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Kel Long Speaks on Perpetual Trusts in Georgia

David L. Watson, *Gomel & Davis, LLP*

Pictured are Section Chair **Nikola R. Djuric**, *Sutherland,* and **A. Kel Long III**, *A. Kel Long III, P.C.*

On November 12, 2008, **A. Kel Long, III**, attorney and past Chair of our Section, spoke at our monthly breakfast. The title of his presentation was "Perpetual Trusts In Georgia? (and How To Fix The Broken Ones)".

Mr. Long begin by discussing the Rule Against Perpetuities, an ancient Rule with which estate planners must be familiar. The Rule, stated simply, is that an interest is not valid unless it vests not later than twenty-one years after some life in being at the creation of the interest. Perhaps the most common example is a contingent remainder interest. Such an interest that does not meet the requirements of the Rule is invalid upon its creation. The primary purpose of the Rule is to control transfers of property which limit the rights of future generations to alienate property. Georgia originally adopted the common law Rule in 1863, but the Rule in our state was modified by statute in 1990. The main change was the addition of a "wait and see" provision whereby even if the interest is invalid under the original Rule, if it nevertheless vests or terminates within ninety years after its creation, it is valid. Therefore, one cannot be sure as to whether an interest violates the Rule until the ninety year period has elapsed. O.C.G.A. Section 44-6-201(a).

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Probate Practice Pitfalls and Pointers Panel

Jacquelyn H. Saylor, *The Saylor Law Firm LLP*

A "Probate Practice Pitfalls and Pointers Panel" was presented by the Estate Planning & Probate (EP&P) Section of the Atlanta Bar Association at its October 2008 breakfast. The panel was moderated and organized by Section Board member, **Rebecca G. Godbey** of *Cohen Pollock Merlin & Small, P.C.* The panelists included the Secretary of the Section Board, **Mary B. Galardi** of *Mary B. Galardi, P.C.*, Section sponsor, **Cathy Rissler** of *Total Estate Solutions, LLC,* who helps families with estate administration, and **Kelli L. Wolk,** who was then in private practice and a candidate for Cobb County Probate Judge. Congratulations to Judge Wolk who was elected in November; she deserves a special thanks for volunteering for the panel at the last minute when a scheduled panelist was unable to come.

Before the panelists reviewed their tips for probate, Ms. Godbey asked them for their tips for drafting wills to make the probate process easier. Some of the tips are from Mary Galardi's "100 (or so) Tips from Lawyers and Judges" that she compiled and passed out with the other material. The panelists also had these suggestions:

1. Personal Representative/Trustee
   a) Galardi: Make it easier to find the Personal Representative and Trustee; put them right up front in bold and in capitals.
   b) Wolk: The drafting attorney should ask the Testator for a back-up for the selected Personal Representative and Trustee.

Panel, continued on Page 2

***Long*, continued from Page 1**

One notable exclusion from the application of the Rule are interests held by charities.

There is currently a trend throughout the country to abolish the Rule, as twenty-six states have done. This is sometimes done in order to increase the trust business done in a particular state, as a trust created under that state's laws can have perpetual duration. Professor Verner Chaffin of the University of Georgia has argued against the repeal of the Rule in Georgia, taking the position that perpetual trusts are against public policy. Among other reasons, Professor Chaffin thinks that perpetual trusts concentrate too much power in the dead, and the grantor is unable to know the needs/requirements of future generations. Mr. Long then reviewed several arguments in favor of repeal, including its complexity, the view that the wishes of the grantor should be respected, and the protection of wealth.

Mr. Long then noted that Georgia already has provided some authority for the modification or termination of trusts. For example, under O.C.G.A. Section 53-12-153, a court can modify a trust "if established by clear and convincing evidence that owing to circumstances not known or anticipated by the settlor, that compliance would defeat or substantially impair accomplishment of the purposes of the trust." Mr. Long noted that for the most part, Superior Court judges have been receptive to modifications where the petitioners can show that real harm will come to the beneficiaries absent modification. Of course, having all the interested parties in agreement is often a critical factor for a successful petition. O.C.G.A. Section 53-12-152(a) provides for termination of a trust where its purpose is no longer being met. Mr. Long also cited several sections of the proposed changes to the Georgia trust code which would deal with modification of trusts.

Mr. Long then discussed the growing practice of "decanting" of trusts, whereby property is distributed from one trust to another. Several states have "decanting" statutes, with South Dakota's being perhaps the most flexible.

Although it appears that there is no immediate movement toward repealing the Rule Against Perpetuities in Georgia, future changes in trust legislation should allow more flexibility in dealing with issues throughout the life of a trust.

***Panel*, continued from Page 1**

c) Galardi: The attorney should challenge the Testator as to why he is naming a particular person as the Personal Representative.
d) Wolk: Do not rely on code section cites for powers for the Personal Representative/Trustee; spell them out if you really want them.
e) Rissler: Encourage your client to communicate with the chosen Personal Representative to determine if he or she will serve. Review the will and finances with the named Personal Representative.

2. Specific Bequests
   a) Galardi: Put specific bequests up front.
   b) Rissler: Identify the bequests in sufficient detail in the home to avoid confusion; back up the bequests with documentation. The Personal Representative does not necessarily have the client's knowledge.
3. General Bequests
   a) Galardi: Make clear who the beneficiaries are; make clear why the Testator is leaving someone out.
   b) Rissler: Do not put in the Will "They know why." There should be no parting shots of fault. Encourage your client to communicate with those people now.
   c) Wolk: Testators need an alternative for their bequests.
4. Heirs/Marriage Status
   a) Galardi: It is helpful to list heirs-at-law in the Will, especially if the Testator is not married and does not have children.
   b) Galardi: "Always identify the Testator's marriage status and spouse at the beginning of the will" in case the Testator marries or remarries without executing a new will. (from "100…Tips…")

Panel, continued on Page 3

STATUTORY DISCLAIMER RESULTS IN MEDICAID PENALTY

The case is Georgia Department of Community Health v. Medders, ___ Ga.App.___ , 664 S.E.2d 832 (decided July 3, 2008), Case No. A08A0067 FCDR July 22, 2008, p 5B. The Court of Appeals held that a renunciation and disclaimer of a bequest under O.C.G.A. §53-1-20 will not work to cleanse the legatee of the bequest for purposes of Medicaid qualification. Not only that, but the attempt will trigger a Medicaid penalty if made within the "lookback" period. The Court of Appeals addresses the resource and income rules on qualification, a "transfer-of-resource" penalty, and recent amendments to the look-back period for property transfers. An ancillary ruling was a partial reversal on the basis that the amount of the bequest subject to the penalty was not properly determined by the Department of Community Health, the Administrative Law Judge on administrative appeal, or the Superior Court on appeal from the ALJ administrative ruling.

***Panel*, continued from Page 2**

5. Galardi: Make trust terms clear.
6. Wolk: Keep the Will short with no codicils.

After the Will has been drafted with the above suggestions in mind, and the Testator has passed away, attorneys should consider the panelists' important pointers and pitfalls for probate. Mary Galardi's top three probate tips are as follows:

1. If you have something unusual, call the probate court; you get different answers from different courts.
2. Make sure to use the most recent versions of the standard forms. They are updated every July.
3. Make sure you know what you are dealing with when working with an estate and charge enough retainer.

Kelli Wolk, who was a law clerk for Judge David Dodd, the former Cobb County probate judge, gave the following inside tips to attorneys:

1. On the probate forms, fill in blanks, cross out what is not needed or put N/A; clerks will process them better. Do not delete items from the forms; it will upset the clerks.
2. When you approach the probate court in a pleading, write the following "Comes now, client, pursuant to Code Section …" and any basis for the request you are making. Judges sometime ask each counsel what the client's standing is; make sure you know why your client has standing.
3. Proof of death is important to the probate courts, although is not required by law. Some courts require death certificates.
4. Investigation for Heirs
   a) Investigation for heirs is a highly fact dependent scenario. You generally take what information you can gather and start with internet and other database searches for heirs. The Personal Representative could even hire an investigator. Generally, only a "good faith effort" is required.
   b) The petition should explain what was found and attach all documents showing the search which was made. Sign an affidavit that you did a diligent search.
   c) If there is a question whether the decedent had children or not, do a diligent search and ask for a guardian ad litem for unknown heirs.
5. When the Beneficiary/Personal Representative Agree to Something Different from What is in the Will
   a) There is a code section that provides for court approval of a distribution which contradicts the terms of the Will, where there is a bona fide controversy about the validity of the Will and the parties come to a fair agreement about the amounts each will get.
   b) If there is not a bona fide dispute about the validity of the Will, you cannot re-do Will provisions by agreement. There would be a distribution to the named recipient followed by gifts to the other people, not a distribution different from the Will.
   c) If you want the court to approve a settlement agreement, file a petition showing the agreement among the parties and show the distribution detail. Usually there is a court hearing. The court's job is to uphold the provisions of a valid Will.
   d) One strategy is to file a caveat citing undue influence if you want to do a settlement against the Will's terms; the next day, file a petition with the settlement.

Mary Galardi also noted that an "Heirs Determination Worksheet" is available at www.gaprobate.org. Some probate courts require an heirs determination worksheet to be presented with the petition, so the court can be certain all the heirs have been listed.

Cathy Rissler of *Total Estate Solutions* has practical tips to help attorneys work with their clients. Her company (among other things) helps families clean out the houses of loved ones who have died. Following are three main pointers she discussed:

1. Practical Ways Lawyers Can Help Personal Representatives/Trustees
   a) A lawyer can help their clients work through the probate process if they tell the clients that help with needed tasks is available.
   b) Tell Personal Representatives/Trustees they can be paid compensation as a Personal Representative/Trustee and how.
   c) Walk the Personal Representative and family through how probate may end.
2. Yard Sales vs. Estate Sales
   a) A yard sale is when you have some items to sell that the family does not want. An estate sale is a sale of the entire contents of the home.
   b) Use an estate sale company if you have at least $8,000 in items which will sell.
3. Appraisals
   a) There are significant differences between insurance appraisals and fair market value appraisals. It is helpful for the family to get

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Estate Planning and Probate Section Upcoming Events

Estate Planning Section Breakfast

Wednesday, March 11, 2009

Panel Discussion led by Melissa Walker

Topic: "End of Life Issues"

***Panel*, continued from Page 3**

an appraisal for fair market value so they can price items to be sold and have an idea what the estate is worth.

b) An appraisal is important because it makes it more comfortable for the family if they are approached by neighbors to buy some items.

c) An appraisal also makes sure distribution is even. An appraiser can keep a running tally to see what the items are worth.

d) Appraisers cost between $100 - $150 an hour.

The panelists also provided the audience with various items of information in a less structured format:

Galardi noted that, when filing a petition for discharge, the Personal Representative has to notify all creditors, except those who have been paid in full. This is true even if the Personal Representative has not communicated with the creditors.

Wolk noted that, if you do not notify an unpaid creditor, the creditor can come back and sue the Personal Representative personally. Notify the creditor, preferably by certified mail, to submit a claim. Tell the creditor to respond to the Personal Representative within 10 days, then maybe the Personal Representative does not have to pay them. Wolk also suggested that creditors should file for a county administrator to be appointed if there are assets in an estate, but no one has done anything about them.

As for whether or not to formally close an estate, Galardi stated that her general inclination is to close the estate, but that other lawyers do not close the estate because of fear that some assets will not get transferred and will need to be moved many years later. Galardi suggests picking one way or another and adopting that as your standard practice. She also noted that, when filing a Petition for Discharge, you should send a notice to heirs and beneficiaries, including churches and other charities, where appropriate, and that, when estate assets have been distributed to a trust, the attorney has to have the trust beneficiary(ies) consent to the discharge, as well as the Trustee. Finally, she strongly recommended that we always send a closing letter to the client to close a file once the work has been completed.

The moderator and all the panelists deserve our appreciation for their wise advice. A special thanks to **Loraine DiSalvo**, *Morgan & DiSalvo*, EP&P board member and *Mortmain* editorial board member, for providing her well-written notes to supplement mine.

The material provided by Mary Galardi to the EP&P members contained valuable information in addition to the "100 (or so) Tips from Judges and Lawyers." The information included the following: Client Intake Form, Interrogatories to Witness to Will, Useful Tips: PT-61 Tax Form and Year's Support, Petition for Authority to Open Safety Deposit Box with Order, Inventory of Items Found in Safe Deposit Box, Acknowledgement of Receipt and Relief of Liability, Disclaimer and Renunciation of Succession and Disclaimer. You may contact Ms. Garlardi at (404) 812-9220, Mary@GalardiLaw.com or at www.GalardiLaw.com for more information about the material.

Estate Tax Changes for 2009

David L. Watson, *Gomel & Davis, LLP*

As many of us are aware, the beginning of 2009 marked the significant increase in the federal estate tax exemption equivalent from $2 million to $3.5 million per taxpayer. This change provides an opportunity for us to contact our married clients to advise them of the possible effect this could have on their estate plan, especially those that rely on a formula for dividing the estate between a marital portion and the "credit shelter" amount. For many married couples who have also seen a decrease in their personal net worth, estate taxes are no longer a consideration, and such a formula approach may no longer be necessary or even advisable.

On the other hand, it may be prudent to wait and see how the future of the estate tax is handled by the new administration and Congress. Many observers are confident that the current estate tax exemption and maximum rate will be "locked in" this year. There is also some speculation about the possible addition of a "portability" feature to the exemption. That is, if one spouse dies without fully using his or her exemption, the surviving spouse can use both his/her own exemption and the "leftover" exemption from the predeceased spouse.

In the area of transfer tax valuation, at least one bill has already been introduced that would attempt to curtail the use of so-called "discount planning" for entities that do not conduct an active business (such as many family limited partnerships). We will have to see if this idea has wider support.

As a reminder, the federal gift tax annual exclusion increased from $12,000 to $13,000 at the beginning of 2009.

Finally, as you are probably aware, the current low Section 7520 rate (2.0% for February) and low asset valuations present a unique opportunity for higher net worth clients to transfer assets via GRATs and installment sales to grantor trusts at minimal transfer tax costs.

Estate planners should keep a close watch for further changes as 2009 unfolds.

David L. Weinreb Speaks to Our Section on "Modern Portfolio (Depletion) Theory: New Perspectives on Multi-Generational Planning."

Loraine M. DiSalvo, *Morgan & DiSalvo, P.C*

On August 13, 2008, our Section was visited by **David L. Weinreb**, a Director in the Wealth Management Group of Bernstein. Mr. Weinreb discussed the challenges of investment and distribution planning in multi-generational beneficiary situations, and gave us some idea of how Bernstein's research and tools can help attorneys and other professionals deal with such challenges.

Mr. Weinreb stated that there are two general goals of multi-generational planning, from the perspective of the first generation: (1) to make sure that they always have enough, and (2) to share excess resources with those who are most important to them, at the desired times and in the desired manner. He also stated that accomplishing these goals can be quite difficult, due to a number of sometimes conflicting concerns, such as taxes, family dynamics, concerns over who has control over resources, a desire not to "spoil" younger generations, multiple marriages, and a desire to keep the planning simple. Bernstein's approach to helping its clients and their advisors deal with these goals and concerns is to use a "quantitative analysis" as part of the estate planning and administration processes.

One problem when developing models to determine the expected results of an estate planning or investment strategy, said Mr. Weinreb, is that, while a given average return can be accomplished via many different strategies, the actual path chosen affects the overall plan, especially where spending (either for support and consumption by the client or for desired estate planning related transfers) must be included in the plan. As an example, he mentioned that the exact pattern of high and low returns realized inside a GRAT could cause the GRAT to fail from an estate planning perspective, even where the average return from the GRAT's assets actually beat the applicable § 7520 rate. The key to success with a GRAT is actually that the internal rate of return ("IRR") for the GRAT must beat the § 7520 rate as assets are distributed for annuity payments.

Bernstein uses proprietary software which allows its representatives to model various proposed plans and project an estimated range of possible outcomes for each, including an estimate of the probability for each possible outcome. This software can look at up to 10,000 different Monte Carlo simulation-produced scenarios based on Bernstein's research, can look at up to 30 different asset classes and 16 different planning strategies, can track the wealth through multiple generations of beneficiaries, and allows easy modification of various aspects of each proposed plan. The projections produced by this process can be helpful to clients and their advisors who are trying to work out a planning strategy.

Mr. Weinreb also stated that, based on Bernstein's extensive research, they have determined that long-term GRATs are likely to fail in periods where difficult market conditions exist, while a stratgy based on a series of two-year rolling GRATs can significantly increase the chances of success. In fact, Bernstein has produced models for every 10 year rolling period in the U.S., beginning monthly, since January 1941, and has compared the performance of 2 year rolling GRATs with that of 10 year rolling GRATs for these same periods. Their conclusion was that 2 year rolling GRATs beat 10 year rolling GRATs 100% of the time during the modeled periods. Bernstein's conclusion is that the 2 year GRAT offers a better chance of capturing short-term appreciation than longer-term GRATs, and that the potential benefits of the 2 year GRATs even outweigh the added costs of creating and funding the extra short-term GRATs. Mr. Weinreb also pointed out that, while Bernstein's models are based on publicly-traded assets, rather than private, less-liquid assets such as closely held businesses, the savings produced by the short-term rolling GRAT strategy often can help ease the transfer of private, less-liquid assets, through sales to GRAT remainder beneficiaries or other methods.

Mr. Weinreb also mentioned that a way to enhance the performance of a 2-year rolling GRAT strategy is to have multiple GRATs created at once, with each GRAT holding assets of a different class. This helps to keep the performance of lower-performing assets from offsetting higher-performing asset classes and increases the likelihood that at least some of the GRATs will succeed in any given 2 year period. The short-term rolling GRAT strategy can also be less risky than discount-based planning, such as family limited partnership. It is also "infinitely scalable" and can be adjusted or turned off easily.

Mr. Weinreb concluded by reminding us that Bernstein representatives are ready and willing to help professional advisors and their clients by providing customized modeling upon request. Thank you to Mr. Weinreb and Bernstein for his presentation and for their support of our Section.

Case Notes

Francis M. Bird, Jr., *Attorney at Law*

In re Estate of Holtzclaw, ___ Ga.App.___ , ___ S.E.2d ___ (9/18/08) Case No. A08A0862, FCDR October 1, 2008 p 1B

Executrix held personally liable for fees and expenses of petitioning heir under O.C.G.A. § 9-15-14(b); some or all of Executrix's own fees may not be paid from estate (issue on remand). Executrix must personally pay fees and expenses of heir who brought Petition for Accounting on findings that she (1) kept estate open unreasonably long (could have closed in 1992, Petition filed in 2005); (2) "'consistently disregarded' court orders;" (3) breached her fiduciary duties to the estate; and (4) unnecessarily expanded the proceedings on the Petition for Accounting. The Court of Appeals reversed and remanded the Probate Court's denial of a request that the Executrix pay her own attorney personally and be denied reimbursement from the estate. The Probate Court had found that the efforts of the attorney for the Executrix had benefitted the estate as a whole; the Court of Appeals noted that the attorney had filed detailed time records and that a hearing should be held, if necessary, to determine what effort was spent defending the Executrix.

Case Notes, continued on Page 6

***Case Notes*, continued from Page 5**

Manders v. King, ___ Ga. ___, ___ S.E.2d ___ (9/22/08) Cases No. S08A1128 and S08A1129, FCDR September 30, 2008 p 8B

Doctrine of Exoneration. Estate will not be compelled to pay off decedent's purchase money note secured by deed on condominium bought by decedent and deeded to herself and son as joint tenants with right of survivorship, where son takes title by succession at decedent's death and not through the probate estate. First, the Supreme Court held that general language "… that 'all my just debts be paid without unnecessary delay by my Executrix…'" in the decedent's will was not a clear direction to pay off a debt secured by a non-probate asset, thereby "exonerating" the property. This was supported by (1) various citations to Georgia cases and cases from other jurisdictions (including reference to numerous statutes abrogating the doctrine of exoneration), (2) the observation that legal title was held by the lender and the decedent had retained only the equitable title, and (3) authority that the maker of a note secured by real estate who conveys the property to another subject to the loan (not assuming the loan) thereby becomes secondarily liable - a surety - to the lender.

Comment – Doctrine of Exoneration: Georgia has adopted neither the Uniform Probate Code nor a specific statute doing away with the doctrine of exoneration; the Supreme Court expressly recognized that the common law rule still holds for probate assets "… so long as the liens were debts of the testator and not an assumption of debts of a predecessor in title." Killingsworth v. First National Bank of Columbus, 237 Ga. 544, 546, 228 S.E.2d 901 (1976).

Practice Note. Given the tendency of married couples to take title to their residence jointly with right of survivorship, this issue should be expressly addressed in the drafting process, especially where a blended family is involved. The default language in numerous forms for Georgia wills contains exceptions from the general directive to the personal representative to pay the debts of the estate (usually from the residue without apportionment), for future installments of debts which are not due, and contains a proviso that unless otherwise expressly provided, real property is to be distributed subject to any indebtedness secured thereby. Sometimes this is modified to allow the personal representative discretion to discharge such liens and pay such debts if it is determined to be in the best interests of the estate.

Huggins v. Powell, ___ Ga.App. ___, ___ S.E.2d ___ (8/27/08) Case No. A08A0885, FCDR September 12, 2008 p 2841.

Probate Court denial of Petition to Recover and Sell Property in Administration is affirmed on procedural grounds. Vernon Powell died intestate in 1996, owning a 20% undivided interest in a parcel of real property. The heirs at law sold their interest in June 2000; the purchaser sold the property to another in 2006. Meanwhile, Dorothy Huggins acquired a fi. fa. against Vernon Powell, and filed for administration of his estate. She then sought to recover the property for sale to satisfy debts of the estate. This was denied by the Probate Court without making findings of fact or providing conclusions of law, none being requested by any party. The decision has substantial discussion of this and other procedural grounds for denying relief to the administrator.

Practice Note. No administration was sought until Huggins tried to satisfy her assigned claim, yet the property had been sold by Vernon's heirs. With no administration or probate pending, what steps may counsel for a purchaser take to insulate the purchaser's title against subsequent attack?

Cronic v. Baker, ___ Ga.___, ___ S.E.2d ___ (9/22/08) Case No. S08A0693, O8 FCDR 2954.

Executor forfeits all compensation for failure to carry out bequest to charitable trust. Attorney General lacks standing under O.C.G.A. §53-12-115 to enforce provisions of Will leaving pecuniary sums outright to specific private cemeteries, but has standing to enforce Will requiring Executor to establish a trust for college or technical school scholarships for specified purposes. Parol evidence that the decedent wanted to create a charitable trust for the cemeteries was excluded because the language of the will clearly spelled out pecuniary bequests.

Practice Note. The Superior Court ordered the executor ("… an attorney who drafted the will …") to forfeit all executor's fees under O.C.G.A. §53-7-54(a)(7) for failing to fund an educational trust required by the will, and instead distributing the bequest ($25,000) to the residuary takers. The will also made pecuniary bequests to each of three private cemeteries. The executor found representatives of one of the three cemeteries and distributed that cemetery's $25,000 bequest to them, but could not locate anyone to take the pecuniary bequests to the other two cemeteries, and treated them as lapsed bequests. He distributed the total of $45,000 which would have gone to those two cemeteries to the residuary takers. It is not clear whether this figured in the Superior Court's decision to deny him fees. The statute authorizes the court to deny compensation altogether or to reduce it.

Sinclair v. Sinclair, ___ Ga. ___, ___ S.E.2d ___ (10/27/08) Case No. S08A1172, FCDR November 3, 2008 p. 9B

Action for Declaratory Judgment does not violate "in terrorem" provision of Will where action seeks declaration that an action to remove Executor on various grounds, and for an accounting, will not violate provision. Reaffirming its full bench holding in Cohen v. Reisman, 203 Ga. 684, 48 S.E.2d 113 (1948), the Court holds that the action brings a justiciable controversy within the requirements of O.C.G.A. §§9-4-1 and 9-4-4(a), and that an action which re-affirms the will and seeks to hold the Executor accountable is supported by public policy, and that the provisions of a will may not relieve the Executor of the responsibilities of office. The action was not an attack on the will, but was brought to enforce the plaintiff's rights under the will.

Practice Note. This 2008 full bench decision reaffirms that an in terrorem clause may not be enforced to deter a beneficiary from acting to protect his or her interests in the proper administration of the estate.

Levenson v. Word, ___ Ga.App. ___, ___ S.E.2d ___ (10/17/08), Case No. A08A1731, FCDR October 29, 2008.

Administrator of husband's estate may not recover attorneys fees paid to death penalty specialists by widow to defend her prosecution for murder of husband. In the course of the prosecution, the widow pleaded guilty after maintaining her innocence for almost two years after the murder. The husband's administrator sought to recover $125,000 paid to the defense attorneys, and lost on summary judgment because: (a) the administrator made no showing sufficient to show that the funds paid to defense counsel had belonged to the decedent and not to the wife at the time the retainer was paid to her attorneys, and (b) the wife's conviction took place over a year after the payment

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***Case Notes*, continued from Page 6**

was made. The court appeared to find it significant that the retainer was paid to the specialist attorneys by the first firm retained by the widow, not by the widow herself. The administrator asserted that the receipt of the fee amounted to conversion, but there was no showing that the fee had come from property of the deceased husband at the time the fee was paid.

Practice Note. If a person who "feloniously and intentionally kills" the deceased is enriched following the demise of the deceased, an attempt by the personal representative to recover the enrichment by relying on the statute, O.C.G.A. §53-1-5, involves significant issues of proof of the source of the enrichment. According to the Court of Appeals in this case, the timing of conviction may defeat the recovery efforts. If there is a prosecution which results in acquittal, may the personal representative maintain a civil action where the burden of proof is a preponderance of evidence? What if there is no criminal prosecution? Where does the attorney who defends a prosecution stand regarding his or her fee? Suppose there is a successful defense of a criminal prosecution, but afterward a civil action goes against the alleged killer?

Kale v. Wilson, ___ Ga. ___, ___ S.E.2d ___ (10/27/08), Case No. S08A1551 FCDR November 4, 2008 p. 3B

Held: It was not error for the court to dismiss a motion to dismiss a petition for probate which was made orally, in contravention of O.C.G.A. §15-9-88, requiring that objections to probate be **made** in writing. **Decision of the Probate Court to allow probate in solemn form affirmed (there were other objections as well). Judicial dictum: Language in will (subject of the oral motion) was not a condition to vesting of estate.** The testatrix left all of her property to the appellee. In the will testatrix recited that appellee "is honor bound to distribute items I have designated to my loved ones. It is my intention that she will be given a list before I die and I know I can trust her to carry out my wishes." The Supreme Court noted, that even if the objection had been properly raised in writing, the quoted language did not impose a condition precedent on the bequest to the appellee. Hilton v. Sherman, 155 Ga. 624, 118 S.E. 356 (1923) cited by the Court, held that where a testator's bequest directing his executors to provide a home to his wife and minor children at a cost not to exceed $5,000, to be selected by his wife, was not conditioned on his wife's making the selection. His wife had died by the time of the lawsuit, which was between those who would inherit from the wife and those who would inherit if the bequest failed. The Court acknowledged that the record did not help with the timing of various events.

Thomas v. Sands, ___ Ga. ___, ___ S.E.2d ___ (10/27/08), Case No. S08A1401 FCDR November 4, 2008 p. 4B

Copy of lost will admitted to probate. In a straightforward, brief opinion, the Court recites that proof, by a preponderance of evidence, that the testator did not intend to revoke his will, and that the copy proferred is a true copy, is sufficient. O.C.G.A. §53-4-46(b). Here the testator's attorney testified that the testator never expressed his desire to change his will, and two other witnesses testified that the testator had expressed the substance of his will to them on "many occasions" (once "just months before his death") that he was leaving only one dollar to his son.

Dyess v. Brewton, ___ Ga. ___, ___ S.E.2d ___ (Nov 3, 2008) Case No. S08A1087) 08 FCDR 3447

Confusion: Which will did codicil amend? The Georgia Supreme Court affirmed the Superior Court's order, on de novo appeal, admitting propounded codicil and will to probate. Codicil's literal identification of which will was changed conflicted with the physical annexation of original of later will to the codicil. Parol evidence (affidavit of the testator's attorney) was admissible to resolve the conflict in favor of the later will.

Practice Note: this case is a good review of the fundamentals. The decision contains a collection of citations to authority for its various points. For example "… [T]he circumstance of annexation is most powerful…." A codicil may republish (and thereby revive) a revoked will. The will is deemed to have been executed "at the time of republication." In proceedings to probate a will, parol evidence of the circumstances may be admitted, and parol evidence of the testator's declarations, even hearsay, may also be admitted. We are reminded in the footnotes that since this was an appeal to the Superior Court from an order of the Probate Court, that the Probate Court had "refrained from any reformation…" of the codicil on jurisdictional grounds.

Elrod v. Cowart, ___ Ga. ___, ___ S.E.2d ___ (1/12/2009); Case No S08A1792, FDCR January 20, 2009 p 2B.

Presumption of Inclusion of Adopted Adult Descendants: Testator died in 1970 leaving a life estate in his real estate to his son Will Henry, with the remainder to his four daughters, his grandson Dean, and any child or children of Will Henry, to take equally with the others. In 2004, Will Henry adopted Steven Dewayne, age 32. In 2005, Will Henry died. Two of the remainder beneficiaries challenged Steven Dewayne's right to share in the remainder. The trial court upheld Dewayne; the Supreme Court affirmed.

One: Since the will did not specify anything different, the law in effect at the testator's death in 1970 applied. **Two:** Parol evidence will not be considered. The Court's inquiry is limited to the "four corners" of the will (or other document in issue) to search for any expression of an intention on the part of the testator (the maker of the document) to exclude an adopted descendant of any age from taking under the will, the same as a natural descendant. **Three:** The law in effect in 1970 placed the adopted adult in the same position as a natural descendant of the adopting parent regardless of the adopted adult's age at the time of adoption.

The legal mechanism is a presumption of inclusion which is rebutted if the document at issue excludes the adopted child or adult expressly or by necessary implication. Prior law was first amended in 1949 to presume the inclusion of persons adopted as minors; the law was further amended in 1967 to include adopted adults. Since the 1967 amendment (Ga. L. 1967, pp. 803, 804-805, §1, amending the predecessor of O.C.G.A. §§19-8-19(a)(2), 19-8-21(b)) this presumption has applied. A 1975 amendment was described as making explicit that the adopted person acquired rights under documents made by third parties, consistent with previous judicial construction that this result was necessarily implied.