Professor Radford is the author of the following Thomson-West treatises:

*Redfearn: Wills & Administration in Georgia* (2007)
*Georgia Trusts & Trustees* (2015-16 ed.)
*Georgia Guardianships & Conservatorships* (2015-16 ed.)

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I. GEORGIA CASES: January 1, 2015 through December 31, 2015
A. INTESTACY

1. Children Born Out of Wedlock

[No cases during the reporting period]

2. Virtual Adoption


Decedent, Clifford Riley, died without leaving a will. Shalanda Sanders claimed she had a right to inherit as an heir of Mr. Riley for two reasons: 1) she was a child born during the marriage of her mother and Mr. Riley; and 2) she had inheritance rights based on the equitable doctrine known as “virtual adoption.” Sanders’ mother had an affair with Roy Neal Warren after Mr. Riley had moved out of the marital home, which was three years before Sanders was born. Mr. Warren testified that Sanders’ mother, Mr. Riley, and Mr. Warren had all agreed that although Warren was the biological father, Mr. Riley would put his name on the birth certificate and treat Sanders as though she were his own child. Sanders grew up thinking that Mr. Riley was her father until her mother told her, when she was age 14, that Mr. Warren was her biological father. Mr. Riley had two other children. One of them, Curtis Riley, filed a motion for partial summary judgment on the virtual adoption issue arguing there was insufficient evidence that Mr. Riley had agreed to adopt Sanders and of the partial performance that is necessary to support such a claim. The trial court granted Curtis Riley’s motion, stating there wasn’t enough evidence to show that Mr. Riley entered into a contract to adopt Sanders and that
Sanders could not demonstrate a “severance” of her parent child relationship with Mr. Warren. Sanders appealed. The Supreme Court found that the trial court erred in granting partial summary judgment to Curtis Riley on Sanders’ claim of virtual adoption as there was some evidence clearly sufficient to defeat summary judgment on whether there was an unwritten contract for Mr. Riley to adopt Sanders. In addition to Mr. Warren’s testimony, the Court pointed to Sanders’ testimony about her being treated the same as Mr. Riley’s other children, that she used his surname, that she was publicly held out as his child including on her wedding invitations, and that Mr. Riley had “given her away” when she was married. The Court also used Sanders’ deposition to show that she never viewed her relationship with Mr. Warren as one that was father-daughter in nature. The Court pointed out that a child who has been adopted cannot become “unadopted” merely because she establishes a relationship later in life with one or both of her biological parents.

b) Johnson v. Rogers, 297 Ga. 413, 774 S.E.2d 647 (June 2015).

Jimmie Lee and Lillian Johnson raised their grandniece, Jessica. In 2005, Lillian executed a will in which she left some items of personal property to Jessica along with contingent remainder interests in certain real property. The rest of Lillian’s property was bequeathed to Jimmie Lee. When Lillian died in 2011, Jessica sought to be awarded a child’s intestate share of Lillian’s estate under the theory that she had been adopted after the will had been executed. OCGA § 53-4-48 provides that, if a child is born or adopted by a testator after the will is executed, the subsequent child is entitled to receive a share of the decedent’s estate equal to what the child would have received if the testator had died intestate. Although Jessica had not been formally adopted by Lillian,
she insisted that a virtual adoption had occurred after the execution of Lillian’s will. The Georgia Supreme Court examined the virtual adoption cases in Georgia and other states and concluded that the doctrine is applicable only in the case of a decedent who dies intestate. The Court said that only a clear legislative direction could abrogate this rule. Jessica had argued that a 2002 amendment to OCGA § 53-4-48 had done away with the requirement of intestacy. The Supreme Court disagreed. The 2002 amendment replaced the rule that the subsequent birth or adoption of a child causes a will to be revoked in its entirety with the rule that will remains valid but the subsequently born or adopted child is entitled to an intestate share of the estate. The Court also pointed out that the former law had never been applied to a virtual adoption and that the use of the term “adoption” in both laws applies only to a statutory adoption.

B. YEAR’S SUPPORT

[No cases during the reporting period]

C. WILLS

1. Proper Execution and Attestation

Reeves et al. v Webb et al. (Groenenboom v Webb et al.), 297 Ga. 405, 774 S.E.2d 641 (June, 2015).

Joseph Thomas Schmidt suffered from paranoid schizophrenia with delusions as well as vision and hearing difficulties and needed to have a guardian and conservator appointed. In 1976, Dale Groenenboom was appointed as guardian of Schmidt’s person and property and served in this capacity until Schmidt’s death on October 5, 2013. In 1997, Schmidt moved into a personal care home owned and operated by Charles Reeves
Jr. and his wife, Jerry Reeves, where he stayed until he died. Schmidt executed a will on
July 20, 2010 that left each of the Reeveses 40% of the estate each with the remaining
20% going to Groenenboom. The will expressly excluded his twin sister, Judi Webb. On
December 6, 2013, Groenenboom filed the petition to probate the will and the
accompanying Settlement. On March 18, 2014, Webb filed a motion to deny the Petition
and the accompanying Settlement as well as an objection and caveat to them asserting
Groenenboom and the Reeveses breached their fiduciary duty and committed fraud.
She also claimed that Groenenboom and the Reeveses unduly influenced Schmidt and
that Schmidt lacked testamentary capacity at the time the will was executed. On June 9,
2014, the probate court dismissed the Petition finding that Groenenboom failed to
produce the witness to the signing of the will and did not assert that that he or she was
deceased or inaccessible. In addition, the court found that the Propounder did not make
the case that the will was properly executed and that the testator had the capacity to
make it at the time it was executed. On June 20, 2014, Groenenboom filed a motion for
reconsideration which was denied on June 24, 2014. On July 8, 2014, Groenenboom
and the Reeveses filed a motion for a new trial which was denied on July 11, 2014. Both
of those cases were consolidated for consideration. The probate court relied on Spivey
v Spivey, 202 Ga. 644, 44 S.E.2d 224, 1947 in its decision, which is based on former
Code Ann. § 113-602 which required the personal appearance of the subscribing witness
to prove the will. Subsequent cases have said that this is not a necessity. See Norton v
Georgia R.R. Bank & Trust Co., 248 Ga. 847, 848, 285 S.E.2d 910, 982, 1982. Also,
O.C.G.A. § 53-4-24 provides for self-proved wills and codicils. In this case, the will had
an attached self-proving affidavit. This affidavit, as laid out in O.C.G.A. § 53-5-21,
presumed that the requirement that the will was freely and voluntarily executed was met and creates a “presumption regarding the prima facie case, subject to rebuttal.” The Supreme Court reversed the judgments of the probate court and remanded the case.

2. Lack of Capacity and Undue Influence

[No cases during the reporting period]

3. Construction of Wills


Hodge King and Hattie King jointly owned four tracts of real property as tenants in common. Mr. King died in 1999 leaving Mrs. King all of his interest in the property under a clause of his will that said, “I give, devise and bequeath to my wife, Hattie F. King, all my property, both real and personal, wherever located and whenever acquired, either before or after the making of this my will, hers in fee simple.” The next item of King’s will stated that “upon the death of my said wife,” all of his interest in the property would be devised to his son, Theodore Roosevelt Thompson, and any children of Mr. Thompson’s born in lawful wedlock. Mrs. King died in 2012 leaving one piece of property to Thompson and the rest of her property to her nieces, Nakamura Jenkins and Eleanor Blackwell (“Jenkins and Blackwell”). Jenkins and Blackwell had no idea the property was not rightfully theirs until they tried to sell it to a third party. Upon realizing the issue, they contacted Thompson and his daughters with a settlement offer through the quit claim of Jenkins’ and Blackwell’s claimed interest in two tracts of the property in return for Thompson and his daughters quitclaiming their interest in one
tract to Jenkins and Blackwell. Thompson signed the offer, but his daughters refused to. Jenkins and Blackwell then filed a “Petition to Remove Cloud from Title and to Establish Title Against All the World” in the Superior Court of Turner County. The Special Master assigned to address the matter concluded that Mr. King’s will created a cloud on the title to the property and that the cloud should be removed to make Mrs. King’s estate the exclusive owner of all tracts of property in fee simple. The trial court found for Jenkins and Blackwell and awarded attorney’s fees and costs because the Thompson daughters refused to settle. This ruling was based on O.C.G.A. §9-15-14 which rewards litigation costs and attorneys’ fees for frivolous actions and defenses. Thompson filed a Motion for Reconsideration on the order of attorney fees and Thompson’s daughters filed a Motion for New Trial, which was denied. Thompson’s daughters appealed the issue whether Mr. King intended to pass the property to Mrs. King in fee simple or only as a life estate with the remainder to go to Thompson and Thompson’s children. Based on the language of Mr. King’s will and following precedent, the Supreme Court held it was Mr. King’s clear intention to convey a life estate in the property to Mrs. King with the remainder to be given to his son and grandchildren. The reasoning was that all items in the will must be read together and the meaning based on the entire document, not individual items. The Supreme Court distinguished the wording of Mr. King’s will from that in other wills that used terms such as “in the event that [my wife should die]” or “should [my wife die].” The Court stated that Mr. King had instead used the word “upon” which is “an adverb of time and not of contingency.” Since the Court found for Thompson and his daughters, it was necessary to find the trial court erred in awarding attorney fees to Jenkins and Blackwell as the daughters were
under no obligation to settle because Jenkins and Blackwell had no claim to the property.

4. **Probate of Lost Wills**

[No cases during the reporting period]

5. **Revocation of Wills**


Mildred Warnock Hilton, the Decedent, had two children, Joe and James, both of whom had predeceased her. Joe had three children, Joe Hilton, Jr., deceased, and appellees Teresa Hilton Lancaster and Donna Hilton Swinson. James had two children: appellant Jamie Hilton Mosley and appellee Jimmy Hilton. This case had a convoluted history with two wills, one executed in 1988 and the other executed in 2004. The will executed in 2004 was eventually found to be invalid because it was the product of undue influence by the Decedent’s brother and sister, who benefited greatly under the 2004 will. The Decedent died on July 23, 2004 at the age of 95. In 2008, after the 2004 will was found to be invalid, Jamie petitioned to probate the 1988 will and Teresa, Donna, and Jimmy filed a caveat. In 2010, the probate court entered an order denying the probate of the 1988 will. Jamie then appealed to superior court. That court denied a motion for summary judgment made by Teresa, Donna, and Jimmy because there were disputed issues of material fact remaining regarding the Decedent’s intent to revoke the 1988 will. A bench trial, which was agreed to by all parties, was held on February 8, 2013. On June 2, 2014, the superior court entered an order affirming the probate
court’s denial of probate of the 1988 will, ruling that Decedent intended to revoke the 1988 will and that the will “was not validated by the doctrine of dependent relative revocation.” Jamie then appealed to the Supreme Court based on the claim that the superior court “lacked subject matter jurisdiction to deny probate of the 1988 will without impaneling a jury.” Jamie cited O.C.G.A. § 15-6-8(4)(E), which gives the superior court authority to review judgments of probate courts “except in cases touching the probate of wills, . . . in which a jury must be impaneled.” Jamie’s theory was that, even though the parties had agreed to a bench trial, the superior court lacked jurisdiction because the matter “touch[ed] the probate of a will” and no jury was impaneled. The Supreme Court cited Article VI, Section IV, Paragraph I of the Georgia Constitution of 1983, which “establishes the superior courts as courts of general jurisdiction with original appellate jurisdiction as provided by law.” The Constitution, along with the Code section cited by the Appellant, made it clear to the Supreme Court that the superior court had jurisdiction in this case. The Supreme Court reasoned that the Code section cited “must be construed together with other statutes relating to the same issue.” Since the parties in this case consented to a trial by the court sitting without a jury, they waived the right to a jury proceeding and thus the superior court had subject matter jurisdiction. Jamie also contended that the superior court erred in failing to apply the doctrine of dependent relative revocation to revive the 1988 will. The Supreme Court’s statement of the doctrine was as follows: “If it is clear that the cancellation [of the old will] and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then, if the new will be not made, or, if made, is invalid, the old will,
though canceled, should be given effect, if its contents can be ascertained in any legal way.” The Court cited *McIntyre v McIntyre*, 47 S.E. 501 (1904). In the instant case, the attorney who drew up Ms. Hilton’s 2004 will testified that the markings Ms. Hilton had made on the 1988 will were so extensive that he could not determine what she intended to remove and which parts she wanted to keep in effect. The Supreme Court cited O.C.G.A. § 53-4-44, which states that the intent to revoke a will is presumed if the testator obliterated or canceled a material portion of the will. Thus, the Supreme Court found the superior court did not err in concluding the 1988 will was revoked prior to the attorney’s meeting with the Decedent and therefore the doctrine of dependent relative revocation did not apply because the 1988 document was revoked prior to the 2004 will being written. Jamie also argued that the Decedent lacked the mental capacity required to revoke the 1988 will due to the finding that the 2004 will was the product of undue influence. The Supreme Court reasoned that mental capacity and undue influence are two separate grounds for finding a will invalid. The superior court overseeing the 2004 will case found undue influence in the case of the creation of the new will but did not decide whether the revocation of the 1988 will was similarly affected. There was also plenty of evidence presented in court that provided good reasons for the Decedent to want to revoke her 1988 will, including the fact that many people named in that will were deceased. Lastly, Jamie argued that the superior court erred in relying on the express revocation clause of the 2004 will after its finding that the 2004 will was procured by undue influence. The Supreme Court found the superior court cited the revocation clause only as “further evidence” of Ms. Hilton’s intent to revoke her 1988 will and acknowledged that the revocation clause standing alone would be insufficient in
proving the intent to revoke the 1998 will. The Supreme Court found that even assuming the trial court erred, it was irrelevant because of all of the other evidence that provided support for the intent to revoke the 1998 will.

D. ADMINISTRATION OF THE ESTATE

1. No Contest Clause

[No cases during the reporting period]

2. Claims By and Against the Estate

[No cases during the reporting period]

3. Sale of Estate Property

[No cases during the reporting period.]

4. Removal of Executor


James T Myers, Sr. (Decedent) executed his last will and testament on June 9, 2008 and died on September 29, 2012. He appointed his son, James T. Myers, Jr. (Appellant), executor with the back-up executor being Decedent’s other son, Anthony Lee Myers (Appellee). The will directed the Decedent’s house to be placed in trust as a life estate for his wife with the remainder to be divided between the two sons, who were required to pay for its maintenance. The rest of the estate was to be divided evenly into separate trusts for each son. As executor, James, Jr. established the trusts, began managing Buckshot Properties, LLC (“Buckshot”), a major asset of the estate, and withdrew
$63,401.05 in executor fees. On October 7, 2013, Anthony filed a “Petition to Cite Executor to a Settlement of His Account and Further to Inquire Whether the Executor Should be Sanctioned, Including Removal, Due to Breach of Fiduciary Duty, Misconduct and/or Mismanagement of the Estate Assets.” The petition claimed that James, Jr. had failed to provide complete information about the estate, used estate funds to pay personal expenses, . . . used a truck owned by the estate as his personal vehicle,” and had a conflict of interest because he was “operating a business on land owned by Buckshot without paying rent, was using estate resources to fund Buckshot’s expenses, and was paying personal expenses from Buckshot’s business account.” James, Jr. then sought to remove Anthony as beneficiary under the will’s in terrorem clause that required “the removal of a legatee or devisee who unsuccessfully seeks the removal of a personal representative.” Anthony then amended to request only an accounting from James, Jr. while still alleging breach of fiduciary duty and conflict of interest. The probate court set a hearing on the “Petitions to Cite Executor and Motion to Remove Executor.” James, Jr. again filed a motion requesting removal of Anthony as a devisee or legatee of the will based on the “will’s provision requiring disinheritance of any beneficiary who ‘objects in any manner to any action taken . . . in good faith by my personal representative.’” The probate court then issued an amended order to set the hearing on “Petitions to Cite Executor, Motion to Remove Executor, and Motion to Remove Devisee or Legatee.” At the hearing, James, Jr. admitted that “he was driving a truck belonging to the estate and that he used estate funds to pay for maintenance on Decedent’s house.” He had also continued to run Buckshot after the Decedent’s death and withdrew funds from the estate for the company and to pay his personal bills. The
probate court entered an order finding that James, Jr. had violated his fiduciary duty, removed him as executor, and appointed a county administrator to replace him. The probate court reasoned there was a conflict of interest and that James, Jr. had breached his fiduciary duty in numerous ways. In addition, the probate court found that James, Jr. had overpaid himself by $53,066.70 in executor’s fees and had wrongfully withdrawn $43,339.21 of estate funds for Buckshot. James, Jr. challenged the rulings regarding Buckshot and his removal as executor in his appeal. He claimed that his continuing to operate Buckshot was consistent with Decedent’s intentions, even though it was not specifically mentioned in the will. The will did give the executor “all of the powers set out in former O.C.G.A. § 53-12-232, which included the power ‘to continue . . . the operation of any business,’” and provided the executor had the power to continue the operation of any business including making investments, retaining business interests, and otherwise operate in the best interests of the beneficiaries.” While the will did lay out those provisions, Buckshot’s operating agreement allowed only for a dissolution of the company upon the Decedent’s death. During the 18 months he had administered the estate, James, Jr. had not dissolved the company. He also had used estate assets to continue operating Buckshot and had, among other things, paid for a new fence and made a capital contribution to the company. The probate court found that continuing the business caused the estate unnecessary delays and expenses. James, Jr. argued that his continuation of the business increased the value of the estate, but the probate court saw the running of the business by him as the executor was a conflict of interest because the estate was losing money while James, Jr. was benefitting personally from continuing the business by using Buckshot funds to pay his bills and using Buckshot property rent-
free. James, Jr. also claimed he was entitled to a commission on all funds paid out of the estate as executor. Since the funds were paid out wrongfully to Buckshot rather than to benefit the estate, the probate court found that those commissions needed to be repaid to the estate. The Supreme Court affirmed the probate court’s removal of James, Jr. Regarding his removal as executor, James, Jr. argued he did not have notice and was not aware he could be removed by the probate court. Anthony contended that he had withdrawn his petition to remove James, Jr. sheerly for the purpose of not invoking the in terrorem clause of the will; in amending his petition, he kept intact in all of the other claims. In addition, James, Jr.’s attorney repeatedly said, on the record, that there was no reason to remove James, Jr. from his position as executor. The Supreme Court found James, Jr.’s removal to be a “predictable consequence” of the findings of the probate court and that probate court had not erred in ordering the removal. Finally, James, Jr. claimed the will made Anthony the contingent executor and thus that the probate court erred in appointing a county administrator as successor. The Supreme Court found that any error the probate court may have made in this action was harmless, particularly since Anthony had said that he would refuse to serve as executor. The Supreme Court agreed with the probate court’s decision not to draw out the estate proceedings any longer.

5. Settlement Agreements

[No cases during the reporting period]
6. Co-Executors


In 1982, John Malcolm Wade named all five of his children—Mary Wade, Bonnie Conner, Dorothy Vuturo, Malcolm Wade, and Carolyn Wade—as co-executors of his estate. Wade died in 1987. After the children were sworn in as co-executors, they all verbally agreed that Mary would be the “coordinating executor” who would pay the estate’s bills. Later on, the siblings agreed that as long as three of them authorized, payments could be made by the estate and Bonnie should administer the assets and wind up the estate. Mary took a share of the estate’s personal property, a diamond agreed upon by all siblings, and packed up the estate paperwork and sent it to Bonnie. In March 1988, a bank sent all five siblings checks and stock certificates representing a “final distribution” from the estate’s accounts at the bank. In August 1988, Malcolm negotiated a $1 million loan from a second bank to the estate in exchange for an interest in estate assets which included real property in North Carolina and Georgia as well as nearly 9000 shares of stock in the privately held “N.G. Wade Investment Co.” In March 1989, Malcolm executed a power of attorney as to the estate matters in favor of Bonnie. The estate’s assets were valued at approximately $1.2 million in February 1991 by a certified public accountant. In January 1993, Mary received a 4-carat diamond and documents concerning the estate’s assets from Dorothy. In March of that same year, Mary contacted the estate’s accountant to ask for documents and said that she would not sign closing documents for the estate until she saw the estate assets were distributed properly, claiming estate funds were spent without her knowledge or consent. In March 1994, Mary asked Bonnie for more estate documents relating to transfers of a house,
automobile, and a copy of a sale agreement concerning timber on property located in North Carolina. In January 1999, Mary paid $60,000 on her own behalf and Bonnie paid $60,000 on behalf of the other four siblings to close out the 1988 loan. In the same year, Carolyn demanded that Bonnie allow her to review the estate’s financial records. In January 2009, Bonnie wrote to Mary asking for her signature on an agreement between the siblings to harvest timber from the estate’s land in Charlton County and share the proceeds. Bonnie also asked Mary, in the same letter, to sign a second document requesting the probate court close the estate. Bonnie said that they would divide the land the timber was on at the same time. Mary did not sign either document. In August 2012, Mary petitioned the court to obtain an accounting of the estate. Because Bonnie intentionally destroyed many estate records and many of the decisions regarding the estate were made by a majority of the executors rather than all of them, the probate court concluded the siblings had violated the terms of their father’s will and ordered an accounting of the estate. Bonnie, Dorothy, and Malcolm moved for summary judgment on grounds the action was time-barred. In August 2013, the siblings filed a counterclaim against Mary for conversion of the family diamond. In April 2014, the superior court granted the motion for summary judgment and did not rule on the counterclaim. Mary appealed, arguing the action was not time-barred because the estate was still open and there was no adverse possession by her siblings that caused the statute of limitations to run. O.C.G.A. § 53-7-62(a) provides that “any person interested as an heir or beneficiary of an estate or the probate court may, after the expiration of six months from the granting of letters, cite the personal representative to appear before the probate court for a settlement of accounts.” O.C.G.A § 9-3-27
provides that “all actions against executors, administrators, or guardians, except on their bonds, shall be brought within ten years after the right of action accrues.” The five co-executors received their Letters Testamentary in December 1987, meaning Mary could have brought an action for accounting as early as June 1988. As co-executors, fiduciary duties were owed among all the siblings. Because of the high standard of care owed, the Supreme Court of Georgia has refused to apply the ten year statute of limitations to bar a beneficiary’s action for accounting by an executor in the absence of evidence the executor held the estate’s property adversely to the beneficiary. Nothing in the record supported that the siblings denied Mary’s status as a co-beneficiary. Because the Court could not say whether the siblings claimed any estate property adverse to Mary, a question for the jury remained as to whether the ten year bar of O.C.G.A. 9-3-27(2) began to run before the filing of Mary’s petition. The trial court erred in granting summary judgment and the Supreme Court reversed.

E. PROCEDURAL AND JURISDICTIONAL MATTERS

1. Standing to Offer Will for Probate

[No cases during the reporting period]

2. Notice

[No cases during the reporting period]
3. Appeals


William Neville Stephens executed his last will and testament on January 26, 2006. In the will, he left the residue of his estate to one of his two children born out of wedlock, Vickie Estes, but did not mention his other child born out of wedlock, Frank Debter. Debter filed a caveat to the executor Roy Milton Stephens’ petition to probate the will. Debter claimed that Mr. Stephens had intended for Debter to share in his estate and that the will was the product of undue influence. The probate court rejected the caveat and Debter appealed to the superior court. The executor filed a motion for summary judgment, which was granted on August 21, 2015. Instead of filing an appeal from this ruling, Debter filed a motion for a new trial, citing new material evidence, on September 15, 2014. The trial court denied the motion for a new trial on November 6, 2014, which prompted this appeal to the Supreme Court. The Supreme Court said that a proper appeal of the summary judgment ruling should have been filed within thirty days of the ruling, as required by O.C.G.A. § 5-6-38 (a). A motion for new trial was not the proper way to appeal the ruling. Even if there had been new evidence and a motion for new trial would have been appropriate, the motion would not have extended the time for filing an appeal to the summary judgment ruling. As it was, no new evidence existed. There was only evidence that should have been but was not produced earlier in the case in the form of affidavits that represented that Stephens had openly acknowledged Debter as his son, that he intended to include Debter in his will, and that he seemed confused. The Supreme Court dismissed the appeal.
4. Contempt

[No cases during the reporting period]

F. TRUSTS

1. Trustee’s Discretion

[No cases during the reporting period]

2. Modification of Trusts


Pauline Strange created the Pauline Strange Inter Vivos Trust in March 2001, naming herself as the trustee. On May 2, 2011, Pauline executed her will, leaving the entire residue of her estate to the trust, and amended the trust naming successor co-trustees: Tony Strange, her son, Raymond Towns, her nephew, and Bertha Towns, her sister. On July 9, 2012, Pauline executed a general durable financial power of attorney (POA) in which she stated that she wished Tony to be “the executor of her estate and the Trust.” The POA, which was signed by both Pauline and Tony, stated further that “[t]his agreement is for the sole benefit of Mr. Tony Strange [ ] in the management of ( [the Trust] ) in which he has full [ownership] pursuant to [the] final wishes of Mrs. Pauline Strange.” In August 2012, Pauline wrote a letter to a lawyer at the law firm that had revised the trust in 2011, stating that the firm had misunderstood her wishes. Pauline stated in the letter that the trust needed to be revised again to show that Tony would be the trustee and executor and the Towns would be alternates. She also added that she had executed a document to reflect the revisions to the trust should the law firm fail to
make the changes prior to her death. Pauline died in October 2012. Tony brought a declaratory judgment action, seeking a determination that he was the only trustee based on the documents executed by Pauline Strange before she died. The trial court denied Tony’s petition and he appealed. The Court of Appeals found the trial court erred in concluding the documents did not constitute a valid revision of the trust. Under O.C.G.A. § 53-12-40 (a), “a settler shall have no power to modify. . . a trust in the absence of an express reservation of such power.” The modification is required to be in writing and signed by the settlor. O.C.G.A. § 53-12-40 (c). The trust instrument itself provided that “[t]he Settlor may at any time by duly executed written instrument alter or amend this Trust in any manner.” Apparently the Towns had argued that the POA was not “duly executed” by a notary. The Court of Appeals pointed out that the statute did not require a notarized writing. Even if the words of the trust arguably required an authenticated document, the Court noted that the notary public had signed the document and stamped it with a stamp that said “Notary Public,” and included the notary’s name and the state and county of her appointment. The Court said that this satisfied the requirements of O.C.G.A. § 45-17-6(a), which statute also allows the use of a stamp for importing the notary’s “seal.” The Court of Appeals also rejected the trial court’s contention that the POA was ambiguous, thus allowing that court to consider parol evidence of Ms. Strange’s intent. Based on that evidence the trial court had concluded that the POA was merely a contract to make a will in the future. The Court of Appeals stated that the POA was unambiguous and that it clearly expressed the intent that Tony be the sole trustee. The Court of Appeals noted that Ms. Strange had said that the POA was meant to “revoke” any special power of attorney, will or trust she had
previously signed. The Court of Appeals said that the words of the POA indicated that Ms. Strange clearly had intended to modify rather than revoke the trust. The Court of Appeals also was not bothered by Ms. Strange’s use of the word “executor” instead of “trustee” as the other words of the trust showed that she clearly intended for Tony to have “full ownership” of the trust. Finally, the Court of Appeals rejected the Towns’ argument that Ms. Strange’s letter to the lawyer indicated that she did not mean for the POA itself to revise the trust. The Court of Appeals pointed out that Ms. Strange “confirmed” in that letter that she had already made the revision in writing and that she, as settlor, was the only person who had the power to revise the trust. The Court of Appeals concluded that “[t]he fact that the law firm did not update the Trust to incorporate Pauline’s intent did not render the July 9 power of attorney invalid....”

3. Breach of Fiduciary Duty

a) Rollins et al. v Rollins et al., ___ Ga. ___, ___ S.E.2d ___ (November, 2015).

To recap: In Rollins v. Rollins, 321 Ga. App. 140, 741 S.E.2d 251 (2013) (Rollins I), the Court of Appeals reversed the trial court’s denial of a request to order an accounting and its grant of summary judgment in favor of the trustees and remanded the case for further proceedings. The settlor of the trusts at issue was O. Wayne Rollins, who was the founder of several business enterprises with a net worth of billions of dollars. The Trustees of the trusts are Wayne’s two sons, Gary and Randall, and Mr. Tippee, a family friend. The trusts at issue are the Rollins Children’s Trust (RCT, of which all three of the gentlemen are trustees) and four Subchapter S-Trusts (the “S-Trusts”), of which Gary is the sole trustee. The beneficiaries who are the plaintiffs (the “Beneficiaries”) are the
four children of Gary. (The five children of Randall, who are the beneficiaries of the RCT and of their own Subchapter S-trusts, are not parties to the case.) The RCT was established in 1968 by the Settlor for the benefit of his children and grandchildren (and the Beneficiaries are four of his nine grandchildren). Per its terms, the RCT distributed a portion of the principal to each of the nine grandchildren when each reached the ages of 25 and 30. According to the Court of Appeals, “In the 1970s and 1980s, primarily to reduce tax liability, the Settlor [of the RCT] created several family entities to hold assets within the trust: ROL, Inc., LOR, Inc., the Rollins Grandchildren’s Partnership (“RGP”), and the Rollins Holding Company (“RHC”) (collectively, the “Family Entities”).” Gary and Randall were the managers of these entities. The four S-Trusts held minority interests in these family entities. The four S-Trusts were established in 1986 for each of the Beneficiaries individually. The S-Trusts were designed to distribute any remaining principal to each Beneficiary when that Beneficiary turned age 45. (Only one of the four Beneficiaries had already turned age 45 at the time of the rendering of a decision in Rollins I. By the time of the most recent appellate decision in 2015, another Beneficiary had also reached age 45.) Again, in the words of the Court of Appeals, “The original assets in the S–Trusts were interests in LOR, Inc. The same year that the S–Trusts were created, the trustee purchased the S–Trusts’ LOR, Inc. stock from RGP and RHC with promissory notes, thereby using debt to acquire the LOR, Inc. stock. Further, in 1988, the Settlor created another family entity called the Rollins Investment Fund (“RIF”), held within the S–Trusts. One of the purposes of RIF was to minimize tax liability.” Each S-Trust was a partner in RIF so that most of the family-owned assets were held ultimately in the RIF partnership. When a Beneficiary of an S-Trust turned age 45, the
trust’s interest in RIF was distributed to that Beneficiary and, consequently, the Beneficiary became a partner in RIF. The original RIF partnership agreement authorized only pro rata distributions of cash flow to the partners. In 1993 (two years after Wayne’s death), the RIF partnership agreement was amended to allow non-pro rata distributions and to vest full management authority in Gary and Randall, in a newly-created category of “managing partners.” The amendment was approved by Gary and Randall as individual partners; by Gary and Randall as co-executors of their father’s estate, which was a partner; and by Gary and Randall voting for each of the S-Trusts of which he was a trustee.

The Beneficiaries claimed that the following actions constituted breaches of trust and fiduciary duty by the Trustees: changes made by the Trustees to the structures, leadership, and distributions of the Family Entities in which the trusts hold an interest; a shifting of power in the Family Entities from the Beneficiaries to the Trustees; changing the nature of the Beneficiaries’ interests from liquid and marketable interests to illiquid and nonmarketable interests; and the establishment of non pro rata distribution schemes, including a “code of conduct.” When the Beneficiaries originally moved for partial summary judgment on the breach of fiduciary duty issue, the Beneficiaries had not demanded an accounting. However, the trial court found that the Trustees had breached their fiduciary duty by not providing an accounting of the trust assets and ordered them to do so. An accounting prepared by Ernst & Young was presented to the Beneficiaries and the trial court thereafter granted summary judgment to the Trustees and denied all further relief to the Beneficiaries. The second amended complaint by the Beneficiaries demanded that a receiver be appointed who would
provide an accounting not only of the trust assets but also of LOR, Inc. and RIF, interests in which were held by the trusts. The trial court refused to order such an accounting. The Court of Appeals cited O.C.G.A. § 53-12-243(a) and (b), which set forth the beneficiaries’ right to receive accountings annually and upon reasonable request. The Court noted also that the terms of the RCT required the beneficiaries to receive “statements disclosing the condition of the trust estate” not more often than every six months. Citing a series of New York cases, the Trustees contended that they were not required to supply an accounting of the Family Entities that were owned in part by the trusts because the trusts only owned minority, non-controlling interests in these Entities. The Court of Appeals noted that “in the ordinary case” a trustee is not required to provide an accounting of an entity owned in part by the trust because it may be “impossible” for the trustees to do so. The Court went on to point out, however, that the instant case was not an “ordinary case” because the Trustees, by virtue of the controlling interest in the Family Entities held by themselves in conjunction with the trusts, the Trustees had access to the information requested by the Beneficiaries. Although it found no Georgia authority to that effect, the Court of Appeals extrapolated from cases from other jurisdictions the “general principle” that a trustee “is obligated as a fiduciary to provide information that is within his control.” This principle and the mandates of Georgia law relating to accountings to beneficiaries led the Court of Appeals to conclude that the trial court had erred when it refused to order an accounting of the Family Entities. The Court of Appeals went on to state that the question of whether the information requested in the accounting was “appropriate” was not one that could be answered until the accounting itself had been made: “Whether the facts revealed by an
accounting in behalf of the corporation activities are or are not important can only be known after they are exhibited. As a practical matter therefore in every case where the court can require disclosure of corporate affairs on an accounting by estate fiduciaries it will exercise its power in favor of disclosure” (quoting In re Witkind’s Estate, 167 Misc. 885, 4 N.Y.S.2d 933, 946 (N.Y.Sur.Ct.1938)).

In response to the claim for breach of fiduciary duty, the Court of Appeals addressed the question whether the trustees, who served in controlling management positions of the Family Entities established by the settlor and owned in part by the trusts, would be held to the standard of trustees in their actions as officers and directors. The Court of Appeals opined that an individual who is also a controlling director of an entity owned by the trust “may have a fiduciary duty to those who hold assets in that entity, even if the director is not per se serving in the role of trustee as to the entity itself.” The Beneficiaries alleged that the individuals who were serving in these dual trustee/manager positions had altered the structure of the underlying entities so as to place new restrictions on the distribution of income and principal from the trusts and had altered the management structure so that the managers/trustees gained control over the trust assets. The trial court had found that these actions occurred at the entity level and thus were not actions for which the beneficiaries could claim there had been a breach of fiduciary duty or a breach of trust. The Court of Appeals reversed, noting among other things that the trustees had acquired their authority to manage the Family Entities by virtue of their trusteeships.

Rollins II: The Supreme Court of Georgia granted certiorari in September, 2013, and the oral argument took place on January 6, 2014. The two questions that were
addressed by the Court were:

1. Whether the Court of Appeals erred when it ruled ... that the trial court should have ordered an accounting of the family entities that are held within the trusts at issue and are within the appellants’ control.

2. Whether the Court of Appeals erred when it ruled that the appellants have trustee-level fiduciary duties as to their actions related to or taken through the family entities that are held within the trusts at issue and are within the appellants’ control.

The Georgia Supreme Court delivered its opinion on March 3, 2014, Rollins v. Rollins, 294 Ga. 711, 755 S.E.2d 727 (March 2014) (Rollins II). On the first question – the question relating to the accounting – the Supreme Court vacated and remanded the holding of the Court of Appeals. The Supreme Court examined OCGA § 53-12-242 to determine the scope of the duty to account. The Supreme Court noted that the Court of Appeals had also looked at this statute and at some New York cases to conclude that the trial court should have ordered an accounting of the family entities that were under the trustees’ controls. The Supreme Court said that, “although the [Court of Appeals’] decision may ultimately prove to be correct,” the issue had to be remanded because “the Court of Appeals failed to give due deference to the discretion of the trial court in this matter.” The Supreme Court said that “on the face of the opinion” it appeared that the Court of Appeals had not given any weight to the trial court’s discretion to order an accounting or not.

The Supreme Court offered a more definitive response to the second cert. question, relating to the standard by which the trustees’ actions would be judged. The
Supreme Court said that the Court of Appeals’ holding (that the higher level fiduciary standard should be applied) “may be appropriate as a general rule.” However, the Supreme Court stated that in this particular case (and given the fact that the trusts only owned minority interests in the family entities), the settlor’s intent would be controlling. The Supreme Court concluded that Wayne Rollins had appreciated the “delicate role” that he had assigned to the trustees and that he had taken “great pains to ensure that the trustees could not take actions at the family entity level solely to benefit the plaintiffs as S-trust beneficiaries – unless those actions were also in the interests of the other shareholders.” The Court noted that Wayne Rollins had made Gary the sole trustee of the S-trusts but had given him shared control of the Family Entities. The Court also said that the trustees could not be criticized for being in a conflict of interest situation, citing an Illinois case to the effect that the settlor can waive the duty of undivided loyalty by knowingly placing the trustee in a position that might conflict with the interests of the beneficiaries. As to the fact that the trusts only owned minority interests in the family entities, the Court noted that in these situations “it is generally best to allow the trustees to act in the interest of all the shareholders and to require that they be held to a corporate level fiduciary standard when acting as directors.” The Court concluded that “where, under the terms of a trust, the trustee is put in control of a corporate entity in which the trust owns a minority interest, the trustee should be held to a corporate level fiduciary standard when it comes to his or her corporate duties and actions.” The Court said that its holding was “buttressed” by OCGA 53-12-246(b) (2010). This Code section provides that a trustee is not precluded from “performing and receiving reasonable compensation for performing services of a managerial, executive, or business advisory
nature for a corporation or other business enterprise, where the trust estate owns an interest in the corporation or other business enterprise” if such action is “fair to the beneficiaries.” The Supreme Court directed the Court of Appeals, on remand, “to apply a corporate fiduciary standard when considering the trustees' conduct with regard to their management of the corporate family entities held within the trusts.”

In Rollins III, 329 Ga. App. 768, 766 S.E.2d 162 (November, 2014), on remand from the Supreme Court of Georgia, the Court of Appeals held that issues of fact precluded summary judgment on the issues it had discussed in its first opinion (Rollins I), again reversed the trial court’s grant of summary judgment to the trustees, and remanded the case to the trial court with direction. In Rollins III, the Court of Appeals focused its discussion on the second holding of the Supreme Court (the holding that the trustees should be held to a corporate level fiduciary standard) and examined in more detail the actions taken by the trustees. The Court of Appeals began by exploring the “business judgment rule” as articulated in previous Georgia cases. The Court of Appeals noted that all fiduciaries “including those acting as corporate directors, officers, or managing partners,” are required to exercise “the highest degree of good faith.” The Court of Appeals then quoted OCGA §§ 14-2-830 and 14-2-842, which require corporate directors and officers to act “in a manner he believes in good faith to be in the best interests of the corporation; and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” The Court of Appeals noted that the Georgia Supreme Court had recently recognized an “alternative statement” of the business judgment rule, which provides that there is a presumption that corporate directors “acted on an informed basis, in good faith, and in the honest belief that the
action taken was in the best interests of the company” but that the presumption could be rebutted by proof that their decisions were made “without good faith, due diligence, or deliberation,” citing Federal Deposit Ins. Corp. v. Loudermilk, 295 Ga. 579, 761 S.E.2d 332 (2014). The Court of Appeals then addressed individually each of the actions that the Beneficiaries contended constituted a breach of fiduciary duty.

Amendment of the RIF partnership agreement: The first action was the amendment of the RIF partnership agreement that concentrated power in Gary and Randall as managing partners and allowed non pro rata distributions to be made at the discretion of Gary and Randall rather than upon a vote of the complete partnership. The Court of Appeals noted that Gary and Randall in this situation were acting as general partners and managing partners rather than as corporate officers or directors and that, although there are similarities between the fiduciary standards of corporate leaders and partners, “the partnership standard appears more akin to the trustee standard.” The Court of Appeals pointed out that the Georgia Supreme Court has never applied the business judgment rule to partners. The Court stated that Gary and Randall had signed the RIF partnership agreement and amendment in their individual capacities and as “trustees” of the S-Trusts. The Court then zeroed in on the Supreme Court’s direction that the Court of Appeals apply the “corporate level fiduciary standard” to Gary’s and Randall’s actions “when acting as directors.” This caused the Court of Appeals to point out that it was not possible to discern from the trial court record in which capacity the men were acting when they amended the agreement and that this presented a question of fact for resolution in the trial court. The
Court of Appeals also found that fact questions existed as to whether Gary and Randall had met the partnership fiduciary standard if they were found to have acted as partners. The Court of Appeals said that the Beneficiaries, as well as Gary and Randall, were all partners when the original RIF agreement was drafted (while the settlor was still alive) and that the agreement required the consent of all the partners for amendment. The Court of Appeals said that clear factual issues remained as to whether Gary and Randall exercised good faith when they amended the agreement and when they sanctioned distributions that did not always include the Beneficiaries. The Court of Appeals also pointed out that the fiduciary duty that partners owe to each other includes a duty to disclose all material information to one another and thus that Gary and Randall were obliged to inform the other partners of the material alteration that would be made to the partnership agreement.

**Code of Conduct:** The Court of Appeals found that numerous fact questions remained open regarding the capacities in which Gary and Randall had been acting when they presented the “Family Entity Distribution Program” that conditioned distributions on the grandchildren’s attendance at quarterly meetings and engagement in “serious pursuits that are meaningful, respectable, and worthwhile in the opinion of the Trustees.” The Beneficiaries claimed that the code of conduct had no basis in the trust instrument and that they had been “tricked” into agreeing to it. The Court of Appeals noted that Gary and Randall had identified themselves in different documents related to the Program as “trustees” of entities that were not trusts but were in fact limited liability
companies. The Beneficiaries complained specifically that they had received no portion of a $9 million distribution that was memorialized by a resolution in which Gary and Randall identified themselves as “trustees.” While recognizing that the Supreme Court’s decision would force them to apply different standards if Gary and Randall were acting in their roles as corporate leaders rather than trustees, the Court of Appeals found it impossible to discern from the record which roles Gary and Randall were playing and when (noting that such discernment would be “nothing short of an act of divination”). The Court of Appeals said, “Thus, not unlike a matryoshka, or Russian nesting doll, the particular distributions at issue potentially implicate decisions made by Gary and Randall in their corporate, partnership and trustee capacities – or in some combination of all three roles.” The Court of Appeals concluded: “Because fact questions abound, a jury must determine which fiduciary cloak the brothers wore in regards to the distributions at issue.” The Court of Appeals added in a footnote that “we empathize with the trial court regarding the extraordinary effort it will take to manage the presentation to and resolution by the jury of these complex and fact intensive issues.”

The *Rollins III* Court finally addressed the issue of the accounting, on which the Supreme Court had insisted that the Court of Appeals place “the sound discretion of the trial court on the scales.” The Court of Appeals noted that the trial court had exercised its discretion in the context of its original conclusion that there remained no fact questions on the breach of fiduciary duty issue. But, as the Court of Appeals had determined that numerous fact issues remained, it remanded “the matter of the
accounting to the trial court so that it may reconsider its decision and exercise its discretion in this new light.”

Rollins IV: On March 30, 2015, the Supreme Court of Georgia again granted the writ of certiorari. The question raised at this point stemmed from the Court of Appeals statement that the jury must determine which roles the brothers were playing when performing the various actions at issue. The Supreme Court of Georgia limited argument to this question: “Whether the Court of Appeals erred in determining that a jury must determine which fiduciary standard applies?” Oral arguments were heard on June 1, 2015 and a decision was rendered on November 23, 2015. Basically, the Supreme Court disagreed with the Court of Appeals that the question of discerning what roles the brothers were playing was a question for the jury. The Supreme Court then described for each of the actions exactly what role the brothers were playing and remanded the case to the Court of Appeals for a decision on whether the brothers should have received the grant of summary judgment based on the various standards that were to be applied. The Supreme Court described the roles as follows:

a) Corporate Management Decisions: For decisions relating to the management of the entities of which Gary and Randall were managers (RHC and LOR), including decisions to transfer stock owned by LOR to a new partnership that the brothers controlled and the decision to retain certain earnings in LOR, the Supreme Court found that the corporate fiduciary standard should be applied.

b) Actions Taken on Behalf of the RCT: For the decision to invest the RCT trust assets in entities controlled by Gary and Randall, thus rendering the trust
assets illiquid and non-marketable, the Court found that Gary and Randall were acting as trustees. The Court noted that trustees were required to administer the trust “in good faith in accordance with its provisions and purposes” (OCGA 53-12-240(b)). The Court pointed out that the trust instrument itself gave the trustees broad discretion to deal with the trust assets and “to do any and all things in connection with such transactions as could be done by the [t]rustees if they owned the trust property in their own right and for their own benefit.” The trust instrument also held the trustees only to a standard of “ordinary care.”

c) **Actions Taken on Behalf of the S-Trusts:** For decisions relating to the S-Trusts, the Court held that Gary’s actions are to be judged under the trustee-level fiduciary standard. Again the Court quoted the broad discretionary language in the trust instrument.

d) **Execution of the RHC Shareholder Agreement that Restricted Shareholders’ Ability to Sell Their Interests:** The Court found that to the degree Gary was signing this agreement on behalf of the trusts, he would be held to the trustee-level standard. This standard would not be applied to Gary’s and Randall’s actions as individual shareholders.

e) **Amendment to the RIF Partnership Agreement:** Again the Court differentiated between Gary’s actions as trustee of the S-Trusts (which in turn were RIF partners) and his and Randall’s actions as individual partners. (The Court pointed out that neither Gary nor Randall were acting as “managing partners” when the agreement was amended because, until the amendment,
there were no “managing partners” in the partnership.) The Beneficiaries had claimed that Gary had breached his fiduciary duty to them as trustee of their S-Trusts when, armed with information they did not have about the effect of the amendment, he voted in favor of the amendment on behalf of the trusts. The Court agreed and instructed the Court of Appeals to hold Gary to the trustee-level standard for these actions. As to their actions as individual general partners, the Court examined the duty owed by Gary and Randall to the S-Trusts (rather than to the trust Beneficiaries) because the S-Trusts were in fact the other general partners. The Court held that the applicable duty was that of good faith and fair dealing owed by one partner to another. The Court pointed out that Gary had probably met his duty to disclose the terms and consequences of the amendment to the other partners because he only owed this duty to himself as the representative authorized to make decision on behalf of the S-Trusts. As to the code of conduct adopted by the RIF partnership, the Court stated the Gary and Randall at this point were acting in their new positions as managing partners and that the duties owed by managing partners were governed by the amended partnership agreement. The agreement, as amended, granted the managing partners sole and absolute discretion with respect to distributions and imposed liability on the only for willful misconduct, gross negligence, or bad faith. The Court concluded that the Court of Appeals could possibly find that Gary and Randall were entitled to summary judgment for the alleged breach of their partnership duties while at the same time they were not entitled to summary judgment for the alleged
breach of their fiduciary duties.

The Supreme Court vacate the Court of Appeals’ opinion in Rollins III and remanded the case to that court with direction.


Plaintiffs Cook and Lipman are married. Cook has her Masters of Business Administration, is a former certified financial planner, and previously owned a financial services company. Lipman owns his own video production company. From 1972 to 1999, Plaintiffs received gifts of shares of stock in Analog Devices, Inc. from Cook’s uncle. By 2000, the stock had a value of over $1,900,000. The Plaintiffs decided to use the stock to fund their retirement. After consulting with their estate planning attorney, the Plaintiffs decided to create a Charitable Remainder Annuity Trust (CRAT) that would give them a fixed annual distribution. (“Under a CRAT, donors can transfer assets into a trust and then provide for, among other options, an annual distribution to one or more beneficiaries for their lifetime, with the remainder of the trust paid to a qualified charity upon the beneficiaries’ death.... The annuity amount paid to beneficiaries must be in a predetermined fixed sum (calculated on the date that the CRAT is funded)....”).

The Plaintiffs met with their personal banker from Wells Fargo who referred them to the trust department. It was agreed that their estate planning attorney would draft the trust document and Wells Fargo would make calculations and suggest a distribution rate. Wells Fargo suggested a fixed annual distribution of 7.5% of the initial fair market value of the trust. The trust documents were drafted accordingly. The Plaintiffs transferred 12,000 shares of the Analog stock into the trust with the understanding the stock would
be sold and the portfolio would be diversified. The Plaintiffs told their banker they wanted their fixed annual distribution to last their lifetimes without depleting the corpus of the trust. The CRAT agreement included the language, “The annuity amount shall be paid from income and, to the extent income is not sufficient, from principal.” Based on the stock’s fair market value of $1,904,250 on the day of the transfer into the CRAT, the annual distribution was fixed at $142,818. On February 28, 2000 (three days after the stock was transferred to the trust), Wells Fargo sold all of the Analog stock and diversified the portfolio. By that date, the value of the account had decreased to $1,678,984. Over the next few years, Wells Fargo paid out the fixed amount of $142,818 annually. The income from the portfolio was not enough to cover the distribution amount, so the remaining amount of the distribution was taken from the corpus of the account. Plaintiffs were sent statements at least quarterly and yearly, but sometimes even monthly. In May 2002, Plaintiff Cook spoke with her investment manager at Wells Fargo about the declining value of the trust and retained an attorney to represent the Plaintiffs in the matter. In November 2003, the Plaintiffs’ attorney sent a letter to the Wells Fargo senior vice president of charitable services regarding whether the trust would be able to pay the annual distribution and still have money left over for the charitable beneficiaries. The attorney also claimed Wells Fargo had assumed the obligation of making sure the trust would be able to make annual distributions for life even if the corpus of the trust was exhausted. In December 2003, the vice president wrote back to say that Wells Fargo would “prudently exercise its fiduciary duties in managing the trust” but denied any guarantee of paying the plaintiffs their distribution if the corpus of the trust was exhausted. In June 2004, the Plaintiffs and their attorney
met with Wells Fargo to discuss the depletion and alleged mismanagement of the trust. In July 2004, the same senior vice president reiterated that the bank did not guarantee to pay the annual distribution if the trust had been depleted. In September 2011, the final distribution was made and the trust account was closed due to the complete depletion of the funds. By that time, the Plaintiffs had received $1,625,288 in distributions, deferred $335,796 in federal capital gains taxes, and received a charitable deduction of $203,012 in 2000 and 2001. The Plaintiffs sued Wells Fargo on April 16, 2012 alleging a breach of fiduciary duty in managing the trust account and a breach of a contractual promise to provide them with an annual distribution for the rest of their lives. Wells Fargo denied liability and moved for summary judgment, arguing that the Plaintiffs’ claims were barred by the statute of limitations and/or the Plaintiffs could not prove all of the necessary elements to recover. The Plaintiffs moved for partial summary judgment on their breach of contract claim asserting that the “uncontroverted evidence showed that the bank had a contractual obligation to pay them $142,818 annually for their lifetimes, even if the Trust corpus was exhausted.” The trial court denied both motions, issued a certificate of immediate review, and both parties appealed.

Case No. A15A0202: Wells Fargo claimed in its appeal that the trial court erred in denying its motion for summary judgment because any claims relating to the failure to follow the plaintiffs’ investment objectives and mismanagement of the Trust before April 2010 are barred by the statute of limitations. Also, any remaining claims after 2010 failed because the Plaintiffs had not shown sufficient evidence to prove all elements of a breach of fiduciary duty claim. The Court of Appeals agreed based on O.C.G.A. § 53-12-307, which reduces the statute of limitations period from six to two
years if a beneficiary has received a written report that shows the beneficiary should 
have inquired about the claim earlier. The Court of Appeals reasoned that the Plaintiffs 
received quarterly, yearly, and sometimes monthly statements starting March 21, 2000 
and continuing through September 30, 2011. These statements contained all identifying 
information for the trust and detailed information about the investments contained in 
the trust and gave the Plaintiffs ample notification to inquire about their claim. To 
establish a breach of fiduciary duty claim, one must show three elements: “1) the 
existence of a fiduciary duty; 2) breach of that duty; and 3) damage proximately caused 
Although the corpus of the trust continually declined, the Court of Appeals did not find 
that alone as evidence of a breach of fiduciary duty. No expert testimony was presented, 
no evidence was offered of how the account should have been managed as opposed to 
how it was managed, and the Plaintiffs did not offer evidence that the depletion of the 
account was the direct result of a breach of fiduciary duty rather than a result of the 
annual distributions. Wells Fargo further contended that the trial court erred in 
denying its motion for summary judgment on the breach of contract claim. The Court of 
Appeals agreed based on the language of the trust agreement that required the 
distribution to be paid from trust income and “to the extent income is not sufficient, 
from principal.” 
Case No. A15A0203: Because of the Court’s ruling in the previous case, the Plaintiffs’ 
claim for breach of contract failed as a matter of law and the trial court was found not to 
have erred in denying partial summary judgment.
4. Implied Trusts

[No cases during the reporting period]

5. No Contest Clause

[No cases during the reporting period.]

6. Governing Law

[No cases during the reporting period]

G. GUARDIANSHIPS AND CONSERVATORSHIPS

1. Guardianship of Adults


In 2009, Nathaniel Graham fell inside his apartment and suffered a brain injury. When he was admitted to the Veterans Administration hospital, his daughter, Althea, held herself out as his guardian and presented a document that purportedly appointed her as such. She used the same document to gain access to his apartment while he was in the hospital. News stories state that Mr. Graham’s other two children became suspicious when they tried to visit their father in the hospital but were told that Althea had instructed that he was to have no visitors. A hospital employee showed them a copy of the document Althea used to prove her guardianship of her father. The document appeared to have been issued by the Gwinnett County Probate Court, but the children knew that their father had never lived in Gwinnett County. At Althea’s forgery trial, the Chief Clerk of the Gwinnett County Probate Court testified that the document did not look like one issued by her court. The Clerk also checked the court records back to 1950.
and found no evidence of any guardianship for an individual named Nathaniel Graham. The Probate Judge of Gwinnett County testified that the signature on the document was not his but that the document looked to be an altered version of another guardianship order with a different guardian and a different ward. Althea Graham was convicted and sentenced to five years in prison and four years’ probation. She insisted that she had done nothing wrong. However, according to news accounts, she had had her father moved to an Atlanta hospital against medical advice. The son was able finally to be appointed guardian and moved his father back to Augusta, but Mr. Graham never recovered. He died seven months after the fall.

b) In Re Estate of Thompson, 332 Ga. App. 774, 775 S.E.2d 158 (July, 2015).

Robyn Thompson, daughter of Ben Thompson, is a developmentally disabled adult. Janice Driggers, Ben’s mother, filed a petition seeking appointment as Robyn’s guardian and Ben responded with his own petition seeking guardianship. The probate court entered an order granting guardianship to Ben. Driggers appealed the order granting guardianship of Robyn to Ben to the superior court claiming the probate court erred by refusing a request to question Robyn’s guardian ad litem (“GAL”). It is unclear whether Joey Marchant, an attorney appointed by the probate court to represent Robyn, was acting as Robyn’s attorney or her GAL. Both the probate court and the superior court treated Marchant as both the ward's attorney and the GAL. During the hearing in the superior court, Marchant asked questions of three witnesses and was also asked to give his recommendation. Driggers’ counsel had asked if they could question Marchant, and the court pushed it off to after the closing arguments. After closing arguments, Driggers
counsel again asked to question Marchant, but the court said that he did not sign on “for cross examination.” The court further said that it was not “his function as the GAL.” The court ruled that counsel would not be able to question Marchant, which is the ruling Driggers appealed to the Court of Appeals. O.C.G.A. § 29-9-3 provides that a person appointed as counsel for a ward is not eligible to also be the GAL for that individual. Based on this statute, the Court of Appeals held that the “trial court erred by treating Marchant as both the attorney and the GAL” and remanded the case to the superior court for a rehearing.

2. Guardianship of Minors


This case revolves around the purported settlement of an action brought by the parents of a minor, Ailen Gailey, against the woman who injured him with her car (Lucille Benton) and her insurance company (Encompass). In the interlocutory appeal to the Georgia Court of Appeals, Benton asked the court to enforce the settlement of an alleged settlement agreement between the insurer and the child’s father. Benton also alleged that the parents had accepted her offer to settle in the amount of $49,250 for the parents and $750 for the child, of whom the parents were the conservators. (The limit for bodily injuries on Benton’s policy was $750). The Court of Appeals refused to enforce the purported settlement. First the Court found no written evidence of the alleged oral agreement. Next, the Court of Appeals focused on a response that Encompass sent to the parents’ lawyer after the lawyer set out the terms of the parents’
offer to settle the claim on behalf of themselves and the child. The lawyers for both parties then exchanged letters discussing whether, under OCGA § 29-3-3, probate court approval of the settlement was required. In its response through its lawyer, Encompass said that it accepted the offer on behalf of Benton but that it was “statutorily required to have Probate Court approval of this settlement pursuant to OCGA § 29–3–1 et seq., and therefore our acceptance is subject to Probate Court approval....” The Court of Appeals held that this response did not constitute an unequivocal acceptance of the parents’ offer. Of interest to fiduciary law attorneys is this focus on probate court approval of the settlement offer, although the Court’s discussion of this point is somewhat vague. In one of her enumerations of error, Benton had also asked the Court of Appeals to address the fact that, in rejecting her motion to enforce the settlement agreement, the trial court had also apparently decided that probate court approval was not required in this case for a valid settlement of the minor’s claim. However, the Court of Appeals refused to address this alleged error because it found that enumeration immaterial to the issue of whether the parents’ offer had been accepted.

H. NON-PROBATE ASSETS / RETIREMENT PLANS


Roberta Fenzel and Decedent, William Lowry, were married on May 6, 1995 and divorced on October 9, 2008. Mr. Lowry died intestate on March 14, 2011 and his niece, Heather Lowry, was appointed administrator of the estate. Mr. Lowry had held an Ameriprise account and three certificate of deposit accounts at Atlanta Postal Credit Union in his name with Fenzel listed as the beneficiary or transfer-on-death recipient. All other accounts at Atlanta Postal Credit Union, GEMC Federal Credit Union, and LGE
Community Credit Union were held jointly between decedent and Fenzel. Heather Lowry filed suit against Fenzel as she had accepted the transfer of all funds in all accounts except LGE. LGE filed an interpleader which ended up being consolidated with Lowry’s suit. Following discovery, Fenzel filed a motion for summary judgment which was granted. Heather Lowry appealed asserting that the trial court erred in granting summary judgment to Fenzel as to the accounts held solely in decedent’s name with Fenzel as the beneficiary. Although no changes of beneficiary occurred, the divorce agreement provided that all items of personal property would be held free and clear of any rights of the other. More specifically, the divorce agreement addressed banking and investment accounts as follows: “[e]xcept as may otherwise be stated in this Agreement, each party shall be entitled to any and all bank accounts, money accounts, investment accounts, including stock portfolios, in that party’s name and the other party shall make no claim whatsoever, legal, equitable, or otherwise, to same.” Heather Lowry contended that the language in the divorce settlement was broad enough to include Fenzel waiving her right to payment as a beneficiary. The Court of Appeals agreed. Heather Lowry also asserted the trial court erred in granting summary judgment to Fenzel for the joint accounts. The Court found that the trial court did not err with regard to the joint accounts. The reasoning was based on the divorce agreement only releasing claims to individually held accounts and Georgia law, O.C.G.A. § 7-1-813 (a), which requires that sums remaining in joint accounts belong to the surviving party unless there is clear and convincing evidence of a contrary intent at the time the account is created.
I. DEEDS

[No cases during the reporting period]

J. POWERS OF ATTORNEY


Bucilla Stephenson executed an Advance Directive for Health Care in November, 2009. (The Advance Directive she signed apparently varied in some respects from the Georgia statutory form set forth in OCGA § 31-32-4, but none of the parties questioned its validity.) Ms. Stephenson named her granddaughter, Jacqueline Alicea, as her agent and granted her unlimited authority to make all health care decisions, including decisions “to provide, withhold, or withdraw artificial hydration and nutrition, and all other forms of health care to keep [her] alive.” In the Directive, Ms. Stephenson instructed the health care providers not to prolong her life if: 1) she had an incurable condition that would result in her death in a relatively short period of time; 2) she became unconscious and, to a reasonable degree of certainty, would not regain consciousness; or 3) the likely risks and burdens of treatment outweighed the expected benefits. Ms. Stephenson has also orally told her family members that she did not want to be kept alive “on any machine.” On March 3, 2012, Ms. Stephenson, age 91, was admitted to Doctors Hospital and found to be suffering from pneumonia, sepsis, and acute renal failure. Alicea gave the hospital a copy of Ms. Stephenson’s advance directive and her own contact information. The advance directive was placed in Ms. Stephenson’s medical record, although it was not placed behind the admission tab. (Hospital policy was to place such documents behind the admission tab so they could be
easily found and readily reviewed.) The day after Ms. Stephenson was admitted, Dr. Catalano ("Dr. C") called Alicea to tell her that he wanted to perform a CT scan. Alicea agreed, but also told Dr. C about the advance directive and specifically said that “no heroic measures” should be administered. Later that day (March 4), another doctor, Dr. Joseph ("Dr. J") called to say he wanted to perform a thoracentesis (the insertion a tube in Ms. Stephenson’s chest to drain the fluid that was building up around one of her lungs). Alicea agreed to the procedure but repeated her conversation with Dr. C about the advance directive and told Dr. J that there was to be no CPR and no intubation was to be performed without her (Alicia’s) consent. Dr. J made a note of these two points on Ms. Stephenson’s chart, per hospital standard procedure. On March 5, Dr. C called Alicea to get permission to perform an additional surgical procedure for drainage after the doctors determined that Ms. Stephenson would most likely die soon if this procedure was not performed. Dr. C did not inform Alicea that the procedure would require intubation (placing a tube in her airway). Alicea consented to the procedure. The procedure was completed and Ms. Stephenson was extubated and taken off the ventilator. Early in the morning of March 7, one of the ICU nurses found Ms. Stephenson unresponsive and, instead of calling Alicea, she called Dr. C and asked him to order an intubation. Without seeking Alicea’s permission, Dr. C ordered the intubation, which was performed approximately 50 minutes after the nurse called him. The next morning, finding her mother intubated and on a ventilator, Alicea demanded to know why she had not been called. The ICU nurses initially could not find the advance directive but it was ultimately located in Ms. Stephenson’s chart at the ICU main desk. Another of the ICU doctors explained what had happened and informed
Alicea that she could authorize an extubation and the removal of the ventilator or, alternatively, a further procedure by Dr. C to clean out the chest cavity. Alicea showed this doctor the advance directive. She stated that she was being put in the position of making a decision that she wasn’t supposed to have to make. She consented to the second surgery, which Dr. C performed on March 8. Numerous other life-sustaining measures followed, including the insertion of a feeding tube and procedures to clear the airways and lungs. Alicea consented to these procedures but, on March 14, authorized the removal of the ventilator, a DNR order, and the provision only of comfort measures. Ms. Stephenson died on March 17.

Alicea was appointed administrator of Ms. Stephenson’s estate and subsequently filed claims against Dr. C and the hospital for breach of professional agreement, professional and ordinary negligence, medical battery, intentional infliction of emotional distress and breach of fiduciary duty. Alicea claimed that had she would not have consented to the March 5 procedure had she known it involved intubation and would not have consented to the March 7 procedure had she been called. Dr. C conceded in a deposition that he had known about the advance directive but had not reviewed it, nor had he reviewed the notes in the file from Dr. J. He said that he believed that there would be no objection to the March 7 intubation because the family had agreed to the March 5 surgery that had involved general anesthesia and “obviously [he] had to intubate her to do [that] surgery.” Dr. C explained his decision to order the March 7 intubation without the family’s consent as follows:

“When this happened I really didn’t go into any of the code/no code/do not resuscitate/resuscitate. Save the patient’s life first, and then we’ll do whatever it takes to make the family and the patient whatever, but we can’t undo death. So
that's what I was thinking.”
The trial court refused to grant summary judgment to the doctor and hospital on the issues of whether they were entitled to immunity under OCGA § 31-32-10(a), whether there was basic and informed consent for the March 5 procedure, and whether there was basic consent for the March 7 intubation. The trial court granted the defendants summary judgment on the issue of whether there was informed consent to the March 7 intubation because it found as a matter of law that intubation was not a medical procedure that required informed consent under OCGA § 31-9-6.1(a). The defendants appealed.

The Court of Appeals affirmed the denial of summary judgment on the lack of immunity and medical battery issues relating to the March 7 intubation and reversed the denial of summary judgment on the claims relating to the March 5 surgical procedure. The Court of Appeals began by pointing out that the defendants had the burden of proving their immunity under OCGA § 31-32-10(a)(2), (3) because immunity is an affirmative defense. They agreed that genuine issues of material fact existed regarding whether the defendants had made a good faith effort to rely on the directions and decision of Alicea when they carried out the March 7 intubation. These statutory provisions state in part (emphasis added):

(a) Each health care provider, health care facility, and any other person who acts in good faith reliance on any direction or decision by the health care agent shall be protected and released to the same extent as though such person had interacted directly with the declarant as a fully competent person. Without limiting the generality of the foregoing, the following specific provisions shall also govern, protect, and validate the acts of the health care agent and each such health care provider, health care facility, and any other person acting in good faith reliance on such direction or decision:
(2) No such health care provider, health care facility, or person shall be subject to civil or criminal liability or discipline for unprofessional conduct solely for failure to comply with any direction or decision by the health care agent, as long as such health care provider, health care facility, or person promptly informs the health care agent of such health care provider’s, health care facility’s, or person’s refusal or failure to comply with such direction or decision by the health care agent. The health care agent shall then be responsible for arranging the declarant’s transfer to another health care provider. A health care provider who is unwilling to comply with the health care agent’s decision shall continue to provide reasonably necessary consultation and care in connection with the pending transfer;

(3) If the actions of a health care provider, health care facility, or person who fails to comply with any direction or decision by the health care agent are substantially in accord with reasonable medical standards at the time of reference and the provider cooperates in the transfer of the declarant pursuant to paragraph (2) of Code Section 31-32-8, the health care provider, health care facility, or person shall not be subject to civil or criminal liability or discipline for unprofessional conduct for failure to comply with the advance directive for health care;....

Alicea claimed that the “good faith” reliance that is referenced in the preamble to the statute applies to any failure to comply with the agent’s direction. The Court of Appeals agreed that the immunity afforded by the statute applies only if the health care provider or facility was making a good faith effort to comply with the decisions and directions of the health care agent. The Court of Appeals stated that “good faith” is “a state of mind indicating honesty and lawfulness of purpose; belief that one’s conduct is not unconscionable or that known circumstances require no further investigation.” The Court of Appeals pointed out that it remained for the jury to decide, based on Dr. C’s own testimony and the evidence relating to the nurses’ actions, whether they had made a good faith effort to rely on Alicea’s directions when the intubation was ordered. As to Alicea’s informed consent claim relating to the March 5 procedure, the Court of Appeals
found that the trial court erred in denying summary judgment to the defendants. The Court pointed out that Alicea had offered no evidence that Ms. Stephenson had suffered any injury that was proximately caused by the procedure. As to the medical battery claim (that is, a medical touching without basic consent), the Court of Appeals reached different conclusions for the March 5 procedure and the March 7 procedure. The Court found that Alicea gave basic consent to the March 5 procedure; thus the trial court erred in denying summary judgment to the defendants on this claim. As to the March 7 intubation, however, the Court of Appeals found that the defendants had notice of Alicea’s request to be informed and were bound to abide by it. The Court said that, given particularly the evidence that there was a 50-minute time lapse before the intubation was performed, a jury could find that this had not been such an emergent situation that consent could not realistically be obtained from Alicea. On October 19, 2015, the Supreme Court of Georgia granted the defendants’ motion for a writ of certiorari on this question: “Did the Court of Appeals correctly construe O.C.G.A. § 31-32-10(a)(2-3)?”

K. ATTORNEY DISCIPLINE AND MALPRACTICE

In the Matter of Huge O. Nowell, 297 Ga. 785, 778 S.E.2d 225 (October, 2015).
Hugh O. Nowell has been a member of the Bar since 1979. Nowell falsely testified in two depositions because he believed it would help the defendants with which he was affiliated. The defendants were a corporate entity and several testamentary trusts. Nowell was general counsel of the corporation and the trustee of the trusts. The testimony was material to the case and Nowell later felt remorse and testified truthfully.
He self-reported his misconduct to the State Bar. At the time of his misconduct, he was general counsel and trustee of several testamentary trusts. Had he not come forward, his misconduct would not have been discovered. Nowell acted with a dishonest motive and violated Rules 4.1(a) and 8.4(a)(4) of the Georgia Rules of Professional Conduct found in Bar Rule 4-102(d). Each violation is punishable by disbarment. The Supreme Court considered the following mitigating factors: Nowell had no prior misconduct, made a good faith effort to rectify the situation, was cooperative in the proceedings, had a good professional reputation, and had demonstrated great remorse for his conduct. In considering those factors, the Court found a two-month suspension and public reprimand to be appropriate. He was reinstated after the two-month suspension on December 10, 2015.

II. GEORGIA LEGISLATION


A Physician Order for Life-Sustaining Treatment (POLST) is a medical order that results from conversations between a patient who has a serious illness or frailty and the patient's physician concerning the patient's end of life care. POLSTs are currently endorsed by statute, regulations, or clinical consensus in 16 states. Georgia joined this group of states in 2010 with fairly minimalist legislation. When the Georgia Temporary Medical Consent Guardian statute was enacted, the statute included a direction to the Georgia Department of Community Health to develop and make available a POLST form. In 2012, this statute was amended to provide immunity for any person acting in good faith in accordance with a POLST. In 2015, the Georgia General Assembly enacted
a full-blown POLST statute, which now appears at O.C.G.A. § 31-1-14. This statute describes the effect and implementation of a POLST and sets out liability and immunity provisions for physicians and other health care providers who act in accordance with the directions in a POLST.

POLSTs begin with a conversation or series of conversations between an attending physician and a patient who has “decision making capacity.” If the patient lacks decision making capacity, the POLST may be consented to and signed by an “authorized person.” An “authorized person” under the POLST statute is anyone who may consent to the patient’s medical treatment under O.C.G.A. § 31-39-2, which describes who may consent to a “do not resuscitate” order (DNR) on behalf of a patient. Authorized persons, in order of preference, are: the patient’s agent under a health care advance directive or durable health care power of attorney; the patient’s spouse; the patient’s guardian; an adult child of the patient; a parent of the patient; or an adult sibling of the patient. There are some limitations on the effectiveness of a POLST when the authorized person is someone other than the patient or the agent named in the patient’s advance directive for health care.

The POLST form is typically executed when the patient “has a serious illness or condition and the attending physician’s reasoned judgment is that the patient will die within the next 365 days.” However, if the patient has been diagnosed with “dementia or another degenerative, progressive disease or condition that attacks the brain, and results in impaired memory, thinking, and behavior,” the POLST may be executed at any
time.

The statute distinguishes between: 1) an order that directs “allow natural death” or “do not resuscitate” (DNR) and 2) an order relating to any intervention other than resuscitation.

B. ADMINISTRATIVE LEGITIMATION (H.B. 264 – proposed for 2016)

This bill would essentially repeal the process contained in O.C.G.A. § 19-7-21.1 that allows a mother and “father” of a child born out of wedlock to voluntarily render the father’s relationship with the child legitimate by a voluntary acknowledgement of paternity and an acknowledgement of legitimation that is signed by both of them. The bill would also clarify refine the judicial process by which a biological father may ask for a court order that renders legitimate his relationship with the child.

C. DIGITAL ASSETS (H.B. 274 – proposed for 2016)

This bill would require “any person that electronically stores, maintains, manages, controls, or administers the digital accounts of a decedent” to transfers those accounts or provide access to those accounts to the decedent’s personal representative within 30 days of the issuance of letters testamentary or letters of administration.

D. ASSET PROTECTION TRUSTS (H.B. 456)

This bill would allow individuals to establish self-settled spendthrift trusts.