shelter for the purpose of securing advice or other services concerning an act of family violence, an alleged act of family violence, or an attempted act of family violence.

e. "Government agency" means any agency of the executive, legislative, or

judicial branch of government or political subdivision or authority thereof of this state, any other state, the District of Columbia, the United States and its territories and possessions, or any foreign government or international governmental or quasi-governmental agency recognized by the United States or by any of the several states.

f. "Negative effect of the disclosure of the evidence on the victim" shall include the impact of the disclosure on the relationship between the victim and the agent and the delivery and accessibility of services.

g. "Program" means a family violence shelter or rape crisis center.

h. "Rape crisis center" means a program whose primary purpose is to provide services to sexual assault victims and their families that is not under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency.

i. "Services" means any services provided to a victim by a program including but not limited to crisis hot lines, safe homes and shelters, assessment and intake, counseling, services for children who are victims of family violence or sexual assault, support in medical, administrative, and judicial systems, transportation, relocation, and crisis intervention. Such term shall not include mandatory reporting as required by OCGA §19-7-5 or 30-5-4.

j. "Sexual assault" shall have the same meaning as provided in OCGA §17-5-70.

k. "Sexual assault victim" means a person who consults a rape crisis center for the purpose of securing advice or other services concerning a sexual assault, an alleged sexual assault, or an attempted sexual assault.

l. "Victim" means a family violence victim or sexual assault victim.

No agent of a program shall be compelled to disclose any evidence in a judicial proceeding that the agent acquired while providing services to a victim, provided that such evidence was necessary to enable the agent to render services, unless the privilege has been waived by the victim or, upon motion by a party, the court finds by a preponderance of the evidence at a pretrial hearing or hearing outside the presence of the jury that:

m. In a civil proceeding:
    i. The evidence sought is material and relevant to factual issues to be determined;
    ii. The evidence is not sought solely for the purpose of referring to the victim's character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim's prior inconsistent statements;
    iii. The evidence sought is not available or already obtained by the party seeking disclosure; and
    iv. The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim; or

n. In a criminal proceeding:
    i. The evidence sought is material and relevant to the issue of guilt, degree of guilt, or sentencing for the offense charged or a lesser included

offense;

ii. The evidence is not sought solely for the purpose of referring to the victim's character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim's prior inconsistent statements;

iii. The evidence sought is not available or already obtained by the party seeking disclosure; and

iv. The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim.

If the court finds that the evidence sought may be subject to disclosure pursuant to subsection (b) of this Code section, the court shall order that such evidence be produced for the court under seal, shall examine the evidence in camera, and may allow disclosure of those portions of the evidence that the court finds are subject to disclosure under this Code section.

The privilege afforded under this Code section shall terminate upon the death of the victim.(e) The privilege granted by this Code section shall not apply if the agent was a witness or party to the family violence or sexual assault or other crime that occurred in the agent's presence.

The mere presence of a third person during communications between an agent and a victim shall not void the privilege granted by this Code section, provided that the communication occurred in a setting when or where the victim had a reasonable expectation of privacy.

If the victim is or has been judicially determined to be incompetent, the victim's guardian may waive the victim's privilege.

In criminal proceedings, if either party intends to compel evidence based on this Code section, the party shall file and serve notice of his or her intention on the opposing party at least ten days prior to trial, or as otherwise directed by the court. The court shall hold a pretrial hearing in accordance with subsection (b) of this Code section and determine the issue prior to trial. O.C.G.A. §24-5-509 (Effective January 1, 2013).

VII. Parol Evidence

A. Admissibility of Parol Contemporaneous Evidence.

Parol contemporaneous evidence shall be generally inadmissible to contradict or vary the terms of a valid written instrument. O.C.G.A. §24-3-1 (Effective January 1, 2013).

B. Admissibility Where Part Only of Stipulations Is In Writing.

If the writing does not purport to contain all the stipulations of the contract, parol evidence shall be admissible to prove other portions thereof not inconsistent with the writing; so collateral undertakings between parties of the same part among themselves would not properly be looked for in the writing. O.C.G.A. §24-3-2 (Effective January 1, 2013).

C. Explanation of Ambiguities

All contemporaneous writings shall be admissible to explain each other.

Parol evidence shall be admissible to explain all ambiguities, both latent and patent. O.C.G.A. §24-3-3 (Effective January 1, 2013).

D. Surrounding Circumstances..

The surrounding circumstances are always proper subjects of proof to aid in the construction of contracts. O.C.G.A. §24-3-4 (Effective January 1, 2013).

E. Usage

Evidence of known and established usage shall be admissible to aid in the construction of contracts as well as to annex incidents. O.C.G.A. §24-3-5 (Effective January 1, 2013).

F. Parol Evidence

Parol evidence shall be admissible to rebut an equity, to discharge an entire contract, to prove a new and distinct subsequent agreement, to enlarge the time of performance, or to change the place of performance. O.C.G.A. §24-3-6 (Effective January 1, 2013).

G. Mistake In Deed Or Contract In Writing.

Parol evidence is admissible to prove a mistake in a deed or any other contract required by law to be in writing. O.C.G.A. §24-3-7 (Effective January 1, 2013).

H. Showing Invalidity of Writing.

Parol evidence shall be admissible to show that a writing either was originally void or subsequently became so. O.C.G.A. §24-3-8 (Effective January 1, 2013).

I. Denial Or Explanation of Receipts For Money.

Receipts for money are always only prima-facie evidence of payment and may be denied or explained by parol evidence. O.C.G.A. §24-3-9 (Effective January 1, 2013).

J. Blank Endorsements, Explanation Of.

Blank endorsements of negotiable paper may always be explained between the parties themselves or those taking with notice of dishonor or of the actual facts of such endorsements. O.C.G.A. §24-3-10 (Effective January 1, 2013).

VIII. Hearsay

A. Definitions.

[NOTE: Hearsay has always proved problematic to courts and attorneys. Prof. Milich's article states "Definition of Hearsay: Georgia's current definition of hearsay and the federal definition (adopted by the new rules) serve much the same function. The primary problem with hearsay is the inability to cross examine the hearsay declarant, to raise questions that could help the trier of fact determine if the declarant was lying or mistaken when the statement was made. If the hearsay declarant is on the stand and available for cross-examination, these problems are not present.]

In Chapter 8, the following terms are defined:

"Statement" means:

a. An oral or written assertion; or

b. Nonverbal conduct of a person, if it is intended by the person as an assertion.

"Declarant" means a person who makes a statement.

"Hearsay" means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

"Hearsay" shall be subject to the following exclusions and conditions:

c. Prior statement by witness.

   i. An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement under Code Section 24-6-613 or is otherwise admissible under this chapter.

   ii. If a hearsay statement is admitted and the declarant does not testify at the trial or hearing, other out-of-court statements of the declarant shall be admissible for the limited use of impeaching or rehabilitating the credibility of the declarant, and not as substantive evidence, if the other statements qualify as prior inconsistent statements or prior consistent statements under Code Section 24-6-613.

   iii. A statement shall not be hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person; and

d. Admissions by party-opponent.

   i. Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is:

1.) The party's own statement, in either an individual or representative capacity;

2.) A statement of which the party has manifested an adoption or belief in its truth;

3.) A statement by a person authorized by the party to make a statement concerning the subject;

4.) A statement by the party's agent or employee, but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

5.) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to make a statement admissible under this subparagraph.

ii. The contents of the statement shall be considered but shall not alone be sufficient to establish the declarant's authority under subparagraph (C) of this paragraph, the agency or employment relationship and scope thereof under subparagraph (D) of this paragraph, or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subparagraph (E) of this paragraph.

"Public office" means:

e. Every state department, agency, board, bureau, commission, division, public corporation, and authority;

f. Every county, municipal corporation, school district, or other political subdivision of this state;

g. Every department, agency, board, bureau, commission, authority, or similar body of each such county, municipal corporation, or other political subdivision of this state; and

h. Every city, county, regional, or other authority established pursuant to the laws of this state.

"Public official" means an elected or appointed official.

"Public record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form and created in the course of the operation of a public office. O.C.G.A. §24-8-801 (Effective January 1, 2013).

B. Hearsay Rule.

Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible. O.C.G.A. §24-8-802 (Effective January 1, 2013).

C. Hearsay Exceptions, Availability of Declarant Immaterial.

As with the old hearsay rule, there are exceptions under the new rule as well. There are now 23 defined exceptions.

The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness,

a. Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter;

b. Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

c. Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless such statements relate to the execution, revocation, identification, or terms of the declarant's will and not including a statement of belief as to the intent of another person;

d. Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

e. Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but shall not itself be received as an exhibit unless offered by an adverse party;

f. Records of regularly conducted activity. Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification. The term "business" as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph;

g. Absence of entry in records kept in accordance with paragraph (6) of this Code section. Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) of this Code section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

h. Public records and reports. Except as otherwise provided by law, public records, reports, statements, or data compilations, in any form, of public offices, setting forth:

i. The activities of the public office;

ii. Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, against the accused in criminal proceedings, matters observed by police officers and other law enforcement personnel in connection with an investigation; or

iii. In civil proceedings and against the state in criminal proceedings, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;

i. Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

j. Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office, evidence in the form of a certification in accordance with Code Section 24-9-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry;

k. Records of religious organizations. Statements of birth, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization;

l. Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter;

m. Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like;

n. Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable law authorizes the recording of documents of that kind in such office;

o. Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document;

p. Statements in ancient documents. Statements in a document in existence 20 years or more the authenticity of which is established;

q. Market reports and commercial publications. Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in the witness's particular occupation;

r. Learned treatises. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;

s. Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage or among a person's associates or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history; (20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community or state or nation in which such lands are located;

t. Reputation as to character. Reputation of a person's character among associates or in the community;

u. Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but shall not affect admissibility; or

v. Judgment as to personal, family, or general history or boundaries. Judgments as proof of matters of personal, family, or general history or boundaries essential to the judgment, if the same would be provable by evidence of reputation. O.C.G.A. §24-8-803 (Effective January 1, 2013).

D. Hearsay Rule Exceptions; Declarant Unavailable.

As used in this Code section, the term "unavailable as a witness" includes situations in which the declarant:

a. Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

b. Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

c. Testifies to a lack of memory of the subject matter of the declarant's statement;

d. Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

e. Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant's attendance or testimony, by process or other reasonable means.

i. A declarant shall not be deemed unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness:

f. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. If deposition testimony is admissible under either the rules stated in Code Section 9-11-32 or this Code section, it shall be admissible at trial in accordance with the rules under which it was offered;

g. In a prosecution for homicide or in a civil proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death;

h. A statement against interest. A statement against interest is a statement:

i. Which a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate a claim by the declarant against another or to expose the declarant to civil or criminal liability; and

ii. Supported by corroborating circumstances that clearly indicate the trustworthiness of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability;

i. A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated or a statement concerning the foregoing matters and death also of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; or

j. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. O.C.G.A. §24-8-804 (Effective January 1, 2013).

E. Hearsay within Hearsay.

Hearsay included within hearsay shall not be excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. O.C.G.A. §24-8-805 (Effective January 1, 2013).

F. Attacking and Supporting Credibility of a Declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, shall not be subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party shall be entitled to examine the declarant on the statement as if under cross-examination. O.C.G.A. §24-8-806 (Effective January 1, 2013).

G. Residual Exception. .

A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:

a. The statement is offered as evidence of a material fact;

b. The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

c. The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. O.C.G.A. §24-8-807 (Effective January 1, 2013).

H. Statements Made by Child Describing Acts of Sexual or Physical Abuse.

A statement made by a child younger than 16 years of age describing any act of sexual contact or physical abuse performed with or on such child by another or with or on another in the presence of such child shall be admissible in evidence by the testimony of the person to whom made if the proponent of such statement provides notice to the adverse party prior to trial of the intention to use such out-of-court statement and such child testifies at the trial, unless the adverse party forfeits or waives such child's testimony as provided in this title, and, at the time of the testimony regarding the out-of-court statements, the person to whom the child made such statement is subject to cross-examination regarding the out-of-court statements. O.C.G.A. §24-8-820 (Effective January 1, 2013).

I. Admissions In Pleadings.

Without offering the same in evidence, either party may avail himself or herself of allegations or admissions made in the pleadings of the other. O.C.G.A. §24-8-821 (Effective January 1, 2013).

J. Entire Conversation Admissible When Admission Given In Evidence.

When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence. O.C.G.A. §24-8-822 (Effective January 1, 2013).

K. Medical Reports.

Upon the trial of any civil proceeding involving injury or disease, any medical report in narrative form which has been signed and dated by an examining or treating licensed physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a witness; provided, however, that such report and notice of intention to introduce such report shall first be provided to the adverse party at least 60 days prior to trial. A statement of the qualifications of the person signing such report may be included as part of the basis for providing the information contained therein, and the opinion of the person signing the report with regard to the etiology of the injury or disease may be included as part of the diagnosis. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within 15 days of being provided with the report. Further, any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony. The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.

The medical narrative shall be presented to the jury as depositions are presented to the jury and shall not go out with the jury as documentary evidence. O.C.G.A. §24-8-826 (Effective January 1, 2013).

IX. Relevancy.

A. "Relevant Evidence" Defined. .

As used in this chapter, the term "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. O.C.G.A. §24-4-401 (Effective January 1, 2013).

B. Relevant Evidence Generally Admissible; Irrelevant Evidence Not Admissible.

All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible. O.C.G.A. §24-4-402 (Effective January 1, 2013).

Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time.

a. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. O.C.G.A. §24-4-403 (Effective January 1, 2013).

C. Methods of Proving Character.

In all proceedings in which evidence of character or a trait of character of a person is admissible, proof shall be made by testimony as to reputation or by testimony in the form of an opinion.

In proceedings in which character or a trait of character of a person is an essential element of a charge, claim, or defense or when an accused testifies to his or her own character, proof may also be made of specific instances of that person's conduct. The character of the accused, including specific instances of the accused's conduct, shall also be admissible in a presentencing hearing subject to the provisions of O.C.G.A. §17-10-2.

On cross-examination, inquiry shall be allowable into relevant specific instances of conduct. O.C.G.A. §24-4-405 (Effective January 1, 2013).

D. Habit; Routine Practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with such habit or routine practice. O.C.G.A. §24-4-406 (Effective January 1, 2013).

E. Compromises and Offers to Compromise.

Except as provided in OCGA §9-11-68, evidence of:

a. Furnishing, offering, or promising to furnish; or

b. Accepting, offering, or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution. O.C.G.A. §24-4-408 (Effective January 1, 2013).

X. Contents of Writings, Recordings, and

A. Definitions

"Writing" or "recording" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, magnetic impulse, or mechanical or electronic recording or other form of data compilation.

"Photograph" includes still photographs, X-ray films, video recordings, and motion pictures.

"Original" means the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

"Duplicate" means a counterpart produced by the same impression as the original or from the same matrix or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, chemical reproduction, or other equivalent techniques which accurately reproduce the original.

"Public record" shall have the same meaning as set forth in Code Section 24-8-801. O.C.G.A. §24-10-1001 (Effective January 1, 2013).

B. Requirement of Original (The Rule).

To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required. O.C.G.A. §24-10-1002 (Effective January 1, 2013).

C. Admissibility of Duplicates. .

a. A genuine question is raised as to the authenticity of the original; or

b. A circumstance exists where it would be unfair to admit the duplicate in lieu of the original. O.C.G.A. §24-10-1003 (Effective January 1, 2013).

D. Best Evidence Rule.

The original shall not be required and other evidence of the contents of a writing, recording, or photograph shall be admissible if:

a. All originals are lost or have been destroyed, unless the proponent lost or

destroyed them in bad faith;

b. No original can be obtained by any available judicial process or procedure;

c. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

The writing, recording, or photograph is not closely related to a controlling issue. O.C.G.A. §24-10-1004 (Effective January 1, 2013).

E. Public Records

The contents of a public record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by duplicate, certified as correct in accordance with Code Section 24-9-902 or Code Section 24-9-920 or testified to be correct by a witness who has compared it with the original. If a duplicate which complies with this Code section cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. O.C.G.A. §24-10-1005 (Effective January 1, 2013).

F. Summaries

The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court. O.C.G.A. §24-10-1006 (Effective January 1, 2013).

G. Testimony or Written Admission of Party.

The contents of writings, recordings, or photographs may be proved by the

[NOTE: In non-Article 6 Probate Courts, the judge is the "trier of facts."]

testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original. O.C.G.A. §24-10-1007 (Effective January 1, 2013).

H. Functions of Court and Jury.

When the admissibility of other evidence of the contents of writings, recordings, or photographs under the rules of evidence depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Code Section 24-1-104; provided, however, that when an issue is raised as to:

a. Whether the asserted writing, recording, or photograph ever existed;

b. Whether another writing, recording, or photograph produced at the trial is the original; or

c. Whether other evidence of the contents correctly reflects the content the issue is for the trier of fact to determine as in the case of other issues of fact. O.C.G.A. §24-10-1008 (Effective January 1, 2013).

XI. Authentication and Identification

A. Requirement of Authentication or Identification.

The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:

a. Testimony of a witness with knowledge that a matter is what it is claimed to be;

b. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation;

Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated. Such specimens shall be furnished to the opposite party no later than ten days prior to trial;

Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker;

Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone service provider to a particular person or business, if:

c. In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

d. In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone;

Evidence that a document authorized by law to be recorded or filed and in fact recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept;

Evidence that a document or data compilation, in any form:

e. Is in such condition as to create no suspicion concerning its authenticity;

f. Was in a place where it, if authentic, would likely be; and

g. Has been in existence 20 years or more at the time it is offered;

Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result; or

Any method of authentication or identification provided by law. O.C.G.A. §24-9-901 (Effective January 1, 2013).

B. Self-Authentication. .

Extrinsic evidence of authenticity as a condition precedent to admissibility shall not be required with respect to the following:

a. A document bearing a seal purporting to be that of the United States or of any state, district, commonwealth, territory, or insular possession thereof or the Panama Canal Zone or the Trust Territory of the Pacific Islands or of a political subdivision, department, officer, or agency thereof or of a municipal corporation of this state and bearing a signature purporting to be an attestation or execution;

b. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) of this Code section having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine;

c. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make such execution or attestation and accompanied by a final certification as to the genuineness of the signature, official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to such execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to such execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that such documents be treated as presumptively authentic without final certification or permit such documents to be evidenced by an attested summary with or without final certification;

d. A duplicate of an official record or report or entry therein or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with paragraph (1), (2), or (3) of this Code section or complying with any law of the United States or of this state, including Code Section 24-9-920;

e. Books, pamphlets, or other publications purporting to be issued by a public office;

f. Printed materials purporting to be newspapers or periodicals;

g. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin;

h. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments;

i. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law;

j. Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic;

k. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration of its custodian or other qualified person certifying that the record:

i. Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters;

ii. Was kept in the course of the regularly conducted activity; and

iii. Was made by the regularly conducted activity as a regular practice.

l. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration; or

m. In a civil proceeding, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

i. Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

ii. Was kept in the course of the regularly conducted activity; and

iii. Was made by the regularly conducted activity as a regular practice.

n. The declaration shall be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration. O.C.G.A. §24-9-902 (Effective January 1, 2013).

C. Subscribing Witness's Testimony.

The testimony of a subscribing witness shall not be necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. O.C.G.A. §24-9-903 (Effective January 1, 2013).

D. Definitions.

As used in this article, the term:

a. "Public office" shall have the same meaning as set forth in O.C.G.A. §24-8-801.

b. “Public officer" means any person appointed or elected to be the head of any entity included in paragraph (1) of Code Section 24-9-902.

c. "Telephone service provider" shall have the same meaning as "voice service provider" as set forth in O.C.G.A. §46-5-231. O.C.G.A. §24-9-904 (Effective January 1, 2013).

E. Documentary Evidence.

Exemplifications

a. The certificate or attestation of any public officer either of this state or any county thereof or any clerk or keeper of county, consolidated government, or municipal records in this state shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper or file, or other matter or thing in such public officer's respective office, or pertaining thereto, to admit the same in evidence. O.C.G.A. §24-9-920 (Effective January 1, 2013).

F. Competence to Identify Medical Bills.

Upon the trial of any civil proceeding involving injury or disease, the patient or the member of his or her family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from:

a. A hospital;

b. An ambulance service;

c. A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or

d. A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist.

Such items of evidence need not be identified by the one who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary. However, nothing in this Code section shall be construed to limit the right of a thorough and sifting cross-examination as to such items of evidence. O.C.G.A. §24-9-920 (Effective January 1, 2013).

G. Full Faith and Credit to the Laws of Other States

The acts of the legislature of any other state, territory, or possession of the United States, the records and judicial proceedings of any court of any such state, territory, or possession, and the nonjudicial records or books kept in the public offices in any such state, territory, or possession, if properly authenticated, shall have the same full faith and credit in every court within this state as they have by law or usage in the courts of such state, territory, or possession from which they are taken. O.C.G.A. §24-9-922 (Effective January 1, 2013).

H. Unavailability of Witness; Admissibility of Photographs or Other Recordings.

As used in this Code section, the term "unavailability of a witness" includes situations in which the authenticating witness:

a. Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the authentication;

b. Persists in refusing to testify concerning the subject matter of the authentication despite an order of the court to do so;

c. Testifies to a lack of memory of the subject matter of the authentication;

d. Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

e. Is absent from the hearing and the proponent of the authentication has been unable to procure the attendance of the authenticating witness by process or other reasonable means.

f. An authenticating witness shall not be deemed unavailable as a witness if his or her exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of an authentication for the purpose of preventing the witness from attending or testifying.

Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.

Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings produced at a time when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator shall be admissible in evidence when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered, provided that, prior to the admission of such evidence, the date and time of such photograph, motion picture, or video recording shall be contained on such evidence, and such date and time shall be shown to have been made contemporaneously with the events depicted in such photograph, motion picture, or video recording.

This Code section shall not be the exclusive method of introduction into evidence of photographs, motion pictures, video recordings, and audio recordings but shall be supplementary to any other law and lawful methods existing in this state. O.C.G.A. §29-9-923 (Effective January 1, 2013).

I. Copies of Records of Dept. of Public Safety or in Other States. .

Any court may receive and use as evidence in any proceeding information otherwise admissible from the records of the Department of Public Safety or the Department of Driver Services obtained from any terminal lawfully connected to the Georgia Crime Information Center without the need for additional certification of such records.

Any court may receive and use as evidence for the purpose of imposing a sentence in any criminal proceeding information otherwise admissible from the records of the Department of Driver Services obtained from a request made in accordance with a contract with the Georgia Technology Authority for immediate on-line electronic furnishing of information. O.C.G.A. §29-9-924 (Effective January 1, 2013).

XII. Establishment of Lost Records

A. Petition is Filed in Superior Court

See O.C.G.A. §24-11-1, et seq. (Effective January 1, 2013).

XIII. Medical and Other Confidential Information

A. Physicians and Pharmacists.

No physician licensed under Chapter 34 of Title 43 and no hospital or health care facility, including those operated by an agency or bureau of this state or other governmental unit, shall be required to release any medical information concerning a patient except to the Department of Public Health, its divisions, agents, or successors when required in the administration of public health programs pursuant to O.C.G.A. §31-12-2 and where authorized or required by law, statute, or lawful regulation; or on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or on appropriate court order or subpoena; provided, however, that any physician, hospital, or health care facility releasing information under written authorization or other waiver by the patient, or by his or her parents or guardian ad litem in the case of a minor, or pursuant to law, statute, or lawful regulation, or under court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding. This Code section shall not apply to psychiatrists or to hospitals in which the patient is being or has been treated solely for mental illness.

No pharmacist licensed under Chapter 4 of Title 26 shall be required to release any medical information concerning a patient except on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena; provided, however, that any pharmacist releasing information under written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding. When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted. O.C.G.A. §24-12-1 (Effective January 1, 2013).

B. Confidentiality of Raw Research Data.

The General Assembly finds and declares that protecting the confidentiality of research data from disclosure in judicial and administrative proceedings is essential to safeguarding the integrity of research in this state, guaranteeing the privacy of individuals who participate in research projects, and ensuring the continuation of research in science, medicine, and other fields that benefits the citizens and institutions of Georgia and other states. The protection of such research data has more than local significance, is of equal importance to all citizens of this state, is of state-wide concern, and consequently is properly a matter for regulation under the police power of this state.

As used in this Code section, the term "confidential raw research data" means medical information, interview responses, reports, statements, memoranda, or other data relating to the condition, treatment, or characteristics of any person which are gathered by or provided to a researcher:

a. In support of a research study approved by an appropriate research oversight committee of a hospital, health care facility, or educational institution; and

b. With the objective to develop, study, or report aggregate or anonymous information not intended to be used in any way in which the identity of an individual is material to the results.

c. The term shall not include published compilations of the raw research data created by the researcher or the researcher's published summaries, findings, analyses, or conclusions related to the research study.

Confidential raw research data in a researcher's possession shall not be subject to subpoena, otherwise discoverable, or deemed admissible as evidence in any judicial or administrative proceeding in any court except as otherwise provided in subsection (d) of this Code section.

Confidential raw research data may be released, disclosed, subject to subpoena, otherwise discoverable, or deemed admissible as evidence in a judicial or administrative proceeding as follows:

d. Confidential raw research data related to a person may be disclosed to that person or to another person on such person's behalf where the authority is otherwise specifically provided by law;

e. Confidential raw research data related to a person may be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the research participant or where a designation is made in writing by a person authorized by law to act for the participant;

f. Confidential raw research data related to a person may be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if such data are required by law or regulation to be reported to such agency or department;

g. Confidential raw research data may be disclosed in any proceeding in which a party was a participant, researcher, or sponsor in the underlying research study, including, but not limited to, any judicial or administrative proceeding in which a research participant places his or her care, treatment, injuries, insurance coverage, or benefit plan coverage at issue; provided, however, that the identity of any research participant other than the party to the judicial or administrative proceeding shall not be disclosed, unless the researcher or sponsor is a defendant in such proceeding;

h. Confidential raw research data may be disclosed in any judicial or administrative proceeding in which the researcher has either volunteered to testify or has been hired to testify as an expert by one of the parties to such proceeding; and

i. In a criminal proceeding, the court shall order the production of confidential raw research data if the data are relevant to any issue in the proceeding, impose appropriate safeguards against unauthorized disclosure of the data, and admit confidential raw research data into evidence if the data are material to the defense or prosecution.

Nothing in this Code section shall be construed to permit, require, or prohibit the disclosure of confidential raw research data in any setting other than a judicial or administrative proceeding that is governed by the requirements of this title.

Any disclosure of confidential raw research data authorized or required by this Code section or any other law shall in no way destroy the confidential nature of that data except for the purpose for which the authorized or required disclosure is made. O.C.G.A. §24-12-2 (Effective January 1, 2013).

C. Confidentiality of Medical Information.

As used in this article, the term:

a. "Confidential or privileged" means the protection afforded by law from unauthorized disclosure, whether the protection is afforded by law as developed and applied by the courts, by statute or lawful regulations, or by the requirements of the Constitutions of the State of Georgia or the United States. The term "confidential or privileged" also includes protection afforded by law from compulsory process or testimony.

b. "Disclosure" means the act of transmitting or communicating medical matter

to a person who would not otherwise have access thereto.

c. "Health care facility" means any institution or place in which health care is rendered to persons, which health care includes, but is not limited to, medical, psychiatric, acute, intermediate, rehabilitative, and long-term care.

d. "Laws requiring disclosure" means laws and statutes of the State of Georgia and of the United States and lawful regulations issued by any department or agency of the State of Georgia or of the United States which require the review, analysis, or use of medical matter by persons not originally having authorized access thereto. The term "laws requiring disclosure" also includes any authorized practice of disclosure for purposes of evaluating claims for reimbursement for charges or expenses under any public or private reimbursement or insurance program.

e. "Limited consent to disclosure" means proper authorization given by or on behalf of a person entitled to protection from disclosure of medical matter and given for a specific purpose related to such person's health or related to such person's application for insurance or like benefits.

f. "Medical matter" means information respecting the medical or psychiatric condition, including without limitation the physical and the mental condition, of a natural person or persons, however recorded, obtained, or communicated.

g. "Nurse" means a person authorized by license issued under Chapter 26 of Title 43 as a registered professional nurse or licensed practical nurse to practice nursing.

h. "Physician" means any person lawfully licensed in this state to practice medicine and surgery pursuant to Chapter 34 of Title 43. O.C.G.A. §24-12-10 (Effective January 1, 2013).

D. Confidential Or Privileged Character Not Destroyed.

The disclosure of confidential or privileged medical matter constituting all or part of a record kept by a health care facility, a nurse, or a physician, pursuant to laws requiring disclosure or pursuant to limited consent to disclosure, shall not serve to destroy or in any way abridge the confidential or privileged character thereof, except for the purpose for which such disclosure is made. O.C.G.A. §24-12-11 (Effective January 1, 2013).

E. Utilization of Such Matter.

Persons to whom confidential or privileged medical matter is disclosed in the circumstances described in Code Section 24-12-11 shall utilize such matter only in connection with the purpose or purposes of such disclosure and thereafter shall keep such matter in confidence. However, nothing in this article shall prohibit the use of such matter where otherwise authorized by law. O.C.G.A. §24-12-12 (Effective January 1, 2013).

F. Immunity From Liability..

Any person, corporation, authority, or other legal entity acting in good faith shall be immune from liability for the transmission, receipt, or use of medical matter disclosed pursuant to laws requiring disclosure or pursuant to limited consent to disclosure. O.C.G.A. §24-12-13 (Effective January 1, 2013).

G. Use In Connection With Medical and Public Education

Nothing in this article shall be construed to prevent the customary and usual audit, discussion, and presentation of cases in connection with medical and public education. O.C.G.A. §24-12-14 (Effective January 1, 2013).

H. Confidentiality of Aids Information.

AIDS confidential information as defined in Code Section OCGA §31-22-9.1 and disclosed or discovered within the patient-physician relationship shall be confidential and shall not be disclosed except as otherwise provided in Code Section 24-12-21. O.C.G.A. §24-12-20 (Effective January 1, 2013).

I. Disclosure of Aids Confidential Information.

Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

Except as otherwise provided in this Code section:

a. No person or legal entity which receives AIDS confidential information pursuant to this Code section or which is responsible for recording, reporting, or maintaining AIDS confidential information shall:

i. Intentionally or knowingly disclose that information to another person or legal entity; or

ii. Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity; and

b. No person or legal entity which receives AIDS confidential information which that person or legal entity knows was disclosed in violation of paragraph (1) of this subsection shall:

i. Intentionally or knowingly disclose that information to another person or legal entity; or

ii. Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity.

AIDS confidential information shall be disclosed to the person identified by that information or, if that person is a minor or incompetent person, to that person's parent or legal guardian.

AIDS confidential information shall be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if that information is authorized or required by law to be reported to that agency or department.

The results of an HIV test shall be disclosed to the person, or that person's designated representative, who ordered such tests of the body fluids or tissue of another person.

When the patient of a physician has been determined to be infected with HIV and that patient's physician reasonably believes that the spouse or sexual partner or any child of the patient, spouse, or sexual partner is a person at risk of being infected with HIV by that patient, the physician may disclose to that spouse, sexual partner, or child that the patient has been determined to be infected with HIV, after first attempting to notify the patient that such disclosure is going to be made.

c. An administrator of an institution licensed as a hospital by the Department of Community Health or a physician having a patient who has been determined to be infected with HIV may disclose to the Department of Public Health:

i. The name and address of that patient;

ii. That such patient has been determined to be infected with HIV; and

iii. The name and address of any other person whom the disclosing physician or administrator reasonably believes to be a person at risk of being infected with HIV by that patient.

d. When mandatory and non-anonymous reporting of confirmed positive HIV tests to the Department of Public Health is determined by that department to be reasonably necessary, that department shall establish by regulation a date on and after which such reporting shall be required. On and after the date so established, each health care provider, health care facility, or any other person or legal entity which orders an HIV test for another person shall report to the Department of Public Health the name and address of any person thereby determined to be infected with HIV. No such report shall be made regarding any confirmed positive HIV test provided at any anonymous HIV test site operated by or on behalf of the Department of Public Health.

The Department of Public Health may disclose that a person has been reported, under paragraph (1) or (2) of this subsection, to have been determined to be infected with HIV to the board of health of the county in which that person resides or is located if reasonably necessary to protect the health and safety of that person or other persons who may have come in contact with the body fluids of the HIV infected person. The Department of Public Health or county board of health to which information is disclosed pursuant to this paragraph or paragraph (1) or (2) of this subsection:

e. May contact any person named in such disclosure as having been determined to be an HIV infected person for the purpose of counseling that person and requesting therefrom the name of any other person who may be a person at risk of being infected with HIV by that HIV infected person;

f. May contact any other person reasonably believed to be a person at risk of being infected with HIV by that HIV infected person for the purposes of disclosing that such infected person has been determined to be infected with HIV and counseling such person to submit to an HIV test; and

g. Shall contact and provide counseling to the spouse of any HIV infected person whose name is thus disclosed if both persons are reasonably likely to have engaged in sexual intercourse or any other act determined by the Department of Public Health likely to have resulted in the transmission of HIV between such persons within the preceding seven years and if that spouse may be located and contacted without undue difficulty.

The Department of Public Health may disclose AIDS confidential information regarding a person who has been reported, under paragraph (1) or (2) of subsection (h), to be infected with HIV to a health care provider licensed pursuant to Chapter 11, 26, or 34 of Title 43 whom that person has consulted for medical treatment or advice.

Any health care provider authorized to order an HIV test may disclose AIDS confidential information regarding a patient thereof if that disclosure is made to a health care provider or health care facility which has provided, is providing, or will provide any health care service to that patient and as a result of such provision of service that health care provider or facility:

h. Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

i. Has a legitimate need for that information in order to provide that health care service to that patient.

A health care provider or any other person or legal entity authorized but not required to disclose AIDS confidential information pursuant to this Code section shall have no duty to make such disclosure and shall not be liable to the patient or any other person or legal entity for failing to make such disclosure. A health care provider or any other person or legal entity which discloses information as authorized or required by this Code section or as authorized or required by law or rules or regulations made pursuant thereto shall have no civil or criminal liability therefor.

When any person or legal entity is authorized or required by this Code section or any other law to disclose AIDS confidential information to a person at risk of being infected with HIV and that person at risk is a minor or incompetent person, such disclosure may be made to any parent or legal guardian of the minor or incompetent person, to the minor or incompetent person, or to both the minor or incompetent person and any parent or legal guardian thereof.

When an institutional care facility is the site at which a person is at risk of being infected with HIV and as a result of that risk a disclosure of AIDS confidential information to any person at risk at that site is authorized or required under this Code section or any other law, such disclosure may be made to the person at risk or to that institutional care facility's chief administrative or executive officer, or such officer's designee, in which case that officer or designee shall be authorized to make such disclosure to the person at risk.

When a disclosure of AIDS confidential information is authorized or required by this Code section to be made to a physician, health care provider, or legal entity, that disclosure may be made to employees of that physician, health care provider, or legal entity who have been designated thereby to receive such information on behalf thereof. Those designated employees may thereafter disclose to and provide for the disclosure of that information among such other employees of that physician, health care provider, or legal entity, but such disclosures among those employees shall only be authorized when reasonably necessary in the ordinary course of business to carry out the purposes for which that disclosure is authorized or required to be made to that physician, health care provider, or legal entity.

Any disclosure of AIDS confidential information authorized or required by this Code section or any other law and any unauthorized disclosure of such information shall in no way destroy the confidential nature of that information except for the purpose for which the authorized or required disclosure is made.

Any person or legal entity which violates subsection (b) of this Code section shall be guilty of a misdemeanor.

Nothing in this Code section or any other law shall be construed to authorize the disclosure of AIDS confidential information if that disclosure is prohibited by federal law, or regulations promulgated thereunder, nor shall anything in this Code section or any other law be construed to prohibit the disclosure of information which would be AIDS confidential information except that such information does not permit the identification of any person.

A public safety agency or prosecuting attorney may obtain the results from an HIV test to which the person named in the request has submitted under OCGA 15-11-603, 17-10-15, 42-5-52.1, or 42-9-42.1, notwithstanding that the results may be contained in a sealed record.

Any person or legal entity required by an order of a court to disclose AIDS confidential information in the custody or control of such person or legal entity shall disclose that information as required by that order.

AIDS confidential information shall be disclosed as medical information pursuant to Code Section 24-12-1 or pursuant to any other law which authorizes or requires the disclosure of medical information if:

j. The person identified by that information:

   i. Has consented in writing to that disclosure; or

   ii. Has been notified of the request for disclosure of that information at least ten days prior to the time the disclosure is to be made and does not object to such disclosure prior to the time specified for that disclosure in that notice; or

k. A superior court in an in camera hearing finds by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information

and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this paragraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal.

l. A superior court of this state may order a person or legal entity to disclose AIDS confidential information in its custody or control to:

i. A prosecutor in connection with a prosecution for the alleged commission of reckless conduct under subsection (c) of Code Section 16-5-60;

ii. Any party in a civil proceeding; or

iii. A public safety agency or the Department of Public Health if that agency or department has an employee thereof who has, in the course of that employment, come in contact with the body fluids of the person identified by the AIDS confidential information sought in such a manner reasonably likely to cause that employee to become an HIV infected person and provided the disclosure is necessary for the health and safety of that employee,

m. and, for purposes of this subsection, the term "petitioner for disclosure" means any person or legal entity specified in subparagraph (A), (B), or (C) of this paragraph.

n. An order may be issued against a person or legal entity responsible for recording, reporting, or maintaining AIDS confidential information to compel the disclosure of that information if the petitioner for disclosure demonstrates by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests.

o. A petition seeking disclosure of AIDS confidential information under this subsection shall substitute a pseudonym for the true name of the person concerning whom the information is sought. The disclosure to the parties of that person's true name shall be communicated confidentially, in documents not filed with the court.

p. Before granting any order under this subsection, the court shall provide the person concerning whom the information is sought with notice and a reasonable opportunity to participate in the proceedings if that person is not already a party.

q. Court proceedings as to disclosure of AIDS confidential information under this subsection shall be conducted in camera unless the person concerning whom the information is sought agrees to a hearing in open court.

r. Upon the issuance of an order that a person or legal entity be required to disclose AIDS confidential information regarding a person named in that order, that person or entity so ordered shall disclose to the ordering court any such information which is in the control or custody of that person or entity and which relates to the person named in the order for the court to make an in camera inspection thereof. If the court determines from that inspection that the person named in the order is an HIV infected person, the court shall disclose to the

petitioner for disclosure that determination and shall impose appropriate safeguards against unauthorized disclosure which shall specify the persons who may have access to the information, the purposes for which the information shall be used, and appropriate prohibitions on future disclosure.

s. The record of the proceedings under this subsection shall be sealed by the court.

t. An order may not be issued under this subsection against the Department of Public Health, any county board of health, or any anonymous HIV test site operated by or on behalf of that department.

A health care provider, health care facility, or other person or legal entity who, in violation of this Code section, unintentionally discloses AIDS confidential information, notwithstanding the maintenance of procedures thereby which are reasonably adopted to avoid risk of such disclosure, shall not be civilly or criminally liable, unless such disclosure was due to gross negligence or wanton and willful misconduct.

AIDS confidential information may be disclosed when that disclosure is otherwise authorized or required by Code Section 42-1-6, if AIDS or HIV infection is the communicable disease at issue, or when that disclosure is otherwise authorized or required by any law which specifically refers to "AIDS confidential information," "HIV test results," or any similar language indicating a legislative intent to disclose information specifically relating to AIDS or HIV.

A health care provider who has received AIDS confidential information regarding a patient from the patient's health care provider directly or indirectly under the provisions of subsection (i) of this Code section may disclose that information to a health care provider which has provided, is providing, or will provide any health care service to that patient and as a result of that provision of service that health care provider:

u. Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

v. Has a legitimate need for that information in order to provide that health care service to that patient.

Neither the Department of Public Health nor any county board of health shall disclose AIDS confidential information contained in its records unless such disclosure is authorized or required by this Code section or any other law, except that such information in those records shall not be a public record and shall not be subject to disclosure through subpoena, court order, or other judicial process.

The protection against disclosure provided by OCGA 24-12-20 shall be waived and AIDS confidential information may be disclosed to the extent that the person identified by such information, his or her heirs, successors, assigns, or a beneficiary of such person, including, but not limited to, an executor, administrator, or personal representative of such person's estate:

w. Files a claim or claims other entitlements under any insurance policy or

benefit plan or is involved in any civil proceeding regarding such claim;

x. Places such person's care and treatment, the nature and extent of his or her injuries, the extent of his or her damages, his or her medical condition, or the reasons for his or her death at issue in any judicial proceeding; or

y. Is involved in a dispute regarding coverage under any insurance policy or benefit plan.

AIDS confidential information may be collected, used, and disclosed by an insurer in accordance with the provisions of Chapter 39 of Title 33.

In connection with any judicial proceeding in which AIDS confidential information is disclosed as authorized or required by this Code section, the party to whom that information is thereby disclosed may subpoena any person to authenticate such AIDS confidential information, establish a chain of custody relating thereto, or otherwise testify regarding that information, including, but not limited to, testifying regarding any notifications to the patient regarding results of an HIV test. The provisions of this subsection shall apply to records, personnel, or both of the Department of Public Health or a county board of health notwithstanding Code Section 50-18-72, but only as to test results obtained by a prosecutor under subsection (q) of this Code section and to be used thereby in a prosecution for reckless conduct under subsection (c) of Code Section 16-5-60.

AIDS confidential information may be disclosed as a part of any proceeding or procedure authorized or required pursuant to Chapter 3, 4, or 7 of Title 37, regarding a person who is alleged to be or who is mentally ill, developmentally disabled, or alcoholic or drug dependent, or as a part of any proceeding or procedure authorized or required pursuant to Title 29, regarding the guardianship of a person or that person's estate, as follows:

z. Any person who files or transmits a petition or other document which discloses AIDS confidential information in connection with any such proceeding or procedure shall provide a cover page which contains only the type of proceeding or procedure, the court in which the proceeding or procedure is or will be pending, and the words "CONFIDENTIAL INFORMATION" without in any way otherwise disclosing thereon the name of any individual or that such petition or other document specifically contains AIDS confidential information;

aa. AIDS confidential information shall only be disclosed pursuant to this subsection after disclosure to and with the written consent of the person identified by that information, or that person's parent or guardian if that person is a minor or has previously been adjudicated as being incompetent, or by order of court obtained in accordance with subparagraph (C) of paragraph (3) of this subsection;

bb. If any person files or transmits a petition or other document in connection with any such proceeding or procedure which discloses AIDS confidential information without obtaining consent as provided in paragraph (2) of this subsection, the court receiving such information shall either obtain written consent as set forth in that paragraph (2) for any further use or disclosure of such information or:

i. Return such petition or other document to the person who filed or transmitted same, with directions against further filing or transmittal

of such information in connection with such proceeding or procedure except in compliance with this subsection;

ii. Delete or expunge all references to such AIDS confidential information from the particular petition or other document; or

iii. If the court determines there is a compelling need for such information in connection with the particular proceeding or procedure, petition a superior court of competent jurisdiction for permission to obtain or disclose that information. If the person identified by the information is not yet represented by an attorney in the proceeding or procedure in connection with which the information is sought, the petitioning court shall appoint an attorney for such person. The petitioning court shall have both that person and that person's attorney personally served with notice of the petition and time and place of the superior court hearing thereon. Such hearing shall not be held sooner than 72 hours after service, unless the information is to be used in connection with an emergency guardianship proceeding under Code Section 29-4-14, in which event the hearing shall not be held sooner than 48 hours after service.

cc. The superior court in which a petition is filed pursuant to division (iii) of this subparagraph shall hold an in camera hearing on such petition. The purpose of the hearing shall be to determine whether there is clear and convincing evidence of a compelling need for the AIDS confidential information sought in connection with the particular proceeding or procedure which cannot be accommodated by other means. In assessing compelling need, the superior court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; and

The court having jurisdiction over such proceeding or procedure, when it becomes apparent that AIDS confidential information will likely be or has been disclosed in connection with such proceeding or procedure, shall take such measures as the court determines appropriate to preserve the confidentiality of the disclosed information to the maximum extent possible. Such measures shall include, without being limited to, closing the proceeding or procedure to the public and sealing all or any part of the records of the proceeding or procedure containing AIDS confidential information. The records of any appeals taken from any such proceeding or procedure shall also be sealed. Furthermore, the court may consult with and obtain the advice of medical experts or other counsel or advisers as to the relevance and materiality of such information in such proceedings or procedures, provided that the identity of the person identified by such information is not thereby revealed. O.C.G.A. §24-12-21 (Effective January 1, 2013).

J. Other Confidential Information

Confidential nature of library records

a. Circulation and similar records of a library which identify the user of library

materials shall not be public records but shall be confidential and shall not be disclosed except:

i. To members of the library staff in the ordinary course of business;

ii. Upon written consent of the user of the library materials or the user's parents or guardian if the user is a minor or ward; or

iii. Upon appropriate court order or subpoena.

b. Any disclosure authorized by subsection (a) of this Code section or any unauthorized disclosure of materials made confidential by subsection (a) of this Code section shall not in any way destroy the confidential nature of that material, except for the purpose for which an authorized disclosure is made. A person disclosing material as authorized by subsection (a) of this Code section shall not be liable therefor. O.C.G.A. §24-12-30 (Effective January 1, 2013).

Veterinary care information

c. No veterinarian licensed under Chapter 50 of Title 43 shall be required to disclose any information concerning the veterinarian's care of an animal except on written authorization or other waiver by the veterinarian's client or on appropriate court order or subpoena. Any veterinarian releasing information under written authorization or other waiver by the client or under court order or subpoena shall not be liable to the client or any other person. The confidentiality provided by this Code section shall be waived to the extent that the veterinarian's client places the veterinarian's care and treatment of the animal or the nature and extent of injuries to the animal at issue in any judicial proceeding. As used in this Code section, the term "client" means the owner of the animal; or if the owner of the animal is unknown, client means the person who presents the animal to the veterinarian for care and treatment. O.C.G.A. §24-12-31 (Effective January 1, 2013).

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I. General Discovery Provisions

A. Diligent Pursuit

In order for a party to utilize the court's compulsory process to compel discovery, any desired discovery procedures must first be commenced promptly, pursued diligently, and completed without unnecessary delay within two months (6 months in courts with expanded jurisdiction) after the filing of the answer unless, for cause shown, the time has been extended or shortened by court order {Ga. Uniform Probate Court Rules, Rule 5 and Appendix A}.

II. General Provisions Governing Discovery under the Civil Practice Act

A. Discovery Methods

Parties may obtain discovery by one or more of the following methods:

a. Depositions upon oral examination or written questions,

b. Written interrogatories,

c. Production of documents or things or permission to enter upon land or other property for inspection and other purposes,

d. Physical and mental examination, and

e. Requests for admission. {O.C.G.A. §9-11-26(a) }.

B. Scope of Discovery

[NOTE: Unless the court orders otherwise under *D. below* the frequency of use of these methods is not limited.]

Unless otherwise limited by order of the court in accordance with the Civil Practice Act, the scope of discovery is as follows:

a. Generally

i. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery

or to the claim or defense of any other party to the action. {O.C.G.A. §9-11-26(b)(1) }.

ii. Discoverable matter includes the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. {O.C.G.A. §9-11-26(b)(1) }.

iii. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. {O.C.G.A. §9-11-26(b)(1) }.

Insurance Agreements

b. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. {O.C.G.A. §9-11-26(b)(2) }.

c. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance is not treated as part of an insurance agreement. {O.C.G.A. §9-11-26(b)(2) }.

Trial Preparation Materials

d. Subject to the provisions of *5. below*, a party may obtain discovery of documents and tangible things otherwise discoverable under *1. above*, and prepared in anticipation of litigation or for trial by or for another party or that party's representative.

e. The material may be subject to discovery only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. {O.C.G.A. §9-11-26(b)(3) }.

f. In ordering discovery of such materials when the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. {O.C.G.A. §9-11-26(b)(3) }.

Obtaining a statement made by a party

g. A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. O.C.G.A. §9-11-37(a)(4) applies to the award of expenses incurred in relation to the motion. {O.C.G.A. §9-11-26(b)(3) }.

h. For purposes of this section, a "statement previously made" is:

i. A written statement signed or otherwise adopted or approved by the

person making it, or

ii. A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of all oral statements by the person making it and contemporaneously recorded. {O.C.G.A. §9-11 26(b)(3) }.

Trial Preparation - Experts

i. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of *1. above*, and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

i. A party may, through interrogatories, require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. {O.C.G.A. §9-11-26(b)(4)(A)(i) }.

ii. A party may obtain discovery under O.C.G.A. §§9-11-30, 9-11-31, and 9-11-34 from any expert described in this subsection, the same as any other witness, but the party obtaining discovery of an expert hereunder must pay a reasonable fee for the time spent in responding to discovery by that expert, subject to the right of the expert or any party to obtain a determination by the court as to the reasonableness of the fee so incurred. {O.C.G.A. §9-11-26(b)(4)(A)(ii) }.

j. A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in O.C.G.A. §9-11-35 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. {O.C.G.A. §9-11-26(b)(4)(B) }.

k. Unless manifest injustice would result:

i. The court must require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery under 5.; and

ii. With respect to discovery obtained under *(a)(2) above*, the court may require, and with respect to discovery obtained under *b. above*, the court must require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. {O.C.G.A. §9-11-26(b)(4)(c) }.

C. Protective Orders {*See Iii*}

D. Sequence and Timing of Discovery

Unless the court, upon motion and for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence; and the fact that a party is conducting discovery, whether by deposition or otherwise, may not operate to delay any other party's discovery. {O.C.G.A. §9-11-26(d) }.

E. Supplementation of Responses

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

a. A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

i. The identity and location of persons having knowledge of discoverable matters; and

ii. The identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

b. A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which:

i. He knows that the response was incorrect when made; or

ii. He knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is, in substance, a knowing concealment.

c. A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses. {O.C.G.A. §9-11-26(e) }.

III. Protective Orders

A. Generally

A motion for a protective order may be made by a party or by the person from whom discovery is sought. {O.C.G.A. §9-11-26(c) }.

The court in which the action is pending or the court in the county where the deposition is to be taken may issue a protective order. {O.C.G.A. §9-11-26(c) }.

B. Good Cause Required/Court's Discretion

Good Cause Required

a. The person or party seeking a protective order must show that there is good cause for the issuance of the order. {O.C.G.A. §9-11-26(c) }.

b. The court may issue a protective order which justice requires to protect a person or party from annoyance, embarrassment, oppression, or undue burden or expense. {O.C.G.A. §9-11-26(c) }.

Court's Discretion

c. The probate court has wide discretion in issuing protective orders and it is contemplated that the judge will exercise a sound and legal discretion in the grant or denial of such orders.

d. Protective orders are not to be used prohibitively and, until such time as the court is satisfied by substantial evidence that bad faith or harassment motivates the discoverer's action, the court should not intervene to limit the scope of pretrial discovery.

e. The court should exercise its discretion and appropriately limit discovery where the proposed discovery appears to be merely cumulative in nature. The information sought should have a reasonable relationship to the issues and there should be some indication that it may be of value in the trial of the case.

C. Drawing a Protective Order

A protective order may include one or more of the following orders:

a. That discovery not be had;

b. That discovery be had only on specified terms and conditions, including a designation of time or place;

c. That discovery may be had only by a method other than that selected by the party seeking it;

d. That certain matters are not to be inquired into, or that the scope of the discovery be limited to certain matters;

e. That discovery be conducted with no one present except persons designated by the court;

f. That a deposition, after being sealed, be opened only by order of the court;

g. That a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only in a designated way; and

h. That parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. {O.C.G.A. §9-11-26(c) }.

The court is not limited to the orders enumerated above and may shape a protective order as the circumstances warrant.

[NOTE: While matters concerning the discretion of the court and the scope and limits of discovery have been raised in the context of protective orders and in *II above*, it must be noted that these considerations apply with equal force to other motions, set out below, which are related to specific discovery devices. Thus, motions pertaining to depositions and discovery require the court to consider the broad purposes of discovery, and the wide latitude necessary to fulfill those purposes, as well as the appropriate limits in a particular situation.)

D. Motion To Quash A Subpoena

A probate order denying a motion to quash a subpoena in an estate matter, which was not a final order, is not subject to interlocutory review by a Superior Court. IN RE: Estate of Wade Steven Putnam, A16A0366 (November 16, 2015) citing Driver v State, 198 Ga. App. 643 (1991).

IV. Oral Depositions

A. Generally

When Depositions May Be Taken

a. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. {O.C.G.A. §9-11-30(a) }.

Leave of Court

b. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under O.C.G.A. §9-11-4 {O.C.G.A. §9-11-30(a) }.

c. Leave is not required if:

i. A defendant has served a notice of taking deposition or otherwise sought discovery, or

ii. Special notice is given as provided in 11.41B2, below {O.C.G.A. §9-11-30(a) }.

Attendance of witnesses

d. The attendance of witnesses may be compelled by subpoena as provided in O.C.G.A. §9-11-45 {O.C.G.A. §9-11-30(a) }.

e. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes {O.C.G.A. §9-11-30(a) }.

Notice

f. General Requirements

i. A party desiring to take the deposition of any person upon oral examination must give reasonable notice in writing to every other party to the action. {O.C.G.A. §9-11-30(b)(1) }.

ii. The notice must state the time and place for taking the deposition, the means by which the testimony shall be recorded, and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. {O.C.G.A. §9-11-30(b)(1) }.

iii. If a subpoena for the production of documentary and tangible evidence is to be served on the person to be examined, the designation of the materials to be produced, as set forth in the subpoena, must be attached to, or included in the notice. {O.C.G.A. §9-11-30(b)(1) }.

g. Special Notice

i. Leave of court is not required for the taking of a deposition by plaintiff if the notice:

1.) States that the person to be examined is about to go out of the county where the action is pending and more than 150 miles from the place of trial, is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before expiration of the thirty-day period; and

2.) Sets forth facts to support the statement. {O.C.G.A. §9-11-30(b)(2) }.

h. The plaintiff's attorney must sign the notice, and his signature constitutes a certification by him that, to the best of his knowledge, information, and belief, the statement and supporting facts are true.

i. If a party shows that, when he was served with notice under *(b) above*, he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him. {O.C.G.A. §9-11-30(b)(2) }.

j. The court may, for cause shown, enlarge or shorten the time for taking the deposition {O.C.G.A. §9-11-30(b)(3) }.

Sanction(s) for Failure to Attend at One's Own Deposition. {*See VIII. below*}.

B. Motions

Motion for Protective Order {*See III.C above*}

Motion to Terminate or Limit Examination

a. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in O.C.G.A. §9-11-37(a)(4) . {O.C.G.A. §9-11-30(d) }.

b. If the order terminates the examination, it must be resumed only upon order of the court in which the action is pending. {O.C.G.A. §9-11-30(d) }.

c. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. {O.C.G.A. §9-11-30(d) }.

d. The provisions of O.C.G.A. §9-11-37(a)(4) apply to the award of expenses incurred in relation to the motion.

Motion for Expenses for Failure to Attend or Serve Subpoena

e. If the party giving notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other

party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees. {O.C.G.A. §9-11-30(g) }.

f. If the party giving notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness, because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving notice to pay to such other party the reasonable expenses incurred by him and his attorney attending, including reasonable attorney's fees. {O.C.G.A. §9-11-30(g) }.

Motions Related to Errors and Irregularities in Depositions – Requirement of Seasonable Objection

g. As to notice: All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice. {O.C.G.A. §9-11-32(d) }.

h. As to disqualification of officer: Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or would be discovered with reasonable diligence. {O.C.G.A. §9-11-32(d) }.

i. As to taking of deposition: Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. {O.C.G.A. §9-11-32(d) }.

i. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition. {O.C.G.A. §9-11-32(d) }.

j. As to completion and return of deposition: Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under O.C.G.A. §§9-11-30 and 9-11-31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. {O.C.G.A. §9-11-30(d) }.

V. Interrogatories to Parties

A. Generally

Service

a. Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation, a partnership, association, or governmental agency, by any officer or agent, who must furnish such information as is available to the party.

{O.C.G.A. §9-11-33(a)(1) }.

b. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. {O.C.G.A. §9-11-33(a)(1) }.

Answers to Interrogatories

c. Contents of answer

i. Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection must be stated in lieu of an answer. The answers are to be signed by the person making them and the objections signed by the attorney making them. {O.C.G.A. §9-11-33(a)(2) }.

d. Service of answer

i. The party upon whom the interrogatories have been served must serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. {O.C.G.A. §9-11-33(a)(2) }.

e. Time limit for objections

i. Failure to file objections within the time limits set forth above constitutes a waiver of the right to object. {Drew v. Hagy 134 Ga. App. 852 (1975))}.

f. Failure to Answer, or Serve Answers to, an Interrogatory

i. The party submitting the interrogatories may move for an order under O.C.G.A. §9-11-37(a) with respect to any objection to, or other failure to, answer an interrogatory. {O.C.G.A. §9-11-33(a)(2)} .

1.) For sanction(s) for failure to serve answers to interrogatories, *see VIII. below*.

B. Motions

Motion for Protective Order. {O.C.G.A. §9-11-26(c) }. {*Chapter 12. .III above*}

Motion to Compel Answer to Interrogatory after Objection or Failure to Answer {O.C.G.A. §9-11-37(a) }

a. In ruling on such a motion, the court should consider the following:

i. Interrogatories may relate to any matters which can be inquired into under O.C.G.A. §9-11-26(b) , and the answers may be used to the extent permitted by the rules of evidence. {O.C.G.A. §9-11-33(b)(1) }.

ii. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time. {O.C.G.A. §9-11-33(b)(2) }.

VI. Production of Documents; Entry Upon Land For Inspection and Other Purposes

A. Generally

Scope: Any party may serve on any other party a request to:

a. Produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phone records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form);

b. Inspect and copy, test, or sample any tangible thing which constitutes or contains matters within the scope of O.C.G.A. §9-11-26(b) , and which are in the possession, custody, or control of the party upon whom the request is served {O.C.G.A. §9-11-34(a)(1)} ; or

c. Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of O.C.G.A. §9-11-26(b) . {O.C.G.A. §9-11-34(a)(2) }.

Procedure

d. Service of request: The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. {O.C.G.A. §9-11-34(b)(1) }.

e. Contents of request: The request must set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity.

i. The request must specify a reasonable time, place, and manner of making the inspection and performing the related acts. {O.C.G.A. §9-11-34(b)(1) }.

f. Service of response to request: The party upon whom the request is served must serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.

g. Contents of response: The response must state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection must be stated. If objection is made to part of an item or category, the part must be specified. {O.C.G.A. §9-11-34(b)(2) }.

h. Failure to respond: The party submitting the request may move for an order under O.C.G.A. §9-11-37 with respect to any objection or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. {O.C.G.A. §9-11-34(b)(2) }.

Persons, Firms, or Corporations Not Parties

i. The provisions of this section are also applicable with respect to discovery against persons, firms, or corporations who are not parties, except that the party desiring such discovery may proceed by taking the deposition of the person, firm, or corporation on oral examination or by serving interrogatories. The person, firm, or corporation so served may move the court for a protective order relieving against such subpoena or interrogatories in whole or in part, and upon good cause shown, the court may grant such relief as it may deem appropriate. {O.C.G.A. §9-11-34(c) }.

B. Motions

Motion for Protective Order {O.C.G.A. §9-11-26(c) } {*See III. above*}

Motion for Order Compelling Inspection {O.C.G.A. §9-11-37} {*See VIII. below*}

VII. Requests For Admission

A. Generally

Scope and Service of Request

a. A party may serve upon any other party a written request for admission, for purposes of the pending action only, of the truth of any matters within the scope of O.C.G.A. §9-11-26 which are set forth in the request and that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. {O.C.G.A. §9-11-36(a)(1) }.

b. Copies of documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. {O.C.G.A. §9-11-36(a)(1) }.

c. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. {O.C.G.A. §9-11-36(a)(1) }.

Answer

d. Each matter of which an admission is requested must be separately set forth. {O.C.G.A. §9-11-36(a)(2) }.

e. The matter is admitted unless, within 30 days after service of the request, or within such time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant must not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. {O.C.G.A. §9-11-36(a)(2) }.

Objections and Denials

f. If objection is made, the reasons therefor must be stated. {O.C.G.A. §9-11-36(a)(2) }.

g. The answer should specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.

{O.C.G.A. §9-11-36(a)(2) }.

h. A denial must fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he must specify so much of it as is true and qualify or deny the remainder. {O.C.G.A. §9-11-36(a)(2) }.

i. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he stated that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. {O.C.G.A. §9-11-36(a)(2) }.

j. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. He may, subject to the provisions of O.C.G.A. §9-11-37, deny the matter or set forth reasons why he cannot admit or deny it. {O.C.G.A. §9-11-36(a)(2) }.

B. Motions

Motion for Protective Order. {O.C.G.A. §9-11-26(c) }. {*See III. above*}.

Motion to Determine Sufficiency of Answer

a. The party who has requested the admissions may move to determine the sufficiency of the answers or objections.

b. Unless the court determines that an objection is justified, it must order that an answer be served. {O.C.G.A. §9-11-36(a) }.

c. If the court determines that an answer does not comply with the requirements of this section, it may order either that the matter is admitted or that an amended answer be served. {O.C.G.A. §9-11-36(a) }.

d. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. {O.C.G.A. §9-11-36(a) }.

e. The provisions of O.C.G.A. §9-11-37(a)(4) apply to the award of expenses incurred in relation to the motion. {O.C.G.A. §9-1-37(a) }.

Motion to Withdraw or Amend Admission

f. Any matter admitted under O.C.G.A. §9-11-36 is conclusively established unless the court, on motion, permits withdrawal or amendment of the admission. {O.C.G.A. §9-11-36(b) }.

g. Subject to the provisions of O.C.G.A. §9-11-16, governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. {O.C.G.A. §9-11-37(b) }.

VIII. Failure to Make Discovery/Sanctions

A. Motion for Order Compelling Discovery

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows.

a. Appropriate Court: An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party must be made to the court in the county where the deposition is being taken. {O.C.G.A. §9-11-37(a)(1) }.

b. Motion: If a deponent fails to answer a question propounded or submitted under O.C.G.A. §§9-11-30 or 9-11-31, or a corporation or other entity fails to make a designation under O.C.G.A. §§9-11-30(6) or 9-11-31(a) , or a party fails to answer an interrogatory submitted under O.C.G.A. §9-11-33 or if a party, in response to a request for inspection under O.C.G.A. §9-11-34, fails to respond that inspection will be permitted as requested or fails to permit the inspection, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. {O.C.G.A. §9-11-37(a)(2) }.

c. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to O.C.G.A. §9-11-26(c) . {O.C.G.A. §9-11-37(a)(2) }.

d. Evasive or Incomplete Answer: For purposes of the provisions of this section which relate to depositions and discovery, an evasive or incomplete answer is to be treated as a failure to answer. {O.C.G.A. §9-11-37(a)(3) }.

Award of Expenses of Motion

e. Motion granted: If the motion is granted, the court must, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion, the party or attorney advising such conduct, or both of them, to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. {O.C.G.A. §9-11-37(a)(4)(A) }

f. Motion denied: If the motion is denied, the court may, after opportunity for hearing, require the moving party, the attorney advising the motion, or both of them, to pay to the party or deponent who opposed the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. {O.C.G.A. §9-11-37(a)(4)(B) }.

g. Motion granted in part, denied in part: If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in just manner. {O.C.G.A. §9-11-37(a)(4)(A) }.

B. Motion to Penalize For Failure to Comply With Order, Available Sanctions, Expenses

Sanctions by Court in County where Deposition Is Taken

a. If a deponent fails to be sworn or to answer a question after being directed to

do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court. {O.C.G.A. §9-11-37(b)(1) }.

Sanctions by Court in which Action Is Pending

b. If a party or an officer, director, or managing agent of a party or a person designated under O.C.G.A. §9-11-30(b)(6) or O.C.G.A. §9-11-31 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under O.C.G.A. §9-11-37(a) or O.C.G.A. §9-11-35, the court in which the action is pending may make such orders in regard to the failure as are just and, among others, the following:

i. An order that the matters regarding which the order was made or any other designated facts must be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. {O.C.G.A. §9-11-37(b)(2)(A) };

ii. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence. {O.C.G.A. §9-11-37(b)(2)(B) };

iii. An order striking pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding, or any part thereof, or rendering a judgment by default against the disobedient party. {O.C.G.A. §9-11-37(b)(2)(C) };

c. In lieu of any of the foregoing orders, or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination. {O.C.G.A. §9-11-37(b)(2)(D) }; or

d. In lieu of any of the foregoing orders, or in addition thereto, the court must require the party failing to obey the order, the attorney advising him, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. {O.C.G.A. §9-11-37(b)(2) }.

C. Motion to Recover Expenses on Failure to Admit

If a party fails to admit the genuineness of any document or the truth of any matter as requested under O.C.G.A. §9-11-36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

The court must make the order unless it finds that:

a. The request was held objectionable pursuant to O.C.G.A. §9-11-36(a) ,

b. The admission sought was of no substantial importance,

c. The party failing to admit had reasonable ground to believe that he might prevail on the matter, or

d. There was other good reason for the failure to admit. {O.C.G.A. §9-11-37(c) }.

D. Failure of Party to Respond to Discovery

Court Action

a. If a party or an officer, director, or managing agent of a party or a person designated under O.C.G.A. §§9-11-30(b)(6) or 9-11-31(a) to testify on behalf of a party fails to:

i. Appear before the officer who is to take his deposition, after being served with proper notice,

ii. Serve answers or objections to interrogatories submitted under O.C.G.A. §9-11-33 after proper service of the interrogatories, or

iii. Serve a written response to a request for inspection submitted under O.C.G.A. §9-11-34 after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under *11.82B1, 2, and 3, above*. {O.C.G.A. §9-11 37(d)(1) }.

b. In lieu of any order, or in addition thereto, the court may require the party failing to act, the attorney advising him, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. {O.C.G.A. §9-11-37(d)(1) }.

When Failure to Act Excused

c. The failure to act described in the provisions of this section which relate to depositions and discovery may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by O.C.G.A. §9-11-26(c) . {O.C.G.A. §9-11-37(d)(2) }.

IX. Motions

A. Motion to Dismiss

A motion to dismiss may be granted only where a complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his or her claim. Walker City. v. Tri-State Crematory, 292 Ga. App. 411, 411 (664 SE2d 788) (2008).

FAILURE TO STATE A CLAIM: A motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor. Kellar v. Davis, et al., 350 Ga. App. 385 , June 11, 2019)..

Voluntary

a. The plaintiff may dismiss an action:

i. Without a court order by filing written notice of dismissal at any time before the plaintiff rests his case.

ii. After the plaintiff rests his case, only with permission and an order of the court.

b. The plaintiff may not dismiss an action if the defendant has filed a counterclaim unless the counterclaim may be adjudicated independently.

c. Dismissal is without prejudice unless the plaintiff has twice before dismissed actions in any court based on or including the same claim. {O.C.G.A. §9-11-41(a) }.

d. These provisions are also applicable to cross-or counterclaims or third party claims. {O.C.G.A. §9-11-41(c) }.

Involuntary

e. The defendant may move for dismissal of any action against him:

i. For failure to prosecute,

ii. For failure to comply with O.C.G.A. Title 9 or order of the court, or

iii. At the close of the plaintiff's evidence in a nonjury trial on grounds that the plaintiff has no right to relief.

f. In the last instance above, the court may: render judgment against the

[NOTE: Defendant does not, thereby, lose right to present evidence.]

plaintiff at that time, or reserve a decision until the close of all evidence.

The effect of dismissals is as follows:

g. A dismissal for failure of the plaintiff to prosecute does not operate as an adjudication upon the merits; and

h. Any other dismissal, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, does operate as an adjudication upon the merits unless the court in its order for dismissal specifies otherwise. {O.C.G.A. §9-11-41(b) }.

i. These provisions are also applicable to cross or counterclaims or third party claims. {O.C.G.A. §9-11-41(c) }.

Automatic

j. If no written order (including an order of continuance) is entered in any suit for five years, the suit must automatically stand dismissed. {O.C.G.A. §9-11-41(e) }.

B. Motion for Summary Judgment

SEE SECTION 6.6 Summary Judgment in Chapter two of the HANDBOOK for law on this topic.

A plaintiff on a claim, cross-or counterclaim, or motion for declaratory judgment may move for summary judgment, with or without supporting affidavits:

a. More than 30 days after commencement of an action, or

b. After service of a motion for summary judgment by an adverse party {O.C.G.A. §9-11-56(a) }.

A defendant to any such action may also seek summary judgment, with or without supporting affidavits, as to all or part of the claim. {O.C.G.A. §9-11-56(b) }.

A separate, short, and concise statement of each theory of recovery and each of the material facts as to which the moving party contends there is no genuine issue to be tried must be annexed to the notice of motion. {Ga. Uniform Probate Court Rules, 6.5}.

The response must include a separate, short, and concise statement of each of the material facts as to which it is contended there exists a genuine issue to be tried. {Ga. Uniform Probate Court Rules, 6.5}.

Motions for summary judgment must be filed sufficiently early so as not to delay the trial. A trial will not be continued because of the delayed filing of a motion for summary judgment. {Ga. Uniform Probate Court Rules, 6.6}.

Service

c. The motion must be served at least 30 days before the hearing. {O.C.G.A. §9-11-56(c) }.

d. Opposing affidavits, if any, must be served before the day of the hearing. {O.C.G.A. §9-11-56(c) }.

Judgment must be rendered if the discovery on file as well as the affidavits, if any, show that there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. {O.C.G.A. §9-11-56(c) }. Courts are not authorized to weigh disputed evidence and resolve conflicts in evidence by summary judgment. Anderson et al. v. Anderson et al., S16A1052 (2016)

If summary judgment is not rendered as to the whole case or all of the relief prayed:

e. The court, at a hearing, must, if practicable, determine which facts are in controversy by:

   i. Examining the pleadings and evidence, and

   ii. Interrogating counsel;

f. The court should then enter an order:

   i. Specifying the facts not controverted, including the extent to which damages or other relief is not in controversy, and

   ii. Directing such proceedings in the action as are just; and

   iii. Upon trial, the facts specified must be deemed established. {O.C.G.A. §

§9-11-56(d) }.

g. Summary judgment orders which do not dispose of the entire case are considered interlocutory and remain with the breast of the court until final judgment is entered. They are subject to revision at any time before final judgment unless the court issues an order upon express direction under OCGA §9-11-54(b). MedTech, Inc. v. Nelson et al., 340 Ga. App. 559 (March 8, 2017).

Supporting and opposing affidavits must:

h. Be made on personal knowledge,

i. Set forth such facts as would be admissible in evidence,

j. Show affirmatively that the affiant is competent to testify to matters stated therein,

k. Have attached thereto sworn or certified copies of all papers or parts thereof referred to in the affidavit, and

l. Be filed with the court and served on opposing parties. {O.C.G.A. §9-11-56(e) }.

m. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. {O.C.G.A. §9-11-56(e) }.

An adverse party may not rest upon the allegation or denials of his pleadings, but his responses by affidavit or otherwise must set forth specific facts showing that there is a genuine issue of fact or else suffer adverse summary judgment. {O.C.G.A. §9-11-56(e) }.

X. Relief From Judgments

A. Collateral Attack.

A judgment void on its face may be attacked in any court by any person. In all other instances, judgments are subject to attack only by a direct proceeding brought for that purpose using one of the methods prescribed below in this section. {O.C.G.A. §9-11-60(a) }.

B. Methods of Direct Attack.

A judgment may be attacked by motion for a new trial {*see below*) or motion to set aside {*see below*}. Judgments may be attacked by motion only in the court of rendition. {O.C.G.A. §9-11-60(b) }.

C. Motion for New Trial.

A motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings. {O.C.G.A. §9-11-60(c) }.

Motions for new trial may be filed only in Article 6 Probate Courts and are not proper when filed in other probate courts. OCGA §5-5-1(b). A movant for a new trial is entitled to a hearing on his or her motion but may waive that right. In The Interest Of M.L. a child, 344 Ga. App. 172 , December 27, 2017, citing OCGA §5-5-40.

Improper Vehicles for Motions for New Trials

a. A Motion for New Trial is not a proper vehicle for obtaining review of a grant of summary judgment. It would not even lie to rectify an erroneous grant of summary judgment. See MedTech, Inc. v. Nelson et al., A16A1687 (March 8, 2017)

b. A Motion for New Trial is not a proper vehicle for review of a trial court's action and will not extend the time for filing the notice of appeal. In the case of Debter v. Stephens, 297 Ga. 652, September 14, 2015, Debter filed a motion for new trial asserting that he had discovered new evidence. The new evidence was available at trial but Debter failed to produce it. The motion was denied. However, see State v. Abernathy, 295 Ga. 816 (2014). In this case, the court held that a new trial may be granted based on newly discovered evidence only where, among other things, "it was not owing to the want of due diligence that [the party putting forth the new evidence] did not require [the evidence] sooner".

D. Motion to Set Aside.

A motion to set aside may be brought to set aside a judgment based upon:

a. Lack of jurisdiction over the person or the subject matter;

b. Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or

c. A nonamendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed. {O.C.G.A. §9-11-60(d) }.

d. NOTE: In the case of IN RE: Estate of Jones, 346 Ga. App. 878, June 12, 2018, the Court of Appeals [Court] ruled in favor of a motion to set aside a previously probated will. The movant was a beneficiary of an earlier will executed by the testator. The beneficiary was not an heir of the testator and was not served notice regarding the petition to probate the latter will. In his petition, the beneficiary alleged the testator lacked testamentary capacity and that the testator had been unduly influenced to make the latter will. The Court cited OCGA § 53-5-50 and §53-5-51 as justification for its ruling. OCGA § 53-5-50(a) provides; the probate court has jurisdiction over any action to vacate, set aside, or amend its order admitting a will to probate which alleges… [t]hat another will is entitled to be admitted to probate. Subsection (b) provides; [a]ny such action shall be combined with a petition to probate in solemn form the other will[.] The Court ruled the trial court erred in denying the petition to set-aside, which was denied for failing to meet the requirements of OCGA § 9-11-60, rather than ruling on the merits of the petition. The Court also cited Mary F. Radford's, Redfearn Wills and Administration in Georgia, § 6:20, pg. 358-359 (2017-2018 ed.) as a leading treatise on this issue.

E. Complaint in Equity.

The use of a complaint in equity to set aside a judgment is prohibited. {O.C.G.A. §9-11-60(e) }.

F. Procedure; Time of Relief.

Reasonable notice must be afforded the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served if it cannot be legally served as any other motion. A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time. Motions for new trial must be brought within the time prescribed by law. In all other instances, all motions to set aside judgments must be brought within three years from entry of the judgment complained of. {O.C.G.A. §9-11-60(f) }.

G. Clerical Mistakes.

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. {O.C.G.A. §9-11-60(g) }.

H. Law of The Case Rule.

The law of the case rule has been abolished; but generally judgments and orders will not be set aside or modified without just cause and, in setting aside or otherwise modifying judgments and orders, the court must consider whether rights have vested thereunder and whether or not innocent parties would be injured thereby; provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case is binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be. {O.C.G.A. §9-11-60(h) }.

Chapter 13. Jury Trials in Probate Court

I. Power to Hold Jury Trial 13-2

A. Jury Trials 13-2

II. Demand For Jury Trial 13-3

A. Time Limitations 13-3

III. Uniform Probate Court Rules - Exhibit A 13-3

A. Exhibit A to the uniform rules applies to probate courts described in *i.c. above.* 13-3

B. There Are Specific Provisions In Exhibit A Concerning Discovery, Motions, Pre-Trial Orders, and Jury Trials, Among Other Matters. 13-3

C. Exhibit A Follows The Uniform Superior Court Rules Unless There Is A Statute Concerning These Probate Courts Which Makes Different Provisions (Such As Rule 24(A) of Exhibit A, Concerning The Demand For A Jury Trial). 13-3

IV. Instructions to Jury 13-3

A. This benchbook may be used as a source of jury instructions. for example, a charge concerning testamentary capacity could be based upon the explanations in Chapter 3.... 13-3

B. Pattern jury instructions are available from the council of superior court judges of georgia. 13-3

C. It is acceptable for the court to provide counsel with sample instructions such as instructions the court has approved in the past which would be relevant to the current case. 13-3

D. It is useful to put the following paragraph in the pre-trial order under "other matters" at paragraph 17d. in the pre-trial order form contained in exhibit a to the uniform probate court rules: 13-3

E. Requests and Exceptions to Charge. 13-4

F. The court will provide counsel with copies of proposed charges at the beginning of the first day of trial. counsel will provide comments and additional charges at the beginning of the second day of trial. additional requests may be submitted to cover unanticipated points that arise thereafter. 13-4

G. All requests to charge shall be numbered consecutively on separate sheets of paper and submitted to the court in duplicate by counsel for all parties. any direct quotation used in any request shall be indicated by the use of quotation marks. if quotation marks are not used, the court will assume the statement is a paraphrase. unless the source is a georgia statute, a photocopy of the page showing the source of the quoted language must be attached to the charge, with the requested language highlighted. 13-4

V. Cheatham-Eldridge Outline 13-4

A. Jury Trials In Probate Court 13-4

B. Pretrial Discovery 13-5

C. The Trial 13-5

VI. Motion For Directed Verdict 13-11

A. A motion for a directed verdict may be made at the close of the evidence offered by an opponent or at the close of the case. A party who moves for a directed verdict at the close of

the evidence offered by an opponent may offer evidence in the event that a motion is not granted without having reserved the right to do so. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict must state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a particular verdict, such verdict must be directed. {O.C.G.A. §9-11-50(A) }. 13-11

VII. Motions For Judgment Notwithstanding The Verdict and For New Trial 13-11

A. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. not later than 30 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or, if a verdict was not returned, such party, within 30 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. {O.C.G.A. §9-11-50(B) }.. 13-11

B. Additional Rules Are Provided In Other Subsections of O.C.G.A. §9-11-50. 13-11

VIII. Form of the Verdict 13-11

A. The form of a verdict and the submission of a special verdict is within the discretion of the trial court, and, absent an abuse of that discretion, the court's choice will not be overturned. {O.C.G.A. §9-11-49(a) }. Even where a special verdict is required to be given to the jury, it is the court that "shall prescribe the form of the questions for submission to the jury." {O.C.G.A. §9-11-49(b) }. 13-11

B. The trial court may amend a verdict's form even after the jury has dispersed {O.C.G.A. §9-12-7}, and a trial court may mold a verdict "so as to do full justice to the parties." {O.C.G.A. §9-12-5; 208 Ga. 861 (3) (1952)}. Thus, if the verdict is imperfect, but the intention of the jury is clearly expressed, then the trial court should have the verdict put in the proper form in accordance with the jury's intention. {177 Ga. App. 512, 513 (1) (1986)}. The jury may express its meaning in an informal manner, and the court has the right to put it in such form and shape as to do justice to the parties, according to the pleadings and the evidence. {194 Ga. 1, 6 (4) (1942)}..... 13-11

I. Power to Hold Jury Trial

A. Jury Trials

In 1986, the Georgia general assembly passed legislation changing the procedures in certain probate courts, giving parties in those courts in civil cases the right to a jury trial and the right to appeal to the Supreme Court or Court of Appeals. {O.C.G.A. §§15-9-120 Through 15-9-126}

In this context, "civil case" is a defined term {O.C.G.A. §15-9-120(1) } and does not include involuntary treatment or habilitation for mental illness, substance abuse or mental retardation, and does not include certain emergency guardianship matters. {1986 Op. Att'y Gen. No. U86-18}.

These statutory provisions apply to probate courts in counties with a population of more than 96,000 persons according to the 1990 census or any future such census, in which the judge has been admitted to the practice of law for a least of seven years. {O.C.G.A. §15-9-120(2) }.

The above provisions allowing jury trials in certain probate courts and direct appeals from such probate courts apply to all "cases" filed on or after July 1, 1986. The Georgia Supreme Court has held that if any pleading was filed concerning a decedent's estate prior to the effective date, any appeal relating to that estate would be de novo to the superior court, whether or not the appeal relates to a pleading filed prior to the effective date. {Porter v. Frazier, 257 Ga. 614 (1987)}. In effect, the Supreme Court construed "case" to mean the entire estate in this context. This rationale would apply to jury trials as well as appeals.

II. Demand For Jury Trial

A. Time Limitations

A party must demand a jury trial in writing 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. The time period is shorter in adult guardianship cases. Failure to assert the right to a jury trial is deemed a waiver of that right. {O.C.G.A. §15-9-121(a)}.

III. Uniform Probate Court Rules - Exhibit A

A. Exhibit A to the uniform rules applies to probate courts described in *i.c. above.*

B. There Are Specific Provisions In Exhibit A Concerning Discovery, Motions, Pre-Trial Orders, and Jury Trials, Among Other Matters.

C. Exhibit A Follows The Uniform Superior Court Rules Unless There Is A Statute Concerning These Probate Courts Which Makes Different Provisions (Such As Rule 24(A) of Exhibit A, Concerning The Demand For A Jury Trial).

IV. Instructions to Jury

A. This benchbook may be used as a source of jury instructions. For example, a charge concerning testamentary capacity could be based upon the explanations in Chapter 3.

B. Pattern jury instructions are available from the council of superior court judges of Georgia.

C. It is acceptable for the court to provide counsel with sample instructions such as instructions the court has approved in the past which would be relevant to the current case.

D. It is useful to put the following paragraph in the pre-trial order under "other matters" at paragraph 17d. In the pre-trial order form contained in exhibit a to the uniform probate court rules:

E. Requests and Exceptions to Charge.

F. The court will provide counsel with copies of proposed charges at the beginning of the first day of trial. Counsel will provide comments and additional charges at the beginning of the second day of trial. Additional requests may be submitted to cover unanticipated points that arise thereafter.

G. All requests to charge shall be numbered consecutively on separate sheets of paper and submitted to the court in duplicate by counsel for all parties. Any direct quotation used in any request shall be indicated by the use of quotation marks. If quotation marks are not used, the court will assume the statement is a paraphrase. Unless the source is a Georgia statute, a photocopy of the page showing the source of the quoted language must be attached to the charge, with the requested language highlighted.

V. Cheatham-Eldridge Outline

- JURY TRIALS IN PROBATE COURT

[NOTE: The following outline entitled "Jury Trials in Probate Court" was disseminated in July 1986 at a seminar for probate judges who had been given the power to hold jury trials. The outline was presented by Hon. Frank Cheatham and Hon. Frank Eldridge, who were active, experienced superior court judges. It has proved extremely useful.]

- Pre-trial discovery
- Pre-trial conference and order
- The trial
- Clerk or judge swears in jury
- Jury panels
- Voir dire
- Selection of jury
- Opening statements by the parties
- Conduct of the trial - Judge's role
- Motions at close of evidence
- Requests to charge and charge conference
- Final argument of counsel
- Order of presentation of charge
- Objections to charge
- Jury deliberations
- Jury returns verdict
- Jury management

A. Jury Trials in Probate Court

O.C.G.A. §15-9-122 provides as follows: "*Unless provided to the contrary by Code §9-11-81, the general laws and rules of practice, pleading, procedure and evidence which are applicable to the Superior Courts of this State shall be applicable to and govern in civil cases in the Probate Court.*" [Emphasis added]

a. I assume that the words "rules of practice" and "procedure" encompass the

Georgia Uniform Superior Court Rules, which would apply in such cases to the exclusion of the rules of the Probate Court.

B. Pretrial Discovery

Georgia Uniform Superior Court Rule 5 (hereinafter Uniform Rule) allows six months for discovery after the filing of the answer with the right of the Court to extend or shorten the time.

Pretrial Conferences

a. A pretrial conference is a useful tool in preparing for a trial. It is a means of clarifying the issues, of spotlighting contested questions of law involving the introduction of evidence, determining the length of the trial, etc. It also gives the judge an opportunity to inquire as to the possibility of settlement and to be a catalyst in this area if possible. Uniform Rule 7 covers pretrial conferences and includes a pretrial order. The procedure I use is to order a pretrial conference at a specified time and date and require the parties to conform to Uniform Rule 7. 1 also require the proposed pretrial order by each side to be submitted five days before the conference in order to allow me to familiarize myself with the issues. After the conference a final pretrial order is drawn either by the judge or on his order by one of the attorneys, after which the judge signs it and files it with the Clerk. The judge may use the narrative descriptions of the issues given by the parties in the pretrial order in lieu of the pleadings when he charges the jury if he wishes to do so.

C. The Trial

Judge or Clerk administers oaths: The jury panels, before voir dire, are administered two oaths by the judge or clerk which can be given at the same time.

a. The first is found in O.C.G.A. §15-12-138 and is as follows: "You shall well and truly try each case submitted to you during the present term and a true verdict give, according to the law as given you in charge and the opinion you entertain of the evidence produced to you, to the best of your skill and knowledge, without favor or affection to either party provided you are not discharged from consideration of the case submitted. So help you God."

b. The second oath has to do with voir dire and is found in O.C.G.A. §15-12-132 as follows: "You shall give true answers to all questions as may be asked by the Court or its authority, including all questions asked by the parties or their attorneys, concerning your qualifications as jurors in the case of . So help you God."

Jury Panels: The jury of twelve shall be selected from two panels, each consisting of twelve jurors. Each side has the right to six peremptory challenges. The remaining twelve jurors will constitute the jury. If an alternate juror or jurors are needed because of the projected length of the trial, then three additional prospective jurors are required for each alternate, each side having one peremptory challenge. Once the jury is chosen, they are not required to take an additional oath.

Voir Dire: The trial judge usually qualifies the jury panels concerning their possible relationship to the parties as follows:

c. "Are you related by blood or marriage to [Plaintiff] or [Defendant]?"

d. If a party is a corporation such as a corporate executor, the question as to that party should be: "Is anyone of you an agent, stockholder or employee of [Corporation]?"

e. If any juror gives an affirmative answer to the foregoing question, he or she must be replaced by one of the alternate prospective jurors.

f. At this stage most judges turn the voir dire over to the attorneys for the parties although, under Uniform Rule 10.1, the Court may elect to propound the questions rather than the attorneys. This part of the rule appears to be in direct conflict with O.C.G.A. §15-12-133, but until the Supreme Court holds otherwise, the Uniform Rule should govern. As a practical matter most judges allow the attorneys to conduct the voir dire with the right to restrict their questions if they get beyond the intent of the aforesaid code section which states in part that "....either party shall have the right to inquire of the individual jurors examined touching any matter or thing which would illustrate any interest of the juror in the case, including any opinion as to which party ought to prevail, the relationship or acquaintance of the juror with the parties or counsel therefor, any fact or circumstance indicating any inclination, leaning, or bias which the juror might have respecting the subject matter of the action or the counsel or parties thereto, and the religious, social, and fraternal connections of the juror." The parameters of the aforesaid quotation are rather broad, especially when investigating such areas as "bias." However, the judges have considerable discretion and the appellate courts have been protective of the right of the judge to control this area of the trial. In Whitlock v. State, 230 Ga. 700, 705 (1973)) the Court stated: "The single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias and prior inclination. The control of the pursuit of such determination is within the sound legal discretion of the trial court, and only in the event of manifest abuse will it be upset upon review." Although the foregoing is a criminal case, the same rationale applies to civil actions. Most of the appellate court rulings on voir dire involve criminal cases but as just stated the same rationale usually applies to civil cases.

g. Generally, however, on *voir dire* the attorneys should be prohibited from asking any question which would indicate how the prospective juror might rule in answer to a hypothetical question. Additionally, the jurors should not be questioned on their knowledge or understanding of various theories of law. If such is attempted, the judge should tell the attorney that he will charge the jury on the law at the proper time. But for the purpose of *voir dire*, the attorney may ask a prospective juror if he will follow the law as it is given to him in charge by the judge.

Selection of the Jury: After *voir dire* has been completed, there are two general methods of selecting the jury. One is to have the plaintiff and then the defendant alternately call out the names and/or numbers of the juror they peremptorily challenge. In my judgment, the better method is a silent method in which the bailiff or deputy hands the plaintiff a piece of paper that has a line drawn down the middle with plaintiff written at the top left and defendant at the top right. Underneath on each side are Arabic numbers 1 through 6. The judge then instructs plaintiff's attorney to write the last name and number of the juror he challenges in the plaintiff's column under No. 1 after which he is instructed to hand it to the sheriff who in turn takes it to the defense table where the defendant enters his first challenge the same way. The paper is passed back and forth by the sheriff until the jury is selected.

Opening Statements: The attorney for each side is entitled to make an opening statement before the presentation of evidence begins. Care should be taken that the attorney confine himself to a statement of what he intends to prove and not an argument of the proposed evidence. The argument comes at the end of the trial. Quite often the attorneys drift into the argumentative phase of a trial in the opening statement and they must be cautioned to confine themselves to what they intend to prove. An admission made by an attorney in an opening statement is an admission in judicio and is binding upon his client.

h. Additionally, judges are fairly liberal in allowing the use of visual aids in opening statements if the attorney is careful to stay within the parameters set out above.

i. The defense counsel is confined to the same restrictions and procedure in making his opening statement.

Conduct of the trial: A judge is a neutral party in the courtroom. He does not take sides. His role is to maintain order and to see that the trial is conducted within the confines of the law and proper procedure.

j. It is essential that the judge maintain control of the courtroom. Occasionally, a lawyer will challenge a judge to learn how far he can go or what he can get away with. Under these circumstances, the judge must firmly assert his control of the courtroom. All objections should be made to the Court. The attorneys should not be allowed to argue with each other. They should be instructed to direct their objections to the Court.

k. Occasionally when an objection is made to a question and the Court wishes to inquire as to the relevancy of the question, rather than allowing the attorney to narrate what he intends to illustrate by the answer in the presence of the jury, under these circumstances the Court should call the attorneys up for a bench conference out of the hearing of the jury, which would be attended also by the Court Reporter, at which time the judge would rule on the objection. It would be wise for the judge to have available a standard text on evidence, such as Green on Evidence or Agnor on Evidence, to which he can refer if complicated questions arise. If the evidence sought to be introduced is critical to the case and the question of its admissibility is close, the judge may wish to take a short recess to research the matter in more depth. I might point out that if close questions of admissibility of evidence are brought out at the pretrial conference, they can be disposed of at more leisure than is available during the course of a trial.

l. If documentary evidence is tendered which is ruled out by the court and the attorney wishes to preserve this evidence for possible appeal, then the court reporter should be instructed to mark the evidence as an exhibit which will not go out with the jury. If the attorney wishes to present the testimony of a witness which the court rules inadmissible, the attorney may request that he have an opportunity to make a showing of the evidence that he would have presented for purposes of appeal. Under these circumstances, the court can either, dismiss the jury from the courtroom and allow that evidence to be put in the record or can instruct the attorney that the evidence can be put in the record at the end of the trial or at some other more convenient time.

m. If a juror wishes to have a particular question answered, the best procedure is to have him write that question down and submit it to the judge who can determine whether or not it would be a proper question. If it is, then he should either ask the question of the proper witness or request one of the attorneys to do so.

Motions at close of evidence: Usually one or both sides moves the Court for a directed verdict at the close of the evidence. Rarely do the facts allow the judge to take the matter away from the jury and grant such motion, but occasionally the motion should be granted. If any material question of fact remains the judge must overrule the directed verdict motion.

Requests to Charge and Charge Conference: Many judges require the attorneys to present their requests to charge to the Court at the beginning of the trial. Some require these requests several days before the trial. The parties should always have an opportunity to add additional charges should matters come out during the trial which were not contemplated prior to the trial. Having the charges before the trial begins allows the judge to compare the charges to the evidence presented and to adjust or delete charges as required so that during the charge conference he can let the lawyers know fairly rapidly what he will and will not charge.

n. A charge conference is held at the close of the evidence and before final arguments at which time the judge tells the attorneys what he will charge the jury and, in particular, which requests to charge he will use and which he will not use.

o. The charge conference is usually not taken down by the Court Reporter unless there is a special request from either party. Objections to the Court's charge should be made after the charge is given the jury at which time the Court Reporter records both the charge and the objections.

p. With reference to proposed charges, the judge should be careful not to be repetitious for fear of overemphasizing a particular point of law. This is easy to do because most attorneys present the same charge in several slightly different forms. The Court should select the appropriate charge or use his own standard charge on the subject.

Final argument of counsel: Both sides are entitled to one hour for closing arguments.

q. When the burden of proof is on the plaintiff he is entitled to the opening and closing arguments unless the Defendant has not presented any evidence in which

event the Defendant is entitled to the opening and closing arguments.

Suggested Order of Presentation of Charge:

r. Describe pleadings (Charge 1)

s. Credibility of witnesses (Charge 4)

t. Conflict in evidence (Charge 6)

u. Burden of proof (Charges 2 & 3)

v. Expert Witnesses (Charge 5)

w. Other Charges Involving Evidence or Procedure

x. Issues to be decided by jury.

y. Form of verdict. (Always include Charge 12)

Objections to Charge: After the jury has been sent to the jury room the judge asks the attorney for each party for objections to the charge. Usually the judge denies the objections. However, occasionally he determines that it is necessary to add or modify his charge in which event he calls the jury back and corrects his charge.

Jury deliberations: Frequently the jury will request that certain testimony be replayed for them. The judge has the discretion to grant or deny such a request. Extreme care should be taken when such a request is granted to see that certain critical testimony is not unduly spotlighted so that unfair emphasis is given to that testimony. Usually one of the attorneys will object and will request that if such testimony is replayed for the jury that the testimony of another witness with an opposing view be played for the jury also. The best rule to follow is to deny such a request for replaying testimony unless the judge feels that it is essential and would be fair to all parties.

z. Occasionally the jury will send a question to the judge through the bailiff. Formal procedure would require the judge to call the jury back in the presence of the attorneys and the court reporter and have the foreman present the question again, after which the judge would respond. Frequently, the questions from the jury have such an obvious answer that it would be a waste of time to bring the jury back into the courtroom. Under these circumstances the judge should call the attorneys in his office and tell them what the question is. For example, the question might be, "May we have the police report which was referred to by Policeman Jones?" The report was not introduced into evidence because it contained hearsay and obviously cannot be sent to the jury room. Under these circumstances, the judge can obtain the consent of the lawyers to have the bailiff tell the jurors that the report was not introduced in evidence and cannot be given to them. You are cautioned however to never handle questions in such an informal way without the consent of the attorneys for all parties. You may want to put this procedure in the record when you return to the courtroom. Even when the jury is brought back into the courtroom for a formal presentation of the question by the foreman, it is often wise to discuss your proposed answer with the attorneys before responding to the jury if the question has been sent out by the jury in advance. If the question has not been sent out in advance, and you are uncertain of the answer, then send the jury back to the jury room. This will give

you an opportunity to discuss the matter with the attorneys and to do any research you feel is necessary before bringing the jury back and giving them the answer to the question. After you have answered the jury question and the jury has again retired, the attorneys should be given an opportunity to enter objections.

Jury returns with verdict: When the jury returns with the verdict, the judge usually asks the foreman if the jury has reached a verdict. Upon receiving an affirmative answer it has been my custom to request the foreman to deliver the verdict to the deputy sheriff who in turn gives it to me. I check it for accuracy and then have the Clerk publish it. Sometimes it is necessary to give the verdict back to the foreman to add the date or some other minor information. If the verdict is unclear, then after a conference with the attorneys, the judge sends the jury back with instructions to correct or clarify the verdict.

aa. Assuming that the verdict is correctly prepared, either side has the right to request that the jury be polled after it is published. The Clerk propounds two questions to each juror. He states, "You have heard the verdict read. Was this your verdict then?" [juror answers yes of no] "Is this your verdict now?" [juror answers yes or no] Jurors sometimes misunderstand this procedure. Therefore it is my custom, before the jury is polled, to explain to them that the first question involves the last decision they made in the jury room and the second question involves their decision as they sit there in the jury box.

bb. If any of the jurors answers "no" to either question, then the jury must be sent out again for continued deliberations.

Jury Management: Consideration should be given to the comfort and well-being of the jury. During the trial ten to fifteen minute breaks should be taken approximately every ninety minutes. Some jurors smoke and others do not. Quite frequently jury rooms become clouded with smoke much to the irritation of those who do not smoke. If your jury room does not dissipate smoke properly, you may wish to ban smoking in the jury room and allow the bailiff to take those jurors who smoke outside the jury room while they are smoking.

cc. Jurors should not be kept beyond normal working hours unless it is necessary for some good reason. In such an event, the jurors should be notified in advance and given an opportunity to make any telephone calls necessary to family members or others.

dd. Lunch breaks should be of sufficient length to prevent jurors from being overly rushed.

ee. The court has the discretion to allow or not allow jurors to take notes. In my judgment it is proper and helpful to take notes. Some attorneys provide pads and pencils which should be made available through the bailiff for distribution to any jurors who wish to use such material. The attorneys should not be allowed to pass out the pads.

ff. After the jury has been selected and before the trial begins, they should be instructed generally as follows: "You have heard very little about this case at this point. However, please do not discuss this case among yourselves any time during the trial until you have heard all the evidence by both sides, the final argument of the attorneys and the charge of the court. You will then have everything before you and can discuss the case at length. Under no

circumstances should you discuss this case with anyone who is not on the jury and should some non-jury person attempt to discuss the case with you, please report the same to the court as quickly as possible."

VI. Motion for Directed Verdict

A. A motion for a directed verdict may be made at the close of the evidence offered by an opponent or at the close of the case. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that a motion is not granted without having reserved the right to do so. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict must state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a particular verdict, such verdict must be directed. {O.C.G.A. §9-11-50(A) }.

VII. Motions for Judgment Notwithstanding The Verdict and For New Trial

A. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. not later than 30 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or, if a verdict was not returned, such party, within 30 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. {O.C.G.A. §9-11-50(B) }

B. Additional Rules Are Provided In Other Subsections of O.C.G.A. §9-11-50.

VIII. Form of the Verdict

A. The form of a verdict and the submission of a special verdict is within the discretion of the trial court, and, absent an abuse of that discretion, the court's choice will not be overturned. {O.C.G.A. §9-11-49(a) }. Even where a special verdict is required to be given to the jury, it is the court that "shall prescribe the form of the questions for submission to the jury." {O.C.G.A. §9-11-49(b) }.

B. The trial court may amend a verdict's form even after the jury has dispersed {O.C.G.A. §9-12-7}, and a trial court may mold a verdict "so as to do full justice to the parties." {O.C.G.A. §9-12-5; Fried v. Fried 208 Ga. 861 (3) (1952)}. Thus, if the verdict is imperfect, but the intention of the jury is clearly expressed, then the trial court should have the verdict put in the proper form in accordance with the jury's intention. {Hannula v. Ramey et al. 177 Ga. App. 512, 513 (1) (1986)}. The jury may express its meaning in an informal manner, and the court has the right to put it in such

form and shape as to do justice to the parties, according to the pleadings and the evidence. {194 Ga. 1, 6 (4) (1942)}

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I. Appointing Qualified Interpreters

A. Georgia State Court Benchbook

In the summer of 2017, the Council of Probate Court Judges voted to adopt the State Court's rules regarding the appointment of Qualified Interpreters. Because these rules can be modified at any time, a decision was made to provide all probate judges with a link to the State Court's Benchbook with the appropriate ID and password. Below are instructions on how to access the Georgia State Court's Benchbook and Chapter 11 regarding the Appointment of Qualified Interpreters. We appreciate the assistance of Bob Bray, Executive Director for the Council of State Court Judges, and the entire council of State Court Judges.

The link to the State Court Benchbook is: http://statecourt.georgiacourts.gov/

At the website, on the left below the picture of the Judge's bench is a link: "Other Judges Log In Here".

Click on that Link. Then use "other judges" as your ID and CSCJ16 as your password.

II. Commission on Equality; Bias Free Communication

A. Introduction to Subchapter

The following pages are reprinted from the Georgia Supreme Court's Internet site concerning Equality {Use Of Interpreters For Non-English Speaking And Hearing Impaired Persons}. Please check that Internet site for information that might be updated, such as the list of foreign language interpreters.

The first two pages which follow provide an overview concerning the Supreme Court Commission on Equality. The next five pages (after the overview) contain a Guide to Bias - Free Communication. This Guide should be useful to judges in oral communications in the courtroom and elsewhere, and in preparing written orders.

B. Supreme Court of Georgia Commission on Equality

HISTORY

a. On March 15, 1989, the Supreme Court of Georgia established the Georgia Commission on Gender Bias in the Judicial System, whose recommendations resulted in the 1992 creation of the Supreme Court Committee for Gender Equality for a two year implementation period. On February 1, 1993, the Supreme Court Commission on Racial and Ethnic Bias in the Courts was established for an initial three year period. At the end of their initial terms, neither group had discharged all of its duties. After careful consideration, the Supreme Court combined the above referenced commissions, and established the Supreme Court Commission on Equality on December 13, 1995. The Commission on Equality is charged with implementing the recommendations made in the Final Reports of the Supreme Court Committee for Gender Equality and the Supreme Court Commission on Racial & Ethnic Bias in the Courts and developing new initiatives that address bias and prejudice on Georgia's courts.

OBJECTIVES

b. The Supreme Court of Georgia has charged the Commission on Equality to:

c. Formulate and propose guidelines, standards and procedures to implement the Commission's recommendations;

d. Develop appropriate mandatory judicial and legal education course materials and programs on equality, including appropriate instruction to be included in Georgia's new judge and new lawyer orientation programs;

e. Develop and participate in programs about equality for professional and lay audiences;

f. Serve as a resource to the media;

g. Advise the legislature on legislation needed to further the aims of the Commission;

h. Facilitate a plan that educates the public about the dynamics of the cycle of domestic violence, the resources for victims and the protections available under Georgia law;

i. Develop a mechanism for the processing of complaints received about judges' and lawyers' biased behaviors;

j. Work with the Judicial Nominating Committee to encourage more racial and ethnic minorities, women and men to apply for appointments as judges; and

i. Act a as a resource to Georgia law schools in revising teaching and curricula to promote the elimination of biased conduct on the part of attorneys.

Guide to Bias-Free Communication

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From the Supreme Court of Georgia

l. I am pleased to provide you with this publication, "Guide to Bias-Free Communication," produced by the Supreme Court Commission on Equality. The Supreme Court seeks to improve the quality of justice in Georgia by identifying and eliminating bias in the courts. The Georgia Commission on Equality has been heralded as one of the best in the nation for its commitment to educating the judiciary, attorneys and court personnel on the ways in which bias affects the provision of access and fairness for all participants in the Georgia judicial system.

m. Language is the most powerful tool in the courtroom. If our courts are to dispense justice fairly and impartially, they must do so in an atmosphere that is free of all forms and shades of prejudice. In order for the legal community to gain and maintain the respect of the public, all people must be treated with dignity and respect at every level of the legal process.

n. I urge all to adhere to the principle that there is no place for discrimination in any form in our judicial system. Please read this guide and share it with others. By working together, we can ensure that bias is eliminated and equality is achieved in our courts.

Chief Justice Robert Benham

o. From the Co-Chairs of the Supreme Court Commission on Equality

i. On behalf of the Georgia Commission on Equality, we gladly offer this "Guide to Bias-Free Communication" to the judges, attorneys and court personnel of Georgia. Our hope is that this publication will make it easier to do our jobs in a manner that clearly exhibits a professional respect for all the participants in the court system.

ii. While we know that intentions are good to refrain from language that might be biased, it can be perplexing to change habitual speech patterns or document forms. We believe that this guide is a step toward achieving the Commission's goal of a court system that is fair and is

perceived by all as bias-free.

Judge Kathlene F. Gosselin Judge John H. Ruffin, Jr.

p. Biased language usually emerges because of assumptions and attitudes that are deeply ingrained in our society. We use the term bias to refer to a predisposition or tendency to think about and behave toward people mainly on the basis of characteristics such as race, gender, religion or nationality. It is often reflected in attitudes and behavior based upon stereotypical beliefs rather than independent evaluation of the individual. Often it is expressed in such subtle ways that the one expressing it does not realize that an instance of bias has occurred. Our challenge is to be alert to ways of thinking, speaking and writing that reflect bias, and not to allow them to translate into biased behaviors.

q. The use of biased language in written materials or in oral communication conveys the appearance of bias. It may also convey the inaccurate message that bias is acceptable in the Judiciary. Language and non-verbal communication may also influence the listener's absorption of material in a way that supports biased assumptions. This brochure contains several suggestions for bias-free communication.

C. Gender Neutrality

Rephrase for gender neutrality, avoiding the use of a male or female pronoun when referring to both men and women. Alternatives include:

Use a neutral article such as a, an, the, or this

a. YES After oral argument, the judge may issue the decision from the bench.

b. NO After oral argument, the judge may issue his decision from the bench.

Repeat the noun or use a synonym

c. YES The clerk of court will then certify the order. This official has now completed the process.

d. NO The clerk of court will then certify the order. He has now completed

Eliminate the pronoun

e. YES The assignment judge shall perform additional duties as assigned by

f. NO The assignment judge shall perform additional duties as assigned to

Use plural pronouns

g. YES The judge should allow counsel to present their cases in their own styles.

h. NO The judge should allow counsel to present his own case in his own style.

Use alternative pronouns such as who, anyone who, or whoever

i. YES An attorney who shows disrespect to the judge may be found in

j. NO If an attorney shows disrespect to the judge, he may be found in

Use he/she sparingly

k. If the above suggestions are used, these terms will seldom be needed.

D. Inclusive Terminology

Use neutral, inclusive and generally accepted terminology. When communicating with groups or individuals, avoid language that does not include everyone present. The use of such language may imply that others are excluded.

YES:

- chair, chairperson
- police officer
- fire fighter
- worker
- homemaker
- representative
- workforce
- spouse
- Dear Sir/Madame
- Foreperson

NO:

- chairman
- policeman
- fireman
- workman
- housewife
- spokesman
- manpower
- husband/wife
- Dear Sir
- Foreman

E. Appropriate Forms of Address

When conducting court business, address everyone in the same formal or professional manner, using appropriate titles and last names. Avoid addressing individuals differently on the basis of gender, race or ethnic background. That is, do not address women and minorities by first name, when addressing men and non-minorities by title. If a judge customarily addresses a male district attorney as "Mr. District Attorney" the judge should address a female district attorney with a similar title such as "Madame District Attorney" rather than a less respectful address such as "the lady District Attorney." Differential treatment and informal address suggest a lack of respect.

a. Appropriate Titles

b. Judge/Your Honor

c. Representative /Senator

d. Counselor/Attorney

e. Mr./Ms. (Miss and Mrs. refer to marital status and should only be used if requested)

f. Dr.

g. Officer

F. Avoid Stereotypes

Stereotyping can occur in your choice of illustrative examples, case studies, or specific words that are laden with prejudicial implications.

Use parallel terms such as husband/wife, and men/women

Avoid diminutive references, such as referring to women as girls and men as boys

Use balanced examples, avoiding racial, ethnic or gender stereotypes

Avoid expressions, jokes and slang used to describe racial, ethnic or other groups. The use of such language might be perceived as biased.

Avoid using racial, ethnic, or other descriptors when not necessary.

YES:
The Plaintiff at the table...
NO:
The Black man at the table...
YES
The witness in this case...
NO
The Chicano woman in this case...

G. Accurate, Unbiased Communication Requires A Continuous and Conscious Effort. We Hope That These Guidelines Help You to Recognize and Avoid The Use of Biased Language.

III. Definitions

A. Modes of Interpreting

The mode of interpreting to be used at any given time (consecutive or simultaneous) depends on the types of communication to be interpreted within a proceeding and not on the types of proceeding. In fact, both the simultaneous and consecutive modes will often be appropriate within a proceeding. For example, interpreting would be simultaneous when a judge is making a defendant aware of his or her rights, and consecutive when the judge begins to question the defendant. The following guidelines for modes of interpreting are suggested.

a. Simultaneous mode. The simultaneous mode of interpreting should be used for a person who is listening only. This is the normal mode for interpreting proceedings. Accordingly, an interpreter should interpret in the simultaneous mode in situations such as the following:

i. For a defendant when testimony is being given by another witness,

ii. For a defendant or witness when the judge is in dialog with an officer of the court or any person other than the defendant or witness,

iii. For a defendant when the court is addressing the juror gallery or any other persons present in the courtroom, or

iv. For any non-English speaking party when the judge is speaking directly to the person without interruption or regular call for responses (e.g., lengthy advisements of rights; judge's remarks to a defendant at sentencing.)

b. Consecutive mode. The consecutive mode of interpreting should be used when a non-English speaking person is giving testimony or when the judge or an officer of the court is communicating directly with such a person and is expecting responses (e.g., taking a plea). This should be the normal mode for witness interpreting.

c. Summary mode. The summary mode of interpretation should not be used. It is most often resorted to only by unqualified interpreters who are unable to keep up in the consecutive or simultaneous modes. Qualified interpreters may report the need to use summary interpreting if they are called upon to interpret highly technical testimony of expert witnesses which they do not understand or have the vocabulary to interpret. The judge should specifically instruct all interpreters to report if it is necessary to resort to summary interpreting. In circumstances when the problem does not involve unusual and highly technical language, the preferred course of action is to dismiss and replace the interpreter if there are other interpreters available who do not need to use the summary mode. Any time the judge determines that the proceedings must continue even if summary interpreting is being used, the judge's determination should be part of the record of the proceedings.

CAUTION: Summary interpreting should never be permitted during witness interpreting, regardless of the immediate lack of availability of a replacement interpreter.

CAUTION: If an interpreter referred to the court is unable to interpret competently in either the consecutive or simultaneous modes, the interpreter is not qualified for court interpreting.

IV. Uniform Superior Court Rule 7.3/Determining Need for An Interpreter

A. Civil and Criminal Cases

In all civil and criminal cases, the party or party's attorney shall inform the court in the form of a notice of the need for a qualified interpreter, if known, within a reasonable time---at least 5 days where practicable ---before any hearing, trial, or other court proceeding. Such notice shall be filed and shall comply with any other service requirements established by the court. The notice shall (1) designate the participants in the proceeding who will need the services of an interpreter, (2) estimate the length of the proceedings for which the interpreter is required, (3) state whether the interpreter will be needed for all proceedings in the case, and (4) indicate the language(s), including sign language for the Deaf/Hard of Hearing, for which the interpreter is required.

B. Receipt of Notice

Upon receipt of such notice, the court shall make a diligent effort to locate and appoint a licensed interpreter, at the court's expense, in accordance with the Supreme Court of Georgia's Rule on Use of Interpreters for Non-English Speaking and Hearing Impaired Persons. If the court determines that the nature of the case (e.g., an emergency) warrants the use of a non-licensed interpreter, then the court shall follow the procedures as outlined in the Supreme Court of Georgia's Commission on Interpreter's Instructions for Use of a Non-Licensed Interpreter. Despite its use of a non-licensed interpreter, the court shall make a diligent effort to ensure that a licensed interpreter is appointed for all subsequently scheduled proceedings, if one is available.

C. Failure to Notify

If a party or party's attorney fails to timely notify the court of a need for a court interpreter, the court may assess costs against that party for any delay caused by the need to obtain a court interpreter unless that party establishes good cause for the delay. The remainder of this section addresses the issue when timely notice is not provided. It does provide that "[u]less immediacy is a primary concern, some delay might be more appropriate than the use of an interpreter not licensed by the Supreme Court of Georgia's Commission on Interpreters (COI), the Registry for interpreters of the Deaf (RID), or other recognized credentialing entity."

D. Appointment on Observation or Disclosure

Notwithstanding any failure of a party or party's attorney to notify the court of a need for a court interpreter, the court shall appoint a court interpreter whenever it becomes apparent from the court's own observations or from disclosures by any other person that a participant in a proceeding is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to meaningfully participate in the proceeding.

E. Advanced Notice of Change of Cancellation

If the time or date of a proceeding is changed or cancelled by the parties, and interpreter services have been arranged by the court, the party that requested the interpreter must notify the court 24 hours in advance of the change or cancellation. If a party fails to timely notify the court of a change or cancellation, the court may assess any reasonable interpreter expenses it may have incurred upon that party unless the party can show good cause for its failure to provide a timely notification.

THE FOLLOWING SECTIONS MAY ASSIST YOU IN THE USE OF AN INTERPRETER:

F. Bona Fide Need

Judges should presume a bona fide need for an interpreter when an attorney or a pro se litigant represents that a party or witness has limited proficiency in English and needs an interpreter. When any doubt exists about the ability of persons to comprehend proceedings fully or adequately express themselves in English, interpreters should be appointed.

G. Voir Dire for Determining Need for an Interpreter

When a party does not request an interpreter but appears to have limited ability to communicate in English, the court should conduct a brief *voir dire* to determine the extent of the party's English skills. Questions that can be answered solely with a "yes" or "no" should be avoided. The questions should ask (what, where, who, when) and require either descriptions of people, places and events or a narration. An example is illustrated below.

H. Model Voir Dire For Determining Need for an Interpreter

Mr./Ms. _____, please tell me your name and address.
Please also tell us your birthday, how old you are, and where you were born.
How did you come to court today?
What kind of work do you do?
What was the highest grade you completed in school?
Where did you go to school?
What have you eaten today?
Please describe for me some of the things (or people) you see in the courtroom.
Please tell me a little bit about how comfortable you feel speaking and understanding English.

I. Proficiency Determination

Many individuals have enough proficiency in a second language to communicate at a very basic level. But participation in court proceedings requires far more than a very basic level of communicative capability. Consider that in order for non-English speaking criminal defendants to testify in their own defense they must be able to:

a. Accurately and completely describe persons, places, situations, events;

b. Tell "what happened" over time,

c. Request clarifications when questions are vague or misleading; and during cross-examination:

d. Recognize attempts to discredit their testimony recognize attempts to have them confirm contradictory interpretations of facts; and defend their position.

J. Comprehension Requirements

For defendants to evaluate and respond to adverse testimony of witnesses and to assist in their defense, they must comprehend the details and the subtle nuances of both questions and answers spoken in English during the testimony of adverse witnesses. At appropriate times, defendants must be able to secure the attention of counsel and draw attention to relevant details of testimony.

K. Same Consideration for Non-English Speaking Persons

Non-English speaking persons should receive the same consideration as native speakers of English in non-evidentiary proceedings that involve determination of custodial status, advisement of rights, consideration of sentences and articulation of obligations and responsibilities established by an order of the court.

V. Waiver of Interpreter

A. Permission of Waiver to Right of an Interpreter

Great caution should be exercised before permitting waiver of a right to an interpreter. The judge should not allow a person who has limited proficiency in English to waive the use of an interpreter unless the person requests a waiver in writing and in the person's native language.

B. Retraction of Waiver to Right of an Interpreter

At any stage of the case or proceeding, a person who has waived an interpreter should be allowed to retract a waiver and receive the services of an interpreter for the remainder of the case or proceeding.

C. Deliberations on Waiver or Retraction

Deliberations made on matters of waiver or retraction of waiver should be on the record.

VI. Qualification

A. Interpreters

All interpreters appointed by the court should be as highly qualified as possible. Trial court judges should consider designating an individual to screen and assess interpreters' skills and consider creation of a local roster of qualified interpreters if interpretation for a particular language is regularly needed.

B. Untested Interpreters

Circumstances frequently arise, however, when a judge is asked to accept the services of an individual whose language skills have not been previously evaluated. When the court is obliged to use an interpreter whose skills are untested, it is recommended that the judge establish on the record that the proposed interpreter:

a. Communicates effectively with the officers of the court and the person(s) who receive(s) the interpreting services;

b. Reads, understands, and agrees to be bound by the Code of Professional Responsibility for Court Interpreters; and

c. Takes an oath that all interpreters must take in a court proceeding.

C. Determination of Qualification of Untested Interpreters

In order to determine if the potential interpreter has adequate qualifications including language skills, knowledge of interpreting techniques, and familiarity with interpreting in a court or administrative hearing setting, the judge should either question the prospective interpreter or permit counsel to do so. In the alternative, the judge may also wish to secure written affidavits from interpreters before conducting the *voir dire*. The affidavit should be substantially similar in content to the suggested *voir dire*. If an affidavit is used, it is recommended that it be briefly reviewed on the record and its truthfulness attested to by the interpreter.

D. A List of Sample Questions Follow That Could Be Used In Voir Dire to Ascertain Whether the Prospective Interpreter Appears to Have Adequate Qualifications.

Model *Voir Dire* to Qualify an Interpreter

a. Do you have any particular training or credentials as an interpreter?

b. What is your native language?

c. How did you learn English?

d. How did you learn the foreign language?

e. What is the highest grade you completed in school?

f. Have you spent any time in the foreign country?

g. Did you formally study either language in school? If so, then to what extent?

h. Do you have any language teaching experience?

i. How many times have you interpreted in court?

j. Have you interpreted for this type of hearing or trial before? If so, then to what extent?

k. Do you know the applicable legal terms in both languages?

l. Are you a potential witness in this case?

m. Do you have any other potential conflicts of interest?

n. Have you had an opportunity to speak with the non-English speaking person informally?

o. Were there any particular communication problems?

p. Are you familiar with the dialectal or idiomatic characteristics of the witness?

q. Can you interpret simultaneously? Can you interpret consecutively?

r. Have you interpreted in any non-court settings? If so, what?

s. Have your interpreting skills ever been evaluated?

t. Have you ever been disqualified from interpreting in any court or administrative hearing?

u. Have you ever been arrested, charged, or held by federal, state, or other law enforcement authorities for violation of any federal law, state law, or county or municipal law, regulation, or ordinance?

VII. Interpreters' Oath

A. Requirement of Oath

Every interpreter used in the court should be required to swear an "oath of accurate interpretation." It is recommended that the interpreter be sworn at the beginning of the proceeding (in which instance the oath extends for the duration of that case) or at the beginning of a day's work in a given courtroom (in which case the oath extends for the duration of the day's services in that courtroom).

B. The Judge Shall Administer the Interpreter's Oath If Satisfied with the Interpreter's Qualifications and Abilities.

The oath shall conform substantially to the following form:

a. Do you solemnly swear or affirm that you will faithfully interpret from (state the language) into English and from English into (state the language) the proceedings before this Court in an accurate manner to the best of your skill and knowledge?

C. Interpreter's Preparation

To be most effective, an interpreter must prepare for trial. While it may not be as necessary for a routine arraignment, preparation for a hearing or trial is imperative. Judges can facilitate this requisite preparation by the following:

a. Promptly appoint an interpreter at the earliest possible stage of proceedings.

b. Allow the interpreter an opportunity either before the proceeding or at the beginning of the proceeding to meet with the non-English speaker to:

i. Become familiar with the dialect, jargon, education level, and other relevant information about the non-English speaker;

ii. Explain to the non-English speaker the role that the interpreter will

serve during the proceedings; and

iii. Make sure the interpreter knows the names of the parties and relevant places as well as other pertinent information before the proceedings begin.

The judge should ask counsel to:

c. Advise the interpreter, as far in advance of the proceedings as possible, of any special concerns they may have related to the particulars of the case or any peculiar linguistic characteristics or other traits their non-English speaking client may present;

d. Give interpreters access to documents or other information pertaining to the case; and

e. Advise the interpreter of the extent and nature of any expert witnesses so that the interpreter can become familiar with any technical materials which may need to be interpreted during the proceeding.

VIII. Instructions

A. General Instructions

The judge should explain the role and responsibilities of interpreters to all the courtroom participants in any court proceeding. The explanation should be given before the proceedings begin. For example, the judge may include these remarks at the beginning of a session of court, or at the beginning of each separate proceeding if all or most of the participants change between proceedings. The clarification should include the following points:

a. The interpreter's only function is to help the court, the principal parties in interest. And attorneys communicate effectively with one another;

b. The interpreter may not give legal advice, answer questions about the case, or help anyone in any other way except to facilitate communication;

c. If a person who is using the services of the interpreter has questions, those questions should be directed to the court or an attorney through the interpreter; the interpreter is not permitted to answer questions, only to interpret them;

d. If someone cannot communicate effectively with or understand the interpreter, that person should tell the court or presiding officer.

Example General Instructions

e. We are going to have an interpreter assist us throughout these proceedings, and you should know what the interpreter can do and cannot do. Basically, the interpreter is here only to help us communicate during the proceedings. The interpreter is not a party in this case, has no interest in this case, and will be completely neutral. Accordingly, the interpreter is not working for either party. The interpreter's sole responsibility is to enable us to communicate with each other.

f. The interpreter is not an attorney and is prohibited from giving legal advice. The interpreter's sole job is to interpret, so please do not ask the interpreter for

legal advice or any other advice or assistance. Please direct any questions to your counsel or me.

g. Does anyone have any questions about the role or responsibilities of the interpreter?

h. If any of you do not understand the interpreter, please let me know by raising your hand. Is anyone having difficulty understanding the interpreter at this time?

B. Instructions to Non-English Speakers

The judge should advise every witness of the role of the interpreter immediately after the witness is sworn and before questioning begins. As the judge gives the advisement, the interpreter simultaneously interprets it for the witness. The clarification should cover the following points:

a. The non-English speaker should be advised that the court interpreter will translate any statements or comments at all times.

b. The non-English speaker should be instructed not to ask direct questions of the court interpreter or initiate any independent dialogue with the interpreter including legal advice or explanations of any statement made during the proceedings. The non-English speaker should be instructed to direct all questions to counsel or the court when necessary.

c. The non-English speaker should be instructed to wait for the full interpretation of the English statement into his or her own language before responding to a question.

d. The witness should speak clearly and loudly so everyone in the court can hear; and

e. If the witness cannot communicate effectively with the interpreter, she or he should tell the court or presiding officer.

Sample Judicial Instructions to a Non-English Speaker

f. I want you to understand the role of the interpreter. The interpreter is here only to interpret the questions that you are asked and to interpret your answers. The interpreter will say only what you say and will not add, omit, or summarize anything.

g. The interpreter will say in English everything you say in your language, so do not say anything you do not want everyone to hear.

h. If you do not understand a question that was asked, request clarification from the person who asked it. Do not ask the interpreter for clarification.

i. Remember that you are giving testimony to this court, not to the interpreter. Therefore, please speak directly to the attorney or to me, not to the interpreter. Do not ask the interpreter for advice.

j. Please speak in a loud, clear voice so that everyone and not just the interpreter can hear.

k. If you do not understand the interpreter, please tell me. If you need the interpreter to repeat something you missed, you may do so, but please make your request to the person speaking, not to the interpreter.

l. Finally, please wait until the entire question has been interpreted in your language before you answer.

m. Do you have any questions about the role of the interpreter?

n. Do you understand the interpreter?

C. Instructions to Interpreters

Interpreters should be instructed:

a. To interpret for the non-English speaking person the "Instructions to Non-English Speakers" noted above;

b. That communications between counsel and client are not to be disclosed;

c. That no legal advice should be given to a party or witness; and

d. That all statements made by the non-English speaker should be interpreted, including statements or questions to the interpreter; (The interpreter should not summarize unless directed to do so by the judge.)

e. That the judge should be informed if the interpreter is unable to interpret a word, expression, *etc.*;

f. That all words, including slang, vulgarisms, and epithets, should be interpreted to convey the intended meaning;

g. That all statements made in the first person should be interpreted in the first person;

h. That all inquiries should be directed to the court and not to a witness or attorney;

i. That the interpreter should to be positioned near the witness, but not block the view of the judge, counsel, or jury; and

j. That the interpreter should speak loudly enough to be heard by all parties.

D. Instructions to Counsel

A judge can help an interpreter immensely by giving a general caution to all lawyers (and witnesses) to speak with clarity and at an average speed. Some counsel, when nervous, speak so fast that neither the court reporter nor the interpreter can work efficiently. Additional cautions and reminders might be necessary during trial.

Counsel should be instructed that:

a. All questions by counsel examining a non-English speaking witness should be directed to the witness and not to the interpreter;

b. If counsel understands both languages and disagrees with the interpretation, any objection should be directed to the court and not to the interpreter; and

c. If counsel believes that a prospective interpreter lacks adequate qualifications, counsel may be permitted to conduct a brief supplemental examination before the court decides whether to appoint that interpreter;

E. Instructions to Jurors

Impaneling a jury: When a case involves a non-English speaking party, the judge should instruct the panel of jurors before *voir dire* begins that an interpreter is sitting at counsel table to enable the party to understand the proceedings. It is also important to determine whether prospective jurors are affected by the presence of an interpreter: do they hold prejudices against people who don't speak English? Do they speak a foreign language that will be used during the proceedings? If so, will they be able to pay attention only to the interpretations?

Clarification of the role of the interpreter to jurors: Any time an interpreter is required for a jury trial, the judge should advise the jurors of (1) the role and responsibilities of interpreters and (2) the nature of evidence taken through an interpreter. Several specific and different advisements may be called for at different stages of the proceeding.

Before the trial begins: After a jury is impaneled and before a trial begins, the judge should instruct jurors as part of the pre-trial instructions that they may not give any weight to the fact that a principal party in interest has limited or no proficiency in English and is receiving the assistance of an interpreter.

Example Pre-Trial Instructions to Jurors

a. This court seeks a fair trial for all parties regardless of the language they speak and regardless of how well they may or may not speak English. Bias against or for persons who have little or no proficiency in English because they do not speak English is not allowed. Therefore, do not allow the fact that the party requires an interpreter to influence you in any way.

b. When a trial involves witness interpreting. When the trial involves witness interpreting, the judge should give instructions to jurors before the witness interpreting begins that include the following points:

i. Jurors must treat the interpretation of a witness's testimony as if the witness had spoken English and no interpreter were present;

ii. Jurors must not evaluate a witness's credibility positively or negatively due to the fact that his or her testimony is being given through an interpreter;

iii. Jurors who speak a witness's language must ignore what is said in that language and treat as evidence only what the interpreter renders in English. Such jurors must ignore all interpreting errors they think an interpreter may have made.

1.) There are several reasons for this last instruction, which may seem preposterous to some jurors, and judges may wish to elaborate those reasons which underscore the need for professional interpreters. First, the record of the proceeding is only in English, and it is the recorded testimony that constitutes evidence in the case. Second, jurors may mishear what is said; the interpreter (like the court reporter) is a trained listener. Finally, ordinary individuals and even trained interpreters may disagree about the correct interpretation of an expression, even if they hear the same words. Once again, interpreters are the court's experts in language, and their interpretation must be presumed reliable.

Example juror instructions regarding interpreted witness testimony

c. Treat the interpretation of the witness's testimony as if the witness had spoken English and no interpreter were present. Do not allow the fact that testimony is given in a language other than English to affect your view of her/his credibility. If any of you understand the spoken language of the witness, disregard completely what the witness says in his/her language. Consider as evidence only what is provided by the interpreter in English. Even if you think an interpreter has made a mistake, you must ignore it completely and make your deliberations on the basis of the official interpretation.

IX. Observation of Interpreter

A. Maximizing Communication during Interpreted Proceedings

As in any proceeding, the judge should keep the room in which sessions are held as quiet as possible and allow only one person to speak at a time. These normal rules are especially important in interpreted proceedings.

Interpreters should never use the pronoun "I" to refer to themselves when speaking. The reason for this is to avoid any possibility of confusion during the proceeding and in the record between interpreted utterance and statements that the interpreter may need to make to the court during the proceeding. For example, the interpreter should say: "Your honor, the interpreter was unable to hear the question and respectfully requests that it be restated," rather than "Your honor, I was unable to hear the question." The latter could be confused in the record with a statement by the witness. Therefore, the judge should always remind the interpreter and court participants that the interpreter, when addressing the court on her or his own initiative, should always speak in the third person and identify her or himself as "the interpreter" or "this interpreter."

When setting the pace of speech during interpreted proceedings, the judge should understand that the interpreter cannot usually work at the same speed as the court reporter. The court reporter works in shorthand and does not need to transfer statements from one language to another.

Other procedures the judge should observe during interpreted proceedings include the following:

a. Speak and assure that others speak at a volume and rate that can be accommodated by the interpreter.

b. Permit an interpreter for a witness to use appropriate signals to regulate the speaker's length of an utterance when it approaches the outer limit of the interpreter's capacity for recall.

c. Position interpreters so that they can make eye contact with parties, counsel, and judge. Make certain that the interpreter can easily hear and see the proceedings.

d. Interpreters ought to have access to drinking water nearby without interruption.

Preventing Interpreter Fatigue: Take breaks to avoid fatigue. The United Nations standards for conference interpreting (simultaneous mode interpreting) call for replacing interpreters with a co-interpreter every 45 minutes. Conference interpreting is arguably a less demanding activity than is simultaneous court interpreting.

If a proceedings interpreter believes that the quality of interpretation is about to falter due to fatigue, the interpreter should inform the court, and a recess should be taken or a replacement obtained.

For any proceeding lasting longer than thirty minutes of continuous simultaneous interpretation, two interpreters might be assigned so they can relieve each other at periodic intervals to prevent fatigue. A similar standard should be observed for continuous witness interpreting.

B. Things to Watch For

When speaking to a non-English speaker, lawyers and judges should always address that individual and not the interpreter.

When speaking for a witness or party, the interpreter should speak in the first person; not "he said he didn't do it," but "I didn't do it."

Judges need to watch for interpreter improprieties such as:

a. Improper influence of answer by head nodding, facial expressions;

b. Lengthy exchanges between interpreter and witness;

c. Otherwise leading of witness; and

d. Answering questions, giving advice, etc.

Do not allow attorneys to ask the interpreter to explain or restate what a witness has stated.

Do not allow two or more people to talk at once, as the interpreter cannot interpret for two speakers at the same time.

Use of Language Other Than English by Judges, Attorneys, or Other Participants Some judges and attorneys are bilingual and are able to communicate in the language of the non-English speaking person. In these situations it may be tempting for the judge to address the non-English speaking person in her or his language, to act as interpreter, or to allow or require counsel to substitute for a qualified interpreter. It is strongly recommended that these practices be avoided, and that courts observe the following guidelines regarding the use of languages other than English during court proceedings:

Judges should not function as interpreters during proceedings.

Judges and other court participants should speak in English at all times during proceedings.

Attorneys should use English during all proceedings at all times, except in confidential communications with a client.

Attorneys should not be permitted to function as interpreters for parties they represent.

If, contrary to these recommended standards, attorneys or any other courtroom participants are permitted to function as interpreters, they should be appointed subject to the same standards related to qualifications for interpreting that are applied to professional interpreters.

Judges who speak the language of a non-English speaking person often wish to make the person feel more at ease in the courtroom through some form of direct communication in the person's native language. A very brief greeting, announced beforehand on the record, might be used in such situations (e.g., "Please note for the record that the court will greet the defendant in [the language]."). Such greeting might then be followed by informing the person in English through the interpreter of the reasons why the judge will refrain from communicating in the shared language.

C. Errors during Witness Interpreting

Interpreting is an extraordinarily demanding activity and cannot be error-free. Appreciation of this reality should be extended to the interpreter during any allegations of inaccurate interpretation. Moreover, professional interpreters are trained to understand and act on their obligation to correct any errors that they might make during a proceeding.

When a witness interpreter discovers his or her own error, the interpreter should correct the error at once, first identifying himself or herself in the third person for the record (e.g., "Your honor, the interpreter requests permission to correct an error"). If the interpreter becomes aware of an error after the testimony has been completed, the interpreter should request a bench or side bar conference with the court and the lawyers to explain the problem. The court can then decide whether a correction on the record is required.

When an error is suspected by the judge, an attorney, or another officer of the court other than the interpreter, that person should bring the matter to the attention of the judge at the earliest convenient opportunity. If testimony is still being taken, the problem should be raised before the witness is released. In the case of a jury trial, the problem and its resolution should be handled at a side bar conference. The following steps are recommended for the trial judge:

The judge should determine first whether the issue surrounding the allegedly inaccurate interpretation is substantial or potentially prejudicial and requires determination.

If the judge agrees that the error is substantial or could be prejudicial, then the judge should refer the matter first to the interpreter for reconsideration. If this does not resolve the problem, evidence from other expert interpreters or any other linguistic expert the judge may select should be sought. In extreme circumstances it may be appropriate to permit attorneys from both sides to submit an expert.

The judge should make a final determination as to the correct interpretation. If the determination is different from the original interpretation, then the court should amend the record accordingly and advise the jury.

X. Use of Multiple Interpreters

A. There are three basic functions an interpreter serves during court proceedings. In some circumstances, it is physically impossible for one interpreter to fulfill more than one of the functions at the same time.

Proceedings interpreting: the most frequently encountered function an interpreter performs is to enable a non-English speaking person who is the subject of litigation to understand the proceedings and communicate with the court when necessary. In short, "proceedings interpreting" makes the defendant or other litigant effectively present during the proceedings. It is conducted in the simultaneous mode.

Witness interpreting: this function of the interpreter is to secure evidence from non-English speaking witnesses that is preserved for the record. It is sometimes called "record" interpreting, and it is conducted in the consecutive mode.

Interview interpreting: this function of the interpreter is to facilitate communication between a non-English speaking person and her or his attorney to ensure the effective assistance of counsel, or to perform similar duties in any other interview setting associated with a court proceeding. (When an interpreter is used to assist in attorney-client consultations, the term "defense" interpreting is sometimes used.) Interviews may use both simultaneous and consecutive interpreting, depending on the circumstance.

XI. Record of Interpreted Testimony

A. Supplementation of Case Record

The record of the case made by a court reporter in interpreted proceedings consists only of the English language spoken in court. (obviously a court reporter cannot preserve any of the non-English language for review.) If questions arise during the trial regarding the faithfulness of the interpretation, it will not be able to be evaluated by the trial judge or later on appeal if a record is not made of the interpretation. Because of this, an audio or audio/video record to supplement the court reporter's transcript may be desirable since errors on the part of the interpreter alter the evidence presented to the judge and jury. Audio taping interpreted witness testimony may be particularly desirable in capital cases and for cases in which the interpreters' skills are not well-known to the judge nor has the interpreter been certified by the federal court or another state's certification program.

Chapter 15.Contested Petition for Leave to Sell in Decedents' Estates

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I. Checklist

- ☐ Does the court have jurisdiction? {*See II. A*}
- ☐ Has notice been given to all heirs or beneficiaries as required? {*See II. B*}
- ☐ Has a guardian been appointed for any party who is unknown, unborn, or not sui juris? {*See II.B.1b(4)*}
- ☐ Are the proper pleadings before the court? {*See III. A*}
- ☐ Has a pretrial conference been held, if appropriate? If not, has pretrial information been submitted? {*See Chapter 1*}
- ☐ Has the case been called? {*See VII. A*}
- ☐ Does the caveator have standing? {*See II. C*}
- ☐ Have any motions been disposed of? {*See VII. B.*}
- ☐ If there are stipulations, have they been reduced to writing or stated for the record? {*See VII. B*}
- ☐ Have the witnesses been properly sworn? {*See VII. C*}
- ☐ Have the witnesses been sequestered if the attorneys have requested this? {*See VII. D*}
- ☐ Have both attorneys had an opportunity to present their opening statements? {*See VII. E*}
- ☐ Has the petitioner met his burden of proof? {*See VII. F*}
- ☐ Has the caveator met his burden of proof? {*See VII. G*}
- ☐ Have counsel presented closing arguments? {*See IX*}
- ☐ Has the order been properly drawn? {*See X*}

II. Preliminary Matters

A. Jurisdiction

The judge of the probate court in which the personal representative was appointed may grant the personal representative authority to:

a. Sell Perishable property, property that is liable to deteriorate from keeping, or property that is expensive to keep as early as practicable and in such manner as the probate court shall determine to be in the best interest of the estate; [GPCSF 71] [O.C.G.A. §53-8-11] or

b. Sell, rent, lease, exchange, or otherwise dispose of any other property upon a petition stating the property involved and the interests in such property, the specific purpose of the transaction, the proposed price, if any, and all other terms or conditions proposed for the transaction and a list of names, addresses, and ages or majority status of heirs in an intestate estate or of beneficiaries in a testate estate. [GPCSF 14] [O.C.G.A. §53-8-13]

The judge of the probate court in which a temporary administrator has been appointed may grant the temporary administrator leave to sell or otherwise deal with property of the estate in accordance with the same procedures applicable to personal representatives, provided good cause is shown. [O.C.G.A. §53-8-10(b)]

B. Notice/Service of Process

[NOTE: A personal representative may sell listed stocks or bonds without an order of court or any required notice. Therefore, there can be no contested petition for leave to sell stocks and bonds UNLESS the personal representative includes them in a petition.]
[NOTE: The statutory provisions regarding sales by personal representatives is not to be construed to limit, enlarge or change any authority, power, restriction or privilege specifically provided by will, incorporated into a will, or otherwise granted to the personal representative under O.C.G.A. §53-7-1. [O.C.G.A. §53-8-10(b)]]

Notice for petition for leave to sell perishable property

a. Upon the filing of the petition, the judge of the probate court determines what notice and opportunity for hearing, if any, is deemed practicable under the circumstances, and notice shall be given in accordance with the specific order for service and notice. [O.C.G.A. §53-8-11]

b. Notice for petition for leave to sell, lease, rent, etc., all other property (except stocks and bonds)

c. Upon the filing of the petition, notice is to be given in accordance with Chapter 11 of Title 53. [O.C.G.A. §53-8-13]

d. Therefore, notice shall be by:

i. Personal service on all Georgia residents;

ii. Certified mail to non-residents of Georgia who are known and whose addresses are known;

iii. Publication on all known heirs whose addresses are unknown; or

iv. Service upon and representation by a guardian-ad-litem for all minors, incapacitated adults, and unknown persons.

e. A sui juris heir/beneficiary or an heir's/beneficiary's guardian may acknowledge service. Any such acknowledgment of service must be signed before a notary public or judge or clerk of the probate court. [Chapter 11, Title 53]

C. Standing to Caveat

D. Any Heir of An Intestate Estate, Any Affected Beneficiary of A Testate Estate, and Any Other Person Having An Interest In The Property to Be Sold May File A Caveat to The Petition. [Davis v. Buie, 197 Ga. 835 (1944)]

III. Pleadings

A. The petition for leave to sell property which is perishable, etc., must be filed and verified by the personal representative, should clearly describe the property sought to be sold, and should set forth the proposed method of sale. [GPCSF 71]

B. The petition for leave to sell, etc., other property must be filed and verified by the personal representative and must set forth:

A description of the property involved and the interests in such property,

The specific purpose of the transaction,

The proposed price, if any, and all other terms or conditions proposed for the transaction, and

A list of names, addresses, and ages or majority status of heirs in an intestate estate or of beneficiaries in a testate estate. In the event full particulars are lacking, the petition shall state the reasons for any such omission. [GPCSF 14] [O.C.G.A. §53-8-13]

C. Right to File

Only the personal representative has the right to file a petition for leave to sell. [West v. Sharpe, 197 Ga. App. 140 (1990)]

D. Caveat

A caveat may be filed by an interested party. It shall be in writing and shall set forth the status giving the person standing to file the caveat and the grounds for the objection. [O.C.G.A. §15-9-88]

IV. Pretrial Conference

A. *See Chapter 1*.

V. Depositions and Discovery

A. Depositions and discovery procedures are governed by The Georgia Civil Practice Act, O.C.G.A. §§9-11-26 Through 9-11-37 and §9-11-45. {*See Chapter 12.IV above*}

VI. Court Reporter

A. *See Chapter 1*.

VII. Beginning Hearing

A. Case Called

See Chapter 1.

B. Motions and Stipulations

See Chapter 1.

C. Oath of Witnesses

See Chapter 1.

D. Sequestration of Witnesses

See Chapter 1.

E. Opening Statements

See Chapter 1.

F. Petitioner's Burden of Proof

Perishable property

a. As with any petition authorized in Title 53, it is the petitioner's burden to prove all statutory elements. Hence, the personal representative, as petitioner must show that the property proposed to be disposed of is either: perishable property; property that is liable to deteriorate from keeping; and/or property that is expensive to keep. {O.C.G.A. §53-8-11}

b. The personal representative should also show that the time, manner, and terms of any proposed sale is in the best interest of the estate. {O.C.G.A. §53-8-11}

c. If the petitioner is the temporary administrator, additionally, it must be shown that good cause exists for disposing of the property prior to the appointment of a personal representative. {O.C.G.A. §53-8-10(b) }

All other property (except stocks and/or bonds)

d. The personal representative, or temporary administrator, must prove that the proposed sale or other transaction is necessary for the purpose of paying debts of the estate and/or for purposes of distribution. [O.C.G.A. §53-8-10(a)]

e. A prima facie case is made when the personal representative or temporary administrator has proved that there are debts of the estate which makes it necessary to have leave to sell. [Brewton v. McLeod, 216 Ga. 686 (1961); Hortman v. Vissage, 193 Ga. 596 (1942)]

f. The infeasibility of division of land and the necessity of sale for the purpose of distribution is a proper foundation for a petition for leave to sell. [Warren v. Warren, 104 Ga. App. 184 (1961)]

g. The personal representative, or temporary administrator, must also prove the other elements for leave to sell: description of the property and the estate's interest in the property; the specific purpose of the transaction; the proposed price, if any; and all other terms and conditions for the proposed transaction. [O.C.G.A. §53-8-13(a)]

Does the proposed sales price represent fair market value; [Adamson v. James, 233 Ga. 130 (1974)]

Has sufficient effort been put forth to seek a higher price or better transaction; [King v. King, 225 Ga. 142 (1969)]

Does the caveator have a higher or better offer at hand (not speculative); [In re Estate of Gore, 292 Ga. App. 285 (2008)]

Is the personal representative or temporary administrator involved on the purchase side, or is there any other conflict of interest in relation to the purchaser(s); [L.L. Minor Co., Inc. v. Perkins, 246 Ga. 6 (1980)); King v. King, 225 Ga. 142 (1969)]

If it is a testate estate, does the proposed sale disproportionately affect any beneficiaries;

Are there any other lawful, justifiable reasons why the proposed sale is not in the best interest of the estate; and

Is there a dispute over the estate's ownership of the full interest proposed to be sold?

h. If, before an order is granted giving the personal representative leave to sell, an objection is made which draws into question the Decedent's title to the property, the issue of title must be transferred to the superior court in which real property is located. In such a case, the superior court will also have jurisdiction to decide upon the petition for leave to sell. [Barfield v. Hilton, 232 Ga. 235 (1974)]

G. Right to Jury Trial.

[NOTE: There appear to have been no appellate decisions on this issue since the enactment of the Revised Probate Code of 1998 nor since the creation of Article 6 Probate Courts. Unless the claim to title adverse to the estate is equitable in nature, it is presumed that both issues, title and the right to sell, could be tried in an Article 6 Probate Court.]

The right to trial by jury on the contested petition for leave to sell where the objection is as to the sale itself and not title will exist in an Article 6 Probate Court or in a superior court on a de novo appeal. [*See Chapter One*]

VIII. Evidence

A. Probate proceedings are subject to the same general rules of evidence as other civil proceedings {96 Ga. 1 (1895)}, *See Ch. 10, Evidence*}.

IX. Closing Arguments

A. *See Chapter 1*.

X. Drawing An Order

A. *See Chapter 1*.

B. In its decision, the court has wide discretion in setting conditions on the sale. indeed, there is nothing that requires that the order granted authority set forth (recite) conditions. [Buckmon V. Futch, 237 Ga. App. 67 (1999)]

XI. Appeals

A. *See Chapter 1*.

Chapter 16. Contested Petition for Leave to Sell By Conservators

[NOTE: Under Chapters 3 and 5 of Title 29, as revised effective July 1, 2005, the procedures for the sale, lease, rental or other disposition of property of minors and wards are essentially the same as sales by personal representatives, except that notice is given only to the minor or ward and a guardian-ad-litem, which must be appointed. Additionally, the procedures in Title 29 grant the minor or ward and the guardian-ad-litem 30 days to file objections. The provisions for sale of perishable property and listed stocks and bonds are the same as for personal representatives. The court is to grant or deny the petition as is found to be in the minor's or ward's best interest. See O.C.G.A. §§29-3-35 and 29-5-35. There are no reported appellate court opinions concerning contested proceedings under the revised Title 29. The opinions prior to the effective date of the revised Title correlate to those in decedents' estates.]

[NOTE: It is conceivable that a motion to intervene might be filed by someone having an interest in the minor's or ward's best interest, especially a guardian or parent. The Code does not require notice to a guardian or parent, but the court is authorized under O.C.G.A. §29-9-7 to order such other or additional service as the judge deems proper in the interest of due process or reasonable opportunity for a party or interest to be heard. When the conservator is not the minor's legal permanent guardian or is not guardian of the adult ward, the court should strongly consider serving notice upon the parent or guardian. Should a motion to intervene and an objection to the transaction be filed, the court still should determine whether granting or denying the petition is in the best interest of the minor or ward.]

[NOTE: A sale, lease, rental or other disposition of property may be proposed as part of an estate plan submitted to the court for consideration under O.C.G.A. §§29-3-36 and 29-5-36. Such matter may be brought before the court by the filing of a petition for leave to sell, etc. Whether so filed or so designated by title of the proceeding, when the issue involves application of income or principal and/or transfers of real or personal property as part of an estate plan, notice is to be given to interested parties as the court directs. The court may grant the petition if the court finds that a competent, reasonable person in the minor's or ward's circumstances would make such transfers and there is no evidence that the minor or ward, if not in need of a conservator, would not adopt such an estate plan. Furthermore, those Code sections require the court to take into account certain factors in making its decision.]

[NOTE: Title 29 is silent on the issue of trial by jury. However, when there is a disputed issue of fact, the parties would be entitled to a trial by jury in an Article 6 Probate Court or in a superior court on a de novo appeal. See Montgomery v. Montgomery, 287 Ga. App. 77 (2007).]

Chapter 17. Appeals of Determination That Dog is Dangerous or Vicious

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I. Jurisdiction

A. Jurisdiction Concerning Dangerous or Vicious Dogs.

[Senate Bill 290, passed in 2014, added another quasi-criminal jurisdiction concerning dangerous or vicious dogs. Its provisions are included below. The cases are not exclusive to probate courts with additional jurisdiction over violations of certain laws. These cases will go to an Article 6 Probate Court if the appeal is taken in that county. *See also Chapter Fourteen of the Georgia Probate Court Benchbook*. Please still refer to the Probate Judges Criminal Benchbook. Because the case may involve convicting the owner of a misdemeanor, it is the Editor's opinion that these cases should be treated as criminal cases, and the officer will bear the burden of proving the case beyond a reasonable doubt.]

Definition of classification as dangerous or vicious dogs

a. O.C.G.A. §4-8-21 contains the definition of the classification, as follows:

b. As used in this article, the term:

i. "Classified dog" means any dog that has been classified as either a dangerous dog or vicious dog pursuant to this article.

ii. "Dangerous dog" means any dog that:

1.) Causes a substantial puncture of a person's skin by teeth without causing serious injury; provided, however, that a nip, scratch, or abrasion shall not be sufficient to classify a dog as dangerous under this subparagraph;

2.) Aggressively attacks in a manner that causes a person to reasonably believe that the dog posed an imminent threat of serious injury to such person or another person although no such injury occurs; provided, however, that the acts of barking, growling, or showing of teeth by a dog shall not be sufficient to classify a dog as dangerous under this subparagraph; or

3.) While off the owner's property, kills a pet animal; provided, however, that this subparagraph shall not apply where the death of such pet animal is caused by a dog that is working or training as a hunting dog, herding dog, or predator control dog.

iii. "Local government" means any county or municipality of this state.

iv. "Owner" means any natural person or any legal entity, including, but not limited to, a corporation, partnership, firm, or trust owning, possessing, harboring, keeping, or having custody or control of a dog. In the case of a dog owned by a minor, the term "owner" includes the parents or person in loco parentis with custody of the minor.

v. "Serious injury" means any physical injury that creates a substantial risk of death; results in death, broken or dislocated bones, lacerations requiring multiple sutures, or disfiguring avulsions; requires plastic surgery or admission to a hospital; or results in protracted impairment of health, including transmission of an infection or contagious disease, or impairment of the function of any bodily organ.

vi. "Vicious dog" means a dog that inflicts serious injury on a person or causes serious injury to a person resulting from reasonable attempts to escape from the dog's attack.

c. No dog shall be classified as a dangerous dog or vicious dog for actions that occur while the dog is being used by a law enforcement or military officer to carry out the law enforcement or military officer's official duties.

d. No dog shall be classified as a dangerous dog or a vicious dog if the person injured by such dog was a person who, at the time, was committing a trespass, was abusing the dog, or was committing or attempting to commit an offense under Chapter 5 of Title 16. O.C.G.A. §4-8-21 (Effective July 1, 2014).

B. Definitions

"Animal shelter" shall have the same meaning as set forth in Code Section 4-14-2.

"Authority" means an animal control board or local board of health, as determined by the governing authority of a local government.

"Mail" means to send by certified mail or statutory overnight delivery to the recipient's last known address. O.C.G.A. §4-8-23(a) (Effective July 1, 2014)

C. Probate Court Involvement in Determining Classification; Appeal

Upon receiving a report of a dog believed to be subject to classification as a dangerous dog or vicious dog within a dog control officer's jurisdiction, the dog control officer shall make such investigations as necessary to determine whether such dog is subject to classification as a dangerous dog or vicious dog. O.C.G.A. §4-8-23(b) (Effective July 1, 2014).

When a dog control officer determines that a dog is subject to classification as a dangerous dog or vicious dog, the dog control officer shall mail a dated notice to the dog's owner within 72 hours. Such notice shall include a summary of the dog control officer's determination and shall state that the owner has a right to request a hearing from the authority on the dog control officer's determination within 15 seven days after the date shown on the notice; provided, however, that if an authority has not been established for the jurisdiction, the owner shall be informed of the right to request a hearing from the probate court for such jurisdiction where the dog was found or confiscated within seven days after the date shown on the notice. [Emphasis added.] The notice shall also provide a form for requesting the hearing and shall state that if a hearing is not requested within the allotted time, the dog control officer's determination shall become effective for all purposes under this article. If an owner cannot be located within ten days of a dog control officer's determination that a dog is subject to classification as a dangerous dog or vicious dog, such dog may be released to an animal shelter or humanely euthanized, as determined by the dog control officer. O.C.G.A. §4-8-23(c) (Effective July 1, 2014).

When a hearing is requested by a dog owner in accordance with subsection (c) of this Code section, such hearing shall be scheduled within 30 days after the request is received; provided, however, that such hearing may be continued by the authority or probate court for good cause shown. At least ten days prior to the hearing, the authority or probate court conducting the hearing shall mail to the dog owner written notice of the date, time, and place of the hearing. At the hearing, the dog owner shall be given the opportunity to testify and present evidence and the authority or probate court conducting the hearing shall receive other evidence and testimony as may be reasonably necessary to sustain, modify, or overrule the dog control officer's determination. O.C.G.A. §4-8-23(d) (Effective July 1, 2014). [This part seems to grant (the authority or) the probate court wide discretion in what type of evidence it will hear and consider on the issue of the classification.]

Within ten days after the hearing, the authority or probate court which conducted the hearing shall mail written notice to the dog owner of its determination on the matter. If such determination is that the dog is a dangerous dog or a vicious dog, the notice of classification shall specify the date upon which that determination shall be effective. If the determination is that the dog is to be euthanized pursuant to Code Section 4-8-26, the notice shall specify the date by which the euthanasia shall occur. O.C.G.A. §4-8-23(e) (Effective July 1, 2014).

Judicial review of the authority's final decision may be had in accordance with Code Section 15-9-30.9. Judicial review of a probate court's final decision shall be in accordance with Code Section 5-3-2 and costs shall be paid as provided in Code Section 5-3-22. O.C.G.A. §4-8-23(f) (Effective July 1, 2014). [This is a de novo appeal to the superior court, except as to Article 6 Probate Courts. See O.C.G.A. §5-3-29. There is no specific provision related to appeals from Article 6 Probate Courts, but, presumably, an appeal would have to go to the Court of Appeals on the law and the record, pursuant to O.C.G.A. §15-9-123.]

D. Additional Jurisdiction over Violations of Responsible Dog Ownership Law

In order to provide the specific jurisdiction over the classification of dangerous or vicious dogs, the following new Code Section was added as O.C.G.A. §15-9-30.9:

a. In addition to any other jurisdiction vested in the probate courts, such courts shall have the right and power to hear cases of violations of Article 2 of Chapter 8 of Title 4 and to impose:

i. Civil penalties for such violations, other than euthanasia; and

ii. Criminal penalties for such violations as provided by Code Section 4-8-32.

An appeal from a decision by an animal control board or local board of health pursuant to subsection (f) of Code Section 4-8-23 shall lie in probate court. No appeal shall be heard in probate court until costs which have accrued in the tribunal below have been paid, unless the appellant files with the probate court or with the tribunal appealed from an affidavit stating that because of indigence he or she is unable to pay the costs on appeal. In all cases, no appeal shall be dismissed in the probate court because of nonpayment of the costs below until the appellant has been directed by the court to do so and has failed to comply with the court's direction.

Filing of the notice of appeal and payment of costs or filing of an affidavit as provided in subsection (b) of this Code section shall act as supersedeas, and it shall not be necessary that a supersedeas bond be filed; provided, however, that the probate court upon motion may at any time require that supersedeas bond with good security be given in such amount as the court may deem necessary unless the appellant files with the court an affidavit stating that because of indigence he or she is unable to give bond. O.C.G.A. §15-9-30.9 (Effective July 1, 2014).

Chapter 18. Search Warrants

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I. Issuing a Search Warrant

A. When determining whether to issue a search warrant, the judge must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him/her, including the veracity and basis of knowledge of

persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of a reviewing court is simply to ensure that the issuing judge had a substantial basis for concluding that probable cause existed. NOTE: The validity of search or suppression of evidence is determined by a trial court, not by a Probate Judge at a preliminary hearing.

B. A search warrant will only issue upon facts sufficient to show probable cause that a crime is being committed or has been committed. OCGA § 17-5-21(a). Willoughby v. State, Ga. App. 401, 403 (2012).

II. Checklist for sufficiency of affidavits supporting Search Warrants

A. Is the affiant a Georgia-certified peace officer employed by the State, a political subdivision of the state, a college or school? The officer can also be a designated employee of Department of Children and Youth Services seeking an escaped juvenile. (see Section IV) for Persons Authorized to Seek Search Warrants) and OCGA § 17-5-20

B. Is probable cause of a crime stated? [O.C.G.A. § 17-5-21].

C. Reliability of evidence under Totality of circumstances (see Section VIII (D))

D. Reliability of person providing information (see Section VIII (E))

E. Is there additional oral testimony which, when added to the affidavit, supports finding of probable cause? [Tuggle v. State, 149 Ga. App. 844, 256 S.E.2d 104 (1979)]. Record supplemental information.

F. If the odor of marijuana was detected, the affidavit for the search warrant must contain sufficient information for the court to determine that the officer who detected the odor emanating from a specific location is qualified to recognize the odor. Wingate v. The State, 347 Ga. App. 341, (September 19, 2018).

G. Dog sniffing luggage or car is not a search. Dog's reaction can then provide probable cause for search warrant.

H. Is the location of property to be searched in county of issuing court? [State v. Lejeune, 276 Ga. 179, 576 S.E.2d 888, (2003); State v. Kirkland, 212 Ga. App. 672, 442 S.E.2d 491, (1994)] [See Section V (B)].

I. Is the place or person to be searched particularly described? [See Section V (C)]

J. Is thing or person to be seized particularly described? (See Section VI)

K. Is it in writing, signed by attesting officer, under oath? [O.C.G.A. § 17-5-21; State v. Barnett, 136 Ga. App. 122, 220 S.E.2d 730, (1975); Henry v. State, 277 Ga. App. 302, 626 S.E.2d 511, (2006) (signature must match officer in text of affidavit); see O.C.G.A. § 17-5-21.1 for the variety of "signatures" allowable when search warrant is sought by video conference].

L. Is time of occurrence set forth? Search warrants require execution within ten days. OCGA § 17-5-25. Also see, [Windsor v. State, 122 Ga. App. 767, 178 S.E.2d 751 (1970)].

M. Is date and time information obtained stated? Is it timely? [See Section VIII (F)]

N. Is it dated (issuance date)? But typo as to date not fatal [Jones v. State, 289 Ga. App. 767, 658 S.E.2d 386, (2008)].

O. Is "No Knock" provision sought? [See Section X (D)]

III. Trial Court Review as to sufficiency of Search Warrant

A. Is time and date of issuance set forth? [OCGA 17-5-22].

B. Is title and identity of judge set forth? [OCGA 17-5-22].

C. Is warrant recorded on warrant docket? Filing of warrants and affidavits suspended until warrant is executed or has been returned unexecuted. [OCGA 17-5-22].

D. Is warrant in duplicate? (Copy, including incorporated references (such as affidavits or exhibits referred to in warrant), to be left with person/place searched) [OCGA 17-5-24, -25; Groh v. Ramirez, 540 U.S. 551 (2004)].

E. Is it directed to all peace officers (may be directed to individual officer)? [OCGA 17-5-23, -24].

F. Does it require execution within ten days? After ten days the warrant is void. [OCGA 17-5-25].

G. Does it command a peace officer to conduct a search? [OCGA 17-5-23].

H. Is place or person to be searched particularly described?

I. Is thing or person to be seized particularly described? [Groh v. Ramirez, 540 U.S. 551 (2004)].

J. Does it require an immediate written return and inventory? [OCGA 17-5-29].

K. Is the applicant a peace officer (See Section IV (A) [OCGA 17-5-20].

L. Has judge made independent determination of probable cause? [Reid, 129 Ga.App. 660, 200 SE2d 456 (1973)].

M. Is it to be executed in county where judge then sitting? [OCGA 15-6-23; Allison v. State, 129 Ga.App. 364, 199 SE2d 587 (1973)].

N. If "No Knock" warrant requested, does warrant specifically allow or deny? [See Jones v. State, 127 Ga.App. 137, 193 SE2d 38 (1972)].

O. Warrant need not be under seal [OCGA 17-5-22].

IV. Persons Authorized to seek Search Warrants

A. Person seeking search warrant must be:

1. Georgia-certified peace officer of the State, a political subdivision of the state, a college or school [O.C.G.A. § 17-5-20; Holstein v. State, 183 Ga. App. 610, 359 S.E.2d 360, (1987)]; OR

2. Designated investigative employee of the Department of Children and Youth Services may also obtain a search warrant for the purpose of locating and apprehending children who have escaped from an institution or facility or have broken the conditions of their supervision [O.C.G.A. § 49-4A-8].

B. Examples of persons who may not obtain search warrants:

1. Federal law enforcement officer [Williams v. State, 171 Ga. App. 807, 321 S.E.2d 386 (1984) (DEA agent not qualified)];

2. Juvenile officer not peace officer [Huff v. Walker, 125 Ga. App. 251, 187 S.E.2d 343, (1972)].

3. Private citizens - search warrant may not issue upon application of private citizen or for aid in enforcement of personal, civil, or property rights [O.C.G.A. § 17-5-20].

C. Qualified officers may seek search warrants from courts outside their own jurisdiction but should execute the warrant only jointly with officers of jurisdiction [State v. Harber, 198 Ga. App. 170, 401 S.E.2d 57 (1990) (campus police off campus); Bruce v. State, 183 Ga. App. 653, 359 S.E.2d 736 (1987) (municipal/adjacent county)].

V. Who May Issue and Location of Property to be Searched

A. Who May Issue - Magistrate courts, Probate courts and other courts of inquiry may issue search warrants [O.C.G.A. § 17-5-21] and OCGA § 17-7-20, even after indictment or accusation, notwithstanding Uniform Rule provisions concerning assignment of related cases [State v. Lejeune, 276 Ga. 179, 576 S.E.2d 888 (2003)]. For specific authority for probate court judges, see Joyner v. The State, A18A1294, (August 3, 2018).

B. Venue - Location of property to be searched must be in county of issuing court [State v. Lejeune, 276 Ga. 179, 576 S.E.2d 888 (2003); State v. Kirkland, 212 Ga. App. 672, 442 S.E.2d 491 (1994); see also O.C.G.A. § 17-5-21.1 (judge may videoconference from elsewhere in state)].

C. Link to crime - There must be a link between the suspected crime and the locality to be searched [State v. Staley, 249 Ga. App. 207, 548 S.E.2d 26 (2001)].

Suspect's Home - Where there is probable cause to link a suspect to a crime there is normally probable cause to search suspect's residence. [Reeves v. State, 197 Ga. App. 107, 397 S.E.2d 601 (1990) (Probable cause to believe Defendant has stored non-contraband items at home despite long lapse of time (11 months) and no special evidence indicating that items are there); see also State v. Tedford, 195 Ga. App. 372, 393 S.E.2d 502 (1990)].

Sex offender profile - Defendant's prior conviction for sex offense and present evidence of molestation at other locations *insufficient* to search Defendant's apartment for pornographic materials without evidence linking molestation to apartment or computer or evidence that pornographic materials were shown to victim. [State v. Staley, 249 Ga. App. 207, 548 S.E.2d 26 (2001)].

Multiple Addresses - Search warrant obtained for two houses and van. Drugs found at one house and van with lease showing third address also in van. Presence of lease with drugs plus evidence defendant used multiple stash houses sufficient to search third location. [Baez v. State, 217 Ga. App. 511, 458 S.E.2d 658, (1995)].

D. Description of premises to be searched - must be sufficient to enable prudent officer to locate premises with reasonable certainty [Minter v. State, 206 Ga. App. 692, 426 S.E.2d 169 (1992); State v. Hardin, 174 Ga. App. 83, 329 S.E.2d 172 (1985)].

1. Not all errors in address preclude reasonable certainty of location [Price v. State, 303 Ga. App. 859, 694 S.E.2d 712 (2010) (*normally address errors are fatal*, but detailed description of location of mobile home established only one location met warrant description - two related warrants read in conjunction); Fuller v. State, 295 Ga. App. 439, 672 S.E.2d 438 (2009) (wrong county listed, but address, travel directions and issuing court were all correct); Lester v. State, 278 Ga. App. 247, 628 S.E.2d 674 (2006) (transposed digits but defendant's actual address verified with landlord); Chambless v. State, 165 Ga. App. 194, 300 S.E.2d 201 (1983) (incorrect mobile home lot, but name of occupant and other information showed correct lot); McNeal v. State, 133 Ga. App. 225, 211 S.E.2d 173 (1974) (involved description of apartment in multiple occupancy structure)].

2. Missing address element on search warrant may not be fatal defect if in affidavit [Franks v. State, 240 Ga. App. 685, 524 S.E.2d 545 (1999) (Exhibit incorporated by reference in search warrant, available to executing officer, and left at premises); Wells v. State, 196 Ga. App. 133, 395 S.E.2d 296 (1990); Cuevas v. State, 151 Ga. App. 605, 260 S.E.2d 737, (1979)]; *however* affidavit would have to be specifically incorporated by reference in the warrant, present with the officer executing the search, and a copy may have to be served upon the occupant [see Vaughn v. State, 141 Ga. App. 453, 233 S.E.2d 848 (1977)]. Caution - language in Wells suggesting it does not matter if officers executing the warrant had the referenced description is inconsistent with Groh v. Ramirez, 540 U.S. 551 (2004).

3. Curtilage

a. "Defined as 'the yards and grounds of a particular address, its gardens, barns, and buildings.'" [Thomas v. State, 300 Ga. App. 265, 267, 684 S.E.2d 391, 394, (2009) (quoting McConville v. State, 228 Ga. App. 463, 467, 491 S.E.2d 900, 903, (1997)]. The Central question is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." [United States v. Dunn, 480 U.S. 294, 301 (1987)].

b. 'A warrant which authorizes the search of a particular dwelling extends by implication to areas within the curtilage of the dwelling.' [Thomas v. State, 300 Ga. App. 265, 267, 684 S.E.2d 391, 394, (2009) (quoting McConville v. State, 228 Ga. App. 463, 467, 491 S.E.2d 900, 903, (1997)]; Likewise, probable cause for search of dwelling extends to curtilage [Thomas v. State, 300 Ga. App. 265, 684 S.E.2d 391 (2009)].

4. Multi-unit dwellings

"[A] search warrant for an apartment house or hotel or other multiple-occupancy building will usually be held invalid if it fails to describe the particular sub-unit to be searched with sufficient definiteness to preclude a search of one or more sub-units indiscriminately." [Fletcher v. State, 284 Ga. 653, 655, 670 S.E.2d 411, 413 (2008) (quoting 2 LaFave, Search & Seizure, § 4.5(b) at p. 479 (4th ed. 2004)].

a. Search of multiple units - ""The warrant of a multi-unit structure will be valid where (1) there is probable cause to search each unit; (2) the targets of the investigation have access to the entire structure; or (3) the officers reasonably believed that the premises had only a single unit"" [Fletcher v. State, 284 Ga. 653, 655, 670 S.E.2d 411, 413 (2008) (evidence that likely perpetrator of assault lived in a house with victim in basement apartment creates probable cause for evidence in both living spaces), (quoting United States v. Perez, 484 F.3d 735, 741, (5th Cir. 2007)); accord, Carter v. State, 319 Ga. App. 609, 737 S.E.2d 714 (2013) (campus suite with common area and separate bedrooms); Braun v. State, 324 Ga. App. 242, 747 S.E.2d 872, (2013) (adjacent houses of father and son owned by father); Hines v. State, 317 Ga. App. 541, 731 S.E.2d 782 (2012) (adding vehicles including an RV used as residence in warrant)].

b. Search of curtilage - With apartments, analysis of whether an area is within the curtilage of the dwelling to be searched, the curtilage of another apartment, or the common area accessible to all is a complicated issue of fact. In cases of doubt, it is best that the warrant specify the search of out-structures, and, if available, the affidavit contain facts justifying the conclusion that the structure is within the resident's exclusive control [Espinoza v. State, 265 Ga. 171, 454 S.E.2d 765 (1995). Compare Thomas v. State, 300 Ga. App. 265, 684 S.E.2d 391 (2009);United States v. Cannon, 264 F.3d 875 (9th Cir. 2001) (two locked storage areas in building separate from residence that were under the control of the owner of the residence were within the curtilage) with United States v. Concepcion, 942 F.2d 1170 (7th Cir. 1991) (involving a building with five apartments other than the defendant's room); United States v. Barrios-Moriera, 872 F.2d 12 (2d Cir. 1989)(concerning a multi-dwelling apartment complex); United States v. Eisler, 567 F.2d 814 (8th Cir. 1977) (pertaining to an apartment complex); United States v. Cruz Pagan, 537 F.2d 554 (1st Cir. 1976) (with an apartment, "a tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control"; common underground parking garage was not within curtilage); United States v. Anderson, 533 F.2d 1210 (D.C. Cir. 1976) (discussing an eight-room boarding house); United States v. Perkins, 286 F. Supp. 259 (D.D.C. 1968) (describing a five room boarding house)].

5. May follow item to be searched [Ferguson v. State, 292 Ga. App. 7, 663 S.E.2d 760 (2008) (followed person with package to his car)].

E. Automobile - Location of automobile not necessary if description of car sufficiently detailed [Reed v. State, 126 Ga. App. 323, 190 S.E.2d 587 (1972)]. However, if the car is located outside the county of the issuing court, the warrant is invalid [State v. Lejeune, 276 Ga. 179, 576 S.E.2d 888 (2003)].

F. Automobile at residence:

1. Home and Car - Cannot issue warrant including car where probable cause exists only for search of house [State v. Crank, 212 Ga. App. 246, 441 S.E.2d 531 (1994)].

2. Auto leaving place of search - Where search warrant is obtained to search residence, surrounding curtilage, and vehicles, but no separate probable cause exists to believe contraband is in car, results vary on whether vehicle can be chased down, searched, and driver returned [Compare Martin v. State, 211 Ga. App. 849, 440 S.E.2d 736 (1994) (permissible to stop occupant driving away just before search less than mile from house, handcuff driver to return, and drive truck back to premises) with State v. Crank, 212 Ga. App. 246, 441 S.E.2d 531 (1994) (not permissible to deliberately wait until occupant drives off, stop 2-3 miles away on public road, drive car back and perform inventory search)].

G. Jails and prisons - Jail searches are subject to 4th Amendment requirement for warrant under some circumstances.

1. *Convicted* prisoners are *not protected by* the 4th Amendment against searches [Hudson v. Palmer, 468 U.S. 517 (1984); State v. Henderson, 271 Ga. 264, 517 S.E.2d 61 (1999)].

2. *Pretrial detainees* have *diminished* 4th Amendment protections. [State v. Henderson, 271 Ga. 264, 517 S.E.2d 61 (1999); Thomas v. State, 263 Ga. 85, 428 S.E.2d 564 (1993). 4th Amendment does not apply to searches for security and maintenance purposes [Thomas] by jail personnel [see Evans v. Stephens, 407 F.3d 1272 (11th Cir. 2005) (distinguished evidentiary search by arresting officer)]; thus, clothes and property worn by Defendant upon arrival are subject to routine search without warrant [Batton v. State, 260 Ga. 127, 391 S.E.2d 914 (1990); Marks v. State, 280 Ga. 70, 623 S.E.2d 504 (2005) (even arresting detective could search briefcase voluntarily brought to jail when defendant arrested)].

3. When the prosecution seeks to search a pre-trial detainee for the purpose of uncovering incriminating evidence for use at trial, a warrant supported by probable cause is required [State v. Henderson, 271 Ga. 264, 517 S.E.2d 61 (1999); United States v. Cohen, 796 F.2d 20 (2d Cir. 1986)].

VI. Property (Evidence) to be Seized

A. Particularity of description of items to be seized:

1. If full description is available but not in warrant, warrant may be invalid [Groh v. Ramirez, 540 U.S. 551 (2004)]:

a. If the description of property to be seized is found in a document other than the warrant, such as the supporting affidavit, there must specific language to *incorporate* the other document *by reference*, and it must be *attached* to the warrant;

b. Officer executing warrant must have any incorporated document listing the items to be seized while executing the search, and the copy served upon the occupant should also have that document attached;

c. A warrant failing to specifically describe the items to be seized is *fatally defective*, and the executing officer can be held legally liable for relying on such a warrant.

2. Specificity of description is somewhat flexible, but warrant cannot leave selection of items to be seized entirely to judgment and opinion of officer [Dobbins v. State, 262 Ga. 161, 415 S.E.2d 168 (1992); Strauss v. Stynchcombe, 224 Ga. 859, 165 S.E.2d 302 (1968)]. The searching officer may have to make determinations of fact, but not of opinion [Reaves v. State, 284 Ga. 181, 664 S.E.2d 211 (2008); Strauss v. Stynchcombe, 224 Ga. 859, 165 S.E.2d 302 (1968)].

3. "Evidence of [specified crime]"

a. Violation of Georgia Controlled Substance Act - Evidence relating to crimes of illegal drug possession and trafficking are generally sufficiently distinctive as to make such a description by the crime sufficiently particular [Fair v. State, 284 Ga. 165, 664 S.E.2d 227 (2008)]. Warrant with residual clause authorizing evidence of possession of marijuana OK to allow seizure of photos and camera [State v. Rogers, 319 Ga. App. 834, 738 S.E.2d 667 (2013)].

b. "Evidence of crime" - Such a description is *insufficient*, amounting to an invalid general warrant [Groh v. Ramirez, 540 U.S. 551 (2004); Reaves v. State, 284 Ga. 181, 664 S.E.2d 211 (2008)].

c. Query - Do these residual clauses for evidence of a specified crime, such as in Reaves v. State, 284 Ga. 181, 664 S.E.2d 211 (2008) and State v. Rogers, 319 Ga. App. 834, 738 S.E.2d 667 (2013) permit routine seizures of computers and cell phones which may contain both private papers and photos and notes that would be evidence of a specified crime? [See Riley v. California, U.S. , 134 S. Ct. 2473 (2014)]. Photos and notes are now typically kept in digital form on a variety of media. Prior case law suggests that searches of computer files require exact descriptions [Compare Grant v. State, 220 Ga. App. 604, 469 S.E.2d 826 (1996) with Walsh v. State, 236 Ga. App. 558, 512 S.E.2d 408, (1999)]. Given the intrusiveness and disruption caused by such seizures, magistrates may wish to specifically include or exclude such sources of electronic files when issuing a warrant with a residual clause.

d. As residual clause after specific list (e.g., [specified items] "and other evidence of murder") - this is proper and the specified items will limit the interpretation of the general evidence clause [Andresen v. Md., 427 U.S. 463, 481-482 (1976); Reaves v. State, 284 Ga. 181, 664 S.E.2d 211 (2008)]. When the warrant authorizes seizure of papers connected with the crime, cursory review of unrelated papers to determine if they are relevant is permissible [Reaves v. State, 284 Ga. 181, 664 S.E.2d 211 (2008)].

e. Reaves and Fair *do not provide clear guidance for* non-drug cases where the warrant specifies merely authorizes *search for evidence of a specified crime without specific examples*, but do suggest that in some cases such a description would be too broad [See also Smith v. State, 274 Ga. App. 106, 110, 616 S.E.2d 868, 872-873 (2005) (search warrant's general description of evidence of "'child molestation and sexual exploitation of children in violation of O.C.G.A. § 16-12-100.2' was sufficient"); Maddox v. State, 272 Ga. App. 440, 444, 612 S.E.2d 484, 487 (2005) (taken as a whole, search warrant was sufficiently specific where it authorized the seizure of all items contained within a specified motel room which is evidence of the crime of Insurance Fraud') (overruled in part on

other grounds Able v. State, 312 Ga. App. 252, 261, 718 S.E.2d 96, 103 (2011))].

f. Error - Typo in warrant description where affidavit correct may be OK where searching officers are looking for correct item [Norton v. State, 320 Ga. App. 327, 739 S.E.2d 782 (2013) (pc for warrant was for meth, warrant authorized seizing marijuana)].

4. The description should provide clear limits to the search and not leave it to the discretion of the officer to determine which items are to be seized [Grant v. State, 220 Ga. App. 604, 469 S.E.2d 826 (1996)].

5. Generic description of items to be seized permissible *if unavoidable* [Dugan v. State, 130 Ga. App. 527, 203 S.E.2d 722 (1974); Maddox v. State, 272 Ga. App. 440, 444, 612 S.E.2d 484, 487 (2005) ("all items contained within [specified motel room] at the time of the fire" and remaining there where probable cause related to fraudulent fire insurance claim and recorded statement said nothing removed from house); but see Dobbins v. State, 262 Ga. 161, 415 S.E.2d 168 (1992) for First Amendment materials (see B7, below)].

6. Full description especially needed for First Amendment items [Dobbins v. State, 262 Ga. 161, 415 S.E.2d 168 (1992)] (see B7, below).

7. The generalized description, "child pornography," may offer sufficient probable cause for a search warrant, and there is no requirement that Judge who reviews a warrant application actually view the images of alleged child pornography [Shirley v. State, 330 Ga. App. 424, 765 S.E.2d 491 (2014)].

B. Types of items to be seized:

1. Search warrant needed for bodily samples, such as blood [State v. Slavny, 195 Ga. App. 818, 395 S.E.2d 56 (1990) (overruled on other grounds in State v. Martin, 278 Ga. 418, 603 S.E.2d 249 (2004)], leg hair [Price v. State, 194 Ga. App. 453, 390 S.E.2d 663 (1990)], dental impressions [Harris v. State, 260 Ga. 860, 401 S.E.2d 263 (1991)], urine or stomach contents [Beck v. State, 216 Ga. App. 532, 455 S.E.2d 110(1995)], whether or not person searched is in custody [Price v. State, 194 Ga. App. 453, 390 S.E.2d 663 (1990)].

a. Fact that arrest warrant has issued does not, by itself, show probable cause for search of bodily substances such as hair, blood, etc. Search warrant affidavit required to show separate probable cause for search. [State v. Toney, 215 Ga. App. 64, 449 S.E.2d 892 (1994)].

b. Actual procedure may be performed by technician [Harris v. State, 260 Ga. 860, 401 S.E.2d 263 (1991); Twiggs v. State, 315 Ga. App. 191, 726 S.E.2d 680 (2012)(computer files and FBI tech)].

c. Surgery generally not permitted, but minor intrusions OK, including extraction of subcutaneous bullet under local anesthetic where no danger to life or limb [Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972); see Schmerber v. Cal., 384 U.S. 757, 86 S. Ct. 1826 (1966)]. Where surgery is not minor or requires use of general anesthetic, court may not authorize surgery, and testimony as to defendant's refusal to submit to surgery is inadmissible [Curry v. State, 217 Ga. App. 623, 458 S.E.2d 385 (1995); Winston v. Lee, 470 U.S. 753 (1985)].

2. Tangible evidence - – Search warrants are generally available only to "seize" tangible evidence [O.C.G.A. § 17-5-21(a)(5) (other categories are generally specific types of" tangible" evidence)].

Sense-enhancing technology - use of sense-enhancing technology not in general public use (aiming a thermal imager) on a house requires a search warrant [Kyllo v. United States, 533 U.S. 27, 38-40 (2001); compare Dow Chem. Co. v. United States, 476 U.S. 227, 236-237 (1986) (greater latitude for warrantless inspections in commercial property)], but such measurements are not "tangible evidence" under O.C.G.A. § 17-5-21, so a search warrant would not be available [Brundige v. State, 291 Ga. 677, 735 S.E.2d 583 (2012)]. Under at least some circumstances, acquiring information from a pre-installed GPS device may require and other forms of digital capture *may* require search warrant [United States v. Jones, 132 S. Ct. 945 (2012) (concurring opinions of Alito and Sotomayor ("I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection"), together constituting a majority of court)]. Jones casts doubt on cases such as United States v. Knotts, 460 U.S. 276 (1983) and Devega v. State, 286 Ga. 448, 453-454, 689 S.E.2d 293, 299-300 (2010) (pinged cell phone), which permit GPS location so long as vehicle is in public location. If trespass required, GPS use clearly invalid; if not, may be invalid under the concurring opinions.

3. Trespass analysis revalidated by [United States v. Jones, 132 S. Ct. 945 (2012) (use of GPS locator without warrant improper if placed through trespass)]. Any case law approving of warrantless search through common law trespass is now questionable. Cases which state that "technical" unlawful trespass does not invalidate search may have to be reconsidered [e.g., Stephenson v. State, 171 Ga. App. 938, 321 S.E.2d 433 (1984)].

4. Private papers [Brogdon v. State, 287 Ga. 528, 697 S.E.2d 211 (2010)].

a. Warrant may authorize seizure *only* of private papers which are designed, used, or intended for use in the commission of the offense for which warrant issued ("instrumentalities of a crime") [O.C.G.A. § 17-5-21].

Can't seize private papers merely as tangible evidence of offense or of other unrelated offenses [O.C.G.A. § 17-5-21].

b. Only papers in possession of accused are private papers, hospital records cannot be considered in patient's possession despite patient's HIPAA privacy rights [Brogdon v. State, 287 Ga. 528, 697 S.E.2d 211 (2010)].

c. Private papers are documents that record the author's personal thoughts, such as diaries, personal letters, and similar documents. They did not include public records business licenses, ledgers, desk calendars, employment contracts, checks, deposit slips, or other financial records which do not contain private thoughts. [Ledesma v. State, 251 Ga. 885, 311 S.E.2d 427 (1984); Flemister v. State, 317 Ga. App. 749, 732 S.E.2d 810 (2012); Smith v. State, 192 Ga. App. 298, 384 S.E.2d 459 (1989); but see Grant v. State, 198 Ga. App. 732, 403 S.E.2d 58 (1991)(checkbook is private paper)].

Private papers *were* (1993-2009) limited to papers covered by privilege (attorney-client, doctor-patient, etc.) [Sears v. State, 262 Ga. 805, 426 S.E.2d 553 (1993); *overruled by* Brogdon v. State, 287 Ga. 528, 697 S.E.2d 211 (2010) which restored the pre-1993 case law]. Note that the private papers doctrine is based upon US Supreme Court authority which was adopted in O.C.G.A. § 17-5-21 before being overruled.

CAUTION - Private papers may include files on a cell phone or computer [Hawkins v. State, 307 Ga. App. 253, 704 S.E.2d 886 (2010)]. Hawkins stated an electronic storage device is "like a container that stores thousands of individual containers in the form of discrete files" — just because there is cause to "enter" the computer does not necessarily mean there is cause to open all the files. Hawkins dealt with a search incident to an arrest without a warrant, but it seems likely that private paper doctrine will be applied to computer files and similar electronic storage so that a warrant as to a computer should limited and specific in terms of what search is authorized. See 7 below: re First Amendment protection of computer files and images.

Since the Hawkins case, the U.S. Supreme Court has ruled on the cellphone issue. Riley v. California, 134 S. Ct. 2473, 2480(U.S.2014). The U.S. Supreme Court unanimously held that the police officers generally could not, without a warrant, search digital information on the cell phones seized from the defendants as incident to the defendants' arrests. While the officers could examine the phones' physical aspects to ensure that the phones would not be used as weapons, digital data stored on the phones could not itself be used as a weapon to harm the arresting officers or to effectuate the defendants' escape. Further, the potential for destruction of evidence by remote wiping or data encryption was not shown to be prevalent and could be countered by disabling the phones. Moreover, the immense storage capacity of modern cell phones implicated privacy concerns with regard to the extent of information which could be accessed on the phones.

5. Attorney files - Search warrants directed at "documentary evidence" in possession of an attorney must be issued only by a *superior court judge* unless there is probable cause that the attorney committed a crime. "Documentary evidence" includes but is not limited to writings, documents, blue-prints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, and papers of any type or description [O.C.G.A. § 17-5-32]. This prohibition is in addition to the prohibition on seizure of private papers.

6. Conversations - (oral, wire, or electronic) may be intercepted and recorded without a search warrant where one adult party to the conversation consents. For a minor to consent, requires approval of a Superior Court judge [O.C.G.A. § 16-11-66]. Non-consensual interception (wiretapping) requires a Superior Court investigative warrant [O.C.G.A. § 16-11-64]; but there is no standing to challenge if one is not the phone subscriber and one's voice is not recorded [Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013)].

NOTE - Electronic location of a device (such as a beeper or GPS device on cell phone) may require a warrant if Defendant is in a private location such as his house [United States v. Karo, 468 U.S. 705 (U.S. 1984)], but requires no warrant if he is in a public location such as a car on the highway [United States v. Knotts, 460 U.S. 276 (1983); Devega v. State, 286 Ga. 448, 453-454, 689 S.E.2d 293, 299-300 (2010) (pinged cell phone)].

In contrast, secretly placing a GPS device on a car is a search and requires a warrant, supported by probable cause [United States v. Jones, 132 S. Ct. 945 (2012); Hamlett v. State, 323 Ga. App. 221, 753 S.E.2d 118 (2013) (4-3 decision finding lack of probable cause)].

If a jail phone message warns inmates that it is monitored, no warrant is needed to record conversations [Boykins-White v. State, 305 Ga. App. 827, 701 S.E.2d 221 (2010)].

7. First Amendment materials - this issue typically arises in obscenity cases and sexual offenses where material is sought to show the sexual proclivities of the defendant

a. Books, videotapes, computer images and files are presumptively First Amendment materials. See Riley v. California, 134 S. Ct. 2473, 2480(U.S.2014) "cell phones can store millions of pages of text, thousands of pictures, or hundreds of videos. This has several interrelated privacy consequences. First, a cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record. Second, the phone's capacity allows even just one type of information to convey far more than previously possible. Third, data on the phone can date back for years. In addition, an element of pervasiveness characterizes cell phones but not physical records. A decade ago officers might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives."

b. Must be described with special particularity: "a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may 'focus searchingly on the question of obscenity.'" [Dobbins v. State, 262 Ga. 161, 164, 415 S.E.2d 168, 169 (1992) (quoting New York v. P. J. Video, Inc., 475 U.S. 868, 873-874 (1986); State v. Kramer, 260 Ga. App. 546, 580 S.E.2d 314 (2003). Examples:

Pornographic (adult) video tapes - affidavit for search warrant for video tapes must contain sufficient information for judge to form own opinion that tapes are obscene (due to First Amendment implications of such seizures). This was despite fact that seizure was for use in molestation case and not for prosecution under obscenity statutes (however, the outcome *might* have been different with more evidence that tapes were instruments of the crime (see c below)) [Dobbins v. State, 262 Ga. 161, 164, 415 S.E.2d 168, 169 (1992)] (child had seen outside cover of one tape "with pictures of 'boys and girls' involved in 'the sex act.'"); but see Smith v. State, 274 Ga. App. 106, 616 S.E.2d 868 (2005) ("materials involving Child Molestation and Sexual Exploitation of Children including but not limited to pictures, computers, and videos. ..." adequate)].

Computer search description - must specify files to be searched [Compare Grant v. State, 220 Ga. App. 604, 469 S.E.2d 826 (1996) with Walsh v. State, 236 Ga. App. 558, 512 S.E.2d 408 (1999)].

c. Instrument of crime - A search warrant seeking material used in furtherance of the crime or involving victims of crime is subject to less stringent standards [Cooper v. State, 212 Ga. App. 34, 441 S.E.2d 448 (1994)' see Brown v. State, 260 Ga. App. 627, 580 S.E.2d 348 (2003) ("receipts" OK)].

8. Medical records - Search warrant (without pre-issuance adversary hearing) is OK for obtaining medical records [King v. State, 276 Ga. 126, 577 S.E.2d 764 (2003)(hospital blood alcohol test to be used in DUI)]. In contrast, when a subpoena is issued, defendant has right to pre-issuance hearing [King v. State, 272 Ga. 788, 535 S.E.2d 492 (2000)].

9. Cell Phones - "the search incident to arrest exception does not apply to cell phones[;] … before searching a cell phone seized incident to an arrest [a law enforcement officer must] get a warrant." [Brown v. State, 330 Ga. App. 488, 490 (2014) (quoting Riley v. California, U.S. Supreme Court, 134 S. Ct. 2473 (2014))].

VII. Affidavit and Application for Search Warrant

A. Affidavit & Application for Search Warrant - FORM

IN THE PROBATE COURT OF _____ COUNTY, GEORGIA

Search Warrant Docket #_____

AFFIDAVIT & APPLICATION FOR A SEARCH WARRANT

The undersigned, being duly sworn, deposes and says: I am a duly sworn, POST certified law enforcement officer in the state of Georgia charged with the duty to investigate criminal activity and enforce the criminal laws of this state.

This is an application for a search warrant and my affidavit in support hereof. Pursuant to O.C.G.A. 17-5-20, et. seq., I am making this sworn affidavit setting forth that there exists probable cause to believe that:

A. specific offense(s) is/are being committed/have been committed; and

B. specifically described property and items and/or persons are to be searched for and seized and constitute evidence of these specific offenses; and

C. the property and items and/or persons constituting evidence to be searched for and seized are located at the particular place to be searched.

There is probable cause to believe that the following crime(s) (is being/has been/have been) committed. (List all applicable offenses and code sections.)

Offense(s) and Code Section(s)

The list of certain property, items, articles, instruments, and person(s) to be searched for and seized are located in _____ County, Georgia and are specifically described as follows:

The foregoing described property, items, articles, instruments and person(s) to be searched for and seized constitute evidence connected with the foregoing listed crime(s) and is/are: (check ALL that are applicable) (O.C.G.A. 17-5-21)

[ ] designed for use in the commission of the crime(s) herein described.

[ ] intended for use in the commission of the crime(s) herein described.

[ ] have/has been used in the commission of the crime(s) herein described.

[ ] stolen; and/or [ ] embezzled; property;

[ ] contraband, the possession of which is unlawful.

[ ] tangible evidence of the commission of the crime(s) set forth above.

[ ] a person who has been kidnapped in violation of the laws of this state or who has been kidnapped in another jurisdiction and is now concealed within this state.

[ ] a human fetus; [ ] a human corpse.

[ ] a person for whom an arrest/fugitive warrant has been issued (Brown v. State, 240 App. 321)

NOTE: Original AFFIDAVIT & SEARCH WARRANT to Court; One original Affidavit & Search Warrant to Officer; One Search Warrant for premises - Affidavit shall not be served upon the premises unless incorporated by Search Warrant.

The facts establishing probable cause in searching for and seizing the foregoing specifically described person(s), property, items, articles, instruments connected with the foregoing crime(s) at the location described herein are: (Set forth facts connecting all crimes, all items to searched for & seized, at the location to be searched.)

The geographic location of the above listed specifically described person(s), property, items, articles, instruments to be searched for and seized is within _____ County, Georgia, and is more particularly described as follows:

[ ] NO KNOCK PROVISION SOUGHT: I am seeking a "No Knock" provision so that entry can be made without knocking and without giving verbal notice of the lawful authority and purpose in execution of this search warrant. There are reasonable grounds to believe that the giving of verbal notice would: (check applicable)

[ ] greatly increase the peril to officer(s) executing this warrant;

[ ] lead to the immediate destruction of the evidence sought.

In support, thereof, I state the following facts:

I swear or affirm that all of the information contained in this Affidavit and all other testimony given by me is true and correct to the best of my knowledge and belief.

Signature: _____ Agency: _____

Name: (Print legibly) _____ Badge No: _____

Sworn to and subscribed before me, this _____ day of _____, 20 ____.

[ ] ORAL TESTIMONY, GIVEN UNDER OATH, [ ] ORAL TESTIMONY NOT CONSIDERED

RECEIVED AND RECORDED _____

Signature: _____ Probate Court

Probate Judge: (Print legibly) _____ STATE OF GEORGIA

B. Search Warrant - FORM

IN THE PROBATE COURT OF _____ COUNTY, GEORGIA

Search Warrant Docket #_____

SEARCH WARRANT

TO ANY LAWFUL OFFICER TO EXECUTE AND RETURN:

AFFIDAVIT having been made before me by _____, a POST certified law enforcement officer, of the following agency,_____, charged with the duty to investigate criminal activity and enforce the criminal laws of the state of Georgia and that said officer has reason to believe that on the premises within _____ County, Georgia, known as and more particularly described as:

There is probable cause to believe that the following crime(s) (is being/has been/have been) committed. (List all applicable offenses and code sections.)

Offense(s) _____ Code Section(s) _____

Offense(s) _____ Code Section(s) _____

The list of certain property, items, articles, instruments, and person(s) to be searched for and seized are located in _____ County, Georgia and are specifically described as follows:

The foregoing described property, items, articles, instruments and person(s) to be searched for and seized constitute evidence connected with the foregoing listed crime(s) and is/are: (The judge shall initial ALL that are applicable) (O.C.G.A. 17-5-21)

(Judge's initials)

[_____] designed for use in the commission of the crime(s) herein described.

[_____] intended for use in the commission of the crime(s) herein described.

[_____] has/have been used in the commission of the crime(s) herein described.

[_____] stolen; and/or [_____] embezzled; property;

[_____] contraband, the possession of which is unlawful.

[_____] tangible evidence of the commission of the crime(s) set forth above.

[_____] a person who has been kidnapped in violation of the laws of this state or who has been kidnapped in another jurisdiction and is now concealed within this state.

[_____] a human fetus; [_____] a human corpse.

[_____] a person for whom an arrest/fugitive warrant has been issued. (Brown v. State, 240 Ga. App. 321)

I am satisfied that there is probable cause to believe that the certain person(s), property, items, articles, and instruments, specifically described herein, is/are being concealed on the premises/person(s) above described and that reasonable grounds exist for the application and issuance of this search warrant.

You are hereby commanded to immediately search the above described premises/person(s), for the above list of specifically described person(s), property, items, articles, instruments and making the search at any time of the day or night and if any of the above-listed person(s), property, items, articles, and instruments can be found to seize them. You shall leave a copy of this warrant and a receipt listing any person(s), property, items, articles, and instruments seized. A written inventory, signed under oath by the officer executing this search warrant, listing the person(s), property, items, articles, and instruments seized shall be prepared without unnecessary delay and shall be returned to me or to any judicial officer of this court. (O.C.G.A. 17-5-29)

EXECUTION OF SEARCH WARRANT: This search warrant shall be executed within ten days from the time of issuance. If the warrant is executed, the duplicate copy shall be left with any person from whom the listed person(s), property, items, articles, and instruments were seized; or if no person is available, the copy shall be left in a conspicuous place on the premises particularly described above. Any search warrant not executed within ten days from the time of issuance shall be void and shall be returned to this court. (O.C.G.A. 17-5-25)

USE OF FORCE IN EXECUTION OF SEARCH WARRANT: Necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute this search warrant if, after verbal notice, or an attempt in good faith to give verbal notice, by the officer directed to execute the same of the officer's authority and purpose:

(1) The officer is refused admittance;

(2) The person or persons within the building or property or part thereof refuse to acknowledge and answer the verbal notice or the presence of the person or persons therein is unknown to the officer; or

(3) The building or property, or part thereof, is not then occupied by any person. (OCGA § 17-5-27)

DETENTION AND SEARCH OF PERSON(S) ON THE PREMISES: In the execution of the search warrant the officer executing the same may reasonably detain or search any person in the place at the time. The scope of the detention and search must be reasonably limited to the purposes of:

(1) protecting an officer from attack; or

(2) preventing the disposal or concealment of any instruments, articles, or things particularly described in the search warrant. (O.C.G.A. 17-5-28)

[_____] "**NO KNOCK PROVISION." (NOT VALID UNLESS**
(Judge's Initials) INITIALED BY THE JUDGE.)

It appearing from affidavit docketed in this case, and such sworn oral testimony as may have been noted, if any, on the application for this search warrant, that there are reasonable grounds to believe that the giving of verbal notice would:

[_____] greatly increase the peril to officer(s) executing this warrant;
(Judge's Initials)

[_____] lead to the immediate destruction of any of the list property
(Judge's Initials) articles and instruments ordered to be seized.

SO ORDERED, this ____ day of _____, 20____, at _____o'clock, ____. M.

Signature:_____ Probate Court

Probate Judge: (Print legibly) _____ STATE OF GEORGIA

C. Return of Search Warrant & Inventory - FORM

IN THE PROBATE COURT OF COUNTY, GEORGIA

Search Warrant Docket #_____

RETURN OF SEARCH WARRANT & INVENTORY

(Include the entire search warrant & affidavit to insure proper & accurate docketing.)

I, the undersigned officer, received the search warrant on the date and time set forth upon the search warrant and have executed it as follows:

[ ] I did not execute the search warrant and I am returning it to this court.

[ ] I did execute the search warrant and I am filing the return and inventory as follows:

On the _____ day of _____, 20_____, I searched the premises particularly described in this search warrant for the specifically listed person(s), property, items, articles and instruments.

I left a copy of the warrant, together with the receipt of the seized person(s), property, items, articles, instruments,

[ ] With the following person: _____.

[ ] Left in a conspicuous place on the premises particularly described in the Search Warrant.

The following is an inventory of the property person(s), property, items, articles and instruments seized pursuant to execution of this search warrant:

[ ] See the attached list, consisting of _____ pages, labeled _____.

This inventory was made in the presence of_____.

I swear that the above is a true and detailed account of the listed person(s), property, items, articles and instruments seized by me at the execution of this search warrant.

Signature:_____ Agency:_____

Name: (Print legibly) _____ Badge No: _____

Sworn to and subscribed before me, this _____ day of _____, 20 ____.

Signature:_____ Probate Court

Probate Judge: (Print legibly)_____ STATE OF GEORGIA

Original AFFIDAVIT & SEARCH WARRANT to Court; One Original Affidavit & Search Warrant to Officer;

1. Citations: STATUTES and RULES

Child pornography - obtaining records from internet provider [O.C.G.A. § 35-3-4.1 (a)(1); see Henderson v. State, 320 Ga. App. 553, 740 S.E.2d 280 (2013)].

Confidential informants, witnesses and victims not to be disclosed by court except by court order after motion, hearing, and in camera review [See if new Proposed Probate Court Rule 4.3(C) was passed and O.C.G.A. § 17-17-10].

DUI cases - Search warrant may issue for bodily fluid sample independent of implied consent [O.C.G.A. § 40-5-67.1(d.1); negating State v. Collier, 279 Ga. 316, 612 S.E.2d 281 (2005); see McAllister v. State, 325 Ga. App. 583, 585, 754 S.E.2d 376, 379 (2014) ("search warrant used to take [Defendant's] blood was valid under the [updated] implied consent statute").]. Also see Williams v. The State, case no. 296 Ga. 817 (2015); concerning a blood draw in a D.U.I. case and the voluntary consent exception to the requirement that a search warrant must be obtained. The court held that actual consent not just implied, consent is required.

HIV tests - where during a crime there is "significant exposure" under statutory definition an HIV test may be ordered *by Superior Court* [O.C.G.A. § 17-10-15].

Requirements for affidavit (verified complaint) supporting application for search warrant? [O.C.G.A. § 17-5-21].

Video search warrants - Applications may be heard by video conference. The judge should have visual and audible contact with all affiants and witnesses and the signature of the judge and affiant may be typed, affixed by electronic stylus, or any other reasonable means which identifies the affiant (statute requires retention of a copy of video) [O.C.G.A. § 17-5-21.1]. Judge can participate from anywhere in the state, but judge's court must have venue for the county where the property is located.

Wiretap information in search warrant or affidavit is probably required to be sealed and not made a part of public record [O.C.G.A. § 16-11-64].

2. Citations: CASES

Absence of original affidavit supporting warrant not fatal regardless of whether it was filed with court where affidavit was presented to magistrate and photocopy of affidavit was produced [Bolt v. State, 230 Ga. App. 760, 497 S.E.2d 406 (1998)].

Affidavit requirements - although affidavit may be supplemented by oral testimony (or taped sworn statement), there must be a written signed statement (verified complaint) under oath underlying the warrant [State v. Barnett, 136 Ga. App. 122, 220 S.E.2d 730 (1975)].

Anticipatory search warrant requires probable cause both that triggering provision will happen *and* that triggering event gives probable cause for search [United States v. Grubbs, 547 U.S. 90 (2006)]. Search warrant laying out detailed procedures to follow in controlled buy of drugs at residence could authorize search if drugs obtained in buy there [Smith v. State, 278 Ga. App. 315, 628 S.E.2d 722 (2006)].

Appointment of senior judge without defined scope (by time or cases) was invalid, voiding his warrant [State v. Kelley, 302 Ga. App. 850, 691 S.E.2d 890 (2010)].

Blood sample - warrant does not have to specify amount of sample to be taken, if amount taken is actually reasonable [Johnson v. State, 320 Ga. App. 231, 739 S.E.2d 718 (2013) (remanded by Supreme Court for reconsideration of other grounds 11/4/2013)]. By implication, the warrant does not have to lay out the procedure to be followed in general.

Compelling Defendant to produce handwriting or voice exemplar impermissible under Georgia Constitution [Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972); State v. Armstead, 152 Ga. App. 56, 262 S.E.2d 233 (1979); see Price v. State, 194 Ga. App. 453, 390 S.E.2d 663 (1990) (can force Defendant to *submit* to act, not to do an act);but see State v. Coe, 243 Ga. App. 232, 533 S.E.2d 104 (2000) (submission to breath, urine, or blood test can be compelled despite cooperation required for producing breath sample)].

Consent to urine test for bond purposes does not allow use of information in separate criminal proceeding for possession of illegal drug if defendant is not informed of possible use for additional charges [Beasley v. State, 204 Ga. App. 214, 419 S.E.2d 92 (1992)].

Confidential informant - analysis of confidential informant in marginal case [see Rogers v. State, 274 Ga. App. 546, 618 S.E.2d 166 (2005); see also Copeland v. State, 273 Ga. App. 850, 616 S.E.2d 189 (2005) (gave information in last month on "one occasion that led to the recovery of a quantity of illegal drugs.")].

Convicted prisoners are not protected by the 4th Amendment against searches [Hudson v. Palmer, 468 U.S. 517 (1984)].

Detention of occupants while police obtain warrant approved (1½ hours) [Clark v. State, 217 Ga. App. 113, 456 S.E.2d 672 (1995)].

Dog, sniffing luggage [O'Keefe v. State, 189 Ga. App. 519, 376 S.E.2d 406 (1988)] or car [State v. Montford, 217 Ga. App. 339, 457 S.E.2d 229 (1995)] is not a search. Dog's reaction can then provide probable cause for search warrant. But see [Florida v. Jardines, 133 S. Ct. 1409 (2013) (bringing drug dog to front door of house was an improper warrantless search because it exceeded scope of implied consent to approach front door)].

Drug dogs - probable cause - the reliability of a drug dog is to be judged through a common sense totality of the circumstances test and not through meeting any abstract or exacting certification standard such as is found for scientific evidence at trial [Florida v. Harris, 133 S. Ct. 1050 (2013); Contrast Carr v. State, 267 Ga. 701, 482 S.E.2d 314 (1997) (Harper standards applied in refusing admission of dog alert as evidence *at trial* for arson)].

Hotel rooms - Occupied rooms have same protections as private residence [Elliot v. State, 274 Ga. App. 73, 616 S.E.2d 844 (2005)].

Identity of person [Holloway v. State, 134 Ga. App. 498, 215 S.E.2d 262 (1975)].

Illegal wiretap [State v. Toomey, 134 Ga. App. 343, 214 S.E.2d 421 (1975)].

"Instrumentality of a crime" as descriptor of items to be seized in warrant were found to include violent writings with references to killings and guns, and therefore within the scope of the description of the property to be seized, but the case did not analyze whether they were "private papers" and stated that they should have been excluded from evidence as more prejudicial than probative [Pitchford v. State, 294 Ga. 230, 751 S.E.2d 785 (2013)].

Invalid judge - No "de facto" magistrate where no position created under O.C.G.A. § 15-10-20(a) (by superior court and county commission), despite approval of salary by county administrator. "De facto" judge requires "de jure" position. Warrant signed by such person, even at oral direction of chief magistrate is invalid and fruits of search must be suppressed [Beck v. State, 283 Ga. 352, 658 S.E.2d 577 (2008)]. Designation of senior judge issuing warrant nullity without scope or length of assistance [State v. Kelley, 302 Ga. App. 850, 691 S.E.2d 890 (2010)].

No telephone oaths - Oaths must be administered in official's presence; thus, there can be no oath administered over the telephone [Redmond v. Shook, 218 Ga. App. 477, 462 S.E.2d 172 (1995); but see State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980) (corrections to search warrant by phone approval of judge)]. Thus, search warrant could probably not be based upon testimony taken over the phone.

Oral testimony may supplement affidavit [Riggins v. State, 136 Ga. App. 279, 220 S.E.2d 775 (1975)].

Privacy expectation less in commercial property, particularly closely regulated industries. [New York v. Burger, 482 U.S. 691 (1987)]. (See Section X (E), Administrative Searches).

Probable cause [Harris v. United States, 331 U.S. 145 (1947); Patterson v. State, 126 Ga. App. 753, 191 S.E.2d 584 (1972)].

Probable cause - close case reversal [Hamlett v. State, 323 Ga. App. 221, 753 S.E.2d 118 (2013) (4-3 decision found lacking)].

Probable cause statement out of place on affidavit no defect [Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973)].

Refusal of search - fails to provide probable cause and should be disregarded. Miley v. State, 279 Ga. 420, 614 S.E.2d 744 (2005)].

Repeat searches OK if probable cause to believe item may have been placed there since last search [Dixon v. State, 197 Ga. App. 369, 398 S.E.2d 428 (1990)].

Taped sworn statement incorporated by reference in affidavit but not reduced to writing due to press of time OK [Williams v. State, 188 Ga. App. 334, 373 S.E.2d 42 (1988)].

VIII. Probable Cause for Search Warrant

A. Standard of Proof

1. "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." [Illinois v. Gates, 462 U.S. 213 (1983); State v. Stephens, 252 Ga. 181, 311 S.E.2d 823 (1984); accord, State v. Lejeune, 276 Ga. 179, 576 S.E.2d 888 (2003)].

2. Does not require as much proof as preponderance of the evidence [State v. Stephens, 252 Ga. 181, 311 S.E.2d 823 (1984); Monroe v. Sigler, 256 Ga. 759, 353 S.E.2d 23 (1987); In the Interest of A.S., 293 Ga. App. 710, 667 S.E.2d 701 (2008); Williams v. State, 269 Ga. App. 616, 604 S.E.2d 640 (2004)]. Articulable suspicion is less than probable cause, and considerably less than preponderance of the evidence [Illinois v. Wardlow, 528 U.S. 119, 123-124 (2000)].

3. "[P]robable cause is a *fluid* concept -- turning on the assessment of probabilities in particular factual contexts -- not readily, or even usefully, reduced to a neat set of legal rules. . . Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" [Illinois v. Gates, 462 U.S. 213, 232-235 (1983)]. Magistrate has discretion "to draw such inferences, or to refuse to draw them if he is so minded" [Illinois v. Gates, 462 U.S. 213, 240 (1983)].

4. Accordingly, "magistrate's determination of probable cause should be paid great deference by reviewing courts" [Illinois v. Gates, 462 U.S. 213, 236 (1983) (on motion to suppress in search warrant context); State v. Palmer, 285 Ga. 75, 673 S.E.2d 237 (2009)(deferential standard of review)].

B. Hearsay - Search warrants are normally based all or in part on hearsay. Hearsay supports valid warrant if judge is informed of some of underlying circumstances supporting reliability of information [United States v. Ventresca, 380 U.S.102 (1965)]. Must always be substantial basis for believing hearsay [Smith v. State, 136 Ga. App. 17, 220 S.E.2d 11 (1975)].

1. Oral Testimony - oral testimony to the judge prior to issuance is of equal weight to matters in the affidavit [Flewelling v. State, 300 Ga. App. 505, 685 S.E.2d 758 (2009); Franklin v. State, 135 Ga. App. 718, 218 S.E.2d 641 (1975)].

2. *Conclusory* statements are *insufficient* - Reliability of informer and information provided must be established by underlying facts presented to judge sufficient for *independent determination by judge*, not merely the officer's conclusions of reliability [Fair v. State, 284 Ga. 165, 664 S.E.2d 227 (2008); State v. Bryant, 210 Ga. App. 319, 436 S.E.2d 57 (1993); State v. Wesson, 237 Ga. App. 789, 516 S.E.2d 826 (1999)]. Shirley v. State, S15G0671, (2015), the court found that the search warrant application for images of child pornography was insufficient to support probable cause. The affidavit implied that the FBI received information from German authorities; however, the name(s) or type(s) of German authorities was not provided.

3. Omitted information - Reliability of tipster/informant must be shown in record of what was presented to judge *and cannot be shown by information not disclosed to judge* [Land v. State, 259 Ga. App. 860, 578 S.E.2d 551 (2003); Lyons v. State, 258 Ga. App. 9, 572 S.E.2d 632 (2002) (controlled buy "that unquestionably would have established the informant's reliability"); Pailette v. State, 232 Ga. App. 274, 501 S.E.2d 603 (1998); see State v. Lejeune, 276 Ga. 179, 576 S.E.2d 888 (2003)]. In contrast, *unreliability* of informer may be shown based upon information known to officer but not disclosed to magistrate [Lyons v. State, 258 Ga. App. 9, 572 S.E.2d 632 (2002); Robertson v. State, 236 Ga. App. 68, 510 S.E.2d 914 (1999)].

Age of victim - in crime against minor, mother's statement that defendant was having sex with daughter sufficient under totality of circumstance despite omission of specific statement in affidavit that daughter was minor [Phillips v. State, 283 Ga. App. 319, 641 S.E.2d 294 (2007)].

Omitted information that suspect had not been seen at girlfriend's apartment during 6 weeks of surveillance not problem where he had no other address and there were other indicia tying him to location; omitted information *does not negate deference* to magistrate's determination [State v. Hunter, 282 Ga. 278, 646 S.E.2d 465 (2007)].

Bias of witness and exculpatory information - where officer omitted information that source wanted custody of defendant's child and omitted exculpatory information without showing basis of sources information or corroboration by investigation, search was invalid [State v. Owens, 285 Ga. App. 370, 646 S.E.2d 340 (2007)], but when wife stated that defendant is addicted to drugs, omission of fact that wife was estranged, defendant claimed to be currently clean and that father-in-law stated defendant did not appear under the influence on the day in question, did not negate probable cause [Herrera v. State, 288 Ga. 231, 702 S.E.2d 854 (2010)] (Both decisions construe the evidence to uphold trial court decision.)

Omission of indicia of unreliability may be offset by independent corroboration through investigation [Davis v. State, 281 Ga. App. 855, 637 S.E.2d 431 (2006); see Bryant v. State, 288 Ga. 876, 708 S.E.2d 362 (2011) (informant not disclosed as jail house inmate, but he provided some past information, some future information (general time of mailing, recipient of letters) and many supporting details)].

Can't use information provided by informant to show status as more than "tipster" where it can't be corroborated [Harper v. State, 283 Ga. 102, 657 S.E.2d 213 (2008) (caller stated he was concerned citizen from defendant's church, but police had no basis to verify ID); see Fair v. State, 284 Ga. 165, 664 S.E.2d 227 (2008)].

C. False and illegally obtained information

1. If information is shown by preponderance of evidence to deliberately false or presented in reckless disregard for the truth, then probable cause will be evaluated based upon remaining information with *false info excised* [Franks v. Delaware, 438 U.S. 154 (1978); Evans v. State, 263 Ga. App. 572, 588 S.E.2d 764 (2003)]; and material omissions added [Moss v. State, 275 Ga. 96, 561 S.E.2d 382 (2002)]

2. Similar analysis for illegally obtained information is the untainted information sufficient to support probable cause? [Brundige v. State, 291 Ga. 677, 735 S.E.2d 583 (2012) (1stwarrant improper, eliminating fruits of 1st warrant, still sufficient probable cause); State v. Pando, 284 Ga. App. 70, 643 S.E.2d 342 (2007); Baker v. State, 295 Ga. App. 162, 671 S.E.2d 206 (2008) (bad lineup)]. If legally obtained information provides probable cause for search warrant, illegal previous entry prior to warrant will not void search [Smithson v. State, 275 Ga. App. 591, 621 S.E.2d 783 (2005)];

In contrast, where a finding of probable cause depends on information obtained through illegal search, observations through trespass, or unauthorized intrusion into protected area with sense-enhancing equipment, warrant will normally be "fruit of the poisonous tree"[Mitchell v. State, 323 Ga. App. 739, 747 S.E.2d 900 (2013); United States v. Jones, 132 S. Ct. 945 (2012) (revalidating common-law trespass analysis);] (plain view and when intrusions on property are not trespass), (sense-enhancing devices)].

3. Miranda - warrant based upon *voluntary* statement *taken in violation of Miranda rights* is OK [United States v. Patane, 542 U.S. 630, 641-642 (2004); State v. Woods, 280 Ga. 758, 632 S.E.2d 654 (2006)].

4. Failure to disclose informant's criminal record to judge *may* justify suppression [State v. Palmer, 291 Ga. App. 157, 661 S.E.2d 146 (2008) (here combined with imperfect search of informant before controlled buy); *but see* Zorn v. State, 291 Ga. App. 613, 662 S.E.2d 370 (2008) (upheld decision not to suppress despite non-disclosure of record)].

5. Police officer may normally rely on hearsay related to another officer [Meneghan v. State, 132 Ga. App. 380, 208 S.E.2d 150 (1974); Walthall v. State, 281 Ga. App. 434, 636 S.E.2d 126 (2006) (New Hampshire Officer)], but affiant must be aware of facts supporting reliability of underlying hearsay and relate them to magistrate [State v. Griffin, 154 Ga. App. 361, 268 S.E.2d 412 (1980)].

6. Double hearsay may be used but each link must be credible [McTaggart v. State, 285 Ga. App. 178, 645 S.E.2d 658 (2007) (2 police officers); Johnson v. State, 265 Ga. App. 777, 595 S.E.2d 625 (2004) (concerned citizen to officer to officer); Smith v. State, 136 Ga. App. 17, 220 S.E.2d 11 (1975)].

Reliability of informer does not establish reliability of hearsay of third party [State v. Holloway, 286 Ga. App. 129, 648 S.E.2d 473 (2007) (if hearsay source for concerned citizen's information is unstated, it is an "anonymous tip," Note); Munson v. State, 206 Ga. App. 76, 424 S.E.2d 290 (1992)], including statements of person arrested due to confidential informer's efforts [State v. Wesson, 237 Ga. App. 789, 516 S.E.2d 826 (1999)], or fact that informer had no known reason to lie and did not know that the information would be related to the police [Wood v. State, 214 Ga. App. 848, 449 S.E.2d 308 (1994)].

G. Voluntary statements taken in violation of Miranda rights may be used to justify search [Reaves v. State, 284 Ga. 181, 664 S.E.2d 211 (2008)].

D. Totality of Circumstances

Probable cause is shown under a *totality of the circumstances* test - information upon which the search warrant is based must be shown to be reliable. Reliability is shown in two ways: *inherent reliability of the evidence* or *reliability of the person providing the information*;

1. Traditional test - The affiant was required to state the underlying circumstances showing:

2. The informant's reliability, and

3. The source of the informant's information [Aguilar v. Tex., 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969)].

NOTE - Informant may establish probable cause independent of Aguilar, Spinelli under totality of circumstances test of Gates. However, State v. Stephens, 252 Ga. 181, 311 S.E.2d 823 (1984) and Gates are outer limit of probable cause and Aguilar/Spinelli standard should be followed whenever possible [See Wells v. State, 180 Ga. App. 133, 348 S.E.2d 681 (1986)].

a. Inherently reliable information - under some special circumstances, the nature of the evidence is so compelling that no special showing of the reliability of the informant is required:

1. Correct future predictions of conduct [Swanson v. State, 201 Ga. App. 896, 412 S.E.2d 630 (1991); Johnson v. State, 197 Ga. App. 538, 398 S.E.2d 826 (1990); see Ala. v. White, 496 U.S. 325 (1990)]; in these cases the informer provides information predicting conduct by the suspect and the police officer then waits and verifies that the predictions come true.

2. Examples of *insufficient* information:

b. Information about Defendant's appearance, his car and tag number, his address and where he banked was insufficient to provide confirmation of reliability [State v. Bryant, 210 Ga. App. 319, 436 S.E.2d 57 (1993)].

c. An anonymous tip that Defendant is carrying a gun does not even provide "articulable suspicion" for a Terry search for weapons for officer safety. [Fla. v. J.L., 529 U.S. 266 2000) (specifically *excludes* analysis of *bomb tips*)].

d. Phone call to unidentified "drug dealer" by arrested drug user to set up cocaine buy and identification of "dealer's" car insufficient to stop car when someone drives it off ten minutes after call [State v. Davenport, 268 Ga. App. 704, 603 S.E.2d 324 (2004)].

e. Address, car, and fact that subject is wanted in another state similarly insufficient to corroborate tip [Lyons v. State, 258 Ga. App. 9, 572 S.E.2d 632 (2002)].

f. Arrestee for possession of drugs on his person implicating car owner/driver as source (supporting search warrant for his residence) not corroborated by knowledge of his residence, his criminal record, smell of marijuana in car, or fact that he was seen conversing with owner outside his residence [State v. Willis, 302 Ga. App. 355, 691 S.E.2d 261 (2010)].

g. Over comes known bias - future prediction of conduct can make information reliable despite known bias of source.

h. Details of crime - Where an informer provides details of crime which allegedly come from defendant and are not available through the news media, such details corroborated his information in a manner similar to future predictions [State v. Henderson, 271 Ga. 264, 517 S.E.2d 61 (1999) (fellow jail inmate)] need "insider information" Fla. v. J.L., 529 U.S. 266 (2000)].

E. Reliability of person providing information:

1. Criminal record - where criminal record is known to police, it is always relevant and should be disclosed to magistrate [Davis v. State, 281 Ga. App. 855, 637 S.E.2d 431 (2006)].

2. Anonymous tipsters - information from anonymous tipsters has no inherent reliability and must be supported by appropriate prediction of future conduct or details of the crime (see B (2) (a-b), above). In Wiggins v. The State, 331 Ga. App. 447 , March 23, 2015, the court held that the anonymous informant's wholly uncorroborated allegations that Wiggins was selling drugs at some undisclosed time--even combined with evidence that Wiggins legally possessed a firearm during a traffic stop and that he and his friend had previously used marijuana--did not provide a substantial basis for determining that probable cause existed to search Wiggins's residence.

3. Named informant making statement against penal interest - "When a *named* informant makes a declaration against penal interest and based on personal observation, that in itself provides a substantial basis for the magistrate to credit that statement" [Graddy v. State, 277 Ga. 765, 596 S.E.2d 109 (2004); accord, Hardy v. State, 162 Ga. App. 797, 292 S.E.2d 902 (1982) (name provided in oral testimony to magistrate)]. Need not be a formal confession and court should not make a highly legalistic interpretation of statement [Graddy v. State, 277 Ga. 765, 596 S.E.2d 109 (2004)]. Statement against interest, being in custody, and setting up and personally appearing for controlled buy and personally ID of suspect all factors adding to credibility of named suspect of unknown reliability [Lopez v. State, 292 Ga. App. 518, 664 S.E.2d 866 (2008)].

• *Statement against interest credibility cannot be extended to* uncorroborated statements made by *unnamed informants* [State v. Wesson, 237 Ga. App. 789, 516 S.E.2d 826 (1999)].

• Not against penal interest to finger supplier of drugs when arrested [State v. Willis, 302 Ga. App. 355, 691 S.E.2d 261 (2010)], but stating one helped manufacture drugs at supplier's residence is [Martis v. State, 305 Ga. App. 17, 699 S.E.2d 349 (2010) (corroboration also present)].

4. Named victims - Crime victims have also been held to be inherently reliable sources [Smith v. State, 274 Ga. App. 106, 616 S.E.2d 868 (2005); Miller v. State, 219 Ga. App. 213, 464 S.E.2d 621 (1995) (both cases involving sexually abused minors apparently without criminal records)]. In some cases, this has questionably been extended to unidentified alleged crime witnesses calling 911.

• 911 complainant who gives name is an identified crime victim for articulable suspicion for stop, not tipster, even when he cannot later be found. Prolonged detention, however, became illegal arrest without probable cause after complainant failed to appear as promised for more than 40 minutes. [Grandberry v. State, 289 Ga. App. 534, 658 S.E.2d 161 (2008)]. In most *warrant* applications, there has been time to determine whether the named victim exists.

5. "*Concerned citizens*" enjoy elevated credibility but affidavit must show *facts* justifying such characterization; conclusory statements are insufficient [State v. White, 196 Ga. App. 685, 396 S.E.2d 601 (1990); Eaton v. State, 210 Ga. App. 273, 435 S.E.2d 756 (1993); Pailette v. State, 232 Ga. App. 274, 501 S.E.2d 603 (1998)]. Where the concerned citizen's information is obviously based on *hearsay*, the elevated credibility does *not* apply; instead, it must be shown that the hearsay comes from a reliable source [State v. Holloway, 286 Ga. App. 129, 648 S.E.2d 473 (2007) (if source unstated, it is an "anonymous tip,")].

Insufficient:

• Tipster's description of self over telephone as "concerned citizen" provides no evidence of reliability unless verified [Eaton v. State, 210 Ga. App. 273, 435 S.E.2d 756 (1993); accord, Sutton v. State, 319 Ga. App. 597, 737 S.E.2d 706 (2013) (correct information on defendant's vehicle, residence and past ownership of business did not enhance credibility)];

• Mature, employed person "who has a reputation for being truthful in the source's community" and "seemed credible to officer" [Pailette v. State, 232 Ga. App. 274, 501 S.E.2d 603 (1998)].

• Where officer previously arrested tipster, not "concerned citizen" [Rucker v. State, 276 Ga. App. 683, 624 S.E.2d 259 (2005)].

Sufficient:

• Officer's statement that the informant was personally known to him as law-abiding citizen, that his demeanor was truthful, *plus* that some key facts were corroborated by investigation. [Thomason v. State, 215 Ga. App. 189, 450 S.E.2d 283 (1994)];

• Officer's statement that the informant was personally known to him as law-abiding citizen, that his demeanor was truthful, *plus* no criminal record and an explanation of citizen's motivation from past experience of drug effects on family [Dearing v. State, 233 Ga. App. 630, 505 S.E.2d 485 (1998); accord, Price v. State, 297 Ga. App. 501, 677 S.E.2d 683 (2009)];

• Employee (hotel housekeeper) making job-related report to supervisor (false report could result in termination) of presence of drugs [Glass v. State, 304 Ga. App. 414, 696 S.E.2d 140 (2010)].

• When a person claims to have just witnessed a crime and reports it face to face to the police they may be considered a concerned citizen [Durden v. State, 320 Ga. App. 218, 739 S.E.2d 676 (2013)].

6. Other named informants:

• Face-to-face informants more reliable because of demeanor observation and accountability for false information [Cole v. State, 282 Ga. App. 211, 638 S.E.2d 363 (2006)].

• The fact that an informant is named, however, is not enough alone to establish the informant's credibility [State v. Lejeune, 276 Ga. 179, 576 S.E.2d 888 (2003); accord, Rucker v. State, 276 Ga. App. 683, 624 S.E.2d 259 (2005) (no prediction of future conduct or facts not easily obtainable); see also State v. Davenport, 268 Ga. App. 704, 603 S.E.2d 324 (2004) (just arrested possessor of drugs with no history as informant treated as tipster); but see Wright v. State, 272 Ga. App. 423, 612 S.E.2d 576 (2005) (*known source with known bias* (ex-spouse in custody dispute who set up drug purchase) treated as more reliable than anonymous tipster but, importantly, tip *predicted future actions*); Lough v. State, 276 Ga. App. 495, 623 S.E.2d 688 (2005) (named informant plus knowledge and observation of defendant by officer). Compare St. Fleur v. State, 286 Ga. App. 564, 649 S.E.2d 817 (2007) (insufficient - police hear arrestee-informant's side of conversations about drug purchase, but no meeting set up so no future conduct predicted (warrant)) with Patton v. State, 287 Ga. App. 18, 650 S.E.2d 733 (2007), (cooperating arrestee sets up drug transaction, police hear her side of set-up conversation, car, time and place of meeting as predicted) and State v. Bryant, 284 Ga. App. 867, 644 S.E.2d 871 (2007) (one side of set-up conversation for drug buy and appearance at location with consistent behavior as predicted before frightened off)].

7. Confidential informant - mere conclusory statement that person is a reliable confidential informer is not probative [State v. Bryant, 210 Ga. App. 319, 436 S.E.2d 57 (1993); Claire v. State, 247 Ga. App. 648, 544 S.E.2d 537 (2001) (police from another jurisdiction)] - should show:

a. Type of information previously supplied;

b. How that information was used (i.e. to find contraband or obtain convictions) (e.g., informant is personally known to affiant, has provided useful information in the past which has led to convictions in x cases);

c. Time elapsed since information obtained [Kessler v. State, 221 Ga. App. 368, 471 S.E.2d 313 (1996); see Rocha v. State, 284 Ga. App. 852, 644 S.E.2d 921 (2007)].

It is *not necessary* for all three of the factors to be shown as long as the magistrate has sufficient information to make an independent analysis [Claire v. State, 247 Ga. App. 648, 544 S.E.2d 537 (2001)]. Confidential informant is treated as anonymous tipster unless there is factual information to show reliability. Officer *should* also inform court if informant was paid and advise of known criminal record of informant but failure to do so will not normally invalidate warrant where informant has provided reliable information in the past [Hockman v. State, 226 Ga. App. 521, 487 S.E.2d 102 (1997); Perkins v. State, 220 Ga. App. 524, 469 S.E.2d 796 (1996); Kessler v. State, 221 Ga. App. 368, 471 S.E.2d 313 (1996); but see Robertson v. State, 236 Ga. App. 68, 510 S.E.2d 914 (1999); Land v. State, 259 Ga. App. 860, 578 S.E.2d 551 (2003)].

For example of showing credibility of first-time informant [see Lopez v. State, 292 Ga. App. 518, 664 S.E.2d 866 (2008)];

Lack of specific underlying info showing reliability of informants balanced by consistent multiple sources and independent verification of some facts [Chambliss v. State, 298 Ga. App. 293, 679 S.E.2d 831 (2009) ("totality of circumstances"];

If past reliability of informant is not shown and alleged "controlled buy" is not monitored by police, then reliability insufficient [Chatham v. State, 323 Ga. App. 51, 746 S.E.2d 605 (2013)];

Where reliability of confidential informant sufficiently shown, no other corroboration of facts provided by him is needed [Williams v. State, 303 Ga. App. 222, 692 S.E.2d 820 (2010)].

8. Collective knowledge of police officers - information from police officers is considered inherently reliable [Eppinger v. State, 231 Ga. App. 614, 500 S.E.2d 383 (1998); Claire v. State, 247 Ga. App. 648, 544 S.E.2d 537 (2001) (police from another jurisdiction)].

9. Judge may also infer facts from circumstantial evidence from police officers:

a. Controlled buy - Confidential informant searched for drugs and given money. Gives money to unknown third party who enters house and comes back with drugs and no money. Probable cause to search house [Clark v. State, 217 Ga. App. 113, 456 S.E.2d 672 (1995). *Compare* interrupted buys in Patton v. State, 287 Ga. App. 18, 650 S.E.2d 733 (2007) (cooperating arrestee sets up drug transaction, police hear her side of set-up conversation, car, time and place of meeting as predicted) and State v. Bryant, 284 Ga. App. 867, 644 S.E.2d 871 (2007) (one side of set-up conversation for drug buy and appearance at location with consistent behavior as predicted before frightened off) with St. Fleur v. State, 286 Ga. App. 564, 649 S.E.2d 817 (2007) (*insufficient* - police hear informant's side of conversations about drug purchase, but no "meet" set up, so no future conduct predicted (warrant))].

Where buyer not under constant surveillance, case is "marginal," but magistrate's determination that buy made informant credible under totality of circumstances is upheld [Pass v. State, 309 Ga. App. 440, 710 S.E.2d 641 (2011)].

b. Drug dog alert [O'Keefe v. State, 189 Ga. App. 519, 376 S.E.2d 406 (1988)].

F. Timeliness and Staleness of information

1. Timeliness of information must be shown or it is treated as too stale by default [Land v. State, 259 Ga. App. 860, 578 S.E.2d 551 (2003); Shivers v. State, 258 Ga. App. 253, 573 S.E.2d 494 (2002); see Lyons v. State, 258 Ga. App. 9, 572 S.E.2d 632 (2002) ("recent past")]. "'Time is assuredly an element of the concept of probable cause.' In reviewing a search warrant application, the magistrate must inquire into whether 'the conditions described in the affidavit might yet prevail at the time of issuance of the search warrant.' If the prior circumstances relied on to establish probable cause have grown stale with time, they are unlikely to provide a reliable barometer of present criminal conduct. This is not to say that 'the precise date of an occurrence is . . . essential. . . .'" [Land v. State, 259 Ga. App. 860, 578 S.E.2d 551 (2003)]:

a. Drug selling operation - 'when the affidavit indicates the existence of an ongoing scheme to sell drugs, the passage of time becomes less significant than would be the case with a single, isolated transaction.'" [Land v. State, 259 Ga. App. 860, 578 S.E.2d 551 (2003)];

b. Odor of marijuana - may establish probable for prompt search of *car* [State v. Folk, 238 Ga. App. 206, 521 S.E.2d 194 (1999); Patman v. State, 244 Ga. App. 833, 537 S.E.2d 118 (2000) (less expectation of privacy)] but does not provide probable cause to search *residence* two days later [Shivers v. State, 258 Ga. App. 253, 573 S.E.2d 494 (2002)]; if the odor of marijuana was detected, the affidavit for the search warrant must contain sufficient information for the court to determine that the officer who detected the odor emanating from a specific location is qualified to recognize the odor. Wingate v. The State, 347 Ga. App. 341, (September 19, 2018). The odor of unburned marijuana [State v. Pando, 284 Ga. App. 70, 643 S.E.2d 342 (2007) (insufficient by itself even for immediate search of *residence*)]; "odor of burning marijuana suggests that marijuana is still present, whereas the smell of marijuana smoke merely suggests that marijuana was present in the past" [State v. Charles, 264 Ga. App. 874, 876, 592 S.E.2d 518, 520 (2003) (insufficient); Patman v. State, 244 Ga. App. 833, 537 S.E.2d 118 (2000)(additional); but see Taylor v. State, 254 Ga. App. 150, 561 S.E.2d 833 (2002)(prior complaints, smell of marijuana smoke on suspects, reentry into *residence* without explanation by a suspect creating exigency to enter, plain view of marijuana - sufficient)]; a warrant affidavit will not establish probable cause if the only relevant information it contained was the officers' detection of the odor of marijuana and the affidavit failed to include information about the officers' qualifications to identify the odor. Wingate v. The State, 347 Ga. App. 341, (September 19, 2018).

c. Weapon and attire - 4 weeks to 9 months have been approved as not stale on case specific analysis - non-perishable, non-consumable items of continuing utility [In re A.Z., 301 Ga. App. 524, 687 S.E.2d 887, (2009); Amica v. State, 307 Ga. App. 276, 704 S.E.2d 831 (2010)] .

d. Residence - suspect's absence during 6 weeks of surveillance of girlfriend's apartment OK when he had no other address, she listed him as employer, he had lived with her in past, suspect drove car registered to her, and fled in direction of her apartment, ½ mile away [State v. Hunter, 282 Ga. 278, 646 S.E.2d 465 (2007)];

e. Pornography related to sexual offense - years of delay OK given such material on computer not likely to be affected by time [Birkbeck v. State, 292 Ga. App. 424, 665 S.E.2d 354 (2008) (digital photos not perishable - incest-themed pornography - years old); Walthall v. State, 281 Ga. App. 434, 636 S.E.2d 126 (2006) (child pornography - 3 months); Shirley v. State, 330 Ga. App. 424, 765 S.E.2d 491 (2014) (Nineteen month delay between suspect accessing child pornography and application for search warrant OK)].

2. Staleness - if affidavit fails to indicate how recent the information is, it would be considered stale and fail to establish probable cause [Gilliam v. State, 124 Ga. App. 843, 186 S.E.2d 290 (1971)].

3. Present tense - use of present tense in affidavit (e.g., suspect is engaged in activity) can be enough to show timeliness [State v. Clark, 141 Ga. App. 886, 234 S.E.2d 713 (1977)].

IX. Amendments to Search Warrants

A. Based upon Sworn Testimony

Amendments may be made to affidavit and warrant based upon sworn testimony establishing probable cause, even by *another* judge of the court [Green v. State, 275 Ga. 569, 570 S.E.2d 207 (2002)]. Probable cause, even by *another* judge of the court [Green v. State, 275 Ga. 569, 570 S.E.2d 207 (2002)].

B. Address corrections (minor)

Address corrections (minor) may be authorized by original judge by telephone [State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980) (different hotel room); Oliver v. State, 161 Ga. App. 567, 287 S.E.2d 698 (1982) (changing street address from 506 to 206)] and may even be authorized by second magistrate [Smith v. State, 205 Ga. App. 848, 424 S.E.2d 60 (1992)]. But if the address change is more than a typo, it would be advisable to have proper sworn testimony (see "No telephone oaths" above).

X. Execution of Warrants

A. Time of execution

1. May execute warrant at any reasonable time [O.C.G.A. § 17-5-26] *within ten days* [O.C.G.A. § 17-5-25; King v. State, 200 Ga. App. 801, 409 S.E.2d 865 (1991); *see* State v. Banks, 185 Ga. App. 760, 365 S.E.2d 855 (1988) (warrant "expires")].

No requirement that analysis of item seized be accomplished within certain time frame - analyzing hard drive is not second search requiring a new warrant [Mastrogiovanni v. State, 324 Ga. App. 739, 751 S.E.2d 536 (2013)].

Time limitation for execution need not appear in the warrant [Johnson v. State, 320 Ga. App. 231, 739 S.E.2d 718 (2013) (remanded by Sup. Ct. for reconsideration of other grounds 11/4/2013)]. Many warrants include such language as a reminder for executing officers.

2. Execution before arrival of warrant - Search may commence after issuance of the warrant and informing those present of search warrant based upon information relayed by telephone or radio, but, at end of search, copy of warrant would still need to be left at scene or with person searched [State v. Rocco, 255 Ga. App. 565, 566 S.E.2d 365 (2002)].

B. Persons Conducting Search

1. Execution by Expert - Police may use expert under their general supervision to make impressions, draw blood, search for records, etc. [Harris v. State, 260 Ga. 860, 401 S.E.2d 263 (1991)].

2. Other Third Parties - while it may be appropriate to employ civilian experts if necessary to execute the search [Harris v. State, 260 Ga. 860, 401 S.E.2d 263 (1991)], persons not needed for the search, such as news media may not come along [Wilson v. Layne, 526 U.S. 603 (1999); Hanlon v. Berger, 526 U.S. 808 (1999)].

C. Property Seized

1. Only contraband and property described in warrant.

2. Mixed property cannot be seized; officer can only seize property known to be contraband (drugs or stolen property) or items authorized by warrant and must separate and leave other property [Grant v. State, 220 Ga. App. 604, 469 S.E.2d 826 (1996)]. There is no burden on the defendant to specify which items were improperly seized when it is shown that the seizures were overbroad.

D. Announcement of Authority – "No-Knock Searches"

Knock on door and verbal notice by the officer announcing authority and purpose (to execute search warrant) is normally required in executing search warrants [O.C.G.A. § 17-5-27]

1. Forced entry where "no-knock entry" not authorized:

2. Entry is refused;

a. The persons inside refuse to acknowledge verbal announcement - in executing a drug search ***without a "no-knock" provision***, a 3-5 second delay before entry is sufficient [Swan v. State, 257 Ga. App. 704, 572 S.E.2d 64 (2002); see United States v. Banks, 540 U.S. 31, 124 S. Ct. 521, 157 (2003) (15-20 second wait sufficient)].

b. Property is unoccupied or believed to be unoccupied

c. "No-knock" searches - may be authorized in search warrant where particularized allegation in affidavit as to increased peril to officers or danger that evidence would be destroyed [Adams v. State, 201 Ga. App. 12, 410 S.E.2d 139 (1991); Richards v. Wis., 520 U.S. 385 (1997); but see State v. Lopez-Chavez, 2015 Ga. App. LEXIS 35 (2015)(generalized statements that unspecified evidence might be destroyed and that weapons are generally associated with drug trade insufficient to authorize no-knock entry)]:

1. May not be routinely issued in drug cases [Adams v. State, 201 Ga. App. 12, 410 S.E.2d 139 (1991); Richards v. Wis., 520 U.S. 385 (1997); State v. Barnett, 314 Ga. App. 17, 722 S.E.2d 865 (2012) (single report of unclear reliability of firearm 5 months earlier insufficient); State v. Lopez-Chavez, 2015 Ga. App. LEXIS 35, 9 (2015) ("the only recitation in the affidavit concerning weapons on the premises was based on an obviously stale, unverified tip that officers received seven years earlier.")];

2. However, the standard is not high [Richards v. Wis., 520 U.S. 385 (1997); Braun v. State, 324 Ga. App. 242, 747 S.E.2d 872 (2013) (prior arrests for battery and weapons charge); Cook v. State, 255 Ga. App. 578, 565 S.E.2d 896 (2002) (prior record of 2 arrests and 1 conviction for battery is sufficient particularized info in drug (cocaine) case)]; arrests are sufficient for probable cause for danger [Braun v. State, 324 Ga. App. 242, 747 S.E.2d 872 (2013)].

3. Court may consider officer's knowledge of suspect's reputation [Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981); see also Neal v. State, 173 Ga. App. 71, 325 S.E.2d 457 (1984)];

4. Where no-knock is authorized or performed without any individual grounds (e.g., just because it is a drug case), items seized are suppressed [State v. Williams, 275 Ga. App. 612, 621 S.E.2d 581 (2005) (drug case with authorization for no-knock in warrant); Poole v. State, 266 Ga. App. 113, 596 S.E.2d 420 (2004) (officers failed to adequately knock and announce); *compare* Smithson v. State, 275 Ga. App. 591, 621 S.E.2d 783 (2005) (prior arrest for sale of narcotics, information about sale of narcotics, and assertion that guns are often present at sales justifies no-knock)].

5. Officer can show probable cause for "no-knock" entry in advance; however, "Court's decision not to authorize a no knock entry should not be interpreted to remove officers' authority to exercise independent judgment concerning the wisdom of a no knock entry at the time the warrant is being executed" [Richards v. Wis., 520 U.S. 385 (1997); *accord*, Neal v. State, 173 Ga. App. 71, 325 S.E.2d 457 (1984)]; Poole v. State, 266 Ga. App. 113, 596 S.E.2d 420 (2004)].

NOTE - "Knock and announce" is recognized as a constitutional rule under the 4th Amendment [Wilson v. Ark., 514 U.S. 927 (1995)], but suppression of evidence is not constitutionally required [Hudson v. Michigan, 547 U.S. 586 (2006)]. Georgia has, however, recognized suppression as the appropriate remedy for illegality in execution of a search warrant, including violation of statutory mandated "knock and announce" [O.C.G.A. § 17-5-27; O.C.G.A. § 17-5-30 ("suppress ... [where] warrant was illegally executed"); Poole v. State, 266 Ga. App. 113, 596 S.E.2d 420 (2004); Barclay v. State, 142 Ga. App. 657, 236 S.E.2d 901 (1977) (common law rule dating to 1603); *see* Gary v. State, 262 Ga. 573, 422 S.E.2d 426 (1992); *but see* Jackson v. State, 280 Ga. App. 716, 634 S.E.2d 846 (2006) (which distinguished Poole (statutory basis for suppression not present), but then also noted that suppression was no longer required under the 4th Amendment)].

CITATIONS

Citations: STATUTES

No seal required [O.C.G.A. § 17-5-22].

Return of warrant [O.C.G.A. § 17-5-29].

Return to be made without delay to court of competent jurisdiction [O.C.G.A. § 17-5-29].

Suppression motion is properly addressed only to the trial court, not a magistrate at a preliminary hearing [O.C.G.A. § 17-5-30].

Warrant, affidavit (complaint) and return *filed* when warrant executed or returned not executed; warrant to be *docketed* at time of issuance on docket kept by judge [O.C.G.A. § 17-5-22].

Citations: CASES

Advance Search Warrant - Court may issue search warrant in advance of item's arrival at location when there is probable cause to believe that the thing to be searched for will be at a location when the search is performed [Bernie v. State, 524 So. 2d 988 (Fla. 1988)]. Why is there a Florida case here? If valid in Florida, it may be valid in Georgia.

Computer search execution - seizure of material requiring further analysis to know if covered [Compare Grant v. State, 220 Ga. App. 604, 469 S.E.2d 826 (1996) with Walsh v. State, 236 Ga. App. 558, 512 S.E.2d 408 (1999)].

Even though no person named, warrant valid if accurate place description [State v. Hatch, 160 Ga. App. 384, 287 S.E.2d 98 (1981)].

Failure to make return does not invalidate warrant [Holloway v. State, 134 Ga. App. 498, 215 S.E.2d 262 (1975); Waters v. State, 122 Ga. App. 808, 178 S.E.2d 770 (1970)].

"John Doe" search warrant [Giles v. State, 149 Ga. App. 263, 254 S.E.2d 154 (1979)].

No "good faith" exception to search warrant requirements [Gary v. State, 262 Ga. 573, 422 S.E.2d 426 (1992); Beck v. State, 283 Ga. 352, 658 S.E.2d 577 (2008)].

Notice to produce cannot be used to avoid procedural requirements of search warrant in criminal case [Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837 (1980)].

Officer with warrant may execute it anywhere within county jurisdiction of judge signing warrant [State v. Varner, 248 Ga. 347, 283 S.E.2d 268 (1981)].

Particularity [Steele v. United States, 267 U.S. 498 (1925); Marron v. United States, 275 U.S. 192 (1927)].

Papers may be seized if instrumentalities of crime, not if mere tangible evidence of crime. Tuzman, 145 Ga. App. 761, 244 SE 2d 882 (1978).

Place [Tomblin v. State, 128 Ga. App. 823, 198 S.E.2d 366 (1973); Buck v. State, 127 Ga. App. 72, 192 S.E.2d 432 (1972); State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980); Vaughn v. State, 141 Ga. App. 453, 233 S.E.2d 848 (1977)].

Subpoena cannot be used to avoid procedural requirements of a search warrant in a criminal case (DUI case involving subpoening medical records of the defendant) [King v. State, 272 Ga. 788, 535 S.E.2d 492 (2000)].

E. Administrative Searches

Administrative searches or inspections of private property must be authorized by consent or search warrant; probable cause may be found in reasonable legislative or administrative standards for inspections (passage of time, area, type of building, etc.) or specific knowledge of condition violating regulation [Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967); see Yingsum Au v. State, 258 Ga. 419, 369 S.E.2d 905 (1988)]. The authorizing statute must carefully limit their time, place, and scope. Nor may an authorizing statute commit the conduct of such an inspection to the unbridled discretion of the inspector. [Bruce v. Beary, 498 F.3d 1232 (11th Cir. 2007) (§ 1983 liability for excessive administrative search)]. There must be 'reasonable legislative or administrative standards for conducting an ... inspection.' [Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967)]. 'Where a statute authorizes the inspection but makes no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply.' [Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)]. Additionally, when the administrative inspection is a pretext for avoiding a criminal search warrant that can be found improper. [Bruce v. Beary, 498 F.3d 1232 (11th Cir. 2007)].

Numerous statutory provisions authorize the magistrate court to issue such warrants and generally contain descriptions of the appropriate probable cause, form of affidavit, officer entitled to seek warrant, etc.

The following is a list of inspection warrants provisions applicable to magistrates:

2-2-11 Commissioner of Agriculture 2-13-13 commercial feed factories

4-11-9.2 Commissioner of Agriculture 10-1-148 sale of petrol products

12-2-2 Department of Natural Resources 12-8-70 hazardous wastes

12-13-8 underground storage tanks 16-13-46 State Board of Pharmacy

25-2-22.1 fire inspections 52-7-25 Boat searches

For jail and prison searches (see 2.15F).

For searching fire-damaged property (see 3.14C).

O.C.G.A. § 40-16-2 alone *fails* to provide standards for administrative searches [Ponce v. State, 271 Ga. App. 408, 609 S.E.2d 736 (2005), remanded for consideration of DMVS and PSC *regulations* at State v. Ponce, 279 Ga. 651, 619 S.E.2d 682 (2005), on remand regulations ineffective for failure to comply with APA (Ponce v. State, 279 Ga. App. 207, 630 S.E.2d 840 (2006)].

XI. Returns

Return to be made without delay to court of competent jurisdiction [O.C.G.A. § 17-5-29].

A. WARRANTLESS SEARCHES - A list of items seized by virtue of a warrantless search must be given to the person arrested and a copy to the judicial officer before whom said arrested person is taken for appearance. Failure does not invalidate search [See O.C.G.A. § 17-5-2; Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978)].

B. SEARCH WARRANTS - A written return of all instruments, articles or things seized should be made without unnecessary delay before the judge issuing the warrant or a court of competent jurisdiction. Return should be signed under oath by the officer executing the warrant [O.C.G.A. § 17-5-29].

NOTE - Failure to do return/inventory does not suppress the evidence [Holloway v. State, 134 Ga. App. 498, 215 S.E.2d 262 (1975)].

NOTE - No exclusionary rule or motion to suppress in probation revocation cases [State v. Thackston, 289 Ga. 412, 716 S.E.2d 517 (2011)].

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